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

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

In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation

ARBITRATOR'S REPORT

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

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

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

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

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

Procedural History

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

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

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

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

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

Arbitrator's Authority

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

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

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[3] Second Prehearing Order (June 28, 2004).

[4] Tr. 3:129-32. By rule, the Arbitrator's Report is due no later than 35 days before the deadline for the Commission's decision, or December 17, 2004. *See* Minn. R. 7812.1700, subps. 19 & 21.

[5] *In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 2252(b)*, Order Denying Motion to Dismiss Without Prejudice and Assigning Arbitrator (Apr. 28, 2004).

[6] Order on Motion to Dismiss (June 4, 2004).

[7] 47 U.S.C. § 252(b)(4)(C).

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

Burden of Proof

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

Remaining Disputed Issues

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

Issue No. 1: Retirement of Copper Facilities

A. Issue

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

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[8] 47 U.S.C. § 252(e)(3).

[9] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket Nos. 96-98, First Report and Order, 11 FCC Rcd 15499 ¶¶ 66, 54, & 58 (Aug. 8, 1996) (*Local Competition Order)*; *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147 at ¶¶ 193-96 (Sept. 17, 2003) (*TRO*).

[10] Minn. R. 7811.1700, 7812.1700; *see also* Minn. Stat. §§ 237.011, 237.16, subd. 1(a).

[11] Minn. R. 7812.1700, subp. 23.

[12] 47 C.F.R. §§ 51.5 & 51.321(d).

[13] These issues were numbered on the Joint Disputed Issues List submitted most recently on October 15, 2004.

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

B. Position of Parties

Alternative Service Proposal

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

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

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

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

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

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[14] *TRO* ¶ 282 (emphasis added).

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

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

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

Content of E-mail Notice

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

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

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

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

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

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

C. Applicable Law

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

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

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

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

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

D. Decision

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

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

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

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

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

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

[33] 47 C.F.R. § 51.327.

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

Issue No. 2: Section 271 Obligations

A. Issue

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

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

B. Position of Parties

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

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

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

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

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

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

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

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[37] Other sections proposed by Covad address access to section 271 elements at any technically feasible point (9.1.5); access to DS1, DS3, and dark fiber loops as section 271 elements in the event that the FCC determines there is no impairment to these elements under section 251 (9.2.1.3); provision of more than two DS3 loops for a single end user customer under § 271 (9.2.1.4); access to feeder subloops under section 271 (9.3.1.1); and access to DS1 feeder loop (9.3.2.2) unbundled dedicated interoffice transport (UDIT) (9.6 and 9.6.1.5, 9.6.1.5.1), DS1 transport along a particular route (9.6.1.6, 9.6.1.6.1), and switching and line splitting (9.21.2) as section 271 elements.
[38] *Verizon-Maine Proposed Schedules, Terms, Conditions, and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Maine PUC Docket No. 2002-682, Order-Part II (September 3, 2004).
[39] *TRO* ¶ 655.
[40] Minn. Stat. § 237.12, subd. 4.
[41] For example, in section 9.3.1.1 of its proposed ICA, Covad includes language that would obligate Qwest to provide feeder subloops, notwithstanding the FCC's ruling in the *TRO* that ILECs are not required to unbundle this network element. *See* TRO at ¶ 253.

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

33. Qwest further argues that the Commission lacks authority to arbitrate the terms and conditions of access to section 271 elements under state law. Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by section 271,[44] provide no role for state commissions. The FCC has confirmed that "[w]hether a particular [section 271] checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6)."[45]

34. To the extent that Covad's language concerning section 271 would require the Commission to unbundle elements that the FCC has declined to unbundle under section 251, Qwest further argues that the Commission lacks authority to do so. Qwest contends that Congress explicitly assigned the task of applying the section 251(d)(2) impairment test and "determining what network elements should be made available for purposes of subsection [251](c)(3)" to the FCC.[46] The Supreme Court confirmed that as a precondition to unbundling, Section 251(d)(2) "requires the [Federal Communications] Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[47] The D.C. Circuit confirmed in *USTA II* that Congress did not allow the FCC to have state commissions perform this work on its behalf.[48]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Applicable Law

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

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

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

[59] 47 U.S.C. § 252(b)(4)(C).

[60] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, FCC 02-276 ¶ 8 (Oct. 4, 2002) (*Declaratory Order*).

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

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

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

D. Decision

46. The Administrative Law Judge agrees with the Department that there is no legal authority in the Act, the *TRO*, or in state law that would require the inclusion of section 271 terms in the interconnection agreement, over Qwest's objection. The authority of a state commission must be exercised consistently with the Act; both the Act and the *TRO* make it clear that state commissions are charged with the arbitration of section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to section 271. Although this is an "open issue" for purposes of determining what issues are subject to arbitration, the law provides no substantive standard that would permit the language Covad proposes. Furthermore, to the extent the *Verizon-Maine* decision stands for the proposition that a state commission has authority to arbitrate section 271 claims, the decision is distinguishable on its facts as it appears to be premised on enforcement of a specific commitment that Verizon made to the Maine Commission during 271 proceedings to include certain elements in its state wholesale tariff.

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

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

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

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

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

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

Issue No. 3: Commingling of Section 271 Elements

A. Issue

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

B. Position of Parties

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

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

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

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

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

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

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

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

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

[67] *TRO* ¶ 655 at n. 1989.

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

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

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

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

C. Applicable Law

61. The *TRO* provides as follows:

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

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

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

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

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

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

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

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

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

D. Decision

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

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

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

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

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

Issue No. 5: Regeneration

A. Issue

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

B. Positions of Parties

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

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

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

70. In section 8.2.1.23.1.4, the interconnection agreement provides that a CLEC is responsible for the end-to-end service design that uses ICDF Cross Connection to ensure that the resulting service meets its customer's needs. This is accomplished by CLEC using the Design Layout Record (DLR) for the service connection. Qwest's proposal ends here; Covad's proposal would add the following at the end of this section:

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

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

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

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

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

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

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

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

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

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

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

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

C. Applicable Law

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

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

D. Decision

80. Because Qwest permits collocating carriers to provide their own cross connection, 47 C.F.R. § 51.323(h) makes the connection and any required regeneration the responsibility of the collocating carriers, assuming that Qwest has otherwise complied with its obligation to provide collocation on terms and conditions that are just, reasonable, and nondiscriminatory.[87] Qwest's proposed contract language should be adopted because it is more clear in describing the parties' obligations and more consistent with the rule; however, the propriety of a regeneration charge and the pricing standard that should be applied to it could be addressed in a collocation cost model, should the Commission open a docket for that purpose.

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

A. Issue

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

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[86] 47 C.F.R. 51.323(h)(1).

[87] 47 U.S.C. § 251(c)(6).

B. Position of Parties

82. The parties have focused their arguments on the payment due date. Since the hearing of this matter, Covad has proposed new language, recommended in part by the Department, regarding the payment due date. Specifically, Covad now proposes the following:

> 5.4.1 Amounts payable for any invoice containing (1) line splitting or loop splitting products, (2) a missing circuit ID, (3) a missing USOC, or (4) new rate elements, new services, or new features not previously ordered by CLEC (collectively "New Products") (hereinafter collectively referred to as "Exceptions") are due and payable within forty-five (45) calendar Days after the date of invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later (payment due date) with respect to the New Products Exception, the forty-five (45) Day time period shall apply for twelve (12) months. After twelve (12) months' experience, such New Products shall be subject to the thirty (30) Day time frame hereinafter discussed. Any invoice that does not contain any of the above Exceptions are due and payable within thirty (30) calendar Days after the date of invoice, or within twenty calendar Days after receipt of the invoice, whichever is later. If the payment due date is not a business day, the payment shall be due the next business day.

83. Covad bases its request for a longer payment due date in part by arguing that contrary to industry standards, Qwest does not provide a circuit identification number on its UNE bills, and therefore, Covad is unable to verify whether it has actually ordered the loop for which it is being billed.[88] Covad also argues that a longer payment period is required, because some of Qwest's UNE bills do not contain universal service ordering codes (USOCs) for the non-recurring charges.[89]

84. It is difficult to determine from Covad's evidence the scope or impact of its problems with validating Qwest's bills. The evidence is that Covad's UNE bills fill "30 boxes" each month; collocation bills run 500-700 pages; and transport bills run 850-1,260 pages.[90] These figures apply to bills from all seven Qwest states in which Covad operates, not just Minnesota.[91] Qwest provides UNE bills electronically; however, "a number of times" the Qwest UNE bills fail to provide circuit identification numbers, without which Covad claims it is utterly unable to confirm wither Qwest is billing for a loop that Covad has actually ordered.[92] In addition, "a number of times" the Qwest UNE bills fail to contain USOCs, which Covad must retrieve before billing can be validated.[93] In Minnesota, Covad is only missing USOCs for conditioning charges.[94] Covad claims

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[88] *See* Ex. 8 (Doberneck Direct) at 23.
[89] *Id.* at 24.
[90] *Id.* at 22
[91] Tr. 1:96.
[92] Ex. 8 (Doberneck Direct) at 24.
[93] *Id.*
[94] Tr. 1:107.

that all nonrecurring charges must be investigated manually because they lack USOCs. Furthermore, Qwest "may" bill incorrectly. In addition, Covad "must" research all disconnects manually to ensure the disconnect dates are correct.[95] It does not appear that this effort is the result of inadequate information on Qwest bills, it is simply Covad's choice to validate disconnects in this manner. Covad anticipates that billing will become more difficult in the future as Covad partners with other CLECs to provide line split or loop split services, because Covad's voice partner must also review the voice billings within this interval.[96]

85. Qwest points out that during the section 271 workshops, these same issues were discussed.[97] All issues pertaining to the payment due date were resolved, resulting in consensus language specifying that amounts payable are due within 30 days after the invoice date.[98] Qwest's proposed language specifies that same 30-day period and is identical to the language in Qwest's Minnesota SGAT.[99]

86. This same 30-day period is specified in Qwest's FCC and Minnesota access tariffs and in the current Qwest-Covad interconnection agreement (in effect since early 1999).[100] Fourteen carriers have opted-in to the Minnesota SGAT, agreeing to the payment language that Covad challenges here[101]; AT&T recently agreed to this language in its new interconnection agreement in Minnesota,[102] and Covad agreed to a 30-day payment term in its Commercial Line Sharing Agreement entered into with Qwest in April of this year.[103] Furthermore, Covad requires its customers to pay its invoices in 30 days.[104]

87. While Qwest does not provide a circuit identification number for line sharing, Qwest does provide information from which Covad may track and validate its line-sharing bills.[105] Qwest originally put the line sharing process into its POTS work flow in order to expedite the time in which a line sharing order could be provisioned.[106] In its POTS system, Qwest assigns a unique identification number to the loop over which Covad is providing line sharing, and this unique identification number is provided to Covad as part of the Firm Order Confirmation (FOC) and the Customer Service Record (CSR).[107] With this identifier, Covad can verify the service for which it has been billed.[108]

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[95] Ex. 8 (Doberneck Direct) at 25.
[96] *Id.* at 26.
[97] Qwest acknowledges that there were no 271 workshops held in Minnesota, however, consensus language was reached through the workshop process and provided the foundation for Qwest's Minnesota SGAT.
[98] *See* Ex. 15 (Easton Direct) at 6.
[99] *Id.*
[100] *Id.* at 5.
[101] *Id.* at 9.
[102] *Id.*
[103] *See* Ex. 22, section 3.2.1.
[104] *See* Ex. 15 (Easton Direct) at 12.
[105] *See* Tr. 2:20.
[106] *See* Tr. 2:19.
[107] *See* Ex. 16 (Easton Rebuttal) at 6.
[108] *Id.*

88. Qwest further argues that it provides USOCs on bills for all recurring charges and for many non-recurring/fractional charges, which make up the vast majority of Covad's bills.[109] Where USOCs are not provided, however, the issue only arises in Qwest's Western Region, which does not include Minnesota.[110] In addition, Qwest projects that this issue will be fixed by a systems change in the near future.[111] Further, for those limited instances where USOCs are not provided, Qwest provides Covad with a description of the charge that makes bill validation possible.[112] Thus, Qwest argues Covad's claim that it must go back to Qwest for the USOC information before it can begin bill validation[113] is unfounded, not only because bill validation does not necessarily require USOC information[114], but also because Covad has only once ever requested USOC information from Qwest on a non-recurring charge.[115]

89. Qwest contends that the vast majority of bills Covad receives from Qwest are in electronic format, allowing for mechanized analysis, and those bills that are only received in paper copy comprise a minute percentage of the total bills.[116] In addition, Covad could develop the appropriate software to handle all of its bills electronically, but it has chosen not to do so. To the extent that Covad has concerns about the format of Qwest's bills, Qwest maintains that these concerns are not appropriately raised in interconnection agreement negotiations, but are properly raised in the change management process (CMP).[117] Qwest also relies on the FCC's review of its wholesale billing processes as part of the section 271 approval processes and conclusion that Qwest's processes satisfy the checklist requirements.[118] Qwest further argues that it has a strong incentive to ensure that its bills are accurate because its Performance Assurance Plan includes performance measures relating to billing completeness and accuracy.

90. Qwest maintains that the proposal by Covad to create different payment periods for different products is unworkable from a systems and administrative standpoint.[119] The necessary system changes implementing this language would require a costly programming effort and billing system logic different from that used by all other Qwest CLEC customers. Qwest maintains that even more problematic, from a systems standpoint, than treating different items on the same bill differently is Covad's request that new products be treated differently for twelve months, then revert back to the 30 day payment period used for previously ordered products. This means that the billing systems must have the capability of determining when a CLEC orders a new product, the capability to treat bills with the new service on them differently, and the

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[109] *See id.* at 7.
[110] Tr. 2:23, 39.
[111] Tr. 2:23.
[112] *See* Ex. 16 (Easton Rebuttal) at 7-8.
[113] *See* Ex. 8 (Doberneck Direct) at 24.
[114] *See* Ex. 16 (Easton Rebuttal) at 8-9.
[115] *See id.*at 9.
[116] *See* Ex. 15 (Easton Direct) at 9-10; s*ee* also Ex. 16 (Easton Rebuttal) at 4-5.
[117] *See* Ex. 16 (Easton Rebuttal) at 6.
[118] *See id.* at 13.
[119] *See* Tr. 1:136-137.

capability to turn off the exception treatment at the end of 12 months. This language also fails to define what constitutes a new product.

91. The Department recommends that Qwest's proposed time period of 30 days be adopted, "except that 45 days should be allowed on a bill containing: (1) line splitting or loop splitting, (2) a missing circuit ID, or (3) a USOC that does not uniquely identify the price." The first exception provides Covad with additional time when it has a partner company, while the second and third exceptions encourage Qwest to make the bills more complete and easier to audit. Covad accepts these recommendations, and proposes them, together with a fourth "45-day exception" for "new products" first ordered during the 12 months preceding the invoice date. The Department is not convinced that new products should all come under the "45-day exception." If Qwest has not appropriately billed a new product, Covad has the choice to dispute the accuracy of the bill it has received.

92. The parties have devoted relatively little attention to the remaining payment issues concerning timing for discontinuing the taking of orders and disconnection of services. Covad and the Department advocate a 60-day timeframe for Qwest to discontinue orders for failure to make full payment, and 90 days for disconnection of service, because these are drastic measures and the timeframe should not be so compressed as to allow either party to use them as leverage in billing disputes or other conflicts. In addition, service to end users is potentially at risk pursuant to these terms.

C. Applicable Law

93. The Telecommunications Act does not specifically address this issue. However, the Commission has general authority under the Act to arbitrate specific unresolved issues and to order terms consistent with the terms of the Act.[120] Further, Minn. Stat. § 237.16, subd. 1(a), authorizes the Commission to prescribe the terms and conditions of service delivery, for the purpose of bringing about fair and reasonable competition for local exchange telephone services.

D. Decision

94. There may well be problems with the format of some of Qwest's bills, but Covad's evidence that billing deficiencies cause Covad to need more than 30 days to review and pay bills is weak. Furthermore, the impact of CLEC opt-in rights cannot be ignored. Any number of CLECs could opt into this agreement to receive the benefit of an extended payment date, and they might not have the prompt payment history that Covad has had to date. This must be viewed as an issue for CLECs as a group, not one that may be resolved specifically for an individual CLEC. Qwest's evidence that the CMP is the best way to address billing issues is not compelling either, though, given that CLECs have no right to prioritize changes to billing systems in this process.[121] The

[120] *See* 47 U.S.C. § 252 (b).
[121] Tr. 1:101-02.

proposal to create different payment periods for different products, however, is unworkable from a systems and administrative standpoint. The necessary system changes implementing this language would be costly. Covad itself has acknowledged the difficulty of implementing such a system.[122]

95. The provision concerning payment due date is a true cash flow issue, in contrast to the other disputed provisions concerning time to discontinue orders and disconnection of services. The Administrative Law Judge agrees with Qwest that Covad's proposal would not, in fact, buy it more time to review Qwest's bills, because Covad would receive its next month's bill (sent every 30 days) before completion of a 45-day review process. Covad has functioned with this same term under the original interconnection agreement, and it has agreed to this term in its commercial line sharing agreement. Based on the record as a whole, the Administrative Law Judge has concluded that Covad is seeking a more favorable payment term for its own business reasons and not solely because of difficulties with validation of Qwest's bills. Qwest's proposal of a 30-day payment period is commercially reasonable and is standard in the industry. Qwest's proposed language for section 5.4.1 should be adopted.

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

Dated this 15th day of June, 2018

Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

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NOTICE

Because of the compressed timeframe for a Commission decision in this case, the time period for filing exceptions has been shortened. Any party wishing to file exceptions to the Arbitrator's Report should do so by December 27, 2004.

[122] *See* Qwest's Post-Hearing Brief, Attachment 1.