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 RESPONSE BRIEF

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Qwest Corporation ("Qwest") submits this post-hearing response brief in support of its positions in this interconnection arbitration under the Telecommunications Act of 1996 ("the Act") between Qwest and Covad Communications Company ("Covad").

INTRODUCTION

Qwest and Covad have been able to resolve most of their disputes through cooperative, good faith negotiations, leaving a relatively small number of disputed issues that the Commission must decide in this arbitration. As Qwest stated in its opening brief, the parties' inability to resolve these remaining issues is largely attributable to Covad's adherence to overly aggressive demands that are without legal support. Covad continues this approach to the disputed issues in its post-hearing brief.

The absence of legal support for Covad's positions has been demonstrated by the recent decisions in the Covad/Qwest arbitrations in Colorado, Minnesota, and Washington. The commissions and administrative law judges in those states have ruled for Qwest on the majority of the issues, finding that a majority of Covad's positions lack legal and evidentiary support. Most recently, in a public deliberation last week, the Minnesota Commission ruled for Qwest and rejected Covad's proposals relating to copper retirement, access to network elements, and regeneration.[1]

The recommendations that the Utah Division of Public Utilities ("DPU") has provided in its post-hearing memorandum are largely consistent with these decisions from the other three states. Like the Minnesota Commission, the Minnesota administrative law judge, and the

[1] The Minnesota Commission issued oral rulings and will soon issue a written order. The Commission also adopted the Minnesota ALJ's ruling relating to commingling, requiring Qwest to commingle network elements provided under section 271 with network elements provided under section 251. In addition, it adopted the ALJ's rulings relating to billing and payment issues, except that it modified the ruling relating to the period within which Covad must pay invoices, finding that in certain circumstances, Covad will have 45 days to pay instead of 30.

administrative law judge in Washington, the DPU concludes that Covad's proposals relating to network unbundling under Section 271 and state law are flawed for several reasons and should be rejected.[2] The DPU also appears to endorse the rulings from the other states that reject Covad's "alternative service" proposal relating to copper retirement and, in addition, concludes correctly that "there does not appear to be anything under Utah law that would prohibit Qwest from retiring copper facilities where that retirement affects DSL services."[3] Further, consistent with Qwest's proposal and the ruling of the Washington ALJ, the DPU also determines correctly that the governing law does not require commingling of section 271 network elements.[4] The DPU also recommends against adoption of Qwest's position relating to regeneration, but, as discussed below, its recommendation on this issue is not consistent with federal law.[5]

There is thus now a reasonably substantial body of determinations and recommendations by neutral parties relating to each of the disputed issues before the Commission in this proceeding. These decisions and recommendations demonstrate forcefully the significant flaws in Covad's proposals. In the discussion that follows, Qwest further demonstrates these flaws and explains why the Commission should adopt Qwest's proposals relating to each of the disputed issues.

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[2] Division of Public Utilities Memorandum ("DPU Memorandum") at 6. In Colorado, Covad adopted Qwest's unbundling language, choosing not to arbitrate its unbundling proposals.

[3] *Id.* at 3.

[4] *Id.* at 7-8.

[5] *Id.* at 8-9. The DPU does not make any specific recommendations relating to the payment and billing issues.

DISPUTED ISSUES

A. Issue 1: Retirement of Copper Facilities (Sections 9.1.15; 9.1.15.1 and 9.1.15.1.1)[6]

1. Covad's "Alternative Service" Proposal Is Unlawful.

Qwest's opening brief demonstrates that in the *TRO*, the FCC confirmed the right of ILECs to retire copper loops that are being replaced with fiber facilities.[7] Covad's proposed ICA language would eviscerate this right by prohibiting Qwest from retiring copper unless it provides Covad with an alternative service at no increase in cost and with no degradation of quality. Nothing in the *TRO* supports imposing this onerous condition, which conflicts directly with the Congressionally-mandated objective of encouraging the deployment of the fiber facilities that support advanced telecommunications services. It is not surprising, therefore, that in the three Qwest/Covad arbitrations in which this demand from Covad has already been considered, it has been rejected outright.[8]

Covad attempts to support its demand by asserting that the *TRO* prohibits an ILEC from retiring a copper loop unless it continues to provide access to the loop facilities required under the FCC's rules.[9] This assertion rests on a distorted reading of the *TRO*. In the *TRO*, the FCC ruled that ILECs must provide notice of planned copper retirements that involve replacements with fiber-to-the-home ("FTTH") loops, while confirming the right of ILECs to retire copper.[10] At the same time, the FCC established a process for CLECs to object to planned retirements and established that CLEC objections will be deemed denied "[u]nless the copper retirement scenario

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[6] As noted in Covad's Post-Hearing Brief ("Covad Br."), Covad agreed to close Sections 9.2.1.2.3; 9.2.1.2.3.1; and 9.2.1.2.3.2. Covad Br. at 5. Accordingly, the only sections at issue are 9.1.15; 9.1.15.1; and 9.1.15.1.1. *Id*.

[7] Qwest Corporation's Post Hearing Brief ("Qwest Br.") at 3.

[8] *See* Qwest Br. at 4.

[9] Covad Post-Hearing Brief ("Covad Br.") at 5.

[10] *TRO* ¶ 282.

suggests that competition will be denied access to the loop facilities required under our rules…."[11]

Covad turns this ruling on its head by arguing that ILECs cannot retire copper facilities without providing an alternative service. As the discussion above shows, that is not what the FCC ruled. Instead, the FCC confirmed the right to retire copper facilities and gave CLECs limited rights to object to retirements. The FCC's reference to "access to the loop facilities required under our rules," contrary to Covad's argument, refers only to an ILEC's continuing obligation to provide access to the narrowband portion of a loop.[12] Qwest complies fully with that requirement by ensuring CLEC access to that portion of a loop, including access to a voice grade channel over the new, replacement loop facilities.[13]

In its brief, Covad concedes that its "alternative service" requirement cannot apply to copper retirements involving FTTH replacements.[14] Covad's position is that its proposal applies only to the circumstance in which Qwest retires copper feeder and replaces it with fiber feeder, resulting in a hybrid copper/fiber loop.[15] However, as Qwest discussed in its opening brief, the retirement rights the FCC granted for replacements of copper feeder with fiber feeder are even broader than those for replacements of copper loops with FTTH loops.[16] There is thus no legal support whatsoever in the *TRO* for application of Covad's alternative service requirement to retirements involving fiber feeder replacements. Further, it is apparent that Covad's new proposal is, in reality, an attempt to gain unbundled access to hybrid loops, as evidenced by

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[11] *Id*.

[12] *Id*. ¶¶ 296-97.

[13] Qwest Exhibit 1 (Stewart Direct) at 7.

[14] Covad Br. at 1, 7, 10.

[15] *Id*.

Covad's reference to these loops and its glaring failure to identify any specific service that would be an "alternative" to these loops.[17] In the *TRO*, the FCC ruled unequivocally that ILECs are not required to provide unbundled access to the broadband capabilities of hybrid loops, confirming again that Covad's proposal conflicts directly with the *TRO*.[18]

Covad's reference to state law also provides no support for its alternative service requirement. The provision of Utah law that Covad cites, Utah Code § 54-8b-1.1, simply lists the goals of Utah's telecommunication policy and does not impose any requirement on Qwest to provide the alternative service that Covad demands. As Ms. Stewart explained in her direct and rebuttal testimony, Covad's proposal actually frustrates the goal of promoting the deployment of advanced telecommunications infrastructure and consumer choice because it "reduce[s] Qwest's economic incentive and ability to deploy fiber facilities."[19] As she stated, "[a] requirement to provide an alternative service for which Qwest may not recover its costs would create an economic disincentive for deploying fiber."[20] Thus, permitting Qwest to retire copper facilities and thereby providing incentive for it to deploy fiber will affirmatively advance the policy goals set forth in Utah Code § 54-8b-1.1, as it will make advanced telecommunications services more widely available to Utah consumers and will increase consumer choice by enabling Qwest to compete more effectively with cable companies. Accordingly, it is Covad's proposal, not Qwest's, that is inconsistent with the Utah statute. As the DPU correctly concluded, nothing

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[16] Qwest Br. at 5, 11-12.

[17] Covad Br. at 3-15.

[18] *TRO* at ¶ 288.

[19] Qwest Exhibit 1 (Stewart Direct) at 10; Qwest Exhibit 2 (Stewart Rebuttal) at 6-7, 15-16.

[20] Qwest Exhibit 1 (Stewart Direct) at 10.

under Utah law prohibits Qwest from retiring copper facilities, even if the retirement affects DSL services.[21]

There also is no merit to Covad's contention that Utah law requires Qwest to provide continued access to facilities and services that would permit Covad to still provide DSL service. The FCC expressly rejected precisely this type of demand in the *TRO* in confirming the right of ILECs to retire copper facilities.[22] To the extent Covad is suggesting that Utah law should be interpreted to prevent Qwest from retiring copper facilities, that interpretation would of course be inconsistent with federal law and thus impermissible.[23] In any case, Qwest already gives Covad different options for continuing to provide DSL to its customers in the unlikely event that Qwest retires a copper loop an affects service to a Covad customer.[24]

Covad argues that Qwest's concerns about the lack of cost recovery that would result from the "alternative service" requirement are unfounded. While making this argument, however, Covad does not dispute that its proposal would prohibit Qwest from charging anything above a range of monthly recurring rates from "0" – the current recurring rate for line sharing in Utah – to $3.70, regardless of the actual cost of the alternative service.[25] This fact alone demonstrates the unlawfulness of Covad's proposal, which would inevitably prevent Qwest from recovering its

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[21] DPU Memorandum at 3. Covad also relies on a rule of this Commission – R746-348-7 – relating to essential facilities and services to argue that Qwest has an unconditional obligation to continue to provide access to DSL facilities and other loop facilities, including feeder subloops. Covad Br. at 9. As discussed in Qwest's opening brief, even with the deployment of fiber loops, Covad can continue to have access to DSL facilities by using remote DSLAMs. Qwest Br. at 9. In addition, Covad's argument for access to feeder subloops and DSL facilities fails to recognize that the Act does not permit a state commission to require ILECs to unbundle facilities that the FCC has declined to require them to unbundle. *See* Qwest Br. at 18-23.

[22] *TRO* at ¶ 281 and n.822.

[23] *See* Qwest Br. at 18-23.

[24] Qwest Exhibit 1 (Stewart Direct) at 8. It is undisputed that Qwest has never affected service to a Covad customer through the retirement of a copper loop. *See* Qwest Br. at 9.

[25] *See* Qwest Br. at 10 and n.31.

costs in violation of the Act's requirement that ILECs recover the costs they incur to provide unbundled network elements ("UNEs") and interconnection.[26]

Covad also presents in its brief for the first time in this proceeding new language for its copper retirement proposal. Specifically, it proposes language that would limit Qwest's "alternative service" obligation to situations where Qwest is retiring copper feeder "over which Qwest itself could provide a retail DSL service."[27] This proposal is fundamentally flawed. First, Covad's focus on loops over which Qwest "could provide a retail DSL service" suggests strongly that it is ultimately seeking access to the broadband capabilities of hybrid loops. However, in paragraphs 288 and 290 of the *TRO*, the FCC ruled that ILECs are not required to unbundle these capabilities, specifically rejecting Covad's arguments for such unbundling:

> We decline to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market. AT&T, WorldCom, Covad, and others urge the Commission to extend our unbundling requirements to the packet-based and fiber optic portions of incumbent LEC hybrid loops. We conclude, however, that applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706. The rules we adopt herein do not require incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information. Moreover, the rules we adopt herein do not require incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as the xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market.[28]

[26] *See* 47 U.S.C. § 252(d)(1).

[27] Covad Br. at 4.

[28] *TRO* at ¶ 288 (Footnotes omitted and emphasis added).

Second, even if the FCC had not expressly disallowed such access, Covad's proposal would not, contrary to its claims, result in parity with Qwest. Covad's use of the words loops "over which Qwest itself could provide a DSL service" reveals that Covad is apparently seeking access to the next-generation equipment of any Qwest loop over which Qwest *could* provide DSL service to its own customers, not just access to the equipment on loops that Qwest is actually using to provide DSL service. Accordingly, Covad is not seeking "parity" between its DSL customers and Qwest's customers; instead, it is seeking to require Qwest to provide Covad with access to next-generation equipment even in situations where Qwest's own customers are not served by such equipment.

Finally, Covad presents three additional arguments in an attempt to support its "alternative service" proposal, none of which has merit. It contends that if Qwest is permitted to retire copper loops, Covad's investment of "well over a billion dollars" in its DSL network could become stranded.[29] That is a gross exaggeration. Covad has expressly acknowledged that, at most, only a "handful" of its Utah customers could ever be affected by Qwest's retirement of a copper loop and that, as of today, none of its customers has ever been affected by a copper retirement.[30] Covad's claim that its network investment is at risk is thus factually unsupported and legally irrelevant. Also without legal foundation is Covad's argument that the FCC's *Section 271 Forbearance Order* supports its proposal.[31] As Qwest discussed in its opening brief, that order does not even discuss ILECs' copper retirements, and Covad's reliance on it is thus baseless.[32]

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[29] Covad Br. at 9-10.

[30] *See* Qwest Br. at 9.

[31] Covad Br. at 13-14.

[32] Qwest Br. at 8.

2. The Notice Of Copper Retirements That Qwest Has Agreed To Provide Complies Fully With The FCC's Notice Requirements.

Covad asserts in its post-hearing brief that Qwest's notices of copper retirements will not meet the requirements established by the FCC for notifying CLECs of changes in an ILEC's network.[33] This assertion ignores, however, in its proposed ICA language, Qwest expressly commits to providing the notice required by the FCC's rules.

Covad's real desire appears to be a requirement for Qwest to notify Covad of the specific Covad customers that could be affected by the retirement of a copper loop, However, Qwest does not know the services that Covad is providing to individual customers and, accordingly, does not have the information needed to determine the effect of copper retirements on individual customers.[34] Equally significant, the notice that Qwest provides informs Covad that loops in specific geographic areas – or "distribution areas" – will be retired. With this information, Covad can determine from its own records of customer addresses whether its customers will be affected. As the administrative law judges in Minnesota and Washington ruled, the burden of making these customer-specific determinations should not be shifted to Qwest – which does not have the information specific to Covad's individual customers – from Covad.[35]

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).

As Qwest demonstrated in its opening brief, the Act's "impairment" standard imposes important limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by

[33] Covad Br. at 15-16.

[34] *See* Qwest Br. at 13.

[35] *See* Qwest Br. at 13.

the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*[36] 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.[37] In this case, the unbundling obligations that Covad would have the Commission impose on Qwest ignore entirely these critical limitations and are based on the legally flawed assumption that a state commission may require unbundling under state law that the FCC has expressly rejected. As shown by its post-hearing brief, Covad does not recognize the Act's important limits on state law authority – namely, that such authority must be exercised consistently with Section 251 and the federal unbundling regime established by the FCC. Moreover, Covad is asking this Commission to order broad unbundling of network elements without having provided any evidence that it will be impaired in the absence of access to those elements. As the ALJ in Washington found, Covad's broad unbundling requests cannot be permitted without evidence of impairment.[38] The DPU confirms that there is no such evidence in this record and that Covad's unbundling demands are, therefore, improper.[39]

Covad also improperly asks this Commission to require unbundling and set rates under Section 271, ignoring that states have no decision-making authority under that section. As discussed below, the FCC has exclusive jurisdiction to determine the network elements that BOCs are required to provide under Section 271 and to determine the rates that apply to those elements. The FCC cannot – and has not – delegated that authority to state commissions. Covad offers several strained readings of the Act to support its claim that states have unbundling authority under Section 271, but its interpretations are wrong and certainly do not come close to

[36] 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

[37] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"); *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I").

[38] Washington Arbitration Order (attached to Qwest's post-hearing brief as "Attachment C") at ¶ 60.

establishing that Congress has expressly conferred Section 271 decision-making authority on state commissions.

1. It Is Improper To Include Terms Relating To Network Elements Provided Under Section 271 In An Interconnection Agreement.

As Qwest discussed in its opening brief, there is no statutory or other legal basis for including terms and conditions relating to network elements provided under Section 271 in a Section 252 interconnection agreement.[40] Indeed, the FCC has defined the "interconnection agreements" that must be submitted to state commissions for approval as "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) . . ."[41] Thus, the term "interconnection agreement" encompasses only terms and conditions relating to network elements and other services provided under Section 251 and does not include terms and conditions relating to elements provided under Section 271. As the Minnesota ALJ stated in a ruling recently upheld by the Minnesota Commission, "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."[42]

The DPU also has accurately explained why it would be improper to include terms and conditions relating to Section 271 elements in an ICA:

> [I]t is not at all clear to the DPU that an arbitration proceeding under Section 252 of the Federal Act in any way authorizes the Commission to impose Section 271 obligations in this agreement without Qwest's consent. In resolving open issues the Commission must resolve those issues

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[39] DPU Memorandum at 6.

[40] Qwest Br. at 14-15.

[41] Memorandum Opinion and Order, Qwest Communications Int'l Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), FCC 02-276, WC Docket No. 02-89 ¶ 8 n.26 (FCC Oct. 4, 2002) ("Declaratory Order").

[42] Minnesota Arbitration Order (attached to Qwest's opening brief as "Attachment B") at ¶ 46.

> consistent with 251 requirements and not 271 requirements. Obligations arising outside of Section 251 are being presented to the PSC in commercial agreements.[43]

Accordingly, for these reasons and those set forth in Qwest's opening brief, Covad's attempt to include Section 271 network elements in the ICA is improper and should be rejected. The terms and conditions relating to offerings under Section 271 are properly addressed in commercial agreements and tariffs, not ICAs. The Commission should reject Covad's proposals for the following ICA sections: Section 4.0 definition of "UNE," Sections 9.1.1; 9.1.5; 9.2.1.4; 9.3.1.1; 9.3.1.2; 9.3.2.2; 9.3.2.2.1; and 9.6(g). For each of these sections, the Commission should adopt Qwest's proposed language, as recommended by the DPU.

2. Covad Has Provided No Legal Support For Its Claim That State Commissions Have Decision-Making Authority Under Section 271 And Can Impose Unbundling Obligations Under That Provision Of The Act.

The Act does not give state commissions any substantive decision-making role in the administration and implementation of Section 271. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine if BOCs have complied with the substantive provisions of Section 271, including the 271 checklist provisions upon which Covad bases its arbitration demands for 271 unbundling. State commissions have only a non-substantive, consulting role in that determination. Accordingly, even if it were proper to address Section 271 issues in the context of a Section 252 arbitration, the Commission still would not have authority to impose affirmative obligations under that section.[44]

Significantly, in its discussion of this issue, Covad fails to cite any provision or language in the Act giving a state commission decision-making authority under Section 271. Instead,

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[43] DPUC Memorandum. at 6.

[44] *See* Qwest Br. at 24-25.

Covad cites the requirement in Section 271 that the FCC "consult" with a state commission in reviewing a BOC's compliance with that section in connection with applications for authority to provide long distance service.[45] That consulting authority, Covad asserts, "clearly" establishes that a state commission has authority to impose unbundling requirements under Section 271.[46] However, Covad's argument ignores the obvious difference between Congress's decision to give states *consulting authority* relating to BOCs' Section 271 applications and the complete absence of any Congressional delegation of *decision-making authority* under that provision.

As the D.C. Circuit made emphatically clear in *USTA II*, the only authority that state commissions have under the Act is that which Congress has clearly and expressly delegated to them.[47] Under the Act, Congress and the FCC took over the regulation of local telephone service, leaving the states only with authority that Congress expressly granted. The Seventh Circuit recently described this regulatory regime:

> In the Act, Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission (FCC). While the state utility commissions were given a role in carrying out the Act, Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act;" it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations.[48]

Under this regime, states are not permitted to regulate local telecommunications competition "except by the express leave of Congress."[49] As described by the Third Circuit,

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[45] Covad Br. at 20

[46] *Id*. at 21.

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

[48] Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Comm'n, 359 F.3d 493, 494 (7th Cir. 2004) (quoting AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n.6 (1999)).

[49] *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3rd Cir. 2001) (internal

"[b]ecause Congress validly terminated the states' role in regulating local telephone competition and, having done so, then permitted the states to resume a role in that process, the resumption of that role by a state is a congressionally bestowed gratuity."[50] Thus, the court explained, a "state commission's authority to regulate comes from Section 252(b) and (e), not from its own sovereign authority."[51] Here, there has been no delegation of 271 decision-making authority to state commissions, and this Commission therefore has no authority to impose the Section 271 unbundling obligations that Covad seeks to impose through its proposed ICA unbundling language.

As Qwest discussed in its opening brief, in *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*,[52] a federal district court held that the consulting role given to states under Section 271 does not give a state commission substantive decision-making authority. Notwithstanding that ruling, Covad claims that *Indiana Bell* confirms that a state commission has authority to impose Section 271 obligations in the context of a Section 252 arbitration. Covad is badly misreading the decision.

Contrary to Covad's misreading, *Indiana Bell* confirms the absence of a decision-making role for states under Section 271. The decision contrasts the substantive role that states have in administering Sections 251 and 252 with the "investigatory" and "consulting" role they have under Section 271.[53] In recognizing the different roles that Congress assigned states under these distinct provisions of the Act, the court noted that the Act does not include a "savings clause"

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citations omitted).

[50] *Id*.

[51] *Id*.

[52] 2003 WL 1903363 (S.D. Ind. 2003).

[53] *See* Qwest Br. at 24-25.

that preserves the application of state law in the administration of Section 271.[54] By contrast, the court observed, Congress included a savings clause – Section 261(b) – that preserves the application of "consistent" state regulations in the administration of Sections 251 and 252.[55] As the court found, this contrast confirms further that Congress did not intend a substantive role for states in the administration of Section 271.[56]

Further, Covad's suggestion that a state legislature may grant to its agencies the authority to administer federal law that Congress has withheld is frivolous.[57] A state legislature may plainly confer authority to adopt and enforce state law. It may also permit the state's administrative agencies to exercise any authority conferred upon them by Congress. However, state legislatures may not confer authority to administer federal law that has been withheld by Congress. Covad cites no decision from any court or agency, federal or state, holding otherwise.

Finally, Covad's reliance on an order issued by the Maine Public Utilities Commission in a proceeding involving Verizon also provides no support for Covad's unbundling demands under section 271. Covad relied on this same order in its Minnesota arbitration with Qwest, and the ALJ in that proceeding correctly determined that the order does not support Covad's demands. As she explained, the *Verizon-Maine* decision "is distinguishable on its facts as it appears to be premised on enforcement of a specific commitment that Verizon made to the Maine Commission during 271 proceedings to include certain elements in its state wholesale tariff."[58] For the same reason, the order is inapplicable here.

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[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] Covad Br. at 19.

[58] Minnesota Arbitration Order at ¶ 46.

3. The Commission Does Not Have Authority To Establish Prices For Section 271 Elements.

Covad asserts that the Act and the *TRO* establish the authority of state commissions to set prices for Section 271 elements.[59] For several reasons, this argument is seriously flawed, as Qwest discusses in its opening brief.[60]

First, the FCC was quite clear in the *TRO* that it has responsibility for setting prices for elements that BOCs provide under Section 271: "[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)."[61]

Second, Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271,[62] provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.[63] The FCC has not delegated that authority, and Congress has not permitted it to do so.

Third, the pricing authority that state commissions have under Section 252(d)(1) does not empower states to set rates for Section 271 elements. The authority granted by that provision is expressly limited to determining "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection [251(c)(2)] . . . [and] for network elements for

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[59] Covad Br. at 20-22.

[60] Qwest Br. at 26-27.

[61] *TRO* ¶ 664.

[62] *Id*. ¶¶ 656, 662.

[63] *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).

purposes of subsection [251(c)(3)]."[64] Thus, the only network elements over which states have pricing authority are those that an ILEC provides pursuant to Section 251(c)(3). Nothing in the Act extends that authority to Section 271 elements, as evidenced by Covad's inability to cite any statutory provision that even remotely suggests state commissions have such authority.

Significantly, as Qwest discussed in its opening brief, the FCC recently rejected substantially the same pricing argument in its opposition to the petitions for a *writ of certiorari* filed with the Supreme Court by NARUC, state commissions, and certain CLECs in connection with *USTA II*.[65] Addressing NARUC's contention that Section 252 gives state commissions exclusive authority to set rates for network elements, the FCC stated that the contention "rests on a flawed legal premise."[66] It explained that Section 252 limits the pricing authority of state commissions to network elements provided under section 251(c)(3).[67]

Fourth, Covad's claim that the Commission has authority to set TELRIC rates for Section 271 elements – which of course incorrectly assumes that state commissions have pricing authority over Section 271 elements – is directly refuted by the *TRO* and *USTA II*. In the *TRO*, the FCC ruled very clearly that any elements a BOC provides 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.[68] Consistent with its prior rulings in Section 271 orders, the FCC confirmed that TELRIC pricing does not apply to these network elements.[69] In *USTA II*, the

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[64] 47 U.S.C. § 252(d)(1).

[65] Qwest Br. at 26-27.

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

[67] *Id*.

[68] *TRO* ¶¶ 656-64.

[69] *Id*.

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."[70]

4. 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*.

As Qwest demonstrated in its opening brief, under Section 251 of the Act, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]."[71] 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."[72]

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.[73] 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

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

[71] 47 U.S.C. § 251(c)(3).

[72] 47 U.S.C. § 251(d)(2).

[73] 47 U.S.C. § 251(d)(2).

of the Act and giving some substance to the 'necessary' and 'impair' requirements."[74] And *USTA II* establishes that Congress did not allow the FCC to have state commissions perform this work on its behalf.[75]

Covad responds to this legal framework described in Qwest's opening brief as if it were not there, arguing that the Act, the *TRO*, and *USTA II* do not impose any meaningful limits on the authority of state commissions to require unbundling under state law. Thus, Covad asserts that the Commission is free to require Qwest to provide network elements that the FCC declined to require ILECs unbundle based on specific findings that CLECs are not impaired without them.[76] Covad's argument fails to recognize that the Act's savings clauses preserve independent state authority only to the extent that authority is exercised in a manner consistent with the Act.[77] This point was forcefully confirmed in the recent decision from the United States District Court for the District of Michigan discussed in Qwest's opening brief.[78]

The fundamental problem with Covad's position, as confirmed by its brief, is that it requires unbundling regardless of consistency with the Act. As Qwest described in its opening brief, the inevitable conflicts with federal law that would result from adoption of Covad's position are demonstrated by the application of Covad's proposed unbundling language to feeder subloops.[79] Covad fails to respond to this striking example of how the virtually limitless unbundling obligations that would result from its language directly conflict with federal law and

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

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

[76] For example, Covad asserts that the Commission has authority to require access to "subloop arrangements" (Covad Br. at 23) even though the FCC expressly ruled in the *TRO* that CLECs are not impaired without access to feeder subloops and that ILECS are therefore not required to provide them. *TRO* ¶ 253.

[77] Qwest Br. at 21-22.

[78] Qwest Br. at 20-21.

[79] Qwest Br. at 22 n.67.

the "federal regime" that the FCC alone has authority to implement. And this example would not be an isolated occurrence under Covad's unbundling language, as the language is broad enough for Covad to contend that Qwest is required to provide unbundled access to OCn loops, feeder subloops, DS3 loops (in excess of two per customer location), extended unbundled dedicated interoffice transport and extended unbundled dark fiber, and other elements despite the FCC's fact-based findings in the *TRO* that CLECs are not impaired without access to these elements.[80]

As the FCC stated quite clearly in the *TRO*, the type of state law unbundling regime that Covad is proposing – one that ignores altogether FCC findings of non-impairment with respect to individual elements – "overlook[s] the specific restraints on state action taken pursuant to state law embodied in section 251(d)(3), and the general restraints on state actions found in sections 261(b) and (c) of the Act."[81] This approach to state law unbundling "ignore[s] long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy."[82] As the United States Court of Appeals for the Seventh Circuit stated, "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.[83]

Equally significant, any unbundling obligations imposed under state law would have to be supported by an express finding that Covad would be impaired without access to specific

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[80] In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundled 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).

[81] *TRO* ¶ 192 (footnote omitted).

[82] *Id*.

[83] Indiana Bell Tel. Co. v. McCarty, 362 F.3d at 395.

network elements. A finding of impairment is essential under Section 251, and any unbundling requirement that does not rest on such a finding is plainly unlawful. Covad's failure to provide any evidence of impairment is thus fatal to its unbundling demands, as the Commission has nothing in this evidentiary record upon which to base findings of impairment or requirements to unbundle. The Washington ALJ recognized this fatal shortcoming of Covad's unbundling demands:

> In addition, this 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] FCC's findings. Covad has not filed a petition requesting that the Commission conduct such a specific independent unbundling analysis, nor submitted the kind of evidence necessary for the Commission to make such determinations for the state of Washington.[84]

The same reasoning applies here. As the DPU has correctly recognized, there is no evidence in this record upon which to impose any unbundling requirements under Utah law.[85]

5. The ICA Should List Specific Non-251 Network Elements That Qwest Is Not Required to Provide Under The Agreement.

In its proposed ICA, Qwest includes several provisions listing the network elements that the FCC has ruled ILECs are not required to provide under Section 251. Qwest's proposed Section 9.1.1.6 lists 18 different elements and services that pursuant to rulings in the *TRO*, ILECs are not required to unbundle under section 251. There is no dispute that Qwest's listing of these elements and services accurately reflects the FCC's *TRO* rulings, but the DPU nevertheless asserts that this proposed section of the ICA should be rejected because it "does not seem necessary."[86]

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[84] Washington Arbitration Order ¶¶ 59-60.

[85] DPU Memorandum. at 6.

[86] DPU Memorandum. at 7.

However, Covad clearly believes that Qwest's unbundling obligations are unlimited and include even the network elements for which the FCC has made findings of non-impairment and declined to impose an unbundling requirement. Given Covad's overreaching position, Qwest is very concerned that Covad will demand unbundling of these de-listed elements if the ICA does not state clearly that the elements are unavailable. To protect against this distinct possibility and the dispute that would result, the ICA should include the list of de-listed UNEs in Qwest's section 9.1.1.6, which all parties agree is accurate.[87]

Furthermore, the DPU's recommendation that the ICA "not try to guess what will take place but instead should allow the change of law provisions to address any changes that might occur in the future" should be rejected.[88] If the DPU's recommendation is adopted, Qwest would be required to continue providing network elements that the FCC has de-listed as UNEs until the Commission approves an ICA amendment removing the UNEs from the ICA. The use of the amendment process for de-listed UNEs is improper because it would require Qwest to continue providing network elements at TELRIC rates potentially long after the FCC has ruled that ILECs are not required to provide the elements under Section 251. Accordingly, the Commission should adopt Qwest's proposed sections that would eliminate unbundling obligations upon non-impairment findings by the FCC.

C. Issue 3: The ICA Should Not Require Qwest to Commingle Elements Provided Under Section 271 With Other Network Elements.

Covad's argument for Section 271 commingling is premised on the *TRO*, but its arguments fail to account for provisions in the *TRO* that undercut its demand for this form of

[87] For the same reason, the Commission should adopt Qwest's proposed language for Sections 9.2.1.3; 9.6.1.5; 9.6.1.5.1; 9.6.1.6; 9.6.1.6.1; and 9.21.2. These sections establish that certain network elements will no longer be available under the ICA if the FCC rules that ILECs are not required to provide them under Section 251.

[88] DPU Memorandum at 7.

commingling. Covad bases its argument on the FCC's statement in paragraph 579 of the *TRO* that commingling involves connecting a UNE or UNE combination with a facility or service a CLEC has obtained from an ILEC "pursuant to any method other than unbundling under section 251(c)(3)."[89] An element provided under Section 271, it argues, is within the reach of this description.

The first flaw in this interpretation is that it eviscerates the FCC's clear ruling that BOCs are not required to combine network elements provided under Section 271. Covad improperly reads this ruling out of the *TRO*. The FCC's statement about commingling obligations must be harmonized with its very specific ruling relating to Section 271 elements. Because BOCs are not required to combine these elements, they cannot be required to commingle them.

The second flaw in Covad's interpretation is that it is contradicted by the FCC's express removal of a reference to section commingling in an errata to the *TRO*. In the Washington arbitration between Qwest and Covad, the ALJ rejected Covad's request for Section 271 commingling, ruling correctly that the *TRO* imposes no such obligation.[90] Indeed, the *TRO* originally listed Section 271 elements in the discussion of commingling obligations in paragraph 584 of the order. However, as Covad acknowledges, in the errata to the *TRO*, the FCC removed this reference, making it clear that commingling obligations do not extend to Section 271 elements.

Covad contends that the FCC's elimination of the *TRO's* reference to Section 271 commingling was intended only to clarify the discussion of resale commingling in the order. But the FCC's decision to remove the reference should be read in the context of its ruling that ILECs

[89] Covad Br. at 31.

[90] Washington Arbitration Order ¶ 68.

are not required to combine Section 271 elements. The correction in the errata is consistent with and confirms that ruling - BOCs are not required to combine or commingle Section 271 elements.[91]

The DPU agrees with Qwest: "In reviewing the TRO paragraphs the DPU believes that the provisions of paragraph 654, 656 and note 1990 are clearer and thus no commingling is required."[92] Accordingly, consistent with the *TRO*, the Commission should reject Covad's request for Section 271 commingling.

D. Issue 5: Covad Is Wrong in Arguing That The FCC Rules Require CLEC To CLEC Regeneration

Since the hearing in this docket, Qwest has proposed alternative language for the sections at issue involving regeneration. Qwest's alternative language is essentially the same language that Covad and Qwest agreed to in Washington, pending Covad's appeal of the arbitrator's ruling. Qwest's proposal confirms that Qwest will not charge for regeneration between the Qwest network and Covad's collocation spaces. Further, Qwest is offering Covad language whereby Qwest will agree not to charge separately for regeneration for Covad to connect two of its non-contiguous collocation spaces. Qwest's language further clarifies that a CLEC may order the EICT product out of Qwest's FCC 1 Access tariff, which product is an end to end service connecting two CLECs and includes any necessary regeneration. The newly proposed language is as follows:

> 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

[91] As Qwest mentioned in its opening brief, the absence of any state decision-making authority under Section 271 also precludes state commissions from ordering the commingling of Section 271 elements. Qwest Br. at 31 n.97.

[92] DPU Memorandum. at 8.

> Layout Record (DLR) for the service connection. Regeneration may be required, depending on the distance parameters of the combination.
>
> 8.3.1.9 Channel Regeneration Charge. Required when the distance from the leased physical space (for Caged or Cageless Physical Collocation) or from the collocated equipment (for Virtual Collocation) to the Qwest network is of sufficient length to require regeneration. Channel Regeneration will not be charged separately for Interconnection between a Collocation space and Qwest's network or between non-contiguous Collocation spaces of the same CLEC. Qwest shall charge for regeneration requested as a part of CLEC-to-CLEC Cross Connections under the FCC Access No. 1 tariff, Section 21.5.2 (EICT). Cable distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B".

The parties agree that Issue 5 (Regeneration) relates exclusively to the provisioning and pricing of CLEC-to-CLEC regeneration, not ILEC-to-CLEC regeneration.[93] Thus, neither Qwest, nor Covad discussed the applicability of section 14 of the Collocation Docket No. 00-049-106 Order issued December 4, 2001 (Collocation Order),[94] because that order is *irrelevant* to the Parties' dispute in this arbitration proceeding. In the Collocation Order, the Utah Commission specifically limited its discussion regarding regeneration to that required on an ILEC-to-CLEC connection, not a CLEC-to-CLEC connection.[95]

Qwest acknowledges that the Commission's Collocation Order denied Qwest the blanket ability to charge for regeneration on a connection between Qwest and a CLEC's collocation space.[96] As the DPU correctly cites in its Memorandum, the Commission ordered Qwest "to provide regeneration whenever the signal *transmitted* to a CLEC's collocation facility is not

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[93] *See* TR Vol. 2 at 289:12-19 and Ex. Qwest 4 (Norman Direct) at 4:1-7.

[94] *See* Attached **Exhibit A** (Erratum Report and Order, Issued December 4, 2001, Docket No. 00-049-106). The DPU's Memorandum identifies the Order as having been issued on December 3, 2001. Qwest assumes that reference to be a typographical error and that the correct date is December 4, 2001.

[95] Collocation Order at section 14.

[96] Collocation Order at section 14.

technically acceptable for its intended use."[97] The Commission further required Qwest to "*deliver* a technically acceptable signal within its central offices where collocation occurs."[98] Qwest can only "transmit" or "deliver" a signal when *it is a party* to the transaction. Thus, by its very language, section 14 of the Collocation Order applies only to connections between Qwest and a CLEC, not to those cross connections between two CLECs whose signals bypass Qwest's network. The Collocation Order simply has no applicability to the issues pending before this Commission.

In contrast to the Collocation Order, the FCC has directly addressed CLEC-to-CLEC connections and its rules are clear and not subject, in the least, to Covad's interpretation. In its *Fourth Advanced Services Order*, the FCC discussed CLEC-to-CLEC connections and amended 47 C.F.R. 51.323(h) to specifically list the only situations in which an ILEC has an obligation to provide a connection between the collocated equipment of two CLECs.[99] 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[100]; or 2) under section 201 when the requesting carrier submits certification that more than 10 percent of the amount of traffic will be interstate.[101] Here, however, Qwest *does* permit CLECs to connect to each other outside of their collocation space. As Mike Norman testified at least four separate times during the hearing, Qwest *does* allow CLECs like Covad full access to each of the Qwest Central Offices 24/7/365

[97] Collocation Order at section 14 (emphasis added).

[98] Collocation Order at section 14 (emphasis added).

[99] 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.

[100] 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…."

[101] 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

for the purpose of allowing the CLECs to provide these connections, and any necessary regeneration, themselves.[102] This critical fact was not disputed by Covad. In fact, Covad did not ask Mr. Norman a single question about this key issue. Why? The reason is clear; Covad never attempted to dispute this key fact because it wants to distance itself from the law. Specifically, it wants to distance itself from the exception which Covad itself recognized in 47 C.F.R.51.323(h).[103] Since Qwest does permit Covad to make its own cross connection, and has thereby removed itself from Covad's relationship with a connecting CLEC, Qwest has no legal obligation to provide the Covad to CLEC connection, much less regeneration of the connection.[104]

Covad also claims that it is discriminatory for Qwest to charge for regeneration of a CLEC-to-CLEC connection because it is economically and technically infeasible. This argument is unfounded and illogical. First, in determining whether an ILEC must provision a CLEC-to-CLEC connection, cost is not the test. As stated above, the FCC very clearly enumerated those instances when an ILEC is required to provision a CLEC-to-CLEC connection, *i.e.,* if the ILEC does not permit the CLEC to self-provision. There is no mention of whether the CLEC must be financially able to self-provision or what the cost should be, but rather whether the ILEC permits the CLEC to self-provision. Had the FCC believed that the cost of self-provisioning should be considered, it would have said so in its rules. Absent a directive by the FCC, economics is not a factor in deciding this issue.

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to section 201 of the Act.

[102] *See*, TR. Vol. 2 at 314:20-25; 315:16-21; 318:16-18; 318:22-25.

[103] *See*, Covad Br. at 36.

[104] *See* Ex. Qwest 4 (Norman Direct) at 5:9-12.

Moreover, Covad incorrectly bases its economic infeasibility claim upon section 251(c)(6) of the Telecommunications Act which requires that collocation be provided on terms that are just, reasonable and non-discriminatory.[105] Covad contends that Qwest's collocation policies are discriminatory and thus it is entitled to regeneration between CLECs for free. There is no dispute, however, that Qwest and Covad resolved their differences with respect to the language in the proposed interconnection agreement regarding assignment of collocation space.[106] Qwest accepted Covad's language and the parties agree that Qwest must assign collocation space in an efficient manner.[107] There is also no dispute that Covad has the opportunity to request a specific collocation space in a Qwest central office if such is available or to request a walk through of a central office to determine if a more desirable location is available.[108] Therefore, Qwest does not unilaterally determine where a CLEC will place its collocation, but rather it is a shared decision based upon a number of factors, which the parties do not dispute.[109] Thus, Covad's claim that Qwest's collocation assignment practices are discriminatory is groundless.

Further, Covad also seems to suggest that it is discriminatory to require Covad to pay for collocation space in order to place a mid-span repeater. This argument fails for a number of reasons. In requiring ILECs to make their network available to CLECs, the FCC determined that collocation was the means by which CLECs were to be given access to an ILEC's central offices. Collocation rates were established at TELRIC, which by definition, means they are cost-based,

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[105] *See* Covad Br. at 36.

[106] TR Vol. 2 at 296:21-25.

[107] TR Vol. 2 at 297:1-2 and 297:10-13.

[108] *See* Ex. Qwest 4 (Norman Direct) at 6:7-9; Ex. Qwest 4R-C (Norman Response) at 3:1 – 4:2.

[109] *Id.*

according to the FCC. Covad's suggestion that purchasing collocation space at a TELRIC price is discriminatory is plainly wrong.

Finally, the FCC does not require ILECs and CLEC to configure their networks in the same manner. ILECs must only give CLECs access to network elements that the FCC has determined are required to avoid impairment. Pursuant to 47 C.F.R. 51.323(h), CLECs are not impaired if ILECs permit CLECs to self-provision CLEC-to-CLEC connections. Thus, it is not discriminatory for Covad to purchase a mid-span collocation space to place its regeneration equipment.[110] Additionally, Covad's claims of technical infeasibility are based upon two hypothetical theories, neither of which were supported by any real evidence. Initially, Covad suggests that it is technically impossible for it to regenerate its own signal because mid-span collocation space *may* not be available. Covad also claims that it cannot regenerate a signal from its own collocation space when making a direct connection to a partner CLEC because of the *chance* of bleed over. Each of these hypothetical theories is unsupported by the record and is factually incorrect. Qwest witness, Mike Norman, confirmed that if Covad requested collocation space midway between its collocation and that of a partner CLEC, Qwest would provide space to accommodate the request.[111] Mr. Norman further testified that there should never be an issue with bleed over if a shielded cable was used which would protect the integrity of the signal.[112]

The Minnesota Administrative Law Judge concisely framed the issue and the law in holding that "[b]ecause Qwest permits collocating carriers to provide their own cross connection,

[110] It should be noted that Covad may purchase either cageless or virtual collocation instead of a caged collocation space at a substantially lower cost.

[111] TR Vol. 2 at 340:19 – 341:7. In this exchange, Mr. Norman testified that he was sure that collocation space could be made available if Covad made such a request, but that there were no guarantees. The lack of evidence that Qwest has ever denied a request for collocation space supports Mr. Norman's testimony that Qwest would work something out. In addition, as mentioned above, cageless and virtual collocation options exist in addition to caged collocation.

[112] TR Vol. 2 at 319:20-320:13.

47 C.F.R. §51.323(h) makes the connection and any required regeneration the responsibility of the collocating carriers, assuming that Qwest has otherwise complied with its obligation to provide collocation on terms and conditions that are just, reasonable, and nondiscriminatory."[113] Here, Covad presented no evidence that Qwest fails to provide collocation on terms that are just, reasonable and nondiscriminatory. In fact, just the opposite is true. As mentioned above, Qwest and Covad settled all of their issues regarding collocation prior to hearing.

E. Issue 9: Covad Has Not Demonstrated Legitimate Grounds For Requiring A 45-Day Payment Schedule

Covad has failed to demonstrate that any Qwest billing practice necessitates a 45-day payment cycle. Covad complains of a number of separate and isolated billing practices, but has not demonstrated that any of these actually prohibit Covad from reviewing and paying its bills within 30 days. For example, Covad complains that bills for non-recurring collocation charges are provided in hard copy, rather than electronically and some contain individual case basis ("ICB") charges. These bills, however, represent a minute percentage of the overall bills,[114] and Covad fails to suggest how an ICB charge is somehow defective or is Qwest's responsibility. More importantly, Covad fails to demonstrate why manual review of the collocation bills cannot be accomplished within 30 days. Similarly, Covad complains that Qwest uses unique identifiers, rather than circuit identification numbers, for purposes of billing line sharing. Covad has not demonstrated why validating a bill using a unique identifier necessitates a longer billing cycle, especially since Covad has been using this same unique identifier for five years. Covad complains that some of Qwest's UNE bills do not contain universal service ordering codes

[113] *See* Minnesota Arbitrator's Report at ¶ 80. This decision was orally upheld by the Minnesota Commission on January 27, 2005.

[114] *See* Ex. Qwest 2-C (Easton Direct) 9:17 – 10:4 and Ex. Qwest 2R-C (Easton Rebuttal) 8:10-14.

("USOCs"), yet as Mr. Easton testified, this affects only Qwest's Western region, which does not include Utah.[115]

Contrary to what one would expect, Covad has done nothing more than to provide numerous self-serving statements that it needs more than 30 days to review its bills. It appears as though Covad believes that the more times they say they need more than 30 days, the stronger their position becomes. The reality is that Covad has not provided any compelling evidence demonstrating that Qwest's billing practices cause actual and material impediments to Covad's ability to operate under a 30-day payment cycle. To the contrary, the evidence in this proceeding has established that (1) the number of bills Covad needs to manually review is quite small[116]; (2) that other members of the industry have agreed to the thirty day time frame and have been able to comply with it[117]; and (3) that Covad itself accepted the same time frames when it entered into the Commercial Line Sharing Agreement with Qwest in April 2004.[118] Moreover, Covad would have this Commission believe that Qwest's bills are defective, while in fact, the FCC endorsed Qwest's bills when it granted Qwest entry into the long distance market under section 271 of the Telecommunications Act.[119]

Covad could not refute Mr. Easton's testimony that, even if Covad incurred real and material impediments to reviewing bills, the 45 day period suggested by Covad would not address its concerns. Covad would continue to receive bills every 30 days. Without adding

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[115] *See* Ex. Qwest 2R-C (Easton Rebuttal) 13:1-11. At the time of the hearing, Mr. Easton testified that a systems fix would occur in the near future. In fact, the USOC issue was corrected in Qwest's western region effective January 31, 2005.

[116] *See* Ex. Qwest 2R-C (Easton Rebuttal) 7:16 – 8:14.

[117] *See* Ex. Qwest 2-C (Easton Direct) 5:3-11 and 8:14-21.

[118] *See* Ex. Qwest 2-C (Easton Direct) 6:20 – 7:2.

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

additional resources, or making existing resources more productive, Covad would be unable to address new bills at the same time old bills were being reviewed.

Furthermore, the language proposed by Covad is vague and subject to several interpretations. For example, one could read the Covad proposed language for section 5.4.1 to mean that Covad would have 45 days to pay the entirety of any bill if one of the exceptions is applicable to that bill. If such an interpretation was accepted, Covad would have gotten a 45 day payment due date, under the guise of only asking for an extended due date in certain instances. If the language is not interpreted as stated above, distinguishing between services having a 30 day payment due date and those having a 45 day payment due date would require significant manual effort on the part of Covad and Qwest. The parties would be required to manually determine how much money is due at any given time, and Covad would be cutting a check to Qwest every 15 days, not every 30 days as stated in its brief. Surely, such manual effort could be better directed toward reconciling its bills.

More importantly, however, the purpose of this arbitration process is to establish contract language that will assist the parties in their relationship with each other, not create confusion. Covad's proposed language can only create more problems, not solve them, while Qwest's proposal is commercially reasonable, is the industry standard, and has been agreed to by numerous CLECs including Covad as early as April of last year.

In contrast to its failure to prove actual impediments, Covad cannot dispute that the 45-day payment cycle will cause real and material harm to Qwest. Qwest will lose the funds that it would otherwise have available to it within 30 days, plus any interest that would be owed as a result of Covad's failure to pay the *undisputed* portion of its bill within that time. Thus, Covad's proposed language amounts to nothing more than a 15 day interest free loan. To the extent other

CLECs demand to opt in to this agreement or demand a similar provision in interconnection arbitrations, this impact will be multiplied.

The new proposal proffered by Covad is unreasonable and should be rejected. As demonstrated by Qwest, there is no basis for extending the payment date for any product. Covad's proposal would require Qwest to make unique and costly permanent changes to its systems solely to address Covad's proposed change. The changes would affect all CLECs, which may cause hardship to those CLECs who have processes in place to verify Qwest's bills as they exist today. The record does not support any justification for such a drastic approach.

Covad's claim that it is unable to address billing issues through the Change Management Process ("CMP") should be dismissed. Before late September, 2004 billing issues had never been subject to prioritization in CMP.[120] Although, even absent a prioritization process, Qwest has always, and continues to, accept and implement Billing change requests via the CMP.[121] Moreover, in late September, Qwest agreed to change the long standing status quo and allow prioritization of billing issues.[122] Covad cannot claim that Qwest changed its position to Covad's detriment or that there is currently any impediment to addressing its claims related to billing deficiencies in the CMP forum. Furthermore, if Covad is dissatisfied with Qwest's position regarding any particular change request, the CMP has provisions in place where disputes will be addressed and resolved with input from all CLECs.[123]

Finally, the Washington ALJ rejected Covad's requested 45-payment period. The ALJ found:

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[120] TR Vol. 1 at 251:5-17.

[121] *Id.*

[122] TR Vol. 1 at 251:18-24.

[123] *See* Exhibit G of the proposed ICA.

> The sheer number of bills appears to be one of the consequences of providing service to its customers. As such, bill review is a cost of business to Covad, which should be to assign sufficient resources to conduct bill review and either contest inaccurate bills or audit those bills after payment. Modifying the payment due date for particular products, and then for a twelve month period, will likely create delays and confusion for both Covad and Qwest that my result in far more problems than the current process…The burden for dealing with these new arrangements should not be placed upon Qwest, but is a cost of doing business.[124]

F. Issue 9: Covad's Proposal To Extend The Time Within Which Qwest May Discontinue Processing Orders And Disconnecting Service is Unreasonable And Unsupported.

Covad does not effectively support its need for extending the time at which Qwest may discontinue processing orders and extending the time at which Qwest may disconnect orders. Contrary to Covad's assertions, Qwest demonstrated that the time periods proposed by Qwest are in accord with industry standards,[125] and limit Qwest's financial exposure. Covad's premise for its alleged need for additional time is entirely vague and speculative. In essence, Covad hypothesizes regarding the potential need to *organize* requests for injunctive relief *or make other arrangements.*[126] In fact, the language in the Covad ICA requires Qwest to provide notice to Covad before Qwest can discontinue processing orders or disconnect service.[127] So, to the extent that Covad somehow overlooked the fact that it was not paying its bills to Qwest, Covad cannot claim that Qwest can act in an arbitrary and harmful manner. Significantly, Covad fails to acknowledge that under the terms of the parties' proposed ICA Qwest can only pursue its

[124] Washington Arbitration Order at ¶ 103.

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

[126] Covad Br. at 46.

[127] *See* Ex. Qwest 2-C (Easton Direct) 13:7 – 14:8 and 16:14 – 17:14.

discontinuance and disconnection remedies if Covad fails to pay the *undisputed* portion of its bill.[128]

Covad suggests that Qwest is adequately protected because of the deposit provision of the ICA. While Qwest is entitled to seek and receive a deposit in the amount of two times Covad's monthly billing amount, assuming Qwest is able to apply the deposit to the outstanding balance, Qwest's protection will be exhausted long before Qwest is able to begin seeking remedies to mitigate its financial risk. The following example is instructive. If Qwest issues a bill for services on January 1, Covad has 30 days (or approximately until February 1) to pay that bill. If Covad fails to dispute the bill, Qwest will expect payment on or about February 1. If Covad fails to pay the bill on February 1, under Covad's proposal, Qwest must wait until April 1 before it can seek to discontinue processing orders. Then, under Covad's proposal, Qwest must wait an additional 30 days before it can disconnect service to Covad. The discontinuance and disconnection remedies will not begin to apply until Qwest has continued to provide service to Covad for three and four months, respectively (i.e. discontinuing processing orders for failure to pay the January 1 bill will not be possible until April 1, and disconnection would not be available until May 1). Obviously, the two month deposit on the original bill due January 1 is exceeded, and Covad has continued to receive services and bills for which Qwest has no indication it will be paid.[129]

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[128] *See* proposed ICA §§ 5.4 .2 and 5.4.3.

[129] This also assumes that the deposit is enough to cover two months of billings. Under the parties' ICA Qwest is limited in its ability to request an additional deposit if two months of a CLEC's average monthly bill exceeds the deposit amount.

Covad admits that extending both dates would cause Qwest financial harm, e.g. if Covad refused or stopped paying Qwest.[130] Failure to pay is a very real risk in the case of CLEC insolvency, and Covad has failed to identify any compelling reason to impose any increased financial risk on Qwest and its shareholders. Covad has argued that due to recent developments in the industry, several CLECs have failed to pay Qwest for services rendered, thereby leaving Qwest with large uncollectibles. This, according to Covad, will result in Qwest becoming more vigilant in enforcing its rights under the interconnection agreement, and therefore, Covad should be given more time to fail to pay its bills before Qwest can take remedial action. This analysis defies logic. Qwest works with each and every CLEC that runs into financial difficulties in order to assist that CLEC in paying its bills. Qwest does not jump to its discontinuance and disconnection remedies in an effort to put a company out of business. Qwest has every incentive to see that its wholesale customers are successful and pay their bills on time; however, the risk to Qwest of the extended time frames is much more than float on a monthly bill, it is complete non-payment. Once a CLEC stops paying its bills, it is likely that it has problems far exceeding a concern for its payment to Qwest. Therefore, the only reasonable conclusion that can be drawn is that a supplier (Qwest) should be able to protect itself from further exposure sooner rather than later.

Again, the Washington ALJ rejected Covad's position on this issue, stating: "Covad's concerns do not outweigh the possible financial risk to Qwest by processing additional orders from Covad and providing service to Covad while Covad has the option of not paying Qwest for services rendered for 90 and 120 days, respectively."[131]

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[130] Covad Br. at 45.

[131] Washington Arbitration Order at ¶ 110.

CONCLUSION

For the reasons stated here and its opening brief, Qwest respectfully requests that the Commission adopt Qwest's proposed language for each of the ICA provisions in dispute.

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Respectfully submitted,

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

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing QWEST CORPORATION'S POST-HEARING RESPONSE BRIEF was mailed by electronic and U.S. Postal Services, postage prepaid, to the following:

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

Karen Shoresman Frame
Senior Counsel
Covad Communications Company
7901 Lowry Boulevard
Denver, CO 80230
Email: kframe@covad.com

Michael Ginsberg
Assistant Attorney General
Heber M. Wells Building
160 East 300 South, Suite 500
Salt Lake City, UT 84111

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