BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION OF COVAD COMMUNICATIONS COMPANY FOR ARBITRATION TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	)))))))	WUTC Docket No. UT-043045

COVAD COMMUNICATIONS COMPANY'S POST-HEARING BRIEF

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Introduction

After hundreds of hours of negotiation and a nearly completed formal arbitration proceeding, Covad Communications Company ("Covad") and Qwest Corporation ("Qwest") (collectively, the "Parties") have narrowed the issues in this docket to six. After the scheduled hearing in this docket, the Parties agreed to language resolving Issue 4 (efficient collocation) in its entirety, as well as language resolving the Parties' disputes regarding Sections 9.1.1.4 and 9.1.1.4.1 (rate ratcheting - a sub-issue contained within Issue 3),[1] Section 9.1.1.5 (EEL service eligibility criteria – a sub-issue contained within Issue 3), and Section 5.4.5 (repeatedly delinquent – a sub-issue contained within Issue 8). The remaining contested issues are discussed below.

Issue 1 involves Qwest's commitments to maintain wholesale service to Covad in the event that copper plant serving Covad and its customers is retired by Qwest. Covad does not believe the Federal Communication Commission's ("FCC") rules permit Qwest to retire copper plant in cases where that retirement denies access to xDSL capable loops for which Qwest continues to have unbundling obligations under both state and federal law. Covad has proposed an alternative that would allow Qwest to retire such facilities so long as Qwest arranges for an alternative service to be provided to Covad's existing customers at the time of the retirement. This solution would allow Qwest to avoid maintaining copper facilities if it chooses, while allowing Covad to recover the investment it has made in its own next generation facilities and customers.

It is important to note that the FCC made clear distinctions between copper retirement resulting from the deployment of Fiber to the Home (FTTH) loops, and the retirement of copper *feeder* resulting in hybrid (copper and fiber) loops. Covad's proposals address both types of copper retirement, rather than simply reiterating the FCC's new rules related to FTTH loops.

[1] Section 9.1.1.4.2 remains open. Covad's proposed language is supported by its discussion of Issue 3 – Commingling.

This additional language is critical to protecting both Covad and Washington consumers from decreased access to bottleneck facilities when Qwest chooses to create hybrid loops.

Issue 2 encompasses the Parties' disagreement regarding the availability of network elements that may, in the future, no longer be available under the FCC's application of the "necessary" and "impair" standard applicable to Section 251 of the Telecommunications Act of 1996 ("Act"),[2] but are nevertheless available from Regional Bell Operating Companies ("RBOCs" or "BOCs") pursuant to Section 271 of the Act. Covad believes that this Commission has clear authority to apply both state law and all provisions of the Act as it decides interconnection arbitration disputes pursuant to both its state law authority and Section 252. For these reasons, Qwest's argument that the Commission is preempted from enforcing Section 271 obligations should be rejected.

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

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

[2] Pub. L. 104-104, 110 Stat. 56 (1996).

[3] See Section 9.1.1 of the Agreement, as well as the Agreement's definition of "Applicable Law" contained in Section 4.

Issue 5 involves the Parties' disagreement over Qwest's obligation to provide regeneration between CLEC-to-CLEC cross connections ordered by FCC rule. Covad believes Qwest should maintain a consistent regeneration policy as to both its ILEC-to-CLEC and CLEC-to-CLEC arrangements, and is certainly not permitted to refuse to provide a CLEC-to-CLEC connection solely because that connection requires regeneration.

With respect to Issue 6, Covad has proposed language obligating Qwest to provision line splitting transfer orders on a single LSR. Qwest has acknowledged the need for this improvement to its systems, but has been relatively noncommittal about implementation of this capability. Covad seeks language that forces Qwest to offer the capability to Covad, whether it chooses to further delay upgrades to its OSS systems or not.

Issue 8 involves the length of the period within which Covad may review Qwest's wholesale invoices prior to payment, and the timing of Qwest's remedies for non-payment. Covad has established a substantial record in this proceeding regarding the deficiencies of Qwest's bills, which slow the review and analysis of the invoices. As a result of the current deficiencies of Qwest's bills, Covad requires additional time to adequately review the invoices. With respect to Qwest's remedies for non-payment, Covad has no objections to the remedies themselves, but believes there are legitimate reasons to extend the timing of those remedies. Because the remedies have a potential to irreversibly damage Covad's business, the modest extensions of time Covad has suggested will allow Qwest to maintain the remedies to which it is entitled while affording Covad sufficient time to either resolve payment issues with Qwest or seek appropriate relief from this Commission if necessary.

Argument

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

The Parties' disagreement with respect to Issue 1 centers on the scope of Qwest's ability, under both FCC rules and this Commission's rules, to retire copper plant even when it is used to serve Covad's xDSL customers. Qwest believes its ability to retire copper plant is unlimited, and that it must merely provide notice to the FCC of such retirement ninety days prior to implementation. Covad has noted that, in addition to being bad policy, allowing Qwest to effectively disconnect Covad's DSL customers when it retires copper plant violates this Commission's rules promulgated under Washington law, and is, in any event, inconsistent with the FCC's *Triennial Review Order*.[4] It is critical that this Commission not allow Qwest to over-read the FCC's new copper retirement rule. Allowing Qwest to deny access to competitive LECs when Qwest chooses to replace copper feeder with fiber (rather than deploy FTTH loops) will not further the goal of broadband deployment, and would provide Qwest a blueprint to re-establish a monopoly for broadband services, in direct conflict with the Washington legislature's stated goal of promoting diversity of telecommunications providers and services.

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

Qwest has correctly pointed out that the FCC has adopted a streamlined notification process for the retirement of copper loops when those loops are replaced with fiber to the home (FTTH) loops. However, Qwest has conveniently ignored the FCC's stated pre-condition for the

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

right of an ILEC to retire copper, that any such retirement must not deny competitors access to loop facilities:

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

Triennial Review Order, ¶ 282.

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

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

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

Triennial Review Order, ¶ 283.

This is perhaps the most significant statement the FCC makes about copper retirement in the *Triennial Review Order*. By specifically recognizing that competitors may object to even a long-term notification of copper retirement, they clarify that, unlike other network modifications,

a competitor can prevent the retirement altogether if their objection is upheld. In all other cases of network modification, CLECs only have the ability to request more time to prepare for the change, i.e., to request that a short-term notification be converted to a long-term notification.

The FCC's intent to protect xDSL capable loops in particular becomes clearer when read alongside the FCC's requirements for narrowband access to fiber loops. Because the FCC had already alleviated any concern regarding narrowband services by establishing specific access requirements for the provision of narrowband services by CLECs over newly deployed fiber loops,[5] the FCC could only have been referring to broadband services, including xDSL capable loops, when it discussed the "denial of access to loop facilities required under our rules."

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

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

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

Triennial Review Order, ¶ 284.

This Commission, at the direction of the Legislature, promulgated rules requiring the unbundling of incumbent LEC facilities, implementing the Legislature's stated policies to:

> (1) Preserve affordable universal telecommunications service;
>
> (2) Maintain and advance the efficiency and availability of telecommunications service;
>
> (3) Ensure that customers pay only reasonable charges for telecommunications service; [and]

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

* * *

> (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state. . . .

RCW 80.36.300.

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

This Commission has the requisite authority to continue these pro-competitive policies by preserving non-discriminatory access to loop facilities. *See* Fourth Supplemental Order Rejecting Tariff Filing and Ordering Refilings; Granting Complaints, In Part ("Interconnection Order"), *WUTC v. U S West Communications, Inc.*, WUTC Docket No. UT-94164, *et al.* at 15 and 51 ("Interconnection Case") (Oct. 30, 1995). In discussing its authority to require the unbundling of loop facilities under its authority granted by Washington statute, the Commission stated:

> The record clearly establishes that unbundling of the local loop is essential to the rapid geographic dispersion of competitive benefits to consumers and is in the public interest. Unbundling allows customers greater opportunity to choose between a diversity of products, services, and companies. Unbundling also allows for the efficient use of the public switched network, reduces the likelihood of inefficient network over-building, and ensures that competition is not held hostage by being bundled with bottleneck functions…
>
> Unbundling also holds the prospect of speeding the delivery of advanced network services such as ISDN (integrated services digital network) to customers who are not yet located along an ALEC's network…
>
> This Commission is charged by statute to determine adequate and <u>efficient</u> practices to be observed by telecommunications

> companies, and to correct practices that tend to stifle competition, RCW 80.04.110.

Id. at 56-57 [emphasis in original].

The Commission should continue to use this plenary authority, granted by state statute, to further the statutory goals cited above. Providing continued access to loop facilities, notwithstanding retirement of legacy plant, is completely consistent with these goals and prior Commission decisions.

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

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

Covad spent millions of dollars deploying its DSL network in Washington.[6] This network is designed, in part, to transform Qwest's legacy last-mile copper facilities into a vital component of Covad's high-speed broadband platform. When Qwest deploys FTTH or copper-fiber hybrid loop facilities and retires legacy copper facilities, it has the potential of destroying Covad's investment in its own broadband network, which relies on copper facilities. As Ms. Doberneck stated in her testimony in this proceeding:

> As more and more fiber feeder replaces copper, fewer and fewer potential customers will be in reach of Covad's central office based DSL, which will result in the progressive stranding of Covad's collocated investment.

Exhibit 22-TC at 13.

At the very least, when faced with this impairment of its investment, Covad should maintain access to its current customers, and their service should not be disrupted. Covad's

[6] Exhibit 22-TC at 13 and 16.

investment, and incentive to invest in the future, should not be discounted as a significant component of serving the public interest and fostering the development and advancement of broadband capability and consumer choice in Washington.

D. The Agreement Should Address All Copper Retirement Scenarios, Not Simply Those Covered by the FCC's New Copper Retirement Rule

Covad is not so much concerned with Qwest's replacement of copper loops with FTTH loops, which may fall within the FCC's new copper retirement rules, as it is concerned with the procedures governing the retirement and replacement of copper feeder with fiber feeder.[7] These retirements are driven by maintenance decisions, and do not necessarily lead to improved broadband service to any Washington consumers. As Ms. Doberneck noted in her testimony, the retirement of fiber feeder is often a result of problems maintaining aging copper facilities:

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

Exhibit 22-TC at 7.

Feeder retirements generally do not fall within the FCC's new rule.[8] As a result, Covad has proposed language that would govern such feeder retirements (as well as complete loop retirements), maintaining Covad's access to facilities serving its customers. These proposals are critical, because an absence of language addressing feeder retirement will provide Qwest a path to driving competitors from its network. If Qwest can deny access to loops simply because it

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

[8] *Triennial Review Order*, ¶ 283, n. 829.

chooses to replace facilities that are damaged or are causing maintenance issues, it is only a matter of time before the entire Public Switched Telephone Network (PSTN) is again closed to broadband competition, frustrating the Commission's statutory mandates and the public interest.

ISSUE 2 – UNIFIED AGREEMENT – 271 ELEMENTS INCLUDED

(Section 4 Definitions of "Unbundled Network Element" and "251(c)(3) UNE"; Sections 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, and 9.21.2)

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

Qwest's proposals with respect to the sections listed above demonstrate its desire to remove network elements provided pursuant to Section 271 of the Act from the Agreement. Covad, on the other hand, proposes that Qwest's obligations pursuant to Section 271 be memorialized in the Agreement, because there is no basis to treat Qwest's Section 271 obligations any differently than either Party's other obligations under the Act. For this reason, the Parties' Agreement is the appropriate document to establish these obligations, and this Commission has clear authority to arbitrate disputes that arise with respect to these obligations.

Furthermore, Covad believes that Qwest should continue to be obligated under Washington law to provide unbundled access to network elements and that to avoid

discrimination in violation of RCW 80.36.186, *inter alia*, the pricing methodology for such access should be set and total element long-run incremental cost ("TELRIC") as further described below.

A. Section 271

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

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

Triennial Review Order, ¶ 653.

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

Triennial Review Order, ¶ 655.

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under Section 251 for *ILECs*, as an RBOC Qwest retains an independent statutory obligation under Section 271 of the Act to provide competitors with unbundled access to the network elements listed in the Section 271 checklist.[9] Moreover, there is no question that these obligations include the provision of unbundled access to loops and dedicated transport under checklist item #4:

[9] *See* 47 U.S.C. § 271(c)(2)(B).

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

Triennial Review Order, ¶ *654.* [emphasis added]

Qwest does not attack this premise directly, but instead argues that this Commission does not have the authority to order the adoption of terms in an interconnection agreement that address compliance with Section 271. This position ignores the requirements of Section 271, as well as common sense. Recently, the Maine Public Utilities Commission rejected this argument and found that:

> …[S]tate commissions have the authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct. Section 271(c)(2)(A)(ii) requires that ILECs provide access and interconnection which meet the requirements of the 271 competitive checklist, i.e. includes the ILEC's 271 unbundling obligations. Thus, state commissions have the authority to arbitrate section 271 pricing in the context of section 252 arbitrations.

Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Order – Part II (September 3, 2004) ("Maine 271 Unbundling Order").

In addition, the Commission has independent authority to enforce these Section 271 BOC obligations. Specifically, Washington law vests the Commission with broad authority to regulate the services and practices of Qwest. For example, RCW 80.36.140 provides, in relevant part:

> Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telecommunications company are unjust or unreasonable, or that the equipment, facilities or service of any telecommunications company is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and service to be

> thereafter installed, observed and used, and fix the same by order or rule as provided in this title.

This authority encompasses the power to ensure that Qwest fulfills its statutory unbundling duties under Section 271, as the Commission made clear when it ordered unbundling well before passage of the Federal Telecommunications Act. The Washington Commission brushed aside U S West's and GTE's arguments that it lacked the authority to order unbundling of their services beyond that voluntarily offered by ILECs, stating:

> The Commission has carefully and thoroughly considered the incumbent LECs' arguments that we lack authority to order any interconnection terms or conditions other than those they are offering. We believe that the incumbent LECs' interpretation of the Commission's authority, and USWC's interpretation in particular, are unreasonably restrictive. The Commission has broad authority to regulate the rates, services, facilities, and practices of telecommunications companies in the public interest. *See, POWER v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 808, 711 P.2d 319 (1985); *State ex rel. American Telechronometer Co. v. Baker*, 164 Wash. 483, 491-96, 2 P.2d 1099 (1931); *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*, 85 Wash. 29, 36, 147 P. 885 (1915).
>
> . . .
>
> The first paragraph of RCW 80.36.140 (quoted in the Commission Jurisdiction section of this order) gives the Commission broad authority over rates. The second paragraph, quoted above, gives the Commission broad authority over practices and services as well. The way in which services are offered, on a bundled or unbundled basis, certainly falls within the scope of the second paragraph. *See, e.g., State ex rel. American Telechronometer Co. v. Baker*, 164 Wash. 483, 491-96, 2 P.2d 1099 (1931) (citing earlier version of above quoted provision); *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*, 85 Wash. 29, 36, 147 P. 885 (1915)(describing Commission's power to regulate public utilities as "plenary").

Interconnection Case, at 15 and 51.

Furthermore, there can be no argument that the Commission's enforcement of Qwest's Section 271 checklist obligations would substantially prevent the implementation of any provision of the Act. Indeed, where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *De Canas v. Bica*, 424 U.S. 351, 356, 96 S. Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers*, 373 U.S. at 142, 83 S. Ct. at 1217). The Act, however, hardly evinces an unmistakable indication of Congressional intent to preclude state enforcement of federal 271 obligations. Far from doing so, the Act expressly preserves a state role in the review of a RBOC's compliance with its Section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a RBOC's Section 271 compliance.[10]

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

> Furthermore, we are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.

Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, Memorandum

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

Opinion and Order, 16 FCC Rcd 6237, 6241-42, ¶¶ 7-10 (2001) ("Oklahoma/Kansas 271 Order").

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

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions…the FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in [section] 252(d) [of the Act]. It is the states that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.

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

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

unbundled under Section 251, but does not *require* TELRIC pricing." *Triennial Review Order*, ¶ 659 (emphasis added).

Washington has repeatedly embraced TELRIC and its equivalent, TSLRIC, as the appropriate cost methodology for non-competitive services. For example, in the first generic cost docket, the Commission stated that "We agree that [TELRIC] is the correct costing standard." Eighth Supplemental Order, *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket No. UT-960369 ¶ 38 (April 16, 1998). Later, the Commission adopted UNE prices based on TELRIC costs plus a "reasonable allocation of forward-looking common costs." *Id.*, 17th Supplemental Order, ¶ 41 (Sept. 23, 1999). The Commission made it clear--at a time when the validity of the FCC's rules requiring TELRIC pricing were in question--that the WUTC had independent authority to implement TELRIC pricing under state law. *Id.*, Eighth Supplemental Order, Note 4.[11]

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

[11] While this proceeding implements the 1996 Act, the Commission also acts under authority of Title 80 RCW and Title 480 WAC. *See Interconnection Case* cited above.

telecommunications services regulated under Sections 201 and 202 of the Act – services which are not subject to the pricing standards in Section 252(d)(1) of the Act. *See, e.g., Access Charge Reform,* CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962, 12984, ¶ 57 (2000).

Furthermore, the FCC does not preclude the use of forward-looking, long-run incremental cost methodologies *other than TELRIC* to establish the prices for access to Section 271 checklist items. As the FCC made clear when it adopted the TELRIC pricing methodology in its *Local Competition Order,* there are various methodologies for the determination of forward-looking, long-run incremental cost. *Local Competition Order,* FCC 96-325, ¶ 631. TELRIC describes only one variant, established by the FCC for setting UNE prices under Section 252(d)(1), derived from a family of cost methodologies consistent with forward-looking, long-run incremental cost principles. *See Local Competition Order,* FCC 96-325, at ¶¶ 683-685 (defining "three general approaches" to setting forward-looking costs). Thus, the FCC's *Triennial Review Order* does not preclude the use of a forward-looking, long-run incremental cost standard *other than TELRIC* in establishing prices consistent with Sections 201 and 202 of the Act.[12]

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

[12] For example, where the 271 checklist item for which rates are being established is not legacy loop plant but next-generation loop plant, incumbents might argue for the use of a forward-looking, long-run incremental cost methodology based on their *current network technologies* – in other words, a non-TELRIC but nonetheless forward-looking, long-run incremental cost methodology. *See, e.g., Local Competition Order,* FCC 96-325, ¶ 684.

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

Maine 271 Unbundling Order.

B. State Law Unbundling Authority

This Commission has the requisite authority to require access to loops, including high capacity loops, line splitting arrangements, and subloop arrangements, as well as dedicated transport, under its independent, state law authority, as the Commission made clear in the Interconnection Case, *supra*. In the context of Washington's policy declarations promoting "efficiency, availability, diversity, universal service and reasonable charges,"[13] Qwest's continued provision of UNEs should be found to be "just, reasonable, proper, adequate and efficient" "rules, regulations, practices" under RCW 80.36.140.

This Commission very clearly established state law authority for the unbundling of incumbent LEC facilities in the *Interconnection Case*. In fact, the *Interconnection Case* was decided prior to enactment of the Telecommunications Act of 1996, and in response to a Washington state court case finding that the Commission was justified in acting more forcefully to encourage the diversity of telecommunications service and providers by authorizing

[13] See RCW 80.36.300.

competition within local exchanges in Washington. *In re Electric Lightwave,* 869 P.2d 1045 (1994). In affirming the lower court's ruling, the Supreme Court of Washington stated:

> RCW 80.36.300(5) notes it is the state's policy to "[p]romote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state." Recognizing an implicit authority to grant monopolies would frustrate the express legislative goal of ensuring diversity.

Id. at 1050.

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

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

Triennial Review Order, ¶ 191.

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

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

Triennial Review Order, ¶ 192.

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

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

Triennial Review Order, ¶¶ *192, 194.*

Notably, in reaching these conclusions, the FCC was simply restating existing, well-known precedents governing the law of preemption. Specifically, the long-standing doctrine of federal conflict preemption provides for exactly the limited sort of federal preemption acknowledged by the FCC's *Triennial Review Order*. Courts have long held that state laws are preempted to the extent that they actually conflict with federal law. As noted by the FCC's *Triennial Review Order*, such conflict exists where compliance with state law "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Triennial Review Orde*r, ¶ 192 n. 613 (citing *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). Even more notably, in its *Triennial Review Order,* the FCC did not act to preempt any existing state law or regulation inconsistent with the FCC's rules, nor did it act to preclude the adoption of future state laws or regulations governing the access of competitors to ILEC facilities which are inconsistent with the FCC's rules. In fact, following the governing law set out in the Eighth Circuit's *Iowa Utilities Board I* decision, the FCC specifically recognized that state laws or regulations which are inconsistent with the FCC's unbundling rules are <u>not</u> *ipso facto* preempted:

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

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

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

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

Id.

Thus, far from taking any specific action to preempt any state law or regulation governing competitor access to incumbent facilities, the FCC merely acted in the *Triennial Review* to restate the already-existing bounds on state action recognized under existing doctrines of conflict preemption. Furthermore, the FCC's *Triennial Review Order* recognized that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules would be insufficient to create such a conflict. Instead, consistent with existing doctrines of conflict preemption, the FCC recognized that the state laws would have to "substantially prevent implementation" of Section 251 in order to create conflict preemption.

Of course, the FCC's *Triennial Review Order* could not have concluded that all state rules unbundling network elements not required to be unbundled nationally by the FCC create conflict preemption. Had the FCC reached such a conclusion, the FCC would have rendered Section 251(d)(3)'s savings provisions a nullity, never operating to preserve any meaningful

state law authority in any circumstance. Rather than reaching such a conclusion, the FCC created a process for parties to determine whether a "particular state unbundling obligation" requiring the unbundling of network elements not unbundled nationally by FCC rules creates a conflict with federal law. The *Triennial Review Order* invited parties to seek declaratory rulings from the FCC regarding individual state obligations. An invitation to seek declaratory ruling, however, hardly amounts to preemption in itself – it merely creates a process for interested parties to establish in future proceedings before the FCC whether or not a particular state rule conflicts with federal law.

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

Thus, while the FCC's *Triennial Review Order* indicates that under some circumstances the FCC would find conflict preemption for state rules requiring the unbundling of network

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

Notably, the FCC's statements indicating when it is 'likely' to find preemption for particular state rules appear to conflict with a recent Sixth Circuit decision. The Sixth Circuit has stated that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." The court further noted that a state commission is permitted to "enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement" entered into pursuant to Section 252 of the Act, "as long as the regulations do not interfere with the ability of new entrants to obtain services." *See Michigan Bell v. MCIMetro*, 323 F.3d 348, 359 (6th Cir. 2003).

While Covad believes preemption of Washington law mandating unbundling is unlikely, it is also irrelevant. This Commission should exercise its authority as it is delineated by

Washington statute, irrespective of preemption analysis, as the adjudication of the constitutionality of legislative enactments in generally beyond the jurisdiction of administrative agencies. *Johnson, Administrator of Veterans' Affairs, et. al. v. Robison,* 415 U.S. 361, 368; 94 S. Ct. 1160, 1166; 39 L. Ed. 2d 389, 398 (1974); *See Prisk v. Poulsbo*, 46 Wn. App. 793, 799 (1987).

Consistent with the discussion above, Covad has proposed language maintaining access to network elements that may, in the future, no longer be available pursuant to Section 251 of the Act, but must nevertheless remain available pursuant to Section 271 of the Act and Washington law.

ISSUE 3 – COMMINGLING
(Section 4 Definitions of "Commingling" and "251(c)(3) UNE," 9.1.1.1, 9.1.1.4.2,[14] 9.1.1.5 (and subsections))

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

A. The TRO Provides For the Commingling Of 271 Elements with 251(c)(3) UNEs

The FCC defines "commingling" as:

> the connecting, attaching, or otherwise linking of a UNE, or a UNE Combination,[15] to one or more facilities or services that a

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

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

Triennial Review Order, ¶ 579.

Originally, the FCC had specifically identified "elements unbundled pursuant to Section 271" in paragraph 584 of the *Triennial Review Order* in the midst of its discussion of ILECs' resale commingling obligations. Qwest apparently believes that the deletion of this phrase in paragraph 584 by the FCC's Errata to the *Triennial Review Order* somehow modifies the FCC's general statement in paragraph 579, cited above, which was not included in the Errata. Covad believes the more reasonable explanation is that paragraph 584 is dedicated exclusively to a discussion of the ILECs' obligations to commingle 251(c)(3) UNEs with resale services, and the introduction of 271 elements to that discussion was confusing. In fact, the inclusion of 271 elements, without the inclusion of other wholesale services, would have left the implication that such elements were to be treated differently than Section 271 elements. If the FCC had truly intended to exclude Section 271 elements from commingling eligibility as a "facilities or service[] that a requesting carrier has obtained at wholesale from and incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act," it would have modified this language in paragraph 579.

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

> (e) Except as provided in Sec. 51.318 [the high-capacity EEL service eligibility criteria], an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

47 C.F.R. § 51.309(e).

Any element provided pursuant to Section 271 is undoubtedly a "wholesale service" which may, under the FCC's rule, be commingled with "unbundled network elements." In fact,

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

the FCC's use of the terms "an unbundled network element pursuant to Section 251(c)(3) of the Act" as well as the more generic term "unbundled network element,"[16] may create some question as to whether a network element that is not available under Section 251, but nevertheless is provided under Section 271 or state law, is in fact an "unbundled network element" according to the FCC. Covad's language does not go that far. For now, Covad is content with this Commission's recognition that a Section 271 element is undoubtedly a "wholesale service." Of this there can be no serious question.

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

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

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

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

> CLEC and Qwest agree that the UNEs identified in Section 9 are not exclusive and that pursuant to changes in FCC rules, state laws, or the Bona Fide Request Process, or Special Request Process (SRP) CLEC may identify and request that Qwest furnish additional or revised UNEs to the extent required under Section 251(c)(3) of the Act and other Applicable Laws.

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

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

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

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

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

The Parties' disagreement with respect to Issue 5 is relatively clear. Covad believes it should be able to order regeneration of a CLEC-to-CLEC cross connect on the same terms it is able to order regeneration for any other interconnection product, such as an unbundled loop or transport circuit. Qwest believes it is not required to provide a wholesale regeneration product

for CLEC-to-CLEC cross connects. Not only is Qwest's position legally wrong, it contradicts Qwest's own longstanding positions on the issue, including the positions Qwest took while obtaining Section 271 approval from this Commission.

A. FCC Rules Require Qwest To Regenerate Qwest-Provisioned CLEC-to-CLEC Cross Connections

47 C.F.R. §51.323(h) states:

> An incumbent LEC shall provide, at the request of a collocating telecommunications carrier, a connection between the equipment in the collocated spaces of two or more telecommunications carriers, except to the extent the incumbent LEC permits the carriers to provide the requested connection for themselves… Where technically feasible, the incumbent LEC shall provide the connection using copper, dark fiber, lit fiber, or other transmission medium, as requested by the collocating telecommunications carrier.

This language does not create a "regeneration exception," as Qwest is proposing in this docket. It provides that Qwest may either permit CLECs to make their own cross connection arrangements, or it must provide the cross connection, upon request. In the case of cross connections requiring regeneration, it is often impossible for CLECs to provide this regeneration themselves, and usually would require an inefficient engineering configuration even if such regeneration were possible from existing collocation space. At hearing, Covad's witness Michael Zulevic noted that CLECs self-provisioning cross-connections would be required to initiate a new collocation, at or near mid-span, to provide adequate regeneration:

> Well, that would be the only way to do it [install a mid-span collocation for regeneration equipment], and then trying to determine where that mid span would be, and then of course having to incur the cost of a mid point collocation just for the purposes of placing regeneration would be very cost prohibitive.

Tr. Vol. II, pp. 189-190.

Mr. Norman, Qwest's witness, appeared to disagree with the need to place mid span regeneration equipment. He testified that the cross-connect signal could be regenerated or

"boosted" from either or both ends of the connection. Tr. Vol. II, pp. 201-202. This testimony was contradicted by Mr. Zulevic, and also seems to be contradicted by basic engineering and physics principles. When a signal leaves a carrier's equipment, it is already being transmitted at an optimum signal strength. The friction inherent in transmission mediums then degrades the signal at certain degrees over certain distances. This fundamental physical principal underlies the ANSI standards. The purpose of mid-span repeaters is to regenerate the signal as it weakens, but before it is lost. Regenerating the signal when it is already at optimal strength (as it leaves one collocation) and/or when the signal is inches away from its ultimate destination (as it enters another collocation) defies these basic principles.

Qwest is obligated, when it provisions the cross connection, to provide the connection using the transmission medium of the CLECs' choice. The obvious import of this language is that the chosen transmission medium would include the equipment necessary to make the medium work. Providing an inferior, if not illusory alternative is not acceptable.

B. Qwest Has Taken A Novel Position On Regeneration In This Proceeding That Is Inconsistent With Its Product Offerings, Its Prior Statements, And The Act

In this proceeding, Qwest's witnesses Norman explained that Qwest considered a CLEC-to-CLEC cross connect a wholesale product unless that cross connection required regeneration. In that case, Qwest would provide a retail regeneration product, available under its access tariff, to provide the connection.[17]

This is entirely inconsistent with Qwest's prior positions and statements regarding regeneration. Previously, Qwest had never argued that any central office regeneration product provided to CLECs should be considered a finished service, or that Qwest had no obligation to provide regeneration, where necessary, under the Act. In fact, Qwest fought for the right to

[17] Tr. Vol. II, p. 200.

implement a separate *wholesale* charge for regeneration, and this Commission rejected that request, and ordered Qwest to instead include these costs in its common costs. *See In the Matter of the Investigation Into U S West Communications, Inc. Compliance with Section 271 of the Telecommunications Act of 1996; In the Matter of U S West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket No. UT-003022; Docket No. UT-003040, Fifteenth Supplemental Order (August 17, 2001) ("Fifteenth Supplemental Order") at 27.

Later, Qwest provided detailed clarification of its CLEC-to-CLEC cross connection product, labeled COCC-X:

> The CLEC-to-CLEC Cross-Connection (COCC-X) offering is defined as the CLEC's capability to order a cross-connection from its Collocation in a Qwest Premises to its non-adjacent Collocation space or to another CLEC's Collocation within the same Qwest Premises at the Interconnection Distribution Frame (ICDF).
>
> …
>
> Given the possibility that total cable lengths from the Collocation spaces through the ICDF are longer than the [ANSI Standards] table allows, there is the opportunity for a CLEC to request regeneration by using a specific Network Channel Interface (NCI) code on their order. The NCI is chosen from Table 6-5 of Tech Pub 77386 using one that calls for regeneration.
>
> …
>
> Qwest, following receipt of the ASR will perform ICDF connections and regeneration functions. Equipment additions for regeneration (if no spares are available) will be initiated. Qwest completes these activities and conducts verification testing.

Exhibit 4 at 1-3.

This quite clearly establishes that the COCC-X offering includes regeneration, if requested by the CLEC. Or at least it did in 2002, when the above language was drafted by Qwest and provided to the CLEC community.

Not content to argue that they wish to change their position on regeneration, Qwest went to great lengths to argue instead that their position has remained consistent. While Mr. Norman

provided a clear explanation of Qwest's current position, the assertion that this position was represented in Qwest's prior statements and product descriptions lacks credibility.

Mr. Norman attempted to explain in this proceeding that Qwest's COCC-X product does not include regeneration. Exhibit 45-T at 15. This explanation is contradicted by Qwest's prior statements regarding the COCC-X product.

In addition to the document cited above, in June of 2003, Qwest proposed "updates" to Tech Pub 77386, including the deletion of the Chapter 15, addressing regeneration for interconnection. When Eschelon raised concerns that deletion of this chapter would eliminate the wholesale regeneration product, Qwest replied:

> Qwest is not eliminating DSX regeneration, but merely changing who is responsible for determining when regeneration is required. The changes in the Tech Pub were driven by this recent change in who is responsible for determining when regeneration is required. More specifically, **the CLEC's are no longer responsible for determining if regeneration is required, Qwest is now responsible for that determination. As a result of this change in responsibility, the tech pub is being updated to remove all statements and NC/NCI codes that indicate that the CLEC's need to order regeneration, or are responsible for determining when regeneration is required.**

Exhibit 3.

As discussed above, Qwest is obligated to provide regeneration for the cross connections it provides in its central offices between CLECs. Its obligation is to provide a wholesale interconnection product, its COCC-X product, and not an overpriced retail product. Nothing in the FCC's rules suggests that ILECs are exempt, with respect to regeneration, from the general pricing rules of 47 U.S.C. § 252(d). Qwest's new position therefore violates 47 C.F.R. § 51.323(h), and for that reason it must be rejected.

C. Covad Has Proposed Regeneration Language That Maintains Consistency For All Wholesale Products

This Commission rejected Qwest's attempt to separately charge for ILEC-to-CLEC regeneration, stating that any costs of such regeneration are more appropriately built into

Qwest's common costs. *See Fifteenth Supplemental Order* at 27. Presumably, Qwest believes this Commission's order only applies to ILEC-to-CLEC connections, and not CLEC-to-CLEC connections. Covad proposes that Qwest maintain policies and rates for both that are consistent.

ISSUE 6 – SINGLE LSR
(Sections 9.21.1, 9.21.4.1.6, and 9.24.1)

Issue 6 addresses the present inability for Covad to transfer voice and data customers served by line splitting and loop splitting arrangements using a single LSR. As Covad's witness Michael Zulevic noted in his testimony, Qwest has long had the capability to provision such services on a single service order, and its continued delay in fully implementing the capability for Covad is discriminatory.[18]

Qwest does not use the LSR process, and creates only one record, a service order, to provision service to its retail customers. CLECs like Covad must use an intermediate system, IMA, to create a Local Service Record (LSR), which Qwest personnel then review and convert to a service order. Prior to August of 2003, Qwest did not have the capability in its service order system to provision service based on a circuit identification number, and only provisioned service based on assigned telephone numbers. This limitation required Qwest to provision voice service to a given customer, either retail or wholesale, prior to beginning the provisioning process for data services, such as DSL.

In August of 2003, Qwest completed its upgrade of its service order system, allowing Qwest, but not CLECs, to provision voice/data customers on a single service order. CLECs, stuck using the IMA system that had not yet been upgraded, were still required to submit two LSRs to provision a voice/data customer. As was pointed out at hearing, CLECs do have the capability of trying to tie the voice and data LSRs together, but there are no guarantees they will be included on the same service order, and two LSRs must still be completed by the CLEC,

[18] Exhibit 1T at 19-20.

creating additional costs, and two LSRs must still be processed by Qwest, creating yet more additional costs. Tr. Vol. II, p. 47.

A. The Act Requires Parity Between The Retail And Wholesale Provisioning Performance

The FCC's rules require that

> the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

47 C.F.R. § 51.313(b).

The FCC has specifically required ILECs to provide nondiscriminatory access to its OSS functions, and recently confirmed this requirement:

> Accordingly, we require incumbent LECs to continue to provide unbundled access to OSS. **This requirement includes an ongoing obligation on the incumbent LECs to make modifications to existing OSS as necessary to offer competitive carriers nondiscriminatory access** and to ensure that the incumbent LEC complies with all of its network element, resale and interconnection obligations in a nondiscriminatory manner-including any new obligations established in this Order.

Triennial Review Order, ¶ 562.

While this Commission has permitted Qwest to construct an intermediate OSS functionality (IMA), it has never permitted Qwest to create a discriminatory advantage for itself by upgrading its internal systems first, while delaying IMA upgrades. That is precisely what Qwest continues to do with respect to the single LSR issue, in violation of the Act, FCC rules, and the FCC's latest statements on the matter.

B. The Commission Must Impose This Parity Requirement To Ensure Qwest Completes The Necessary OSS Changes

Qwest is already nearly a year behind in meeting its legal obligation to provide nondiscriminatory access. It has delayed implementation of its chosen electronic upgrades

through two IMA releases. It is proper for this Commission to issue an order that effectively requires Qwest to provide nondiscriminatory access.

There is no doubt that the Change Management Process (CMP) provides a useful forum for Qwest and its CLEC customers to discuss OSS issues, and to agree upon and prioritize upgrades. However, the CMP is not, as Qwest insinuates, the ultimate forum for determining Qwest's obligations under the Act. In fact, the CMP has a specific process for implementing regulatory directives, such as a requirement issued by this Commission for a single LSR ordering capability:

> **4.0 TYPES OF CHANGE**
>
> A Change Request should fall into one of the following classifications:
>
> **4.1 Regulatory Change**
>
> A Regulatory Change is mandated by regulatory or legal entities, such as the Federal Communications Commission (FCC), a state commission/authority, or state and federal courts, or as agreed to by Qwest and CLECs. Regulatory changes are not voluntary but are requisite to comply with newly passed legislation, regulatory requirements, or court rulings. Either the CLEC or Qwest may initiate the change request.

Exhibit 71, Qwest Change Management Process (Exhibit G to the Agreement) at 11.[19]

The problem, in this case, is that Qwest is unwilling to truly commit to fully implementing the single LSR capability on a date certain, not to mention that that date, whatever it may turn out to be, will occur well over a year after the legal obligation arose.

[19] Covad is unsure whether Exhibit G to the Agreement, the Change Management Process Document, has been filed in this proceeding. Accordingly, a copy is attached.

"We're working on it" is hardly a firm commitment at all. It is time for this Commission to step in and order Qwest back to the parity standard. If Qwest cannot complete its IMA upgrade, it should be required to process the orders manually.

ISSUE 8 – PAYMENT DUE DATE AND TIMING OF REMEDIES FOR NON-PAYMENT
(Sections 5.4.1, 5.4.2, and 5.4.3)

A. Payment Due Date

Covad has requested that the payment interval included in Section 5.4.1 be forty-five (45) days, while Qwest maintains that the interval should be thirty (30) days.

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

As Covad witness Megan Doberneck explained both in her written and live testimony, Qwest's billing systems currently produce invoices to Covad that require substantial human effort to verify. This is true whether the included charges are correct or not, and whether the invoice is provided by Qwest in electronic format or not.[20]

First of all, Covad typically receives its bills from Qwest five to eight days after the "invoice date," which starts the clock for the payment due date.[21] Also, Qwest's bills for non-recurring collocation charges continue to be provided in paper format.[22] In these circumstances, the bills must be hand-entered into Covad's billing systems before a review can even begin.[23] Then Covad employees must manually review the charges, many of which are individual case basis (ICB) charges, to verify them.

[20] This is not meant to minimize the additional difficulties created by inaccurate Qwest billing. As Ms. Doberneck pointed out in her testimony, the Parties have resolved several billing errors in the past few years, leading to substantial repayments to Covad as well as payments by Qwest under the Washington Performance Assurance Plan (PAP). Covad believes these issues can be separated from the process deficiencies and other challenges mentioned above, which are not addressed by PAP remedies and bear specifically on Covad's ability to review Qwest bills prior to the Payment Due Date.
[21] Exhibit 21-T at 25.
[22] Exhibit 21-T at 26.
[23] Id.

With respect to electronic bills received from Qwest, Covad employees must still verify non-recurring charges, ICB charges, and disconnections.[24] Often, Qwest's bills do not contain circuit identification numbers or universal service ordering codes (USOCs), which causes substantial delays and difficulties in verifying charges.[25]

2. Affording Covad Fifteen Additional Days to Review Qwest Bills Will Not Disrupt the Parties' Billing Relationship, and Will Promote Efficiencies

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

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

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

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[24] Exhibit 21-T at 26-27.
[25] Id.

3. There is Substantial, Unrefuted Evidence in the Record That Covad Should Be Afforded More Time To Review and Verify Qwest Bills

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

Absolutely no evidence was presented to contradict these facts. Qwest, through its witnesses, relies instead on two arguments: (1) Covad should have enough experience by now to review Qwest's invoices in 30 days;[26] (2) The 30-day time period was produced by consensus in Qwest's 271 proceedings, and that outcome should bind the Parties here.[27]

The substantial evidence provided by Covad in this proceeding demonstrates that (1) Qwest is mistaken that Covad "should" be able to review Qwest's bills within 30 days. The uncontradicted evidence presented by Covad in this proceeding establishes that 30 days is *not* a reasonable time frame; (2) Regardless of what was produced by "consensus" in historic proceedings, substantial attention has been paid by Covad to billing issues more recently, and that attention has revealed specific obstacles to performing a thorough review within thirty days.

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

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

Covad acknowledges Qwest's right to discontinue the processing of orders, and even to discontinue service in the event it does not receive payment from its wholesale customers, including Covad. The Parties' dispute is not with respect to the *right* of Qwest to take these remedial actions, but with respect to the *timing* for these actions. Covad believes that the time

[26] Exhibit 35-T at 8.
[27] Exhibit 35-T at 7.

frames for employing these drastic remedies should not be so compressed as to allow either Party to use them as leverage in billing disputes or other conflicts. Covad does not believe the modest extensions it has proposed will truly prejudice Qwest at all, and will allow both Parties some breathing room should a serious conflict develop.

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

Covad has specifically proposed that the time period for Qwest to discontinue orders for failure to make full payment be set at ninety (90) days, rather than the thirty (30) days Qwest has suggested. *See* Agreement, Section 5.4.2. In cases where Covad pays Qwest for services, either on time or late, this provision has no effect on Qwest's cash flow at all, because it has no impact on when payments are due, when payments are considered past due, or when Qwest could take action for a breach of the Agreement. The only circumstance where this provision could lead to increased losses for Qwest would be if Covad refused to pay Qwest and continued to order new services. In that case, Qwest's increased exposure would be limited to sixty days' worth of new services ordered by Covad. This would constitute only a fraction of the amount Covad would owe Qwest if it was failing to pay its bills, and cannot seriously be considered to create true cash flow issues for Qwest.

For Section 5.4.3 of the Agreement, Covad has proposed a one hundred twenty (120), rather than a sixty (60) day period after which Qwest may disconnect service if full payment is not received. In circumstances where Covad pays Qwest, this sixty day difference would have no impact on Qwest's cash flow or receivable amounts. If Covad were to stop paying Qwest, it would extend the time period for Qwest to disconnect service by 60 days. This would have an effect on the total amount owed to Qwest in the event Covad failed to pay.

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

To understand Covad's proposals, it is important to realize that Covad is not concerned about its rights should it be unable or otherwise refuse to pay Qwest for services, though it does

recognize *Qwest's* concerns in such situations. If Covad were truly unable to pay Qwest, Covad would have more pressing concerns than whether it could receive service for an additional 60 days. Covad's concern is that a situation could arise in which Qwest refused to recognize a legitimate dispute that affected payment, and use the short disconnection interval it has proposed to obtain leverage in that dispute.

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

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

Conclusion

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

Dated this 1st day of October, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2004, the original and six copies of the foregoing **Covad's Post-Hearing Brief** was served electronic service and/or placed in the United States Mail, this 1st day of October, 2004, to the following addressees:

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