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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC., D/B/A COVAD COMMUNICATIONS COMPANY, FOR ARBITRATION TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	**)**	Docket No. _____ Petition for Arbitration

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") through its undersigned counsel, petitions the Utah Public Service Commission ("Commission") to arbitrate, pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act"), certain terms and conditions of a proposed Interconnection Agreement between Covad and Qwest Corporation ("Qwest") (hereafter, Covad and Qwest are collectively referred to as the "Parties") for the State of Utah.

A. Name, Address, and Telephone Number of the Petitioner and its Counsel

1. Petitioner's full name and its official business address are as follows:

DIECA Communications, Inc.
d/b/a Covad Communications Company
110 Rio Robles
San Jose, California 95134-1813

DIECA Communications, Inc., is a Virginia corporation, and it is authorized by the Commission to provide local exchange service in Utah.[1] Covad is, and at all relevant times has been, a "telecommunications carrier" under the Act.

2. The names, addresses, and contact numbers of Covad's representatives in this proceeding are as follows:

Stephen F. Mecham
Callister, Nebeker & McCullough
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10 East South Temple
Salt Lake City, Utah 84133
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Covad Communications Company
7901 Lowry Boulevard
Denver, Colorado 80230
Phone: 720-208-1069
Fax: 720-208-3350
Email: kframe@covad.com

B. Name, Address, and Telephone Number of the Other Party to the Negotiation and its Counsel

3. Qwest is a corporation organized and formed under the laws of the State of Colorado, having an office at 1801 California Street, Denver, Colorado 80202. Qwest provides local exchange and other services within its service areas in Utah. Qwest (in current name or as U S WEST Communications, Inc.) is, and at all relevant times has been, a "Bell Operating Company" and an "incumbent local exchange carrier" ("ILEC") under the terms of the Act.

4. The names, addresses, and contact numbers for Qwest's representatives during the negotiations with Covad are as follows:

[1] *See* Docket No. 99-2277-01.

Linda Miles
Qwest Corporation
1600 7th Ave
Room 3007
Seattle, Washington 98191
(206) 447-3890 (Tel)
(206) 345-0225 (Fax)

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Qwest is represented in Utah by its counsel:

Robert Brown
1801 California Avenue, Suite 4900
Denver, Colorado 80202
(303) 672-5839 (Tel)
(303) 295-7069
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C. Jurisdiction and Brief Summary of Negotiation History

5. The Commission has jurisdiction over Covad's Petition pursuant to 47 U.S.C. § 252(e),[2] Utah Code Ann. §54-8b-2.2(e), and Utah Admin. Code R746-348-1 through R746-348-7. The Parties agree that this Petition is timely filed.

6. The Parties have worked in good faith from language supplied by both Covad and Qwest to resolve the vast majority of issues raised during the negotiations. Notwithstanding these negotiations, Covad and Qwest have been unable to come to agreement on all terms,

[2] This Commission's authority to enforce interconnection agreements is further explained in *Iowa Util. Bd. v. Fed. Communications Comm'n,* 120 F.3d 753 at 804 (8th Cir. 1997): "We believe that the state commissions' plenary authority to accept or reject these [interconnection] agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved."

particularly certain terms relating to the retirement of copper loop facilities, the provision of various services in light of the Federal Communications Commission's (FCC) recent *Triennnial Review Order*,[3] collocation, the provisioning of line splitting arrangements, maintenance charges, and billing. The remaining issues that Covad understands to be unresolved between the Parties are addressed below in Section G – Unresolved Issues Submitted for Arbitration and Positions of the Parties.

7. A draft of the Interconnection Agreement ("Agreement") reflecting the Parties' negotiations to date is attached hereto as Exhibit A. Unless otherwise expressly marked in the Agreement as the proposal of one Party or another, agreed upon language is shown in normal type. Covad will continue to negotiate in good faith with Qwest to resolve disputed issues and will advise the Commission in the event arbitration, or arbitration on particular issues, is no longer necessary.

8. Covad requests that the Commission approve the Agreement between Covad and Qwest reflecting: (i) the agreed upon language in Exhibit A, and (ii) the resolution in this arbitration proceeding of unresolved issues in accordance with the recommendations made by Covad below and in Exhibit A.

D. Date of Initial Request for Negotiation and Dates 135 days, 160 days, and Nine Months After that Date

9. Covad initiated negotiations by a letter dated January 31, 2003. The Parties have agreed to numerous extensions, agreeing that the negotiation request date for Utah would be

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

November 18, 2003. Pursuant to Section 252(b)(1), arbitration must be requested between the 135th day (April 2, 2004) and the 160th day (April 27, 2004) following the date negotiations were requested.

E. Issues Resolved by the Parties

10. The Parties have resolved the issues and negotiated contract language to govern the Parties' relationship with respect to most of the provisions set forth in Exhibit A. These negotiated portions of the Agreement are shown in normal type. To the extent Qwest asserts that any provisions remain in dispute, Covad reserves the right to present evidence and argument as to why those provisions were considered closed and why they should be resolved in the manner shown in Exhibit A.

F. Unresolved Issues Not Submitted for Arbitration

11. There are no unresolved issues that are not being submitted for arbitration.

G. Unresolved Issues Submitted for Arbitration and Positions of the Parties

ISSUE 1 (Sections 9.2.1.2.3, 9.2.1.2.3.1 and 9.2.1.2.3.2)

Issue: *Should Qwest be permitted to retire copper facilities serving Covad's end users in a way that causes them to lose service?*

The Parties have largely agreed that, consistent with the *Triennial Review Order*, Qwest will work to maintain existing service arrangements for Covad's DSL customers should Qwest choose to retire copper facilities serving their neighborhood. The outstanding issue is whether Qwest must provision an alternative service over any available, compatible facility in a manner that does not degrade service or increase costs, allowing Covad to continue to provide broadband service to its customers, or whether such facilities must be merely "like facilities," creating uncertainty as to what standards, if any, govern Qwest's obligations to allow Covad to continue

to serve its customers. Clear standards are required to ensure that customers, not Qwest, have the right to choose their services and service provider.

Covad submits that any reasonable definition of "like facilities" must contemplate the continued provision of Qualifying Services, such as DSL.[4] There is no legitimate basis for treating DSL service as an inferior service that may be disrupted as a result of a Qwest construction project. Covad's proposed language merely clarifies that the facilities made available by Qwest will be of a character that will allow continued service to the end user. Nothing in Covad's proposed language conflicts with the FCC's network modification rules, located at 47 C.F.R. § 51.333.

Furthermore, Covad's proposed language memorializes Utah's statutorily mandated policies to:

> …(2) facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state;
>
> (3) encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state;…
>
> (5) facilitate and promote the efficient development and deployment of an advanced telecommunications infrastructure, including networks with nondiscriminatory prices, terms, and conditions of interconnection;
>
> (6) encourage competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis;…
>
> (8) encourage new technologies and modify regulatory policy to allow greater competition in the telecommunications industry;
>
> (9) enhance the general welfare and encourage the growth of the economy of the state through increased competition in the telecommunications industry; and

[4] "Qualifying Service" is defined in 47 C.F.R. § 51.5. The definition explicitly encompasses DSL.

(10) endeavor to protect customers who do not have competitive choice.

Utah Code § 54-8b-1.1.

Covad's proposals would further all of these statutorily mandated goals. Continued access to loop plant to serve Covad's customers would encourage Covad to continue to deploy advanced central office equipment, such as Digital Subscriber Line Access Multiplexers (DSLAMs), to serve Utah customers. The proposals would also foster reasonable and fair competition, maintain quality of service, and promote consumer protection and choice by offering an economically rational means by which Covad can continue to provide service. As a result, Utah customers would maintain their right to choose an alternative provider for broadband services, which are becoming an ever more important service for residential subscribers, and for the growth of small business in Utah.

ISSUE 2 (Section 4 Definition of "Unbundled Network Element," Sections 9.1.1, 9.1.1.6, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6, 9.6.1.5, 9.6.1.6.1 and 9.21.2)

Issue: *Should the Parties' Agreement provide for access to network elements pursuant to Section 271 of the Telecommunications Act of 1996 and Utah law, as well as Section 251 of the Telecommunications Act of 1996?*

The Parties disagree with respect to Qwest's continuing obligations to provide certain network elements, including certain unbundled loops (including high capacity loops, line splitting arrangements, and subloop elements) and dedicated transport, after the FCC's recent analysis in the *Triennial Review Order*. Covad maintains that the FCC's explicit direction was to continue the obligations of Regional Bell Operating Companies ("RBOCs") to provide all network elements listed in the provisions of Section 271 of the Telecommunications Act (the

"Act")[5] outlining specific RBOC obligations to maintain authority to provide in-region interLATA service (the "271 Checklist" or "Checklist"). Qwest's position on this issue remains somewhat unclear to Covad, even after lengthy negotiations, however it does appear to Covad that Qwest believes its obligations under Section 271, if any, are outside the jurisdiction of this Commission.

Furthermore, Covad believes that Qwest continues to be obligated under Utah law to provide unbundled access to network elements pursuant to Utah Code §§ 54-8b-2.2(b)(i) and 54-8b-2.2(b)(ii), and that the pricing methodology for such access has been established by Utah law. Qwest argues this Commission's authority to regulate access to its essential facilities has been preempted by congressional and FCC action.

A. Section 271

This Commission can, and should, use its authority to enforce the unbundling requirements of Section 271 of the Act. The FCC made clear in the *Triennial Review* that Section 271 creates independent access obligations for the RBOCs:

> [W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

Triennial Review Order, ¶ 653.

> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance 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.

Triennial Review Order, ¶ 655.

[5] 47 U.S.C. § 271.

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under Section 251 for *ILECs*, as a Bell Company Qwest retains an independent statutory obligation under Section 271 of the Act to provide competitors with unbundled access to the network elements listed in the Section 271 checklist.[6] Moreover, there is no question that these obligations include the provision of unbundled access to loops and dedicated transport under checklist item #4:

> Checklist items 4, 5, 6, and 10 separately impose access requirements regarding **loop**, **transport**, **switching**, and signaling, without mentioning section 251. [emphasis added]

Triennial Review Order, ¶ 654.

In addition, the Commission has independent authority to enforce these Section 271 BOC obligations. Specifically, Utah law vests the Commission with the authority to encourage competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis. Utah Code § 54-8b-1.1(6). The Commission also possesses the authority, and is directed by the legislature, to "facilitate and promote the efficient development and deployment of an advanced telecommunications infrastructure, including networks with nondiscriminatory prices, terms and conditions of interconnection." Utah Code § 54-8b-1.1(5). This enforcement authority encompasses the authority to ensure that Qwest fulfills its statutory duties under Section 271. Furthermore, there can be no argument that the Commission's enforcement of Qwest's Section 271 checklist obligations would substantially prevent the implementation of any provision of the Act. Indeed, where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized. *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248

[6] *See* 47 U.S.C. § 271(c)(2)(B).

(1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *De Canas v. Bica,* 424 U.S. 351, 356, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers,* 373 U.S. at 142, 83 S.Ct. at 1217). The Act, however, hardly evinces an unmistakable indication of Congressional intent to preclude state enforcement of federal 271 obligations. Far from doing so, the Act expressly preserves a state role in the review of a RBOC's compliance with its Section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a RBOC's Section 271 compliance.[7] Thus, the Commission clearly has the authority to enforce Qwest's obligations to provide unbundled access to loops (including high capacity loops, line splitting arrangements and subloop elements) and dedicated transport under Section 271 checklist item #4.

The FCC did make clear in the *Triennial Review Order* that a different pricing standard applied to network elements required to be unbundled under Section 271 as opposed to network elements unbundled under Section 251 of the Act. Specifically, the FCC stated that "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 – the standards set forth in sections 201 and 202." *Triennial Review Order*, ¶ 656. In other words, according to the FCC, the *legal standard* under which pricing for Section 271 checklist items should be determined is a different *legal standard* than that applied to price Section 251 UNEs. Thus, "Section 271 requires RBOCs to provide unbundled access to elements not required to be

[7] *See* 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing RBOC compliance with the 271 checklist).

unbundled under Section 251, but does not *require* TELRIC pricing." *Triennial Review Order*, ¶ 659 (emphasis added).

Utah has already established a general pricing framework for essential facilities and services available under state law, requiring that prices be no less favorable than those the telecommunications corporation provides to itself or its affiliates. Utah Code § 54-8b-2.2(1)(b)(ii). Total Element Long Run Incremental Cost methodology (TELRIC) meets this statutory standard.

Notably, in the *Triennial Review*, the FCC nowhere forbids the application of such pricing of network elements required to be unbundled under Section 271. Rather, the FCC merely states that unbundled access to Section 271 checklist items is not *required* to be priced pursuant to the particular forward-looking cost methodology specified in the FCC's rules implementing Section 252(d)(1) of the Act – namely, TELRIC. The FCC states that the appropriate legal standard to determine the correct price of Section 271 checklist items is found in Sections 201 and 202. However, nowhere does the FCC state these two different legal standards may not result in the same rate-setting methodology. In fact, the FCC itself has allowed the use of forward-looking economic costs to establish the rates for tariffed interstate telecommunications services regulated under Sections 201 and 202 of the Act – services which are <u>not</u> subject to the pricing standards in Section 252(d)(1) of the Act. *See, e.g., Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962, 12984, ¶ 57 (2000).

Furthermore, the FCC does not preclude the use of forward-looking, long-run incremental cost methodologies *other than TELRIC* to establish the prices for access to Section 271 checklist items. As the FCC made clear when it adopted the TELRIC pricing methodology

in its *Local Competition Order*, there are various methodologies for the determination of forward-looking, long-run incremental cost. *Local Competition Order*, FCC 96-325, ¶ 631. TELRIC describes only one variant, established by the FCC for setting UNE prices under Section 252(d)(1), derived from a family of cost methodologies consistent with forward-looking, long-run incremental cost principles. *See Local Competition Order*, FCC 96-325, at ¶¶ 683-685 (defining "three general approaches" to setting forward-looking costs). Thus, the FCC's *Triennial Review Order* does not preclude the use of a forward-looking, long-run incremental cost standard *other than TELRIC* in establishing prices consistent with Sections 201 and 202 of the Act.[8]

B. State Law Unbundling Authority

Utah has the requisite authority to require access to loops, including high capacity loops, line splitting arrangements and subloop arrangements, as well as dedicated transport, under its independent, state law authority. *See* Utah Code §§ 54-8b-1.1, 54-8b-2.2; *see also* Utah Admin. Code R746-348-7 (specifically designating unbundled local loops, loop concentration, loop distribution and loop feeder facilities, as well as inter-office transmission facilities as "essential facilities" under Utah Code § 54-8b-2.2). This independent state law authority is not preempted by the FCC's recent *Triennial Review Order*. Nowhere does Section 251 of the Act evince any general Congressional intent to preempt state laws or regulations providing for competitor access to unbundled network elements or interconnection with the ILEC. In fact, as recognized by the FCC in its *Triennial Review Order*, several provisions of the Act expressly indicate Congress'

[8] For example, where the 271 checklist item for which rates are being established is not legacy loop plant but next-generation loop plant, incumbents might argue for the use of a forward-looking, long-run incremental cost methodology based on their *current network technologies* – in other words, a non-TELRIC but nonetheless forward-looking, long-run incremental cost methodology. *See, e.g., Local Competition Order,* FCC 96-325, ¶ 684.

intent not to preempt such state regulation, and forbid the FCC from engaging in such preemption:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.

Triennial Review Order, ¶ 191.

As the FCC further acknowledges in the *Triennial Review Order*, Congress expressly declined to preempt states in the field of telecommunications regulation:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.

Triennial Review Order, ¶ 192.

In fact, the FCC only identified a narrow set of circumstances under which federal law would act to preempt state laws and rules providing for competitor access to ILEC facilities:

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 *and* do not "substantially prevent" the implementation of the federal regulatory regime….
>
> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.

Triennial Review Order, ¶¶ 192, 194.

Notably, in reaching these conclusions, the FCC was simply restating existing, well-known precedents governing the law of preemption. Specifically, the long-standing doctrine of federal conflict preemption provides for exactly the limited sort of federal preemption acknowledged by the FCC's *Triennial Review Order*. Courts have long held that state laws are preempted to the extent that they actually conflict with federal law. As noted by the FCC's *Triennial Review Order*, such conflict exists where compliance with state law "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Triennial Review Orde*r, ¶ 192 n. 613 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Even more notably, in its *Triennial Review Order*, the FCC did not act to preempt any existing state law or regulation inconsistent with the FCC's rules, nor did it act to preclude the adoption of future state laws or regulations governing the access of competitors to ILEC facilities which are inconsistent with the FCC's rules. In fact, following the governing law set out in the Eighth Circuit's *Iowa Utilities Board I* decision, the FCC specifically recognized that state laws or regulations which are inconsistent with the FCC's unbundling rules are <u>not</u> *ipso facto* preempted:

> That portion of the Eighth Circuit's opinion reinforces the language of [Section 251(d)(3)], *i.e.*, that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).

*Triennial Review Orde*r, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

In so doing, the FCC made clear that it was acting in conformance with the governing law set out in the *Iowa Utilities Board I* decision:

> We believe our decision properly balances the broad authority granted to the Commission by the 1996 Act with the role preserved

> for the states in section 251(d)(3) and is fully consistent with the Eighth Circuit's interpretation of that provision.

Id.

Thus, far from taking any specific action to preempt any state law or regulation governing competitor access to incumbent facilities, the FCC merely acted in the *Triennial Review* to restate the already-existing bounds on state action recognized under existing doctrines of conflict preemption. Furthermore, the FCC's *Triennial Review Order* recognized that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules would be insufficient to create such a conflict. Instead, consistent with existing doctrines of conflict preemption, the FCC recognized that the state laws would have to "substantially prevent implementation" of Section 251 in order to create conflict preemption.

Of course, the FCC's *Triennial Review Order* could not have concluded that all state rules unbundling network elements not required to be unbundled nationally by the FCC create conflict preemption. Had the FCC reached such a conclusion, the FCC would have rendered Section 251(d)(3)'s savings provisions a nullity, never operating to preserve any meaningful state law authority in any circumstance. Rather than reaching such a conclusion, the FCC created a process for parties to determine whether a "particular state unbundling obligation" requiring the unbundling of network elements not unbundled nationally by FCC rules creates a conflict with federal law. The *Triennial Review Order* invited parties to seek declaratory rulings from the FCC regarding individual state obligations. An invitation to seek declaratory ruling, however, hardly amounts to preemption in itself – it merely creates a process for interested parties to establish <u>in future proceedings before the FCC</u> whether or not a particular state rule conflicts with federal law.

The FCC did give interested parties some indication of how it might rule on such petitions. Specifically, the FCC stated that it was "*unlikely*" that the FCC would refrain from finding conflict preemption where future state rules required "unbundling of network elements for which the Commission has either found no impairment … or otherwise declined to require unbundling on a national basis." *Triennial Review Order*, ¶ 195. The FCC's statement, however, that such future rules were merely "*unlikely*" – as opposed to simply unable – to withstand conflict preemption leads to the inevitable conclusion that there are some circumstances in which the FCC would find that such future rules were not preempted. Moreover, with respect to state rules in existence at the time of the *Triennial Review Order*, the FCC's indications that it might find conflict preemption are even more muted. Specifically, the FCC merely stated that "in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation." *Triennial Review Order*, ¶ 195.

Thus, while the FCC's *Triennial Review Order* indicates that under some circumstances the FCC would find conflict preemption for state rules requiring the unbundling of network elements not unbundled nationally under federal law, the decision also indicates that in some circumstances the FCC would decline to find that such state rules substantially prevent implementation of Section 251.[9] In fact, the FCC's decision gives some direction on the circumstances that would lead the FCC to decline a finding of conflict preemption for state rules

[9] Notably, the FCC's statements indicating when it is 'likely' to find preemption for particular state rules appear to conflict with a recent Sixth Circuit decision. The Sixth Circuit has stated that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." The court further noted that a state commission is permitted to "enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement" entered into pursuant to section 252 of the Act, "as long as the regulations do not interfere with the ability of new entrants to obtain services." *See Michigan Bell v. MCIMetro*, 2003 WL 909978, at 9 (6th Cir. 2003).

unbundling network elements the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that "the availability of certain network elements may vary between geographic regions." *Triennial Review Order*, ¶ 196. Indeed, according to the FCC, such a granular "approach is required under *USTA*." *Triennial Review Order*, ¶ 196 (citing *USTA*, 290 F.3d at 427). Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of Section 251.

Consistent with the discussion above, Covad has proposed language maintaining access to network elements that may, in the future, no longer be available pursuant to Section 251 of the Act, but must nevertheless remain available pursuant to Section 271 of the Act and Utah law.

ISSUE 3 (Sections 9.2.2.3, 9.2.2.3.1, 9.2.3.5, 9.3.1.2, 9.3.2.2, 9.3.2.2.1)

Issue: *Should the Parties' agreement be clear that both conditioning and routine network modification activities will be performed by Qwest to make <u>all</u> types of unbundled loops available, including DS1-capable loops?*

In its *Triennial Review Order*, the FCC clarified that ILECs "must make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested facility has already been constructed." *Triennial Review Order*, ¶ 632. The FCC defines routine network modifications as "those activities that incumbent LECs regularly undertake for their own customers." *Id.* The FCC clarified that such activities include, but are not limited to, rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer.

Qwest routinely performs these tasks in order to provide service to their retail customers. For example, in the case of DS1 capable loops, Qwest and its technicians are highly motivated to perform such routine work in order to provide a high-capacity circuit. These circuits are typically high-margin products provided to high-volume business customers, and the work performed is minimal in comparison to the potential revenues. The FCC stated:

> …performing such functions is easily accomplished. The record shows that requiring incumbent LECs to make the routine adjustments to unbundled loops discussed above that modify a loop's capacity to deliver services in the same manner as incumbent LECs provision such facilities for themselves is technically feasible and presents no significant operational issues. In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules. Specifically, based on the record, high-capacity loop modifications and line conditioning require comparable personnel; can be provisioned within similar intervals; and do not require a geographic extension of the network.

Triennial Review Order, ¶ 635.

This requirement is also not limited to copper loops. The FCC clarified that the above requirements apply to all transmission facilities, including dark fiber facilities. *See Triennial Review Order,* ¶ 638.

The above concepts are not in dispute by the Parties. The dispute is focused upon Qwest's refusal to include language in the Agreement that clarifies that Qwest is obligated to perform conditioning for DS1 facilities as well as other loop facilities. Qwest proposes exclusion of all language referencing its obligation to condition DS1 capable loops. Such an exclusion is inappropriate, as nothing in the *Triennial Review Order*'s discussion of routine network modifications can be read to exclude DS1 capable loops from its conditioning rules.

Excluding DS1 capable loops from Qwest's conditioning obligations only introduces the possibility of confusion and controversy. For instance, Qwest may argue that a given activity needed to make a DS1 capable loop available is "conditioning" rather than a "routine network modification," and is therefore unavailable.

In addition, Covad has section 9.2.2.3.1 clarifying that Qwest is obligated to perform "line moves," described as the transfer of service from loops served by digital loop carrier (UDC) to available spare copper loops where available. Such activity would be performed as a conditioning activity, and charges would only be assessed for work if Qwest charges its retail customers for the same work.

ISSUE 4 (Section 4 Definitions of "251(c)(3) UNE", "Commingling", 8.2.1.1.1.2, 9.1.1, 9.1.1.1, 9.1.1.3.2, 9.1.1.4, 9.1.1.4.1, 9.1.1.4.2, 9.1.1.4.3, and all sections between 9.1.1.5 and 9.1.1.8)

Issue: *Should Qwest be required to follow the FCC's directives regarding the commingling of facilities, combination of UNEs, and ratcheting established in the Triennial Review Order?*

The Parties disagree in their interpretation of the FCC's recent discussion of commingling, combinations, and ratcheting contained in the *Triennial Review Order.* In a practical sense, these issues are inextricably linked. Arrangements not available as UNE combinations may nevertheless be ordered as commingling arrangements, and the pricing for such arrangements is dictated by the FCC's ratcheting criteria.

Covad's proposed language is premised on a few simple concepts embodied in the *Triennial Review Order*. First, UNEs are available for the provision of a qualifying service. *See Triennial Review Order,* ¶ 135. Second, CLECs may only order combinations of two or more UNEs available under Section 251(c)(3), and ILECs, even RBOCs such as Qwest, have no

obligation to combine other services, even elements provided under Section 271. *See Triennial Review Order,* ¶ 655, fn. 1990. Third, CLECs may *commingle* UNEs and combinations of UNEs with services obtained at wholesale pursuant to any method of access other than Section 251(c)(3) of the Act, and ILECs must perform the functions necessary to commingle these services upon request. *See Triennial Review Order*, ¶ 579. Fourth, ILECs are not required to bill for circuits aggregating UNE and non-UNE circuits at blended rates ("ratcheting"). Fifth, that additional service eligibility criteria apply to the availability of UNE combinations of high-capacity loops and transport ("Enhanced Extended Loops," or "EELs"). Covad's proposals embody these five simple concepts, and nothing more.

Qwest has proposed alternate language that does not differentiate between UNEs available pursuant to Section 251(c)(3) and UNEs available pursuant to other statutory unbundling methods, such as Section 271. The premise of Qwest's position is that the only UNEs available under the Parties' agreement are those made available pursuant to Section 251(c)(3), and no differentiation between classes of UNEs is required. Qwest also believes that an implied exemption from the commingling rules exists for entrance facilities, which may not, in Qwest's view, be commingled or combined with UNEs under any circumstances.

Covad believes its proposed language represents a faithful implementation of the FCC's new commingling and ratcheting rules, as well as the FCC's clarifications of the limits to an ILECs' obligations to combine services obtained by some method other than Section 251(c)(3) of the Act. Specifically, nothing in the *Triennial Review Order* may be read to exempt entrance facilities from the FCC's commingling rule, which broadly applies to "facilities and 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." *Triennial Review Order,* ¶ 579.

Qwest's concern, that Qwest provided entrance facilities could be used by CLECs as a substitute for recently deleted E-UDIT offerings, would more properly be focused on the use of such entrance facilities, rather than creating restrictions on commingling that do not exist in FCC rules. It should be noted that entrance facilities are not offered in the Agreement, rendering Qwest's concern even more unnecessary.

ISSUE 5 (Sections 8.1.1.3 and 8.3.1.9)

Issue: *Is Covad entitled to an efficient collocation space assignment from Qwest, and should it be forced to pay charges resulting from Qwest's inefficiency?*

Covad has proposed provisions that delineate Qwest's responsibilities to provide efficient collocation space assignment to Covad, and deny Qwest the right to recover collocation expenses that result from Qwest's inefficiency. Qwest opposes these proposals.

A commitment to maintain efficient collocation planning practices is necessary to send proper economic signals to Qwest as it plans for the future use of space within its central offices. At a minimum, the Parties' Agreement should not provide Qwest an opportunity to raise the costs of facilities-based market entry by assigning Covad collocation space that unnecessarily inflates costs. For instance, the assignment of unfinished space to Covad leads to charges for the construction of a new BDFB, racking, and lineups. If space is available where these charges would not be incurred, that space should be assigned to Covad. If Qwest refuses to assign such space because it reserves it for its own future use, it should not be permitted to charge Covad for the additional costs resulting from that reservation.

Covad acknowledges Qwest's need to reserve space within its central offices for its own future needs. Current practice allows Qwest to reserve space according to a reasonable planning

horizon that has been thoroughly examined in the context of Qwest's § 271 applications. However, there must be limits on Qwest's ability to benefit from the reservation of desirable space, and in turn assign undesirable and unfinished space to Covad.

ISSUE 6 (Sections 8.2.1.23.1.4 and 9.1.10)

Issue: *Should Qwest provide regeneration between CLEC collocations, and can Qwest recover regeneration costs?*

Covad has proposed language that clarifies that Qwest will provide regeneration if necessary, and Covad will not be charged for the regeneration of circuits connecting multiple collocations within a central office, including CLEC-to-CLEC cross connections. This is consistent with other sections of the Agreement that specify that Covad will not be charged for regeneration between the Qwest network and Covad collocations.

Qwest believes that it is not obligated to provide necessary regeneration between CLEC-to-CLEC cross connection arrangements.

Regeneration should rarely be necessary in these circumstances if Qwest uses efficient engineering and cabling techniques. In the context of Expanded Interconnection, the FCC stated:

> We find that it is unreasonable for the LECs that are the subject of this investigation to charge interconnectors for the cost of repeaters in a physical collocation arrangement because the record demonstrates that repeaters should not be needed for the provision of physical collocation service…
>
> In proscribing recovery of repeater costs from interconnectors, we rely on the ANSI standard's requirement that when a passive POT bay is used, a repeater is only necessary when the cabling distance between the POT bay and the LEC's cross-connection bay exceeds 655 feet for a DS1 signal and 450 feet for a DS3 signal.

In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, Second Report and Order, CC Docket No. 93-162, FCC 97-208 (Rel. June 13, 1997), ¶¶ 117-118.

The above decision was reached by the FCC after an exhaustive study of interconnection and collocation costs within ILEC central offices, and follows recognized standards with respect to signal regeneration requirements. Common sense dictates that cable lengths of 450 feet (for DS1 regeneration), let alone 655 feet (for DS3 regeneration) should be rare: in most central offices, achieving such distances would require placement of a CLEC's equipment in the worst possible location, implementing a creatively inefficient cabling design, or both. The Agreement should, however, provide for Qwest's provision of regeneration in the rare cases where it is necessary, on the same terms Qwest provides regeneration for other cabling arrangements in its central offices.

ISSUE 7 (Sections 8.3.1.3 and 8.3.1.3.1)

Issue: *Should Qwest charge a more reasonable quote preparation fee for minor augments to existing Covad collocations?*

Covad proposes language that will address the issue of Planning and Engineering, or Quote Preparation Fees, in a manner that more accurately reflects Qwest's costs. When compared to the planning and engineering activities for an entirely new collocation arrangement, the activities associated with the augment of an existing collocation are significantly reduced. These differences should be reflected in the costs assessed to Covad for planning and engineering.

Qwest agrees to apply a lower rate for certain augment activities, but limits the application of this lower fee to only one augment activity, the installation of additional cabling. Furthermore, Qwest refuses to credit the cost of this planning and engineering for augments to the cost of the build, as it does for new collocation builds.

Planning and Engineering fees are used to cover the cost incurred by Qwest to provide price quotes when collocation work is requested by a CLEC. Should the CLEC not accept the quote, Qwest is entitled to retain this fee to cover its costs. If the quote is accepted by the CLEC, Covad believes the fee should be credited toward the Non-Recurring charges for the work requested, as much of the work required to develop the quote is the same work required to plan and engineer the requested work.

Qwest has agreed to credit the fee toward the Non-Recurring charges for a completely new collocation build, but has not agreed to do so for augments to existing collocations. This is an economically irrational position, as the character of planning and engineering work done for a new collocation is similar, though less extensive, to that done for augments to existing collocations. The only difference is the amount of work, and the number of work steps required.

Qwest's limited application of the reduced Planning and Engineering, or Quote Preparation Fee to requests for additional cabling is not an accurate reflection of all circumstances where planning and engineering activities are significantly reduced. Covad's proposal identifies additional augment activities that should be subject to a reduced planning and engineering fee, including the addition of a reasonable number of voice grade and high-capacity terminations, conversion of voice grade terminations to HFPL terminations, and the addition of up to 60 amps of additional power.

ISSUE 8 (Sections 9.21.1, 9.21.4.1.6, and 9.24.1)

Issue: *Should Qwest allow for a single LSR to be submitted for a new line splitting order (parity with its own retail operations) or may Qwest continue to delay the necessary system upgrades?*

Covad has proposed language requiring Qwest to accept orders for a line-split voice and data bundle ordered by CLECs on a single Local Service Request (LSR) form, providing parity between CLECs' (either Covad or a partnering voice CLEC) and Qwest's own ability to submit a single order for processing. Qwest refuses to incorporate this language, and has counterproposed that this obligation must be conditioned on the inclusion of this capability in an upcoming IMA release.

The problem with the current process is that a voice CLEC must first submit an order for UNE-P, and only after the voice service is provisioned may a second order be placed for a line-split DSL product provided by Covad. This leads to increased provisioning costs for Covad, and perhaps more importantly, a delay in the provisioning DSL service to end users that is not experienced by end users ordering Qwest DSL. The existing process is therefore discriminatory, and violates Section 251 of the Act.

An IMA upgrade is not necessary for the implementation of the single LSR for line-splitting. Qwest is capable of processing line-split orders on a single LSR with its current systems, albeit this processing may involve more manual activity than Qwest wishes to perform. There are several problems with tying this obligation to a future IMA release. First, Qwest's obligation to provision UNEs in a non-discriminatory manner is not conditioned upon the current status of its back office systems under Section 251. Qwest is able to perform this activity for its own DSL customers, and must therefore perform at parity for its retail customers. Second, there are no guarantees when, if ever, an IMA release will include this functionality. While Qwest and

CLECs work together within the CMP process to assign priorities to specific functionalities to be included in future IMA releases, Qwest alone has the power to determine how much time or money will be invested in IMA releases, and when those IMA releases will occur. If Qwest is not obligated to provide non-discriminatory provisioning performance, it will have no motivation to complete the IMA release. Qwest's obligation to handle single LSR line-splitting orders manually is consistent with the requirements of Section 251 and will motivate Qwest to upgrade its systems.

ISSUE 9 (Section 4 Definition of "Maintenance of Service Charge," Sections 9.2.2.9.11, 9.2.5.2.1, 9.4.4.4.1, 9.4.4.4.2, 9.4.6.3.1, 9.4.6.3.3, 9.21.3.3.1, 9.21.6.3.3, 9.24.3.3.1, 12.3.4.2, 12.3.4.3, and 12.3.6.5)

Issue: *Should provisions regarding the recovery of maintenance expenses apply to both Parties, or should Qwest alone be entitled to recover its maintenance expenses?*

Covad has proposed new language for the Parties' Agreement that permits both Parties, not just Qwest, to recover their costs for isolating trouble to the other Party's network in certain circumstances. A reciprocal application of these charges ensures that both Parties have the proper economic incentives to isolate network trouble properly.

When Covad learns one of its customers is experiencing trouble with their service, Covad runs various tests on its network to determine the problem. If Covad is able to isolate the trouble to Qwest's network, it opens a trouble ticket with Qwest. Covad does not propose to charge Qwest for this initial trouble isolation. It is a routine cost of doing business.

Once the trouble ticket is opened, Qwest commits to run various tests to identify the problem. If Qwest determines that Covad mistakenly isolated the trouble to Qwest's network, it assesses a maintenance charge against Covad to cover its costs. If Qwest determines the problem

exists on its network, no charge is assessed and Qwest initiates the repair. Covad agrees that Qwest should be allowed to assess a charge in cases where Covad mistakenly opens a trouble ticket, and Qwest can isolate the trouble to Covad's network.

In some circumstances, however, Qwest closes the trouble ticket claiming the trouble exists on the Covad network, and Covad is forced to demonstrate, for a second time, that the trouble is in fact isolated to the Qwest network. The costs incurred to isolate this trouble a second time are solely a result of Qwest's inability to properly perform their testing work the first time. Covad proposes that it be enabled to recover its actual costs to re-isolate the trouble to Qwest's network, not to exceed Qwest's costs.

Covad's proposal creates the proper economic incentive for Qwest to thoroughly test its network each time a trouble ticket is opened. Qwest would only incur costs if it failed to adequately test for network trouble, resulting in unnecessary additional costs to Covad. Covad's proposed language would level the playing field, and allow each Party to recover the actual costs incurred as a result of the other's error.

ISSUE 10 (Sections 5.4.1, 5.4.2, 5.4.3, and 5.4.5)

Issue: *Should provisions related to billing and billing dispute resolution more accurately reflect the reality of wholesale billing practices, and provide Covad adequate protection against disconnection of its customers?*

Covad has proposed more realistic timeframes for payment of invoices by the Parties under the Agreement (within forty-five days of the invoice date), and more time before unpaid amounts are considered delinquent (ninety days after the payment due date). Qwest maintains that all invoices should be paid by the Parties within thirty days of the invoice date, and if

payment is not received within thirty days of the payment due date, the billing Party may discontinue the processing of new orders.

Processing, auditing, and paying wholesale invoices is complicated. While some bills are sent to Covad by Qwest in electronic format, others are sent in paper format only. Monthly invoices for wholesale services often number in the hundreds of pages, and skilled auditors must be employed to ensure their accuracy. Covad must complete the audit and verification process prior to processing payments to Qwest.

Despite the steps that must be undertaken, Qwest maintains that the payment intervals set forth in the Agreement should be roughly equivalent to the intervals allowed for residential customers to review and pay a bill for a single residential line. Given the enormous differences between the size and scope of the two tasks, this "parity" is inappropriate.

The short time frames contained in Qwest's proposal are also unreasonable because they would provide Covad an impractically short time to identify amounts that should be withheld and disputed. Under Section 5.4.4 of the Agreement, a billed Party is afforded only fifteen days from the payment due date to inform the billing Party that it disputes specific amounts on an invoice. When combined with the time frames discussed above, this still does not provide Covad adequate time to review Qwest's invoices in all circumstances.

The billing time frames contained in the Agreement are critical given the severe consequences for late payment. Once an amount is considered past due, the billing Party may discontinue the processing of new orders and may eventually disconnect services. The time frames proposed by Qwest for these activities are unrealistically short, do not reflect the reality

of the Parties' past billing relationship, and are inappropriate terms between Parties with an established business relationship.

H. Proposed Contract Language Reflecting the Parties' Positions

12. Proposed contract language is reflected in Exhibit A to this Petition.

I. Terms and Conditions that the Petitioner Recommends Imposing

13. In order to resolve the remaining disputed issues, Covad recommends imposing the contract language for the sections referenced in Section G of this Petition, as set forth in Exhibit A.

J. Proposed Schedule for Implementing Terms and Conditions Imposed in the Arbitration

14. Covad proposes that terms and conditions imposed in the arbitration take effect immediately upon their approval by the Commission.

K. Recommendation as to What Information Other Parties to the Negotiation Should Provide

15. Covad does not anticipate the need for discovery in this matter, but reserves its right to seek such information as may become necessary for an adequate development of the record pertinent to the determination of the issue presented for resolution by the Commission.

L. Procedural Recommendations

16. Covad proposes that this matter be scheduled for hearing, and requests that a procedural schedule be established pursuant to which it will submit direct testimony, Qwest will submit reply testimony, and Covad will submit rebuttal testimony.

M. Request for Protective Order

17. Covad does not anticipate the need for a protective order at this time, but reserves its right to seek such an order as may be appropriate under the circumstances.

N. List of Witnesses and Exhibits

18. Covad will call Michael Zulevic and Megan Doberneck as its witnesses at the hearing, and reserves the right to call additional witnesses as Covad deems necessary.

19. Covad proposes to introduce the Direct Testimony of Michael Zulevic and Megan Doberneck and the Rebuttal Testimony of same as exhibits at the hearing, and reserves the right to file testimony and exhibits of additional persons as Covad deems necessary.

REQUEST FOR RELIEF

WHEREFORE, Covad respectfully requests that the Commission grant the following relief:

A. Arbitrate the unresolved issues between Covad and Qwest.

B. Issue an order directing the Parties to submit an Agreement reflecting: (i) the agreed upon language in Exhibit A and (ii) the resolution in this arbitration proceeding of the unresolved issues in accordance with the recommendations made by Covad herein and in Exhibit A.

C. Retain jurisdiction of this arbitration until the Parties have submitted an Agreement for approval by the Commission in accordance with section 252(e) of the Act.

D. Further retain jurisdiction of this arbitration and the Parties hereto until Qwest has complied with all implementation time frames specified in the arbitrated Agreement and has fully implemented the Agreement.

E. Take such other and further actions as it deems necessary and appropriate.

Respectfully submitted, this 27th day of April, 2004.

By_____

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Certificate of Service

I certify that on April 27, 2004, I emailed and mailed, postage prepaid, a copy of the foregoing Petition of DIECA Communications, Inc., D/B/A Covad Communications Company for Arbitration to the following:

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PETITION OF DIECA COMMUNICATIONS, INC., D/B/A COVAD COMMUNICATIONS COMPANY FOR ARBITRATION

EXHIBIT A

Draft Interconnection Agreement