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	)))))))	WUTC Docket No. UT-043045

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DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY'S PETITION FOR REVIEW

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INTRODUCTION

1 DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), pursuant to WAC 480-07-825 respectfully petitions the Washington Utilities and Transportation Commission ("Commission") for review of Order No. 4 in this Docket, the Arbitrator's Report and Decision, dated November 2, 2004 ("Arbitrator's Report").

2 Covad specifically requests review of the decisions contained in the Arbitrator's Report regarding Copper Retirement (Issue 1), resolution of unbundling issues related to section 271 of the Telecommunications Act of 1996[1] and Washington law (Issue 2), the scope of the language in the arbitrated agreement ("Agreement") regarding commingling (Issue 3), Qwest's obligations to provide central office regeneration of cross-connections (Issue 5), and issues regarding payment deadlines and remedies for non-payment (Issue 8).

ARGUMENT

INITIAL ARGUMENTS REGARDING THE FCC'S INTERIM UNBUNDLING ORDER

3 The Arbitrator's Report separately addresses the impact of the FCC's recent interim rules[2] promulgated in response to the D.C. Circuit's Decision in *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"). The Arbitrator's Report determined that nothing precludes the Commission from arbitrating issues related to the *Interim Unbundling Order,* and that the full Commission will likely have the aid of permanent unbundling rules prior to issuing its decision in this case.[3] While Covad generally agrees with this statement, it further believes that none of its proposals are even potentially impacted by the *Interim Unbundling Order.*

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the Act").
[2] *In the Matter of the Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking (rel. August 20, 2004) ("Interim Unbundling Order").
[3] Arbitrator's Report, ¶ 23.

A. Covad's Proposals Do Not Conflict with the FCC's Interim Unbundling Order

4 The FCC, in its *Interim Unbundling Order,* admonished Incumbent LECs 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."[4] Covad does not believe that any decision implementing the FCC's commingling rules, which are currently effective, would conflict with this statement in the *Interim Unbundling Order*.

5 Such a reading of the *Interim Unbundling Order* would create an unnecessary conflict between the FCC's own statements in the *Triennial Review Order*[5] and its current commingling rules, on the one hand, and the "standstill" provisions of the *Interim Unbundling Order* on the other. Aside from the fact that the FCC recognized no such conflict in its *Interim Unbundling Order*, there are additional logical reasons to reject such a reading. First, the FCC provided no justification for such a decision in the *Interim Unbundling Order*, even as it went to great lengths to explain why it believed it must continue to provide interim access to certain network elements. Second, none of the justifications for the interim rules (maintaining short-term market stability for competitive LECs, protecting consumers)[6] have any relevance to the status of the FCC's commingling rules.

6 Furthermore, reading the *Interim Unbundling Order* as in conflict with the *Triennial Review Order* would necessitate additional changes to disputed sections of the Agreement. For instance, Qwest's proposed deletions of elements available under the agreement (citing their removal from the list of UNEs available under section 251) would all suffer equally, if not more so, as they clearly alter the pricing, terms and conditions of access to enterprise market

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[4] *Interim Unbundling Order,* ¶ 1.

[5] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 18 FCC Rcd. 16978 (2003) ("*Triennial Review Order*").

[6] *Interim Unbundling Order,* ¶ 1.

loops, dedicated transport, and switching from those in effect between the parties on June 15, 2004. In short, the Commission would have to reject all of Qwest's proposals related to Issue 2 in this Arbitration. Additionally, Qwest's copper retirement proposals clearly bear upon and alter the terms and conditions for offering loops, including enterprise market loops, and must also be set aside. This would require the rejection of all of Qwest's proposals for Issue 1.[7] Covad does not believe this accurately reflects the intent of the *Interim Unbundling Order*, and therefore agrees with Arbitrator's Report inasmuch as it supports the Commission's authority to arbitrate these issues under the FCC's provision for "change in law" proceedings.[8]

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

7 With respect to Issue 1, the Arbitrator's Report found that Qwest's proposed language governing the retirement of copper loop plant was consistent with Federal Communications Commission (FCC) rules, and that no additional restrictions were warranted.[9] Covad believes that this resolution does not adequately consider this Commission's prior orders confirming the utility of a loop unbundling requirement. If Qwest is permitted to retire copper facilities, and replace them with facilities that are unavailable to local competitors such as Covad, this Commission's previous policy decisions regarding unbundling, prompted by Washington law, would be rendered a nullity.

8 The Commission should also recognize that limits to the FCC's copper retirement policies are further explained and clarified by its recent decisions regarding the scope of its new limitations for the unbundling of fiber or copper-fiber hybrid loops. Its decision to deny competitive LEC access to these loops is limited to circumstances where incumbent LECs deploy FTTH and FTTC loops to serve mass market customers, and therefore have no bearing

[7] Upon the rejection of Qwest's proposals for Issues 1 and 2, the Commission would be required to replace the parties' disputed language with that contained in their current interconnection agreement. If no language addresses the issue, the section(s) at issue must be deleted.
[8] *Interim Unbundling Order,* ¶ 23; Arbitrator's Report, ¶ 22.
[9] Arbitrator's Report, ¶¶ 1, 35-38.

on Covad's proposal to maintain access to loop facilities in the face of routine network modifications resulting in the creation of non-FTTH or non-FTTC loops.

A. This Commission's Previous Rulings Regarding Loop Unbundling Support Covad's Proposals

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

> (1) Preserve affordable universal telecommunications service;
>
> (2) Maintain and advance the efficiency and availability of telecommunications service;
>
> (3) Ensure that customers pay only reasonable charges for telecommunications service; [and]
>
> * * *
>
> (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state. . . .

RCW 80.36.300.

10 Covad's proposals would further all of these statutory goals. Continued access to loop plant to serve Covad's customers would encourage Covad to continue to deploy advanced central office equipment, such as Digital Subscriber Line Access Multiplexers (DSLAMs), to serve Washington customers. The proposals would also foster reasonable and fair competition, maintain quality of service, and promote consumer protection and choice by offering an economically rational means by which Covad can continue to provide service. As a result, Washington customers would maintain their right to choose an alternative provider for broadband services, which are becoming an ever more important service for residential subscribers and the growth of small business in Washington.

11 This Commission has the requisite authority to continue these pro-competitive policies by preserving non-discriminatory access to loop facilities. *See* Fourth Supplemental Order Rejecting Tariff Filing and Ordering Refilings; Granting Complaints, In Part ("Interconnection

Order"), *WUTC v. U S West Communications, Inc.*, WUTC Docket No. UT-94164, *et al.* at 15 and 51 ("Interconnection Case") (Oct. 30, 1995). In discussing its authority to require the unbundling of loop facilities under its authority granted by Washington statute, the Commission stated:

> The record clearly establishes that unbundling of the local loop is essential to the rapid geographic dispersion of competitive benefits to consumers and is in the public interest. Unbundling allows customers greater opportunity to choose between a diversity of products, services, and companies. Unbundling also allows for the efficient use of the public switched network, reduces the likelihood of inefficient network over-building, and ensures that competition is not held hostage by being bundled with bottleneck functions...
>
> Unbundling also holds the prospect of speeding the delivery of advanced network services such as ISDN (integrated services digital network) to customers who are not yet located along an ALEC's network...
>
> This Commission is charged by statute to determine adequate and efficient practices to be observed by telecommunications companies, and to correct practices that tend to stifle competition, RCW 80.04.110.

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

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

13 It is also worth noting that Covad's copper retirement proposals are further limited to Covad's *existing* customers. Adopting Covad's proposal will merely allow consumers to choose their broadband provider, rather than have Qwest choose for them by performing routine network modifications.

B. Covad's Copper Retirement Proposals Do Not Impact The FCC's New Copper Retirement Rules Related To FTTH Loops.

14 After the hearing in this matter, and as part of ongoing negotiations around the agreement being arbitrated in other Qwest states, Covad modified its copper retirement proposal to remove any appearance of conflict with the FCC's new copper retirement process, which applies solely to FTTH loops. Covad's current copper retirement proposal reads:

> 9.1.15 In the event Qwest decides to retire a copper loop, copper feeder or copper Subloop and replace it with fiber, Qwest will: (i) provide notice of such planned retirement on its web site (www.qwest.com/disclosures); and (ii) provide email notice of such planned retirement to CLECs; and (iii) provide public notice of such planned replacement to the FCC. Qwest can proceed with copper retirement at the conclusion of the applicable FCC notice process as identified in FCC rules unless retirement was explicitly denied (or otherwise delayed or modified). Such notices shall be in addition to any applicable state commission requirements. The e-mail notice provided to each CLEC shall include the following information: city and state; wire center; planned retirement date; the FDI address; a listing of all impacted addresses in the DA; a listing of all of CLEC's customer impacted addresses; old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information.
>
> 9.1.15.1 Continuity of Service During Copper Retirement. This section applies where Qwest retires copper feeder cable and the resultant loop is comprised of either (1) mixed copper media (i.e. copper cable of different gauges or transmission characteristics); or (2) mixed copper and fiber media (i.e. a hybrid copper-fiber loop) (collectively, "hybrid loops"). ***This section does not apply where the resultant loop is a fiber to the home (FTTH) loop.***
>
> 9.1.15.1.1 When Qwest retires copper feeder for loops serving CLEC-served End User Customers or the CLEC at the time such retirement is implemented, Qwest shall adhere to all regulatory and legal requirements pertaining to changes in the Qwest network. Qwest will not retire copper facilities serving CLEC's End User Customers or CLEC, at any time prior to discontinuance by CLEC or CLEC's End User Customer of the service being provided by CLEC, without first provisioning an alternative service over any available, compatible facility (i.e. copper or fiber) to CLEC or CLEC End User Customer. Such alternative service shall be provisioned in a manner that does not degrade the service or increase the cost to CLEC or End User Customers of CLEC. Disputes over copper retirement shall be

subject to the Dispute Resolution provisions of this Interconnection Agreement.

[Emphasis added]

15 The purpose of this change is to make clear that Covad does not request that this Commission order language that conflicts with the FCC's most recent rule, resulting from the *Triennial Review Order,* regarding the retirement of copper loops, and replacement of those loops with FTTH loops.[10] Rather, Covad proposes that when Qwest retires copper feeder *not resulting in a FTTH loop*, and that deployment disrupts Covad's ability to continue providing service to its customers, that Qwest will avoid service disruption by offering Covad an alternative means of reaching its customers that does not increase the costs or degrade service quality.

16 Covad's proposal, as narrowed, reflects Covad's most basic concerns regarding copper retirement, which have nothing to do with access to the full features and capabilities of any next generation FTTH loops that Qwest may deploy and which were the focus of the FCC's discussion around fiber unbundling relief and associated copper retirement policies in the *Triennial Review Order*. Rather, Covad is concerned with Qwest's routine maintenance decisions to retire copper *feeder* plant, completely unrelated to any upgrade of Qwest facilities to provide new services. In other words, Covad seeks language unrelated to FTTH deployments to ensure that it can maintain service to its existing customers.

C. Recent FCC Rulings Limiting Loop Unbundling Obligations Under Section 251 Of The Act Are Limited To FTTH and FTTC Loops, And Are Therefore Inapplicable To Covad's Proposals

17 The FCC has made clear that there are two absolutely necessary prerequisites that an ILEC must satisfy before it can take advantage of any new fiber unbundling policies espoused by the *Triennial Review Order*. The first prerequisite is that fiber loops deployed be capable

[10] *See* 47 C.F.R. § 51.333(b), (c), and (f).

and actually provide enhanced broadband services. As the FCC stated numerous times in the *FTTC Reconsideration Order*:[11]

> We further specify that the fiber transmission facility in a FTTC loop must connect to copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises. ***We do this to ensure that our unbundling relief is targeted to FTTC deployments that are designed to bring increased advanced services capability to users, rather than extend to other hybrid loop deployments...***[12]
>
> Finally, in order to ensure that our new rules promote the goals of section 706, we tailor unbundling relief ***to those FTTC deployments specifically designed to bring advanced services to users***.. . . we provide those incumbents seeking to avail themselves of this unbundling relief an incentive ***to reconfigure their network to bring advanced services to the entire geographic area rather than permitting them to obtain unbundling relief where, by happenstance, there may be an existing loop with 500 feet or less copper distribution***.[13]

18 Qwest provided no evidence or testimony in this proceeding that its fiber deployment is in any way designed to ensure the delivery of enhanced broadband services. Covad believes that the testimony and evidence points to the fact that Qwest's fiber deployment is done solely for the purpose of network maintenance or, more perniciously, to drive competitors off the network. This kind of activity was not designed to be protected in any way, as the FCC made clear.

19 Supporting this belief is the fact that Qwest's highest ranking officer, Richard Notebaert, recently reiterated the fact that Qwest is not and will not engage in any kind of fiber deployment designed to bring enhanced broadband services to existing Washington consumers:

> After failing to generate adequate returns by offering TV over fiber-to-copper networks in Colorado and Arizona, the No. 4 Bell, Denver-based Qwest Communications International, Inc. is

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[11] *In the Matter of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*; CC Docket Nos. 01-338, 96-98 and 98-147, Order on Reconsideration (rel. Oct. 18, 2004) ("FTTC Reconsideration Order").

[12] Id., ¶10 (emphasis added).

[13] Id. ¶ 17 (emphasis added).

> sitting out the current [fiber deployment] craze. CEO Richard C. Notebaert says he's willing to install fiber only in new housing developments. "When you go in to do a tear up or an overlay, the economics don't work," he says.[14]

20 Consequently, while Qwest has notified carriers regularly about copper retirement activity, none of these retirements appear to be resulting in the deployment of additional advanced services to customers, and Qwest has made no pretense at proving otherwise. As the FCC has made clear, maintenance decisions like Qwest's are not protected activity, and certainly should not trump state and federal market-opening measures, or this Commission's directive to promote diversity in the supply of telecommunications services, which led to this Commission's decision regarding loop unbundling.

21 With respect to the FCC's second prerequisite, The FTTC Reconsideration Order also made clear that its copper retirement rules and associated unbundling relief were not to further deployment of facilities to enterprise customers, but rather to mass market customers. The FTTC Reconsideration Order makes a number of references to the fact that the deployment incentive originally discussed in the *Triennial Review Order* with respect to FTTH loops and then extended to FTTC loops in the Reconsideration Order was granted in order to ensure deployment of enhanced broadband capabilities to mass market customers:

> "Such a change in our rules is necessary to ensure that regulatory disincentives for broadband deployment are removed for carriers seeking to provide advanced services to ***mass market customers*** ..."[15]

> "We do not require incumbent LECs to provide unbundled access to new ***mass market*** FTTC loops for either narrowband or broadband services."[16]

22 FCC Chairman Powell, in his concurring statement, reiterated the fact that the FCC's *Triennial Review Order* and associated reconsideration orders were designed to ensure that the

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[14] Catherine Yang, *Cable vs. Fiber: In the Titanic Battle to Control the Flow of Data to U.S. Households, the Bells Fight Back b Offering Video via Phone Lines*, Businessweek, November 1, 2004.
[15] Id., ¶ 9 (emphasis added).
[16] Id., ¶ 14 (emphasis added).

Triennial Review Order and Reconsideration Order unbundling and copper retirement relief would result in benefits to consumers, and not businesses -- "by limiting the unbundling obligations of incumbents when they roll out deep fiber networks ***to residential customers***, we restore the market place incentives of carriers to invest in new networks."

23 The Arbitrator's Report states that Covad's proposal is "inconsistent" with the *Triennial Review Order*. Covad believes this analysis misses the point: Covad's proposals regarding copper retirement (both its past and current proposal) provide a solution for an issue left unanswered by the new rule, whether service and customer choice can be maintained when Qwest retires copper feeder plant and does not deploy FTTH loops. The question then is not one of consistency, but rather authority, as discussed below.

D. This Commission Has The Authority To Adopt Covad's Proposals

24 The Arbitrator's Report focuses solely on whether Covad's proposal is required by the *Triennial Review Order*, and provides no discussion of whether the Commission has the authority to adopt its own copper retirement policies. This decision either assumes federal preemption, a notion expressly disclaimed by the FCC, or simply fails to recognize that this Commission can, and should, continue to enforce its policies designed to promote the diversity in the supply of telecommunications in the State of Washington.

25 The FCC has clearly permitted state utilities commissions to enforce their own copper retirement rules. On this issue, the FCC stated that, "As a final matter, we stress that we are not preempting the ability of any state commission to evaluate an incumbent LEC's retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements." [17]

26 Also, despite the clear opportunity to do so in any number of recent proceedings, the FCC has done nothing to reverse its long-standing determination that section 251 unbundling

[17] *Triennial Review Order,* ¶ 284.

requirements act as a national "floor" on unbundling, rather than an upper bound. In the *Local Competition First Report and Order,*[18] the FCC established the overall context for its application of section 251's unbundling requirements:

> ...[W]e adopt or tentative conclusion that states may impose additional unbundling requirements pursuant to section 252(e)(3), as long as such requirements are consistent with the 1996 Act and our regulations. This conclusion is consistent with the statement in section 252(e)(3) that 'nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement.'[19]

27 Despite the dizzying number of controversies, court challenges, remands and complete confusion surrounding the FCC's "impairment" standard and the scope of section 251 (and now section 271) unbundling, nothing has disturbed this original decision on the meaning of national unbundling rules, and the remaining authority of state utilities commissions to add additional requirements grounded in state law. In 2003, the Sixth Circuit confirmed the continued right of state commissions to enforce state regulations. In confirming the Michigan Public Service Commission's right to enforce state tariff requirements related to unbundled elements, the court stated:

> ...[the Act] allows room for state regulation. The Act does not impliedly preempt Michigan's tariff regime. The [Michigan Public Service] Commission can enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.[20]

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[18] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd. 15499 (rel. August 8, 1996) ("Local Competition First Report and Order").

[19] *Id.*, ¶ 244.

[20] *Michigan Bell Telephone Company v. MCI Metro Access Transmission Services, Inc.*, 323 F.3d 348, 359 (6th Cir. 2003).

E. Covad's Proposals Regarding Notices Of Copper Retirement Should Be Adopted

28 In ruling on the issue of the sufficiency of Qwest's proposed notice regarding individual copper retirement projects, the Arbitrator's Report characterized Covad's proposals, which provide more detailed and relevant information regarding copper retirement projects, as "burdensome to Qwest," and noted that it believed Qwest's notice complied with the FCC's notice requirements.[21] Covad disagrees with both of these assertions.

29 47 C.F.R. § 51.327 prescribes the "minimum" standards for notices of network changes.[22] Qwest's current notifications do not even meet these "minimum" standards. For instance, notices must, according to the rule, include the "location(s) at which the changes will occur"[23] as well as the "reasonably foreseeable impact of the planned changes."[24]

30 The Arbitrator's Report reads these requirements in an unduly narrow fashion. For instance, Qwest's notice, endorsed by the Arbitrator's Report, does not provide such vital information as what Covad customers, if any, will be impacted by the retirement project. The vague notice proposed by Qwest would be useful only as a starting point for a major research project to determine whether a given retirement will impact Covad's customers. In response to each and every notice of a Qwest copper retirement project, Covad would have to determine whether any of its customers would actually be affected.

31 Covad submits that any notice that can be read to comply with the FCC's rules must specifically inform competitive LECs whether the retirement threatens service to existing customers. The FCC rule clearly places the burden on ILECs to determine the "reasonably foreseeable impact" of its retirements. Qwest's proposal, which would not require specific

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[21] Arbitrator's Report, ¶ 36.
[22] 47 C.F.R. § 51.327(a) uses the term "at a minimum" to describe the obligation to meet the listed public notice requirements.
[23] 47 C.F.R. § 51.327(a)(4).
[24] 47 C.F.R. § 51.327(a)(6).

notice of the customers affected, is so devoid of substance that it must be rejected as an unreasonable interpretation of the rule.

32 Furthermore, the FCC's rules regarding network modifications clearly require

> A description of the type of changes planned (Information provided to satisfy this requirement must include, as applicable, but is not limited to, references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection)...

47 C.F.R. § 51.327(a)(5).

33 Covad's notice proposals embody this requirement, by specifying that notices contain information regarding "old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information."[25] Covad believes the information it seeks, and which Qwest refuses to provide, is clearly within the scope of the FCC rule. Not only is it within the scope of the rule, it is necessary to lend any meaning whatsoever to the notice requirement.

34 Even if this Commission does not believe the FCC has required the information Covad requests, the FCC has undoubtedly recognized this Commission's authority to add, or otherwise specify, the notice requirements requested by Covad in order to afford meaningful notice of Qwest retirement projects. In addition to the minimum requirements of 47 C.F.R. § 51.327, the FCC directs ILECs to comply with "any applicable state requirements" related to the retirement of copper loops and copper subloops.[26] While 47 C.F.R. § 51.327 should be read broadly enough to require what Covad seeks, additional state requirements are also clearly authorized.

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[25] Covad Proposed Section 9.1.15.
[26] 47 C.F.R. § 51.319(a)(3)(iii)(B).

ISSUE 2 – UNIFIED AGREEMENT – 271 ELEMENTS INCLUDED
(Section 4 definitions of "Unbundled Network Element" and "251(c)(3) UNE"; Sections 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, 9.21.2)

35 While the Arbitrator's Report recognizes the Commission's authority under Washington law and section 271 of the Act to require the continued unbundling of certain network elements, notwithstanding their removal from the FCC's national list of elements required to be unbundled pursuant to section 251 of the Act, the Arbitrator's Report determines that the relevant sections of the Agreement discussing such access were not negotiated by the parties, and are therefore ineligible for arbitration by the Commission in this proceeding.[27] The Arbitrator's Report also states that pending FCC decisions may further restrict the availability of unbundled network elements pursuant to section 271 of the Act.[28] Further, the Arbitrator's Report posits that this Commission would be required to initiate a proceeding to make unbundling determinations consistent with Covad's proposals, and that this cannot be done based upon the record presented in this proceeding.[29] Covad respectfully disagrees with these factual and legal conclusions, as detailed below.

A. The Relevant Sections Of The Agreement Are "Open Issues" Subject To Commission Resolution

36 The Arbitrator's Report fails to recognize the following facts that clearly establish that sections of the Agreement addressing access to certain elements are "open issues" between the parties: (1) Prior versions of the Agreement provided for access to these elements; (2) Following the issuance of the *Triennial Review Order,* it was Qwest that proposed changes to the relevant sections of the Agreement, thus opening negotiations regarding the sections; (3) The parties listed these sections as "open issues" in the negotiations prior to March 9, 2004.

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[27] Arbitrator's Report, ¶ 55.
[28] Id., ¶ 56.
[29] Id., ¶ 60.

37 In addition to these facts, it is logically impossible to find that a party (Qwest) may propose new language, receive a counterproposal, reject it, then later be found to have not negotiated that language. Other states considering this issue have recognized the logical flaw of such a position.

38 The original draft of the Agreement was based upon Qwest's Statement of Generally Available Terms (SGAT), including provisions providing for unbundled access to now-controversial network elements, such as switching, transport, line splitting, and packet switching. As a result of the FCC's *Triennial Review Order*, the legal landscape surrounding this access changed significantly. Seeking to capitalize on these changes, Qwest proposed new "TRO Language" to replace several sections of the Parties' Agreement. At this point, the disputes in question developed. *Covad* did not agree with *Qwest's* proposed changes to the Agreement. At no time did Covad attempt to initiate discussions on some new language unrelated to the language under negotiation in the Agreement. Covad merely offered counterproposals to Qwest's language that Covad believes reflect current state and federal unbundling obligations. On these factual issues there is no dispute.

39 If these facts do not reflect a negotiation leading to open issues, it is difficult to understand what constitutes "negotiation." Other state commissions have agreed. In finding that the relevant sections were "open issues," the Utah Public Service Commission stated:

> It is not difficult to conclude for purposes of this Motion that the parties negotiated those items which Qwest now seeks to have dismissed from this proceeding. In May 2003, Qwest agreed to negotiate ICA Section 9 issues. This section of the ICA contains the unbundled network element provisions at which Qwest directs its Motion. Not only did these Section 9 items variously appear on Qwest's own "Issues List", but the state law and section 271 language to which Qwest now objects resulted from Qwest's own *"TRO"* proposals during negotiations aimed at removing network elements from the ICA following release of the *TRO*. The fact that Qwest did not agree to Covad's counterproposal language and apparently chose not to respond to it cannot reasonably be interpreted as removing the issues from the parties' negotiations. Where there are proposals and counter proposals, there is negotiation...As stated by the Fifth Circuit in *Coserv*, those

> negotiated issues on which no agreement is reached remain "open" and properly within the scope of section 252 arbitration.[30]

40 In resolving this issue in the parties' parallel arbitration proceeding in Minnesota, the administrative law judge assigned to the matter found:

> Qwest's assertion that it refused to negotiate 271 issues goes too far. After release of the TRO on August 21, 2003, and after it became effective on October 2, 2003, the parties exchanged language proposals concerning a variety of subsections in section 9, each reflecting the party's focus on different provisions of the TRO. Only after the USTA II opinion was released in early March, and shortly before the 135-day deadline for seeking arbitration, did Qwest assert that certain provisions were not open issues. That the parties did not move from their initial proposals does not mean they were not negotiating. Qwest offered contract language on these issues and sought to obtain Covad's agreement. In doing so, Qwest agreed to negotiate, and in fact did negotiate, the relevant terms of section 9 of the interconnection agreement that are presented in this arbitration petition. Because these issues were the subject of voluntary negotiations, they are open issues within the meaning of 47 U.S.C. § 252(b)(1), and they are subject to arbitration by the MPUC.[31]

B. Any Future Action On Forbearance Petitions Before The FCC Should Have No Bearing On The Commission's Decision In This Proceeding

41 Covad does not believe the FCC's eventual action, or non-action, regarding ILEC petitions to the FCC for further forbearance from section 271 unbundling obligations have any bearing on the Commission's decision. Even if the FCC were to forbear from enforcing additional elements on the section 271 Competitive Checklist,[32] such a decision does not equate to preemption of state unbundling determinations. Not only has the FCC made this clear on several occasions, applicable case law clarifies that administrative agencies should not presume

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[30] Utah Public Service Commission docket no. 04-2277-02, Order Denying Motion To Dismiss Or, Alternatively, For Summary Judgment Relating To Portions Of Issues Submitted By Covad Communications Company For Arbitration (Issued: November 12, 2004) at 6. A copy of this decision is attached hereto as Attachment A.

[31] OAH Docket No. 3-2500-15908-4; MPUC Docket No. P-5692,421/CI-04-549, In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b), Order on Motion to Dismiss (Dated: June 4, 2004) at 6 [footnote omitted]. A copy of this decision is attached hereto as Attachment B.

[32] 47 U.S.C. § 271(c)(2)(B) ("Competitive Checklist").

federal preemption, but should instead apply the law in accordance with their statutory directives.[33]

C. The Act Grants this Commission Clear Authority to Order Unbundling in Addition to the Minimum Requirements of Section 251

42 The Arbitrator's Report asserts that any decisions regarding unbundling in addition to the FCC's minimum requirements established pursuant to section 251(c)(3) of the Act would require that the Commission engage in "impairment analysis."[34] Covad disagrees, and has not proposed that this Commission perform an impairment analysis under section 251. Instead, Covad asks this Commission to recognize its authority under section 271 of the Act, Washington law, or both, to order unbundling consistent with the Competitive Checklist and the statutory directives of this Commission.

43 Any questions regarding this Commission's authority to impose additional unbundling obligations has been repudiated not only by the FCC in the *Local Competition First Report and Order*,[35] but also by every federal court passing judgment on the meaning of section 252(e)(3) of the Act.[36] Federal courts have routinely confirmed that the Act's savings clauses, especially 47 U.S.C. § 252(e)(3), provide state commissions with the requisite authority to enforce their own access obligations. They have likewise determined that for state requirements to be preempted, they must actually conflict with federal law, or thoroughly occupy the legislative

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[33] *See, e.g., Johnson, Administrator of Veterans' Affairs, et. al. v. Robison,* 415 U.S. 361, 368; 94 S. Ct. 1160, 1166; 39 L.Ed. 2d 389, 398 (1974).

[34] Arbitrator's Report, ¶ 59.

[35] *See Local Competition First Report and Order,* ¶ 244.

[36] *See Southwestern Bell Telephone Co. v. Public Util. Comm'm of Texas,* 208 F.3d 475, 481 (5th Cir. 2000) ("The Act obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements."); *AT&T Communications v. BellSouth Telecommunications Inc.,* 238 F.3d 636, 642 (5th Cir. 2001) ("Subject to § 253, the state commission may also establish or enforce other requirements of state law in its review of an agreement." [citing § 252(e)(3)]); *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.,* 240 F.3d 279, 301-302 (4th Cir. 2001) ("Determinations made [by state commissions] pursuant to authority other than that conferred by § 252 are, by operation of § 601(c) of the 1996 Act, left for review by State courts. [citing 47 U.S.C. § 152 note]...Section 252(e) also permits State commissions to impose State-law requirements in its review of interconnection agreements.")

field.[37] Congress effectively eliminated any argument supporting implied preemption by including the following language in the Act:

> (c) Federal, State, and Local Law.--
>
> (1) **No implied effect**.--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Pub. L. 104-104, title VI, Sec. 601(c), Feb. 8, 1996, 110 Stat. 143. [emphasis added]

44 As discussed above, the FCC has, as recently as the *Triennial Review Order*, rejected the premise that access obligations exceeding those required by section 251's "impair" standard *directly* conflict with section 251:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.[38]

D. Access Obligations Consistent with the Section 271 Competitive Checklist Cannot, as a Logical Matter, Conflict with the Act

45 While the Arbitrator's Report recognizes this Commission's authority to unbundle elements pursuant to state law, it claims that an analysis must be performed to determine whether such unbundling conflicts with federal law. This decision fails to take into account the statements made by the FCC, and left undisturbed by the D.C. Circuit in its *USTA II* decision, that network elements contained in the section 271 Competitive Checklist[39] must be available notwithstanding any finding of non-impairment. The FCC specifically rejected the idea that section 271 access requirements might conflict with section 251:

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[37] *Cippillone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992).
[38] *Triennial Review Order*, ¶ 191 [citations omitted].
[39] *See* 47 U.S.C. § 271(c)(2)(B) ("Competitive Checklist").

> Verizon asserts that an interpretation of the Act that recognizes the independence of sections 271 and 251(d)(2) places these sections in conflict with each other. We disagree. Verizon's reading of section 271 would provide no reason for Congress to have enacted items 4, 5, 6, and 10 [loop, transport, switching and signaling] of the checklist because item 2 [compliance with section 251] would have sufficed.

Triennial Review Order, ¶ 654.

46 If the additional unbundling requirements contained in the Competitive Checklist do not conflict with section 251, it is a logical impossibility that identical state access obligations could conflict with section 251. Therefore, any access obligation limited by the scope of the competitive checklist (such as those proposed by Covad), whether grounded in section 271 or Washington law, cannot conflict with the Act and cannot be preempted.

E. The Commission Has Authority to Enforce Section 271 by Requiring Compliance with the Competitive Checklist

47 While the Arbitrator's Report recognizes this Commission's authority to enforce section 271 access requirements, Qwest has consistently taken the position that even if section 271 can be read to create additional unbundling obligations, this Commission possesses no authority to enforce those obligations. For this premise, it cites *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003). Qwest also claims that the role for state commissions envisioned by the Act with respect to section 271 is markedly different than that envisioned by sections 251 and 252, and that this Commission has no real power to enforce compliance with the Competitive Checklist.

48 Qwest's reliance on *Indiana Bell* misconstrues the court's holding in that case. The *Indiana Bell* court held that the Indiana Utility Regulatory Commission (IURC) did not have authority to order a specific performance and remedy plan as a condition of interLATA authority, because the FCC, not the IURC, had the ultimate authority to grant Indiana Bell's application. By ordering compliance with the remedy plan, the court ruled that the IURC

"*imposes additional* obligations on Ameritech, beyond what is contemplated by Section 271 of the Act." (emphasis added) *Id.* at 6.

49 Notably, however, the court went to great lengths to explain that the IURC *did* have the authority to implement its performance and penalty plan *through the 252 interconnection process*. The court stated: "It is precisely because enforcement mechanisms are contemplated by Section 252 that they cannot be developed through the 271 Application process alone." In other words, the IURC had no need to require certain access standards as a condition of 271 approval, because it was free to require the same terms in its review of 252 interconnection agreements.

50 A proper reading of *Indiana Bell* affirms that this Commission may properly interpret and enforce the Competitive Checklist in its review of an interconnection agreement. In the current proceeding, Covad does not propose additional obligations and penalties under the aegis of section 271, making the court's holding in *Indiana Bell* inapplicable.

51 Recently, the Maine Public Utilities Commission issued an order requiring Verizon to continue to provide elements on the Competitive Checklist through tariffs approved by that commission.[40] The Maine PUC also specifically found they possessed the authority to require compliance with the Competitive Checklist in the context of 252 arbitration proceedings.[41]

52 All of this is consistent with the clear direction provided by the FCC in approving RBOC 271 applications, which firmly support the enforcement authority of state utilities commissions with respect to the competitive checklist. In approving Qwest's 271 application for Washington, the FCC stated:

> Working in concert with the Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming

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[40] *See* Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Order - Part II (September 3, 2004) ("Maine 271 Unbundling Order"). A copy of this decision is attached hereto as Attachment C.

[41] *Maine 271 Unbundling Order* at 19.

> Commissions, we intend to closely monitor Qwest's post-approval compliance for these states...
>
> ...
>
> We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into these nine states.[42]

53 Logically attendant to this enforcement authority is the authority to interpret the requirements of section 271. Doing so in the context of a 252 arbitration proceeding is the most obvious, expedient, and legally defensible method available to this Commission.

54 By incorporating its decisions in its order resolving this arbitration, the Commission would establish its own authority, separate from section 271, to enforce the requirements imposed. If Qwest were to refuse to comply with the Commission's order in this case, citing this Commission's lack of authority to interpret section 271, the Commission could enforce its order as it enforces any Commission order, as well as advise the FCC of Qwest's non-compliance with section 271 of the Act. Ultimately, only the FCC may judge whether non-compliance with the Competitive Checklist requires enforcement under section 271 of the Act, but this is clearly distinguishable from this Commission's authority to interpret and enforce interconnection agreements.

F. A Generic Proceeding Is Not Required To Adopt Covad's Unbundling Proposals

55 Finally, Covad believes that the Arbitrator's report is incorrect in stating that this Commission would be required to conduct a separate proceeding to consider whether Washington law permitted or required the maintenance of *existing* unbundling requirements. After all, Covad's proposals merely propose to maintain the *status quo*, and do not seek to add new unbundled elements not previously available in Washington.

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[42] *In the Matter of Application of Qwest Communications International, Inc., for Authorization To Provide In-Region, InterLATA Services in the States* of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming, WC Docket No. 02-314, Memorandum Opinion and Order, FCC 02-332 (rel. December 23, 2002), ¶¶ 498-499.

56 First, this Commission is free to recognize that the existing competitive landscape in Washington is a result, in part, of the unbundled access Covad seeks to preserve by its proposals. Covad asks for nothing new. The Commission need not look to build a record regarding the impacts of Covad's proposals - it need only look at the current status of the telecommunications marketplace in Washington.

57 Second, it should be noted that it is Qwest's, not Covad's, proposals that will lead to a fundamental change in the competitive nature of the telecommunications market in Washington. It is Qwest's proposals, and their effects on the marketplace, that should be thoroughly examined prior to adoption, because this Commission is charged with "[p]romot[ing] diversity in the supply of telecommunications services and products in telecommunications markets throughout the state."[43] If the Commission were inclined to adopt Qwest's proposals to restrict unbundling, it should first build a record to determine whether such restrictions, new to Washington, would thwart this statutory directive. To decide otherwise would be to cede state authority to implement Washington law, clearly established in *In re Electric Lightwave*[44] to the FCC.

ISSUE 3 - COMMINGLING
(Section 4 Definitions of "Commingling" and "251(c)(3) UNE," 9.1.1.1, , 9.1.1.5 (and subsections))

58 With respect to Issue 3, the Arbitrator's Report misinterprets the *Triennial Review Order* in determining that elements purchased pursuant to section 271 are not "facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act."[45] The Arbitrator's decision confuses the FCC's decision not to afford section 271 elements status equivalent to section 251(c)(3) elements, established by paragraph 655, footnote 1990 of the *Triennial Review Order*, with a decision to afford section 271 elements with no status as a wholesale

[43] RCW 80.36.300(5).
[44] *In re Electric Lightwave,* 869 P.2d 1045 (1994).
[45] *Triennial Review Order,* ¶ 579.

service. This reading reaches an absurd result and is contrary to the clear and broad language specific to commingling contained in the *Triennial Review Order*.

A. The Most Reasonable Reading Of The Triennial Review Order Supports The Adoption Of Covad's Limited Commingling Proposal

59 At the heart of Covad's disagreement with the Arbitrator's Report is the issue of whether network elements obtained pursuant to section 271 of the Act are "wholesale services" obtained "pursuant to a method other than unbundling under section 251(c)(3) of the Act," or whether the FCC intended to place 271 elements in a special category as neither a UNE nor a wholesale service, ineligible for either combination or commingling. The Arbitrator's Report asserts the latter, and claims that paragraph 655, footnote 1990 of the *Triennial Review Order* confirms this interpretation.[46]

60 To accept this reading, one must assume that footnote 1990 of the *Triennial Review Order* was intended to carve out 271 elements from the definition of "wholesale service," as that term was used seventy-six paragraphs earlier by the FCC in discussing commingling obligations, despite the fact that no such comment or suggestion was made there reflecting such a restrictive reading.[47] The alternative reading, proposed by Covad, is that footnote 1990 was intended to clarify that elements available pursuant to section 271 would not be treated the same as elements available pursuant to section 251(c)(3) of the Act. In other words, while section 271 elements can be commingled with section 251(c)(3) UNEs,[48] a section 271 element may not be commingled or combined with another section 271 element.

61 This is a far more plausible interpretation, given that this meaning is consistent with the FCC's discussion at paragraph 655 (where footnote 1990 is located), which is entirely focused on the independence of the unbundling obligations contained in section 271 from section 251

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[46] Arbitrator's Report, ¶ 68.

[47] *Id.*

[48] This distinction is the source of Covad's proposed definition of "251(c)(3) UNE." The definition is necessary to draw the same distinction drawn by the FCC in the *Triennial Review Order*.

(rather than the distinctions between 271 elements and other wholesale services). Furthermore, footnote 1990 clearly intends to deny section 271 elements a status equivalent to section 251(c)(3) elements when it states "[w]e decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[49] Therefore, 271 elements are not to be treated as 251(c)(3) UNEs, and cannot be substituted as the "lynchpin" of a commingling arrangement. This interpretation, supported by Covad, lends the most logical meaning to the FCC's statement that it declines to apply its commingling rule to 271 UNEs,[50] and is the most consistent with the FCC's commingling rules established in paragraph 579 of the *Triennial Review Order*.

B. Covad's Interpretation Is More Consistent With The Decision To Distinguish Between "251(c)(3) UNEs" And Other Available Network Elements

62 Prior to ruling that 271 elements are ineligible for commingling, the Arbitrator's Report adopted Covad's proposal to distinguish between UNEs available pursuant to section 251(c)(3) of the Act ("251(c)(3) UNEs") and elements available pursuant to other legal authority, such as section 271 elements.[51] This decision implicitly recognizes the FCC's decision in the *Triennial Review Order* that unbundling obligations other than those mandated by its interpretation of section 251(c)(3) of the Act continue to exist, such as those related to the Competitive Checklist contained in section 271 of the Act[52] and additional unbundling ordered by state commissions.[53]

63 It is therefore more plausible that the distinction drawn between classes of UNEs by the FCC, and agreed with by the Arbitrator's Report, was intended to clarify that section 271 elements are not to be treated as 251(c)(3) UNEs, i.e., they are not eligible for combination

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[49] *Triennial Review Order,* ¶ 655, fn. 1990.
[50] *Id.*
[51] Arbitrator's Report, ¶ 67.
[52] 47 U.S.C. § 271(c)(2)(B).
[53] *Triennial Review Order* ¶ 191.

with other UNEs, and cannot be substituted for 251(c)(3) UNEs in commingling arrangements (all commingling arrangements require the use of a 251(c)(3) UNE). This interpretation gives meaning to the FCC's statements in footnote 1990 without creating an obvious conflict with the FCC's commingling rule in ¶ 579 of the *Triennial Review Order*.

64 The Colorado Public Utilities Commission agreed with Covad's interpretation, and recently adopted Covad's proposal:

> There is no dispute in this proceeding that Qwest need not commingle network elements available under § 271 of the Act with *non*-§ 251 network elements. The parties agree that commingling must involve a UNE or UNE combination made available under § 251(c)(3) of the Act. ...
>
> Because we agree with Covad's interpretation of the TRO as it relates to ILECs' commingling obligations, we direct the parties to include Covad's proposed language in their interconnection agreement. Notably, we agree with Covad that the plain and clear language in the TRO (*e.g.*, in ¶ 579) and the FCC's commingling rule itself (47 CFR § 51.309(3)) supports its position. Those provisions plainly state that an ILEC shall permit a requesting carrier to commingle UNEs with facilities or services obtained at wholesale from the ILEC pursuant to a method other than unbundling under § 251(c)(3). Those provisions do not contain the restriction advocated by Qwest here. There can be no dispute that network elements obtained under § 271 are wholesale services. As such, the TRO allows for commingling of UNEs with § 271 elements.[54]

ISSUE 5 - REGENERATION REQUIREMENTS
(Sections 8.2.1.23.1.4, 8.3.1.9, 9.1.10)

65 The Arbitrator's Report resolves Issue 5 by requiring Qwest to provision central office cross-connections requiring regeneration between Covad collocations and between Covad and the Qwest network at no charge, consistent with this Commission's previous orders. However, the Arbitrator's Report concludes that Qwest may charge non-TELRIC rates for regenerated cross connects between Covad and other CLECs.[55] Covad petitions for review of this decision

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[54] Colorado PUC Docket No. 04B-160T, *In the Matter of Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Company Pursuant to 47 U.S.C. § 252(B),* Initial Commission Decision (mailed: August 27, 2004), ¶¶ 164, 176. A copy of this decision is attached hereto as Attachment D.

[55] Arbitrator's Report, ¶ 86.

to the extent it permits the charging of non-TELRIC rates for regenerated cross-connects. Due to restrictions placed upon Covad by Qwest that prohibit the placement of the necessary regeneration equipment, it is financially and technically impossible for Covad to provision its own regenerated cross-connections. Due to these technical limitations, Qwest's refusal to provision cross-connections at a reasonable rate leads to a discriminatory result.[56] Such discriminatory treatment of collocators seeking to cross-connect with each other is precisely what the FCC intended to avoid in its *Fourth Report and Order* by requiring that incumbent LECs, such as Qwest, allow competitors to connect with each other on a non-discriminatory basis. Qwest should therefore be required to provision these connections upon request, and charge, at most, TELRIC rates for the connection.

A. The FCC Has Established The Non-Discrimination Requirement Of Section 251(c)(6) Of The Act As the Critical Touchstone For Central Office Cross Connections

66 The Arbitrator's Report accepts Qwest's claim that it designs, and allows CLECs to construct, their own cross-connects within Qwest central offices, and that 47 C.F.R. 51.323(h)(1) creates a specific exception to any cross-connection requirements if it does so.[57] However, the scope of the FCC's cross-connection rule must be viewed in light of the FCC's written decision in its *Fourth Report and Order* adopting the rule, which reveals the FCC's intent to protect competitive LECs from any discrimination related to incumbent LEC collocation restrictions. Furthermore, the standard for evaluating Qwest's claim that self-provisioned cross-connects are available should be the *practical* availability of this option, not simply its theoretical availability.

67 In requiring Incumbent LECs to provision cross-connections between CLECs, the FCC stated: "our action reflects our overriding concern than an incumbent LEC would be acting in

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[56] *See* July 15 Direct Testimony of Mike Zulevic at 16-17; July 29, 2004 Responsive Testimony of Mike Zulevic at 4-5.

[57] Arbitrator's Report, ¶ 80.

an unreasonable and discriminatory manner if it refused to provide cross-connects between collocators,"[58] and that "an incumbent LEC's refusal to provide a cross-connect between two collocated carriers would violate the incumbent's duties under section 251(c)(6) to provide collocation 'on ... terms and conditions that are just, reasonable, and nondiscriminatory.'"[59] The FCC went on to find that an incumbent LEC's provisioning of cross-connects to two collocated carriers was required by section 251(c)(6) of the Act.[60]

68 Based on this analysis, it is clear that the FCC's goal in adopting its cross-connection rule was to ensure compliance with the non-discrimination requirements of section 251 of the Act, and that necessary cross-connections between competitive LECs were part of an incumbent LECs' obligations to provide collocation pursuant to section 251(c)(6). The exception contained in 47 C.F.R. § 51.323(h)(1) assumes that competitive LECs could self-provision the desired connection under conditions that did not violate section 251(c)(6).

69 In many circumstances, it is possible for a competitive LEC to self-provision a cross-connect. However, in circumstances requiring regeneration, the Arbitrator's Report reads the "self-provisioning" exception in a way that clearly results in discrimination. While Qwest will make a technically feasible route available between collocators, it maintains that repeater equipment should be placed at both ends of the connection, rather than mid-span, if regeneration is required to make the connection operable.[61] Qwest, on the other hand, regenerates its own signals at or near mid-span using equipment located near its distribution frame.[62]

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[58] *Fourth Report and Order*, ¶ 79.
[59] *Id.*, ¶ 80.
[60] *Id.*, ¶ 82
[61] *See* Hearing Transcript (Vol. II) at 201-203.
[62] *See Id.* at 190.

B. There Is No Practical Option For CLECs To Self-Provision Cross Connections Requiring Regeneration

70 Not only are the conditions offered by Qwest discriminatory, Qwest has not established that its self-provisioning option is available in practical terms. It was not established at hearing that self-provisioned regeneration is either technically or economically feasible under the terms imposed by Qwest, which prohibit the placement of mid-span equipment. Should the Commission believe that such an arrangement somehow meets the non-discrimination requirements of section 251(c)(6) (Covad believes it clearly does not), it must recognize the lack of evidence in the record regarding whether, as a practical matter, such a solution is workable. Covad believes that, at least in some situations, it will be technically and practically impossible. In all situations it would result in arrangements that are plainly uneconomic.

C. The Absence Of A Positive TELRIC Rate Is Not A Sufficient Basis To Permit Qwest To Assess Confiscatory Access Rates For Cross Connections

71 While the Arbitrator's Report permits Qwest to assess inflated access rates for regenerated cross connections between Covad and other CLECs, it also recognizes the unfairness of this solution: "Although it may not seem equitable to allow Qwest to charge rates from the FCC Access No. 1 tariff for channel regeneration for CLEC-to-CLEC cross connections, there is no TELRIC rate to fall back upon."[63] This ruling should fail for two reasons.

72 First, the Arbitrator's Report notes that the Commission reviewed Qwest's proposed rates for regeneration, and reduced them from the levels proposed by Qwest to $0.00 in Docket No. UT-003013. While the Arbitrator's Report chooses to characterize this as "no TELRIC rate to fall back upon," it can just as easily be said that the Commission considered the appropriate rate for regeneration, and determined that the appropriate rate was $0.00. It is an important fact that this Commission hasn't simply neglected to address the issue, but has

[63] Arbitrator's Report, ¶ 87.

instead made a reasoned determination regarding the appropriateness of charging for central office regeneration. If the Arbitrator's Report is correct in its lamentation that access rates are perhaps inappropriate, there is no reason why the existing TELRIC methodology applied by this Commission (leading to a $0.00 rate) cannot be employed, at least until the issue is further resolved in a subsequent cost docket. This is a far more equitable solution, as it would prevent the discrimination prohibited by section 251(c)(6) of the Act and the *Fourth Report and Order*. To the extent the Commission believes that this creates a windfall for Covad or other CLECs, and a positive rate is appropriate, it can set one in the future. It is worth noting, however, that the Commission previously determined that Qwest should recover the costs of regenerating central office signals through common costs rather than specific rates, further alleviating any concern that Covad's proposal would result in a windfall to Covad or other CLECs.[64]

73 Furthermore, allowing Qwest to assess access rates for a product required by section 251(c)(6) of the Act would be a significant departure from past practice. Typically, when a new wholesale product is introduced, Qwest either (i) proposes a rate it believes complies with TELRIC pricing methodology;[65] or (ii) uses the established TELRIC rate for a product it believes to be similar to the new product.[66] In other words, there are clear alternatives to the lamented result reached by Arbitrator's Report to import access rates for a section 251(c)(6) element. Either option described above would yield a far more equitable and legally acceptable result.

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[64] *See In the Matter of the Investigation Into U S West Communications, Inc. Compliance with Section 271 of the Telecommunications Act of 1996; In the Matter of U S West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket No. UT-003022; Docket No. UT-003040, Fifteenth Supplemental Order (August 17, 2001) ("Fifteenth Supplemental Order") at 27.

[65] *See* Qwest's Washington SGAT, Exhibit A, note 1.

[66] *Id.*, note 8.

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

74 Despite the Arbitrator's Report's finding that Covad raised "credible claims" regarding the deficiency of Qwest's wholesale billing systems, it declined to provide Covad with a remedy for this serious problem.[67] Instead of adopting Covad's proposal for a modest extension of time to review deficient invoices before payment, the Arbitrator's Report claimed that billing issues are best solved through Qwest's Change Management Process. The Arbitrator's Report further found that Covad's increased costs of reviewing Qwest's invoices should be borne by Covad as a "cost of business."[68]

75 This decision effectively ignores a serious problem requiring a meaningful solution. The fact of the matter is that Covad cannot force Qwest to bring its billing systems and billing outputs (i.e. the bills themselves) up to industry standards, affording Covad a legitimate chance to perform a meaningful review of its invoices. The Change Management Process is an illusory solution, because Qwest maintains effective control over the process, and has refused to make the necessary changes despite requests made by Covad. The Arbitrator's Report fails to analyze these issues in any detail, and provides no support for its conclusion to deny Covad relief. In fact, it seems to recognize that the evidence supports the need for the Commission to take decisive action, yet fails to do so.

A. Covad's Revised Proposal For Section 5.4.1

76 After hearing in this matter, Covad advised the Commission of its revised proposal for Section 5.4.1, which focuses Covad's proposed 45-day payment interval only for line splitting and loop splitting invoices, new products, and/or products for which Qwest provides deficient billing information:

> 5.4.1 Amounts payable for any invoice containing (1) line splitting or loop splitting products, (2) a missing circuit ID, (3) a

[67] Arbitrator's Report, ¶ 100.
[68] Arbitrator's Report, ¶ 103.

> missing USOC, or (4) new rate elements, new services, or new features not previously ordered by CLEC (collectively "New Products") (hereinafter collectively referred to as "Exceptions") are due and payable within forty-five (45) calendar Days after the date of invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later (payment due date) with respect to the New Products Exception, the forty-five (45) Day time period shall apply for twelve (12) months. After twelve (12) months' experience, such New Products shall be subject to the thirty (30) Day time frame hereinafter discussed. Any invoice that does not contain any of the above Exceptions are due and payable within thirty (30) calendar Days after the date of invoice, or within twenty calendar Days after receipt of the invoice, whichever is later. If the payment due date is not a business day, the payment shall be due the next business day.

77 These revisions more clearly focus Covad's proposal to the Qwest billing deficiencies examined at hearing, as well as products whose nature makes review within just over twenty days impossible.[69] And as described above, the ALJ recognized the legitimacy and existence of the problems identified by Covad, yet nonetheless failed and refused to provide the appropriate recourse – an extension of the payment due date for the problem areas identified by Covad.

B. The Change Management Process Is An Unrealistic Forum For The Resolution Of Qwest's Billing Deficiencies

78 Covad disagrees with the assessment of the Arbitrator's Report that the Change Management Process (CMP) is the most appropriate forum for addressing Qwest's billing deficiencies. While the CMP is undoubtedly a constructive forum for accomplishing certain tasks, namely those for which Qwest's interests are aligned with competitive LECs (or at least not antagonistic to them), it should come as no surprise that it has not been an especially useful forum for adjudicating contested issues.

79 This is because the CMP is not a forum for adjudicating contested issues, such as the existence and effects of Qwest's billing deficiencies. Ultimately, Qwest can either veto any

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[69] As discussed in Covad's Post Hearing Brief, the invoice date for Qwest's invoices, which starts the clock on the 30-day payment interval proposed by Qwest, precedes Covad's actual receipt of its invoices by several days. *See* Covad's Post Hearing Brief at 33, citing Exhibit 21-T at 25.

proposed change within the CMP, or other factors may come into play that preclude or prevent the implementation of a particular change request. While Covad can submit any change request it wants, there is absolutely no guarantee whatsoever that the change it seeks will be implemented. Depending on such a forum to resolve issues results in Qwest being free of any requirement to correct the numerous deficiencies identified by Covad. This would deny Covad any real access to relief.

80 Covad cannot force specific changes upon Qwest in the CMP, so it has instead sought additional time to review Qwest invoices to alleviate the impact of the existing deficiencies. The due date for payments made under the Agreement is clearly an arbitrable issue, and should be resolved by the Commission, not deferred to a forum that is unequipped to resolve arbitration issues.

C. Characterizing Deficient Qwest Bills As A "Cost Of Doing Business," Amounts To An Unwarranted Decision To Shift The Costs Of Qwest's Problems To Covad

81 Covad fundamentally disagrees with the Arbitrator's Report to the extent that it suggests that the time and trouble resulting from Qwest's inability to meet industry billing standards is a "cost of doing business." To the contrary, forcing one party to pay for the failings of another is a classic case of cost-shifting.

82 Covad agrees that wholesale invoices are inherently complicated, and that they require substantial effort to review. Reviewing these invoices, in the abstract, is in fact a cost of doing business, and one which Covad does not seek to avoid. Covad only seeks to address the additional costs created by Qwest's failure to include pertinent information with its invoices, such as relevant circuit identification numbers and USOC codes. Even then, Covad is not seeking to avoid these costs; it is merely seeking more time to employ its own resources, at its own expense, to address the problem. Far from seeking to avoid a cost of doing business,

Covad only requests a few more days to deal with the time, effort and expense Qwest continues to shift onto Covad.

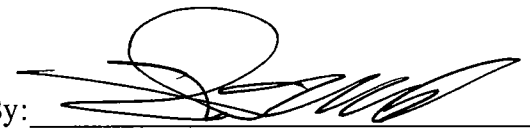
83 While a 30-day period for paying invoices may be a familiar time frame in the industry, it should not apply to carriers that fail to comply with other recognized industry standards and norms. The record is clear that Qwest does not meet its obligations to comply with industry standards and norms, and it is therefore unfair to allow Qwest to selectively choose which standards or norms it wishes to ignore, and which standards or norms it wishes to enforce against competitors.

CONCLUSION

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

85 Dated this 2nd day of December, 2004

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **DIECA Communications, Inc. d/b/a Covad Communications Company's Petition for Review** was served via electronic service and/or deposited into the United States Postal system, postage prepaid, on the 2nd day of December, 2004, to the following:

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