

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

**IN THE MATTER OF THE PETITION)
OF COVAD COMMUNICATIONS)
COMPANY FOR ARBITRATION TO) WUTC Docket No. UT-043045
RESOLVE ISSUES RELATING TO AN)
INTERCONNECTION AGREEMENT)
WITH QWEST CORPORATION)
)**

**COVAD COMMUNICATIONS COMPANY'S REPLY IN SUPPORT
OF ITS PETITION FOR RECONSIDERATION**

Covad Communications Company ("Covad") in reply and support of its petition for reconsideration states as follows:

- 1. Federal law unequivocally requires Covad the right to enter into line splitting arrangements off a Qwest loop with other competing carriers regardless of whether it enters into a QPP agreement with Qwest.**

1 Contrary to the many false assertions made by Qwest in its response that line splitting is no longer available (see motion for leave to file) to competing carriers (except ostensibly if they enter into a QPP agreement with Qwest), Covad and other competing carriers have an absolute legal right under order and rule of the Federal Communication Commission ("FCC") to line split with each other without the need to enter into a QPP agreement.

- a. The FCC Has Confirmed That Line Splitting Must Still Be Provided By ILECs**

2 The FCC's rule regarding line splitting, adopted pursuant to the *Triennial Review Order*, is abundantly clear:

(ii) Line splitting. **An incumbent LEC shall provide a requesting telecommunications carrier that obtains an unbundled copper loop from the incumbent LEC with the ability to engage in line splitting arrangements** with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. Line splitting is the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop.

(A) An incumbent LEC's obligation, under paragraph (a)(1)(ii) of this section, to provide a requesting telecommunications carrier with the ability to engage in line splitting applies regardless of whether the carrier providing voice service provides its own switching or obtains local circuit switching as an unbundled network element pursuant to paragraph (d) of this section.

(B) An incumbent LEC must make all necessary network modifications, including providing nondiscriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements.

47 C.F.R. § 51.319(a)(1)(ii)(emphasis added).

3 This rule remained unchanged following the *TRO Remand Order*. The FCC's treatment of line splitting in both the *Triennial Review Order* and its resulting rules make clear not only that line splitting must still be made available, but that both the high frequency and low frequency portions of the loop used to provide line splitting are loop UNEs. This is confirmed by the line splitting rule's inclusion in 47 C.F.R. § 51.319(a)(1), which establishes the FCC's rules regarding unbundled loops.

b. Qwest Has Confirmed That Line Splitting Should Be Addressed In Interconnection Agreements

4 In its proposed commercial agreements for its switching product, labeled Qwest Platform Plus (QPP), Qwest confirms that purchasers of its commercial switching product may combine the product with digital loops in order to provide line splitting:

As part of the QPP service, Qwest shall combine the Network Elements that make up QPP service with Analog/Digital Capable Loops, with such Loops (including services such as line splitting) being provided pursuant to the rates, terms and conditions of the CLEC's ICAs as described below.

Service Exhibit 1 – Qwest Platform Plus Service (“QPP Agreement”) at 1 (emphasis added). A copy of this agreement is attached to Covad’s petition for reconsideration.

5 Qwest’s QPP Agreement suggests that Qwest believes line splitting is a loop-based product that should be purchased not pursuant to a commercial agreement, but through ICAs. It has not, and does not intend to offer it as a commercial product. It does, however, contemplate that it may be combined with its QPP product, which includes only the switching and shared transport elements of local service, which are to be combined with loops purchased as unbundled network elements. In order to lend any meaning to Qwest’s commitment to combine line splitting with its QPP product, it must therefore be available in ICAs.

6 As it stands, the two agreements, the interconnection agreement approved in this docket under Order No. 6 and the QPP Agreement, make no sense when read together and are also not compliant with the FCC’s rules. On the one hand, the QPP Agreement clearly contemplates line splitting as a loop UNE, to be purchased from ICAs, while the ICA approved in this docket declares it unavailable. The Commission should follow the

FCC rule and order the parties to amend the interconnection agreement to provide for the purchase of line splitting elements needed to provide the data portions of line splitting.

2. Adoption of Qwest's Language Will Lead To Anti-Competitive Results

7 The clear intent of the FCC's *TRO Remand Order* was to confirm that unbundled mass-market switching was no longer available as a UNE; it was not to grant Qwest a decisive operational advantage in the DSL market, and place it in a dominant position to partner with CLECs to whom it sells its commercial switching product (i.e., QPP). Qwest acknowledges as much in the language of its QPP Agreement, which intends to preserve the right of CLECs to partner with competitive DSL providers, such as Covad, in line splitting arrangements. If Covad is not permitted to order line splitting elements from Qwest, CLECs purchasing QPP, and their customers, will have no choice but to partner with Qwest for the provision of DSL.

8 This would have a clear negative effect on the competitive market for DSL in the state of Washington. While the switching portion of line splitting arrangements is clearly no longer a section 251 UNE, neither the *TRO Remand Order*, nor any of the decisions leading to that order, can be read to express a policy of closing the combined voice/broadband market to competition. The unambiguous pronouncement of the FCC is that unbundled switching alone was the target of the FCC's revised non-impairment analysis, and that DSL providers should continue to have the ability to partner with voice CLECs, notwithstanding the fact that those voice CLECs purchase switching on a commercial basis from Qwest via the QPP Agreement.

9 In addition, if Covad is not permitted to order line splitting elements from Qwest (apart from entering into a QPP agreement with Qwest), CLECs purchasing QPP, and

their customers, will have no choice but to partner with Qwest for the provision of DSL. In short, Qwest is favoring its DSL offering (contrary to law) over the DSL offering of Covad.

10 Moreover, if, as Qwest concedes at paragraph 18 of its response, Qwest will consider (presumably under the the terms of a separate commercial agreement) a line splitting arrangement with Qwest only if Covad enters into a QPP agreement, this also puts Covad at a tremendous competition disadvantage. There is no basis in law or fact to require Covad to enter into a QPP agreement in order to obtain line splitting off of a Qwest loop as a prerequisite to offering Covad DSL service. The law unequivocally requires Qwest to provision line splitting to requesting carriers and accordingly the Commission should revisit Order No. 6 on this issue and adopt Covad's proposed language on line splitting.

3. Covad did not first raise the issue of line splitting in its petition for reconsideration. The issue has been before the Commission from the inception of this docket.

11 From the very inception of this arbitration, Covad directly and openly raised the issue of line splitting in both its petition for arbitration and in the draft interconnection agreement both parties presented to the Commission.

12 In the petition for arbitration submitted May 25, 2005 Covad explicitly raised the issue of line splitting. The petition provides in pertinent part as follows:

The Parties disagree with respect to Qwest's continuing obligations to provide certain network elements, including certain unbundled loops (including high capacity loops, line splitting arrangements, and subloop elements) and dedicated transport, after the FCC's recent analysis in the *Triennial Review Order*. (See p 7 of initial petition attached hereto as exhibit 1) (emphasis added)

13 Moreover, the parties collectively raised the issue of line splitting before the Commission in the Joint Disputed Issues List admitted into the record at the hearing as Exhibit 70. On pages 18 and 19 of the first Joint Disputed Issues List (dated August 25, 2004), under "Issue 2 9.21.2" Covad's request for line splitting is set forth under the heading, "Covad Proposed Language." (pages 18 and 19 of the first Joint Disputed Issues List is attached hereto as exhibit 2). Then, after the hearing, Qwest submitted an updated Joint Disputed Issues List (dated October 20, 2004). This issues list contained the very same language regarding line splitting as the first issues list (see page 26 -28 of the updated issues list attached hereto as exhibit 3).

14 In addition to the foregoing, Covad's proposed line splitting proposal (section 9.21.2) was redlined in the draft interconnection agreement during the entire course of this arbitration (see section 9.21.2 at page 194 of the interconnection agreement at issue in this docket attached hereto as exhibit 4). In its response, Qwest ignores the petition, the two separate Joint Disputed Issues Lists and the interconnection agreement and, instead, resorts to false allegations in an attempt to defeat Covad's motion. The Commission should not countenance such tactics.

CONCLUSION

15 For the reasons set forth above, in Covad's motion for leave to file this reply and in its petition for reconsideration, Covad respectfully requests that the Commission reconsider its decision in Order No. 6 to adopt Qwest's language excluding the data elements of line splitting from the parties' agreement, and instead order language that preserve this element as a UNE available under the parties' interconnection agreement (see Covad's proposed section 9.21.2 in exhibit 4 attached to this reply).

Dated this 14th day of March, 2005.

Respectfully submitted,

By: 

Gregory Diamond, WSBA #28025
Senior Counsel
Covad Communications Company
7901 Lowry Boulevard
Denver, Colorado 80230
Phone: 720-670-1069
Fax: 720-670-3350
gdiamond@covad.com

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **Covad Communications Company's Reply in Support of Its Petition for Reconsideration** was served via electronic service and deposited into the United States Postal system, postage prepaid, on the 14th day of March, 2005, to the following:

Lisa A. Anderl
Adam Sherr
Quest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Lisa.anderl@qwest.com
adam.sherr@qwest.com

George B. Thomson
Qwest Corporation
1005 17th Street, Suite 200
Denver, CO 80202
George.Thomson@qwest.com

Mary Rose Hughes
John Devaney
Perkins Coie LLP
607 Fourteenth Street, N.W.
Ste. 800
Washington, D.C. 20005-2011
Mhughes@perkinscoie.com
jdevaney@perkinscoie.com

Simon Fitch
Assistant Attorney General
Office of the Attorney General
900 4th Avenue, Suite 200
Seattle, WA 98164
simonf@atg.wa.gov

Shannon E. Smith
Assistant Attorney General
Washington Utilities &
Transportation Commission
1400 S. Evergreen Park Dr. SW
Post Office Box 40128
Olympia, WA 98504-0128
ssmith@wutc.wa.gov

David L. Rice
Brooks E. Harlow
MILLER NASH
4400 Two Union Square
601 Union Street
Seattle, WA 98101-2352



- (2) Maintain and advance the efficiency and availability of telecommunications service;
- (3) Ensure that customers pay only reasonable charges for telecommunications service; [and]

* * *

- (5) Promote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state. . . .⁴

15

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

ISSUE 2 (Section 4 Definition of "Unbundled Network Element," Sections 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.1.8, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6, 9.6.1.5.1 [and related Section 9.6.1.5], 9.6.1.6.1 [and related Section 9.6.1.6], and 9.21.2)

Issue: Should the Parties' Agreement provide for access to network elements pursuant to Section 271 of the Telecommunications Act of 1996 and Washington law, as well as Section 251 of the Telecommunications Act of 1996?

16

The Parties disagree with respect to Qwest's continuing obligations to provide certain network elements, including certain unbundled loops (including high capacity loops, line splitting arrangements, and subloop elements), and dedicated transport, after the FCC's recent analysis in the *Triennial Review Order*. Covad maintains that the FCC's explicit direction was to continue the obligations of Regional Bell Operating Companies ("RBOCs")

⁴ RCW 80.36.300.

Washington Joint Disputed Issues List
Docket No. UT-043045
Qwest/Covad Washington ICA Negotiations
August 23, 2004

Exhibit 2
Page 1

<p>Issue 2 9.6.1.6.1 Unified Agreement – 271 Elements Included</p>	<p>service. If such alternative arrangements are not in place within sixty (60) Days of the effective date of the Commission determination, Qwest may bill for such transport in accordance with the Qwest Special Access Tariff.</p>	<p>See Qwest position set forth above at page 44 (§ 4.0 Definition of "Unbundled Network Elements" and "251(c)(3) UNE")</p>	<p>In the event CLEC has DS1 UDIT transport in service along such a route that pre-exists the Commission determination, CLEC shall make arrangements for other service. If such alternative arrangements are not in place within sixty (60) Days of the effective date of the Commission determination, Qwest may bill for such transport in accordance with the Qwest Special Access Tariff.</p>	<p>The list referenced by this section should only have relevance with respect to transport routes that are completely unavailable under applicable law, if any.</p>
<p>Issue 2 9.21.2 Unified Agreement –</p>	<p>9.21.2 Terms and Conditions On the effective date of a Commission determination that Qwest is no longer required to provide UNE-P Combination</p>	<p>See Qwest position set forth above at page 44 (§ 4.0 Definition of "Unbundled Network Elements" and "251(c)(3) UNE")</p>	<p>9.21.2 Terms and Conditions On the effective date of a Commission determination If the Commission determines that Qwest is no longer required to provide UNE-</p>	<p>Notwithstanding any finding of non-impairment, existing UNEs must nevertheless be made available pursuant to Section 271 and state law. The Agreement should create an</p>

Washington Joint Disputed Issues List
 Docket No. UT-043045
 Qwest/Covad Washington ICA Negotiations
 August 23, 2004

Exhibit 2
 Page 2

<p>271 Elements Included</p>	<p>services in a market area Line Splitting is also not available in that market area to the extent CLEC has an embedded base of Line Splitting End User Customers on the effective date of the Commission determination, CLEC shall transition its embedded base of Line Splitting End User Customers in accordance with the Transition Timelines for unbundled switching, as described in Section 9.11.2.0.1. In such markets where Line Splitting is not available, Loop Splitting will continue to be available pursuant to Section 9.24 of this Agreement.</p>	<p>P Combination services in a market area pursuant to Section 251 of the Act, CLEC shall not submit new orders for Line Splitting is also not available in that market area as of the date the Commission rules CLECs are no longer entitled to submit orders for unbundled switching. If, notwithstanding the Section 251 determination, Qwest is required to provide access to unbundled switching under Section 271 or applicable state law, then line splitting remains available in that market area. To the extent Qwest is no longer required to provide access to unbundled switching under any applicable law, and To the extent CLEC has an embedded base of Line Splitting End User Customers on the effective date of the Commission determination, CLEC shall transition its embedded base of Line Splitting End User Customers in accordance with the Transition Timelines for unbundled switching, as described in Section 9.11.2.0.1. In such markets where Line Splitting is not available, Loop Splitting will continue to be available pursuant to Section 9.24 of this Agreement.</p>	<p>orderly process for the movement of UNEs from one category to another, rather than create uncertainty as to whether 271 or state law obligations apply.</p>
<p>Issue 3 4.0 Definition ("Commingling")</p>	<p>"Commingling" means the connecting, attaching, or otherwise linking of an Unbundled Network Element, or a Combination of Unbundled Network Elements, to</p>	<p>Consistent with the rulings in the TRO relating to commingling, Qwest's proposed language establishes that Covad can obtain from Qwest UNEs and UNE</p>	<p>Covad concedes that any commingling arrangement involves the attachment of a UNE obtained pursuant to Section 251(c)(3) with another</p>

Washington Updated Joint Disputed Issues List
Docket No. UT-043045
Qwest/Covad Washington ICA Negotiations
October 20, 2004

Issue Number/ ICA Section or Attachment Number/ Statement of Issue	Qwest Proposed Language	Qwest Position	Covad Proposed Language	Covad Position
	determination, Qwest may bill for such transport in accordance with the Qwest Special Access Tariff.		arrangements for other service, if such alternative arrangements are not in place within sixty (60) Days of the effective date of the Commission determination, Qwest may bill for such transport in accordance with the Qwest Special Access Tariff.	
Issue 2 9.6.1.6.1 Unified Agreement – 271 Elements Included	9.6.1.6.1 Qwest will maintain on its website a listing of routes for which the Commission has so found. In the event CLEC has DS1 UDIT transport in service along such a route that pre-exists the Commission determination, CLEC shall make arrangements for other service. If such alternative arrangements are not in place within sixty (60) Days of the effective date of the Commission determination, Qwest may bill for such transport in accordance with the Qwest Special Access Tariff	See Qwest position set forth above in connection with section 4.0 Definition of "Unbundled Network Elements."	9.6.1.6.1 Qwest will maintain on its website a listing of routes for which the Commission has found <u>no</u> impairment under Section 251 and also has not required access under Section 271 or applicable state law. In the event CLEC has DS1 UDIT transport in service along such a route that pre-exists the Commission determination, CLEC shall make arrangements for other service. If such alternative arrangements are not in place within sixty ninety (90) Days of the effective date of the Commission determination, Qwest may bill for such transport in accordance with the Qwest Special Access Tariff.	The list referenced by this section should only have relevance with respect to transport routes that are completely unavailable under applicable law, if any.
Issue 2	9.21.2 Terms and Conditions	See Qwest position set forth above in connection with section	9.21.2 Terms and Conditions	Notwithstanding any finding of non-impairment, existing UNEs

Washington Updated Joint Disputed Issues List
Docket No. UT-043045
Qwest/Covad Wasington ICA Negotiations
October 20, 2004

Issue Number/ ICA Section or Attachment Number/ Statement of Issue	Qwest Proposed Language	Qwest Position	Covad Proposed Language	Covad Position
<p>9.21.2 Unified Agreement -- 271 Elements Included</p>	<p>On the effective date of a Commission determination that Qwest is no longer required to provide UNE-P Combination services in a market area Line Splitting is also not available in that market area to the extent CLEC has an embedded base of Line Splitting End User Customers on the effective date of the Commission determination, CLEC shall transition its embedded base of Line Splitting End User Customers in accordance with the Transition Timelines for unbundled switching, as described in Section 9.11.2.0.1. In such markets where Line Splitting is not available, Loop Splitting will continue to be available pursuant to Section 9.24 of this Agreement.</p>	<p>4.0 Definition of "Unbundled Network Elements."</p>	<p>On the effective date of a Commission determination if the Commission determines that Qwest is no longer required to provide UNE-P Combination services in a market area pursuant to Section 251 of the Act, CLEC shall not submit new orders for Line Splitting is also not available in that market area as of the date the Commission rules CLECs are no longer entitled to submit orders for unbundled switching. If, notwithstanding the Section 251 determination, Qwest is required to provide access to unbundled switching under Section 271 or applicable state law, then line splitting remains available in that market area. To the extent Qwest is no longer required to provide access to unbundled switching under any applicable law, and to the extent CLEC has an embedded base of Line Splitting End User Customers on the effective date of the Commission determination, CLEC shall transition its embedded base of Line Splitting End User Customers in</p>	<p>must nevertheless be made available pursuant to Section 271 and state law. The Agreement should create an orderly process for the movement of UNEs from one category to another, rather than create uncertainty as to whether 271 or state law obligations apply.</p>

Washington Updated Joint Disputed Issues List
Docket No. UT-043045
Qwest/Covad Wasington ICA Negotiations
October 20, 2004

Issue Number/ ICA Section or Attachment Number/ Statement of Issue	Qwest Proposed Language	Qwest Position	Covad Proposed Language	Covad Position
<p>Issue 3 4.0 Definition ("251(c)(3) UNE", and "Commingleing") Commingleing</p>	<p>"Commingleing" 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 of Unbundled Network Elements, with one or more such facilities or services.</p>	<p>See Qwest position set forth above in connection with section 4.0 Definition of "Unbundled Network Elements." Further, under the FCC's <i>Interim Unbundling Rules</i>, parties are bound by the terms and conditions in interconnection agreements as of June 15, 2004 relating to access to enterprise market loops, dedicated transport, and switching. The existing Qwest/Covad agreement that was in effect as of June 15, 2004 does not provide for commingleing and, hence, Covad's request for any commingleing involving these elements is inconsistent with the <i>Interim Rules</i>.</p> <p>In addition, consistent with the</p>	<p>accordance with the Transition Timelines for unbundled switching, as described in Section 9.11.2.0.1. In such markets where Line Splitting is not available, Loop Splitting will continue to be available pursuant to Section 9.24 of this Agreement.</p>	
			<p>"251(c)(3) UNE" means any unbundled network element obtained by CLEC pursuant to Section 251 of the Act.</p> <p>"Commingleing" 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 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</p>	<p>Covad concedes that any commingleing arrangement involves the attachment of a UNE obtained pursuant to Section 251(c)(3) with another product. The proposed revisions eliminate any confusion with respect to Qwest's obligations to commingle non-UNEs with UNEs available pursuant to Section 271 or state law.</p>

9.20 Unbundled Packet Switching

Packet Switching is no longer an Unbundled Network Element under existing rules.

9.21 UNE-P Line Splitting

CLEC intends to operate only as a DLEC and does not intend to operate as the voice provider CLEC as described in this Section 9.21. In the event that CLEC wishes to order voice services under this Section 9.21, the Parties will negotiate an amendment to this Agreement adding the appropriate sections of the SGAT.

9.21.1 Description

OPEN – Covad proposed; Qwest cannot agree

Line Splitting provides CLEC/DLEC with the opportunity to offer advanced data service simultaneously with a new or existing UNE-P by using the frequency range above the voice band on the copper portion of a Loop. The advanced data service may be provided by the Customer of record or another data service provider chosen by the Customer of record. A POTS Splitter must be inserted into the UNE-P to accommodate establishment of the advanced data service. The POTS Splitter separates the voice and data traffic and allows the copper portion of the Loop to be used for simultaneous DLEC data transmission and CLEC provided voice service to the end user. "CLEC" will herein be referred to as the voice service provider while "DLEC" will be referred to as the advanced data service provider. CLEC and DLEC may be the same entity. Only one (1) Customer of record determined by the CLEC/DLEC partnership will be identified to Qwest.

Deleted: an

9.21.2 Terms and Conditions

OPEN – Covad proposed; Qwest cannot agree

If the Commission determines that Qwest is no longer required to provide UNE-P Combination services in a market area pursuant to Section 251 of the Act, CLEC shall not submit new orders for Line Splitting as of the date the Commission rules CLECs are no longer entitled to submit orders for unbundled switching. If, notwithstanding the Section 251 determination, Qwest is required to provide access to unbundled switching under Section 271 or applicable state law, then line splitting remains available in that market area. To the extent Qwest is no longer required to provide access to unbundled switching under any applicable law, and to the extent CLEC has an embedded base of Line Splitting End User Customers on the effective date of the Commission determination, CLEC shall transition its embedded base of Line Splitting End User Customers in accordance with the Transition Timelines for unbundled switching, as described in Section 9.11.2.0.1. In such markets where Line Splitting is not available, Loop Splitting will continue to be available pursuant to Section 9.24 of this Agreement.

Deleted: On the effective date of a Commission determination

Deleted: .

Deleted: is also not available in that market area

Deleted: .

Deleted: T