MICHAEL L. GINSBERG (#4516)
Assistant Attorney General
Division of Public Utilities
MARK L. SHURTLEFF (#4666)
Attorney General
160 East 300 South
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone (801) 366-0353

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC., dba COVAD COMMUNICATIONS COMPANY, FOR ARBITRATION TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	Docket 04-2277-02 DIVISION OF PUBLIC UTILITIES MEMORANDUM

The following is a Memorandum by the Division of Public Utilities (DPU) in this Arbitration between Covad Communication and Qwest.

INTRODUCTION

In this Docket the DPU has not filed any testimony. DPU's participation in the hearings was limited. In this Memorandum the DPU will attempt to provide its analysis of many of the disputed areas in the interconnection agreement based primarily on its review of any relevant areas of State law with reference to the decisions of the FCC and the Courts. Where the State's actions are relevant to the issues in this proceeding the DPU will point those out and will address any conflicting Federal rules that may cause Federal preemption.

Three Commissions have adjudicated the provisions of this interconnection agreement dispute. Colorado, Washington and Minnesota have issued arbitration decisions resolving the exact same issues that are being debated in Utah. The DPU has prepared a summary of those decisions to aid the ALJ. That summary is attached to this Memorandum as Attachment 1.

The Telecommunications Act, 47 U.S.C. § 252(c) (Federal Act), establishes the standard to be used in this Arbitration. In essence the State is to ensure the Arbitration decision meets the requirements of Section 251 of the Federal Act and any regulations adopted thereunder, to establish rates that are in conformance with subsection (d) of Section 252 and to provide a schedule for implementation of the terms of the agreement. Each interconnection agreement, whether reached by agreement or through compulsion, must be submitted to the PSC for approval. However, what can be compelled is limited to what is necessary to achieve the above stated goals. Currently all interconnection agreements that contain network elements, whether required by section 251 or otherwise, need to be filed with the State PSC[1]

One other preliminary matter concerns the recent announcement by the FCC concerning new final rules. Although those rules have received some press coverage the FCC has not yet released them. It is not clear to the DPU what impact they have. If released prior to decision parties should have an opportunity to file additional comments with the ALJ. Absent that occurrence, the FCC's interim rules (Interim Rules or Interim Order) adopted on August 20, 2004 apply.

[1] See In the Matter of an Interconnection agreement between Qwest and MCI metro, Docket No. 04-2245-01, Order issued September 30, 2004.

Any decision in this proceeding must be consistent with that Interim Order and the FCC Triennial Review Order issued August 21, 2003 and the Court decisions applying that Order.

ISSUE 1: RETIREMENT OF COPPER FACILITIES

Two main issues relate to the retirement of copper wire. First, and most significant, is whether Qwest is required to provide an alternative service prior to retirement of its copper facilities at the same price as Covad receives its current service. Second, is whether the e-mail notice of retirement needs to contain certain information suggested by Covad.

In all three states that have arbitrated this matter, the Commissions ruled that there is no obligation to provide an alternative service at current costs for an XDSL provider prior to retirement of copper facilities. All three Commissions adopted Qwest's language. In addition there does not appear to be anything under Utah law that would prohibit Qwest from retiring copper facilities where that retirement affects DSL services.

There does not appear to be anything under Federal law that would prohibit a state from adding additional notice requirements to Qwest's notification of retirement of facilities. It does not appear that either Washington or Minnesota required the additional information in the e-mail notices that Covad requests. Colorado appears to be the first state that required the e-mail notice but did appear to define what should be in the e-mail notice (See Paragraph 137 of the Colorado decision). The objective of the notice is to make the retirement of the copper facilities as seamless as possible. If the information Covad requests

makes the e-mail notice more meaningful there does not appear to be any prohibition under Federal law nor State law against defining what information is to be included in the e- mail notice.

ISSUE 2: DEFINITION OF UNBUNDLED NETWORK ELEMENTS - 271 ELEMENTS INCLUDED

The Triennial Review Order (TRO) and the Court's decision in USTA II relieved ILEC's from certain obligations to provide access to some network elements under Section 251(c)(3). The FCC seemingly determined that CLEC's are not impaired without access to these elements at cost based rates. The FCC also determined that a company like Qwest also has an independent obligation to provide access to certain elements under Section 271 at just and reasonable rates. Section 271 is the competitive checklist that Qwest needed to satisfy in order to obtain approval from the FCC to offer Inter-LATA Toll service. The issue that has been raised in all of the other three jurisdictions is whether this interconnection agreement should contain language that addresses Qwest's obligations under Section 271.

Covad's definition of UNEs in Section 4.0 includes those that may be required under either Section 271 or State law. Covad's position seems to recognize that these elements are not UNEs authorized under Section 251 but are something else. Covad urges their inclusion is in order to avoid "confusion." Qwest, on the other hand, limits its definition of a UNE to those authorized under Section 251(c)(3). Qwest requests including in paragraph 9.1.16 a lengthy list of those elements that Qwest does not believe they are required to provide under Section 251(c)(3). Presumably Qwest is, like Covad, seeking to avoid confusion.

Numerous other Sections of the interconnection agreement are addressed through issue 2. The DPU will focus mainly on the definition in Section 4.0. Many of the other Sections can be addressed depending upon how this initial decision is made. The issue of what UNEs are to be required and at what price is in a great period of flux, particularly recognizing that the new FCC final rules are not out and may impact what is and is not required under Section 251.

No one, including Qwest, would disagree that there are independent obligations under both Section 271 and State law.[2] For example the State has created a list of essential facilities in R746-348-7 that may or may not fit either directly or indirectly with the list of elements that Qwest claims it no longer has to provide under Section 251. Further, this Commission has established prices for many of the 251 network elements. At the time those prices were set the focus of the inquiry was the pricing standards established by the FCC that now are also in a great state of uncertainty.

The Federal Act establishes the standard to determine if Federal preemption has occurred. Section 251(d)(3) states:

> In prescribing and enforcing regulation to implement the requirements of this Section, the Commission shall not preclude the enforcement of any regulation, Order or Policy of a State that-
> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) Is consistent with the requirements of this Section;
> (C) Does not substantially prevent implementation of the requirements of section and the purposes of this part.

[2] There is currently a pending Docket at the FCC where Qwest and other RBOC are requesting forbearance from the FCC to forbear in enforcing any independent obligations that may exist under Section 271. That request has not yet been decided but could have an impact on what Covad is requesting.

Covad's request to refer to Section 271 elements and State law is vague. Covad does not make it clear what State requirement it wishes to have imposed in this agreement. It does not outline what price it would impose on Qwest for any State required agreement. This proceeding did not in any way attempt to determine if any State required obligations would pass the test of Section 251(d)(3). In light of the TRO and the decision in USTA II, the Utah Docket has also not attempted to determine if Covad is impaired under either State or Federal law which might warrant obligations to be imposed under Section 251 or the State's essential facility rules. In essence, there is not a record in this Docket to do what Covad wants even if the jurisdictional issues were not present. Finally, it is not at all clear to the DPU that an arbitration proceeding under Section 252 of the Federal Act in any way authorizes the Commission to impose Section 271 obligations in this agreement without Qwest's consent. In resolving open issues the Commission must resolve those issues consistent with 251 requirements and not 271 requirements. Obligations arising outside of Section 251 are being presented to the PSC in commercial agreements.

In light of the above the DPU suggests resolution of the 271 issues along the method used in Minnesota. That would include the following recommendations:

1. Adopt Qwest language concerning unbundling obligations under Section 4 of the Interconnection agreement;

2. Since this agreement is not intended to resolve a Section 271 related issue. Qwest's language on pricing of Section 271 required elements in Section 9.1.1.7 should be eliminated;
3. It does not seem necessary to provide a lengthy list of network elements no longer required under Section 251. Therefore the list under 9.1.16 could be eliminated;
4. In general, until there is a clear understanding as to what elements are to be required under Section 251 or 271 and at what price, the interconnection agreement should not try to guess what will take place but instead should allow the change of law provisions to address any changes that may occur in the future.

ISSUE 3: COMMINGLING OF SECTION 271 ELEMENTS

Commingling is "the connecting, attaching or otherwise linking of a UNE or a UNE combination, to one or more facilities or services a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other then unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or a UNE combination with one or more wholesale services" (TRO paragraph 571). At issue seems to be if Section 271 elements are wholesale services under this definition. Another apparent dispute is whether the TRO distinguishes between a 271 element and any other element.

It seems to the DPU that the dispute concerns language in the TRO order. Paragraph 654, 656 and note 1990 seem to indicate that commingling of 251 elements and 271 elements is not required while paragraph 584 relates to 271

elements and resale elements Contrastingly, 251 (c)(4) seems to require the opposite. In reviewing the TRO paragraphs the DPU believes that the provisions of paragraph 654, 656 and note 1990 are clearer and thus no commingling is required.

In addition, it is the DPU's understanding that the existing interconnection agreement does not contain a commingling obligation of 251 and 271 elements and therefore under the FCC Interim Order this would constitute an expansion of a right.

Finally, although there may be Utah State UNE obligations there does not appear to be any State adopted commingling obligations that can be addressed whether those obligations would be preempted or not.

ISSUE 5: REGENERATION REQUIREMENTS[3]

Regeneration can be needed for a CLEC to Qwest connection. It can be needed for a CLEC to another CLEC connection and it can be needed for a CLEC to itself at a different location in the central office. Qwest apparently does not charge for a CLEC to Qwest regeneration when needed. Qwest argues it has no obligation to provide regeneration without a charge where it does not have a direct business relationship.

The issue of a regeneration charge is one that has been directly addressed by the Utah Commission in its Collocation Docket No. 00-049-106 Order issued December 3, 2001 (Collocation Order). In that Collocation Order the Commission stated:

[3] The numbering of the issues tracks the sequence used by the parties on their issue lists and related documents, and thus appears out of numerical order here.

> The Commission denies recovery of this proposed regeneration charge and Orders Qwest to provide regeneration whenever the signal transmission to a CLEC's collocation facility is not technically acceptable for its intended use. The record shows that the distances involved in transmitting signals within Qwest's Utah central offices should be within the range where no significant signal degradation should occur. Qwest must deliver a technically acceptable signal within its central offices where collocation occurs.
>
> In the future, Qwest may Petition the Commission for recovery of the costs of regeneration on an individual case bases. However, the showing is not that regeneration was required in a particular instance. Instead, Qwest must show that (1) no collocation location existed in the central office in question where a regeneration signal would not have been required; (2) that the cabling through which the signal is transmitted is routed in an efficient manner; and (3) that proper precautions were undertaken to protect the integrity of the signal. A failure to prove any of these three points will result in a rejection of the request for recovery of the regenerating charge.[4]

In the Arbitration it does not appear that the applicability of this Collocation Order came up. It does not seem to the DPU that there is any reason this Collocation Order should not apply to this Docket. No restriction under Federal law has limited the State from determining that there should be no charge for regeneration except under certain circumstances. Therefore, the DPU recommends that the ALJ order that the sections on regeneration be amended to comply with Commission's Collocation Order in Docket No. 00-049-106.

ISSUE 9: BILLING ISSUES

The DPU has nothing in particular to add to the record on this issue except that there does not appear to be anything directly in the Federal Act that

[4] Order, Docket No. 00-049-106, Section 14.

preempts the State. Also there does not appear to be anything directly in the PSC's rules or Orders that controls this issue.

Respectfully submitted this _____ day of January, 2005.

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Michael Ginsberg
Assistant Attorney General
Counsel for Dept. of Public Utilities

CERTIFICATE OF SERVICE

This certifies that a true and exact copy of the foregoing Division of Public Utilities Memorandum was mailed by US Mail, postage prepaid and electronically mailed on this 21st day of January, 2005 to:

Winslow B. Waxter
Robert C. Brown
Qwest Services Corp.
1005 17th St, Suite 200
Denver, CO 80209
Winslow.waxter@qwest.com
Robert.brown@qwest.com

Mary Rose Hughes
PERKINS COIE LLP
607 Fourteenth St. NW 800
Washington DC 2005-2011
mhughes@perkinscoi.com

Ted D. Smith
STOEL RIVES LLP
201 South Main St 1100
Salt Lake City UT 844111
tsmith@stoel.com

Stephen F. Mecham
CALLISTER NEBEKER & McCULLOUGH
Gateway Tower East 900
10 E South Temple
Salt Lake City UT 84133
sfmecham@cnmlaw.com

Karen Shoresman Frame
Senior Counsel
Covad Communications Company
7901 Lowry Blvd
Denver CO 80230
kframe@covad.com

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