- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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| 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<br><br>ORDER ON RECONSIDERATION |
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ISSUED: April 13, 2005

SYNOPSIS

Upon reconsideration, the Commission affirms its prior Arbitration Order with respect to Issues 1, 2, and 5; clarifies Qwest's notice obligations under Issue 1; concludes that Qwest is required to commingle Section 251(c)(3) elements with Section 271 elements; and requires Qwest to provide a 45-day payment period to Covad so long as Qwest fails to provide electronic invoices containing circuit identification numbers.

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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"). Hearing on this matter was held before the Administrative Law Judge December 8-9, 2004. The Commission issued its Arbitration Report and Order ("Arbitration Order") on February 8, 2005. On March 10, 2005, Covad filed a Petition for Review or Rehearing requesting Commission review of each of the five issues addressed in the Arbitration Order. On March 11, 2005, Qwest submitted its Motion for Review Seeking Clarification of a Portion of the Commission's Arbitration Report and Order. Both Covad and Qwest filed their respective Responses on April 4, 2005.

Having reviewed the parties' requests and responses, we hereby affirm our findings and conclusions with respect to Arbitration Order Issues 1, 2, and 5; clarify Qwest's notice obligations under Issue 1; and modify our findings and conclusions concerning Issues 3 and 9, as discussed below.

DISCUSSION AND FINDINGS

**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)**

In the Arbitration Order, we ordered the parties to adopt Covad's proposed Section 9.1.15 notice requirements, except for the proposed language that would require Qwest to provide "a listing of all of CLEC's customer impacted addresses." However, the parties' reconsideration requests and responses indicate that there may be some confusion regarding Qwest's notice obligation under this language. We therefore clarify our intent that the ordered language requires Qwest to provide Covad a listing of all addresses impacted by a planned retirement, but does not require Qwest to determine which of these addresses represent Covad customers or to specifically notify Covad which of Covad's customers may be impacted by the planned retirement.

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

As noted in our Arbitration Order, the parties' dispute regarding this Issue centers on whether Qwest must, at Covad's request, commingle elements obtained pursuant to 47 U.S.C. Section 271 with elements obtained under 47 U.S.C. Section 251(c)(3). In previously determining that the ICA should not require the commingling of Section 271 elements, we recognized that the Federal Communications Commission ("FCC") defines "commingling" at paragraph 579 of the *Triennial Review Order* 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.

At the same time, we noted that paragraph 584 of the *TRO*, as originally drafted, specifically included Section 271 elements as "wholesale facilities and services" that incumbent LECs must permit to be commingled with Section 251(c)(3) elements, but that in its *Errata* the FCC removed the Section 271 reference from this paragraph. Finally, we noted *TRO* footnote 1989 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).

From these texts, we previously concluded that a reasonable reading of the FCC's intent required ILECs to commingle Section 251(c)(3) network elements with facilities and services obtained at wholesale, except for those wholesale facilities and services obtained pursuant to Section 271.

However, upon reconsideration, we agree with Covad that a more reasonable reading of these passages leads to the conclusion that the FCC did not intend to exclude Section 271 elements from its commingling requirements but only intended to prohibit Section 271 elements from taking the place of Section 251(c)(3) elements in commingling arrangements.

We arrive at this conclusion by noting that the FCC's unambiguous language in *TRO* paragraph 579 and its commingling rule at 47 C.F.R. § 51.309(e) make no mention of excluding Section 271 elements, but instead simply require commingling with wholesale facilities and services. There is no dispute that Section 271 elements are wholesale elements. We therefore conclude that the plain meaning of both the *TRO* commingling definition and the FCC's commingling rule reasonably includes Section 271 elements.

Furthermore, we agree with Covad that *TRO* footnote 1989 does not prohibit commingling of Section 271 elements *in toto* but merely prohibits combining elements obtained pursuant to Section 271 that are no longer available under Section 251(c)(3) with other elements obtained at wholesale. This reading is supported by the fact that this footnote originally included a final sentence stating "[w]e decline to apply our commingling rule, set forth in Part V11.A above, to services that must be offered pursuant to these checklist items", but that, in its *Errata*, the FCC deleted this sentence without explanation.

We also conclude that the deletion of language referencing Section 271 elements from *TRO* paragraph 584 was not intended to indicate an FCC prohibition against commingling Section 271 elements. A thorough reading of this paragraph discloses that its purpose is to discuss the commingling of resale services. Read in this light, deletion of the phrase referencing Section 271 simply intensifies the paragraph's focus on resale services. This reading is consistent with our interpretation above of *TRO* paragraph 579, the CFR definition of commingling, and

the *Errata* change to footnote 1989.

Because we conclude that Section 251(c)(3) elements must, at Covad's request, be commingled with Section 271 elements, we hereby modify the ICA Section 4.0 definition of commingling set forth in our Arbitration Order to delete the final phrase "except that such facilities or services obtained pursuant to Section 271 of the Act are expressly excluded."

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

In our Arbitration Order, we adopted Qwest's proposed ICA language relating to payment due date and the time that must have passed since the payment due date before Qwest may discontinue orders and disconnect service. In doing so, we concluded that Qwest's proposed 30-day payment due date represented the industry standard and that it's adoption in the ICA was therefore reasonable. However, upon reconsideration, we are persuaded by Covad's point that, while a 30-day payment period may be standard in the industry, Qwest's invoicing practices do not represent industry standards and are therefore not entitled to the industry standard payment period.

Qwest is in fact the only ILEC that fails to provide CLECs electronically verifiable invoices containing circuit identification numbers for line sharing invoices. Receipt of Qwest's paper invoices causes Covad to expend additional manpower and time to verify these invoices. Verification is made even more difficult by Qwest's failure to provide the circuit identification number on each of its invoices. In response, Covad proposes extending the 30-day payment due date for these invoices to 45 days.

Seen in this light, we can not reasonably conclude that Qwest's billing practices represent an industry standard. On the contrary, we conclude that Qwest's failure to supply electronic invoices with circuit identification numbers as requested by Covad is out of step with the rest of the ILEC community and therefore warrants providing Covad additional time to verify and pay the paper invoices it receives.

While we continue to recognize that extending Covad's payment due date could negatively impact Qwest's cash flow, we conclude that the problem is of Qwest's own making so it is reasonable that any impact should fall on Qwest. Were Qwest to implement industry standard invoicing, we would see no reason to deviate from industry standard payment terms. However, Qwest has thus far failed to do so and it is therefore reasonable to permit Covad an additional fifteen days to verify the invoices it receives.

Our decision herein applies to that portion of Covad's proposed ICA Section 5.4.1 that calls for a 45-day payment period for invoices containing line splitting or loop splitting products, missing circuit identification numbers, or missing USOCs. However, while we continue to find Covad's blanket request for an extended payment period for new products and services to be unjustified based on the evidence presented, we expect the 45-day payment term to apply to any new product or service for which Qwest provides less than industry standard invoicing. With respect to the timing of order processing and service termination, we find no compelling reason to deviate from our prior findings and conclusions.

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

DATED at Salt Lake City, Utah, this 13th day of April, 2005.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#43913