Robert C. Brown
Winslow B. Waxter
QWEST CORPORATION
1005 17th Street, Suite 200
Denver, CO 80209
Telephone: 303-896-1518
Facsimile: 303-896-6095
Email: winslow.waxter@qwest.com
robert.brown@qwest.com

John M. Devaney
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
Telephone: 202-628-6600
Facsimile: 202-434-1690
Email: jdevaney@perkinscoie.com

Ted D. Smith (3017)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
Telephone: 801-578-6961
Facsimile: 801-578-6999
Email: tsmith@stoel.com

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC., D/B/A COVAD COMMUNICATIONS COMPANY, FOR ARBITRATION TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	: : : : : : :	Docket No. 04-2277-02

QWEST CORPORATION'S POST-HEARING BRIEF

TABLE OF CONTENTS

I. INTRODUCTION

This interconnection arbitration conducted pursuant to the Telecommunications Act of 1996 ("the Act") demonstrates that the negotiation/arbitration process set forth in Sections 251 and 252 can work fairly and efficiently. While Qwest appreciates Covad's good faith conduct in the negotiations, the five unresolved issues that remain after the parties' exhaustive negotiations are nevertheless largely attributable to Covad attempting to impose obligations on Qwest that either conflict with rulings by the FCC or are inconsistent with the Act. These deviations from governing law are sharply demonstrated by Covad's demands and proposed interconnection agreement ("ICA") language relating to implementation of the FCC's rulings in the Triennial Review Order ("*TRO*").[1]

For example, although the *TRO* confirms Qwest's right to retire copper facilities, Covad asks the Commission to gut that right by imposing onerous conditions that are nowhere found in the *TRO* and that conflict directly with the FCC's Congressionally-mandated obligation to encourage investment in the fiber facilities that support broadband services. Similarly, despite the FCC's pronouncements that Bell Operating Companies ("BOCs") are not required under the Act to commingle or combine network elements provided under Section 271, Covad proposes language that would require Qwest to do just that.

Covad's departures from governing law are perhaps most sharply demonstrated by its proposed ICA language that would require Qwest to provide almost unlimited access to the elements in Qwest's Utah telecommunications network. These proposals ignore FCC findings in the *TRO* that CLECs are not impaired without access to many network elements and that ILECs are therefore not required to

[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003), *aff'd in part and rev'd and vacated in part, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

unbundle them. Covad's broad unbundling demands also violate the rulings of the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit in which those courts struck down FCC unbundling requirements while confirming in the most forceful terms that the Act imposes real and substantial limitations on ILEC unbundling obligations. In addition, Covad's proposed unbundling language assumes incorrectly that state commissions have authority to require BOCs to provide network elements pursuant to Section 271, to determine pricing for those elements, and to include them in Section 252 ICAs.

The flawed nature of Covad's arguments is confirmed by recent decisions in the Covad/Qwest arbitrations in Colorado, Minnesota, and Washington, copies of which are attached. In those arbitrations, with limited exception, the Colorado Commission and administrative law judges in Minnesota and Washington rejected Covad's positions and proposed ICA language relating to most of these *TRO-related* issues in dispute here, relying on substantially the same evidentiary record that exists here.[2] This consistency among the three decision-makers that have addressed these issues is not a coincidence – Covad's proposals relating to each of the disputed issues are without legal or factual support.

[2] *See In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Co.*, Colorado Commission Docket No. 04B-160T, Decision No. C04-1037, Initial Commission Decision (Colo. Commission Aug. 19, 2004)("Colorado Arbitration Order")(Attachment A); *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*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Arbitrator's Report (Minn. Commission Dec. 15, 2004)("Minnesota Arbitration Order")(Attachment B); *In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation*, Washington Commission Docket No. UT-043045, Order No. 04, Arbitrator's Report and Decision (Wash. Commission Nov. 2, 2004)("Washington Arbitration Report")(Attachment C"). An exception is that the Colorado and Minnesota decisions require Qwest to commingle section 271 network elements with unbundled network elements it provides under section 251. However, the Washington ALJ correctly determined that the FCC has excluded section 271 elements from the commingling obligations established in the TRO and thus ruled that Qwest is not required to commingle those elements. In addition, the Colorado Commission did not address the section 271 unbundling issues encompassed by arbitration issue no. 2, since Covad agreed to Qwest's ICA language in Colorado relating to those issues. Covad has filed exceptions to the *TRO*-related rulings in Minnesota and Washington, and Qwest has filed an exception to the Minnesota ruling involving commingling. Covad's exceptions have been argued before the Washington Commission, and the parties are awaiting a Commission decision. The exceptions to the Minnesota Arbitration Order are scheduled to be argued before the Minnesota Commission on January 27.

In contrast to Covad's demands, Qwest's ICA proposals are specifically based upon the FCC's rulings in the *TRO* and other governing law. To ensure that the ICA complies with governing law and is consistent with the policy objectives of the Commission and the FCC, the Commission should adopt Qwest's proposed ICA language for each of the disputed issues.

Finally, like its positions relating to the *TRO* issues, Covad's positions relating to channel regeneration and payment/billing deviate from governing law and industry practice. For the reasons discussed below, the Commission should also adopt Qwest's proposed ICA language relating to these issues.

II. DISPUTED ISSUES

A. Issue 1: Retirement of Copper Facilities (Sections 9.2.1.2.3.1 and 9.2.1.2.3.2)

The *TRO* confirms that ILECs have a right to retire copper facilities that they replace with fiber facilities. The FCC specifically rejected attempts by CLECs to preclude ILECs from retiring copper loops: "we decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced with fiber."[3] This ruling goes hand-in-hand with the FCC's Congressionally-mandated policy of encouraging the deployment of fiber facilities that carriers can use to provide advanced telecommunications services, since the retirement of copper facilities and the resulting elimination of the maintenance expenses associated with those facilities increases an ILEC's economic incentive to install fiber facilities.[4] Thus, the FCC specifically rejected CLEC proposals that would have required ILECs to provide alternative forms of access and to obtain regulatory approval before retiring copper facilities.[5]

Covad's proposed ICA language would eviscerate the copper retirement rights confirmed in the *TRO*. Specifically, under Covad's proposal, Qwest be prohibited from retiring a copper loop over

[3] *TRO* at ¶ 271.

[4] *See* Exhibit 1 ("Ex.")(Stewart Direct) at 3:9-12, 11:6-12:12.

[5] *TRO* at ¶ 281 & n.822.

which Covad is providing DSL service unless it provides Covad with an "alternative service" that does not increase the cost to Covad or its customers or degrade the quality of the service that Covad is receiving from Qwest today.[6] These conditions are not found in the *TRO* or in any other FCC order. Not surprisingly, therefore, the Colorado Commission and ALJs in Minnesota and Washington have uniformly rejected Covad's proposal. The Washington ALJ succinctly summarized the flawed nature of the proposal, stating that "the proposal requiring Qwest to provide an alternative arrangement at no additional cost to Covad is not consistent with the requirements of the Triennial Review Order."[7] Likewise, the Colorado Commission found that Covad's proposal is without legal support,[8] and the Minnesota ALJ ruled that "[t]here is no legal support in the TRO for Covad's position concerning 'alternative' services."[9] These rulings are correct and, for the reasons set forth below, this Commission should reach the same result.

1. In Contrast To Covad's "Alternative Service" Proposal, Qwest's Proposed ICA Language Relating To Copper Retirement Meets The Requirements Of The *TRO*

a) Covad's "Alternative Service" Proposal Is Inconsistent With The *TRO*.

As telecommunications carriers have increasingly moved from copper to fiber facilities, it has become a standard practice to retire copper facilities in many circumstances when fiber facilities are deployed. The ability to retire copper facilities is important from a cost perspective, since, without that ability, carriers would be required to incur the costs of maintaining two networks. If carriers were faced with that duplicative cost, they would have reduced financial ability to deploy facilities to

---

[6] As discussed *infra*, Covad has modified its proposal relating to copper retirement by offering new language under which its "alternative service" requirement would not apply to situations where Qwest retires a copper loop and replaces it with a fiber-to-the-home ("FTTH") loop. As the Colorado Commission recently ruled, this modification does not cure the legal shortcomings of Covad's proposal. *See Petition of Qwest Corporation for Arbitration of an Interconnection Agreement*, Docket No. 04B-160T, Decision No. C04-1348, Order Granting in Part and Denying in Part Application for Rehearing, Reargument, or Reconsideration at 10 (rel. Nov. 16, 2004)("Colorado RRR Order")("Attachent D").

[7] Washington Arbitration Order at ¶ 38.

[8] Colorado Arbitration Order at 54.

[9] Minnesota Arbitration Order at ¶ 23.

replace copper and, therefore, reduced ability to deploy facilities that can support advanced telecommunications services.[10] Accordingly, in the *TRO*, the FCC confirmed the right of ILECs to retire copper facilities without obtaining regulatory approval before doing so. Specifically, in paragraph 271 of the *TRO*, the FCC ruled:

> As we note below in our discussion of FTTH loops, we decline to prohibit incumbent LECs from retiring copper loops or subloops that they have replaced with fiber. Instead, we reiterate that our section 251(c)(5) network modification disclosure requirements (with the minor modifications also noted below in that same discussion) apply to the retirement of copper loops and copper subloops.[11]

As reflected by this excerpt from the *TRO*, the only retirement condition that the FCC established are that the ILEC provide notice of its intent to retire specific copper facilities when those facilities are being replaced by FTTH loops so that CLECs can object to the FCC.[12]

Qwest's proposed language for Sections 9.2.1.2.3 and 9.2.1.2.3.1 of the ICA, combined with the parties' agreed language relating to notice, accurately implements the *TRO*. Under these provisions, Qwest is permitted to retire copper facilities but will provide Covad and other CLECs with notice of all planned retirements, not just retirements involving FTTH replacements. Further, consistent with the *TRO*, Qwest's language for Section 9.2.1.2.3 establishes that Qwest will comply with any applicable state requirements. Qwest's Section 9.2.1.2.3.1 also provides Covad with substantial protection by establishing that: (1) copper loops and subloops will be left in service where technically feasible; and (2) Qwest will coordinate with Covad the transition from old facilities to new facilities "so that service interruption is held to a minimum."

---

[10] *See* Qwest Ex. 1 (Stewart Direct) at 3:9-12, 11:6-12:12.

[11] *TRO* at ¶ 271.

[12] *See also TRO* at ¶ 281. Although the FCC ruled that the notice requirements do not apply to the retirement of copper feeder, as noted above, Qwest has nevertheless agreed to provide notice of copper feeder retirements.

In contrast to Qwest's proposal, Covad's demands relating to copper retirement are not supported by the *TRO* and conflict with key policy objectives of Congress and the FCC. While Covad asserts that its "alternative service" demand is consistent with the *TRO*, as found in the Colorado, Minnesota, and Washington arbitrations, there is no wording in the *TRO* that requires an ILEC to provide an alternative service before retiring a copper facility. Moreover, the proposal directly conflicts with the FCC's Congressionally-mandated obligation to promote the deployment of facilities that support broadband services. In the *TRO*, the FCC identified the deployment of broadband services as one of its paramount objectives, emphasizing that "[b]roadband deployment is a critical domestic policy objective that transcends the realm of communications."[13] Thus, the FCC sought to formulate rules that would "help drive the enormous infrastructure investment required to turn the broadband promise into a reality."[14]

As Ms. Stewart described, the economic incentive of a carrier to deploy the fiber facilities that support broadband services increases if the carrier is permitted to retire copper loops when it deploys fiber.[15] Without a right to retire copper or with a right conditioned upon the onerous retirements proposed by Covad, a carrier evaluating whether to deploy fiber would be faced with the duplicative costs of maintaining *both* the copper and the fiber facilities.[16] Thus, the FCC specifically rejected CLEC proposals that would have required ILECs to provide alternative forms of access and to obtain

[13] *TRO* at ¶ 212.

[14] *Id.*

[15] *See* Qwest Ex. 1 (Stewart Direct) at 3:9-12, 11:6-12:12.

[16] Covad attempts to minimize the significance of this economic disincentive by asserting that in Utah, Qwest likely would be required to continue to maintain only a "handful" of copper loops that are being used to provide DSL service to Covad customers. However, Qwest cannot leave just Covad's loops in service and retire all the other copper loops in the 3600 and 4200 pair feeder cables that are used in the network. Instead, if Qwest had to leave the handful of Covad loops in service, it would have no choice but to also leave in service the hundreds of other copper loops in those cables. The maintenance costs that Qwest would incur, therefore, would be for not just a few copper loops used by Covad, but for the entire 3600 or 4200 pair cable. Those maintenance costs would thus reduce Qwest's economic incentive to deploy fiber to the hundreds of

regulatory approval before retiring copper facilities.[17] As stated by the Washington ALJ, the FCC has "rejected proposals to place specific conditions on an ILEC's right to retire copper facilities" and has only required that ILECs provide public notice of planned retirements.[18]

In attempting to defend its proposal, Covad argues that the right of an ILEC to retire a copper facility is narrowly limited to situations where an ILEC deploys a FTTH loop or a fiber-to-the-curb ("FTTC") loop and asserts that only its proposal is so limited. For several reasons, this argument is wrong. First, as demonstrated by the plain language of the *TRO* excerpt quoted above, the FCC did not limit ILECs' retirement rights to situations where copper loops are replaced with FTTH or FTTC loops. Instead, the FCC stated that the right to retire exists when an ILEC replaces copper loops "with fiber," meaning any fiber facility: "[W]e decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced *with fiber*."[19] Accordingly, the Colorado Commission rejected this same argument in the Covad/Qwest arbitration in that state, concluding as follows:

> 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 (*sic*). 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

---

Washington customers served by those loops in those cables, all for the sake of a "handful" of Covad customers.

[17] *TRO* at ¶ 281 & n.822.

[18] Washington Arbitration Order at ¶ 37.

[19] *Id.* at ¶ 271 (emphasis added).

> with the FCC's Part 51 notice requirements, without any exclusion given to hybrid loops.[20]

The same analysis and conclusion apply here.

Second, Covad's narrow reading of the ILECs' retirement rights is inconsistent with the FCC's clear intent to encourage the deployment of fiber facilities as a whole, not just FTTH and FTTC loops, as stated in the *TRO*:

> Upgrading telecommunications loop plant is a central and critical component of ensuring the deployment of advanced telecommunications capability to all Americans is done on a reasonable and timely basis and, therefore, where directly implicated, our policies must encourage such modifications. Although a copper loop can support high transmission speeds and bandwidth, it can only do so subject to distance limitations and its broadband capabilities are ultimately limited by its technical characteristics. *The replacement of copper loops with fiber will permit* far greater and more flexible broadband capabilities.[21]

Third, contrary to Covad's new contention, the FCC's recent *Section 271 Forbearance Order* establishing that ILECs are not required to provide unbundled access to FTTC loops provides no support for the claim that ILECs are only permitted to retire copper loops they have replaced with FTTH or FTTC loops.[22] Indeed, Covad's reliance on that order is baffling, since nowhere in it does the FCC even discuss ILECs' copper retirement rights. As the Minnesota ALJ stated in response to the same argument from Covad, "[i]t 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."[23]

---

[20] Colorado RRR Order at ¶ 35.

[21] *Id.* at ¶ 243 (emphasis added).

[22] *See 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 (October 27, 2004) ("*Section 271 Forbearance Order*").

[23] Minnesota Arbitration Order at ¶ 24. Covad seems to be arguing that in the *Section 271 Forbearance Order*, the FCC ruled that ILECs can avoid unbundling FTTC loops only if the ILEC is actually using the FTTC loop to provide broadband service. According to Covad, it follows as a matter of inference that an ILEC can only retire a copper loop that has been replaced with a fiber facility that is actually providing broadband service. The FCC said no such thing, however, and, moreover, did not rule that ILECs must be using FTTC loops for broadband service to avoid having to unbundle them.

Covad also attempts to advance its proposal by claiming that allowing Qwest to retire copper facilities will bring substantial harm to consumers. This claim is unfounded. As Ms. Doberneck acknowledged, no Covad customer has ever been disconnected from service in Utah or anywhere else in Qwest's region because of Qwest's retirement of a copper loop.[24] And the likelihood of that occurring is remote, as evidenced by Ms. Stewart's testimony establishing that Qwest routinely leaves copper loops in place when it deploys fiber – a practice that is captured by Qwest's proposed ICA language.[25] Further, Ms. Doberneck testified that there are, at most, only a "handful" of Covad customers – perhaps only four or five– in Utah that potentially could be affected by Qwest's retirement of a copper loop.[26] In the unlikely event those customers are affected by Qwest's retirement of a copper loop, Covad could continue serving them by purchasing other services from Qwest that would result in an overall negligible cost increase given the small number of Covad customers that could be affected.[27] In addition, Covad could continue providing service to its customers despite Qwest's retirement of copper loops by deploying remote DSLAMs.[28] While Covad claims that deploying DSLAMs is cost-prohibitive, the FCC has concluded otherwise, as reflected by its stated objective – set forth in the *TRO* – of promoting CLEC investment in remote DSLAMs and other next-generation

---

Instead, the FCC emphasized that its objective of encouraging the deployment of fiber facilities that support broadband services is advanced by the deployment of fiber loops that are *capable* of providing broadband service, and, consistent with this statement, it ruled that ILECs are not required to unbundle FTTC loops. *See Section 271 Forbearance Order* at ¶ 17 and n.56. Nor is there any support for Covad's claim that in the *Section 271 Forbearance Order*, the FCC established that ILECs are only permitted to retire copper loops that have been replaced with fiber facilities that are serving mass market customers. There is simply no such statement anywhere in the order.

[24] Hearing Tr., Vol. 1, at 18:17-20:7.

[25] Hearing Tr., Vol. 1, at 85:22-86:9.

[26] Covad Ex. 1 (Doberneck Amended Confidential Direct) at 17:397-18:433.

[27] *See* Qwest Ex. 2 (Stewart Rebuttal) at 10:11-11:13.

[28] *Id.* at 16:1-15.

network equipment.[29]

b) Covad's "Alternative Service" Proposal Would Unlawfully Prevent Qwest From Recovering Its Costs And Is Not Properly Defined.

Covad also cannot reconcile its "alternative service" proposal with the provisions of the Act that require CLECs to compensate ILECs for the costs they incur to provide interconnection and access to UNEs. Section 252(d)(1) of the Act requires that rates for interconnection and network element charges be "just and reasonable" and based on "the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." In *Iowa Utilities Board v. FCC*,[30] the United States Court of Appeals for the Eighth Circuit succinctly described the effect of these provisions: "Under the Act, an incumbent LEC *will* recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests." (emphasis added).

Under Covad's proposal, Qwest could not charge any recurring rate for the alternative service since the current recurring rate of $0 for line sharing in Utah would serve as the cap.[31] This artificial cap would prevent Qwest from recovering its costs, much less a reasonable profit, in plain violation of the Act's cost recovery requirements. While Ms. Doberneck claimed in her written testimony that Covad's proposal would permit Qwest to recover the costs of providing an alternative service, plus a reasonable profit,[32] it was quite telling during the hearing that she refused to agree to ICA language that would give Qwest that right.[33] It is thus clear that both the effect and intent of Covad's proposal is

[29] *See TRO* at ¶ 291.

[30] 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part, remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[31] According to Covad, if the undefined "alternative service" required tie pairs and caused an operation system support expense separate from other elements and services that Qwest provides, the total monthly rate could be capped at approximately $3.70. Hearing Tr., Vol. 1, at 30:1-31:6. That cap would still very likely deny Qwest recovery of its costs, as it is hard to imagine an "alternative service" that would cost less than $4.00 per month to provide.

[32] Covad Ex. 1 (Doberneck Confidential Direct) at 21:508-10.

[33] Hearing Tr., Vol. 1, at 43:4-12.

to deny unlawfully the cost recovery to which Qwest is entitled under the Act.

Moreover, it is fundamental that ICA terms and conditions, as with any contract, should be clearly defined to apprise parties of their rights and obligations and to thereby avoid or minimize disputes. Covad's "alternative service" proposal falls far short of this basic requirement. Nowhere in its proposed ICA language does Covad attempt to define the "alternative service" that Qwest would have to provide upon retiring a copper loop. Qwest would have no way, therefore, of knowing what alternative service to provide or whether such a service would meet the requirements of the ICA. Covad likewise fails to define the requirement that the alternative service "not degradate the service or increase the costs to CLEC or End-User Customers of CLEC." It does not propose, for example, any metrics to determine whether the service has degraded. The reality is that the "alternative service" Covad is seeking likely involves some form of unbundled access to hybrid copper/fiber loops, as confirmed by Covad's testimony stating that access to hybrid loops would satisfy its proposal.[34] However, the FCC expressly prohibited such access in the *TRO*, which further demonstrates the unlawfulness of Covad's proposal.[35]

2. Qwest Has Committed In The ICA To Comply With The FCC's Notice Requirements, And Covad's Proposed Additional Requirements Are Impermissibly Burdensome.

As these arbitrations between Covad and Qwest have progressed, Qwest has significantly expanded its copper retirement notice obligations under the ICA by agreeing to: (1) provide notice when it intends to retire not just copper loops and subloops, but also copper feeder; (2) provide notice not just when a copper facility is being replaced with FTTH loop, but whenever a copper facility is being replaced with any fiber facility (including fiber feeder); and (3) provide e-mail notice of planned

[34] Hearing Tr., Vol. 1, at 40:1-18.

retirements to CLECs. Qwest's overall notice commitments meet the FCC's notice requirements, as confirmed by Qwest's proposed language for Section 9.2.1.2.3, which requires Qwest to provide notice of planned retirements "in accordance with FCC Rules." Qwest's expansion of its notice commitments is reflected in Section 9.1.15 of its proposed ICA.

Notwithstanding Qwest's agreement to provide notice that meets the FCC's notice requirements, Covad is requesting more. In particular, it is proposing that Qwest be required to provide specific categories of information in the e-mail notices that Qwest has volunteered to provide to CLECs. Covad has cited no legal authority for this request, and there apparently is none. The FCC rule relating to notice of network modifications permits an ILEC to provide notice by *either* filing a public notice with the FCC *or* providing notice through industry publications or an "accessible Internet site."[36] Here, instead of committing to just one form of notice, Qwest is agreeing to provide three forms of notice – through its website, by a public filing with the FCC, and through e-mail notice to CLECs. Further, its proposed Section 9.2.1.2.3 establishes that Qwest will provide any additional notices that may be required by Utah law.

Moreover, by agreeing to provide notice in accordance with FCC and state rules, Qwest is committing to provide detailed information about copper retirements with its notices, including, for example, the date of the planned retirement, the location, a description of the nature of the network change, and a description of foreseeable impacts resulting from the network change.[37] This information, along with the multiple forms of notice Qwest will provide, ensures that Covad will have

---

[35] *TRO* at ¶¶ 273, 288.

[36] *Id.*

[37] *See* 47 U.S.C. § 51.327(a)(1)-(6).

timely and complete notice of any copper retirements.

Covad's objection to the notice Qwest has agreed to provide appears to center on its contention that Qwest should be required to tell Covad whether the retirement of a copper loop will affect the service Covad is providing to specific customers. While Qwest provides network facilities to Covad, it does not know the specific services Covad is providing to its customers over these facilities. A requirement for Qwest to tell Covad whether service to its customers would be affected by the retirement of a copper loop would therefore require Qwest to speculate about the services Covad is providing.[38] If Qwest guessed wrong, Covad would undoubtedly seek recourse and attempt to hold Qwest responsible. Qwest should not be put in that unfair position, which is why the ALJs in Minnesota and Washington properly rejected Covad's notice demands as improperly burdensome. The Washington ALJ accurately described Covad's demands as being improperly "burdensome."[39] Similarly, the Minnesota ALJ found that Covad's demands relating to notice are unnecessary and improperly attempt to shift responsibility from Covad to Qwest:

> [T]he 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. 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.[40]

In sum, Qwest's commitment to comply with the FCC's notice requirements ensures that Covad will receive the information it needs to assess whether Qwest's retirement of a copper facility will affect service that Covad is providing. Accordingly, the Commission should reject Covad's objection

[38] Hearing Tr., Vol. 1, at 131:11-18, 132:22-133:5, 146:19-147:13.

[39] Washington Arbitration Order at ¶ 36.

[40] Minnesota Arbitration Order at ¶ 25 (footnote omitted).

to the Arbitrator's resolution of this issue.

B. Issue 2: Unified Agreement/Defining Unbundled Network Elements (Sections 4.0 (Definition Of "Unbundled Network Element"), 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, 9.21.2).

The Act requires ILECs to provide UNEs to other telecommunications carriers and gives the FCC the authority to determine which elements the ILECs must provide. In making these network unbundling determinations, the FCC must consider whether the failure to provide access to an element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[41] This "impairment" standard imposes important limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*[42] and the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating each of the FCC's three attempts at establishing lawful unbundling rules.[43]

Issue 2 arises because of Covad's insistence upon ICA language that would require Qwest to provide almost unlimited access to network elements in violation of the unbundling limitations established by these decisions, the Act, and the *TRO*. Covad's clear objective is to obtain access to all elements of Qwest's network that Covad may desire at the lowest rates possible. Not surprisingly, the ALJs in Minnesota and Washington rejected Covad's unbundling language, finding that it is plainly unlawful.[44]

In the Minnesota and Washington orders, both ALJs determined correctly that it would be improper to include in a section 251/252 ICA terms and conditions relating to network elements that

---

[41] 47 U.S.C. § 251(d)(2).

[42] 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

[43] *USTA II*, *supra*; *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427-28 (D.C. Cir. 2002) ("*USTA I*").

[44] In the Colorado arbitration, Covad accepted Qwest's language relating to unbundled network elements and did not

Qwest provides under section 271, as Covad proposes. As the Washington ALJ stated, "network elements unbundled pursuant to Section 251 should be distinguished from those network elements that are available on an unbundled basis pursuant to Section 271," as the "foundation for their availability on an unbundled basis is different."[45] Consistent with this statement, the Minnesota ALJ ruled 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."[46] She explained further that "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."[47]

The Washington ALJ also explained why Covad's demand for broad network unbundling under state law is improper and must be rejected. She emphasized that a state commission cannot require unbundling under state law without "tak[ing] into consideration the FCC's findings and rules, and may only act in a way that is not inconsistent with federal law."[48] Further, the ALJ explained, a state commission "cannot find independent unbundling obligations pursuant to state law without engaging in the necessary impairment analysis, and determining whether any findings are inconsistent with [the]

---

propose its unbundling language that is in dispute here. Accordingly, the Colorado Commission did not address this issue.

[45] Washington Arbitration Order at ¶ 54.

[46] Minnesota Arbitration Order at ¶ 46.

[47] *Id*. As occurred in this case, the Minnesota ALJ had denied Qwest's motion to dismiss portions of Covad's unbundling claims in which Qwest argued that certain of the claims were beyond the permissible scope of a section 251/252 arbitration. However, the Minnesota ALJ properly distinguished her ruling that the claims are an "open issue" subject to arbitration – a ruling with which Qwest disagrees – from her ruling on the merits that there is no legal basis for including section 271 unbundling obligations in the ICA: "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." Minnesota Arbitration Order at ¶ 46. Based on the same reasoning, the ALJ's denial of Qwest's motion to dismiss in this case should not affect the merits of Covad's unbundling claims. Because there is no legal basis for Covad's unbundling proposals, as the Minnesota ALJ ruled, Covad's language must be rejected on the merits.

[48] Washington Arbitration Order at ¶ 59.

FCC's findings."[49] Because Covad had not provided any evidence of impairment, there was no foundation for its unbundling proposals.

These rulings, which address the same Covad unbundling language at issue here, confirm the unlawfulness of Covad's proposals. As the Minnesota and Washington ALJs correctly determined, and as is discussed further below, neither the Act nor the *TRO* permits including section 271 unbundling obligations in a section 251/252 ICA. Further, just as it failed to do in the prior arbitrations, Covad provided no evidence of impairment in this case to support its demands for unbundling under state law. There is thus no evidentiary basis for those demands and no way for the Commission to determine, as it must, whether the demands are consistent with federal law.

Accordingly, for the reasons cited by the Minnesota and Washington ALJs and those set forth below, the Commission should resolve Issue 2 in Qwest's favor and reject Covad's unbundling language.

1. Summary Of Qwest's And Covad's Conflicting Unbundling Proposals

In contrast to Covad's unbundling demands, Qwest's ICA language ensures that Covad will have access to the network elements that ILECs must unbundle under Section 251 while also establishing that Qwest is not required to provide elements for which there is no Section 251 obligation. Thus, in Section 4.0 of the ICA, Qwest defines the UNEs available under the agreement as:

> [A] Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access or for which unbundled access is provided under this Agreement. Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act.

[49] *Id.*

Qwest's language also incorporates the unbundling limitations established by the Act, the courts, and the FCC by listing specific network elements that, per court and FCC rulings, ILECs are not required to unbundled under Section 251. For example, Qwest's proposed Section 9.1.1.6 lists 18 network elements that the FCC specifically found in the *TRO* do not meet the "impairment" standard and do not have to be unbundled under Section 251.

While Qwest's ICA language properly recognizes the limitations on unbundling, its exclusion of certain network elements does not mean that those elements are unavailable to Covad and other CLECs. As the Commission is aware, Qwest is offering access to non-251 elements through commercial agreements and tariffs, including, for example, its line sharing agreement with Covad and agreements relating to its Qwest Platform Plus ("QPP") product.

Covad's sweeping unbundling proposals are built around its proposed definition of "Unbundled Network Element," which Covad defines as "a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access, *for which unbundled access is required under section 271 of the Act or applicable state law* . . . ." (emphasis added). Consistent with this definition, Covad's language for Section 9.1.1 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 . . . ."

Its proposal leaves no question that Covad is seeking to require Qwest to provide access to network elements for which the FCC has specifically refused to require unbundling and for which unbundling is no longer required as a result of the D.C. Circuit vacatur of unbundling requirements in *USTA II*. In Section 9.1.1.6, for example, Covad proposes language that would render irrelevant the FCC's non-impairment findings in the *TRO* and the D.C. Circuit's vacatur of certain unbundling rules:

> On the Effective Date of this Agreement, Qwest is no longer obligated to provide to CLEC certain Network Elements pursuant to Section 251 of the Act. Qwest will continue providing access to certain network 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 unbundling obligations are offered to CLEC.

Under this proposal, Covad could contend, for example, that it can obtain unbundled access to OCn loops, feeder subloops, signaling and other elements despite the FCC's fact-based findings in the *TRO* that CLECs are not impaired without access to these elements.[50]

In addition to these demands, in its proposed Section 9.1.1.7, Covad is seeking TELRIC ("total element long run incremental cost") pricing for the network elements it claims Qwest must provide under Section 271. While its proposed language suggests that Covad is seeking TELRIC pricing only on a temporary basis, Covad's filings in this proceeding and in other states reveal that Covad is actually requesting that the permanent prices to be set under Sections 201 and 202 for Section 271 elements be based on TELRIC.[51]

2. The Act Does Not Permit The Commission To Create Under State Law Unbundling Requirements That The FCC Rejected In The *TRO* Or That The D.C. Circuit Vacated In *USTA II*.

Under Section 251, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. As the Supreme Court made clear in the *Iowa Utilities Board* case, the Act does not authorize "blanket access to incumbents' networks."[52] Rather, Section

[50] In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundle these and other elements under section 251: ¶ 315 (OCn loops); ¶ 253 (feeder subloops); ¶ 324 (DS3 loops); ¶ 365 (extended dedicated interoffice transport and extended dark fiber); ¶¶ 388-89 (OCn and DS3 dedicated interoffice transport); ¶¶ 344-45 (signaling); ¶ 551 (call-related databases); ¶ 537 (packet switching); ¶ 273 (fiber to the home loops); ¶ 560 (operator service and directory assistance), and ¶ 451 (unbundled switching at a DS1 capacity).

[51] *See* Covad's Petition for Arbitration at Issue 2 (Covad's petition does not include page numbers)(advocating the use of "forward-looking, long-run incremental cost methodologies" for Section 271 elements and arguing that the FCC does not "forbid" TELRIC pricing for these elements).

[52] *Iowa Utilities Board*, 525 U.S. at 390.

251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]."[53] Section 251(d)(2), in turn, provides that unbundling may be required *only if the FCC determines* (A) that "access to such network elements as are proprietary in nature is necessary" and (B) that the failure to provide access to network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[54] The Supreme Court and D.C. Circuit have held that the Section 251(d)(2) requirements reflect Congress's decision to place a real upper bound on the level of unbundling regulators may order.[55]

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.[56] 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."[57] And 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.[58] *USTA II*'s clear holding is that the FCC, not state commissions, must make the impairment determination called for by Section 251(d)(3)(B) of the Act.

Iowa Utilities Board makes clear that the essential prerequisite for unbundling any given

---

[53] 47 U.S.C. § 251(c)(3).

[54] 47 U.S.C. § 251(d)(2).

[55] *See Iowa Utilities Board*, 525 U.S. at 390 ("We cannot avoid the conclusion that if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] has come up with, it would not have included §251(d)(2) in the statute at all."); *USTA* I, 290 F.3d at 427-28 (quoting *Iowa Utilities Board*'s findings regarding congressional intent and section 251(d)(2) requirements, and holding that unbundling rules must be limited given their costs in terms of discouraging investment and innovation).

[56] 47 U.S.C. § 251(d)(2).

[57] *Iowa Utilities Board*, 525 U.S. at 391-92.

element under Section 251 is a formal finding by the FCC that the Section 251(d)(2) "impairment" test is satisfied for that element. Simply put, if there has been no such FCC finding, the Act does not permit any regulator, federal or state, to require unbundling under Section 251. In the *TRO*, the FCC reaffirmed this:

> 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.
>
> ***
>
> If a decision pursuant to state law were to require unbundling of a network element for which the Commission has either found no impairment—and thus has found that unbundling that element would conflict with the limits of section 251(d)(2))—or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(c).[59]

Federal courts interpreting the Act have reached the same conclusion.[60] Indeed, in a decision issued just two weeks ago, the United States District Court of Michigan observed that in *USTA II*, the D.C. Circuit "rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations."[61] The court emphasized that while the Act permits states to adopt some "procompetition requirements," they cannot adopt any requirements that are inconsistent with the

---

[58] *See USTA II*, 359 F.3d at 568.

[59] *TRO* at ¶¶ 193, 195.

[60] *See Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (citing the above-quoted discussion in the *TRO* and stating that "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).

[61] *Michigan Bell Tel. Co. v. Lark*, Case no. 04-60128, slip op. at 13 (E.D. Mich. Jan. 6, 2005)(attached hereto as "Attachment E").

statute and FCC regulations. Specifically, the court held, a state commission "cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law."[62]

Covad's broad proposals for unbundling under state law reflect its erroneous view that the Commission has plenary authority under state law to order whatever unbundling it chooses. To support this argument, Covad cites various state law savings clauses contained in the Act. What Covad ignores is that these savings clauses preserve independent state authority *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. Section 251(d)(3), for example, protects only those state enactments that are "consistent with the requirements of this section" — which a state law unbundling order ignoring the Act's limits would clearly not be. Likewise, Sections 261(b) and (c) both protect only those state regulations that "are not inconsistent with the provisions of this part" of the Act, which includes Section 251(d)(2). Nor 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.[63]

Thus, these savings clauses do not preserve the authority of state commissions to adopt or enforce under state law unbundling requirements that have been rejected by the FCC or vacated in *USTA II*. Indeed, the Supreme Court has "decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law."[64] Congress has mandated the application of limiting principles in the determination of unbundling requirements that

[62] *Id.*

[63] *See* 47 U.S.C. § 251(d)(2).

reflect a balance of "the competing values at stake."[65] That balance would plainly be upset if a state commission could impose under state law unbundling requirements that have been found by the FCC to be inconsistent with the Act.

The limitations on state unbundling authority were recently recognized by the Oregon Commission in response to substantially the same arguments that Covad is presenting here. As that Commission correctly concluded, a state commission "may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been eliminated by the *TRO* or *USTA II*."[66] Yet, that is precisely what Covad is requesting this Commission to do through its proposed unbundling language. As both the Oregon Commission and the Washington ALJ in the Covad/Qwest arbitration concluded, any unbundling a state commission requires must be based upon a fact-specific impairment analysis required by Section 251(d). Here, Covad is requesting that the Commission require blanket unbundling without an impairment analysis and without providing any evidence that it would be impaired without the multitude of network elements it is seeking.[67]

In sum, the relevant question is not, as Covad presumes, whether sweeping unbundling obligations can be cobbled together out of state law, but rather whether any such obligations would be consistent with *Congress's* substantive limitations on the permissible level of unbundling, as

---

[64] *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000).

[65] *Id*. *See also Iowa Utils. Bd.*, 535 U.S. at 388.

[66] *In the Matter of the Investigation to Determine Whether Impairment Exists in Particular Markets if Local Circuit Switching is no longer available*, Oregon Docket UM-1100, Order Denying CLEC Motion at 6 (Oregon P.U.C. June 11, 2004). The Oregon Commission adopted the order issued by an Oregon administrative law judge.

[67] The clash between Covad's state law unbundling demands and the federal unbundling scheme is demonstrated sharply by Covad's language in section 9.3.1.1 that would require Qwest to unbundle feeder subloops. In the *TRO*, the FCC refused to give CLECs unbundled access to this network element, finding that such access would undermine the objective of Section 706 of the Act "to spur deployment of advanced telecommunications capability . . . ." *TRO* at ¶ 253. A state-imposed requirement to unbundle feeder subloops would plainly conflict with this FCC determination and would undermine the FCC's attempt to achieve a fundamental objective of the Act – promoting investment in advanced telecommunications facilities. This conflict would of course not be limited to feeder subloops, since Covad contends that its unbundling

authoritatively construed by the Supreme Court, the D.C. Circuit, and the FCC. Covad's proposals for broad unbundling under state law ignore these limitations and the permissible authority of state commissions to require unbundling.

3. The Commission Does Not Have The Ability To Make The Impairment Determinations Required By The Act.

Even if the Commission wanted to step into the FCC's shoes and make the impairment determinations required by the Act, it could not as a practical matter do so. This is so because the FCC has not sufficiently defined the impairment standard to allow such determinations.

In *USTA II*, the D.C. Circuit decided not to review the Commission's impairment standard since the standard "finds concrete meaning only in its application, and only in that context is it readily justiciable."[68] However, the court nonetheless noted significant deficiencies in the standard. First, it criticized the standard for being so open-ended that it imposed no meaningful constraints on unbundling.[69] Second, court noted that the standard failed to address impairment in markets where state regulation holds rates below historic costs. Third, in making the impairment determination, the FCC is required to balance the advantages of unbundling against the costs, both in terms of spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.[70] *USTA II* makes clear that the FCC's impairment standard does not strike this balance. It is a "looser concept of impairment" in which the costs of unbundling are "brought into the analysis under §251(d)(2)'s 'at a minimum' language."[71] Thus, not only is the impairment definition open-ended, it is

---

language reaches other network elements for which the FCC specifically rejected CLEC unbundling requests.

[68] *USTA II*, 359 F.3d at 572.

[69] *Id.* (emphasis added).

[70] *Id.* at 563.

[71] *Id.* at 572.

incomplete in that it fails to capture all of the considerations that must be taken into account under Section 251(d)(2) before unbundling can be required under federal or state law.

The Commission therefore has no legitimate way to determine which, if any, network elements Qwest would be required to provide under Covad's state law unbundling proposals. Adding to this uncertainty, with the limited exception noted above involving feeder subloops, Covad's proposed ICA language fails to identify the specific network elements that would be unbundled under state law. Even if there were a lawful impairment standard for the Commission to apply, therefore, there would be no meaningful way to apply the standard. In this sense, Covad's proposal lacks the "concrete meaning" that, in the words of the D.C. Circuit, is necessary to make an impairment standard "readily justiciable."

4. State Commissions Do Not Have Authority To Require Unbundling Under Section 271.

Covad's unbundling proposals also assume incorrectly that state commissions have authority to impose binding unbundling obligations under Section 271. Section 271(d)(3) 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 upon which Covad purports to base its requests.[72] State commissions have only a non-substantive, "consulting" role in that determination.[73] As one court has explained, a state commission has a fundamentally different role in implementing Section 271 than it does in implementing Sections 251 and 252:

> Sections 251 and 252 contemplate state commissions may take affirmative action towards the goals of those Sections, *while Section 271 does not contemplate substantive conduct on the part of state commissions*. Thus, a "savings clause" is not necessary for Section 271

[72] 47 U.S.C. 271(d)(3).

[73] 47 U.S.C. 271(d)(2)(B).

because the state commissions' role is investigatory and consulting, not substantive, in nature.[74]

Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271,[75] likewise provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.[76] The FCC has thus 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)."[77]

The absence of any state commission decision-making authority under Section 271 also is confirmed by the fundamental principle that a state administrative agency has no role in the administration of federal law, absent express authorization by Congress. That is so even if the federal agency charged by Congress with the law's administration attempts to delegate its responsibility to the state agency.[78] *A fortiori*, where (as here) there has been no delegation by the federal agency, a state agency has no authority to issue binding orders pursuant to federal law.[79]

---

[74] *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) (emphasis added).

[75] *TRO* at ¶¶ 656, 662.

[76] *See id*; 47 U.S.C. 201(b) (authorizing the FCC to prescribe rules and regulations to carry out the Act's provisions); 205 (authorizing FCC investigation of rates for services, etc. required by the Act); 207 (authorizing FCC and federal courts to adjudicate complaints seeking damages for violations of the Act); 208(a) (authorizing FCC to adjudicate complaints alleging violations of the Act).

[77] *TRO* at ¶ 664.

[78] *USTA II*, 359 F.3d at 565-68.

[79] *See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (state commission not authorized by section 271 to impose binding obligations). *See also TRO* at ¶¶ 186-87 ("states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations").

5. Covad's Proposal To Use TELRIC Rates For Section 271 Elements Is Unlawful.

Under Covad's proposed Section 9.1.1.7 of the ICA, existing TELRIC rates would apply to network elements that Qwest provides pursuant to Section 271 until new rates are established in accordance with "Sections 201 and 202 of the Act or applicable state law." In addition, it is clear from Covad's arbitration petition and its filings in other states that Covad is ultimately seeking permanent TELRIC-based prices for Section 271 elements.[80]

The absence of state decision-making authority under Sections 201, 202, and 271 establishes that state commissions are without authority to determine the prices that apply to network elements provided under Section 271. Thus, as noted above, the FCC ruled in the *TRO* that it will determine the lawfulness of rates that BOCs charge for Section 271 elements in connection with applications and enforcement proceedings brought under that section.

Significantly, the FCC recently rejected the argument that the pricing authority granted to state commissions by Section 252(c)(2) to set rates for UNEs provided under Section 251 gives commissions authority to set rates for Section 271 elements. In its opposition to the petitions for a *writ of certiorari* filed with the Supreme Court in connection with *USTA II*, the FCC addressed the contention that Section 252 gives state commissions exclusive authority to set rates for network elements. It stated that the contention "rests on a flawed legal premise,"[81] explaining that Section 252 limits the pricing authority of state commissions to network elements provided under Section 251(c)(3):

---

[80] *See* Covad's Petition for Arbitration at Issue 2.

[81] Brief for the Federal Respondents in Opposition to Petitions for a Writ of Certiorari, *National Association of Regulatory Utility Commissioners v. United States Telecom Association*, Supreme Court Nos. 04-12, 04-15, and 04-18, at 23 (filed September 2004).

> Section 252(c)(2) directs state commissions to "establish any rates for * * * network elements *according to subsection (d)*." 47 U.S.C. 252(c)(2) (emphasis added). Section 252(d) specifies that States set "the just and reasonable rate for network elements" *only* "for purposes of [47 U.S.C. 251(c)(3)]." 47 U.S.C. 252(d)(1).[82]

Accordingly, the FCC emphasized, "[t]he statute makes no mention of a state role in setting rates for facilities or services that are provided by Bell companies to comply with Section 271 and are *not* governed by Section 251(c)(3)."[83]

In requesting that the Commission adopt its rate proposal, Covad is therefore asking the Commission to exercise authority it does not have and that rests exclusively with the FCC. In addition, Covad's demand for even the temporary application of TELRIC pricing to Section 271 elements violates the FCC's ruling in the *TRO* that TELRIC pricing does not apply to these elements. 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 not be unjust, unreasonable, or unreasonably discriminatory.[84] In so ruling, the FCC confirmed, consistent with its prior rulings in Section 271 orders, that TELRIC pricing does not apply to these network elements.[85] 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" and instead stating that "we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment."[86]

---

[82] *Id.* (emphasis in original).

[83] *Id.* (emphasis in original). In the same brief, the FCC commented that the *TRO* does not express an opinion as to the precise role of states in connection with section 271 pricing. *Id.*

[84] *TRO* at ¶¶ 656-64.

[85] *Id.*

[86] *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

C. Issue 3: Commingling (Section 4.0 and Definition of "Section 251(c)(3) UNE," Section 9.1.1.1): Covad's Proposed Language Would Improperly Require Qwest to Commingle Network Elements Provided Under Section 271.

Covad attempts to achieve the impermissible result of requiring Qwest to commingle Section 271 elements by defining commingling in ICA 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* . . . ." (emphasis added). Covad's reference to facilities obtained "pursuant to any 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 properly 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 . . . ." Because only Qwest's definition of "Unbundled Network Element" complies with the *TRO* by expressly excluding elements provided under Section 271, the Commission should resolve this issue by adopting Qwest's proposal.

The *TRO* permits "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."[87] The FCC defines commingling as "the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the

[87] *TRO* at ¶ 579; *see also* 47 C.F.R. § 51.309(e) and (f).

Act, or the combining of a UNE or UNE combination with one or more such wholesale services."[88]

The FCC's ruling relating to commingling must be harmonized with its very specific ruling that BOCs are not required to combine network elements provided under section 271. While the FCC ruled in the *TRO* that BOCs have an independent obligation under Section 271 (independent of Section 251) to provide access to loops, transport, switching, and signaling, it also ruled that a BOC is not required to combine those elements when it provides them under that section of the Act. The FCC explained that checklist items 4, 5, 6 and 10 of section 271(c)(2)(B) -- the checklist items that impose the independent unbundling obligation -- do not include any cross-reference to the combination requirement set forth in section 251(c)(3).[89] If Congress had intended any Section 251 obligations to apply to those section 271 elements, the FCC emphasized, "it would have explicitly done so," just as it did with checklist item 2.[90] Thus, the FCC ruled 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."[91] In *USTA II*, the D.C. Circuit expressly upheld this limitation on ILEC combining obligations.[92]

Significantly, the FCC's rules that address commingling are included within its rules relating to combinations and the FCC's rules define "commingling" as including the act of "combining" network elements:

> Commingling means the connecting, attaching, or otherwise linking of an unbundled network element or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, *or the combining of an unbundled network element*, or a combination of unbundled network elements, with one or more such

[88] *TRO* at ¶ 579; *see also* 47 C.F.R. § 51.5 (definition of "commingling").

[89] *TRO* at ¶¶ 654, 656 & n.1990.

[90] *Id.* at ¶ 654.

[91] *Id.* at n. 1990.

[92] *USTA II*, 359 F.3d at 589-90.

facilities or services.[93]

As is clear from this definition, there is no difference between "combining" and "commingling" network elements -- they are one and the same. They are simply different labels applied to the same physical act of connecting, attaching, linking, or combining network elements with other facilities or services. In other words, to commingle is to combine and vice versa, and the *TRO* rulings relating to combining apply with equal force to commingling. Accordingly, as the Washington ALJ concluded, the FCC has made it clear that section 271 elements are not subject to commingling.[94]

Covad nonetheless asserts that section 271 elements are "wholesale services" and, as such, are within the BOCs' commingling obligations set forth in paragraph 579 of the *TRO*. The flaw in this interpretation, however, is that it reads out of the *TRO* the FCC's ruling that BOCs are not required to combine section 271 elements.[95] To preserve the effect of that ruling, it is necessary to interpret paragraph 579 of the *TRO* consistently with the FCC's and the D.C. Circuit's (in *USTA II*) very express holdings that BOCs are not required to combine section 271 elements. Covad never addresses the inconsistency between requiring Qwest to commingle section 271 elements and the rulings in *USTA II* and the *TRO* removing those elements from BOC's combining obligations. Moreover, Covad's interpretation of paragraph 579 is inconsistent with the Act itself and in particular, with the absence of any cross-references to section 251's combination requirement in checklist items 4, 5, 6, and 10 of

[93] *See* 47 U.S.C. § 51.5 (definition of "commingling") (Emphasis added); *see also TRO* at ¶ 575 (defining commingling as meaning to "connect, combine, or otherwise attach….").

[94] Washington Arbitration Report at ¶ 68. The Colorado Commission and the Minnesota ALJ each ruled for Covad on this issue, determining that Qwest is required to commingle section 271 elements. Neither decision addressed the inconsistency between that ruling and the rulings in the *TRO* and *USTA II* establishing that BOCs are not required to combine section 271 elements. Qwest has challenged the ALJ's ruling in exceptions filed with the Minnesota Commission. The Colorado Commission has denied Qwest's rehearing motion relating to this issue.

[95] *See USTA II*, 359 F.3d at 589-90.

Section 271(c)(2)(B).[96]

Any claim by Covad that "commingling" of Section 271 elements is permissible while "combining" of them is not is refuted by the FCC's *TRO Errata*. In the original version of the *TRO*, paragraph 584 instructed that BOCs' commingling obligations included permitting the commingling of UNEs and UNE combinations with network elements provided under Section 271. However, in the *Errata*, the FCC removed this language, thereby making that section of the Order consistent with its ruling that BOCs are not required to combine Section 271 elements and eliminating any requirement for ILECs to commingle those elements.[97]

Finally, while Covad claims incorrectly that the FCC has ruled only that BOCs are not required to combine Section 271 elements with other Section 271 elements, even if that interpretation were correct, Covad's own ICA language would violate Covad's understanding of the law. Specifically, as discussed, Covad's definition of "UNE" in Section 4.0 of the ICA includes Section 271 elements. Further, agreed language of the ICA defines "UNE Combinations" as "a combination of two (2) or more Unbundled Network Elements that were or were not previously combined or connected in Qwest's network as required by the FCC, the Commission or this Agreement." Under this language, Qwest would be required to combine Section 271 elements with other Section 271 elements in violation of the FCC's plainly stated ruling that it "decline[s] to require BOCs, pursuant to section 271,

[96] There is no merit to Covad's contention that the *TRO* establishes only that BOCs are not required to combine section 271 elements with other section 271 elements. In footnote 1990 of the *TRO*, the FCC stated broadly that ILECs do not have "to combine network elements that no longer are required to be unbundled under section 251." As reflected by this language, the FCC did not limit this ruling to combining section 271 elements with other section 271 elements. Instead, it ruled that BOCs do not have to combine section 271 elements at all, which is consistent with the absence of any cross-references to the section 251 combining requirement in checklist items. Thus, there is no obligation to combine section 271 elements with 251 elements or with other section 271 elements.

[97] In addition, as Qwest demonstrates above in connection with Issue 2, state commissions do not have authority to impose terms and conditions relating to section 271 network elements. That absence of authority prohibits the Commission from imposing ICA language that would require Qwest to commingle elements provided under Section 271 with Section 251 elements and wholesale services.

to combine network elements that no longer are required to be unbundled under section 251."[98]

This improper result highlights the inappropriateness of including Section 271 elements in the ICA's definition of "UNE." Accordingly, the Commission should reject Covad's definition of "UNE," confirm that "UNEs" do not include Section 271 elements, and clarify that Qwest has no obligation to combine or commingle these elements.

D. Issue 5: Channel Regeneration

1. Under 47 C.F.R. 51.323(h), Qwest Has No Obligation To Provision CLEC-to-CLEC Connections, And Therefore Has No Obligation To Offer Channel Regeneration On A CLEC-to-CLEC Connection Free Of Charge.

Issue 5 involves Covad's proposal to require Qwest to provide channel regeneration for CLEC-to-CLEC connections free of charge.[99] Contrary to Covad's assertion, under the FCC's rules, Qwest is not required to provision a CLEC-to-CLEC connection -- nor, therefore, regeneration -- if it permits

---

[98] *TRO* at ¶ 656 & n.1990.

[99] The parties have arbitrated certain provisions of their proposed interconnection agreement in several of Qwest's regional states. Through the course of the arbitration proceedings Covad has amended its proposal for the sections involving CLEC to CLEC regeneration. Specifically, Covad has presented revised language for the following sections:

> 8.2.1.23.1.4 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. Depending on the distance parameters of the combination, regeneration may be required. Qwest shall assess charges for CLEC to CLEC regeneration, if any, on the same terms and conditions, and at the same rates as ILEC to CLEC regeneration.

> 8.3.1.9 Channel Regeneration Charge. Required when the distance from CLEC's leased physical space (for Caged or Cageless Physical Collocation) or from the collocated equipment (for Virtual Collocation) to the Qwest network ("ILEC to CLEC regeneration"), to CLEC's non-contiguous Collocations space ("CLEC to CLEC regeneration"), or to the Collocation space of another CLEC ("CLEC to CLEC regeneration") is of sufficient length to require regeneration based on the ANSI Standard for cable distance limitations. Channel Regeneration Charges shall not apply until the Commission approves a wholesale Channel Regeneration Charge. After approval of such charge, Channel Regeneration Charges shall be assessed for ILEC to CLEC and CLEC to CLEC regeneration on the same terms and conditions, and at the same rates. If CLEC requests Channel Regeneration in spite of the fact that it is no required to meet ANSI standards, Qwest will provide such regeneration, and CLEC will pay the Channel Regneration Charge described herein.

The underlined language is new and is objectionable to Qwest. The net effect of the newly proposed language is that Covad would receive regeneration on a CLEC to CLEC connection free of charge, because Qwest has agreed to not charge for regeneration on an ILEC to CLEC connection.

the interconnecting CLECs to perform the connection themselves.[100] Since Qwest permits collocating telecommunications carriers to interconnect with each other -- or with a single CLEC's non-adjacent collocation location -- in its central offices, any FCC requirement that Qwest provide such connection is eliminated. Absent the obligation to provide the connection between CLECs, Qwest need not provide regeneration for the connection at any price, and certainly not free of charge. While Qwest 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 Qwest's FCC 1 Access Tariff.[101]

In its *Fourth Advanced Services Order*, the FCC discussed CLEC-to-CLEC connections and amended 47 C.F.R. 51.323(h) to list only those situations in which an ILEC has an obligation to provide a connection between the collocated equipment of two CLECs.[102] Specifically, 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[103]; or 2) under Section 201 when the requesting carrier submits certification that more than 10 percent of the traffic will be interstate.[104] Because Qwest permits CLECs to connect to each other outside their collocation space and thereby removes itself from the CLEC-to-CLEC relationship, it has no FCC-imposed obligation to provide a CLEC-to-

[100] *See* 47 C.F.R. § 51.323(h).

[101] *See* Ex. Qwest 4 (Norman Direct) at 7:10-18; *See also*, Proposed Interconnection Agreement at § 8.2.1.23. For purposes of this brief, any reference to a CLEC-to-CLEC connection shall also include the scenario where a CLEC is connecting to its own non-adjacent collocation location.

[102] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order (*Fourth Advanced Services Order*), CC Docket No. 98-147, (FCC 01-204) Rel. August 8, 2001.

[103] Pursuant to 47 C.F.R. § 51.323(h)(1), an ILEC is *not* required to provide a connection if ". . . the incumbent LEC permits the collocating parties to provide the requested connection for themselves . . . ."

[104] Pursuant to 47 C.F.R. § 51.323(h)(2), "[a]n incumbent LEC is not required to provide a connection between the equipment in the collocated space of two or more telecommunications carriers if the connection is requested pursuant to

CLEC connection, much less regeneration for a CLEC-to-CLEC connection. The absence of that obligation is established by the express language of Rule 51.323(h)(1), which specifically eliminates the requirement for an ILEC to provide a connection between two CLECs' networks where the ILEC permits the CLECs to establish that connection:

> An incumbent LEC shall provide . . . 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. (Emphasis added).

As stated above, despite the fact that Qwest permits CLECs to provision their own connections, Qwest has agreed voluntarily – not because of any collocation obligation imposed by the FCC – to provision the connection if requested by the CLEC.[105] Thus, the specific FCC rules that govern regeneration whenever the ILEC does *not* permit the CLEC to provide its own CLEC-to-CLEC cross connection, no matter how interpreted, have no applicability to Qwest because of Qwest's decision to permit CLECs to provision their own connection.

The FCC's rules, cited above, were developed for the sole purpose of overseeing those circumstances where the ILEC does not permit the CLECs to provision CLEC-to-CLEC connections themselves and are plainly inapplicable where, as here, an ILEC permits such CLEC provisioning. Because of the inapplicability of the FCC rules, the binding FCC tariff relating to regeneration governs in these circumstances.

---

section 201 of the Act . . . ."

[105] *See* Qwest Ex. 4 (Norman Direct) 7:10-14.

2. **Covad's Reliance On The FCC's *Second Report and Order*[106] Is Misplaced.**

Covad relies upon the FCC's *Second Report and Order* to support its position that Qwest should provide CLEC-to CLEC regeneration free of charge.[107] This reliance stems from the proposition that regeneration should rarely be necessary if Qwest efficiently assigns collocation space[108], and therefore, if regeneration is required on a CLEC-to-CLEC connection, Qwest should be required to provide such regeneration on the same terms as on a Qwest to CLEC connection.[109] Covad's conclusion that the same legal principles apply to a CLEC-to-CLEC connection as apply to an ILEC-to-CLEC ignores that the *Second Report and Order* does not address CLEC-to-CLEC cross-connections, and, therefore, is inapplicable in this situation.[110] Moreover, 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 CLEC[111] ignores the reality that CLECs seek collocation space at different times. This fact means that it often is not possible to place two CLECs immediately adjacent to each other, since other CLECs that have previously collocated already occupy the space that would be needed for such adjacent collocation.

Covad's idealistic vision of how collocation can be implemented ignores the additional reality that CLECs often enter into business relationships with each other after one or both of the CLECs has established collocation space in a Qwest central office. Thus, there are multiple factors that prevent

---

[106] *In the Matter of Local Exchange Carrier's 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) (*Second Report and Order).*

[107] *See* Covad's Petition at Issue 6.

[108] *See* Covad's Petition at Issue 6.

[109] *See* Covad's Petition at Issue 6. There is no dispute that Qwest has chosen not to charge CLECs for regeneration if such is required on a connection between the CLEC and Qwest. *See,* Ex. Qwest 4 (Norman Direct) at 4:1-7.

[110] Second Report and Order at ¶¶ 117-118.

[111] *See* Covad Ex. 3 (Zulevic Direct) at 9-10.

Qwest from ultimately determining where a CLEC will locate its collocation space.[112] Moreover, in practice, Qwest provides options to a CLEC that requests collocation space, and if that CLEC is dissatisfied with its space assignment, the CLEC may request a walk-through of a Qwest central office to determine if there is a more desirable collocation location available.[113] Therefore, Covad's suggestion that Qwest ultimately controls where a CLEC is collocated and therefore controls whether regeneration will be required is wrong.

Rather than the *Second Report and Order,* 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.[114] As mentioned above, Qwest's practice of permitting CLECs to perform their own connections to an interconnecting CLEC eliminates any FCC requirement that Qwest would have to provide a CLEC-to-CLEC connection, thereby also eliminating any justification for Qwest to provide CLEC-to-CLEC regeneration free of charge.[115]

3. CLECs Do Not Have To Rely On Qwest To Provide Regeneration And May Provision Their Own CLEC-to-CLEC Connections And Regeneration.

As stated in Section 8.2.1.23 of the ICA, if a CLEC so chooses, it can either provision its own CLEC-to-CLEC connection, *e.g.,* a direct connect, and regeneration if such is required, or a CLEC can request that Qwest provision such connection and if regeneration is required, can order such as a

[112] *See* Ex. Qwest 4R-C (Norman Rebuttal) at 2:3-22.

[113] *See* Ex. Qwest 4R (Norman Rebuttal) at 3:1-11.

[114] Fourth Advanced Services Order at ¶¶ 55-84.

[115] Covad does not dispute the fact that Qwest permits CLECs to provide cross-connections for themselves and that in doing so, Covad would bypass the Qwest network entirely. *See* Hearing Tr. Vol. 1, at 291:5-7 and 292:5-9.

finished service, *e.g.*, the EICT product.[116] To the extent regeneration is required and a CLEC has chosen to provision its own connection, a CLEC may regenerate its own signal by placing a repeater bay in its collocation space, or as is discussed below, may regenerate from a mid-span point.[117] A central purpose of the 1996 Act is to encourage competitors to expand their facilities and to develop their own networks, thereby reducing reliance upon the ILECs.[118] The FCC has continued to encourage such activity as evidenced by its rules discussed herein, where ILECs who permit CLECs to provision their own connections are relieved of the responsibility of providing the connection. In addition, the relationship between CLECs, by definition, does not include Qwest, and it is the CLEC who has the information necessary to design circuits between it and its partner CLEC and who would make the business decision as to whether to provision its own connection or to request Qwest to do so.[119] Therefore, Qwest's only involvement occurs upon request by the CLEC, which is consistent with Qwest's tariff filings and product offerings.

Covad's claim that self-provisioning of regeneration would be impossible is simply wrong and unsupported by the record. The undisputed evidence is that CLECs have the ability to boost a signal to meet ANSI standards, either from the CLEC's collocation space or from a mid-span point.[120] In fact, Covad's witness Mike Zulevic agreed in his testimony that "Qwest has an obligation to allow [Covad] to collocate any equipment that is approved by the FCC, which would include regeneration

---

[116] *See* Hearing Tr., Vol. 2, at 333:19-25 and 334:22 – 335:7.

[117] *See* Ex. Qwest 4R (Norman Rebuttal) at 8:6-8.

[118] As the FCC has observed, "[t]hrough its experience over the last five years in implementing the 1996 Act, the Commission has learned that only by encouraging competitive LECs ["CLECs"] to build their own facilities or migrate toward facilities-based entry will real and long-lasting competition take root in the local market." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd 15435, 15437 ¶ 4 (2001) ("*FCC Fourth Report*"); *see also TELRIC NPRM* ¶ 3 (observing that promotion of facilities-based competition is one of the "central purposes of the Act").

[119] *See* Ex. Qwest 4R-C (Norman Rebuttal) at 7:3-8.

[120] *See,* Ex. Qwest 4R-C (Norman Rebuttal) at 8:1-10.

equipment."[121] Thus, Covad's only issue with provisioning its own connection where regeneration is required is one of economics, not technical infeasibility.[122]

There is no dispute that the need for a signal boost is rare.[123] If a CLEC determines that a mid-span boost is necessary or desirable, CLECs may order a collocation space and self-provision the regeneration.[124] The alternative is for the CLEC to order the EICT product from Qwest's FCC 1 Access Tariff. Qwest witness Michael Norman testified regarding the minimal cost to Covad of ordering the EICT product from the FCC 1 Access Tariff Section 21.5.2.[125] Mr. Zulevic's statements regarding Covad's perceived cost are not only without proper foundation, but also cannot alter the fact that the FCC considered CLEC to CLEC cross-connections and explicitly determined that an ILEC that opens its central office doors to CLECs and permits them to provision their own CLEC cross-connections is not obligated to provide a connection, much less regeneration.[126]

For the reasons stated above, Qwest's proposed language is consistent with the FCC's directives and should be adopted here.

E. Issue 10: Payment Due Date; Timing For Discontinuing Orders; And Timing For Disconnecting Services.

1. Payment Due Date.

Utah is the fourth state to arbitrate this dispute between Qwest and Covad regarding the payment due date provision of the parties interconnection agreement. The three states that previously heard Covad's arguments on this issue, Colorado, Washington and Minnesota, all found against

[121] Hearing Tr., Vol. 2, at 294:24 – 295:1.

[122] Hearing Tr., Vol. 2, at 293:19-20.

[123] *See* Ex. Covad 3(Zulevic Direct) 5:112-116.

[124] *See* Ex. Qwest 4R-C (Norman Rebuttal) 8:8-10.

[125] Hearing Tr., Vol. 2, at 319:2-19.

Covad, and in favor of Qwest.[127] Perhaps the Minnesota Administrative Law Judge described the issue best when she stated: "The provision concerning payment due date is a true cash flow issue… and … 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."[128] In Utah, the questions on this issue from the Division of Public Utilities ("DPU"), and Covad's answers to those questions, were telling. More specifically, the DPU asked Covad a few very pointed questions and Covad responded as follows:

Q. So you said it's evolving. It's only really evolving in how Covad is presenting it, but Qwest's position hasn't changed?

A. That's right. Qwest has stuck with, for example on the payment due date, the 30 days. . . .

Q. And for the additional interval, is Covad paying something for that?

A. You mean are –

Q. I assume there's a cost to Qwest to get their money 15 days later.

A. We wouldn't be paying a premium for those amounts because they would not – if Covad's proposal is accepted, because they would not be considered past due until the 45th day. . . .

* * *

Q. I got the impression from looking at the issues list that the 30 days is the time interval that's included in the SGAT; is that correct?

---

[126] *Fourth Advanced Services Order* at ¶¶ 55-84.

[127] *See,* **Exhibit A,** Colorado Arbitration Order at ¶43 (Covad has not challenged this decision on this issue)*;* **Exhibit B,** Minnesota Arbitration Order at ¶95 (this decision is under review by the Minnesota Commission at the request of Covad); and **Exhibit C,** Washington Arbitration Decision at ¶104 (this decision is under review by the Washington Commission at the request of Covad).

[128] *See* **Exhibit B** Minnesota Arbitration Order at ¶ 95. In her Report, the Minnesota Administrative Law Judge ("ALJ") recommended adopting Qwest's 30 day payment language.

A. Yes.[129]

In fact, the Utah Statement of Generally Available Terms ("SGAT") does contain the same 30 day payment period that Qwest is advocating for this agreement with Covad. This SGAT provision was established by Qwest, and approved by the DPU, as part of the extensive §271 proceedings. Furthermore, billing and payment issues in general, and the 30 day time frame for payment of invoices specifically, were discussed at length in the Section 271 proceedings, in which Covad actively participated. In the workshops, the parties balanced the needs of the billed and billing parties and reached consensus on language that addresses each of the issues Covad now disputes. Qwest's proposed language on these issues is virtually identical to that consensus language, which now appears in the Utah SGAT and the SGATs in 13 other states. Nonetheless, Covad now seeks to (1) extend the payment due date by 50 percent, from 30 to 45 days with certain exceptions, (2) extend the amount of time Qwest must wait before it discontinues processing orders, and (3) extend the number of days Qwest must wait before disconnecting service.[130]

Again, Covad has arbitrated this same issue regarding an extension of the payment due date in three other states. In each of those cases, the hearing examiner determined that Qwest's proposal was commercially reasonable and/or standard in the industry and should be adopted.[131] This case is no different, and the result should be no different. Through the process of arbitrating these issues in the other states, Covad has proposed language that is different than that contained in its Petition. Specifically, Covad proposes the following:

---

[129] *See* Hearing Tr., Vol. 1, at 201:9 to 202:23.

[130] *See* Ex. Qwest 2-C (Easton Direct) at 4:19 – 5:2; Ex. Qwest 2R-C (Easton Rebuttal) at 20:14 – 21:15.

[131] *See* **Exhibit A**, Colorado Arbitration Order at ¶¶ 25 and 43;**Exhibit B**, Minnesota Arbitration Order at ¶95; and **Exhibit C,** Washington Arbitration Order at ¶¶ 100 and 104.

> 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.

This change in Covad's language does not alter the flawed nature of its proposal. Qwest's proposed 30-day payment period is commercially reasonable, is the industry standard, and balances a CLEC's need for sufficient time to analyze monthly bills with Qwest's right to timely compensation for services rendered. No new facts justify these radical departures from the consensus time frames set during the 271 process that are standard, balanced and commercially reasonable, and that are in numerous ICAs today. Qwest recognizes that the purpose of a negotiated interconnection agreement is to permit the parties to develop contract provisions unique to their individual needs. However, this particular provision was recently reviewed, analyzed and debated at length and a consensus reached by industry participants and regulators in each of Qwest's 14 states during the 271 dockets. Absent some compelling evidence presented by Covad in this docket, of which there was none, there is no reason to alter that which is the industry norm.

It is important to note that although the language in the agreement appears to apply to both parties, Covad does not provide service or issue any bills to Qwest.[132] Because Covad has no interest

[132] *See* Ex. Qwest 2-C (Easton Direct) at 3:14 – 4:7.

in obtaining payment for services, its view of the disputed payment issues is not tempered by any sense of balance or reciprocity.[133] Furthermore, Covad's claim that it has a good payment history with Qwest does not support extending the payment time frames, because not only will Covad's interconnection agreement be available for opt-in by other CLECs, but past payment performance does not necessarily indicate future payment performance.[134] Thus, Covad's proposed extended time frames are at odds with commercially reasonable practice, unsupported by the record, and should be rejected.

Moreover, Covad's new proposal which includes "Exceptions" to the 30 day payment due date is unworkable from a systems and administrative standpoint.[135] Covad is now proposing that some bills would have a 45 day due date and others a 30 day due date depending upon whether certain items appear on the bill. The necessary system changes implementing this language would not only require a costly programming effort but would require billing system logic different from that used by all other Qwest CLEC customers. Furthermore, such a result would be challenging for Covad to implement as its witness, Megan Doberneck, admitted during the Colorado proceeding that using a 45 day payment period for some products and a 30 day payment period for other products would be difficult.[136]

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.[137] This means that the billing systems must have the capability of determining when a CLEC orders a new product, the capability to

---

[133] *See* Ex. Qwest 2-C (Easton Direct) at 3:14 – 4:7.

[134] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 23:15 -24:22.

[135] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 2:10-16.

[136] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 3:12-18, *citing* Covad Witness, Megan Doberneck's, testimony before the Colorado Public Utilities Commission.

[137] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 3:1-11.

treat bills with the new service on them differently, and the capability to turn off the exception treatment at the end of 12 months.

This proposed language also begs the question of what constitutes a new product. For example, if a CLEC had previously been ordering 2-wire loaded loops and at some point in the future ordered a new 2-wire unloaded loop, it is unclear from Covad's proposed language as to whether this would be considered a new product even though there is no difference from a bill presentation and billing validation perspective.[138] Disputes regarding whether a product is a new product would create further confusion for both Qwest and Covad and would require unnecessary effort on the part of both parties to resolve such confusion. Furthermore, since a bill would contain products subject to both a 30 and 45 day payment requirement, a significant degree of manual effort would be required by both Covad and Qwest to determine how much of the bill was due on the 30th day and how much was due on the 45th day. Add to the mix the possibility of disputing charges for both the 30 and 45 day services, and it becomes reasonable to expect that both Qwest and Covad would spend an inordinate amount of time trying to figure out what was due, whereas the time could be better spent validating the bill.

Covad claims that analyzing bills is complex and time-consuming, and therefore, it requires an additional 15 days for review. This position rings hollow because these realities existed when the parties reached consensus on the 30-day payment period in the 271 workshops,[139] and existed in April when Covad signed the Commercial Line Sharing Agreement with Qwest.[140] Further, the vast majority of bills Covad receives from Qwest regionally are in electronic format, allowing for easy mechanized

[138] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 3:7-11.

[139] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 5:24 – 6:16.

analysis. As for those bills that are only received in paper copy, they comprise a minute percentage of the total bills.[141] They become even more inconsequential when looking at the Utah specific numbers.[142]

The 30-day period proposed by Qwest balances Covad's need for sufficient time to analyze monthly bills and issue payments with Qwest's right to receive timely compensation. This same 30-day period is specified in Qwest's FCC and Utah access tariffs and in the current Qwest-Covad ICA (in effect since early 1999).[143] Further, seven carriers have opted into the Utah SGAT, agreeing to the payment language that Covad challenges here[144]; in fact, AT&T recently agreed to this language in its new interconnection agreement in Utah,[145] and Covad agreed to a 30-day payment term in its Commercial Line Sharing Agreement entered into with Qwest in April of this year.[146] Perhaps most telling, Covad requires *its customers* to pay its invoices in 30 days.[147] Covad serves its customers through services it purchases from Qwest. Hence, even as Covad receives payment from its own customers in 30 days for services that include services provided by Qwest, Covad seeks to extend by 50% the amount of time when Covad itself must pay Qwest for these services. Covad's proposed extension is simply a bald attempt to delay paying for its purchases and to require Qwest to extend interest-free loans to Covad. In short, Covad seeks to use the float of funds for its own purposes.

Covad argues that it requires more time to pay its bills to Qwest because it is in the process of

---

[140] *See* Ex. Qwest 2-C (Easton Direct) at 6:13 – 7:2.

[141] *See* Ex. Qwest 2-C (Easton Direct) at 9:10 – 10:4; *See* also, Ex.Qwest 2R-C (Easton Rebuttal) at 7:16 – 8:9.

[142] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 8:10-14; Hearing Tr., Vol. 1, at 185:5 – 186:5.

[143] *See* Ex. Qwest 2-C (Easton Direct) at 5:3-11.

[144] *See* Ex. Qwest 2-C (Easton Direct) at 8:19-21.

[145] *See* Ex. Qwest 2-C (Easton Direct) at 8:16-17.

[146] *See* Ex. Qwest 2-C (Easton Direct) at 6:13 – 7:2.

modifying its business strategy by partnering with other CLECs to provide line splitting and loop splitting services. This change of direction by Covad does not justify imposing *on Qwest* the additional risk the cost of deferred payments.[148] Covad and its business partners will have no incentive to adopt efficient billing procedures if they are allowed to defer payment and shift the business costs and risks of non-payment to Qwest.[149] Covad provides no justification for requiring Qwest to incur increased cost and risk as a result of a potential change in Covad's business model. That Covad's change in strategy may have been prompted by developments in federal regulatory law does not justify shifting the brunt of Covad's new partnering arrangements to Qwest. Further, while such partnering arrangements may be new to Covad, they are not new in the industry. CLECs are currently ordering line-splitting products from Qwest -- which CLECs offer through the very same partnering arrangements Covad now anticipates -- pursuant to agreements that provide for the industry-standard 30-day payment period, not the 45-day period Covad proposes.[150]

(a) Covad's Claim That Qwest's Bills Are Deficient Because They Lack A Circuit ID In Certain Circumstances Does Not Support A Longer Payment Period.

Covad maintains that it requires additional days to pay its bills to Qwest because Qwest's bills are deficient. As an initial matter, during Qwest's bid for Section 271 approval, the FCC extensively reviewed Qwest's wholesale billing processes and concluded that Qwest's processes and its bills satisfy the checklist requirement.[151] The FCC stated:

---

[147] *See* Ex. Qwest 2-C (Easton Direct) at 12:15 – 13:2.

[148] *See* Ex. Qwest 2-C (Easton Direct) at 11:14 – 12:2.

[149] *See* Ex. Qwest 2-C (Easton Direct) at 12:5-8.

[150] *See* Ex. Qwest 2-C (Easton Direct) at 12:9-14.

[151] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 20:7-13.

> Consistent with the determinations of the commissions of the nine application states, we find that Qwest provides nondiscriminatory access to its billing functions. As discussed below, Qwest offers competing carriers access to a set of billing systems that are the same systems Qwest uses for its own retail operations. In combination, these billing systems provide all the information, in an appropriate format, that is necessary for competing carriers to have a meaningful opportunity to compete. Qwest's commercial performance data demonstrate its ability to provide competing carriers with service usage information in substantially the same time and manner that Qwest provides such information to itself, and with wholesale carrier bills in a manner that gives competing carriers a meaningful opportunity to compete. In sum, Qwest has met, with few exceptions, the benchmarks for timeliness, accuracy, and completeness in providing usage information and for wholesale bills. Moreover, in finding that competing carriers have a meaningful opportunity to compete, we rely on third-party testing, conducted by KPMG, which found Qwest's billing system to be accurate and reliable.[152]

Therefore, any claim by Covad that Qwest's bills are deficient is not only contrary to the FCC's analysis, but more importantly, such concerns are not appropriately raised in an ICA arbitration. Rather, a Section 252 arbitration is designed specifically to discuss contract language, and the proper forum for raising an issue regarding a bill format and content, which may or may not lead to a requirement that one party alter its current practice, is the Change Management Process ("CMP"), not an interconnection agreement arbitration.[153] Moreover, this Commission may only determine which parties' proposed contract language should be inserted into the ICA, not whether one party should be ordered to change it systems to settle an issue raised in the arbitration.[154]

Nonetheless, Covad has inserted into this arbitration proceeding evidence suggesting that

---

[152] *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02 – 314, FCC 02-332, at ¶ 114, footnotes omitted.

[153] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 9:18 – 10:7 and Hearing Tr., Vol. 1, at 250:1-4.

[154] Covad submitted a change request to the CMP in mid October asking that the circuit ID be included on its line sharing bills. Qwest denied the request, as economically infeasible, however, under the terms of the CMP, if Covad is dissatisfied with Qwest's position, Covad may escalate the change request to the CMP Oversite Committee (*See*, Ex. Covad 1, (Doberneck Direct) Change Management Document Section 14.0, identified as KMD-7), or may pursue further review either in AAA Arbitration or at a state commission. *Id.* Section 15.0.

Qwest's bills are deficient. Covad bases its request for a longer payment due date in part by arguing that contrary to industry guidelines, Qwest does not provide a circuit identification number ("circuit ID") on its UNE bills, and therefore, Covad is unable to verify whether it has actually ordered the loop for which it is being billed.[155] In fact, as discussed further below, Qwest provides the circuit ID for all designed services, such as unbundled loops. Qwest does not provide the circuit ID for non-designed services such as UNE-P loops and shared loops.[156]

For a shared loop a unique number is assigned, which Qwest refers to as a sub-account number, and that number is provided to the CLEC at the time the service is ordered.[157] The service is not circuit based and therefore there would be no circuit ID in the Qwest billing system.[158] Instead, this sub-account number, is provided to Covad as part of the Firm Order Confirmation ("FOC") and the Customer Service Record (CSR).[159] Like the regular monthly bills it receives from Qwest, this FOC and CSR are also received by Covad in electronic format.[160] With this identifier, Covad is able to directly and efficiently verify the service for which it has been billed.[161] Thus, while Qwest does not provide the circuit ID number to CLECs for shared loops, Qwest does provide information from which Covad may track and validate its line-sharing bills.[162]

Qwest was the first ILEC in the nation to offer line-sharing and hence established the industry

---

[155] *See* Ex. Covad 1 (Doberneck Direct) at 33:804-806.

[156] *See* Ex. Qwest 3R-C (Albersheim Rebuttal) at p. 6:7-20.

[157] *See* Ex. Qwest 3R-C (Albersheim Rebuttal) at p. 8:1-13.

[158] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 10:16-18 and Qwest 3R-C (Albersheim Rebuttal) at pp. 8:19-20.

[159] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 10:18 – 11:8 and Qwest 3R-C (Albersheim Rebuttal) at pp. 10:18 – 11:4.

[160] *See* Hearing Tr., Vol. 1, at 180:18 – 23; 182:4 – 8 and Qwest 3R-C (Albersheim Rebuttal) at 15:1-6.

[161] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 11:4-6 and Qwest 3R-C (Albersheim Rebuttal) at p. 10:5-6.

[162] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 11:19 – 12:1 and Hearing Tr. Vol. 1, at 249:12-20.

norm at the time the product was developed.[163] Qwest and participating CLECs, which included Covad, formed a team of telecommunication providers charged with the task of resolving issues regarding the provisioning of line sharing.[164] Through this group effort, the decision was made to use the POTS provisioning system flow (now known as the non-design provisioning system flow) to provision the line sharing product.[165] The alternative to the non-design provisioning system flow, was the design provisioning system flow. Because the non-design provisioning system flow could produce a faster interval for provisioning line-sharing, however, Covad specifically requested that it be used rather than the design provisioning system flow.[166] At the time the request was made, Qwest informed Covad, and the other CLECs that a circuit ID would not be available.[167] In other words, Covad specifically requested that line sharing be offered through a process that it knew would have no circuit ID information available.

Qwest's practices in this regard may be different than other ILECs across the nation, because Qwest lead the nation in implementing line sharing.[168] Covad cannot now claim that Qwest is out of synch with the industry norm, especially since Qwest and *Covad* established the industry norm. Since the procedures were established before other ILECs offered the product, Covad's argument that Qwest does not comply with industry guidelines must fail.

Covad suggests that Qwest could change its systems to accommodate its request for a circuit ID since Verizon was able to do so with the assistance of Telcordia. The only "evidence" presented by

---

[163] *See* Hearing Tr., Vol. 1, at 249:1-4.

[164] *See* Hearing Tr., Vol. 1, 249: 1 – 11 and Ex. Qwest 3R-C at 5:4-6.

[165] *See* Hearing Tr., Vol. 1, at 249:5-8.

[166] *See* Hearing Tr., Vol. 1, at 261:15-25.

[167] *See* Hearing Tr. Vol. 1, at 263:6-13 and Hearing Exhibit 1, Attachment C to Qwest's response to Covad's data request number 42, attached hereto as **Attachment F**.

Covad on this subject is the unsupported statement by Covad witness Megan Doberneck that Telcordia developed a solution for Verizon to accommodate its request for a circuit ID.[169] In fact, when asked directly by the ALJ what the cost would be to Covad to make the necessary systems change, Ms. Doberneck responded "Your Honor, right now I do not [know]. And I am unaware in terms of how Covad would actually quantify that because – it would be programming work on our side and I don't know how we would quantify, so I don't have a number."[170] Qwest presented evidence, however, that the estimated cost to add the circuit ID is over $900,000.[171] Furthermore, as mentioned above, this Commission is not charged with making the decision as to whether to order Qwest to include the circuit ID on a line sharing bill, rather, the decision before the Commission is whether the language proposed by Qwest or Covad is appropriate for inclusion in the parties' interconnection agreement. Covad's language is unsupported and deviates from the industry norm.

(b) Covad's claim that missing USOCs require a longer payment term is unfounded.

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.[172] Covad would have this Commission believe that this is a widespread problem affecting all of its bills. In fact, Qwest routinely and regularly provides USOCs on bills for all recurring charges and for many non-recurring/fractional charges, which charges make up the vast majority of Covad's bills.[173] Where

---

[168] *See* Hearing Tr., Vol. 1, at 249:1-4.

[169] *See* Hearing Tr., Vol. 1, at 174:12-19.

[170] *See* Hearing Tr., Vol. 2, at 349:9-13.

[171] *See* Hearing Tr., Vol. 1, at 264:14-23.

[172] *See* Ex. Covad 1 (Doberneck Direct) at 39:967-968.

[173] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 13:4-6.

USOCs are not provided, however, the issue only arises in Qwest's Western Region, which does not include Utah.[174] In addition, it is projected that this issue will be fixed by a systems change in the near future.[175] Further, for those limited instances where USOCs are not provided, Qwest provides Covad with a detailed description of the charge making bill validation possible.[176] Thus, Covad's claim that it must go back to Qwest for the USOC information before it can begin bill validation[177] is unfounded, not only because bill validation does not necessarily require USOC information[178], but also because Covad has only once ever requested USOC information from Qwest on a non-recurring charge.[179]

Clearly, the combined impact of the extended time frame Covad proposes and CLEC opt-in rights cannot be ignored. In addition, Qwest has been left with large uncollected balances by CLECs who failed to pay Qwest for services[180], and the time frame Covad proposes to pay its bills will unreasonably increase Qwest's financial exposure -- particularly when other CLECs are able to opt-in to them. Furthermore, with a 30 day billing cycle and a 45 day payment due date, assuming Covad requires the full 45 days to review each months bills, it would find itself behind in the bill validation process after the first billing cycle since it will receive its next month's bill before it has completed its first month's bill validation.[181] Therefore, Covad's proposal would not provide the benefits it claims it requires.

---

[174] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 13:8-11.

[175] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 13:8-9.

[176] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 13:12-20.

[177] *See* Ex. Covad 1 (Doberneck Direct) at 39:967-973.

[178] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 14:13-19.

[179] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 15:4-10.

[180] *See* Ex. Qwest 2-C (Easton Direct) at 8:6-13.

[181] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 9:8-17.

2. Timing for Discontinuing Orders and Disconnecting Services.

These issues are quite simple. Issue 10-2 involves Qwest's proposal that it be permitted to discontinue processing orders if Covad becomes 30 days past due on the undisputed portion of its bill. Covad requests 60 days. Issue 10-3 involves Qwest's proposal that it be permitted to disconnect Covad's services 60 days after the payment due date for the undisputed portion of its bill. Covad requests 90 days. Covad devoted virtually all of its testimony on payment issues to the Payment Due Date portion of this issue. Thus, Covad offered only the slimmest "rationale," but no relevant evidence, to support its proposed language relating to the remaining payment issues. Qwest, on the other hand, proposes time frames that are consistent with the industry standard, are commercially reasonable, balance the needs of the billed and billing parties, are consistent with the language agreed to by industry participants, including Covad, during Qwest's bid for § 271 approval, and are identical to that contained in Utah's SGAT.

In connection with these issues, Covad observed only that it has enjoyed a good billing relationship with Qwest and that a UDIT-related rate issue had arisen in Arizona, causing Covad to dispute certain bills in that state.[182] Both assertions support Qwest's language, not the extensions Covad seeks. That Covad has enjoyed a good billing relationship with Qwest establishes that there is no basis in the parties' billing relationship to challenge the balanced consensus language that resulted from the 271 process. Further, the UDIT rate issue in Arizona exemplifies precisely why Qwest's proposed language should be ordered here. Qwest properly billed Covad at the Commission-ordered rate. While Covad disputed the bills, Qwest did not assess late payment charges, stop taking Covad

[182] *See* Ex. Covad 1 (Doberneck Direct) at 48:1175-1184 and 48:1197 – 50:1229.

orders, or disconnect service.[183] Thus, the record contains no factual support for Covad's proposals to extend the timing for discontinuing orders or disconnecting services. By contrast, Qwest submitted specific reasons and evidence establishing that the industry standard time frames it proposes are appropriate and should be accepted.[184] Moreover, the remedies of discontinuance and disconnection are only available to Qwest if Covad fails to pay the *undisputed* portion of its bill. For any amounts disputed by Covad, Qwest will not and historically has not, exercised its discontinuance and disconnection rights.[185]

For these reasons, the Commission should reject Covad's proposals to extend the payment and collection time frames.

III. CONCLUSION

For the reasons stated, Qwest respectfully requests that the Commission adopt Qwest's proposals relating to each of the disputed issues.

DATED: January 21, 2005

Respectfully submitted,

By _____
Robert C. Brown
Winslow B. Waxter
QWEST CORPORATION
1801 California Street, Suite 380
Denver, Colorado 80202
Telephone: 303-896-1518
Facsimile: 303-896-6095
Email: winslow.waxter@qwest.com
robert.brown@qwest.com

[183] *See* Ex. Qwest 2R-C (Easton Rebuttal) at 26:19 – 27:7.

[184] *See* Ex. Qwest 2-C (Easton Direct) at 13:7 – 19:7.

[185] *See*, Hearing Tr., Vol. 1, 198: 3 – 24. (In Arizona, Qwest billed Covad a Commission ordered rate for UDIT which was disputed by Covad. Qwest did not assess late payment charges, stop taking Covad orders or disconnect service.)

John M. Devaney
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)
Email: jdevaney@perkinscoie.com

Ted D. Smith (3017)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
Telephone: 801-578-6961
Facsimile: 801-578-6999
Email: tsmith@stoel.com

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of QWEST CORPORATION'S POST-HEARING BRIEF was mailed by U.S. Mail, postage prepaid, and electronically mailed to the following on this 21st day of January, 2005:

Stephen F. Mecham
Callister, Nebeker & McCullough
Gateway Tower East, Suite 900
10 East South Temple
Salt Lake City, UT 84133
Email: sfmecham@cnmlaw.com

Andrew R. Newell, Esq.
Krys Boyle,P.C.
600 Seventeenth Street
Suite 2700
Denver, CO 80202
Email: anewell@krysboyle.com

Michael Ginsberg
Assistant Attorney General
Heber M. Wells Building
160 East 300 South, Suite 500
Salt Lake City, UT 84111
Email: mginsberg@utah.gov