

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION OF
DIECA COMMUNICATIONS, INC. D/B/A
COVAD COMMUNICATIONS COMPANY
FOR ARBITRATION TO RESOLVE ISSUES
RELATING TO AN INTERCONNECTION
AGREEMENT WITH QWEST
CORPORATION

Docket No. UT-043045

DIRECT TESTIMONY OF KAREN A. STEWART

ON BEHALF OF

QWEST CORPORATION

(Issues 1, 2, and 3)

July 15, 2004

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1 **I. INTRODUCTION AND PURPOSE OF TESTIMONY**

2 **Q. PLEASE STATE YOUR NAME, POSITION, EMPLOYER, AND BUSINESS**
3 **ADDRESS.**

4 A. My name is Karen A. Stewart. I am a Director in the Qwest Services Corporation
5 Regulatory Compliance Organization. My office is located at 421 SW Oak Street,
6 Portland, Oregon.

7 **Q. PLEASE REVIEW YOUR EDUCATION, WORK EXPERIENCE AND**
8 **PRESENT RESPONSIBILITIES.**

9 A. I received a Bachelor of Science degree in Business Administration from Portland
10 State University in 1980, and a Masters degree in Business Administration from the
11 University of Oregon in July, 1994. I have been employed by Qwest and its
12 predecessor companies since 1981. I have held a variety of positions in Qwest,
13 including sales, product management, regulatory affairs, issues management, and
14 E911 project management and technical design.

15 I am currently a member of the Qwest Regulatory Compliance organization and
16 have represented Qwest in a number of 271 workshops related to Qwest's
17 provisioning of unbundled network elements ("UNEs").

18 **Q. HAVE YOU PREVIOUSLY TESTIFIED?**

19 A. Yes. I have testified in the states of Arizona, Colorado, Idaho, Iowa, New Mexico,
20 Minnesota, Montana, Nebraska, North Dakota, Oregon, South Dakota, Utah,
21 Washington, and Wyoming.

22 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

1 A. My testimony addresses Issues 1 and 3, as set forth in Covad's Petition for Arbitration.
2 In particular, I focus on Qwest's and Covad's competing ICA language relating to: (1)
3 the FCC's ruling in the *Triennial Review Order* ("*TRO*")¹ establishing the right of
4 incumbent local exchange carriers ("ILECs") to retire the copper loops that are
5 currently used in their networks; and (2) the ruling in the *TRO* relating to the
6 obligations of ILECs to commingle unbundled network elements ("UNEs") with
7 wholesale services. I also briefly address a portion of Issue 2 and the definition of
8 "unbundled network element," as that definition relates to commingling and Issue 3.
9 Qwest and Covad have agreed that they will address the remaining portions of Issue 2
10 in their post-hearing briefs, and I therefore do not address those issues in my testimony.
11

12 In connection with each of the issues that I address, my testimony demonstrates that
13 Covad is seeking to impose obligations on Qwest that the FCC and the courts have
14 rejected. As I discuss below, in connection with Issue 3 and commingling, Covad is
15 also improperly asking the Commission to exercise authority it does not have in this
16 arbitration conducted pursuant to section 252 of the Act. I show that Qwest's proposed
17 ICA language relating to each of these issues more accurately incorporates the rights
18 and obligations established by FCC rules than Covad's language and demonstrate that
19 the Commission should adopt Qwest's language.

20 **Q. DOES QWEST'S PROPOSED LANGUAGE FOR THE INTERCONNECTION**
21 **AGREEMENT ("ICA") THAT YOU ADDRESS IN THIS TESTIMONY**

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Red. 16978 ¶ 195 (2003), *aff'd in part and rev'd and vacated in part*, *U.S. Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

1 **ACCOUNT FOR THE EFFECTS RESULTING FROM THE D.C. CIRCUIT'S**
2 **ISSUANCE OF THE MANDATE IN *U.S. TELECOM ASSOCIATION V. FCC*?²**

3 A. No. The D.C. Circuit recently issued its mandate in *USTA II*. The issuance of that
4 mandate affects ILEC unbundling obligations in several ways. The ICA language at
5 issue in this proceeding was developed before the issuance of the mandate, and
6 therefore, does not account for the effects of the mandate. Covad and Qwest will have
7 to address the full effects of the mandate on the ICA.

8
9 **II. ISSUE 1: RETIREMENT OF COPPER FACILITIES (Sections**
10 **9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2).**

11 **Q. PLEASE PROVIDE AN OVERVIEW OF THE DISPUTE RELATING TO THE**
12 **RETIREMENT OF COPPER FACILITIES.**

13 A. As Qwest and other carriers have increasingly moved from copper to fiber facilities, it
14 has become a standard practice of carriers to retire copper facilities in many
15 circumstances when fiber facilities are deployed. The ability to retire copper facilities
16 is important from a cost perspective, since, without that ability, carriers would be
17 required to incur the costs of maintaining two networks. If carriers were faced with that
18 duplicative cost, they would have reduced financial ability to deploy facilities to
19 replace copper and, therefore, reduced ability to deploy facilities that can support
20 advanced services. Accordingly, in the *TRO*, the FCC confirmed the right of ILECs to
21 retire copper facilities without obtaining regulatory approval before doing so. The only
22 retirement conditions that the FCC established are that the ILEC provide notice of its
23 intent to retire specific copper facilities so that CLECs can object to the FCC.

² *U.S. Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

1 The dispute relating to this issue arises from Covad's attempt to condition Qwest's right
2 to retire copper facilities on onerous conditions that the FCC did not adopt and that, if
3 adopted, would reduce Qwest's ability to replace copper facilities with more advanced
4 technologies. Specifically, in section 9.2.2.3.1 of its proposed ICA, Covad attempts to
5 condition the retirement of copper facilities on Qwest providing an "alternative service"
6 over a "compatible facility" to Covad or its end-user. This alternative service would be
7 required to not "degrade the service or increase the cost" to Covad or its end-user.

8 These ambiguous conditions are nowhere to be found in the *TRO*.

9 Qwest's proposed language for sections 9.2.1.2.3.1 and 9.2.1.2.3.2, by contrast, is not
10 only consistent with the *TRO*, it also provides significant protections to Covad that are
11 not required by the *TRO*. Thus, in addition to including the retirement notice
12 requirements established by the *TRO*, Qwest's language establishes that Qwest (1) will
13 leave copper loops and subloops in service where it is technically feasible to do so and
14 (2) will coordinate with Covad the transition of new facilities "so that service
15 interruption is held to a minimum."

16 **Q. WHAT IS MEANT BY THE TERM "RETIRING" COPPER FACILITIES?**

17 A. As used in this context, "retiring" means to take facilities out of service. In some cases,
18 such as with aerial facilities, taking them out of service can mean actually removing
19 wire and cable from telephone poles. In other cases, facilities can be taken out of
20 service by being deactivated or deleted from network inventory systems but not
21 physically removed. In either case, the retirement of the facility eliminates the need to
22 maintain it.

23 **Q. UNDER THE FCC'S RULING CONFIRMING THE ILECS' RIGHT TO**

1 **RETIRE COPPER FACILITIES, IS IT NECESSARY FOR ILECS TO OBTAIN**
2 **REGULATORY APPROVAL BEFORE RETIRING COPPER LOOPS AND**
3 **SUBLOOPS?**

4 A. No. The *TRO* confirms the ILECs' right to retire copper loops and subloops that have
5 been replaced with fiber, which is a ruling that advances the FCC's objective of
6 increasing economic incentives for carriers to deploy fiber facilities.³ In granting
7 ILECs the right to retire copper loops, the FCC rejected CLEC proposals that would
8 have required ILECs to obtain regulatory approval before retiring these facilities.⁴ As a
9 result, ILECs are permitted to retire these facilities without regulatory approval as long
10 as they comply with the FCC's notice requirements relating to network changes.

11 Under these notice requirements, after receiving notice from the FCC of an ILEC's
12 intent to retire a copper facility, a CLEC is permitted to object to the retirement in a
13 filing with the FCC. Unless the FCC affirmatively allows the objection, it is deemed
14 denied 90 days after the FCC's issuance of the retirement notice.⁵

15 **Q. DOES THE *TRO* PROVIDE SUPPORT FOR THE CONDITIONS COVAD**
16 **SEEKS TO IMPOSE ON QWEST?**

17 A. No. In fact, the FCC considered and rejected this type of condition. Several CLECs
18 proposed that ILECs should not be permitted to retire copper loops without taking

3 *TRO* at ¶ 281.

4 *TRO* at ¶ 281

5 *TRO* at ¶ 282. The *TRO* does not preempt evaluations by state commissions of whether loop retirements
comply with state law. *Id.* at ¶ 284.

1 affirmative steps to avoid effects on CLEC service.⁶ For example, one party to the
2 FCC's *TRO* proceeding proposed that ILECs should not be permitted to retire copper
3 loops unless they permit CLECs access to their broadband facilities. The FCC rejected
4 this and other proposals, concluding that its notice rules "serve as adequate
5 safeguards."⁷

6 **Q. ALTHOUGH IT IS NOT NECESSARY FOR QWEST TO OBTAIN**
7 **REGULATORY APPROVAL BEFORE RETIRING COPPER FACILITIES,**
8 **DOES QWEST NEVERTHELESS TAKE INTO CONSIDERATION THE**
9 **NEEDS OF CLECS BEFORE RETIRING THESE FACILITIES?**

10 A. Yes. First, before deciding to retire copper loops that are serving Qwest and/or CLEC
11 end-users, Qwest routinely evaluates whether it is technically feasible to leave the
12 copper loops in place. Second, when it retires copper loops that a CLEC is using to
13 provide DSL service, Qwest gives the CLEC the option of continuing to provide DSL
14 service to the end-users through the use of CLEC-owned remote digital subscriber loop
15 access multiplexers ("DSLAMs"). The CLEC can use Qwest remote collocation space
16 to collocate a DSLAM and to continue providing DSL service to its customers. Third,
17 Qwest coordinates circuit changes with CLECs to ensure that transitions from copper
18 facilities to new fiber facilities are orderly and involve minimal disruptions of local
19 exchange service. Fourth, when Qwest replaces copper facilities with new copper
20 facilities, it jointly coordinates the transition to the new facilities with CLECs to
21 minimize service disruptions.

⁶ *TRO* at ¶ 281 & n.822.

⁷ *TRO* at ¶ 281.

1 **Q. IF QWEST WERE REQUIRED TO PROVIDE ALTERNATIVE SERVICE**
2 **OVER COMPATIBLE FACILITIES, AS COVAD PROPOSES, WHAT EFFECT**
3 **COULD THAT HAVE ON QWEST'S DECISIONS WHETHER TO DEPLOY**
4 **ADVANCED TELECOMMUNICATION FACILITIES?**

5 A. Imposing Covad's requirements would reduce Qwest's economic incentive and ability
6 to deploy fiber facilities, since compliance with those requirements would force Qwest
7 to consider all such costs in any investment decision concerning whether to deploy
8 fiber. If Qwest is faced with costs of providing an "alternative service" over
9 "compatible facilities" (as defined by Covad) each time it considers whether to replace
10 copper facilities with fiber, the economics of that decision will be changed in a way that
11 will make the deployment of fiber less likely. In addition, based on testimony Covad
12 recently provided in Colorado, it is my understanding that Covad's proposal would
13 prohibit Qwest from recovering the costs of this undefined "alternative service" if the
14 costs exceed the amount Covad is currently paying Qwest to access copper loops. A
15 requirement to provide an alternative service for which Qwest may not recover its costs
16 would create an economic disincentive for deploying fiber that is clearly inconsistent
17 with the Act's objective, as set forth in section 706, of increasing the deployment of
18 advanced telecommunications facilities.

19 While the FCC stated in the *TRO* that it was not preempting state commissions from
20 evaluating whether an ILEC's policies relating to loop retirements comply with state
21 law, any state law requirements relating to this issue should be consistent with the Act's
22 objective of encouraging the deployment of advanced telecommunications facilities.

23 **Q. PLEASE EXPLAIN FURTHER QWEST'S ABILITY TO RETIRE COPPER**

1 **FACILITIES RELATES TO THE GOAL OF ENCOURAGING THE**
2 **DEPLOYMENT OF FACILITIES THAT SUPPORT BROADBAND SERVICES.**

3 A. In the *TRO*, the FCC identified the deployment of broadband services as one of its
4 paramount objectives, emphasizing that "[b]roadband deployment is a critical domestic
5 policy objective that transcends the realm of communications."⁸ Accordingly, the FCC
6 sought to formulate rules that would "help drive the enormous infrastructure investment
7 required to turn the broadband promise into a reality."⁹

8 A key component of the FCC's regulatory regime for promoting investment in
9 broadband is its decision not to require ILECs to unbundle the broadband capability
10 of fiber-to-the-home-loops ("FTTH loops") and its related decision confirming the
11 ILECs' right to retire copper loops.¹⁰ In declining to require ILECs to unbundle
12 FTTH loops, the FCC determined that CLECs are not impaired without unbundled
13 access to these loops and that removing ILEC unbundling obligations for them "will
14 promote [the] deployment of the network infrastructure necessary to provide
15 broadband services to the mass market."¹¹ As part of this ruling, the FCC confirmed
16 the ILECs' right to retire copper loops and subloops that they have replaced with
17 FTTH loops.¹²

8 *TRO* at ¶ 212.

9 *Id.*

10 While the FCC concluded that CLECs are not impaired without access to these loops, it ruled that "in fiber loop overbuild situations where the incumbent LEC elects to retire existing copper loops . . . the incumbent LEC [must] offer unbundled access to those fiber loops, and in such cases the fiber loops must be unbundled for narrowband services only." *Id.* at ¶ 273.

11 *Id.* at ¶ 278.

12 *Id.* at ¶ 281.

1 There is a direct relationship between this ruling and the FCC's decision to encourage
2 the deployment of FTTH loops. The economic incentive of a carrier to deploy fiber
3 loops increases if the carrier is permitted to retire copper loops when it deploys fiber.
4 Without a right to retire copper, a carrier evaluating whether to deploy fiber would be
5 faced with the duplicative costs of maintaining *both* the copper and the fiber facilities.
6 A critical shortcoming of Covad's proposal is that it would require Qwest to either (1)
7 not retire copper loops and incur the resulting duplicative maintenance costs or (2)
8 retire copper loops but only after providing an "alternative service" for which full cost
9 recovery may not be allowed. Both of these options reduce Qwest's ability to deploy
10 fiber facilities and are inconsistent with the right of Qwest to recover its costs for
11 providing access to network elements to CLECs.

12 **Q. DOES QWEST'S PROPOSED ICA LANGUAGE GO BEYOND THE**
13 **REQUIREMENTS OF THE *TRO* IN AN ATTEMPT TO ACCOMMODATE**
14 **COVAD'S DESIRE FOR CONTINUED ACCESS TO COPPER FACILITIES?**

15 A. Yes. In addition to including the retirement notice requirements established by the
16 *TRO*, Qwest's proposed language for sections 9.2.1.2.3.1 and 9.2.1.2.3.2 provides
17 protections to Covad that are not required by the *TRO*. As I noted above, Qwest's
18 language establishes that Qwest (1) will leave copper loops and subloops in service
19 where it is technically feasible to do so and (2) will coordinate with Covad the
20 transition of new facilities "so that service interruption is held to a minimum." In
21 addition to going beyond the requirements of the *TRO*, these commitments respond
22 directly to Covad's concern that the retirement of copper facilities will cause Covad's
23 customers to experience service disruptions.

24 **Q. DOES QWEST PROVIDE NOTICE TO CLECS OF COPPER RETIREMENTS**
25 **IN A MANNER THAT COMPLIES WITH THE FCC'S NOTICE**

1 **REQUIREMENTS?**

2 A. Yes. Consistent with the requirements of the *TRO*, Qwest provides notice to CLECs
3 that it intends to retire a copper facility, and it provides that notice at least 90 days prior
4 to the proposed retirement date.¹³ Qwest provides this notice on its "disclosure
5 website" at <http://www.qwest.com/disclosures>. This disclosure website has been used
6 for other disclosures in recent years, and CLECS are familiar with its location and use.
7 The information that Qwest provides includes the state and wire center where the
8 facility is located, the specific location of the facility within the wire center, the
9 anticipated date that the facility will be retired, and a description of the immediate
10 effect of the retirement. Moreover, Qwest will send broadcast emails to all CLECs
11 when new copper retirement disclosures are added to the disclosure website.

12
13 **II. ISSUE 2: UNIFIED AGREEMENT/DEFINING UNBUNDLED**
14 **NETWORK ELEMENTS (Section 4.0 and definitions of**
15 **"unbundled network element" and "section 251(c)(3) UNE")**

16 **Q. WHAT DOES ISSUE 2 INVOLVE, AND HOW ARE THE PARTIES**
17 **ADDRESSING THIS ISSUE?**

18 A. Issue 2 generally involves Covad's demand for language in the ICA that would require
19 Qwest to provide, pursuant to section 271 and state law, network elements that the FCC
20 has not required ILECs to unbundle under section 251. Qwest and Covad have agreed
21 that they will address most of the issues encompassed by Issue 2 in their post-hearing
22 briefs, and, accordingly, I do not address those issues in this testimony. The lone
23 exception relates to Covad's request that its definition of "section 251(c)(3) UNEs" be

13 See *id.* at ¶ 281 & n.824.

1 used in the ICA language that addresses commingling. I discuss this issue in the
2 following section of my testimony relating to commingling.

3
4 **III. ISSUES 3: COMMINGLING AND RATCHETING (Sections 4.0**
5 **(Definitions of "251(c)(3)" and "Commingling"), 9.1.1, 9.1.1.1,**
6 **9.1.1.4 (and subsections), and 9.1.1.5 (and subsections))**

7 **Q. WHAT IS COMMINGLING?**

8 A. In the *TRO*, the FCC defined commingling as "the connecting, attaching, or otherwise
9 linking of a UNE, or a UNE combination, to one or more facilities or services that a
10 requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any
11 method other than unbundling under section 251(c)(3) of the Act, or the combining of a
12 UNE or UNE combination with one or more such wholesale services."¹⁴

13 **Q. DID THE FCC REQUIRE UNLIMITED COMMINGLING IN THE *TRO*?**

14 A. No. The *TRO* requires "requesting carriers to commingle UNEs and combinations of
15 UNEs with services (*e.g.*, switched and special access services offered pursuant to
16 tariff), and to require incumbent LECs to perform the necessary functions to effectuate
17 such commingling upon request."¹⁵ The permissible commingling under the *TRO* also
18 includes commingling with resale services offered under section 251(c)(4).¹⁶

19
20 However, the FCC did not require ILECs to combine (and therefore commingle)

14 *TRO* at ¶ 579.

15 *TRO* at ¶ 579.

16 *Id.* at ¶ 584 (as amended by *Triennial Review Order Errata*, ¶ 27, released September 17, 2003) ("*Triennial Review Order Errata*").

1 network elements obtained under section 271¹⁷ and, as described below, there are limits
2 on an ILEC's obligation to commingle high capacity loop and transport combinations
3 known as EELs.

4 **Q. PLEASE EXPLAIN THE RELATIONSHIP BETWEEN THE FCC'S**
5 **COMMINGLING RULES AND ITS RULES RELATING TO SERVICE**
6 **ELIGIBILITY FOR EXTENDED ENHANCED LINKS ("EELS").**

7 A. The *TRO* established specific eligibility criteria for high capacity extended enhanced
8 loops or EELs. These facilities are defined as "combinations of high-capacity (DS1
9 and DS3) loops and interoffice transport."¹⁸ The FCC found that service eligibility
10 criteria are needed for these facilities to prevent "gaming" by non-qualifying providers,
11 with gaming defined as "a provider of exclusively non-qualifying service obtaining
12 UNE access in order to obtain favorable rates or to otherwise engage in regulatory
13 arbitrage."¹⁹ To implement this ruling and to prevent the gaming that is the object of
14 the FCC's concern, it is necessary to make it clear in the ICA that Qwest's obligation to
15 commingle high capacity EELs applies only to EELs that meet the service eligibility
16 requirements, as described below.

17
18 **Q. PLEASE DESCRIBE THE NATURE OF QWEST'S AND COVAD'S DISPUTES**
19 **RELATING TO COMMINGLING.**

20 A. Qwest and Covad have four disputes relating to commingling. First, to make it clear

17 *TRO* at ¶ 655 n.1990

18 *Id.* at ¶ 591.

19 *Id.*

1 that the service eligibility criteria for EELs apply to commingling that involves EELs,
2 Qwest's proposed ICA language (section 9.1.1.5 and subsections) lists each of the
3 eligibility criteria. In its proposed section 9.1.1.5, Covad has refused to list these
4 criteria and has proposed instead a general reference to them. Second, through its
5 proposed definition of commingling and its description of Qwest's commingling
6 obligations (sections 4.0 and 9.1.1.1), Covad is seeking to expand Qwest's
7 commingling duties beyond what the FCC has required by proposing language that
8 would require Qwest to commingle UNEs and UNE combinations with network
9 elements and services for which unbundling is not required under section 251 but that
10 are provided under section 271. Third, Covad has rejected Qwest's proposed language
11 that is necessary to define clearly the scope of Qwest's obligation to provide
12 commingling with wholesale resale services. In Section 9.1.1.1, Qwest proposes
13 language establishing its obligation to provide commingling with resale services. An
14 essential part of this section is Qwest's language identifying certain services and
15 facilities that are not available for resale commingling, including non-
16 telecommunications services, enhanced or information services, features or functions
17 not offered for resale on a stand-alone basis or separate from basic exchange service,
18 and network elements offered pursuant to Section 271. These services and facilities are
19 not among the "telecommunications services" that Qwest is required to make available
20 for resale under Section 251(c)(4). Fourth, Qwest and Covad disagree concerning the
21 ICA language that is necessary to establish the appropriate prices for commingled
22 facilities.

23 **Q. WITH RESPECT TO THE FIRST OF THESE DISPUTES, WHAT**
24 **ELIGIBILITY CRITERIA DID THE FCC ADOPT FOR EELS?**

1 A. To prevent CLECs from using high capacity EELs to engage in "gaming" and
2 regulatory arbitrage, the FCC adopted the following eligibility criteria: (1) the
3 requesting carrier "must have a state certification of authority to provide local voice
4 service;" (2) the requesting carrier must "demonstrate that it actually provides a local
5 voice service to the customer over a DS1 circuit" by having "at least one local number
6 assigned to each circuit and must provide 911 or E911 capability to each circuit;" and
7 (3) there must be specifically defined, circuit-specific architectural safeguards in place
8 to prevent gaming.²⁰ A provider must satisfy each of these service eligibility criteria
9 "(1) to convert a special access circuit to a high-capacity EEL; (2) to obtain a new high-
10 capacity EEL; or (3) to obtain at UNE pricing part of a high-capacity loop-transport
11 combination (commingled EEL)."²¹

12 **Q. WHAT LANGUAGE HAS QWEST PROPOSED TO IMPLEMENT THESE**
13 **ELIGIBILITY CRITERIA FOR HIGH CAPACITY EELS?**

14 A. Qwest's proposed language for section 9.1.1.5 and related subsections establishes that
15 the service eligibility criteria for high capacity EELs apply to any commingling of
16 services that includes a high capacity loop and a transport facility or service. Qwest's
17 language lists virtually verbatim each of the eligibility criteria that the FCC listed in
18 paragraph 597 of the *TRO*.

²⁰ *Id.* at ¶ 597. The safeguards referred to in this paragraph are (i) "each circuit must terminate into a collocation governed by section 251(c)(6) at an incumbent LEC central office within the same LATA as the customer premises;" (ii) "each circuit must be served by an interconnection trunk in the same LATA as the customer premises served by the EEL for the meaningful exchange of local traffic;" (iii) "for every 24 DS1s or the equivalent, the requesting carrier must maintain at least one active DS1 local service interconnection trunk;" and (iv) "each circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic." *Id.*

²¹ *Id.* at ¶ 593.

1 **Q. HOW DOES COVAD ADDRESS THE ELIGIBILITY CRITERIA FOR HIGH**
2 **CAPACITY EELS IN ITS PROPOSED LANGUAGE?**

3 A. Covad refuses to list the criteria and, instead, includes vague language in section 9.1.1.5
4 of its proposed ICA stating that "there are additional eligibility criteria [for EELs] that
5 do not apply to other UNEs." Covad also proposes including language stating that it
6 does not intend to order high capacity EELs and that if it changes its mind, "the parties
7 will negotiate an amendment to this Agreement that will enable [Covad] to order High
8 Capacity EELs subject to service eligibility criteria established by Applicable Law."

9 **Q. WHY IS QWEST OPPOSED TO COVAD'S LANGUAGE RELATING TO THE**
10 **SERVICE ELIGIBILITY CRITERIA?**

11 A. Covad's language improperly leaves uncertainty about what service eligibility criteria
12 apply to high capacity EELs. There is no need for this uncertainty. The *TRO* very
13 clearly describes the criteria, and Covad does not dispute that the criteria apply to high
14 capacity EELs. Accordingly, these legally binding criteria should be expressly listed in
15 the ICA so that there is no doubt about their applicability.

16 Covad's representation in its proposed language that it does not intend to purchase high
17 capacity EELs does not justify excluding the eligibility criteria from the ICA. Even if
18 Covad chooses not to order high capacity EELs, other CLECs that may opt into the
19 ICA may elect to purchase these facilities. Given the possibility of opt-ins, it would be
20 shortsighted to exclude the eligibility criteria from the ICA. Moreover, Covad has
21 failed to provide any legitimate reason for excluding the criteria.

22 **Q. PLEASE EXPLAIN FURTHER WHY THE AGREEMENT SHOULD INCLUDE**
23 **THE EEL ELIGIBILITY CRITERIA DESPITE COVAD'S REPRESENTATION**

1 **THAT IT DOES NOT INTEND TO ORDER EELS.**

2 A. Qwest is concerned that if another CLEC opts into the ICA, it could effectively obtain
3 an EEL by ordering a high capacity loop and high capacity transport (both of which are
4 available under the ICA) and requesting that Qwest combine those facilities. In other
5 words, by ordering the EEL piece-parts and requiring Qwest to combine them, a CLEC
6 could obtain an EEL despite the Covad's representation in the ICA that it does not
7 intend to order EELs. If that were to occur, the EEL eligibility clearly would apply to
8 the combined facility, which Covad does not contest. In anticipation of this possible
9 scenario, the ICA should list the EEL eligibility criteria. There is no downside to
10 including the criteria, since there is no dispute about what they are and that they apply
11 to EELs. Alternatively, Qwest would accept a somewhat different resolution of this
12 issue. Instead of listing each of the EEL eligibility criteria, the ICA could expressly
13 exclude EELs from the definition of UNEs that are available under the agreement.
14 That exclusion, plus an express statement in the UNE combination definition of the
15 ICA establishing that Qwest is not required to combine high capacity loops with high
16 capacity transport, would meet Qwest's concern and would eliminate the need to list the
17 EEL eligibility criteria in the ICA.

18 **Q. WITH RESPECT TO THE SECOND DISPUTE RELATING TO**
19 **COMMINGLING, WHAT ICA LANGUAGE IS COVAD PROPOSING THAT**
20 **WOULD REQUIRE QWEST TO COMMINGLE FACILITIES PROVIDED**
21 **PURSUANT TO SECTION 271?**

22 A. In section 9.1.1.1 of its proposed ICA, Covad defines commingling as "connecting,
23 attaching, or otherwise linking" a UNE or a UNE combination provided pursuant to
24 section 251(c)(3) with facilities or services obtained at wholesale "pursuant to any

1 method other than unbundling under Section 251(c)(3)" It is clear that through
2 this language and through its use of the terms "section 251(c)(3) UNE" instead of
3 "UNE" in connection with commingling, Covad intends to require Qwest to commingle
4 UNEs provided under section 251(c)(3) with network elements that Qwest provides
5 under section 271. This intent also is demonstrated by Covad's rejection of Qwest's
6 proposed language (section 9.1.1.1) that would have expressly excluded network
7 elements provided under section 271 from Qwest's commingling obligations. Covad's
8 proposed section 9.1.1.1 does not include this exclusion.

9 **Q. WHY IS COVAD'S DEMAND FOR COMMINGLING WITH SECTION 271**
10 **NETWORK ELEMENTS IMPROPER?**

11 A. First, this is not the proper forum for determining Qwest's obligations under section
12 271. The only issues that state commissions are permitted to address in arbitrations
13 conducted under section 252(b) are those relating to an ILEC's obligations under
14 sections 251(b) and (c). State commissions do not have any authority to make
15 determinations relating to an ILEC's obligations under section 271 in arbitrations or any
16 other proceedings. That authority rests exclusively with the FCC.

17 Second, Covad's demand for section 271 commingling also is contradicted by the
18 language of the Act. As the FCC and the D.C. Circuit in *USTA II* have recognized,
19 Congress deliberately omitted any reference to section 251's combination duties (of
20 which the commingling rules are simply a broader implementation) from the terms by
21 which BOCs must offer facilities under section 271. In the section of the *TRO*
22 specifically discussing what section 271 obligations BOCs have with respect to
23 facilities taken off the section 251 unbundling list, the FCC made clear that BOCs have

1 no obligation to combine such de-listed facilities with the UNEs that BOCs must
2 continue to provide under section 251: “We decline to require BOCs, pursuant to
3 section 271, to combine network elements that no longer are required to be unbundled
4 under section 251.”²²

5 Third, Covad's position is directly contradicted by the FCC's *errata* that modified the
6 initial ruling in the *TRO* relating to ILEC commingling obligations. In the original
7 version of the *TRO*, paragraph 584 instructed that ILECs' commingling obligations
8 included permitting the commingling of UNEs and UNE combinations with network
9 elements provided under section 271. However, in the *Errata*, the FCC removed this
10 language, thereby eliminating the requirement that ILECs permit commingling with
11 section 271 elements.

12 **Q. WITH RESPECT TO THE THIRD DISPUTE RELATING TO**
13 **COMMINGLING, PLEASE DESCRIBE QWEST'S PROPOSAL RELATING**
14 **TO ITS RESALE COMMINGLING OBLIGATIONS.**

15 A. In section 9.1.1.1, Qwest proposes language establishing its obligation to provide
16 commingling with resale services. Section 251(4)(A), which defines ILEC's resale
17 obligations under the Act, requires ILECs "to offer for resale at wholesale rates any
18 *telecommunications service* that the carrier provides at retail to subscribers who are not
19 telecommunications carriers." Qwest's proposed section 9.1.1.1 establishes clearly that
20 Qwest will commingle telecommunications services that Covad purchases through
21 resale with UNEs and UNE combinations. In addition, to eliminate ambiguity and to
22 avoid potential disputes relating to the resale services that are available for

²² *TRO* at ¶ 655 n.1990.

1 commingling, Qwest's language establishes that the following are not available for
2 resale commingling: (1) non-telecommunications services, (2) enhanced or information
3 services, (3) features or functions not offered for resale on a stand-alone basis or
4 separate from basic exchange service, and (4) network elements offered pursuant to
5 Section 271. These services and facilities are not among the "telecommunications
6 services" that Qwest is required to make available for resale under Section 251(c)(4)
7 and, therefore, they are not available for resale commingling.

8 **Q. HOW DOES COVAD'S PROPOSED LANGUAGE RELATING TO RESALE**
9 **COMMINGLING DIFFER FROM QWEST'S, AND WHY SHOULD THE**
10 **COMMISSION ADOPT QWEST'S PROPOSAL?**

11 A. The need for the express resale exclusions listed in Qwest's proposed language is
12 highlighted by ovad's proposed section 9.1.1.1, which refers vaguely to commingling of
13 "services offered pursuant to tariff and resale." This language fails to limit the resale
14 services available for commingling to "telecommunications services," as is required by
15 section 251(c)(4). It is essential for the ICA to recognize this statutorily-mandated
16 limitation on Qwest's resale and commingling obligations. Accordingly, the
17 Commission should adopt Qwest's proposed section 9.1.1.1.

18 **Q. PLEASE EXPLAIN THE FOURTH DISPUTED COMMINGLING ISSUE THAT**
19 **INVOLVES THE PRICING OF COMMINGLED FACILITIES.**

20 A. In conjunction with the its ruling requiring commingling, the FCC rejected rate
21 "ratcheting" for these commingled UNE/wholesale service combinations.²³ As
22 explained by the FCC, ratcheting is a pricing mechanism that involves billing a single

²³ *TRO at ¶ 582.*

1 circuit at multiple rates to develop a single, blended rate for the circuit as a whole. In
2 rejecting ratcheting, the FCC stated that ILECs are permitted "to assess the rates for
3 UNEs (or UNE combinations) commingled with tariffed access services on an element-
4 by-element and a service-by-service basis."²⁴ This result, the FCC explained, "ensures
5 that competitive LECs do not obtain an unfair discount off the prices for wholesale
6 services, while at the same time ensuring that competitive LECs do not pay twice for a
7 single facility."²⁵ While Qwest and Covad agree that ratcheting is not required; we
8 disagree concerning the language needed for the agreement to implement the FCC's
9 ratcheting ruling.

10 **Q. PLEASE DESCRIBE THE LANGUAGE THAT QWEST IS PROPOSING TO**
11 **IMPLEMENT THE TRO'S RULING RELATING TO RATCHETING.**

12 A. Qwest's proposed language for Sections 9.1.1.4 and 9.1.1.4.1 implements the FCC's
13 ratcheting ruling clearly and accurately. Qwest's language establishes the following
14 principles that are based directly on the FCC's ruling: (1) a circuit or facility that
15 includes a mix of UNEs and other services will be ordered and billed under the terms of
16 the applicable Qwest tariff or the resale provisions of the ICA; (2) mixed-use circuits or
17 facilities will not be ordered or billed as UNEs; (3) Qwest is not required to bill for
18 mixed-use circuits or facilities at blended or multiple rates; and (4) if a multiplexer is
19 included in the commingled circuit, it will be ordered and billed at the UNE rate
20 (instead of a tariff rate) only if all the circuits entering the multiplexer are UNEs.
21 Under this language, it is clear that Qwest will be permitted to assess rates for UNEs

24 *Id.* at ¶ 582.

25 *Id.*

1 commingled with tariffed access services on an element-by-element and a service-by-
2 service basis.

3 **Q. WHAT CONCERNS DOES QWEST HAVE ABOUT COVAD'S PROPOSED**
4 **LANGUAGE RELATING TO RATE RATCHETING AND PRICES FOR**
5 **COMMINGLED FACILITIES AND SERVICES?**

6 A. The most significant shortcoming of Covad's proposed language is that it fails to
7 establish Qwest's right to convert from TELRIC ("total element long run incremental
8 cost") pricing to tariffed pricing for UNEs that Covad initially uses to carry qualifying
9 services but that it later uses to carry non-qualifying services over one or more circuits.
10 Covad and Qwest agree that under the terms of the *TRO*, Qwest should be permitted to
11 convert to tariffed pricing in this circumstance, as established by the following
12 testimony in from Covad Vice President, Megan Doberneck, in the Qwest/Covad
13 Colorado arbitration:

14 So we would agree, where you have 24 DS0 loops that are going to be
15 multiplexed and put on to a DS1 or DS3 transport, the existence of the
16 loop being combined into that arrangement because it provides solely
17 – I want to make sure we're clear here – solely non-qualifying service,
18 that would take you out of UNE [TELRIC] pricing.²⁶

19 Despite this agreement, Covad's proposed language for section 9.1.1.4 and related sub-
20 sections of the ICA does not establish Qwest's right to convert to tariffed pricing.

21 In addition, Covad's proposed language is unnecessarily complex. Covad proposes
22 three different subsections to establish the principle that commingled UNEs (and

²⁶ *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Company, Colorado Docket No. 04B-160T, Hearing Transcript from June 22, 2004 at 171.* A copy of this transcript excerpt from the Colorado arbitration is attached as Exhibit 1.

1 multiplexers used in connection with UNEs) will be priced at UNE rates. Qwest's
2 language in Section 9.1.1.4 clearly provides that UNEs connected to mixed-use circuits
3 will be charged based on the TELRIC rates listed in Appendix A of the Proposed
4 Interconnection Agreement; therefore, there is no need for the multiple subsections
5 Covad is proposing.

6 **IV. CONCLUSION**

7 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

8 A. Yes.

1 BEFORE THE PUBLIC UTILITIES COMMISSION
2 OF THE STATE OF COLORADO
3 Docket No. 04B-160T - Volume 2

4 * * *

5 IN THE MATTER OF THE PETITION OF QWEST CORPORATION
6 FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH
7 COVAD COMMUNICATIONS COMPANY PURSUANT TO 47 USC
8 SS 252(b) .
9 -----

10 Pursuant to notice to all parties of interest,
11 the above-entitled matter came on for hearing at
12 11:10 a.m., June 22, 2004, at 1580 Logan Street,
13 Office Level 2, Denver, Colorado, before
14 Adminstrative Law Judge Mana Jennings-Fader.

15 APPEARANCES

16 For Qwest Corporation: WINSLOW WAXTER, ESQ.

 1005 17th Street

 Suite 200

 Denver, Colorado 80209

18 JOHN DEVANEY, ESQ.

 1899 Wynkoop

 Denver, Colorado 80202

20 For Covad Communciations: ANDREW NEWELL, ESQ.

 1515 Arapahoe Street

 Suite Tower 1, Suite 1000

 Denver, Colorado 80202

22 KAREN FRAME, ESQ.

 7901 Lowry Boulevard

 Denver, Colorado 80230

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24
25

1 from Qwest.

2 MR. DEVANEY: You know, I think it's a
3 distinction without a difference; but if this will
4 satisfy counsel, I will rephrase it.

5 BY MR. DEVANEY:

6 Q. Let's assume 24 DS0s.

7 A. Okay, I can follow that there is no
8 channelizing going on.

9 Q. One of which is non-qualifying, 22 of
10 which are mixed use, as you have described it, and one
11 is qualifying. And you have acquired the DS3 at a UNE
12 rate, but all of a sudden it's now handling at least
13 some non-qualifying traffic. What happens to the
14 pricing of that DS3?

15 A. I hope we're doing a DS3 and not a DS1 if
16 there are 24 DS0s. So we would agree, where you have
17 24 DS0 loops that are going to be multiplexed and put
18 on to a DS1 or DS3 transport, the existence of the loop
19 being combined into that arrangement because it
20 provides solely -- I want to make sure we're clear
21 here -- solely non-qualifying service, that that would
22 take you out of UNE pricing.

23 Q. Okay, Qwest could convert the pricing of
24 that DS3 from a UNE to a tariff price under that
25 scenario, correct?