Decision No. C04-1348

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04B-160T

IN THE MATTER OF PETITION OF QWEST CORPORATION FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH COVAD COMMUNICATIONS COMPANY PURSUANT TO 47 U.S.C. § 252(B).

ORDER GRANTING IN PART AND DENYING IN PART APPLICATIONS FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: November 16, 2004
Adopted Date: October 27, 2004

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of the Applications for Rehearing, Reargument, or Reconsideration (RRR) filed by DIECA Communications, Inc., doing business as Covad Communications Company (Covad) and Qwest Corporation (Qwest). The applications request reconsideration of portions of Decision No. C04-1037 (Decision).[1]

2. Qwest's first issue on RRR for our consideration concerns Issue #6, Regeneration. The Commission, in Decision No. C04-1037, decided that 1) Qwest must provide channel regeneration as a wholesale product; 2) Qwest may charge a Total Element Long-Run Incremental Cost (TELRIC) rate for regeneration on a Competitive Local Exchange Carrier (CLEC)-to-CLEC connection and may not charge for regeneration between a CLEC's own collocations; and 3) Qwest may reserve space for itself which does not alter Qwest's ability to

[1] Subsequent to the filing of the Applications for RRR, Covad and Qwest withdrew certain issues for reconsideration. Specifically, Qwest Issue # 5, Covad Issue #12, TRO-1, and TRO-2 were all withdrawn.

charge for regeneration. Qwest requests the Commission reconsider items 1 and 2 because the decision is in conflict with 47 *Code of Federal Regulations* (C.F.R.) 51.323(h). Qwest states that the decision appears to be based upon a misreading of the Federal Communications Commission's (FCC) rules and regulations regarding collocation and a misunderstanding of the products offered by Qwest pursuant to those rules. *See* Decision, pages 32 through 41.

3. Rule 47 C.F.R. 51.323(h) states that incumbent local exchange carriers (ILECs) must provide a connection between two CLEC collocation spaces: 1) if the ILEC does not permit the CLECs to provide the connection for themselves; or 2) under § 201 when the requesting carrier submits certification that more than 10 percent of the amount of traffic will be interstate. Qwest asserts that because it permits CLECs to connect to each other outside of their collocation spaces and thereby removes itself from the equation, Qwest states that it has no FCC-imposed obligation to provide a CLEC-to-CLEC connection, much less regeneration for a CLEC-to-CLEC connection.

4. Qwest states that if requested it will install cable and provision the circuits for direct connection between two CLECs or from the CLECs' collocation spaces to the Interconnection Distribution Frame (ICDF), which would be ordered as a Direct Connect product under its FCC Access tariff. However, Qwest asserts that this is a voluntary offering, not required by FCC rule.

5. If the CLECs choose to interconnect at the ICDF, either Covad or the other CLEC can run a jumper wire to connect the two CLECs. Alternatively, they can request that Qwest run the jumper – the COCC-x product (which is a wholesale product). If regeneration is required this would be a finished tariffed product known as Interconnection Tie Pair.

6. Qwest states that by this Commission initial decision, it is effectively acting outside its jurisdiction by attempting to supercede a federal tariff.

7. On the issue of rates for the regeneration product, Qwest asserts that the Commission assumes improperly that the elements and activities that go into ILEC-to-CLEC regeneration are the same as those that are needed for CLEC-to-CLEC regeneration and that the same charge is appropriate for both. Qwest requests that, if the Commission abides by its initial ruling, Qwest be permitted an opportunity to present a cost study specific to CLEC-to-CLEC regeneration so that the rate for that service is cost-based.

8. In its RRR filing, Qwest does not distinguish between Covad-to-Covad connections and Covad-to-CLEC connections, but believes that they should be treated the same. Qwest states that Covad could game the regeneration payment system if there is a difference in the rate for CLEC-to-CLEC verses Covad-to-Covad regenerations. Covad avoids a regeneration charge between itself and its partner CLEC if it collocates nearer to its partner and further from its existing collocation, which could result in Qwest having to pay for the regeneration between Covad's own collocations.

9. Qwest states that the FCC rules that provide the governing law apply whether the connection is between different CLECs or between collocation spaces controlled by the same CLEC. Qwest asserts that in both situations, Qwest's decision to allow the CLECs to provide their own interconnection is dispositive and the Qwest service, when chosen by the CLEC, must be purchased from the interstate tariff.

10. We agree with Qwest on this issue, in part. It is not clear in the record before us, whether, in fact, Qwest offers Covad the ability to provision its own regeneration either in its collocation space or at the ICDF. There is contradictory testimony from the parties on this matter.

Therefore, if Qwest provides Covad with an unfettered ability to provision its own regeneration either in the collocation space or at the ICDF, then when requested by Covad, Qwest may provision and charge for regeneration at tariffed rates.

11. We continue to believe that there is a distinction between Covad-to-Covad connections and regeneration, and Covad-to-CLEC. 47 C.F.R. 51.323(h) does not apply to these Covad-to-Covad connections because it states:

> An incumbent LEC shall provide . . . a connection between the equipment in the collocations 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*. . . (Emphasis added.)

12. This language clearly contemplates two or more separate CLECs wanting to interconnect their collocations. For that reason and for the reason stated in the Decision, we affirm our prior ruling that Covad-to-Covad regeneration should be treated the same as Qwest-to-Covad regeneration. Therefore, Qwest is not allowed to charge for this type of regeneration as long as it chooses not to charge for Qwest-to-CLEC regeneration. If, in the future, Qwest seeks to charge for Qwest-to-CLEC regeneration, it may also charge for CLEC-to-its own regeneration, at a TELRIC rate. This rate may either be the rate established in 99A-577T or a new rate to be approved in 04M-111T.

13. As to Qwest's concern that Covad can somehow "game the regeneration payment system," we disagree. For Covad to game this situation to avoid paying regeneration charges, too many unlikely factors would have to align. We find that the potential for this situation to occur is extremely remote.

14. Qwest's second issue on RRR is Issue TRO-1 and TRO-3 combined, concerning commingling. For various reasons, Qwest argues that we erred by requiring Qwest to commingle § 251 unbundled network elements (UNEs) it provides to Covad with § 271 network elements.

See Decision, pages 60 through 72. Specifically, Qwest argues that (1) the FCC's *Interim Unbundling Order*[2] does not permit the Commission to require commingling for enterprise market loops, dedicated transport, and switching; (2) our order requiring commingling of § 271 network elements contravenes the FCC's rulings in the Triennial Review Order (TRO) and the court's order in *USTA II*;[3] and (3) the Commission does not posses the authority to order commingling of network elements pursuant to § 271 of the Act.

15. With the exception of the argument relating to the *Interim Unbundling Order*, the Decision fully addressed Qwest's arguments. For example, the Decision held that Covad's position, which excluded delisted UNEs from the commingling obligation, was consistent with the TRO; that, in fact, the Decision was explicitly based upon our interpretation of the TRO; and that the Decision was not purporting to order commingling based upon § 271. *See* Decision, pages 70 through 72. We affirm the rulings in the Decision.

16. The *Interim Unbundling Order* was issued by the FCC after our oral deliberations on the Decision. However, we affirm our ruling regarding Qwest's commingling obligations, since we do not interpret the Decision as being inconsistent with the FCC's Order. Essentially, Qwest contends that the *Interim Unbundling Order* requires it to continue providing unbundled access to enterprise market loops, dedicated transport, and switching under the same terms and conditions that applied under the interconnection agreement in effect between Covad and Qwest as of June 15, 2004. That interconnection agreement, Qwest argues, does not require Qwest to perform any commingling. According to Qwest, the Commission cannot alter terms and

[2] *In the Matter of Unbundled Access to Network Elements*, FCC 04-179 (rel. August 20, 2004).

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

conditions in effect as of June 15, 2004 (*i.e.*, ordering commingling of network elements) because of the FCC's directives in the *Interim Unbundling Order*.

17. We disagree with Qwest's interpretation of the *Interim Unbundling Order*. That Order does not mention commingling obligations; rather, the order is intended to establish interim *unbundling* obligations on the part of ILECs. In our view, the Order is not intended to change commingling requirements previously established by the FCC in the TRO. Notably, the order does not modify the existing commingling rule (47 C.F.R. § 51.309(e)) nor the FCC's directives in the TRO regarding commingling (discussed in the Decision).

18. For these reasons and those stated in the Decision, we deny Qwest's request to reconsider our ruling on Issue TRO 1 and 3.

19. Turning to Covad's Application for RRR, Covad's first issue for reconsideration is Issue #1, Payment Due Date. Covad believes that the Commission was in error when it decided in Qwest's favor that the payment due date should remain 30 days after the invoice date. *See* Decision, pages 9 through 18.

20. Covad states that it has provided substantial uncontroverted evidence that it has identified significant deficiencies in the bills received from Qwest that cause delays in performing proper analysis. Not one single weakness or inefficiency with respect to Covad's reconciliation process was ever pointed out in the record, asserts Covad. Further, Covad states that the Decision does not appear to address the facts that: 1) Covad actually receives the bills five to eight days after the invoice dates; 2) bills can run thousands of pages and all exceptions totaling hundreds of pages must be manually reviewed; 3) many bills are not available electronically; 4) transport invoices require manual review to confirm non-recurring charges; 5) disconnected circuits and associated changes must be researched manually; 6) bills often do

not contain circuit identification numbers or Universal Service Ordering Codes (USOCs); and 7) USOCs and rates may not always correlate, necessitating a manual review.

21. Covad states that the dispute resolution process is a far inferior remedy to an ability to actually review the invoices that are paid.

22. In this argument for RRR on Issue #1, Covad also moves to supplement the record. Covad presents a letter from a Qwest employee, Susie Bliss, to Liz Balvin of Covad. This letter concerns a Change Management Process (CMP) issue regarding prioritization of billing change requests. Covad states that because Qwest seems to have a new position that billing issues are not in the scope of CMP, the Commission can no longer rely on CMP for resolution of these issues.

23. Qwest filed a response to this Motion on September 28, 2004. In this response, Qwest contends that Covad's Motion to Supplement should be denied. Covad's claim that this letter represents a change in Qwest's position on the proper forum to address billing issues is inaccurate, and Covad's attempt to introduce evidence after the close of the evidentiary record is clearly untimely and improper, according to Qwest. Further, Qwest states that Covad's argument is based on pure speculation as to the basis of the Commission's decision, when it states that this must have been "implicit" in the Commission's decision. If the Commission allows the letter and Covad's comments, Qwest requests the opportunity to respond substantively.

24. We deny Covad's Motion to Supplement the record. We agree with Qwest that the Commission did not rely heavily on whether the CMP is available to address billing issues. It is not proper to supplement our record with this new information without giving Qwest an opportunity to respond fully, but the Commission does not need this information to make our decision on RRR.

25. As to the merits of Covad's RRR on this payment due date issue, we deny Covad's request for reconsideration. The Commission fully considered the entire record including Covad's arguments concerning the billing problems and practices before we made our initial decision. No new facts were presented in the RRR to change our original decision. We affirm our ruling with the reasons stated in the Decision.

26. Covad also requests the Commission modify its decision on Issue #6, Regeneration. Covad states that it generally agrees with the Commission's proposed resolution of this issue, but it believes that there may be a more reasonable alternative for addressing the wholesale charges for regeneration between CLECs. Covad states that the policies surrounding ILEC-to-CLEC regeneration and CLEC-to-CLEC regeneration should be the same. That is, if Qwest chooses not to charge for ILEC-to-CLEC regeneration than it should not be allowed to charge for CLEC-to-CLEC regeneration even at TELRIC rates.

27. Covad contends that the regeneration costs could be included in Qwest's common costs to be recovered from all providers. Covad asserts that this might be a more equitable and reasonable solution for all.

28. Covad respectfully suggests only a slight modification to the Commission's decision on Issue #6. The Commission should clarify that the manner in which Qwest will charge for all regeneration services is at issue in Docket No. 04M-111T, and going forward the rates and treatment of all regeneration services will be the same prior to the implementation of new rates.

29. We deny Covad's request for RRR on this issue. We addressed the rating concern in our discussion above on Qwest's RRR on this same issue.

30. Covad's last issue on RRR is Issue #8, Copper Retirement. Covad states that it has serious concerns with the Commission's initial decision as it applies to the retirement of copper

subloops, especially feeder subloops, and the Commission's decision to deny access to replacement facilities in order to maintain existing services to Covad's end user customers. Covad urges the Commission to reconsider its decision to provide for continued access to existing customers when home run copper is replaced with copper/fiber hybrid loops. *See* Decision, pages 43 through 55.

31. Covad asserts that if the FCC had believed that § 706 of the Act compelled it to deny access to hybrid loops on the same terms as Fiber to the Home (FTTH) loops, it would have done so specifically. Citing ¶¶ 277-279 of the TRO, Covad states that the FCC carefully pointed out that retirement of copper resulting in hybrid loops were included in the copper retirement rules only to the extent that hybrid loops were an interim step to establishing an all fiber, FTTH loop. Because Qwest's CEO Dick Notebaert has publicly stated that Qwest's copper retirement is wholly unrelated to any FTTH deployment, Covad claims that these such retirements cannot be considered interim in nature.

32. Covad states that the replacement of copper feeder with fiber feeder alone will do nothing to advance to deployment of broadband services and the decision to retire copper feeder may be based solely on maintenance decisions, or anti-competitive intent. Further, Covad asserts that this Commission erred in concluding that it should not apply state statutes requiring access to loops for broadband services.

33. Finally, Covad argues that the FCC Chairman's statement attached to the TRO decision clarifies that rules that bar such intramodal competition cannot be read to be consistent with the FCC's policy positions or its rules.

34. Covad requests that to the extent that this Commission will not read its rules to require the unbundling of hybrid loops, it should at least recognize that the FCC envisioned

continued access to ILEC plant using DSL technology, and any new technology that will enable CLECs to access these facilities without accessing ILEC packet switching functionality.

35. We deny Covad's application for RRR on this matter. In our reading of the TRO, ¶¶ 277-294, the FCC does not differentiate between requirements when "home run" copper is replaced with copper-fiber hybrid loops. Covad cites ¶¶ 277-279 of the TRO, stating that the copper retirement rules only apply to the extent that hybrid loops are an interim step to establishing an all fiber FTTH loops. Nowhere in these paragraphs do we find this statement. In fact, the FCC indicates at footnote 847 that an ILEC can remove copper loops from plant so long as they comply with the FCC's Part 51 notice requirements, without any exclusion given to hybrid loops.

36. Covad does not point to any specific provision in the TRO or elsewhere that requires different copper retirement requirements for replacement that results in hybrid loops. Covad still has the ability to protest these retirements at the federal level when Qwest sends its required notifications. Beyond that, a protection of sorts is given to CLECs in ¶ 294, which prohibits ILECs from "engineering transmission capabilities. . . that would disrupt or degrade local loop UNEs."

37. We affirm our prior ruling on this matter for the reasons above and the reasons stated in the Decision.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration filed by DIECA Communications, Inc., doing business as Covad Communications Company is denied, consistent with the above discussion.

2. The Application for Rehearing, Reargument, or Reconsideration filed by Qwest Corporation is granted in part and denied in part, consistent with the above discussion.

3. The Motion to Supplement the Record filed by DIECA Communications, Inc., doing business as Covad Communications Company is denied.

4. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING October 27, 2004.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

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