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

Andrew R. Newell
Krys Boyle, P.C.
600 Seventeenth Street
Suite 2700 South Tower
Denver, CO 80202
E-mail: anewell@krysboyle.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 DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY'S POST-HEARING BRIEF

January 21, 2005

TABLE OF CONTENTS

Introduction

After hundreds of hours of negotiation and a nearly completed formal arbitration proceeding, DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") and Qwest Corporation ("Qwest") (collectively, the "Parties") have narrowed the issues in this docket to five.

Issue 1 involves Qwest's commitments to maintain wholesale service to Covad in the event that copper plant serving Covad and its customers is retired by Qwest and replaced with fiber optic facilities. Covad's proposal that Qwest provide an alternative service to Covad in the event that it retires copper feeder is applicable only to situations in which Qwest retires copper feeder subloops, creating mixed-media or "hybrid" copper/fiber loops. Covad has agreed that copper retirement resulting in a Fiber to the Home (FTTH) or Fiber to the Curb (FTTC) loop may be governed by the process established by the FCC's *Triennial Review Order.*[1]

Because of this change, any statements made by the Federal Communications Commission (FCC) in its *Triennial Review Order* regarding certain copper retirement activity are no longer relevant to the disputed issue. The *Triennial Review Order* and resulting FCC rules explicitly limit the scope of their new copper retirement provisions to situations involving the creation of FTTH loops, and are silent with respect to Qwest's rights and responsibilities with respect to the retirement of copper feeder resulting in service disruptions to Covad's customers. Covad's proposals are therefore critical to protecting both Covad and Utah consumers from decreased access to bottleneck facilities when Qwest chooses to deploy hybrid loops.

Covad has also proposed improvements to Qwest's notice procedures for copper retirement activity, which are required by FCC rules. These improvements are required to lend meaning to Qwest's notices, and to comply with existing FCC standards.

---

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

Issue 2 encompasses the Parties' disagreement regarding the availability of network elements that may, in the future, no longer be available under the FCC's application of the "necessary" and "impair" standard applicable to Section 251 of the Telecommunications Act of 1996 ("Act"),[2] but must nevertheless be unbundled by Regional Bell Operating Companies ("RBOCs" or "BOCs") pursuant to Section 271 of the Act. This Commission has clear authority to apply both state law and all provisions of the Act as it decides interconnection arbitration disputes. Qwest's argument that the Commission is preempted from enforcing provisions of Utah law requiring access to these elements and Qwest's Section 271 obligations should be rejected.

Issue 3 involves the language in the Agreement describing permissible commingling arrangements. Covad has proposed language that is consistent with the FCC's statements regarding the commingling of unbundled network elements purchased under Section 271 of the Act: while Section 271 elements are not afforded status as Section 251 elements under the FCC's commingling rules, they are eligible for commingling with Section 251 elements just like any other telecommunications service.

Covad also proposes a definition of "251(c)(3) UNE." Covad believes that this definition is helpful in describing the precise group of unbundled network elements (those obtained pursuant to Section 251(c)(3) of the Act) that must be present in any commingling arrangement. This definition, rather than the general definition of "unbundled network element," is necessary because "unbundled network element" is used (and Covad believes will continue to be used) to describe not only UNEs purchased pursuant to Section 251 but also elements provided under other "Applicable Law,"[3] such as Utah law.

Issue 5 involves the Parties' disagreement over Qwest's obligation to provide regeneration between CLEC-to-CLEC cross connections ordered by FCC rule. Covad believes Qwest should

[2] Pub. L. 104-104, 110 Stat. 56 (1996).
[3] See Section 9.1.1 of the Agreement, as well as the Agreement's definition of "Applicable Law" contained in Section 4.

maintain a consistent regeneration policy as to both its ILEC-to-CLEC and CLEC-to-CLEC arrangements, and is certainly not permitted to refuse to provide a CLEC-to-CLEC connection solely because that connection requires regeneration.

Issue 9 involves the length of the period within which Covad may review Qwest's wholesale invoices prior to payment, and the timing of Qwest's remedies for non-payment. Covad has established a substantial record in this proceeding regarding the deficiencies of Qwest's bills, which slows down Covad's review and analysis of those bills. As a result of the current deficiencies of Qwest's bills, Covad requires additional time to adequately review certain portions of the UNE, collocation, and transport invoices it receives. With respect to Qwest's remedies for non-payment, Covad has no objections to the remedies themselves, but believes there are legitimate reasons to extend the timing of those remedies. Because the remedies have a potential to irreversibly damage Covad's business, the modest extensions of time Covad has proposed will allow Qwest to maintain the remedies to which it is entitled, while affording Covad sufficient time to either resolve payment issues with Qwest or seek appropriate relief from this Commission if necessary.

Argument

ISSUE 1 - COPPER RETIREMENT
(Sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2)

The Parties' disagreement with respect to Issue 1 centers on the conditions under which Qwest may, under both FCC rules and this Commission's rules, retire copper plant when it is used to serve Covad's xDSL customers. Qwest believes its ability to retire copper plant is unlimited, and that it must merely provide notice to the FCC of such retirement ninety (90) days prior to implementation. Covad has noted that, in addition to being bad policy, allowing Qwest to effectively disconnect Covad's DSL customers when it retires copper plant violates Utah law, and is, in any event, inconsistent with the FCC's *Triennial Review Order*. It is critical that this Commission not allow Qwest to over-read the FCC's new copper retirement rule. Allowing

Qwest to deny access to competitive LECs when Qwest chooses to retire copper feeder and replace it with fiber (thereby deploying a hybrid loop, rather than broadband capable FTTH loops) will not further the goal of broadband deployment, and would provide Qwest a blueprint to re-establish a monopoly for broadband services, in direct conflict with the Utah's stated goal of "encourag[ing] the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state." Utah Code § 54-8b-1.1(3).

After the hearing in this matter, Covad made a minor modification to its copper retirement proposals. The language in bold type below has been added to Covad's proposed 9.1.15.1:

> 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") **over which Qwest itself could provide a retail DSL service**. 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 copper distribution plant that is not more than 500 feet from the customer's premises) serving mass market or residential End User Customers.

This modification clarifies that Qwest will not ever, in order to comply with Covad's language, be required to make investments or incur costs that it had not already incurred to continue service to its existing retail customers. This ensures that Qwest will never experience increased costs to provide Covad an alternative service after retiring copper feeder loop.

In an effort to focus its core disagreement with Qwest's proposals to a minimum number of sections in the agreement, Covad has agreed to close sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2. The only sections of the agreement remaining open for Issue 1 are 9.1.15, 9.1.15.1, and 9.1.15.1.1.

A. The FCC Specifically Limited The Application Of Its Copper Retirement Rules To Circumstances Where CLECs Would Not Be Denied Access To Loops

Qwest has correctly pointed out that the FCC has adopted a streamlined notification process for the retirement of copper loops when those loops are replaced with fiber to the home (FTTH) loops. However, Qwest has conveniently ignored the FCC's stated pre-condition for the right of an ILEC to retire copper, that any such retirement must not deny competitors access to loop facilities:

> **Unless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules**, we will deem all such oppositions denied unless the Commission rules otherwise upon the specific circumstances of the case at issue within 90 days of the Commission's public notice of the intended retirement.

Triennial Review Order, ¶ 282.

In other words, there are two methods by which the FCC intended to prevent copper retirement. First, if the retirement will deny access to loop facilities as required by the FCC's rules (xDSL capable loops meet this criteria), then the ILEC may not use the copper retirement provisions of the *Triennial Review Order* at all. Second, the FCC may issue a ruling with respect to any objections filed within the ninety (90) day period, in which case an ILEC "may not retire those copper loops or copper subloops at issue for replacement with fiber-to-the-home loops." 47 C.F.R. §51.333(f).

The clear intent of the FCC, based upon its statements in the *Triennial Review Order* and its adopted rules, was to deny ILECs an unconditional right to retire copper in circumstances where a CLEC's service to customers would be affected by a denial of access to loops:

> We note that, with respect to network modifications that involve copper loop retirements, the rules we adopt herein differ in two respects from the notification rules that apply to other types of network modifications. **First, we establish a right for parties to object to the incumbent LEC's proposed retirement of its copper loops for both short-term and long-term notifications as outlined in Part 51 of the Commission's rules. By contrast, our disclosure rules for other network modifications permit**

oppositions only for instances involving short-term notifications.

Triennial Review Order, ¶ 283.

This is perhaps the most significant statement the FCC makes about copper retirement in the *Triennial Review Order*. By specifically recognizing that competitors may object to even a long-term notification of copper retirement, the FCC clarifies that, unlike other network modifications, a competitor can prevent the retirement altogether if their objection is upheld. In all other cases of network modification, CLECs only have the ability to request more time to prepare for the change, i.e., to request that a short-term notification be converted to a long-term notification.

The FCC's intent to protect xDSL capable loops in particular becomes clearer when read alongside the FCC's requirements for narrowband access to fiber loops. Because the FCC had already alleviated any concern regarding narrowband services by establishing specific access requirements for the provision of narrowband services by CLECs over newly deployed fiber loops,[4] the FCC could only have been referring to broadband services, including xDSL capable loops, when it discussed the "denial of access to loop facilities required under our rules."

As discussed above, Covad has elected to limit its “alternative service” proposals to fiber feeder retirement scenarios, which are clearly not subject to the FCC’s new rule espoused in the *Triennial Review Order*. Covad will pursue any disputes related to FTTH retirements through the established FCC process. The FCC’s position is important, however, in understanding that the FCC’s intent was not to provide Incumbent LECs and opportunity to close their networks, but instead to clearly provide that such retirements should not deny access to loops that are required to be unbundled.[5]

[4] *See Triennial Review Order,* ¶¶ 296-297; 47 C.F.R. § 51.319(a)(2)(iii).

[5] It is also important to note that the FCC’s findings of non-impairment with respect to next generation loop facilities were performed under section 251 of the Act, and in no way alter the responsibilities of RBOCs to make facilities available pursuant to section 271 of the Act and just and reasonable rates.

B. Utah Law Requires Continued Access To Customer Loops In Most Circumstances, Notwithstanding Copper Retirement

Prior to discussing this Commission's specific requirements regarding unbundled loops, it is worth noting that the FCC specifically noted that its streamlined procedures for copper retirement were not intended in any way to preempt state laws requiring access:

> As a final matter, we stress that we are not preempting the ability of any state commission to evaluate an incumbent LEC's retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements.

Triennial Review Order, ¶ 284.

The Legislature in Utah has stated the following goals regarding the state's telecommunications policy:

> (1) endeavor to achieve the universal service objectives of the state as set forth in Section 54-8b-11;
>
> **(2) facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state;**
>
> **(3) encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state;**
>
> (4) allow flexible and reduced regulation for telecommunications corporations and public telecommunications services as competition develops;
>
> **(5) facilitate and promote the efficient development and deployment of an advanced telecommunications infrastructure, including networks with nondiscriminatory prices, terms, and conditions of interconnection;**
>
> **(6) encourage competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis;**
>
> (7) seek to prevent prices for tariffed public telecommunications services or price-regulated services from subsidizing the

> competitive activities of regulated telecommunications corporations;
>
> **(8) encourage new technologies and modify regulatory policy to allow greater competition in the telecommunications industry;**
>
> **(9) enhance the general welfare and encourage the growth of the economy of the state through increased competition in the telecommunications industry; and**
>
> **(10) endeavor to protect customers who do not have competitive choice.**

Utah Code § 54-8b-1.1. [emphasis added]

Covad's proposals would further all of the statutory goals emphasized above. The proposals would foster reasonable and fair competition, maintain quality of service, and promote consumer protection and choice by offering an economically rational means by which Covad can continue to provide service. As a result, Utah consumers would maintain their right to choose an alternative provider for broadband services, which is becoming an ever more important service for residential subscribers and the growth of small business in Utah.

In response to these legislative directives, as well as the specific directive to enact rules to provide carriers the right to interconnect with the essential facilities and to purchase the essential services of telecommunications carriers,[6] this Commission adopted specific rules regarding access to loop facilities:

> **R746-348-7. Essential Facilities and Services.**
>
> A. Designation -- At a minimum, the following are considered to be essential facilities or services pursuant to 54-8b-2.2.:
>
> 1. Unbundled local loops including 2-wire, 4-wire **and digital subscriber line facilities**;
>
> 2. **Loop concentration, loop distribution and loop feeder facilities**;

[6] Utah Code § 54-8b-2.2(1)(b)(i).

These rules clearly establish the Commission's finding that the access to loop facilities, and specifically feeder facilities and digital subscriber line facilities, is essential to promoting the policies of competition and consumer choice established by the legislature. Qwest must, therefore, provide unbundled access to these facilities regardless of the medium or technology used.

The Commission must continue to use its authority, granted by state statute and clearly established by Commission rule, to protect competitors and consumers alike. Adopting Covad's copper retirement proposals is a critical component of this effort.

C. The Commission Should Respect Covad's Investment In Next Generation Facilities And Protect It Where Legally Permissible

The purpose of Covad's proposals is not to obtain unbundled access to Qwest's next generation facilities on some unlimited basis, as Qwest argues. Covad has invested in its own next generation facilities, and the purpose of its proposals is to protect its investment in those facilities that have been providing broadband service to Utah consumers for the past four (4) years.

Covad has spent well over a billion dollars deploying its xDSL network throughout its operating territory, including Utah.[7] This network is designed, in part, to transform Qwest's legacy last-mile copper facilities into a vital component of Covad's high-speed broadband platform. When Qwest deploys FTTH or copper-fiber hybrid loop facilities and retires legacy copper facilities, it has the potential of destroying Covad's investment in its own broadband network, which relies on copper facilities. As Qwest's Witness Karen Stewart pointed out, Qwest certainly takes its own DSL customers' needs into account when Qwest considers a retirement project,[8] and for good reason: Like Covad, Qwest has made substantial investments in its DSL network and its customers. It would be patently discriminatory and anti-competitive

[7] Exhibit Covad-1, p. 18, l. 437.
[8] Transcript, Vol. I, p. 109, l. 24 through p. 110, l. 3.

for Qwest to mistreat consumers that have chosen Covad service while it accommodates its own retail customers.

At the very least, when faced with this impairment of its investment, Covad should maintain access to its current customers, and those customers' service should not be disrupted. Covad's investment, and incentive to invest in the future, should not be discounted as a significant component of serving the public interest and fostering the development and advancement of broadband capability and consumer choice in Utah.

D. The Agreement Should Address Copper Feeder Retirement Scenarios

Covad is not so much concerned with Qwest's replacement of copper loops with FTTH loops, which fall within the FCC's new copper retirement rules, as it is concerned with the procedures governing the retirement and replacement of copper feeder with fiber feeder, hence its agreement to limit the impact of its proposals to copper feeder retirements.[9] As Ms. Doberneck stated in her testimony:

> Lest there be any question, Qwest's highest ranking officer, Richard Notabaert, just last week reiterated the fact the Qwest is not and will not engage in any kind of fiber deployment designed to bring enhanced broadband services to existing Utah consumers…

Exhibit Covad-2 at p. 4, ll. 116-119 [referring to quote of Mr. Notabaert contained in a *Businessweek* article].

This fact was essentially confirmed by Qwest Witness Karen Stewart, when she testified that copper retirements are primarily driven by maintenance issues and growth. With respect to the deployment of advanced services, she noncommittally stated: "… we're taking the incremental steps … this could very well be an incremental step toward providing eventually broadband services …" Transcript, Vol. I, p. 92, ll.9-12.

[9] Covad does not believe Qwest is likely, in the near future, to retire copper to build FTTH loops. Qwest CEO Richard Notabaert stated earlier this year that, "It is hard for us to look at the economic model and invest in fiber to the home…There are lower cost alternatives to fiber." Wall Street Journal, January 20, 2004. If Qwest does choose to do so, Covad has remedies, as the FCC made clear in the *Triennial Review Order*.

In response to data requests issued by Covad, Qwest confirmed that it had not deployed a single FTTH or FTTC loop in Utah, but had deployed 83,700 loops containing some fiber.[10] While Qwest refused to directly answer questions regarding the capability of these loops to provide advanced services, the logical inference based upon Qwest's responses to discovery and the testimony of its witnesses is that most of the fiber deployed to date was deployed in response to maintenance problems or to increase *voice grade* capacity, and not to bring new services to Utah consumers.

Unlike the investment in next generation facilities characteristic of FTTH deployments, copper feeder retirements do not necessarily lead to improved broadband service to any Utah consumers. As Ms. Doberneck noted in her testimony, the retirement of fiber feeder is often a result of problems maintaining aging copper facilities:

> It may be a 3600 pair *feeder* cable in Minnesota or Washington that consistently gets wet, year after year, during the rainy season. Or it may be a 4200 pair *feeder* in Arizona or New Mexico that has finally succumbed to the desert heat. These problems, brought on by the elements, ultimately result in a significant customer service degradation and a constant increase in costs to Qwest for repair. In today's world, the final resolution is often replacement of the entire copper feeder cable with fiber and the placement of fiber fed digital loop carrier in the field.

Exhibit Covad-1 at p. 9, ll. 211-218.

Feeder retirements generally do not fall within the FCC's new copper retirement rule.[11] As a result, Covad has proposed language that would govern such feeder retirements, maintaining Covad's access to facilities serving its customers.[12] These proposals are critical, because an absence of language addressing feeder retirement will provide Qwest a path to driving competitors from its network. If Qwest can deny access to loops simply because it chooses to replace facilities that are damaged or are causing maintenance issues, it is only a

[10] Exhibit Covad-5, Qwest's Responses 01-003 through 01-007S1.
[11] *Triennial Review Order*, ¶ 283, n. 829.
[12] Contrary to Qwest's characterization, Covad's proposal does not mandate that Qwest maintain a parallel copper network. Under Covad's proposal, Qwest would have complete flexibility to choose a method to continue to allow Covad to provide an equivalent, alternative service to its customers affected by a copper retirement.

matter of time before the entire Public Switched Telephone Network (PSTN) is again closed to broadband competition, frustrating the Commission's statutory mandates and the public interest.

E. Qwest's Cost Recovery Arguments Are Unfounded

At hearing, Qwest made clear that it believed Covad's proposal was unlawful because it denied Qwest an opportunity to recover the costs of providing wholesale access to Covad by mandating that any "alternative service" be provided at the same cost line sharing, or unbundled loops, are currently being provided to Covad. This argument is both overstated and incorrect.

First, Qwest will make decisions to deploy fiber whether or not it must provide an alternative service to Covad for a handful of customers. The idea that such a substantial investment, and the revenue and cost savings associated with that investment, would be inhibited by a perceived loss related to Covad's customers is ludicrous.

Second, it is important to remember that Qwest has made the network modification decision. There is a policy choice to be made by this Commission with respect to that decision: should the result be neutral to competitors,[13] or should Qwest be permitted to raise competitors' costs, destroy the value of their infrastructure investment and essentially drive them from the market? If Qwest is permitted to retire copper feeder, and by doing so deny access to bottleneck loop facilities to competitors, no competitive carrier will invest in entry via the Public Switched Telephone Network (PSTN). This is clearly not what the Utah legislature intended, notwithstanding Qwest's attempts to convince this Commission it is what the FCC intended.

Third, there is no valid reason to believe that Qwest's deployment of more efficient technology would raise, rather than lower, the incremental cost of providing wholesale service to Covad. Rather than attempt to prove this, Qwest points to its retail service offerings for DSL for the premise that it would lose money providing wholesale service to Covad. This is unavailing

[13] Covad believes this is a reasonable goal. By "neutral," Covad means the change provides no more or less access than competitors had under the previous network configuration, at prices that are neither higher nor lower than previously offered.

because the same is true today: there is no doubt that Qwest would make more money serving a retail customer than providing wholesale inputs to Covad. The fact that this would continue to be true after a copper retirement says nothing about Qwest's incentives to retire copper, or its recovery of costs, and everything about Qwest's desire to eliminate competition and drive wholesale competitors away from its network.

F. The FCC's Recent Decision in the *BellSouth Reconsideration Order* Is Instructive Regarding The Limits Of Incumbent LECs' Rights To Retire Copper

As the FCC stated in the *BellSouth Reconsideration Order*,[14] its ruling in the *Triennial Review Order* "required incumbent LECs to provide unbundled access to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information."[15] As Covad's proposal makes clear, it is not seeking unbundled access to the packet switching capability of Qwest's facilities, merely a method to make use of Covad's *own* packet switching capability.

Even as the FCC granted unbundling relief for Fiber to the Curb (FTTC) loops in many circumstances in the *BellSouth Reconsideration Order,* it recognized that :

> [D]eploying FTTC loops in overbuild situations 'enables an incumbent LEC to replace and ultimately deny access to the already-existing copper loops that competitive LECs were using to serve mass market customers.' Thus, in the overbuild context, we find that competitive LECs face impairment to a limited extent.

BellSouth Reconsideration Order, ¶ 12*, citing the Triennial Review Order,* ¶ 277.

It is therefore significant that, while the FCC expanded its non-impairment analysis to *FTTC loops*, it declined to do so for hybrid loops, and also recognized the impairment faced by

---

[14] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338; 96-98; 98-147, Order on Reconsideration (rel. October 18, 2004) ("BellSouth Reconsideration Order").

[15] *Bell South Reconsideration Order,* ¶ 6, *citing the Triennial Review Order,* 18 FCC Rcd at 17149-90, paras. 288-89; 47 C.F.R. §§ 51.319(a)(2)(i), (ii).

competitors when copper plant is retired. This Commission can therefore act under its statutory authority to preserve competitive choices for the benefit of Utah consumers by adopting Covad's proposal.

G. Qwest's Proposals Provide It An Unlimited Ability To Close Its Network To Competition, And Would Make Facilities-Based Competition Impossible

Qwest's proposals surrounding copper retirement, if adopted, would grant it a limitless ability to close its network, denying access to essential facilities to competitors, such as Covad. As Ms. Stewart volunteered at hearing, Qwest believes that the deployment of *any* amount of fiber in its loop plant exempts that plant from any unbundling obligations, and its proposals are designed to reflect this position. In fact, Ms. Stewart testified that even if Qwest deploys fiber feeder facilities *solely within a Qwest Central Office*, and no outside copper plant is replaced with fiber, Qwest is nevertheless relieved of its unbundling obligations. Transcript, Vol. I, p. 114, ll. 1-12.

This position is particularly troubling to Covad. While Covad is not concerned, at least in the near term, that Qwest will make substantial investments to retrofit its outside plant with fiber, even a company with scarce financial resources[16] is likely to scrounge enough to place a few feet of fiber within its central offices, if doing so will eliminate its competitors.

H. Covad's Proposals For Sufficient Notice Of Copper Retirements Should Be Adopted

47 C.F.R. § 51.327 prescribes the "minimum" standards for notices of network changes.[17] Qwest's current notifications, embodied by its proposals in this arbitration, do not even meet these "minimum" standards. For instance, notices must, according to the rule, include

[16] *See* Al Lewis, "Qwest Thirsts For Ghost of a Chance," Denver Post, Friday December 17, 2004 at C1.
[17] 47 C.F.R. § 51.327(a) uses the term "at a minimum" to describe the obligation to meet the listed public notice requirements.

the "location(s) at which the changes will occur"[18] as well as the "reasonably foreseeable impact of the planned changes."[19]

Qwest's notice does not provide such vital information as what Covad customers, if any, will be impacted by the retirement project. The vague notice proposed by Qwest would be useful only as a starting point for a major research project to determine whether a given retirement will impact Covad's customers. In response to each and every notice of a Qwest copper retirement project, Covad would have to determine whether any of its customers would actually be affected.

Covad submits that any notice that can be read to comply with the FCC's rules must specifically inform competitive LECs whether the retirement threatens service to existing customers. The FCC rule clearly places the burden on ILECs to determine the "reasonably foreseeable impact" of its retirements. Qwest's proposal, which would not require specific notice to Covad that any Covad customers are affected, is so devoid of substance that it must be rejected as an unreasonable interpretation of the rule.

Furthermore, the FCC's rules regarding network modifications clearly require

> 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).

Covad's notice proposals embody this requirement, by specifying that notices contain information regarding "old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information."[20] Covad believes the information it seeks, and which Qwest refuses to provide, is clearly within the scope of the FCC rule. Not only

[18] 47 C.F.R. § 51.327(a)(4).
[19] 47 C.F.R. § 51.327(a)(6).
[20] Covad Proposed Section 9.1.15.

is it within the scope of the rule, it is necessary to lend any meaning whatsoever to the notice requirement.

Even if this Commission does not believe the FCC has required the information Covad requests, the FCC has undoubtedly recognized this Commission's authority to add, or otherwise specify, the notice requirements requested by Covad in order to afford meaningful notice of Qwest retirement projects. In addition to the minimum requirements of 47 C.F.R. § 51.327, the FCC directs ILECs to comply with "any applicable state requirements" related to the retirement of copper loops and copper subloops.[21] While 47 C.F.R. § 51.327 should be read broadly enough to require what Covad seeks, additional state requirements are also clearly authorized.

ISSUE 2 – UNIFIED AGREEMENT – 271 AND STATE LAW ELEMENTS INCLUDED (Section 4 Definitions 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)

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

Qwest's proposals with respect to the sections listed above demonstrate its desire to remove network elements provided pursuant to Section 271 of the Act from the Agreement. Covad, on the other hand, proposes that Qwest's obligations pursuant to Section 271 be memorialized in the Agreement, because there is no basis to treat Qwest's Section 271

[21] 47 C.F.R. § 51.319(a)(3)(iii)(B).

obligations any differently than either Party's other obligations under the Act. For this reason, the Parties' Agreement is the appropriate document to establish these obligations, and this Commission has clear authority to arbitrate disputes that arise with respect to these obligations.

Perhaps more importantly, Qwest continues to be obligated under Utah law to provide unbundled access to "essential facilities," which, by Commission rule, specifically include the elements to which Covad seeks continued access in this arbitration. Furthermore, this Commission has already established rates for these essential facilities as required by Utah Code § 54-8b-2.2(2)(b).

A. Section 271

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

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

Triennial Review Order, ¶ 653.

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

Triennial Review Order, ¶ 655.

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under Section 251 for *ILECs*, as an RBOC Qwest retains an independent statutory obligation under Section 271 of the Act to provide competitors with unbundled access to the network elements listed in the Section 271 checklist.[22] Moreover, there is no question that these obligations include the provision of unbundled access to loops and dedicated transport under checklist item #4:

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

Triennial Review Order, ¶ 654. [emphasis added]

Qwest does not attack this premise directly, but instead argues that this Commission does not have the authority to order the adoption of terms in an interconnection agreement that address compliance with Section 271. This position ignores the requirements of Section 271, as

[22] *See* 47 U.S.C. § 271(c)(2)(B).

well as common sense. Recently, the Maine Public Utilities Commission rejected this argument and found 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) ("Maine 271 Unbundling Order").

In addition, the Commission has independent authority to enforce these Section 271 BOC obligations. Utah law specifically vests this Commission with the authority to "encourage competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis,"[23] as well as the authority to "determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed [by public utilities], and shall fix the same by its order, rule or regulation."[24] Enforcement of federal unbundling requirements pursuant to Section 271 of the Act would clearly fall within this authority.

Furthermore, there can be no argument that the Commission's enforcement of Qwest's Section 271 checklist obligations would substantially prevent the implementation of any provision of the Act. Indeed, where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity

[23] Utah Code § 54-8b-1.1(6).
[24] Utah Code § 54-4-7.

"in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *De Canas v. Bica*, 424 U.S. 351, 356, 96 S. Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers*, 373 U.S. at 142, 83 S. Ct. at 1217). The Act, however, hardly evinces an unmistakable indication of Congressional intent to preclude state enforcement of federal 271 obligations. Far from doing so, the Act expressly preserves a state role in the review of a RBOC's compliance with its Section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a RBOC's Section 271 compliance.[25]

The FCC has confirmed state commissions' enforcement role with respect to Section 271:

> We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into these nine states.

In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming, WC Docket No. 02-314, Memorandum Opinion and Order, FCC 02-332 (Rel. Dec. 23, 2002) ("Qwest 271 Order"), ¶499.

The Maine Public Utilities Commission agreed:

> Indeed, it makes both procedural and substantive sense to allow state commissions, which are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to monitor ILEC compliance with section 271 by applying the standards prescribed by the FCC, i.e. ensuring that Verizon meets its Checklist Items No. 4, 5, 6, and 9 obligations.

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*

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

(PUC 21), Examiner's Report (July 23, 2004) ("Maine 271 Examiner's Report"), *affirmed by the Maine Public Utilities Commission in the Maine 271 Unbundling Order*.

Thus, the Commission clearly has the authority to enforce Qwest's obligations to provide unbundled access to loops (including high capacity loops, line splitting arrangements and subloop elements) and dedicated transport under Section 271 checklist item #4. Specifically, this Commission has clearly been granted the authority to arbitrate provisions of interconnection agreements addressing Section 271 obligations, as well as set prices that comply with federal pricing standards:

> [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.

AT&T v. Iowa Utils. Bd., 525 U.S. 366, 384, 142 L.Ed.2d 834, 876 (1999).

The FCC did make clear in the *Triennial Review Order* that a different pricing standard applied to network elements required to be unbundled under Section 271 as opposed to network elements unbundled under Section 251 of the Act. Specifically, the FCC stated that "the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202." *Triennial Review Order*, ¶ 656. In other words, according to the FCC, the *legal standard* under which pricing for Section 271 checklist items should be determined is a different *legal standard* than that applied to price Section 251 UNEs. Thus, "Section 271 requires RBOCs to provide unbundled access to elements not required to be unbundled under Section 251, but does not *require* TELRIC pricing." *Triennial Review Order*, ¶ 659 (emphasis added).

Utah has already established specific costs for network elements to which Covad seeks continued access under state law.[26] These rates should remain in place until the Commission finds just cause to alter them, in accordance with its directives under Utah law to establish such rates on a nondiscriminatory basis.[27]

Notably, in the *Triennial Review*, the FCC nowhere forbids the application of such pricing of network elements required to be unbundled under Section 271. Rather, the FCC merely states that unbundled access to Section 271 checklist items is not *required* to be priced pursuant to the particular forward-looking cost methodology specified in the FCC's rules implementing Section 252(d)(1) of the Act – namely, TELRIC. The FCC states that the appropriate legal standard to determine the correct price of Section 271 checklist items is found in Sections 201 and 202. However, nowhere does the FCC state these two different legal standards may not result in the same rate-setting methodology.

Furthermore, the FCC does not preclude the use of forward-looking, long-run incremental cost methodologies *other than TELRIC* to establish the prices for access to Section 271 checklist items. As the FCC made clear when it adopted the TELRIC pricing methodology in its *Local Competition Order*,[28] there are various methodologies for the determination of forward-looking, long-run incremental cost. *Local Competition Order*, ¶ 631. TELRIC describes only one variant, established by the FCC for setting UNE prices under Section 252(d)(1), derived from a family of cost methodologies consistent with forward-looking, long-run incremental cost principles. *See Local Competition Order*, ¶¶ 683-685 (defining "three general approaches" to setting forward-looking costs). Thus, the FCC's *Triennial Review Order*

[26] *See* Docket No. 00-049-105, *In the Matter of the Application of Qwest Corporation for Commission Determination of Prices for Wholesale Facilities and Services*, Commission order issued January 12, 2001.
[27] Utah Code § 54-8b-2.2(1)(b)(i).
[28] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (rel. August 8, 1996) ("Local Competition Order").

does not preclude the use of a forward-looking, long-run incremental cost standard *other than TELRIC* in establishing prices consistent with Sections 201 and 202 of the Act.[29]

Given the intense scrutiny that has been applied by this Commission in establishing TELRIC rates for elements that may eventually be subject only to Section 271 unbundling obligations, adopting those rates, at least for an interim period, makes far more sense than any other result. In resolving this issue the Maine Public Utilities Commission stated:

> Until such time as we approve new rates for section 271 UNEs, adopt FCC-approved rates, or CLECs agree to section 271 UNE rates, Verizon must continue to provide all section 271 UNEs at existing TELRIC rates. We find this requirement necessary to ensure a timely transition to the new unbundling scheme. We have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the agreement of the parties. We note that the decision we reach today is consistent with the approach embodied in the FCC's Interim Rules, which require a six-month moratorium on raising wholesale rates.

Maine 271 Unbundling Order.

B. State Law Unbundling Authority

This Commission has the requisite authority to require access to loops, including high capacity loops, line splitting arrangements, and subloop arrangements, as well as dedicated transport, under its independent, state law authority. Not only does the Commission have this authority, it has already acted to mandate access to all of the elements Covad seeks:

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

R746-348-7. Essential Facilities and Services.

A. Designation -- At a minimum, the following are considered to be essential facilities or services pursuant to 54-8b-2. 2.:

1. Unbundled local loops including 2-wire, 4-wire and digital subscriber line facilities;

2. Loop concentration, loop distribution and loop feeder facilities;

3. Network interface devices;

4. Switching capability including line-side facilities, trunk-side facilities and tandem facilities;

5. 911 and E911 emergency call networks;

6. Access to numbering resources;

7. Local telephone number portability;

8. Inter-office transmission facilities;

9. Signaling networks and call-related databases including signaling links, signaling transfer points and databases used for billing and collection, and transmission and routing of public telecommunications services;

10. Operations support systems used to pre-order, order, provision, maintain and repair unbundled network elements, or services purchased for resale from an incumbent local exchange carrier by another telecommunications corporation;

11. Billing functions;

12. Operator services and directory assistance;

13. Physical and virtual collocation and,

14. Intra-premises cabling and inside wiring owned or controlled by an incumbent local exchange carrier.

This list contains each and every one of the elements to which Covad seeks access in this arbitration proceeding. This Commission has already determined that these elements are "essential facilities" to which access is mandated under Utah law. As a result, Covad need not ask this Commission to determine the essential nature of these facilities under R746-348-7(B).

This independent state law authority is not preempted by the FCC's recent *Triennial Review Order*. Nowhere does Section 251 of the Act evince any general Congressional intent to preempt state laws or regulations providing for competitor access to unbundled network elements or interconnection with the ILEC. In fact, as recognized by the FCC in its *Triennial Review Order*, several provisions of the Act expressly indicate Congress' intent not to preempt such state regulation, and forbid the FCC from engaging in such preemption:

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

Triennial Review Order, ¶ 191.

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

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

Triennial Review Order, ¶ 192.

Any questions regarding this Commission's authority to impose additional unbundling obligations has been repudiated not only by the FCC in the *Local Competition First Report and Order*,[30] but also by every federal court passing judgment on the meaning of section 252(e)(3) of the Act.[31] Federal courts have routinely confirmed that the Act's savings clauses, especially 47

---

[30] *See Local Competition First Report and Order*, ¶ 244.

[31] *See Southwestern Bell Telephone Co. v. Public Util. Comm'm of Texas*, 208 F.3d 475, 481 (5th Cir. 2000) ("The Act obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements."); *AT&T Communications v. BellSouth Telecommunications Inc.*, 238 F.3d 636, 642 (5th Cir. 2001) ("Subject to § 253, the state commission may also establish or enforce other requirements of state law in its review of an agreement." [citing § 252(e)(3)]); *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 301-302 (4th Cir. 2001) ("Determinations made [by state commissions] pursuant to authority other than that conferred by § 252 are, by operation of § 601(c) of the 1996 Act, left for review by State courts. [citing 47 U.S.C. §

U.S.C. § 252(e)(3), provide state commissions with the requisite authority to enforce their own access obligations. They have likewise determined that for state requirements to be preempted, they must actually conflict with federal law, or thoroughly occupy the legislative field.[32] Congress effectively eliminated any argument supporting implied preemption by including the following language in the Act:

> (c) Federal, State, and Local Law.--
>
> (1) **No implied effect**.--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Pub. L. 104-104, title VI, Sec. 601(c), Feb. 8, 1996, 110 Stat. 143. [emphasis added]

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

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

Triennial Review Order, ¶¶ 192, 194.

Notably, in reaching these conclusions, the FCC was simply restating existing, well-known precedents governing the law of preemption. Specifically, the long-standing doctrine of federal conflict preemption provides for exactly the limited sort of federal preemption acknowledged by the FCC's *Triennial Review Order*. Courts have long held that state laws are

---

152 note]…Section 252(e) also permits State commissions to impose State-law requirements in its review of interconnection agreements.")

[32] *Cippillone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992).

preempted to the extent that they actually conflict with federal law. As noted by the FCC's *Triennial Review Order*, such conflict exists where compliance with state law "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Triennial Review Orde*r, ¶ 192 n. 613 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Even more notably, in its *Triennial Review Order*, the FCC did not act to preempt any existing state law or regulation inconsistent with the FCC's rules, nor did it act to preclude the adoption of future state laws or regulations governing the access of competitors to ILEC facilities which are inconsistent with the FCC's rules. In fact, following the governing law set out in the Eighth Circuit's *Iowa Utilities Board I* decision, the FCC specifically recognized that state laws or regulations which are inconsistent with the FCC's unbundling rules are not *ipso facto* preempted:

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

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

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

> We believe our decision properly balances the broad authority granted to the Commission by the 1996 Act with the role preserved for the states in section 251(d)(3) and is fully consistent with the Eighth Circuit's interpretation of that provision.

Id.

Thus, far from taking any specific action to preempt any state law or regulation governing competitor access to incumbent facilities, the FCC merely acted in the *Triennial Review* to restate the already-existing bounds on state action recognized under existing doctrines

of conflict preemption. Furthermore, the FCC's *Triennial Review Order* recognized that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules would be insufficient to create such a conflict. Instead, consistent with existing doctrines of conflict preemption, the FCC recognized that the state laws would have to "substantially prevent implementation" of Section 251 in order to create conflict preemption.

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

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

FCC's indications that it might find conflict preemption are even more muted. Specifically, the FCC merely stated that "in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation." *Triennial Review Order*, ¶ 195.

Thus, while the FCC's *Triennial Review Order* indicates that under some circumstances the FCC would find conflict preemption for state rules requiring the unbundling of network elements not unbundled nationally under federal law, the decision also indicates that in some circumstances the FCC would decline to find that such state rules substantially prevent implementation of Section 251. In fact, the FCC's decision gives some direction on the circumstances that would lead the FCC to decline a finding of conflict preemption for state rules unbundling network elements the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that "the availability of certain network elements may vary between geographic regions." *Triennial Review Order*, ¶ 196. Indeed, according to the FCC, such a granular "approach is required under *USTA*." *Triennial Review Order*, ¶ 196 (citing *USTA*, 290 F.3d at 427). Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of Section 251.

Notably, the FCC's statements indicating when it is 'likely' to find preemption for particular state rules appear to conflict with a recent Sixth Circuit decision. The Sixth Circuit has stated that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." The court further noted that a state commission is permitted to "enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement" entered into pursuant to Section 252 of the Act, "as long as the regulations do not interfere with the ability of

new entrants to obtain services." *See Michigan Bell v. MCIMetro*, 323 F.3d 348, 359 (6th Cir. 2003).

While Covad believes preemption of Utah law mandating unbundling is unlikely, it is also irrelevant. This Commission should exercise its authority as it is delineated by Utah statute, irrespective of preemption analysis, as the adjudication of the constitutionality of legislative enactments in generally beyond the jurisdiction of administrative agencies. *Johnson, Administrator of Veterans' Affairs, et. al. v. Robison*, 415 U.S. 361, 368; 94 S. Ct. 1160, 1166; 39 L. Ed. 2d 389, 398 (1974).

C. The Impact Of The FCC's Interim Unbundling Order

While Covad does not believe the *Interim Unbundling Order* has any impact on the issues being arbitrated in this proceeding, Qwest has argued in other jurisdictions that state Commissions have no authority to order pricing, terms or conditions for loops, switching, or transport different than those in effect as of June 15, 2004. If Qwest's argument is to be accepted, the reasoning applies not only to the commingling of facilities, as Qwest suggests, but also to Qwest's proposed language that denies Covad access to certain loops, subloops and transport based upon rulings in the *Triennial Review Order*. While Covad believes the intent of the *Interim Unbundling Order* was clearly not to overrule portions of the *Triennial Review Order* that survived appellate scrutiny, if the Commission disagrees it must at least apply its interpretation in an even-handed manner, which would require that all language at issue in this arbitration related to loops, switching, and transport revert back to the terms in the previous interconnection agreement between Covad and Qwest.

ISSUE 3 - COMMINGLING

(Section 4 Definitions of "Commingling" and "251(c)(3) UNE," 9.1.1.1, 9.1.1.4.2,[33] and 9.1.1.5 (and subsections))

The Parties' disagreement can be distilled to the following: Qwest believes the FCC intended to create a special category for elements that must be provisioned under Section 271 of the Act, and that such elements have a status inferior to all other wholesale telecommunications services, and cannot be commingled with any other wholesale services. Covad believes the FCC intended, and confirmed in its Errata to the *Triennial Review Order*, to treat Section 271 elements just like any other telecommunications service not purchased pursuant to Section 251(c)(3) of the Act.

A. The *Triennial Review Order* Provides For The Commingling Of 271 Elements With 251(c)(3) UNEs

The FCC defines "commingling" as:

> the connecting, attaching, or otherwise linking of a UNE, or a UNE Combination,[34] to one or more facilities or services that a requesting carrier has obtained at wholesale from and 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.

Triennial Review Order, ¶ 579.

Originally, the FCC had specifically identified "elements unbundled pursuant to Section 271" in paragraph 584 of the *Triennial Review Order* in the midst of its discussion of ILECs' resale commingling obligations. Qwest apparently believes that the deletion of this phrase in paragraph 584 by the FCC's Errata to the *Triennial Review Order* somehow modifies the FCC's general statement in paragraph 579, cited above, which was not included in the Errata. Covad believes the more reasonable explanation is that paragraph 584 is dedicated exclusively to a discussion of the ILECs' obligations to commingle 251(c)(3) UNEs with resale services, and the

[33] While the Parties have generally resolved their dispute with respect to rate ratcheting, Section 9.1.1.4.2 remains open due to the parties commingling dispute.

[34] Unlike the Parties' Agreement, the FCC generally uses the term "UNE" to refer to a network element available pursuant to its analysis under section 251 of the Act.

introduction of 271 elements to that discussion was confusing. In fact, the inclusion of 271 elements, without the inclusion of other wholesale services, would have left the implication that such elements were to be treated differently than Section 271 elements. If the FCC had truly intended to exclude Section 271 elements from commingling eligibility as a "facilities or service [ ] 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," it would have modified this language in paragraph 579.

Further supporting Covad's reading of the FCC's statements is the resulting FCC Rule:

> (e) Except as provided in Sec. 51.318 [the high-capacity EEL service eligibility criteria], an 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).

Any element provided pursuant to Section 271 is undoubtedly a "wholesale service" which may, under the FCC's rule, be commingled with "unbundled network elements." In fact, the FCC's use of the terms "an unbundled network element pursuant to Section 251(c)(3) of the Act" as well as the more generic term "unbundled network element,"[35] may create some question as to whether a network element that is not available under Section 251, but nevertheless is provided under Section 271 or state law, is in fact an "unbundled network element" according to the FCC. Covad's language does not go that far. For now, Covad is content with this Commission's recognition that a Section 271 element is undoubtedly a "wholesale service."

B. A Definition of "251(c)(3) UNE" Is Necessary To Accurately Reflect The FCC's Commingling Rules And To Maintain Consistency Within The Agreement

[35] *See* 47 C.F.R. § 51.309(d) and (e).

As noted above, the FCC made a distinction in paragraph 579 of the *Triennial Review Order* between elements purchased under Section 251(c)(3) of the Act, and elements "obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act." For this reason, Covad has introduced a new definition to the Agreement: "251(c)(3) UNE." This definition is relatively self-explanatory, and does not include non-251(c)(3) elements, which are arguably not "UNEs" for purposes of the FCC's commingling rules. By incorporating this definition, the Agreement can restrict commingling arrangements to the commingling of 251(c)(3) UNEs with elements "obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act."

Qwest's opposition to this definition raises larger questions. Apparently, Qwest believes that "unbundled network element," as used in the Agreement, can only mean elements provided pursuant to Section 251(c)(3). In other words, the definition proposed by Covad is not so much incorrect as it is unnecessary. What Qwest overlooks is that the Agreement itself, in language agreed to by Qwest, contains a broader definition of UNEs:

> 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.

In agreeing with Covad's position in a parallel arbitration proceeding, the Colorado Public Utilities Commission stated:

> Notably, we agree with Covad that the plain and clear language in the TRO (e.g., in ¶ 579) and the FCC's commingling rule itself (47 CFR § 51.309(3)) supports its position. Those provisions plainly state that an ILEC shall permit a requesting carrier to commingle UNEs with facilities and services obtained at wholesale from the ILEC pursuant to a method other than unbundling under § 251(c)(3). Those provisions do not contain the restriction advocated by Qwest here. There can be no dispute that network elements obtained under § 271 are wholesale services. As such, the TRO allows for commingling of UNEs with § 271 elements.

Colorado Public Utilities Commission Docket No. 04B-160T, *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Company Pursuant to 47 U.S.C. § 252(b),* Initial Commission Decision (Mailed: August 27, 2004) at ¶ 176.

Given this necessary vagueness as to what may be provided as an "unbundled network element" under the Agreement, Covad believes its more narrow definition of "251(c)(3) UNE" allows for the implementation of the FCC's commingling rules, and should be adopted by this Commission.

C. Qwest's Arguments That Commingling Is Prohibited By The FCC's Interim Unbundling Rules Is Misguided

In other jurisdictions, Qwest has argued that the FCC's recent Interim Unbundling Order[36] prohibits state commissions from allowing commingling, because the FCC mandated that the pricing, terms, and conditions for access to loops, switching, and transport remain the same as those available on June 15, 2004, with limited exceptions. This position defies any accepted method of legal interpretation.

Qwest's position ignores the fact that the FCC established the commingling rules Covad proposes for the Agreement in its recent *Triennial Review Order*, and those rules were not touched by the D.C. Circuit in its review of that order. To believe that the FCC promulgated interim rules to contradict its own rules that had just survived appellate scrutiny defies logic and is legally incorrect.

The true purpose of the FCC's interim unbundling rules was to protect consumers from the whims of the RBOCs, such as Qwest, who had threatened to turn the industry upside down as

[36] *In the Matter of the Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking (rel. August 20, 2004) ("Interim Unbundling Order").

a result of their perceived victory in the *USTA II* decision.[37] As the FCC stated in the *Interim Unbundling Order*:

> In the absence of such a[n] [interim unbundling] plan, existing UNE arrangements might be terminated prematurely without an orderly transition mechanism in place. Such an abrupt result would be inimical to competition and its benefits for consumers, and thus would be inconsistent with the public interest. Thus, we set forth below a plan that (1) ensures continued availability over the next six months of elements provided under interconnection agreements as of June 15, 2004 and (2) mitigates, during the next six-month period thereafter, the disruption that might otherwise ensue in the absence of a Commission finding that any or all of those elements are subject to unbundling.

Interim Unbundling Order, ¶ 10.

The Commission should therefore recognize that Covad's proposed commingling language accurately reflects the FCC's commingling rules and adopt its proposals in this proceeding.

ISSUE 5 - REGENERATION REQUIREMENTS
(Sections 8.2.1.23.1.4, 8.3.1.9, and 9.1.10)

Covad has proposed language for the agreement that clarifies that Qwest must provide regenerated cross connects between Covad collocations as well as between a Covad collocation and another CLEC's collocation ("CLEC-to-CLEC cross connections with regeneration") when requested by Covad. This language is supported by the Telecommunications Act's requirement that collocation be provided by incumbent LECs on terms that are just, reasonable, and non-discriminatory.[38] While Covad can place its own CLEC-to-CLEC connections that do not require regeneration (and, incidentally, Qwest offers such connections as a wholesale product anyway), Qwest's collocation policies, in combination with industry standards, render the self-

[37] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").
[38] 47 U.S.C. § 251(c)(6).

provision of *regenerated* cross connections technically and financially infeasible, leading to cases of clear discrimination.

A. The Act and FCC Rules Require Non-Discriminatory Access To Central Office Collocation, Including CLEC-to-CLEC Cross Connections

In his written testimony and at hearing, Qwest's witness Michael Norman maintained that Qwest should not have to offer CLEC-to-CLEC cross connections with regeneration because Qwest allows CLECs, such as Covad, to make the connection themselves, satisfying the exception contained in 47 C.F.R. § 51.323(h)(1). However, the scope of the FCC's cross-connection rule must be viewed in light of the FCC's written decision in its *Fourth Report and Order* adopting the rule, which reveals the FCC's intent to protect competitive LECs from any discrimination related to incumbent LEC collocation restrictions.

In requiring Incumbent LECs to provision cross-connections between CLECs, the FCC stated: "our action reflects our overriding concern than an incumbent LEC would be acting in an unreasonable and discriminatory manner if it refused to provide cross-connects between collocators,"[39] and that "an incumbent LEC's refusal to provide a cross-connect between two collocated carriers would violate the incumbent's duties under section 251(c)(6) to provide collocation 'on … terms and conditions that are just, reasonable, and nondiscriminatory.'"[40] The FCC went on to find that an incumbent LEC's provisioning of cross-connects to two collocated carriers was required by section 251(c)(6) of the Act.[41]

Based on this analysis, it is clear that the FCC's goal in adopting its cross-connection rule was to ensure compliance with the non-discrimination requirements of section 251 of the Act, and that necessary cross-connections between competitive LECs were part of an incumbent LECs' obligations to provide collocation pursuant to section 251(c)(6). The exception contained

[39] *Fourth Report and Order*, ¶ 79.
[40] *Id.*, ¶ 80.
[41] *Id*., ¶ 82

in 47 C.F.R. § 51.323(h)(1) assumes that competitive LECs could self-provision the desired connection under conditions that did not violate section 251(c)(6).

B. Covad Has No Practical Option To Self-Provision Cross Connects Requiring Regeneration

The section 251(c)(6) standard for evaluating Qwest's claim that self-provisioned cross-connects are available should be the *practical* availability of this option, not simply its theoretical availability. While Mr. Norman argued that CLECs *can* regenerate their own cross connects, these claims are less convincing when the applicable engineering standards are examined closely.

First, Mr. Norman claimed that a CLEC could increase the strength, or "boost" a cross connected signal in order to overcome distance limitations. This suggestion fails to take into account, however, that finite engineering standards exist, which Covad must follow, that prevent significant boosting of the signal. As Mr. Norman admitted at hearing:

> Q. Is it your testimony that in Covad's case when it sends out the signal, it could boost the signal to any strength it wanted and it wouldn't cause any engineering issues?
>
> A. Well, I'm just saying it wouldn't cause bleed over. The engineers at Covad or Qwest are not just going to jack up the signal as you put it. There are engineering criteria that needs to be followed…
>
> Q. Would Qwest allow Covad to boost the signal beyond the maximum powers set forth in the ANSI standards?
>
> A. There's no reason to do that.

Transcript, Vol. II, p. 324, ll. 1-14.

In other words, boosting the signal to avoid regeneration is an illusory solution. In fact, the applicable ANSI standards provide a maximum signal strength that would prohibit significant

boosting of a cross connection signal.[42] Mr. Norman therefore confirmed that the cable distance limitations contained in the ANSI standards are very real.[43] Beyond those prescribed cable distances, regeneration is required.

Mr. Norman's second solution, outlined in his testimony, is for CLECs to place regeneration equipment mid-span, between their two collocations. On cross examination, however, he agreed that there is no guarantee space will be available to place such equipment.[44] Mr. Norman also admitted he had no idea what a mid-span collocation arrangement to place regeneration equipment would cost.[45] On the other hand, Mr. Zulevic, Covad's witness regarding this issue, provided detailed testimony regarding the substantial, infeasible costs of such an arrangement.[46]

At hearing, Mr. Norman agreed that another solution was available: Covad, or any other CLEC, could order interoffice transport to another central office, then order another transport circuit back to the original central office to complete the connection. In fact, that solution may be more cost effective than Mr. Norman's other suggestions. It is therefore instructive that this solution was specifically rejected by the FCC as discriminatory in its *Fourth Report and Order*:

> For instance, for two competitive LECs collocated at the same central office to exchange traffic without a cross-connect, each competitive LEC would have to carry its own telecommunications traffic into its collocation space and then, in the typical case, have the incumbent LEC transport that traffic over incumbent-owned facilities to an interconnection point outside the incumbent's premises. From this interconnection point, the other competitive LEC would likely then carry the traffic back to its own collocation

[42] Transcript, Vol. II, p. 338, l.1-24.
[43] Transcript, Vol. II, p. 339-340.
[44] Transcript, Vol. II, p. 340, l. 19 through p. 341, l. 7.
[45] Transcript Vol. II, p. 341, ll. 8-11.
[46] *See* Exhibit Covad-4 at 8.

> space in the same central office to be transported through the competitive LEC's network. **This approach creates additional potential points of failure, may require otherwise unnecessary signal boosting, and, perhaps most importantly and most dramatically, imposes significant wasteful economic costs on competitive LECs – costs that incumbent LECs themselves do not face…**

Fourth Report and Order, ¶ 64. [citation omitted]

Given the fact that (1) Central office cross-connections are required to avoid discrimination violating section 251(c)(6) of the Act, and (2) There is no practical method for Covad to self-provision these connections when they require regeneration, the Commission should confirm that Qwest must offer CLEC-to-CLEC cross connections requiring regeneration to Covad as a section 251(c)(6) collocation element. This element should be subject to the same pricing, terms and conditions as ILEC-to-CLEC regeneration, as the legal obligations and prescribed pricing standards for the two are indistinguishable.

ISSUE 9 - BILLING ISSUES
(Sections 5.4.1, 5.4.2, and 5.4.3)

A. Payment Due Date

Covad has requested that the payment interval included in Section 5.4.1 be forty-five (45) days for any invoices 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 Covad. Qwest maintains that the interval for payment on all invoices should be thirty (30) days. Covad's proposal for additional time is based upon specific and substantial deficiencies in Qwest's invoices which require manual verification effort. This manual effort requires additional time to perform.

1. There Are Inherent Deficiencies in Qwest's Billing Systems That Require Substantial Manual Verification Effort

As Covad witness Megan Doberneck explained both in her written and live testimony, Qwest's billing systems currently produce invoices to Covad that require substantial human effort to verify. This is true whether the included charges are correct or not, and whether the invoice is provided by Qwest in electronic format or not.[47] This is a direct result of specific deficiencies in Qwest's wholesale billing systems. As Ms. Doberneck, testifying on behalf of Covad, summarized at hearing:

> … despite the fact that [the ILECs] all use the same process, they all use the same interval [to provision services], only Qwest has not been able to actually fix its billing and provide that key information that we need on our bills in order to validate them … This is a problem that existed across all of the ILECs, and all of the ILECs except for Qwest were willing or able to fix [the problem].

Transcript, Vol. I, p. 173, l. 19 through p. 174, l. 1.

[47] This is not meant to minimize the additional difficulties created by inaccurate Qwest billing. As Ms. Doberneck pointed out in her testimony, the Parties have resolved several billing errors in the past few years, leading to substantial repayments to Covad as well as payments by Qwest under its Performance Assurance Plan. Covad believes that these issues can be separated from the process deficiencies and other challenges mentioned above, which are not addressed by the foregoing remedies and bear specifically on Covad's ability to review Qwest bills prior to the Payment Due Date.

First of all, Covad typically receives its bills from Qwest five (5) to eight (8) days after the "invoice date," which starts the clock for the payment due date.[48] Also, Qwest's bills for non-recurring collocation charges continue to be provided in paper format.[49] In these circumstances, the bills must be hand-entered into Covad's billing systems before a review can even begin.[50] Then Covad employees must manually review the charges, many of which are individual case basis (ICB) charges, to verify them.

Often, Qwest's bills do not contain circuit identification numbers or universal service ordering codes (USOCs), which cause substantial delays and difficulties in verifying charges.[51] As Ms. Doberneck explained at hearing, Qwest provides the Billing Telephone Number (BTN) rather than the circuit identification number for line-shared and line-split loops, making verification impossible.[52] The precise scope of this problem is described in Ms. Doberneck's direct testimony, and is "enormous."[53] As Ms. Doberneck explained in her testimony:

> We're simply requesting additional time to address issues that are created by the deficiencies or gaps in our bills so that we can do the best job we can to validate the billing [from Qwest], which I think benefits everybody.

2. Affording Covad Fifteen Additional Days To Review Qwest Bills Will Not Disrupt The Parties' Billing Relationship, And Will Promote Efficiencies

There is nothing inherently disruptive about a 45-day, rather than a 30-day payment interval. Qwest can continue to bill on a 30-day (or monthly) billing cycle, and will continue to receive payments from Covad every thirty (30) days. In other words, Qwest's only possible concern would be that if Covad refused to pay its final bill from Qwest, it would not realize this until fifteen (15) days later than if Qwest's proposal were adopted. This hardly creates the type

[48] Exhibit Covad-1, p. 31, ll. 767-768.
[49] Id., p. 32, ll. 782-791.
[50] Id.
[51] Id., pp. 39-40.
[52] Id., pp. 33-34.
[53] Id.

of delinquency exposure Qwest has alleged in this proceeding. It should also be noted that Qwest bills recurring charges in advance, further limiting, if not eliminating, Qwest's financial exposure.[54]

In addition, affording Covad a meaningful amount of time to review Qwest bills will avoid inefficient results for both Parties, such as Covad relying on the audit process to conduct bill reviews, which would increase the cost of the billing relationship for both Parties. Covad could also dispute Qwest bills blindly, just to buy time to conduct a thorough review. This is an unrealistic remedy, however, because like the audit process, it is too time consuming and labor intensive to serve as an alternative to a reasonable payment interval. In addition, Covad would be forced to pay late payment charges for amounts it knew, at least in general, were legitimate and was willing to pay.

Rather than relying on remedies that are tantamount to digging a trench with a kitchen fork, the Parties should implement a payment interval that affords Covad enough time to verify the bills it receives from Qwest. This will ensure accurate payment and will minimize disputes and audits, thus saving both Parties time and money in the long run.

3. There is Substantial, Un-Refuted Evidence In The Record That Covad Should Be Afforded More Time To Review And Verify Qwest Bills

Ms. Doberneck's testimony in this proceeding, described above, provided detailed explanations of the time-consuming nature of the review and verification process, as well as Covad's inability to adequately perform these tasks in a 30-day period. This difficulty is not a result of Covad's unwillingness to dedicate adequate human resources to the task.

Qwest's arguments are not based upon any evidence presented, but instead rely on the premise that avenues other than this arbitration are available to resolve issues related to billing matters. First, Qwest argues that the issue at hand is the date payment is due, and that

[54] Transcript, Vol. I, p. 219, ll. 18-25.

information regarding Qwest's billing deficiencies is irrelevant to establishing a payment due date. This ignores the plain fact that the amount of time needed to pay a bill is directly related to the amount of effort needed to review the bill. Covad, through Ms. Doberneck, outlined the Qwest-specific deficiencies causing the delays in Covad's review.

The Change Management Process (CMP), or other Qwest contacts, are not the appropriate avenues for resolving these billing issues. As discussed in detail below, the CMP is now essentially closed to this issue. In any event, arbitrations are the proper avenue for establishing the rights and responsibilities for the parties, especially when, as in this case, discussions with Qwest personnel have yielded no results.

While performance measurements contained in Qwest's Performance Assurance Plan provide for remedies when incorrect bills are issued, outright errors are only part of the problem. Futhermore, a remedy for billing errors is useless if Covad is not afforded the time to identify those errors.

The Commission should also reject the premise that Covad should simply dedicate more manpower, or "increase productivity" to review Qwest's bills. This is an inequitable solution which ignores the true problem: the deficiencies in Qwest's billing systems. Covad could just as easily, and more justifiably, demand that Qwest dedicate more personnel, and become more productive, in generating wholesale bills to Covad. Far from doing so, Covad only asks for an additional fifteen (15) days to sort through the deficient bills Qwest produces.

Notably, in making its arguments against Covad's proposals, Qwest did not question a single fact placed into evidence by Covad with respect to the billing relationship, or the time required to adequately review Qwest's bills. The facts in this case provide sufficient justification for this Commission to adopt Covad's proposed language.

4. Qwest's Billing Deficiencies Are Unlikely To Be Resolved Within the Change Management Process

Recently, Qwest rejected a change request submitted by Covad within the CMP to resolve the circuit ID issue discussed above. In rejecting the request, Qwest claimed that while it had identified systems changes that could be made, those changes cost more than Qwest cared to spend. This should not surprise the Commission, because Qwest has absolutely no motivation to fix its systems. Today, Qwest is able to force Covad to bear the entire burden of the deficiencies by requiring the payment of invoices within abbreviated time frames and forcing Covad to manually verify invoices. Until Qwest must share at least part of this burden, it is safe to say there will be no systems changes.

Qwest's position that its billing deficiencies will not be addressed within the CMP underscores the need for the Commission to address the issue in this forum. As an alternative to correcting each and every deficiency, Covad has proposed just an additional fifteen (15) days to conduct its review.

5. Qwest Has Already Agreed To Extended Payment Intervals

While Qwest describes its proposed payment interval as the "industry standard," it should be noted that Qwest has already agreed to an alternate, extended payment interval. As Qwest's witness William Easton admitted at hearing, Qwest has executed agreements that calculate the thirty-day payment interval from the date the bill is actually received by the CLEC.[55] Based upon both Mr. Easton and Ms. Doberneck's testimony regarding the delays in delivery of invoices by Qwest, this equates to an extension of as much as eight days beyond the interval proposed by Qwest in this proceeding. In light of these facts, Qwest's arguments that Covad's proposal will cause severe cash flow problems and systems issues appear quite insignificant.

B. Timing for Discontinuation of Processing of Orders and Disconnection of Services (Sections 5.4.2 and 5.4.3)

Covad acknowledges Qwest's right to discontinue the processing of orders, and even to discontinue service in the event it does not receive payment from its wholesale customers,

[55] Transcript, Vol. I, p. 222, ll.13-18.

including Covad. The Parties' dispute is not with respect to the *right* of Qwest to take these remedial actions, but with respect to the *timing* for these actions. Covad believes that the time frames for employing these drastic remedies should not be so compressed as to allow either party to use them as leverage in billing disputes or other conflicts. Covad does not believe the modest extensions it has proposed will truly prejudice Qwest at all, and will allow both Parties some breathing room should a serious conflict develop.

1. Covad's Proposals Would Have Negligible Impact On Qwest's Receivables and Cash Flow

Covad has specifically proposed that the time period for Qwest to discontinue orders for failure to make full payment be set at sixty (60) days, rather than the thirty (30) days Qwest has suggested. In cases where Covad pays Qwest for services, either on time or late, this provision has no effect on Qwest's cash flow at all, because it has no impact on when payments are due, when payments are considered past due, or when Qwest could take action for a breach of the Agreement. The only circumstance where this provision could lead to increased losses for Qwest would be if Covad refused to pay Qwest and continued to order new services. In that case, Qwest's increased exposure would be limited to thirty (30) days' worth of new services ordered by Covad. This would constitute only a fraction of the amount Covad would owe Qwest if it was failing to pay its bills, and cannot seriously be considered to create true cash flow issues for Qwest.

For Section 5.4.3 of the Agreement, Covad proposes a ninety (90), rather than a sixty (60) day period after which Qwest may disconnect service if full payment is not received. In circumstances where Covad pays Qwest, this thirty (30) day difference would have no impact on Qwest's cash flow or receivable amounts. If Covad were to stop paying Qwest, it would extend the time period for Qwest to disconnect service by thirty (30) days. This would have an effect on the total amount owed to Qwest in the event Covad failed to pay, but Qwest’s advance billing of recurring charges does provide substantial protection against large unpaid balances.

2. The Timing Of Qwest's Right To Receive Payment Should Be Balanced Against The Severity Of The Remedies Involved

To understand Covad's proposals, it is important to realize that Covad is not concerned about its rights should it be unable or otherwise refuse to pay Qwest for services, though it does recognize *Qwest's* concerns in such situations. If Covad were truly unable to pay Qwest, Covad would have more pressing concerns than whether it could receive service for an additional thirty (30) days. Covad's concern is that a situation could arise in which Qwest refused to recognize a legitimate dispute that affected payment, and use the short disconnection interval it has proposed to obtain leverage in that dispute.

A disconnection of service, or even the refusal to process Covad's orders, would have a disastrous and likely irreversible impact on Covad's business. If Qwest were to wrongfully reject a billing dispute raised by Covad, it is true that Covad would have a legal remedy for such refusal. However, that legal remedy would be meaningless if Qwest were to disconnect service before that remedy was obtained. As a result, Covad must have sufficient time to organize requests for injunctive relief, or make other arrangements, prior to the time these remedies may be employed. Given the fact that Covad may not receive notice that Qwest intends to disconnect services until well into the time period under dispute, and the fact that Covad would likely be seeking remedies in multiple states, the modestly larger time frame proposed is reasonable. This additional time would allow Covad to file, and the Commission to act upon, a request for injunctive relief. Perhaps this situation will never arise. Perhaps there is little chance it could arise. The problem is that the cost of being wrong is unbearably high for Covad.

Qwest has offered no specific evidence in this proceeding as to how the Covad proposals would prejudice Qwest. Consequently, this Commission should balance Qwest's right to control its receivables and cash flow, which are legitimate concerns, though largely unexplored in this proceeding, with Covad's concern that unreasonably short time frames could be abused, and that the effect of such abuse could be extremely harmful to Covad. Covad believes that the time

frames it has proposed for the discontinuance of order processing and the disconnection of services are the best balance of these competing interests.

Conclusion

For the reasons set forth above, Covad respectfully requests that this Commission adopt Covad's proposed language to resolve the issues set forth above, and enter an order consistent with this resolution.

Dated this 21st day of January, 2005.

Respectfully submitted,

DIECA COMMUNICATIONS, INC., d/b/a Covad Communications Company

By_____
Stephen F. Mecham (4089)
Callister Nebeker & McCullough
Gateway Tower East Suite 900
10 East South Temple
Salt Lake City, Utah 84133
Telephone: 801 530-7300
Facsimile: 801 364-9127
E-mail: sfmecham@cnmlaw.com

And

Andrew R. Newell
Krys Boyle, P.C.
600 Seventeenth Street
Suite 2700 South Tower
Denver, CO 80202
Telephone: 720 889-2237
Facsimile: 303 893-2882
E-mail: anewell@krysboyle.com

Its attorneys.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY'S POST-HEARING BRIEF was mailed by U.S. Mail, postage prepaid, and electronically mailed to the following on this 21st day of January, 2005:

Winslow B. Waxter Robert C. Brown Qwest Services Corporation 1005 17th Street, Suite 200 Denver, CO 80209 Email: winslow.waxter@qwest.com robert.brown@qwest.com	Ted D. Smith (3017) STOEL RIVES LLP 201 South Main Street, Suite 1100 Salt Lake City, Utah 84111 Telephone: 801-328-3131 Facimile: 801-578-6999 tsmith@stoel.com
Mary Rose Hughes PERKINS COIE LLP 607 Fourteenth Street, N.W., Suite 800 Washington, D.C. 20005-2011 Telephone: 202-628-6600 Facsimile: 202-434-1690 Email: mhughes@perkinscoie.com	John 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
Michael Ginsberg Assistant Attorney General Heber M. Wells Building 160 East 300 South, Suite 500 Salt Lake City, UT 84111	