

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

**IN THE MATTER OF THE CONTINUED
COSTING AND PRICING OF
UNBUNDLED NETWORK ELEMENTS,
TRANSPORT, TERMINATION, AND
RESALE**

**Docket No. UT-003013
(Part D)**

**INITIAL POST-HEARING BRIEF OF
COVAD COMMUNICATIONS COMPANY**

Covad Communications Company (“Covad”) respectfully submits the following initial post-hearing brief in connection with the above-captioned proceeding, which addressed the unbundled network element (“UNEs”) rates, terms and conditions proposed by Qwest Corporation (“Qwest”). As discussed below, Covad respectfully requests that the Commission order Qwest to modify its proposed UNE offerings as discussed herein.

**I. INTRODUCTION: THE NEED FOR PRO-COMPETITIVE RATES,
TERMS AND CONDITIONS**

In evaluating the rates, terms and conditions proposed by Qwest for UNEs, the Commission should be guided by the increasing need to encourage the maximum level of competition in the local exchange market. With respect specifically to advanced services, such as xDSL services, the FCC has designated the provision of advanced telecommunications as a discrete, separate market, in which barriers to entry must be removed and competition promoted. According to the FCC:

[t]he advanced services market is ripe for competition to develop in a robust fashion. In order to encourage competition among carriers to develop and deploy new advanced services, it is critical that the

marketplace for these services be conducive to investment, innovation, and meeting the needs of consumers.¹

Without a concerted effort at the federal and state levels, the promise of local exchange and advanced services competition is likely to suffer unnecessary delays, frustrating consumer demand and permanently hobbling competition.

Adoption of Qwest's proposed rates, terms and conditions for services such as basic installation with cooperative testing (to determine whether a loop is capable of supporting xDSL services), unbundled packet switching and other miscellaneous charges will impose obstacles to the development of a competitive marketplace for advanced services in the state of Washington, and certainly will allow Qwest to leverage its control over vital network facilities to increase its own advantage in providing advanced services.

This proceeding provides the Commission with a valuable opportunity to implement on a global basis pro-competitive rules that will promote the deployment of telecommunications and advanced services in the state of Washington, and will ensure that consumers have a choice of service providers and services. For these reasons, Covad urges the Commission to take the following actions:

Reject Qwest's cooperative testing charge and establish a \$0 rate for cooperative testing;

Reject or reduce Qwest's unbundled packet switching rates to be consistent with the TELRIC-required least cost methodology; and

Recognize that Qwest's "miscellaneous charges" are unsupported and rule that no miscellaneous charges should be permitted.

¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Fourth Further Notice of Proposed Rulemaking, 14 FCC Rcd. 4761 at ¶ 2 (Released March 31, 1999) ("*Advanced Services Order*").

II. LEGAL AND POLICY ISSUES

A. Legal Issues

The Telecommunications Act of 1996 (the “Act”) “sought to bring competition to local-exchange markets, in part by requiring incumbent local-exchange carriers to lease elements of their networks at rates that would attract new entrants when it would be more efficient to lease than to build or resell.”² This landmark legislation thus changed national telecommunications policy from protecting monopolies to promoting competition.³ In doing so, the Act addressed in detail the relationship between incumbent local exchange companies (“ILECs”) and their new competitors. To promote meaningful competition between the ILEC and its competitors, Congress required that network elements necessary for competition be made available at cost-based, nondiscriminatory prices.⁴ These principles apply not just to competition in the provision of basic local phone service, but also to competition in the provision of advanced telecommunications services. Section 706 of the Act expresses Congress’ intent to:

[E]ncourage the deployment on a reasonable and timely basis of advanced telecommunications capability of all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications markets, or other regulating methods that remove barriers to infrastructure investment.

Congress has directed the Federal Communications Commission (“FCC”) to promulgate rules for pricing network elements, and directed state commissions to set

² *Verizon Communications Inc. v. Federal Communications Commission, et al.*, 535 U.S. ____ (2002), Slip. Op., pp. 68-69 (“*Verizon v. FCC*”).

³ *See* 47 U.S.C. § 151 *et seq.*

⁴ 47 U.S.C. § 252(d); *see also Verizon v. FCC.*

prices consistent with the principles of the Act and the directives of the FCC. Significantly, in light of the Supreme Court's May 13, 2002 decision in *Verizon v. FCC*, there can be no doubt that the TELRIC methodology is the only appropriate methodology for rate setting in this proceeding, and must be firmly adhered to by the Commission in setting rates for Qwest's competitors. Moreover, as the Supreme Court found, CLECs had invested \$55 billion dollars in their respective telecommunications networks. Thus, "it suffices to say that a regulatory scheme that can boast such substantial competitive capital spending over a four year period is not easily described as an unreasonable way to promote competitive investment in facilities."⁵ It is these principles the Commission should keep in mind when setting UNE rates in this proceeding.

1. FCC Pricing Rules and Relevant Orders

In its *Local Competition Order*, the FCC set out rules for state commissions to apply when establishing UNE prices.⁶ The FCC adopted a cost-based pricing methodology based on forward-looking economic costs, concluding that this best furthered the goals of the Act.⁷ The adoption of a forward-looking cost methodology required the FCC to reject ILEC claims that UNEs should be priced to recover other costs, including (1) embedded or accounting costs in excess of economic costs; (2) incumbent LECs' opportunity costs; (3) universal service subsidies; and (4) access charges.⁸ To properly capture forward-looking economic costs, the FCC adopted the TELRIC methodology. Because, in competitive markets, the price of a good or service

⁵ *Id.*, p. 46.

⁶ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15,499, ¶ 1 (1996) ("*Local Competition Order*").

⁷ *Id.*, ¶ 620.; *see generally*, *Verizon v. FCC*.

⁸ *Id.*, ¶ 621.

tends to move towards its long-run economic cost, the FCC expected this pricing methodology to encourage efficient levels of entry and investment.⁹

The FCC also placed the burden of demonstrating costs of providing UNEs on the ILEC, because the ILEC has access to that information and is better situated to meet that burden:

We note that incumbent LECs have greater access to the cost information necessary to calculate the incremental cost of the unbundled elements of the network. Given this asymmetric access to cost data, we find that incumbent LECs must prove to the state commission the nature and magnitude of any forward-looking cost that it seeks to recover in the prices of interconnection and unbundled network elements.¹⁰

Part and parcel of its burden of proof is the ILEC's demonstration that its TELRIC-modeled network is based on the least cost, forward-looking technology currently available and the most efficient network architecture. This allocation of the burden of proof on costing issues was codified in FCC Rule 51.505.

As important as the allocation of the burden of the proof is the FCC's method for how the ILEC can meet that burden of proof. Specifically, Rule 51.505(e) requires that the ILEC demonstrate that its rates are cost-based and TELRIC-compliant *not* through testimony of witnesses, but rather through the preparation and production of a cost study supporting the claim that the ILEC has assumed an efficient network configuration using least cost and forward-looking technology, and that its rates are based on incremental cost. Thus, where the ILEC fails to offer evidence in the form of a cost study sufficient to prove the appropriateness of its inputs, assumptions and proposed prices, the Commission should reject those prices in full.

⁹ *Id.*, ¶ 672-675.

¹⁰ *Id.*, ¶ 680.

The FCC established another critical directive for the application of TELRIC principles in its *Local Competition Order*. The FCC expressly prohibited ILECs from charging competitive local exchange carriers (“CLECs”) for costs not caused by the provision of the UNE being priced:

Only those costs that are incurred in the provision of the network elements in the long run shall be directly attributable to those elements. Costs must be attributed on a cost-causative basis. Costs are causally-related to the network element being provided if the costs are incurred as a direct result of providing the network elements, or can be avoided, in the long run, when the company ceases to provide them.¹¹

All of these FCC principles apply in this docket.

2. Washington Law and Prior Commission Orders

Washington State telecommunications policy, as declared by the Legislature in 1985, provides that it is the policy of the State to:

- (1) Preserve affordable universal telecommunications service;
- (2) Maintain and advance the efficiency and availability of telecommunications service;
- (3) Insure that customers pay only reasonable charges for telecommunications service;
- (4) Insure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of regulated telecommunications companies;
- (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state . . .¹²

Properly interpreted and applied, these policies are fully consistent with the Act and applicable FCC orders. Covad’s recommendations in this docket will further several

¹¹ *Id.*, ¶ 691.

¹² RCW 80.36.300.

of these policies and have no adverse impact on any of them. For example, adopting Covad's recommendation that the Commission reject Qwest's UPS rates and require Qwest to set those rates on a least-cost, forward looking technology will clearly "advance the efficiency and availability of telecommunications service" and "[p]romote diversity in the supply telecommunications services," without impairing universal service funding.

Also, the Commission approved a standard for cost models in the prior cost docket, requiring that for UNE pricing, "the inputs 'must be realistic, accurate estimates of all of the actual costs a provider would incur if it built out a new network using the least cost, forward-looking technology.'"¹³ Consistent therewith, the Commission may not only reject inefficient costs and prices for UNEs, but may also direct the ILECs to provide the most efficient means of provisioning UNEs and advanced services under its authority to regulate "the rates, services, facilities, and practices" of telecommunications companies.¹⁴

B. POLICY ISSUES

The Commission's responsibility in this proceeding is to price UNEs so CLECs have the ability to effectively compete with ILECs in the provision of telecommunications services to Washington consumers. This will be possible only if UNEs are priced at long-run, forward-looking costs, and are non-discriminatory in their application. Ultimately, appropriate pricing mechanisms will benefit consumers, and are in fact necessary to bring consumers the benefits of competition promised in the Act.

¹³ Eighth Supplemental Order, *Generic Cost Docket*, Docket Nos. UT-960369, et al., 27 (quoting U S West Brief).

¹⁴ See, e.g., RCW 80.01.040(3); Fourth Supplemental Order, *WUTC v. US West Communications, Inc.*, Docket Nos. UT-941464, et al. (October 1995) (requiring unbundling, collocation, and interconnection under state law provisions prior to passage of the Act).

The Commission's pricing of UNEs necessary for the provision of advanced services is especially significant to consumers in the State. Unlike basic "plain old telephone service," xDSL service is currently unavailable to a substantial portion of Washington consumers. As a result, the Commission's efforts in xDSL services will not only bring competitive xDSL offerings, but will also expose this service to many consumers who previously did not have access to this technology. How the Commission prices the advanced telecommunications UNEs will in large part determine the breadth of the "digital divide" that separates those with access to high-speed data services and those without such access.

The Commission should price the advanced telecommunications UNEs to promote efficient competition among providers. Thus, the Commission's goal here is to establish prices that are cost-based, non-discriminatory, and efficient as between the ILEC and a CLEC wishing to provide advanced telecommunications services. As a matter of public policy and good economics, the right policy for the Commission is to set prices correctly and let the market choose among alternative technologies and providers.

III. ARGUMENT ON QWEST'S PROPOSED RATES

A. Issue III(A)(4)(i): Basic Installation with Cooperative Testing

As an initial matter, Qwest's costs for basic installation with cooperative testing cannot be sustained. Rather than submit a TELRIC-compliant cost study supporting the inputs and assumptions giving rise to the rate it now seeks to charge for this installation option, Qwest relied on an outdated 1996 cost study. Qwest did not produce the entirety of the cost study,¹⁵ nor did Qwest produce a witness competent to testify as to the dated

¹⁵ See Exhibit 2065.

inputs and assumptions.¹⁶ As the Commission just recently ruled, reliance by Qwest on a cost study not even fully into evidence and at issue in the proceeding is not appropriate and rates cannot be set on a model not fully a part of the instant proceeding.¹⁷ Thus, under Commission precedent, as well as controlling federal law that requires that all rates be grounded in fully supported and developed cost models¹⁸, Qwest's proposed rate for installation with cooperative testing should be rejected.

Even assuming that Qwest's purported cost study was sufficient to pass Commission muster, Qwest should not be permitted at any time to assess any charges for cooperative testing in connection with the installation process. The uncontroverted evidence before the Commission shows that cooperative testing is ordered by CLECs in response to provisioning problems encountered by CLECs, including Covad, due to Qwest's regular and routine failure to provide loops that meet basic continuity and technical specification requirements.¹⁹ Hence, cooperative testing is ordered to ensure delivery of a "good" loop – that is, a loop that meets the applicable technical specification and has continuity from the network interface device – or NID -- to Qwest's point of demarcation within the central office at the interconnection distribution frame ("ICDF").²⁰ Because cooperative testing is required to rectify Qwest provisioning problems and deficiencies, it is unreasonable and contrary to TELRIC and the FCC's

¹⁶ Trans., 5/6/02 (Million), pp. 4265-67.

¹⁷ Thirty Second Supplemental Order, Docket No. UT-003013, June 21, 2002, ¶ 228.

¹⁸ 47 C.F.R. 51.505.

¹⁹ Exhibit T-2350, pp. 5-14; Exhibits T-2358, pp. 2-10 and C-2359-C-2365.

²⁰ *Id.*; *see also* Trans., 5/8/02 (Hubbard), pp. 4504-05 (at least 27% of loops had to be fixed prior to delivery to Covad).

pricing rules to impose the cost of cooperative testing entirely on competitors.²¹ A \$0 rate for cooperative testing should be set.

During the provisioning process for stand-alone loops (i.e., 2 wire non-loaded loops), Covad and Qwest perform cooperative testing to ensure that there is continuity on the line and that the loop meets the technical specifications contained in the NC/NCI codes.²² In simple terms, cooperative testing involves personnel from both companies checking the line together to determine that a “good” circuit exists.²³ Cooperative testing thus is simply an additional step that Covad takes to help Qwest manage its installation process, to ensure that Qwest delivers the type of loop that was actually ordered by Covad, and to confirm that the both ends of the loop are properly connected.²⁴

The benefits of cooperative testing extend far beyond just the management of the installation process and the imposition of “quality control” over loops Qwest delivers. In the absence of cooperative testing, Qwest and Covad incur additional manual activity and associated administrative costs to undertake the repair of a loop that was not properly provisioned in the first place.²⁵ Cooperative testing allows Qwest and its competitors to avoid incurring costs (both in the form of manpower and money) that neither company would choose to, or actually, incur if loops were provisioned correctly in the first place.²⁶ Thus, Qwest should compensate competitors, or at least not charge them, for the testing

²¹ Exhibit T-2370, pp. 5-6; Exhibits T-2358, pp. 2-10 and C-2359-C2365; Exhibit T-2350, pp. 13-18.

²² Exhibit T-2350, pp. 3-10; Exhibit T-2370, pp. 5-6; *see also* Trans., 5/8/02 (Hubbard), pp. 4505-06 (no evidence that CLECs use cooperative testing for any purpose other than to confirm circuit continuity and to ensure technical specifications of the loop).

²³ Exhibit T-2350, pp. 3-10.

²⁴ *Id.*

²⁵ *See, e.g.*, Trans., 5/8/02 (Hubbard), pp. 4516-17; Trans., 5/10/02 (Donovan), pp. 5053-54 and 5056-5060; Exhibit T-2370, pp. 5-6; Exhibit T-2350, pp. 10-12.

²⁶ *Id.*

costs that Qwest has forced CLECs to bear in order to minimize the costs created by Qwest's own provisioning problems. Tellingly, Qwest never contested the fact that Covad originally requested that Qwest engage in cooperative testing because of an unacceptably high percentage of the loops that Qwest delivered did not work, and that Qwest originally consented to doing cooperative testing at no cost with Covad and other CLECs so that its performance in providing loops would improve and it would receive a "passing grade."²⁷

Qwest now seeks to charge Covad and other CLECs an unbelievable \$109.82 for cooperative testing²⁸ (almost three times more than the basic installation rate), which would not have been necessary in the first place if Qwest could deliver a "good" loop.²⁹ Qwest tacitly acknowledged that cooperative testing is a response to the delivery of bad loops as evidenced by the fact that Qwest never really rebutted the examples provided by Covad as to the quality of the loops delivered, never explained why bad loops could or would be delivered despite the testing Qwest supposedly does on every loop, and never provided any affirmative examples or the percentage of good loops that were delivered.³⁰ The Commission should reject Qwest's proposal out of hand and require Qwest to perform cooperative testing during installation at no charge. Otherwise, Qwest will have little incentive to improve its loop provisioning performance (especially if it can increase its competitors' costs at no cost to itself).

²⁷ See Exhibit T-2350, p. 12.

²⁸ Exhibit 2050, Section 9.2.4.5.

²⁹ Trans., 5/10/02 (Cabe), pp. 5030-31.

³⁰ Trans., 5/8/02 (Hubbard), pp. 4513-21, 4523 and 4609. Of course, the question of whether Qwest actually tests 100% of the loops prior to delivery to the CLEC still exists since, for a number of the Covad loops, there was no documentation showing that testing had actually occurred. Trans., 5/8/02 (Hubbard), p. 4525; Exhibit C-2366, Att. A.

Qwest at no point seriously challenges or disputes the facts adduced by Covad during the hearings in this matter. Rather, Qwest attempts to muddy the waters in several ways. Qwest first points to the work tasks associated with cooperative testing that are over and above those steps it takes in order to perform a basic installation, and then claims that it is entitled to recover the costs associated with those work tasks. Qwest's argument, however, places the cart before the horse. Put simply, Qwest would never have to undertake any work beyond that it purportedly does with every basic installation if it performed its work in a professional, competent manner in the first place by delivering a "good loop" to Covad.³¹ Since the additional steps come into play only because Qwest hasn't performed the required work and routinely delivers "bad" loops to Covad, Qwest should be required to bear the cost of any work associated with ensuring the loop delivered is a good loop. Tellingly, Qwest's primary witness on the installation option products, William Easton, tacitly admitted that a CLEC should not have to pay anything extra to ensure that a good loop is delivered.³²

Second, Qwest points to the purposes to which cooperative testing might be put, i.e., the ability to test to beyond the technical specifications of the loop or to test the CLEC side of the network. Qwest provided no evidence in the form of cooperative testing documentation, discovery responses, or the affidavit of any CLEC that CLECs use cooperative testing for either of the purposes identified by Qwest.³³ This silence speaks

³¹ Exhibit T-2350, p. 5; *see also id.*, pp. 7 and 11-14. Of course, the question of whether Qwest actually tests 100% of the loops prior to delivery to the CLEC still exists since, for a number of the Covad loops, there was no documentation showing that testing had actually occurred. Trans., 5/8/02 (Hubbard), p. 4525; Exhibit C-2366, Att. A.

³² Trans., 5/7/02 (Easton), pp. 4360-61.

³³ Trans., 5/8/02 (Hubbard), p. 4508; Trans., 5/7/02 (Easton), p. 4359.

volumes. Qwest is in full possession of the identification of all CLECs ordering cooperative testing and the associated testing documentation, and thus easily could have determined how and why cooperative testing is used. Had this documentation in any way supported Qwest's claims as to why cooperative testing is ordered, it could and would have provided it. Because Qwest failed to do so, the only reasonable inference to make is that cooperative testing is not being used for the purposes Qwest suggests it is or should be used.

More importantly, the evidence is clearly and completely against Qwest on this point. The only direct evidence in this record as to why CLECs order cooperative testing was provided by Covad. As that evidence demonstrates, because of Qwest's historical inability to provision loops correctly, Covad orders cooperative testing in order to ensure that the loop meets the technical specifications and has circuit continuity from the NID to the ICDF.³⁴ Qwest's own testimony and evidence confirms the purposes to which cooperative testing is put. As Mr. Hubbard stated in his testimony, as well as the exhibits attached thereto, the testing he observed was to reinforce and repeat the Qwest tests in order, presumably, to ensure the loop is a good one. Qwest has the duty and obligation under the Act of delivering a functioning loop to Covad. To shift the burden and expense onto CLECs to correct a Qwest problem is patently unfair, improper and grossly anti-competitive.

The Washington Commission would not be the first to recognize that the genesis of, and the need for, cooperative testing is the ILEC's ability to provision loops correctly. The Maryland Public Service Commission recently found that:

³⁴ *See supra.*

The Commission finds that each party should bear its own costs with respect to Cooperative Testing. Both parties, the ILEC and the CLEC, enjoy the benefits of engaging in cooperative testing and, as such, it would be grossly unfair to require CLECs to bear the burden of paying for their costs as well as for Verizon's. Additionally, Verizon, not the CLEC, has the duty and obligation of delivering a functioning high frequency portion of the loop to the CLEC ordering the line sharing UNE. Verizon's argument that cooperative testing is necessary for it to comply with this obligation is not compelling. The Commission believes that the proper allocation of the costs for cooperative testing is for each party to shoulder its own expenses there shall be no charge for cooperative testing.³⁵

The Massachusetts Department of Telecommunications and Energy ruled similarly and found that:

"It is inappropriate to permit Verizon to levy a 'cooperative testing' charge on CLECs, which is based on costs that are caused by provisioning difficulties experienced by both Verizon and CLECs for stand-alone xDSL loops ... The record shows that CLECs already incur their own cost for the cooperative test. Moreover, the record is clear that Verizon believes such testing is 'mutually beneficial'; therefore, Verizon should share in the cost of cooperative testing by absorbing all of its own costs associated with this tests as CLECs do. ... Finally, the Department agrees that shifting the costs of this test to CLECs relieves Verizon of an incentive to improve its loop performance."³⁶

The New Jersey Board likewise rejected Verizon's proposed cooperative testing charge in all cases except when trouble is proven to exist on the CLEC-provided portion of the circuit.³⁷ Recently, the New York Public Service Commission also rejected

³⁵ Maryland Pub. Servs. Comm'n, Docket No. 8842, Phase II, Order No. 76852, p. 24 (Apr. 3, 2001).

³⁶ Massachusetts Dept. of Telecom. & Energy, Docket No. 98-57-Phase III, Order at 110 (Sept. 29, 2000).

³⁷ New Jersey Bd. Of Public Utils., Docket No. T-000060356, p. 10 (Nov. 20, 2001).

Verizon's cooperative testing charge in the standalone DSL context and found that Verizon's cooperative testing charge should be waived.³⁸ Just two weeks ago, the Massachusetts Department of Telecommunications and Energy again rejected Verizon's request for a positive cooperative testing rates.³⁹

It bears reminding at this point that, while Qwest seeks to charge CLECs for the steps it takes in undertaking testing, CLECs currently are not permitted to assess Qwest for the costs they incur when they also test loops and facilitate the correction of problems that should have been caught by Qwest but were not. This asymmetry of payment and benefit cannot be the correct approach, and should be rejected by the Commission.

For all the reasons set forth above, the Commission should not permit Qwest to charge for cooperative testing. However, if the Commission believes that there may be circumstances under which a charge might be appropriate (which there currently are not), the Commission should impose the following conditions. First, the Commission should delay the implementation of any cooperative testing charge until Qwest has demonstrated that it can consistently provide competitors with working loops. Second, thereafter, the Commission should limit any charge for optional cooperative testing to the situation where the cooperative test is *not* performed (a) to facilitate Qwest's own provisioning responsibilities, or (b) to replicate the performance tests that are or should be performed on every loop installation. Third, the Commission should offset cooperative testing charges by mandating that competitors can also be reimbursed for their own costs to test loops that Qwest did not properly provision. Finally, the Commission should specify that Qwest may not charge for multiple cooperative tests or for cooperative tests associated

³⁸ New York Public. Serv. Comm'n, Docket No. 98-C-1357, p. 136-37 (Jan. 28, 2002).

³⁹ Mass. Dep't of Telecomms. & Energy, Docket No. 01-20, pp. 223 (July 2002).

with repair dispatches within thirty days of installation when trouble is determined to be Qwest's fault or in the Qwest network.

B. Issues III(A)(4)(aa) and III(B)(3)(r): Rates, Terms and Conditions for Access to Fiber-Fed Loops via Unbundled Packet Switching (“UPS”).

DSL is an emerging technology with great promise for meeting the need for advanced telecommunications services. “DSL” is the acronym for Digital Subscriber Line. “x” is a variable, meant to encompass the various types of Digital Subscriber Line technologies and is used when referring generally to DSL. Digital Subscriber Line technologies are transmission technologies used on circuits that run between a customer's premises and the central office. Traditionally, DSL technologies have been deployed on loops that are copper end-to-end from the central office to the customer premises (“home run copper”). However, with the current deployment of new network equipment by ILECs, some types of DSL may be deployed on hybrid loops that are copper from the customer's premises to a mid-point equipment location, known as a remote terminal (RT) or feeder distribution interface (“FDI”), where signals are combined and transmitted over fiber optics from the RT or FDI to the central office (“fiber-fed loops”).

ILECs, including Qwest, have deployed, and have announced plans to increase their deployment of fiber-fed loops now and in the future. In Qwest's case, there currently are two mechanisms in Washington State by which companies can work around the presence of fiber in order to provide DSL service – companies can collocate at a DA Hotel (placed at or near an FDI) or, if the circumstances exist, companies are provided with access to the Qwest packet switched network. Either scenario is unworkable and will only reinforce what the Supreme Court recently described as the ILECs' “almost insurmountable competitive advantage”.

1. Unbundled Packet Switching

One of the two methods by which Qwest proposes to provide access to DLC loops – or loops where fiber is present – is via its “unbundled packet switching” (“UPS”) product offering. Qwest’s UPS costs and associated rates are, in large part, based on its DA Hotel network architecture. That is, Qwest’s UPS costs and rates are driven by the costs associated with the remote collocation of DSLAMs at “DA Hotels” placed at the field distribution interface (“FDI”). Because the network architecture, equipment, assumptions and inputs underlying the DA Hotel architecture are not TELRIC-compliant, and have previously been rejected by the Commission as an appropriate method for access to fiber fed loops, Qwest’s UPS offering is defective and should be rejected by the Commission.

The Commission has already ruled that Qwest’s DA Hotel architecture creates a significant barrier to entry and thus is an inappropriate and unacceptable method by which to provide CLECs with access to fiber fed loops.⁴⁰ Since the UPS rates are based on and derived from the costs underlying the Qwest DA Hotel architecture, the UPS rates likewise create a significant barrier to entry. Thus, under the rationale and precedent previously articulated by the Commission, the UPS rates must be rejected and any consideration of those rates in the future should be included in the proceeding in which the Commission considers all of the technical, costing and pricing issues associated with CLEC access to fiber fed loops.

⁴⁰ Docket No. UT-003013, Part B Thirty Second Supplemental Order, dated June 21, 2002, ¶ 42.

Even if the Commission's Part B Order were not determinative of the issues, which it is, Qwest's UPS rates still must be rejected because they are fundamentally flawed on numerous grounds.

First, the FCC has made clear that the *only* method by which an incumbent LEC may prove that its rates are *cost-based* and compliant with FCC rules is through a cost study:

(e) Cost study requirements. An incumbent LEC *must prove* to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511. 47 C.F.R. § 51.505(e) (emphasis added).

As the FCC further specified in the body of its pricing rules, a cost study sufficient to support a claim of cost-based pricing must include support for the network configuration selected by the ILEC:

Cost studies must include the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such elements . . . measured *based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration* [plus a] reasonable allocation of forward-looking common costs. . . . 47 C.F.R. § 51.505.

The FCC's requirement of a cost study for both incremental costs as well as the selection of the network and technology is not mere recital. To the contrary, the FCC was emphatic that cost studies be the basis of any state commission pricing ruling by requiring the state commission to include such studies in the record relied upon to establish UNE rates. 47 C.F.R. § 51.505(e)(2).

Here, even as it acknowledged that a cost study forms the basis for determining what equipment should be deployed in a TELRIC-compliant network,⁴¹ Qwest did not even make a pretense at proving by any degree of evidence (much less a cost study) that its UPS cost study is grounded in the most forward looking technology or an efficient network configuration. To the contrary, Qwest produced only a high level review⁴² of the costs associated with a remote DSLAM-based UPS costing methodology, versus UPS rates based on next generation digital loop carrier (“NGDLC”), which, according to the criteria articulated by Qwest’s own costing experts, should be rejected out of hand.⁴³

It is self-evident that any determination as to whether a particular UNE is based on cost, as required by TELRIC, starts with an analysis of the investment that an ILEC must make in order to provide a particular service or UNE. Thus, in order to determine whether a particular UNE is priced consistent with TELRIC, it is critical to be able to determine and review (1) the equipment used; (2), the vendor providing the equipment; (3) the utilization for a particular piece of equipment; and (4) documentation or contracts supporting the cost of the equipment investment. Qwest’s own evaluation of the DA Hotel and NGDLC options, however, lacks all of this critical information. Thus, whether reviewed under the FCC’s criteria relating to the ILEC’s burden of proof or Qwest’s own standard for reliability, Qwest has failed to establish that its UPS rates are based on a least-cost, forward-looking, most efficient network architecture.

Second, compounding the problems created by Qwest’s own failure to fairly and adequately evaluate the competing architectures available to it, Qwest never produced

⁴¹ See Exhibit T-2020, pp. 4 and 6.

⁴² See Exhibit C-2074.

⁴³ See, e.g., Exhibit T-2049, pp. 9-12.

any witness that could testify, from either an engineering perspective or a cost basis, as to the assumptions embedded in Exhibit C-2074, what that exhibit was actually intended to depict, or whether there was any other documentation regarding the cost differences between NGDLC and the mini-DSLAM based UPS rates. Ms. Million, for instance, couldn't state precisely how any of the columns contained in Exhibit C-2074 did or would reflect an alternative approach based on NGDLC.⁴⁴ Neither could Ms. Million respond to any questions regarding the details underlying assumptions or inputs into Exhibit C-2074.⁴⁵ Even more egregiously, Ms. Million could not even testify as to whether the RT DSLAM was lower cost and more efficient than the NGDLC solution.⁴⁶

The lack of any meaningful analysis by Qwest of the costs and efficiencies associated with NGDLC and the DA Hotel architectures from any perspective is particularly concerning in light of the evidence produced by the parties in this matter that, from basic cost, economic and engineering perspectives, NGDLC is the least cost solution. As Covad engineering witness John Donovan testified,

[NGDLC] is the forward-looking cost effective technology, and it should be the only one considered for the purposes of estimating forward-looking costs in this docket. . . .

I believe there is no question on this issue. When faced with a situation such as a new housing development, the most cost effective solution is to place an NGDLC Remote Terminal with the capability to add xDSL services.

⁴⁴ Trans., 5/6/02 (Million), p. 4222.

⁴⁵ *Id.*, pp. 4224-25 and 4230-32.

⁴⁶ *Id.*, p. 4227.

No rational person would place separate sets of common equipment at a Remote Terminal location – one for POTS and one for xDSL in a forward-looking environment [which is what Qwest proposes].

[T]he only correct solution is an integrated NGDLC platform that can serve both POTS and xDSL services within the same Common Equipment configuration. For any deviation from that efficient, forward looking construct, Qwest should be held responsible for the extra costs.⁴⁷

Qwest's own documents demonstrate the engineering efficiencies of an NGDLC deployment. As page 3 of the Qwest Remote DSL presentation illustrates⁴⁸, each DLC can serve multiple FDI's. Under the NGDLC solution, the DSLAM functionality is combined with and located at the DLC and can serve all of the end users that are served by each FDI. That is, one NGDLC placed at the DLC can serve all end users at each of the three FDI's. By contrast, because the Qwest DSLAM is placed at each FDI, it can only serve a fraction ($1/3^{\text{rd}}$, according to the diagram), of the number of end users that an NGDLC at the DLC can serve.⁴⁹ The DA Hotel solution also requires the placement of two separate pieces (one each for telephone and for data) of equipment at two different locations with two sets of common costs, whereas with NGDLC, only one piece of equipment at one location can perform both the voice and data muxing functions.⁵⁰ Thus, NGDLC provides by far the most effective manner to serve end users where there is fiber in the loop because an NGDLC solution permits the placement of a single piece of equipment in a single location that has the ability to aggregate at last three times the

⁴⁷ Exhibit T-2370, pp. 9, 13, 14-15.

⁴⁸ See Ex. 2061.

⁴⁹ *Id.*

⁵⁰ Exhibit T-2370, p. 14.

amount of traffic to transport back to the central office than can a DSLAM placed at an FDI, which would require 6 pieces of expensive equipment to transport the same amount of data traffic.⁵¹

Mr. Donovan further elaborated on the technical and cost efficiencies associated with the NGDLC solution. As Mr. Donovan testified, the NGDLC solution can easily, cheaply and quickly be upgraded to benefit from technological and manufacturer improvements simply by swapping out two cards.⁵² By contrast, the remote DSLAM deployment requires significant construction and other costs, with an associated time delay. Moreover, the NGDLC solution is scalable (i.e., it can satisfy as little or as much demand as is required without modification) whereas there is no evidence whatsoever on the scalability of the RT DSLAM solution.⁵³ Finally, the NGDLC solution allows a CLEC to continue benefiting from its CO-based investment, whereas, the remote DSLAM renders a CLEC's investment in central office collocation and equipment obsolete.⁵⁴

Mr. Donovan provided additional compelling evidence that fully demonstrates that the NGDLC solution is more cost-efficient and, consequently, lower cost, than the remote DSLAM solution. As Mr. Donovan pointed out, the NGDLC architecture reflects an investment of \$123 per subscriber, whereas the Qwest DA Hotel solution costs four times that amount – requiring an investment of \$514 per subscriber.⁵⁵ Moreover, as Mr.

⁵¹ Trans., 5/10/02 (Donovan), pp. 5062-64.

⁵² Trans., 5/10/02 (Donovan), pp. 5046 and 5061-62.

⁵³ *Id.*, p. 5048.

⁵⁴ Trans., 5/8/02 (Price), pp. 4825-26.

⁵⁵ Trans., 5/10/02 (Donovan), pp. 5063-64.

Donovan testified, the NGDLC solution has the capability of paying for itself because of the cost savings that results from a fiber-fed (versus copper-fed) NGDLC deployment.⁵⁶

Third, Qwest makes no bones about the fact that its UPS cost study is not TELRIC-compliant. Qwest states quite explicitly in Exhibit C-2074 that its UPS rates are based on an *overlay* network. The “overlay” approach utilized by Qwest is nothing more than an embedded cost approach. As Qwest stated in late 2001 in an Arizona cost proceeding, the architecture underlying its UPS costs and rates (the “DA Hotel” architecture) is “by definition []a change to the existing network and thus UPS to the RT *should be based on the cost of adding to the network, not replacing the entire network.*”⁵⁷

The FCC has correctly recognized that Qwest’s embedded cost approach is improper and gives the ILECs an advantage over competitors.⁵⁸ Thus, the FCC rejected an embedded cost approach, and even went so far as to make clear that embedded costs can never be considered by, or factored into an ILEC’s cost study.⁵⁹ More recently, the Supreme Court made clear that an embedded cost approach is wholly inconsistent with the Act and the TELRIC methodology.⁶⁰ Even Qwest’s own witness Million points out that a TELRIC-compliant cost study requires that costs and rates be based on a network built from scratch and on the forward-looking replacement costs of replacing the telecommunications network.⁶¹ Measured against any of the criteria for a TELRIC-

⁵⁶ Trans., 5/101/02 (Donovan), pp. 5051-52.

⁵⁷ Qwest Corporation’s Post-Hearing Brief, dated Dec. 19, 2001, AZ Corp. Comm’n Docket No. T-00000A-00-0194, Phase II-A, p. 43.

⁵⁸ *In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 95-185, FCC 96-325, ¶705 (Rel. Aug. 8, 1996) (“*Local Competition Order*”).

⁵⁹ *Id.*, ¶621.

⁶⁰ *Verizon*, Slip Op. at 26.

⁶¹ Exhibit T-2020, p. 4.

compliant cost study, therefore, Qwest's UPS costs and associated rates clearly fail the test.

Finally, it is uncertain as to whether the Qwest UPS product offering is even competitively viable and legally sufficient. As Mr. Craig pointed out, Qwest offers UPS at an unspecified bit rate. Thus, even assuming UPS works as assumed (which assumption one cannot currently make) competitors likely may not be able to ensure any class or quality of service to their end users, thereby negating any CLEC ability to differentiate itself from Qwest as far as the quality of the product offering.⁶² Of even greater concern are the charges associated with ordering UPS. As Ms. Malone testified, a CLEC would have to pay at least \$2 more than the Qwest retail rates in order to cover just its costs in obtaining UPS.⁶³

Further, the question of whether the rates, terms and conditions for UPS are non-discriminatory is in question. Qwest utilizes its packet switched network to provide an end to end service to its customers.⁶⁴ By contrast, CLEC use of the UPS produce provides only transmission and DSLAM functionality between the CO and the RT – the “last half-mile” to the end user is not included even though it apparently is for Qwest.⁶⁵

At the end of the day, Qwest has selected a network architecture based not on a least cost, forward looking technology, but rather as an interim step to achieve a revenue stream from video on demand and interactive video in the future.⁶⁶ While Qwest is free to make whatever decisions it deems in its own economic best interest, it is improper and

⁶² Trans., 5/8/02 (Craig), pp. 4624-25 and 4626-27.

⁶³ Trans., 5/7/02 (Malone), pp. 4452-55 and 4455-56.

⁶⁴ Exhibit 2069.

⁶⁵ Trans., 5/7/02 (Malone), p. 4456.

⁶⁶ Trans., 5/10/01(Cabe), p. 4999.

impermissible for CLECs to have to pay UNE rates based on anything other than an architecture that is least cost, forward-looking, and utilizing the most efficient architecture and equipment. Qwest's UPS costs and rates should be rejected, and Qwest should be ordered to rerun its cost models with an architecture based on NGDLC.

C. Issue III(A)(4)(w): Miscellaneous Charges

In Exhibit 2050, Qwest lists a number of charges, called "Miscellaneous Charges" which are supposedly described in the testimony of William Easton. These charges, which range from "additional engineering," to "testing and maintenance," to "maintenance of service" to "cancellation charges," encompass all the charges that CLECs incur regularly during provisioning and maintenance of UNEs, but which lack any cost support or clearly defined and applicable statement of application. Because of these twin deficits, Qwest should be prohibited from assessing any charge contained in the list of miscellaneous charges.

Qwest makes no bones about the fact that it provided no cost study to support the development or application of the miscellaneous charges.⁶⁷ As set forth more fully above, however, Qwest is obligated to provide a cost study to support each and every rate it proposes.⁶⁸ Because Qwest has failed to provide a cost study, it has failed to meet its burden of proof and cannot permissibly charge CLECs any of the rates contained in the miscellaneous charge category.

V. CONCLUSION

Rates set pursuant to a policy of providing opportunity for the widespread deployment of UNEs and advanced services will result in significant benefits to the

⁶⁷ Trans., 5/21/02 (Easton), p. 153.

⁶⁸ See *supra*.

consumers in this state. Competitors, such as Covad, are offering a wide range of services and options. As in other segments of the telecommunications business, however, the potential for new entrants to accelerate the delivery of competitive benefits to customers depends on the new entrants' ability to obtain access to customers on terms and conditions that place them on an even competitive footing with the incumbent. Qwest, in contrast, has an incentive to leverage its control over local loops and other elements of the local exchange network to dominate the provision of telecommunications services. Indeed, Qwest can leverage its incumbency advantage by slowing new entrants' efforts to offer services that Qwest itself is not prepared to offer, or for which it does not want any competition in order to secure an exclusive customer base that will ensure a return on its investment. To avoid any delay in getting the benefits of competition to as many Washington consumers as possible, the Commission must closely scrutinize Qwest's proposed prices, terms and conditions for providing new entrants such as Covad with the necessary facilities to provide services. Until the Commission resolves these competitive issues, Washington consumers may not only be denied a choice of providers, but also they may also be denied choices in the types of services available.

Dated: July 22, 2002.

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CERTIFICATE OF SERVICE
UT-003013

I hereby certify that on this day I served a true and correct copy of the foregoing *Initial Post-Hearing Brief of Covad Communications Company* on the following persons by electronic mail and U.S. Mail unless otherwise indicated:

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