[Service Date February 9, 2005]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of	)	DOCKET NO. UT-043045
COVAD COMMUNICATIONS COMPANY	)	ORDER NO. 06
	)	FINAL ORDER AFFIRMING, IN
With	)	PART, ARBITRATOR'S REPORT
	)	AND DECISION; GRANTING, IN
QWEST CORPORATION	)	PART, COVAD'S PETITION FOR
	)	REVIEW; REQUIRING FILING OF
Pursuant to 47 U.S.C. Section 252(b) and the Triennial Review Order	)	CONFORMING INTER-CONNECTION AGREEMENT
. . . . .	)	

1 ***SYNOPSIS.*** *The Commission, ruling on Covad's Petition for Review, affirms the Arbitrator's determinations concerning: (1) retirement of copper facilities, with a minor modification to Qwest's proposal for Section 9.1.15; and (2) timeframes for payment of invoices and remedies for non-payment. As to other disputed issues in the proceeding, the Commission finds that (1) Issue No. Two in the proceeding, concerning availability of network elements pursuant to Section 271 and state law, is an open issue for arbitration, but that the Commission lacks authority to require inclusion of the elements in the agreement; (2) the Commission may require Qwest to commingle Section 251(c)(3) UNEs with Section 271 elements, where the Section 271 elements are wholesale facilities and services; and (3) where CLECs request regeneration as part of a CLEC-provided cross-connection at the ICDF, the regeneration is a wholesale product for which Qwest must charge TELRIC prices.*

2 **PROCEEDINGS:** Docket No. UT-043045 concerns a petition filed by Covad Communications Company (Covad) for arbitration pursuant to 47 U.S.C. § 252(b)(1) of the Telecommunications Act of 1996,[1] (Act) and the Federal

[1] Public Law No. 104-104, 101 Stat. 56 (1996).

Communication Commission's (FCC) Triennial Review Order,[2] of a proposed Interconnection Agreement between Covad and Qwest Corporation (Qwest). Arbitrator Ann E. Rendahl entered Order No. 04, the Arbitrator's Report and Decision (Arbitrator's Report), on November 2, 2004.

3 Covad filed its Petition for Commission Review of Arbitrator's Report on December 3, 2004. Qwest filed its Response on December 17, 2004. The parties also filed a complete, signed Interconnection Agreement on December 17, 2004, which incorporated negotiated and arbitrated terms consistent with the Arbitrator's Report.

4 On January 13, 2005, the parties presented oral argument before the Commission on the issues in dispute.

5 **APPEARANCES:** Andrew R. Newell, Krys Boyle P.C., Denver, Colorado, represented Covad at the arbitration hearing and on review. Winslow Waxter, Senior Attorney, Denver, Colorado, and John M. Devaney, Perkins Coie, LLP, Washington, D.C., represented Qwest at the arbitration hearing and on review.

6 **COMMISSION:** The Commission affirms the Arbitrator's Report, in part, and requires the parties to file with the Commission within 15 days of the service date of this order a fully executed Interconnection Agreement that conforms to the requirements of this Order.

---

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96098, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C. Rcd 16978 (2003) [hereinafter "*Triennial Review Order*"], *aff'd in part and rev'd and vacated in part, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) [hereinafter "*USTA II*"].

MEMORANDUM

7 We have considered the parties' arguments concerning the five issues Covad raises in its Petition for Review. Our analyses and decisions, based on these arguments and the record below, follow.

1) Terms and Conditions Concerning Retirement of Copper Facilities[3]

8 The parties contest language describing the notice Qwest must provide to Covad in the event that Qwest retires copper facilities in Washington State, as well as any actions Qwest must take or conditions Qwest must meet upon retiring copper facilities. We will first address the notice language the parties propose for Section 9.1.15 of the Agreement, and then address any terms or conditions for retirement of copper facilities proposed in Section 9.2.1.2.3 of the Agreement.

9 **A. Notice Requirements.** The parties propose notice language in Section 9.1.15 as follows:[4]

Qwest	**Covad**
9.1.15 In the event Qwest decides to retire a copper loop, copper feeder or copper subloop and replace it with fiber, Qwest will: (i) provide notice of such planned retirement on its web site (www.qwest.com/disclosures); and (ii) provide email notice of such planned retirement to CLECs; and (iii) provide public notice of such	9.1.1.5 In the event Qwest decides to retire a copper loop, copper feeder, or copper subloop and replaces it with fiber, Qwest will: (i) provide notice of such planned retirement on its web site (www.qwest.com/disclosures); and (ii) provide e-mail notice of such planned retirement to CLECs; and (iii) provide public notice of such

[3] This was identified as "Issue No. One" in the parties' Joint Issues List and was referred to as Issue No. One at all stages of this arbitration.

[4] Qwest proposes similar language in Section 9.2.1.2.3 of the proposed agreement relating to retirement of copper facilities and replacement with FTTH (fiber to the home) loops.

planned replacement to the FCC. Qwest can proceed with copper retirement at the conclusion of the applicable FCC notice process as identified in FCC rules unless retirement was explicitly denied (or otherwise delayed or modified). Such notices shall be in addition to any applicable state commission requirements.	planned replacement to the FCC. Qwest can proceed with copper retirement at the conclusion of the applicable FCC notice process as identified in FCC rules unless retirement was explicitly denied (or otherwise delayed or modified). <u>The e-mail notice provided to each CLEC shall include the following information: city and state; wire center; planned retirement date; the FDI address; a listing of all impacted addresses in the DA; a listing of all of CLEC's customer impacted addresses; old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information.</u>

Covad requests language that identifies specific information to be provided in an e-mail notice of retirement of copper facilities, while Qwest proposes language that merely identifies the process it will follow in giving notice of a planned retirement of copper facilities. The parties identified these proposals in an Updated Joint Disputed Issued List (Joint Issues List) filed with the Commission after the parties filed briefs on the issues.

10 The Arbitrator rejected Covad's proposed additional language, finding that Qwest has agreed to provide the information required by FCC rule and that the information Covad requests be put in an e-mail notice may be burdensome to Qwest.[5]

[5] Arbitrator's Report and Decision, ¶ 36.

11 Covad argues on review that Qwest's proposed language does not meet the minimum notice requirements set forth in the FCC's rule for public notice of planned network changes, 47 C.F.R. § 51.327(a).[6] Covad asserts that Qwest should provide notice identifying the reasonably foreseeable impact of the retirement, *i.e.*, providing specific notice of any Covad customers affected by the retirement.[7] In the event the Commission finds that the FCC does not require the specific information Covad proposes, Covad requests the Commission adopt as an additional state requirement that Qwest provide the information Covad has proposed.[8]

12 Qwest asserts that its proposed notice language meets the requirements of the FCC's rule, and that Covad's proposal "imposes substantially more than the FCC requires."[9] Qwest asserts that Covad's proposed language would shift the burden to Qwest to research which specific Covad customers are affected and how they are affected.[10]

13 ***Decision.*** The FCC determined in the Triennial Review Order that ILECs such as Qwest may retire copper facilities, but must first comply with the FCC's network modification rules.[11] The FCC modified these rules to require ILECs to provide 90 days' notice of the proposed copper retirement, and to allow parties an opportunity to object.[12] The FCC requires ILECs to include in a public notice of planned network change, "at a minimum," the following information:

---

[6] Covad Petition, ¶¶ 29-30.
[7] *Id.*, ¶ 31.
[8] *Id.*, ¶ 34.
[9] Qwest Response, ¶ 19.
[10] *Id.*, ¶¶ 19-20.
[11] *Triennial Review Order*, ¶¶ 281-83.
[12] *Id.*, ¶¶ 282-83.

> (1) The carrier's name and address;
> (2) The name and telephone number of a contact person who can supply additional information regarding the planned changes;
> (3) The implementation date of the planned changes;
> (4) The location(s) at which the changes will occur;
> (5) A description of the type of changes planned (Information provided to satisfy this requirement must include, as applicable, but is not limited to, references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection); and
> (6) A description of the reasonably foreseeable impact of the planned changes.[13]

14 We generally concur with the Arbitrator's decision to include Qwest's notice language in the agreement, but find that Qwest's proposed language in Sections 9.1.15 and 9.2.1.2.4 does not specifically refer to the FCC's minimum notice requirements. Qwest agrees that it is obligated to comply with the FCC's rules,[14] however its proposed language for Section 9.1.15 does not state that notices will comply with the FCC's rule. Including this reference in the agreement will allow Covad to seek enforcement of the agreement if it believes that Qwest is not complying with the requirements of the FCC rule. Qwest's language should be modified to include a specific reference to the FCC's rule. In particular, we find that the last sentence of Qwest's proposed language in Sections 9.1.15 and 9.2.1.2.3 should be modified as follows:

---

[13] 47 C.F.R. § 51.327(a).
[14] *See* TR. 430:21-431:9.

> Such notices shall be provided in accordance with FCC rules, including 47 C.F.R. § 51.327(a), and in addition to any applicable state commission requirements.

15 We also concur with the Arbitrator's decision that the specific information Covad requests, *i.e.*, "a listing of all impacted addresses in the DA; a listing of all of CLEC's customer impacted addresses; old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information," is more than Qwest must provide under the FCC's rule. We reject Covad's assertion that the FCC's rule requires the identification of specific Covad customers affected by the change, or places the burden solely on the ILEC to determine the impact of a change.

16 Qwest's proposed network disclosure announcement, admitted into the record as Exhibit 67, indicates that Qwest will provide notice of the state, wire center, 8-character CLLI code, the planned retirement date, as well as the DA (Distribution Area) and FDI (Feeder Distribution Interface) addresses of the copper facilities to be retired. These addresses identify a general area or location affected by a planned retirement. The notice appears sufficient to allow Covad to determine, with some research, whether a planned change will affect its customers.

17 **B. Terms and Conditions of Retirement of Copper Facilities**. Covad proposes language for Sections 9.1.15.1.1 and 9.2.1.2.3.1 that is similar:

> Qwest will not retire copper facilities serving CLEC's End User Customers or CLEC, at any time prior to discontinuance by CLEC or CLEC's End User Customer of the service being provided by CLEC, without first provisioning an alternative service over any available, compatible facility (i.e. copper or fiber) to CLEC or CLEC End User Customer. Such alternative service shall be provisioned in a manner that does not degredate the service or increase the cost to CLEC or End User Customers of CLEC. Disputes over copper

> retirement shall be subject to the Dispute Resolution provisions of this Interconnection Agreement.

18 The Arbitrator determined that Covad's proposal for an alternative arrangement at no additional cost is not consistent with the Triennial Review Order.[15] The Arbitrator found that Covad's recourse upon notice of a proposal by Qwest to retire copper facilities is to file an objection with the FCC pursuant to the FCC's rules governing planned network changes.[16]

19 Covad asserts that the Triennial Review Order addressed only copper retirement and fiber replacement with fiber-to-the-home (FTTH) or fiber-to-the-curb (FTTC) facilities, and that the Commission has authority to adopt state requirements concerning the replacement of facilities not addressed by the FCC's Order.[17] Covad asserts that its language addresses the replacement of copper facilities with fiber facilities that are not FTTH or FTTC facilities.[18] Covad asserts that Qwest's language does not provide sufficient protection for Covad end-user customers when copper facilities are retired.[19] Covad asserts that the Commission has authority under its unbundling orders to place conditions on Qwest's retirement and replacement of copper feeder.[20]

20 Qwest argues that Covad's position is inconsistent with the Triennial Review Order, asserting "the FCC did not limit an ILEC's retirement rights to situations in which it is replacing a copper loop with a FTTH loop."[21] Qwest further asserts that there is no support in the Triennial Review Order for requiring ILECs to

---

[15] Arbitrator's Report and Decision, ¶¶ 37-38.
[16] *Id.*, ¶ 38.
[17] Covad Petition, ¶¶ 7-12.
[18] *Id.*, ¶¶ 15-16.
[19] *Id.*, ¶¶ 13, 15-16.
[20] *Id.*, ¶¶ 24-27.
[21] Qwest Response, ¶ 13.

provide alternative facilities in the event of copper retirement, or in the Act for providing such alternative facilities at no additional cost.[22]

21 ***Decision.*** We uphold the Arbitrator's decision on this issue. As Qwest notes in its response, the FCC addressed the issue of an ILEC's right to copper retirement in three sections of the Triennial Review Order, not just sections relating to FTTH loops.[23] The FCC did not place conditions on an ILEC's retirement of copper facilities, and concerning FTTH loops, specifically rejected proposals to provide alternative facilities.[24] The FCC found its requirements for notice of planned network changes to provide "adequate safeguards."[25]

2) Unified Agreement - Inclusion in the Agreement of Section 271 Elements and Unbundled Elements Under State Law[26]

22 This issue concerns the Commission's authority to require Qwest to include in its interconnection agreement with Covad access to network elements pursuant to Section 271 or state law, where the FCC and the courts have found no obligation to provide the elements under Section 251(c)(3).

23 Covad seeks to maintain the status quo of its access to network elements from Qwest, *i.e.*, Covad seeks access to all network elements to which it had access under its current interconnection agreement, prior to the effect of the Triennial Review Order and the *USTA II* decision. To accomplish this goal, Covad proposes to define "Unbundled Network Element" in this agreement to include elements available under Section 271 and state law. Qwest opposes Covad's

---

[22] *Id.*, ¶¶ 8-10*; see also* 47 U.S.C. § 252(d)(1).
[23] *See Triennial Review Order*, ¶¶ 271, 281, 296, n.850.
[24] *Id.*, ¶ 281, n.822.
[25] *Id*., ¶ 281.
[26] This was identified as "Issue No. Two" in the parties' Joint Issues List and was referred to as Issue No. Two at all stages of this arbitration.

proposal. The parties' proposals for the definition of unbundled network element are as follows:

Qwest	**Covad**
Section 4.0 – Definitions: "Unbundled Network Element" (UNE) is a Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access or for which unbundled access is provided under this Agreement. Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act.	Section 4.0 – Definitions: "Unbundled Network Element" (UNE) is a Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access, for which unbundled access is required under section 271 of the Act or applicable state law, or for which unbundled access is provided under this Agreement. ~~Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act.~~.

24 Covad also proposes language in Section 9.1.1 to require Qwest to provide " any and all UNEs required by the Telecommunications Act of 1996 (including, but not limited to Sections 251(b), (c), 252(a) and 271), FCC Rules, FCC Orders, and/or applicable state rules or orders, or which are ordered by the FCC, any state commission or any court of competent jurisdiction." Covad proposes in Section 9.1.1.6 that Qwest "continue providing access to certain network elements as required by Section 271 or state law, regardless of whether access to such UNEs is required by Section 251 of the Act," and proposes that the agreement contain the terms and conditions for Section 271 elements. Covad further proposes in Section 9.1.1.7 that Section 271 and state elements be priced at

TELRIC rates until other rates are determined. Covad proposes language in a number of other provisions in Section 9 to implement its proposal.[27]

25 The issue arises because the FCC's Triennial Review Order and the D.C. Circuit's *USTA II* decision remove a number of network elements from the unbundling requirements of Section 251(c)(3). In addition, however, the FCC determined that BOCs, such as Qwest, have an independent obligation under Section 271 to provide unbundled access to certain network elements identified in the Section 271 checklist.[28] The D.C. Circuit upheld the FCC's decision on this point.[29] The checklist items, *i.e.*, Nos. 4, 5, 6, and 10, require BOCs to provide access to local loops, local transport, local switching, and databases and signaling for call routing and completion.[30] Covad seeks access in its interconnection agreement to these Section 271 elements, either under Section 271 or pursuant to state law.

26 The Arbitrator determined that network elements required to be unbundled pursuant to Section 251(c)(3) and Section 271 should be distinguished in the agreement.[31] The Arbitrator found that the network elements may be the same, *i.e.*, loops, switching, and transport, but the foundation for their availability on an unbundled basis is different.[32] The Arbitrator required the parties to modify the definition of Unbundled Network Element in Section 4 of the agreement to reflect this decision.

---

[27] Covad proposes language seeking access to Section 271 elements at any technically feasible point (§ 9.1.5), access to DS1, DS3, and dark fiber loops under Section 271 (§ 9.2.1.3), provisioning of more than two unbundled loops for a single end user customer under Section 271 (§ 9.2.1.4), and access as Section 271 elements to feeder subloops (§9.3.1.1), DS1 feeder loops (§§ 9.3.1.2 and 9.3.2.2), unbundled dedicated interoffice transport (UDIT) (§ 9.6, 9.6.1.5, 9.6.1.5.1), DS1 transport along a particular route (§§ 9.6.1.6, 9.6.1.6.1), and unbundled switching and line splitting (§ 9.21.2).

[28] *Triennial Review Order*, ¶¶ 653-655.

[29] *USTA II*, 359 F.3d at 588.

[30] 47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), and (x).

[31] Arbitrator's Report and Decision, ¶ 54.

[32] *Id*.

27 The Arbitrator determined that "state commission arbitration of interconnection agreements under Section 252 is limited to those matters identified in Section 252(c), specifically 'ensuring that such resolution and condition meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251'."[33] The Arbitrator further determined that states cannot impose conditions in a Section 252 arbitration other than those identified in Section 252(c), unless the parties have mutually agreed to negotiate matters other than those addressed in Section 251.[34] The Arbitrator implied that Covad and Qwest had not mutually agreed to negotiate the issue and that Issue No. Two was not an open issue.

28 Covad petitions for review of the Arbitrator's decision that the issue of access to Section 271 elements or state law elements was not an open issue for arbitration, as well as findings that the FCC's decision in pending forbearance applications may restrict the availability of Section 271 elements, and that the Commission would be required to initiate a proceeding to make unbundling determinations concerning Covad's proposal.[35]

29 Covad asserts certain facts it claims establish that the sections of the proposed agreement subsumed under Issue No. Two were "open issues" for arbitration.[36] Covad attaches to its petition orders entered by administrative law judges for the Minnesota Public Utilities Commission and the Utah Public Service Commission finding that these issues were open issues for arbitration.[37]

---

[33] *Id*., ¶ 55, *citing* 47 U.S.C. § 252(c)(1).
[34] *Id*.
[35] Covad Petition, ¶ 35; *see also* Arbitrator's Report and Decision, ¶¶ 56-60.
[36] Covad Petition, ¶¶ 36-38.
[37] *Id*., ¶¶ 39-40, *see also* Att. A and B.

30 Covad asserts that the Commission should not rely on anticipated FCC decisions, but act based on the law as it exists today.[38] Even if the FCC were to grant Qwest's petition to forbear from enforcing Section 271 requirements, Covad asserts that this decision would not preempt states from making unbundling determinations concerning these elements.[39]

31 Objecting to the Arbitrator's decision that the Commission would be required to engage in an impairment analysis before requiring additional unbundled elements, Covad asserts that it requests only that the Commission "recognize its authority under section 271 of the Act, Washington law, or both, to order unbundling consistent with the Competitive Checklist and the statutory directives of this Commission."[40] Covad asserts that the FCC and numerous state courts have consistently held that the savings clauses under the 1996 Act, in particular Section 252(e)(3), provide state commissions with the authority to enforce state access obligations to the extent these obligations do not directly conflict with section 251.[41] Covad also argues that no separate proceeding would be necessary to determine whether to maintain under state law existing unbundling requirements.[42]

32 Covad asserts that requiring access under state law to network elements independently available under Section 271 would not conflict with Section 251 or regulations implementing the section.[43] Covad cites to the FCC's finding in the Triennial Review Order that the independent obligations under Section 271 do not conflict with the requirements of Section 251.[44] Based on this analysis, Covad

---

[38] *Id*., ¶ 41.
[39] *Id*.
[40] *Id*., ¶ 42.
[41] *Id*., ¶¶ 43-44.
[42] *Id*., ¶¶ 55-57.
[43] *Id*., ¶¶ 45-46.
[44] *Id*., ¶ 45.

asserts that state access obligations identical to those under Section 271 would not conflict with federal law.[45]

33 Covad contests Qwest's arguments that state commissions have no authority to enforce Section 271 obligations. Covad relies on decisions by the Maine Public Utilities Commission and a federal district court in Indiana to support its argument that state commissions may require compliance with the Section 271 competitive checklist items in the context of a Section 252 arbitration proceeding.[46] While Covad admits that only the FCC enforce non-compliance with the Section 271 checklist, Covad asserts that this is distinguishable from a state commission's authority to interpret and enforce interconnection agreements under Section 252.[47]

34 Qwest asserts that the Arbitrator properly rejected Covad's proposal as an issue that the parties did not "mutually agree" to arbitrate.[48] Qwest asserts specific facts to support its claim that Issue No. Two was not an open issue, and objects to Covad introducing evidence from the record of other states on this issue.[49]

35 Qwest asserts that the Arbitrator reasonably concluded that it would not be prudent to include Section 271 obligations in an interconnection agreement as, the FCC was expected to enter a decision in December concerning Qwest's forbearance petition before the FCC.[50] In response to Covad's argument that an

---

[45] *Id*., ¶ 46.

[46] *Id*., ¶¶ 47-54, *citing*, *In the Matter of Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* Order – Part II, Maine PUC Docket No. 2002-682 (Sept. 3, 2004) [hereinafter "*Maine Order*"]; *Indiana Bell Tel. Co., Inc. v. Indiana Util. Reg. Comm'n*, 2003 WL 1903363 (S.D. Ind. 2003), *aff'd* 359 F.3d 493 (7th Cir. 2004).

[47] Covad Petition, ¶¶ 50-54.

[48] Qwest Response, ¶ 26.

[49] *Id*., ¶¶ 27-28.

[50] *Id*., ¶ 29. After the Arbitrator entered her Report and Decision, the FCC extended the date for deciding Qwest's forbearance petition to March 17, 2005. *See In the Matter of Qwest Communications International Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c) from Application*

FCC forbearance decision would not preclude a state unbundling requirement, Qwest asserts that the savings clauses in the Act, *i.e.*, Sections 251(d)(3), 252(3)(3), and 261(b) and (c), require that any state requirements be consistent with the provisions of Section 251.[51] Qwest asserts any state requirement to unbundle network elements would be inconsistent with the Act if the FCC has determined that the elements are not subject to unbundling.[52]

36 Qwest asserts that state commissions have no authority under Section 271 to require unbundling.[53] Relying on the same case as Covad, *Indiana Bell*, Qwest asserts that states have no substantive role or decision-making authority under Section 271, only a consulting role.[54] Qwest distinguishes the *Maine Order* as based on a specific commitment that Verizon made during the Section 271 proceeding in Maine.[55] Qwest asserts that states have no authority to impose Section 271 obligations, regardless of whether the proceeding is conducted pursuant to Section 252 or Section 271.[56]

37 ***Decision.*** We reverse the Arbitrator's decision that Issue No. Two was not an open issue subject to arbitration. On the merits of the issue, however, we determine that this Commission has no authority under Section 251 or Section 271 of the Act to require Qwest to include Section 271 elements in an interconnection agreement. We find the Arbitrator's discussion of pending forbearance petitions to be dicta, and not a finding subject to review. We uphold the Arbitrator's decision concerning lack of an impairment analysis in this proceeding, but also find that any unbundling requirement based on state law would likely be preempted as inconsistent with federal law, regardless of the

---

of Section 271, Order, WC Docket No. 03-260, DA 04-3845 (rel. Dec. 7, 2004).
[51] Qwest Response, ¶ 30.
[52] *Id*., ¶¶ 31-33.
[53] *Id*., ¶ 34.
[54] *Id*., ¶¶ 34-36.
[55] *Id*., ¶ 38.
[56] *Id*., ¶ 37.

method the state used to require the element. Thus, we agree with the result of the Arbitrator's decision, and find in favor of Qwest's language on this issue.

38 **A. Issue No. Two as an Open Issue.** As there was no record evidence in this proceeding concerning whether Issue No. Two was an open issue, and the parties acted in this proceeding as if the matter was an open issue, we reverse the Arbitrator's decision on this point. The decision appears to be based on a footnote in Qwest's brief asserting that the matter was not an open issue.[57] Covad raised the issue in its Petition and Qwest addressed the issue in its response. Neither Qwest nor Covad presented evidence in the record concerning whether the issue was open for arbitration—in fact, the parties did not file testimony on the issue, nor were the issues subject to cross-examination at hearing, as the parties agreed to address the issues in post-hearing briefs.[58] While the parties addressed the question through Qwest's motions to dismiss Issue No. Two in proceedings in Minnesota[59] and Utah,[60] Qwest did not question in this proceeding whether the matter was open for arbitration. We find that Issue No. Two is appropriately an open issue for arbitration.

39 **B. State Authority to Include Section 271 Elements**. Having determined that Issue No. Two is an open issue for arbitration, we must answer the remaining question concerning whether state commissions have authority under Section 271 or Section 252 to require an ILEC to include independent Section 271 network elements in an interconnection agreement in the context of Section 252 arbitration.[61] We conclude that state commissions do not have authority under either Section 271 or Section 252 to enforce the requirements of Section 271.

---

[57] Qwest's Post-Hearing Brief, n.72.

[58] *See* Exh. No. 61-T at 10:20-11:2 (Stewart); *see also* TR. 8:4-10:17.

[59] *See* Attach. B to Covad Petition.

[60] *See* Attach. A to Covad Petition.

[61] It is clear that an ILEC may enter into a commercial agreement with a CLEC to provide access to Section 271 elements. Qwest has entered into such an agreement with MCI in Washington. *See In the Matter of the Request of MCIMetro Access Transmission Services, LLC and Qwest Corporation for Approval of Negotiated Interconnection Agreement, in its Entirety, Under the Telecommunications Act of*

40 The issue of whether state commissions may require Section 271 network elements to be included in arbitrated interconnection agreements arises due to the FCC's decision that BOCs have an independent obligation to provide access to loops, switching, transport, and signaling network elements under Section 271(c)(2)(B) (iv), (v), (vi) and (x), regardless of whether the elements are subject to unbundling under Section 251.[62] Covad requests that the Section 271 elements be included in a "unified" definition of network elements, and that the proposed agreement include elements that have been "delisted" or made unavailable under Section 251(c)(3), pursuant to Section 271 or state law, in order to maintain the status quo.[63]

41 The first issue we must address concerning state commission authority is whether state commissions have authority under Section 271 to enforce the independent unbundling requirements of Section 271. The statutory scheme in Section 271 provides that the FCC is solely responsible for determining whether a BOC should be allowed to provide in-region interLATA, or long-distance, service in a particular state.[64] The Act requires the FCC to consult with state commissions as to whether the BOC has met the statutory requirements for providing long distance service, but provides no decision-making authority to state commissions.[65]

1996, Order No. 01, Order Approving Negotiated Interconnection Agreement in its Entirety, WUTC Docket Nos. UT-960310 and UT-043084 (Oct. 20, 2004). Where the commercial agreement is part of an integrated interconnection agreement, state commissions may require ILECs to file such commercial agreements for approval pursuant to Section 252(e). *Id.*, ¶¶ 29, 32.

[62] *Triennial Review Order,* ¶¶ 653-54.

[63] TR. 384:22 – 385:12.

[64] 47 U.S.C. § 271(d)(3).

[65] *See* 47 U.S.C. § 271(d)(2)(B); *see also Indiana Bell*, 2003 WL 1903363 at 6, 10.

42 Similarly, the FCC has the sole authority under Section 271 to enforce BOC compliance with Section 271, without any shared decision-making role for state commissions.[66] Covad asserts that the FCC has recognized a role for state enforcement of Section 271 compliance in its Section 271 orders. In the FCC's Section 271 Order governing Washington State, the FCC stated "[w]e are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into these nine states."[67] The FCC's statement in its Section 271 orders does not mean that states may enforce the provisions of Section 271. To the extent a BOC has included its plan to prevent against backsliding—in Washington, the Qwest Performance Assurance Plan—as a part of its Statement of Generally Available Terms and Conditions, and the state has approved such a statement under Section 252(f), the state will have authority to enforce the BOC's performance obligations. As Covad concedes, the FCC retains sole authority under Section 271 to determine compliance with Section 271.[68]

43 The relevant cases on the issue of state law authority under Section 271 primarily address state commission authority during the Section 271 process for enforcement of Section 271 requirements or commitments made by a BOC. The *Indiana Bell* court found that states have no substantive authority under Section 271.[69] The *Maine Order* found independent state authority to enforce Section 271 obligations where the BOC has made commitments to the state and FCC to file a tariff with the state in the context of a Section 271 proceeding.[70] The Maine Order can be distinguished as relying on a BOC commitment and apparent state authority over the tariff, not on state authority under Section 271.

---

[66] 47 U.S.C. § 271(d)(6).

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

[68] *See* Covad Petition, ¶ 54.

[69] *Indiana Bell*, 2003 WL 1903363 at 6, 10.

[70] *See Maine Order* at 12-14.

44 The FCC does not directly address in the Triennial Review Order how the independent Section 271 obligations are to be implemented. In discussing the pricing of Section 271 elements, however, the FCC implies that it has sole authority over such elements and that BOCs should make Section 271 elements available through interstate tariffs or commercial agreements:

> Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that *the [FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6).* We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers *under its interstate access tariff*, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into *arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.*[71]

45 Based on our analysis above, we find that we have no authority under Section 271 to require Qwest to include Section 271 elements, or pricing for such elements, in its interconnection agreement. Section 271 elements, are, however, appropriately included in commercial agreements entered into between an ILEC and CLEC.

46 **C. State Commission Authority Under Section 252.** The next issue we must address concerning state commission authority is whether state commissions have authority under Section 252 to require an ILEC to include the independent unbundling requirements of Section 271, or unbundling requirements under

---

[71] *Triennial Review Order,* ¶ 664 *(emphasis added)*.

state law, in arbitrating an interconnection agreement. Section 252 requires state commissions to limit their consideration of a petition for arbitration to the issues included in the petition and any response. As discussed above, both Covad and Qwest addressed in their petition and response the issue of the inclusion in the agreement of network elements available pursuant to Section 271 and state law.

47 Section 252(c) establishes certain standards for arbitration of interconnection agreements:

> In resolving by arbitration under subsection(b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

48 Invoking the *Indiana Bell* and *Maine Orders*, Covad asserts that in the exercise of state authority granted in Section 252 to interpret and enforce interconnection agreements, state commissions may interpret the requirements of Section 271. In our view, however, the court in *Indiana Bell* determined only that state commissions may include performance benchmarks and penalties in interconnection agreements pursuant to the Section 252 process to encourage compliance with nondiscrimination rules, and that state commissions have no authority to do so under Section 271.[72] The *Maine Order* found authority under Section 252(g) to consolidate its tariff proceeding arising from the Section 271 proceeding with an arbitration proceeding Verizon had filed in Maine.[73] The Maine Order also found that state commissions have authority to arbitrate

---

[72] *Indiana Bell*, 2003 WL 1903363 at 6, 8.

[73] *See Maine Order*, n.22.

Section 271 pricing in the context of Section 252 arbitrations, as Section 271 elements are intended to provide access and interconnection through an SGAT or interconnection agreements.[74]

49 The *Maine Order*, however, ignores the fact that states have no authority under Section 271 to enforce Section 271 unbundling obligations, as well as the FCC's apparent intent that Section 271 elements be made available through tariff or commercial agreements.[75] While the parties may have agreed to negotiate the issue of including Section 271 elements in this Section 252 arbitration, the parties cannot require the Commission arbitrate an issue over which it has no authority. In addition, we find that requiring Qwest to include Section 271 elements in the context of arbitration under Section 252 would conflict with the federal regulatory scheme in the Act, as Section 271 of the Act provides authority only to the FCC and not to state commissions.

50 **D. State Commission Authority to Impose State Unbundling Requirements.** We are left, then, with the question of whether we may require Qwest to include in an interconnection agreement, as a requirement of state law, unbundled elements that the FCC has determined ILECs are no longer obligated to provide under Section 251(c)(3). Covad asserts that the Commission may require inclusion of such elements in an interconnection agreement, based on the policies identified in RCW 80.36.300(5) to "[p]romote diversity in the supply of telecommunications services and products in the telecommunications markets throughout the state," and based on the state supreme court's decision upholding that policy interpretation in *In re Electric Lightwave.*[76]

---

[74] *Id.*, at 19.

[75] *See Triennial Review Order*, ¶ 664.

[76] *In re Electric Lightwave*, 123 Wn.2d 530, 538-39, 869 P.2d 1045 (1994)

51 Since the state statute was enacted in 1985 and the *Electric Lightwave* decision was entered, however, Congress enacted the Telecommunications Act of 1996, which clearly removes some authority from the states to regulate in this area.[77] The Act does preserve in savings clauses the authority for states to prescribe and enforce regulations concerning access to elements and interconnection or to further competition, to the extent that the regulations are consistent with Section 251 and Part II of the Act, which addresses developing competitive markets.[78] Thus, the issue is not whether we have authority under Section 252 to require access to certain network elements, but whether such a requirement is preempted, *i.e.*, conflicts with the federal regulatory scheme under the Act, FCC decisions, and federal court decisions.

52 We find Covad's request—that we require in the agreement inclusion of elements that have been "delisted" as Section 251(c)(3) network elements—to be in direct conflict with federal law. The FCC has stated as much:

> If a decision pursuant to state law were to require the unbundling of a network element for which the [FCC] has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, *we believe it unlikely that such a decision would fail to conflict with and "substantially prevent" implementation of the federal regime*, in violation of section 251(d)(3)(C).[79]

53 This position is supported by a recent decision concerning Michigan's authority to implement a batch hot-cut process pursuant to vacated portions of the Triennial Review Order,[80] as well as a recent decision by the Seventh Circuit

---

[77] *See AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 378, n.6 (1999).
[78] *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3), and 261(b) and (c).
[79] *Triennial Review Order*, ¶ 195 *(emphasis added)*.
[80] *Michigan Bell Tel. Co. v. Lark et al.*, Case No. 04-60128, Opinion and Order Granting Plaintiff's Motion for Summary Judgment (E.D. Mich., So. Div., Jan. 6, 2005).

Court of Appeals.[81] The *Lark* decision finds that a state order is contrary to federal law where the order requires what a federal court has deemed to be contrary to federal law.[82] The *McCarty* court addressed a decision of the Indiana Utility Regulatory Commission to include unbundled packet switching in an interconnection agreement during Section 252 arbitration. After noting that the FCC found in the Triennial Review Order that ILECs are not required to unbundle packet switching, the court observed that "only in very limited circumstances, which we cannot now imagine, will a state be able to craft a packet switching unbundling requirement that will comply with the Act."[83]

54 In this proceeding, Covad clearly requests access to elements under state law that the FCC and the D.C. Circuit Court have determined are no longer unbundled network elements under Section 251(c)(3). We uphold the Arbitrator's decision to include Qwest's language on this issue in the agreement, on the basis of conflict with federal law. Further, whether or not state commissions must conduct an impairment analysis before ordering unbundled access to network elements, a decision would conflict with federal law if the ordered elements were the same as those "delisted" as Section 251(c)(3) UNEs.

3) Commingling or Combining of Section 271 Elements in the Agreement[84]

55 Like Issue No. Two above, this issue addresses Section 271 elements, but concerns whether we may require Qwest in its interconnection agreement with Covad to commingle or combine Section 251(c)(3) UNEs with Section 271 elements as wholesale facilities or services. Commingling means to combine or connect UNEs with wholesale facilities or services, *e.*g., UNE loops and special

---

[81] *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004).
[82] *Lark*, Case No. 04-60128, at 10.
[83] *McCarty*, 362 F.3d at 395, *citing Triennial Review Order*, ¶ 195.
[84] This was identified as "Issue No. Three" in the parties' Joint Issues List and was referred to as Issue No. Three at all stages of this arbitration.

access facilities.[85] This issue involves interpretation of the FCC's definition in the Triennial Review Order of "commingling," as well as portions of the Triennial Review Order addressing BOC obligations to provide Section 271 elements. Qwest interprets the Triennial Review Order to provide that BOCs are not required to combine or commingle Section 271 elements at all, either with other Section 271 elements or with Section 251(c)(3) UNEs. Covad agrees that Section 271 elements are not required to be commingled with other Section 271 elements, but asserts that Section 271 elements may be commingled as wholesale facilities and services with Section 251(c)(3) UNEs.[86] The parties propose language for definitions in Section 4, and Sections 9.1.1 and 9.1.1.1 of the proposed agreement, which address Qwest's obligations under the agreement to combine or commingle network elements. The parties' proposals are as follows:

Qwest	**Covad**
Section 4 – Definitions:	Section 4 – Definitions:
	"251(c)(3) UNE" means any unbundled network element obtained by CLEC pursuant to Section 251 of the Act.
"Commingling" means the connecting, attaching, or otherwise linking of an Unbundled Network Element, or a Combination of Unbundled Network Elements, to one or more facilities or services that a requesting Telecommunications Carrier has obtained at wholesale from Qwest, or the combination of an Unbundled Network Element, or a Combination	"Commingling" means the connecting, attaching, or otherwise linking of ~~an Unbundled Network Element,~~ 251(c)(3) UNE's or a Combination of ~~Unbundled Network Elements~~, 251(c)(3) UNE's to one or more facilities or services that a requesting Telecommunications Carrier has obtained at wholesale from Qwest, pursuant to any method other than

[85] *Triennial Review Order*, ¶ 579.

[86] Section 9.1.1.3 of the proposed agreement, to which the parties agree, provides that Qwest will not commingle or combine Section 271 elements with other Section 271 elements.

of Unbundled Network Elements, with one or more such facilities or services.	unbundling under Section 251(c)(3) of the Act, or the combination of an ~~Unbundled Network Element,~~ a 251(c)(3) UNE or a Combination of ~~Unbundled Network Elements,~~ 251(c)(3) UNE's with one or more such facilities or services.
9.1.1 – See above	9.1.1 – See above. (Excerpt – not in Qwest's language): Qwest is required to connect or combine 251(c)(3) UNEs with any and all of its service offerings, as required by the Telecommunications Act of 1996, FCC Rules, FCC Orders and/or state law or orders. Qwest must provide all technically feasible 251(c)(3) UNE combinations, including 251(c)(3) UNEs ordinarily combined and new 251(c)(3) UNE combinations.
9.1.1.1 This Agreement does not provide for the purchase and/or provision of resold telecommunications services with unbundled network elements provided pursuant to section 251(c)(3) of the Act, or for commingling of resale telecommunications services with other resale telecommunications services. At CLEC's request, the parties will negotiate an amendment to this Agreement governing resale and the commingling of resold telecommunications pursuant to Applicable Law.	9.1.1.1 Commingling - CLEC may commingle 251(c)(3) UNEs and combinations of 251(c)(3) UNEs with any other services obtained by any method other than unbundling under section 251(c)(3) of the Act, including switched and special access services offered pursuant to tariff and resale. Qwest will perform the necessary functions to effectuate such commingling upon request. This Agreement does not provide for the purchase and/or provision of resold telecommunications services with unbundled network elements

	provided pursuant to section 251(c)(3) of the Act, or for commingling of resale telecommunications services with other resale telecommunications services. At CLEC's request, the parties will negotiate an amendment to this Agreement governing resale and the commingling of resold telecommunications pursuant to Applicable Law.

56 The Arbitrator determined that Section 271 and Section 251(c)(3) UNEs should be defined separately in the proposed agreement and found in favor of Covad's definition of Section 251(c)(3) UNE.[87] The Arbitrator also interpreted the Triennial Review Order to mean that BOCs are not required to commingle Section 271 elements at all, and found Qwest's proposed language appropriate to include in the proposed agreement.[88]

57 On review, Covad asserts that the Arbitrator misinterpreted the intent of the Triennial Review Order in finding that Section 271 elements are not wholesale facilities or services.[89] Covad interprets paragraph 579 and footnote 1990 of the Triennial Review Order as intending that BOCs are required to commingle Section 251(c)(3) UNE with Section 271 elements, but are not required to commingle Section 271 elements with other Section 271 elements.[90] Covad asserts that this interpretation focuses on the independence of Section 271 elements from Section 251(c)(3) UNEs, *i.e.*, Section 271 elements are a type of wholesale service and may not be treated as Section 251(c)(3) UNEs.[91]

---

[87] Arbitrator's Report and Decision, ¶ 67.
[88] *Id*., ¶ 68.
[89] Covad Petition, ¶ 58.
[90] *Id*., ¶¶ 60-61, 63.
[91] *Id*., ¶ 61

58 Qwest asserts that the Arbitrator correctly interpreted the Triennial Review Order and FCC rules to find that BOCs are not required to commingle Section 271 elements.[92] Qwest asserts that the portions of the Triennial Review Order that describe and define commingling obligations for Section 251(c)(3) UNEs must be "harmonized" with the FCC's finding that BOCs are not required to combine network elements under Section 271.[93] Qwest asserts that Covad's argument is flawed, as it ignores the FCC's ruling, upheld by the D.C. Circuit in *USTA II*, concerning combination of Section 271 elements.[94] Qwest asserts that Covad's interpretation of paragraph 579 of the Triennial Review Order is inconsistent with the Act, as checklist items 4, 5, 6, and 10 of Section 271(c)(2)(B)) do not include a cross reference to the combination requirements of Section 251.[95] Qwest further asserts that the FCC's removal in the Errata to the Triennial Review Order of language in paragraph 584 relating to commingling of Section 271 elements as wholesale facilities and services supports the interpretation that BOCs are not required to combine or commingle Section 271 elements.[96]

59 ***Decision***. In the Triennial Review Order, the FCC provided that:

> [A]n incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination *with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act*. In addition, upon request, an incumbent LEC shall perform the functions necessary to commingle a UNE or UNE combination with one or more *facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act*. As a result, competitive LECs may

---

[92] Qwest Response, ¶ 44.
[93] *Id*., ¶ 40-41.
[94] *Id*., ¶ 45.
[95] *Id*.
[96] *Id*., ¶ 46.

> connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services.[97]

The FCC defines commingling as " the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."[98]

60 The FCC included the following discussion of ILEC commingling obligations in paragraph 584 of the Triennial Review Order, as corrected by the Errata to the Triennial Review Order:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including ~~any network elements unbundled pursuant to section 271 and~~ any services offered for resale pursuant to section 251(c)(4) of the Act.[99]

The paragraph, as a whole, addresses obligations to combine and commingle Section 251(c)(3) obligations with resale services provided under Section 251(c)(4).

---

[97] *Triennial Review Order*, ¶ 579.

[98] *Id*.

[99] *Triennial Review Order*, ¶ 584, as modified by *In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96098, 98-147, Errata, FCC 03-227 (rel. Sept. 17, 2003), ¶ 27 [hereinafter "*Errata*"].

61 In the FCC's discussion of the BOCs' independent obligation to provide access to Section 271 elements, the FCC addressed commingling obligations for Section 271 in a footnote. The FCC later modified the text of the footnote in the Errata, as follows:

> We decline to require BOCs, pursuant to section 271, to combine network elements that are no longer required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). ~~We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items.~~[100]

62 This issue concerns whether state commissions may require ILECs to include in an interconnection agreement the combination of UNEs provided under Section 251(c)(3) with network elements provided pursuant to Section 271. It is clear that BOCs are not prohibited from combining Section 271 elements: Qwest has agreed in a negotiated agreement with MCI—the QPP—to commingle Section 271 elements, including "delisted" 251(c)(3) elements, with Section 251(c)(3) UNEs. The issue, therefore, is whether a state can order commingling in an arbitrated interconnection agreement.

63 The first question we must address is whether Section 271 elements are considered a wholesale service under the FCC's definition of commingling. We agree with Covad that Section 271 elements are wholesale facilities or services obtained from an ILEC by a method other than unbundling under Section 251(c)(3). BOCs have an obligation to provide Section 271 elements to requesting carriers under the Act, and those elements may be provided under tariff or under Section 201 standards. The FCC characterizes other services provided under the

---

[100] *Triennial Review Order*, n.1990, as modified by *Errata*, ¶ 31.

FCC Access No. 1 tariff, such as special access facilities as wholesale for purposes of commingling. We reverse the Arbitrator's decision on this issue.

64 The next question is whether the FCC has excluded Section 271 elements as a whole from commingling obligations, as Qwest asserts, or allows Section 251(c)(3) UNEs to be commingled with Section 271 elements, as Covad claims. We find Covad's interpretation of paragraph 1990 persuasive, and reverse the Arbitrator's decision on this point as well. The FCC removed language from footnote 1990 that would support Qwest's expansive view prohibiting any commingling of Section 271 elements. The subject of the FCC's commingling definition is Section 251(c)(3) UNEs, not wholesale services. It is reasonable to infer that BOCs are not required to apply the commingling rule by commingling Section 271 elements with other wholesale elements, but that BOCs must allow requesting carriers to commingle Section 251(c)(3) UNEs with wholesale services, such as Section 271 elements. The D.C. Circuit's decision in *USTA II* supports this finding. The D.C. Circuit approved the FCC's finding that "in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements."[101]

65 We also agree with Covad that the phrase "any network elements unbundled pursuant to Section 271" was removed from paragraph 584 of the Triennial Review Order in order to allow the paragraph to address commingling of resale services, not to imply that Section 271 elements are not wholesale services. Given other language in the Triennial Review Order, and with no explanation from the FCC as to the omitted language, it does not appear appropriate to place the weight Qwest proposes to the deleted language.

66 We find it appropriate, and consistent with federal law, to include language addressing commingling of Section 251(c)(3) UNEs with Section 271 elements in the agreement, as there is a direct connection with interconnection obligations

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

under Section 251(c)(3). Our authority to require commingling of Section 251(c)(3) UNEs with wholesale Section 271 elements is found not under Section 271, but rather under Section 252(c)(1), which requires us to ensure that interconnection agreements meet the requirements of Section 251, including the FCC's regulations addressing commingling.

67 Consistent with the Arbitrator's Report, there should be some distinction in the proposed agreement in the definitions of Section 251(c)(3) UNEs and Section 271 elements. We find that Qwest's proposed definition of "commingling" matches the definition in FCC rule, and is appropriate to include in the proposed agreement.[102] We decline to include Covad's proposed language for Section 9.1.1 of the agreement, as this section is a general statement concerning unbundled network elements. Specific language concerning Qwest's obligations for combinations and commingling are included in Sections 9.1.1.1, 9.1.1.2, and 9.1.1.3. Given the FCC's findings in paragraph 579 of the Triennial Review Order, we find Covad's proposed language for Section 9.1.1.1 of the agreement appropriate. The parties must modify the proposed amendment consistent with these findings.

4) Channel Regeneration in CLEC-to-CLEC Cross Connections[103]

68 On review, this dispute presents two related issues: First, whether channel regeneration requested as a part of a CLEC-provided CLEC-to-CLEC cross-connection is a wholesale product, or a finished product; and Second, whether Qwest may charge for regeneration of a CLEC-to-CLEC cross-connection using TELRIC rates or must charge the FCC's access tariff. Covad asserts that a CLEC-to-CLEC cross-connection is a wholesale product and that regeneration provided as a part of that product should be priced accordingly as a wholesale product

---

[102] *See* 47 C.F.R. § 51.5.

[103] This was identified as "Issue No. Five" in the parties' Joint Issues List and was referred to as Issue No. Five at all stages of this arbitration.

under TELRIC rates. Qwest asserts that it has no responsibility to provision a CLEC-to-CLEC cross-connection under FCC rules: Regeneration provided as part of that cross-connection is a finished product, not a wholesale product, and must be ordered under the FCC access tariff.

69 During the arbitration, Covad proposed language for Sections 8.2.1.23.1.4 and 8.3.1.9 of the proposed agreement requiring Qwest to provide any regeneration required in a CLEC-to-CLEC cross-connection at no charge, in particular if the need for regeneration is due to Qwest's space allocation policies. Qwest proposed language for Sections 8.2.1.23.1.4 and 9.1.10 providing that channel regeneration charges will not apply for interconnection between Qwest and a CLEC's collocated space. The parties' proposed language is as follows:

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

	for its own future use.
8.3.1.9 Intentionally Left Blank	8.3.1.9 Channel Regeneration Charge. Required when the distance from the leased physical space (for Caged or Cageless Physical Collocation) or from the collocated equipment (for Virtual Collocation) to the Qwest network is of sufficient length to require regeneration. Channel Regeneration Charges shall not apply until the Commission approves Qwest's authentication plan. After approval of the authentication plan, Channel Regeneration Charges shall not apply if Qwest fails to make available to CLEC: (a) a requested, available location at which regeneration would not be necessary or (b) Collocation space that would have been available and sufficient, but for its reservation for the future use of Qwest. Channel Regeneration will not be charged separately for Interconnection between a Collocation space and Qwest's network or between non-contiguous Collocation spaces of the same CLEC or to connect to the Collocation space of another CLEC. Channel Regeneration will not be charged separately for facilities used by CLEC to access Unbundled Network Elements and

	ancillary services from the Collocation space, but if based on the ANSI Standard for cable distance limitations, regeneration would not be required but is specifically requested by CLEC, then the Channel Regeneration Charge would apply. If Channel Regeneration is required, based on the ANSI standard for cable distance limitations, Qwest will recover the costs indirectly and on a proportionate basis with equal sharing of the costs among all collocators and Qwest. Cable distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B."
9.1.10 Channel Regeneration. Qwest's design will ensure the cable between the Qwest provided active elements and the DSX will meet the proper signal level requirements. Channel Regeneration will not be charged separately for Interconnection between a collocation space and Qwest's network. Cable distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B".	~~9.1.10 Channel Regeneration. Qwest's design will ensure the cable between the Qwest provided active elements and the DSX will meet the proper signal level requirements. Channel Regeneration will not be charged separately for Interconnection between a collocation space and Qwest's network. Cable distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B".~~

70 The Arbitrator's Report determined that Qwest has allowed CLECs to provide or perform CLEC-to-CLEC cross-connections themselves, as provided under FCC rule, and that under that rule, Qwest is not required to provide or pay for regeneration as a part of a CLEC-provisioned CLEC-to-CLEC cross-connection.[104] The Arbitrator directed the parties to include Qwest's proposed language for Section 8.2.1.23.1.4, and to include the following sentence at the end: "Regeneration may be required, depending on the distance parameters of the combination."[105]

71 Based on this determination, the Arbitrator determined that Qwest may charge for regeneration under its FCC Access Tariff No. 1, and found that as Qwest does not charge for channel regeneration for Qwest-CLEC or same CLEC cross-connections, that there is no TELRIC rate to fall back on.[106]

72 The Arbitrator agreed with Covad that it was appropriate to address channel regeneration charges in Section 8 of the agreement, which relates to collocation, as opposed to Section 9, which relates to UNEs.[107] The Arbitrator also agreed with Covad that Qwest may not charge for channel regeneration in cross-connections between Qwest and a CLEC or between non-contiguous spaces of the same CLEC.[108] The Arbitrator found inappropriate Covad's remaining proposals in Section 8.3.1.9, finding that Qwest does not have complete control over where CLEC's choose to collocate.[109] The Arbitrator directed the parties to delete Qwest's proposed language for Section 9.1.10, and modify Section 8.3.1.9 based on the Arbitrator's decisions.[110]

---

[104] Arbitrator's Report and Decision, ¶¶ 80, 83.
[105] *Id.*, ¶ 83.
[106] *Id.*, ¶ 87.
[107] *Id.*, ¶ 84.
[108] *Id*.
[109] *Id*.
[110] *Id.*, ¶ 86.

73 Qwest filed a proposed Interconnection Agreement with the Commission on December 17, 2004, modifying Sections 8.2.1.23.1.4, 8.3.1.9, and 9.1.10 as required by the Arbitrator's Report. The parties' proposed language for Section 8.3.1.9 is as follows:

> 8.3.1.9 Channel Regeneration Charge. Required when the distance from the leased physical space (for Caged or Cageless Physical Collocation) or from the collocation equipment (for Virtual Collocation) to the Qwest network is of sufficient length to require regeneration. Channel regeneration will not be charged separately for Interconnection between a Collocation space and Qwest's network or between non-contiguous Collocation spaces of the same CLEC. Qwest shall charge for regeneration requested as a part of CLEC-to-CLEC Cross Connections under the FCC Access No. 1 tariff, Section 21.5.2 (EICT). Cable distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B."

74 Covad seeks review only of the Arbitrator's decision that Qwest may charge for regeneration of CLEC-to-CLEC cross-connections at non-TELRIC rates.[111] Covad asserts that Qwest's proposal for CLEC-to-CLEC cross-connections is discriminatory and contrary to the FCC's Fourth Report and Order.[112] Covad requests that Qwest be required to provide the cross-connections upon request and to charge, at most, TELRIC rates for the connection.[113]

75 Covad asserts in its petition that Qwest places restrictions on the placement of necessary regeneration equipment, and that these restrictions make it financially and technically impossible for Covad to provision its own regenerated cross-

---

[111] Covad Petition, ¶ 66.
[112] *Id.*, ¶ 66. *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, CC Docket No. 98-147, FCC 01-204 (rel. Aug. 8, 2001) [hereinafter "Fourth Report and Order"].
[113] Covad Petition, ¶ 66.

connections.[114] Covad asserts that Qwest would allow collocating CLECs to self-provision a cross-connection, but would require that repeater equipment be placed at both ends of the connection, rather than mid-span.[115] According to Covad, Qwest regenerates signals on its own cross-connections "at or near mid-span using equipment located near its distribution frame."[116]

76 During argument, Covad asserted that Qwest requires CLECs to purchase collocation space to locate regeneration equipment at mid-span of a CLEC-to-CLEC cross-connection.[117] Qwest clarified that a mid-span collocation facility would be necessary in a direct connection between CLECs, but not for a CLEC-to-CLEC connection through an interconnection distribution frame, or ICDF.[118] The only reference in evidence in the proceeding to a requirement for a mid-span collocation facility is testimony by Covad's witness, Mr. Zulevic, that such a requirement would be discriminatory, as Qwest would not incur similar costs for mid-span regeneration of its own cross-connections.[119]

77 Covad asserts that the Fourth Report and Order requires ILECs to provision CLEC-to-CLEC cross-connections under Section 251(c)(6), and that the refusal to do so would violate the ILECs' duties under Section 251(c)(6) to provide collocation on terms that are just, reasonable, and non-discriminatory.[120] Covad asserts that the exception in FCC rule "assumes that competitive LECs could self-provision the desired connection under conditions that did not violate section 251(c)(6)."[121] Covad asserts that Qwest's proposal, permitted by the Arbitrator's

---

[114] *Id*.
[115] *Id.*, ¶ 69, *citing* TR. 201-203.
[116] *Id*., *citing* TR. 190.
[117] TR. 437:16-23; 440:5-13.
[118] TR. 444:24-446:16.
[119] TR. 189:16-190:9 (Zulevic).
[120] Covad Petition ¶ 67, *citing Fourth Report and Order*, ¶¶ 80, 82.
[121] *Id.*, ¶ 68.

decision, is technically and practically impossible, and does not meet the non-discrimination provisions of Section 251(c)(6).[122]

78 Finally, Covad contests the Arbitrator's decision to apply retail rates given an absence of TELRIC rates for channel regeneration.[123] Covad asserts that the Commission-established rate of $0.00 for channel regeneration *is* the applicable TELRIC rate approved by the Commission.[124] Further, Covad asserts that applying the TELRIC rate rather than the retail rate in the FCC access tariff would be a "more equitable and legally acceptable result."[125]

79 Qwest asserts that there is no record evidence of prohibitions or restrictions on Covad's placement or use of regeneration equipment.[126] Qwest further asserts that the FCC's Fourth Report and Order and rules provide that ILECs have no obligation to provide CLEC-to-CLEC cross-connections if the ILEC allows CLECs to self-provision the cross-connection.[127] Qwest asserts that if an ILEC has no obligation to provide the cross-connection, it has no obligation to provide regeneration of the signal on the cross-connection.[128]

80 Qwest asserts that the record in the proceeding shows that CLECs have the ability to cross-connect with each other in Qwest central offices by creating a direct connection between collocation spaces or through a common ICDF (Interconnection Distribution Frame).[129] Qwest asserts that CLECs have the ability to self-provision regeneration, if necessary, by boosting the signal from their own collocation spaces.[130]

---

[122] *Id*., ¶ 70.
[123] *Id.,* ¶¶ 71-73.
[124] *Id.,* ¶ 72.
[125] *Id.,* ¶ 73.
[126] Qwest Response, ¶ 48.
[127] *Id.,* ¶ 49.
[128] *Id*.
[129] *Id.,* ¶ 50.
[130] *Id*.

81 Qwest asserts that it is not required to provide CLEC-to-CLEC cross-connections under the FCC's rule, and that therefore, "its conduct is sanctioned by the rules," and it cannot be seen as acting in a discriminatory manner.[131] Qwest further asserts that there is no legal basis to require Qwest to provide regeneration as a wholesale product, and that even if there were, there is no evidence in the record to show that a zero rate is appropriate.[132]

82 ***Decision.*** At its core, this dispute concerns whether the exception in the FCC rule allowing CLECs to self-provision CLEC-to-CLEC cross-connections means that ILECs may charge CLECs for regeneration equipment the CLECs cannot self-provision, and whether ILECs must charge TELRIC (*i.e.*, interconnection or UNE wholesale) rates for regeneration or must charge the FCC access tariff (*i.e.*, non-interconnection, or retail) rates for a finished service. In order to resolve this issue, we must first clarify the factual situation the parties present and the nature of the language the parties propose, and then look to the FCC's Fourth Report and Order and the policy interests at stake.

83 Both parties recognize that the circumstances at issue are likely to arise where CLECs in highly-congested urban central offices enter into loop-splitting and line-splitting arrangements requiring cross-connections, and mid-span regeneration is required to boost the signal between CLEC collocation sites located far apart from one another in the central office.[133] Given the nature of their collocation arrangements, CLECs generally may not self-provision equipment outside of their collocation space without ILEC approval.

---

[131] *Id.*, ¶ 51.

[132] *Id.*, ¶ 52.

[133] *See* Exh. 45-T at 19: 9-21(Norman); Exh. 11-RT at 3-4 (Zulevic); TR. 200:21-201:10, 202:16-203:1 (Norman).

84 Qwest asserts that it allows CLECs to self provision cross-connections between CLEC collocation spaces either through a direct connection, in which Qwest asserts it need not be involved, or through Qwest's interconnection distribution frame, or ICDF, at which point Qwest will connect the two CLEC cables. The language in dispute, Sections 8.2.1.23.1.4, 8.3.1.9, and 9.1.10, concerns only cross-connection at the ICDF, not direct connection. Although Covad raised concerns during oral argument about the prospect of building a new collocation facility at mid-span of a direct CLEC-to-CLEC connection, Covad did not provide direct evidence concerning this issue during the proceeding, and has not proposed language in either Section 8.1.2.23.1.4 or Section 8.3.1.9 to address it. We find, therefore, that we need not address the question of channel regeneration in all situations of self-provisioned cross-connection, but will focus our analysis on regeneration required in cross-connections at the ICDF.

85 Qwest defines CLEC-to-CLEC cross-connection, or COCC-X, as a "CLEC's capability to order a Cross Connection from it's [sic] Collocation in a Qwest Premises to its non-adjacent Collocation space or to another CLEC's Collocation within the same Qwest Premises *at the ICDF*."[134] The cross-connection to the ICDF is a wholesale product, which Qwest provides at TELRIC rates.[135] Where regeneration is necessary as a part of the cross-connection, Qwest asserts that it offers channel regeneration as a "finished service," meaning that the CLEC will purchase a private line or access service from Qwest via the FCC Access No. 1 tariff, and Qwest will design the circuit to include the necessary channel regeneration.[136] Covad asserts that channel regeneration in a cross-connection is a wholesale service and should not be priced as a retail service. The language in dispute in Sections 8.2.1.23.1.4 and 8.3.1.9 addresses this issue.

---

[134] Exh. 71, § 8.2.1.23.1.1 (*emphasis added*).
[135] Exh. 51 at 23:13-20 (Norman testimony in Colorado proceeding).
[136] Exh. 45-T at 13:11-14:2 (Norman); *see also* Exh. 51 at 23:6-24:10 (Norman testimony in Colorado proceeding).

86 In its Fourth Report and Order, the FCC determined that ILECs must provision cross-connects, upon request, between CLEC collocation spaces under both Section 201 and Section 251(c)(6) of the Act.[137] The cross-connections in dispute in this agreement concern connections provisioned under Section 251(c)(6). Section 251(c)(6) imposes a duty on ILECs "to provide, on rates, terms, and conditions that are just, reasonable, and non-discriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier."[138]

87 The FCC determined in the Fourth Report and Order that:

> Incumbent LEC-provisioned cross-connects are properly viewed as part of the terms and conditions of the requesting carrier's collocation in much the same way as the incumbent LEC provisions cables that provide electrical power to collocators. Once equipment is eligible for collocation, the incumbent LEC must install and maintain power cables, *among other facilities and equipment*, to enable the collocator to operate the collocated equipment. The power cables are not "collocated" merely because the incumbent LEC installs and maintains these cables in areas outside the requesting carrier's immediate collocation space. Instead, the incumbent provides the power cables as part of its obligation to provide for interconnection and collocation "on rates, terms, and conditions that are just, reasonable, and non-discriminatory." [Footnote omitted] *As with power cables, an incumbent installs and maintains cross-connect cables—or refuses to install and maintain them—as part of the terms and conditions under which the incumbent provides collocation*. Indeed, the Commission has long considered cross-connects to be part of the terms and conditions under which LECs provide interconnection. [Footnote omitted][139]

---

[137] *Fourth Report and Order*, ¶¶ 63, 79. The FCC determined that cross-connections provided under Section 201 of the Act were subject to pricing similar to special access interconnection services, *i.e.*, pursuant to the FCC retail tariff. *Id.*, ¶¶ 72-73.

[138] 47 U.S.C. § 251(c)(6).

[139] *Fourth Report and Order*, ¶ 79 (*emphasis added*).

88 The FCC found that "an incumbent LEC would be acting in an unreasonable and discriminatory manner if it refused to provide cross-connects between collocators."[140] The FCC further stated "[t]he provisioning of cross-connects within the incumbent's premises merely puts the collocator in position to achieve the same interconnection with other competitive LECs that the incumbent itself is able to achieve."[141]

89 The FCC rule incorporating this obligation, 47 CFR § 51.323(h)(1), provides, in relevant part:

> An incumbent LEC shall provide, at the request of a collocating telecommunications carrier, a connection between the equipment in the collocated spaces of two or more telecommunications carriers, *except to the extent the incumbent LEC permits the collocating parties to provide the requested connection for themselves . . .*

(*Emphasis added*). The FCC addressed the nature of the exception to the rule only in a footnote. Noting that there was no statutory authority for requiring ILECs to allow CLECs to self-provision cross-connections, the FCC stated that CLEC self-provisioning imposes less of a burden on ILEC property when the cross-connection is between adjacent collocation space, "than when the cross-connect would traverse common areas of the incumbent LEC's premises."[142] The FCC encouraged ILECs "to adopt flexible cross-connect policies that would not prohibit competitive LEC-provisioned cross-connects *in all instances*."[143] The FCC appeared to try to avoid imposing unnecessary burdens on ILECs in providing cross-connections to adjacent CLEC collocation facilities, where CLECs can easily self-provision the connection. On the other hand, the FCC distinguished the type

---

[140] *Fourth Report and Order*, ¶ 79.
[141] *Id.*, ¶ 82.
[142] *Id.*, n.158.
[143] *Id. (Emphasis added)*.

of situation present in this arbitration, *i.e.*, a cross-connection that would traverse common areas and make use of a distribution frame.

90 We reject Qwest's argument that it has no obligation to provision required regeneration as a wholesale service if it allows the CLECs to self-provision cross-connections at the ICDF under the FCC's exception. Regeneration may be necessary for the cross-connection to function, just as the FCC recognized that power cables may be necessary for collocation, as a whole, to function. It is discriminatory for Qwest to charge wholesale rates for the cross-connection at the ICDF, yet charge retail rates as a "finished product" if regeneration is required along that circuit.

91 While we agree with the Arbitrator's decision that Qwest may charge for regeneration provided in CLEC-to-CLEC cross-connections, we reverse the Arbitrator's decision that such regeneration is a finished product subject to retail rates in cross-connections at the ICDF. We find that Qwest has an obligation under the non-discrimination provisions of Section 251(c)(6) to provide regeneration for CLEC-provisioned cross-connections on terms that are just, reasonable, and non-discriminatory. As Qwest charges wholesale rates for the cross-connection, it must also charge wholesale rates for the regeneration. Qwest must charge no more than TELRIC rates for channel regeneration requested as a part of a CLEC-to-CLEC cross-connection at the ICDF, as set forth in Exhibit A of the Agreement. These rates are similar to those identified in Exhibit A to Qwest's SGAT.

92 The Arbitrator is incorrect that there are no TELRIC-based rates for channel regeneration in Exhibit A to the SGAT: Qwest has simply chosen not to charge for channel regeneration. In our 46th Supplemental Order in Docket Nos. UT-003022 and 003040, we approved Qwest's request to modify SGAT Exhibit A, so

as to eliminate existing charges under Section 8.1.7 for channel regeneration.[144] These charges included a $9.88 recurring charge and $479.79 non-recurring charge for DS1 Regeneration, and a $36.00 recurring charge and a $1810.56 nonrecurring charge for DS3 Regeneration.[145] Qwest explained in its filing that "Effective 8/1/03 Qwest will no longer charge for Channel Regeneration for both recurring and nonrecurring charges. Contract amendments to remove the charge is not required. Qwest reserves the right to revert back to the contractual rate only after appropriate notice is given."[146]

93 We direct the parties to amend proposed Section 8.3.1.9 as follows:

> 8.3.1.9 Channel Regeneration Charge. Required when the distance from the leased physical space (for Caged or Cageless Physical Collocation) or from the collocation equipment (for Virtual Collocation) to the Qwest network is of sufficient length to require regeneration. Channel regeneration will not be charged separately for Interconnection between a Collocation space and Qwest's network or between non-contiguous Collocation spaces of the same CLEC. ~~Qwest shall charge for regeneration requested as a part of CLEC-to-CLEC Cross Connections under the FCC Access No. 1 tariff, Section 21.5.2 (EICT).~~ Cable distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B."

---

[144] *In the Matter of the Investigation into U S West Communications, Inc.'s, Compliance with Section 271 of the Telecommunications Act of 1996,* Docket No. UT-003022, *In the Matter of U S West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket No. UT-003040, 46th Supplemental Order; Rescinding In Part and Modifying 45th Supplemental Order; Approving Qwest's Revisions to SGAT Exhibit A (Aug. 21, 2003) ¶ 35.

[145] *See* Qwest Corporation's Washington SGAT Eighth Amended SGAT, Fifth Amended Exhibit A, Redlined Version filed July 11, 2003, at 3.

[146] *Id*., at 29.

5) Payment Issues[147]

94 The dispute centers on Covad's proposal for Section 5.4.1 of the proposed agreement for an extended timeframe for payment of Qwest's invoices, and for additional time before Qwest may invoke remedies for non-payment of invoices in Sections 5.4.2 and 5.4.3 of the proposed agreement. We will first address the issue of the payment time frame, and then address timeframes for invoking remedies for non-payment.

95 **A. Payment Due Date.** The standard timeframe in the industry for payment of invoices is 30 days from the invoice date. Covad initially proposed language seeking an additional 15 days before paying any Qwest's invoice, asserting that errors and problems with Qwest's billing practices make it difficult and impossible for Covad to complete its bill review within 30 days. In the Updated Joint Issues List, Covad proposed language allowing 45 days for payment only for billing relating to certain services or products, referring to it as the "new product exception." The parties proposed the following language:

Qwest	**Covad**
5.4.1 Amounts payable under this Agreement are due and payable within thirty (30) calendar Days after the date of invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later (payment due date). If the payment due date is not a business day, the payment shall be due the next business day.	5.4.1 Amounts payable for any invoice containing (1) line splitting or loop splitting products, (2) a missing circuit ID, (3) a missing USOC, or (4) new rate elements, new services, or new features not previously ordered by CLEC (collectively "New Products") (hereinafter collectively referred to as "Exceptions") are due and payable within forty-five (45) calendar Days after the date of invoice, or within twenty (20) calendar Days after

[147] This was identified as "Issue No. Eight" in the parties' Joint Issues List and was referred to as Issue No. Eight at all stages of this arbitration.

	receipt of the invoice, whichever is later (payment due date) with respect to the New Products Exception, the forty-five (45) Day time period shall apply for twelve (12) months. After twelve (12) months' experience, such New Products shall be subject to the thirty (30) Day time frame hereinafter discussed. Any invoice that does not contain any of the above Exceptions are due and payable within thirty (30) calendar Days after the date of invoice, or within twenty calendar Days after receipt of the invoice, whichever is later. If the payment due date is not a business day, the payment shall be due the next business day.

96 The Arbitrator's Report found that Covad had raised credible claims regarding problems with Qwest's billing process, in particular concerning the lack of circuit identification numbers and universal service order codes, or USOCs.[148] The Arbitrator determined, however, that these problems did not justify a change in the industry standard of a 30-day period for payment of invoices.[149] The Arbitrator found that the Change Management Process, established to allow Qwest and CLECs to collaboratively address changes to Qwest products and processes, and the six-month review process for reviewing performance measurements, are more appropriate means to address Covad's concerns with Qwest's billing practices.[150] The Arbitrator further found that bill review is a cost of business for Covad and does not merit a change in the payment due-date. *Id.*, ¶ *103*.

---

[148] Arbitrator's Report and Decision, ¶ 100; *see also* TR. 143:6-9 (Doberneck).
[149] *Id.*, ¶¶ 100-101.
[150] *Id.*, ¶¶ 101-102.

97 The Arbitrator found Covad's "new products exception" to be unworkable, noting that it may cause more delays and confusion that the current process. *Id.* The Arbitrator found it inappropriate to allow Covad an additional 15 days to address billing issues relating to increased CLEC partnering in line-splitting arrangements, as such new arrangements are a cost of doing business. *Id.*

98 Covad petitioned for review, asserting that the Arbitrator recognized the existence of the billing problems Covad identified, but did not provide the appropriate recourse by adopting Covad's proposed language.[151] Covad asserts that the Change Management Process is not an appropriate forum for addressing Qwest's billing problems, noting that the Change Management Process is not a forum for adjudicating issues, and that Qwest can veto any CLEC request.[152] Covad noted during oral argument that Qwest had rejected Covad's proposal to address the billing issue through the Change Management Process and that Covad was seeking review through the escalation process.[153]

99 Covad further disputes the Arbitrator's decision that bill review is merely a cost of business for Covad.[154] Covad argues that requiring one party to pay for another party's failings is cost-shifting.[155] Covad asserts that it requests additional time only to address problems created by Qwest's failure to meet industry norms for billing.[156]

---

[151] Covad Petition, ¶ 77.
[152] *Id.,* ¶¶ 78-80.
[153] TR. 452:18-24.
[154] Covad Petition, ¶¶ 81-83.
[155] *Id.,* ¶ 81.
[156] *Id.,* ¶¶ 82-83.

100 Qwest urges the Commission to adopt the Arbitrator's decision on this issue, asserting that the industry standard, including Covad's own standard for payment by its customers, is 30 days.[157] Qwest asserts that Covad has not established a compelling reason for extending the payment due-date.[158] Qwest also asserts that the Change Management Process is the appropriate process for billing process changes, noting that the process includes escalation and dispute resolution should Qwest reject a change request.[159]

101 ***Decision.*** We uphold the Arbitrator's decision on this issue. The industry standard of a 30-day payment due-date is appropriate in an interconnection agreement between Covad and Qwest. The 30-day payment due-date is an industry standard and is included in Covad's current agreement with Qwest, many other interconnection agreements, Qwest's Statement of Generally Available Terms, and Covad's own commercial agreements.[160] While Covad's proposed language narrows the application of the extended payment due-date to line splitting or loop splitting products, missing circuit identification numbers, missing USOCs, and new products, we agree with the Arbitrator that these exceptions to the general 30-day payment due-date would likely cause more delay and confusion for the parties than a uniform payment due-date.

102 In addition, it is not appropriate to delay payments to Qwest arising from line-splitting and loop-splitting arrangements: Any billing issues arising from these arrangements are a cost of doing business for Covad. Similarly, it is not appropriate to delay payments to Qwest arising from any new rate elements, services, or features. Covad presented no evidence in its testimony or during hearing of billing issues relating to these items.

---

[157] Qwest Response, ¶ 54.
[158] *Id*.
[159] *Id.*, ¶ 55.
[160] Exh. 35-T at 5:8-14, 9:8-15, and 13:11-13 (Easton);

103 While Covad argued in hearing that Qwest's failure to include USOC's and circuit identification numbers in certain invoices poses a substantial problem for Covad, the testimony does not appear to confirm this assertion. The majority of bills do not appear to have missing USOCs. Qwest agrees that there are certain circumstances when USOC's are not included on bills.[161] Qwest asserts that it is not difficult to identify USOC's or to validate the billed amount from other information on the bill.[162] As the purpose of bill validation is to determine whether charges match what is expected,[163] the lack of a USOC code does not appear to justify additional time before payment is due. The lack of circuit identification numbers appears to be an issue only for bills for line sharing.[164] While Covad's business as a data CLEC relies heavily on line sharing, we agree with the Arbitrator that this issue is more appropriately addressed in the Change Management Process. We encourage Covad to pursue the issue through the escalation and dispute resolution processes of the Change Management Process. As Qwest has asserted that this process is the most appropriate means for addressing the issue, it should, in good faith, give serious consideration to Covad's request in the Change Management Process.

104 **B. Time Frames for Non-Payment Remedies**. The current agreement between Covad and Qwest does not include remedies Qwest may invoke for non-payment of invoices. Qwest proposes new Sections 5.4.2 and 5.4.3 allowing Qwest to discontinue processing orders and discontinue providing service for non-payment. Covad does not oppose inclusion of the remedies in the agreement, but requests a longer timeframe before Qwest may invoke its remedies. The relevant portion of the parties' proposed language is as follows:

---

[161] Exh. 40-RTC at 6:21-22 (Easton).
[162] *Id*., at 7:7-19.
[163] *Id*., at 7:21-8:2.
[164] *Id*., at 5:18 – 6:10.

Qwest	**Covad**
5.4.2 One Party may discontinue processing orders for the failure of the other Party to make full payment for the relevant services, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the relevant services provided under this Agreement within thirty (30) calendar Days following the payment due date. 5.4.3 The Billing Party may disconnect any and all relevant services for failure by the billed Party to make full payment, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the relevant services provided under this Agreement within sixty (60) Calendar Days following the payment due date.	5.4.2 One Party may discontinue processing orders for the failure of the other Party to make full payment for the relevant services, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the relevant services provided under this Agreement within ~~thirty (30)~~ sixty (60) calendar Days following the payment due date. 5.4.3 The Billing Party may disconnect any and all relevant services for failure by the billed Party to make full payment, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the relevant services within ninety (90) Calendar Days following the payment due date.

105 The Arbitrator found Qwest's proposed language appropriate, as Covad's concerns did not outweigh the possible financial risk to Qwest of processing additional orders and providing service to Covad while Covad has the option of not paying Qwest for services rendered for 90 and 120 days, respectively.[165]

106 Covad does not appear to seek review of this decision: Covad identified the issue in a heading of its petition for review, but did not address the issue in the text of its argument.[166]

[165] Arbitrator's Report and Decision, ¶ 110.
[166] Covad Petition at 30-33.

107 Qwest asserts that Qwest offers no basis for reversing the Arbitrator's decision concerning Qwest's proposed language for Sections 5.4.2 and 5.4.3.

108 ***Decision.*** We uphold the Arbitrator's decision, finding that Covad did not seek review of the decision.

FINDINGS OF FACT

109 The Commission makes the following summary findings of fact, having discussed above the evidence concerning all material matters and having stated our more detailed findings of fact. Those portions of the preceding discussion pertaining to the Commission's ultimate findings in this matter are incorporated by this reference.

110 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of telecommunications companies in the state.

111 (2) Qwest Corporation is engaged in the business of furnishing telecommunications services, including, but not limited to, basic local exchange service within the state of Washington, and is a local exchange carrier as defined in the Act.

112 (3) Covad Communications Company is a competitive local exchange carrier that furnishes telecommunications services to customers in Washington.

113 (4) On January 31, 2003, Covad commenced negotiations with Qwest with the intention to achieve an Interconnection Agreement between Covad and Qwest. The parties agreed to numerous extensions, agreeing that the negotiation request date for Washington state would be December 17,

2003. The parties could not resolve certain issues by negotiation and Covad requested arbitration on May 25, 2004.

114 (5) The essential facts pertinent to the Arbitrator's Report and Decision and the Commission's consideration of "Issue No. One," "Issue No. Three," "Issue No. Five," and "Issue No. Eight," as presented on review, are not disputed.

115 (6) There was no record evidence in this proceeding concerning whether Issue No. 2 is an open issue for arbitration. Both Qwest and Covad acted in this proceeding as if the matter was an open issue, as neither party raised the question, but agreed to address the issue in post-hearing briefs.

116 (7) The Arbitrator relied on facts not in evidence in finding that Issue No. Two in this proceeding was not an "open issue" for arbitration.

117 (8) Covad provided evidence, and proposed language in Sections 8.2.1.23.1.4, 8.3.1.9, and 9.1.10, concerning regeneration and its pricing for cross-connection at the ICDF, but did not provide evidence and language concerning regeneration for direct connection between CLECs.

118 (9) Qwest provides a cross-connection to the ICDF as a wholesale product, at TELRIC rates, but charges retail rates for the whole circuit as a finished service if regeneration is required as a part of the cross-connection.

119 (10) Covad did not petition for review of the Arbitrator's decision finding in favor of Qwest's language for Sections 5.4.2 and 5.4.3 of the proposed agreement relating to remedies for non-payment.

CONCLUSIONS OF LAW

120 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter and the parties to this proceeding.

121 (2) The Telecommunications Act of 1996 ("Act") authorizes the Commission to arbitrate and approve interconnection agreements between telecommunications carriers, pursuant to Section 252 of the Act. The Commission is specifically authorized by state law to engage in that activity. *RCW 80.36.610*. This arbitration and approval process was conducted pursuant to and in compliance with 47 U.S.C. § 252 and RCW 80.36.610.

122 (3) The only condition or requirement incumbent local exchange carriers (ILEC) must meet before retiring copper facilities is to comply with FCC rules governing planned network changes, including providing at least 90 days' notice of a proposal to retire copper facilities before taking action to retire the facilities. *Triennial Review Order, ¶¶ 281-83; see also 47 C.F.R. § 51.327(a).*

123 (4) FCC rules governing planned network changes do not require identification of specific competitive local exchange carrier (CLEC) customers affected by a planned network change, nor do the rules place the burden solely on the ILEC to determine the potential impact of a change.

124 (5) Qwest's proposed language for Sections 9.1.15 and 9.2.1.2.4, if modified to include a specific reference to the FCC's rule, complies with the FCC's rules regarding planned network changes.

125 (6) Covad's proposed language for Sections 9.1.15.1.1 and 9.2.1.2.3.1 is not consistent with the FCC's findings concerning an ILEC's right to retire copper facilities, as the FCC did not limit an ILEC's ability to retire copper facilities to situations where the ILEC is replacing copper with fiber-to-the home or fiber-to-the-curb facilities. *See Triennial Review Order, ¶¶ 217, 281, 296, n.850.*

126 (7) The Arbitrator's decision that Qwest and Covad did not mutually agree to negotiate or arbitrate Issue No. Two was in error, as the decision was based on facts not in evidence.

127 (8) Section 271 of the Act provides the FCC with the sole decision-making and enforcement authority under the statute, granting no shared decision-making authority to state commissions.

128 (9) State commissions have no authority under Section 271 to require BOCs to provide access to Section 271 network elements, or to determine the prices of Section 271 elements, as requiring such access or pricing would conflict with the statutory scheme providing only the FCC with decision-making and enforcement authority under Section 271.

129 (10) BOCs may provide access to Section 271 elements through commercial agreements or interstate tariffs. *See Triennial Review Order, ¶ 664.*

130 (11) Covad's request, pursuant to state law, to require inclusion in its interconnection agreement of access to network elements that the FCC has determined need not be made available under Section 251(c)(3), would directly conflict with the federal statutory scheme and federal law.

131 (12) The FCC defines commingling as " the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services." *Triennial Review Order, ¶ 579.*

132 (13) Section 271 elements are wholesale facilities or services obtained from an ILEC by a method other than unbundling under Section 251(c)(3), as described in the FCC's definition of commingling.

133 (14) It is reasonable to infer from the FCC's commingling rule, and paragraph 579 and footnote 1990 of the Triennial Review Order, that BOCs are not required to commingle Section 271 elements with other wholesale elements, but that BOCs must allow requesting carriers to commingle Section 251(c)(3) UNEs with wholesale services, such as Section 271 elements.

134 (15) State commissions have authority under Section 252(c)(1) of the Act to require in an interconnection agreement the commingling of Section 251(c)(3) UNEs with wholesale facilities and services, including Section 271 elements.

135 (16) Qwest's proposed definition of "commingling" matches the FCC's definition in 51 C.F.R. § 51.5, and is appropriate.

136 (17) Covad's proposed language for Section 9.1.1 of the proposed agreement concerning commingling is not appropriate in a general statement concerning unbundled network elements.

137 (18) Covad's proposed language for Section 9.1.1.1 of the proposed agreement is appropriate as it follows the FCC's findings in paragraph 579 of the Triennial Review Order.

138 (19) ILECs must provision cross-connects, upon request, between CLEC collocation spaces under Section 251(c)(6) of the Act, which imposes a duty on ILECs "to provide, on rates, terms, and conditions that are just, reasonable, and non-discriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." *See Fourth Report and Order*, ¶ *79; 47 U.S.C. § 251(c)(6).*

139 (20) Under FCC rules, ILECs must provide, upon request, cross-connections between collocating CLECs, "except to the extent the incumbent LEC permits the collocating parties to provide the requested connection for themselves." *47 C.F.R. § 51.323(h)(1).*

140 (21) Where regeneration may be necessary for the cross-connection to function, it is discriminatory under Section 251(c)(6) for Qwest to charge wholesale rates for cross-connection at the ICDF, yet retail rates as a "finished product" if regeneration is required along that circuit.

141 (22) Where Qwest has chosen not to charge for channel regeneration, the TELRIC rate for channel regeneration listed in SGAT Exhibit A and Qwest's interconnection agreement with Covad is $0.00.

142 (23) A 30-day payment due-date is appropriate in an interconnection agreement with Qwest, as this same payment due-date is an industry standard and is included in Covad's current agreement with Qwest, many other interconnection agreements, Qwest's Statement of Generally Available Terms, and Covad's own commercial agreements.

143 (24) Covad's proposed exceptions to the general 30-day payment due-date for line-splitting or loop-splitting products, missing circuit identification numbers, missing USOCs, and new products, would likely cause more delay and confusion for the parties than a uniform payment due-date.

144 (25) Billing issues arising from line-splitting and loop-splitting arrangements between Covad and other CLECs are a cost of doing business for Covad, and are not a valid basis for extending the standard 30-day payment due-date.

145 (26) Covad has not demonstrated through testimony or other evidence that billing issues relating to new rate elements, services, or features require the extension of the standard 30-day payment due-date.

146 (27) Covad's request for additional time before payment is due is not justified where the lack of circuit identification numbers and USOCs affects a minority of Qwest's bills and the purpose of bill validation is to determine whether charges match what is expected.

ORDER

THE COMMISSION ORDERS:

147 (1) The Arbitrator's Report and Decision, Order No. 4 in this arbitration proceeding, entered on November 2, 2004, is affirmed with respect to the following issues contested on review:

a) The parties must include in their Interconnection Agreement Qwest's proposed language for Sections 9.1.15 and Section 9.2.1.2.3, as modified by this Order, concerning notice requirements and terms concerning copper retirement;

b) The parties must include in their Interconnection Agreement, with the exception of the definition of "unbundled network element" in Section 4, the language Qwest proposes concerning inclusion of network elements under Section 271 and state law;

c) Qwest may charge for regeneration provided in CLEC-to-CLEC cross-connections; and

d) The parties must include in their Interconnection Agreement Qwest's proposed language concerning the timeframe for payment of invoices in Section 5.4.1, and the timeframes for remedies for non-payment in Sections 5.4.2, and 5.4.3;

148 (2) The Arbitrator's Report and Decision, Order No. 4 in this arbitration proceeding, entered on November 2, 2004, is reversed with respect to the following issues contested on review:

a) Whether Issue No. Two is an "open issue" for arbitration;

b) Whether Section 271 elements are wholesale facilities and services under the FCC's definition of "commingling" in 51 C.F.R. § 51.5;

c) Whether the Commission may require Qwest Corporation to include in the arbitrated interconnection agreement commingling of Section 251(c)(3) unbundled network elements with Section 271 elements, as wholesale facilities and services; and

d) Whether regeneration is a finished product subject to retail rates in CLEC-provisioned cross-connections at the ICDF;

149 (3) The parties must file an Interconnection Agreement with the Commission within 15 days of the service date of this Order, including all negotiated terms and arbitrated terms that are consistent with this Order.

DATED at Olympia, Washington and effective this 9th day of February, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.