- 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 ARBITRATION REPORT AND ORDER

ISSUED: February 8, 2005

By the Commission:

PROCEDURAL HISTORY

On April 27, 2004, DIECA Communications D/B/A Covad Communications (Covad) filed a Petition pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act), seeking arbitration of a proposed interconnection agreement (ICA) between Covad and Qwest Corporation (Qwest).

Pursuant to the parties' agreement, the Administrative Law Judge issued a scheduling order on July 6, 2004, under which Covad and Qwest filed their Direct Testimony by October 8, 2004, and Rebuttal Testimony by November 12, 2004. The parties having agreed to waive the final adjudication deadline established for this proceeding under Section 252(b)(4)(C) of the Act, hearings were scheduled to commence on December 8, 2004, with written briefs to be filed by January 10, 2005, and Commission Order to issue by February 11, 2005. Hearing on this matter was held before the Administrative Law Judge December 8-9, 2004. Pursuant to mutual request of the parties filed on January 4, 2005, the deadline for submission of briefs was extended to January 21, 2005, with Commission Order to follow by February 25, 2005. Both parties having submitted Post-Hearing Briefs on January 21, 2005, Qwest submitted a Post-Hearing Response Brief on February 7, 2005. Because the agreed-upon and duly ordered schedule for this docket had not anticipated or called for the parties to submit response briefs, the Administrative Law Judge did not consider Qwest's Response Brief in deciding upon the disputed issues or drafting the recommended Report and Order.

BACKGROUND

The issues presented for arbitration in this docket are not unique to Utah. In fact, the parties have engaged in a sort of traveling road show over the past half-year or more litigating these and similar issues in ICA arbitration proceedings in at least three other states: Colorado, Minnesota, and Washington. Each of these state commissions has now issued its order in these matters.

Covad filed its Petition for Arbitration of the disputed issues pursuant to 47 U.S.C. § 252, which states:

> Standards for arbitration. In resolving by arbitration under subSection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall – (1) ensure that such resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to Section 251; (2) establish any rates for interconnection, services, or network elements according to subSection (d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c).

After interconnection agreement terms and conditions are adopted by two companies, either by mutually agreed negotiation or arbitration, 47 U.S.C. § 252(e)(1) requires that the interconnection agreement be submitted to the state commission for approval. Title 47 U.S.C. § 252(e)(2)(B) permits a state commission to reject an agreement or portion "if it finds that the agreement does not meet the requirements of Section 251 . . ."

During the negotiation and arbitration process, many issues have been resolved by mutual agreement between Covad and Qwest. We now address the remaining open issues identified by the parties.

Issue 1. Retirement of Copper Facilities (Sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2)

Although Covad's Petition for Arbitration sought Commission action concerning ICA Sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2 pertaining to retirement of copper loops and subloops, Covad has since agreed to close these Sections (which we take to mean Covad now accepts Qwest's proposed language for these Sections) and to instead seek arbitration of the parties' proposed language for Sections 9.1.15, 9.1.15.1, and 9.1.15.1.1, as provided in the parties' Joint Disputed Issues List submitted on December 3, 2004. The dispute regarding these Sections arises from Covad's concern that Qwest's replacement of copper facilities used by Covad to provide Digital Subscriber Line (DSL or xDSL) service to its customers with fiber facilities will effectively preclude Covad from continuing to serve those customers. In closing Sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2, the parties' dispute now centers not on fiber to the home (FTTH) or fiber to the curb (FTTC) facilities, but primarily on the replacement of copper feeders with fiber feeders.

With regard to Section 9.1.15, the parties are in general agreement that, in the event it decides to retire a copper loop, copper feeder, or copper subloop, Qwest will provide notice of such retirement via three different means: (I) on its web site, (ii) by email to competitive local exchange carriers (CLECs), and (iii) by public notice to the Federal Communications Commission (FCC). However, where Qwest's proposed language merely acknowledges that, having satisfied all FCC and state commission notice requirements, Qwest may proceed with copper retirement, Covad proposes a detailed listing of the information that must be included in Qwest's email notice to CLECs as follows:

> The e-mail notice provided to each CLEC shall include the following information: city and state; wire center; planned retirement date; the FDI address; a listing of all impacted addresses in the DA; a listing of all of CLEC's customer impacted addresses; old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information.

In addition to its proposed notice requirements, Covad also proposes language in Sections 9.1.15.1 and 9.1.15.1.1 that would require Qwest to ensure continuity of service to Covad customers through an alternative means with no degradation in service and no increase in cost to Covad or its customers:

> 9.1.15.1 Continuity of Service During Copper Retirement. This Section applies where Qwest retires copper feeder cable and the resultant loop is comprised of either (1) mixed copper media (i.e., copper cable of different gauges or transmission characteristics); or (2) mixed copper and fiber media (i.e., a hybrid copper-fiber loop) (collectively, "hybrid loops"). This Section does not apply where the resultant loop is a fiber to the home (FTTH) loop or a fiber to the curb (FTTC) loop (a fiber transmission facility connecting to a copper distribution plant that is not more than 500 feet from the customer's premise) serving mass market or residential End User Customers.
>
> 9.1.15.1.1 When Qwest retires copper feeder for loops serving CLEC-served End User Customers or the CLEC at the time such retirement is implemented, Qwest shall adhere to all regulatory and legal requirements pertaining to changes in the Qwest network. Qwest will not retire copper facilities serving CLEC's End User Customers or CLEC, at any time prior to discontinuance by CLEC or CLEC's End User Customer of the service being provided by CLEC, without first provisioning an alternative service over any available, compatible facility (i.e., copper or fiber) to CLEC or CLEC End User Customer. Such alternative service shall be provisioned in a manner that does not degrade the service or increase the cost to CLEC or End User Customers of CLEC. Disputes over copper retirement shall be subject to the Dispute Resolution provisions of this Interconnection Agreement.

Covad Position

Covad believes that any notice provided by Qwest must be "meaningful" and must therefore include the information contained in its proposed ICA Section 9.1.15. Covad claims that 47 C.F.R. § 51.327 prescribes the "minimum" notice standards for network changes and that Qwest's notice does not even meet these minimum requirements since it does not, for instance, provide information concerning which Covad customers, if any, will be impacted by the planned retirement. Covad also notes that its proposed notices, unlike Qwest's notices, would require information regarding "old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information" in accordance with FCC rules requiring

> A description of the type of changes planned (Information provided to satisfy this requirement must include, as applicable, but is not limited to, references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection)…

47 C.F.R. § 51.327(a)(5).

With regard to its proposal requiring Qwest to provide an alternative service, Covad notes that it has now modified its proposed Section 9.1.15.1, adding "over which Qwest itself could provide retail DSL service" immediately following "(collectively, "hybrid loops")". Covad believes this modified language clarifies that Qwest will never, in order to comply with the proposed language, "be required to make investments or incur costs that it had not already incurred to continue service to its existing retail customers."

Covad argues that permitting Qwest to retire copper feeder and replace it with fiber will not further the goal of broadband deployment and will only serve to enable Qwest to deny access to CLECs in contravention of Utah's statutory goal of "encourag[ing] the development of competition as a means of providing wider customer choices for public telecommunication services throughout the state." Utah Code Ann. § 54-8b-1.1(3). Covad believes that in establishing its copper retirement rules the FCC limited application of those rules to situations in which CLECs would not be denied access to loops. Covad notes that *TRO* ¶ 284 specifically recognizes a state commission's authority to ensure that a proposed copper retirement comports with applicable state law and regulation. It also cites UCA § 54-8b-1.1 and Commission Rule 746-348-7 as laying out numerous telecommunications policy goals and requirements that would be furthered by adoption of its proposed alternative service plan. Covad notes that it has spent over one billion dollars deploying its xDSL network throughout its service territory, including Utah. It believes the Commission should recognize and protect this investment by ensuring Covad's customers do not suffer service disruptions due to Qwest's retirement of copper feeders.

Covad points out that, as indicated at *TRO*, ¶ 283, n. 829, copper feeder is generally not covered by the *TRO*'s copper loop and subloop retirement rules and that Covad is merely attempting to provide language that would govern the retirement of copper feeder. Covad argues that to permit Qwest to deny CLEC access to bottleneck loop facilities by replacing copper feeder with fiber would raise competitors' costs, destroy the value of their infrastructure, and potentially drive them from the market. Covad believes that the Commission should ensure that Qwest's decision to retire copper is "neutral" to its competitors, providing no more or no less access to Qwest's network at prices that are neither higher nor lower than offered prior to the

installation of fiber.

Qwest Position

Qwest, on the other hand, notes that FCC rules require an ILEC either to file a public notice with the FCC or to provide notice via its Internet site. Qwest points out that it has agreed to do both, and has further agreed to send email notices to CLECs. Qwest objects to Covad dictating the specific information such email notices must provide, characterizing Covad's proposed language as an attempt to shift the burden from Covad to Qwest in determining whether any Covad customers may be affected by the proposed retirement.

In objecting to Sections 9.1.15.1 and 9.1.15.1.1 in their entirety, Qwest argues that *TRO* ¶ 271 affirms the ILECs' right to retire copper facilities and replace them with fiber, and that in so doing the FCC specifically rejected CLEC proposals that would have required ILECs to provide alternative service prior to retiring copper facilities. Qwest cites the testimony of its witness Ms. Karen Stewart in support of the proposition that the economic incentive for a carrier to deploy fiber in support of broadband services increases if the carrier is permitted to retire the copper loops replaced by the fiber. Qwest challenges Covad's assertion that an ILEC's right to retire copper is limited to those situations where the ILEC deploys FTTH or FTTC loops, pointing out that nowhere in the *TRO* does the FCC order such a limitation. Furthermore, Qwest believes Covad's "narrow reading" of the FCC's copper retirement rules is inconsistent with the FCC's clear intent to encourage the deployment of fiber facilities in order to "permit far greater and more flexible broadband capabilities."

Finally, Qwest refutes Covad's contention that allowing Qwest to retire copper feeders will bring substantial harm to its customers by pointing out that Covad witness Ms. Megan Doberneck acknowledged in her testimony that no Covad customer has ever been disconnected in Utah or anywhere else in Qwest's service territory because of the retirement of copper feeder. Ms. Doberneck further testified that only a "handful" (perhaps as few as four or five) of Covad's customers in Utah might be affected by Qwest's retirement of copper facilities. Ms. Stewart, on the other hand, testified that even after the retirement of copper feeder Covad would retain the option of continuing to serve these customers by deploying remote Digital Subscriber Line Access Multiplexers (DSLAM).

Division Position

The Division of Public Utilities (Division) notes that there is nothing in Federal law that would prohibit a state from adding additional notice requirements to those imposed by 47 C.F.R. § 51.327.

Decision

47 C.F.R. § 51.327 provides that public notice of a planned network change must contain "at a minimum" the carrier's name and address, the name and telephone number of the contact person able to supply additional information concerning the change, the implementation date and location of the change, a description of the type of changes planned, and a "description of the reasonably foreseeable impact of the planned changes." 47 C.F.R. § 51.327(a). Not only does the regulation anticipate that additional information may be required beyond the "minimum" information specified, but it also

requires the carrier to provide the "reasonably foreseeable impact" of the change. This regulation clearly envisions and permits the expansion of notice requirements. Aside from the requirement to provide an address listing of all impacted CLEC customers, nothing in Covad's proposed language appears to fall outside the scope of notice envisioned by this provision. Given the direct and final effect retirement of copper facilities could have on Covad's DSL customers, we conclude that it is reasonable to require Qwest to provide the additional information called for in Covad's proposed language, except that it would not be reasonable to require Qwest to anticipate the affect its proposed retirement of copper will have on specific Covad customers. The additional information we are requiring Qwest to provide should sufficiently identify the impacted area to permit Covad to determine for itself which of its customers may be affected. We find it reasonable to expect Covad, not Qwest, to make this determination. We therefore decline to require Section 9.1.15 to include the language "a listing of all of CLEC's customer impacted addresses" as proposed by Covad.

We further conclude that the interconnection agreement need not include Covad's proposed Sections 9.1.15.1 and 9.1.15.1.1. We find no support in the *TRO* for Covad's contention that hybrid loops should be treated differently under the FCC's copper retirement rules than are FTTH or FTTC loops. The FCC has made clear that ILECs may retire copper facilities, presumably *any* copper facilities, so long as they comply with the FCC's notice requirements. Nor are we persuaded by Covad's state law argument. Covad correctly notes that Utah law and Commission policies seek to foster competition by protecting CLEC access to essential facilities, but we decline to extend that protection to situations in which technical or economic considerations necessitate the retirement of copper feeder facilities by an incumbent LEC. We find nothing in federal or state law that would impose an obligation on Qwest to provide an alternative service at current costs for an xDSL provider prior to retirement of copper facilities. Qwest has a right to retire its copper facilities and replace them with fiber. We will not impinge on this right by requiring Qwest to provide "alternative services" at Qwest expense to CLECs whose operations may be affected by such retirements. It is sufficient that Qwest comply with the FCC notice requirements and those additional notice requirements ordered above.

Issue 2. Unified Agreement–Section 271 and State Law Elements Included (Section 4 Definition of "Unbundled Network Element"; Sections 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, and 9.21.2)

In accordance with prior agreement of the parties and in recognition that this issue presents no factual dispute, the parties briefed this issue but no evidence or testimony was presented at hearing.

Qwest proposes the following language for the ICA Section 4.0 definition of "Unbundled Network Element":

> "Unbundled Network Element" (UNE) is 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.

Covad's proposed language for the same section is:

> "Unbundled Network Element" (UNE) is 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, for which unbundled access is required under Section 271 of the Act or applicable state law, or for which unbundled access is provided under this Agreement.

As is the case with each of the disputed Sections encompassed under this Issue, the parties' disagreement centers on whether the ICA should acknowledge Qwest's continuing obligation to provide access to certain network elements under Section 271 of the Act and applicable Utah law, and require Qwest to provide those elements even though it may be no longer required to do so under FCC orders and regulations.

Covad Position

In arguing for inclusion of Section 271 and state law elements in the ICA, Covad first points out that the *TRO* specifically acknowledged and approved the Bell Operating Companies' (BOCs) continuing independent access obligations under Section 271:[W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under Section 251.

TRO, ¶ 653.

> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the Section 251 unbundling analysis.

TRO, ¶ 655

Thus, argues Covad, there is no doubt that Qwest retains an independent statutory duty to provide

unbundled access to the network elements listed in the Section 271 checklist at 47 U.S.C. § 271(c)(2)(B):

> Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning Section 251.

TRO, ¶ 654

Covad then argues that this Commission has the authority to arbitrate Section 271 and state law requirements in a Section 252 proceeding. Covad points to a recent decision by the Maine Public Utilities Commission finding that:

> …[S]tate commissions have the authority to arbitrate and approve interconnection agreements pursuant to Section 252 of the TelAct. Section 271(c)(2)(A)(ii) requires that ILECs provide access and interconnection which meet the requirements of the 271 competitive checklist, i.e. includes the ILEC's 271 unbundling obligations. Thus, state commissions have the authority to arbitrate Section 271 pricing in the context of Section 252 arbitrations.

Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection* (PUC 20) *and Resold Services* (PUC 21), Order – Part II (September 3, 2004).

Covad argues that this Commission retains independent authority under state law and our own rules to require continued unbundling of network elements no longer required by the FCC under Section 251. Covad notes that R747-348-7 lists network elements that we have already determined to be "essential facilities" to which access is mandated under Utah statute, and that this list of essential facilities contains every one of the network elements to which Covad seeks access in the proposed ICA.

Covad insists that Commission enforcement of Qwest's Section 271 and state law obligations in this arbitration is not preempted because the Commission's action would not impair federal regulatory interests. Covad further argues that the Commission has been granted the authority to arbitrate provisions of interconnection agreements addressing Section 271 obligations, and to set prices in accordance with federal pricing standards. Covad points to the Supreme Court's decision in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999) in support for this proposition:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions … the FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in [Section] 252(d) [of the Act]. It is the states that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.

Covad also points to the savings clauses of Sections 251(d)(3) and 252(e)(3) as proof of Congressional intent that the Act's regulatory scheme respecting UNEs should not preempt state enforcement of state unbundling requirements. Covad notes that the FCC and various federal courts have acknowledged that state action in this area is not preempted as a matter of law.

Covad acknowledges the FCC's recognition that the proper pricing standard for Section 271 elements is provided in the just, reasonable, and nondiscriminatory language of Sections 201 and 202 of the Act and that Section 271 does not require TELRIC pricing. However, Covad argues that the FCC has not prohibited TELRIC pricing for Section 271. Covad urges the Commission, given its lengthy experience in establishing rates for elements that may be subject to Section 271 unbundling, to order, as has the Maine Public Utilities Commission, that Qwest continue to provide Section 271 elements under the ICA at TELRIC rates until such time as new rates are adopted.

Qwest Position

Qwest urges this Commission to adopt its ICA Section 4.0 UNE definition because, in Qwest's view, its language makes clear that Qwest will continue to provide those Section 251 elements that it is required to provide while also making clear that it is not required under the ICA to provide elements for which it has no Section 251 obligation. Qwest's proposed ICA Section 9.1.1.6 takes this definition a step further by listing, and making unavailable under the ICA, those eighteen network elements that the FCC rejected in the *TRO* or that the D.C. Circuit vacated in *USTA II* and which Qwest therefore need not unbundle under Section 251. Qwest points out that CLECs such as Covad will retain access to these elements through various commercial agreements and tariffs; it is only in the context of the proposed ICA that these elements will no longer be available.

Qwest argues that the Act does not permit this Commission to create or enforce unbundling obligations under Section 271 or state law for

elements rejected by the FCC in the *TRO* or vacated by the court in *USTA II*. Unbundling a network element may only be required, argues Qwest, if the FCC has made the "impairment" finding required by Section 251(d)(2); absent such a finding by the FCC, the state commission is powerless to order the unbundling of that element under Section 271 or state law. Qwest cites familiar language from the *TRO* in support of this position:

> 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).

Qwest further argues that this Commission does not have the authority to order unbundling under Section 271 and that Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine whether BOCs have complied with the requirements of Section 271. With regard to pricing Section 271 elements, Qwest points out that

> [w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that 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).

TRO at ¶ 664.

Qwest also notes that the FCC has previously determined that the Section 201-02 requirement that prices must not be unjust, unreasonable, or discriminatory controls pricing decisions for Section 271 elements; TELRIC pricing does not apply to these network elements.

Division Position

The Division notes that many uncertainties currently exist with regard to federal regulation of UNEs under the Act. The Division also notes that it is not at all clear that an arbitration proceeding under Section 252 in any way authorizes this Commission to impose Section 271 unbundling obligations without both parties' consent. The Division therefore recommends that the Commission adopt Qwest's proposed language for ICA Section 4.0, thereby limiting the definition of UNEs to those required under Section 251. The Division notes that if the ICA does not address Section 271 issues then there would be no need for Qwest's proposed Section 271 pricing language in ICA Section 9.1.1.7. Nor, since the definition of UNEs is limited to only those elements required under Section 251(c)(3), does the Division believe that it is necessary to include in ICA Section 9.1.1.6. Qwest's proposed list of elements no longer required under Section 251. In general, the Division believes that since a basic understanding exists concerning the elements that are required under Sections 251 and 271, as well as what prices should be paid for those elements, the ICA should not try to anticipate what regulations may issue in the future but should simply rely on its change of law provisions to address changes when they occur.

Decision

We agree with Covad's general proposition that states are not preempted as a matter of law from regulating in the field of access to network

elements. Clearly, Congress did not intend such preemption or it would not have included the various savings clauses in the Act. The FCC has recognized on numerous occasions that room remains within the federal scheme for reasonable state regulation consistent with the Act. While we agree with Qwest's view that only an FCC finding of impairment renders a network element available under Section 251, we reject Qwest's apparent view that we are totally preempted by the federal system from enforcing Utah law requiring unbundled access to certain network elements. Clearly, where the FCC has issued no impairment finding with respect to a given element, there is no federal regulation with which our action under Utah law could conflict.

While we see a continuing role for Commission regulation of access to UNEs under state law, we differ with Covad in its belief that we should therefore impose Section 271 and state law requirements in the context of a Section 252 arbitration. Section 252 was clearly intended to provide mechanisms for the parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law.

Nor has Covad offered any legal authority that would require this Commission to consider Section 271 or state law obligations in a Section 252 arbitration proceeding. Indeed, Section 271 on its face makes quite clear that the FCC retains authority over the access obligations contained therein. Furthermore, Section 251 elements are distinguishable from Section 271 elements precisely because the access obligations regarding these elements arise from separate statutory bases. The fact that under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration does not lead us to conclude that it would be reasonable in this case for us to do so.

We therefore decline in this proceeding to require the inclusion in the proposed ICA of language referencing Qwest's Section 271 and state law unbundling obligations. Qwest's Section 271 and state law unbundling obligations remain in effect and we expect Qwest to continue to abide by them. However, given the current uncertainty of the federal regulatory regime and the fact that this docket is the product of a Section 252 action intended to arbitrate Section 251 obligations, we conclude it is reasonable to limit the parties' obligations under the resultant ICA to those mandated by Section 251 and the FCC's implementing regulations. We therefore adopt Qwest's proposed language for ICA Section 4.0.

Because we determine not to require provision of Section 271 or state law network elements in this interconnection agreement, we reject all Covad language referencing Section 271 and state law requirements and specifically adopt Qwest's proposed language for ICA Sections 9.1.1, 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, and 9.21.2.

We agree with the Division that the best way to avoid conflicts with the FCC's rules and any future FCC or judicial pronouncements is to stick to the plain language of the ICA which limits access to only Section 251 elements. We therefore conclude that the list of "former Network Elements" included in Qwest's proposed ICA Section 9.1.1.6 may ultimately prove confusing and is in any event redundant since only those elements required under Section 251 will be available under the ICA. We therefore adopt Qwest's proposed language for this section, but order the deletion of subsections (a) through (r).

Issue 3. Section 4 Definitions of "Commingling" and "251(c)(3) UNE", and 9.1.1.4.2

In accordance with prior agreement of the parties and in recognition that this issue presents no factual dispute, the parties briefed this issue but no evidence or testimony was presented at hearing.

Qwest proposes the following definition of "commingling" for ICA Section 4.0:

> "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 Qwest, or the combination of an Unbundled Network Element, or a Combination of Unbundled Network Elements, with one or more such facilities or services.

Alternatively, Covad proposes an ICA Section 4.0 definition of "251(c)(3) UNE" and incorporates this concept into its own proposed definition of commingling as follows:

> "251(c)(3) UNE" means any unbundled network element obtained by CLEC pursuant to Section 251 of the Act.
>
> "Commingling" means the connecting, attaching, or otherwise linking of 251(c)(3) UNE's or a Combination of 251(c)(3) UNE's 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, or the combination of a 251(c)(3) UNE or a Combination of 251(c)(3) UNE's with one or more such facilities or services.

As understood from this competing language, the core of the parties' dispute regarding this Issue is whether Qwest may be required to commingle Section 271 elements with Section 251 UNEs.

Covad Position

Covad argues that the FCC recognized in the *TRO* that Section 271 elements may be commingled with elements obtained pursuant to Section 251(c)(3) by defining 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 Act, or the combining of a UNE or UNE combination with one or more such wholesale services.

TRO, ¶ 579.

According to Covad, Section 271 elements are included in this definition as "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 Act". Covad points out that the FCC's intent is reinforced in the language of its resulting rule:

> [A]n incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

47 C.F.R. § 51.309(e).

Since an element provided pursuant to Section 271 is undoubtedly a "wholesale service", argues Covad, the FCC has authorized the commingling of such elements with Section 251(c)(3) UNEs.

Covad has therefore proposed its "251(c)(3) UNE" definition to make clear in the ICA the FCC's apparent distinction between UNEs, i.e.,

those elements obtained pursuant to Section 251(c)(3), and those elements obtained by some other means. In doing so, Covad intends to restrict commingling under the ICA to the combining of "251(c)(3) UNEs" with elements, such as Section 271 elements, obtained at wholesale by any method other than unbundling under Section 251(c)(3).

Covad argues that Qwest's proposed commingling definition is indicative of Qwest's inaccurate conclusion that the term "unbundled network element" as used in the ICA can only refer to Section 251(c)(3) elements. Covad points to the parties' agreement to ICA Section 9.1.1 as evidence that Qwest's narrow view of what constitutes a "UNE" under the ICA is not accurate:

> CLEC and Qwest agree that the UNEs identified in Section 9 are not exclusive and that pursuant to changes in FCC rules, state laws, or the Bona Fide Request Process, or Special Request Process (SRP) CLEC may identify and request that Qwest furnish additional or revised UNEs to the extent required under Section 251(c)(3) of the Act and other Applicable Laws.

Therefore, Covad argues, its "251(c)(3) UNE" definition is necessary to differentiate these elements from the other UNEs referenced in the ICA.

Finally, Covad argues against Qwest's position, apparently put forward in other jurisdictions, that the FCC's *Interim Unbundling Order* prohibits state commissions from allowing commingling because the FCC ordered that the pricing, terms, and conditions for access to loops, switching, and transport should remain the same as those available on June 15, 2004. Covad believes Qwest's position ignores the fact that the FCC established its commingling rules in the *TRO* and that *USTA II* did not address the commingling portion of the *TRO*. As put by Covad, "[t]o believe that the FCC promulgated interim rules to contradict its own rules that had just survived appellate scrutiny defies logic and is legally incorrect."

Qwest Position

Qwest views Covad's proposed language as an attempt to obtain the "impermissible" commingling of Section 271 elements, and argues that its proposed commingling and UNE definitions are consistent with the requirements of the *TRO* in that they expressly exclude Section 271 elements.

Qwest points to *TRO* ¶¶ 654, 656 and note 1989 in support of the proposition that while BOCs have an independent obligation under Section 271 to provide access to certain network elements, they are not required to combine those elements when they are provided under Section 271 because the specific Section 271 checklist items at issue contain no reference to the combination requirement set forth in Section 251(c)(3). Specifically, at note 1989 the FCC states

> [w]e decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3).

Qwest further notes that the D.C. Circuit in *USTA II* upheld the FCC's ruling that the combination rules of Section 251(c)(3) do not apply to these checklist items.

Qwest argues that Covad ignores the FCC's clear ruling in *TRO* n. 1989 declining to order the BOCs to commingle under Section 251(c)(3) the elements from Section 271 checklist items 4, 5, 6, and 10 that are no longer required to be unbundled under Section 251. Qwest also points out that, while paragraph 584 of the *TRO* as originally released indicated that BOCs' commingling obligations extended to Section 271 elements, the FCC in its *Errata* expressly removed this language, thereby relieving the BOCs of this obligation. Qwest argues that the FCC would have removed Section 271

elements from paragraph 584's express commingling requirements only if the FCC intended that its commingling rules not apply to those elements.

Finally, Qwest repeats its contention that this Commission has no authority to impose terms and conditions in this arbitration relating to Section 271 network elements, including ICA language that would require Qwest to commingle Section 271 elements with Section 251 elements or other wholesale services.

Division Position

The Division believes that the provisions of TRO ¶¶ 654, 656 and note 1989 establish that no commingling of Section 271 elements is required. The Division also notes that the parties' current ICA does not contain an obligation to commingle Section 251 and 271 elements and believes that adoption of such an obligation here as proposed by Covad would constitute an impermissible expansion of rights under the FCC's *Interim Unbundling Order*. Finally, the Division notes that there do not appear to exist any Utah commingling obligations applicable to this dispute.

Decision

We have already determined that Qwest's proposed ICA Section 4.0 definition of an Unbundled Network Element is the appropriate definition to be included in the parties' interconnection agreement. Because that provision defines a UNE as a network element "to which Qwest is obligated under Section 251(c)(3)" to provide access, we see no reason to create a redundant definition of a "251(c)(3) UNE" as proposed by Covad. Having removed Section 271 and state law elements from consideration under the ICA, we see no confusion stemming from our decision to define all UNEs as indicated above and therefore reject Covad's proposed definition.

In determining an appropriate definition of commingling, we are left to weigh the import of competing paragraphs of the *TRO*. On one hand, the FCC has already defined commingling at *TRO* ¶ 579 and both the Qwest and Covad proposed language employ this definition virtually verbatim, each party carving out or adding only that small portion that suits their purposes. On the other hand, *TRO* n. 1989 explicitly states that the FCC specifically declines to require commingling under Section 251(c)(3) of elements provided pursuant to Section 271. This express language is consistent with the *Errata's* deletion from *TRO* ¶ 584 of language requiring the commingling of elements unbundled pursuant to Section 271.

We agree with Covad that elements provided pursuant to Section 271 are "obtained at wholesale", and would therefore appear to be available for commingling under *TRO* ¶ 579. However, while one might *infer* such a requirement from this paragraph, the FCC later, in its changes to paragraph 584 and at note 1989, *expressly* declined to require commingling of Section 271 elements. We therefore conclude that any reasonable reading of the facially conflicting requirements of these portions of the *TRO* must recognize the FCC's apparent decision that ILECs are required to commingle wholesale elements obtained by means other than Section 251(c)(3), *except for Section 271 elements*. Since neither party's proposed language adequately captures the totality of the FCC's commingling definition and rules, we adopt neither and instead order the parties to substitute the following as the ICA Section 4.0 definition of commingling:

> "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 Qwest pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the combination of an Unbundled Network Element, or

a Combination of Unbundled Network Elements, with one or more such facilities or services, except that such facilities or services obtained pursuant to Section 271 of the Act are expressly excluded.

Issue 5: Regeneration Requirements (Sections 8.2.1.23.1.4, 8.3.1.9, and 9.1.10)

Regarding regeneration of signals within Qwest central office space, Qwest proposes the following language for ICA Section 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.

To the end of this language, Covad proposes adding the following:

> 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.

In addition, Covad proposes the following language for ICA Section 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 not required to meet ANSI standards, Qwest will provide such regeneration, and CLEC will pay the Channel Regeneration Charge described herein.

Qwest opposes creation of this section and instead proposes the following language for ICA Section 9.1.10:

> Channel Regeneration. Qwest's design will ensure the cable between the Qwest provided active elements and the DSX will meet the proper signal level requirements. Channel Regeneration will not be charged separately for Interconnection between a collocation space and Qwest's network. Cable distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B".

Covad Position

Covad believes that Qwest should be required to provide regeneration for cross-connects between Covad collocations, and between a Covad collocation and another CLEC's collocation ("CLEC-to-CLEC") when requested by Covad. Covad argues that, since Qwest ultimately decides the location of CLEC collocations, Qwest should bear the financial burden of any regeneration requirements caused by its collocation placement decisions. Covad believes that placing this burden on Qwest would be consistent with the Act's requirement that collocation be provided by ILECs on terms that are just, reasonable, and non-discriminatory. Covad admits that Qwest permits CLECs to make their own CLEC-to-CLEC connections, but asserts that Qwest's collocation policies, and industry standards, render self-provision of cross-connects requiring regeneration technically and financially infeasible, resulting in the discrimination prohibited by the Act.

Covad acknowledges that 47 C.F.R. § 51.323(h)(1) requires an ILEC to provide a connection between two collocated CLECs, except where

the ILEC permits the CLECs to provide the connection themselves, but argues that this rule and its exception must be viewed in light of the FCC's *Fourth Report and Order* , which reveals that the FCC intended to protect CLECs from discrimination caused by ILEC collocation policies. Specifically, Covad notes that the FCC found that Section 251(c)(6) of the Act requires ILECs to provide cross-connects for two collocated carriers. Because, argues Covad, the FCC clearly intended its cross-connection rules to ensure compliance with the non-discrimination requirements of Section 251(c)(6), the exception contained in 47 C.F.R. § 51.323(h)(1) must assume that CLECs would be permitted to self-provision cross-connects in a manner consistent with Section 251(c)(6).

Covad asserts that it has no practical ability to self-provision cross-connects requiring regeneration. Covad points to the testimony of Qwest witness Mr. Michael Norman who argued that Covad could boost cross-connected signal strength in order to overcome distance limitations but admitted that "engineering criteria" must be followed and indicated that boosting signal strength beyond acceptable ANSI standards is not an option. Qwest's alternate solution, enunciated by Mr. Norman, is for CLECs to place regeneration equipment at mid-span between the two cross-connected collocations. However, Covad points out that Mr. Norman testified there is no guarantee regeneration space will be available mid-span and that he did not know how much such regeneration would cost. Covad witness Mr. Michael Zulevic, on the other hand, testified that the cost of mid-span regeneration would be substantial.

Qwest Position

Qwest argues that because it permits CLECs to self-provision cross-connections in accordance with 47 C.F.R. § 51.323(h)(1) it has no obligation to provision those connections itself and therefore cannot have any obligation to provide regeneration on those connections. Furthermore, Qwest notes that because it provides regeneration for ILEC-to-CLEC connections at no charge, Covad's proposed language would require Qwest to provide free regeneration for CLEC-to-CLEC connections to which it is not even a party. Absent an obligation to provide the CLEC-to-CLEC connection, Qwest argues, it can not be required to provide regeneration services at any price, let alone free of charge. Qwest notes that it does, however, provide regeneration services at its FCC 1 Access Tariff rate to those CLECs who do not wish to provision it themselves.

Qwest then challenges Covad's claim that the FCC's *Second Report and Order* supports the view that Qwest should provide CLEC-to-CLEC regeneration free of charge. In accordance with the FCC's findings in the *Second Report and Order,* Covad argued in its petition and at hearing that regeneration should rarely be necessary if Qwest assigns collocation space efficiently. Therefore, argues Covad, if regeneration is required it must be because Qwest has failed to assign space in an efficient manner. Qwest, however, points out that the *Second Report and Order* dealt only with ILEC-to-CLEC connections, not the CLEC-to-CLEC connections to which Qwest is not itself a party. Qwest also argues that Covad ignores the reality that CLECs seek collocation space at different times, meaning it is often not possible to place two CLECs adjacent to each other. Qwest also notes that its policy is to provide a central office walkthrough to any CLEC that is dissatisfied with the collocation space to which it is assigned so that it can determine for itself if a more desirable space is available.

Division Position

The Division notes that the Commission has previously addressed regeneration in its Collocation Docket No. 00-049-106, Order issued December 3, 2001 (Collocation Order). The Division points out that in that Order we stated:

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

While neither party addressed the relevancy of this Order to these proceedings, the Division believes that it is applicable. Since the Division finds no prohibition under Federal law against a state commission ordering regeneration at no charge, the Division recommends that we amend the parties' proposed language to comply with our Order as noted above.

Decision

We begin by noting that our Collocation Order does not specifically address regeneration of CLEC-to-CLEC cross-connects but instead is directed more generally to ILEC-to-CLEC connections. In that instance, we found it reasonable to require Qwest to provide regeneration at no charge in order to support a CLEC's collocation with a technically adequate signal. In this case, however, we are asked to decide whether a Covad-to-Covad or a Covad-to-CLEC cross-connect imposes similar regeneration obligations upon Qwest. We conclude that the answer to the former is yes while the answer to the latter is no.

Where Covad seeks to connect to its own collocation space, there is no third-party business arrangement to which Qwest is not a party. The only party involved is Covad which already maintains a relationship with Qwest, is already connected to Qwest's network at no charge for any required regeneration, and simply seeks to extend that connection to an additional collocation space within Qwest's central office. In such a situation, we conclude that it is reasonable for Qwest to provide the connection, and any required regeneration, on the same rates, terms and conditions as Qwest provides for the underlying Qwest-to-Covad connection.

However, we find nothing in the record to persuade us that Qwest should be required to provide regeneration services for a CLEC-to-CLEC cross-connect to which Qwest is not a party. While Qwest is generally expected to reasonably accommodate CLEC requests to collocate and to attach to Qwest's network, we see no such expectation regarding CLEC-to-CLEC connections in the requirements of the Act, or in the prior pronouncements of the FCC or this Commission. As Qwest suggests, regeneration, though rare, may be necessary for several reasons, any number of which may be beyond Qwest's control. Covad is apparently concerned that competitive considerations may impact Qwest's collocation decisions and that it and the other CLECs will pay the price in the form of otherwise unnecessary signal regeneration charges. However, ICA Section 8.2.1.23, which as been agreed to by the parties, makes clear Qwest's responsibility to "design and engineer the most efficient route and cable racking for the connection" between Covad collocations or

between Covad and other CLECs. While we understand that this “most efficient route” may be less efficient than optimal due to prior Qwest space provisioning decisions, we believe that Covad’s interests are adequately protected by its ability to challenge as discriminatory any Qwest space allocation or connection decision. Absent evidence of discriminatory practices, however, we refuse to require Qwest to pay the price of regeneration when CLECs collocated in its central office decide to cross-connect their networks.

We do, however, take issue with Qwest’s apparent intent to charge for regeneration according to its FCC 1 Access Tariff when regeneration is requested by a CLEC. We fail to see how regeneration of a signal originating and terminating in a Qwest central office located in Utah could possibly implicate interstate commerce such that Qwest’s FCC tariff would apply. We note that we have not previously established a CLEC-to-CLEC signal regeneration charge, nor do we have sufficient evidence in this docket to permit us to do so. Therefore, the parties are directed that any rate Qwest may charge for CLEC-to-CLEC regeneration pending Commission action establishing a reasonable rate would be an interim rate subject to true-up. Since the evidence indicates that CLEC-to-CLEC regeneration has not yet been required and is unlikely to occur in the future, we will rely on the parties to bring an action before this Commission seeking establishment of such a rate when the need arises. We order the parties to submit ICA language in accordance with this decision.

Issue 9: Billing Issues (Sections 5.4.1, 5.4.2, 5.4.3)

This Issue involves the parties’ disputes over establishing Covad’s payment due date and the time that must have passed since the payment due date before Qwest may discontinue orders and disconnect service. Qwest proposes the following ICA Section 5.4.1 language regarding payment due date:

> Amounts payable under this Agreement are due and payable within thirty (30) calendar Days after the date of invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later (payment due date). If the payment due date is not a business day, the payment shall be due the next business day.

In its Petition for Arbitration, Covad originally proposed simply lengthening the payment due date time period from 30 to forty-five (45) days. However, Covad now proposes this 45-day payment period for invoices containing specific billable items as shown below:

> 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.

With respect to discontinuation of orders, Qwest’s proposed ICA Section 5.4.2 would permit it to discontinue processing orders thirty (30) days after the payment due date while Covad proposes lengthening this period to sixty (60) days. In addition, Qwest proposes in ICA Section 5.4.3 that after an additional 30 days (or a total of 60 days after the payment due date) it may disconnect all services for nonpayment; Covad proposes requiring Qwest to wait

until ninety (90) days after the payment due date before disconnecting services to Covad.

Covad Position

Covad argues that it seeks 45 days instead of 30 days in order to process and pay certain Qwest invoices because of billing problems created by Qwest; specifically, recurring information deficiencies in Qwest's invoices that require Covad to process those invoices by hand. Covad witness Ms. Megan Doberneck testified that while all ILECs use essentially the same billing process only Qwest has been unable or unwilling to fix the invoice problems Covad has identified so that Covad can more efficiently process the invoices. Among these problems are Qwest's failure to include in the invoice circuit identification numbers or universal service ordering codes (USOCs), information that would greatly speed Covad's billing verification process. Ms. Doberneck testified that Qwest provides the Billing Telephone Number (BTN) rather than the circuit identification number for line-shared and line-split loops, creating a problem of enormous scope that makes verification of charges impossible. Covad also complains that Qwest's bills for non-recurring collocation charges are provided in paper format rather than electronically, causing Covad employees to first manually enter the data into Covad's electronic billing system before a review can even begin. Ms. Doberneck also testified that Covad typically receives Qwest invoices five to eight days after the "invoice date" so that, because the invoice date starts the payment due clock, Covad often only has twenty-two days instead of thirty to review an invoice and make payment.

Covad argues that its proposed 45-day payment window would not preclude Qwest from continuing to bill on a 30-day cycle and that Covad would continue to pay Qwest every 30 days. Covad notes that Qwest bills recurring charges in advance so permitting Covad an extra fifteen (15) days would not create a great hardship for Qwest but it would afford Covad meaningful time to review Qwest bills and determine if there were any reason to dispute a charge.

Covad disputes Qwest's claim that other avenues rather this arbitration exist for the parties to iron out their billing disputes. Covad points to the fact that although it sought inclusion of the Circuit ID number through the Change Management Process (CMP), Qwest recently rejected this change request, citing the cost of the necessary systems changes as the primary factor leading to denial. Nor, argues Covad, do the performance measures in Qwest's Performance Assurance Plan provide any meaningful remedies, especially if Covad is not afforded the time necessary to identify errors before paying its bills.

Covad argues that under current arrangements Qwest has no incentive to fix problems because it is able to force Covad to bear the entire burden of dealing with those problems. Covad points out that Qwest has not challenged any of the evidence put forward by Covad concerning invoice timing, billing errors, and invoice deficiencies. Instead, Qwest simply attempts to shift the burden to Covad by suggesting that Covad dedicate more personnel to the invoice review process or become more efficient in executing that process. Covad maintains that Qwest's invoice deficiencies are the source of the problem so Qwest should bear the burden of dealing with those deficiencies, either by correcting them or by extending Covad's invoice payment period.

Covad seeks to extend the time Qwest must wait before discontinuing order processing or disconnecting service so that neither party is able

to use the shorter periods currently in effect, and proposed by Qwest, as leverage in billing or other disputes. Covad argues that its proposals would typically have almost no effect on Qwest's cash flow since the extended periods would only apply in those situations in which Covad has not paid an invoice because of a dispute and has continued to order additional services from Qwest. Even in such a case, Qwest's exposure to delayed payment would only be extended by 30 days.

Covad argues that discontinued order processing or disconnected service would likely have a disastrous, and perhaps irreversible, impact on the company. So high are the stakes, that Covad's legal remedy for disputing erroneous bills can have no practical effect if Qwest is able in the meantime to discontinue processing orders or disconnect Covad's service. Covad believes that balancing Qwest's concerns for prompt payment against Covad's ability to reasonably dispute a bill free from the threat of discontinued order processing or disconnected service weighs clearly in favor of our finding for Covad.

Qwest Position

Qwest points out that the 30-day payment term it proposes is already included in its Utah Statement of Generally Available Terms (SGAT), and is both commercially reasonable and the industry standard. Qwest also disputes Covad claims that extension of these time periods would have negligible effect on Qwest. Qwest witness Mr. William Easton testified that Covad's good payment history is not an indicator of future payment performance and that the interconnection agreement adopted following this arbitration will be available for opt-in by other CLECs. Mr. Easton also testified that implementing Covad's proposals would be costly and problematic because some bills would maintain their 30-day due date while others would have to be changed to 45 days. This would necessitate billing system changes putting Covad's billing at odds with every other Qwest CLEC customer.

Further complicating the billing process is Covad's proposal that "new products" be treated differently (i.e., given a 45-day due date) for the first twelve months then revert back to a 30-day due date. Qwest's billing system would therefore have to automatically determine when a CLEC ordered a specific product and update that product's due date accordingly with the passage of time. In addition, the parties would have to agree to what constitutes a "new product" since it is not otherwise defined in Covad's proposed language.

Qwest points out that the same 30-day period which it seeks in this arbitration exists in its FCC and Utah access tariffs, in the current Qwest-Covad ICA, and in the Commercial Line Sharing Agreement Covad entered into with Qwest in April, 2004. Qwest also disputes Covad's claim that Qwest's bills are deficient because they do not always provide circuit ID numbers. Qwest notes that it provides this information for all designed services, such as unbundled loops, but does not provide the circuit ID for non-designed services such as UNE-P loops and shared loops. On invoices for these services, Qwest employs a sub-account number as a unique identifier, along with the Firm Order Confirmation (FOC) and Customer Service Record (CSR) information provided in electronic format on all Qwest bills. Using this information, Qwest argues, Covad should be able to directly and efficiently verify the service for which it has been billed.

Division Position

The Division took no position and offered no recommendation concerning bill payment, except to note that there appeared to be nothing in the Act to preempt state action in this area and nothing in Commission rules or orders that would control this Issue.

Decision

While on their face Covad's proposed provisions would apply equally to both parties, we note that, because Covad neither supplies services to Qwest nor bills Qwest for any services, any cash flow and accounts receivable impact of Covad's proposals would fall squarely and solely on Qwest. We find nothing in the record to convince us that deviating from the standard time frames contained in Qwest's proposed language would be a reasonable response to Covad's claimed problems with Qwest's invoices. Permitting the additional 15-day extension Covad seeks for the payment due date would present serious billing system challenges and expenses for Qwest and could also negatively impact Qwest's cash flow while providing little or no tangible benefit to the parties' billing and payment relationship. If Covad believes that Qwest's decisions regarding Covad invoice changes, such as its recent CMP decision regarding the Circuit ID number, are unreasonable, Covad has appropriate avenues available to it under the ICA to seek resolution of its concerns.

Likewise, Covad's proposed extension of the waiting time required before Qwest could discontinue order processing and disconnect service would provide Covad more time to dispute a bill, but Covad has provided no concrete evidence demonstrating that it requires more time. There is no dispute that Qwest has the right to discontinue order processing and disconnect service for nonpayment; Covad merely seeks to delay Qwest's ability to act in accordance with this right. While Covad witnesses made general claims that they require more time to review and dispute Qwest invoices, no evidence was presented to demonstrate the scope or breadth of this problem, nor how providing the extra time would solve this problem.

We understand Covad's general concern that its business decisions concerning invoice disputes not be held hostage to an unreasonably short payment period, but the record amply reflects that the time periods contained in Qwest's proposed language represent current industry practice and standard. We do not find them to be unreasonable. We note further that the additional 15 days which Covad seeks in ICA Section 5.4.1 is essentially already provided by Section 5.4.4 which would allow Covad to dispute any bill within 15 days after the payment due date. Section 5.18.5 notes that Covad has up to 120 days after the payment due date to dispute a bill. In either case, if Covad should prevail, Qwest is obligated to refund the disputed amount with interest so long as Covad had remitted payment on time.

We therefore agree with Qwest on this issue and order the parties to adopt Qwest's proposed language for ICA Sections 5.4.1, 5.4.2, and 5.4.3.

Wherefore, we direct the parties to submit an interconnection agreement that includes the terms and conditions reflecting their mutual agreement and the Commission's resolution of the disputed issues discussed and resolved herein.

DATED at Salt Lake City, Utah, this 8th day of February, 2005.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 8th day of February, 2005, as the Arbitration Report and Order of the Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

G#42679