BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY FOR ARBITRATION TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	Docket No. UT-043045 QWEST CORPORATION'S POST-HEARING BRIEF

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TABLE OF CONTENTS

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I. INTRODUCTION

1 This interconnection arbitration conducted pursuant to the Telecommunications Act of 1996 ("the Act") demonstrates that the negotiation/arbitration process set forth in Sections 251 and 252 can work fairly and efficiently. While Qwest appreciates Covad's good faith conduct in the negotiations, the six unresolved issues that remain after the parties' exhaustive negotiations are nevertheless largely attributable to Covad attempting to impose obligations on Qwest that either conflict with rulings by the FCC or are inconsistent with prior pronouncements, agreements and orders of this Commission. These deviations from governing law are sharply demonstrated by Covad's demands and proposed interconnection agreement ("ICA") language relating to implementation of the FCC's rulings in the *Triennial Review Order* ("*TRO*").[1]

2 For example, although the *TRO* confirms Qwest's right to retire copper facilities, Covad asks the Commission to gut that right by imposing onerous conditions that are nowhere found in the *TRO* and that conflict directly with the FCC's Congressionally-mandated obligation to encourage investment in the fiber facilities that support broadband services. Similarly, despite the FCC's pronouncements that Bell Operating Companies ("BOCs") are not required under the Act to commingle or combine network elements provided under Section 271, Covad proposes language that would require Qwest to do just that.

3 Covad's departures from governing law are perhaps most sharply demonstrated by its proposed ICA language that would require Qwest to provide almost unlimited access to the elements in Qwest's Washington telecommunications network. These proposals ignore FCC findings in the *TRO* that CLECs are not impaired without access to many network elements and that ILECs are therefore not required to unbundle them. Covad's broad unbundling demands also violate

[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003), aff'd in part and rev'd and vacated in part, United States Telecom Association v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

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the rulings of the United States Supreme Court and the United States Court of Appeals for the District of Columbia in which those courts struck down FCC unbundling requirements while confirming in the most forceful terms that the Act imposes real and substantial limitations on ILEC unbundling obligations. In addition, Covad's proposed unbundling language assumes incorrectly that state commissions have authority to require BOCs to provide network elements pursuant to Section 271, to determine pricing for those elements, and to include them in Section 252 ICAs. For these and other reasons discussed below, the Commission should reject Covad's unbundling proposals.

4 Covad's approach to issues unrelated to the *TRO* is similarly without legal support. Many of the issues raised in this arbitration were exhaustively examined by Qwest and participating CLECs, including Covad, during the Section 271 workshops. To the extent an issue was addressed in the Section 271 process, Qwest's proposed language reflects the final resolution resulting from the process, whereas Covad's does not. To the extent Covad now contends that the FCC and Commission resolutions reached in the Section 271 process are irrelevant, Covad is improperly attempting to circumvent governing law.

5 In contrast to Covad's demands, Qwest's ICA proposals are specifically based upon the FCC's rulings in the *TRO* and rulings of this Commission. To ensure that the ICA complies with governing law and is consistent with the policy objectives of the Commission and the FCC, the Commission should adopt Qwest's proposed ICA language for each of the disputed issues.

6 Finally, since the hearing on this matter, the parties have continued to negotiate and have resolved the following issues, which will be reflected in an updated matrix to be filed with the Commission shortly:

Issue 1 – Copper Retirement (New Section 9.1.15);

Issue 2 – Pricing of UNE (a portion of Section 9.1.1);

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Issue 3 – Commingling and EEL Eligibility Criteria (Section 9.1.1.5 and all subsections);

Issue 3- Ratcheting (Section 9.1.1.4 and all subsections);

Issue 4 – Collocation (Section 8.1.1.3); and

Issue 8 – Repeatedly Delinquent (Section 5.4.5).

7 In addition to these issues and sections of the ICA for which the parties have recently agreed upon language, Qwest and Covad have reached agreements in principle to resolve sub-issues relating to copper retirement and commingling and are in the process of developing language to reflect their agreements. The language that the parties have agreed to for the sections listed above and any additional language that the parties may agree upon for the other sections under discussion will be reflected in the ICA the parties will submit for Commission approval.

II. DISPUTED ISSUES

A. Issues 1, 2, and 3

1. The FCC's *Interim Unbundling Rules* and *Unbundling NPRM* Directly Affect Issues Raised By Covad's Petition For Arbitration.

8 During the arbitration hearing, the Administrative Law Judge requested that the parties address the potential effects of the FCC's *Interim Unbundling Rules* and *Unbundling NPRM* on the issues that are disputed between the parties.[2] That following section provides that discussion.

[2] Order and Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 at ¶ 1 (rel. Aug. 20, 2004) ("*Interim Unbundling Rules*" and "*Unbundling NPRM*"). On August 23, 2004, Qwest, Verizon, and the United States Telecom Association challenged the lawfulness of the *Interim Rules* in a petition for a *writ of mandamus* filed with the D.C. Circuit. While Qwest strongly believes that the *Interim Rules* are unlawful and that a *writ of mandamus* should issue, the rules are of course still in effect. Accordingly, this brief discusses the legal effects of the *Interim Rules* on Covad's unbundling demands, notwithstanding the pending petition. *Interim Unbundling Rules and Unbundling NPRM* at ¶ 1.

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a) The *Interim Unbundling Rules* Limit The Authority Of State Commissions To Order Terms And Conditions Relating To Access To Enterprise Loops, Dedicated Transport, And Switching.

9 The FCC's *Interim Unbundling Rules*, released August 20, 2004, require ILECs "to continue providing unbundled access to enterprise market loops, dedicated transport, and switching under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004." The FCC ordered that these rates, terms, and conditions must remain in effect "until the earlier of the effective date of final unbundling rules promulgated by the [FCC] or six months after Federal Register publication of [the *Interim Unbundling Rules*]…."[3]

10 Under these rules, therefore, Qwest and Covad are bound by the rates, terms, and conditions in their existing ICA that was in effect on June 15, 2004, relating to access to enterprise market loops, dedicated transport, and switching. The FCC's intent in issuing the *Interim Unbundling Rules* was to preserve "legal obligations" as of June 15, 2004.[4] Accordingly, with limited exceptions that do not apply here, the *Interim Unbundling Rules* forbid state commissions from ordering any different terms or conditions.[5]

11 This prohibition precludes the Commission from adopting any of Covad's demands in this arbitration relating to access to the elements addressed in the *Interim Unbundling Rules* that differ from the terms and conditions in the existing Qwest/Covad ICA. For example, there can be no dispute that the current Qwest/Covad ICA that was in effect on June 15, 2004 does not

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[3] *Id.*

[4] *Id.* at ¶ 26.

[5] The FCC established three exceptions under which rates, terms, and conditions may differ from those in ICAs as of June 15, 2004: "(1) voluntarily negotiated agreements; (2) an intervening [FCC] order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration); or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements." *Id.* None of these exceptions applies here. First, the agreement under consideration in this proceeding is an arbitrated interconnection agreement, not the type of voluntary commercial agreement that is the focus of the first exception. *See Interim Unbundling Rules and Unbundling NPRM* at ¶ 21 and n. 58 (explaining that this exception applies to "voluntarily negotiated agreements" of the type resulting from the FCC's call for the industry to engage in good faith negotiations of commercial arrangements). Second, there are no intervening FCC orders relating to unbundling obligations nor UNE rate increases at issue in this proceeding.

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require Qwest to perform any commingling. There is, therefore, no "legal obligation" or "term and condition" relating to access to enterprise market loops, dedicated transport, or switching that requires Qwest to commingle these elements. A requirement in the ICA at issue in this arbitration for Qwest to commingle these elements with any other elements or services would be a new term and condition of access imposing a new legal obligation on Qwest. Under the express terms of the *Interim Unbundling Rules*, that requirement would alter the status quo and is therefore impermissible.

b) The FCC's Impending Issuance Of Final Unbundling Rules Supports Rejecting Covad's Unlimited Demands For Access To Network Elements.

12 The FCC expressed its intent in the *Unbundling NPRM* to formulate permanent unbundling rules "on an expedited basis."[6] The likelihood of impermissible conflicts between Covad's unbundling proposals and the FCC's impairment determinations has risen substantially with the FCC's issuance of the *Unbundling NPRM* and the FCC's expressed objective of expeditiously establishing final unbundling rules. Given the D.C. Circuit's vacatur of substantial portions of the FCC's unbundling rules and the court's findings in both *USTA I*[7] and *USTA II* that the FCC has misapplied the impairment standard, there is at least a reasonable likelihood that the final unbundling rules will require less network unbundling than the *TRO* imposed. In contrast to this probable decrease in federally imposed unbundling requirements, Covad's language seeks to expand Qwest's unbundling obligations without any meaningful limits and far beyond what the FCC required in the *TRO*. In other words, Covad is headed in a direction precisely opposite to that the FCC is apparently taking, resulting in a high probability of impermissible conflicts with federal unbundling laws if the Commission were to adopt Covad's language.

13 In these circumstances, Qwest respectfully suggests that the prudent course for the Commission

[6] Interim Unbundling Rules and Unbundling NPRM at ¶ 18.

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

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is to reject Covad's aggressive unbundling demands while the FCC formulates final unbundling rules. This path recognizes the deference that must be given to the FCC as the regulatory body with primary responsibility for administering the Act. As the Eighth Circuit has stated, "[t]he new regime for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for state commissions, *the scope of that role is measured by federal, not state law*."[8] To avoid impermissible conflicts, the federal law relating to unbundling should be known and established before a state commission should even consider imposing the type of far-reaching unbundling obligations that Covad proposes.

14 In the discussion of Issue 2 below, Qwest explains further why Covad's unbundling demands are unlawful and should be rejected.

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

15 Since the conclusion of the arbitration hearing, Qwest and Covad have resolved part of their dispute relating to the retirement of copper facilities. Specifically, the parties have reached substantial agreement concerning the notice that Qwest will provide when it intends to retire copper facilities. Under the agreement, Qwest has substantially expanded its notice obligations by committing to: (1) provide notice when it intends to retire not just copper loops and subloops, but also copper feeder; (2) provide notice not just when a copper facility is being replaced with a fiber-to-the-home ("FTTH") loop, but whenever a copper facility is being replaced with any fiber facility (including fiber feeder); and (3) provide e-mail notice of planned retirements to CLECs.[9] These new commitments are in addition to Qwest's previous agreement to provide notice of planned retirements on its web site and to file public notices of retirements with the FCC.

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[8] *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000) (emphasis added).

[9] These new notice commitments will be set forth in a new section of the interconnection agreement – section 9.1.15 – and in section 9.2.1.2.3. In the discussions between the parties relating to notice, Covad has expressed a desire to exercise control over the content of the e-mail notice that Qwest will provide. The parties have not resolved this aspect of the notice issue.

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16 With the agreement the parties have reached relating to notice, the copper retirement issues that remain unresolved are: (1) whether Qwest should be permitted to retire a copper facility only if it provides Covad with "an alternative service" that "does not degredate the service or increase the cost to [Covad] or End User Customers of [Covad]" (Covad proposed Section 9.2.1.2.3.1); (2) whether the ICA should list the procedures the FCC has established for CLECs to object to proposed copper retirements and for the resolution of such objections (Qwest proposed Section 9.2.1.2.3);[10] and (3) whether the e-mail notice that Qwest has agreed to provide should include specific information that Covad is requesting. Qwest addresses each of these issues in the sections that follow.

a) In Contrast To Covad's "Alternative Service" Proposal, Qwest's Proposed ICA Language Relating To Copper Retirement Meets The Requirements Of The *TRO*

(1) Covad's "Alternative Service" Proposal Is Inconsistent With The *TRO*

17 As telecommunications carriers have increasingly moved from copper to fiber facilities, it has become a standard practice to retire copper facilities in many circumstances when fiber facilities are deployed. The ability to retire copper facilities is important from a cost perspective since, without that ability, carriers would be required to incur the costs of maintaining two networks. If carriers were faced with that duplicative cost, they would have reduced financial ability to deploy facilities to replace copper and, therefore, reduced ability to deploy facilities that can support advanced telecommunications services.[11] Accordingly, in the *TRO*, the FCC confirmed the right of ILECs to retire copper facilities without obtaining regulatory approval before doing so. Specifically, in paragraph 271 of the *TRO*, the FCC ruled:

> As we note below in our discussion of FTTH loops, we decline to

[10] As discussed below, Qwest and Covad have reached conceptual agreement on this issue and are developing ICA language reflecting their agreement. Accordingly, Qwest is optimistic that this issue will be resolved.

[11] *See* Exhibit ("Ex.") 61-T (Stewart Direct) at 3:11-3:23 and 7:1-9:11.

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> prohibit incumbent LECs from retiring copper loops or subloops that they have replaced with fiber. Instead, we reiterate that our section 251(c)(5) network modification disclosure requirements (with the minor modifications also noted below in that same discussion) apply to the retirement of copper loops and copper subloops.[12]

18 As reflected by this excerpt from the *TRO*, the only retirement condition that the FCC established are that the ILEC provide notice of its intent to retire specific copper facilities when those facilities are being replaced by FTTH loops so that CLECs can object to the FCC.[13]

19 Qwest's proposed language for Sections 9.2.1.2.3 and 9.2.1.2.3.1 of the ICA, combined with the parties' agreed language relating to notice, accurately implements the *TRO*. Under these provisions, Qwest is permitted to retire copper facilities, but will provide Covad and other CLECs with notice of all planned retirements, not just retirements involving FTTH replacements. Further, consistent with the *TRO*, Qwest's language for Section 9.2.1.2.3 establishes that Qwest will comply with any applicable state requirements. Qwest's Section 9.2.1.2.3.1 also provides Covad with substantial protection by establishing that: (1) copper loops and subloops will be left in service where technically feasible; and (2) Qwest will coordinate with Covad the transition from old facilities to new facilities "so that service interruption is held to a minimum."

20 In contrast to Qwest's proposal, Covad's demands relating to copper retirement are not supported by the *TRO* and conflict with key policy objectives of Congress and the FCC. While Covad asserts that its "alternative service" demand is consistent with the *TRO*, Ms. Doberneck

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[12] *TRO* at ¶ 271. The FCC also noted in this paragraph that any state requirements relating to an ILEC's retirement practices for copper loops and subloops would continue to apply. Covad has not identified any Washington laws that address Qwest's right to retire copper facilities. In a response to a question from her counsel on redirect, Ms. Doberneck stated that RCW 80.36.300 bears on the copper retirement issue because it addresses the promotion of diversity in the supply of telecommunications products and services. Tr., Vol. III, at 274:15-275:1. However, that provision does not address the rights and obligations relating to the retirement of network facilities and, hence, is irrelevant.

[13] *See also TRO* at ¶ 281. Although the FCC ruled that the notice requirements do not apply to the retirement of copper feeder, as noted above, Qwest has nevertheless agreed to provide notice of copper feeder retirements.

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acknowledged during the hearing that there is no wording in the *TRO* that requires an ILEC to provide an alternative service before retiring a copper facility.[14] Indeed, not only is there no mention of such a condition in the *TRO,* but the proposal directly conflicts with the FCC's Congressionally-mandated obligation to promote the deployment of facilities that support broadband services. In the *TRO*, the FCC identified the deployment of broadband services as one of its paramount objectives, emphasizing that "[b]roadband deployment is a critical domestic policy objective that transcends the realm of communications."[15] Thus, the FCC sought to formulate rules that would "help drive the enormous infrastructure investment required to turn the broadband promise into a reality."[16]

21 As Ms. Stewart described, the economic incentive of a carrier to deploy the fiber facilities that support broadband services increases if the carrier is permitted to retire copper loops when it deploys fiber.[17] Without a right to retire copper or with a right conditioned upon the onerous requirements proposed by Covad, a carrier evaluating whether to deploy fiber would be faced with the duplicative costs of maintaining *both* the copper and the fiber facilities.[18] Thus, the FCC specifically rejected CLEC proposals that would have required ILECs to provide

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[14] Tr., Vol. III, at 221:8-14.

[15] *TRO* at ¶ 212.

[16] *Id.*

[17] *See* Ex. 61-T (Stewart Direct) at 3:11-3:23 and 7:1-9:11.

[18] Covad attempts to minimize the significance of this economic disincentive by asserting that in Washington, Qwest likely would be required to continue to maintain only a "handful" of copper loops that are being used to provide DSL service to Covad customers. Ex. 21-T (Doberneck Direct) at 14:11-15:8. However, Qwest cannot leave just Covad's loops in service and retire all the other copper loops in the 3600 and 4200 pair feeder cables that are used in the network. Instead, if Qwest had to leave the handful of Covad loops in service, it would have no choice but to also leave in service the hundreds of other copper loops in those cables. The maintenance costs that Qwest would incur, therefore, would be for not just a few copper loops used by Covad, but for the entire 3600 or 4200 pair cable. *See*, e.g., Ex. 30 (Colorado Transcript) at 130-31. Those maintenance costs would thus reduce Qwest's economic incentive to deploy fiber to the hundreds of Washington customers served by those loops in those cables, all for the sake of a "handful" of Covad customers.

The second option that would be available under Covad's proposal – deploying an "alternative service" after retiring copper facilities – does not solve the problem of economic disincentive. While Covad has not defined the term "alternative service" in any meaningful way, it is unavoidable that any such service would require Qwest to incur significant costs. Moreover, as Ms. Doberneck made clear during the hearing, Covad's proposal would not even allow Qwest to recover all the costs of the alternative service if they exceed the costs Covad is currently paying. Tr., Vol. III, at 226:8-21.

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alternative forms of access and to obtain regulatory approval before retiring copper facilities.[19]

22 In attempting to defend its proposal, Covad argues that the right of an ILEC to retire a copper is narrowly limited. For several reasons, this argument is wrong. First, as demonstrated by the plain language of the *TRO* excerpt quoted above, the FCC did not limit ILECs' retirement rights to situations where copper loops are replaced with FTTH loops. Instead, the FCC stated that the right to retire exists when an ILEC replaces copper loops "with fiber," meaning any fiber facility: "[W]e decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced *with fiber*."[20] Second, Covad's narrow reading of the ILECs' retirement rights is inconsistent with the FCC's clear intent to encourage the deployment of fiber facilities as a whole, not just FTTH loops, as stated in the *TRO*:

> Upgrading telecommunications loop plant is a central and critical component of ensuring the deployment of advanced telecommunications capability to all Americans is done on a reasonable and timely basis and, therefore, where directly implicated, our policies must encourage such modifications. Although a copper loop can support high transmission speeds and bandwidth, it can only do so subject to distance limitations and its broadband capabilities are ultimately limited by its technical characteristics. *The replacement of copper loops with fiber will permit* far greater and more flexible broadband capabilities.[21]

23 Third, contrary to Covad's claim, the retirement rights the FCC granted for replacements of copper feeder with fiber feeder are even broader than those for replacements of copper loops with FTTH loops. Thus, the FCC ruled that the notice requirements it imposed for FTTH replacements do not apply to replacements of copper feeder with fiber feeder.[22]

24 Moreover, Covad's proposed ICA language would eviscerate even Qwest's right to retire

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[19] *TRO* at ¶ 281 & n.822.

[20] *Id.* at ¶ 271 (emphasis added).

[21] *Id.* at ¶ 243 (emphasis added). The FCC's emphasis on the benefits of deploying fiber – benefits that are recognized as a given throughout the telecommunications industry – highlights the inaccuracy of Covad's claim that deploying fiber does not produce any meaningful consumer benefits. *See* Ex. 21-T (Doberneck Direct) at 19:13; Tr. Vol. III at 237-40.

[22] *TRO* at ¶ 283 & n.829.

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copper loops after FTTH replacements by requiring Qwest to provide an alternative service for FTTH replacements. Specifically, Covad's proposed Section 9.2.1.2.3.1 would impose the alternative service requirement for the retirement of any copper facility regardless whether Qwest replaces the facility with a FTTH loop or another fiber facility.

25 Covad also attempts to advance its proposal by claiming that allowing Qwest to retire copper facilities will bring substantial harm to consumers. This claim is unfounded. As Ms. Doberneck acknowledged, no Covad customer has ever been disconnected from service in Washington or anywhere else in Qwest's region because of Qwest's retirement of a copper loop.[23] And the likelihood of that occurring is remote, as evidenced by Ms. Stewart's testimony establishing that Qwest routinely leaves copper loops in place when it deploys fiber – a practice that is captured by Qwest's proposed ICA language. Further, Ms. Doberneck testified that there are, at most, only a "handful" of Covad customers – perhaps only four or five -- in Washington that potentially could be affected by Qwest's retirement of a copper loop.[24] In the unlikely event those customers are affected by Qwest's retirement of a copper loop, Covad could continue serving them by purchasing other DSL-related services from Qwest, such as Qwest Choice DSL, which would result in an overall negligible cost increase given the small number of Covad customers that could be affected.[25] In addition, Covad could continue providing service to its customers despite Qwest's retirement of copper loops by deploying remote DSLAMs.[26] While Covad claims that deploying DSLAMs is cost-prohibitive, the FCC has concluded otherwise, as reflected by its stated objective – set forth in the *TRO* – of promoting CLEC investment in remote DSLAMs and other next-generation network equipment.[27]

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[23] Tr., Vol. III, at 257:14-19.

[24] Ex. 21-T (Doberneck Direct) at 14:11-15:8.

[25] *See* Ex. 63-T (Stewart Response) at 14:3-7.

[26] *Id.* at 10:11-22.

[27] *See TRO* at ¶ 291.

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(2) Covad's "Alternative Service" Proposal Is Not Properly Defined And Would Unlawfully Prevent Qwest From Recovering Its Costs.

26 It is fundamental that ICA terms and conditions, as with any contract, should be clearly defined to apprise parties of their rights and obligations and to thereby avoid or minimize disputes. Covad's "alternative service" proposal falls far short of this basic requirement.

27 The most glaring contractual shortcoming of Covad's proposal is the absence of any definition of the "alternative service" that Qwest would have to provide upon retiring a copper loop. Nowhere in its proposal does Covad define this term, which is central to its proposal. Under the plain language of the ICA, therefore, Qwest would have no way of knowing what alternative service to provide or whether such a service would meet the requirements of the ICA. Covad likewise fails to define the requirement that the alternative service "not degradate the service or increase the costs to CLEC or End-User Customers of CLEC." It does not propose, for example, any metrics to determine whether the service has degraded. Nor does it offer any ICA language for measuring whether the costs of service have increased.

28 Even if Covad's proposal were not in violation of the *TRO*, these ambiguities would be enough to require rejection of the proposal. Covad's language fails to define with any clarity the parties' rights and obligations and would inevitably lead to costly and time-consuming disputes in the implementation and administration of the ICA.

29 In addition, the requirement that the "alternative service" not result in an increase in the cost of service for Covad or its end-users would prevent Qwest from recovering its costs in violation of the Act's cost recovery requirements. Section 252(d)(1) of the Act *requires* that rates for interconnection and network element charges be "just and reasonable" and based on "the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing

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the interconnection or network element." In *Iowa Utilities Board v. FCC*,[28] the United States Court of Appeals for the Eighth Circuit succinctly described the effect of these provisions: "Under the Act, an incumbent LEC *will* recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests." (emphasis added)

30 As Ms. Doberneck acknowledged, under Covad's proposal, Qwest would be permitted to charge Covad no more than $3.96 per month for the alternative service – Ms. Doberneck's estimate of the total monthly charges Covad is currently paying Qwest – regardless of the amount by which Qwest's actual costs of providing an alternative service exceeded $3.96.[29] This artificial cap that would limit Qwest's ability to recover its costs plainly violates the Act's cost recovery requirement. For this additional reason, Covad's proposal is unlawful and should be rejected.

b) The ICA Should Reflect The Parties' Apparent Agreement Relating To The FCC's Procedures For Copper Retirement Notices And Objections.

31 The *TRO* establishes procedures for ILECs to provide notice of planned copper retirements, for CLECs to object to the retirements, and for resolution of any CLEC objections.[30] Because these procedures include specific time deadlines, Qwest concluded that the procedures should be listed in the ICA so that there is no confusion about what ILECs and CLECs are required to do. Accordingly, Qwest's proposed Section 9.2.1.2.3, included a listing of the FCC's procedures. Covad objected to including the procedures in the ICA, claiming that it is unnecessary to incorporate the FCC rules given that there is no dispute that they apply.

32 Since the arbitration hearing, Qwest and Covad have reached a conceptual agreement relating to this issue under which Qwest will remove the listing of the FCC's procedures from Section

[28] 120 F.3d 753, 810 (8th Cir. 1997), aff'd in part, rev'd in part, remanded, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

[29] Tr., Vol. III, at 226:8-21.

[30] *See TRO* at ¶ 282.

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9.2.1.2.3. At the same time, the parties will add language to this provision clarifying that: (1) at the conclusion of the FCC's notice process, Qwest can proceed with the retirement of a copper facility unless expressly prohibited by the FCC; and (2) the required FCC notice is in addition to any applicable state commission requirements. Based on this conceptual agreement, Qwest proposes deleting the listing of the FCC's procedures in Qwest's initially proposed Section 9.2.1.2.3 and adding the following language at the end of that section:

> Qwest can proceed with copper retirement at the conclusion of the applicable FCC notice process as identified in FCC Rules, unless retirement was expressly denied. Such notices shall be in addition to any applicable state Commission requirements.

33 Alternatively, if the parties do not resolve this issue and the Commission does not adopt this language, Qwest requests that the Commission adopt Qwest's original language that listed the FCC's notice and objection procedures. In the absence of the language proposed above, adoption of Qwest's original language will ensure that Qwest, Covad, and any CLECs that opt into the ICA are aware of their specifically defined notice and objection obligations established by the *TRO*. This language will benefit Covad and opt-in CLECs by, for example, making it clear that, per the FCC's rules, they must object to any planned retirements within nine business days of Qwest providing notice to the FCC. There is obvious value in ensuring that parties are aware of obligations of this type by providing express notice of them in the ICA.

c) Qwest Has Committed In The ICA To Comply With The FCC's Notice Requirements, And Covad Should Not Be Permitted To Impose Additional Requirements.

34 As discussed above, Qwest has significantly expanded its copper retirement notice obligations under the ICA by agreeing to: (1) provide notice when it intends to retire not just copper loops and subloops, but also copper feeder; (2) provide notice not just when a copper facility is being replaced with FTTH" loop, but whenever a copper facility is being replaced with any fiber facility (including fiber feeder); and (3) provide e-mail notice of planned retirements to

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CLECs. Qwest's overall notice commitments meet the FCC's notice requirements, as confirmed by Qwest's proposed language for Section 9.2.1.2.3, which requires Qwest to provide notice of planned retirements "in accordance with FCC Rules."

35 Notwithstanding Qwest's agreement to provide notice that meets the FCC's notice requirements, Covad is requesting more. In particular, it is apparently proposing that Qwest be required to provide specific categories of information in the e-mail notices that Qwest has volunteered to provide to CLECs. Covad has cited no legal authority for this request, and there apparently is none. The FCC rule relating to notice of network modifications permits an ILEC to provide notice by *either* filing a public notice with the FCC *or* providing notice through industry publications or an "accessible Internet site."[31] Here, instead of committing to just one form of notice, Qwest is agreeing to provide three forms of notice – through its website, by a public filing with the FCC, and through e-mail notice to CLECs. Further, its proposed Section 9.2.1.2.3 establishes that Qwest will provide any additional notices that may be required by Washington law.

36 Moreover, by agreeing to provide notice in accordance with FCC and state rules, Qwest is committing to provide detailed information about copper retirements with its notices, including, for example, the date of the planned retirement, the location, a description of the nature of the network change, and a description of foreseeable impacts resulting from the network change.[32] This information, along with the multiple forms of notice Qwest will provide, ensures that Covad will have timely and complete notice of any copper retirements.

37 Finally, in contrast to its attempt to exercise detailed control over the content of Qwest's notices, Covad's proposed Section 9.2.1.2.3 would have imposed notice obligations on Qwest

[31] *Id.*

[32] *See* 47 U.S.C. § 51.327(a)(1)-(6).

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that are significantly less demanding than those to which has voluntarily agreed. Covad's own language proposal did not require e-mail notice and obligated Qwest to provide notice only when it intended to replace a copper loop with a FTTH loop. Thus, Qwest has already agreed to provide substantially broader notice than Covad requested. In addition, Covad has not revised its notice language to include the additional requirements it seeks to impose and there is, therefore, no ICA language that reflects its demands.

38 Accordingly, the Commission should reject Covad's demand for ICA language relating to the content of Qwest's e-mail notices.

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

39 The Act requires ILECs to provide UNEs to other telecommunications carriers and gives the FCC the authority to determine which elements the ILECs must provide. In making these network unbundling determinations, the FCC must consider whether the failure to provide access to an element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[33] This "impairment" standard imposes important limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*[34] and the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating each of the FCC's three attempts at establishing lawful unbundling rules.[35]

40 Issue 2 arises because of Covad's insistence upon ICA language that would require Qwest to provide almost unlimited access to network elements in violation of the unbundling limitations

[33] 47 U.S.C. § 251(d)(2).

[34] 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

[35] USTA II, supra; United States Telecom Ass'n v. FCC, 290 F.3d 415, 427-28 (D.C. Cir. 2002) ("USTA I").

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established by these decisions, the Act, and the *TRO*. Covad's clear objective is to obtain access to all elements of Qwest's network that Covad may desire at the lowest rates possible. As demonstrated below, there are multiple reasons why Covad's unbundling demands are unlawful and should be rejected. First, the forceful message of *Iowa Utilities Board, USTA I,* and *USTA II* is that regulators must recognize the real and substantial limitations on ILEC unbundling obligations that Congress included in the Act. Covad's unbundling proposals do away with those limitations and therefore ask this Commission to act unlawfully.

41 Second, in the *TRO,* the FCC specifically declined to require ILECs to provide access to certain network elements under Section 251, ruling that CLECs are not "impaired" without access to them. Covad is improperly asking this Commission to override these FCC determinations and to require unbundling despite the absence of any FCC findings of impairment. As the D.C. Circuit ruled quite emphatically in *USTA II*, the Act requires the FCC – not state commissions – to make the impairment determinations required by Section 251. State commissions thus do not have authority to override FCC impairment determinations and to order unbundling that the FCC has rejected.

42 Third, Covad's unbundling demands assume incorrectly that state commissions have authority to require unbundling and set rates under Section 271, ignoring that states have no decision-making authority under that section of the Act. The FCC has exclusive jurisdiction to determine the network elements that BOCs are required to provide under Section 271 and to determine the rates that apply to those elements. The FCC cannot – and has not – delegated that authority to state commissions.

43 Fourth, as discussed above, the FCC expressed its intent in the *Unbundling NPRM* to formulate permanent unbundling rules "on an expedited basis."[36] There is a strong likelihood that

[36] Unbundling NPRM at ¶ 18.

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adoption of Covad's unbundling language would lead to conflicts with the FCC's final rules, since Covad is seeking unbundling that the FCC rejected even before the D.C. Circuit imposed the limiting standards of *USTA II*.

a) Summary Of Qwest's And Covad's Conflicting Unbundling Proposals

44 In contrast to Covad's unbundling demands, Qwest's proposed unbundling language ensures that Covad will have access to the network elements that ILECs must unbundle under Section 251 while also establishing that Qwest is not required to provide elements for which there is no Section 251 obligation. Thus, in Section 4.0 of the ICA, Qwest defines the UNEs available under the agreement as:

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

45 Qwest's language also incorporates the unbundling limitations established by the Act, the courts, and the FCC by listing specific network elements that, per court and FCC rulings, ILECs are not required to unbundled under Section 251. For example, Qwest's proposed Section 9.1.1.6 lists 18 network elements that the FCC specifically found in the *TRO* do not meet the "impairment" standard and do not have to be unbundled under Section 251. At the same time, Qwest's language recognizes that the law governing unbundling is likely to change and that additions or deletions to the UNEs available under the ICA will be implemented through an amendments to the agreement.[37]

46 While Qwest's ICA language properly recognizes the limitations on unbundling, its exclusion of certain network elements does not mean that those elements are unavailable to Covad and

[37] *See* Qwest's proposed section 9.1.1.

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other CLECs. As the Commission is aware, Qwest is offering access to non-251 elements through commercial agreements, including, for example, its line sharing agreement with Covad and agreements relating to its Qwest Platform Plus ("QPP") product.

47 Covad's sweeping unbundling proposals are built around its proposed definition of "Unbundled Network Element," which Covad defines as "a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access, *for which unbundled access is required under section 271 of the Act or applicable state law . . . .*" (emphasis added). Consistent with this definition, Covad's language for Section 9.1.1 would require Qwest to provide "any and all UNEs required by the Telecommunications Act of 1996 (including, but not limited to Sections 251(b), (c), 252(a) and 271), FCC Rules, FCC Orders, and/or applicable state rules or orders . . . ."

48 Its proposal leaves no question that Covad is seeking to require Qwest to provide access to network elements for which the FCC has specifically refused to require unbundling and for which unbundling is no longer required as a result of the D.C. Circuit vacatur of unbundling requirements in *USTA II*. In Section 9.1.1.6, for example, Covad proposes language that would render irrelevant the FCC's non-impairment findings in the *TRO* and the D.C. Circuit's vacatur of certain unbundling rules:

> 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. This Agreement sets forth the terms and conditions by which network elements not subject to Section 251 unbundling obligations are offered to CLEC.

49 Under this proposal, Covad could contend, for example, that it can obtain unbundled access to OCn loops, feeder subloops, signaling and other elements despite the FCC's fact-based findings

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in the *TRO* that CLECs are not impaired without access to these elements.[38] Covad also seeks to require Qwest to continue to provide access to certain network elements under Section 271 and state law despite possible rulings *in the future* that CLECs are not impaired without access to those elements.[39]

50 In addition to these demands, in its proposed Section 9.1.1.7, Covad is seeking TELRIC (total element long run incremental cost) pricing for the network elements it claims Qwest must provide under Section 271. While its proposed language suggests that Covad is seeking TELRIC pricing only on a temporary basis, Covad's filings in this proceeding and in other states reveal that Covad is actually requesting that the permanent prices to be set under Sections 201 and 202 for Section 271 elements be based on TELRIC.

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

51 Under Section 251 of the Act, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. As the Supreme Court made clear in the *Iowa Utilities Board* case, the Act does not authorize "blanket access to incumbents' networks."[40] Rather, Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]."[41] Section 251(d)(2), in turn, provides that unbundling may be required *only if the FCC determines* (A) that "access to such network elements as are proprietary in nature is necessary" and (B) that the failure to provide access to network elements "would

[38] In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundle these and other elements under section 251: ¶ 315 (OCn loops); ¶ 253 (feeder subloops); ¶ 324 (DS3 loops); ¶ 365 (extended dedicated interoffice transport and extended dark fiber); ¶¶ 388-89 (OCn and DS3 dedicated interoffice transport); ¶¶ 344-45 (signaling); ¶ 551 (call-related databases); ¶ 537 (packet switching); ¶ 273 (fiber to the home loops); ¶ 560 (operator service and directory assistance), and ¶ 451 (unbundled switching at a DS1 capacity).

[39] *See* Covad's proposed section 9.2.1.3.

[40] *Iowa Utilities Board*, 525 U.S. at 390.

[41] 47 U.S.C. § 251(c)(3).

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impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[42] The Supreme Court and D.C. Circuit have held that the Section 251(d)(2) requirements reflect Congress's decision to place a real upper bound on the level of unbundling regulators may order.[43]

52 Congress explicitly assigned the task of applying the Section 251(d)(2) impairment test and "determining what network elements should be made available for purposes of subsection [251](c)(3)" to the FCC.[44] The Supreme Court confirmed that as a precondition to unbundling, Section 251(d)(2) "requires the [Federal Communications] Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[45] And the D.C. Circuit confirmed in *USTA II* that Congress did not allow the FCC to have state commissions perform this work on its behalf.[46]

53 *USTA II*'s clear holding is that the FCC, not state commissions, must make the impairment determination called for by Section 251(d)(3)(B) of the Act. As the Supreme Court held in *Iowa Utilities Board*, "the Federal Government has taken the regulation of local telephone competition away from the states," and it is clear that the FCC must "draw the lines to which [the states] must hew," lest the industry fall into the "surpassing strange" incoherence of "a federal program administered by 50 independent state agencies" without adequate federal oversight.[47]

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[42] 47 U.S.C. § 251(d)(2).

[43] *See Iowa Utilities Board*, 525 U.S. at 390 ("We cannot avoid the conclusion that if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] has come up with, it would not have included §251(d)(2) in the statute at all."); *USTA* I, 290 F.3d at 427-28 (quoting *Iowa Utilities Board*'s findings regarding congressional intent and section 251(d)(2) requirements, and holding that unbundling rules must be limited given their costs in terms of discouraging investment and innovation).

[44] 47 U.S.C. § 251(d)(2).

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

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

[47] *Iowa Utilities Board*, 525 U.S. at 366, 378 n. 6.

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54 *Iowa Utilities Board* makes clear that the essential prerequisite for unbundling any given element under Section 251 is a formal finding by the FCC that the Section 251(d)(2) "impairment" test is satisfied for that element. Simply put, if there has been no such FCC finding, the Act does not permit any regulator, federal or state, to require unbundling under Section 251. In the *TRO*, the FCC reaffirmed this:

> 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.
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> ***
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> If a decision pursuant to state law were to require unbundling of a network element for which the Commission has either found no impairment—and thus has found that unbundling that element would conflict with the limits of section 251(d)(2))—or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(c).[48]

55 Federal courts interpreting the Act have reached the same conclusion.[49]

56 Covad's broad proposals for unbundling under state law reflect its erroneous view that the Commission has plenary authority under state law to order whatever unbundling it chooses. To support this argument, Covad cites various state law savings clauses contained in the Act. What Covad ignores is that these savings clauses preserve independent state authority *only to the extent it is consistent with the Act,* including Section 251(d)(2)'s substantive limitations on the level of unbundling that may be authorized. Section 251(d)(3), for example, protects only those state enactments that are "consistent with the requirements of this section" — which a

[48] *TRO* at ¶¶ 193, 195.

[49] *See Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (citing the above-quoted discussion in the *TRO* and stating that "we cannot now imagine" how a state could require unbundling of an element consistently with the Act where the FCC has not found the statutory impairment test to be satisfied).

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state law unbundling order ignoring the Act's limits would clearly not be. Likewise, Sections 261(b) and (c) both protect only those state regulations that "are not inconsistent with the provisions of this part" of the Act, which includes Section 251(d)(2). Nor does Section 252(e)(3) help Covad; that simply says that "nothing in *this section*" — that is, Section *252* — prohibits a state from enforcing its own law, 47 U.S.C. § 252(e)(3) (emphasis added), but the relevant limitations on the scope of permissible unbundling that are at issue are found in Section 251.[50]

57 Thus, these savings clauses do not preserve the authority of state commissions to adopt or enforce under state law unbundling requirements that have been rejected by the FCC or vacated in *USTA II*. Indeed, 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."[51] The federal regulatory scheme that Congress has established for unbundling recognizes that "unbundling is not an unqualified good," because it "comes at a cost, including disincentives to research and development by both ILECs and CLECs, and the tangled management inherent in shared use of a common resource."[52] Thus, Congress has mandated the application of limiting principles in the determination of unbundling requirements that reflect a balance of "the competing values at stake."[53] 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.

58 The clash between Covad's state law unbundling demands and the federal unbundling scheme is demonstrated sharply by Covad's approach to the unbundling of feeder subloops. In Section

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[50] *See* 47 U.S.C. § 251(d)(2).

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

[52] *USTA I*, 290 F.3d at 429. *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").

[53] *Id*. *See also Iowa Utils. Bd.*, 535 U.S. at 388.

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9.3.1.1 of its proposed ICA, Covad includes language that would obligate Qwest to provide feeder subloops, notwithstanding the FCC's ruling in the *TRO* that ILECs are not required to unbundle this network element.[54] The FCC determined that an unbundling requirement for this facility would undermine the objective of Section 706 of the Act "to spur deployment of advanced telecommunications capability . . . ."[55]

59 The limitations on state unbundling authority were recently recognized by an administrative law judge in Oregon in response to substantially the same arguments that Covad is presenting here. As the ALJ correctly concluded, a state commission "may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been eliminated by the *TRO* or *USTA II*."[56] That is precisely what Covad is requesting this Commission to do through its proposed unbundling language. As the Oregon ALJ concluded, any unbundling a state commission requires must be based upon a fact-specific impairment analysis required by Section 251(d). Here, Covad is requesting that the Commission require blanket unbundling without an impairment analysis and without providing any evidence that it would be impaired without the multitude of network elements it is seeking.

60 A state-imposed requirement to unbundle feeder subloops would plainly conflict with this FCC determination and would seriously undermine the FCC's attempt to achieve a fundamental objective of the Act – promoting investment in advanced telecommunications facilities. This conflict with FCC rulings and policy determinations would of course not be limited to feeder subloops, since Covad would contend that its unbundling language reaches other network elements for which the FCC specifically declined to require unbundling based on element-

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[54] *TRO* at ¶ 253.

[55] *Id.*

[56] *See* Attachment 1, In the Matter of the Investigation to Determine Whether Impairment Exists in Particular Markets if Local Circuit Switching is no longer available, Oregon Docket UM-1100, Order Denying CLEC Motion at 6 (Oregon P.U.C. June 11, 2004).

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specific fact and policy determinations.

61 In sum, the relevant question is not, as Covad presumes, whether sweeping unbundling obligations can be cobbled together out of state law, but rather whether any such obligations would be consistent with *Congress's* substantive limitations on the permissible level of unbundling, as authoritatively construed by the Supreme Court, the D.C. Circuit, and the FCC. Covad's proposals for broad unbundling under state law ignore these limitations and the permissible authority of state commissions to require unbundling.

c) The Commission Does Not Have The Ability To Make The Impairment Determinations Required By The Act.

62 Even if the Commission wanted to step into the FCC's shoes and make the impairment determinations required by the Act, it could not as a practical matter do so. This is so because the FCC has not sufficiently defined the impairment standard to allow such determinations.

63 In *USTA II*, the D.C. Circuit decided not to review the Commission's impairment standard since the standard "finds concrete meaning only in its application, and only in that context is it readily justiciable."[57] However, the Court nonetheless noted significant deficiencies in the standard. First, the Court criticized the FCC's impairment standard for being so open-ended that it imposed no meaningful constraints on unbundling:

> [W]e do note that in at least one important respect the Commission's definition of impairment is *vague almost to the point of being empty***.** The touchstone of the Commission's impairment analysis is whether the enumerated operational and entry barriers "make entry into a market uneconomic." Order P 84. Uneconomic by whom? By any CLEC, no matter how inefficient? By an "average" or "representative" CLEC? By the most efficient existing CLEC? By a hypothetical CLEC that used "the most efficient telecommunications technology currently available," the standard that is built into TELRIC? Compare 47 CFR § 51.505(b)(1). We need not resolve the significance of this uncertainty, but we highlight it because we suspect that the issue of whether the

[57] *USTA II*, 359 F.3d at 572.

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standard is too open-ended is likely to arise again.[58]

64 Second, the Court noted that the impairment standard failed to address impairment in markets where state regulation holds rates below historic costs.

65 In making the impairment determination, the FCC is required to balance the advantages of unbundling against the costs, both in terms of spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.[59] *USTA II* makes clear that the FCC's impairment standard does not strike this balance. It is a "looser concept of impairment" in which the costs of unbundling are "brought into the analysis under §251(d)(2)'s 'at a minimum' language."[60] Thus, not only is the impairment definition open-ended, it is incomplete in that it fails to capture all of the considerations that must be taken into account under Section 251(d)(2) before unbundling can be required under federal or state law.

66 The Commission therefore has no legitimate way to determine which, if any, network elements Qwest would be required to provide under Covad's state law unbundling proposals. The FCC's impairment standard is too open-ended and does not contain guidance as to how to limit unbundling where the costs of unbundling outweigh any benefits there may be.

67 Adding to this uncertainty, with the limited exception noted above involving feeder subloops, Covad's proposed ICA language fails to identify the specific network elements that would be unbundled under state law. Even if there were a lawful impairment standard for the Commission to apply, therefore, there would be no meaningful way to apply the standard. In this sense, Covad's proposal lacks the "concrete meaning" that, in the words of the D.C. Circuit, is necessary to make an impairment standard "readily justiciable."[61]

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[58] *Id.* (emphasis added).

[59] *Id.* at 563.

[60] *Id.* at 572.

[61] *Id.* While it is clear that Covad is seeking unbundling even where there is no impairment under section 251, its proposed ICA

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d) State Commissions Do Not Have Authority To Require Unbundling Under Section 271.

68 Covad's unbundling proposals assume incorrectly that state commissions have authority to impose binding unbundling obligations under Section 271. 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.[62] State commissions have only a "consulting" role in that determination.[63] As one court has explained, a state commission has a fundamentally different role in implementing Section 271 than it does in implementing Sections 251 and 252:

> Sections 251 and 252 contemplate state commissions may take affirmative action towards the goals of those Sections, *while Section 271 does not contemplate substantive conduct on the part of state commissions*. Thus, a "savings clause" is not necessary for Section 271 because the state commissions' role is investigatory and consulting, not substantive, in nature.[64]

69 Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271,[65] likewise provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.[66] The FCC has thus confirmed 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*

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language does not (except for feeder subloops) identify the specific network elements it would demand from Qwest.

62 47 U.S.C. § 271(d)(3).

63 47 U.S.C. § 271(d)(2)(B).

64 *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) (emphasis added).

65 *TRO* at ¶¶ 656, 662.

66 *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).

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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)."[67]

70 The absence of any state commission decision-making authority under Section 271 also is confirmed by the fundamental principle that 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.[68] *A fortiori*, 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.[69]

71 Additionally, the process mandated by Section 252, the provision pursuant to which Covad filed its petition for arbitration, is concerned with implementation of an ILEC's obligations under Section 251, not Section 271. In an arbitration conducted under Section 252, therefore, state commissions only have authority to impose terms and conditions relating to Section 251 obligations, as demonstrated by the following provisions of the Act.

(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) through (5) of [section 251(b)] and [section 251(c)]."[70]

(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*."[71]

(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)]."[72]

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[67] *TRO* at ¶ 664.

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

[69] *See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13. *See also TRO* at ¶¶ 186-87 ("states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations").

[70] 47 U.S.C. § 251(c)(1).

[71] 47 U.S.C. § 252(a)(emphasis added).

[72] *See* 47 U.S.C. § 252(b)(1). The Fifth Circuit has ruled that state commissions may arbitrate disputes regarding matters other

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(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).[73]

(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]."[74]

72 It is thus clear that state commission arbitration of disputes over the duties imposed by federal law is limited to those imposed by Section 251 and excludes the conditions imposed by Section 271. Accordingly, the Commission does not have the authority to require the Section 271 unbundling that Covad seeks or to establish prices for those elements.

e) Covad's Proposal To Use TELRIC Rates For Section 271 Elements Is Unlawful.

73 Under Covad's proposed Section 9.1.1.7 of the ICA, existing TELRIC rates would apply to network elements that Qwest provides pursuant to Section 271 until new rates are established in accordance with "Sections 201 and 202 of the Act or applicable state law." In addition, it is clear from Covad's arbitration petition and its filings in other states that Covad is ultimately seeking permanent TELRIC-based prices for Section 271 elements.[75]

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than the duties imposed by Section 251 if *both* parties *mutually agree* to 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 ruling 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"). In the Qwest/Covad Minnesota arbitration, the administrative law judge ruled that Qwest and Covad did negotiate Covad's request for unbundling under Section 271. *Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Minn. Commission Docket No. P-5692, 421/C1-04-549, Minn. Office of Administrative Hearings Docket No. 3-2500-15908-4, Order on Motion to Dismiss (June 4, 2004). In that case, however, Qwest established that its negotiators consistently refused to negotiate those issues and expressly told Covad's representatives that the issues were not properly part of the section 251/252 process. The ruling incorrectly finds that Qwest opened the door to Covad's insertion of section 271 issues into the negotiations by proposing ICA language to implement the section 251 unbundling obligations established by the *TRO*. Qwest itself, however, never proposed any language relating to section 271 unbundling obligations, and Qwest and Covad never discussed Covad's proposed language. There was not, therefore, *mutual agreement* to address those issues in the negotiations, as is required under *Coserv*.

[73] *See* 47 U.S.C. § 252(e)(2)(b).

[74] 47 U.S.C. § 252(e)(6).

[75] *See* Covad's Petition for Arbitration at 11-13.

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74 The absence of state decision-making authority under Sections 201, 202, and 271 establishes that state commissions are without authority to determine the prices that apply to network elements provided under Section 271. Thus, as noted above, the FCC ruled in the *TRO* that it will determine the lawfulness of rates that BOCs charge for Section 271 elements in connection with applications and enforcement proceedings brought under that section.

75 Significantly, the FCC recently rejected the argument that the pricing authority granted to state commissions by Section 252(c)(2) to set rates for UNEs provided under Section 251 gives commissions authority to set rates for Section 271 elements. In its opposition to the petitions for a *writ of certiorari* filed with the Supreme Court in connection with *USTA II*, the FCC addressed the contention that Section 252 gives state commissions exclusive authority to set rates for network elements. It stated that the contention "rests on a flawed legal premise,"[76] explaining that Section 252 limits the pricing authority of state commissions to network elements provided under Section 251(c)(3):

> Section 252(c)(2) directs state commissions to "establish any rates for * * * network elements *according to subsection (d)*." 47 U.S.C. 252(c)(2) (emphasis added). Section 252(d) specifies that States set "the just and reasonable rate for network elements" *only* "for purposes of [47 U.S.C. 251(c)(3)]." 47 U.S.C. 252(d)(1).[77]

76 Accordingly, the FCC emphasized, "[t]he statute makes no mention of a state role in setting rates for facilities or services that are provided by Bell companies to comply with Section 271 and are *not* governed by Section 251(c)(3)."[78]

77 In requesting that the Commission adopt its rate proposal, Covad is therefore asking the

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[76] Brief for the Federal Respondents in Opposition to Petitions for a Writ of Certiorari, *National Association of Regulatory Utility Commissioners v. United States Telecom Association*, Supreme Court Nos. 04-12, 04-15, and 04-18, at 23 (filed September 2004).

[77] *Id.* (emphasis in original).

[78] *Id.* (emphasis in original). In the same brief, the FCC commented that the *TRO* does not express an opinion as to the precise role of states in connection with section 271 pricing. *Id.*

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Commission to exercise authority it does not have and that rests exclusively with the FCC. In addition, Covad's demand for even the temporary application of TELRIC pricing to Section 271 elements violates the FCC's ruling in the *TRO* that TELRIC pricing does not apply to these elements. The FCC ruled unequivocally 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.[79] In so ruling, the FCC confirmed, consistent with its prior rulings in Section 271 orders, that TELRIC pricing does not apply to these network elements.[80] In *USTA II*, the D.C. Circuit reached the same conclusion, rejecting the CLECs' claim that it was "unreasonable for the Commission to apply a different pricing standard under Section 271" and instead stating that "we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment."[81]

4. Issue 3: Commingling (Section 4.0 and Definition of "Section 251(c)(3) UNE," Section 9.1.1.1) and Ratcheting

78 Qwest and Covad have resolved the "ratcheting" portion of Issue 3 in its entirety by agreeing on language in Sections 9.1.1 and 9.1.1.4 of the ICA that addresses both parties' concerns.[82] Accordingly, it is no longer necessary for the Commission to decide any issues relating to ratcheting.

79 In addition, Qwest and Covad have narrowed their disputes relating to commingling, having resolved their disagreement concerning whether the ICA should list each of the FCC's eligibility criteria for enhanced extended lines ("EELs"). The parties resolved this issue by adding language to the ICA confirming that Covad will not order any type of EEL and by

[79] *TRO* at ¶¶ 656-64.

[80] *Id.*

[81] *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

[82] Portions of section 9.1.1 unrelated to ratcheting remain in dispute in connection with Issue 2.

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removing language that recited all of the eligibility criteria. This agreement will be reflected in Section 9.1.1.5 of the ICA. The parties also have reached conceptual agreement relating to their dispute about whether Section 9.1.1.1 of the ICA should list specific services that are unavailable for resale commingling and are in the process of preparing ICA language that will reflect their agreement. While it is unlikely that the Commission will have to address this issue, Qwest nevertheless addresses it below since it is not yet fully resolved.

80 Accordingly, the remaining disputed issues for the Commission to decide in connection with Issue 3 are: (1) whether Qwest is required to commingle network elements provided under Section 271 with wholesale services and network elements provided under Section 251 (involving Section 9.1.1.1 and Covad's definition of a "Section 251(c)(3) UNE" within Section 4.0); and (2) the manner in which the ICA should address resale commingling (Section 9.1.1.1). In addition, as discussed above, the FCC's *Interim Unbundling Rules* prohibit the Commission from imposing any terms and conditions relating to access to enterprise market loops, dedicated transport, and switching that are not included in the existing Qwest/Covad that was in effect on June 15, 2004. The Commission should also address the effect of these rules on commingling. Finally, as discussed below, Covad's proposed definition of "UNE" and its ICA description of Qwest's combining obligations would impermissibly require Qwest to combine Section 271 network elements with other Section 271 elements, further demonstrating the inappropriateness of including Section 271 elements in the definition of "UNE."

81 Qwest addresses each of these three disputed issues below.

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a) Covad's Proposed Language Would Improperly Require Qwest to Commingle Network Elements Provided Under Section 271.

(1) The FCC's *Interim Unbundling Rules* Do Not Permit The Commission to Require Qwest to Provide Commingling for Enterprise Market Loops, Dedicated Transport, and Switching.

82 The *TRO* 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."[83] The FCC defines commingling as "the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."[84]

83 As discussed above, the FCC's *Interim Unbundling Rules* require ILECs "to continue providing unbundled access to enterprise market loops, dedicated transport, and switching under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004."[85] The FCC ordered that these rates, terms, and conditions must remain in effect "until the earlier of the effective date of final unbundling rules promulgated by the [FCC] or six months after Federal Register publication of [the *Interim Unbundling Rules*]…."[86]

84 Under these rules, therefore, Qwest and Covad are bound by the rates, terms, and conditions in their existing ICA that was in effect on June 15, 2004, relating to access to enterprise market

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[83] *TRO* at ¶ 579; *see also* 47 C.F.R. § 51.309(e) and (f).

[84] *TRO* at ¶ 579; *see also* 47 C.F.R. § 51.5 (definition of "commingling").

[85] On August 23, 2004, Qwest, Verizon, and the United States Telecom Association challenged the lawfulness of the *Interim Unbundling Rules* in a petition for a writ of mandamus filed with the D.C. Circuit. While Qwest strongly believes that the *Interim Unbundling Rules* are unlawful and that a writ of mandamus should issue, the rules nevertheless remain in effect. Accordingly, this brief addresses the legal effects of the *Rules* notwithstanding the mandamus petition.

[86] Interim Unbundling Rules and Unbundling NPRM at ¶ 1.

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loops, dedicated transport, and switching. Because the current Qwest/Covad ICA that was in effect on June 15, 2004 does not require Qwest to perform any commingling, the Commission cannot require Qwest to commingle these elements with any other elements or services. Under the express terms of the *Interim Unbundling Rules*, such a requirement would alter the status quo and is therefore impermissible. Accordingly, the Commission should order the parties to include language in the ICA establishing that the commingling required by the agreement does not include any commingling of enterprise market loops, dedicated transport, or switching.

(2) Covad's Demand For Commingling Of Section 271 Elements Assumes Incorrectly That The Commission Has Section 271 Authority And Violates The Rulings In The *TRO* And *USTA II* Establishing That ILECs Are Not Required To Combine Section 271 Elements.

85 Covad attempts to achieve the impermissible result of requiring Qwest to commingle Section 271 elements by defining commingling in ICA Section 4.0 as the "connecting, attaching, or otherwise linking of a 251(c)(3) UNE . . . to one or more facilities or services that a requesting Telecommunications Carrier has obtained at wholesale from Qwest *pursuant to any method other than unbundling under Section 251(c)(3) of the Act . . . .*" (emphasis added). Covad's reference to facilities obtained "pursuant to any method other than unbundling under Section 251(c)(3)" is intended to include network elements that Qwest provides pursuant to Section 271. By contrast, Qwest's Section 4.0 definition of commingling properly excludes Section 271 elements by referring to "the connecting, attaching, or otherwise linking of an Unbundled Network Element . . . to one or more facilities that a requesting Telecommunications Carrier has obtained at a wholesale from Qwest . . . ." Qwest's definition of "Unbundled Network Element" in Section 4.0 expressly excludes elements provided under Section 271.

86 As Qwest demonstrates above in connection with Issue 2, state commissions do not have authority to impose any terms and conditions relating to network elements that BOCs provide pursuant to Section 271. That absence of authority prohibits the Commission from imposing

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ICA language that would require Qwest to commingle elements provided under Section 271 with Section 251 elements and wholesale services.

87 In addition, the Section 271 commingling obligations that would be imposed by Covad's proposed Section 9.1.1.1 conflict with the FCC's and the D.C. Circuit's holdings that ILECs are not required to combine Section 271 elements with UNEs. In violation of those holdings, the effect of the Covad's proposal would be to require Qwest to combine Section 271 elements with Section 251 UNEs.

88 While the FCC ruled in the *TRO* that ILECs have an independent obligation under Section 271 (independent of Section 251) to provide access to loops, transport, switching, and signaling, it also ruled that an ILEC is not required to combine those elements when it provides them under that section of the Act. The FCC explained that checklist items 4, 5, 6 and 10 of Section 271(c)(2)(B) -- the checklist items that impose the independent unbundling obligation -- do not include any cross-reference to the combination requirement set forth in Section 251(c)(3).[87] If Congress had intended any Section 251 obligations to apply to those Section 271 elements, the FCC emphasized, "it would have explicitly done so," just as it did with checklist item 2.[88] Thus, the FCC ruled that it "decline[s] to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under section 251."[89]

89 Significantly, the FCC's rules that address commingling are included within its rules relating to combinations. Equally important, the FCC's rules define "commingling" as including the act of "combining" network elements:

> Commingling means the connecting, attaching, or otherwise linking of an unbundled network element or a combination of unbundled network elements, to one or more facilities or services that a requesting

[87] *TRO* at ¶¶ 654, 656 & n.1990.

[88] *Id.* at ¶ 654.

[89] *Id.* at n. 1990.

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> telecommunications carrier has obtained at wholesale from an incumbent LEC, *or the combining of an unbundled network element*, or a combination of unbundled network elements, with one or more such facilities or services.[90]

90 As is clear from this definition, there is no difference between "combining" and "commingling" network elements -- they are one and the same. They are simply different labels applied to the same physical act of connecting, attaching, linking, or combining network elements with other facilities or services. In other words, to commingle is to combine and vice versa.

91 Thus, if the Commission were to adopt Covad's language and thereby order Qwest to commingle Section 271 elements with UNEs provided under Section 271, it would be requiring Qwest to combine those elements. For example, if Covad requested Qwest to "commingle" an unbundled loop provided under Section 251 with dedicated transport provided under Section 271, the resulting product would be exactly the same as that produced by a request for Qwest to "combine" those elements.

92 For this reason, Covad's proposal violates the *TRO's* proscription against the combining of Section 271 elements. In *USTA II*, the D.C. Circuit expressly upheld this limitation on ILEC combining obligations. In so doing, the D.C. Circuit emphasized, as the FCC did, that checklist items 4, 5, 6, and 10 do not include any of the requirements of Section 251(c)(3).[91] Thus, the court ruled, the FCC properly determined that ILECs have no obligation to combine Section 271 elements.

93 Covad does not address the inconsistency between requiring Qwest to commingle Section 271 elements and the rulings in *USTA II* and the *TRO* removing those elements from BOC's combining obligations. Instead, Covad relies on paragraph 579 of the *TRO* where the FCC

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[90] *See* 47 U.S.C. § 51.5 (definition of "commingling") (Emphasis added); *see also TRO* at ¶ 575 (defining commingling as meaning to "connect, combine, or otherwise attach….").

[91] *USTA II*, 359 F.3d at 589-90.

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described commingling as requiring the connecting, attaching, linking, or combining 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. . . ." According to Covad, this last phrase -- "pursuant to any method other than unbundling under section 251(c)(3) of the Act" -- necessarily includes elements that BOCs provide under Section 271.

94 The flaw in this interpretation, however, is that it reads out of the *TRO* the FCC's ruling that BOCs are not required to combine Section 271 elements. To preserve the effect of that ruling, it is necessary to interpret paragraph 579 of the *TRO* consistently with the FCC's and the D.C. Circuit's very express holdings that ILECs are not required to combine Section 271 elements. To do otherwise is to improperly nullify those holdings. Moreover, the interpretation of paragraph 579 reflected in the Order is inconsistent with the Act itself and in particular, with the absence of any cross-references to Section 251's combination requirement in checklist items 4, 5, 6, and 10 of Section 271(c)(2)(B).[92]

95 Finally, any claim by Covad that "commingling" of Section 271 elements is permissible while "combining" of them is not is refuted by the FCC's *TRO Errata*. In the original version of the *TRO*, paragraph 584 instructed that BOCs' 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 making that section of the Order consistent with its ruling that BOCs are not required to combine Section 271 elements and eliminating any requirement for ILECs to commingle those elements. For these

[92] There is no merit to Covad's contention that the *TRO* establishes only that BOCs are not required to combine section 271 elements with other section 271 elements. In footnote 1990 of the *TRO*, the FCC stated broadly that ILECs do not have "to combine network elements that no longer are required to be unbundled under section 251." As reflected by this language, the FCC did not limit this ruling to combining section 271 elements with other section 271 elements. Instead, it ruled that BOCs do not have to combine section 271 elements at all, which is consistent with the absence of any cross-references to the section 251 combining requirement in checklist items. Thus, there is no obligation to combine section 271 elements with 251 elements or with other section 271 elements.

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reasons, the Commission should reject Covad's definition of "commingling" and its related use of the term "section 251(c)(3) UNE" and should adopt Qwest's definition of commingling as set forth in Qwest's proposed Section 4.0.

b) Covad's Proposed ICA Language Improperly Requires Qwest To Combine Section 271 Elements With Other Section 271 Elements.

96 As discussed above, the *TRO* establishes that BOCs are not required to combine Section 271 elements with other network elements and wholesale services. Covad claims that this ruling establishes only that BOCs are not required to combine Section 271 elements with other Section 271 elements, an interpretation that, as discussed above, is not supported by the plain language of the FCC's ruling. However, even if Covad's interpretation were correct, its own ICA language would violate its understanding of the law.

97 Specifically, as discussed, Covad's definition of "UNE" in Section 4.0 of the ICA includes Section 271 elements. Further, agreed language of the ICA defines "UNE Combinations" as "a combination of two (2) or more Unbundled Network Elements that were or were not previously combined or connected in Qwest's network as required by the FCC, the Commission or this Agreement." Under this language, Qwest would be required to combine Section 271 elements with other Section 271 elements in violation of the FCC's plainly stated ruling that it "decline[s] to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[93]

98 This improper result highlights the inappropriateness of including Section 271 elements in the ICA's definition of "UNE." Accordingly, the Commission should reject Covad's definition of "UNE," confirm that "UNEs" do not include Section 271 elements, and clarify that Qwest has

[93] *TRO* at ¶ 656 & n.1990.

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no obligation to combine or commingle these elements.

c) The ICA Should Clearly Define The Resale Services For Which Commingling Is Required.

99 As discussed above, Qwest and Covad have reached conceptual agreement concerning the ICA's treatment of resale services in connection with commingling and are in the process of developing language to implement their agreement. Qwest is optimistic that the parties will resolve this issue and will apprise the Commission when it is resolved.

100 The dispute relating to resale commingling concerned whether the ICA should include a list of services and elements that are not available for resale commingling. In its proposed Section 9.1.1.1, Qwest included a list of four services and elements for which resale commingling is unavailable, since they are not among the "telecommunications services" that ILECs are required to provide for resale pursuant to Section 251(c)(4). Covad opposed including this list, claiming that three of the exclusions were accurate but unnecessary and that one of the exclusions – the Section 271 element exclusion – was improper.

101 The parties' tentative agreement to resolve this issue is premised on the fact that Section 6.0 of the ICA provides that, absent an amendment, Covad will not order any resale services under the agreement. Because resale services are not available under the ICA, the parties have agreed in principle that commingling of resale services also is not available without an amendment to the agreement. Thus, Qwest is proposing the following language for Sections 6.0 and 9.1.1.1 of the ICA:

> Section 6.0 – Resale
>
> This agreement does not include resale or resale commingling. In the event CLEC wishes to order resale or resale commingling, the Parties will negotiate an amendment to this agreement, subject to Applicable Law.
>
> 9.1.1.1 This agreement does not include resale or resale commingling. In the event CLEC wishes to order resale or resale commingling, the

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> Parties will negotiate an amendment to this agreement, subject to Applicable Law.

102 With these clarifications that resale and resale commingling are not available under the ICA, there is no longer a need for Qwest's proposed resale exclusions. While Qwest expects this issue to be resolved, if it is not, Qwest requests that the Commission adopt the language set forth above in lieu of Qwest's proposal to include the resale exclusions in Section 9.1.1.1 of the ICA. Alternatively, if the issue is not resolved and the Commission does not adopt this language, Qwest requests that the Commission adopt Qwest's initial proposal to include the resale exclusions for the reasons set forth in Ms. Stewart's testimony.[94]

B. Issue 5: Channel Regeneration

1. Under 47 C.F.R. 51.323(h) Qwest has no obligation to provision CLEC-to-CLEC connections, and therefore has no obligation to offer channel regeneration on a CLEC-to-CLEC connection free of charge.

103 Issue 5 involves Covad's proposal to require Qwest to provide channel regeneration for CLEC-to-CLEC connections free of charge.[95] Qwest opposes such proposal because under the FCC's rules Qwest is not required to provision a CLEC-to-CLEC connection if it permits the interconnecting CLECs to perform the connection themselves.[96] Qwest permits collocating telecommunications carriers to interconnect with each other in its central offices thereby removing any FCC requirement that Qwest provide such connection.[97]

104 It follows that absent the obligation to provide the connection between CLECs, Qwest need not provide regeneration for the connection at any price, and certainly not free of charge. While Qwest is not legally bound to do so, Qwest offers CLEC-to-CLEC connections upon request by

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[94] *See* Ex. 61-T (Stewart Direct) at 18:12-19:17.

[95] *See* Covad's Petition for Arbitration at ¶ 51.

[96] *See* 47 C.F.R. § 51.323(h).

[97] *See* Ex. 45-T (Norman Direct) at 13:7-10; *See also*, Ex. 71 (Proposed Interconnection Agreement) at § 8.2.1.23.

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the CLEC. However, where channel regeneration is required on the connection and the CLEC does not wish to provision its own regeneration, Qwest will provide the connection, including regeneration, as a finished service under its FCC 1 Access Tariff.[98]

105 In its *Fourth Advanced Services Order*, the FCC discussed CLEC-to-CLEC connections and amended 47 C.F.R. 51.323(h) to list specifically the only situations in which an ILEC has an obligation to provide a connection between the collocated equipment of two CLECs.[99] Specifically, ILECs must provide a connection between two CLEC collocation spaces: 1) if the ILEC does not permit the CLECs to provide the connection for themselves[100]; or 2) under Section 201 when the requesting carrier submits certification that more than 10 percent of the amount of traffic will be interstate.[101] Because Qwest permits CLECs to connect to each other outside of their collocation space and thereby removes itself from the CLEC-to-CLEC relationship, it has no FCC-imposed obligation to provide a CLEC-to-CLEC connection, much less regeneration for a CLEC-to-CLEC connection. The absence of that obligation is established by the express language of Rule 51.323(h)(1) which specifically eliminates the requirement for an ILEC to provide a connection between two CLECs' networks where the ILEC permits the CLECs to establish that connection:

> An incumbent LEC shall provide . . . a connection between the equipment in the collocation spaces of two or more telecommunications carriers, *except to the extent the incumbent LEC permits the collocating parties to provide the requested connection for themselves* or a connection is not required under paragraph (h)(2) of this section. (Emphasis added).

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98 *Id.* at 13:11 – 14:2.

99 *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order* (Fourth Advanced Services Order), CC Docket No. 98-147, (FCC 01-204) Rel. August 8, 2001.

100 Pursuant to 47 C.F.R. § 51.323(h)(1) an ILEC is <u>not</u> required to provide a connection if ". . . the incumbent LEC permits the collocating parties to provide the requested connection for themselves . . . ."

101 Pursuant to 47 C.F.R. § 51.323(h)(2) "[a]n incumbent LEC is not required to provide a connection between the equipment in the collocated space of two or more telecommunications carriers if the connection is requested pursuant to section 201 of the Act . . . ."

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106 As stated above, despite the fact that Qwest permits CLECs to provision their own connections, Qwest has agreed voluntarily – not because of any collocation obligation imposed by the FCC -- to provision the connection if requested by the CLEC under its FCC 1 Access Tariff, Section 21.[102] Thus, the specific FCC rules that govern regeneration whenever the ILEC does *not* permit the CLEC to provide its own CLEC-to-CLEC cross connection, no matter how interpreted, have no applicability to Qwest because of Qwest's decision to permit CLECs to provision their own connection.

107 The FCC's rules were developed for the sole purpose of overseeing those circumstances where the ILEC does not permit the CLECs to provide this connection themselves and, quite simply, are not applicable to Qwest. In fact, given that Qwest is not subject to these rules, the FCC tariff must govern regeneration under these circumstances and should the Washington Commission order otherwise, the ruling would be tantamount to a state overruling of a federal tariff.

2. The Commission should reevaluate its prior orders regarding regeneration so that Section 8.2.1.23.1.4 of the ICA is consistent with the FCC's rules.

108 Covad seeks to have the following underlined language included in Section 8.2.1.23.1.4 of the parties' ICA. The bold and underlined portion is currently a part of Qwest's 8th Revised SGAT, while the underlined portion, which is not in bold, is additional language proposed by Covad. Qwest opposes inclusion of all of the underlined language:

> 8.2.1.23.1.4 CLEC is responsible for the end-to-end service design that uses ICDF Cross Connections to ensure that the resulting service meets its Customer's needs. This is accomplished by CLEC using the Design Layout Record (DLR) for the service connection. **Depending on the distance parameters of the combination, regeneration may be required but Qwest shall not charge CLEC for such regeneration,** if there does not exist in the affected Premises, another Collocation space whose use by CLEC would not have required regeneration, and such a

[102] *See* Ex. 53 (Qwest Technical Publication 77386), Chapter 16.

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space would not have existed except for Qwest's reservation of the space for its own future use.

109 In conjunction with Qwest's 271 application, this Commission issued three orders that addressed regeneration.[103] In its 11th Supplemental Order, the Commission analyzed the FCC's *Second Report and Order,* and found that the *Second Report and Order* required ILECs, and therefore Qwest, to "furnish any regeneration required in cross-connection between LECs and CLEC."[104] In its ordering clause, however, the Commission required Qwest to amend certain sections of its SGAT which included Section 8.2.1.23.1.4.[105] Section 8.2.1.23.1.4 discusses CLEC-to-CLEC cross connections at the ICDF. The discussion in the body of the order, in particular paragraph 92, very clearly states that the *Second Report and Order* is limited to a discussion of ILEC to CLEC connections and not CLEC-to-CLEC connections,[106] thus Qwest believes the Commission inadvertently included this section in its ordering clause. This notion is further supported by the Commission's discussion in its 15th Supplemental Order wherein the Commission permitted Qwest to indirectly recover the costs of ILEC-to-CLEC regeneration by including in its collocation cost study the cost of such regeneration.[107] Qwest compounded the problem by amending its SGAT which further perpetuated what Qwest believes to be the Commission's unintended extrapolation of the FCC's *Second Report and*

[103] *See*, In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. UT-003022, 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-003040, Eleventh Supplemental Order; Initial Order Finding Noncompliance on Collocation Issues ("11th Supplemental Order"), ¶¶ 88-92, 155 (Mar. 30, 2001); In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. UT-003022, 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-003040, Thirteenth Supplemental Order Initial Order (Workshop Three): Checklist Item No. 2, 5, and 6 ("13th Supplemental Order), ¶¶ 57-64 (Jul. 24, 2001); In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. UT-003022, 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-003040, Fifteenth Supplemental Order (15th Supplemental Order"); Commission Order Addressing Workshop Two Issues: Checklist Items Nos 1, 11, and 14, ¶¶ 60, 61, 62, 157 (August 17, 2001).

[104] 11th Supplemental Order, at ¶ 92.

[105] *Id.* at ¶ 155(1)(c).

[106] *Id.* at ¶ 92.

[107] 15th Supplemental Order, at ¶¶ 60, 62.

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Order.

110 Since the *Second Report and Order* did not address CLEC-to-CLEC cross-connections, it is not controlling here.[108] Rather the FCC's *Fourth Advanced Services Order,* discussing CLEC-to-CLEC connections, resulted in the amendment of 47 C.F.R. 51.323(h) to enumerate those situations when an ILEC is obligated to provide a connection between the collocated equipment of two CLECs.[109] As mentioned above, Qwest's practice of permitting CLECs to perform their own connections to an interconnecting CLEC eliminates any FCC requirement that Qwest would have to provide a CLEC-to-CLEC connection. Thus, going forward, in addition to correcting the pertinent SGAT sections in the Covad ICA, it is Qwest's intention that when it re-files its 9th Revised SGAT in Washington[110], it will make the appropriate changes to the SGAT to accurately reflect the FCC's requirements regarding ILEC to CLEC regeneration, and in light of the confusion experienced by Covad in this arbitration proceeding, will clarify Qwest's position regarding CLEC-to-CLEC connections.

111 While Qwest acknowledges that a portion of the language proposed by Covad exists in its 8th Revised SGAT, Qwest asks the Commission to reevaluate that language based upon the FCC's rules and to accept Qwest's proposal as it is consistent with the FCC's directives. Qwest seeks to rectify what it believes was an inadvertent revision by removing the language from its SGAT and interconnection agreements as it moves forward with negotiating new contracts and when it re-files its 9th Revised SGAT.[111]

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[108] In the Matter of Local Exchange Carrier's Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, Second Report and Order, CC Docket No. 93-162, FCC 97-208 (Rel. June 13, 1997), ¶¶ 117-118.

[109] Fourth Advanced Services Order at ¶¶ 55-84.

[110] Qwest initially filed its 9th Revised SGAT on February 26, 2004 which was intended to reflect changes necessitated by the FCC's *Triennial Review Order* and to correct a number of miscellaneous grammatical changes and changes based upon agreements reached with CLECs in other states in Qwest's region. Qwest withdrew this filing on March 11, 2004.

[111] Upon the filing of its 9th Revised SGAT, Qwest intends to ask the Commission to correct Section 8.2.1.23.1.4 such that it is consistent with Qwest's proposed language herein. In addition, Qwest will ask the Commission to enter an order correcting all effective interconnection agreements accordingly.

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3. Qwest's proposals for Sections 8.3.1.9 and 9.1.10 confirm Qwest's position that it will not charge for regeneration in a Qwest to CLEC connection

112 When read in the context of the ICA, Qwest's proposals for Sections 8.3.1.9 and 9.1.10 limit Qwest's obligations to providing regeneration at no charge in a Qwest to CLEC connection. This is consistent with the rulings of this Commission and with the statements and assurances Qwest has given to the CLEC community.[112] As with Section 8.2.1.23.1.4, Covad's proposals seek to extend Qwest's policy regarding Qwest to CLEC regeneration to the CLEC to CLEC scenario.[113] For the reasons stated herein, and ignoring for the moment whether this Commission has the authority to do so, there is no compelling reason for this Commission to order Qwest to provide a service free of charge, particularly when such order would be inconsistent with the FCC's rules.

4. Qwest's position regarding CLEC-to-CLEC connections and regeneration as a finished service has not changed.

113 As stated in Section 8.2.1.23 of the ICA, if a CLEC so chooses, a CLEC can either provision its own CLEC-to-CLEC connection, or a CLEC can request that Qwest provision such connection and if regeneration is required, can order such as a finished service.[114] To the extent regeneration is required and a CLEC has chosen to provision its own connection, a CLEC may regenerate its own signal by placing a repeater bay in its collocation space.[115] Since the Telecommunications Act, CLECs have been encouraged to expand their facilities and to develop their own networks, thereby reducing reliance upon the ILECs. The FCC has continued to encourage such activity as evidenced by its rules discussed herein, where ILECs who permit CLECs to provision their own connections are relieved of the responsibility of providing the connection. In addition, the relationship between CLECs, by definition, does not

[112] *See* 11th Supplemental Order, 13th Supplemental Order and 15th Supplemental Order.

[113] *See* Petition at ¶ 51.

[114] *See* Ex 46-RT (Norman Redacted Response Testimony) at 11:2-10.

[115] *Id. at* 11:10-13.

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include Qwest, and it is the CLEC who has the information necessary to design circuits between it and its partner CLEC. Therefore, Qwest's only involvement occurs upon request by the CLEC, which is consistent with Qwest's tariff filings and with its product offerings at least since 2001, if not before.[116] Covad's suggestion that Qwest has changed its policy regarding regeneration on a CLEC-to-CLEC connection is unfounded. Exhibits 3-T and 4-T (which are the same as Exhibits 55 and 56) represent discussions held between Qwest and participating CLECs in the Change Management Process ("CMP"). They include responses from Qwest telling the CLEC community what Qwest will and will not do from a technical perspective. The responses have nothing to do with pricing of the services provided or what the FCC requires Qwest to do or not do.[117]

114 For example, Exhibit 3-T discusses a change Qwest was making to its Technical Publication #77386 ("Tech Pub"). Eschelon was concerned that Qwest did not define how it would meet the ANSI standards on a CLEC-to-CLEC cross-connect at the ICDF. Qwest's response was that the Tech Pub change was not eliminating regeneration. This exhibit provides a detailed analysis of the connection at issue and does not discuss the cost of the product.[118]

115 Exhibit 4-T is, in effect, the same type of discussion and response as Exhibit 3-T. Specifically, Eschelon was concerned that Qwest did not define how it would meet the ANSI standards on a CLEC-to-CLEC cross connect through the ICDF and asked that Qwest commit to providing a signal that adhered to the ANSI standards. Once again, Qwest assured the CLEC community that it would adhere to the ANSI standards. Nothing in either of these exhibits suggests that if regeneration was required under the ANSI standards, Qwest would provide such regeneration free of charge.[119]

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[116] Tr. Vol. II 197:11 – 198:17.

[117] *See* Ex. 46-RT (Norman Redacted Response Testimony) at 16:7-18.

[118] *Id.* At 16:20 – 17:2.

[119] *Id.* at 17:4-11.

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5. Qwest did not discriminate against Covad by entering into an ICA with Qwest Communications Corporation ("QCC").

116 Covad offers the ICA between Qwest and QCC for the proposition that Qwest has discriminated against Covad by offering terms for CLEC-to-CLEC channel regeneration that are more favorable to its affiliate than what it is offering Covad.[120] Covad's argument must fail because it ignores the fact that the Qwest/QCC ICA is for all practical purposes the 8th Revised SGAT[121] and in particular, Section 8.2.1.23.1.4 of the Qwest/QCC ICA is identical to that same provision in the 8th Revised SGAT.[122]

117 Covad would have the Commission believe that Qwest and QCC negotiated terms regarding CLEC-to-CLEC regeneration that are more favorable to QCC than what Qwest is offering to Covad in this arbitration proceeding. This is clearly not the case.[123] The 8th Revised SGAT was filed by Qwest on June 25, 2002, was approved by the Commission, and has been available to any CLEC, including Covad for opt-in, for nearly two years. There is no dispute that any CLEC, including Covad, may adopt the 8th Revised SGAT, regardless of whether there are errors or provisions that Qwest intends to correct or revise in a future SGAT filing as discussed *infra*.

118 Furthermore, since the 8th Revised SGAT has been approved and in effect for nearly two years, Covad has had an abundant amount of time, prior to negotiating its new contract with Qwest,

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[120] *See* Ex. 5-RT (Zulevic Corrected Response Testimony) at p. 5.

[121] The Qwest/QCC ICA includes certain non-substantive changes from the 8th Revised SGAT such as referencing the ICA as an Agreement rather than the SGAT and correcting certain typographical and formatting errors. The only substantive change from the 8th Revised SGAT is found in sections 7.3.4 and 7.3.6 regarding billing for Exchange Service and ISP-Bound Traffic. In each of these sections Qwest and QCC agreed to a bill and keep arrangement. Consistent with Washington Commission Rules, however, and because bill and keep for the exchange of traffic is not a permissible election under Washington rules Qwest and QCC filed the ICA as a negotiated agreement.

[122] Tr. Vol. II 182:6-16.

[123] Notwithstanding the testimony given by Qwest witness Michael Norman (*see* Tr. Vol. II 195:15 – 197:10), the question of whether Qwest acted in a discriminatory manner in entering into an ICA with QCC calls for a legal conclusion. Mr. Norman was offered as an expert witness in technical matters on the issues of collocation and channel regeneration (*See*, Ex 45-T 2:6-8), and not as an expert on legal matters. Covad had the option of adopting the 8th Revised SGAT which contains a portion of Covad's requested language, therefore, there is no valid claim of discrimination.

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to decide whether it would adopt the SGAT or negotiate a new agreement with Qwest. Covad chose to negotiate an agreement and therefore chose not to take what it apparently believes to be a favorable term contained in Section 8.2.1.23.1.4 of the 8th Revised SGAT. Covad's choice in this regard does not support the conclusion that Qwest acted in a discriminatory manner.

C. Issue 6: Line Splitting, Loop Splitting, and Single LSR
The CMP Should Not Be Supplanted with Contract Language Mandating Systems Changes That Are Properly Addressed in CMP and Are Already Implemented or in the Process of Being Implemented through CMP.

119 This issue relates to the process for ordering line splitting with UNE-P and loop splitting with unbundled loops.[124] The parties' dispute regarding this issue is very limited.[125] It does not involve any dispute regarding the provisioning of products, but is limited to the ordering process.[126] There is a significant agreement between the parties on this narrow issue. The parties agree that:

(a) the ordering process should be changed to enable the orders to be submitted on one LSR;
(b) Qwest has already committed to implementing a single LSR ordering capability in the IMA ordering system and has initiated two Change Requests ("CRs") in the Change Management Process ("CMP") to make the required changes;[127]
(c) the single LSR ordering process was implemented for most products in August 2003,[128] and was implemented in April 2004 for new connections and transfers involving line splitting and loop splitting products;[129] and
(d) the single LSR process for conversions and migrations is scheduled to be

[124] In the past, it was necessary for CLECs to submit two separate LSRs for these product combinations: the voice UNE (UNE-P or unbundled loop) had to be ordered first on one LSR, followed by a second LSR for the data UNE (line splitting or loop splitting). *See* Ex. 11-T (Albersheim Direct) at 5:4 – 6:7 and Ex. 15-RT (Albersheim Redacted Response Testimony) at 1:13 - 2:17.

[125] In March 2004, there were a total of 2906 line-split lines in service throughout Qwest's 14-state local service region. There was only a single loop-split line in service region-wide. *See* Ex.11-T (Albersheim Direct) at 4:17-18.

[126] *See* Ex.15-RT-(Albersheim Redacted Response Testimony) at 2;1-17.

[127] *See* Ex. 11-T (Albersheim Direct) at 9:31 – 10:15; Ex. 15-RT (Albersheim Redacted Response Testimony) at 8:25 - 9:2.

[128] Tr. Vol. II at 73:9-19 (Line splitting and loop splitting were the only 2 products that were not included in the 13.0 release in August of 2003).

[129] *See* Ex. 11-T (Albersheim Direct) at 15:3-5; Ex. 15-RT (Albersheim Redacted Rebuttal Testimony) at 1:18-19.

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implemented with IMA Release 16.0 in October 2004.[130]

120 Covad's witness concedes that the parties' dispute regarding this issue *will be mooted* with the deployment of IMA Release 16.0 in October 2004.[131] Covad does not even dispute the October 2004 implementation date, but would "withdraw this issue" if it received additional commitments from Qwest that the date would be met.[132] Indeed, Mr. Zulevic said "[i]f they [Qwest] would have given us a written statement from someone empowered to do so committing to actually making this happen in that release [16.0], then we would have been more than happy to pull it."[133] Thus, the dispute is essentially whether Covad should be allowed to insert requirements regarding system changes into the ICA that override the CMP process.

121 CMP is the appropriate forum for processing the changes Covad requests because it was established specifically to define the process for Qwest's implementation of CLEC-impacting systems changes.[134] CMP was created to allow CLECs to voice their concerns and work toward an equitable solution that better meets the larger community's needs. Covad participated with Qwest and other CLECs in designing the CMP and has accepted it as the mechanism for changing systems that affect multiple CLECs.[135]

122 The remaining CR should be allowed to proceed through CMP because systems changes involve the interface available to all CLECs, not only Covad, and therefore are required to be processed through CMP.[136] It is inappropriate for systems changes to be mandated in a single

[130] Ex. 15-RT (Albersheim Redacted Rebuttal Testimony) at 11:15-16.

[131] *See*, Ex. 5-RT (Zulevic Corrected Response Testimony) at pp. 7-8.

[132] *Id.* at 8.

[133] Tr. Vol. II at 53:21-14.

[134] *See* Ex.11-T (Albersheim Direct) at 13:7-8.

[135] *Id.* at 14:7-9.

[136] *Id.* at 13:11-17. The Qwest Wholesale Change Management Process Document ("CMP Document") mandates that "[a] CLEC or Qwest seeking to change an existing OSS Interface *must* submit a Change Request (CR)." Since the creation of a

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CLEC's contract. The CMP provides that all CLECs determine how best to prioritize changes to IMA, thus allocating resources for the benefit of all CLECs. If a change is contractually mandated, Qwest must divert resources that would otherwise be available to the greater CLEC community. Individual contract provisions mandating systems changes subvert the purpose of the CMP, and give an individual CLEC the ability to undermine CMP and obtain changes for its own benefit that may conflict with priorities established in CMP.[137]

123 Qwest is committed to making the change sought by Covad and has provided the scheduled implementation dates for the remaining CR in accordance with CMP procedures. Qwest has already implemented most of the required systems changes.[138] Further, although Covad expressed concern regarding a recent reduction in IMA development hours, the reduction will have no impact on the implementation of the second CR, which was ranked the second highest by the CLECs and is scheduled to be implemented in IMA Release 16.0 in October 2004.[139]

124 Given that the remaining functionality is on track to be provided, it should remain subject to CMP rather than contract language. Clearly, there is no prejudice to Covad in keeping this systems issue where it belongs in CMP. Interestingly, Covad has not yet used the single LSR ordering that is already available to it. In fact, the evidence established that as of the time of the hearing, *there had been no orders* for line splitting or loop splitting using the single LSR process that was implemented with IMA Release 15.0.[140]

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single LSR ordering process requires changes to an existing OSS interface, CMP is the appropriate forum for addressing those requests. *Id*. (*citing* CMP Document is Exhibit G to the parties proposed interconnection agreement.

[137] *Id.* at 20:2-5.

[138] There is no reason to expect that the delays that occurred in conjunction with the implementation of the first CR (which applied to new connections and transfers) will recur because the issues that caused the delay have been resolved and that resolution will apply to the second CR (which applies to migrations and conversions). Tr. Vol. II at 68:24 – 69:10.

[139] *See* Ex. 15-RT (Albersheim Redacted Response Testimony) at 11:15-16.

[140] S*ee* Ex 11-T (Albersheim Direct) at 18:23 - 19:1.

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D. Issues 8: Payment Due Date; Timing for Discontinuing Orders; and Timing for Disconnecting Services. Covad's Proposed Language is Unsupported, Unbalanced, Commercially Unreasonable and Improperly Shifts Cost and Business Risk to Qwest

125 Billing and payment issues were discussed at length in the Section 271 proceedings, in which Covad actively participated. In the workshops, the parties balanced the needs of the billed and billing parties, reaching consensus on language that addresses each of the issues Covad now disputes. Qwest's proposed language on these issues is virtually identical to that consensus language, which now appears in Qwest's Washington SGAT. Nonetheless, Covad now seeks to (1) extend the payment due date by 50 percent, from 30 to 45 days, (2) triple the amount of time Qwest must wait before it discontinues processing orders, and (3) double the number of days Qwest must wait before disconnecting service.[141] No new facts justify these radical departures from the consensus time frames set during the 271 process that are standard, balanced and commercially reasonable, and that are in numerous ICAs today.

126 It is important to note that, although the language in the agreement appears to apply to both parties, Covad does not provide service or issue any bills to Qwest. Because Covad has no interest in obtaining payment for services, its view of the disputed payment issues is not tempered by any sense of balance or reciprocity.[142] Covad's proposed extended time frames are at odds with commercially reasonable practice, unsupported by the record, and should be rejected.

127 **Payment Due Date.** During the Section 271 workshops, issues regarding allowing CLECs adequate time to analyze monthly bills -- including many of the concerns Covad raises in this proceeding -- were thoroughly discussed. All issues pertaining to the payment due date were

[141] *See* Ex. 35-T (Easton Direct) at 5:2-5; Ex. -39-RT (Easton Redacted Response Testimony) at 12:9 – 13:2.

[142] *See* Ex.35-T (Easton Direct) at 3:18 – 4:6.

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resolved, resulting in consensus language specifying that amounts payable are due within 30 days after the invoice date.[143] Qwest's proposed language specifies that same 30-day period and is identical to the language in Qwest's Washington SGAT.[144]

128 The 30-day period balances Covad's need for sufficient time to analyze monthly bills and issue payments with Qwest's right to receive timely compensation. In addition to Qwest's SGAT, this same 30-day period is specified in Qwest's FCC and Washington access tariffs and in the current Qwest-Covad ICA (in effect since early 1998).[145] Further, 30 carriers have opted-in to the Washington SGAT, agreeing to the payment language that Covad challenges here; in fact, AT&T recently agreed to this language in its new interconnection agreement in Washington.[146] Perhaps most telling, Covad requires *its customers* to pay its invoices in 30 days.[147] Covad serves its customers through services it purchases from Qwest. Hence, even as Covad receives payment from its own customers in 30 days for services that include services provided by Qwest, Covad seeks to extend well past 30 days the amount of time when Covad itself must pay Qwest for these services. Covad's proposed extension is simply a bald attempt to delay paying for its purchases and to require Qwest to extend interest-free loans to Covad.

129 The 30-day period is not only commercially reasonable but is also the wholesale industry standard. In the face of the overwhelming evidence and Covad's own admission, Covad offers no credible basis for claiming that the 30-day period is nonetheless unreasonable.[148] Tellingly, Covad has never identified any problems with this 30-day payment period during the course of

[143] *Id.* at 6:18 – 7:2.

[144] *Id.* at 6:13-16.

[145] *Id.* at 5:6-14.

[146] *Id.* at 9:8-15.

[147] *Id.* at 13:11-20.

[148] The entire billed amount is not due in 30 days if Covad disputes the amount. Section 5.4.4 states that the undisputed amounts shall be paid. If a portion of the bill is disputed and the issue is resolved in favor of the billed party, the disputed amount and associated interest will be credited or paid to the billed party. Conversely, if the dispute is resolved in favor of the billing party, the disputed portion of the bill becomes due and payable and late payment charges are applied. *See* Ex 35-T (Easton Direct) at 6:2-11.

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the parties' business operations under their existing ICA.[149]

130 Covad's claim that analyzing bills is complex and time-consuming rings hollow because these realities existed when the parties reached consensus on the 30-day payment period in the workshops.[150]. Further, both Qwest and Covad agree that the vast majority of bills Covad receives from Qwest are in electronic format, allowing for mechanized analysis,[151] and those bills that are only received in paper copy comprise a minute percentage of the total bills.[152] In addition, Covad could develop the appropriate software to handle all of its bills electronically, however, it has chosen not to do so at this time.[153] To the extent that Covad has concerns about the format of Qwest's bills, such concerns are not appropriately raised in ICA negotiations, but are properly raised in CMP.[154] Similarly, Covad's discussion of billing errors is not relevant to the parties' dispute regarding payment and collection provisions.[155] Such issues are appropriately addressed by the designated Qwest personnel responsible for Qwest's relationship with Covad.[156] Further, the FCC extensively reviewed Qwest's wholesale billing processes as part of the Section 271 approval processes and concluded that Qwest's processes satisfy the checklist requirements.[157] Additionally, as discussed above, while the accuracy of Qwest's bills are not at issue in this arbitration proceeding, Qwest's Performance Assurance Plan includes performance measures relating to billing completeness and accuracy, therefore,

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[149] *See* Ex.35-T (Easton Direct) at 7:16-19.

[150] *See* Ex. 39-RT (Easton Redacted Response Testimony) at 3:19 – 4:5.

[151] Tr. Vol. II at 97:16-18 (testimony of Covad witness Megan Doberneck).

[152] *See* Ex. 36-TC (Easton Confidential Direct) at 10:1-15; *See* also, Ex. 40-RTC (Easton Confidential Response Testimony) at 4:12-18.

[153] Tr. Vol. II at 101:11 – 102:1 and 112:11-22 (testimony of Covad witness Megan Doberneck).

[154] *See* Ex. 39-T (Easton Redacted Response Testimony) at 5:10-16.

[155] *Id.* at 9:9-22.

[156] *Id.* at 99-22 (*i.e.* Qwest's Wholesale Billing Service Delivery Coordinators and Wholesale Service Managers). Qwest has designated three Service Delivery Coordinators to explain Covad's bills and answer any questions Covad may have about its bills. Ex. 35-T (Easton Direct) at 10:18 – 11:4.

[157] *See* Ex. 39-T (Easton Redacted Response Testimony) at 12:1-7.

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Qwest has a strong incentive to ensure that its bills are accurate.[158]

131 Covad's expectation that it may modify its business strategy by partnering with other CLECs to provide line splitting and loop splitting services does not justify imposing *on Qwest* additional risk the cost of deferred payments.[159] Covad and its business partners would have no incentive to adopt efficient billing procedures if they were allowed to defer payment and shift the business costs and risks of non-payment to Qwest.[160] Covad provides no justification for requiring Qwest to incur increased cost and risk as a result of a potential change in Covad's business model. That Covad's change in strategy may have been prompted by developments in federal regulatory law does not justify shifting the brunt of Covad's new partnering arrangements to Qwest. Further, while such partnering arrangements may be new to Covad, they are not new in the industry. CLECs are currently ordering line-splitting products from Qwest -- which CLECs offer through the very same partnering arrangements Covad now anticipates -- pursuant to agreements that provide for the industry-standard 30-day payment period, not the 45-day period Covad proposes.[161]

132 Clearly, the combined impact of the extended time frames Covad proposes and CLEC opt-in rights cannot be ignored. Covad does not dispute that Qwest was left with large uncollected balances by CLECs who failed to pay Qwest for services.[162] The time frames Covad proposes will unreasonably increase Qwest's financial exposure -- particularly when other CLECs are able to opt-in to them. Furthermore, with a 30 day billing cycle and a 45 day payment due date, assuming Covad requires the full 45 days to review each months bills, it would find itself behind in the bill validation process after the first billing cycle since it will receive its next

[158] *See* Ex.35-T (Easton Direct) at 11:6-11.

[159] *See* Ex. 39-T (Easton Redacted Response Testimony) at 11:6-24.

[160] *Id.* at 11:17-20.

[161] *See* Ex. 35-T at 13:4-9; *see* also Ex. 39-RT *a*t 11:20-24.

[162] *See* Ex. 21-T (Doberneck Corrected Direct) at 32:3-14.

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month's bill before it has completed its first month's bill validation.[163] Therefore, Covad's proposal would not provide the benefits it claims it requires.

133 **Timing for Discontinuing Orders and Timing for Disconnecting Services.** Covad devoted virtually all of its testimony on billing issues to the Payment Due Date portion of this issue. Thus, Covad offered only the slimmest "rationale," but no relevant evidence, to support its proposed language relating to the remaining payment issues. In connection with these issues, Covad observed only that it has enjoyed a good billing relationship with Qwest and that a UDIT-related rate issue had arisen in Arizona, causing Covad to dispute certain bills in that state.[164] Both assertions support Qwest's language, not the extensions Covad seeks. That Covad has enjoyed a good billing relationship with Qwest establishes that there is no basis in the parties' billing relationship to challenge the balanced consensus language that resulted from the 271 process. Further, the UDIT rate issue in Arizona exemplifies precisely why Qwest's proposed language should be ordered here. Qwest properly billed Covad at the Commission-ordered rate. While Covad disputed the bills, Qwest did not assess late payment charges, stop taking Covad orders, or disconnect service.[165] Thus, the record contains no factual support for Covad's proposals to extend the timing for discontinuing orders or disconnecting services. By contrast, Qwest submitted specific reasons and evidence establishing that the industry standard time frames it proposes are appropriate and should be accepted.[166]

134 For these reasons, the Commission should reject Covad's proposals to extend the payment and collection time frames.

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[163] *See* Ex. 39-RT (Easton Redacted Response Testimony) at 5:1-8.

[164] *See* Ex. 21-T (Doberneck Redacted Corrected Direct) at 34:13 – 36:6.

[165] *See* Ex. 39-RT (Easton Redacted Response Testimony) at 15:19 - 16:24.

[166] *See* Ex. 35-T (Easton Direct) at 14:1 - 21:20.

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III. CONCLUSION

135 For the reasons stated herein, Qwest respectfully requests that the Commission adopt Qwest's proposed language on each of the disputed issues.

DATED this 1st day of October, 2004.

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