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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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 COVAD COMMUNICATIONS COMPANY'S PETITION FOR REVIEW OR REHEARING

March 10, 2005

TABLE OF CONTENTS

Introduction

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") respectfully petitions this Commission for review or rehearing of certain aspects of the Arbitration Report and Order issued in this docket on February 6, 2005 ("Decision"). While Covad agrees in many respects with the legal analysis and conclusions contained in the Decision, it does request review of certain aspects of that decision, as further explained below.

Argument

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

The Parties' disagreement with respect to Issue 1 centers on the conditions under which Qwest may, under both FCC rules and this Commission's rules, (1) Retire copper plant when it is used to serve Covad's xDSL customers; and (2) When Qwest does retire copper facilities, what notice must be provided to Covad. Qwest believes its ability to retire copper plant is unlimited, and that it must merely provide notice to the FCC of such retirement ninety (90) days prior to implementation. Covad has noted that, in addition to being bad policy, allowing Qwest to effectively disconnect Covad's DSL customers when it retires copper plant violates Utah law, and is, in any event, inconsistent with the FCC's *Triennial Review Order.*[1]

It is critical that this Commission not allow Qwest to over-read the FCC's new copper retirement rule. Allowing Qwest to deny access to competitive LECs when Qwest chooses to retire copper feeder and replace it with fiber (thereby deploying a hybrid loop, rather than broadband capable FTTH loops) will not further the goal of broadband deployment, and would provide Qwest a blueprint to re-establish a monopoly for broadband services, in direct conflict with the Utah's stated goal of "encourag[ing] the development of competition as a means of

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

providing wider customer choices for public telecommunications services throughout the state." Utah Code § 54-8b-1.1(3).

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

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

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

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

A. Covad's Alternative Service Proposal

1. The Decision

The Decision rejected Covad's proposals designed to allow Covad to maintain service and preserve its investment in its Utah customers and infrastructure in the face of Qwest copper retirement projects. In doing so, the Decision specifically declined to place any conditions on

Qwest's ability to retire any copper facilities and replace them with either fiber or new copper facilities that make the delivery of Covad's DSL services impossible. The decision stated: "Qwest has a right to retire copper facilities and replace them with fiber. We will not impinge on this right by requiring Qwest to provide "alternative services" at Qwest expense to CLECs whose operations may be affected by such retirements." Decision at 11. The Decision also seemed to conclude that any service provided by Qwest over newly deployed facilities, at least under Covad's proposal, would be provided "at Qwest's expense." Id. at 11.

Covad believes this decision does not appropriately balance the benefits, if any, of Qwest's incremental fiber deployment against Utah's statutory goals of promoting competition and the provision of broadband service to Utah consumers. Given the record evidence of the nature of Qwest's fiber deployment, which is not associated with providing new broadband services to consumers, and the limited reach of Covad's proposals, Covad believes its proposals should be adopted. Furthermore, Covad believes the Decision reaches incorrect conclusions regarding the costs of Covad's proposal, and who will bear any such costs. As explained below, the limited nature of Covad's proposal ensures that Qwest's costs of providing the contemplated alternative service will not increase.

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

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

> **Unless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules**, we will deem all such oppositions denied unless

> the Commission rules otherwise upon the specific circumstances of the case at issue within 90 days of the Commission's public notice of the intended retirement.

Triennial Review Order, ¶ 282.

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

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

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

Triennial Review Order, ¶ 283.

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

prepare for the change, i.e., to request that a short-term notification be converted to a long-term notification.

The FCC's intent to protect xDSL capable loops in particular becomes clearer when read alongside the FCC's requirements for narrowband access to fiber loops. Because the FCC had already alleviated any concern regarding narrowband services by establishing specific access requirements for the provision of narrowband services by CLECs over newly deployed fiber loops,[2] the FCC could only have been referring to broadband services, including xDSL capable loops, when it discussed the "denial of access to loop facilities required under our rules."

As discussed above, Covad has elected to limit its "alternative service" proposals to fiber feeder retirement scenarios, which are clearly not subject to the FCC's new rule espoused in the *Triennial Review Order*. Covad will pursue any disputes related to FTTH retirements through the established FCC process. The FCC's position is important, however, in understanding that the FCC's intent was not to provide incumbent LECs an opportunity to close their networks, but instead to clearly provide that such retirements should not deny access to loops that are required to be unbundled.[3]

3. Utah Law Requires Continued Access To Customer Loops In Most Circumstances, Notwithstanding Copper Retirement

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

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

Triennial Review Order, ¶ 284.

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

[3] It is also important to note that the FCC's findings of non-impairment with respect to next generation loop facilities were performed under section 251 of the Act, and in no way alter the responsibilities of RBOCs to make facilities available pursuant to section 271 of the Act and just and reasonable rates.

The Legislature in Utah has stated the following goals regarding the state's telecommunications policy:

> (1) endeavor to achieve the universal service objectives of the state as set forth in Section 54-8b-11;
>
> **(2) facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state;**
>
> **(3) encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state;**
>
> (4) allow flexible and reduced regulation for telecommunications corporations and public telecommunications services as competition develops;
>
> **(5) facilitate and promote the efficient development and deployment of an advanced telecommunications infrastructure, including networks with nondiscriminatory prices, terms, and conditions of interconnection;**
>
> **(6) encourage competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis;**
>
> (7) seek to prevent prices for tariffed public telecommunications services or price-regulated services from subsidizing the competitive activities of regulated telecommunications corporations;
>
> **(8) encourage new technologies and modify regulatory policy to allow greater competition in the telecommunications industry;**
>
> **(9) enhance the general welfare and encourage the growth of the economy of the state through increased competition in the telecommunications industry; and**
>
> **(10) endeavor to protect customers who do not have competitive choice.**

Utah Code § 54-8b-1.1. [emphasis added]

Covad's proposals would further all of the statutory goals emphasized above. The proposals would foster reasonable and fair competition, maintain quality of service, and promote consumer protection and choice by offering an economically rational means by which Covad can continue to provide service. As a result, Utah consumers would maintain their right to choose an alternative provider for broadband services, which is becoming an ever more important service for residential subscribers and the growth of small business in Utah.

In response to these legislative directives, as well as the specific directive to enact rules to provide carriers the right to interconnect with the essential facilities and to purchase the essential services of telecommunications carriers,[4] this Commission adopted specific rules regarding access to loop facilities:

> **R746-348-7. Essential Facilities and Services.**
>
> A. Designation -- At a minimum, the following are considered to be essential facilities or services pursuant to 54-8b-2.2.:
>
> 1. Unbundled local loops including 2-wire, 4-wire **and digital subscriber line facilities**;
>
> 2. **Loop concentration, loop distribution and loop feeder facilities**;

These rules clearly establish the Commission's finding that the access to loop facilities, and specifically feeder facilities and digital subscriber line facilities, is essential to promoting the policies of competition and consumer choice established by the legislature. Qwest must, therefore, provide unbundled access to these facilities regardless of the medium or technology used.

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

[4] Utah Code § 54-8b-2.2(1)(b)(i).

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

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

Covad has spent well over a billion dollars deploying its xDSL network throughout its operating territory, including Utah.[5] This network is designed, in part, to transform Qwest's legacy last-mile copper facilities into a vital component of Covad's high-speed broadband platform. When Qwest deploys FTTH or copper-fiber hybrid loop facilities and retires legacy copper facilities, it has the potential of destroying Covad's investment in its own broadband network, which relies on copper facilities. As Qwest's Witness Karen Stewart pointed out, Qwest certainly takes its own DSL customers' needs into account when Qwest considers a retirement project,[6] and for good reason: Like Covad, Qwest has made substantial investments in its DSL network and its customers. It would be patently discriminatory and anti-competitive for Qwest to mistreat consumers that have chosen Covad service while it accommodates its own retail customers.

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

[5] Exhibit Covad-1, p. 18, l. 437.
[6] Transcript, Vol. I, p. 109, l. 24 through p. 110, l. 3.

5. The Agreement Should Address Copper Feeder Retirement Scenarios

Covad is not so much concerned with Qwest's replacement of copper loops with FTTH loops, which fall within the FCC's new copper retirement rules, as it is concerned with the procedures governing the retirement and replacement of copper feeder with fiber feeder, hence its agreement to limit the impact of its proposals to copper feeder retirements.[7] As Ms. Doberneck stated in her testimony:

> Lest there be any question, Qwest's highest ranking officer, Richard Notabaert, just last week reiterated the fact the Qwest is not and will not engage in any kind of fiber deployment designed to bring enhanced broadband services to existing Utah consumers…

Exhibit Covad-2 at p. 4, ll. 116-119 [referring to quote of Mr. Notabaert contained in a *Businessweek* article].

This fact was essentially confirmed by Qwest Witness Karen Stewart, when she testified that copper retirements are primarily driven by maintenance issues and growth. With respect to the deployment of advanced services, she noncommittally stated: "… we're taking the incremental steps … this could very well be an incremental step toward providing eventually broadband services …" Transcript, Vol. I, p. 92, ll.9-12.

In response to data requests issued by Covad, Qwest confirmed that it had not deployed a single FTTH or FTTC loop in Utah, but had deployed 83,700 loops containing some fiber.[8] While Qwest refused to directly answer questions regarding the capability of these loops to provide advanced services, the logical inference based upon Qwest's responses to discovery and the testimony of its witnesses is that most of the fiber deployed to date was deployed in response

[7] Covad does not believe Qwest is likely, in the near future, to retire copper to build FTTH loops. Qwest CEO Richard Notabaert stated earlier this year that, "It is hard for us to look at the economic model and invest in fiber to the home…There are lower cost alternatives to fiber." Wall Street Journal, January 20, 2004. If Qwest does choose to do so, Covad has remedies, as the FCC made clear in the *Triennial Review Order*.

[8] Exhibit Covad-5, Qwest's Responses 01-003 through 01-007S1.

to maintenance problems or to increase *voice grade* capacity, and not to bring new services to Utah consumers.

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

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

Exhibit Covad-1 at p. 9, ll. 211-218.

Feeder retirements generally do not fall within the FCC's new copper retirement rule.[9] As a result, Covad has proposed language that would govern such feeder retirements, maintaining Covad's access to facilities serving its customers.[10] These proposals are critical, because an absence of language addressing feeder retirement will provide Qwest a path to driving competitors from its network. If Qwest can deny access to loops simply because it chooses to replace facilities that are damaged or are causing maintenance issues, it is only a matter of time before the entire Public Switched Telephone Network (PSTN) is again closed to broadband competition, frustrating the Commission's statutory mandates and the public interest.

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

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

6. Covad's Proposals Will Not Deny Qwest Its Right To Recover Its Costs

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

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

Second, it is important to remember that Qwest has made the network modification decision. There is a policy choice to be made by this Commission with respect to that decision: should the result be neutral to competitors,[11] or should Qwest be permitted to raise competitors' costs, destroy the value of their infrastructure investment and essentially drive them from the market? If Qwest is permitted to retire copper feeder, and by doing so deny access to bottleneck loop facilities to competitors, no competitive carrier will invest in entry via the Public Switched Telephone Network (PSTN). This is clearly not what the Utah legislature intended, notwithstanding Qwest's attempts to convince this Commission it is what the FCC intended.

Third, there is no valid reason to believe that Qwest's deployment of more efficient technology would raise, rather than lower, the incremental cost of providing wholesale service to Covad. Rather than attempt to prove this, Qwest points to its retail service offerings for DSL for the premise that it would lose money providing wholesale service to Covad. This is unavailing because the same is true today: there is no doubt that Qwest would make more money serving a retail customer than providing wholesale inputs to Covad. The fact that this would continue to

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

be true after a copper retirement says nothing about Qwest's incentives to retire copper, or its recovery of costs, and everything about Qwest's desire to eliminate competition and drive wholesale competitors away from its network.

7. Qwest's Proposals Provide It An Unlimited Ability To Close Its Network To Competition, And Would Make Facilities-Based Competition Impossible

Qwest's proposals surrounding copper retirement, if adopted, would grant it a limitless ability to close its network, denying access to essential facilities to competitors, such as Covad. As Ms. Stewart volunteered at hearing, Qwest believes that the deployment of *any* amount of fiber in its loop plant exempts that plant from any unbundling obligations, and its proposals are designed to reflect this position. In fact, Ms. Stewart testified that even if Qwest deploys fiber feeder facilities *solely within a Qwest Central Office*, and no outside copper plant is replaced with fiber, Qwest is nevertheless relieved of its unbundling obligations. Transcript, Vol. I, p. 114, ll. 1-12.

This position is particularly troubling to Covad. While Covad is not concerned, at least in the near term, that Qwest will make substantial investments to retrofit its outside plant with fiber, even a company with scarce financial resources[12] is likely to scrounge enough to place a few feet of fiber within its central offices, if doing so will eliminate its competitors.

B. Covad's Copper Retirement Notice Proposals

1. The Decision

The Decision adopted most of Covad's proposals regarding the content of notices that Qwest must provide to Covad when Qwest retires copper loop facilities. In doing so, the ALJ

[12] *See* Al Lewis, "Qwest Thirsts For Ghost of a Chance," Denver Post, Friday December 17, 2004 at C1.

noted that the FCC's rules require incumbent LECs, such as Qwest, to identify the "reasonably foreseeable impact" of the planned retirement, and that additional state law requirements were also clearly authorized. Decision at 10.

However, the Decision rejected the most critical of Covad's proposals, that notice be provided to Covad when its customers are served with the facilities being retired. Covad believes that any reasonable reading of the term "reasonably foreseeable impact of the planned changes," as used by the FCC, must require Qwest to provide notice to competitive LECs, such as Covad, when its retirement project may disrupt service to end-users. Without this notice, consumers' service may be disconnected without notice.

2. The FCC's Notice Requirements

47 C.F.R. § 51.327 prescribes the "minimum" standards for notices of network changes.[13] Qwest's current notifications, embodied by its proposals in this arbitration, do not even meet these "minimum" standards. For instance, notices must, according to the rule, include the "location(s) at which the changes will occur"[14] as well as the "reasonably foreseeable impact of the planned changes."[15]

Qwest's notice does not provide such vital information as what Covad customers, if any, will be impacted by the retirement project. The vague notice proposed by Qwest would be useful only as a starting point for a major research project to determine whether a given retirement will impact Covad's customers. In response to each and every notice of a Qwest

[13] 47 C.F.R. § 51.327(a) uses the term "at a minimum" to describe the obligation to meet the listed public notice requirements.
[14] 47 C.F.R. § 51.327(a)(4).
[15] 47 C.F.R. § 51.327(a)(6).

copper retirement project, Covad would have to determine whether any of its customers would actually be affected.

3. The Commission Should Adopt Covad's Proposal Regarding Specific Notice Of Impacted Customers

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

Qwest's primary objection to Covad's proposal is that Qwest should not be charged with determining specifically how, if at all, its project will disrupt service to Covad customers, because it does not have sufficient visibility into what services Covad provides, and whether those services can be provided over newly provisioned loop facilities. This overstates the scope of Covad's proposal. Covad merely requests that Qwest identify any Covad leased circuits that have been provisioned over the affected facilities, and notify Covad if any such facilities exist. Covad can then determine, based upon other information Qwest has provided regarding the retirement, whether there is a possibility of service disruption.

If Qwest is not required to perform this simple review and notification, a mountain of new work is created for Covad. This is not simply an issue of who must perform the work – it is an issue of whether Qwest should be required to perform a simple task as a result of its own network modification decisions, or whether Covad must undertake a substantial research project each time Qwest makes such decisions. Further supporting the logic of Covad's proposal is the

undisputed fact that an extremely small percentage of Qwest's copper retirements impact Covad customers.[16]

ISSUE 2 – UNIFIED AGREEMENT – 271 AND STATE LAW ELEMENTS INCLUDED (Section 4 Definitions of "Unbundled Network Element"; Sections 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, and 9.21.2)

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

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

[16] Tr. p. 16, l. 21 – p. 17, l. 3.

A. State Law Unbundling Authority

1. The Decision

The Decision agreed with Covad that the Commission is not preempted from enforcing its specific unbundling rules. Decision at 20. In fact, the Decision notes that Qwest continues to be obligated to provide unbundled access to the elements sought by Covad: "Qwest's 271 and state law unbundling obligations remain in effect and we expect Qwest to continue to abide by them." Decision at 21. Because Covad agrees with these aspects of the Decision's analysis, it will not repeat its fundamental arguments on these points in this brief.

Unfortunately, the Decision goes on to rule that this Commission is not required to enforce state law or section 271 unbundling requirements in a section 252 arbitration proceeding. While the Decision seems to acknowledge that the Commission has the authority to do so ("…the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration…"),[17] it concludes that it would not be reasonable in this case to enforce these obligations. Decision at 21.

2. The Commission Should Enforce Utah Law And Section 271 Consistent With The Legal Analysis Contained In The Decision

Covad respectfully submits that the Decision's resolution of Issue 2 does not logically follow from its legal analysis that (1) Qwest continues to be obligated under Utah law and section 271 of the Act to provide access to the elements proposed by Covad in this arbitration; and (2) This Commission possesses the authority to enforce these obligations within a section 252 arbitration proceeding. If the Decision agrees with Covad's arguments that the law requires

[17] Decision at 21.

access, and that the forum is appropriate, there seems to be no reason left to reject Covad's proposals.

As noted in part above, the Decision states:

> The fact that under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration does not lead us to conclude that it would be reasonable in this case to do so.

Decision at 21.

Why doesn't it lead to this conclusion? For whatever reason, the Decision contains no explanation. Without some explanation, Covad is at a loss to understand the logical progression that led to rejecting Covad's proposals, which the Decision noted were consistent with Qwest's continuing unbundling obligations and also an appropriate issue to be resolved in this arbitration.

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

Qwest's proposals regarding the *data* portion of line splitting arrangements (unrelated to unbundled switching), adopted by the Decision, would make this product unavailable in all markets where switching is no longer available as a section 251 element. This issue has not previously been separately argued by the parties. Because Covad believes <u>all</u> of its language for Issue 2 should be adopted, it did not previously raise arguments specific to line splitting.

The parties' dispute regarding line splitting raises an entirely separate set of issues. First, neither the *Triennial Review Order* nor the *TRO Remand Order*[18] can be read to eliminate line splitting. In fact, the *Triennial Review Order* contains several discussions confirming that the continued

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

availability of line splitting was a critical component in conducting its impairment analysis for other UNEs.[19] This makes line splitting clearly distinct from other elements Qwest seeks to eliminate in the parties' Agreement.

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

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

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

47 C.F.R. § 51.319(a)(1)(ii).

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

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

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

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

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

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

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

Despite this, Qwest's proposal for section 9.21.2, adopted by Order No. 6, reads:

> On the effective date of a Commission determination that Qwest is no longer required to provide UNE-P Combination services in a market area, Line Splitting is also not available in that market area. To the extent CLEC has an embedded base of Line Splitting End User Customers on the effective date of the Commission determination, CLEC shall transition its embedded base of Line Splitting End User Customers in accordance with the Transition Timelines for unbundled switching, as described in Section 9.11.2.0.1. In such markets where Line Splitting is not available, Loop Splitting will continue to be available pursuant to Section 9.24 of this Agreement. (emphasis added)

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

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

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

permitted to order line splitting elements from Qwest, CLECs purchasing QPP, and their customers, will have no choice but to partner with Qwest for the provision of DSL.

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

ISSUE 3 - COMMINGLING
(Section 4 Definitions of "Commingling" and "251(c)(3) UNE," 9.1.1.1, 9.1.1.4.2,[20] and 9.1.1.5 (and subsections))

A. The Decision

While the Decision agreed with Covad that paragraph 579 of the *Triennial Review Order* appears to require Qwest to commingle, and permit the commingling, of section 271 elements with unbundled network elements (and combinations of UNEs) obtained under section 251(c)(3), it goes on to find that this language is contradicted by the FCC's later statement, in a footnote, that section 271 elements may not be commingled, and that

> any reasonable reading of these facially conflicting requirements of these portions of the *TRO* must recognize the FCC's apparent decision that ILECs are required to commingle wholesale elements obtained by means other than Section 251(c)(3), *except for Section 271 elements.*

Decision at 28.

[20] While the Parties have generally resolved their dispute with respect to rate ratcheting, Section 9.1.1.4.2 remains open due to the parties commingling dispute.

Covad submits that the FCC's statements are not contradictory at all. Consistent with Covad's proposals, the FCC sought to provide for the commingling of all wholesale products and services with 251(c)(3) UNEs in paragraph 579 of the *Triennial Review Order*, and merely clarified in paragraph 584, in a footnote, that section 271 elements may not take the place of section 251(c)(3) UNEs in commingling arrangements.

The ALJ also rejected Covad's definition of "251(c)(3) UNE." Decision at 27. For the reasons set forth below, this definition should be reinstated, regardless of whether the Commission ultimately resolves Issue 2 in Covad's favor.

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

The FCC defines "commingling" as:

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

Triennial Review Order, ¶ 579.

As noted above, the Decision concludes that the FCC contradicts, and therefore limits, this definition by its later discussion in paragraph 584 of the *Triennial Review Order*. Covad believes the more reasonable explanation is that paragraph 584 was intended by the FCC to clarify that section 271 elements did not have the status of section 251(c)(3) UNEs in commingling arrangements. In other words, all commingling arrangements must contain a section 251(c)(3) UNE, and section 271 elements could not be substituted for these section 251(c)(3) UNEs.

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

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

47 C.F.R. § 51.309(e).

Any element provided pursuant to Section 271 is undoubtedly a "wholesale service" which may, under the FCC's rule, be commingled with "unbundled network elements." In fact, the FCC's use of the terms "an unbundled network element pursuant to Section 251(c)(3) of the Act" as well as the more generic term "unbundled network element,"[21] may create some question as to whether a network element that is not available under Section 251, but nevertheless is provided under Section 271 or state law, is in fact an "unbundled network element" according to the FCC. This further explains the distinction made by the FCC in paragraph 584.

In essence, this Commission must determine whether the FCC intended section 271 elements to fall within one of the following three categories: (1) Equivalent to Section 251(c)(3) UNEs; (2) Equivalent to other wholesale services purchased pursuant to some method other than section 251(c)(3); or (3) inferior to all other wholesale services, and therefore ineligible for commingling. The Decision places section 271 elements in category (3) above, and reads two sections of the *Triennial Review Order* to conflict with each other in order to do so. As Covad has explained, the more natural reading of the *Triennial Review Order*, and the resulting FCC rule, is that the FCC intended section 271 elements to fall within category (2): clearly not equivalent to section 251(c)(3) UNEs (this is clarified in paragraph 584), but equivalent to other wholesale services (as explained by paragraph 579).

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

> Notably, we agree with Covad that the plain and clear language in the TRO (e.g., in ¶ 579) and the FCC's commingling rule itself (47

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

> CFR § 51.309(3)) supports its position. Those provisions plainly state that an ILEC shall permit a requesting carrier to commingle UNEs with facilities and services obtained at wholesale from the ILEC pursuant to a method other than unbundling under § 251(c)(3). Those provisions do not contain the restriction advocated by Qwest here. There can be no dispute that network elements obtained under § 271 are wholesale services. As such, the TRO allows for commingling of UNEs with § 271 elements.

Colorado Public Utilities Commission Docket No. 04B-160T, In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Company Pursuant to 47 U.S.C. § 252(b), Initial Commission Decision (Mailed: August 27, 2004) at ¶ 176.

In overturning an Arbitrator's Report deciding the issue in a fashion similar to the Decision in this proceeding, the Washington Utilities and Transportation Commission stated:

> The next question is whether the FCC has excluded Section 271 elements as a whole from commingling obligations, as Qwest asserts, or allows Section 251(c)(3) UNEs to be commingled with Section 271 elements, as Covad claims. We find Covad's interpretation of paragraph [584, footnote] 1990 persuasive, and reverse the Arbitrator's decision on this point as well. The FCC removed language from footnote 1990 that would support Qwest's expansive view prohibiting any commingling of Section 271 elements. The subject of the FCC's commingling definition is Section 251(c)(3) UNEs, not wholesale services. It is reasonable to infer that BOCs are not required to apply the commingling rule by commingling Section 271 elements with other wholesale elements, but that BOCs must allow requesting carriers to commingle Section 251(c)(3) UNEs with wholesale services, such as Section 271 elements.

Washington Utilities and Transportation Commission, Docket No. UT-043045, *In the Matter of the Petition for Arbitration of Covad Communications Company With Qwest Corporation*, Order No. 6 (Issued February 9, 2005) ("Washington Order") at 30.

While a written decision has not yet been issued, the Minnesota Public Utilities Commission, by unanimous voice vote, has also voted to adopt Covad's proposed language regarding this issue.

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

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

While the Decision rejects Covad's proposed definition on the basis that it has likewise rejected Covad's proposals regarding Issue 2, this decision ignores the fact that the undisputed language of the agreement (with the noted, irrelevant exception) provides that:

> CLEC and Qwest agree that the UNEs identified in Section 9 are not exclusive and that pursuant to FCC rules, state laws, or the Bona Fide Request Process, or Special Request Process (SRP) CLEC may identify and request that Qwest furnish additional or revised UNEs to the extent required under Section 251(c)(3) or Section 271[22] of the Act, or other Applicable Laws.

Section 9.1.1 of the Agreement.

[22] The underlined language has been proposed by Covad. Whether or not this language is ultimately adopted, it is clear that UNEs in addition to those mandated by section 251(c)(3) may be incorporated into the agreement.

Given this necessary vagueness as to what may be provided as an "unbundled network element under the Agreement, Covad believes its more narrow definition of "251(c)(3) UNE" allows for the implementation of the FCC's commingling rules, and should be adopted by this Commission. This will allow for additional clarity in the agreement's terms, regardless of the Commission's ultimate decision regarding Issue 2.

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

Covad has proposed language for the agreement that clarifies that Qwest must provide regenerated cross connects between Covad collocations as well as between a Covad collocation and another CLEC's collocation ("CLEC-to-CLEC cross connections with regeneration") when requested by Covad. This language is supported by the Telecommunications Act's requirement that collocation be provided by incumbent LECs on terms that are just, reasonable, and non-discriminatory.[23]

A. The Decision

While the Decision agreed with Covad that Qwest should be required to provide CLEC-to-CLEC cross connections with regeneration, it declined to apply the same pricing treatment to such connections as is afforded to cross connections between Qwest and Covad ("ILEC-to-CLEC connections") or between two Covad collocations ("Covad-to-Covad connections"). Decision at 35-36. After determining that Qwest's FCC 1 Access Tariff was the inappropriate vehicle for setting rates for CLEC-to-CLEC connections with regeneration, the Decision suggested that the parties bring a separate action to establish a rate should one be needed in the future.

[23] 47 U.S.C. § 251(c)(6).

Covad disagrees with this resolution on both legal and practical grounds. First, the decision ignores the FCC's requirement that CLEC-to-CLEC cross connections be provisioned on rates, terms and conditions consistent with section 251(c)(6) of the Act, to wit, that those rates, terms and conditions be just, reasonable and non-discriminatory. It is settled law that prices consistent with this standard are established using TELRIC methodology, which is the methodology used by this Commission to determine charges (or no charges) for ILEC-to-CLEC connections. There is simply no legal basis to distinguish, either in terms of price or availability, between ILEC-to-CLEC and CLEC-to-CLEC connections. Second, the Decision's suggestion that a new proceeding be opened to determine the appropriate rate for CLEC-to-CLEC connections with regeneration, when the need arises, creates practical burdens for Covad. It is unrealistic to expect Covad to litigate a mini-cost docket in a single state in order to determine the rate for an element that is technically identical to another element (ILEC-to-CLEC connections) that the Commission has already addressed.

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

In requiring incumbent LECs to provision cross-connections between CLECs, the FCC stated: "our action reflects our overriding concern than an incumbent LEC would be acting in an unreasonable and discriminatory manner if it refused to provide cross-connects between collocators,"[24] and that "an incumbent LEC's refusal to provide a cross-connect between two collocated carriers would violate the incumbent's duties under section 251(c)(6) to provide

[24] *Fourth Report and Order*, ¶ 79.

collocation 'on … terms and conditions that are just, reasonable, and nondiscriminatory.'"[25] The FCC went on to find that an incumbent LEC's provisioning of cross-connects to two collocated carriers was required by section 251(c)(6) of the Act.[26]

Based on this analysis, it is clear that the FCC's goal in adopting its cross-connection rule was to ensure compliance with the non-discrimination requirements of section 251 of the Act, and that necessary cross-connections between competitive LECs were part of an incumbent LECs' obligations to provide collocation pursuant to section 251(c)(6). In other words, the legal obligations of incumbent LECs to provide CLEC-to-CLEC connections are precisely the same as those applicable to ILEC-to-CLEC connections. As the Decision noted, this Commission has already addressed the rates, terms and conditions for ILEC-to-CLEC connections. Decision at 34.

C. The Decision's Ruling Requiring An Additional Cost Proceeding Is Impractical

Regardless of whether the Commission ultimately decides that it should apply its rulings regarding ILEC-to-CLEC connections with regeneration to CLEC-to-CLEC connections, or implement a positive rate, it should not require the parties to initiate another proceeding to address this rate. This Commission should resolve all open issues raised by the parties in this arbitration, including the rates, terms and conditions applicable to elements available pursuant to section 251 of the Act. *See* 47 U.S.C. § 252(b), (c) and (d).

An additional proceeding will be wasteful of both parties', as well as the Commission's, resources. In addition, if Covad cannot be heard on this issue prior to being faced with the need

[25] *Id.*, ¶ 80.
[26] *Id.*, ¶ 82

to obtain regeneration for a CLEC-to-CLEC connection, it will either have to pay Qwest a rate the Commission has already ruled should not apply (the FCC 1 Tariff rate) or delay its business plans indefinitely while it awaits a decision. The Act establishes compulsory arbitration to avoid precisely this situation.

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

A. Payment Due Date

Covad has requested that the payment interval included in Section 5.4.1 be forty-five (45) days for any invoices containing: (1) line splitting or loop splitting products, (2) a missing circuit ID, (3) a missing USOC,[27] or (4) new rate elements, new services, or new features not previously ordered by Covad. Qwest maintains that the interval for payment on all invoices should be thirty (30) days. Covad's proposal for additional time is based upon specific and substantial deficiencies in Qwest's invoices which require manual verification effort. This manual effort requires additional time to perform.

1. The Decision

In rejecting Covad's proposals, the Decision determined that implementing Covad's proposals for a 45-day payment interval for certain invoices would "present serious billing system challenges" and could "negatively impact Qwest's cash flow while providing little or no tangible benefit to the parties' billing and payment relationship." Decision at 42.

Covad respectfully notes that these conclusions are reached contrary to the evidence presented in this case. As noted below, Covad presented substantial, un-refuted evidence with respect to the verification delays and difficulties caused by Qwest's current invoices, especially for shared loop products. Extending the payment interval by an additional fifteen days would provide a significant and tangible benefit for Covad. Conversely, there is little or no evidence on the record regarding the "serious billing system challenges" Qwest would experience as a result of the change. In any event, Covad believes its fundamental ability to review Qwest invoices for accuracy is more important than any difficulties Qwest may encounter in receiving payment

[27] "USOC" stands for Universal Service Ordering Code. While this proceeding was pending, Qwest implemented a systems change that appears to have resolved the issue of missing USOCs. It is likely that this element of Covad's proposal will therefore never need to be exercised.

fifteen days later. To decide otherwise is to place Qwest's interests in a position far superior to those of Covad.

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

As Covad witness Megan Doberneck explained both in her written and live testimony, Qwest's billing systems currently produce invoices to Covad that require substantial human effort to verify. This is true whether the included charges are correct or not, and whether the invoice is provided by Qwest in electronic format or not.[28] This is a direct result of specific deficiencies in Qwest's wholesale billing systems. As Ms. Doberneck, testifying on behalf of Covad, summarized at hearing:

> … despite the fact that [the ILECs] all use the same process, they all use the same interval [to provision services], only Qwest has not been able to actually fix its billing and provide that key information that we need on our bills in order to validate them … This is a problem that existed across all of the ILECs, and all of the ILECs except for Qwest were willing or able to fix [the problem].

Transcript, Vol. I, p. 173, l. 19 through p. 174, l. 1.

First of all, Covad typically receives its bills from Qwest five (5) to eight (8) days after the "invoice date," which starts the clock for the payment due date.[29] Also, Qwest's bills for non-recurring collocation charges continue to be provided in paper format.[30] In these circumstances, the bills must be hand-entered into Covad's billing systems before a review can even begin.[31] Then Covad employees must manually review the charges, many of which are individual case basis (ICB) charges, to verify them.

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[28] This is not meant to minimize the additional difficulties created by inaccurate Qwest billing. As Ms. Doberneck pointed out in her testimony, the Parties have resolved several billing errors in the past few years, leading to substantial repayments to Covad as well as payments by Qwest under its Performance Assurance Plan. Covad believes that these issues can be separated from the process deficiencies and other challenges mentioned above, which are not addressed by the foregoing remedies and bear specifically on Covad's ability to review Qwest bills prior to the Payment Due Date.

[29] Exhibit Covad-1, p. 31, ll. 767-768.

[30] Id., p. 32, ll. 782-791.

[31] Id.

Often, Qwest's bills do not contain circuit identification numbers, which cause substantial delays and difficulties in verifying charges.[32] As Ms. Doberneck explained at hearing, Qwest provides the Billing Telephone Number (BTN) rather than the circuit identification number for line-shared and line-split loops, making verification impossible.[33] The precise scope of this problem is described in Ms. Doberneck's direct testimony, and is "enormous."[34] As Ms. Doberneck explained in her testimony:

> We're simply requesting additional time to address issues that are created by the deficiencies or gaps in our bills so that we can do the best job we can to validate the billing [from Qwest], which I think benefits everybody.

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

There is nothing inherently disruptive about a 45-day, rather than a 30-day payment interval. Qwest can continue to bill on a 30-day (or monthly) billing cycle, and will continue to receive payments from Covad every thirty (30) days. In other words, Qwest's only possible concern would be that if Covad refused to pay its final bill from Qwest, it would not realize this until fifteen (15) days later than if Qwest's proposal were adopted. This hardly creates the type of negative impact on Qwest's cash flow the Decision suggests. It should also be noted that Qwest bills recurring charges in advance, further limiting, if not eliminating, Qwest's financial exposure.[35]

In addition, affording Covad a meaningful amount of time to review Qwest bills will avoid inefficient results for both Parties, such as Covad relying on the audit process to conduct bill reviews, which would increase the cost of the billing relationship for both Parties. Covad could also dispute Qwest bills blindly, just to buy time to conduct a thorough review. This is an

[32] Id., pp. 39-40.
[33] Id., pp. 33-34.
[34] Id.
[35] Transcript, Vol. I, p. 219, ll. 18-25.

unrealistic remedy, however, because like the audit process, it is too time consuming and labor intensive to serve as an alternative to a reasonable payment interval. In addition, Covad would be forced to pay late payment charges for amounts it knew, at least in general, were legitimate and was willing to pay.

Rather than relying on remedies that are tantamount to digging a trench with a kitchen fork, the Parties should implement a payment interval that affords Covad enough time to verify the bills it receives from Qwest. This will ensure accurate payment and will minimize disputes and audits, thus saving both Parties time and money in the long run.

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

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

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

Covad cannot determine what record evidence the Decision relies upon for its conclusion that Qwest would undergo a severe hardship if it were required to wait an additional fifteen days for payment. For instance, Qwest provided no evidence regarding the extent to which it would be deprived of the time value of that money in real financial terms, and provided no evidence regarding what systems changes, if any, would be necessary to accommodate a longer payment interval. In fact, it is unlikely that any hardship would be experienced at all.

In any event, any necessary changes will already need to be made by Qwest to comply with the Minnesota Public Utilities Commission's unanimous decision, on voice vote, to adopt an extended payment interval for invoices that do not contain circuit identification numbers. Because Qwest makes any such systems changes on a regional basis, this Commission's decision to adopt Covad's proposals will not impose any additional costs or hardship on Qwest.

5. Qwest Has Already Agreed To Extended Payment Intervals

In the past, Qwest has agreed to payment intervals longer than those proposed in this proceeding, and has never, to Covad's knowledge, claimed hardship due to different payment intervals being contained in its agreements with different CLECs. As Qwest's witness William Easton admitted at hearing, Qwest has executed agreements that calculate the thirty-day payment interval from the date the bill is actually received by the CLEC.[36] Based upon both Mr. Easton and Ms. Doberneck's testimony regarding the delays in delivery of invoices by Qwest, this equates to an extension of as much as eight days beyond the interval proposed by Qwest in this proceeding. In light of these facts, the Decision's determination that Covad's proposal will cause severe cash flow problems and systems issues for Qwest should be reconsidered.

6. It Is Inappropriate To Consider Qwest's Payment Intervals As "Industry Standard" As They Apply To Invoices For Shared Loops

The Decision characterizes Qwest's proposed interval for payment as "industry practice and standard." While it is true that most interconnection agreements provide for some iteration of a thirty day payment interval (either from receipt or issuance of an invoice), producing an electronic bill, in a format both parties agree is electronically verifiable, is also industry standard. In fact, a standards body, the Ordering and Billing Forum (OBF) was established to determine these standards. As noted above, Qwest is the only incumbent LEC that does not provide Covad electronically verifiable invoices for shared loop products, necessitating *manual*, rather than

[36] Transcript, Vol. I, p. 222, ll.13-18.

electronic, review. As the Commission may or may not be aware, Covad is one of the only, and certainly the largest, purchaser of shared loop products from Qwest, which explains why the Commission has not received complaints about this issue from other carriers, and why other carriers have agreed to the thirty day interval proposed by Qwest.

To apply "industry standard" payment intervals to invoices requiring manual verification is tantamount to expecting a person can walk fifteen miles to work in thirty minutes, simply because that is the amount of time it would take to drive. The reality is that Covad has established electronic bill verification with every other incumbent LEC, but Qwest has refused to do so.

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

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

1. The Decision

In rejecting Covad's proposals to modestly extend the time for discontinuing new orders and disconnection of services, the Decision seems to rely upon its previous conclusion that Covad should not be afforded more time to manually review invoices from Qwest. *See* Decision at 42.

Covad does not believe there is much relationship between the parties' dispute over appropriate intervals for *payment*, on the one hand, and Covad's justification for extended time periods prior to *discontinuance and disconnection*. Covad's written testimony details its entirely separate justification for the latter extensions, which relate primarily to the seriousness of the remedies involved, and the need to provide sufficient time for Covad to prepare appropriate filings seeking injunctive relief should Qwest pursue these remedies without justification.

2. Covad Should Be Afforded Sufficient Time To Seek Injunctive Relief And Avoid Disruption For End Users In The Event Of A Serious Dispute

Covad's primary concern in seeking an extension of the discontinuance and disconnection deadlines is that it have sufficient time to recognize that Qwest is refusing to acknowledge a billing dispute and take the appropriate steps to protect its business. In evaluating the reasonableness of the extended time frames proposed, the Commission should consider how such a dispute would develop, and the timelines associated with that dispute.

If Covad identifies a billing dispute, it advises Qwest of that dispute within fifteen days of the payment due date for the invoice involved. In other words, if the date the invoice is issued is considered Day 1, the dispute is announced by Day 45. Just fifteen days later, on Day 60, Qwest proposes it may cease taking orders (new installations and/or changes to existing end user's accounts) for service if it has not been paid. If Qwest refuses to acknowledge a billing dispute sometime between Day 45 and Day 60, Covad will have fifteen days *or less* to seek Commission or court orders to prevent Qwest from discontinuing the processing of such orders for non payment. Compounding the time constraints is the fact that most billing disputes leading to the need to seek such relief will be experienced by Covad on a regional basis, not just in Utah. This would create a logistical crisis for Covad, even if Qwest did not ultimately decide to discontinue taking orders, because Covad would have to move quickly to protect its interests given the mortal threat to its business.

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

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

A disconnection of service, or even the refusal to process Covad's orders, would have a disastrous and likely irreversible impact on Covad's business. If Qwest were to wrongfully reject a billing dispute raised by Covad, it is true that Covad would have a legal remedy for such refusal. However, that legal remedy would be meaningless if Qwest were to disconnect service before that remedy was obtained. Covad's proposals provide it the protection necessary, and in turn provide that protection to innocent end users. As the Administrative Law Judge assigned to the parties arbitration in Minnesota noted in her decision, recently upheld by unanimous voice vote by the full commission:

> The other terms at issue for sections 5.4.2 and 5.4.3 do not routinely affect cash flow and have more direct impact on end users. The proposals by Covad and the Department to extend these periods to 60 and 90 days, respectively, are reasonable and should be adopted.

Minnesota Public Utilities Commission Docket No. P-5692,421/IC-04-549; OAH Docket No. 3-2500-15908-4, *In the Matter of the Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation,* Arbitrator's Report (Dated December 15, 2004) at 29.

Covad respectfully requests that this Commission implement the same safeguards for Covad and end users alike by adopting Covad's proposals.

Conclusion

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

Dated this 10th day of March, 2005.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PETITION FOR REVIEW OR REHEARING was mailed by U.S. Mail, postage prepaid, and electronically mailed to the following on this 10th day of March, 2005:

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