ISSUED: August 11, 2005

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 584

In the Matter of	)	
	)	
COVAD COMMUNICATIONS COMPANY	)	ARBITRATOR'S DECISION
	)	
	)	
Petition for Arbitration of an Interconnection Agreement with Qwest Corporation.	)	

Procedural History

On July 9, 2004, DIECA Communications, Inc., d/b/a Covad Communications Company (Covad), filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement (ICA) with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996[1] (the Act). Qwest responded to the petition on August 2, 2004, and Covad filed a Reply on August 18, 2004. The following day, Qwest filed a Motion to Strike the Covad Reply. A prehearing conference was held on September 8, 2004, and, at the request of the parties, the Arbitrator held his ruling in abeyance until such time as a party requested a ruling. A procedural schedule was adopted, and Protective Order No. 04-507 was entered on September 9, 2004.

On September 16, 2004, Qwest filed a Motion to Dismiss Portions of Covad's Petition for Arbitration. Covad filed its Response on September 30, 2004, and Qwest filed a Reply October 7, 2004. A telephone conference was held on October 18, 2004, and, pursuant to a request of the parties, the Arbitrator withheld ruling on the Motion. On February 25, 2005, the parties filed direct testimony. On March 18, 2005, the parties jointly moved to waive hearing. On March 22, 2005, the Arbitrator granted the motion. The parties filed rebuttal testimony on March 23, 2005.

The parties filed a Joint Disputed Issues List on April 6, 2005. Initial Briefs were filed by the parties on April 29, 2005, and Reply Briefs were filed on May 13, 2005.

[1] Covad and Qwest do not have any preexisting interconnection agreement in Oregon.

Statutory Authority

The standards for arbitration are set forth in 47 U.S.C. §252(c):

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission (FCC) pursuant to section 251;
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Legal and Regulatory Background. The interpretation of Sections 251 and 252 of the Act, which concern how parties negotiate an ICA, and their application via the Rules promulgated by the FCC have been the subject of virtually continuous litigation since the legislation was passed almost a decade ago. With each Appellate and Supreme Court decision, prior FCC rules and their interpretations have been struck down or modified in whole or in part and new rules adopted, in an attempt to satisfactorily comply with the later Court rulings. The most significant rulings affecting the current state of federal law and regulation, which the Commission is required to utilize in fulfilling its statutory obligations under the Act, are the *Triennial Review Order (*TRO*)*[2] and the *Triennial Review Remand Order (TRRO).*[3] As a former Bell Operating Company (BOC), Qwest is also bound by the requirements of Section 271 of the Act, and the Arbitrator is obliged to be cognizant of federal rules and regulations and judicial opinions related thereto, in the arbitration process.

Issue 1 – Retirement of Copper Facilities (Sections 9.1.15, 9.1.15.1 and 9.1.15.1.1).

Positions of the Parties. Qwest proposes that, in the event it decides to retire a copper loop, cable or feeder and replace it with fiber, Qwest will provide notice of such retirement as may be required by the FCC rules and state regulations. Qwest asserts that the TRO plainly confirms Qwest's right to retire copper facilities and that Covad is seeking "to gut that right by imposing onerous conditions that are nowhere found in the TRO and that conflict with the FCC's Congressionally-mandated obligation to encourage investment in the fiber facilities that support broadband services."[4] "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."[5]

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

[3] 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).

[4] Qwest Initial Brief, pp. 1, 3, citing TRO, ¶271.

[5] *Id*., p. 3, citing TRO, ¶ 281, and fn. 822.

Qwest notes that retirement of copper plant is the standard practice for ILECs migrating to fiber facilities because the cost of maintaining two networks reduces the financial ability of the carriers to invest in advanced services and facilities.[6] The FCC recognized this when it required that ILECs only give notice of retirement of copper facilities.[7] Qwest contends that its proposed language accurately implements the TRO and that Covad's demands go far beyond the TRO's requirements and that arbitrations before the Colorado, Minnesota, Washington and Utah Commissions confirm that no requirement for an "alternative service before retiring a copper facility" exists.[8] Qwest rejected the assertion that retiring copper facilities would bring substantial harm to customers asserting that "no Covad customer has ever been disconnected from service anywhere in Qwest's region because of Qwest's retirement of a copper loop…. And the likelihood of that occurring is remote…."[9] Qwest further asserts that under Covad's "alternative service" proposal, Qwest would be insufficiently compensated for the costs incurred to provide interconnection and access to UNEs, a violation of Section 252(d)(1) of the Act and that what Covad really wants is to avoid being required to ensure that Qwest's costs are fully recovered if "it is in the best interest of the end user."[10] Qwest also criticizes the Covad proposal for vagueness and contends that "[t]he reality is that the 'alternative service' Covad is seeking likely involves some form of unbundled access to hybrid copper/fiber loops" although such access is expressly prohibited by the TRO.[11] Finally, Qwest asserts that the numerous requirements of Covad's proposed Notice language go far beyond anything required by the FCC and is impermissibly burdensome.[12]

Covad provides numerous arguments in support of its requested language for conditions on the retirement of copper plant. Covad states that Qwest has ignored the FCC's stated precondition for an ILEC's right to retire copper: "Unless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules…."[13] Furthermore, the FCC has delegated to the states the ultimate decision regarding copper retirement with the clear intention of denying ILECs the unconditional right to retire copper where a CLEC's service to customers would be affected by the denial of access to loops.[14] Covad further asserts that the Commission's authority to evaluate ILEC copper loop retirement has not been preempted and that the prior Commission precedent "clearly established the Commission's finding that access to loop facilities, which include feeder facilities and digital subscriber line facilities, is essential to promoting the policies of competition and consumer choice."[15]

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[6] *Id.*, pp. 4-5.
[7] *Id.*, p. 5, citing TRO, ¶ 281.
[8] *Id.*, pp. 5-7, citing *Colorado RRR Order*, ¶ 35, *Washington Arbitration Order*, ¶ 21, and *Utah Arbitration Order*, p. 11. (Full citations omitted.) The arbitration decision before the Iowa Utilities Board, ARB-5-01, issued May 24, 2005, of which Qwest formally asked the Commission to take official notice, did not address this issue.
[9] *Id.*, p. 8.
[10] *Id.*, pp. 9-10, citing *Iowa Utilities Board v. FCC*, and Covad testimony in the *Arizona* hearing (full citations omitted).
[11] *Id.*, p. 10.
[12] *Id.*, p. 11.
[13] Covad Initial Brief, p. 6, citing TRO, ¶ 282 (emphasized in text).
[14] *Id*, pp. 6-7, citing TRO ¶ 777, n. 2309, ¶ 283, 47, and C.F.R. §51.333(f).
[15] *Id.*, pp. 8-9, citing *In the Matter of the Investigation into the cost of Providing Telecommunications Services*, Docket No. UM 351, Order No. 96-188, entered July 19, 1996.

Covad next argues that Oregon law requires Qwest to continue to provide Covad with access to customer loops under most circumstances, regardless of whether the copper plant is being retired and replaced with fiber. Covad asserts that the FCC specifically enabled states to evaluate ILEC copper plant retirement "to ensure such retirement complies with any applicable state legal or regulatory requirement."[16] Covad then cites the Commission decision in Docket UM 351, *In the Matter of the Investigation into the Cost of Providing Telecommunications Services*, which set forth the Commission's general policy to "facilitate competition in local exchange telecommunications service markets by allowing competitors to use existing LEC network facilities that have been installed as part of the public switched network."[17] Covad then argues that "[t]his order clearly established the Commission's finding that the access to loop facilities, which include feeder facilities and digital subscriber line facilities, is essential to promoting the policies of competition and consumer choice. Qwest must, therefore, provide unbundled access to these facilities regardless of the medium or technology used…. Adopting Covad's copper retirement proposals is a critical component of this effort."[18]

Next Covad notes that it has committed to providing "next generation" facilities to its customers and has been offering broadband service in Oregon for the past four years, investing considerable sums throughout the Qwest region to deploy xDSL, which relies on Qwest last-mile copper facilities. "When Qwest deploys FTTH[19] or copper-fiber loop facilities and retires legacy copper facilities, it has the potential of destroying Covad's investment in its own broadband network…."[20] Covad asserts that it only receives "a vague notice just a few days before the changes are made, and leaves it up to Covad to determine whether service can be maintained to its customers," whereas Qwest carefully considers the needs of its own DSL customers when timing and planning facilities changes.[21]

Covad asks that the Commission adopt language that would govern feeder retirements because replacing damaged facilities with fiber feeder for maintenance purposes will drive competitors from the network without necessarily improving broadband availability.[22] Covad is further unimpressed with Qwest's arguments that it would be denied recovery of its costs because it would be required to provide Covad with alternative means to serve its few customers.[23] Covad cites the *Bellsouth Reconsideration Order*[24] to support the position that impairment, to at least a limited extent, is faced in some circumstances of FTTC loops (overbuild situations) and Qwest's withdrawal of a proposal that would have denied competitors of access to hybrid loops means that unbundled access to those loops remains both a Section 271 and Oregon requirement.[25] Finally, Covad asserts that Qwest's proposals give Qwest sweeping power to close the public switched network and deprive competitors of access and that Covad's notice proposals are necessary to provide CLECs with information vital to the maintenance of their customers' service.[26]

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[16] *Id.*, p. 8, citing TRO, ¶ 284.
[17] Order No. 96-188, entered July 19, 1996.
[18] *Id.*, p. 9.
[19] "Fiber-to-the-Home."
[20] *Id.*
[21] *Id.*, p. 10.
[22] *Id.*, pp. 11-12.
[23] *Id.*, pp. 12-13.
[24] *Id.*, p. 13, full citation in fn. 19.
[25] *Id.*, p. 14.
[26] *Id.*, pp. 15-18.

Discussion. The questions brought for arbitration by the parties with respect to the language to be adopted in Sections 9.1.15, 9.1.15.1 and 9.1.15.1.1 are not unique to Oregon. Most recently, the Washington State Utilities and Transportation Commission (WUTC) addressed these questions under the caption "Terms and Conditions Concerning Retirement of Copper Facilities" (also identified as Issue 1).[27] While the WUTC Order largely affirmed the Arbitrator's Decision on this issue, it found that the language that had been first offered by Qwest "does not specifically refer to the FCC's minimum notice requirements. Qwest agrees that it is obligated to comply with the FCC's rules, however, its proposed language…does not state that notices will comply with the FCC's rule. Including this reference in the agreement will allow Covad to seek enforcement of the agreement if it believes that Qwest is not complying…. Qwest's language should be modified to include a specific referent to the FCC's rule…as follows: Such notices shall be provided in accordance with FCC rules, including 47 C.F.R.§51.327(a), and in addition to any applicable state commission requirements."[28] The WUTC upheld the Arbitrator who sided with Qwest on the remaining issues raised by Covad with respect to conditions relating to the retirement of copper plant.[29]

In its Oregon ICA filing, Qwest included proposed language for Section 9.2.1.2.3, which requires Qwest to provide notice of planned retirements "in accordance with FCC Rules," and expanded its notice in Section 9.1.15, providing three forms of notice. Qwest further proposes that it will provide any additional notices that may be required by Oregon law.[30]

For the reasons set forth in Qwest's briefs and in the WUTC Order with respect to the FCC's requirements and the appropriate means for Covad to determine whether a planned change will affect its customers, I direct that the parties submit an ICA that adopts Qwest's language on this issue. For the reasons set forth in the WUTC Order,[31] I also reject Covad's proposed language in Section 9.1.15 and reject proposed Sections 9.1.15.1 and 9.1.15.1.1.

Issue 2 – Unified Agreement/Defining Unbundled Network Elements, Sections 4.0, 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1 and 9.21.2.[32]

The language proposed by the parties for the definition of Unbundled Network Element" (Section 4.0) differs insofar as Covad proposes to add "…to provide unbundled access," after the following: "for which unbundled access is required under Section 271 of the Act or applicable state law," and to delete the following final sentence proposed by Qwest:

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[27] *In the Matter of the Petition for Arbitration of Covad Communications Company With Qwest Corporation Pursuant to 47 U.S.C. Section 252(b) and the Triennial Review Order*, Docket No. UT-040345, 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, Service Date February 9, 2005, pp. 3-9. (WUTC Order.)

[28] *Id.*, pp. 6-7.

[29] *Id.*, pp. 7-10.

[30] Qwest Initial Brief, p. 11.

[31] "The FCC addressed the issue of an ILEC's right to copper retirement in three sections of the Triennial Review Order, not just sections relating to FTTH Loops. The FCC did not place conditions on an ILEC's retirement of copper facilities, and concerning FTTH loops, specifically rejected proposals to provide alternative facilities." WUTC Order, p. 9, ¶ 21. (Citations therein omitted.)

[32] *See* Oregon Updated Joint Disputed Issues List (Issues List), Docket No. ARB 584, Qwest/Covad Oregon Interconnection Agreement Negotiations, pp. 5-28, filed April 6, 2005.

"Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act."

The language proposed by the parties for Section 9.1.1 with respect to the inclusion of 271 elements into the ICA differs in several ways. Covad proposes to add the following language at the beginning of this section:

> Qwest will provide to CLEC any and all UNEs required by the Telecommunications Act of 1996 (including but not limited to Sections 251(b), (c), 252(a) and 271, FCC Rules, FCC Orders, and/or applicable state rules or orders, or which are ordered by the FCC, any state commission or any court of competent jurisdiction. Qwest is required to connect or combine 251(c)(3) UNEs with any and all of its service offerings, as required by the Telecommunications Act of 1996, FCC Rules, FCC Orders and/or state law or orders. Qwest must provide all technically feasible 251(c)(3) UNEs ordinarily combined and new 251(c)(3) UNE combinations.

Covad also proposes to add "or Section 271" after "251(c)(3)" and "Section 251, Section 271 or state-mandated" after "Failure to list a." Finally, Qwest proposes, and Covad rejects, inclusion of the following language:

> UNEs shall only be obtained for the provision of Qualifying Services. It is determined that the Unbundled Network Elements are used exclusively for Non-Qualifying Services, CLEC will have thirty (30) calendar Days to contact Qwest and make alternate service arrangements.

The parties disagree on the language of Section 9.1.1.6. Qwest proposes that, once the ICA becomes effective, it is no longer obligated to provide Covad with the following: Ocn Loops; Feeder Subloops; DS3 Loops in excess of two DS3 Loops per Enduser Customer location; Enhanced Dedicated Unbundled Interoffice Transport (E-UDIT); unbundled Dark Fiber (E-UDF) from a Qwest wire center to a Covad wire center; Ocn UDIT; DS3 UDIT in excess of 12 DS3 circuits per route; Unbundled Signaling (except in conjunction with Unbundled Switching and UNE-P); Call Related Databases, including 8XX, LNP, ICNAM, LIDB and AIN (except in conjunction with Unbundled Switching and UNE-P); Packet Switching; UDIT and UDF as a part of a Meet-Point arrangement/billed entrance facility; Remote Node/Remote Port; Line Sharing in accordance with the Grandfathering and Transition Plan described in Section 9.4.1.2; Fiber to the Home in accordance with Section 9.2.1.2; Operator Services and Directory Assistance (except in conjunction with Unbundled Switching and UNE-P) when Qwest does not provide customized routing or the equivalent; Unbundled Switching at a DS1 capacity pursuant to a transition process described in Section 9.11.2.0; Unbundled Local Tandem Switching provisioned at the DS1 level or above capacity; SONET add/drop multiplexing and noncopper distribution Subloop unless required to access Qwest-owned inside wire at an MTE. Covad proposes the following:

> 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.

The parties disagree on the language of Section 9.1.1.7. The significant differences are that Covad proposes that the agreement specifically acknowledge independent unbundling obligations under applicable state law and that Qwest would be required to bill for UNEs, as well as services, "using the Commission-approved TELRIC rates for such UNEs until such time as new, just, reasonable and non-discriminatory rates as required by Section 271 or state law required UNEs." Covad would also delete the conflicting Qwest-offered language: "in accordance with prices and terms that will be described on Qwest's website or applicable Tariff. Such Billing shall commence on the Effective Date of this Agreement."

The parties disagree on the language of Section 9.1.5. Covad proposes to add the following language after the first sentence: "CLEC shall have the right to access UNEs, ancillary services or Network Elements offered pursuant to Section 271 at any technically feasible point as required by 47 C.F.R. 51.311, 47 U.S.C. 251(c)(3) and 47 U.S.C. 271, et seq."

The parties disagree on the language of Section 9.2.1.3. Again, Covad seeks language asking that Qwest provide access to loops pursuant to Section 271 and applicable state law and limit the webpage listing to only those DS1, DS3 and Dark Fiber Loops for which the Commission has "found non-impairment under Section 251 of the Act." Qwest offers language to clarify that it refers to impairment at the end user "customer" premises. Covad also proposes to delete "other service" after "arrangements for" and insert "any records changes, or alternate services, as required by applicable state law, and requested by Qwest."

In its proposed Section 9.2.1.4, Covad seeks to limit Qwest's avoidance of responsibility to provide available DS3 Unbundled Loops only to times when not required "pursuant to Section 251 of the Act" and adds "Notwithstanding the above, CLEC may request such additional loops pursuant to Section 271 of the Act or applicable state law, and will be charged rates for such additional loops in accordance with Section 9.1.1.7, above."

In Section 9.3.1.1, Covad again proposes to limit denial of access to certain UNEs only "pursuant to Section 251 of the Act" and similarly seeks language differing from that offered by Qwest, enlarging Qwest's obligations: "Notwithstanding the limitations on subloop unbundling pursuant to Section 251 of the Act described above, Qwest will make remaining feeder subloops available as required by Section 271 and other Applicable Law."

Covad offers new Sections 9.3.1.2, 9.3.2.2, 9.3.2.2.1 and 9.6(g). In Sections 9.3.1.2(b) and 9.3.2.2.1, Covad proposes the availability of DS1 Capable Unbundled Feeder Loop UNEs and defines them. In Section 9.6 (g) Covad proposes that UDIT[33] be made available

[33] Unbundled Dedicated Interoffice Transport.

pursuant to Section 271 of the Act or applicable state law, notwithstanding a finding of no Section 251 impairment on a particular route. In Section 9.6.1.5, as with feeder subloops, Covad proposes that UDIT be supplied pursuant to Section 271 or applicable state law.

In Sections 9.6.1.5, 9.6.1.5.1, 9.6.1.6 and 9.6.1.6.1, Covad again seeks to have the subject UNEs provided, notwithstanding a finding of no Section 251 impairment, if the Commission finds that the UNE should be offered under Section 271 or state law and, further, seeks an additional 30 days beyond the Qwest-proposed 60 days, to make alternative arrangements when losing access to DS1 and DS3 UDIT.

In Section 9.21.2, Covad proposes that, notwithstanding any Commission ruling that CLECs are no longer entitled to submit orders for unbundled switching under Section 251, line splitting would still be available if Qwest was required to provide access to unbundled switching under Section 271 or applicable state law.[34]

Positions of the Parties. Qwest contends that the 47 U.S.C. §251(d)(2) "impairment" standard, as interpreted by the Courts, imposes important limitations on its unbundling obligations.[35] Furthermore, the Commission itself recently ruled that "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."[36] Qwest also cites decisions in other states, discussed *infra*, that have 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 ICA, such as those proposed above by Covad, over Qwest's objections. Neither has Covad provided any evidence of impairment to support its demands for unbundling under state law.[37]

Covad asserts that the *TRO* supports its contention that Section 271 creates "an independent obligation on the part of Qwest to provide access to loops, switching, transport, and signaling regardless of any analysis under section 251." It further asserts that Qwest's 271 obligations should be memorialized in the ICA and that the Commission has clear authority to arbitrate disputes that arise with respect to those obligations. Furthermore, Covad argues, Qwest is still obligated under Oregon law to provide "building blocks," i.e., UNEs, pursuant to the Phase II order in Docket UT 138/UT 139.[38] Covad then cites a decision by the Maine Public Utilities Commission, which concluded that "state commissions have the authority to arbitrate section 271 pricing in the context of section 252 arbitrations."[39] Covad asserts that the state authority should be applied under a different legal standard than applies to price Section 251 UNEs, and that, while TELRIC pricing is not required, the FCC has not stated that the two different legal standards cannot result in the same rate-setting methodology.[40]

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[34] The parties have read an agreement on the subject of Covad's access to "line splitting" discussed at pages 32-35 of the Covad Initial Brief. *See* Qwest Corporation's Reply Brief on the Merits (Qwest Reply Brief), p. 8. This decision will therefore not include a discussion of that subissue.
[35] *Id.*, pp. 13-14, citing *Iowa Utilities Board, USTA I* and *USTA II*. (Full citations omitted.)
[36] *Id.*, p. 15, citing Ruling in Docket UM 1100, June 11, 2004, at pp. 6-7.
[37] *Id.*, p. 16.
[38] Covad Initial Brief, pp. 19-20, citing *Triennial Review Order*, ¶¶653, 655 and Oregon PUC Order No. 01-1106 entered December 26, 2001.
[39] *Id.*, pp. 20-21, citing Maine PUC Docket No. 2002-682, Order of September 3, 2004. (Full citation omitted.)
[40] *Id.*, p. 23, citing *TRO*, ¶¶656, 659.

Covad derides claims that the Commission is federally preempted and cites UT 138/UT 139 Order No. 00-316 charging Staff to identify "building blocks additional" to the federally identified UNEs. Although the cited order is five years old and precedes *USTA I* and *USTA II* decisions, Covad asserts that the *TRO* has not subsequently undermined the language of Order No. 00-316.[41] Under the *TRO*, there could well be circumstances where the FCC would decline to find that state rules conflicted with implementation of Section 251, and would therefore not preempt them.[42] In any event, Oregon should, in Covad's view, exercise its authority irrespective of preemption analysis, because constitutional issues and legislative intent are beyond the jurisdiction of administrative agencies.[43]

In reply, Qwest asserts that the Act's "impairment" standard limits the FCC's ability to impose unbundling obligations on ILECs and that the Courts have invalidated the FCC's unbundling rules three times. Covad's argument that the Commission can ignore acting consistently with Section 251 yet still comply with these opinions is legally flawed. Furthermore, Covad has offered no evidence of "impairment."[44] Qwest also reiterates that the Commission is being asked by Covad to require unbundling and set rates pursuant to Section 271, even though it has no authority under that section; it resides exclusively with the FCC to determine which network elements must be provided under Section 271.[45] Qwest further reiterates that the rate setting authority under Section 271 is examined by the FCC in the context of the BOC's application for 271 authority and that Sections 201 and 202, which govern rates, terms and conditions under 271 provide no role for state commissions.[46] Qwest also asserts that it is appropriate for the ICA to list UNEs that Qwest, under the *TRO*, is indisputably not required to provide under Section 251, as it is concerned that Covad will ask for these UNEs unless the ICA clearly states that they are unavailable.[47] Qwest also asks the Commission to approve language that indicates Qwest is not required to provide FCC delisted UNEs until the Commission approves an ICA amendment removing the UNEs from the ICA.[48]

In its reply, Covad states that Qwest "attempts to over-read" the *TRO* and that the FCC left undisturbed the requirement that Section 271 checklist UNEs must be available notwithstanding any finding of nonimpairment.[49] Furthermore, "if the additional unbundling requirements contained in the Competitive Checklist do not conflict with section 251, it is a logical impossibility that identical state access obligations could conflict with section 251."[50] Covad also asserts that the Commission indeed has the authority to impose additional unbundling obligations and that these "savings clauses" have been routinely confirmed.[51] Covad distinguishes the *Indiana Bell* case cited by Qwest and cites decisions of the Maine Public Utility Commission and Illinois Commerce Commission to support the proposition of continued state authority to require offering 271 checklist UNEs in the context of 252 arbitration

[41] *Id.*, p. 26.
[42] *Id.*, p. 30.
[43] *Id.*, p. 31-32.
[44] Qwest Reply Brief, p. 8.
[45] *Id.*, pp 8-14 and cases cited therein.
[46] *Id.*, p. 15.
[47] *Id.*, p. 20.
[48] *Id.*, pp. 20-21.
[49] Covad Communications Company's Reply Brief (Covad Reply Brief), p. 17.
[50] *Id.*, p. 18.
[51] *Id.*, pp. 20-21 and cases cited therein.

proceedings.[52] Covad also objects to Qwest's assertion that TELRIC pricing is *per se* illegal, because it is based on the FCC's brief on appeal in *USTA II*, rather than on an actual FCC decision and that continued compliance with Section 271 may include TELRIC pricing.[53] Finally, Covad asserts that commission decisions in the Qwest region do not provide consistent guidance with respect to this issue; they do not support Qwest's positions to the extent Qwest suggests. The Minnesota decision ordered the adoption of language reflecting that removal of any Section 251 elements from the ICA was premature; the Utah decision found Covad's language unreasonable, but not illegal; and the Washington decision, finding itself preempted by federal law, is, in Covad's view, legally flawed.[54] On July 19, 2005, subsequent to the conclusion of the briefing schedule, Covad provided a copy of a decision by the Missouri Public Service Commission[55] ordering the inclusion of §271 UNEs and setting interim rates, supporting its position that Oregon does have the authority to require their inclusion.

Discussion. Covad and Qwest have been in arbitration proceedings on this precise issue and with respect to virtually identical proposed language in Minnesota, Utah, Washington, South Dakota and Idaho.[56]

In Minnesota, the Commission adopted the Arbitrator's Report on this issue but "clarifies that it has not surrendered any of its jurisdiction to determine which topics are properly the subject of interconnection agreements, or to review those agreements."[57] The Arbitrator found that:

> [T]here 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….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….To the extent the *Verizon-Maine* decision stands for the proposition that a state commission has authority to arbitrate section 271 claims, the decision is distinguishable on its facts as it appears to be premised on enforcement of a specific commitment that Verizon made to

[52] *Id.*, pp. 23-25 and cases cited therein.
[53] *Id.*, pp. 25-26 and cases cited therein.
[54] *Id.*, pp. 26-28 and decisions cited therein.
[55] *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A").* Case No. TO-2005-0336, issued July 11, 2005.
[56] The Idaho Decision, *In the Matter of the Petition of Dieca Communications, Inc. DBA Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Case No. CVD-T-05-1, Order No. 29825, July 18, 2005 (Idaho Decision), occurred after the conclusion of briefing by the parties on this issue. By letter of July 18, 2005, Qwest advised the Commission that an oral ruling by the South Dakota Commission adopted Qwest's language on this issue.
[57] *In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b),* Docket No. P-5692, 421/IC-04-549, Order Resolving Arbitration Issues and Required Filed Interconnection Agreement, issued March 14, 2005, Issue No. 2, pp. 5, 13.

> the Maine Commission during 271 proceedings to include certain elements in its state wholesale tariff.[58]

In the Utah Order, the Commission agreed with Covad's general proposition that:

> [S]tates are not preempted as a matter of law from regulating in the field of access to network elements…. While we see a continuing role for Commission regulation of access to UNEs under state law, we 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."[59]

The WUTC found that it had no authority under Section 251 or Section 271 to require Qwest to include Section 271 elements in an interconnection agreement and that any unbundling requirement based on state law would likely be preempted as inconsistent with federal law. It agreed with the Arbitrator's decision and adopted Qwest's language on the issue.[60]

The Idaho Commission concluded that it "does not have authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement…. Having concluded the Commission has no legal authority to require Qwest to include its Section 271 unbundling obligations in an interconnection agreement, we approve the relevant language proposed by Qwest…." (Idaho Decision, pp. 4-5.)

The South Dakota Commission stated: "With respect to the section 271 issue, the Commission finds that it does not have the authority to enforce section 271 requirements within this section 252 arbitration…. The language in these sections clearly anticipates that Section 252

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[58] *In the Matter of the Petition of Dieca Communications, Inc. DBA Covad Communications Company for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Arbitrator's Report, OAH Docket No. 3-2500-15908-4, MPUC Docket No. P-5692, 421/IC-04-549, December 15, 2004 (Minnesota Arbitrator's Report), p. 15, ¶ 46.

[59] *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*, Docket No. 04-2277-02, Arbitration Report and Order, issued February 8, 2005 (Utah Order), pp. 20-21.

[60] *In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b) and the Triennial Review Order*, 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, February 9, 2005, pp. 15-16, ¶ 37.

arbitrations will concern section 251 requirements, not section 271 requirements…. The Commission finds Covad's argument regarding this issue to be less than persuasive."[61]

Every state within the Qwest operating region that has examined this issue has done so in a thoughtful, thorough and well-reasoned manner. In each case, the agency with the authority to review the Covad/Qwest ICA dispute has found that there is no legal authority requiring the inclusion of Section 271 UNEs in an interconnection agreement subject to arbitration under Section 251 of the Act, and I adopt the legal conclusions that they all hold in common and, specifically, the findings and conclusions of the Minnesota Arbitrator recited above.

Covad's assertion that, under UT 138/UT 139, "Qwest continues to be obligated under Oregon law to provide access to unbundled network elements or 'building blocks,' which, by Commission order, specifically include most, if not all, of the elements to which Covad seeks continued access in this arbitration" mischaracterizes the law in that docket. There is no such obligation. Specifically, in Order No. 00-316, at page 5, the Commission stated the following:

> Although §251(d)(2) of the Act permits State commissions to require incumbent LECs to provide UNEs in addition to those on the national list, the states must first conduct a 'necessary' and 'impair' analysis for each UNE added to the national list. *See* FCC Rule 317(d)…. Thus, until such time as the statutory standard is met, incumbent LECs shall not be required to provide UNEs in addition to those listed in Rule 319.

I also note that in the vast majority of decisions by other state commissions, Qwest's proffered language has been adopted without modification. I find the language proposed by Qwest to be that which is most reasonably reflective of the intent of the Act and of the *TRO*, and direct that it be included in the ICA.

Issue 3 – 4.0 Definition of 251(c)(3) UNE and Commingling with Network Elements Provided Under Section 271 (Section 9.1.1.1).

Covad proposes a new definition: "251(c)(3)UNE" to identify those UNEs that it wishes to use in conjunction with ("commingling") wholesale services or facilities obtained from Qwest. It then proposes "commingling" language, which would allow for combining those UNEs with switched and special access services offered pursuant to tariff and resale (as opposed to merely unbundling the 251(c)(3) UNEs and requiring Qwest to perform the necessary functions to effectuate a commingling request.[62]

Positions of the Parties. Qwest asserts that Covad's intent is to include network elements Qwest provides pursuant to Section 271. The *TRO* expressly excludes elements provided under Section 271, and the obligations to unbundle in Section 271 are

[61] *In the Matter of the Petition of DIECA Communications, Inc. D/B/A Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Arbitration Order TC05-056, dated July 26, 2005, p. 6.
[62] Issues List, pp. 28-31.

independent and not cross-referenced to Section 251 obligations. There is no difference between "commingling" and "combining" network elements, and an *Errata* to the *TRO* removed any ambiguity about Qwest's obligations.[63]

Covad claims that the FCC intended and confirmed in its *Errata,* "to treat Section 271 elements just like any other telecommunications service not purchased pursuant to Section 251(c)(3) of the Act." The FCC issued the *Errata* because "paragraph 584 is dedicated exclusively to a discussion of the ILEC's obligations to commingle 251(c)(3) UNEs with resale services, and the introduction of 271 elements to that discussion was confusing…. If the FCC had truly intended to exclude Section 271 elements from commingling eligibility as a 'facilities or service that a requesting carrier has obtained at whole from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act,' it would have modified this language in paragraph 579."[64] Covad asserts that other state commissions have uniformly adopted Covad's interpretation and proposed language.[65]

In reply, Qwest finds flaws in Covad's interpretation of the *TRO*. First, the Covad interpretation eviscerates the FCC's ruling that BOCs are not required to combine network elements provided under Section 271; second, Covad is contradicted by the removal of Section 271 elements from the order via the *Errata.*[66]

In reply, Covad asserts that the FCC drew a distinction between "commingling" and "combining" network elements to delineate the scope of its UNE Combination Rules and provides different requirements for each.[67]

Discussion. Public service commissions in Colorado, Utah and Washington have each examined this issue in conjunction with Qwest/Covad ICA arbitrations during the past 12 months. In the Colorado decisions,[68] the Commission found that Qwest's definition of "commingling" was proper, but that 251(c)(3) UNEs that had not been delisted must be combined or commingled with wholesale services, including Section 271 elements.[69] The Utah Commission decided that neither proposed language captured the FCC's intent regarding commingling definition and rules and ordered the inclusion of the following language:

> '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 Qwest pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the

[63] Qwest Initial Brief, pp. 27-30 and cases cited therein.
[64] Covad Initial Brief, pp. 36-37.
[65] *Id.*, pp. 38-39 and cases cited therein and discussed *infra.*
[66] Qwest Reply Brief, pp. 21-22.
[67] Covad Reply Brief, pp. 28-29, fns 42-43 citing *TRO* ¶¶ 573-579.
[68] *In the Matter of Petition of Qwest corporation for Arbitration of an Interconnection Agreement with Covad Communications Company Pursuant to 47 U.S.C. §252(b),* Initial commission Decision, Docket No. 04B-160T, Decision No. C04-1037, adopted August 19, 2004 (Colorado Initial Decision), and Order Granting in Part and Denying in Part Applications for Rehearing, Reargument, or Reconsideration, Decision C04-1348, adopted October 27, 2004 (Colorado RRR Decision).
[69] Colorado Initial Decision, pp. 71-72, ¶¶ 178-180, Colorado RRR Decision, p. 6, ¶¶ 17-18.

> combination of an Unbundled Network Element or a combination of Unbundled Network Elements, with one or more such facilities or services, except that such facilities or services obtained pursuant to Section 271 of the Act are expressly excluded.

The WUTC also found that "BOCs must allow requesting carriers to commingle Section 251(c)(3) UNEs with wholesale facilities and services, including Section 271 elements" but that Qwest's definition of "commingling" matches the FCC definition and is appropriate.[70]

I concur in the WUTC's reasoning and outcome and direct the parties to include Qwest's language for the Section 4.0 definition of "Commingling" and Covad's language for Section 9.1.1.1.

Issue 5a – CLEC-to-CLEC Channel Regeneration Requirements (Sections 8.2.1.23.1.4, 8.3.1.9 and 9.1.10).

Positions of the Parties. Qwest asserts that it has no obligation under the FCC's Rules, specifically, 47 C.F.R. 51323(h)(1), to provision CLEC-to-CLEC connections because it permits CLECs to self-provision the CLEC-to-CLEC cross-connect. Because it is not obligated to provide such connections, it cannot be required to provide signal regeneration for the connection. Qwest says that its obligations to provide channel regeneration, where necessary, relate exclusively to Qwest-to-CLEC connections, and, because it does not charge for channel regeneration services under such circumstances, Covad's proposed language would force Qwest to provide CLEC-to-CLEC channel regeneration also without charge.[71] CLEC-to-CLEC regeneration is not a UNE that an ILEC is required to provide at TELRIC rates, and Covad is free to provision the connection and the regeneration if necessary by placing a repeater in a midspan regeneration bay to which it is guaranteed access. The FCC did not condition its rules on "economic infeasibility."[72] CLECs can also obtain a finished service out of Qwest's FCC 1 Access Tariff that provides CLECs with interconnection facilities between each other and includes regeneration, if needed.[73]

Covad contends that the FCC's Rules must be viewed in light of FCC's statements of "overriding concern that an incumbent LEC would be acting in an unreasonable and discriminatory manner if it refused to provide cross-connects between collocators," and that "an incumbent LEC's refusal to provide a cross-connect between two collocated carriers would violate the incumbent's duties…to provide collocation 'on terms and conditions that are just, reasonable, and nondiscriminatory,'"[74] and cites the WUTC Order, which required Qwest to provide channel regeneration at wholesale rates.[75] The self-provisioning exception applies only to adjacent collocation spaces.[76] Finally, Covad argues that it has no practical self-provisioning

[70] WUTC Order, pp. 30-31, ¶¶ 64-67, p. 55, ¶¶133-135.
[71] Qwest Initial Brief, pp. 31-32.
[72] *Id.*, pp. 33-35.
[73] *Id.*, p. 36.
[74] Covad Initial Brief, p. 42, citing *Fourth Report and Order*, ¶¶ 79-80.
[75] *Id.*, p. 43, citing WUTC Order, p. 43.
[76] *Id.*, p. 44, citing WUTC Order, p. 42.

option, and Qwest's Retail "EICT" offering is not a substitute for the wholesale TELRIC regeneration rate.[77]

In reply, Qwest reiterates its view that its obligation to provide CLEC-to-CLEC cross-connections ends when it permits CLECs to self-provision those cross-connections and that the regeneration obligation follows a parallel structure.[78] Qwest voluntarily offers a product in which its involvement is limited to designating the path in the central office for running the circuit between the CLECs' collocation spaces. The issue is not whether Qwest will provide regeneration but whether it is permitted to charge (and be paid) for doing so. Qwest asks that the Covad language, which would deny Qwest compensation for these voluntarily provided services, be rejected.[79]

In its reply, Covad says that self-provisioning is sometimes impossible and that the FCC requires cross-connection provisioning because collocation must be on terms and conditions that are just, reasonable and nondiscriminatory.[80]

Discussion. This issue has been addressed in Colorado, Minnesota, Utah and Washington.

In Colorado, the Commission ordered the language of Section 8.2.1.23.1.4 to include only the following additional Covad-requested language: "Depending on the distance parameters of the combination, regeneration may be required."[81] The Colorado Commission agreed with Covad that regeneration should be a wholesale product when it is needed to maintain signal strength in a CLEC-to-nonadjacent CLEC connection and further found that Qwest is allowed to charge a TELRIC rate for regeneration when it is required. Covad-to-Covad regeneration would have to be provided as Qwest does for its own network; i.e., without charge. Finally, the Colorado Commission found that Qwest should be able to charge for CLEC-to-CLEC regeneration, even when collocation space would have been available but for Qwest's reservation of such space for its own use.[82]

The Minnesota Commission found that, if Qwest permits collocating carriers to provide their own cross-connection, regeneration is the CLECs' responsibility, and Qwest has complied with the obligation to be nondiscriminatory. Qwest's language was therefore adopted.[83]

The Utah Commission found nothing in the record that would require Qwest to provide CLEC-to CLEC regeneration services; however, Qwest had not shown why its FCC tariff rate should be used in calculating the charge when no interstate commerce was involved. The Commission asked the parties to come up with an interim rate. Since the evidence indicated that CLEC-to-CLEC regeneration is unlikely to occur in the future, the parties would have to

[77] *Id.*, pp. 47-50.
[78] Qwest Reply Brief, p. 22.
[79] *Id*., pp. 22-23.
[80] Covad Reply Brief, pp. 32-35.
[81] Colorado Initial Decision, p. 39, ¶ 102.
[82] *Id.*, pp. 40-41.
[83] Minnesota Arbitrator's Report, p. 24, ¶ 80.

bring a new action when that occurred; the interim rate that Qwest would charge for the service would be subject to true-up after the order established the new rate.[84]

After reviewing the factual record in light of the *Fourth Report and Order*, the Washington Commission rejected Qwest's argument and found that it indeed has an obligation to provision regeneration as a wholesale service if it allows CLEC-to-CLEC self-provisioning of cross-connections at the Interconnection Distribution Frame (ICDF). The WUTC reasoned that it would be discriminatory for Qwest to charge retail rates for regeneration as part of a "finished product" in conjunction with the connection when the connection itself can be obtained, without regeneration at a wholesale rate.[85] The TELRIC rate for channel regeneration exists, contrary to what the WUTC Arbitrator found. The WUTC noted that Exhibit A from an earlier Qwest SGAT set a rate for recurring and nonrecurring DS1 and DS3 channel regeneration.[86]

The WUTC analysis is the most cogent, and its solution the most reasonable application of the *Fourth Report and Order*. I adopt the WUTC's modifications to the language proposed by Qwest for Section 8.3.1.9, requiring the parties to submit the Qwest-proposed language but deleting the sentence beginning "Qwest shall charge…" and further order the parties to submit language with the inclusion of a reference to the channel rate from Exhibit A to the Oregon SGAT prior to the rate's removal from the SGAT in the Twelfth Amendment (Eleventh Revision) Order in Docket UM 973, Order No. 03-572, entered September 25, 2003.[87]

Issue 8 – Payment Due Dates—Regular Invoices (Section 5.4.1), Discontinuing Orders (Section 5.4.2) and Disconnecting Services (Section 5.4.3).

Covad seeks to change its existing ICA and line sharing agreement with Qwest in three respects. First, it proposes 45 days to pay certain[88] invoices instead of the 30-day period that Qwest currently requires from other CLECs. Second, it asks that Qwest be prohibited from discontinuing processing Covad orders until Covad is 60—rather than 30—days past due on undisputed amounts owed Qwest. Finally, Covad seeks language preventing Qwest from disconnecting service to Covad customers until Covad is at least 90—rather than 60—days past due on undisputed amounts owed Qwest.

Positions of the Parties. Qwest asserts that the billing and payment issues were resolved with the CLEC community in the 271 workshops and that the testimony it submitted demonstrates that Covad's proposal would impose costly systems-related and administrative burdens, requiring a change in computer billing system logic different from all other customers' bills. Even Covad's witness could not explain how its proposal would be implemented.[89]

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[84] Utah Order, pp. 35-36.
[85] WUTC Order, pp. 39-43, ¶¶82-91.
[86] *Id.*, pp. 43-44, ¶ 92, and fn. 145.
[87] "Qwest also states that, effective August 1, 2003, it will no longer impose recurring or nonrecurring charges for the Channel Regeneration elements (DS0 Low Side Channelization and DS1/DS0 Low Side MUX Channelization) listed in Section 9.6.7 of Exhibit A." A copy of the June 10, 2003, Errata to the Qwest Oregon SGAT, Tenth Revision, Exhibit A, page 9, which includes Section 9.6.7 is affixed to this decision as Attachment 1.
[88] "(1) Line splitting or loop splitting products, (2) a missing circuit ID, (3) a missing USOC, or (4) new rate elements, new services, or new features not previously ordered by CLEC…." Issues List, Covad Proposed Language, pp. 36-37.
[89] Qwest Initial Brief, pp. 38-39.

Applying the methodology to "new services," which would later revert back to the ordinary billing method, would require further billing program design.[90] Covad allows its customers only 30 days and therefore seeks an unjustified 15-day float, an interest-free loan from Qwest.[91] The lack of Circuit ID under some circumstances, such as line-sharing, of which Qwest was the first ILEC provider, does not prove noncompliance with FCC standards or justify the longer payment period.[92]

Covad asserts that Qwest sends invoices to Covad for line sharing and line splitting in a format not used by other ILECs and does not include Circuit ID. Covad is therefore forced to manually verify the accuracy of the invoices. Furthermore, Qwest's bills for nonrecurring collocation charges are provided in paper format and must be hand entered before a billing review can begin.[93] Covad's proposal is not destructive; Qwest will continue to bill and Covad to pay on the 30-day interval; there is no real delinquency exposure and Qwest's position encourages Covad to "dispute Qwest bills blindly, just to buy time to conduct a thorough review…it is too time consuming and labor intensive to serve as an alternative to a reasonable payment interval. In addition, Covad would be forced to pay late payment charges for amounts it knew…were legitimate and was willing to pay." Covad bears the burdens of Qwest's failure to change its system's deficiencies.[94]

Covad also objects to the timing for discontinuance of processing orders and disconnection of services proposed by Qwest, saying that an extension to 60 days from 30 for discontinuance and 90 days from 60 for disconnection will have negligible impact on Qwest's cash flow and receivables "and will allow both Parties some breathing room should a serious conflict develop."[95] Qwest's right to prompt payment should be balanced against the severity of the remedies involved, which would be disastrous to Covad.[96]

In reply, Qwest claims that Covad has not shown why manual review and payment cannot be accomplished within 30 days, that the number of bills subject to the problem is quite small, other CLECs have been able to comply and Covad itself accepted the time frames in April 2004. Furthermore, the Covad language is vague and causes, rather than resolves, confusion.[97] With respect to discontinuance of new orders and disconnection of service, Qwest asserts "Covad's premise for its alleged need for additional time is entirely vague and speculative." Furthermore, Qwest's deposit provisions would be exceeded by the delays Covad seeks and would expose Qwest to greater risk in the event of Covad's insolvency.[98]

In its reply, Covad asserts that because Qwest's language "enjoys the presumption of reasonableness," it provided detailed refutation on the record. Qwest's technical difficulties in providing for a 45-day interval must be weighed against Covad's technical impossibility of reviewing the deficient invoices. Its proposal is unambiguous and easily implemented and

[90] *Id*., p. 40.
[91] *Id*., p. 41.
[92] *Id*., pp. 43-45.
[93] Covad Initial Brief, pp. 51-53.
[94] *Id.*, pp. 54-56.
[95] *Id.*, p. 57.
[96] *Id.*, p. 58.
[97] Qwest Reply Brief, pp. 29-31.
[98] *Id.*, pp. 32-33.

consistent with the need for just, reasonable and nondiscriminatory terms.[99] Covad's execution of the commercial line sharing agreement was not the result of traditional negotiation but of an absence of commercial leverage.[100]

Discussion. Billing payment schedules were considered in arbitration proceedings in Colorado, Minnesota, Utah and Washington.

The Colorado Commission let stand the Initial Commission Decision and adopted the Qwest proposed language for Section 5.4.1, stating "We are not compelled by Covad's assertion that it is harmed by the shorter 30 day payment due date…Covad has four plus years of experience in reading and analyzing the Qwest bills…. In either case, Covad is not harmed."[101] With respect to discontinuance of processing orders (Section 5.4.2) and disconnection (Section 5.4.3), the Colorado Commission adopted Qwest's language for the same reasons as expressed with respect to Section 5.4.1, since it applies only to nondisputed and relevant services.[102]

The Minnesota Commission found Covad's need for the additional 15 days reasonable in those circumstances where bills lacked Circuit ID. Extending the payment times for those bills while retaining the 30-day billing period for other items was "a reasonable balancing of all parties' concerns."[103] The ALJ's recommendations, with respect to Section 5.4.2 and 5.4.3, adopted Covad's proposed language, as being more reasonable because it did not routinely affect Qwest's cash flow and had a more direct impact on end users.[104]

The Utah Commission found "nothing in the record to convince us that deviating from the standard time frames contained in Qwest's proposed language would be a reasonable response to Covad's claimed problems with Qwest's invoices." With respect to discontinuance of order processing and disconnection of service, the Utah Commission said: "We understand Covad's general concern…but the record amply reflects that the time periods contained in Qwest's proposed language represent current industry practice and standard. We do not find them to be unreasonable."[105]

The WUTC held that, with respect to Section 5.4.1, "The 30-day payment due-date is an industry standard…. While Covad's proposed language narrows the application of the extended payment due-date to line splitting or loop splitting products, missing circuit identification numbers, missing USOCs, and new products, we agree with the Arbitrator that these exceptions…would likely cause more delay and confusion for the parties…. Any billing issues arising from these arrangements are a cost of doing business for Covad."[106] With respect to Sections 5.4.2 and 5.4.3, the Arbitrator found Qwest's proposed language appropriate, and Covad did not seek Commission review of the Arbitrator's findings.[107]

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[99] Covad Reply Brief, pp. 36-37.
[100] *Id.*, p. 39.
[101] Colorado Initial Decision, p. 17, ¶ 43.
[102] *Id.*, pp. 21-23, ¶¶ 56, 63.
[103] Minnesota Order, p. 13.
[104] Minnesota Arbitrator's Report, p. 29.
[105] Utah Order, pp. 41-42.
[106] WUTC Order, p. 48, ¶¶ 101-102.
[107] *Id.*, p. 50, ¶¶ 105-106.

Qwest's language has been previously considered and adopted by the Commission in the 271 process and the language, as noted by other state commissions in Qwest's western region, is industry standard. The reasonableness of Qwest's language, combined with the difficulties in refashioning the billing system to accommodate Covad and application of the extension period to limited circumstances, makes the Qwest offered language for Section 5.4.1 preferable, and the parties shall include it in their agreement. Likewise, the language offered by Qwest for Sections 5.4.2 and 5.4.3 are industry standard, help limit the ILEC's exposure in the event of CLEC bankruptcy and relate solely to undisputed amounts due and owing. Qwest's proposed language for Sections 5.4.2 and 5.4.3 are adopted and shall be included in the ICA submitted by the parties.

Arbitrator's Decision

1. The interconnection agreement between Covad and Qwest shall utilize the language proposed by Qwest with respect to Section 9.1.15. Covad-proposed new Sections 9.1.15.1 and 9.1.15.1.1 are rejected.

2. The interconnection agreement between Covad and Qwest shall utilize the language proposed by Qwest with respect to Sections 4.0, 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, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1 and 9.21.2 and shall exclude Covad-proposed new Sections 9.3.2.2 and 9.3.2.2.1.

3. The interconnection agreement between Covad and Qwest shall utilize Qwest's language for the Section 4.0 definition of "Commingling" and Covad's language for Section 9.1.1.1.

4. The interconnection agreement between Covad and Qwest shall utilize the Qwest proposed language for Sections 8.2.1.23.1.4, 8.3.1.9 and 9.1.10, except as follows:

   In Section 8.3.1.9, delete the following: "Qwest shall charge for regeneration requested as a part of CLEC-to-CLEC Cross Connections under the FCC Access No. 1 tariff, Section 21.5.2 (EICT)."

5. The interconnection agreement between Covad and Qwest shall include the regeneration channel rate from Exhibit A to the Oregon SGAT prior to the rate's removal from the SGAT in the Twelfth Amendment (Eleventh Revision) Order in Docket UM 973, Order No. 03-572, entered September 25, 2003.

6. The interconnection agreement between Covad and Qwest shall utilize the Qwest proposed language for Sections 5.4.1, 5.4.2 and 5.4.3.

7. Within 30 days of the date of the Commission's final order in this proceeding, Qwest and Covad shall submit an interconnection agreement consistent with the terms of this decision.

8. As provided in OAR 860-016-0030(10), any person may file written comments within 10 days of the date this decision is served.

Dated at Salem, Oregon, this 11th day of August, 2005.

_____

Allan J. Arlow, Arbitrator

Exhibit A
Oregon*

		Recurring	Non-Recurring	Notes
Mechanized			$120.45	
DS3 Over 0 to 8 Miles	$331.53	$51.57		12
DS3 Over 8 to 25 Miles	$331.53	$51.57		12
DS3 Over 25 to 50 Miles	$331.53	$51.57		12
DS3 Over 50 Miles	$339.34	$34.10		12
9.6.4 OC-3 UDIT			$305.80	12
OC-3 Over 0 to 8 Miles	$753.12	$70.10		12
OC-3 Over 8 to 25 Miles	$753.12	$70.10		12
OC-3 Over 25 to 50 Miles	$753.12	$70.10		12
OC-3 Over 50 Miles	$753.12	$86.86		12
9.6.5 OC-12 UDIT			$305.80	12
OC-12 Over 0 to 8 Miles	$2,133.93	$139.44		12
OC-12 Over 8 to 25 Miles	$2,133.93	$139.44		12
OC-12 Over 25 to 50 Miles	$2,133.93	$139.44		12
OC-12 Over 50 Miles	$2,133.93	$176.98		12
9.6.6 OC-48 UDIT			$305.80	12
OC-48 Over 0 to 8 Miles	$4,358.83	$352.82		12
OC-48 Over 8 to 25 Miles	$4,358.83	$352.82		12
OC-48 Over 25 to 50 Miles	$4,358.83	$352.82		12
OC-48 Over 50 Miles	$4,358.83	$450.92		12
		Recurring	Non-Recurring	
9.6.7 Channel Performance				
DS0 Low Side Channelization		$14.50		12
DS1/DS0 Low Side MUX Channelization		$8.27	$194.18	12
9.6.8 Multiplexing				
DS3 to DS1		$313.51	$2,752.17	12
DS1 to DS0		$247.46	$226.11	12
9.6.9 Extended Unbundled Dedicated Interoffice Transport				
DS1 E-UDIT		$94.40	$372.67	12
DS3 E-UDIT		$496.98	$372.67	12
OC-3 E-UDIT		$952.68	$372.67	12
OC-12 E-UDIT		$1,386.81	$372.67	12
OC-48 E-UDIT		$3,938.81	$372.67	12
9.6.10 UDIT Rearrangement				
Single Office			$171.64	12
Dual Office			$215.90	12
Hi-Cap Single Office			$231.72	12
Hi-Cap Dual Office			$260.28	12
9.6.11 Remote Node/Remote Port				
OC-3 E-UDIT Remote Node		$511.01		12
DS1 Remote Port		$3.90	$201.98	12
DS3 Remote Port		$52.61	$201.98	12
				12
OC-12 E-UDIT Remote Node		$959.74		12
DS1 Remote Port		$13.60	$201.98	12
DS3 Remote Port		$35.39	$201.98	12
OC-3 Remote Port		$111.14	$201.98	12
OC-48 E-UDIT Remote Node		$3,423.57		12
DS3 Remote Port		$23.77	$201.98	12
OC-3 Remote Port		$129.47	$201.98	12
OC-12 Remote Port		$510.24	$201.98	12
9.7 Unbundled Dark Fiber (UDF)				
9.7.1 UDF-Interoffice Facility (IOF) Single Strand				
Order Charge per 1st Strand / Route / Order			$513.92	12
Order Charge each Additional Strand / Same Route			$262.68	12
Termination, Fixed per Strand / Office		$4.90		12
Fiber Transport, per Mile / Strand		$73.86		12
Fiber Cross-Connect per Strand / Office		$2.63	$19.93	12
			$262.68	12
9.7.2 UDF-Loop Charges - Single Strand				
Order Charge per 1st Strand / Route / Order			$513.92	12