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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

INTRODUCTION

Pursuant to section 252(b)(3) of the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (the "Act"), Qwest Corporation ("Qwest") submits this Response to the Petition

of DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation ("Petition").

As Covad accurately describes in its Petition, the parties have engaged in good faith, extensive negotiations over the proposed terms and conditions of a successor interconnection agreement to replace the parties' 1999 agreement currently in effect in Utah. These negotiations, encompassing hundreds of hours in both telephonic and face-to-face meetings, have resulted in the resolution of the vast majority of the issues raised during negotiations. Indeed, because negotiations were largely successful in achieving the objective of resolving issues completely or narrowing the scope of the disputes considerably, the parties extended by mutual agreement the effective negotiation request dates several times in order to continue negotiations. As set forth below, the parties are continuing to negotiate while this arbitration is pending. Qwest reserves the right to submit revised language for the proposed interconnection agreement attached as Exhibit A to Covad's Petition (the "Proposed Interconnection Agreement") to reflect the results of further negotiations as well as to reflect any changes in existing law during the pendency of this arbitration that may affect the appropriate terms and conditions of the parties' relationship.

I. BACKGROUND

A. The Parties And Negotiation History

In general, Qwest does not dispute Covad's summary of the history of the parties' negotiations.[1] Covad initiated negotiations with Qwest by its letter dated January 31, 2003. Pursuant to Covad's request, the parties have been voluntarily negotiating interconnection agreements in states throughout Qwest's service territory, including Utah. A number of times during the course of the negotiations, Covad and Qwest agreed to extend the effective negotiation request dates in order to continue negotiations, with the objective of trying to resolve disputes where possible. Under the most recent agreement, Covad and Qwest agreed that the negotiation request date for Utah is November 18, 2003.

With the last extension and pursuant to the timeline established by the Act, arbitration must be requested from April 2, 2004 (the 135th day after Covad's request for negotiations) through April 27, 2004 (the 160th day after Covad's request for negotiations). Accordingly, Qwest agrees that Covad has timely filed its Petition and that the nine-month period for this Commission to decide the disputed issues, as set forth in section 252(b)(4)(c), expires on August 18, 2004.

[1] To the extent that Covad's Petition suggests the parties have engaged in negotiations concerning access to network elements under Section 271 of the Act, or under state law, Qwest disagrees with that characterization. The negotiations leading to Covad's Petition were conducted pursuant to sections 251 and 252 of the Act, and the parties did not negotiate Covad's request for access to network elements pursuant to Section 271 and/or state law. Qwest made it clear to Covad that the negotiations would not include issues relating to network element unbundling under Section 271 and/or state law, and, accordingly, the parties did not address those issues during their negotiations. For this reason, Qwest is filing a motion to dismiss or, alternatively, for summary judgment that requests dismissal of Covad's claims that seek to impose network unbundling obligations under Section 271 and unbundling obligations under state law relating to elements that the FCC has not required ILECs to unbundle.

B. Resolved Issues

The Proposed Interconnection Agreement attached to the Petition as Exhibit A contains the contract language negotiated by the parties. As set forth elsewhere in this response, since the filing of the Petition, the parties have continued to negotiate and have reached agreement on some disputed issues or parts of disputed issues. Accordingly, while Exhibit A to Covad's Petition reflects the contract language negotiated between the parties as of April 27, 2004, it does not reflect contract language negotiated since April 27, 2004.

II. UNRESOLVED ISSUES

Qwest and Covad resolved numerous substantive issues to their mutual satisfaction through negotiation. Since approximately January 2003, Qwest and Covad have met at least weekly, most often by telephone, and sometimes in person, to review proposed terms and conditions of the successor interconnection agreement. To address specific substantive areas, subject matter experts from Qwest and Covad have participated in the negotiation sessions and have met separately from the negotiations to discuss open issues. At this point, more than 50 sessions have taken place, involving hundreds of hours. These substantial efforts have been productive, as the parties have resolved numerous issues, leaving only a relatively small number of issues to be arbitrated. There are no unresolved issues relating to Sections 251 and 252 of the Act that are not being submitted for arbitration.

In light of the progress made by the parties during negotiations, relatively few issues[2] (including several issues relating to the *Triennial Review Order*)[3] remain unresolved and

[2] In Qwest's experience negotiating and arbitrating interconnection agreements with other CLECs, the parties have routinely agreed to the assignment of issue numbers and a neutral description of the issue for the convenience of the parties and commissions. Despite repeated

constitute "open issues" for the Commission's resolution pursuant to Section 252(b) of the Act. As discussed below, Covad seeks Commission involvement in issues that do not constitute "open issues" under the arbitration provisions of the Act. In addition, simultaneous with the filing of this response, Qwest is filing its Motion to Dismiss or, Alternatively, for Summary Judgment relating to Portions of Issues submitted by Covad Communications Company for Arbitration ("Motion to Dismiss"). Qwest incorporates herein by reference the arguments set forth in that motion. For the reasons set forth below and in Qwest's Motion to Dismiss, these putative issues are not subject to resolution by the Commission, and Covad's attempt to improperly enlarge the scope of this arbitration to include issues that do not arise under Sections 251 and 252 of the Act should be rejected.

The parties' proposed language for each unresolved issue as of April 27, 2004 is set forth in the Proposed Interconnection Agreement. Covad has requested the inclusion of provisions in the Proposed Interconnection Agreement that would impose network unbundling obligations on Qwest under Section 271, the section of the Act that governs the entry of the Regional Bell Operating Companies ("RBOCs") into long distance markets, and/or under Utah's Public Telecommunications statutes found at U.C.A. §54-8b-1.1 et. seq.

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requests, Covad has failed to respond to Qwest's request that that the parties jointly number and describe the issues. Accordingly, the issue numbers and description Covad used in its Petition here are different from those Covad used in its petition for arbitration of these same issues in Minnesota and from those used by Qwest for tracking purposes and in its petition for arbitration in Colorado. By Qwest's count, 15 unresolved issues existed at the time the Petition was filed. Since that time, the parties have resolved one entire issue and portions of others.

[3] 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 Dkt.

As more fully discussed below, Covad's attempt to invoke Section 271 in the Section 251/252 negotiation and arbitration process is improper, and the terms Covad seeks under that section cannot be granted in this arbitration. Similarly, Covad's reliance on Utah law in support of its attempt to obtain broader network unbundling than the FCC allowed in the *Triennial Review Order* is improper, and its request for that unbundling under state law is not a proper subject of this arbitration. Qwest's discussion of this issue should not be construed in any way as an acknowledgement that non-Section 251 obligations are a proper subject of this arbitration; indeed, it is clear in the Act that state commissions do not have authority to make determinations under Section 271 and that their authority in interconnection arbitrations is limited to issues relating to an ILEC's obligations under Sections 251(b) and (c). Specifically, the Commission is only authorized in interconnection arbitrations to decide "open issues" relating to the duties of ILECs established by Sections 251(b) and (c). Because of this limitation on the Section 251/252 negotiation and arbitration process, Qwest and Covad have not negotiated issues relating to Covad's request for network unbundling under Section 271 and Utah law, or relating to any provisions of law other than Sections 251/252. Qwest's position on these Section 251/252 issues is set forth below.

Negotiations are continuing, and Qwest will apprise the Commission of the parties' progress. Indeed, since Covad filed its Petition, the parties have reached agreement regarding certain of the issues raised in the Petition. In addition, Covad mistakenly included certain issues in the Petition. Accordingly, in an attempt to accurately reflect the status of the parties'

Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*"), *vacated in part, remanded in part, U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

negotiations as of the filing of this response, Qwest has discussed the issues in the order in which they appear in Covad's Petition and noted the issues or portions thereof that have been resolved, as appropriate.

Qwest respectfully requests that the Commission adopt Qwest's positions and proposed contract language.

III. PROPOSED CONTRACT LANGUAGE

It is Qwest's understanding that the Proposed Interconnection Agreement attached as Exhibit A to Covad's Petition is an unmodified copy of the document Qwest has maintained throughout the parties' negotiations, which Qwest provided to Covad so that Covad could attach it to the Petition. Based on this understanding, Qwest believes that Exhibit A accurately describes the parties' competing language proposals as of the time Qwest provided it to Covad. As noted above, the parties' continuing negotiations have already resulted in resolution of certain issues. Accordingly, Qwest reserves the right to submit revised language for the Proposed Interconnection Agreement to reflect any further negotiations, as well as to correct errors or reflect any changes in existing law during the pendency of this arbitration that may affect the appropriate terms and conditions of the parties' relationship.

IV. POSITIONS OF THE PARTIES

While Covad included extensive argument regarding its positions in the Petition, it did not include a summary of Qwest's positions for most of the issues it described. Qwest has therefore summarized its position on each disputed issue below. Because Covad detailed its positions in its Petition, Qwest has not repeated Covad's positions in this response.

Qwest respectfully submits that Qwest's positions on the disputed issues meet the requirements of the Act and other applicable law, reflect sound public policy, and should be adopted in full here.

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

The *Triennial Review Order* confirms that ILECs have the right to retire copper loops and subloops that have been replaced with fiber.[4] The dispute underlying this issue arises because of Covad's demand for provisions in the Proposed Interconnection Agreement that would significantly dilute Qwest's right to retire copper loops. Specifically, in its proposed Section 9.2.1.2.3.1, Covad seeks to condition the retirement of these facilities on Qwest providing an alternative service over a "compatible facility" to Covad or Covad's end-user. Under Covad's demanded language, the alternative service must not "degrade the service or increase the cost" to Covad or its end-user.

The *Triennial Review Order* does not impose these or other conditions on an ILEC's right to retire copper facilities. Covad's proposal for adoption of these unauthorized conditions would effectively prevent Qwest from retiring copper facilities in many situations and would significantly dilute this important right. The proposal also conflicts directly with the FCC's stated objective of encouraging the deployment of facilities that can be used to provide advanced telecommunications services, as the onerous conditions Covad is proposing would reduce Qwest's economic incentive to deploy fiber facilities in some situations. For these reasons, Covad's proposal should be rejected.

[4] *Triennial Review Order* at ¶ 281.

In confirming that ILECs have the right to retire copper loops, the FCC rejected CLEC proposals that would have required ILECs to obtain regulatory approval before retiring these facilities.[5] Thus, ILECs are permitted to retire copper loops and subloops, as long as they comply with the FCC's notice requirements relating to network changes.[6]

The conditions Covad would have this Commission impose are not found anywhere in the *Triennial Review Order*. Indeed, the FCC rejected multiple CLEC proposals that would have conditioned an ILEC's retirement rights in ways quite similar to what Covad is proposing here.[7] The FCC found that these conditions are unnecessary because its existing notice rules for network changes provide "adequate safeguards" for CLECs.[8]

By confirming that ILECs have an unconditional right to retire copper facilities, the FCC advanced its objective of increasing the economic incentive for ILECs to deploy fiber facilities. Covad's proposed retirement conditions would undermine that objective and result in the type of onerous retirement scheme that the FCC considered and rejected in the *Triennial Review Order*.

In contrast to Covad's proposal, Qwest's proposed Sections 9.2.1.2.3.1 and 9.2.1.2.3.2 are consistent with the *Triennial Review Order*. Moreover, Qwest's language provides Covad with further protection by establishing that: (1) Qwest will leave copper loops and subloops

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[5] *Id*.

[6] After receiving notice from the FCC of an ILEC's intent to retire a copper facility, a CLEC is permitted to object to the retirement in a filing with the FCC. Unless the FCC affirmatively allows the objection, it is deemed denied 90 days after the FCC's issuance of the retirement notice. *Triennial Review Order* at ¶ 282.

[7] *See Triennial Review Order* at ¶ 281 & n.822.

[8] *Id.*

in service where it is technically feasible to do so; and (2) Qwest will coordinate with Covad the transition to new facilities "so that service interruption is held to a minimum." For these reasons, the Commission should adopt Qwest's proposed language relating to copper loop and subloop retirements.

Issue 2: Unified Agreement/Defining Unbundled Network Elements (Sections 4.0 (Definitions of "251(c)(3)" and "Unbundled Network Element"), 9.1.1, 9.1.1.6, 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), 9.6.1.5.1 (and related 9.6.1.5), 9.6.1.6.1 (and related Section 9.6.1.6), and 9.21.2).

The parties' dispute underlying Issue 2 concerns whether their Section 251/252 interconnection agreement should include provisions requiring Qwest to provide UNEs and services not just under Section 251(c)(3), but also under Section 271 and state law. As described by Covad, it is proposing language that would require Qwest to provide network elements under Section 271 and Utah law even if the FCC has determined that the elements are not available under Section 251. In other words, Covad claims that Qwest should be required to provide network elements even when the FCC has ruled that CLECs are not impaired without access to those elements.

Covad is asking this Commission to exercise authority it does not have. In addition, even if the Commission had the authority Covad assumes, Covad's proposed language that would require Qwest to provide unbundled access to "all UNEs required by [Section 271] and [state law]" is extremely ambiguous and would inevitably lead to disputes about the parties' rights and obligations. Accordingly, the Commission should reject Covad's request for language that would obligate Qwest to provide network elements under Section 271 and to

provide access to network elements under Utah law where the FCC has not required such access.

A. State Commissions Do Not Have Authority To Require Access To Network Elements Pursuant To Section 271.

A state administrative agency has no role in the administration of federal law, absent express authorization by Congress. That is so even if the federal agency charged by Congress with the law's administration attempts to delegate its responsibility to the state agency.[9] Where, as here, there has been no delegation by the federal agency, a state agency has no authority to issue binding orders pursuant to federal law.[10]

No provision of the Act authorizes state commissions to impose or enforce obligations under Section 271. First, the process mandated by Section 252 -- the provision pursuant to which Covad filed its Petition[11] -- is concerned with implementation of an ILEC's obligations under Section 251, not Section 271.

(a) By its terms, the "duty" of an ILEC "to negotiate in good faith in accordance with Section 252 the particular terms and conditions of [interconnection] agreements" is limited to implementation of "the duties described in paragraphs (1) though (5) of [Section 251(b)] and [Section 251(c)]."[12]

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[9] *USTA II* at 564-68. *See generally Qwest Corp. v. Scott*, 2003 WL 79054 (D. Minn. 2003) (state commission not authorized to regulate interstate or "mixed use" service where Congress has entrusted such regulation to the FCC).

[10] *See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by Section 271 to impose binding obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004). *See also Triennial Review Order* at ¶¶ 186-87 ("states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations").

[11] Petition at 1.

[12] 47 U.S.C. 251(c)(1).

(b) Section 252(a) likewise makes clear that the negotiations it requires are limited to "request[s] for interconnection, services or network elements *pursuant to section 251*."[13]

(c) Section 252(b), which provides for state commission arbitration of unresolved issues, incorporates those same limitations through its reference to the "negotiations under this section [252(a)]."[14]

(d) The grounds upon which a state commission may approve or reject an arbitrated interconnection agreement are limited to non-compliance with Section 251 and Section 252(d).[15]

(e) The final step of the Section 252 process, federal judicial review of decisions by state commissions approving or rejecting interconnection agreements (including the arbitration decisions they incorporate), is likewise limited to "whether the agreement . . . meets the requirements of section 251 and this section [252]."[16]

Thus, it is clear that state commission arbitration of disputes regarding the duties imposed by federal law is limited to those imposed by Section 251, and excludes the conditions imposed by Section 271.

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[13] 47 U.S.C. 252(a)(emphasis added).

[14] *See* 47 U.S.C. 252(b)(1). The Fifth Circuit has opined in dictum that state commissions may arbitrate disputes regarding matters other than the duties imposed by Section 251 if *both* parties include those matters in their Section 252(a) negotiations. *CoServ Limited Liability Corp. v. Southwestern Bell Tel. Co*., 350 F.3d 482 (5th Cir. 2003). Even if correct, that dictum is not relevant here, for Qwest has not included in its Section 252(a) negotiations with Covad its duties under Section 271. *See id*. at 488 ("an ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to sections 251 and 252").

[15] *See* 47 U.S.C. 252(e)(2)(b).

Second, Section 271 itself confers no authority on state commissions to impose binding obligations. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine whether BOCs have complied with the substantive provisions of Section 271, including the "checklist" provisions upon which Covad purports to base its requests.[17] State commissions have only a non-substantive, "consulting" role in that determination.[18] Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271,[19] likewise provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.[20] The FCC has ruled that "[w]hether a particular [Section 271] checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)."[21]

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[16] 47 U.S.C. 252(e)(6).

[17] 47 U.S.C. 271(d)(3).

[18] 47 U.S.C. 271(d)(2)(B). *See also Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 ("section 271 clearly contemplates an advisory role for the [state commission], not a substantive role").

[19] *Triennial Review Order* at ¶¶ 656, 662.

[20] *See id*; 47 U.S.C. 201(b) (authorizing the FCC to prescribe rules and regulations to carry out the Act's provisions); 205 (authorizing FCC investigation of rates for services, etc. required by the Act); 207 (authorizing FCC and federal courts to adjudicate complaints seeking damages for violations of the Act); 208(a) (authorizing FCC to adjudicate complaints alleging violations of the Act).

[21] *Triennial Review Order* at ¶ 664.

Finally, Covad's suggestion that a state legislature may grant to its agencies the authority to administer federal law that Congress has withheld is meritless.[22] A state legislature may plainly confer authority to adopt and enforce state law. It may also permit the state's administrative agencies to exercise any authority conferred upon them by Congress. However, state legislatures may not confer authority to administer federal law that has been withheld by Congress. Covad cites no decision from any court or agency, federal or state, holding otherwise.

B. State Commissions Do Not Have Authority To Impose Unbundling Requirements That The FCC Has Rejected.

Covad's request that the Commission impose under Utah law the same unbundling requirements that the FCC has rejected is no more persuasive than its contention that the Commission has jurisdiction over these matters under Section 271. Such a requirement is preempted by federal law, as interpreted and applied by the FCC and the courts.

Contrary to Covad's claims, Section 251(d)(3) does not preserve the authority of state commissions to adopt or enforce under state law unbundling requirements that have been rejected by the FCC. The Supreme Court has "decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law."[23]

Congress has recognized that "unbundling is not an unqualified good," because it "comes at a cost, including disincentives to research and development by both ILECs and

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[22] Petition at 8-9.

[23] *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000).

CLECs, and the tangled management inherent in shared use of a common resource."[24] Thus, Congress mandated the application of limiting principles in the determination of unbundling requirements that would reflect a balance of "the competing values at stake."[25] That balance would plainly be upset if a state commission could impose under state law unbundling requirements that have been found by the FCC to be inconsistent with the Act and its objectives.

Further, Covad properly concedes that state law unbundling requirements are preempted by federal law if they would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[26] That concession is fatal to Covad's request that the Commission impose the same unbundling requirements that the FCC rejected in the *Triennial Review Order*. The FCC determined in the *Triennial Review Order* that imposing the types of virtually unlimited unbundling requirements that Covad seeks would stand as an obstacle to some of the Act's goals, such as "encouraging facilities-based competition,"[27] and investment in facilities necessary to provide advanced services.[28] Whether the source of these requirements is an FCC regulation adopted pursuant to Section

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[24] *United States Telecom Assoc. v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002). *See also AT&T Communs. of Ill. v. Il. Bell Tel. Co.*, 2003 U.S. App. LEXIS 22961 (7th Cir 2003) (explaining that unbundling obligations may have negative effect on "investment and innovation").

[25] *Id.* *See also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

[26] Petition at 14, *citing Triennial Review Order* at ¶ 192 n.613 (state law preempted if it "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress"), *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

[27] *USTA II* at 37; *id.* at 31.

[28] *See, e.g., Triennial Review Order* at ¶¶ 286, 288, 290, 295. *USTA II* at 35-38.

251, or a Commission regulation adopted pursuant to state law, is simply irrelevant: the deleterious effect on the "purposes and objectives of Congress" is the same.[29]

C. Covad's Proposed Unbundling Language Is Impermissibly Broad And Vague.

Covad's proposed language that would require Qwest to provide network elements under Section 271 and Utah law is so broad as to leave undefined the specific network elements that Qwest would be obligated to make available. Even if a state commission had authority to require unbundling pursuant to this law, the extreme vagueness of Covad's proposed language would lead to significant uncertainty about the parties' rights and obligations and inevitable disputes about how to implement those provisions.

For example, Covad's proposed Section 9.1.1.6 provides broadly:

> On the Effective Date of this Agreement, Qwest is no longer obligated to provide to CLEC certain Network Elements pursuant to Section 251 of the Act. Qwest will continue providing access to certain network elements as required by Section 271 or state law, regardless of whether access to such UNEs is required by Section 251 of the Act.[30]

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[29] Covad claims, erroneously, that the Act preempts only those state laws and regulations unfavorable to resellers relative to ILECs and other facilities-based carriers, and that the FCC's contrary holding in the *Triennial Review Order* "appear[s] to conflict with *Michigan Bell Tel. Co., v. MCIMETRO,* 323 F.3d 348 (6th Cir 2003). Petition at 16 n.9. *Michigan Bell* did not concern unbundling obligations, including the balancing required to determine their scope, and the impact of excessive unbundling on the Act's objectives. Further, Covad fails to disclose that *Michigan Bell* relied (*see* 323 F.3d at 359) on a statement by the FCC prior to the *Triennial Review Order*, in which the FCC clearly rejected the pro-resale view of preemption now urged by Covad. *See Triennial Review Order* at ¶ 195. Contrary to Covad's claim, moreover, that the FCC did not in the *Triennial Review Order* unequivocally preempt all state law unbundling requirements does not mean that state commissions are free to adopt such requirements based on their view of circumstances prevailing in their states. The FCC had no proposal before it, and thus could undertake no specific analysis. This Commission, however, now has before it a proposal by Covad that is clearly inconsistent with the Act and its underlying objectives, and would therefore be preempted if adopted.

[30] This section is among the disputed provisions of the agreement relating to Issue 4, "commingling."

The vague reference in this provision to "certain Network Elements" plainly falls far short of the certainty parties to an interconnection agreement must have to understand their rights and obligations and to avoid disputes involving implementation of the agreement. By failing to define the network elements that Qwest would be required to provide under Section 271 and state law despite a finding of non-impairment under Section 251, this language would almost certainly lead to significant disputes in implementing the agreement.

For this reason, even if the Commission had the authority to impose the types of unbundling requirements Covad seeks, it would be necessary to reject Covad's overly broad, ambiguous proposals.

D. Covad's Pricing Proposal For Network Elements Provided Pursuant To Section 271 Violates The *Triennial Review Order* And *USTA II*.

Covad's arbitration petition reveals two basic flaws in Covad's position relating to the pricing of any network elements that Qwest provides pursuant to Section 271. First, Covad assumes erroneously that state commissions have authority to set prices for these elements. They do not, as the pricing of Section 271 elements is within the FCC's exclusive jurisdiction. Second, Covad claims incorrectly that the FCC has authorized the application of TELRIC-like pricing principles to Section 271 elements. The FCC and the D.C. Circuit have both ruled that TELRIC pricing does not apply to network elements that BOCs provide under Section 271 and that the prices for such elements are to be set by the FCC based on the standards in Sections 201 and 202 of the Communications Act of 1934.

The FCC ruled unequivocally in the *Triennial Review Order* that any elements an ILEC unbundles pursuant to Section 271 are to be priced based on the Section 201-02

standard that rates must not be unjust, unreasonable, or unreasonably discriminatory.[31] In so ruling, the FCC confirmed, consistent with its prior rulings in Section 271 orders, that TELRIC pricing does not apply to network elements provided under Section 271.[32] In *USTA II*, the D.C. Circuit reached the same conclusion.[33]

The FCC has made it clear that it, not state commissions, has exclusive jurisdiction to determine rates for elements and services provided under Section 271:

> Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the *Commission will undertake* in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). (Emphasis added).

Thus, only the FCC has decision-making authority under Section 271.

Qwest's proposed language for Section 9.1.1.7, which Covad includes under Issue 4, reflects this pricing scheme for any elements and services provided pursuant to Section 271. Specifically, Qwest's language provides that, absent agreement to the contrary, Qwest will bill for elements provided under Section 271 "in accordance with prices and terms that will be described on Qwest's website or applicable Tariff." This language is consistent with Section 271, the *Triennial Review Order*, and *USTA II*.

In violation of the rulings in the *Triennial Review Order* and *USTA II*, Covad's proposed language would apply TELRIC rates to elements and services provided under

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[31] *Triennial Review Order* at ¶¶ 656-64.

[32] *Id.*

[33] *USTA II*, 359 F.3d at 588-90.

Section 271.[34] Moreover, Covad assumes incorrectly that state commissions are permitted to set rates for elements and services provided under Section 271. This proposal conflicts with the FCC's statement that it, not state commissions, will determine whether ILEC prices for these elements and services meet the pricing standard of Sections 201 and 202. As with Section 271, Sections 201 and 202 do not contemplate any role for state commissions in defining, implementing or enforcing carriers' obligations thereunder. The FCC has not delegated any authority under these Sections, and *USTA II* establishes that such a delegation would be unlawful.[35]

Nor is Covad's position supported by state law. Even if a state law existed to confer authority on a state commission to set prices for Section 271 elements, it would plainly be preempted by the Act's conferral of jurisdiction to the FCC to make the determinations

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[34] Relying on the FCC's statement in the *Triennial Review Order* that Section 271 "does not *require* TELRIC pricing" (*Triennial Review Order* at ¶ 659 (emphasis added)), Covad argues that TELRIC-based pricing is nonetheless permitted for elements provided under section 271. Covad Petition at 10-11. This argument plainly misstates the FCC's ruling and is based on nothing more than semantic gamesmanship. In paragraphs of the *Triennial Review Order* that Covad ignores, the FCC could not have been clearer that Section 252 TELRIC pricing does not apply to elements provided under Section 271. Thus, in paragraph 656, the FCC stated: "[W]e find that the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202." Similarly, in paragraph 661, the FCC acknowledged its "recognition that pricing pursuant to section 252 [TELRIC] does not apply to network elements that are not required to be unbundled . . . ."

In its transparent attempt to avoid the controlling effect of these rulings, Covad suggests that the "forward-looking" pricing standards it is proposing for section 271 elements is different from TELRIC pricing. Covad Petition at 10-12. However, as the FCC and the D.C. Circuit have established, the pricing standards of Sections 201 and 202 govern, and those standards do not include any reference to "forward-looking pricing." Moreover, the forward-looking standard that Covad describes in its petition is, in the end, indistinguishable from TELRIC standards.

[35] While *USTA II* focused on the FCC's unlawful delegation of authority to states to determine the UNEs to which ILECs must provide access under Section 251(c)(3), the court's

relating to the provision of elements under Section 271. In addition, contrary to governing federal law, Covad claims that the application of state law would result in TELRIC prices for Section 271 elements. As discussed above, the FCC and the D.C. Circuit have both ruled that TELRIC pricing does not apply to network elements provided under Section 271.

E. Covad's Continuing Request For Access To Fiber Subloops Violates The *Triennial Review Order*.

In the *Triennial Review Order*, after careful consideration of the standards set forth in Section 251(d)(2) and the policies reflected in the Act, the FCC determined that ILECs are not required to provide unbundled access to fiber subloops.[36] Notwithstanding this unequivocal ruling, Covad's proposals for the provisions of the agreement listed above would require Qwest to provide access to these facilities. This demand incorrectly assumes that state commissions have authority to require unbundling under Section 271 and can impose unbundling requirements that the FCC has specifically rejected.

In ruling that ILECs are not required to unbundle feeder subloops, the FCC found that an unbundling requirement for these facilities would undermine the objective of Section 706 of the Act "to spur deployment of advanced telecommunications capability."[37] The FCC recognized that access to ILECs' fiber feeder may be necessary for CLECs to obtain access to unbundled copper subloops, but it nevertheless did not require feeder unbundling. Instead, it encouraged carriers to negotiate arrangements for obtaining access to copper subloops, stating it "expect[s] that incumbent LECs will develop wholesale service offerings for access

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reasoning that delegation to state commissions is impermissible in the absence of express statutory authorization is equally applicable to determinations under Sections 271, 201, and 202.

[36] *Triennial Review Order* at ¶ 253.

to their fiber feeder to ensure that competitive LECs have access to copper subloops."[38] Importantly, and consistent with its ruling that ILECs are not required to unbundle feeder subloops, the FCC emphasized that "the terms and conditions of such access would be subject to sections 201 and 202 of the Act."[39]

For the reasons discussed above, Covad's demand for unbundled access to feeder subloops must be rejected. Specifically, as discussed, state commissions are without authority to impose any unbundling or other obligations under Section 271; Covad's request that this Commission require feeder subloop unbundling under that section assumes authority that does not exist. In addition, any attempt to impose feeder subloop unbundling under state law would be preempted by the FCC's clearly expressed finding that unbundling this network element would undermine the federal law and policy reflected in Section 706. As Covad itself concedes, a state law unbundling requirement is preempted by federal law if it would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[40] The FCC's ruling relating to this issue establishes that a state law requirement to unbundle feeder subloops would undermine Congress's objective of promoting the deployment of advanced telecommunications facilities.

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[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Petition at 14, *citing Triennial Review Order* at ¶ 192 n.613 (state law preempted if it "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress"), *see also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Issue 3: Conditioning - Requirements, Intervals, Charges and Credits (Sections 9.2.2.3, 9.2.2.3.1, 9.2.3.5 (and subsection), 9.3.1.2, 9.3.2.2, and 9.3.2.2.1).

The parties have resolved their disputes regarding Sections 9.2.2.3, 9.2.2.3.1, and 9.2.3.5 of the agreement, leaving no unresolved issues regarding those sections for determination by the Commission. If Covad raises any disputes relating to Sections 9.2.2.3, 9.2.2.3.1, or 9.2.3.5 in this proceeding, Qwest reserves the right to respond to such issues.

In its Petition, Covad included Sections 9.3.1.2, 9.3.2.2, and 9.3.2.2.1 as disputed sections relating to both Issues 2 and 3. Qwest's discussion of its position regarding those sections of the agreement is set forth under Issue 2, at subpart E, above.

Issue 4: Commingling, Ratcheting, Pricing (Sections 4.0 (Definitions of "251(c)(3)" and "Commingling"), 8.2.1.1.1.2,[41] 9.1.1, 9.1.1.1, 9.1.1.4 (and subsections), 9.1.1.5 (and subsections), 9.1.1.6 (and subsections), 9.1.1.7 (and subsections),[42] and 9.1.1.8 (and subsections)).

This issue concerns the parties' disagreements regarding the language needed in the Proposed Interconnection Agreement to implement the FCC's rulings in the *Triennial Review Order* relating to: (1) commingling of UNEs and wholesale tariffed services, such as interstate access; and (2) the prices ILECs can charge for these commingled UNEs and services. For the reasons described below, the Commission should adopt Qwest's language relating to these issues.

A. Commingling

The parties recognize the basic commingling requirements established in the *Triennial Review Order*, but Covad has proposed language that goes beyond those

[41] The parties have resolved their disputes relating to Section 8.2.1.1.1.2, leaving no unresolved issues for determination by the Commission with respect to that section of the agreement.

requirements and would impose obligations that do not exist under the FCC's rules. Covad also has refused to accept language proposed by Qwest that implements important limitations on Qwest's commingling obligations required under the *Triennial Review Order*.

The *Triennial Review Order* permits "requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request."[43] The commingling required under the *Triennial Review Order* is defined specifically 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."[44] The permissible commingling under the *Triennial Review Order* also includes commingling with resale services offered under section 251(c)(4): "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale services, including any services offered for resale pursuant to section 251(c)(4) of the Act."[45]

Of relevance to the *Triennial Review Order*'s commingling requirements, the *Triennial Review Order* established specific eligibility criteria for high-capacity EELs. These

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[42] *See* Qwest's discussion of Section 9.1.1.7 under Issue 2 above.

[43] *Triennial Review Order* at ¶ 579.

[44] *Id.*

[45] *Id.* at ¶ 584 (as amended by *Triennial Review Order Errata*, ¶ 27, released September 17, 2003) ("*Triennial Review Order Errata*").

facilities are defined as "combinations of high-capacity (DS1 and DS3) loops and interoffice transport."[46] The FCC found that service eligibility criteria are needed for these facilities to prevent "gaming" by non-qualifying providers, with gaming defined as "a provider of exclusively non-qualifying service obtaining UNE access in order to obtain favorable rates or to otherwise engage in regulatory arbitrage."[47]

The service eligibility criteria that apply to these high-capacity facilities are: (1) the requesting carrier "must have a state certification of authority to provide local voice service;" (2) the requesting carrier must "demonstrate that it actually provides a local voice service to the customer over a DS1 circuit" by having "at least one local number assigned to each circuit and must provide 911 or E911 capability to each circuit;" and (3) there must be specifically defined, circuit-specific architectural safeguards in place to prevent gaming. These safeguards are (i) "each circuit must terminate into a collocation governed by section 251(c)(6) at an incumbent LEC central office within the same LATA as the customer premises;" (ii) "each circuit must be served by an interconnection trunk in the same LATA as the customer premises served by the EEL for the meaningful exchange of local traffic;" (iii) "for every 24 DS1s or the equivalent, the requesting carrier must maintain at least one active DS1 local service interconnection trunk;" and (iv) "each circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic."[48] A provider must satisfy each of these service eligibility criteria "(1) to convert a special access circuit to a high-

[46] *Id.* at ¶ 591.

[47] *Id.*

[48] *Id.* at ¶ 597.

capacity EEL; (2) to obtain a new high-capacity EEL; or (3) to obtain at UNE pricing part of a high-capacity loop-transport combination (commingled EEL)."[49]

Qwest's proposed language for the sections listed above captures fully and accurately the commingling obligations imposed by the *Triennial Review Order*. As proposed by Qwest, these sections of the ICA establish that Covad can obtain from Qwest UNEs and UNE combinations commingled with wholesale services and facilities, and that Covad can request Qwest to perform the functions to provision such commingling. In addition, Qwest's proposed language permits Covad to commingle telecommunications services purchased on a resale basis with UNEs and UNE combinations. Consistent with the rulings in the *Triennial Review Order* relating to high-capacity EELs, Qwest's language also establishes that the service eligibility criteria for high-capacity EELs apply to any commingling of services that includes a high-capacity loop and a transport facility or service.

In rejecting substantial portions of Qwest's commingling language, Covad is offering positions that are not supported by the *Triennial Review Order* and is proposing to omit several ICA provisions that are necessary to a clear definition of Qwest's commingling obligations. For example, Covad has rejected Qwest's language that specifically enumerates the service eligibility requirements for high-capacity EELs. The important limitation on Qwest's commingling obligations established by these criteria should be expressly stated in the agreement to avoid any disputes relating to high capacity EELs.

Covad is also seeking to expand Qwest's commingling obligations beyond what the FCC has required by proposing language that would obligate Qwest to commingle UNEs and

[49] *Id.* at ¶ 593.

UNE combinations with network elements and services for which unbundling is not required under Section 251 but that are provided under Section 271. That the *Triennial Review Order* does not require commingling with elements and services provided under Section 271 is confirmed by the *Triennial Review Order Errata*. In the original version of the *Triennial Review Order*, paragraph 584 instructed that ILECs' commingling obligations included permitting the commingling of UNEs and UNE combinations with network elements provided under Section 271. However, in the *Errata*, the FCC removed this language, thereby eliminating the requirement that ILECs permit commingling with Section 271 elements and services. Covad's position fails to acknowledge this critical change to the *Triennial Review Order*.

Covad also ignores Congress's conscious decision (acknowledged by the FCC and the D.C. Circuit) to *omit* Section 251's combination duties (of which the commingling rules are simply a broader implementation) from the terms by which BOCs must offer facilities under Section 271. In the section of the *Triennial Review Order* specifically discussing what Section 271 obligations BOCs have with respect to facilities taken off the Section 251 unbundling list, the FCC made clear that BOCs have no obligation to combine such de-listed facilities with the UNEs that BOCs must continue to provide under Section 251: "We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[50] Covad's interpretation of the *Triennial Review Order's* commingling requirements would stretch a section of the *Triennial Review*

[50] *Triennial Review Order* at ¶ 655 n.1990.

Order having nothing to do with Section 271 to render the *Triennial Review Order's* specific decision *not* to require Section 251/271 combinations as surplusage.

Covad's improper demand for this Commission to order commingling with Section 271 elements and services also assumes incorrectly that state commissions have authority to determine obligations relating to Section 271. As discussed above in connection with Issue 2, states do not have any decision-making authority under this section of the Act and therefore cannot order ILECs to provide or commingle Section 271 elements or services. Moreover, any obligations that Qwest has under Section 271 are beyond the scope of this Section 252 arbitration, which is expressly limited to issues involving Qwest's duties under Sections 251(b) and (c).

Covad also is unwilling to include language in the ICA that is necessary to define clearly the scope of Qwest's obligation to provide commingling with wholesale resale services. In Section 9.1.1.1, Qwest proposes language establishing its obligation to provide commingling with resale services. An essential part of this section is Qwest's language identifying certain services and facilities that are not available for resale commingling, including non-telecommunications services, enhanced or information services, features or functions not offered for resale on a stand-alone basis or separate from basic exchange service, and network elements offered pursuant to Section 271. These services and facilities are not among the "telecommunications services" that Qwest is required to make available for resale under Section 251(c)(4). To eliminate any ambiguity and future disputes about the wholesale resale services that are available for commingling, the agreement should include these exclusions.

B. Pricing Of Commingled Facilities And Services ("Rate Ratcheting")

While the *Triennial Review Order* permits CLECs to commingle UNEs and wholesale services, in conjunction with that ruling, the FCC rejected rate "ratcheting" for these UNE/wholesale service combinations.[51] As explained by the FCC, ratcheting 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. For example, ratcheting leads to a reduction in special access charges by 1/24th for each switched access voice-grade circuit on a special access DS1.[52]

In rejecting ratcheting, the FCC stated that ILECs are permitted "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."[53] This result, the FCC explained, "ensures that competitive LECs do not obtain an unfair discount off the prices for wholesale services, while at the same time ensuring that competitive LECs do not pay twice for a single facility."[54] Qwest and Covad disagree concerning the language needed for the agreement to implement the FCC's ratcheting ruling.

Qwest's proposed language for Sections 9.1.1.4 and 9.1.1.4.1 implements the FCC's ratcheting ruling in clear, straightforward terms. Qwest's language establishes the following principles that are based directly on the FCC's ruling: (1) a circuit or facility that includes a mix of UNEs and other services will be ordered and billed under the terms of the applicable

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[51] *Triennial Review Order* at ¶ 582.

[52] *See Triennial Review Order* at ¶ 582 and n.1793.

[53] *Id.* at ¶ 582.

[54] *Id.*

Qwest tariff or the resale provisions of the Proposed Interconnection Agreement; (2) mixed-use circuits or facilities will not be ordered or billed as UNEs; (3) Qwest is not required to bill for mixed-use circuits or facilities at blended or multiple rates; and (4) if a multiplexer is included in the commingled circuit, it will be ordered and billed at the UNE rate (instead of a tariff rate) only if all the circuits entering the multiplexer are UNEs.

Qwest's language fully and accurately implements both the letter and the intent of the FCC's ratcheting ruling. Specifically, under Qwest's language, it is clear that Qwest will be permitted to assess rates for UNEs commingled with tariffed access services on an element-by-element and a service-by-service basis.

By contrast, Covad's proposed language for ratcheting, set forth in Section 9.1.1.4 and four additional sub-sections, does not accurately reflect the FCC's ruling. It addresses issues that go beyond ratcheting and, as a result, is unnecessarily complex and ambiguous. The unnecessary complexity of Covad's proposed language apparently arises from Covad's concern that when a UNE is commingled with a wholesale service or facility, Qwest will charge a wholesale tariffed rate for the entire commingled circuit, not for just the mixed-use portion of the circuit. Its concern is unfounded, since Qwest's language in Section 9.1.1.4 clearly provides that UNEs connected to mixed-use circuits will be charged based on the TELRIC rates listed in Appendix A of the Proposed Interconnection Agreement. There is, therefore, no need for Covad's detailed, complex language that apparently is intended to ensure that these UNEs are charged at TELRIC rates. The parties agree that TELRIC rates apply to these UNEs, and Qwest's straightforward language properly reflects that agreement.

Issue 5: Collocation Space Provisioning (Sections 8.1.1.3 and 8.3.1.9).

Issue 5 relates to Covad's proposal to include the following provision in Section 8.1.1.3, Cageless Physical Collocation: "Qwest shall provide such space in an efficient manner that minimizes the time and costs."

Qwest opposes Covad's proposed language because it is vague, ambiguous, and unreasonable. The language does not define "efficient" or identify the party's whose time and costs are to be minimized. Further, it does not state whether both the "time and costs" to be minimized should be evaluated from a single party's perspective. For example, it is not clear how Qwest should provision space if the quickest or cheapest alternative for Qwest would require Covad to invest more time or money. Even if only one party's time and costs are considered, Covad's proposal provides no guidance regarding how Qwest should provision space if the less expensive option would take more time -- or the costliest would be quicker. The collocation configuration that is most efficient from Covad's perspective may not be efficient from Qwest's perspective or, for that matter, other CLECs' perspectives. Indeed, read literally, Covad's proposed language could require Qwest to provision in a way that minimizes Covad's time and costs at the expense of Qwest and all other collocating CLECs.

These issues become infinitely more complex when considered in the context in which Covad offered the proposal: Covad wants Qwest to provision collocation space in such a way that Covad's access to other CLECs is more efficient. And if the Commission were to adopt Covad's proposal and one or more CLECs opt in to the language, it literally will be impossible for Qwest to minimize every party's time and costs. If collocation space were available near CLEC A, for example, and both CLEC B and CLEC C desired to be as near to

CLEC A as possible, Covad's proposal would impose conflicting duties on Qwest to mediate irreconcilable interests.

Qwest's existing processes already accommodate CLEC requests in a reasonable manner. Qwest's space planning processes are designed to take into consideration a variety of CLEC concerns. Qwest requests from each CLEC a forecast of its potential growth, based on its own business model, and considers that information when space is requested. Qwest also provides to CLECs maps and other detailed information regarding occupied and available space for consideration in making their collocation requests. Collocation space is offered on a first-come, first-served basis. Space is not planned in pre-defined sections on each floor because the amount of space varies per request. To the extent possible, Qwest will make contiguous space available when a CLEC requests an expansion of existing collocation space. When adjoining space is not available, Qwest will engineer a route, if feasible, for a CLEC to provide facilities between its non-adjoining collocation spaces. In addition, Qwest maintains, for 24 months, records specifying the date on which physical space becomes unavailable at any Qwest premises and the circumstance causing the exhaust. These processes reasonably and adequately address Covad's concerns.

Issue 6: Regeneration Requirements (Sections 8.2.1.23.1.4, 8.3.1.9, and 9.1.10).

Issue 6 involves Covad's proposal to require Qwest to provide channel regeneration for CLEC-to-CLEC connections.

Qwest's proposed language on this issue, which reflects Qwest's current policy, provides that Qwest will provide regeneration without charge between Covad's collocation

space and Qwest's network. Qwest has no obligation to manage or facilitate Covad's access to or interface with the networks of third party CLECs.

This issue is closely related to Issue 5. Covad's rationale for its proposed language regarding regeneration is based on an extension of its claim with regard to Issue 5 that Qwest should maximize Covad's efficiencies in assigning collocation space. Covad claims that, because Qwest is in a position to maximize efficiencies for Covad's CLEC-to-CLEC connections, Qwest should provide regeneration free of charge if it is required for such connections because, Covad reasons, regeneration would only be required if Qwest has failed to maximize Covad's efficiencies. This argument fails because it is based on the fundamentally unreasonable notion that Qwest should have the obligation to maximize efficiencies for the benefit of Covad and to the detriment of Qwest and other collocating CLECs. Because Covad's regeneration proposal is squarely based on this flawed foundation, its regeneration proposal is also unreasonable and should be rejected.

Issue 7: Augment Request Fee for Collocation Cable Augments (Section 8.3.1.3[55] and 8.3.1.3.1).

Issue 7 relates to the augment request fee for collocation cable augments. The parties continued to negotiate regarding these sections of the agreement after Covad filed its Petition and have resolved their disputes on this issue, leaving no unresolved issues regarding those sections for determination by the Commission. If Covad raises any disputes relating to this issue in this proceeding, Qwest reserves the right to respond to such issues.

[55] Section 8.3.1.3 was mistakenly included in Covad's Petition. The parties have no dispute regarding that section of the agreement.

Issue 8: Single LSR (Sections 9.21.1, 9.21.4.1.6, and 9.24.1).

This issue relates to the timing of a system change that will allow orders for the unbundled network element platform ("UNE-P") with line splitting or unbundled loop with loop splitting to be submitted on a single local service request ("LSR").

In Sections 9.21.1 and 9.21.4.1.6, Covad seeks to include language stating that orders for UNE-P with line splitting may be submitted on a single LSR. In Section 9.24.1, Covad adds the same language that orders for unbundled loop with loop splitting may be submitted on a single LSR.

Qwest has submitted Change Requests ("CRs") in Qwest's Change Management Process ("CMP") to establish the capability to order UNE-P and line splitting or unbundled loop and loop splitting on a single LSR, and CLECs have given these CRs a high priority. Indeed, Qwest has already implemented single LSR ordering for new connections in IMA Release 15.0, which was deployed on April 19, 2004. Single LSR ordering for product conversions is scheduled in IMA Release 16.0, to be implemented in October 2004. Accordingly, much of this dispute is moot by the system changes that are already in place and the remainder of this dispute will be moot with the implementation of the system changes now in progress. Because, however, single LSR ordering does not currently exist for conversions, language regarding the ability to submit line splitting and loop splitting requests on a single LSR must include a qualifier that single LSR ordering will be permitted once the functionality is made available in IMA. Covad's absolutist language is only acceptable if it is qualified with the phrase "when that capability becomes available through an IMA release."

Covad, however, refuses to agree to this qualification necessary to make the language accurate.

Covad argues that an IMA change is not necessary to implement single LSR processing because Covad now claims that single LSR processing can be done manually. Covad ignores, however, the fact that such a manual process would have to go through CMP, that no CLEC, including Covad, has requested that CMP consider such a process change, and that the IMA Release 16.0 is on track to provide Covad with the capability it requests.

Finally, Covad is simply wrong in suggesting that its proposal seeks parity with Qwest's retail operations. There is no retail equivalent to line splitting or loop splitting, which involves two carriers providing service to an end-user -- one for the voice and one for the data -- neither of which is Qwest. Because there is no retail equivalent for this wholesale service, the concept of parity does not apply.

Issue 9: Reciprocal Application of Maintenance Charges (Sections 4.0 (Definition of "Maintenance of Service Charge"), 9.2.2.9.11, 9.2.5.2.1,[56] 12.3.4.2, 12.3.4.3, and 12.3.6.5; and Charges Assessed by the Parties (Sections 9.4.4.4.1, 9.4.4.4.2, 9.4.6.3.1, 9.4.6.3.3, 9.21.3.3.1, 9.21.6.3.3, and 9.24.3.3.1).

This issue relates to Covad's desire to insert language in several sections of the agreement that would allow Covad to charge Qwest maintenance of service ("MOS") charges and trouble isolation ("TIC") charges. Covad claims that it should be able to charge Qwest a TIC and MOS charge under the same conditions Qwest charges Covad.

[56] Section 9.2.5.2.1 was mistakenly included in the Petition. The parties have resolved their disputes regarding this section, leaving no unresolved issues relating to that section of the agreement for determination by the Commission. If Covad raises any disputes relating to this in this proceeding, Qwest reserves the right to respond to such issues.

Qwest's proposed language is tailored to directly address the situation Covad describes in its Petition, *i.e.*, where the same trouble recurs in Qwest's network on a line for which Covad previously submitted a trouble report and Qwest previously isolated the trouble to Covad's network. Under Qwest's proposal, Covad may bill Qwest a TIC or MOS charge under the following circumstances. First, before Covad can bill Qwest, Qwest must have first billed Covad for the initial dispatch of a Qwest technician. This provides for the reciprocal treatment Covad seeks. Second, the repeat trouble must be the same trouble as the initial trouble. This provision simply appropriately limits application of these provisions to repeat troubles that actually are the same as the initial trouble. Third, the repeat trouble must be reported within 3 days of the initial trouble ticket closure. This requirement provides Covad with the flexibility to respond to trouble that was reported by a customer over a weekend while still promptly addressing valid Repeat Troubles. Fourth, the repeat trouble must be found in the Qwest network. Fifth, Covad must provide test results on initial and Repeat Trouble that indicate there is trouble in Qwest's network. This requirement helps both companies understand the nature of the trouble. Finally, Covad must provide Qwest with evidence that Covad has actually dispatched and is appropriately billing Qwest for such dispatches. Thus, Qwest's proposed language clearly sets forth the specific circumstance and conditions under which Covad may bill Qwest for TIC and MOS.

Covad's proposal, on the other hand, is ambiguous and is not tailored to provide Covad with the reciprocal opportunity to charge Qwest that Covad claims to want. Instead, Covad's language allows Covad additional opportunities to charge Qwest where Qwest does not charge Covad. For example, Covad's language would allow Covad to charge Qwest a

TIC or MOS for performing remote testing without dispatching a technician. Qwest does not charge Covad for such remote testing. Without clearer and more concise language regarding the circumstances under which Covad can charge a TIC or MOS, Covad's proposed language would allow Covad to bill Qwest for using any means to initially isolate trouble other than dispatching a technician. That ability far exceeds Qwest's more limited ability to bill Covad only for dispatches where Covad has requested Qwest to dispatch a technician for trouble isolation. Permitting Covad to charge Qwest under these conditions would result in additional and unnecessary billing disputes between the parties.

Issue 10: Payment and Billing Issues (Sections 5.4.1, 5.4.2, 5.4.3, and 5.4.5).

This issue includes four primary payment and billing issues relating to the following: the due date for billed amounts, the time at which a party may discontinue processing orders due to the other party's failure to make full payment, the time at which a party may disconnect service due to the other party's failure to make full payment, and the relevant time period for determining whether a payment is late for purposes of defining "repeatedly delinquent." At the core of the parties' dispute is Covad's desire to extend the due dates for amounts payable and to extend the time when Qwest may discontinue taking orders or may disconnect services. Covad's proposed extended times are at odds with the consensus that was reached during the 271 process, at odds with commercially-reasonable practices, and would improperly require Qwest to continue to provide services to Covad for extended periods even though Covad does not dispute the amount owed. Covad's allegations that it needs more time to analyze and process Qwest's bills because of alleged deficiencies in these bills are belied by the fact that Covad has had years of experience with Qwest's bills and has had ample

opportunity to raise any specific concerns about its ability to efficiently analyze and process these bills within the time frame allotted for payment of them. Each of these billing issues is discussed below.

Due Date for Billed Amounts. Qwest proposes that amounts payable under the contract be due within 30 days from the date of the invoice.[57] This 30-day period, which is in numerous interconnection agreements between Qwest and CLECs and which is in all of Qwest's SGATs, balances a CLEC's need for sufficient time to analyze monthly bills with Qwest's right to timely compensation for services rendered. The 30-day due date is the industry standard and, because Qwest offers its bills in a variety of electronic formats that are readily searchable, that period provides a reasonable amount of time for CLECs to review their bills. Indeed, the parties' existing agreement – under which the parties have been operating since 1999 – provides that payments are due within 30 days from the invoice date. During the Section 271 workshops, in which Covad actively participated, the issue of allowing CLECs appropriate time to analyze monthly bills was discussed at length. Ultimately, all payment issues were resolved in a manner satisfactory to CLECs and the resulting Utah SGAT language specifies that amounts payable are due within 30 days from the invoice date.[58]

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[57] Section 5.4.1 actually allows CLECs a minimum of 30 days from the date of the invoice. That period could be extended if the CLEC receives the bill later than the 10th day after the invoice date, in which case the CLEC must pay the invoice within 20 days after receiving it. Section 5.4.1 states as follows: "Amounts payable under this Agreement are due and payable within thirty (30) calendar Days after the date of invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later (payment due date)."

[58] The relevant sentence in Section 5.4.1 of the Utah SGAT, which is identical to the relevant sentence in Qwest's proposal for Section 5.4.1 of the Covad agreement, provides as follows: "Amounts payable under this Agreement are due and payable within thirty (30) calendar Days after

Timing for Discontinuing Orders. Qwest is entitled to timely payment for services rendered and to take remedial action if the risk of nonpayment is apparent. Although the language in section 5.4.2 is written as if it applies to either party, in practice, it applies only to Qwest because Qwest is the only party that is processing orders under the agreement. Therefore, this section only restricts Qwest's ability to discontinue processing Covad's orders if Covad fails to pay. Qwest's proposal provides Covad with 30 days before the billed amount is due and another 30 days before Qwest would discontinue processing orders if Covad failed to pay. Further, section 5.4.4 sets forth a dispute resolution process that Covad may invoke if it has a good faith dispute about its bill. Under this process, Covad is not required to pay disputed amounts until the dispute is resolved. Taken together, Covad's proposals would prevent Qwest from taking action in cases of non-payment until 135 days after Qwest provided the service because Covad seeks 45 days until payment is due plus an additional 90 days before Qwest could stop processing orders. Allowing Covad to continue to incur debt for months before Qwest can take appropriate action to protect itself is unreasonable. Again, during the Section 271 workshops in which Covad actively participated, this issue was discussed at length. Ultimately the issue was resolved to the satisfaction of CLECs, resulting in Utah SGAT language specifying the 30 day period Qwest proposes here.[59]

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the date of invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later (payment Due Date)."

[59] The relevant sentence in Section 5.4.2 of the Utah SGAT, which is identical to the relevant sentence in Qwest's proposal for Section 5.4.2 of the Covad agreement, provides as follows: "One Party may discontinue processing orders for the failure of the other Party to make full payment for the relevant services, less any disputed amount as provided for in Section 5.4.4 of this Agreement,

Timing for Disconnecting Services. This issue is related to the timing for discontinuing orders. As with Section 5.4.2, discussed above, although the language in Section 5.4.3 is written as if it applies to either party, in practice it applies only to Qwest because Qwest is the only party that is providing services under the agreement. Therefore, this section only restricts Qwest's ability to disconnect service if Covad fails to pay. Again, Qwest is entitled to timely payment for services rendered and to take remedial action if risk of nonpayment is apparent. Qwest's proposal provides Covad with 30 days before the billed amount is due and another 60 days before Qwest would disconnect service for nonpayment. If Covad disputes its bill in good faith, it can invoke the dispute resolution process in Section 5.4.4, which provides that Covad is not required to pay disputed amounts until the dispute is resolved. Taken together, Covad's proposals would prevent Qwest from taking action in cases of non-payment until 165 days after service was provided because Covad seeks 45 days until payment is due plus an additional 120 days before Qwest could disconnect service. Allowing Covad to continue to incur debt for months before Qwest can take appropriate action to protect itself is unreasonable. Again, this issue was discussed at length during the Section 271 workshops in which Covad actively participated. The issue was resolved to CLECs' satisfaction with the same Utah SGAT language that Qwest proposes here.[60]

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for the relevant services provided under this Agreement within thirty (30) calendar Days following the payment Due Date."

[60] The relevant sentence in Section 5.4.3 of the Utah SGAT, which is identical to the relevant sentence in Qwest's proposal for Section 5.4.3 of the Covad agreement, provides as follows: "The Billing Party may disconnect any and all relevant services for failure by the billed Party to make full payment, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the relevant services provided under this Agreement within sixty (60) calendar Days following the payment Due Date."

"Repeatedly Delinquent." Under Section 5.4.5 of the Proposed Interconnection Agreement, a party that is "repeatedly delinquent" in making payments may be required to submit a deposit before orders will be provisioned and completed, or reconnected. Consistent with its 30 day due date proposal in Section 5.4.2, Qwest's proposal for this section provides that "repeatedly delinquent" means "any payment received 30 calendar Days or more after the payment due date, three (3) or more times during a twelve (12) month period." Qwest's proposal is reasonable and is identical to the "repeatedly delinquent" definition in the Utah SGAT, which was reviewed and approved in the Section 271 workshops.[61]

V. PROPOSED TERMS AND CONDITIONS

The terms and conditions Qwest recommends are contained in the contract language set forth in the Proposed Interconnection Agreement, as updated throughout this proceeding.

VI. INFORMATION TO BE PROVIDED BY THE OTHER PARTY

Covad has provided its positions in the Petition on all unresolved issues.

VII. PROPOSED SCHEDULE FOR IMPLEMENTING THE TERMS AND CONDITIONS IMPOSED IN THE ARBITRATION

Qwest recommends that upon resolution of the disputes set forth in the Petition and this response, the Commission direct Covad and Qwest to finalize the Proposed

[61] The relevant sentence in Section 5.4.5 of the Utah SGAT, which is identical to the relevant sentence in Qwest's proposal for Section 5.4.5 of the Covad agreement, provides as follows: "'Repeatedly delinquent' means any payment received thirty (30) calendar Days or more after the payment Due Date, three (3) or more times during a twelve (12) month period."

Interconnection Agreement to conform to the Commission's order and file it within 30 days of issuance of the order.

VIII. PROPOSED AGREEMENT

Qwest respectfully requests that the Commission adopt all of Qwest's proposed contract language in the Proposed Interconnection Agreement attached as Exhibit A to Covad's Petition.

IX. DOCUMENTATION RELEVANT TO THE DISPUTE

Covad has appended the Proposed Interconnection Agreement to its Petition. As described above, this document captures the agreed-upon agreement language and the disputed language that is before the Commission for resolution. Additional documentation relevant to Qwest's positions concerning the disputed issues will be provided by Qwest in accordance with the prehearing orders and Commission rules governing this arbitration proceeding.

X. PROCEDURAL RECOMMENDATIONS

Qwest believes that the procedures adopted herein should err on the side of creating a full and complete fact record with due opportunity for Qwest to review, investigate and respond to claims. Accordingly, Qwest opposes Covad's requested procedure for submission of testimony in this proceeding, which calls for Covad to submit direct and rebuttal testimony and allows Qwest to submit only response testimony. Qwest proposes that both parties be afforded the same opportunity to submit testimony in this proceeding, for example, by simultaneously submitting direct and rebuttal testimony. As detailed in Qwest's Motion to

Dismiss, Qwest requests that portions of the issues Covad has submitted for arbitration be dismissed or, alternatively, that summary judgment be granted as to those portions.

XI. REQUEST FOR A PROTECTIVE ORDER

Qwest believes that a protective order is appropriate to protect any confidential and/or trade secret information that may be exchanged. Qwest has filed a motion for a standard protective order in this matter

XII. LIST OF WITNESSES AND EXHIBITS

Qwest's proposed witnesses and the substantive areas of their testimony are set forth below. Each Qwest witness will provide written, prefiled testimony, including exhibits, and any additional testimony permitted, including exhibits. Qwest reserves the right to amend its proposed witness and exhibit lists.

1. Michael Norman -- Retirement of Copper Facilities, Collocation Space Provisioning, Regeneration Requirements, Reciprocal Application of Maintenance Charges, Charges Assessed by the Parties;
2. Margaret Bumgarner -- Retirement of Copper Facilities;
3. Karen Stewart -- Unified Agreement/Defining Unbundled Network Elements, Unified Agreement - Section 271 Elements Included, Commingling, Ratcheting, Pricing, Single LSR;
4. Bill Easton -- Payment and Billing Issues; and
5. Renee Albersheim -- Single LSR.

CONCLUSION AND REQUEST FOR RELIEF

The Commission should enter an order adopting Qwest's proposed language on all disputed issues.

DATED: May 24, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing RESPONSE OF QWEST CORPORATION TO COVAD'S PETITION FOR ARBITRATION was mailed by U.S. Mail, postage prepaid, and electronically mailed to the following on this 24th day of May, 2004:

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