Decision No. C04-1037

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04B-160T

IN THE MATTER OF 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 Date: August 27, 2004
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APPEARANCES:

Andrew R. Newell, Esq., Denver, Colorado, and Karen Shoresman Frame, Esq., Denver, Colorado, for DIECA Communications, Inc., doing business as Covad Communications Company;

Winslow B. Waxter, Esq., Denver, Colorado, and John M. Devaney, Esq., Washington, D.C., for Qwest Corporation;

David Nocera, Esq., Assistant Attorney General, Denver, Colorado, for Staff of the Commission.

I. BY THE COMMISSION

A. Statement of the Case

1. On April 6, 2004, Qwest Corporation (Qwest) filed a Petition for Arbitration of an Interconnection Agreement (Petition) with DIECA Communications, Inc., doing business as Covad Communications Company (Covad). Qwest requests that we arbitrate unresolved issues between it and Covad in connection with the Interconnection Agreement being negotiated (ICA, Agreement Being Negotiated, or ABN) pursuant to § 252(b) of the Telecommunications Act of 1996 (Act), 47 U.S.C. § 252(b). On May 3, 2004, Covad filed its Response to the Petition.

2. By Decision No. C04-0393 we referred the matter to an Administrative Law Judge (ALJ) for hearing. Because of the time constraints contained in the Act, and pursuant to the provisions of § 40-6-109(6), C.R.S., in that Order we found that due and timely execution of our functions requires that the recommended decision of the ALJ be omitted and that we render an initial decision in this matter.

3. Staff of the Commission (Staff) intervened of right on April 16, 2004.[1]

4. Following a scheduling conference the ALJ issued Decision No. R04-0456-I establishing a procedural schedule and hearing dates of June 21 and 22, 2004. Finally, the Order stated that the parties had agreed that the operative date of July 29, 2004 for a decision on the disputed issues raised in this matter was extended to August 13, 2004.[2]

5. On May 24, 2004, Qwest filed a Motion to Dismiss or, Alternatively, for Summary Judgment Relating to Portions of Issues Submitted by Covad Communications Company for Arbitration. On June 7, 2004, Covad and Staff each filed a response in opposition to the Qwest motion. On June 11, 2004, Qwest filed a reply in support of its motion.[3] By Decision No. R04-0649-I, the ALJ denied the Qwest motion for the reasons discussed in that Order. *See id.* at ¶¶ 7-25.

6. On May 28, 2004, Covad filed a Motion to Strike Direct Testimony of Paul R. McDaniel. On June 4, 2004, Qwest filed its response in opposition to that Covad motion. By Decision No. R04-0649-I, the ALJ denied the Covad motion for the reasons discussed in that Order. *See id.* at ¶¶ 25-27.

7. On June 18, 2004, Qwest filed a verified Motion for Admission of Counsel *pro hac vice* in which it sought the admission of attorneys Mary Rose Hughes, Esq., and

[1] Covad, Staff, and Qwest are referred to collectively as the parties.

[2] Covad and Qwest waived the nine-month arbitration time frame contained in § 252(b)(4)(C) of the Act as well as their right to petition the Federal Communications Commission (FCC) to invoke jurisdiction pursuant to § 252(e)(5) of the Act. They also agreed not to appeal the instant Commission decision on the basis of its issuance outside the nine-month arbitration time frame contained in § 252(b)(4)(C) of the Act.

[3] The ALJ granted Qwest's Motion for Leave to File Reply to Responses to Qwest Corporation's Motion to Dismiss and, thus, considered that reply in ruling on the Motion to Dismiss or alternative Motion for Summary Judgment. *See* Decision No. R04-0649-I at ¶ 4.

John M. Devaney, Esq., of Perkins Coie, LLP, Washington, D.C., to practice before the Commission in this docket.

8. The hearing commenced as scheduled on June 21, 2004, and continued on June 22, 2004. Initially, several preliminary matters were resolved. First, the Qwest motion for admission of counsel *pro hac vice* to admit attorneys Mary Rose Hughes, Esq., and John M. Devaney, Esq., of Perkins Coie, LLP, Washington, D.C., to practice before the Commission in this docket was granted. Second, the parties confirmed that the issues remaining for arbitration are Issues No. 1-6, 8, 12, TRO 1, TRO 2, and a portion of TRO 3. Third, the parties stated that the prepared testimony which was filed in accordance with the procedural schedule addressed issues which had been successfully negotiated and that, as a result, the parties would redact the prepared testimony to remove those portions which addressed the issues no longer in dispute.[4]

9. As another preliminary matter, the ALJ denied the reservation of right by Staff to submit, in its statement of position, language it suggested for resolution of disputed Issues No. TRO 1 through No. TRO 3. The ALJ determined that, in accordance with the clear terms of the procedural schedule established in Decision No. R04-0456-I, each party was to submit its suggested language for disputed issues in the Final Joint Disputed Issues Matrix filed on June 14, 2004. The ALJ found that it would be unfair to Qwest and to Covad to permit Staff to file its suggested language after the hearing, thus depriving those parties of the opportunity to question Staff about the meaning, source, and impact of its language, and similarly would prevent the Commission from inquiring about the Staff's language. As a result, the ALJ determined that

[4] The redaction occurred at the time each witness who had filed prepared testimony gave her or his oral testimony. Each witness initialed the portions of the testimony which she or he redacted while on the witness stand.

Staff would not be permitted to submit proposed language because it had failed to meet the filing requirements of the procedural order.

10. Qwest presented the oral and written testimony of Ms. Renée Albersheim and Messrs. William R. Easton, Michael Norman, and Paul R. McDaniel. In addition, Qwest presented the oral testimony of Mr. Jeff Hubbard. Covad presented the oral and written testimony of Ms. K. Megan Doberneck and Mr. Michael Zulevic. Hearing Exhibits No. 1 through 13 and No. 15 through 21 were marked for identification, offered, and admitted into evidence.[5] Hearing Exhibit No. 14 was marked for identification but was not offered into evidence.

11. At the conclusion of the hearing, the parties agreed to an extension of time to file post-hearing Statements of Position, and the ALJ agreed. The date for Commission decision on the arbitrated issues was extended to August 20, 2004, and the date for filing post-hearing Statements of Position was extended to and including July 9, 2004.

12. On July 9, 2004, Covad and Qwest each filed its Statement of Position. Staff did not file a Statement of Position.

13. With its Statement of Position, Qwest filed a Motion to Reverse or Vacate Interim Order No. R04-0659-I. Covad filed its response to that motion on July 23, 2004.

[5] Hearing Exhibit No. 19, entitled "Updated Draft -- 6/23/04 -- Agreement For Terms and Conditions For Interconnection, Unbundled Network Elements, Ancillary Services, and Resale Of Telecommunications Service Provided by Qwest Corporation for DIECA Communications, Inc., d/b/a Covad Communications Company In the State of Colorado," was admitted during the hearing but was late-filed on July 25, 2004. This exhibit is the most recent version of the body of Agreement Being Negotiated and supersedes the body of the ABN filed with the Commission on April 4, 2004 (*see* Hearing Exhibit No. 18). Exhibits A through M appended to Hearing Exhibit No. 18 have not been modified and, therefore, are the exhibits referenced in the June 23rd draft of the ABN (Hearing Exhibit No. 19). References in this Decision to the ABN are to Hearing Exhibit No. 19.

14. On July 15, 2004, Qwest filed the Updated Final Disputed Issues List (Final Issues Matrix). This filing contained the final language which Covad and Qwest each proposed to resolve the remaining disputed issues in this arbitration. We used this Issues Matrix as the starting point for this decision.

15. On July 13, 2004, after the Statements of Position were filed, the Federal Communications Commission (FCC) issued a decision[6] in which it adopted an all-or-nothing rule governing the ability of Competitive Local Exchange Carriers (CLECs) to opt into existing interconnections agreements (ICAs).[7] The all-or-nothing rule replaces the pick-and-choose rule[8] in effect during the negotiations of a new ICA by Covad and Qwest and during the hearing in this matter. To provide the parties an opportunity to address the impact, if any, of the *Second Report and Order* on the issues in this arbitration, the ALJ issued Decision No. R04-0830-I in which she ordered the parties to file supplemental briefs on this question. On July 28, 2004, Covad and Qwest each filed a supplemental brief addressing the impact of the *Second Report and Order* on the issues. We consider these supplemental briefs in deciding this arbitration.

16. On August 2, 2004, Covad filed a Motion for Leave to File Supplemental Materials (Motion to Supplement). Accompanying that filing were several documents, including an Order Approving Negotiated Agreement for Interconnection and Resale of Services issued by the Washington Utilities and Transportation Commission (WUTC) on July 28, 2004, and the

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[6] Second Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC No. 04-164 (rel. July 13, 2004) (*Second Report and Order*).

[7] Generally, the all-or-nothing rule requires a CLEC seeking to avail itself of terms in an existing ICA to adopt that ICA *in toto*, taking all terms, conditions, and rates from the adopted ICA. CLECs may no longer opt into only portions of an existing ICA.

[8] Generally, the pick-and-choose rule permitted a CLEC to include in its ICA any individual service, network element, or interconnection contained in another carrier's ICA approved by a state commission. *See* 47 *Code of Federal Regulations* § 51.809 (2003).

referenced Negotiated Agreement between Qwest Communications Corporation and Qwest Corporation. By Decision No. R04-0913-I the ALJ shortened the response time to the Motion to Supplement. On August 10, 2004, Qwest filed its Response in Opposition to Covad's Motion. Accompanying that filing were numerous documents, including three WUTC orders, two FCC orders, 47 *Code of Federal Regulations* (CFR) § 51.323, and Qwest's Notice of Updated SGAT filed with the WUTC in September 2001. The Commission's decision with respect to the Motion to Supplement is found *infra* in the discussion of Issue No. 6**.**

17. On August 3, 2004, Covad and Qwest agreed to extend the time for Commission decision in this matter to and including August 27, 2004. *See* Decision No. R04-0913-I.

18. On August 11, 2004, Qwest filed a Motion to Strike Portions of Covad's Statement of Position or, in the Alternative, Motion for Leave to Reopen the Record to Respond to the New Evidence Presented by Covad (Motion to Strike). By Decision No. R04-0949-I the ALJ shortened the response time to the Motion to Strike. On August 16, 2004, Covad filed its response to the Motion to Strike. The Commission's decision with respect to the Motion to Strike is found *infra* in the discussion of Issue No. 6.

II. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION

19. Under the Act, parties seeking to negotiate an interconnection agreement relating to telecommunications services are required to engage in good faith negotiations in an attempt to informally and voluntarily resolve interconnection issues. *See* Section 251(c)(1) of the Act. Our authority to arbitrate such issues arises only in the event the parties are unable to resolve them on their own. *See* § 252(b)(1) of the Act.

20. Covad and Qwest entered into extensive negotiations in connection with the Agreement Being Negotiated in this proceeding. After the Petition was filed, they succeeded in

resolving seven of the disputed issues originally identified in that Petition. Eleven issues remain to be arbitrated by the Commission. These issues are summarized in the Issues Matrix dated July 15, 2004.

21. In arbitrating an interconnection agreement the Commission has two goals. First, it attempts to replicate the agreement the parties would reach through arms-length negotiations in a competitive market. Second, it seeks to arbitrate an agreement consistent with the provisions of § 251 of the Act, the provisions of the FCC rules implementing the Act, and the decisions of the FCC interpreting the Act. Applying these criteria, the Commission will order the following resolution to the issues in dispute:

A. Issue No. 1 – Provision 5.4.1:

Whether the amounts payable under the ICA should be due and payable within 30 calendar days or within 45 calendar days after the date of the invoice.

22. The language proposed by Qwest would require that amounts payable under the ICA would be due and payable within **30 calendar days** after the date of the invoice.

23. The language proposed by Covad would require that amounts payable under the ICA would be due and payable within **45 calendar days** after the date of the invoice.

24. Although on its face this provision applies equally to both parties to the ICA, Provision 5.4.1 affects Qwest's receipt of monies as the billing party. At this time Covad does not supply service to Qwest and, therefore, does not bill Qwest.

25. Qwest first argues that there are regulatory and historical reasons underlying and supporting the 30-day time period it advocates. The language is identical to the language in the Covad-Qwest ICA which has been in effect since 1999; is identical to the language in Qwest's

Statement of Generally Available Terms and Conditions (SGAT) filed with, and approved by, the Commission, and reviewed by the FCC as part of the § 271 process; is identical to the language in Qwest's current FCC tariff (FCC No. 1) and Colorado tariff (Colorado PUC No. 21); and is the industry standard. Qwest states that the language was developed during the § 271 workshops held in Docket No. 97I-198T, a process in which Covad participated actively; was consensus (*i.e.*, agreed to by all parties) language; and, therefore, should not be disturbed. Qwest notes that there is a service Performance Indicator Definition (PID) which addresses Covad's concerns: PID BI-3A sets the standard against which the accuracy of Qwest's bills to CLECs is judged, and, should Qwest's bill be inaccurate, there are monetary penalties assessed as part of the Colorado Performance Assurance Plan (CPAP).[9]

26. Covad agrees that the 30-day period is in its current ICA with Qwest, is the time period established in the § 271 process, is in Qwest's SGAT, and is the industry standard. Covad views these historical references as irrelevant in the face of what has occurred in the intervening years: Covad now has more experience with Qwest's bills than it had during the § 271 process, and that experience has shown Covad that it cannot review and analyze the bills adequately in a 30-day period. Since the § 271 workshop process during which the 30-day period was agreed upon, Covad has undertaken an extensive review and revamping of its billing systems and processes, is now more focused on billing issues than it was in the past, and is now in a very different position than it was in early 2001. The terms of the new ICA should take into account this change in circumstance.

[9] Hearing Exhibit No. 18 (the Agreement Being Negotiated dated April 5, 2004) contains the PIDs as Exhibit B and contains the CPAP as Exhibit K. These exhibits remain the same in Hearing Exhibit No. 19 (the Agreement Being Negotiated dated June 23, 2004). *See* note 4, *supra*.

27. Qwest next states that, as a practical matter, Covad can analyze the bills it receives from Qwest within the 30-day period. Over 96% of the bills Covad receives from Qwest are in electronic format and, thus, Covad should be able to analyze those bills using mechanized review processes. In addition, Covad has had years of experience with Qwest's bills and should have acquired considerable familiarity with and expertise in analyzing those bills. Finally, Qwest and Covad have in place business processes which Covad can use, and has used, to address specific issues it may have with respect to billing. Covad responds that the work necessary to do a thorough review of Qwest's monthly bill, described in detail *infra*, cannot be accommodated reasonably in 30 days.

28. Qwest notes that, to the extent Covad's concerns are with Qwest's billing practices or the format in which Qwest issues its bills, the proper forum to address those issues is the Change Management Process (CMP) for local service.[10] Qwest asserts that the CMP, and not this arbitration, is the forum because changes to billing practices or billing format are issues of concern to all CLECs and, if changes are made, would require changes to Qwest's processes which would affect all CLECs, not just Covad.

29. Qwest is also concerned about the potential for increased financial exposure if Covad's language is adopted. First, the billing cycle and the payment cycle would not be synchronized. Qwest issues its bills to Covad on a 30-day cycle. If Covad is permitted to pay

[10] The CMP was created during the Qwest § 271 proceeding. Broadly speaking, it is the territory-wide forum to which CLECs and Qwest take requests for implementation of changes in Operations Support Systems (OSS) Interfaces, products, and processes (including manual processes). In general, CMP governs submission of change requests (CRs) for review and discussion by CLECs and Qwest, voting on CRs, prioritization of CRs, and implementation of CRs through changes in processes or procedures. The details of the operation of the CMP are found in Exhibit G to the Agreement Being Negotiated.

a bill in 45 days, it would be submitting payment for a bill 15 days after the next bill was issued. According to Qwest, this would create problems.

30. Second, Qwest's financial exposure would be increased by other CLECs opting into only the 45-day payment provision. Initially, Qwest argued that this increased financial exposure would result from the pick-and-choose right of another CLEC to elect to opt into only the 45-day payment provision and, should a CLEC with a questionable payment history or questionable financial stability so elect, Qwest's financial exposure would increase and Qwest could do nothing to control or to limit that increased exposure. During the course of this arbitration, the FCC issued the *Second Report and Order* in which it adopted the all-or-nothing rule governing the ability of CLECs to opt into existing ICAs. Qwest does not believe that the *Second Report and Order* reduces its financial exposure because a CLEC with a questionable payment history or questionable financial stability, by opting into (*i.e.*, adopting) the entire Covad ICA, could obtain extended payment time frames it would not have obtained in individual negotiations with Qwest. In Qwest's view, under the all-or-nothing rule, after another CLEC opted into the Covad ICA, that CLEC could demand that Qwest negotiate provisions which are left open for future negotiations under the terms of the Covad agreement.[11] Thus, Qwest concludes that the all-or-nothing rule does not materially reduce its risk of financial exposure.

31. Covad responds that the additional 15 days is not inherently disruptive and does not threaten Qwest's financial situation. First, Covad has a good payment history. Second, in the event Covad should fail to pay an undisputed amount, at most there will be 15 additional days

[11] *See, e.g.*, §§ 6.0 (Resale), 7.0 (Interconnection), 13.0 (Access to Telephone Numbers), 14.0 (Local Dialing Parity), and 15.0 (Qwest Dex) of the ABN. In each case the ABN states that Covad does not intend to order the specific service or product and that, in the event Covad wishes to order the service or product in the future, Covad and Qwest "will negotiate an appropriate amendment to this Agreement."

before Qwest is aware of the nonpayment. Third, in light of the remedies available to it (*see* discussion of Issues No. 2, 3, and 4, *infra*), there is no threat to Qwest financially.

32. Fourth and finally, Covad argues the *Second Report and Order* protects Qwest because a CLEC would need to adopt the entire Covad ICA to receive the benefit of the 45-day payment period. Covad notes that the FCC adopted the all-or-nothing rule "to promote more 'give-and-take' negotiations which will produce creative agreements that are better tailored to meet carriers' individual needs" (*id.* at ¶ 1); because "an all-or-nothing rule would better serve the goals of section 251 and 252 to promote interconnection agreements because it would encourage incumbent LECs to make trade-offs in negotiations that they are reluctant to accept under the existing [pick-and-choose] rule" (*id.* at ¶ 12); and, so that "requesting carriers [would] be able to negotiate individually tailored interconnection agreements designed to fit their business needs more precisely" (*id.* at ¶ 14).[12] In Covad's view, if Qwest were confronted with the circumstances it posits (described above), the all-or-nothing rule and the *Second Report and Order* allow Qwest to protect itself during negotiations with the opting-in CLEC. Thus, Covad concludes that Qwest's concern about a less-than-financially-sound CLEC opting into the Covad ICA is not well-founded.

33. On the other hand, Covad argues, the inability to do a thorough review and analysis of the monthly bills does have an adverse financial impact on it. First, Covad runs the risk of incurring late payment charges. Second, if Covad pays first and then disputes the billed amount, Covad loses the use of the money while Qwest has the use of money which it should not have. Third, if it does not dispute the bill within the 15-day time period of Provision 5.4.4

[12] In short, through the *Second Report and Order* the FCC "seeks to remove disincentives to the ability of incumbent LECs and competitive LECs to negotiate more customized agreements, including agreements that may include significant concessions in exchange for negotiated benefits." *Second Report and Order* at ¶ 68.

(discussed below), Covad's rights to dispute a billed amount are constrained by other provisions of the ICA, such as Provision 5.4.4.3,[13] and those other provisions are more time-consuming and, therefore, more costly to pursue. Covad believes the better course is to avoid these difficulties by adding 15 days to the time to pay a bill.

34. Qwest asserts that the 15 days of additional time sought by Covad is unnecessary in light of Provisions 5.4.4 and 5.18.5 of the ABN, provisions to which Covad has agreed. Provision 5.4.4 allows either party to dispute, in good faith, any portion of a bill and requires that disputing party to notify the other party, in writing, "within fifteen (15) calendar Days following the payment due date identifying the amount, reason and rationale of such dispute." Thus, according to Qwest, this provision gives Covad the 15 additional days it seeks. Provision 5.18.5 states that, for billing-related issues, a dispute must be brought to the attention of the other party not "more than one hundred twenty (120) Days after the date of the bill(s) at issue." In Qwest's view, this provisions allows Covad to raise late-identified billing issues for a significant period of time after the billing date.

35. Qwest also points to Provisions 5.4.4.1 and 5.4.4.2, which address what happens in the event of a disputed bill with respect to payment, bill credit, and interest. Qwest notes that Covad is protected by these provisions and, in the event of a dispute, may elect to pay or to withhold payment pending resolution of the dispute.

36. In support of the requested 45 days from the date of the invoice within which to pay a bill, Covad argues that the amount of work and the time necessary to review its bills from

[13] That provision allows a party which has paid a bill to dispute that bill after the 15 days stated in Provision 5.4.4 but appears not to contain the same provisions for rapid investigation and resolution of the dispute as those contained in Provision 5.4.4.

Qwest require 45 days and that the current 30-day period has caused Covad to "skimp" on its analysis of the bills it received from Qwest.

37. Covad described the work associated with its bill review and analysis process: Covad receives from Qwest the electronic bills for Unbundled Network Elements (UNEs), collocation, and transport approximately five to eight days after the invoice date; thus, Covad has 20-25 days to review the bills. Each month the process involves review and analysis of 30 boxes of UNE bills, 500-600 pages of collocation bills, and 850-1260 pages of transport bills. If the bills are received in paper format,[14] Covad must input the information into its system before it can analyze the bills. Whether received in electronic or paper format, Covad must check the bills to be sure that Qwest charged the correct applicable rate; must locate and then input data which are missing from the Qwest bills (*e.g.*, circuit identification numbers and Universal Service Ordering Codes (USOCs)); must verify non-recurring charges and individual case basis charges; and must manually and individually research all disconnects to verify that the date of disconnection is accurate.

38. In view of the FCC's *TRO*[15] decision mandating the phase-out of line-sharing,[16] which in turn will increase line-splitting,[17] Covad believes that the billing review process will become even more complicated and time-consuming than it is at present. Both affected CLECs

[14] Non-recurring collocation charges are received in paper format, for example.

[15] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *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 Dockets No. 01-338, No. 96-98, and No. 98-147, FCC No. 03-36 (rel. Aug. 21, 2003) (*TRO*), *aff'd in part and rev'd and vacated in part by United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II*).

[16] *TRO* at ¶¶ 255 through 269.

[17] Line-splitting occurs when two CLECs split the use of a single line, one using the low frequency portion of the line to provide narrowband voice service and the other using the high frequency portion of the same line to provide broadband (*i.e.*, xDSL) service. *TRO* at ¶¶ 211, 251. In a line-splitting situation, one CLEC is Qwest's customer; and the other is not. The Qwest customer receives, and is responsible for paying, the bill.

will need to verify and to analyze the Qwest bills for accuracy, thus increasing the required time and making the 30-day payment date more difficult to meet. In response, Qwest contends that, to the extent Covad seeks additional time to review bills in order to work with another CLEC in the case of a line splitting arrangement, Qwest should not be deprived of monies owed to it because Covad chose to change its business strategy. Qwest states that it is the responsibility of Covad and the other CLEC to work out an arrangement between them that permits bill review and analysis within the 30-day time period which is standard in the industry.

39. Covad asserts that, over time, the additional 15 days will increase the accuracy of billing and payment and, as the parties identify and fix problems, will minimize costs for both Covad and Qwest because it will avoid the costs of bill audits, the costs of "blind" assertions of billing errors,[18] the costs associated with resolution of billing disputes, and the costs associated with erroneous billing. In little more than one year, Qwest has made erroneous billings to Covad in the hundreds of thousands of dollars; and these erroneous billings have resulted in payments to Covad from Qwest for failure to meet the standards established in PID BI-3A.

40. Covad states that it has a good payment history with Qwest, which Qwest acknowledges. Covad has a history with Qwest of paying undisputed billed amounts on time, and, in line with the individual negotiations encourages and fostered by the *Second Report and Order*, the terms of the new ICA should take this into account.

41. Covad asks the Commission to bear in mind that Qwest is both Covad's wholesale supplier and Covad's competitor. When resolving the issues in this arbitration, the Commission must be cognizant of, and balance, these competing motivations of Qwest.

[18] These are assertions of billing errors made by a CLEC for the purpose of allowing it additional time to complete its bill analysis and verification process.

42. As its final argument, Qwest notes that Covad allows its customers 30 days within which to review, to analyze, and to pay their bills from Covad. Qwest argues that, by extension, 30 days is sufficient for Covad with respect to the wholesale bills it receives from Qwest. Covad responds that the difference between the amount of information that a retail customer must review and the thousands of pages of information that Covad must review makes this comparison pointless.

43. We agree with Qwest's arguments on this issue and order the parties to adopt Qwest's proposed language for provision 5.4.1. We are not compelled by Covad's assertions that it is harmed by the shorter 30 day payment due date. While we understand that the wholesale bills can be lengthy and complex, Covad has had four plus years of experience in reading and analyzing the Qwest bills and should be gaining efficiencies from that experience. Further, to the extent that a discrepancy should arise, Covad has the opportunity pursuant to provision 5.4.4 to dispute a bill within 15 days after the payment due date. In addition, provision 5.18.5 allows Covad to dispute a bill within 120 days after the payment due date. If the dispute in either instance is found in Covad's favor, Qwest is obligated to refund the disputed amount and pay Covad interest if Covad remitted the payment on time. If Covad did not remit the disputed amount, it has had use of the money during the resolution process and no interest is owed by Qwest. In either case, Covad is not harmed.

44. On the other hand, if we were to accept Covad's 45 day payment due date proposal, Qwest would not receive payment on even the *undisputed* amounts for 15 days later than it currently receives payment. Qwest would, therefore, not have the use of the money that it is rightly owed when it could have been earning its own interest for those 15 days. We find this scenario unacceptable.

45. In addition, we are persuaded by Qwest's argument concerning the ability of other CLECs with poor payment histories to opt into the Covad agreement and therefore have an extended payment due date. While we do not fully know how the FCC's new all or nothing rule will play out, Qwest's concern is at least plausible.

B. Issue No. 2 – Provision 5.4.2:

Whether one party must wait *30 calendar days* or *90 calendar days* following the payment due date before it may discontinue processing orders if the other party fails to make full payment, less any disputed amount, for the relevant services provided under the ICA.

46. Under the Qwest-proposed language one party could discontinue processing orders in the event the other party failed to pay the *undisputed* portion of a bill within **30 calendar days** of the payment due date. The discontinuance would apply to orders for those services for which payment was not received.

47. Under the Covad-proposed language one party could discontinue processing orders in the event the other party failed to pay the *undisputed* portion of a bill within **90 calendar days** of the payment due date. As with the Qwest proposal, the discontinuance would apply to orders for those services for which payment was not received.

48. Although on its face the provision under consideration applies equally to both parties to the ICA, this provision affects Qwest's receipt of monies as the billing party. At this time Covad does not supply service to Qwest and, therefore, does not bill Qwest.

49. In support of its proposal, Qwest relies on some of the regulatory and historical reasons it presented with respect to Issue No. 1 (discussed above), principally that the language is identical to the language in the existing Covad-Qwest ICA and is identical to the language in Qwest's SGAT. Qwest notes that a good billing relationship between Covad and Qwest is no

basis on which to challenge and to replace the consensus language developed during the § 271 process. Covad responds to these arguments as it did to similar arguments raised in Issue No. 1. *See* discussion *supra*.

50. Qwest makes the argument that CLECs which are less financially responsible than Covad would be able to opt into this provision; these are the same arguments presented with respect to Issue No. 1. In response Covad takes the same position and makes the same arguments as those presented in Issue No. 1. *See* discussion *supra*.

51. Qwest argues that it would suffer negative financial repercussions if Covad's proposal is adopted. Under its proposal Qwest could stop processing orders 60 days after the date of the unpaid invoice[19] while under Covad's proposal Qwest could stop processing orders 135 days after the date of the unpaid invoice.[20] Qwest notes that it provides some wholesale services one month in advance of billing for those services and contends that, under Covad's proposal, the delay between Covad's failure to pay for those services and Qwest's ability to cease processing orders for those services would be an additional 30 days (that is, a total of 165 days). According to Qwest, this delay of 75-105 days in its ability to cease processing orders would increase the likelihood of bad debt and would impose cash flow costs on Qwest. Further, Qwest argues that adoption of the Covad proposal would leave Qwest without a remedy for Covad's nonpayment of undisputed amounts and would leave Qwest unable to stop processing Covad orders for additional service, thus compounding the initial problem of Covad's failure to pay timely.

[19] This calculation assumes a 30-day payment period and a 30-day period following failure to pay on the bill due date.

[20] This calculation assumes a 45-day payment period and a 90-day period following failure to pay on the bill due date.

52. Covad responds that Qwest has the right to discontinue processing orders in the event that it does not receive payment of an undisputed amount from its wholesale customers, including Covad. Covad's position is: the time frames for that discontinuance should not be so short that Qwest can use the threat of discontinuance as leverage in a billing dispute, and the Qwest-advocated 30-day period lends itself to use as leverage. Covad asserts that it requests only a modest 60-day extension and that Qwest's additional financial exposure, to the extent it exists, is limited to that 60-day period. Covad reiterates that there is little prospect of Qwest's having to invoke this provision in light of the good payment history of Covad and the fact that Covad does not dispute bills to avoid paying on time.

53. As further support for its concern about negative financial repercussions, Qwest provided general information about recent instances in which it claims to have been left without payment and seemingly without recourse when unidentified CLECs (not Covad) which had failed to pay their bills for Qwest-provided services ceased operation.[21] Both Covad and Qwest agree that these instances occurred under the current 30-day period and that Qwest did not take action to cease processing orders following nonpayment even though it could have done so. From this, Covad argues that these instances say more about Qwest's collection practices than about the length of the time period. Covad asserts that, if Qwest had been less lenient (*i.e.*, timely ceased processing orders when it was permitted to do so), it could have limited its losses for services provided to, but not paid for by, those unidentified CLECs.

54. In support of its request for a 90-day period, Covad argues that the Commission must consider and balance the harm that each proposal, if adopted, would do to each company. For Covad, adoption of the Qwest proposal would have a likely irreversible and devastating

[21] Qwest did not provide the specifics of these instances.

impact on Covad's business, should Qwest invoke the provision, because Qwest is Covad's only wholesale supplier of essential services. If Qwest were to discontinue processing Covad's orders, Covad would have no alternative suppliers to which to turn. If Qwest were to invoke the provision inappropriately, Covad would have little time[22] to seek legal recourse (for example, to seek an injunction) and would be barred from seeking consequential damages.[23] In addition, after it discontinued processing Covad's order, Qwest could demand a substantial deposit as a precondition to provisioning and completing future orders. *See* Provision 5.4.5 of the ABN.[24] By contrast, for Qwest, adoption of the Covad proposal would have a relatively limited financial impact on Qwest because Qwest would not cease operations or suffer substantial financial harm. Given this balance of relative harm, Covad asserts that its 90-day time period is the more appropriate and should be adopted.

55. Each party asserts that the other failed to produce evidence supporting its claims of harm.

56. For much of our same reasoning as expressed in our decision on Issue 1, we order the parties to adopt Qwest's proposed language for provision 5.4.2. There is no dispute that Qwest has the right to discontinue processing orders in the event that it does not receive payment

[22] Covad would receive written notice "at least ten (10) business days prior to [Qwest's] discontinuing the processing of orders for the relevant services." Provision 5.4.2 of the ABN.

[23] *See* Provision 5.8.2 of the ABN.

[24] Provision 5.4.5 of the ABN states in relevant part that, following discontinuance of processing orders due to nonpayment, the billing party (*i.e.*, Qwest) "may require a deposit to be held as security for the payment of charges before the orders from the billed Party [*i.e.*, Covad] will be provisioned and completed[.] … The deposit may not exceed the estimated total monthly charges for an average two (2) month period within the 1st three (3) months for all services. … Required deposits are due and payable within thirty (30) calendar Days after demand."

of undisputed amounts from wholesale customers such as Covad. The only question is one of timing. We agree with Qwest that it has the right to discontinue processing orders 30 calendar days after the payment due date. This discontinuance is not applicable to services for which payment amounts are disputed, nor is it applicable to non-relevant services. Given these parts of the provisions, Covad's argument that Qwest can use discontinuance as leverage in billing disputes is not convincing.

C. Issue No. 3 – Provisions 5.4.3:

Whether one party must wait *60 calendar days* or *120 calendar days* following the payment due date before it may disconnect any and all relevant services if the other party fails to make full payment, less any disputed amount, for the relevant services provided under the ICA.

57. Under the Qwest-proposed language one party could disconnect services in the event the other party fails to pay the undisputed portion of a bill within **60 calendar days** of the payment due date. The disconnection would be limited to those services for which payment was not received.

58. Under the Covad-proposed language one party could disconnect services in the event the other party fails to pay the undisputed portion of a bill within **120 calendar days** of the payment due date. As with the Qwest proposal, the disconnection would be limited to those services for which payment was not received.

59. Although on its face the provision under consideration applies equally to both parties to the ICA, this provision affects Qwest's receipt of monies as the billing party. At this time Covad does not supply service to Qwest and, therefore, does not bill Qwest.

60. In general each party presents the same arguments in support of its position with respect to this Issue as it presented with respect to Issue No. 2. *See* discussion *supra*. Each added only limited information or argument.

61. In support of its financial repercussions argument, Qwest presents this time line of each proposal: Under its proposal Qwest could disconnect the service 90 days after the date of the unpaid invoice[25] while under Covad's proposal Qwest could disconnect the service 165 days after the date of the unpaid invoice.[26] For those wholesale services which Qwest provides one month in advance of billing, Qwest contends that the delay between Covad's failure to pay for those services and Qwest's ability to disconnect those services would be an additional 30 days (that is, a total of 195 days).

62. In support of its position, Covad adds one point to its argument that the Commission must balance the relative harm of each proposal. That point is: if it were disconnected, Covad would bear the expense of paying reconnection charges and also (at Qwest's option) could be required to pay a deposit as a condition of being reconnected.[27] *See* Provision 5.4.5 of the ABN.

63. We agree with Qwest on this issue as well for much the same reasons as provided in our decisions on Issues 1 and 2 above. The parties are ordered to adopt Qwest's proposed language for provision 5.4.3 concerning Timing for Disconnection of Services.

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[25] This calculation assumes a 30-day payment period and a 60-day period following failure to pay on the bill due date.

[26] This calculation assumes a 45-day payment period and a 120-day period following failure to pay on the bill due date.

[27] Provision 5.4.5 of the ABN states in relevant part that, following disconnection for nonpayment, the billing party (*i.e.*, Qwest) "may require a deposit to be held as security for the payment of charges … before reconnection of service [to the billed Party, here Covad]. … The deposit may not exceed the estimated total monthly charges for an average two (2) month period within the 1st three (3) months for all services. … Required deposits are due and payable within thirty (30) calendar Days after demand."

D. Issue No. 4 – Provision 5.4.5:

Should the definition of "repeatedly delinquent" mean a payment received *30 calendar days* or more after the payment due date or *60 calendar days* or more after the payment due date, three or more times during a twelve month period.

64. In accordance with Provision 5.4.5, if a party to the ABN is "repeatedly delinquent" in making payments, the billing party may require a sizable deposit. *See* footnote 27. Provision 5.4.5 reads, in relevant part: "'Repeatedly delinquent'" means any payment received _____ calendar Days or more *after the payment due date*, three (3) or more times during a twelve (12) month period." (Emphasis supplied.)

65. The issue here is how many calendar days should be inserted in the blank. Under the Qwest-proposed language the missing number would be **30**. Under the Covad-proposed language the missing number would be **60**.

66. Although on its face the provision under consideration applies equally to both parties to the ICA, this provision affects Qwest's receipt of monies as the billing party. At this time Covad does not supply service to Qwest and, therefore, does not bill Qwest.

67. Qwest presents essentially the same arguments in support of its position with respect to this issue as it presented in support of its position on Issue No. 2. *See* discussion *supra*. Covad likewise presents essentially the same arguments here as it presented in support of its position on Issue No. 2 (*see* discussion *supra)* with the additional observation that, if a CLEC is "repeatedly delinquent," Qwest may demand a deposit (*see* Provision 5.4.5) and may charge a compounded late charge penalty.

68. Qwest's argument on this issue is based on it's proposal for Issue 1 that we have now ordered be adopted. We agree here as well, that Qwest's proposed language for provision 5.4.5 should be adopted by the parties.

E. Issue No. 5 – Provision 8.1.1.3:

Whether the following language should be added to the provision governing Cageless Physical Collocation: "Qwest shall provide such space in an efficient manner that minimizes the time and costs."

69. Cageless physical collocation is a non-caged, non-secured collocation space in a Qwest premises. In this arrangement carriers, including both Qwest and collocating CLECs, are not physically separated from one another by a caged barrier. Provision 8.1.1.3 contains the instructions regarding Qwest's provisioning of cageless physical collocation to requesting CLECs.[28]

70. The parties agree on the language of Provision 8.1.1.3 with the exception of the highlighted language, which is the addition advocated by Covad:

> Cageless Physical Collocation -- is a non-caged area within a Qwest Premises. **Qwest shall provide such space in an efficient manner that minimizes the time and costs.** In Wire Centers, space will be made available in single frame bay increments. Qwest shall provide space, where available, in existing Qwest line ups, under existing cable racking and ironwork, where there is existing HVAC and proximately available power supplies, subject to the reservation guidelines set forth in Section 8.2.1.16. In Wire Centers, the current minimum square footage is nine (9) square feet per bay, however, if smaller bays are or become available, Qwest will reduce the minimum square footage accordingly. Space will be provided utilizing industry standard equipment bay configurations in which CLEC can place and maintain its own equipment. CLEC is responsible for the procurement, installation and on-going maintenance of its equipment as well as the Cross Connections required within CLEC's leased Collocation space. CLEC may elect to share its Cageless Collocation space (e.g. sublease a shelf to another CLEC), however, the CLEC of record is solely responsible for ordering, provisioning, repairing, maintaining, and billing for equipment, cross-connects, and services in its Collocation space.

71. Section 251(c)(6) of the Act requires Incumbent Local Exchange Carriers (ILECs), such as Qwest, to provide for physical collocation "on rates, terms, and conditions that

[28] *See also* Provision 8.2.1.1 (Qwest will provide collocation on terms, conditions, and rates that are just, reasonable, and nondiscriminatory).

are just, reasonable, and nondiscriminatory." To implement this statutory requirement, the FCC established this basic standard for ILEC management of collocation space: "an incumbent LEC must act as a neutral property owner and manager, rather than as a direct competitor of the carrier requesting collocation, in assigning physical space." *Advanced Services Fourth Report and Order* at ¶ 92.[29] To effectuate this standard, the FCC announced these principles: (a) "an incumbent LEC's space assignment policies and practices must not materially increase a requesting carrier's collocation costs or materially delay a requesting carrier's occupation and use of the incumbent LEC's premises" (*id.* at ¶ 93); (b) "an incumbent LEC must not assign physical collocation space that will impair the quality of service or impose other limitations on the service a requesting carrier wishes to offer" (*id.* at ¶ 94); (c) "an incumbent LEC's space assignment policies and practices must not reduce unreasonably the total space available for physical collocation or preclude unreasonably physical collocation within the incumbent's premises" (*id.* at ¶ 95); (d) "an incumbent LEC must allow a requesting carrier to submit physical collocation space preferences prior to assigning that carrier space (*id.* at ¶ 96); (e) "incumbent LECs [must] make physical collocation space available to requesting carriers on a first-come, first-served basis" (*id.* at ¶ 85); and (f) incumbent LECs must allow "collocators seeking to expand their collocated space … to use contiguous space where available" (*id.*). The FCC rule establishing standards for collocation of equipment necessary for access to unbundled network elements and for interconnection (47 CFR § 51.323(f)) implemented these principles.

72. There is no dispute about the process used by Qwest when collocation space is requested: Qwest provisions all requests for collocation on a first-come, first-served basis,

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

including any forecasted need.[30] If a requesting CLEC has an existing collocation arrangement in a central office and requests contiguous space, and if sufficient contiguous space is available, Qwest will offer that contiguous space to the requesting CLEC. If a requesting CLEC has an existing collocation arrangement in a central office and requests contiguous space but sufficient space is not available, Qwest offers the best (in its opinion) available space and will engineer a route between the CLEC's existing space and the available space to provide cable racking necessary to connect the two non-adjacent spaces. If a requesting CLEC has an existing collocation arrangement in a central office and requests contiguous space but sufficient space is not available, or if the requesting CLEC does not want the space offered, Qwest provides an opportunity for the requesting CLEC to walk through the central office to identify any available space that the CLEC deems more desirable. If possible, Qwest will provision the collocation space the CLEC identifies. In provisioning collocation space, Qwest takes into account: pending applications for available space, interconnection terminations, power requirements, heat dissipation, grounding, and security. To assist requesting carriers, Qwest posts on its wholesale website its available inventory of collocation space for all types of collocation.

73. Requesting carriers, such as Covad, use cageless physical collocation because it maximizes use of existing collocation space and reduces Qwest's cost of preparing the space. In addition, Qwest can provision cageless physical collocation within a 45-day provisioning interval. It is the most efficient form of collocation available at present.

74. Covad seeks the addition of one sentence to Provision 8.1.1.3: "Qwest shall provide such [collocation] space in an efficient manner that minimizes the time and costs."

[30] This includes Qwest's requests and forecasted needs for space in a premises. Qwest encourages the requesting carriers to provide forecasts of future needs.

From Covad's perspective, this language delineates Qwest's obligation to provide efficient collocation space assignment to Covad. According to Covad witness Zulevic, the language will assure that Qwest does not have "the opportunity to raise the costs of facilities-based market entry by assigning Covad collocation spaces that unnecessarily inflates costs." Hearing Exhibit No. 9 at 5:3-5.

75. Covad first observes that it has no collocation options or alternatives to Qwest-provided collocation and that it is Qwest's largest collocation customer. As a result, this is an important issue to Covad because anything which reduces collocation costs and improves Qwest's provisioning of collocation inures to Covad's benefit.

76. Covad argues that the proposed language accurately states Qwest's existing obligation to determine, at the time of the collocation request, the most efficient placement and provisioning of collocation space to meet Covad's needs which, in turn, assures that the collocation costs are not artificially inflated. According to Covad, because Qwest has control of all central office planning, the ICA ought to state clearly that Qwest must "look at the existing floor plan and … make allocation and placement decisions that reflect the maximum efficiencies possible." Direct testimony of Covad witness Zulevic (Hearing Exhibit No. 9) at 8:16-20. Covad asserts that, if adopted, this language will require Qwest to plan and to engineer collocation space to keep Qwest's time and costs to a minimum and will benefit Covad because Qwest's time and costs, in turn, affect Covad's cost and time to market. Such an efficiency concept, in Covad's view, is neither new nor novel in the telecommunications industry. It is Covad's view that Qwest cannot be in compliance with statutory and regulatory requirements that collocation be provided in a just, reasonable, and nondiscriminatory manner without adhering to Covad's proposed language.

77. In response, Qwest states that the language of Provision 8.1.1.3, without the proposed addition, is consensus language from the § 271 process. Qwest asserts that its proposed language is based on, and is consistent with, the definition of cageless physical collocation in FCC rules and the requirements of the *Advanced Services Fourth Report and Order*. Qwest notes that its processes and procedures (for example, the space availability reports on its website) exceed the FCC's requirements. Because it believes it already goes beyond the statutory and regulatory requirements, Qwest views the proposed language as unnecessary and duplicative.

78. From Qwest's perspective, the principal difficulty with Covad's proposed language is: it is vague, is ambiguous, and could create disputes between the parties. There are practical difficulties, according to Qwest. For example, when determining whether collocation space is provided "in an efficient manner that minimizes the time and costs," from whose (*i.e.*, Qwest, Covad, other requesting carriers) perspective -- and using what point in time (present or future) -- does one make that judgment? When making that determination, does one consider each collocation request in isolation or does one consider all present (and, possibly, future) collocation requests simultaneously?

79. Qwest asserts that the proposed language would place a difficult implementation requirement on Qwest. It argues that CLEC business plans change over time and, thus, what a CLEC considers an efficient collocation today it may come to see as inefficient later. Yet the Covad language, according to Qwest, could be read to require Qwest, for example, to plan collocation space for a future Covad-to-another-CLEC interconnection which is neither contemplated nor forecasted at the time of Covad's initial collocation. Qwest resists Covad's language as unworkable and unreasonable.

80. In support of its proposal, Covad also asserts that its additional language is an incentive to Qwest to be more efficient in planning and allocating its collocation space. Qwest responds by noting that it has two already-existing incentives to be efficient. The first incentive is the CPAP, which contains two PIDs (CP-2[31] and CP-4[32]) that address these collocation efficiency questions. If it fails to meet these PID requirements, Qwest will suffer monetarily. The second incentive is that Qwest is in business to provide important services to its wholesale and retail customers and, thereby, to make money for its shareholders. If it is inefficient (that is, if it fails to minimize costs), it loses its customers and its shareholders. Qwest states that these are two powerful incentives driving it to be efficient.

81. As the last major argument in support of its proposed language, Covad references Qwest's past practice of building new facilities for collocation space. This contributed to Covad's concern that, in a situation in which Covad had collocation space in a central office and subsequently requested additional space in that same central office, Qwest might locate the additional space in a separate premises, thereby delaying Covad's obtaining the requested space and increasing the collocation costs.

82. Qwest responds to this argument, first, by pointing out that Provision 8.1.1.3 contains a requirement that, where available, Qwest will offer additional collocation space to Covad in the same premises as that in which the existing collocation is located. As its second point, Qwest states that the period of building to which Covad refers ended when the telecommunications and technology bubble burst; that Qwest is not building new premises

[31] PID CP-2 "evaluates the extent to which Qwest completes collocation arrangements for CLECs within the standard intervals or intervals established in interconnection agreements." Hearing Exhibit No. 18 at Exhibit B, page 88.

[32] PID CP-4 "evaluates the degree that Qwest completes the sub-process function of providing a collocation feasibility study to the CLEC as committed." Hearing Exhibit No. 18 at Exhibit B, page 92.

because it has a glut of collocation space; and that it now offers collocation space at a discounted (as much as 75%) price to requesting carriers.

83. Qwest witness Mr. Michael Norman stated at hearing

> A. I'm just saying that the time and the costs are in other proceedings that we had during the 271, so the real dispute that I have is the efficient manner we're talking about in a collocation.
> Q. So we understand whose time and whose cost we're talking about minimizing, it's the word efficient that's creating an issue for you?
> A. That's correct. [33]

84. Based on this oral testimony, we order the parties to adopt Covad's additional language for provision 8.1.1.3 with the exception of the word "efficient." The sentence to be inserted will therefore read: "Qwest shall provide such space in a manner that minimizes the time and costs." Our hope is that, by adopting this sentence with a slight change, Covad will receive some further assurance in how Qwest provisions collocation space, while at the same time Qwest will not feel it is being held accountable to some ambiguous standard.

[33] Hearing Transcript Vol I. Page 147 lines 8-16.

F. Issue No. 6 – Provisions 8.2.1.23.1.4, 8.3.1.9, and 9.1.10:

Whether Qwest must provide, as a wholesale product, channel regeneration of CLEC-to-CLEC cross-connections within a Qwest premises or whether Qwest may provide such a product as a "finished service."

Whether Qwest should be permitted to charge for channel regeneration of CLEC-to-CLEC or Covad-to-Covad cross-connections within a Qwest premises.

If Qwest is permitted to charge for channel regeneration of CLEC-to-CLEC cross-connections within a Qwest premises, whether Qwest should be permitted to charge for channel regeneration of CLEC-to-CLEC cross-connections in those circumstances in which adjacent or close-by collocation space, which would not require regeneration, is not available due to decisions made by Qwest.

85. Under the Agreement Being Negotiated, Qwest installs and maintains (that is, provisions) cross-connections (or cross-connects) to allow a collocating carrier to connect its collocated equipment to (a) its collocated equipment located in a non-adjacent collocation space in the same Qwest premises or (b) equipment of another carrier, either Qwest or another CLEC, within the same ILEC premises so long as, under either circumstance, each collocating carrier's equipment is used for interconnection with Qwest or for access to Qwest's UNEs. *See* Provision 8.2.1.23. There is no dispute that this implements the FCC requirements. *Advanced Services Fourth Report and Order* at ¶¶ 55, 62; *see also* 47 CFR § 51.323(h). As discussed above with respect to Issue No. 5, when assigning collocation space, Qwest is responsible for that assignment and must meet specific requirements.

86. When a CLEC requests cross-connects to itself or to another carrier, Qwest gives the requesting carrier the choice of provisioning the cross-connection itself or of having Qwest provision it. Qwest provisions CLEC-to-CLEC[34] cross-connects as a wholesale service unless

[34] As used in this decision, this refers to Covad-to-other CLEC.

the cross-connection requires regeneration.[35] To this point, Qwest has provisioned all cross-connects within its premises.

87. As pertinent here and simply stated, channel regeneration is required when the length of the circuit prevents transmission of proper signal strength to the point that degradation of signal quality occurs. Channel regeneration, in essence, boosts the signal back to the proper signal strength established by the reference standard.[36] Qwest provisions cross-connections on the Interconnection Distribution Frame (ICDF). *See* Letter dated February 6, 2002, addressed to Kathy Stichter of Eschelon Telecom Inc. (Hearing Exhibit No. 15) at 1. Channel regeneration is required only if the distances from each collocation space to the intermediate cross-connect (that is, the ICDF) exceed the reference standard.

88. This Commission has determined that, "to the extent that regeneration is a true 'cost' of collocation, [Qwest] should be allowed to recover that cost." Decision No. R01-0848 (Hearing Exhibit 13) at 65. There is no dispute that, at present, Qwest provides CLEC-to-Qwest channel regeneration at no cost to CLECs.

89. There are three parts to this issue: First, should Qwest provide regeneration of CLEC-to-CLEC cross-connects as a wholesale product or as a finished service.[37] Second, should Qwest be allowed to charge for regeneration of CLEC-to-CLEC or Covad-to-Covad cross-connects. Third, if Qwest is permitted to charge, should Qwest charge for regeneration of

[35] Whether Qwest should provision a CLEC-to-CLEC cross-connect requiring regeneration as a wholesale product or whether it can provision this type of cross-connect as a "finished product" is at issue here.

[36] The reference standard is American National Standards Institute Standard T1.102-2003, "Digital Hierarchy - Electrical Interface; Annex B. *See* Provision 8.3.1.9 and 9.1.10 of the ABN.

[37] A finished service is a tariffed product offered to wholesale customers and to retail customers and is purchased from Qwest's FCC 1 Access Tariff (Hearing Exhibit No. 21), which is a retail tariff.

CLEC-to-CLEC cross-connects in those circumstances in which adjacent or close-by collocation space, which would not require regeneration, is not available due to decisions made by Qwest.

90. Covad's position on the first question is: Covad should be able to order regeneration for CLEC-to-CLEC cross-connects, including Covad-to-Covad cross-connects,[38] as a wholesale product. Qwest's position on the first question is: Qwest should be able to provide regeneration for CLEC-to-CLEC cross-connects, including Covad-to-Covad cross-connects, as a finished service.

91. In support of its position on the first question, Covad argues that its language implements the provisions of Decision No. R01-0848 (Hearing Exhibit No. 13). Entered in the § 271 proceeding, that Decision addressed the issue of whether the Qwest SGAT should contain a provision allowing Qwest to charge for channel regeneration. The Commission determined that the SGAT language would be satisfactory for purposes of complying with the § 271 checklist if two specified changes were made to the language. Qwest responds to this argument by noting that the specified SGAT language changes were made, the Commission approved the SGAT with that specified language, and nothing remains to be done to implement Decision No. R01-0848.

92. Covad also argues that it should be able to order regeneration for CLEC-to-CLEC cross-connects, including Covad-to-Covad cross-connects, on the same terms and conditions as it is able to order regeneration for any other interconnection product, such as unbundled loop or transport circuit (that is, as a wholesale product). Covad states that 47 CFR § 51.323(h) mandates Qwest to provide CLEC-to-CLEC cross-connect when requested to do so.

[38] This type of cross-connect is required when Covad adds collocation space in a Qwest premises in which it already has collocation space and wishes to connect the two collocation spaces.

Covad points to 47 CFR § 51.323(h)(1), which specifies that "[w]here technically feasible, the [ILEC] shall provide the connection using copper, dark fiber, lit fiber, or other transmission medium, as requested by the collocating … carrier." According to Covad, because this language requires use of the medium of the CLEC's choice, "the obvious import of this language is that the chosen medium would include the equipment necessary to make the medium work." Covad's Statement of Position at 16. Thus, since the cross-connection is a wholesale service which only Qwest can provide, any required regeneration likewise should be a wholesale service because the required regeneration equipment is part and parcel of providing the cross-connection using the medium requested by the CLEC.

93. With respect to the first question presented, Qwest notes that it delivers all Qwest-to-CLEC CLEC-ordered circuits with the signal quality that meets the reference standard, which Qwest establishes by testing the circuits. In Qwest's opinion and based on its experience since 1999, no regeneration is required even if the two cross-connecting CLEC collocation spaces are located at opposite and far ends of a central office from one another.

94. In support of its position on the first question (and in response to Covad's position), Qwest argues that it now offers channel regeneration of CLEC-to-CLEC cross-connects as a finished service and should be permitted to do so under the Agreement Being Negotiated. Qwest witnesses Norman and Hubbard testified that, when a collocating carrier requests CLEC-to-CLEC cross-connects (the COCC-X wholesale product) with regeneration, Qwest's back office systems "read" and treat the request as one for a finished service offered under Qwest's Private Line Transport Service offering found in Tariff FCC No. 1 (Hearing Exhibit No. 21). Covad responds that, to its knowledge, Qwest does not provide this service as a finished service because, insofar as an ordering CLEC can discern, cross-connection with

channel regeneration is ordered as a wholesale service and the change from wholesale product order to finished service order occurs without the knowledge of the ordering CLEC. Covad points to the letter dated February 6, 2002, addressed to Kathy Stichter of Eschelon Telecom Inc. (Hearing Exhibit No. 15), and to chapters 5 and 15 of Qwest Technical Publication 77386 (Hearing Exhibit No. 20)[39] referenced in that letter, as support for its position.

95. According to Qwest, there is no legal requirement to provide channel regeneration of CLEC-to-CLEC cross-connects as a wholesale product; and Covad is attempting to extend Qwest's current policies with respect to Qwest-to-CLEC regeneration to cover other types of regeneration. Qwest argues that Covad's only basis for its position is that Qwest is responsible for managing collocation at its premises. This is insufficient justification, in Qwest's view, because it is not legally responsible for, and is not legally obligated to facilitate or to manage, a CLEC's interface with, or any other coordinating effort with respect to, another CLEC's network. According to Qwest, it meets its regulatory responsibilities when it provides access to its premises so CLECs can engineer both cross-connects and necessary cabling (including any required regeneration) between the CLECs without Qwest's interference or involvement. If those CLECs want Qwest to provide the cross-connects including any required regeneration, Qwest asserts it is within its rights to offer that product as a finished service, not a wholesale product.

96. In response to Qwest's argument, Covad asserts that Qwest cannot fulfill its obligations, by providing an "over-priced" finished service in lieu of a wholesale product. Covad states that, if it orders from Qwest a CLEC-to-CLEC (including a Covad-to-Covad) cross-

[39] The letter to Ms. Stichter referenced Technical Publication 77386 as it existed in February 2002; this version is not in the record. Hearing Exhibit No. 20 is Technical Publication 77386 (May 2004). The two version are not identical.

connection for its DS1 and DS3 circuits *as a wholesale product*, the nonrecurring (*i.e.*, one-time) charge is $165.85 per circuit, and there is no monthly recurring charge. Covad states that, if it must order from Qwest a CLEC-to-CLEC (including a Covad-to-Covad) cross-connection *with regeneration* for its DS1 and DS3 circuits *as a finished service*, the recurring charges are approximately $700 per month per DS1 circuit and approximately $1000 per month per DS1 circuit. Thus, according to Covad, it would be forced to pay substantially higher costs, and be placed at a competitive disadvantage *vis-à-vis* Qwest and other data service providers, because of space allocation decisions made by Qwest. In Covad's opinion, because the product provided as a finished service would not be provided at just and reasonable rates, Qwest's proposed language violates § 252(h) of the Act and should be rejected.

97. Turning to the second question (*i.e.*, should Qwest charge for regeneration of CLEC-to-CLEC cross-connects at all), it is Covad's position that Qwest should not charge for the regeneration of CLEC-to-CLEC cross-connects because it does not charge for regeneration of CLEC-to-Qwest cross-connects. In Docket No. 99A-577T, the Commission determined that Qwest could charge for channel regeneration in Qwest-to-CLEC cross-connects and set a rate for that purpose. *See* Decision No. C01-1302; *see also* Decision No. R01-0848 (Hearing Exhibit No. 13) at 65. At some point subsequent, Qwest decided that it would not charge for that type of channel regeneration. Covad believes that the policy on charging for channel for regeneration should be consistent: because it has voluntarily chosen not to charge for Qwest-to-CLEC channel regeneration, Qwest should not charge for CLEC-to-CLEC (including Covad-to-Covad) channel regeneration.

98. Qwest responds that, if it is ordered to provide or to offer a wholesale regeneration product for CLEC-to-CLEC cross-connects, § 252(d)(1) of the Act entitles it to

recover its costs of providing that product. It also relies upon *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part, remanded sub nom., AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366 (1999). Qwest notes that its position is consistent with the position Commission Staff took in the § 271 proceeding, citing Commission Staff Report on Issues That Reached Impasse During the Workshop Investigation into Qwest's Compliance, Volume IIA Final Report (dated January 9, 2002) filed in Docket No. 97I-198T, at ¶ 119.

99. Turning to the third issue (*i.e.*, if Qwest is permitted to charge, should Qwest charge for regeneration of CLEC-to-CLEC cross-connects in those circumstances in which adjacent or close-by collocation space, which would not require regeneration, is not available due to decisions made by Qwest), Covad's position is that Qwest should not be permitted to charge for regeneration under those circumstances. Qwest's position is that it should be permitted to charge for regeneration.

100. As a preliminary matter, Covad notes that the regeneration issue is most significant in the larger, multi-floor central offices in major metropolitan areas, the very central offices in which Covad has the most DS1 and DS3 circuits which might require regeneration. Covad then argues that, even if it is permitted to charge for CLEC-to-CLEC regeneration, Qwest should not be permitted to charge for CLEC-to-CLEC (including Covad-to-Covad) regeneration caused by Qwest's inefficient or imprudent management of its premises, including reserving space for Qwest's own future use. In support of this proposition, Covad relies on the arguments it made with respect to Issue No. 5, again asserting that its proposed language will provide an incentive for Qwest to use efficient collocation practices (*see* discussion above).

101. Qwest asserts that it should be permitted to charge for channel regeneration for CLEC-to-CLEC (including Covad-to-Covad) cross-connections. For the reasons discussed above with respect to Issue No. 5 and relying on its entitlement to recover its costs, Qwest opposes the language proposed by Covad. In addition, Qwest argues that it should not be prevented from charging for channel regeneration when it has no involvement in the business relationship between the two CLECs.

102. We order the parties to adopt the following language for provisions 8.2.1.23.1.4, 8.3.1.9 and 9.1.10:

> 8.2.1.23.1.4 CLEC is responsible for the end-to-end service design that uses ICDF Cross Connection to ensure that the resulting service meets its Customer's needs. This is accomplished by CLEC using the Design Layout Record (DLR) for the service connection. Depending on the distance parameters of the combination, regeneration may be required.
>
> 8.3.1.9 Channel Regeneration Charge. Required when the distance from the leased physical space (for Caged or Cageless Physical Collocation) or from the collocated equipment (for Virtual Collocation) to the Qwest network is of sufficient length to require regeneration. Channel Regeneration will not be charged separately for Interconnection between a Collocation space and Qwest's network or between non-contiguous Collocation spaces of the same CLEC. Channel Regeneration will not be charged separately for facilities used by CLEC to access Unbundled Network Elements and ancillary services from the Collocation space, but if based on the ANSI Standard for cable distance limitations, regeneration would not be required but is specifically requested by CLEC, then the Channel Regeneration Charge would apply. Cable distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B."
>
> 9.1.10 Reserve for future use.

103. The above language represents our decisions on the three issues subsumed in Issue 6. On the first issue, we agree with Covad that regeneration should be a wholesale product when it is needed to maintain a signal strength on a cross-connection between two CLEC

collocations or a CLEC to its own non-adjacent collocation. Qwest currently offers the cross-connection (COCC-X) product on a wholesale basis at a TELRIC price. We agree with Covad that it should be able to order the regeneration product, when required, on the same terms and TELRIC pricing that it orders any other interconnection product. There is no dispute that the FCC rules require Qwest to use a transmission medium of Covad's choice for the cross-connection of collocation spaces. We agree with Covad that the FCC would not have allowed this choice if it did not intend for the chosen medium to include the equipment necessary to make the medium work. Therefore, Qwest is ordered to make available its cross-connection product with regeneration at wholesale rates, terms and conditions.

104. Procedurally, we note that the TELRIC rate for regeneration was investigated and set in Docket No. 99A-577T. Although Qwest has chosen not to charge CLECs for regeneration between Qwest's network and a CLEC collocation space when necessary, this rate can be used for regeneration between CLEC collocation spaces as allowed for below.

105. As for the second issue, should Qwest be allowed to charge for CLEC-to-CLEC regeneration or Covad-to-Covad regeneration, we find that Qwest should be allowed to charge in the first instance, but not in the second.

106. We agree with Qwest's statements that there is no way it can or should predict future relationships between two CLECs and whether those two CLECs will need to interconnect. These business decisions are made by the CLECs without the participation or even the knowledge of Qwest. Qwest should not then be held accountable to provide regeneration free-of-charge. The individual CLECs could have had legitimate business reasons to collocate where they did, even though down the road those collocation spaces are far enough apart to

require regeneration of the cross-connection. Therefore, we find that Qwest is allowed to charge a TELRIC rate for regeneration when it is required for CLEC-to-CLEC cross-connection.

107. As for Covad-to-Covad regeneration, however, we believe that this cross-connection and any required regeneration is much more similar to the product Qwest currently provisions to connect to its network, *i.e.*, regeneration at no charge. There is not a third party relationship involved, only the connection of Covad's collocation space(s) to Qwest's network. These Covad-to-Covad connections (and regeneration) should be offered on the same rates, terms and conditions that Qwest offers connections to its own network.

108. The third issue, should Qwest be able to charge for regeneration for CLEC-to-CLEC regeneration when collocation space would be available if not for Qwest's own decisions, we find that Qwest should be able to charge. The example used by the parties on this issue is Qwest's reservation of space for its own future use. We agree with Qwest that it has as much of a right as a CLEC to reserve space, while adhering to the FCC's requirements on space reservation and allocation, for its own future use. The ability to charge for regeneration should not be affected by Qwest's own facilities growth decisions. If Covad believes that Qwest is somehow gaming its reservation practice in order to charge for regeneration, a scenario we find highly unlikely, Covad can file a formal complaint with the Commission for investigation.

109. After consideration of the arguments presented, the Commission denies the Covad Motion for Leave to File Supplemental Materials (Covad Motion). The Covad Motion seeks to supplement the record with a copy of (1) a decision by the Washington Utilities and Transportation Commission (WUTC) approving an interconnection agreement between Qwest and a Qwest affiliate, Qwest Communications Corporation, (2) Qwest's letter seeking approval of the interconnection agreement, and (3) and the interconnection agreement approved by the

WUTC. Qwest's Response demonstrates that, in order to make the supplemental material relevant to issues in this case, it would be necessary to accept into the record additional factual material placing the Washington documents into proper perspective. For example, Qwest asserts that the interconnection agreement approved by the WUTC is based upon the Eighth Revised Statement of Generally Available Terms and Conditions (SGAT) in effect in Washington. Furthermore, Qwest asserts that it intends to change the Washington SGAT in the near future. Because the evidentiary hearing in this matter was closed on June 22, 2004, the request to submit additional factual material into the record is untimely.[40] Therefore, the motion is denied. Accordingly, the Commission did not consider the materials in reaching its decision in this arbitration proceeding.

110. After consideration of the arguments presented, the Commission grants the Qwest Motion to Strike (Motion to Strike). Qwest's Motion to Strike, filed on August 11, 2004, seeks to strike portions of Covad's Statement of Position, specifically those portions of the Statement that refer to discussions held in the Change Management Process in June 2003 in which the deletion of Chapter 15 of Qwest's Tech Pub 77386 was at issue. According to the Statement of Position, Qwest proposed and discussed updates to Tech Pub 77386 in the Change Management Process, including deletion of Chapter 15 (regeneration for interconnection). The Motion to Strike asserts that this material constitutes an attempt to present additional evidence after hearing and after the evidentiary record has been closed.

111. In response, Covad essentially argues that the disputed information is not new "evidence," but, rather, publicly available "reference material" similar to a statute. Covad asserts

[40] The WUTC decision was issued on July 28, 2004, a date after the hearing in this case. However, according to Qwest, that decision simply reflects an SGAT that has been in effect since June 25, 2002.

that it is proper for the Commission to take administrative notice of this information even after hearing. Finally, Covad contends that the motion to strike is untimely. The Statement of Position was filed on July 9, 2004; however, Qwest submitted its motion only on the eve of Commission deliberations on this case.

112. We grant the Motion to Strike. Qwest is correct that the disputed material is factual information, and not the kind of information that could properly be noticed by the Commission (such as a statute or rule). As factual information, it does constitute evidence that should have been offered at hearing where Qwest could have conducted cross-examination relating to the information, and offered responsive evidence. It is inappropriate for a Statement of Position to rely on factual information not placed into the record at hearing. Therefore, the Motion to Strike is granted. Accordingly, the Commission did not consider the materials found in the Covad Statement of Position at pages 19 (paragraph which carries over the next page) and 20 (carry over paragraph and first full paragraph) in reaching its decision in this arbitration proceeding.

G. Issue No. 8 – Provisions 9.2.1.2.3 and subsections:

Whether the ICA should contain the substance of FCC rules and the *TRO* pertaining to process before the FCC.

Whether Qwest should be permitted to retire copper loops and copper subloops which Covad is using to provide xDSL service to end users.

If Qwest is permitted to retire such copper loops and copper subloops, what conditions should be imposed on Qwest's retirement of copper loops and copper subloops which Covad is using to provide xDSL service to end users.

113. In the *TRO* the FCC addressed, as relevant to this issue, the question of the level of impairment CLECs seeking to serve the mass market would face if they were denied access to the transmission path connecting the customer premises with the central office. Based on its

analysis, the FCC determined that, on a national level, such CLECs face different levels of impediment depending upon the type (that is, fiber, copper, or copper-fiber hybrid) of loop used in the transmission path and upon whether the requesting CLEC seeks to offer broadband service, narrowband service, or both. Broadly speaking, the FCC found no impairment if CLECs do not have access to Fiber To The Home (FTTH) loops;[41] found impairment if CLECs do not have unbundled access to stand-alone local loops comprised entirely of copper; found impairment if CLECs do not have unbundled access to copper subloops;[42] and found impairment in some circumstances if CLECs do not have unbundled access to the capabilities, functions, and features of hybrid loops[43] that are not used to transmit packetized information.

114. At the present time, most homes and businesses in Qwest's Colorado service area are connected to the telephone network by copper loops. There is no dispute that presently no one can afford to replicate the ubiquitous loop network, the vast majority of which is copper, owned by Qwest.

115. The questions presented in this Issue are related only to the retirement of copper loops and subloops. In the main, Qwest retires existing copper loops and copper subloops when its system planners and engineers design new copper or new fiber facilities that replace existing copper cable facilities. On occasion, Qwest may do such a replacement within a timeframe dictated by another entity, such as a relocation mandated by a municipality.

[41] These are loops which consist entirely of fiber (and its associated equipment) from the central office to the customer premises. *TRO* at ¶ 219.

[42] Copper subloops are the distribution plant which consists of the copper transmission facility between the customer's premises and a remote terminal.

[43] "Hybrid loops are local loops which consist of both copper and fiber optic cable (and associated electronics)."

116. At present, for Covad to provide Digital Subscriber Line (xDSL) service, either it must have access to copper over the entire local loop or it must place a remote Digital Subscriber Loop Access Multiplexer (DSLAM).[44] Lacking one or the other of these facilities, Covad is unable to provide xDSL service to its end users using its existing facilities.

117. There are three parts to this issue: First, should Provision 9.2.1.2.3 contain the substance of the FCC rules and the *TRO* pertaining to process before the FCC. Second, should Qwest be permitted to retire copper loops and copper subloops which Covad is using to provide xDSL service to end users. Third, if Qwest is permitted to retire such copper loops and copper subloops, what conditions should be imposed on Qwest's retirement of copper loops and copper subloops which Covad is using to provide xDSL service to end users.

118. Covad's position on the first question (*i.e.*, should Provision 9.2.1.2.3 contain the substance of the FCC rules and the *TRO* pertaining to FCC process) is that the language is redundant. Qwest's position on this question is that the language accurately reflects the *TRO* and the FCC's rules governing process and so should be retained.

119. Provision 9.2.1.2.3 is new and does not appear in Covad and Qwest's existing ICA. The contested language sets out the substance of the FCC rule governing the time for a CLEC which objects to a planned retirement of copper loops or copper subloops to file an objection with the FCC and the time within which the FCC must make a decision granting such an objection.[45] *See* 47 CFR §§ 51.333(c) and (f). The contested language accurately states the substance of the rules.

[44] Covad asserts that the DSLAM option is prohibitively expensive and, therefore, not a viable option for it.

[45] The objection is deemed denied unless the FCC issues an order granting the objection within 90 days of the date on which the FCC gives public notice of the filing of the objection. *See* 47 CFR § 51.333(f).

120. Turning to the second question (*i.e.*, should Qwest be permitted to retire copper loops and copper subloops which Covad is using to provide xDSL service to end users), Covad's position is that, under federal and Colorado law, the retirement of copper loops and copper subloops should not be permitted where the retirement will disrupt Covad's ability to serve its customers. Qwest takes the position that, so long as the required notice is provided, such retirement is permissible under both federal and state law and should be permitted here.

121. Covad states that the basis of its concern here is that its business depends on unbundled access to Qwest's copper loops and that, as Qwest replaces those loops with fiber, Covad's ability to serve its present customers, and thus its business, steadily shrinks. Covad states that it has spent millions of dollars to deploy its DSL network in Colorado and that the investment is destroyed to the extent it is denied access to Qwest's copper loops. As a result, Covad urges the Commission, as it considers the issue of retirement of copper loops and subloops, to respect Covad's existing investment in next-generation facilities and to protect Covad's investment -- and its ability to serve its customers -- whenever it is legally able to do so.

122. Covad takes the position that the Commission has the authority, under both federal and state law, to determine that Qwest cannot retire copper loops and copper subloops which Covad is using to provide xDSL service to end users. Covad first cites the *TRO*, which states at ¶ 282: "Unless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules, we [that is, the FCC] will deem all such oppositions [to retirement of copper loops] denied unless the [FCC] rules otherwise upon the specific facts and circumstances of the case at issue within 90 days of the [FCC's] public notice of the intended retirement." Covad interprets this language to mean that, because FCC rules require CLEC access to xDSL loops, Qwest cannot rely upon the copper loop retirement

provisions of the *TRO* at all if the planned retirement would deny CLEC access to those xDSL loops. Covad also notes that retirement of copper loops is not an absolute "right" because a CLEC can prevent the retirement if the FCC upholds its objection. *See TRO* at ¶ 283.

123. In response to this Covad argument, Qwest asserts that the *TRO* (at ¶ 281 and note 822) makes it clear that the FCC considered, and rejected, arguments similar to that made by Covad here. The FCC determined that allowing ILECs to retire copper loops and subloops would promote the growth of facilities-based competition; would foster the deployment of facilities that support broadband services and, thus, implement § 706 of the Act; and would encourage CLECs to invest in next-generation technology. *See, e.g., TRO* at ¶¶ 212, 272, 278-79. As a result, Qwest states, the FCC refused "to impose a blanket prohibition on the ability of incumbent LECs to retire any copper loops or subloops they have replaced with FTTH loops." *Id.* at ¶ 281. According to Qwest, the Covad language would impose the blanket prohibition which the FCC refused to impose. Qwest also argues that the Covad language directly contradicts the explicit decision of the FCC that ILECs may retire copper loops and subloops so long as they provide unbundled access to fiber loops for narrowband voice services only. *See id.* at ¶ 273. For these reasons, Qwest concludes that the Commission should not adopt Covad's language because it is contrary to, and would hinder implementation of, federal telecommunications policy announced by the FCC.

124. Qwest concludes that the Commission should adopt its proposed language because its language implements the *TRO* and the regulatory regime of promoting investment in broadband. In addition, its language is consistent with and correctly states the notice and other requirements established by the FCC under federal law for retirement of copper loops and subloops.

125. Turning to state law, Covad and Qwest agree that the FCC did not preempt "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." *TRO* at ¶ 284; *see also id.* at ¶ 271. The FCC explained, in pertinent part, *id.* at ¶ 284:

> We understand that many states have their own requirements related to discontinuance of service, and our rules do not override these requirements. We expect that the state review process, working in combination with the [FCC's] network disclosure rules noted above, will address the concerns noted by [commentors] regarding the potential impact of an incumbent LEC retiring its loops.

126. Relying on these FCC statements, Covad asserts that the Commission has the necessary state law authority to adopt Covad's proposed language concerning retirement of copper loops which Covad is using to provide xDSL service to end users. Covad asserts that the Qwest language violates state telecommunications law.

127. Section 40-15-503(2)(b)(I), C.R.S., gives the Commission authority to adopt rules which require carrier interconnection to essential facilities or functions, which are to be unbundled. Rule 4 *Code of Colorado Regulations* (CCR) 723-39-6.2 implements this statutory provision and lists loop as an essential facility. Rule 4 CCR 723-39-6.4 states, in pertinent part: "A facilities-based telecommunications provider that provides the sole loop to a customer's premises shall offer that loop as the unbundled network element." Citing these authorities, Covad argues that the fiber loop to the customer premises is the sole loop to that premises; that the Commission rule requires that such a loop be provided as an unbundled network element; and that, as a result, the ICA should contain language which assures Covad unbundled access to the facilities (*i.e.*, the loop) it needs to continue to provide service to its customers. Covad further concludes that the Qwest language, which does not provide Covad with access to the unbundled loop, violates the statute and the regulations.

128. Qwest responds to Covad's state law argument by stating that the Qwest language does not violate Colorado law. First, when the FTTH loop is the sole customer loop, Qwest will provide unbundled voice channel on the FTTH to permit a CLEC to provide narrowband service and that this fully comports with and satisfies both federal and state law requirements. Qwest asserts that neither federal nor state law requires it to do more. Second, Qwest states that the cited Colorado statute and regulations do not apply to Covad because the statute and rules are intended to allow a CLEC to provide basic local telecommunications service (*see, e.g.*, §§ 40-15-102(3), -501, and -503, C.R.S.). Covad, which is a DSL provider, does not provide basic local service. Qwest states that Rule 4 CCR 723-39-6.4 does not give a DSL provider the right to an unbundled loop to provide DSL service.

129. Qwest makes a third argument concerning state law: If the Commission were to interpret Rule 4 CCR 723-39-6.4 as requiring unbundled access to loops for DSL providers, that interpretation would conflict directly with the *TRO* on the issue of FTTH[46] and would substantially prevent achievement of the FCC's objective of promoting deployment of broadband facilities. As a result, according to Qwest, such a Commission interpretation would be preempted.

130. Turning to the third question (*i.e.*, if Qwest is permitted to retire copper loops and subloops and to replace them with fiber loops, what conditions should be imposed on Qwest's retirement of copper loops and copper subloops which Covad is using to provide xDSL service to end users), Covad's position is that Qwest should not be permitted to retire copper loops and copper subloops unless the following conditions are met for loops which are serving Covad end

[46] As discussed above, the FCC determined that an ILEC must provide unbundled access to fiber loops when copper loops and subloops are retired but that "in such cases the fiber loops must be unbundled for narrowband services only." *TRO* at ¶ 273.

users or are serving Covad: (a) Qwest must comply with the notice requirements pertaining to changes in its network;[47] (b) Qwest must provision an alternative service over a compatible, available loop; (c) the alternative service must not degrade the service quality and must not increase the cost to Covad or its end user; and (d) disputes concerning copper loop retirement must be resolved using the dispute resolution provisions of the ICA.[48] Qwest's position is that the following conditions are sufficient and exceed FCC requirements: Qwest (a) will give the FCC-required notice of its intent to change its network (that is, to retire copper loops and subloops); (b) will leave the retired copper loops and subloops in service where technically feasible to do so; (c) will coordinate with Covad the transition from copper loops to like copper loops to hold service interruption to a minimum; (d) when retiring copper loops and subloops and replacing facilities includes the placement of a remote DSLAM, will offer Covad (to the extent space is available) remote collocation or field connection point to maintain existing services; and (e) will coordinate with Covad the transition from copper loops to the new facilities to hold service interruption to a minimum.[49]

131. As discussed above, Covad states that its business relies on access to Qwest's copper loops and that it offers these conditions in order to preserve and to protect its business. For this reason, the Qwest language, particularly the suggestion that Covad can have access to remote DSLAMs, is unacceptable to Covad because of the expense involved and because Qwest has offered no indication of how Covad would get service back to the central office from the remote DSLAM. In addition, Covad argues that its end users are widely dispersed within the Qwest network so that implementation of Covad's proposal will not affect Qwest's economic

[47] There is no disagreement about this condition.

[48] *See* Covad's proposed language for Provision 9.2.1.2.3.1.

[49] *See* Qwest's proposed language for Provision 9.2.1.2.3 and its subparts.

incentives to deploy fiber loops. Further, Covad asserts that only a small number of its end users will be affected and this further reduces the financial impact on Qwest of implementation of its proposals.

132. It is Covad's position that Qwest chooses to install fiber and to retire copper loops and subloops for three reasons: the initial investment is high, but the long-term maintenance costs are much lower; fiber provides a tremendous amount of bandwidth so Qwest is able to offer a wide array of products and services; and Qwest need not provide CLECs with unbundled access to fiber loops.

133. Because Qwest does not have to provide access to its fiber loops, the retirement of copper loops and subloops in favor of fiber loops raises a customer choice issue, according to Covad. First, customers' choice for xDSL service is limited to Qwest; and, second, Covad's end users who can no longer obtain Covad's xDSL service are forced to use the service of Qwest, a provider they did not choose and do not want. To Covad's customer choice argument, Qwest responds that there is no diminution of choice because, under its language, Qwest will keep copper in service when technically feasible to do so and, as the FCC found in the *TRO* at ¶ 291, Covad can provide service over copper loops which have been retired from service by deploying remote DSLAMs and next-generation network equipment. These options are available to Covad so that it can remain in business. In addition, according to Qwest, customer choice is enhanced when it deploys fiber loops because end users are able to receive voice, data, and video services over one loop. Finally, Qwest argues that its deployment of fiber loops generates true facilities-based competition (*e.g.*, Qwest competing with cable and dish), and customers will benefit from this competition as they see additional products and services, thus increasing customer choice.

134. In support of its proposed language, Qwest states that its conditions exceed FCC requirements, which mandate only notice in advance of the retirement, because Qwest agrees to keep copper loops in service even after they are retired, provided it is technically feasible to do so. This means that if technically feasible Qwest will leave the copper loops serving Covad's customers in place when Qwest deploys fiber loops and will continue to maintain those loops for at least some period of time after fiber deployment. Qwest's conditions also exceed FCC requirements because Qwest will provide Covad access to remote DSLAMs and will coordinate circuit design with Covad to ensure an orderly transition to the new fiber facilities to minimize service interruption.

135. Qwest states that Covad's proposals are unacceptable. First, implementation would reduce Qwest's economic incentive to deploy fiber because Qwest either would maintain its copper loops (and incur the higher maintenance cost associated with copper loops) or would incur the expense of provisioning an alternative service. These costs would be in addition to the costs of deploying and maintaining the fiber loops and associated equipment. Second, Covad has not defined the term "alternative service." Third, Covad has not defined or set the parameters of the phrase "not degrade the service or increase the costs" to Covad or Covad's end users. In particular, Covad has offered no metric or measurement against which to judge either service degradation or cost increase. Fourth, the Covad language limits the amount which Qwest can recover to the amount which Covad is now paying for copper loops; and this limit will apply irrespective of the cost of provisioning the alternative service. As a result, Qwest would not be able to recover its costs, and this limitation would violate § 252(d)(1) of the Act. Fifth, one option available to Qwest under the Covad proposal is to leave Covad's copper loops in service. This is not a viable alternative because one cannot separate the copper loops used to provide

service to Covad from the other loops used in the 3600- and 4200-pair feeder cables used in Qwest's network. As a practical matter, Qwest would incur the expense of maintaining all the loops in those feeder cables, which would reduce Qwest's economic incentive to deploy fiber loops. Sixth and finally, Covad states that it has relatively few end users scattered throughout Qwest's service area. Given this, Qwest argues, it is illogical to impose potentially large costs on Qwest, particularly if those costs would not be recoverable, for a small number of Covad end users.

136. There is one question about the notice which Qwest will provide when it elects to change its network by retiring copper loop and deploying fiber loop: should Qwest provide notice of this network change directly to Covad. Qwest's proposal is to provide notice on its website at least 90 days in advance of the proposed retirement of copper loop and to file notice with the FCC in accordance with 47 CFR § 51.333(a). Covad has nine days from the date of the FCC's notice of the proposed retirement within which to file an objection with the FCC. *See* 47 CFR § 51.333(c). Covad states that, because the website is not Colorado-specific, it is possible that Covad will miss the notice or will see it too late to file an objection. Due to the importance to it of proposed copper loop retirement, Covad requests that Qwest provide notice directly to Covad at the same time as it files its notice with the FCC. Covad notes that BellSouth Communications, Inc., provides direct and individual notice to each affected CLEC in addition to filing with the FCC.

137. We agree with Covad on this issue of direct notification. We order Qwest to include language in provision 9.2.1.2.3 that requires Qwest to directly notify Covad of planned copper retirement that will affect Covad and/or its end user customers. To accomplish this requirement, we order the parties to adopt the language as follows:

9.2.1.2.3 Retirement of Copper Loops or Copper Subloops and Replacement with FTTH Loops. In the event Qwest decides to replace any copper loop or copper Subloop with a FTTH Loop, Qwest will: (i) provide notice of such planned replacement on its website (www.qwest.com/disclosures); ~~and~~ (ii) provide public notice of such planned replacement in accordance with FCC Rules; and (iii) provide direct notice of such planned replacement to CLEC when CLEC or its customers will be affected.

138. The rest of provision 9.2.1.2.3 should be adopted as Qwest has proposed. We agree with Qwest that its proposed language that contains the FCC's requirements for notifications of and objections to copper retirement. While perhaps understood by the parties, we believe that this language adds clarity to the notification process and it should be included.

139. We order the parties to adopt Qwest's proposed language for provisions 9.2.1.2.3.1 and 9.2.1.2.3.2. Covad argues that state law requires Qwest to either maintain access to copper loops to enable Covad to provide xDSL service, or to provide access to overbuilt fiber facilities also to enable Covad to provide its services. Covad cites § 40-15-503(2)(b)(I), C.R.S. (Commission shall adopt rules for carrier interconnection to essential facilities which shall be unbundled), and Commission Rules 4 CCR 723-39-6.2 and 6.4 (ILEC shall offer access to sole loop to a customer's premises on unbundled basis). We disagree with these contentions. Rule 6.2 and 6.4, which implement § 40-15-503(2)(b)(I), require unbundled access to the sole loop to a customer's premises for the provision of telecommunications services.[50] Qwest correctly points out that, where it replaces copper facilities with FTTH, it will unbundle the fiber loop in accordance with the TRO--the loop will be available to competing carriers to provide narrowband service. Therefore, in these circumstances, Qwest will comply with

[50] Qwest argues that the statute and rules do not require unbundled access to loops for the provision of services other than basic local exchange.

Rules 6.2 and 6.4. The rules do not prohibit an ILEC from retiring copper plant and replacing that plant with FTTH.

140. As for the suggestion that the Commission require Qwest to unbundle FTTH to allow Covad to provide xDSL service, Qwest argues that such a ruling would violate the TRO. Specifically, Qwest notes, the FCC concluded that competing carriers are not impaired without access to FTTH, with a limited exception for narrowband purposes. The FCC stated:

> Only in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops must the incumbent LEC offer unbundled access to those fiber loops, and in such cases the fiber loop must be unbundled for narrowband services only…. TRO, ¶ 273.

We conclude that state law does not prohibit Qwest from retiring copper loops, and the TRO precludes a state commission order that would require unbundled access to FTTH for the purpose of providing xDSL services.

H. Issue No. 12 – Provisions 9.21.1, 9.21.4.1.6, and 9.24.1:

Whether the ICA should contain a provision requiring Qwest to implement a process in which Covad uses a single Local Service Request (LSR) to order line splitting or loop splitting.

141. The Change Management Process (CMP) is the forum used by all CLECs and Qwest to request, to approve, and to prioritize[51] Change Requests (CRs)[52] submitted by CLECs and by Qwest because the types of changes requested by CRs affect CLECs and Qwest. *See generally* Exhibit G to the Agreement Being Negotiated (Hearing Exhibit No. 18), the CMP

[51] The priority assigned to a CR by vote of the CMP determines the Qwest resources devoted to implementation of the change requested in the CR.

[52] A carrier may submit a Change Request to obtain, for example, a change to or retirement of an existing OSS Interface; the creation of a new OSS Interface; a change to or retirement of a Qwest product or service; the creation of a new Qwest product or service; a change to or retirement of a Qwest process; or the creation of a new Qwest process.

operations document. Covad and Qwest both accepted the CMP for these purposes and have worked within that structure since CMP's creation.

142. The issue here is limited to the process Covad uses to order line splitting and UNE-P and loop splitting and Unbundled Loop on a single LSR in a conversion[53] or migration[54] situation.[55] At present, Covad must submit two separate LSRs for Qwest to provision line splitting: first, Covad submits an LSR for UNE-P migration or conversion (voice service) and, second, Covad submits a separate LSR for line splitting (data service). Covad follows the same process to order Unbundled Loop and loop splitting.

143. Qwest is scheduled to release IMA Release 16.0 in October 2004. Part of that Release is a change to Qwest's IMA which will permit Covad to order line splitting and UNE-P and loop splitting and Unbundled Loop on a single LSR in a conversion or migration situation. There is no dispute that this Issue will be moot if IMA Release 16.0 contains this change to Qwest's IMA. The heart of this Issue is Covad's concern that the Release will be delayed or that it will not contain the anticipated functionality.

144. Covad proposes the following language for Provision 9.21.4.1.6 (and conforming languages for Provisions 9.21.1 and 9.24.1):

> The Customer of record shall submit the appropriate LSR's associated with establishing UNE-P and Line Splitting. **A single LSR may be used to establish both the UNE-P and Line Splitting service at the same time**.

145. Covad makes two arguments in support of its proposed language: first, the language is necessary to assure parity with the way in which Qwest provisions this service for

[53] Conversion occurs when an existing customer changes its service arrangement.

[54] Migration occurs when a customer moves from one carrier to another.

[55] Due to an OSS change implemented in April 2004 with IMA Release 15.0, CLECs may order line splitting with UNE-P and loop splitting with Unbundled Loop on a single LSR for new orders.

itself; and, second, Qwest has failed to provide a firm commitment that it will implement the necessary functionality with IMA Release 16.0.

146. With respect to parity, Covad states that Qwest (which does not use LSRs) creates a single service order to provision voice and data service to its end users and has been able to do so since August 2003. Covad, on the other hand, must submit two LSRs to achieve that same result, which adds to the cost and length of the provisioning process. FCC rules require ILECs (here, Qwest) to offer CLECs (here, Covad) access to, and to provision, unbundled network elements on terms and conditions which are "no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself." 47 CFR § 51.313(b). Covad concludes that, to achieve parity, Covad must be able to order voice and data service using a single LSR immediately. If the Commission orders Qwest to implement a single LSR as Covad proposes, Covad states that it will be in a position to work within CMP to assure Qwest will take action, citing §§ 4.0 and 4.1 of Exhibit G, Hearing Exhibit No. 18.

147. The absence of a "truly firm" commitment to implement a single LSR capability by a date certain is problematic from Covad's perspective. First, Qwest originally was to provide in one IMA Release the ability to use a single LSR to order voice and data for all types of orders, but Qwest unilaterally delayed (from October 2003 until April 2004) implementation and did not provide the functionality for conversions and migrations. Second, Qwest has reduced from three to two the number of IMA Releases per year and has reduced the number of personnel hours it devotes annually to wholesale IMA Releases. From these facts Covad concludes that Qwest may well delay implementation of the remaining LSR functionality, a functionality which does not benefit Qwest but which Covad needs. In addition, Covad notes that the lack of commitment to

implementing the requested functionality is highlighted by Qwest's failure to offer to provide manual processing of single LSRs as a stop-gap until mechanized processing is available.[56]

148. Qwest proposes the following language for Provision 9.21.4.1.6:

> The Customer of record shall submit the appropriate LSR's associated with establishing UNE-P and Line Splitting. **Customer of record may offer advanced data service simultaneous with a new UNE-P order, on the same LSR, when that capability becomes available through an IMA release**.

149. In support of this language, and as the basis for its opposition to Covad's language, Qwest notes that the issue is a narrow one; does not involve provisioning of products requested by Covad; and will be moot with the October 2004 IMA Release 16.0 which should contain the requested functionality. Qwest also points out that it submitted the CRs which resulted in the implementation of a single LSR for voice and data.

150. Against this background, Qwest states that the requested functionality simply is not available at present and that putting Covad's requested language in the ABN will have no impact on making that functionality available. Qwest maintains that the necessary change to Qwest's system interface with the CLECs (including Covad) is on track to be contained in IMA Release 16.0, that unforeseen programming difficulties caused the delay cited by Covad, and that those difficulties will not delay release of single LSR functionality in IMA Release 16.0. According to Qwest, its proposed language provides the functionality sought by Covad without disrupting the normal operation of the CMP whereas adopting the Covad language in an ICA subverts CMP by removing one CR from the process, elevating that CR to a special status which requires more immediate response from Qwest, and thus reducing the Qwest resources available to CMP-derived and CMP-prioritized system changes. Qwest further argues that the

[56] Covad requests that the Commission order Qwest to provide manual processing in the event Qwest fails to implement mechanized processing with IMA Release 16.0 in October 2004.

Commission recently denied a similar attempt by AT&T Communications of the Mountain States, Inc., and TCG-Colorado to use the arbitration process to bypass the CMP, citing Decision No. C03-1189 (entered in Docket No. 03B-287T) at ¶ 168. On the issue of suggesting an interim and manual process for single LSRs, Qwest states that Covad did not request such processing and, in any event, such a request would be handled through CMP and could not be implemented unilaterally by Qwest upon Covad's request.

151. We order the parties to adopt Qwest's proposed language for provisions 9.21.1, 9.21.4.1.6, and 9.24.1. There is nothing in the record to indicate that Qwest will not implement the single LSR capability with its 16.0 IMA release in October 2004. However, until that release, Qwest's limiting language concerning single LSR ordering "once the functionality is made available" is justified for the intervening time between the effective date of this ICA and the 16.0 release.

152. The proper forum to handle this change is the CMP. Covad has not demonstrated to us that that process has in any way broken down. Covad's one example of a delay in implementing the single LSR process for new connections is not compelling. Qwest states that the functionality challenges of implementing that process initially will not be a problem with the 16.0 release. The change request should be allowed to run its course through CMP before we are asked to usurp that process.

153. If, for some unforeseen reason, release 16.0 gets delayed or the single LSR functionality drops out of that release, Covad can avail itself of the dispute resolution process in the CMP and bring the issue as a complaint before this Commission or an arbitrator. We do not order Qwest to implement a manual single LSR process at this time. If Covad wishes to pursue this option, it can do so through CMP.

I. Issue No. TRO 1 – Provisions 4.0 (definition of Commingling), 9.1.1.1, and 9.1.1.5 (and all subsections):

Which proposed language better tracks, and is more consistent with, the meaning of "commingling" as discussed by the FCC in the *TRO*.

Whether the ICA should contain provisions relating to service eligibility criteria which apply to high-capacity Enhanced Extended Loops (EELs) and which were established in the *TRO*.

154. Addressing first the question (*i.e.*, which definition of "commingling" best tracks, and is most consistent with, the meaning of "commingling"), in the *TRO* at ¶ 579[57] (emphasis supplied), the FCC defines "commingling" as:

> the connecting, attaching, or otherwise linking of a UNE or a UNE combination to one or more facilities or services that a *requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act*, or the combining of a UNE or UNE combination with one or more such wholesale services.

155. This definition does not contain an exception which permits an ILEC to refuse to permit a requesting carrier to commingle wholesale resale services with UNEs and combinations of UNEs obtained at wholesale by a method other than unbundling under § 251(c)(3) of the Act. In addition, ¶ 584 of the *TRO* reads, in relevant part: "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations [referring to those under § 253(c)(3)] with other wholesale facilities and services, including any services offered for resale pursuant to section 251(c)(4) of the Act."

156. Continuing in ¶ 579 of the *TRO*, the FCC explains the ILEC (here, Qwest) obligations with respect to commingling:

> Thus, an incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act.

[57] *See also* 47 CFR § 51.5 (definition of "commingling").

> In addition, upon request, an incumbent LEC shall perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act. As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services.

157. To implement this language in the Agreement Being Negotiated Qwest proposes the following language for Provision 4.0 (definition of "commingling"):

> "Commingling" means the connecting, attaching, or otherwise linking of **an Unbundled Network Element**, or a Combination of **Unbundled Network Elements**, to one or more facilities or services that a requesting Telecommunications Carrier has obtained at wholesale from Qwest, or the combination of **an Unbundled Network Element**, or a Combination of **Unbundled Network Elements**, with one or more such facilities or services.

158. Covad proposes the following language for that same Provision:

> "Commingling" means the connecting, attaching, or otherwise linking of **a 251(c)(3) UNE**, or a Combination of **251(c)(3) UNEs**, to one or more facilities or services that a requesting Telecommunications Carrier has obtained at wholesale from Qwest, **pursuant to any method other than unbundling under Section 253(c)(3) of the Act**, or the combination of **a 251(c)(3) UNE**, or a Combination of **251(c)(3) UNEs**, with one or more such facilities or services.

159. To establish the parameters of commingling, Qwest proposes the following language for Provision 9.1.1.1:

> To the extent it is Technically Feasible, CLEC may Commingle Telecommunications Services purchased on a resale basis with an Unbundled Network Element or combination of Unbundled Network Elements. Notwithstanding the foregoing, the following are not available for resale Commingling:
>
> a) Non-telecommunications services;
>
> b) Enhanced or Information services;
>
> c) Features or functions not offered for resale on a stand-alone basis or separate from basic exchange service; and

d) Network Elements offered pursuant to Section 271.

160. For that same Provision, Covad proposes the following language:

> **Commingling -** CLEC may commingle 251(c)(3) UNEs and combinations of 251(c)(3) UNEs with any other services obtained by any method other than unbundling under section 251(c)(3) of the Act, including switched and special access services offered pursuant to tariff and resale. Qwest will perform the necessary functions to effectuate such commingling upon request.

161. To some extent this Issue concerns the interaction, if any, between the provisions of § 251(c)(3) and those of § 271(c)(2)(B) of the Act. Section 251(c)(3) of the Act establishes the duty of ILECs (such as Qwest) to provide any requesting carrier (such as Covad) with access to unbundled network elements on terms, conditions, and rates which are just, reasonable, and nondiscriminatory. In the *TRO* the FCC identified those network elements ILECs are required to provide on an unbundled basis to CLECs pursuant to this section.

162. Section 271 of the Act sets out the requirements which a Bell Operating Company (BOC)[58], such as Qwest, must meet before it is allowed to provide interLATA services in a state within its region. Section 271(c)(2)(B), commonly referred to as the "competitive checklist," contains 14 specific interconnection and access conditions which a BOC must satisfy before it is allowed to offer in-region interLATA services. Checklist item 2[59] references and incorporates the §§ 251(c)(3) and 252(d)(1)[60] obligations into the competitive checklist. Four other competitive checklist items relate to specific network elements which the FCC has deemed to be UNEs under § 251(c)(3): Checklist item 4[61] ("[a]ccess to loop transmission from the central office to the

[58] BOCs are a subset of ILECs. *See TRO* at ¶ 655.

[59] Section 271(c)(2)(B)(ii) of the Act.

[60] Section 252(d)(1) of the Act, *inter alia*, establishes the standards to be used for pricing UNEs under § 251(c)(3).

[61] Section 271(c)(2)(B)(iv) of the Act.

customer's premises, unbundled from local switching or other services"); checklist item 5[62] ("[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services"); checklist item 6[63] ("[l]ocal switching unbundled from transport, local loop transmission, or other services"); and checklist item 10[64] ("[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion"). Following the *TRO* and *USTA II*, switching, signaling, some types of loops, and some types of transport are no longer required to be unbundled pursuant to § 251(c)(3).

163. In the *TRO* at ¶¶ 649-667, the FCC addressed whether a BOC has a continuing obligation to provide access to network elements described in checklist items 4, 5, 6, and 10 irrespective of whether the FCC mandates unbundled access to those same network elements pursuant to § 251(c)(3) of the Act. In ¶ 653 of the *TRO*, the FCC found: 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" of the Act. With respect to whether a BOC has an obligation to combine[65] § 271 network elements, the FCC stated that it "decline[d] to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251" of the Act. *TRO* at ¶ 655, n.1990.[66]

[62] Section 271(c)(2)(B)(v) of the Act.

[63] Section 271(c)(2)(B)(vi) of the Act.

[64] Section 271(c)(2)(B)(x) of the Act.

[65] Pursuant to § 251(c)(3) of the Act, ILECs have a duty to "combine" UNEs and to allow CLECs to combine those UNEs.

[66] This footnote originally contained the following sentence: "We also decline to apply our commingling rules, as set forth in Part VII.A. [of the *TRO*] to services that must be offered pursuant to [checklist items 4-6 and 10]." The *TRO Errata* struck this sentence from footnote 1990.

164. There is no dispute in this proceeding that Qwest need not commingle network elements available under § 271 of the Act with *non*-§ 251 network elements.[67] The parties agree that commingling must involve a UNE or UNE combination made available under § 251(c)(3) of the Act.

165. In support of its proposed language for Provisions 4.0 (definition of "commingling") and 9.1.1.1, Qwest states that its proposed language conforms to the *TRO* because that Order does not require ILECs to commingle network elements unbundled pursuant to § 251(c)(3) of the Act (or combinations of such network elements) with § 271(c)(2)(B) network elements.

166. In support of its language, Qwest offers a number of arguments. Qwest contends, first, that permitting commingling of UNEs and UNE combinations provided pursuant to § 251(c)(3) with network elements provided pursuant to § 271(c)(2)(B) ignores the Congressional decision to omit from § 271(c)(2)(B) the duty to combine UNEs which is found in § 251(c)(3) of the Act. Second, Qwest asserts that the commingling rules are simply a broader implementation of the ILEC's § 251(c)(3) combination duties. Third, Qwest notes that the FCC did not require, under § 271 authority, the BOCs to combine network elements no longer required to be unbundled pursuant to § 251(c)(3) of the Act. Fourth, Qwest argues that, under Covad's proposed language, Qwest would be required to commingle (that is, connect, link, or otherwise attach) § 271 network elements with UNEs provided pursuant to § 251(c)(3); that the network elements in checklist items 4-6 and 10 overlap substantially with the network elements found in § 251(c)(3); and, thus, Covad's language would result in an arrangement not functionally different from Qwest's being required to provide UNE combinations under

[67] For example, Qwest need not commingle a § 271 network elements with another § 271 network element.

§ 251(c)(3) which it is no longer required to provide. Fifth, Qwest argues that, when the FCC changed the language of *TRO* ¶ 584 by issuing the *TRO Errata*, that change made it clear that one cannot commingle UNEs and UNE combinations provided pursuant to § 251(c)(3) with § 271(c)(2)(B) network elements.[68] Finally, Qwest asserts that the Commission must harmonize the general language found in the *TRO* at ¶ 579, which seems to permit commingling with § 271 network elements, with the more specific language found in the *TRO* at ¶ 655 and n.1990, which states that the FCC will not require under § 271 of the Act that BOCs combine network elements which are no longer required to be unbundled pursuant to § 251(c)(3) of the Act. Qwest contends that its language harmonizes the seemingly inconsistent language by relying on the specific language over the general. Based on the foregoing, Qwest states that its proposed language should be adopted.

167. Qwest's version of Provision 9.1.1.1 states that Qwest will commingle UNEs and UNE combinations provided pursuant to § 253(c)(3) with telecommunications services purchased for resale but will not commingle the following: "non-telecommunications services," "enhanced or information services," "features or functions not offered for resale on stand-alone basis or separate from basic exchange service," and "network elements offered pursuant to section 271." Qwest states that the Provision identifies those items which do not fall within the definition of "telecommunications services" and, therefore, do not have to be offered for resale. *See* § 251(c)(4) of the Act. Qwest claims that Covad's language is too vague and fails to limit

[68] As originally published, *TRO* ¶ 584 read, in relevant part: "As a final matter, we require that incumbent LECs permit commingling of [section 253(c)(3)] UNEs and UNE combinations with other wholesale facilities and services, including any **network elements unbundled pursuant to section 271 and any** services offered for resale pursuant to section 251(c)(4) of the Act." (Emphasis supplied.) The *TRO Errata* struck the highlighted language.

resale services available for commingling to "telecommunications services." In Qwest's view, it is essential that the statutory limitations be included in the ABN.

168. Because it believes that there is no *TRO* basis for a requirement that it commingle UNEs and combinations of UNEs with a § 271 network element, Qwest addresses the question of whether the Commission has authority to impose such an obligation pursuant to § 271 of the Act. Qwest argues that the Commission has no such authority. First, Qwest contends that, pursuant to § 271(d)(2)(B) of the Act, the Commission's function is consultative *vis-à-vis* whether a BOC has met the requirements of the competitive checklist; that the FCC makes the decision and, thus, that only the FCC can impose requirements based on § 271 of the Act. Second, because, as stated in the *TRO* at ¶ 664, the FCC determines whether a particular § 271 network element's rates, terms, and conditions satisfy the just, reasonable, and nondiscriminatory standard of §§ 201 and 202 of the Act, Qwest states that this Commission lacks authority to impose any § 271-based obligation. Third, Qwest argues that the FCC cannot delegate its authority under §§ 201 and 202 of the Act to the states[69] and that this further supports Qwest's position that the Commission lacks authority to impose conditions based on § 271 of the Act. Finally, Qwest asserts that the Commission cannot use its arbitration authority to impose conditions based on § 271 of the Act because the arbitration authority is limited to deciding issues relating to an ILEC's §§ 251(b) and (c) obligations; only the FCC has authority to decide issues arising under § 271 of the Act.

169. In support of its proposed language for Provisions 4.0 (definition of "commingling") and 9.1.1.1, Covad makes several arguments. First, citing the *TRO* at ¶ 579 and

[69] Qwest cites *USTA II*, 359 F.3d at 568.

47 CFR § 51.309(3),[70] Covad asserts that Qwest's commingling obligation is all-inclusive in that it must connect, attach, or otherwise link a UNE or UNE combination made available under § 251(c)(3) of the Act with all wholesale facilities and services. A network element provided pursuant to § 271(c)(2)(B) is a wholesale service and, Covad asserts, falls within the ambit of commingling as defined in the *TRO* at ¶ 579. Second, Covad notes that, although it deleted mention of § 271 network elements from ¶ 584 of the *TRO*,[71] the FCC left intact the basic definition of commingling found in the *TRO* at ¶ 579. Thus, Covad argues, the FCC did not disturb the definition of commingling and that definition encompasses network elements provided pursuant to § 271 of the Act. Third, citing the *TRO* at ¶ 584, Covad contends that resale products are to be treated like any other wholesale product with respect to commingling and, thus, its language correctly states the law with respect to resale commingling.

170. Addressing Qwest's proposed language for Provisions 4.0 (definition of "commingling") and 9.1.1.1, Covad states its opinion that use of the term Unbundled Network Element as Qwest proposes could result in Qwest having to commingle more than the FCC requires. Covad quotes agreed-upon ABN language which leaves the definition of Unbundled Network Element open to future change.[72] As a result of the open-ended nature of the term Unbundled Network Element as used in the ABN, according to Covad, use of the narrower and

[70] That section provides that, except with respect to high-capacity Enhanced Extended Loops for which there are specific eligibility requirements, "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."

[71] Covad suggests that the language was deleted because the paragraph addressed the obligation to commingle UNEs and UNE combinations provided pursuant to § 251(c)(3) of the Act with services purchased at wholesale and adding the reference to § 271 network elements was out of place and confusing.

[72] The language is: "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." Covad Statement of Position at 30-31. Covad did not provide a citation to the ABN for this quote.

more focused term (*i.e.*, "Section 251(c)(3) UNE") when defining commingling for purposes of the ABN protects Qwest against unintended consequences in the event Qwest and Covad later expand the scope of Unbundled Network Element.

171. Turning next to the question related to high-capacity Enhanced Extended Loops (EELs), high-capacity EELs are combinations of high-capacity (DS1 and DS3) loops with high-capacity (DS1 and DS3) interoffice transport. The FCC has established specific eligibility requirements for high-capacity EELs. *See* 47 CFR § 318(b); *see also TRO* at ¶¶ 591-600. These criteria, and when they apply, are not at issue in this proceeding.

172. The issue here arises because Covad does not wish at this time to purchase high-capacity EELs. To make this clear, Covad proposes language for Provision 9.1.1.5 which states, in relevant part (emphasis supplied):

> With respect to combinations of high-capacity (DS1 and DS3) loops and interoffice transport (High Capacity EELs), there are additional eligibility criteria that do not apply to other UNEs. *CLEC will not order High Capacity EELs. Upon request by CLEC, the parties will negotiate an amendment to this Agreement that will enable CLEC to order High Capacity EELs subject to service eligibility criteria established by Applicable Law*.

173. Because it does not intend to purchase high-capacity EELs under this Agreement, Covad deems the Qwest-proposed language in Provision 9.1.1.5 (and all subsections) to be unnecessary because it describes the service eligibility criteria for a service Covad does not wish to purchase, and cannot purchase, under the terms of the ABN. For this reason, Covad opposes including the special eligibility criteria applicable to high-capacity EELs. Qwest is concerned, however, that another CLEC may opt into the Covad ICA, purchase high-capacity (DS1 and DS3) loops and high-capacity (DS1 and DS3) interoffice transport, and demand that Qwest

combine (or, in appropriate cases, commingle) those network elements into high-capacity EELs without having to meet the specific eligibility criteria found in 47 CFR § 51.318(b).[73]

174. The parties may have reached agreement on this issue. At the hearing, Qwest witness McDaniel suggested that Qwest would be satisfied if the ABN were clear that Covad cannot order *high-capacity EELs* under the Agreement. Covad stated its agreement with that proposal. In addition, Qwest's suggestion seemed to coincide with the language proposed by Covad for Provision 9.1.1.5.1 (emphasis supplied):

> CLEC qualifies for access to loops, transport, subloops and other stand-alone UNEs, as well as *EELs combining lower capacity loops*, so long as CLEC provides a qualifying service to its end-user customer.

175. Later, however, in its Comments in Response to Interim Order Requiring Additional Briefing at 5, Qwest stated that, "as an alternative to including the EEL eligibility criteria in the ICA, Qwest would accept language in the 'UNE' and 'UNE Combination' definitions establishing that a CLEC cannot order a loop and transport and require Qwest to combine them." Qwest offers the following language for Provision 4.0 (definition of "Unbundled Network Element") should the Commission decide not to include the eligibility criteria in the ICA: "The UNEs available under this Agreement do not include EELs, which are combinations of loops and transport." Qwest also offers language for Provision 4.0 (definition of "UNE Combination") and for inclusion in Provision 9.23 should the Commission decide not to include the eligibility criteria in the ICA: "Qwest does not have any obligation under this Agreement to combine loops and transport, referred to as EELs, and nothing in this Agreement

[73] As discussed *supra*, Qwest does not believe that the *Second Report and Order* addresses its concern about the potential for opt-in; and Covad believes that that Order fully protects Qwest from the type of abuse of opt-in which Qwest fears.

requires Qwest to provide combinations of loops and transport, or EELs." From this language, one cannot determine whether the EELs referred to are high-capacity EELs only or are all EELs.

176. Because we agree with Covad's interpretation of the TRO as it relates to ILECs' commingling obligations, we direct the parties to include Covad's proposed language for section 4.0 (definition of commingling) and section 9.1.1.1 (commingling) in their interconnection agreement. 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 or 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.

177. Qwest's primary contention here is that the TRO prohibits commingling of § 251(c)(3) UNEs with § 271 network elements. We observe, however, that little in the TRO itself supports this position. Essentially, Qwest points to the *errata* to ¶ 584 of the TRO (discussion *supra*, footnote 71) and asserts that with this *errata* the FCC intended to clarify that ILECs are not required to commingle § 251(c)(3) UNEs with § 271 network elements. We discern no such intent. As discussed above, the *errata*, rather than setting forth an affirmative statement supporting Qwest's interpretation, merely deleted a reference to commingling network elements unbundled under § 271 from the original decision without modifying other discussion in the TRO, including Rule 51.309(3), which supports Covad's position. We note that Covad's interpretation of that *errata*--that ¶ 584 is dedicated to a discussion of ILECs' obligations to commingle UNEs with resale services and the reference to § 271 elements was confusing--is

every bit as plausible as Qwest's interpretation.[74] We place little weight on the *errata* to § 584 given the plain and clear language in the TRO which allow for commingling of § 251(c)(3) UNEs with § 271 network elements.

178. Qwest cites the language in the TRO where the FCC stated: "We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[75] This statement means that Qwest, under the TRO, need not combine (or commingle) the network elements which are no longer subject to unbundling under § 251(c)(3); the parties referred to these as "delisted UNEs." In fact, Covad recognizes this limitation. As noted above, the parties agree that commingling must involve UNEs that *continue to be available under § 251(c)(3).* That is, Covad is not requesting commingling of delisted UNEs with § 271 network elements. Qwest argues here for the expansive proposition that it need not commingle any § 251(c)(3) UNE with any § 271 network elements. However, the cited language (from the TRO), that the BOCs need not combine delisted UNEs, is a substantially narrower principle. As noted above, Covad's advocacy here recognizes the TRO's narrow ruling regarding those network elements (*i.e.* delisted UNEs) that need not be combined (or commingled) with § 271 elements.[76]

179. Qwest's other arguments regarding its § 271 obligations are misplaced. Qwest contends that (1) neither § 271, nor FCC rules, establish an obligation to combine or commingle UNEs, and (2) state commissions are not empowered to impose new obligations on the BOCs under § 271, inasmuch as only the FCC is authorized to establish binding obligations under the

[74] Moreover, the above discussion (footnote 71 of this decision) points to another *errata* deletion to the original TRO that appears to support Covad's position in this case.

[75] TRO at § 655, footnote 990.

[76] Covad's proposed definitions regarding UNEs, which exclude non-251(c)(3) elements, accounts for the TRO's ruling that delisted UNEs are not available for commingling. *See* discussion *infra*.

statute. In response, we note that our decision here is based upon the FCC's ruling in the TRO which, as stated above, require ILECs to commingle § 251(c)(3) UNEs with wholesale services. Our ruling does not establish new, independent obligations for Qwest in reliance upon § 271, but merely implements the FCC's directives in the TRO.[77]

180. For these reasons, we approve Covad's language with respect to the definition of commingling and Qwest's obligation to commingle § 251(c)(3) UNEs with wholesale services, including § 271 network elements.

181. As for provision 9.1.1.5 and all its subsections, we believe there is agreement by Qwest and Covad to replace all of Qwest's previously proposed language in the issues matrix and testimony, with the language Qwest proposed in its Comments in Response to Interim Order Requiring Additional Briefing dated July 28, 2004. In this Brief, Qwest states that as an alternative to including the EEL eligibility criteria in the ICA, Qwest would accept limiting language for the definitions of UNE and UNE Combinations. We believe that Covad agreed to this change in concept at the hearing and also in its Additional Brief filed the same day. Therefore, we order the parties to adopt the following language and delete provision 9.1.1.5 and all its subparts:

> As the last sentence of the § 4.0 definition of Unbundled Network Element – "The UNEs available under this Agreement do not include EELs, which are combinations of loops and transport."
> As the last sentence in § 9.23 – "Qwest does not have any obligation under this Agreement to combine loops and transport, referred to as EELs, and nothing in

[77] We reject Qwest's argument that, citing Indiana Bell Telephone Co. v. Indian Utility Regulatory Comm'n, 2003WL1903363 (S.D. Ind. March 11, 2003), this Commission has no authority to impose § 271-related obligations. In Indiana Bell, the Court found that the IURC could not enforce state law requirements in its review of § 271 applications. *Id.* at ¶ 12. However, the court noted that some courts have upheld state commissions' orders to so act in the context of § 252-type proceedings; and the Indiana Bell, Court indicated this possibility for IURC to so act. *Id.* at ¶ 11-12. Since the matter at hand is in the context of a § 252 proceeding, and in any case this Commission is imposing its interpretation of Federal, not state law, Indiana Bell is inapposite.

this Agreement requires Qwest to provide combinations of loops and transport, or EELs."

Issue No. TRO 2 – Provision 9.1.1.4 (and all subsections):

Which proposed language better tracks, and is more consistent with, the prohibition against rate ratcheting established by the FCC in the *TRO*.

182. When UNEs or combinations of UNEs are commingled with services and network elements which are not UNEs, the question arises of how to price that commingled service or element. Addressing this issue, the FCC determined not to permit rate ratcheting, which is "a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate," for the circuit as a whole. *TRO* at ¶ 582. The FCC rejected rate ratcheting as the pricing mechanism for commingled services and network elements because it found that rate ratcheting could result in requesting carriers receiving an unfair price discount and could result in ILECs double recovering for a single facility. The FCC adopted rules which "permit incumbent LECs to assess the rates for UNEs (or UNE combinations) commingled with tariffed access services on an element-by-element and a service-by-service basis." *Id.*

183. The parties agree that a single UNE used to provide only qualifying services is billed at the Total Element Long Run Incremental Cost (TELRIC) rate found in Appendix A to the Agreement Being Negotiated. They also agree that a single UNE, once made available to and purchased by a requesting carrier, may be used to provide both qualifying services[78] and non-qualifying services[79] (referred to in the ABN as mixed use). *See* 47 CFR § 51.100(b). Further,

[78] Qualifying services are "those telecommunications services offered by requesting carriers in competition with those telecommunications services that have been traditionally within the exclusive or primary domain of incumbent LECs." *TRO* at ¶ 140. These services include, for example, "local exchange services, such as [Plain Old Telephone Service] and local data service, and access services, such as xDSL and high-capacity circuits." *Id.* (footnotes omitted).

[79] Non-qualifying services are any services, such as information services, which are not "qualifying services." *Id.* at ¶ 143.

they agree that, if a multiplexer is included in a commingled circuit, the multiplexer may be ordered as a UNE and billed at TELRIC rates only if all circuits entering the multiplexer are carrying only qualifying services. Finally, they agree that "Qwest shall not be required to bill for mixed use circuits or facilities at" ratcheted rates. *Compare* Qwest's proposed language for Provision 9.1.1.4 *with* Covad's proposed language for that same provision.

184. The Issue here arises when a CLEC connects a Qwest-provided circuit or facility to a mix of UNEs and other services (mixed use). Qwest asserts that, in that circumstance, it has the right to convert the mixed use circuit or facility from TELRIC pricing to tariff pricing and to prevent the ordering of such a mixed use circuit or facility as a UNE.

185. In support of its proposal, Qwest states that the language establishes principles which are based on the *TRO*: First, a circuit or facility that includes a mix of UNEs and non-qualifying services is ordered and billed under the terms of the applicable Qwest tariff or the resale provisions of the ICA. Second, mixed use circuits or facilities are not ordered or billed as UNEs. Third, Qwest is not required to bill for mixed use circuits or facilities at ratcheted rates.[80] Fourth, if a multiplexer is included in a commingled circuit, the multiplexer may be ordered as a UNE and billed at TELRIC rates only if all circuits entering the multiplexer are carrying only qualifying services.[81]

186. In support of its proposal, and relying on the *TRO* at ¶ 143, Covad states its view that a UNE single facility or circuit may be used to provide both qualifying and non-qualifying services (*i.e.*, mixed use) and still be ordered as a UNE and billed at TELRIC rates. Covad argues that Qwest's language does not make this clear. In addition, Covad states that its

[80] There is no dispute about this proposition.

[81] There is no dispute about this proposition.

language is necessary because it makes clear that, when Covad commingles a § 251(c)(3) UNE or UNE combination with a wholesale service and all commingled services are used to provide a qualifying service only, Qwest will provide the UNEs involved in the commingling arrangement at TELRIC rates.

187. Qwest responds that there is no dispute that a UNE single facility or circuit may be used to provide both qualifying and non-qualifying services and still be ordered as a UNE and billed at TELRIC rates. Thus, it appears that there is no dispute about this point.

188. Second, Qwest responds that there is no dispute that, when Covad commingles a UNE or UNE combination provided pursuant to § 251(c)(3) of the Act with a wholesale service and all commingled services are used to provide a qualifying service only, Qwest will provide the UNEs involved in the commingling arrangement at TELRIC rates. Qwest refers to its proposed language for Provision 9.1.1.4, which reads in pertinent part: "UNEs connected to the mixed-use circuit or facility meeting the Service Eligibility Criteria shall be billed at the UNE rate set forth in Exhibit A to the Agreement." Thus, it appears that there is no dispute on this point.

189. Third, Qwest argues that the Covad-proposed language is complex and ambiguous, a point which Qwest asserts Covad acknowledged during the hearing.

190. In reading the parties positions and the oral testimony given at hearing, we believe that there is no dispute between the parties on the intent of the FCC's ratcheting rule. Specifically, Covad agrees that the ICA should establish that Qwest has the right to convert from TELRIC to tariff pricing for UNEs that Covad uses to carry non-qualifying services. The FCC states that these UNEs then become a mixed-use facility and Qwest is entitled to charge the tariffed rate. Covad also agrees with Qwest's language regarding multiplexers and simply offers

further clarification with its own proposed language. However, Covad stated at hearing that its understanding for these provisions and Qwest's understanding appeared to be the same. Covad also admitted that its proposed language for this provision, 9.1.1.4 and all subsections, is confusing.[82]

191. Therefore, we order the parties to adopt Qwest's proposed language for provision 9.1.1.4 and 9.1.1.4.1.

J. Issue No. TRO 3 – Provision 4.0 (definition of "Unbundled Network Element" and of "251(c)(3) UNE"):

Which proposed language better tracks, and is more consistent with, the meaning of "Commingling" as discussed by the FCC in the *TRO*.

192. For Provision 4.0 (definition of Unbundled Network Element), Qwest proposes the following language:

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

193. For that same provision, Covad suggests the following language:

> Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access, for which unbundled access is required under section 271 of the Act or applicable state law, or for which unbundled access is provided under this Agreement.

194. In addition, Covad proposes the addition of the following definition: "'251(c)(3) UNE' means any unbundled network element obtained by CLEC pursuant to Section 251 of the Act."

[82] Hearing Transcript, Vol. II, pages 173-175.

195. This Issue is the same as the portion of Issue No. TRO 1 addressing the definition of Unbundled Network Element and its relationship to § 271 of the Act. The parties address Issues No. TRO 1 and No. TRO 3 as a single issue in this respect. For the parties' positions on Issue TRO 3, *see* discussion *supra*.

196. For the reasons discussed with respect to Issue No. TRO 1, we approve Covad's proposals regarding Provision 4.0 (definition of "Unbundled Network Element"), and its suggestion to adopt a new definition for the term "251(c)(3) UNE." We again note that establishing these definitions will restrict commingling arrangements to commingling of § 251(c)(3) UNEs with elements obtained at wholesale from Qwest pursuant to any method other that unbundling under § 251(c)(3). These provisions are consistent with the TRO's restriction against combining or commingling of delisted UNEs.

197. Qwest's Statement of Position included its Motion to Reverse or Vacate Interim Order. The motion suggests that the ALJ, in Interim Order No. R04-0659-I, incorrectly found that Qwest negotiated certain unbundling demands by Covad and thereby conferred jurisdiction on the Commission to arbitrate those demands in this proceeding. Qwest requests that we reverse the findings in the Interim Order. Alternatively, Qwest suggests that, in fact, the parties resolved the underlying dispute; therefore, the Interim Order addresses matters no longer in controversy and not part of this arbitration. Accordingly, Qwest requests that we vacate the Interim Order as moot.

198. Covad opposes the motion. First, Covad contends that the Interim Order was correctly decided and should not be reversed. Second, Covad argues that the motion is procedurally improper as a separate appeal of an interim ruling, an action prohibited by the Commission's Rules of Practice and Procedure. Finally, Covad agrees with Qwest that the

underlying dispute was resolved by the parties. However, Covad concludes that Qwest's request for relief (*i.e.* reversing or vacating the ALJ's order) is itself moot and should be denied.

199. We grant the motion to vacate the Interim Order. The parties agree that the underlying dispute addressed by the order is now moot for purposes of this case. Qwest, however, expresses concern with the precedential effect of the ALJ's decision We also note that Qwest timely raised its objection to the ALJ's order given our determination to dispense with the Recommended Decision and issue the initial decision in this matter. Therefore, we reject Covad's suggestion that Qwest's request was procedurally deficient. Since the underlying dispute addressed in the Interim Order is moot, we vacate the order.

III. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration of an Interconnection Agreement (Petition) with DIECA Communications, Inc., doing business as Covad Communications Company, filed by Qwest Corporation on April 6, 2004, are resolved as set forth in the above discussion.

2. Within 30 days of the final Commission decision in this docket, DIECA Communications, Inc., doing business as Covad Communications Company, and Qwest Corporation shall submit a complete proposed interconnection agreement for approval or rejection by the Commission, pursuant to the provisions of § 252(e) of the Telecommunications Act of 1996, 47 U.S.C. § 252(e).

3. The Motion for Leave to File Supplemental Materials filed by DIECA Communications, Inc., doing business as Covad Communications Company, is denied consistent with the discussion above.

4. The Motion to Strike Portions of Covad's Statement of Position filed by Qwest Corporation is granted consistent with the discussion above.

5. The Alternative Motion for Leave to Reopen the Record to Respond to the New Evidence filed by Qwest Corporation is denied as moot.

6. The Motion to Reverse or Vacate Interim Order No. R04-0659-I filed by Qwest Corporation is granted consistent with the discussion above. Decision No. R04-0659-I is vacated.

7. The twenty-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this decision.

8. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING August 19, 2004

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners