BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between DIECA COMMUNICATIONS, INC., d/b/a COVAD COMMUNICATIONS COMPANY with QWEST CORPORATION Pursuant to 47 U.S.C. Section 252(b), and the *Triennial Review Order*	DOCKET NO. UT-043045 **QWEST CORPORATION'S RESPONSE TO COVAD COMMUNICATION COMPANY'S PETITION FOR REVIEW**

I. INTRODUCTION

1 This interconnection arbitration conducted pursuant to the Telecommunications Act of 1996 ("the Act") demonstrates that the negotiation/arbitration process set forth in sections 251 and 252 can work fairly and efficiently. Through good faith negotiations, Qwest Corporation ("Qwest") and Covad Communications Company ("Covad") were able to resolve hundreds of issues and agree on the vast majority of the provisions in their interconnection agreement ("ICA"). As a result, the arbitration hearing that Administrative Law Judge Rendahl ("the Arbitrator") conducted on August 26 and 27, 2004, involved only six unresolved issues.

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2 In her Report and Decision ("Arbitrator's Report") issued November 2, 2004, the Arbitrator resolved each of the open issues consistently with the governing provisions of the Act and binding FCC orders. Because her Report complies fully with governing law and is supported by the evidentiary record, the Commission should endorse it in all respects.

3 In its Petition for Review, Covad objects to the Arbitrator's resolution of all six disputed issues. As demonstrated below, Covad's objections rely upon plainly flawed interpretations of the Act, the FCC's *Triennial Review Order*,[1] and rulings of this Commission. The flawed nature of Covad's arguments and the correctness of the Arbitrator's rulings are confirmed in substantial part by recent decisions in the Covad/Qwest arbitrations in Colorado and Minnesota, copies of which are attached as Exhibits A and B. In those arbitrations, the Colorado Commission and a Minnesota administrative law judge reached substantially the same conclusions as the Arbitrator reached in this case relying on substantially the same legal analysis and evidentiary record.[2] This consistency among the three decision-makers that have addressed these issues is not a coincidence – Covad's proposals relating to each of the disputed issues are without legal or factual support.

4 In the discussion that follows, Qwest demonstrates the flaws in Covad's objections to each of the Arbitrator's six rulings relating to: the retirement of copper network facilities (arbitration issue no. 1), network unbundling under section 271 (arbitration

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

2 An exception is that the Colorado and Minnesota decisions require Qwest to commingle section 271 network elements with unbundled network elements it provides under section 251. For the reasons discussed below, the Arbitrator in this case correctly determined that the FCC excluded section 271 elements from the commingling obligations established in the *TRO*. In addition, the Colorado Commission did not address the section 271 unbundling issues encompassed by arbitration issue no. 2, since Covad agreed to Qwest's ICA language in Colorado relating to those issues.

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issue no. 2), the commingling of network elements (arbitration issue no. 3), requirements relating to regeneration (arbitration issue no. 5), and issues relating to billing and payment (arbitration issue no. 8). For the reasons set forth below and in Qwest's post-hearing brief, Qwest respectfully requests that the Commission deny each of Covad's objections to the Arbitrator's Report.

II. ARGUMENT

A. Issue 1: The Arbitrator Properly Rejected Covad's Proposal That Would Have Compromised Qwest's Right to Retire Copper Facilities.

5 The *TRO* confirms that ILECs have a right to retire copper facilities that they replace with fiber facilities. The FCC specifically rejected attempts by CLECs to preclude ILECs from retiring copper loops: "we decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced with fiber."[3]

6 This ruling goes hand-in-hand with the FCC's Congressionally-mandated policy of encouraging the deployment of fiber facilities that carriers can use to provide advanced telecommunications services, since the retirement of copper facilities and the resulting elimination of the maintenance expenses associated with those facilities increases an ILEC's economic incentive to install fiber facilities.[4] Thus, the FCC specifically rejected CLEC proposals that would have required ILECs to provide alternative forms of access and to obtain regulatory approval before retiring copper facilities.[5]

7 In the arbitration, Covad proposed ICA language that would have eviscerated the copper retirement rights confirmed in the *TRO*. Specifically, under Covad's proposal,

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3 *TRO* at ¶ 271.

4 Ex. 61-T (Stewart Direct) at 3:11-3:23 and 7:1-9:11.

5 *TRO* at ¶ 281 & n.822.

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Qwest would have been prohibited from retiring a copper loop over which Covad is providing DSL service unless it provided Covad with an "alternative service" that did not increase the cost to Covad or its customers or degrade the quality of the service that Covad is receiving from Qwest today.[6] These conditions are not found in the *TRO* or in any other FCC order.

8 The Arbitrator's Report properly rejects Covad's proposal, finding that "the proposal requiring Qwest to provide an alternative arrangement at no additional cost to Covad is not consistent with the requirements of the Triennial Review Order."[7] In so ruling, the Arbitrator relied on the fact that the FCC has "rejected proposals to place specific conditions on an ILEC's right to retire copper facilities" and has only required that ILECs provide public notice of planned retirements.[8] The Arbitrator's ruling is consistent with that of the Colorado Commission, which also rejected Covad's proposal on the ground that it is without legal support.[9] Likewise, in the Minnesota order issued this week, the ALJ rejected Covad's proposal, stating that "[t]here is no legal support in the TRO for Covad's position concerning 'alternative' services."[10]

9 In challenging the Arbitrator's ruling on this issue, Covad offers several arguments, none of which has any merit. What is most conspicuous about Covad's arguments is that none of them relies upon -- or even acknowledges -- the FCC's very specific

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6 As discussed *infra*, Covad modified its proposal relating to copper retirement following the arbitration hearing by offering new language under which its "alternative service" requirement would not apply to situations where Qwest retires a copper loop and replaces it with a fiber-to-the-home ("FTTH") loop. As the Colorado Commission recently ruled, this modification does not cure the legal shortcomings of Covad's proposal. *See* Ex. A, *Petition of Qwest Corporation for Arbitration of an Interconnection Agreement*, Docket No. 04B-160T, Decision No. C04-1348, Order Granting in Part and Denying in Part Application for Rehearing, Reargument, or Reconsideration at 10 (rel. Nov. 16, 2004).

7 Arbitrator's Report at ¶ 38.

8 *Id.*

9 *See* Ex. A, *Petition of Qwest Corporation for Arbitration of an Interconnection Agreement*, Docket No. 04B-160T, Initial Commission Decision, Decision No. CO4-1037 at 54 (Aug. 27, 2004).

10 See Ex. B, Minnesota Arbitration Order at ¶ 23.

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rulings relating to copper retirement. In three separate sections of the *TRO* -- the sections relating to line sharing, FTTH loops, and hybrid copper-fiber loops -- the FCC established in clear terms that ILECs have the right to retire copper loops that they have replaced with fiber facilities:

> •"[W]e decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced with fiber."[11]
>
> •"We decline to impose a blanket prohibition on the ability of incumbent LECs to retire any copper loops or subloops they have replaced with FTTH loops. Several parties also propose extensive rules that would require affirmative regulatory approval prior to the retirement of any copper loop facilities. We find that such a requirement is not necessary at this time because our existing rules, with minor modifications, serve as adequate safeguards."[12]
>
> •"As discussed below, we do not require incumbent LECs to maintain or retain copper loops if they have deployed fiber replacements."[13]

10 Notably, none of these statements conditions an ILEC's right to retire copper facilities on the ILEC providing an "alternative service," as Covad proposes.

11 At least as conspicuous as Covad's failure to acknowledge these statements by the FCC is its failure to attempt to reconcile its "alternative service" proposal with the provisions of the Act that require CLECs to compensate ILECs for the costs they incur to provide interconnection and access to unbundled network elements ("UNEs"). Section 252(d)(1) of the Act requires that rates for interconnection and network element charges be "just and reasonable" and based on "the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." In *Iowa Utilities Board v. FCC*,[14] the United

11 *TRO* at ¶ 271.

12 *Id* at ¶ 281 (footnotes omitted).

13 *Id.* at ¶ 296 and n. 850.

14 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part, remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

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States Court of Appeals for the Eighth Circuit succinctly described the effect of these provisions: "Under the Act, an incumbent LEC *will* recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests." (emphasis added).

12 Covad acknowledged during the hearing that under its proposal, the amount it would pay Qwest for an "alternative service" would be capped by the monthly amount it is paying Qwest today for line sharing -- approximately $3.96 per month.[15] Thus, if Qwest's monthly cost of providing the alternative service were $10, Qwest would be unable to recover $6.04 of its costs.[16] This cap on the costs Qwest would be permitted to recover plainly violates the requirement in section 252(d)(1) of the Act that CLECs pay rates for UNEs and interconnection that are based on cost and include a reasonable profit. Under Covad's proposal, Qwest would not even recover its costs, much less earn a reasonable profit.

13 While failing to acknowledge any of the FCC's rulings relating to copper retirement, Covad broadly suggests that the Arbitrator's ruling is wrong because the *TRO* only authorizes an ILEC to retire a copper loop if it replaces the loop with a FTTH loop.[17] It contends that only its copper retirement proposal is consistent with the *TRO* since only its proposal recognizes that Qwest's retirement rights are limited to situations involving FTTH replacements. However, as is evident from the *TRO* excerpts quoted above, the FCC did not limit an ILEC's retirement rights to situations in which it is replacing a copper loop with a FTTH loop. Instead, the FCC made it clear that the

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15 Tr., Vol. III, at 226:8-21.

16 An additional shortcoming of Covad's proposal is that it does not define the term "alternative service." As a result, Qwest would not know what service it would be required to provide or what the cost of the undefined service would be.

17 *See, e.g.*, Covad Petition at 6 ("the FCC's new copper retirement process . . . applies solely to FTTH loops").

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retirement right applies to "fiber replacements," not just FTTH replacements. Accordingly, the Colorado Commission recently rejected this same argument in the Covad/Qwest arbitration in that state, concluding as follows: "Covad cites ¶¶ 277-279 of the TRO, stating that the copper retirement rules only apply to the extent that hybrid loops are an interim step to establishing an all fiber FTTH loops (*sic*). Nowhere in these paragraphs do we find this statement. In fact, the FCC indicates at footnote 847 that an ILEC can remove copper loops from plant so long as they comply with the FCC's Part 51 notice requirements, without any exclusion given to hybrid loops."[18] The same analysis and conclusion apply here.

14 Equally baseless is Covad's new contention that an ILEC is permitted to retire a copper loop only if: (1) the newly installed fiber facility is "capable [of] and actually provide[s] broadband services" and (2) the new fiber facility is being used to serve mass market customers, not enterprise customers.[19] Just like Covad's "alternative service" proposal, these proposed limitations on Qwest's retirement rights are not found in the *TRO* or in any other FCC order. As shown by the *TRO* excerpts quoted above, the FCC has broadly permitted ILECs to retire copper loops they replace with fiber regardless whether the new fiber facilities are actually being used to provide broadband service or to serve enterprise or mass market customers.

15 Covad's new argument that these conditions govern ILECs' retirement rights is premised on the FCC's recent *Section 271 Forbearance Order* establishing that ILECs are not required to provide unbundled access to fiber-to-the-curb ("FTTC") loops.[20] Covad's reliance on that order is baffling, however, since nowhere in the

18 Ex.A, Colorado RRR Order at ¶ 35.

19 Covad Petition at 7-9.

20 *In the Matters of Petition for Forbearance of Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth*

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order does the FCC even discuss ILECs' copper retirement rights. Thus, as the Minnesota ALJ stated this week in response to the same argument from Covad, "[i]t is simply not possible to read the FCC's decision to refrain from requiring any access to broadband elements under section 271 as providing any support whatsoever for Covad's alternative service proposal."[21]

16 Covad seems to be arguing that in that order, the FCC ruled that ILECs can avoid unbundling FTTC loops only if the ILEC is actually using the FTTC loop to provide broadband service. According to Covad, it follows as a matter of inference that an ILEC can only retire a copper loop that has been replaced with a fiber facility that is actually providing broadband service. The FCC said no such thing, however, and, moreover, did not rule that ILECs must be using FTTC loops for broadband service to avoid having to unbundle them. Instead, the FCC emphasized that its objective of encouraging the deployment of fiber facilities that support broadband services is advanced by the deployment of fiber loops that are *capable* of providing broadband service, and, consistent with this statement, it ruled that ILECs are not required to unbundle FTTC loops.[22]

17 Nor is there any support for Covad's claim that in the *Section 271 Forbearance Order*, the FCC established that ILECs are only permitted to retire copper loops that have been replaced with fiber facilities that are serving mass market customers. There is simply no such statement anywhere in the order, as evidenced by Covad's failure to provide a citation to such a statement.

Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order (October 27, 2004) ("*Section 271 Forbearance Order*").

21 See Ex. B, Minnesota Arbitration Order at ¶ 24.

22 *Section 271 Forbearance Order* at ¶ 17 and n.56.

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18 Covad's petition also invokes Washington law -- specifically, RCW 80.36.300 -- in an attempt to support its demand for "continued access to loop facilities, notwithstanding retirement of legacy [*i.e.*, copper] plant . . . ."[23] However, this provision of Washington law does not address the right of ILECs to retire copper facilities. Further, the policies reflected in this law are actually promoted by allowing ILECs to retire copper facilities. For example, RCW 80.36.300(2) and (5) set forth the Washington Legislature's goals of "maintain[ing] and advanc[ing] the efficiency and availability of telecommunications service" and "[p]romot[ing] diversity in the supply of telecommunications services and products in telecommunications markets throughout the state . . . ." These policies are advanced by encouraging the deployment of fiber facilities, which provide the additional bandwidth and speed needed to support advanced telecommunications services. Permitting ILECs to retire copper facilities increases their economic incentive to deploy fiber, since the ability to retire copper eliminates the need for ILECs to incur the costs of maintaining both fiber and copper facilities.[24] By increasing ILEC incentive to deploy fiber and, in turn, to provide advanced telecommunications services, copper retirement "increases the availability of telecommunications service" and promotes "diversity in the supply of telecommunications services and products" in Washington. In addition, Qwest will continue to provide CLECs with access to the narrowband channels on the fiber facilities it deploys, which responds directly to Covad's assertion that RCW 80.36.300 requires access to loop facilities.

19 Covad's challenge to the Arbitrator's ruling relating to the notice Qwest will provide when it retires copper facilities also is meritless. As the Arbitrator recognized, Qwest has committed in its ICA language to comply with all of the FCC's requirements

23 Covad Petition at 5.

24 Ex. 61-T (Stewart Direct) at 3:11-3:23 and 7:1-9:11.

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relating to notices of network modifications.[25] Covad's notice demands would impose substantially more than the FCC requires, which the Arbitrator accurately described as being improperly "burdensome."[26] Covad's petition focuses on the most burdensome and unreasonable of these notice demands, which is that Qwest would have to inform Covad whether the retirement of a copper loop will effect the service Covad is providing to specific customers.[27] While Qwest provides network facilities to Covad, it does not know the specific services Covad is providing to its customers over these facilities. A requirement for Qwest to tell Covad whether service to its customers would be affected by the retirement of a copper loop would therefore require Qwest to speculate about the services Covad is providing. If Qwest guessed wrong, Covad would undoubtedly seek recourse and attempt to hold Qwest responsible. Qwest should not be put in that unfair position, which is why the Arbitrator properly rejected Covad's notice demands as improperly burdensome.

20 Like the Arbitrator here, the Minnesota ALJ found that Covad's demands relating to notice are unnecessary and improperly attempt to shift responsibility from Covad to Qwest. In rejecting Covad's demands, she explained that "the issue seems to be that Covad wants Qwest to assume the responsibility for doing the research in advance and to put the results in the notice, or to put directions for using the Qwest website in the notice. The latter seems redundant when, by law, the name and telephone number of a contact person who can provide additional information about the planned change must be on the notice. Qwest has met its burden of proving that the information it provides is sufficient to comply with 47 U.S.C. § 51.327."[28]

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25 Arbitrator's Report at ¶ 36.

26 *Id*.

27 *See* Covad Petition at 12-13.

28 Minnesota Arbitration Order at ¶ 25 (footnote omitted).

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21 Qwest's commitment to comply with the FCC's notice requirements ensures that Covad will receive the information it needs to assess whether Qwest's retirement of a copper facility will affect service that Covad is providing. Accordingly, the Commission should reject Covad's objection to the Arbitrator's resolution of this issue.

22 Finally, Covad's assertions that allowing Qwest to retire copper facilities will bring substantial harm to consumers are unfounded. As a Covad witness acknowledged during the hearing, no Covad customer has ever been disconnected from service in Washington or anywhere else in Qwest's region because of Qwest's retirement of a copper loop.[29] And the likelihood of that occurring is remote, as evidenced by Qwest's testimony establishing that Qwest routinely leaves copper loops in place when it deploys fiber – a practice that is captured by Qwest's proposed ICA language. Further, Covad has acknowledged that there are, at most, only a "handful" of Covad customers – perhaps only four or five -- in Washington that potentially could be affected by Qwest's retirement of a copper loop.[30] In the unlikely event those customers are affected by Qwest's retirement of a copper loop, Covad could continue serving them by purchasing other DSL-related services from Qwest, such as Qwest Choice DSL, which would result in an overall negligible cost increase given the small number of Covad customers that could be affected.[31] In addition, Covad could continue providing service to its customers despite Qwest's retirement of copper loops by deploying remote DSLAMs.[32] While Covad claims that deploying DSLAMs is cost-prohibitive, the FCC has concluded otherwise, as reflected by its stated objective

29 Tr., Vol. III, at 257:14-19.

30 Ex. 21-T (Doberneck Direct) at 14:11-15:8.

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

32 *Id.* at 10:11-22.

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– set forth in the *TRO* – of promoting CLEC investment in remote DSLAMs and other next-generation network equipment.[33]

B. Issue 2: The Arbitrator Properly Rejected Covad's Demand To Include Obligations Relating To Network Elements Provided Under Section 271 Of The Act In The Interconnection Agreement.

23 The Act requires ILECs to provide UNEs to other telecommunications carriers and gives the FCC the authority to determine which elements the ILECs must provide. In making these network unbundling determinations, the FCC must consider whether the failure to provide access to an element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[34] This "impairment" standard imposes important limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*[35] and the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating each of the FCC's first three attempts at establishing lawful unbundling rules.[36]

24 Issue 2 arose because of Covad's insistence upon ICA language that would require Qwest to provide almost unlimited access to network elements in violation of the unbundling limitations established by these decisions, the Act, and the *TRO*. Covad's clear objective is to obtain access to all elements of Qwest's network that Covad may desire at the lowest rates possible. Covad's sweeping unbundling proposals are built around its proposed definition of "Unbundled Network Element," which Covad defines as "a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access, *for which unbundled access is required under*

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33 *See TRO* at ¶ 291.

34 47 U.S.C. § 251(d)(2).

35 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

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

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section 271 of the Act or applicable state law . . . ." (emphasis added). Consistent with this definition, Covad's language for Section 9.1.1 would require Qwest to provide "any and all UNEs required by the Telecommunications Act of 1996 (including, but not limited to Sections 251(b), (c), 252(a) and 271), FCC Rules, FCC Orders, and/or applicable state rules or orders . . . ."

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

> On the Effective Date of this Agreement, Qwest is no longer obligated to provide to CLEC certain Network Elements pursuant to Section 251 of the Act. Qwest will continue providing access to certain network elements as required by Section 271 or state law, regardless of whether access to such UNEs is required by Section 251 of the Act. This Agreement sets forth the terms and conditions by which network elements not subject to Section 251 unbundling obligations are offered to CLEC.

26 The Arbitrator found that Covad's proposal is improper and rejected it for several compelling reasons. First, the arbitrator recognized correctly that the Act limits arbitrations of interconnection agreements conducted by state commissions to the issues listed in section 252(c), "'specifically ensuring that such resolution and condition meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251.'"[37] Accordingly, as the Arbitrator ruled, a state

37 Arbitrator's Report at ¶ 55.

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commission cannot impose conditions other than those required by section 252(c) unless the parties "mutually agreed" to discuss matters other than those required by section 252(c).[38]

27 In challenging the Arbitrator's ruling, Covad does not contest that the jurisdiction of a state commission in a section 252 arbitration is limited to the issues listed in section 252(c). However, without citing any evidence that is part of the record in this proceeding, Covad asserts that the parties agreed in their negotiations to address issues relating to section 271 unbundling and that those issues are therefore arbitrable.[39] The obvious flaw in this argument is that it is based on nothing more than Covad's assertions, not on any evidence that Covad presented in this case. In fact, there was never a mutual agreement to address section 271 issues in the parties' interconnection negotiations. On the contrary, Qwest's negotiators consistently told Covad that terms and conditions relating to access to section 271 network elements are not a proper subject for section 251/252 negotiations, and Qwest expressly refused to discuss any issues relating to section 271.

28 Covad cites a ruling from an administrative law judge in the Covad/Qwest arbitration in Minnesota in which the ALJ concluded, based on a different record in that state, that section 271 issues were arbitrable.[40] However, in a decision issued two days ago, the same ALJ rejected Covad's unbundling proposals, expressly ruling that it would be improper to include terms and conditions relating to section 271 in an interconnection agreement.[41] In other words, the Minnesota ALJ ultimately reached

38 *See CoServ Limited Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 488 (5th Cir. 2003).

39 *See* Covad Petition at 14-15.

40 *See* Covad Petition at 16.

41 *See* Ex. B.

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the same conclusion that the Arbitrator reached in this case.[42]

29 A second reason that the Arbitrator relied upon for her ruling is that the issue of forbearance of section 271 unbundling obligations is pending before the FCC and is likely to be decided soon – perhaps before this Commission considers Covad's petition. With the likelihood of an imminent FCC ruling relating to section 271 unbundling obligations, the Arbitrator reasonably concluded that, even if it was not inappropriate to include section 271 obligations in an interconnection agreement, it would not be prudent to do so with the FCC expected to rule soon on section 271 unbundling.[43]

30 Covad argues that the section 271 forbearance petitions pending before the FCC do not provide reason to exclude section 271 obligations from the interconnection agreement, since states will be free to order whatever unbundling they deem appropriate regardless of the FCC's rulings on the petitions.[44] What Covad ignores is that the Act's savings clauses preserve independent state authority *only to the extent it is consistent with the Act*, including Section 251(d)(2)'s substantive limitations on the level of unbundling that may be authorized. Section 251(d)(3), for example, protects only those state enactments that are "consistent with the requirements of this section" — which a state law unbundling order ignoring the Act's and the FCC's limits would clearly not be. Likewise, Sections 261(b) and (c) both protect only those state regulations that "are not inconsistent with the provisions of this part" of the Act, which includes Section 251(d)(2). Nor does Section 252(e)(3) help Covad; that

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42 While an ALJ in the Covad/Qwest Utah arbitration has ruled that issues relating to section 271 network unbundling, neither he nor the Utah Commission has addressed whether section 271 obligations can be included in an interconnection agreement. The Utah hearing recently concluded, and the parties will soon file post-hearing briefs addressing that and the other disputed issues.

43 Arbitrator's Report at ¶¶ 56-57.

44 *See* Covad Petition at 16-17.

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simply says that “nothing in *this section*” — that is, Section *252* — prohibits a state from enforcing its own law, 47 U.S.C. § 252(e)(3) (emphasis added), but the relevant limitations on the scope of permissible unbundling that are at issue are found in Section 251.[45] Thus, the Arbitrator correctly recognized that "states must also take into consideration the FCC's findings and rules, and may only act in a way that is not inconsistent with federal law."[46]

31 Thus, contrary to Covad's suggestion, the Act does not preserve the authority of state commissions to adopt or enforce under state law unbundling requirements that have been rejected by the FCC or vacated in *USTA II*. Indeed, the Supreme Court has "decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law."[47] The federal regulatory scheme that Congress has established for unbundling recognizes that "unbundling is not an unqualified good," because it "comes at a cost, including disincentives to research and development by both ILECs and CLECs, and the tangled management inherent in shared use of a common resource."[48] Thus, Congress has mandated the application of limiting principles in the determination of unbundling requirements that reflect a balance of "the competing values at stake."[49] That balance would plainly be upset if a state commission could impose under state law unbundling requirements that have been found by the FCC to be inconsistent with the Act.

32 The limitations on state unbundling authority were recently recognized by an

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45 *See* 47 U.S.C. § 251(d)(2).

46 Arbitrator's Report at ¶ 59.

47 *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000).

48 *USTA I*, 290 F.3d at 429. *See also AT&T Communs. Of Ill. v. Il. Bell Tel. Co.*, 2003 U.S. App. LEXIS 22961 (7th Cir 2003) (explaining that unbundling obligations may have negative effect on "investment and innovation").

49 *Id*. *See also Iowa Utils. Bd.*, 535 U.S. at 388.

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administrative law judge in Oregon in response to substantially the same arguments that Covad is presenting here. As the ALJ correctly concluded, a state commission "may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been eliminated by the *TRO* or *USTA II*."[50] That is precisely what Covad has attempted through its proposed unbundling language.

33 A third rationale the Arbitrator relied upon in support of her rejection of Covad's unbundling language is that a state commission cannot require any unbundling of network elements, much less the limitless unbundling that Covad seeks, without conducting the "impairment" analysis required under section 251 of the Act. Here, as the Arbitrator observed, Covad did not submit any evidence upon which the Commission could make any findings of impairment and did not file a petition asking the Commission to conduct an impairment and unbundling analysis.[51] Covad is thus requesting the Commission to require Qwest to provide network elements regardless whether the section 251 impairment standard is satisfied, which plainly violates the Act.

34 Covad has no response to this patent flaw in its unbundling proposal. Indeed, it concedes that it has not requested the Commission to conduct any impairment analyses and, accordingly, has not provided any evidence necessary for the Commission to make unbundling determinations.[52] It attempts to minimize this problem by asserting that despite the absence of evidence, the Commission should simply declare and require broad unbundling under section 271.[53] However, this

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

51 Arbitrator's Report at ¶ 60.

52 Covad Petition at 17.

53 Covad Petition at 17.

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argument wrongly assumes that state commissions have the authority to require unbundling under section 271. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine whether BOCs have complied with the substantive provisions of Section 271, including the "checklist" provisions upon which Covad purports to base its requests.[54] State commissions have only a non-substantive, "consulting" role in that determination.[55] As one court has explained, a state commission has a fundamentally different role in implementing Section 271 than it does in implementing Sections 251 and 252:

> Sections 251 and 252 contemplate state commissions may take affirmative action towards the goals of those Sections, *while Section 271 does not contemplate substantive conduct on the part of state commissions*. Thus, a "savings clause" is not necessary for Section 271 because the state commissions' role is investigatory and consulting, not substantive, in nature.[56]

35 Thus, there is neither a legal nor an evidentiary basis for Covad's assertion that the Commission can require the limitless unbundling Covad seeks by invoking section 271. In support of its argument that the Commission can broadly impose unbundling requirements under section 271, Covad cites *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 (S.D. Ind. 2003), claiming that the federal district court's ruling in that case establishes that state commissions have decision-making authority under section 271.[57] However, contrary to Covad's misreading, *Indiana Bell* confirms the absence of a decision-making role for states under section 271. The decision contrasts the substantive role that states have in

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54 47 U.S.C. 271(d)(3).

55 47 U.S.C. 271(d)(2)(B).

56 *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by section 271 to impose binding obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004) (emphasis added).

57 Covad Petition at 19-20.

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administering sections 251 and 252 with the "investigatory" and "consulting" role they have under section 271:

> Sections 251 and 252 contemplate state commissions may take affirmative action towards the goals of those Sections, while *Section 271 does not contemplate substantive conduct on the part of state commissions*. Thus, a "savings clause" is not necessary for Section 271 because *the state commissions' role is investigatory and consulting, not substantive, in nature*.[58]

36 In recognizing the different roles that Congress assigned states under these distinct provisions of the Act, the *Indiana Bell* court noted that the Act does not include a "savings clause" that preserves the application of state law in the administration of section 271.[59] By contrast, the court observed, Congress included a savings clause – section 261(b) – that preserves the application of "consistent" state regulations in the administration of sections 251 and 252.[60] As the court found, this contrast confirms further that Congress did not intend a substantive role for states in the administration of section 271.[61]

37 Thus, the critical holding of *Indiana Bell* is that states do not have authority to impose section 271 obligations, and that ruling applies regardless whether the proceeding in which a state commission attempts to impose such obligations is conducted under section 252 or section 271. In other words, the nature of the proceeding in which a state commission attempts to exercise authority it does not have cannot alter the fact that the commission is without authority in the first place.

38 Finally, Covad's reliance on an order issued by the Maine Public Utilities

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58 *Indiana Bell Tel. Co.*, 2003 WL 1903363 at 11 (emphasis added).

59 *Id.*

60 *Id.*

61 *Id.*

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Commission in a proceeding involving Verizon also provides no support for Covad's unbundling demands under section 271. Covad relied on this same order in its Minnesota arbitration with Qwest, and the ALJ in that proceeding correctly determined that the order does not support Covad's demands. As she explained, the *Verizon-Maine* decision "is distinguishable on its facts as it appears to be premised on enforcement of a specific commitment that Verizon made to the Maine Commission during 271 proceedings to include certain elements in its state wholesale tariff."[62] For the same reason, the order is inapplicable here.

39 In sum, the Arbitrator's ruling rejecting Covad's network unbundling proposals is compelled by the governing law and by the evidentiary record in this proceeding. Covad's objections to the ruling are unfounded and should be rejected.

C. Issue 3: The Arbitrator Ruled Correctly That Qwest Is Not Required To Commingle UNEs Provided Under Section 251 Of The Act With Network Elements Provided Under Section 271.

40 The *TRO* permits "requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request."[63] The FCC defines commingling as "the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."[64]

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62 *Minnesota Arbitration Order* at ¶ 46.

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

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

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41 The FCC's ruling relating to commingling must be harmonized with its very specific ruling that BOCs are not required to combine network elements provided under section 271. While the FCC ruled in the *TRO* that ILECs have an independent obligation under Section 271 (independent of Section 251) to provide access to loops, transport, switching, and signaling, it also ruled that an ILEC is not required to combine those elements when it provides them under that section of the Act. The FCC explained that checklist items 4, 5, 6 and 10 of section 271(c)(2)(B) -- the checklist items that impose the independent unbundling obligation -- do not include any cross-reference to the combination requirement set forth in section 251(c)(3).[65] If Congress had intended any Section 251 obligations to apply to those section 271 elements, the FCC emphasized, "it would have explicitly done so," just as it did with checklist item 2.[66] Thus, the FCC ruled that it "decline[s] to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[67]

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

> Commingling means the connecting, attaching, or otherwise linking of an unbundled network element or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, *or the combining of an unbundled network element*, or a combination of unbundled network elements, with one or more such facilities or services.[68]

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65 *TRO* at ¶¶ 654, 656 & n.1990.

66 *Id.* at ¶ 654.

67 *Id.* at n. 1990.

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

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

44 The Arbitrator's Report implements the FCC's rulings relating to combining and commingling by establishing that Qwest is not required to commingle section 271 elements. As the Arbitrator correctly states, the FCC has made it clear that these elements are not subject to commingling.[69] In particular, the Arbitrator correctly points to footnote 1990 of the *TRO* where the FCC ruled unambiguously that it "decline[s] to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 271."

45 In objecting to this ruling, Covad asserts that the Arbitrator erred by failing to recognize that section 271 elements are "wholesale services" and, as such, are within the BOCs' commingling obligations set forth in paragraph 579 of the *TRO*.[70] The flaw in this interpretation, however, is that it reads out of the *TRO* the FCC's ruling that BOCs are not required to combine section 271 elements.[71] To preserve the effect of that ruling, it is necessary to interpret paragraph 579 of the *TRO* consistently with the FCC's and the D.C. Circuit's (in *USTA II*) very express holdings that BOCs are not required to combine section 271 elements. Covad never addresses the inconsistency between requiring Qwest to commingle section 271 elements and the rulings in *USTA*

69 Arbitrator's Report at ¶ 68.

70 Covad Petition at 23-24.

71 *See USTA II*, 359 F.3d at 589-90.

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II and the *TRO* removing those elements from BOC's combining obligations. Moreover, Covad's interpretation of paragraph 579 is inconsistent with the Act itself and in particular, with the absence of any cross-references to section 251's combination requirement in checklist items 4, 5, 6, and 10 of Section 271(c)(2)(B).[72]

46 Finally, any claim by Covad that "commingling" of Section 271 elements is permissible while "combining" of them is not is refuted by the FCC's *TRO Errata*. In the original version of the *TRO*, paragraph 584 instructed that BOCs' commingling obligations included permitting the commingling of UNEs and UNE combinations with network elements provided under Section 271. However, in the *Errata*, the FCC removed this language, thereby making that section of the Order consistent with its ruling that BOCs are not required to combine Section 271 elements and eliminating any requirement for ILECs to commingle those elements.

47 Accordingly, the Arbitrator correctly rejected Covad's request for Qwest to be required to commingle elements provided under section 271.

D. Issue 5: The Arbitrator Correctly Determined Qwest's Obligations Relating To CLEC-to-CLEC Regeneration.

48 Covad asks the Commission to reverse the Arbitrator's ruling that Qwest need not provide Covad with regeneration of connections between Covad and other CLECs. In its Petition, Covad argues that Qwest should be required under its ICA to provide free regeneration because, it claims, Qwest places restrictions upon Covad that "prohibit the placement of the necessary regeneration equipment and that it is

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

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"financially and technically impossible for Covad to provision its own regenerated cross connections."[73] These arguments fail on two grounds. First, as evidenced by the absence of citations in Covad's Petition, there is absolutely no record evidence establishing any prohibition or restrictions upon Covad's placement or use of regeneration equipment. Second, and most importantly, the law clearly sets forth the circumstances under which an ILEC must provide cross-connection (and therefore regeneration) and Qwest is not required to provide regeneration, even if it were less costly for Qwest to use its equipment, than for Covad to provide it for itself.

49 Covad's request for reconsideration of the Arbitrator's decision ignores a critical point: the FCC has considered an ILEC's obligations under section 251 and determined that an ILEC has no obligation to provide connections between collocated CLECs, so long as Qwest allows CLECs to self provision the cross-connection. If the ILEC has no obligation to provide the connection—and, indeed, is not involved in providing and designing the circuit through which CLECs accomplish the connection—the ILEC cannot be responsible for regeneration of the signal between the CLECs.[74]

50 The record in this matter clearly establishes that CLECs, including Covad, have the ability to connect with other CLECs in the central office. CLECs may connect with each other by creating a transmission directly from one collocation space to another or may connect at a common ICDF in the central office. In both of these circumstances, the CLEC designs the circuit between the two connections and is responsible for the regeneration if necessary. If regeneration is required, the CLEC

73 Covad Petition at 25-26.

74 *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order (Fourth Advanced Services Order), CC Docket No. 98-147, ¶¶ 55-84 (FCC 01-204) Rel. August 8, 2001; 47 C.F.R. 51.323(h).

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has the ability to self-provision the regeneration.[75]

51 The FCC rules are promulgated pursuant to the Fourth Report and Order and enunciate an ILEC's obligations under the Act with respect to cross connection between CLECs. Because Qwest is not required to provide connections under the rules (and therefore the Act), its conduct is sanctioned by the rules (and the Act) and, therefore, it cannot be acting in a discriminatory manner under the Act. Covad cannot conjure a different result out of its interpretation of the Fourth Report and Order. The rules promulgated from the order, 47 C.F.R 51.323(h) are unambiguous.

52 Covad's claim that the Commission could apply the cost docket rate for ILEC to CLEC regeneration to CLEC to CLEC regeneration is not credible. As demonstrated above, there is no legal basis for requiring Qwest to provide regeneration as a wholesale product. Even if it were legally permissible, there is no evidence in the record to support a zero rate—or an ordered rate in this proceeding for CLEC to CLEC regeneration.

E. Issue 8: Payment Due Date, Discontinuance, And Discontinuance Of Service

53 Covad purports to raise all three disputed payment sections of the ICA for reconsideration: section 5.4.1 (timing of payments); section 5.4.2 (discontinuance of ordering and section 5.4.3 (disconnection). However, Covad offers absolutely no basis on which the Commission could reverse the ALJ's decision on sections 5.4.2 and 5.4.3. Covad's reasons for reversing the ALJ's decision on section 5.4.1 are without merit.

54 Covad criticizes the Arbitrator for allegedly failing to analyze and support her

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75 Ex. 45-T (Norman Direct) at 15: 4-12; Ex. 46-RT (Norman Response) at 11: 4-15.

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rejection of Covad's request for a 45-day payment term. However, the Arbitrator appropriately found that the 30-day period complied with the industry standard. As the Arbitrator noted, the same payment term exists in Covad's existing ICA and in Covad's agreements with its own customers. Covad does not claim otherwise. Nor does it provide any specific and credible explanation as to why it cannot verify its bills within 30 days. Covad has simply failed to demonstrate a compelling basis on which the Arbitrator should have granted Covad's request for a payment period that amounts to a fifty percent increase over the industry standard. Nor has Covad provided any basis for the Commission to do so now.

55 The Arbitrator appropriately determined that Covad's request for different billing information should be addressed in the Change Management Process ("CMP"). Covad's new claim that CMP is an unrealistic forum for addressing these issues is simply a red herring. The CMP process is one to which Covad agreed and accepted as a part of its ICA.[76] The process is a collaborative way for both parties to raise and work through issues, such as billing. As a part of that process, Covad may submit a Change Request ("CR") and obtain a response. The CMP includes an escalation and a dispute resolution process. The escalation process, documented in Section 14 of the CMP Document, allows a CLEC to take an issue to the CMP oversight committee. For example, the CLEC may ask the oversight committee to review a CR that has been denied. Finally, if a CLEC is dissatisfied with the escalation process, the CLEC may seek dispute resolution, per Section 15 of the CMP Document. (To date, no CLEC has taken advantage of the dispute resolution process available via the CMP.)

56 The CMP process is the appropriate forum to address billing issues. The question in this arbitration is whether Covad should be granted additional time to pay its bill and

76 *See*, ICA Exhibit G.

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obtain the corresponding float on cash flow. The Arbitrator appropriately determined that Covad's request was not well-founded; the Commission should adopt that finding.

III. CONCLUSION

57 For the reasons stated, the Commission should deny Covad's petition for review.

DATED this 17th day of December, 2004.

Respectfully Submitted,

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