

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
2 COMMISSION

3 In the Matter of the Petition )  
for Arbitration of an )  
4 Interconnection Agreement ) DOCKET NO. UT-043045  
Between ) Volume IV  
5 ) Pages 382 - 463  
DIECA COMMUNICATIONS, INC., )  
6 d/b/a COVAD COMMUNICATIONS )  
COMPANY )  
7 with )  
QWEST CORPORATION )  
8 )  
Pursuant to 47 U.S.C. Section )  
9 252(b), and the Triennial )  
Review Order. )

10 -----

11 Oral argument in the above matter was held on  
12 January 13, 2005, at 1:40 p.m., at 1300 South Evergreen  
13 Park Drive Southwest, Olympia, Washington, before  
14 Chairwoman MARILYN SHOWALTER, Commissioners PATRICK J.  
15 OSHIE and RICHARD HEMSTAD.

16 The parties were present as follows:

17 COVAD COMMUNICATIONS COMPANY, by ANDREW  
18 NEWELL, Attorney at Law, Krys Boyle, 600 17th Street,  
19 Suite 2700, Denver, Colorado 80202; telephone, (303)  
893-2300.

20 QWEST CORPORATION, by WINSLOW B. WAXTER,  
21 Senior Attorney, 1005 17th Street, Room 200, Denver,  
Colorado 80202; telephone, (303) 896-1518.

22 QWEST CORPORATION, by JOHN M. DEVANEY,  
23 Attorney at Law, Perkins Coie, 607 14th Street  
Northwest, Washington, D.C. 20005; telephone, (202)  
434-1624.

24 Kathryn T. Wilson, CCR  
25 Court Reporter

0383

1 P R O C E E D I N G S

2 CHAIRWOMAN SHOWALTER: Let's be on the  
3 record. We are here on January 13th, 2005, in Docket  
4 No. UT-043045. I'm Marilyn Showalter, chair of the  
5 Commission, and with me are my two colleagues, Richard  
6 Hemstad and Patrick Oshie.

7 This is oral argument on a Covad, Qwest  
8 arbitration, and we have set for argument five issues  
9 that have been raised to us, and they are identified by  
10 numbers that refer to an earlier list, and they are in  
11 the order that we will take them in: Issue No. 2,  
12 which is UNE issues; Issue No. 3, commingling and  
13 combinations; Issue No. 1, retirement copper  
14 facilities; Issue No. 5, channel regeneration; Issue  
15 No. 8, payment issues.

16 Let's begin by taking appearances, and when  
17 you give your appearance, if there is a division of  
18 labor involved on these issues, please identify that.  
19 Thank you. Go ahead.

20 MS. WAXTER: Good afternoon, Chairwoman,  
21 Commissioners, Winslow Waxter on behalf of Qwest. I  
22 will be handling Issue No. 5 and Issue No. 8.

23 CHAIRWOMAN SHOWALTER: Would you spell your  
24 last name, please?

25 MS. WAXTER: W-a-x-t-e-r.

0384

1                   CHAIRWOMAN SHOWALTER: You are going to be  
2 Issue No. 5 and Issue No. 8, and that's the fourth and  
3 fifth issue we will take up.

4                   MS. WAXTER: That's correct. Thank you.

5                   CHAIRWOMAN SHOWALTER: Mr. Devaney?

6                   MR. DEVANEY: John Devaney also appearing for  
7 Qwest, and I will be handling Issues 1, 2, and 3, and  
8 the orders of those are 2, 3, and 1.

9                   MR. NEWELL: Good afternoon, Chairwoman,  
10 Commissioners. My name is Andrew Newell. I'm with the  
11 law firm Kryz Boyle in Denver, Colorado, and I  
12 represent Covad Communications, and I will be handling  
13 all issues.

14                   CHAIRWOMAN SHOWALTER: Are you going to go  
15 first on each of the issues with a response from Qwest?

16                   MR. NEWELL: Yes.

17                   CHAIRWOMAN SHOWALTER: I will try to keep  
18 good time. I'm not a master at it, however. All  
19 right. Let's turn to the first issue, which is issue  
20 No. 2, on UNE issues. Go ahead, Mr. Newell.

21                   MR. NEWELL: Thank you, Chairwoman. I think  
22 to start, I would like to explain from an operational  
23 perspective, Covad is essentially proposing to maintain  
24 the status quo. Access to the same elements that were  
25 available to it prior to the Triennial Review Order

0385

1 from an operational perspective.

2           From a legal perspective, the theory for  
3 access to those elements has changed. Covad recognizes  
4 that Section 251 has been reinterpreted by the FCC to  
5 interpret out access to those elements, at least  
6 pursuant to Section 251, but we believe that Washington  
7 law, as well as Section 271 of the Telecommunications  
8 Act, still mandate access to those elements, and they  
9 should be made available, and the interconnection  
10 agreement in the arbitration process is the most  
11 obvious and expedient and legal, permissible way to  
12 process those requests.

13           CHAIRWOMAN SHOWALTER: On that, don't you  
14 need to address, and I think you have addressed,  
15 whether first this commission has been preempted by the  
16 federal scheme, and if we have not, is this arbitration  
17 proceeding the correct proceeding to be addressing  
18 other things we may have jurisdiction on?

19           MR. NEWELL: Well, I'll take the first part  
20 of your question first, the preemption question. I  
21 don't believe there is any doubt that this commission  
22 has not been preempted. Even in the Triennial Review  
23 Order, the FCC recognized that states under the savings  
24 clause in the Section 251(d)(3) maintain their  
25 authority to add elements to the national list of

0386

1 UNE's.

2 Federal courts have interpreted that language  
3 as well and have confirmed that state commissions have  
4 the right to enforce state law and have the right to  
5 add additional UNE's and additional unbundling  
6 requirements. This commission enacted specific,  
7 detailed and very detailed collocation rules under  
8 essentially the same sort of theory that the FCC is not  
9 the first and last word on local competition. That's  
10 clear under the Act.

11 Now, with respect to your second question --

12 CHAIRWOMAN SHOWALTER: Before you leave the  
13 first one, there is sort of a new wrinkle that your  
14 answer poses, which are you saying that we have added  
15 new UNE elements to the list under 251(d)(3), and  
16 therefore, it does fall on this proceeding, or  
17 somewhere else, say, under our state authority or 271,  
18 we've done some other things, because I think those are  
19 two different situations, aren't they?

20 MR. NEWELL: Yes. If this commission were to  
21 adopt Covad's proposals, it would not do so under  
22 Section 251(c)(3). It could do so under its state law  
23 authority, which is clearly authorized by Section  
24 251(d)(3).

25 Section 251(d)(3) doesn't grant any organic

0387

1 authority to this commission. It would be Washington  
2 law that would do that, and it would be the same theory  
3 by which this commission has enacted additional  
4 collocation rules, the same theories that led to the  
5 first interconnection were in 1995 prior to the passage  
6 of the Act.

7 CHAIRWOMAN SHOWALTER: So now you were going  
8 to the second issue.

9 MR. NEWELL: Which is whether this is the  
10 proper forum to resolve the issues. I don't think  
11 Covad has any problem with a generic proceeding to  
12 determine the scope of Washington law with respect to  
13 unbundling, but there is certainly nothing wrong with  
14 resolving that issue in this proceeding.

15 The Act is clear. Section 252 is clear that  
16 state commissions are to resolve all issues that are  
17 presented in a petition and response for arbitration,  
18 and the only qualification to that is what's contained  
19 in the Coserve case that issues have to be open issues  
20 that when negotiated by the parties, and in addition to  
21 that, there is another savings clause in Section  
22 252(e)(3), I believe, that establishes that state  
23 commissions may also enforce state law obligations as  
24 part of the 252 arbitration process.

25 So I'm not really taking a position on what

0388

1 is the most expedient, efficient way, but in terms of  
2 legal authority, the Commission clearly has authority  
3 to impose obligations beyond those in Section 251 in a  
4 252 arbitration.

5 COMMISSIONER OSHIE: Mr. Newell, are you  
6 basing solely on our authority under state law to  
7 include any elements in an interconnection agreement?

8 I thought the argument too was tied up in  
9 what was an element under 271 versus an element under  
10 Section 251, but the way you addressed it, it seems  
11 that you are resting really on our authority under  
12 Washington law to include in an ICA under which we have  
13 jurisdiction to arbitrate or to hear on arbitration the  
14 inclusion of elements.

15 MR. NEWELL: We rely on both. We believe  
16 that in addition to the clear policy directives under  
17 Washington law, Section 271 is absolutely crystal clear  
18 as to what needs to be unbundled; loops, switching,  
19 transport to name three, and this commission also has  
20 the authority to enforce Section 271.

21 The FCC has confirmed that in its 271 orders  
22 that it expects state commissions along with the FCC to  
23 prevent backsliding, and if the state commission  
24 weren't to take an active role in implementing the  
25 language of 271 and enforcing it in an interconnection

0389

1 context, I'm not sure what else enforcement of those  
2 271 obligations could mean.

3 Now, that's a separate issue from determining  
4 interLATA entry. That authority is clearly solely with  
5 the FCC. Only the FCC can revoke interLATA authority,  
6 and only the FCC can grant intraLATA entry to Bell  
7 operating companies. But that's a separate issue from  
8 enforcing federal law, which this commission can  
9 clearly do under existing theories of parallel state  
10 and federal enforcement of federal law.

11 COMMISSIONER OSHIE: So you see our authority  
12 to arbitrate an interconnection agreement or to deal  
13 with the issues within stemming both from 251 and also  
14 from the enforcement provisions arising out of 271? In  
15 other words, that we can use an arbitration proceeding  
16 to enforce an obligation to unbundle under 271?

17 MR. NEWELL: Yes, I believe you can. I don't  
18 believe there is anything in the law that prohibits it.  
19 It's the most administratively expedient way to do it.

20 Certainly this commission has, I think, some  
21 discretion as to how actively it would like to enforce  
22 Section 271 of the Act. Ultimately, the FCC has that  
23 residual authority and certainly is the only entity  
24 that has the authority to revoke 271 authority, but  
25 most commissions that have reviewed the issue have



0390

1 decided that their state orders and the commitments  
2 made to those state commissions in the process of  
3 obtaining 271 approval are enforceable by state  
4 commissions as separate state law orders.

5 CHAIRWOMAN SHOWALTER: So how do you  
6 distinguish the Indiana Bell case, other than it's not  
7 our circuit?

8 MR. NEWELL: In Indiana Bell, the Indiana  
9 Utility Regulatory, IURC, they attempted in the 271  
10 review process, attempted to impose additional  
11 conditions beyond the requirements of Section 271 on  
12 Indiana Bell and essentially withheld their  
13 recommendations of 271 approval until Indiana Bell  
14 would agree to those conditions.

15 The court ruled that that was improper, that  
16 only the FCC could grant 271 authority, and there is  
17 nothing in Federal law that allowed state commissions  
18 to add conditions to entry, and it really didn't matter  
19 because the Commission didn't have the ultimate  
20 authority to grant 271 rule.

21 But the court also said that those same  
22 conditions could be imposed in a Section 252  
23 arbitration proceeding, so it's really -- I don't think  
24 that case tells us much about this case because all  
25 Covad is asking for is implementation of the

0391

1 requirements of 271. We are not asking for any  
2 additions and we are not asking for this commission to  
3 withhold or approval after the fact or to recommend  
4 revocation of Qwest 271 authority to the FCC if they  
5 don't agree to additional requirements.

6 CHAIRWOMAN SHOWALTER: We should probably  
7 continue with your own argument. We've been  
8 interrupting here.

9 MR. NEWELL: No, please.

10 CHAIRWOMAN SHOWALTER: Particularly if there  
11 are areas we haven't asked about that you want to  
12 emphasize.

13 MR. NEWELL: I think I've already been  
14 overemphasizing Washington law, but at the expense of  
15 doing that again, I'll go back to it. Revised Code of  
16 Washington 80.36.300, Subsection 5, has typically been  
17 a key section the Commission has relied on to promote  
18 local competition.

19 The statute directs the Commission to promote  
20 diversity in the supply of telecommunications services.  
21 That has been interpreted by this commission to mean  
22 local competition, and that interpretation led to the  
23 Commission deciding to unbundle loops prior to passage  
24 of the Act.

25 CHAIRWOMAN SHOWALTER: I think there is

0392

1 really no question if there were no Federal Telecom Act  
2 and we were just operating under our own statutes, we  
3 would know that we had or would have fairly broad  
4 authority. Isn't really the question of how is it that  
5 the federal act reaches in and removes, if it does,  
6 some of our authority to do what we used to do?

7 MR. NEWELL: Well, now we are back to the  
8 preemption question, and I think the most constructive  
9 case, the case that is most on point, is the Michigan  
10 Bell case that we cited in our brief where the federal  
11 court, the Sixth Circuit ruled that the purpose, the  
12 core purpose of Section 251 is to open the market to  
13 competition, so the only state rules that really  
14 preempt Section 251 are rules that would frustrate that  
15 goal. In other words, would deny local competitors  
16 access to UNE's that are required under Section 251.

17 CHAIRWOMAN SHOWALTER: Maybe it's because  
18 I've just recently read the Indiana case and I'm  
19 looking at its rationale, but it's not enough that you  
20 have a common goal. That is, it's a problem if the  
21 state has a goal of competition and the federal act has  
22 a goal of competition, but the federal act has  
23 different procedures for getting there.

24 You can't do an end-run around those  
25 procedures, so it's like you have to get down one more

0393

1 level and find that the procedures or the process that  
2 the federal act has set up can be fully honored, even  
3 if there is an independent state process and standards  
4 for achieving the same goal.

5 MR. NEWELL: I think that's true. I think  
6 the question is -- I believe what you are getting at is  
7 two people can have the same goal, but because they  
8 choose different means to get there, you can end up  
9 with confusion and frustrate each other's progress.

10 I don't think there is anything about our  
11 proposal that does that. All it does is add elements  
12 that would not otherwise be available under federal  
13 law. I think of it as the equivalent of the state of  
14 California having more strict regulations with respect  
15 to certain consumer products or air quality. Those  
16 things are clearly authorized under federal law under  
17 the same theory that our proposal would be authorized.

18 CHAIRWOMAN SHOWALTER: You actually have just  
19 a minute left, so why don't you summarize anything we  
20 haven't touched on.

21 MR. NEWELL: We haven't talked about the  
22 pricing issue so I will do that briefly. We covered it  
23 in our brief. The state of Washington, independent of  
24 the Telecom Act, has adopted a cost methodology that is  
25 either the equivalent of or actually is TELRIC, and

0394

1 that pricing standard ought to apply to elements that  
2 the Commission adds to the national list under state  
3 law.

4 With respect to 271 elements, if the theory  
5 of access is Section 271, the FCC has made clear that  
6 the pricing standards of Section 201 and 202 of the  
7 Act, there is nothing that prevents this commission  
8 from applying that pricing standard just as it applies  
9 Section 251(d)(2) pricing standards, and it clearly has  
10 the authority to set those rates under its plenary  
11 authority under Washington law to establish rates for  
12 public utilities.

13 COMMISSIONER OSHIE: If I can just ask one  
14 question, Mr. Newell, and I know you have probably run  
15 out of time here, but I will go over this briefly.

16 If we were to follow Qwest's guidance in this  
17 matter, would the result be that Covad would be  
18 required to sign two agreements, one essentially  
19 covering the 271 elements in whatever form it may be,  
20 and then one covering the 251 elements, and only those  
21 elements under 251 would be subject to arbitration  
22 under 252? Is that where we would be? Or essentially,  
23 you are asking to interlace those -- I'll use that  
24 term -- and for us to decide if they should be, to use  
25 another term, commonly bundled together in one

0395

1 arbitration proceeding.

2 MR. NEWELL: I think the scenario you raised,  
3 the separate agreement scenario, is the best-case  
4 scenario. That assumes that Qwest is willing to  
5 negotiate an agreement to cover 271 elements and they  
6 agree with us what those elements are. I can tell you  
7 there are serious disagreements as to what elements are  
8 covered under 271 between Qwest and Covad. They are  
9 not subject to this arbitration.

10 But the other position that Qwest has taken,  
11 as I understand it, is to the extent that they have a  
12 tariff that includes a fairly equivalent service, they  
13 won't sign a commercial agreement. They will just  
14 expect people to buy it out of their retail tariff or  
15 perhaps utilize their resale option under the Act to  
16 avoid the cost discount.

17 CHAIRWOMAN SHOWALTER: Your time is up.  
18 Mr. Devaney?

19 MR. DEVANEY: Thank you, Chairwoman. Before  
20 I jump into the heart of this issue, I thought I would  
21 mention that in Qwest's view, the way this negotiation  
22 and arbitration process has proceeded is an example  
23 really of how the Act ought to work, because both  
24 sides, Qwest and Covad, our negotiators got together  
25 more than a year ago and really worked in good faith to

0396

1 resolve hundreds of contract issues leaving us with  
2 only six disputed issues before the Commission. Just  
3 for the record, I would like to applaud both  
4 negotiators on both sides.

5           In our view though, a common theme with  
6 respect to all six disputed issues is that Covad is  
7 taking positions that aren't supported by the Triennial  
8 Review Order, by the DC circuit's decision in USTA-2,  
9 or in some cases by the evidentiary record in this  
10 case. This whole UNE unbundling issue is a good  
11 example of that, in our view.

12           In that regard, I want to just talk about the  
13 context of how this dispute arose. In the Triennial  
14 Review Order, as the Commission is no doubt aware of,  
15 the FCC found that CLEC's are not impaired without  
16 access to certain unbundled network elements. In some  
17 cases, the FCC said there is impairment for other  
18 elements.

19           And I found Mr. Newell's opening statement, I  
20 think his first sentence was, We are trying to maintain  
21 the status quo. We are trying to have the elements  
22 that existed to us before the Triennial Review Order,  
23 and that's precisely what they are trying to do through  
24 their unbundling language, and during the negotiations,  
25 we saw this, and I had in my notes the term "end-run."

0397

1 We saw this as an end-run on the Triennial Review Order  
2 where they were trying to get access to elements for  
3 which the FCC had expressly found CLEC's are not  
4 impaired without them, and as you all know under  
5 Section 251 of the Act, unbundling has to be premised  
6 on a finding of impairment. If there is no impairment,  
7 there can be no Section 251 unbundling requirement.

8           So that's why we objected to the holes in  
9 this case, that we would have to provide under this 251  
10 interconnection agreement elements for which there is  
11 no impairment, and that really goes to the heart of the  
12 dispute. In response to certain issues that you raised  
13 in your discussion with Mr. Newell, rather than going  
14 through our brief, I will just try to address certain  
15 issues that you discussed.

16           First state law. The statutory scheme of the  
17 Telecom Act of '96 is fairly dramatic in that I think  
18 what congress did is it took largely away from states  
19 the regulation of the local exchange market but gave  
20 back to the states certain authority in specifically  
21 defined areas to continue to regulate, and that  
22 authority is given in the context of these savings  
23 clauses that Mr. Newell has talked about.

24           A very important factor is that in exercising  
25 authority under these savings clauses, a state



0398

1 commission must act consistently with federal law; that  
2 is, with findings by the FCC and the Act itself. Our  
3 view is that Covad's proposal here is essentially  
4 asking the Commission to act inconsistently with  
5 federal law.

6           An example of this is in the Triennial Review  
7 Order, the FCC found that CLEC's are not impaired  
8 without access to so-called feeder subloops, and under  
9 Covad's proposal in this case, we would have to provide  
10 feeder subloops. There is a direct clash between that  
11 request and the FCC's federal policy that ILEC's  
12 shouldn't be required to provide unbundled access to  
13 feeder subloops, so by asking for access to that  
14 element from this commission, Covad is asking for a  
15 ruling that would conflict directly with what the FCC  
16 has done, and whether you call it preemption or whether  
17 you call it consistency with federal law, it's unlawful  
18 and impermissible.

19           Related to that, as I mentioned before, it's  
20 essential that any unbundling requirement be based on  
21 evidence of impairment. I remember nine months ago you  
22 all convened in the Triennial Review proceeding, which  
23 I think lasted for less than a day because of USTA-2,  
24 but the whole purpose of that proceeding was to take  
25 evidence of impairment, and that's what you have to do

0399

1 to decide whether something needs to be unbundled.

2 In this case, as the administrative law judge  
3 correctly found and there is no dispute, there is no  
4 evidence in this record of impairment. Covad didn't  
5 present any evidence that's impaired without access to  
6 feeder subloops or some of the other elements it's  
7 seeking in this agreement, and without that evidence,  
8 there is no basis for a ruling that Qwest is required  
9 to unbundle elements as Covad would have us do under  
10 its proposal.

11 COMMISSIONER HEMSTAD: Is it your view that  
12 were there such evidence of impairment that we would  
13 have the authority to act?

14 MR. DEVANEY: No. So my impairment point is  
15 a secondary point. My first point is that you are  
16 being asked to act inconsistently with federal law.  
17 But setting that aside, even if there weren't that  
18 problem, you still couldn't, in our view, order the  
19 unbundling that Covad has requested because there is no  
20 evidence of impairment with respect to specific  
21 elements.

22 CHAIRWOMAN SHOWALTER: You are saying  
23 evidence of impairment is necessary but not sufficient.  
24 You are saying that even if we found evidence of  
25 impairment, that if the FCC had found there is no

0400

1 impairment, that would be a conflict. Is that what you  
2 are saying?

3 MR. DEVANEY: That is what I'm saying, yes.

4 CHAIRWOMAN SHOWALTER: In other words, you  
5 are saying that we don't have the independent ability  
6 to find impairment if the FCC has already ruled on that  
7 precise thing, which is perhaps different than adding  
8 an element to the list if the FCC has somehow been  
9 silent on that UNE.

10 MR. DEVANEY: There is a distinction.  
11 Clearly in the former case, there is a problem with  
12 inconsistency in the federal law and preemption. In  
13 the latter case, there still may be preemption issues.  
14 There still may be consistency issues, for instance, a  
15 clash with a federal policy if you are unbundling a  
16 certain element, but it's a different situation. What  
17 the FCC has said, for example, feeder subloops, No, you  
18 don't have to provide them, and the state commission  
19 said, Yes, you do.

20 COMMISSIONER HEMSTAD: What is your view of  
21 how the Colorado and Minnesota commissions dealt with  
22 this issue?

23 MR. DEVANEY: In Colorado, interestingly,  
24 Covad agreed to Qwest on unbundling language, so we  
25 didn't even arbitrate these issues in Colorado. It was

0401

1 just agreed out of the box that they would use our  
2 language.

3 In Minnesota, the ruling there was that these  
4 unbundling proposals from Covad also were improper in a  
5 251 agreement. This is from the administrative law  
6 judge in Minnesota. It hasn't gone to the full  
7 commission yet. So we fully agree with the Minnesota  
8 administrative law judge.

9 COMMISSIONER HEMSTAD: How about Utah and  
10 Maine?

11 MR. DEVANEY: Utah, there has been no ruling  
12 yet on these unbundling issues. Maine is somewhat  
13 unique. I think the ruling in Maine had to do  
14 specifically with Commission jurisdiction over certain  
15 271 elements with respect to pricing, as I recall, and  
16 what's unique about Maine -- in fact, in the Minnesota  
17 decision, the Covad/Qwest arbitration, the ALJ, I  
18 think, aptly described why Maine is different from this  
19 situation.

20 In Maine, there was a commitment by, I guess  
21 it was Verizon, to have certain 271 elements tariffed  
22 in their pricing, and that was part of the entry into  
23 the long-distance market. So there, the Maine  
24 Commission was really engaging in enforcing a deal it  
25 had reached with Verizon in connection with 271 in

0402

1 pricing, which, of course, is a very different  
2 situation from this 251 interconnection agreement.

3 COMMISSIONER HEMSTAD: So may I conclude from  
4 your remarks that at least in your view, none of those  
5 courts ruled in such a way that's inconsistent with  
6 your position?

7 MR. DEVANEY: That's correct, yes. The other  
8 couple of points I would like to make before I conclude  
9 is whether, and this goes to Commissioner Oshie's  
10 question, the whole issue of whether 271 elements  
11 should be included in the 251 agreement, and in the  
12 Triennial Review Order and in USTA-2 both, the FCC and  
13 DC Circuit made it very clear that there is a different  
14 legal framework for elements provided under 251 and for  
15 elements provided under 271.

16 For example, under Section 251, TELRIC-based  
17 rates apply to elements that the carrier provides.  
18 Under 271, so-called market-based rates apply.  
19 Consistent with that, it makes sense to have separate  
20 agreements for those elements so that you have 251  
21 elements covered with TELRIC rates and the 251  
22 agreement and 271 elements covered either in commercial  
23 agreements or tariffs, and that's very consistent with  
24 the legal framework that the FCC and DC Circuit has  
25 established.

0403

1           Then my final point on this issue goes to  
2 another issue the arbitrator, we believe, correctly  
3 addressed, and that is the state commission authority  
4 in arbitrations, in interconnection arbitrations, the  
5 authority, with all due respect to my opponent, is not  
6 simply to decide any open issue that one party presents  
7 to the Commission. Rather the authority requires  
8 looking at Section 252(c) of the Act, and in turn,  
9 251(b)and(c).

10           I know I've given a lot of subsections there,  
11 but fundamentally, the Commission's authority is to  
12 resolve terms and conditions relating to an ILEC's  
13 obligations under 251(b)and(c), and if you look at  
14 251(b)and(c), there is nothing mentioned there about  
15 unbundling under 271. There is unbundling under 251,  
16 and this commission certainly has jurisdiction in an  
17 interconnection arbitration to decide terms and  
18 conditions related to unbundling under 251 but not  
19 under 271.

20           Then finally, consistent with that, the  
21 Indiana Bell case, Indiana Bell says quite clearly that  
22 state commission authority in the area of 271 is in a  
23 consulting investigatory role, and that is, the FCC has  
24 the ultimate decision-making authority under 271, and  
25 therefore, that's another reason, in our view, why

0404

1 Covad's request for you to declare that we, Qwest, had  
2 the unbundling in 271 is asking you to exercise  
3 authority that pursuant to the Indiana Bell, and we  
4 think the Act and the state commissions don't have.  
5 That's all I have on the issue of additional questions.

6 CHAIRWOMAN SHOWALTER: I think that we are  
7 ready to go on to Issue No. 3, commingling and  
8 combination, which is somewhat related to the issue we  
9 were just discussing, so my guess is you can work  
10 whatever argument you look as if you want to make into  
11 that.

12 MR. NEWELL: Yes. I was going to ask that if  
13 there would be time at some point to go back over  
14 John's arguments, I will do that quickly. There is a  
15 lot of discussion about impairment and making  
16 impairment determinations. I think we need to be  
17 clear.

18 The only statute we are talking about here  
19 that involves impairment analysis is Section 251, and  
20 the only entity that makes that impairment analysis  
21 under Section 251 is the FCC. We are not asking this  
22 commission to analyze impairment under Section 251. We  
23 are asking this commission to look at Washington law  
24 and determine whether it's statutory directives require  
25 it to unbundle these elements under state law. There

0405

1 is no impairment analysis contained in Washington law.

2 That doesn't mean that that can't be part of  
3 the policy analysis that goes on, but it's certainly  
4 not a parallel impairment analysis under 251 that would  
5 be conducted that would be in direct conflict with the  
6 impairment analysis the FCC had performed.

7 CHAIRWOMAN SHOWALTER: I think to  
8 characterize it, you would say that if we exercise  
9 independent state authority about unbundling, that does  
10 not conflict with the federal scheme; whereas  
11 Mr. Devaney would say it would conflict, so it's an  
12 issue of when do we or don't we conflict, and at what  
13 level of detail and process do we conflict, and at what  
14 level is it some kind of parallel goals.

15 MR. NEWELL: Yes. I believe it is a logical  
16 impossibility for any unbundling that is required under  
17 271, any of those elements when they are required by a  
18 state commission pursuant to state law, how that can  
19 conflict with the Act.

20 The FCC has made clear that 271 elements are  
21 not subject to 251 impairment analysis. They have to  
22 be made available notwithstanding impairment analysis.  
23 All we are asking for in this arbitration is those  
24 elements that are on that check list. So I fail to  
25 understand how asking for those elements that are set



0406

1    forth in federal law can conflict with federal law.

2                   CHAIRWOMAN SHOWALTER:   Wouldn't Mr. Devaney's  
3    answer be it's not that they do.   It's who has  
4    authority, us or the FCC, to enforce those?

5                   MR. NEWELL:   I think the savings clause and  
6    even the FCC has made clear that state commissions can  
7    add elements to the national list that is almost  
8    verbatim what they said.

9                   The other point John made is that if a  
10   decision of this commission on unbundling is  
11   inconsistent with an FCC determination under 251, then  
12   it's de facto preempted, and under the Iowa Utilities  
13   Board decision, that is not the case.

14                   In fact, the FCC in the TRO discussed the  
15   Iowa Utilities Board case and said based upon the plain  
16   language of the statute, We conclude the distinct  
17   authority to preserve by Section 251(d)(3) is limited  
18   to state unbundling actions that are consistent with  
19   requirements of Section 251 and do not substantially  
20   prevent the implementation of the federal regulatory  
21   regime.   We find the most reasonable interpretation of  
22   Congress's intent in enacting Sections 251 and 252 to  
23   be that state action, whether taken in the course of a  
24   rule-making or during the review of an interconnection  
25   agreement, must be consistent with Section 251 and must

0407

1 not substantially prevent its implementation.

2 CHAIRWOMAN SHOWALTER: I hope you are making  
3 comments that are somewhat relevant to commingling  
4 because that's the time slot you are in, which is only  
5 ten minutes.

6 COMMISSIONER HEMSTAD: I was going to ask the  
7 same question of you. What about the other state  
8 commission actions to date? Do you see those as  
9 supporting your position or not?

10 MR. NEWELL: In Colorado, we didn't put the  
11 issue on the table for operational reasons. Covad  
12 makes decisions about whether they will fight issues  
13 based on market entry and all sorts of issues.

14 We don't agree with the Minnesota decision.  
15 We don't believe it supports our position, but the  
16 position, as I recall, is essentially, Yes, the  
17 Commission has the authority to order additional  
18 unbundling, but it can't do so in a 252 arbitration,  
19 and we don't agree with that decision and expect that  
20 it will be reversed by the full commission. So no  
21 utilities commission has yet issued a distinction on  
22 these issues, a final decision.

23 So commingling, I'm sorry. I think this is  
24 essentially a language interpretation issue of the  
25 Triennial Review Order, and there is essentially three

0408

1 categories that the FCC could have intended for 271  
2 elements with respect to commingling. They could have  
3 either made clear that 271 elements are the equivalent  
4 of a 251(c)(3) element, and they are available to  
5 combine with other 251(c)(3) elements in UNE  
6 combinations, like UNE-P, or they could decide it's  
7 just another wholesale service like any wholesale  
8 service that's not a 251(c)(3), like resale or access  
9 elements, something like that, or they could decide  
10 it's in a category all by itself and cannot be  
11 connected or combined with any other element.

12 Qwest's position is it's all by itself. It  
13 can't be combined with any other element. It's in this  
14 special new category that is inferior even to an access  
15 service or any other wholesale service, and that's the  
16 position that was taken in the arbitrator's report as  
17 well.

18 CHAIRWOMAN SHOWALTER: I just want to be  
19 precise about our language because I think it would  
20 help. You are not saying that anybody says it can't be  
21 combined. The issue is whether this commission can  
22 force the ILEC to combine it; right? In other words,  
23 no one is prohibiting it from being combined. Isn't  
24 the issue whether Qwest and we direct it for us to  
25 combine something?

0409

1           MR. NEWELL: I think both of those are  
2 issues. The way the FCC's decision reads on  
3 commingling, they made clear that if something is  
4 eligible for commingling that a competitor can  
5 commingle them or they can ask the ILEC to commingle  
6 for them. So I don't think it is entirely clear that  
7 even if 271 elements were ineligible for commingling  
8 that a CLEC could commingle them. I think it would be  
9 open to dispute.

10           I think the most natural reading would be if  
11 a CLEC connects them itself that it should be able to  
12 do that, but I don't think it's entirely clear, and I  
13 think what the FCC was trying to do and trying to  
14 clarify in the errata was 271 elements don't have the  
15 status of 251(c)(3) UNE's. They are not a UNE. They  
16 are not eligible for combinations, which is a legal  
17 category that's established in Section 251(c)(3) that  
18 those elements may be combined together.

19           The FCC relies on different authority to  
20 establish its commingling rules. While the two  
21 operationally are very similar, the legal theories  
22 supporting each is very different, and that's the  
23 purpose of making the distinction. Qwest argues there  
24 is really no distinction between commingling and  
25 combination, and that's clearly not supported by the

0410

1 TRO where they discuss each separately and talk about  
2 the eligibility rules for commingling.

3 CHAIRWOMAN SHOWALTER: Can you make clear,  
4 are you here arguing that point as an abstract  
5 principle, or are you asking for particular  
6 combinations or commingling that we need to order? In  
7 other words, is this sort of a legal issue or is this  
8 an operational issue in the context of this proceeding?

9 MR. NEWELL: We see it as potentially huge  
10 operational issue, and the reason is we expect under  
11 the FCC's rules, at least, if this commission does not  
12 add the elements under state law, we could see  
13 unbundled transport go away as a 251(c)(3) UNE, at  
14 least on certain routes in certain central offices, and  
15 maybe --

16 CHAIRWOMAN SHOWALTER: Is it something you've  
17 been denied? It seems like normally, this would come  
18 up where you would have asked for something and Qwest  
19 would say, No, you are not entitled to that, and you  
20 would be asking us to say, Yes, you are entitled to  
21 this particular element or thing that you want in the  
22 real world, and that's what I'm having a hard time  
23 with.

24 MR. NEWELL: Under the existing agreement,  
25 there is no question about the availability of the

0411

1 elements. There has never been a denial, but really,  
2 this is focused on future business plans. It's  
3 specifically providing voice-over IP service and  
4 perhaps using commingling EELs, which under the  
5 arbitrator's reading of the TRO wouldn't really exist  
6 because you couldn't connect an unbundled loop under  
7 251(c)(3) with a transport element that you had to  
8 purchase under Section 271.

9 CHAIRWOMAN SHOWALTER: Your time is up unless  
10 you have one more minute.

11 MR. NEWELL: No, that's fine.

12 CHAIRWOMAN SHOWALTER: Mr. Devaney?

13 MR. DEVANEY: I guess I would like to begin  
14 with a response to Mr. Newell's last statement that was  
15 in response to the Chairwoman's question about is this  
16 abstract or is it concrete, and Mr. Newell said that,  
17 for example, in the future, Covad may want to have  
18 commingled EELs, which is a combining of a loop with  
19 transport.

20 In the last couple of months, language has  
21 specifically said in this agreement there will be no  
22 access to commingling EELs. Covad has agreed for  
23 purposes of this agreement it is not seeking access to  
24 commingled EELs, so it's just not an issue. We haven't  
25 denied it to them, but they've said, We don't want it

0412

1 in this agreement, and we agreed to language to that  
2 effect.

3 So I have to take exception to the suggestion  
4 that that is a concrete issue. It's not. It's one the  
5 parties have agreed upon, so this really is more at an  
6 abstract level. We haven't been presented with any  
7 suggestion by Covad that, We want to put this together  
8 with that and you are not permitting us to do that.  
9 It's really at a very high level without any examples,  
10 that I'm aware of, that we've been presented with.

11 With respect to the legal issue of  
12 commingling itself --

13 COMMISSIONER OSHIE: I want to make sure I'm  
14 clear on the issue, and that is, we are talking  
15 about -- I know that commingling and combinations have  
16 their own meaning within the telecommunications world,  
17 but as I hear the argument, what I'm hearing is that  
18 the elements cannot be combined, and so there are legal  
19 reasons why they may not be combined or could not be.  
20 There are technical reasons, for example, why they  
21 couldn't be combined, perhaps, but I don't know whether  
22 you are saying that the FCC has prohibited those  
23 elements from being combined or that Qwest isn't  
24 required to combine them anymore and therefore will  
25 only combine them if they could be negotiated to

0413

1 Qwest's satisfaction or that they won't be combined in  
2 an ICA and that you would have a market agreement on  
3 one side, an ICA on the other that combines the  
4 elements in a technical way to provision the service.

5 So maybe you can explain to me, at least --  
6 maybe the other commissioners know precisely what you  
7 are talking about, but maybe you could explain it to  
8 me.

9 MR. DEVANEY: Sure. I'll see if I can.  
10 First of all, what is commingling? It's the combining,  
11 connecting, or attaching of one element to another  
12 element or one element to a combination of a group of  
13 elements. It's the physical act of, I guess, running  
14 jumpers to connect these pieces together. I'm not sure  
15 if this is part of your question --

16 COMMISSIONER OSHIE: I think I'm beyond that,  
17 but understanding that to be true, when you say they  
18 cannot be combined or -- what do you mean by that?

19 MR. DEVANEY: It's a legal use of the word  
20 "cannot." Physically, most of these elements that we  
21 are talking about, I believe, can be combined. But  
22 what we are really getting at is an interpretation not  
23 just of the Triennial Review Order but of the Act, and  
24 whether there is a legal requirement for Qwest in a 251  
25 agreement to combine these elements together. Should I



0414

1 continue?

2 COMMISSIONER OSHIE: That's fine. So really  
3 it's whether Qwest is obligated to combine them. Let's  
4 go under an ICA or within the context of an ICA?

5 MR. DEVANEY: Of course, that's the context  
6 we are discussing, so yes, within the context of an  
7 ICA, but I think I can address that legal question even  
8 outside the context of an ICA, and here, in our view,  
9 is what the critical distinction is.

10 In Section 251, and I'm sorry, but I'm  
11 forgetting the subsection right now, there is clearly  
12 an obligation to combine unbundled network elements.  
13 There is language in that section of the Act that says,  
14 Yes, you need to combine, and we don't dispute that.  
15 In Section 271 by contrast, and the FCC and the DC  
16 Circuit are very careful to point out this distinction,  
17 there is no combination language in the checklist items  
18 that require us to produce network elements.

19 So I think the FCC said in 251, congress  
20 said, Yes, you have to combine elements, and 271,  
21 congress didn't say that, and if they had wanted to  
22 require the combining or commingling of 271 elements,  
23 they would have said so because they did in 251, but  
24 they didn't in 271, and that's the heart of our  
25 position on this, and again, it's not just

0415

1 interpretation of the Triennial Review Order. That  
2 supports us as does USTA-2, but it begins with an  
3 interpretation of the express language of the Act, 271  
4 versus 251.

5 Our view is if we are required to commingle  
6 271 elements with 251 UNE's that that directly  
7 contradicts what the Act says about our combination  
8 requirements and also directly contradicts the ruling  
9 of the FCC and the DC Circuit that BAC's don't have an  
10 obligation to combine 271 elements.

11 CHAIRWOMAN SHOWALTER: Is this Footnote 1990  
12 from the FCC?

13 MR. DEVANEY: Yes, that's correct.

14 CHAIRWOMAN SHOWALTER: So if the FCC said,  
15 and I'm quoting from their Footnote 1990, Paragraph  
16 655, but I can't tell you what order, the Triennial  
17 Review, I believe, "We decline to require BAC's  
18 pursuant to Section 271 to combine network elements  
19 that are no longer required to be unbundled under  
20 Section 251."

21 I can read that sentence and I can see what  
22 the FCC is saying they decline to do, and the question  
23 is, if they have declined to do that, does that mean we  
24 also must decline, and doesn't this get back to the  
25 issue of what does or doesn't conflict, and you would

0416

1 say yes, it conflicts because the FCC has just said  
2 this is a required --

3 MR. DEVANEY: Actually, I would say it  
4 slightly differently. I would say that yes, you cannot  
5 do it because the Act doesn't permit it because Section  
6 271, as I mentioned earlier, doesn't contain a  
7 combination requirement. Section 251 does.

8 And since any authority this commission has  
9 has to be exercised consistent with the Act, there is  
10 no authority to require us to combine Section 271  
11 elements. I'm not disagreeing with you, but I begin  
12 with the Act and then I go to the FCC.

13 CHAIRWOMAN SHOWALTER: It really gets in a  
14 way to the same question, just substitute "Act" for  
15 "FCC," and you would say it conflicts with the Act  
16 because it's not required by it, but then there is this  
17 little zone under the Act of permissible state  
18 activity, so don't you just get back to a more  
19 functional analysis of what kinds of things the state  
20 can order without running afoul of the Act in an  
21 operational sense?

22 Isn't there a degree of judgment there that's  
23 not probably going to be black or white? You have to  
24 say when is the scheme frustrated by a state versus,  
25 arguably, when is the scheme enhanced or complementary

0417

1 or basically not frustrated?

2 MR. DEVANEY: I certainly agree that, as we  
3 discussed earlier, there is some areas where there have  
4 been clear, definitive statements from the FCC about  
5 what is and is not permitted. Other areas are grayer,  
6 and it's very difficult to get into that gray area to  
7 determine where state authority begins and ends, so I  
8 agree with that concept.

9 In this case though, again, we are dealing  
10 with 271 elements, and so I also go back to Indiana  
11 Bell and raise the question, since we are talking about  
12 the combining of 271 elements, even if this commission  
13 had the authority or even if the Act permitted you to  
14 do that, although it's not required under the Act,  
15 could this commission exercise that kind of authority  
16 over a 271 element, and as we discussed earlier, under  
17 Indiana Bell, and we think the express language of 271,  
18 there is no authority to do that.

19 Could I spend 20 seconds on a point that goes  
20 back to the first issue?

21 CHAIRWOMAN SHOWALTER: Yes, because I think  
22 we had a little extra time on that one.

23 MR. DEVANEY: It goes to the whole question  
24 and even to this issue of whether state actions under  
25 the Act must be consistent with federal law. It came

0418

1 to my attention just yesterday as I was preparing for  
2 this argument that a decision came down last week from  
3 a federal court in Michigan that the Commission might  
4 already be aware of.

5 CHAIRWOMAN SHOWALTER: Is this district  
6 court?

7 MR. DEVANEY: Yes, Federal District Court in  
8 Michigan, Michigan Bell versus the Michigan Commission  
9 and AT&T.

10 CHAIRWOMAN SHOWALTER: Is there a district?

11 MR. DEVANEY: Eastern District of Michigan,  
12 Southern Division, and this was reported in one of the  
13 communications reports, and it had to do with the  
14 Michigan Commission's directive for Michigan Bell, or  
15 SBC, to engage in a batch hot-cut process and  
16 collaborative workshop, and SBC filed for a preliminary  
17 injunction to stop that from going forward arguing that  
18 the proceeding was inconsistent with federal law, and  
19 this decision that just came down last week talks about  
20 how state actions have to be consistent with federal  
21 law. So it goes to the point we've been talking about  
22 with respect to both of these issues.

23 CHAIRWOMAN SHOWALTER: What did the court do?

24 MR. DEVANEY: They granted the injunction and  
25 said this proceeding was not consistent with federal

0419

1 law, and I apologize for not telling you, but I was  
2 going to pull this out. I'll gave this to you at the  
3 break, but I wanted that to be brought to the  
4 Commission's attention.

5 CHAIRWOMAN SHOWALTER: Let's go to the third  
6 issue, and this one is 15 minutes apiece on retirement  
7 of copper facilities, and that's Issue No. 1. Go  
8 ahead.

9 MR. NEWELL: John's point dovetails nicely  
10 into the point I wanted to make to start out with,  
11 copper retirement, which was -- first of all, I read  
12 you the wrong quotation before talking about the  
13 consistency issue, which is a critical issue for copper  
14 retirement as well.

15 To the extent this new case says that  
16 absolute consistency is necessary, it seems to conflict  
17 with the 8th Circuit decision, which says, Merely an  
18 inconsistency, and I'm not quoting now, between state  
19 regulation and a commission regulation was not  
20 sufficient for commission preemption under 251(d)(3),  
21 and that's in the Triennial Review Order citing the  
22 Iowa Utilities Board case, Paragraph 192, 611.

23 There is a recognition there that absolute  
24 uniformity is not necessary, and as a logical matter,  
25 it wouldn't make any sense to have the vacancy clause

0420

1 if absolute uniformity was necessary.

2           The other point I wanted to make just to tell  
3 the other side of the story with respect to the  
4 commingling, EEL issue, on the eve of filing these  
5 arbitration proceedings, Covad acquired a company  
6 called Go Beam who provides voice-over IP services, and  
7 that is driving new business plans that are not really  
8 reflected in this arbitration, because we discussed  
9 those issues and decided it would be unfair to try to  
10 arbitrate those issues on the eve of filing.

11           So on to copper retirement. I apologize.  
12 Covad's position is really crafted to not disturb what  
13 the FCC has said with respect to retiring copper  
14 facilities. For instance, Covad is not through its  
15 language attempting to prevent Qwest from retiring  
16 copper, and they are not attempting to apply their  
17 alternative service proposal to fiber-to-the-home or  
18 fiber-to-the-curb deployments, which the FCC clearly  
19 weighed Section 706 of the Act in its directive to  
20 remove broadband deployment against the unbundling  
21 requirements of Section 251, so we thought it best to  
22 avoid that issue all together and craft a proposal that  
23 doesn't apply to those loops where the Commission, the  
24 FCC had conducted that 706 analysis.

25           Instead, it applies to feeder deployments

0421

1 that don't result in a fiber-to-the-home or  
2 fiber-to-the-curb loop, and these are typically related  
3 to maintenance issues or, let's say, a road  
4 construction-issue request has to abandon a copper  
5 facility. In today's world, no one replaces copper  
6 with copper. That's very rare. Everyone replaces with  
7 fiber. It doesn't necessarily mean you are going to  
8 provide anything new or you even have the capability to  
9 provide anything new over that facility.

10 But if Covad is denied access to that  
11 facility and they have customers that are served by  
12 that facility, then those customers don't have DSL  
13 service anymore. They don't have a choice about  
14 service. So essentially, a road construction project  
15 can determine whether there is local competition or  
16 not, and we believe that's an incorrect result. It's  
17 inconsistent with Washington law.

18 And the FCC certainly hasn't taken any  
19 definitive action to decide otherwise. In fact, they  
20 pointed out that any state copper retirement policies  
21 would continue to apply, notwithstanding their copper  
22 retirement rules that apply to fiber-for-the-home loops  
23 and their generic network notification rules.

24 CHAIRWOMAN SHOWALTER: I'm wondering on this  
25 one what kind of remedy or modification, I guess, of



0422

1 the arbitrator's report you think would be sufficient,  
2 and if we did require that the notice will include  
3 information identified in the FCC rule, including the  
4 locations at which changes will occur and a description  
5 of the types of changes planned and a description of  
6 the reasonably foreseeable effect of the plan changes,  
7 would that satisfy you? I'm trying to get a sense of  
8 where the dispute is.

9 MR. NEWELL: The dispute is really  
10 surrounding what determining the reasonably foreseeable  
11 impact means. We think it means Qwest needs to tell us  
12 whether we have customers on those facilities that are  
13 being retired so we can look at our records and  
14 determine whether it's a service that can be continued  
15 over fiber, i.e., a narrowband service, or if they are  
16 being provided DSL and their service would have to be  
17 discontinued.

18 Qwest thinks it means they broadcast these  
19 general announcements of copper retirement and tell you  
20 the DA where the copper is being retired, and it's then  
21 your job as a CLEC to go research in databases to  
22 figure out if you have any customers that are served  
23 out of that distribution area.

24 So for each and every Qwest project, you  
25 would have to look, and it takes substantial time to do

0423

1 that, and we believe the rule is clear that determining  
2 the reasonably foreseeable impact at a minimum should  
3 be tell us if we have any customers that are on those  
4 facilities, and Qwest refuses to do that going forward.

5 CHAIRWOMAN SHOWALTER: So I think the answer  
6 to my question is no, that would not satisfy you for  
7 this commission simply to repeat, more or less, what is  
8 required in the federal rule. You want direction or  
9 guidance from us on what constitutes or compliance with  
10 the requirement to state impact; is that correct?

11 MR. NEWELL: Yes, because Qwest believes its  
12 current notices comply with that requirement, and we  
13 completely disagree. So it will be necessary to  
14 implement clearer language with respect to the notice  
15 requirement.

16 COMMISSIONER HEMSTAD: Do you have such  
17 language that you proposed or that you offer to us?

18 MR. NEWELL: Yes. We proposed language that  
19 laid out the specifics of the notice, and it's  
20 consistent with notices Covad receives from other bell  
21 operating companies, other ILEC's, when they retire  
22 copper.

23 COMMISSIONER HEMSTAD: And that's in your  
24 brief?

25 MR. NEWELL: It is, and it should be in the

0424

1 issues matrix for this issue as well.

2 CHAIRWOMAN SHOWALTER: You will forgive us,  
3 but there are a lot of materials. If you are able  
4 quickly to point to any page in your brief, that would  
5 just help us.

6 MR. NEWELL: I'm not finding it. Our  
7 proposed language should be in the issues matrix, and  
8 to your point, there are a lot of materials, and we've  
9 got seven of these open now, so it's all sort of a  
10 blur.

11 CHAIRWOMAN SHOWALTER: We will find it.  
12 Anything more on this?

13 MR. NEWELL: Yes. One of Qwest's points, and  
14 I thought was interesting supporting its position that  
15 it shouldn't have to unbundle these fiber facilities  
16 that result from copper retirement, is that not having  
17 to unbundle those facilities essentially that are a  
18 result of maintenance decisions and network-driven  
19 decisions that it will encourage them to continue to  
20 deploy fiber.

21 They are already deploying fiber for  
22 efficiency reasons, and essentially what they are  
23 saying is, Give us back our monopoly and we will deploy  
24 more fiber. In the maintenance context, it doesn't  
25 make a lot of sense, and this reminds me of a story

0425

1 that Professor Phil Wiser loves to tell at the  
2 University of Colorado. He loves to tell it because  
3 he's told the story about five times about decades ago,  
4 Dow-Corning went to AT&T and said, We have this great  
5 new technology, fiber optics, and we want to build  
6 fiber-optic cabling for you, and you can run long-haul  
7 fiber all over the country, and AT&T said to them --  
8 this is predivestiture -- Well, we have 10 years  
9 depreciation left on our current plan, so we aren't  
10 going to touch it until then, and by the way, whenever  
11 we do get around to deploying fiber-optic technology,  
12 we will manufacture it and do it ourselves.

13 I think that's essentially what we are going  
14 to be back to if we let Qwest remonopolize the local  
15 network by deploying fiber, and that's really over time  
16 is exactly what this copper retirement issue could do  
17 if you adopt Qwest language. They could literally put  
18 an inch of fiber in every loop or put a fiber  
19 distribution panel right next to their distribution  
20 frame in the central office and run a fiber  
21 cross-connect and claim they have no unbundling  
22 obligations to any of their local plant anymore.

23 COMMISSIONER HEMSTAD: What will you have us  
24 do about that?

25 MR. NEWELL: Our proposal is that we would

0426

1 maintain access to an alternative service that could be  
2 provided over those facilities. We don't want access  
3 to the whole broadband capabilities of whatever they  
4 deployed to take advantage of any next-generation  
5 facilities they deploy.

6           We will deploy our own next-generation new  
7 facilities if the economics make sense. We just don't  
8 want to lose customers because of a road construction  
9 project or because Qwest decides, Well, capacity out in  
10 this neighborhood is becoming a problem. There is a  
11 new development or whatever, so we are just going to  
12 convert all these customers to a fiber facility, and  
13 when they do that, if we don't have access to the fiber  
14 to provide DSL, those consumers don't have a choice as  
15 to if they want DSL service, broadband service.

16           CHAIRWOMAN SHOWALTER: Isn't your argument a  
17 consequence of how the FCC has drawn lines around fiber  
18 broadband, other things, and you are seeking to remedy  
19 those lines through us?

20           MR. NEWELL: Not really, and that's the  
21 reason our proposal is as narrow as it is to try to  
22 steer clear of the specific FCC rulings with respect to  
23 broadband loops, next-generation loops.

24           They made it clear that they want to promote  
25 the deployment of fiber to the home and fiber to the

0427

1 curb, and the way they've chosen to do that, like it or  
2 not, is let the bells remonopolize those facilities.  
3 That's the decision, and so we've steered clear of  
4 those fiber-to-the-home and fiber-to-the-curb loops for  
5 that reason.

6           What the FCC clearly was not doing was, and  
7 we discussed this in our brief, they were clearly not  
8 talking about routine network grooming and maintenance  
9 projects. There is no discussion, no analysis of why  
10 they want to encourage that by relieving unbundling  
11 obligations.

12           CHAIRWOMAN SHOWALTER: Your time is up.  
13 Mr. Devaney?

14           MR. DEVANEY: Thank you, Chairwoman. Before  
15 I get into the merits of the argument, I want to, I  
16 guess, express some disgruntlement that Covad is  
17 suggesting that Qwest is acting improperly by deploying  
18 fiber.

19           As the Commission is aware, the Act, the  
20 FCC -- the Act is structured and the FCC has emphasized  
21 that the deployment of fiber is supportive in the  
22 advance of telecommunications services, a critical part  
23 of the Act, and Chairman Powell and the other FCC  
24 commissioners have been on a march for quite awhile now  
25 to encourage carriers to deploy fiber to really advance

0428

1 telecommunications services to people throughout this  
2 country, and to suggest that Qwest is somehow acting  
3 improperly by deploying fiber is something we have to  
4 take exception to.

5           This issue of copper retirement goes hand in  
6 hand with the policy of encouraging the deployment of  
7 fiber. Simply put, if we can't retire our copper  
8 facilities, we have reduced incentive to deploy fiber,  
9 because if you deploy fiber and you have to leave  
10 copper in the ground, you have to maintain both and  
11 incur the costs of maintaining both. So there is the  
12 investment incentive here that really underlies the  
13 FCC's ruling, very clear ruling in the TRO, that ILEC's  
14 have a right to retire copper facilities.

15           CHAIRWOMAN SHOWALTER: So you would take  
16 Professor Wiser's story and turn it around.

17           MR. DEVANEY: Exactly. And I also wanted to  
18 really emphasize the context of this issue. It sounds  
19 like a very complicated issue with potentially major  
20 consequences, but very important, and the evidentiary  
21 record supports this, not once in the state of  
22 Washington has Qwest ever retired a copper loop that  
23 resulted in discontinuance of a service for a Covad  
24 customer. Moreover, not once in our entire 14-state  
25 region have we ever retired a copper loop that resulted

0429

1 in discontinuance of service for a Covad customer.

2 CHAIRWOMAN SHOWALTER: Are those two  
3 statements supported in the record of this proceeding?

4 MR. DEVANEY: Ms. Doberneck testified on  
5 behalf of Covad acknowledged that, and in our brief, we  
6 cite to that portion of the transcript.

7 Equally significant, Ms. Doberneck testified  
8 that this issue could only potentially affect a handful  
9 of customers in Washington, and I think the number was  
10 even something less than ten. So we are not talking  
11 about a major issue that's going to affect large  
12 numbers of customers. In fact, we are talking about an  
13 issue that's never arisen and involves at most a  
14 handful of customers.

15 That said, on legal grounds, we feel like the  
16 arbitrators' report is exactly on point, because in the  
17 Triennial Review Order, it's undisputed. The FCC gave  
18 ILEC's the right to retire copper facilities. Nowhere  
19 in there is there a suggestion that we can only retire  
20 facilities if we provide an alternative service, which  
21 is what Covad has proposed, that we can only retire if  
22 we provide them with an alternative service.

23 It does not increase the current amounts they  
24 pay to Qwest. I'm emphasizing that point for a reason.  
25 Today for DSL service in Washington, Covad pays Qwest a



0430

1 recurring monthly rate of \$3.96. Under their proposal,  
2 if we had to provide this alternative service, which is  
3 nowhere found in the Triennial Review Order, we  
4 couldn't recover anything more than \$3.96 a month.

5 I don't know what this alternative service is  
6 because they haven't proposed any contract language  
7 that defines it, but let's say hypothetically as we  
8 discussed in our brief that it costs us ten dollars a  
9 month to provide. Under their proposal, and they admit  
10 this, we would only be able to recovery \$3.96.

11 As the Commission is aware under the Act,  
12 specifically Section 252(d)(1), we as an ILEC have a  
13 right to recover the costs we incur to provide  
14 unbundled elements in interconnection, and their  
15 proposal flatly contradicts that by denying us cost  
16 recovery and also denying us a profit, which we are  
17 also entitled to under the Act. To us, that's a fatal  
18 flaw in their proposal, in addition to the fact that  
19 nowhere in the TRO can you find support to this  
20 alternative service requirement.

21 Final point on this issue goes to the notice  
22 question. We are more than happy and have proposed in  
23 our own language that we will live with the  
24 requirements of the FCC in providing notice, and in  
25 particular --

0431

1 CHAIRWOMAN SHOWALTER: Don't you have to?

2 MR. DEVANEY: We do. But in particular,  
3 51.327 sets forth the notice requirements, and while  
4 one could call it a preexisting obligation, it's one we  
5 accept. So I just wanted to make it clear to the  
6 extent the Commission was thinking of enumerating the  
7 obligations the FCC has set forth, we are very  
8 comfortable with that, and our language indicates that  
9 we will comply with all FCC notice requirements.

10 COMMISSIONER HEMSTAD: Isn't there a  
11 disagreement between the parties here as to  
12 specifically what notice Qwest has to provide?

13 MR. DEVANEY: The one area of disagreement I  
14 can detect on the notice issue goes to the question of  
15 whether when we retire a copper loop, do we have an  
16 obligation to say to Covad, We are retiring a copper  
17 loop on Elm Street, and by the way, you are providing  
18 service to a customer on Elm Street, and your customer  
19 is going to be affected by this retirement.

20 We don't think we should have to do that  
21 because number one, we don't know what services Covad  
22 is providing to those customers in all cases. Two, we  
23 don't think we should be put at risk of saying their  
24 customer service is or is not affected by the  
25 retirement of a loop. That is something they can

0432

1 determine when we let them know that we are retiring a  
2 loop on Elm Street. They can go to their own records  
3 and say, Oh, we are providing Joe Jones this service  
4 that's going to be affected by this retirement.

5 We don't think that's our obligation. We are  
6 going to give them enough information by saying we are  
7 retiring that loop on Elm Street so they can figure out  
8 whether their own customer is affected.

9 We don't think we need to go that extra step  
10 to say, Yes, Joe Jones is affected by that retirement.  
11 That's something they can do, and we don't like to take  
12 the risk of maybe getting it wrong. What if we say Joe  
13 Jones isn't affected but he is? That's not an area we  
14 want to dabble in, and I think that's where we  
15 fundamentally disagree.

16 COMMISSIONER OSHIE: If that's true,  
17 Mr. Devaney, what's the point of Subsection 6 of the  
18 FCC's rule where it deals with the description of a  
19 reasonably foreseeable impact to the plan changes?

20 Your point is to what appears to be four and  
21 five, location where the changes are going to take  
22 place, and then as to five, a description of the type  
23 of changes that are planned, and that's just saying we  
24 are going to change something on Elm Street, but then  
25 the FCC goes further and says, Well, you've got to tell

0433

1    them what you think the reasonably foreseeable impact  
2    would be.

3                    That's kind of fuzzy language.  It's  
4    ambiguous as to what that might be, but it seems as if  
5    Qwest isn't willing to take that next step --

6                    MR. DEVANEY:  Well, I think for example, one  
7    could say that means that you can talk about the types  
8    of services that would be affected by the retirement in  
9    the notice.  I don't think it goes so far as to saying  
10   you identify for Covad whether Joe Jones is affected.

11                   We are not willing to go that extra step, but  
12   giving impacts such as, Here are the types of services  
13   that could be affected, that's closer to something  
14   that's reasonable, but identify specific customers,  
15   which is what they want us to do --

16                   COMMISSIONER HEMSTAD:  However we decide it,  
17   do you agree that we should determine rather precisely  
18   what information you do have to provide?

19                   MR. DEVANEY:  We certainly are comfortable  
20   with that, certainly if there is specificity --

21                   COMMISSIONER HEMSTAD:  If we leave it in the  
22   generalized language of the statute, and I assume the  
23   two parties will continue to argue about what that  
24   means.

25                   MR. DEVANEY:  That's a fair point.

0434

1                   CHAIRWOMAN SHOWALTER: I have a question on  
2 that, because if we say in this order that we will put  
3 out that you must follow the FCC rule and you must  
4 provide, quote, a description of the reasonably  
5 foreseeable impact of the plan changes -- that's the  
6 level of the agreement -- then wouldn't it be a factual  
7 matter, a violation of the agreement, if sometime in  
8 the future you put out a notice, someone, some party  
9 such as Covad says, You didn't give us a description of  
10 the reasonably foreseeable future impact of the plan  
11 changes.

12                   So what I'm trying to draw here is the  
13 agreement is going to have some level of specificity,  
14 but surely it wouldn't be as specific as whatever the  
15 facts require when you go around to Elm Street and say  
16 whatever it is you have to say. In a way, I'm taking  
17 the adverse side of Commissioner Hemstad's question,  
18 but this is an agreement. It's not a specific time and  
19 place contractual agreement.

20                   So there is only so far we are able to go in  
21 terms of specificity. What level is that? Even if we  
22 went further than this and said, Such as, then we could  
23 fill out further detail on this provision, and still  
24 there would be ultimately factual issues to whether the  
25 ILEC did or didn't, in the real world sense, give the

0435

1 kind of notice that we require.

2 MR. NEWELL: I think for Covad it's pretty  
3 cut and dry. All we need to know is do we have  
4 customers on the loops you are retiring, because the  
5 way Qwest provides the notice today, it lists  
6 distribution areas, which is not how Covad or anyone  
7 else tracks customers. It's not information that we  
8 have that's readily searchable for us. We would have  
9 to go to a Qwest database and perform a major research  
10 project to even understand if we had a customer.

11 CHAIRWOMAN SHOWALTER: So if it's just  
12 customers then, that's a little different, Mr. Devaney,  
13 then saying, Your customer will lose service. Is there  
14 a problem with us requiring that you include a list of  
15 customers affected? Do you know who the customers are?

16 MR. DEVANEY: I honestly don't know the  
17 answer to that, whether we have the ability to say  
18 there is a Covad customer that would be affected by the  
19 retirement of a specific loop.

20 COMMISSIONER HEMSTAD: This is a question to  
21 Mr. Newell or maybe both. Your point was you would  
22 have to research the Qwest database. Won't Qwest have  
23 to do the same thing? Doesn't it become an issue of  
24 who does the search?

25 MR. NEWELL: Yes, but not to an equal agree.

0436

1 Qwest is able to search its circuits by DA much easier  
2 than Covad can, as I understand it. In fact, we  
3 believe that originally, prior to some policy changes  
4 at Qwest, they were actually running these checks and  
5 determining if there were CLEC lines that were impacted  
6 by retirement, and they are just no longer doing that.

7 Not to the same degree. It's not a major  
8 research project for Qwest. They are already involved  
9 in a major research project by doing the retirement.  
10 These are fairly big deals when they happen, and also,  
11 the FCC rule puts the obligation on the ILEC to  
12 determine the reasonably foreseeable impact, so to the  
13 extent there is research to be done, we believe it  
14 should be up to the ILEC at least to determine our  
15 customers, and we will determine whether our service is  
16 impacted by what they describe as the retirement. We  
17 don't need Qwest to do that for us.

18 CHAIRWOMAN SHOWALTER: Mr. Devaney, we  
19 started eating into your time.

20 MR. DEVANEY: I just have one additional  
21 point to make that Mr. Reynolds helped me with, and  
22 that is that Qwest leases on a wholesale basis loops to  
23 Covad, and what Covad does with those loops and the  
24 customers for whom it provides those loops is a matter  
25 between Covad and its customers, and while we know the

0437

1 general area where a loop is being used by Covad, we  
2 don't know who their specific customers are.

3           So for us to be obligated to say, Tell us  
4 which of our customers are affected, I don't think we  
5 can do. We can certainly tell them, There is a loop in  
6 this area of town that's being retired, and they have  
7 the addresses of their customers. I have a hard time  
8 believing it's an extensive research project. When we  
9 say there is a loop being retired on Elm Street, they  
10 can look and see if they have customers on Elm Street  
11 and make a decision about whether their customer is  
12 going to be affected.

13           I'm not disputing we have an obligation to  
14 provide for impacts, talk about locations, but you've  
15 got to draw a line at some reasonable point, and I  
16 don't think that line is at the level of customer  
17 identification.

18           CHAIRWOMAN SHOWALTER: Thank you. Shall we  
19 move to Issue No. 5? Issue No. 5 is channel  
20 regeneration. This one is ten minutes per side.

21           MR. NEWELL: Thank you, Chairwoman.  
22 Essentially, I think it will be easier to start with a  
23 description of what we are talking about to make sure  
24 that we all are on the same page. Some of us are so  
25 close to it that we assume things, assume knowledge



0438

1 that is a little unfair.

2           Within a central office, occasionally one  
3 carrier, one CLEC will want to cross-connect to another  
4 CLEC to cooperatively provide a service. Depending on  
5 how far away their collocations are in a central  
6 office, a circuit will have to be boosted or  
7 regenerated in order to make that connection, and that  
8 requires regeneration equipment. If CLEC's are  
9 required to place that equipment themselves, which  
10 Qwest says they will allow under Qwest's collocation  
11 policy --

12           CHAIRWOMAN SHOWALTER: Required or allowed  
13 you mean? You said CLEC's are required to place it  
14 themselves.

15           MR. NEWELL: Required due to the technical  
16 issues. Qwest will not force someone to place  
17 regeneration, but as a practical engineering matter,  
18 you have to, and you have to place it somewhere close  
19 to mid span between the two collocations to make it  
20 work, which means under Qwest policies, they are not  
21 just going to allow you to throw that regeneration  
22 equipment into a cable rack. You have to buy another  
23 collocation mid span to regenerate the service.

24           And first of all, there is no guarantee that  
25 there will be space available where you need it to be.

0439

1 Second of all, it's a cost-prohibitive remedy to  
2 provide a cross-connect. It's the equivalent of  
3 saying, Go build your own copper loop plant. It's just  
4 not practical. As a practical matter, if the CLEC is  
5 faced with that decision, they are not going to  
6 cross-connect with another CLEC.

7 Qwest maintains that they don't have to  
8 provide a wholesale cross-connection product. They do  
9 have a retail product. They have considerable freedom  
10 as to how they price that product or whether they are  
11 going to offer it at all, and we believe that's  
12 improper.

13 It is a vital collocation element. It's  
14 subject to 251(c)(6) of the Act, which governs  
15 collocation, or just, reasonable, and nondiscriminatory  
16 terms, and it's clearly discriminatory for a CLEC to  
17 have to incur that type of expense when Qwest itself  
18 wouldn't have to incur that expense, and it creates a  
19 market disproportion where it is much easier to connect  
20 with Qwest's network and purchase services from Qwest  
21 than it would be to connect to another CLEC that's  
22 collocated and purchase services from them or work in  
23 partnership with them. That's clear discrimination.  
24 That should be remedied under 251(c)(6).

25 CHAIRWOMAN SHOWALTER: You said it would be

0440

1 prohibitively expensive for Covad or AT&T on a  
2 cross-connect. You said it would be prohibitively  
3 expensive for the two of you to somehow pay for that  
4 regeneration expense. Did you say that?

5 MR. NEWELL: It's not the regeneration  
6 expense. It's the expense under Qwest's collocation  
7 policies to buy the space to place that. The minimum  
8 amount of space you could buy is one bay, which is  
9 grossly more space than you would need to place the  
10 equipment. You would have to buy a separate power  
11 lead. You have to pay a separate monthly charge for a  
12 collocation space just to regenerate the signal that  
13 Qwest could regenerate on their own frame for pennies.

14 You are essentially taking a relatively  
15 inexpensive service, one that this commission ruled, at  
16 least in the ILEC to CLEC context, should just be  
17 rolled into common cost, and there shouldn't be a  
18 specific rate for it. You are taking that element and  
19 you are deciding that it's okay for a CLEC to incur  
20 thousands and thousands of dollars, I think a  
21 collocation is going to run. Even a one-bay  
22 collocation is at least twenty thousand dollars.

23 CHAIRWOMAN SHOWALTER: Thank you for that  
24 answer, the sort of economic argument you are making.

25 On the issue of terminology, I am really

0441

1 confused; that is, what is wholesale and what is  
2 retail? I was thinking of this analogy, and I don't  
3 know if it is an appropriate analogy, but if Dell  
4 computers buys a chip from Intel, I think to Dell,  
5 that's a wholesale purchase. They are buying wholesale  
6 from Intel to put into their computers to ultimately  
7 sell retail, but from Intel's point of view, that's a  
8 retail sale, that Dell is Intel's end-use customer.  
9 It's done as soon as it sells.

10           And I'm just having trouble with what is  
11 wholesale and retail here. From Covad's point of  
12 view -- well, I'm really not certain, and I'll just ask  
13 both of you this. Frankly, I'm surprised that the FCC  
14 had a retail tariff for this, so that says to me there  
15 are some kind of company purchasers, maybe ISP, I don't  
16 know, that buy retail under an FCC tariff, that surely  
17 they aren't ultimate end users.

18           MR. NEWELL: You make an excellent point, and  
19 what you've picked up on is the shifting use of the  
20 terminology.

21           At least the way I'm using it, I think of  
22 access service, at least when I'm talking about this  
23 issue, that's what I'm calling retail, but in  
24 actuality, it's probably more precise to call them  
25 non-UNE wholesale services, non-Telecom Act wholesale

0442

1 services, and primarily, they are used by interexchange  
2 carriers that collocate to provide long-distance  
3 service. They have a history much longer than  
4 unbundled elements under the Act, and what Qwest has  
5 said is, You can purchase the product we provide to the  
6 ISP's that we provide at a non-TELRIC rate at  
7 essentially a marked-up rate.

8           So that's the genesis of the FCC tariff  
9 element. We maintain that it is a vital collocation  
10 element, so it's a 251(c)(6) element. What the  
11 arbitrator's report seemed to say was, Yes, we agree  
12 that it is a Telecom Act 251(c)(6) service. It doesn't  
13 say that specifically, but it seems to be leaning that  
14 direction, and then note there is no TELRIC rate that's  
15 been established by this commission that could be  
16 charged, and that's where we part ways with the  
17 decision.

18           This commission has considered the issue of  
19 pricing regeneration and has decided to roll it into  
20 common cost, and there is no reason that this  
21 regeneration between CLEC's can't be rolled into those  
22 common costs too and be treated in the exact same way  
23 as ILEC-to-CLEC regeneration.

24           COMMISSIONER OSHIE: Mr. Newell, I want to go  
25 back to a statement you made as to how Qwest can

0443

1 provide the same service that you just described that  
2 the CLEC's would have to undertake, and if they could  
3 regenerate the same signal from their own mainframe, I  
4 guess, they are not required then to install the same  
5 cogeneration equipment that the CLEC's would have to  
6 install?

7 In other words, wouldn't Qwest have to do the  
8 same thing that the CLEC's would have to do to  
9 regenerate that signal?

10 MR. NEWELL: You have economy-of-scale issues  
11 first, but physically, it's the same service, but like  
12 I said, first you have the economy of scale, and also,  
13 Qwest doesn't have to pay for collocation space in its  
14 own central office, so --

15 COMMISSIONER OSHIE: I agree with that, but  
16 physically, wouldn't Qwest have to perform the same  
17 functions as the CLEC's would, only in this  
18 circumstance, they would be performing them within the  
19 context of the CLEC's facilities?

20 You would be asking Qwest to install their  
21 equipment on your facilities to provide the service,  
22 and I'm trying to get to the cost issue in a general  
23 way. Wouldn't Qwest incur the same costs? You are  
24 essentially saying economy of scale. Maybe that means  
25 they can buy the equipment at a less expensive price,

0444

1 and there is that kind of economy of scale.

2 MR. NEWELL: It really isn't about the cost  
3 of the regeneration equipment. It's the cost imposed  
4 by the Qwest collocation policies of paying for the  
5 space and whether the space is even available that  
6 create the problem.

7 We are not here arguing, We don't want to pay  
8 whatever it costs to buy a regeneration box. We can  
9 pay for a regeneration box. What we can't pay is a  
10 discriminatory rate or rate that ends up being  
11 discriminatory to buy space and the power and all of  
12 that to place the equipment, and when Qwest provides  
13 the service, all they do is run a jumper to their frame  
14 to the regeneration equipment and a jumper back to the  
15 next space.

16 CHAIRWOMAN SHOWALTER: I think we are done on  
17 that one, or your time is up anyway.

18 MS. WAXTER: Interestingly,  
19 Mr. Newell's almost entire argument you will not find  
20 in the record. There was no record evidence with  
21 respect to the cost that Covad would incur to set up a  
22 separate collocation mid span between two CLEC  
23 collocation spaces.

24 And I think it's important though to  
25 understand that we are talking really two different

0445

1 connections here. There is a direct connection where  
2 you've got CLEC A and CLEC B, and either of those  
3 CLEC's can run a connection directly from their  
4 collocation spaces to the other where they don't have  
5 any interaction with any kind of Qwest equipment.  
6 That's called a direct-connect.

7           There is also a CLEC-to-CLEC connection which  
8 can go through an ICDF, or an interconnection  
9 distribution frame, and in that instance, CLEC A and  
10 CLEC B would take their own facility, run it to a  
11 common facility, and in that case, they can ask Qwest  
12 to run a jumper between those two facilities on the  
13 ICDF.

14           Now, the regeneration parameters surrounding  
15 each of those two connections is very different. On  
16 the first one I described, the direct connection, a  
17 CLEC, either of those CLEC's can regenerate the signal  
18 from their own collocation space if that distance is  
19 required by the ANSI standards, and even though these  
20 signals will be boosted before it really needs to be  
21 boosted or regenerated, it can still carry a longer  
22 distance.

23           Now, what Mr. Newell was talking about is on  
24 that direct connection, if a CLEC chose to instead of  
25 boosting a signal from a collocation space but chose



0446

1 instead to pick a mid span or something in between the  
2 two collocation spaces that they would need to  
3 essentially purchase or set up their own repeater in  
4 their own collocation space. Again, in that direct  
5 connection, Qwest has nothing to do with that  
6 interconnection, if you will, between the two CLEC's.

7           On the ICDF, the second one, Qwest can be  
8 asked at that point to when they run the jumper to  
9 boost the signal, if need be, and it's that instance  
10 that the CLEC would, in essence, purchase a product out  
11 of the interconnection tariff which would include the  
12 regeneration of the signal. So there are two very  
13 different situations. In one, Qwest is involved. In  
14 one, Qwest is not involved.

15           The important thing to note is that when  
16 looking at the FCC's Fourth Advanced Services Order,  
17 very simply, it does not require Qwest to provide a  
18 connection or to provision a connection between two  
19 CLEC's if Qwest permits the CLEC's to do it themselves.

20           Now, I've described for you that  
21 direct-connect, and Qwest says to the two CLEC's, You  
22 can connect yourself. You don't have to touch a Qwest  
23 facility. You can provision it yourself, and because  
24 Qwest permits the CLEC's to do that, we have no  
25 requirement to provide a connection or to provision a

0447

1 connection because we tell the CLEC's they can do it  
2 themselves.

3           And not to oversimplify the issue, but that's  
4 really the issue, and to get to your question about the  
5 terminology of wholesale versus retail, I do agree with  
6 Mr. Newell. It really surrounds the pricing of it and  
7 what the FCC requires, and if the FCC required Qwest to  
8 provision a cross-connect and to price it at a TELRIC  
9 rate, then we probably would be talking about something  
10 very different, but the Fourth Advanced Services Order  
11 clearly says we don't have to do that if we let them do  
12 it themselves.

13           CHAIRWOMAN SHOWALTER: Just to help me out on  
14 this, I thought it was helpful to try to define  
15 "retail," weird as it sounds, to be non-Federal Act  
16 required services. Did you agree with that  
17 paraphrasation?

18           MS. WAXTER: I do. Mr. Newell said that the  
19 difference in the pricing between a wholesale and a  
20 retail product is the wholesale is at TELRIC and the  
21 retail is at a marked-up rate. It's actually a market  
22 rate, not a marked up.

23           CHAIRWOMAN SHOWALTER: I actually thought he  
24 said "market." I heard "market."

25           MS. WAXTER: That's how we would characterize

0448

1 it certainly.

2 CHAIRWOMAN SHOWALTER: So is another way to  
3 think of this is that the retail rates are the old  
4 style of the FCC setting a tariffed rate, but the basis  
5 nowadays for the FCC accepting the tariffed rate is not  
6 the old cost-of-service methodology. It's some other  
7 methodology, maybe perhaps even market.

8 MS. WAXTER: Actually, I haven't been around  
9 telecom that long, so I'm not sure I can give you an  
10 historical perspective.

11 CHAIRWOMAN SHOWALTER: You have helped me.  
12 Thank you.

13 MS. WAXTER: I would also mention though that  
14 if Covad truly felt a CLEC-to-CLEC connection, which  
15 includes regeneration, was a wholesale service that  
16 should be priced at a TELRIC rate, they certainly could  
17 have and would have raised it in any one of the cost  
18 dockets that occurred in any of the states, and they  
19 have not done so, and especially have not done it in  
20 Washington, yet they have participated in the  
21 cost-docket cases.

22 So the CLEC-to-CLEC connection, which  
23 includes regeneration, has not come up in a cost  
24 docket, has not been TELRIC rated, and simply because  
25 the FCC doesn't require it.

0449

1           CHAIRWOMAN SHOWALTER: Aren't they starting  
2 at an earlier point, which is they say there is a  
3 wholesale rate, zero, which is a TELRIC rate, and this  
4 is a wholesale product and we want to buy it?

5           MS. WAXTER: Thank you for bringing that up,  
6 actually, because I think throughout the arbitration  
7 proceeding, Covad has actually confused and attempted  
8 to blend an ILEC-to-CLEC connection with a CLEC-to-CLEC  
9 connection, and they are two very different scenarios,  
10 and as I understand it, the rate that Mr. Newell, that  
11 Covad has discussed with respect to being TELRIC-rated  
12 is actually the ILEC-to-CLEC connection, which in  
13 Washington is zero-rated at this time, but it's very  
14 different than a CLEC-to-CLEC connection.

15           CHAIRWOMAN SHOWALTER: What about the  
16 question of how you treat yourself? Is there an issue  
17 of discrimination here then?

18           MS. WAXTER: Qwest will boost a signal if  
19 need be when it is connecting itself to another CLEC or  
20 itself to itself. I'm not sure about that second  
21 scenario, but it will boost a signal if need be.

22           Similarly, I don't think there is a  
23 discrimination issue, because what we are saying to  
24 Covad is, You can boost your signal too. We don't  
25 police or tell you what you can or cannot put in your

0450

1 collocation spaces, so if you want to put repeater  
2 equipment in there, go to it.

3 CHAIRWOMAN SHOWALTER: What if the span is  
4 too long and it requires the company buy a new cage  
5 for a lot of money that Qwest would not have to do if  
6 it had such a long span?

7 MS. WAXTER: If I'm understanding your  
8 question correctly, the ANSI standards set what the  
9 span is so the span is the span is the span. If Qwest  
10 had a connection they had to make at the same distance  
11 that Covad would have to make, both parties would have  
12 to do the boosting. If your question is directed to  
13 the location of the collocation space; is that where  
14 you are going?

15 CHAIRWOMAN SHOWALTER: My question was  
16 assuming, I'm not sure appropriately, but it was  
17 assuming that Covad couldn't make the booster or the  
18 improvement without buying a new location in the  
19 building for that purpose, which costs a lot of money,  
20 which Qwest would not have to do because it doesn't  
21 need to buy collocation from itself. At least that was  
22 the argument I heard Mr. Newell make, and I wondered  
23 what your response was.

24 MS. WAXTER: As I understand it, Qwest is not  
25 required to, and I hope I'm going to say this right,

0451

1 but Qwest is not required to provision CLEC connections  
2 in the same way it provisions its own, if you will, so  
3 there is not a discrimination issue.

4 Qwest would still have to boost the signal,  
5 would still have to have the equipment somewhere in its  
6 central office to do the boosting of the signal. The  
7 fact that Covad or another CLEC would have to purchase  
8 that equipment and put it somewhere doesn't create a  
9 discrimination issue.

10 CHAIRWOMAN SHOWALTER: So you are saying that  
11 even though Qwest could do it more cheaply than Covad,  
12 it's not a discrimination problem.

13 MS. WAXTER: That's correct.

14 CHAIRWOMAN SHOWALTER: I think we are up on  
15 time for that one. That gets us to our last issue,  
16 which is the payment issue, Issue No. 8. This is ten  
17 minutes a side. Mr. Newell?

18 MR. NEWELL: Thank you. Before I start, I'll  
19 just note to Ms. Waxter's point about the fact that  
20 Covad or no one else had raised the regeneration issue  
21 in prior cost proceedings, there is a discussion as to  
22 why no one did that in our petition for review.  
23 Everyone was led to believe that the wholesale product  
24 did include regeneration, but I won't bore you with  
25 details of that now. It's in the brief.

1           With respect to billing, what Covad did on  
2 the record in this proceeding was lay out some very  
3 specific, very problematic issues with respect to Qwest  
4 bills that make them difficult to reconcile  
5 electronically, which causes Covad to incur the time  
6 and cost of a manual review.

7           The general standard for billing between  
8 carriers is that bills should be electronically  
9 verifiable. Qwest's position is they are verifiable.  
10 They are just not verifiable in the same format that  
11 all the other bells provide the bills.

12           The ALJ found that these were serious  
13 problems and suggested that rather than adopt Covad's  
14 proposal, it would give them enough time for manual  
15 verification. It should take the issue to the Change  
16 Management Process and have Qwest make the changes to  
17 its system to bring it in line with industry norms.

18           Since the hearing in this matter, the  
19 decision in this matter, Qwest has rejected our request  
20 to do that, so to the extent this problem was going to  
21 get solved, it's going to get solved in this  
22 arbitration proceeding and not likely through the  
23 Change Management Process unless something happens in  
24 the escalation procedures.

25           Our point is if the bills continue to be what

0453

1 they are today, we need more time to review them  
2 because we have to engage in a manual verification  
3 process for a lot of these items because they are not  
4 able to be electronically verified.

5 CHAIRWOMAN SHOWALTER: Why is your request to  
6 extend from 30 to 45 days? I think your request would  
7 be to have a different -- well, the request you just  
8 made to Qwest, but that you would want us to -- strike  
9 that.

10 You would want to arbitrate or negotiate the  
11 issue of how you were going to verify the bills. In  
12 other words, I would think that you would be saying,  
13 Yes, 30 days is a standard amount of time for anybody  
14 to pay their bills, but meanwhile, Qwest, you need to  
15 send us a bill we can verify in 30 days, as distinct  
16 from, If you are going to send us this kind of bill, we  
17 need 45 days to verify it.

18 MR. NEWELL: That's an excellent question. I  
19 think under the arbitrator's decision in this case, she  
20 seemed to agree that the Change Management Process is  
21 the only forum to take up that billing format issue.  
22 If this commission were to order that, I believe that  
23 would go into the Change Management Process as a  
24 regulatory change that would be mandated that would  
25 have to be made, and certainly, we would be overjoyed



0454

1 if that happened.

2 I think our position was that since anything  
3 that would have to be done would have to go there CMP,  
4 that rather than fight that battle in a forum that when  
5 you are in direct conflict with the incumbent LEC, the  
6 Change Management Process is not a very useful process.  
7 It's a great collaborative process when everybody has  
8 the same goal, but when there is resistance from Qwest,  
9 it's not a particularly useful process. So our thought  
10 was in the meantime until this is fixed, if ever, we  
11 just need more time to try to verify these manually.

12 COMMISSIONER OSHIE: Mr. Newell, aren't there  
13 provisions within the contract that allow for a  
14 reconciliation of any particular bill so that payment  
15 could be made within a 30-day time frame? I don't know  
16 whether it would have to be notice of some problem with  
17 the bill would have to be given under the agreement. I  
18 don't know whether that's required in 30 or 60 days,  
19 but isn't that really a period in which the  
20 reconciliation can be done?

21 I'm assuming we are not talking about either  
22 have to pay one hundred percent of the bill or zero of  
23 the bill. The question is whether you have to pay some  
24 small fraction of the bill. Isn't that really -- well,  
25 it seems to me that's at least maybe not a totally

0455

1 satisfactory remedy to Covad, but at least it's a  
2 remedy in dealing with this issue that you are talking  
3 about.

4 MR. NEWELL: Here's the problem. Until you  
5 verify the bill, you don't know how much to pay, so you  
6 can blindly pay something, and if you are wrong, which  
7 inevitably you will be every month if you are doing it  
8 blindly, if you overshoot, you are paying too much and  
9 you have to wait for your refund, and if you  
10 undershoot, you are paying late-payment charges.

11 And to your point about the dispute period,  
12 that's true, and if you extend the payment deadline,  
13 that extends the dispute deadline as well and gives  
14 enough time that we expect most months, we'll be able  
15 to verify the bill within 45 days and make the payment,  
16 and if there is a dispute, we'll have it identified and  
17 laid out.

18 But there may be months here and there where  
19 we will need that additional dispute period after a  
20 payment to identify disputes, but that's not a very  
21 efficient way, month to month, to handle bill  
22 verification. Monthly disputes is not acceptable, and  
23 paying the invoices blindly is not acceptable either.

24 COMMISSIONER OSHIE: I know it doesn't  
25 exactly work this way in the real world, but it seems

0456

1 as if you need 45 days, you have 30, and you will be  
2 able to reconcile at least two thirds of the bill at  
3 that point. I mean, we are talking about percentages  
4 here, and it just squeezes it down a little more, and I  
5 understand the principle, and I think just as a  
6 practical matter, how big of an issue really is this?

7 MR. NEWELL: It's a huge issue, and it's laid  
8 out in the record that it creates obsolete compliance  
9 issues, because when you report financials and you  
10 represent that you have clean books, part of that is  
11 knowing what you are paying your vendors and whether  
12 that's the correct amount. If you don't have time to  
13 know before you pay them and you are incurring late  
14 payment charges or you are losing the use of that  
15 money, you have a problem.

16 The other point I should make on the 45-day  
17 interval, and one of the criticisms that we heard from  
18 Qwest on this is if you have 45 days, now you have  
19 overlapping billing cycles, because we are going to  
20 send you a bill every 30 days, and the answer to that  
21 is that's fine. We are not going to spend 45 days  
22 reviewing the bill.

23 Often what happens is there is a question.  
24 There is something that needs to be clarified with  
25 Qwest that takes a few days for those answers to come

0457

1 back, and it might not be every month that we need more  
2 than 30 days, but there will be months when we do, and  
3 we want that time and not have to pay interest charges,  
4 but the sole source of it is there is a way to provide  
5 these invoices with the circuit identifications with  
6 the USOC's the way all the other bells do, but Covad's  
7 need to be electronically verified.

8 CHAIRWOMAN SHOWALTER: Why wouldn't you take  
9 the 45 days every time, because then you get the float?  
10 It seems to me that you would be kind of silly not to  
11 take the 45 days because Qwest is --

12 MR. NEWELL: My point was not that we  
13 wouldn't take the 45 days each billing cycle --

14 CHAIRWOMAN SHOWALTER: But you need the 45  
15 days.

16 MR. NEWELL: We wouldn't necessarily need it,  
17 but that's true of any time frame. That's true of 30  
18 days. There is a float involved in 30 days, and  
19 depending on the complexity of the bill at 30 days, you  
20 might not need 30 days to do the review.

21 CHAIRWOMAN SHOWALTER: Thank you.

22 Ms. Waxter?

23 MS. WAXTER: First of all, let me go to the  
24 question you asked Mr. Newell with respect to why not  
25 arbitrate the issue with bill content, essentially, in

0458

1 until this particular proceeding, and the answer to  
2 that is this is not the proper place to arbitrate the  
3 content of a bill.

4 The Change Management Process, CMP, is the  
5 place to arbitrate that because it is a collaborative  
6 effort, all CLEC's who will be affected, and since all  
7 CLEC's get the same bill, essentially, all should have  
8 a say in the process as far as what the bill content  
9 would be, and so an individual arbitration proceeding  
10 is not the place to discuss the content of the bill or  
11 whatever billing questions or issues Covad may have --

12 CHAIRWOMAN SHOWALTER: Can you answer this?  
13 Let's say that's true, that it should not be done  
14 individually. It should be done generically, but the  
15 Change Management Process I'm not certain is guaranteed  
16 to produce that.

17 My bottom-line question is what is your  
18 obligation, if any, to produce a bill that is  
19 verifiable within 30 days? If you were, and I'm not  
20 saying you are, handing everybody a bill that was full  
21 of X's and O's and was fully indecipherable and nobody  
22 knew what it even said other than maybe the bottom  
23 line, you owe \$100, is that any violations of something  
24 or not? It surely would be in our retail world.

25 MS. WAXTER: As far as whether it's an actual

0459

1 violation of something, I would say the FCC would have  
2 some say in the matter. During the 271 process when  
3 Qwest was seeking approval for long distance, the FCC  
4 did scrutinize its billing systems and its output and  
5 whatnot and made the recommendation and gave Qwest 271  
6 approval.

7           So the FCC has looked at the bills and looked  
8 at what's contained in them and looked at whether the  
9 CLEC's can verify those bills, and certainly also  
10 decided that 30 days is a reasonable payment date  
11 because that is the industry standard. The FCC did not  
12 make that determination, but certainly, the industry  
13 standard is that 30 days is reasonable for payment due  
14 dates.

15           COMMISSIONER HEMSTAD: I'm not sure you  
16 answered the Chair's question. What if the CLEC's were  
17 getting bills they can't decipher?

18           MS. WAXTER: I think my answer was I don't  
19 know if there is any governing body that's going to  
20 say, Qwest your bills are terrible, but there is the  
21 CMP process, and the CMP does have a dispute resolution  
22 process where if the CLEC's are dissatisfied with the  
23 response they get to any request, they can take it  
24 through the dispute resolution process, and I don't  
25 know what the very last point or at what point you've

0460

1 gone through the dispute resolution process and there  
2 is still an issue, but I know that the CMP document  
3 itself leaves out the process that CLEC's and ILEC's  
4 can follow if there is a dispute.

5 CHAIRWOMAN SHOWALTER: But actually, that  
6 becomes fairly important, because ultimately, if the  
7 Change Management Process is whatever Qwest ultimately  
8 wants to agree to it can and what it doesn't want to  
9 agree to it doesn't. That's very different than if  
10 ultimately, a CLEC can walk into a commission, whether  
11 it's a federal one or a state one, and say, We just  
12 can't get bills that can be worked through in the  
13 industry standard of 30 days.

14 Don't you agree that there is a reasonable  
15 difference there, who is the ultimate authority?

16 MS. WAXTER: I do, and that question wasn't  
17 asked and it's not in the record. Although, what is in  
18 the record, and I certainly would be happy to  
19 supplement with at least some statement from Qwest, the  
20 CMP document is in the record. I'm sure it's outlined  
21 in there, and hopefully, there is something in that  
22 document.

23 COMMISSIONER HEMSTAD: CMP, Change Management  
24 Process?

25 MS. WAXTER: Yes.

0461

1                   COMMISSIONER HEMSTAD: Qwest has rejected  
2 doing that. What is your response to that?

3                   MS. WAXTER: After the hearing on this matter  
4 but not until October, in mid October, Covad for the  
5 first time did submit a change request to the change  
6 management forum, and Qwest looked at that, and they do  
7 what they do with all change requests when they come  
8 in, which is they go through a level of effort  
9 determination, and they determine what the level of  
10 effort would be to implement that change request.

11                   Again, this is evidence that's not in the  
12 record, but for the sake of discussion here, the level  
13 of effort that was determined for the change request  
14 that Covad requested was close to a million dollars.  
15 It was just over nine hundred thousand, and one of the  
16 provisions of the CMP document is that Qwest can  
17 decline or deny a change request based on financial  
18 infeasibility, and looking at the request and the nine  
19 hundred thousand dollars, Qwest chose to deny that  
20 change request because of financial infeasibility. It  
21 is the first time that any CLEC has ever requested this  
22 particular change in its billing process.

23                   Again, Covad has the opportunity to run  
24 through the dispute resolution process with respect to  
25 that, and again, as long as we are talking about



0462

1 evidence that's not in the record, I'll just mention  
2 that this specific request that Covad made was just to  
3 include a circuit identification number for  
4 line-sharing bills. It wasn't an overhaul of their  
5 bills itself, and I'll also mention, and this is in the  
6 record, that admittedly on Covad's behalf, Megan  
7 Doberneck stated that the majority of Qwest's bills are  
8 reviewable electronically, so we really are talking  
9 about a very small portion of its bills that they seem  
10 to have problems with.

11           May I make one comment just before we  
12 conclude, and that is we've had a lot of discussion  
13 about the 30-day payment period, and Covad sort of drew  
14 into the same argument their request for extended  
15 remedy times, and that's on the discontinuance and  
16 disconnect, and I would just like to reiterate to this  
17 commission that the rationale behind extending a  
18 payment due date is very different than the rationale  
19 behind extending the remedies that Qwest might have in  
20 the event of a nonpayment.

21           Consequently, Qwest's position is that Covad  
22 has really presented no evidence to support their  
23 request to extend the remedies, the continuance date  
24 and the disconnection date.

25           CHAIRWOMAN SHOWALTER: I think that brings us

0463

1 to a conclusion. Thank you very much. Your arguments  
2 were very well put on very complex issues, and it is  
3 hard for us to tune into these extremely detailed,  
4 technically-laden arguments, and you did an outstanding  
5 job. So we will take all your arguments under  
6 advisement and issue an appropriate order in an  
7 appropriate time.

8 (Oral argument concluded at 3:45 p.m.)

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25