Robert C. Brown
QWEST CORPORATION
1801 California Street, Tenth Floor
Denver, CO 80202
Telephone: 303-383-6642
Facsimile: 303-295-7069
Email: robert.brown@qwest.com

John M. Devaney
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
Telephone: 202-628-6600
Facsimile: 202-434-1690
Email: jdevaney@perkinscoie.com

Ted D. Smith (3017)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
Telephone: 801-578-6961
Facsimile: 801-578-6999
Email: tsmith@stoel.com

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC., D/B/A COVAD COMMUNICATIONS COMPANY, FOR ARBITRATION TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	:	Docket No. 04-2277-02 **QWEST CORPORATION'S OPPOSITION TO COVAD COMMUNICATION COMPANY'S PETITION FOR REHEARING**

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Qwest Corporation ("Qwest") submits this opposition to Covad Communication Company's ("Covad") petition for review or rehearing in this interconnection arbitration under the Telecommunications Act of 1996 ("the Act").

INTRODUCTION AND SUMMARY

Through cooperative, good faith negotiations, Covad and Qwest were able to resolve most issues relating to the interconnection agreement ("ICA") that is the subject of this arbitration. The negotiations left only a small number of disputed issues for the Commission to decide under the authority it has pursuant to Section 252 of the Act to conduct interconnection arbitrations. In a two-day hearing held in December 2004, the parties presented extensive evidence relating to the fact-based disputed issues, and in briefs following the hearing, the parties thoroughly addressed all the disputed issues. In its Arbitration Report and Order ("Arbitration Report") issued February 8, 2005, the Commission resolved all of the disputed issues in a manner consistent with the evidence and with the governing law established by the Act, the Federal Communications Commission ("FCC"), and the decisions of federal courts interpreting the Act. The Commission's rulings are largely consistent with those of the other state commissions – the commissions in Colorado, Minnesota, and Washington – that have addressed the same issues in the Covad/Qwest arbitrations in those states.[1] This consistency is not a coincidence; it is a clear

[1] *See In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Co.*, Colorado Commission Docket No. 04B-160T, Decision No. C04-1037, Initial Commission Decision (Colo. Commission Aug. 19, 2004) ("Colorado Arbitration Order"); *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Co.*, Colorado Commission Docket No. 04B-160T, Decision No. C04-1348, Order Granting in Part and Denying in Part Applications for Rehearing, Reargument, or Reconsideration (Colo. Commission October 27, 2004) ("Colorado RRR Order"); *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Arbitrator's Report (Minn. Commission Dec. 15, 2004) ("Minnesota ALJ Order"), *aff'd in part In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement With Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement (Minn. Commission March 14, 2005) ("Minnesota Arbitration Order"); *In the Matter of*

demonstration of the results that are dictated by the governing law and the evidence and an equally clear demonstration of the correctness of this Commission's rulings.

Remarkably, Covad objects to and seeks reconsideration of the Commission's rulings relating to each of the five issues and related sub-issues addressed in the Arbitration Report. In most cases, its objections are nothing more than a reprise of the arguments it presented in the arbitration that the Commission has already considered and rejected. Covad has provided no basis for the Commission to modify any of the rulings in the Arbitration Report.

For example, with respect to Issue 1 – "copper retirement" – Covad continues to argue that Qwest should not be permitted to retire copper loops unless it first provides Covad with an undefined "alternative service" at no increase in cost to Covad and with no decrease in the quality of service that Covad's end-users receive. As this Commission ruled and as has been determined by the Colorado, Minnesota, and Washington Commissions, Covad's "alternative service" proposal is inconsistent with the copper retirement rights the FCC established in the *Triennial Review Order* ("*TRO*")[2] and is entirely without legal support. In addition to being unlawful, Covad's drastic proposal is unnecessary, since it is undisputed that Qwest has never retired a copper loop in Utah or anywhere else that resulted in a discontinuance of service for a Covad customer.

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the Petition for Arbitration of Covad Communications Company with Qwest Corporation, Washington Commission Docket No. UT-043045, Order No. 04, Arbitrator's Report and Decisions (Wash. Commission November 2, 2004) ("Washington ALJ Order"); *In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation*, Washington Commission Docket No. UT-043045, Order No. 06, Final Order Affirming in Part, Arbitrator's Report and Decision; Granting, In Part, Covad's Petition for Review; Requiring Filing of Conforming Interconnection Agreement (Wash. Commission Feb. 9, 2005) ("Washington Arbitration Order").

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (FCC 2003) ("*Triennial Review Order*" or "*TRO*"), *aff'd in part and rev'd and vacated in part, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. cir. 2004) ("*USTA II*").

Covad takes a similar approach to Issue 2, repeating again its patently flawed legal arguments in support of its positions that the ICA should impose obligations upon Qwest to provide unbundled access to network elements under Section 271 of the Act and to provide access to network elements under state law that the FCC has refused to require incumbent local exchange carriers ("ILECs") like Qwest to unbundle. Again, the other state commissions that have considered this issue have uniformly rejected Covad's positions, ruling that there is neither legal nor evidentiary support for including Section 271 elements in an ICA or for ordering access to network elements under state law that the FCC has declined to require ILECs to unbundled under Section 251. The correctness of these rulings and this Commission's resolution of Issue 2 is confirmed by an order the FCC issued less than two weeks ago in which it held that states are without authority to require unbundling of network elements that the FCC has itself rejected.[3]

Covad also presents no new arguments in challenging the Commission's ruling, which the Division of Public Utilities ("DPU") supported, that Qwest is not required to commingle network elements it provides under Section 271, pursuant to commercial agreements, with network elements it provides under Section 251 and the ICA (Issue 3). As this Commission correctly determined, Covad's request for this form of commingling violates the FCC's unequivocal ruling in the *TRO* that the Act does not impose any obligation on ILECs to combine network elements provided under Section 271 with other network elements, which was expressly affirmed by the United States Court of Appeals for the D.C. Circuit in *USTA II*. On this issue, Covad does have support in the rulings from the other state commissions, but unlike the other commissions, this Commission properly interpreted the *TRO* as prohibiting the commingling that Covad seeks.

[3] *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of

Covad's approach of offering the same legally unsupported arguments that the Commission has already considered and rejected also is reflected in its objections to the Commission's rulings relating to signal regeneration (Issue 5). As the Commission ruled, the controlling FCC order does not impose any obligation upon Qwest to provide regeneration between Covad's collocation space and the collocation space of another competitive local exchange carrier ("CLEC") where Qwest permits CLECs to self-provision that service. If Qwest volunteers to provide that regeneration, it is entitled to charge for it and to recover the costs of providing it. Covad would have Qwest provide regeneration for free, and its objection to the Commission's ruling, like its previous arguments relating to this issue, offer no support for that legally untenable position.

Finally, the Commission resolved the payment and billing disputes encompassed by Issue 9 based on its careful review of the evidentiary record relating to these fact-intensive issues. Based on that review, the Commission determined correctly that there is no basis for deviating from the industry-standard time periods for payment of invoices and discontinuance of order processing and disconnection of service in the event of Covad's non-payment of undisputed amounts owed to Qwest. Covad's challenge to these rulings consist of nothing more than a rehash of the evidence that the Commission has already considered. Covad has not provided any basis for the Commission to reverse itself on these issues and to order time periods that would deviate significantly from industry standards.

Inquiry, WC Docket No. 03-251, FCC 05-78 ¶ 27 (FCC March 25, 2005) ("*BellSouth Declaratory Order*").

COVAD'S OBJECTIONS

A. Issue 1: Retirement of Copper Facilities (Sections 9.1.15; 9.1.15.1 and 9.1.15.1.1)[4]

Covad presents multiple arguments in challenging the Commission's ruling that rejected Covad's "alternative service" proposal. The common features of these arguments is that, with one exception, they already have been considered and rejected by the Commission and are entirely without legal and evidentiary support. The one new argument that Covad presents is based on an amendment to its ICA language that does nothing to cure its fatally flawed alternative service proposal and that, in any case, is plainly untimely. Covad has not provided any basis for the Commission to modify its rulings on this issue.

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

Based on its careful analysis of the *TRO*, the Commission ruled in the Arbitration Report that there is "nothing in federal or state law that would impose an obligation on Qwest to provide an alternative service at current costs for an xDSL provider prior to retirement of copper facilities."[5] The Commission explained further that "Qwest has a right to retire its copper facilities and replace them with fiber" and concluded that it would "not impinge on this right by requiring Qwest to provide 'alternative services' at Qwest expense to CLECs whose operations may be affected by such retirements."[6] As these statements recognize, the FCC confirmed in the *TRO* the right of ILECs to retire copper loops that are being replaced with fiber facilities. Covad's alternative service proposal would eviscerate that right. Nothing in the *TRO* or in any other FCC order supports imposing the onerous condition of providing an alternative service at

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

[5] Arbitration Report at 11.

no increase in cost to Covad. It is not surprising, therefore, that in the other Qwest/Covad arbitrations in which this demand from Covad has been considered, it has been rejected outright.[7]

Covad challenges the Commission's ruling by asserting that the *TRO* prohibits an ILEC from retiring a copper loop unless it continues to provide access to the loop facilities required under the FCC's rules.[8] This assertion rests on a distorted reading of the *TRO*. In the *TRO*, the FCC ruled that ILECs must provide notice of planned copper retirements that involve replacements with fiber-to-the-home ("FTTH") loops, while confirming the right of ILECs to retire copper.[9] At the same time, the FCC established a process for CLECs to object to planned retirements and established that CLEC objections will be deemed denied "[u]nless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules…."[10]

Covad turns this ruling on its head by arguing that ILECs cannot retire copper facilities without providing an alternative service. As the discussion above shows, that is not what the FCC ruled. Instead, the FCC confirmed the right to retire copper facilities and gave CLECs limited rights to object to retirements. The FCC's reference to "access to the loop facilities required under our rules," contrary to Covad's argument, refers only to an ILEC's continuing obligation to provide access to the narrowband portion of a loop.[11] Qwest complies fully with

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[6] *Id.*

[7] *See* Colorado Arbitration Order at 54; Minnesota ALJ Order ¶ 23; Washington Arbitration Order ¶ 21.

[8] Covad Petition at 3-5.

[9] *TRO* ¶ 282.

[10] *Id*.

[11] *Id*. ¶¶ 296-97.

that requirement by ensuring CLEC access to that portion of a loop, including access to a voice grade channel over the new, replacement loop facilities.[12]

Covad concedes that its "alternative service" requirement cannot apply to copper retirements involving FTTH loop and fiber-to-the-curb ("FTTC") loop replacements. Its position now is that its proposal applies only to the circumstance in which Qwest retires copper feeder and replaces it with fiber feeder, resulting in a hybrid copper/fiber loop.[13] However, the FCC did not limit ILECs' retirement rights to situations where copper loops are replaced with FTTH or FTTC loops. Instead, the FCC stated that the right to retire exists when an ILEC replaces copper loops "with fiber," meaning any fiber facility: "[W]e decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced *with fiber*."[14] Accordingly, the Colorado Commission rejected this same argument in the Covad/Qwest arbitration in that state, concluding as follows:

> Covad cites ¶¶ 277-279 of the TRO, stating that the copper retirement rules only apply to the extent that hybrid loops are an interim step to establishing an all fiber FTTH loops (*sic*). Nowhere in these paragraphs do we find this statement. In fact, the FCC indicates at footnote 847 that an ILEC can remove copper loops from plant so long as they comply with the FCC's Part 51 notice requirements, without any exclusion given to hybrid loops.[15]

The same analysis and conclusion apply here. There is thus no legal support whatsoever in the *TRO* for application of Covad's alternative service requirement to retirements involving fiber feeder replacements.

Further, it is apparent that Covad's new proposal is, in reality, an attempt to gain unbundled access to hybrid loops, as evidenced by Covad's reference to these loops and its

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

[13] Covad Petition at 9-10.

[14] *TRO* ¶ 271 (emphasis added).

glaring failure to identify any specific service that would be an "alternative" to these loops. In the *TRO*, the FCC ruled unequivocally that ILECs are not required to provide unbundled access to the broadband capabilities of hybrid loops, confirming again that Covad's proposal conflicts directly with the *TRO*.[16]

Covad's reference to state law also provides no support for its alternative service requirement.[17] The provision of Utah law that Covad cites, Utah Code § 54-8b-1.1, simply lists the goals of Utah's telecommunication policy and does not impose any requirement on Qwest to provide the alternative service that Covad demands. As Qwest witness, Karen Stewart, explained in her direct and rebuttal testimony, Covad's proposal actually frustrates the goal of promoting the deployment of advanced telecommunications infrastructure and consumer choice because it "reduce[s] Qwest's economic incentive and ability to deploy fiber facilities."[18] As she stated, "[a] requirement to provide an alternative service for which Qwest may not recover its costs would create an economic disincentive for deploying fiber."[19] Thus, permitting Qwest to retire copper facilities and thereby providing incentive for it to deploy fiber will affirmatively advance the policy goals set forth in Utah Code § 54-8b-1.1, as it will make advanced telecommunications services more widely available to Utah consumers and will increase consumer choice by enabling Qwest to compete more effectively with cable companies. Accordingly, it is Covad's proposal, not Qwest's, that is inconsistent with the Utah statute. As the DPU correctly concluded, nothing

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[15] Colorado RRR Order ¶ 35.

[16] *TRO* ¶ 288.

[17] Covad Petition at 6-7.

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

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

under Utah law prohibits Qwest from retiring copper facilities, even if the retirement affects DSL services.[20]

There also is no merit to Covad's contention that Utah law requires Qwest to provide continued access to facilities and services that would permit Covad to still provide DSL service.[21] The FCC expressly rejected precisely this type of demand in the *TRO* in confirming the right of ILECs to retire copper facilities.[22] In any case, Qwest already gives Covad different options for continuing to provide DSL to its customers in the unlikely event that Qwest retires a copper loop and affects service to a Covad customer.[23]

Covad argues that Qwest's and the Commission's concerns about the lack of cost recovery that would result from the "alternative service" requirement are unfounded.[24] While making this argument, however, Covad does not dispute that its proposal would prohibit Qwest from charging anything above a range of monthly recurring rates from "0" – the current recurring rate for line sharing in Utah – to $3.70, regardless of the actual cost of the alternative service. Indeed, under Covad's proposal, Qwest likely would not be able to charge any recurring rate for the alternative service since the current recurring rate of $0 for line sharing in Utah would serve as the cap.[25] This artificial cap would prevent Qwest from recovering its costs, much less a

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

[21] Covad Petition at 7.

[22] *TRO* ¶ 281 and n.822.

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

[24] Covad Petition at 11-12.

[25] According to Covad, if the undefined "alternative service" required tie pairs and caused an operation system

reasonable profit, in plain violation of the Act's cost recovery requirements. While Covad witness Megan Doberneck claimed in her written testimony that Covad's proposal would permit Qwest to recover the costs of providing an alternative service, plus a reasonable profit,[26] it was quite telling during the hearing that she refused to agree to ICA language that would give Qwest that right.[27] It is thus clear that both the effect and intent of Covad's proposal is to deny unlawfully the cost recovery to which Qwest is entitled under the Act.

This fact alone demonstrates the unlawfulness of Covad's proposal, which would inevitably prevent Qwest from recovering its costs in violation of the Act's requirement that ILECs recover the costs they incur to provide unbundled network elements ("UNEs") and interconnection.[28]

Covad also presents in its brief new language for its copper retirement proposal that it failed to present during the arbitration. Specifically, it proposes language that would limit Qwest's "alternative service" obligation to situations where Qwest is retiring copper feeder "over which Qwest itself could provide a retail DSL service."[29] This proposal is fundamentally flawed. First, Covad's focus on loops over which Qwest "could provide a retail DSL service" suggests strongly that it is ultimately seeking access to the broadband capabilities of hybrid loops. However, in paragraphs 288 and 290 of the *TRO*, the FCC ruled that ILECs are not required to unbundle these capabilities, specifically rejecting Covad's arguments for such unbundling:

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support expense separate from other elements and services that Qwest provides, the total monthly rate could be capped at approximately $3.70. Hearing Tr., Vol. 1, at 30:1-31:6. That cap would still very likely deny Qwest recovery of its costs, as it is hard to imagine an "alternative service" that would cost less than $4.00 per month to provide.

[26] Covad Ex. 1 (Doberneck Confidential Direct) at 21:508-10.

[27] Hearing Tr., Vol. 1, at 43:4-12.

[28] *See* 47 U.S.C. § 252(d)(1).

> We decline to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market. AT&T, WorldCom, Covad, and others urge the Commission to extend our unbundling requirements to the packet-based and fiber optic portions of incumbent LEC hybrid loops. We conclude, however, that applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706. The rules we adopt herein do not require incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information. Moreover, the rules we adopt herein do not require incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as the xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market.[30]

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

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[29] Covad Petition at 1-2.

[30] *TRO* ¶ 288 (footnotes omitted and emphasis added).

Finally, Covad contends that if Qwest is permitted to retire copper loops, Covad's investment of "well over a billion dollars" in its DSL network could become stranded.[31] That is a gross exaggeration. Covad has expressly acknowledged that, at most, only a "handful" of its Utah customers could ever be affected by Qwest's retirement of a copper loop and that, as of today, none of its customers has ever been affected by a copper retirement.[32] Covad's claim that its network investment is at risk is thus factually unsupported and legally irrelevant.

2. The Commission Correctly Ruled That Covad, Not Qwest, Is Responsible For Determining Whether Covad's Customers Will Be Affected By A Copper Retirement.

In the Arbitration Report, the Commission adopted some of Covad's proposed ICA language relating to the content of Qwest's notices of copper retirements, but it specifically ruled that the ICA should not include language requiring Qwest to identify Covad customers that may be affected by a copper retirement:

> [I]t would not be reasonable to require Qwest to anticipate the affect its proposed retirement of copper will have on specific Covad customers. The additional information we are requiring Qwest to provide should sufficiently identify the impacted area to permit Covad to determine *for itself* which of its customers may be affected.[33]

Based on this ruling, the Commission excluded from the notice the Covad language that would have required Qwest to list "all of CLEC's customer impacted addresses." Covad objects to this ruling, contending that Qwest should be responsible for determining whether Covad's customers will be affected by a copper retirement.[34] Its objection is baseless.

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[31] Covad Petition at 8-9.

[32] Covad Ex. 1 (Doberneck Amended Confidential Direct) at 17:397-18:433.

[33] Arbitration Report at 10 (emphasis added).

[34] Covad Petition at 13-15.

Covad's desire for Qwest to provide notice of the specific Covad customers that could be affected by the retirement of a copper loop ignores the fact that Qwest does not know the services that Covad is providing to individual customers and, accordingly, does not have the information needed to determine the effect of copper retirements on individual customers. A requirement for Qwest to tell Covad whether service to its customers would be affected by the retirement of a copper loop would therefore require Qwest to speculate about the services Covad is providing.[35] If Qwest guessed wrong, Covad would undoubtedly seek recourse and attempt to hold Qwest responsible. Qwest should not be put in that unfair position, which is why, in addition to this Commission, the ALJs and commissions in Minnesota and Washington properly rejected Covad's notice demands.

The Washington ALJ accurately described Covad's demands as being improperly "burdensome,"[36] and the Washington Commission, in turn, rejected "Covad's assertion that the FCC's rule requires the identification of specific Covad customers affected by the change, or places the burden solely on the ILEC to determine the impact of a change."[37] Similarly, the Minnesota ALJ found that Covad's demands relating to notice are unnecessary and improperly attempt to shift responsibility from Covad to Qwest:

> [T]he issue seems to be that Covad wants Qwest to assume the responsibility for doing the research in advance and to put the results in the notice, or to put directions for using the Qwest website in the notice. The latter seems redundant when, by law, the name and telephone number of a contact person who can provide additional information about the planned change must be on the notice. Qwest has met its burden of proving that the information it provides is sufficient to comply with 47 U.S.C. § 51.327.[38]

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[35] Hearing Tr., Vol. 1, at 131:11-18, 132:22-133:5, 146:19-147:13.

[36] Washington ALJ Order ¶ 36.

[37] Washington Arbitration Order ¶ 15.

[38] Minnesota ALJ Order ¶ 25 (footnote omitted).

The Minnesota Commission agreed that Covad, not Qwest, should have the ultimate responsibility for determining whether a Covad customer may be affected by a copper retirement. Accordingly, it directed Qwest to provide sufficient information to enable Covad to determine through its own inquiry whether any of its customers may be affected.[39]

Significantly, the notice that Qwest provides informs Covad that loops in specific geographic areas – or "distribution areas" – will be retired. With this information, Covad can determine from its own records of customer addresses whether its customers will be affected. Accordingly, as this Commission and the ALJs and commissions in Minnesota and Washington ruled, the burden of making these customer-specific determinations should not be shifted to Qwest – which does not have the information specific to Covad's individual customers – from Covad.

B. Issue 2: Unified Agreement/Defining Unbundled Network Elements (Sections 4.0 (Definition Of "Unbundled Network Element"), 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, 9.21.2).

The Arbitration Report correctly rejects Covad's request for ICA language that would require Qwest to provide unbundled access to network elements under Section 271 and access under state law to elements that the FCC has expressly refused to require ILECs to unbundled. As noted above, the Commission's ruling on these issues is consistent with those of the other state commissions that have addressed this issue. Despite this weight of authority, Covad continues to argue that the Commission should include these unbundling obligations in the ICA. In addition, for the first time in this proceeding, Covad presents argument and untimely "evidence" in support of its belated claim that the ICA should require Qwest to provide

[39] Minnesota Arbitration Order at 10.

unbundled access to "line splitting." Covad's objections to the Commission's rulings relating to Issue 2 are fundamentally flawed and should be rejected.

The Act's "impairment" standard set forth in Section 251 imposes important limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*[40] and the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating each of the FCC's three attempts at establishing lawful unbundling rules.[41] In this case, the unbundling obligations that Covad would have the Commission impose on Qwest ignore entirely these critical limitations and are based on the legally flawed assumption that a state commission may require unbundling under state law that the FCC has expressly rejected. Covad does not recognize the Act's important limits on state law authority – namely, that such authority must be exercised consistently with Section 251 and the federal unbundling regime established by the FCC. Moreover, Covad is asking this Commission to order broad unbundling of network elements without having provided any evidence that it will be impaired in the absence of access to those elements. As the ALJ in Washington found, Covad's broad unbundling requests cannot be permitted without evidence of impairment.[42] The DPU confirms that there is no such evidence in this record and that Covad's unbundling demands are, therefore, improper.[43]

Covad also improperly asks this Commission to require unbundling and set rates under Section 271, ignoring that states have no decision-making authority under that section. As discussed below, the FCC has exclusive jurisdiction to determine the network elements that

[40] 525 U.S. 366 (1999) ("*Iowa Utilities Board*").

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

[42] Washington ALJ Order ¶ 60.

[43] DPU Memorandum at 6.

BOCs are required to provide under Section 271 and to determine the rates that apply to those elements. The FCC cannot – and has not – delegated that authority to state commissions. Covad offers several strained readings of the Act to support its claim that states have unbundling authority under Section 271, but its interpretations are wrong and certainly do not come close to establishing that Congress has expressly conferred Section 271 decision-making authority on state commissions.

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

There is no statutory or other legal basis for including terms and conditions relating to network elements provided under Section 271 in a Section 252 interconnection agreement.[44] The Act does not give state commissions any substantive decision-making role in the administration and implementation of Section 271. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine if BOCs have complied with the substantive provisions of Section 271, including the 271 checklist provisions upon which Covad bases its arbitration demands for 271 unbundling. State commissions have only a non-substantive, consulting role in that determination. Accordingly, even if it were proper to address Section 271 issues in the context of a Section 252 arbitration, the Commission still would not have authority to impose affirmative obligations under that section.[45]

As the D.C. Circuit made emphatically clear in *USTA II*, the only authority that state commissions have under the Act is that which Congress has clearly and expressly delegated to them.[46] Under the Act, Congress and the FCC took over the regulation of local telephone

[44] Qwest Br. at 14-15.

[45] *See* Qwest Br. at 25-28.

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

service, leaving the states only with authority that Congress expressly granted. The Seventh Circuit recently described this regulatory regime:

> In the Act, Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission (FCC). While the state utility commissions were given a role in carrying out the Act, Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act;" it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations.[47]

Under this regime, states are not permitted to regulate local telecommunications competition "except by the express leave of Congress."[48]

Accordingly, in *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*,[49] a federal district court held that the consulting role given to states under Section 271 does not give a state commission substantive decision-making authority. *Indiana Bell* confirms the absence of a decision-making role for states under Section 271. The decision contrasts the substantive role that states have in administering Sections 251 and 252 with the "investigatory" and "consulting" role they have under Section 271.[50]

Indeed, the FCC has defined the "interconnection agreements" that must be submitted to state commissions for approval as "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) . . ."[51] Thus, the term "interconnection agreement" encompasses only terms and conditions relating to network elements and other services provided under Section

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

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

[49] 2003 WL 1903363 (S.D. Ind. 2003).

[50] *See* Qwest Br. at 25-26.

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

251 and does not include terms and conditions relating to elements provided under Section 271. As the Minnesota ALJ stated in a ruling recently upheld by the Minnesota Commission, "there is no legal authority in the Act, the *TRO*, or in state law that would require the inclusion of section 271 terms in the interconnection agreement, over Qwest's objection."[52]

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

> [I]t is not at all clear to the DPU that an arbitration proceeding under Section 252 of the Federal Act in any way authorizes the Commission to impose Section 271 obligations in this agreement without Qwest's consent. In resolving open issues the Commission must resolve those issues consistent with 251 requirements and not 271 requirements. Obligations arising outside of Section 251 are being presented to the PSC in commercial agreements.[53]

Accordingly, the Commission properly rejected Covad's proposal to include Section 271 unbundling obligations in the ICA.

2. The Act Does Not Permit The Commission To Create Under State Law Unbundling Requirements That The FCC Rejected In The *TRO* Or That The D.C. Circuit Vacated In *USTA II*.

Under Section 251 of the Act, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]." Section 251(d)(2), in turn, provides that unbundling may be required *only if the FCC determines* (A) that "access to such network elements as are proprietary in nature is necessary" and (B) that the failure to provide access to network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

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[52] Minnesota ALJ Order ¶ 46.

[53] DPUC Memorandum. at 6.

Congress explicitly assigned the task of applying the Section 251(d)(2) impairment test and "determining what network elements should be made available for purposes of subsection [251](c)(3)" to the FCC.[54] The Supreme Court confirmed that as a precondition to unbundling, Section 251(d)(2) "requires the [Federal Communications] Commission to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[55] And *USTA II* establishes that Congress did not allow the FCC to have state commissions perform this work on its behalf.[56]

Also, in *USTA II*, the D.C. Circuit vacated substantial portions of the affirmative unbundling requirements the FCC established in the *Triennial Review Order*. In response, the FCC issued its *Triennial Review Remand Order* in which it adopted a more limiting unbundling standard than it had adopted in the *Triennial Review Order*.[57] As described by the FCC, the new "more targeted" standard "imposes unbundling obligations only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition."[58]

Covad responds to this legal framework as if it were not there, arguing that the Act, the *TRO*, and *USTA II* do not impose any meaningful limits on the authority of state commissions to require unbundling under state law. Thus, Covad asserts that the Commission is free to require

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[54] 47 U.S.C. § 251(d)(2).

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

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

[57] *In the Matter of Review of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Dkt. Nos. 01-338, WC Docket No. 04-313 (FCC rel. February 4, 2005) ("*Triennial Review Remand Order*").

[58] *Id*. ¶ 2.

Qwest to provide network elements that the FCC declined to require ILECs unbundle based on specific findings that CLECs are not impaired without them. Covad's argument fails to recognize that the Act's savings clauses preserve independent state authority only to the extent that authority is exercised in a manner consistent with the Act.[59] This point was forcefully confirmed in the recent decision from the United States District Court for the District of Michigan. In *Michigan Bell Tel. Co. v. Lark*,[60] the Court observed that in *USTA II*, the D.C. Circuit "rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations."[61] The Court emphasized that while the Act permits states to adopt some "procompetition requirements," they cannot adopt any requirements that are inconsistent with the statute and FCC regulations. Specifically, the court held, a state commission "cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law."[62]

Similarly, in an order issued less than two weeks ago, the FCC ruled that state commissions are generally without authority to require ILECs to unbundled network elements that the FCC has declined to require ILEC to unbundled. In its *BellSouth Declaratory Order*, the FCC addressed orders from four different state commissions that required BellSouth to provide DSL service over unbundled loops that CLECs were using to provide voice service.[63] This requirement, the FCC determined, effectively obligated BellSouth to unbundle the low frequency

[59] Qwest Br. at 21-22.

[60] Case No. 04-60128, slip op. at 13 (E.D. Mich Jan. 6, 2005).

[61] *Id*.

[62] *Id*.

[63] *BellSouth Declaratory Order* ¶¶ 9-15.

portion of the loop ("LFPL"), which the FCC had specifically refused to require ILECs to unbundle in the *TRO*.[64]

In striking down the orders, the FCC emphasized the preeminence of its regulations under the Act over state laws and regulations: "except in limited cases, the [FCC's] prerogatives with regard to local competition supersede state jurisdiction over these matters."[65] State authority is preserved under the Act, the FCC stated, only to the extent state regulations are not inconsistent with the requirements of Section 251 and do not "substantially prevent implementation of the requirements of section 251 or the purposes of sections 251 though 261 of the Act."[66] Because it had refused to require ILEC to unbundled the LFPL in the *TRO*, the FCC held that the four state orders requiring such unbundling "directly conflict and are inconsistent with the Commission's rules and policies implementing section 251."[67] It explained further that "[s]tate requirements that impose on BellSouth a requirement to unbundled the LFPL do exactly what the Commission expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B)."[68]

This ruling forcefully confirms the unlawfulness of Covad's unbundling language. By requesting the Commission to impose ICA language that would require Qwest to unbundle under state law network elements that the FCC has refused to require ILECs to unbundle under Section 251, Covad is asking the Commission to do precisely what the FCC found unlawful in the

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[64] *Id*. ¶¶ 25-26.

[65] *Id*. ¶ 22.

[66] *Id*. ¶ 23.

[67] *Id*. ¶ 26.

[68] *Id*. ¶ 27.

BellSouth Declaratory Order. As the FCC stated, such a ruling would "exceed the reservation of authority [to states] under section 251(d)(3)(B)."[69]

The fundamental problem with Covad's position is that it requires unbundling regardless of consistency with the Act. As the FCC stated quite clearly in the *TRO*, the type of state law unbundling regime that Covad is proposing – one that ignores altogether FCC findings of non-impairment with respect to individual elements – "overlook[s] the specific restraints on state action taken pursuant to state law embodied in section 251(d)(3), and the general restraints on state actions found in sections 261(b) and (c) of the Act."[70] This approach to state law unbundling "ignore[s] long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy."[71] As the United States Court of Appeals for the Seventh Circuit stated, “we cannot now imagine” how a state could require unbundling of an element consistently with the Act where the FCC has not found the statutory impairment test to be satisfied.[72]

Equally significant, any unbundling obligations imposed under state law would have to be supported by an express finding that Covad would be impaired without access to specific network elements. A finding of impairment is essential under Section 251, and any unbundling requirement that does not rest on such a finding is plainly unlawful. Covad's failure to provide any evidence of impairment is thus fatal to its unbundling demands, as the Commission has nothing in this evidentiary record upon which to base findings of impairment or requirements to

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[69] *Id*.

[70] *TRO* ¶ 192 (footnote omitted).

[71] *Id*.

[72] *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004).

unbundle. As the DPU has correctly recognized, there is no evidence in this record upon which to impose any unbundling requirements under Utah law.[73]

3. Covad's Attempt To Raise A Line Splitting Issue At This Late Stage In The Arbitration Is Improper, And Its Argument Relating To Line Splitting Should Be Rejected.

For the first time in this arbitration, Covad argues in its petition for review that the ICA should give Covad access to line splitting.[74] Covad acknowledges that it has not previously presented evidence or argument relating to this issue, stating that the "issue has not previously been separately argued by the parties."[75] In support of its new argument on this issue, Covad attaches to its brief as "evidence" a copy of a Qwest Platform Plus ("QPP") service agreement, which is a commercial agreement under which Qwest provides access to switching and transport. Covad did not present this agreement during the arbitration hearing and is attempting to present it for the first time with its petition for review. Covad is apparently requesting that the Commission modify the Arbitration Report to establish that line splitting will be available under the ICA.

Covad's belated attempt to raise this issue is procedurally improper and prejudicial. Covad has known for many months that Qwest's proposed ICA language excludes line splitting from the agreement. If the issue has the level of importance that Covad now claims, Covad should have raised it during the arbitration and in post-hearing briefing. Had it done so, the issue could have been addressed fairly and properly in the evidentiary and post-hearing briefing stages of the proceeding. By raising the issue for the first time in its petition for review and attempting to present "evidence" in support of its position, Covad has acted improperly and has prevented

[73] DPU Memorandum. at 6.

[74] Covad Petition at 18-22.

the parties and the Commission from developing the type of record that is needed to resolve the issue. For this reason alone, the Commission should reject Covad's argument relating to line sharing.

The prejudice resulting from Covad's untimely attempt to raise this issue is demonstrated by Covad's reliance on the QPP agreement attached to its petition. Based on its interpretation of QPP, Covad argues that the agreement suggests that Qwest believes line splitting is a loop-based product that should be purchased not pursuant to a commercial agreement, but through ICAs.[76] This broad characterization of Qwest's position relating to line splitting is incomplete, which Qwest could have demonstrated through testimony relating to QPP. To raise this issue now when the time for presenting evidence has passed is highly prejudicial to Qwest.

With respect to the substance of Covad's argument, there is a lack of clarity concerning what Covad is actually seeking. In the *TRO*, the FCC established that ILECs are required to provide line splitting only in connection with a CLEC's lease and use of "an unbundled stand-alone loop."[77] It is unclear whether Covad is seeking line splitting only for use with stand-alone loops or whether it is seeking it for some additional purpose. If it is seeking line splitting for uses unrelated to stand-alone loops, that plainly is not permitted under the *TRO* and is improper. The lack of clarity is a problem of Covad's own making; this confusion would not exist had Covad timely raised this issue. On the existing record, it cannot be determined whether Covad's request is consistent with the FCC's *TRO* rulings relating to line splitting. Because it is not possible to make that determination, the Commission should deny Covad's request.

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[75] *Id.*

[76] Covad Petition at 20.

[77] *TRO* at 251.

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

The Arbitration Report correctly finds that pursuant to the FCC's rulings in the *TRO*, Qwest cannot be required to commingle network elements provided under Section 271 with UNEs provided under Section 251.[78] As the Commission correctly stated, "in its changes to paragraph 584 [of the *TRO*] and at note 1989, [the FCC] *expressly* declined to require commingling of Section 271 elements."[79] In challenging this ruling, Covad offers no arguments it has not presented before. Instead, it simply expresses its disagreement with the Commission's interpretation of the *TRO*. However, the Commission has already analyzed the *TRO* rulings relating to commingling in their entirety and has properly concluded that the Order does not permit Section 271 commingling. Covad has not provided any reason for the Commission to reverse itself.

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

The first flaw in this interpretation is that it eviscerates the FCC's clear ruling that Bell Operating Companies are not required to combine network elements provided under Section 271. Covad improperly reads this ruling out of the *TRO*. The FCC's statement about commingling

[78] Arbitration Report at 27-28.

obligations must be harmonized with its very specific ruling relating to Section 271 elements. Because BOCs are not required to combine these elements, they cannot be required to commingle them.

The second flaw in Covad's interpretation is that it is contradicted by the FCC's express removal of a reference to Section 271 commingling in an errata to the *TRO*. As the Commission observed, the *TRO* originally listed Section 271 elements in the discussion of commingling obligations in paragraph 584 of the order. However, as Covad acknowledges, in the errata to the *TRO*, the FCC removed this reference, making it clear that commingling obligations do not extend to Section 271 elements.

Covad contends that the FCC's elimination of the *TRO's* reference to Section 271 commingling was intended only to clarify the discussion of resale commingling in the order. But the FCC's decision to remove the reference should be read in the context of its ruling that ILECs are not required to combine Section 271 elements. The correction in the errata is consistent with and confirms that ruling - BOCs are not required to combine or commingle Section 271 elements.[80]

The DPU agrees with Qwest and the Commission: "In reviewing the TRO paragraphs the DPU believes that the provisions of paragraph 654, 656 and note 1990 are clearer and thus no commingling is required."[81]

Accordingly, Covad has provided no basis for the Commission to reverse its correct determination that the *TRO* does not impose Section 271 commingling obligations. For this

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[79] *Id.* at 27 (emphasis in original).

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

reason, the Commission also reject Covad's objection to the Commission's rejection of Covad's proposed definition of a "section 251(c)(3) UNE."[82]

D. Issue 5: The Commission Properly Rejected Covad's Request For Qwest To Provide CLEC-To-CLEC Regeneration At No Charge.

The Arbitration Report concludes correctly that there is no legal requirement for Qwest to provide CLEC-to-CLEC regeneration based upon the evidentiary record in this case relating to regeneration.[83] The Commission concludes further that in the rare instances in which CLECs need regeneration and Qwest voluntarily provides it, Qwest should be compensated for doing so. The Report instructs further that because there is no existing Utah rate for CLEC-to-CLEC regeneration, Qwest should charge a rate for regeneration that will be subject to true-up upon the Commission's establishment of a permanent rate for this service.[84]

In requesting that the Commission reverse itself on this issue, Covad is effectively requesting that the Commission order Qwest to provide CLEC-to-CLEC regeneration for free. Specifically, Covad asserts that the rate Qwest charges for ILEC-to-CLEC regeneration should apply to CLEC-to-CLEC regeneration, which would result in a rate of zero since Qwest does not assess any charges for the former service. In the Arbitration Report, however, the Commission recognized the important legal distinction between the two types of regeneration that directly undermines Covad's argument:

> While Qwest is generally expected to reasonably accommodate CLEC requests to collocate and to attach to Qwest's network, we see no such expectation regarding

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[81] DPU Memorandum at 8.

[82] Covad Petition at 26-27.

[83] Arbitration Report at 34.

[84] Arbitration Report at 35.

> CLEC-to-CLEC connections in the requirements of the Act, or in the prior pronouncements of the FCC or this Commission.[85]

Covad's objections to the Commission's ruling fail to address the absence of any legal obligation for Qwest to provide cross-connects and regeneration in the CLEC-to-CLEC scenario, which is a fatal shortcoming in its request for free regeneration.

Indeed, the FCC has expressly determined that an ILEC has no obligation to provide connections between collocated CLECs, as long as the ILEC allows CLECs to-self provision the cross-connection. If the ILEC has no obligation to provide the connection—and, moreover, is not involved in providing and designing the circuit through which CLECs accomplish the connection—the ILEC cannot be responsible for regeneration of the signal between the CLECs.[86] The evidence in this case clearly establishes that CLECs, including Covad, have the ability to connect with other CLECs in Qwest's central offices. CLECs may connect with each other by creating a transmission path directly from one collocation space to another or may connect at a common "interconnection distribution frame" ("ICDF"). In both circumstances, the CLEC designs the circuit between the two connections and is responsible for any necessary regeneration. If regeneration is required, the CLEC has the ability to self-provision it.[87]

The FCC rules relating to this issue are based upon its Fourth Report and Order relating to collocation. Because Qwest is not required to provide CLEC-to-CLEC connections under that Order and the rules (and therefore the Act), its voluntary decision to provide the service and charge for it on the rare occasions it may be needed is not "discriminatory," as Covad claims.

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[85] Arbitration Report at 34.

[86] *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order (Fourth Advanced Services Order), CC Docket No. 98-147, ¶¶ 55-84 (FCC 01-204) Rel. August 8, 2001; 47 C.F.R. 51.323(h).

[87] Ex. 45-T (Norman Direct) at 15: 4-12; Ex. 46-RT (Norman Response) at 11: 4-15.

Covad's claim of discrimination rests on its position that it is economically and technically infeasible for CLECs to self-provision regeneration. But, in determining whether an ILEC must provision a CLEC-to-CLEC connection, cost is not the test. As stated above, the FCC very clearly enumerated those instances when an ILEC is required to provision a CLEC-to-CLEC connection, *i.e.*, if the ILEC does not permit the CLECs to self-provision. There is no mention of whether the CLEC must be financially able to self-provision or what the cost should be, but rather whether the ILEC permits the CLEC to self-provision. Had the FCC believed that the cost of self-provisioning should be considered, it would have said so in its rules. Absent a directive by the FCC, economics is not a factor in deciding this issue.

Finally, there is no merit to Covad's claim that it is improper for Qwest to charge Covad an interim rate for regeneration that would be subject to a true-up. Covad cites no legal authority for its objection to this process and, indeed, there is none. State commissions routinely direct parties to arbitrations to use interim rates subject to true-ups where no permanent rate has been established for the element or service at issue, which is the case for CLEC-to-CLEC regeneration in Utah. Consistent with the requirements of the Act, the use of a true-up mechanism ensures that Covad will not over-pay and that Qwest will recover its costs.

For these reasons, the Commission should reject Covad's objections to the rulings in the Arbitration Report relating to regeneration.

E. Issue 9: Payment Due Date, Discontinuance, And Discontinuance Of Service

Covad challenges all three of the Commission's rulings relating to payment due date, discontinuance of orders, and disconnection of service. In these rulings, the Commission rejected Covad's requests for extended time frames that significantly exceed the time frames that are standard in the industry. The Commission's rulings on these issues were primarily fact-based

and were driven by the Commission's evaluation of the evidence. Thus, the Commission stated, "[w]e find nothing in the record to convince us that deviating from the standard time frames contained in Qwest's proposed language would be a reasonable response to Covad's claimed problems with Qwest's invoices."[88] The Commission found further that "[w]hile Covad witnesses made general claims that they require more time to review and dispute Qwest invoices, no evidence was presented to demonstrate the scope or breadth of this problem, nor how providing the extra time would solve this problem."[89]

In objecting to these rulings, Covad simply rehashes the same evidence and arguments that the Commission has already considered and rejected. As the statements quoted above demonstrate, the Commission's rulings on these issues were based on its evaluation of the evidence. Covad does not like the conclusions the Commission reached in its fact-based evaluation of the record, but it provides no ground for the Commission to change those conclusions.

For example, Covad criticizes the Commission for allegedly failing to analyze and support the rejection of Covad's request for a 45-day payment term. However, the Commission appropriately found that the 30-day period complied with the industry standard and that Covad had not provided justification for extending the period. As Qwest emphasized in the hearing, the same payment term exists in Covad's existing ICA and in Covad's agreements with its own customers. Covad does not claim otherwise. And as the Commission found, Covad does not provide any specific and credible explanation as to why it cannot verify its bills within 30 days. Covad has simply failed to demonstrate a compelling basis on which the Commission could have

[88] Arbitration Report at 40.

[89] *Id.* at 41.

granted the request for a payment period that amounts to a fifty percent increase over the industry standard.

Indeed, the evidence in this proceeding has established that (1) the number of bills Covad needs to manually review is quite small;[90] (2) that other members of the industry have agreed to the thirty day time frame and have been able to comply with it;[91] and (3) that Covad itself accepted the same time frames when it entered into the Commercial Line Sharing Agreement with Qwest in April 2004.[92] Moreover, Covad would have this Commission believe that Qwest's bills are defective, while in fact, the FCC endorsed Qwest's bills when it granted Qwest entry into the long distance market under Section 271 of the Telecommunications Act.[93]

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

Covad likewise cannot remedy the complete lack of evidence in support of its request for substantial extensions of the time frames for Qwest to discontinue processing orders and discontinuing service. The same Commission fact-findings discussed above support the Commission's determinations that there is no evidentiary basis for the requested extensions of

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

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

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

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

these time periods. Covad's protestations to the contrary do not change the state of the record. Further, Covad's discussion of these two issues does not properly acknowledge that under the language the Commission adopted, Qwest can stop processing orders and can discontinue service only if Covad fails to pay *undisputed* invoice amounts. The calamities that Covad claims will befall it if the time periods are not extended easily can be avoided by Covad paying its *undisputed* bills on time. If Covad is not paying amounts it admits to owing, it is entirely reasonable for Qwest to have the right to discontinue processing orders 30 days after the undisputed amount is owed and to discontinue service 60 days after the amount is owed.

Contrary to Covad's assertions, Qwest demonstrated that the time periods proposed by Qwest are in accord with industry standards,[94] and limit Qwest's financial exposure. Covad's premise for its alleged need for additional time is entirely vague and speculative. In essence, Covad hypothesizes regarding the potential need to *organize* requests for injunctive relief *or make other arrangements.* In fact, the language in the Covad ICA requires Qwest to provide notice to Covad before Qwest can discontinue processing orders or disconnect service.[95] So, to the extent that Covad somehow overlooked the fact that it was not paying its bills to Qwest, Covad cannot claim that Qwest can act in an arbitrary and harmful manner. As noted, Covad fails to acknowledge that under the terms of the parties' proposed ICA Qwest can only pursue its discontinuance and disconnection remedies if Covad fails to pay the *undisputed* portion of its bill.[96]

Covad admits that Qwest would suffer financial harm if Covad refused or stopped paying Qwest. Failure to pay is a very real risk in the case of CLEC insolvency, and Covad has failed to

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

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

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

In sum, based on the evidentiary record and consistent with industry standards, the Commission properly rejected Covad's proposals for extended time frames for payment. Covad's objections to these rulings are meritless.

CONCLUSION

For the reasons stated, Qwest respectfully requests that the Commission deny Covad's petition for review or rehearing.

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

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Respectfully submitted,

Robert C. Brown
QWEST CORPORATION
1801 California Street, Tenth Floor
Denver, CO 80202
Telephone: 303-383-6642
Facsimile: 303-295-7069
robert.brown@qwest.com

John M. Devaney
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
Telephone: 202-628-6600
Facsimile: 202-434-1690
Email: jdevaney@perkinscoie.com

Ted D. Smith (3017)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
Telephone: 801-578-6961
Facsimile: 801-578-6999
Email: tsmith@stoel.com

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of **QWEST CORPORATION'S OPPOSITION TO COVAD COMMUNICATION COMPANY'S PETITION FOR REHEARING** was mailed by U.S. Mail, postage prepaid, and electronically mailed to the following on this 4th day of April, 2005:

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

Andrew R. Newell, Esq.
Krys Boyle,P.C.
600 Seventeenth Street
Suite 2700
Denver, CO 80202
Email: anewell@krysboyle.com

Gregory Diamond
Senior Counsel
Covad Communications Company
7901 Lowry Boulevard
Denver, CO 80230
Email: gdiamond@covad.com

Michael Ginsberg
Assistant Attorney General
Heber M. Wells Building
160 East 300 South, Suite 500
Salt Lake City, UT 84111
Email: mginsberg@utah.gov

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