## BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| 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-_________<br><br>PETITION OF COVAD COMMUNICATIONS COMPANY FOR ARBITRATION |

1 **A. <u>Name, Address, and Telephone Number of the Petitioner, the Other Party to this Negotiation, and Their Counsel</u>**

Petitioner's full name and its official business address are as follows:

DIECA Communications, Inc., d/b/a
Covad Communications Company ("Covad")
110 Rio Robles
San Jose, California 95134-1813

Covad is a Virginia corporation, and it is registered with the Commission as a telecommunications company in Washington.[1] Covad is, and at all relevant times has been, a "local exchange carrier" ("LEC") under the Act.

The names, addresses, and contact numbers of Covad's representatives in this proceeding are as follows:

Brooks Harlow
4400 Two Union Square
601 Union Street
Seattle, Washington 98101-2352
Phone: (206) 622-8484
Fax: (206) 622-7485
Email: brooks.harlow@millernash.com

[1] In the Matter of the Petition of Covad Communications Company, Order Granting Registration, Docket UT-970553 (1997).

Karen Shoresman Frame
Senior Counsel
Covad Communications Company
7901 Lowry Boulevard
Denver, Colorado 80230
Phone: 720-208-1069
Fax: 720-208-3350
Email: kframe@covad.com

Qwest, the other party to this negotiation, is a corporation organized and formed under the laws of the State of Colorado, having an office at 1801 California Street, Denver, Colorado 80202. Qwest provides local exchange and other services within its franchised areas in Washington state. Qwest (in current name or as U S WEST Communications, Inc.) is, and at all relevant times has been, a "Bell Operating Company" and an "incumbent local exchange carrier" ("ILEC") under the terms of the Act.

The names, addresses, and contact numbers for Qwest's representatives during the negotiations with Covad are as follows:

Linda Miles
Qwest Corporation
1600 7th Ave
Room 3007
Seattle, Washington 98191
(206) 447-3890 (Tel)
(206) 345-0225 (Fax)

John Devaney
Mary Rose Hughes
Kelly Cameron
Perkins Coie, LLP
607 Fourteenth Street, N.W., Suite 800
Washington, DC 20005-2011
(202) 628-6600 (Tel)
(202) 434-1690 (Fax)

Qwest is represented in Washington by its counsel:

Winslow B. Waxter, Esq.
Qwest Corporation
1005 17th St., Suite 200
Denver, CO 80202
Phone (303) 896-1518
Fax (303) 896-6095
E-mail - winslow.waxter@qwest.com

Lisa A. Anderl, Esq.
Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Phone (206)345-1574
Fax - (206)343-4040
E-mail - Lisa.Anderl@qwest.com

2 **B. Rules and Statutes at Issue**

Covad Communications Company ("Covad") hereby petitions the Washington Utilities and Transportation Commission ("Commission") to arbitrate, pursuant to WAC 480-07-630, and Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act"), certain terms and conditions of a proposed Interconnection Agreement between Covad and Qwest Corporation ("Qwest") (hereafter, Covad and Qwest are collectively referred to as the "Parties") for the State of Washington.

3 The Commission has jurisdiction over Covad's Petition pursuant to the Act and WAC 480-07-630. The Parties agree that this Petition is timely filed.

4 **C. Brief Summary of Negotiation History**

5 The Parties have worked in good faith from language supplied by both Covad and Qwest to resolve the vast majority of issues raised during the negotiations. Notwithstanding these negotiations, Covad and Qwest have been unable to come to agreement on all terms, particularly certain terms relating to the provision of unbundled loops, collocation, maintenance charges, and billing. The remaining issues that Covad understands to be

unresolved between the Parties are addressed below in Section G – Unresolved Issues Submitted for Arbitration and Positions of the Parties.

6 A draft of the Interconnection Agreement ("Agreement") reflecting the Parties' negotiations to date is attached hereto as Exhibit A. Unless otherwise expressly marked in the Agreement as the proposal of one Party or another, agreed upon language is shown in normal type. Covad will continue to negotiate in good faith with Qwest to resolve disputed issues and will advise the Commission in the event arbitration, or arbitration on particular issues, is no longer necessary.

7 Covad requests that the Commission approve the Agreement between Covad and Qwest reflecting: (i) the agreed upon language in Exhibit A, and (ii) the resolution in this arbitration proceeding of unresolved issues in accordance with the recommendations made by Covad below and in Exhibit A.

## D. Date of Initial Request for Negotiation and Dates 135 days, 160 days, and Nine Months After that Date

8 Covad initiated negotiations by a letter dated January 31, 2003. The Parties have agreed to numerous extensions, agreeing that the negotiation request date for Washington would be December 17, 2003. Pursuant to Section 252(b)(1), arbitration must be requested between the $135^{th}$ day (April 30, 2004) and the $160^{th}$ day (May 25, 2004) following the date negotiations were requested.

## E. Issues Resolved by the Parties

9 The Parties have resolved the issues and negotiated contract language to govern the Parties' relationship with respect to most of the provisions set forth in Exhibit A. These negotiated portions of the Agreement are shown in normal type. To the extent Qwest asserts that any provisions remain in dispute, Covad reserves the right to present evidence and argument as to why those provisions were considered closed and why they should be resolved in the manner shown in Exhibit A.



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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

### F. Unresolved Issues Not Submitted for Arbitration

10 There are no unresolved issues that are not being submitted for arbitration.

### G. Unresolved Issues Submitted for Arbitration and Positions of the Parties

**ISSUE 1** (Sections 9.2.1.2.3, 9.2.1.2.3.1 and 9.2.1.2.3.2)

**Issue:** Should Qwest be permitted to retire copper facilities serving Covad's end users in a way that causes them to lose service?

11 The Parties have largely agreed that, consistent with the *Triennial Review Order*,[2] Qwest will work to maintain existing service arrangements for Covad's DSL customers should Qwest choose to retire copper facilities serving their neighborhood. The outstanding issue is whether Qwest must provision an alternative service over any available, compatible facility in a manner that does not degrade service or increase costs, allowing Covad to continue to provide broadband service to its customers, or whether such facilities must be merely "like facilities," creating uncertainty as to what standards, if any, govern Qwest's obligations to allow Covad to continue to serve its customers. Clear standards are required to ensure that customers, not Qwest, have the right to choose their services and service provider.

12 Covad submits that any reasonable definition of "like facilities" must contemplate the continued provision of Qualifying Services, such as DSL.[3] There is no legitimate basis for treating DSL service as an inferior service that may be disrupted as a result of a Qwest construction project. Covad's proposed language merely clarifies that the facilities made available by Qwest will be of a character that will allow continued service to the end user.

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[2] 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, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17125-26, ¶ 242 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003) (collectively "Triennial Review Order"), reversed and remanded, United States Telecom Ass'n v. FCC, D.C. Cir. No. 00-1012 (and consolidated cases) (decided March 2, 2004).

[3] "Qualifying Service" is defined in 47 C.F.R. § 51.5. The definition explicitly encompasses DSL.



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TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

Contrary to Qwest's claims, it does not have the unconditional right to retire copper loops. Any copper retirement plan is subject to objections and review by the FCC. Nothing in Covad's proposed language conflicts with the FCC's network modification rules, located at 47 C.F.R. § 51.333. Specifically, those rules provide:

> <u>Resolution of objections to replacement of copper loops or copper subloops with fiber-to-the-home loops.</u> An objection to a notice that an incumbent LEC intends to retire any copper loops or copper subloops and replace such loops or subloops with fiber-to-the-home loops shall be deemed denied 90 days after the date on which the Commission releases public notice of the incumbent LEC filing, unless the Commission rules otherwise within that time. **Until the Commission has either ruled on an objection or the 90-day period for the Commission's consideration has expired, an incumbent LEC may not retire those copper loops or copper subloops at issue for replacement with fiber-to-the-home loops. [emphasis added]**

47 C.F.R. § 51.333(f).

13 In fact, the FCC's rules are designed to provide adequate safeguards to ensure that competitive LECs can work together with incumbent LECs, such as Qwest, "to ensure competitive LECs maintain access to loop facilities." *Triennial Review Order, ¶ 281.* The FCC further clarified that the purpose of the rule changes was to ease restrictions in incumbent LECs "unless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules." *Triennial Review Order, ¶ 282.* Access to xDSL capable loops is undeniably required by the FCC's rules, and the copper retirement scenarios Covad identifies in its proposals would clearly deny Covad access to xDSL capable loops.

14 The FCC also clarified that the intent of their copper retirement rules was not to preempt state commission's evaluation of any copper retirement plan, or any other existing state legal or regulatory requirements. *Triennial Review Order,* ¶ 284. Furthermore, Covad's proposed language memorializes the statutorily mandated policies to:

(1) Preserve affordable universal telecommunications service;



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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 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.



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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

to provide all network elements listed in the provisions of Section 271 of the Telecommunications Act (the "Act")[5] outlining specific RBOC obligations to maintain authority to provide in-region interLATA service (the "271 Checklist" or "Checklist"). Qwest's position on this issue remains somewhat unclear to Covad, even after lengthy negotiations, however it does appear to Covad that Qwest believes its obligations under Section 271, if any, are outside the jurisdiction of this Commission.

*17* Furthermore, Covad believes that Qwest should continue to be obligated under Washington law to provide unbundled access to network elements and that to avoid discrimination in violation of RCW 80.36.186, *inter alia*, the pricing methodology for such access must be set and total element long-run incremental cost ("TELRIC") as further described below. Qwest argues this Commission's authority to regulate access to its essential non-competitive services and facilities has been preempted by congressional and FCC action.

## A. <u>Section 271</u>

*18* This Commission can, and should, use its authority to enforce the unbundling requirements of Section 271 of the Act. The FCC made clear in the *Triennial Review* that Section 271 creates independent access obligations for the RBOCs:

> [W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

*Triennial Review Order, ¶ 653.*

> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.

*Triennial Review Order, ¶ 655.*

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[5] 47 U.S.C. § 271.



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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

19 Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under Section 251 for *ILECs*, as a Bell Company Qwest retains an independent statutory obligation under Section 271 of the Act to provide competitors with unbundled access to the network elements listed in the Section 271 checklist.[6] Moreover, there is no question that these obligations include the provision of unbundled access to loops and dedicated transport under checklist item #4:

> Checklist items 4, 5, 6, and 10 separately impose access requirements regarding **loop**, **transport**, **switching**, and signaling, without mentioning section 251. [emphasis added]

*Triennial Review Order, ¶ 654.*

20 In addition, the Commission has independent authority to enforce these Section 271 BOC obligations. Specifically, Washington law vests the Commission with broad authority to regulate the services and practices of Qwest. For example, RCW 80.36.140 provides, in relevant part:

> Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telecommunications company are unjust or unreasonable, or that the equipment, facilities or service of any telecommunications company is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and service to be thereafter installed, observed and used, and fix the same by order or rule as provided in this title.

This authority encompasses the power to ensure that Qwest fulfills its statutory unbundling duties under Section 271, as the Commission made clear when it ordered unbundling well before passage of the Federal Telecommunications Act. The Washington Commission brushed aside U S West's and GTE's arguments that it lacked the authority to order unbundling of their services beyond that voluntarily offered by ILECs, stating:

> The Commission has carefully and thoroughly considered the incumbent LECs' arguments that we lack authority to order any interconnection terms

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[6] *See* 47 U.S.C. § 271(c)(2)(B).



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TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

> or conditions other than those they are offering. We believe that the incumbent LECs' interpretation of the Commission's authority, and USWC's interpretation in particular, are unreasonably restrictive. The Commission has broad authority to regulate the rates, services, facilities, and practices of telecommunications companies in the public interest. *See, POWER v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 808, 711 P.2d 319 (1985); *State ex rel. American Telechronometer Co. v. Baker*, 164 Wash. 483, 491-96, 2 P.2d 1099 (1931); *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*, 85 Wash. 29, 36, 147 P. 885 (1915).
>
> . . .
>
> The first paragraph of RCW 80.36.140 (quoted in the Commission Jurisdiction section of this order) gives the Commission broad authority over rates. The second paragraph, quoted above, gives the Commission broad authority over practices and services as well. The way in which services are offered, on a bundled or unbundled basis, certainly falls within the scope of the second paragraph. *See, e.g., State ex rel. American Telechronometer Co. v. Baker*, 164 Wash. 483, 491-96, 2 P.2d 1099 (1931) (citing earlier version of above quoted provision); *State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co.*, 85 Wash. 29, 36, 147 P. 885 (1915)(describing Commission's power to regulate public utilities as "plenary").

Fourth Supplemental Order Rejecting Tariff Filing and Ordering Refilings; Granting Complaints, In Part ("Interconnection Order"), *WUTC v. U S West Communications, Inc.*, WUTC Docket No. UT-94164, *et al.* at 15 and 51 ("Interconnection Case") (Oct. 30, 1995).

21 Furthermore, there can be no argument that the Commission's enforcement of Qwest's Section 271 checklist obligations would substantially prevent the implementation of any provision of the Act. Indeed, where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized. *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *De Canas v. Bica,* 424 U.S. 351, 356, 96 S. Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers,* 373 U.S. at 142, 83 S. Ct. at 1217). The Act, however,



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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

hardly evinces an unmistakable indication of Congressional intent to preclude state enforcement of federal 271 obligations. Far from doing so, the Act expressly preserves a state role in the review of a RBOC's compliance with its Section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a RBOC's Section 271 compliance.[7] Thus, the Commission clearly has the authority to enforce Qwest's obligations to provide unbundled access to loops (including high capacity loops, line splitting arrangements and subloop elements) and dedicated transport under Section 271 checklist item #4.

22 The FCC did make clear in the *Triennial Review Order* that a different pricing standard applied to network elements required to be unbundled under Section 271 as opposed to network elements unbundled under Section 251 of the Act. Specifically, the FCC stated that "the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202." *Triennial Review Order*, ¶ 656. In other words, according to the FCC, the *legal standard* under which pricing for Section 271 checklist items should be determined is a different *legal standard* than that applied to price Section 251 UNEs. Thus, "Section 271 requires RBOCs to provide unbundled access to elements not required to be unbundled under Section 251, but does not *require* TELRIC pricing." *Triennial Review Order*, ¶ 659 (emphasis added).

23 Washington has repeatedly embraced TELRIC and its equivalent, TSLRIC, as the appropriate cost methodology for non-competitive services. For example, in the first generic cost docket, the Commission stated that "We agree that [TELRIC] is the correct costing standard." Eighth Supplemental Order, *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket No.

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[7] *See* 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing RBOC compliance with the 271 checklist).



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TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

UT-960369 ¶ 38 (April 16, 1998). Later, the Commission adopted UNE prices based on TELRIC costs plus a "reasonable allocation of forward-looking common costs." *Id.*, 17th Supplemental Order, ¶ 41 (Sept. 23, 1999). The Commission made it clear--at a time when the validity of the FCC's rules requiring TELRIC pricing were in question--that the WUTC had independent authority to implement TELRIC pricing under state law." *Id.*, Eighth Supplemental Order, Note 4.[8]

24 Notably, in the *Triennial Review,* the FCC nowhere forbids the application of such pricing of network elements required to be unbundled under Section 271. Rather, the FCC merely states that unbundled access to Section 271 checklist items is not *required* to be priced pursuant to the particular forward-looking cost methodology specified in the FCC's rules implementing Section 252(d)(1) of the Act – namely, TELRIC. The FCC states that the appropriate legal standard to determine the correct price of Section 271 checklist items is found in Sections 201 and 202. However, nowhere does the FCC state these two different legal standards may not result in the same rate-setting methodology. In fact, the FCC itself has allowed the use of forward-looking economic costs to establish the rates for tariffed interstate telecommunications services regulated under Sections 201 and 202 of the Act – services which are not subject to the pricing standards in Section 252(d)(1) of the Act. *See, e.g., Access Charge Reform,* CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962, 12984, ¶ 57 (2000).

25 Furthermore, the FCC does not preclude the use of forward-looking, long-run incremental cost methodologies *other than TELRIC* to establish the prices for access to Section 271 checklist items. As the FCC made clear when it adopted the TELRIC pricing methodology in its *Local Competition Order*, there are various methodologies for the determination of forward-looking, long-run incremental cost. *Local Competition Order,*

[8] "While this proceeding implements the 1996 Act, the Commission also acts under authority of Title 80 RCW and Title 480 WAC. See, Fourth Supplemental Order, Docket No. UT-941465 [*sic*, should be 941464], *et seq.*"



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4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

FCC 96-325, ¶ 631. TELRIC describes only one variant, established by the FCC for setting UNE prices under Section 252(d)(1), derived from a family of cost methodologies consistent with forward-looking, long-run incremental cost principles. *See Local Competition Order,* FCC 96-325, at ¶¶ 683-685 (defining "three general approaches" to setting forward-looking costs). Thus, the FCC's *Triennial Review Order* does not preclude the use of a forward-looking, long-run incremental cost standard *other than TELRIC* in establishing prices consistent with Sections 201 and 202 of the Act.[9]

### B. State Law Unbundling Authority

26 This Commission has the requisite authority to require access to loops, including high capacity loops, line splitting arrangements and subloop arrangements, as well as dedicated transport, under its independent, state law authority as the Commission made clear in the Interconnection Case, *supra*. In the context of Washington's policy declarations promoting "efficiency, availability, diversity, universal service and reasonable charges,"[10] Qwest's continued provision of UNEs such as line sharing should be found to be "just, reasonable, proper, adequate and efficient" "rules, regulations, practices" under RCW 80.36.140. Moreover, RCW 80.36.200 states:

> Every telecommunications company operating in this state shall receive, transmit and deliver, without discrimination or delay, the messages of any other telecommunications company.

Thus, Qwest's refusal to deliver Covad's packets over the high frequency portion of the loop would violate that statute.

27 Another statute to which the Commission might look is RCW 80.36.260, which provides:

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[9] For example, where the 271 checklist item for which rates are being established is not legacy loop plant but next-generation loop plant, incumbents might argue for the use of a forward-looking, long-run incremental cost methodology based on their *current network technologies* – in other words, a non-TELRIC but nonetheless forward-looking, long-run incremental cost methodology. *See, e.g., Local Competition Order,* FCC 96-325, ¶ 684.

[10] See RCW 80.36.300.



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ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

> Whenever the commission shall find, after a hearing had on its own motion or upon complaint, that repairs or improvements to, or changes in, any telecommunications line ought reasonably be made, or that any additions or extensions should reasonably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for telecommunications communications, the commission shall make and serve an order directing that such repairs, improvements, changes, additions or extensions be made in the manner to be specified therein.

The Commission can order "repairs, improvements, and changes" to promote the "convenience of the public." The provision of UNEs has been proven to be a huge "convenience" to the public. Likewise, another provision in Washington law requires that:

> All rates, tolls, contracts and charges, rules and regulations of telecommunications companies, for messages, conversations, services rendered and equipment and facilities supplied, whether such message, conversation or service to be performed be over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable and sufficient, and the service so to be rendered any person, firm or corporation by any telecommunications company shall be rendered and performed in a prompt, expeditious and efficient manner and the facilities, instrumentalities and equipment furnished by it shall be safe, kept in good condition and repair, and its appliances, instrumentalities and service shall be modern, adequate, sufficient and efficient.

RCW 80.36.080. Services provided by Qwest must be "modern, adequate, sufficient, and efficient." Qwest's position on elimination of UNEs is not consistent with "adequate," "sufficient," or "efficient" service by Qwest.

*28* This independent state law authority is not preempted by the FCC's recent *Triennial Review Order*. Nowhere does Section 251 of the Act evince any general Congressional intent to preempt state laws or regulations providing for competitor access to unbundled network elements or interconnection with the ILEC. In fact, as recognized by the FCC in its *Triennial Review Order*, several provisions of the Act expressly indicate Congress' intent <u>not</u> to preempt such state regulation, and forbid the FCC from engaging in such preemption:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to



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4400 TWO UNION SQUARE
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> establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.

*Triennial Review Order, ¶ 191.*

29 As the FCC further acknowledges in the *Triennial Review Order*, Congress expressly declined to preempt states in the field of telecommunications regulation:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.

*Triennial Review Order, ¶ 192.*

30 In fact, the FCC only identified a narrow set of circumstances under which federal law would act to preempt state laws and rules providing for competitor access to ILEC facilities:

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime....
>
> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.

*Triennial Review Order, ¶¶ 192, 194.*

31 Notably, in reaching these conclusions, the FCC was simply restating existing, well-known precedents governing the law of preemption. Specifically, the long-standing doctrine of federal conflict preemption provides for exactly the limited sort of federal preemption acknowledged by the FCC's *Triennial Review Order*. Courts have long held that state laws are preempted to the extent that they actually conflict with federal law. As noted by the FCC's *Triennial Review Order*, such conflict exists where compliance with state law "stands as an obstacle to the accomplishments and execution of the full purposes and



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

objectives of Congress." *Triennial Review Order*, ¶ 192 n. 613 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Even more notably, in its *Triennial Review Order*, the FCC did not act to preempt any existing state law or regulation inconsistent with the FCC's rules, nor did it act to preclude the adoption of future state laws or regulations governing the access of competitors to ILEC facilities which are inconsistent with the FCC's rules. In fact, following the governing law set out in the Eighth Circuit's *Iowa Utilities Board I* decision, the FCC specifically recognized that state laws or regulations which are inconsistent with the FCC's unbundling rules are not *ipso facto* preempted:

> That portion of the Eighth Circuit's opinion reinforces the language of [Section 251(d)(3)], *i.e.*, that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).

*Triennial Review Order, ¶ 192 n. 611* (citing Iowa Utils. Bd. v. FCC, 120 F.3d at 806).

32 In so doing, the FCC made clear that it was acting in conformance with the governing law set out in the *Iowa Utilities Board I* decision:

> We believe our decision properly balances the broad authority granted to the Commission by the 1996 Act with the role preserved for the states in section 251(d)(3) and is fully consistent with the Eighth Circuit's interpretation of that provision.

*Id.*

33 Thus, far from taking any specific action to preempt any state law or regulation governing competitor access to incumbent facilities, the FCC merely acted in the *Triennial Review* to restate the already-existing bounds on state action recognized under existing doctrines of conflict preemption. Furthermore, the FCC's *Triennial Review Order* recognized that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules would be insufficient to create such a conflict. Instead, consistent with existing doctrines of conflict preemption, the FCC recognized that the state



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

laws would have to "substantially prevent implementation" of Section 251 in order to create conflict preemption.

34 Of course, the FCC's *Triennial Review Order* could not have concluded that all state rules unbundling network elements not required to be unbundled nationally by the FCC create conflict preemption. Had the FCC reached such a conclusion, the FCC would have rendered Section 251(d)(3)'s savings provisions a nullity, never operating to preserve any meaningful state law authority in any circumstance. Rather than reaching such a conclusion, the FCC created a process for parties to determine whether a "particular state unbundling obligation" requiring the unbundling of network elements not unbundled nationally by FCC rules creates a conflict with federal law. The *Triennial Review Order* invited parties to seek declaratory rulings from the FCC regarding individual state obligations. An invitation to seek declaratory ruling, however, hardly amounts to preemption in itself – it merely creates a process for interested parties to establish <u>in future proceedings before the FCC</u> whether or not a particular state rule conflicts with federal law.

35 The FCC did give interested parties some indication of how it might rule on such petitions. Specifically, the FCC stated that it was "*unlikely*" that the FCC would refrain from finding conflict preemption where future state rules required "unbundling of network elements for which the Commission has either found no impairment ... or otherwise declined to require unbundling on a national basis." *Triennial Review Order*, ¶ 195. The FCC's statement, however, that such future rules were merely "*unlikely*" – as opposed to simply unable – to withstand conflict preemption leads to the inevitable conclusion that there are some circumstances in which the FCC would find that such future rules were not preempted. Moreover, with respect to state rules in existence at the time of the *Triennial Review Order*, the FCC's indications that it might find conflict preemption are even more muted. Specifically, the FCC merely stated that "in *at least some circumstances* existing state



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

requirements will not be consistent with our new framework and may frustrate its implementation." *Triennial Review Order*, ¶ 195.

36 Thus, while the FCC's *Triennial Review Order* indicates that under some circumstances the FCC would find conflict preemption for state rules requiring the unbundling of network elements not unbundled nationally under federal law, the decision also indicates that in some circumstances the FCC would decline to find that such state rules substantially prevent implementation of Section 251.[11] In fact, the FCC's decision gives some direction on the circumstances that would lead the FCC to decline a finding of conflict preemption for state rules unbundling network elements the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that "the availability of certain network elements may vary between geographic regions." *Triennial Review Order*, ¶ 196. Indeed, according to the FCC, such a granular "approach is required under *USTA*." *Triennial Review Order*, ¶ 196 (citing *USTA*, 290 F.3d at 427). Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of Section 251.

36 While Covad believes preemption of Washington law mandating unbundling is unlikely, it is also irrelevant. This Commission should exercise its authority as it is delineated by Washington statute, irrespective of preemption analysis, as the adjudication of the constitutionality of legislative enactments in generally beyond the jurisdiction of administrative agencies. *Johnson, Administrator of Veterans' Affairs, et. al. v. Robison,* 415

[11] Notably, the FCC's statements indicating when it is 'likely' to find preemption for particular state rules appear to conflict with a recent Sixth Circuit decision. The Sixth Circuit has stated that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." The court further noted that a state commission is permitted to "enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement" entered into pursuant to section 252 of the Act, "as long as the regulations do not interfere with the ability of new entrants to obtain services." *See Michigan Bell v. MCIMetro*, 2003 WL 909978, at 9 (6th Cir. 2003).



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

U.S. 361, 368; 94 S. Ct. 1160, 1166; 39 L. Ed. 2d 389, 398 (1974); *See Prisk v. Poulsbo*, 46 Wn. App. 793, 799 (1987).

37 Consistent with the discussion above, Covad has proposed language maintaining access to network elements that may, in the future, no longer be available pursuant to Section 251 of the Act, but must nevertheless remain available pursuant to Section 271 of the Act and Washington law.

**ISSUE 3**[12] (Section 4 Definitions of "251(c)(3) UNE", "Commingling", 9.1.1, 9.1.1.1, 9.1.1.4, 9.1.1.4.1, 9.1.1.4.2, 9.1.1.4.3, and 9.1.1.5 (and subsections)

**Issue:** Should Qwest be required to follow the FCC's directives regarding the commingling of facilities, combination of UNEs, and ratcheting established in the Triennial Review Order?

38 The Parties disagree in their interpretation of the FCC's recent discussion of commingling, combinations, and ratcheting contained in the *Triennial Review Order*. In a practical sense, these issues are inextricably linked. Arrangements not available as UNE combinations may nevertheless be ordered as commingling arrangements, and the pricing for such arrangements is dictated by the FCC's ratcheting criteria.

39 Covad's proposed language is premised on a few simple concepts embodied in the *Triennial Review Order*. First, UNEs are available for the provision of a qualifying service. *See Triennial Review Order*, ¶ 135. Second, CLECs may only order combinations of two or more UNEs available under Section 251(c)(3), and ILECs, even RBOCs such as Qwest, have no obligation to combine other services, even elements provided under Section 271. *See Triennial Review Order*, ¶ 655, fn. 1990. Third, CLECs may *commingle* UNEs and combinations of UNEs with services obtained at wholesale pursuant to any method of access other than Section 251(c)(3) of the Act, and ILECs must perform the functions necessary to commingle these services upon request. *See Triennial Review Order*, ¶ 579. Fourth, ILECs

[12] Issue 3 in Covad's original petition, addressing conditioning issues, has been closed by the Parties.



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

are not required to bill for circuits aggregating UNE and non-UNE circuits at blended rates ("ratcheting"). Fifth, that additional service eligibility criteria apply to the availability of UNE combinations of high-capacity loops and transport ("Enhanced Extended Loops," or "EELs"). Covad's proposals embody these five simple concepts, and nothing more.

*40* Qwest has proposed alternate language that does not differentiate between UNEs available pursuant to Section 251(c)(3) and UNEs available pursuant to other statutory unbundling methods, such as Section 271. The premise of Qwest's position is that the only UNEs available under the Parties' agreement are those made available pursuant to Section 251(c)(3), and no differentiation between classes of UNEs is required.

*41* Covad believes its proposed language represents a faithful implementation of the FCC's new commingling and ratcheting rules, as well as the FCC's clarifications of the limits to an ILECs' obligations to combine services obtained by some method other than Section 251(c)(3) of the Act.

**ISSUE 4** (Sections 8.1.1.3 and 8.3.1.9)

> **Issue:** Is Covad entitled to an efficient collocation space assignment from Qwest, and should it be forced to pay charges resulting from Qwest's inefficiency?

*42* Covad has proposed provisions that delineate Qwest's responsibilities to provide efficient collocation space assignment to Covad, and deny Qwest the right to recover collocation expenses that result from Qwest's inefficiency. Qwest opposes these proposals.

*43* A commitment to maintain efficient collocation planning practices is necessary to send proper economic signals to Qwest as it plans for the future use of space within its central offices. At a minimum, the Parties' Agreement should not provide Qwest an opportunity to raise the costs of facilities-based market entry by assigning Covad collocation space that unnecessarily inflates costs. For instance, the assignment of unfinished space to Covad leads to charges for the construction of a new BDFB, racking, and lineups. If space is available where these charges would not be incurred, that space should be assigned to Covad.



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

If Qwest refuses to assign such space because it reserves it for its own future use, it should not be permitted to charge Covad for the additional costs resulting from that reservation.

44 Covad acknowledges Qwest's need to reserve space within its central offices for its own future needs. Current practice allows Qwest to reserve space according to a reasonable planning horizon that has been thoroughly examined in the context of Qwest's § 271 applications. However, there must be limits on Qwest's ability to benefit from the reservation of desirable space, and in turn assign undesirable and unfinished space to Covad.

45 Qwest argues that forcing it to be "efficient" would create irreconcilable conflicts between controlling its own costs and those of other collocating CLECs. Covad's proposal cannot be reasonably read in such a bizarre manner. Covad's proposal is positively simple, and merely requires that when Qwest receives a request for a collocation arrangement from Covad, the request should be provisioned in a manner that minimizes time and costs.

46 Qwest believes that it may be faced with a situation in which it must choose between minimizing its own time and costs and Covad's time and costs. However, Qwest recovers every penny of its costs for Covad's collocation arrangements from Covad. The only way that Qwest could experience higher costs due to a Covad collocation arrangement, efficient or not, would be if Qwest is forced to place their newly installed equipment in an area of its central office that it believes is less desirable. The space reservation policy Qwest has adopted is designed to address this precise issue.

47 Qwest's argument that it cannot possibly balance the interest of all CLECs to obtain efficient collocation arrangements is also specious. As Qwest itself points out, the assignment of collocation space is first come, first served. Qwest's only responsibility is to provide the most efficient arrangement available once a request is received. If the optimal space for a given arrangement has already been occupied or reserved, this acts as an obvious limitation to Qwest's responsibility.



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

48 Qwest also objects that the term "efficient" is vague, ambiguous and unreasonable. Qwest itself uses the term in the collocation context, stating in Section 8.2.1.23 of its SGAT (and the Agreement) that:

> Qwest shall design and engineer the most efficient route and cable racking for the connection between CLEC's equipment in its collocated spaces to the collocated equipment of another CLEC located in the same Qwest premises; or to CLEC's own contiguous or non-contiguous Collocation space.

49 Qwest also uses the term in describing its design of central office floor space for collocation purposes, stating that "Qwest will design the floor space in the most efficient manner possible within each Premises that will constitute CLEC's leased space." *See* Section 8.2.3.1 of the Agreement.

50 All Covad asks is that this same standard of efficiency that applies to the cabling and racking and the design collocation arrangements also apply to the *assignment* of collocation space.

**ISSUE 5** (Sections 8.2.1.23.1.4, 8.3.1.9 and 9.1.10)

> **Issue:** Should Qwest provide regeneration between CLEC collocations, and can Qwest recover regeneration costs?

51 Covad has proposed language that clarifies that Qwest will provide regeneration if necessary, and Covad will not be charged for the regeneration of circuits connecting multiple collocations within a central office, including CLEC-to-CLEC cross connections. This is consistent with other sections of the Agreement that specify that Covad will not be charged for regeneration between the Qwest network and Covad collocations. *See* Section 9.1.10. Specifically, Covad proposes the deletion of Section 9.1.10 and the introduction of a new Section 8.3.1.9 that addresses all situations in which regeneration is required. In situations where regeneration is not required under applicable standards discussed below, but is nevertheless requested by Covad, Covad agrees it should pay for such regeneration.



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

52 Regeneration should rarely be necessary if Qwest uses efficient engineering and cabling techniques. In the context of Expanded Interconnection, the FCC stated:

> We find that it is unreasonable for the LECs that are the subject of this investigation to charge interconnectors for the cost of repeaters in a physical collocation arrangement because the record demonstrates that repeaters should not be needed for the provision of physical collocation service. . . .
>
> In proscribing recovery of repeater costs from interconnectors, we rely on the ANSI standard's requirement that when a passive POT bay is used, a repeater is only necessary when the cabling distance between the POT bay and the LEC's cross-connection bay exceeds 655 feet for a DS1 signal and 450 feet for a DS3 signal.

*In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, CC Docket No. 93-162, FCC 97-208 (Rel. June 13, 1997), ¶¶ 117-118.

53 The above decision was reached by the FCC after an exhaustive study of interconnection and collocation costs within ILEC central offices, and follows recognized standards with respect to signal regeneration requirements. Common sense dictates that cable lengths of 450 feet (for DS1 regeneration), let alone 655 feet (for DS3 regeneration) should be rare: in most central offices, achieving such distances would require placement of a CLEC's equipment in the worst possible location, implementing a creatively inefficient cabling design, or both. The Agreement should, however, provide for Qwest's provision of regeneration in the rare cases where it is necessary, on the same terms Qwest provides for regeneration between the Covad and Qwest networks.

54 Qwest's argument in opposition to providing regeneration for CLEC to CLEC cross connections is that it forces Qwest to "maximize efficiencies" for Covad, and that somehow this would work to the detriment of other carriers, including Qwest. This argument misses the point. Because Qwest is in a position to manage space assignment and cabling arrangements, it is in a position to avoid the need for regeneration (which the FCC ruled



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

should not be needed in physical collocation arrangements). Covad only asks that the current policies regarding the regeneration of signals between the Covad and Qwest network be extended to cover the regeneration of signals between Covad's physical collocations and those of other collocated CLECs within a Qwest premises.

55 Qwest's current proposals also represent its view that it is not required to regenerate signals associated with CLEC-to-CLEC cross-connections, notwithstanding its obligation to provide the cross-connection arrangement itself under current FCC rules. *See* 47 C.F.R. § 51.323(h). This position conflicts with the fundamental requirements of the FCC rule, and should be rejected.

**ISSUE 6** (Sections 9.21.1, 9.21.4.1.6, and 9.24.1)

> **Issue:** Should Qwest allow for a single LSR to be submitted for a new line splitting order (parity with its own retail operations) or may Qwest continue to delay the necessary system upgrades?

56 Covad has proposed language requiring Qwest to accept orders for a line-split voice and data bundle ordered by CLECs on a single Local Service Request (LSR) form, providing parity between CLECs' (either Covad or a partnering voice CLEC) and Qwest's own ability to submit a single order for processing. Qwest refuses to incorporate this language, and has counterproposed that this obligation must be conditioned on the inclusion of this capability in an upcoming IMA release.

57 The problem with the current process is that a voice CLEC must first submit an order for UNE-P, and only after the voice service is provisioned may a second order be placed for a line-split DSL product provided by Covad. This leads to increased provisioning costs for Covad, and perhaps more importantly, a delay in the provisioning DSL service to end users that is not experienced by end users ordering Qwest DSL. The existing process is therefore discriminatory, and violates Section 251 of the Act.

58 An IMA upgrade is not necessary for the implementation of the single LSR for line-splitting. Qwest is capable of processing line-split orders on a single LSR with its

current systems, albeit this processing may involve more manual activity than Qwest wishes to perform. There are several problems with tying this obligation to a future IMA release. First, Qwest's obligation to provision UNEs in a non-discriminatory manner is not conditioned upon the current status of its back office systems. Under Section 251, if Qwest is able to provision parallel orders for voice and DSL service for its own customers, it must perform at parity for its wholesale customers. Second, there are no guarantees when, if ever, an IMA release will include the required functionality. While Qwest and CLECs work together within the CMP process to assign priorities to specific functionalities to be included in future IMA releases, Qwest alone has the power to determine how much time or money will be invested in IMA releases, and when those IMA releases will occur. If Qwest is not obligated to provide non-discriminatory provisioning performance, it will have no motivation to complete the IMA release. Qwest's obligation to handle single LSR line-splitting orders manually is consistent with the requirements of Section 251 and will motivate Qwest to upgrade its systems.

**ISSUE 7** (Section 4 Definition of "Maintenance of Service Charge," Sections 9.2.2.9.11, 9.4.4.4.1, 9.4.6.3.1, 9.4.6.3.3, 9.21.3.3.1, 9.21.6.3.3, 9.24.3.3.1, 12.3.4.2, 12.3.4.3, and 12.3.6.5)

**Issue:** Should provisions regarding the recovery of maintenance expenses apply to both Parties, or should Qwest alone be entitled to recover its maintenance expenses?

59 Covad has proposed new language for the Parties' Agreement that permits both Parties, not just Qwest, to recover their costs for isolating trouble to the other Party's network in certain circumstances. A reciprocal application of these charges ensures that both Parties have the proper economic incentives to isolate network trouble properly.

60 When Covad learns one of its customers is experiencing trouble with their service, Covad runs various tests on its network to determine the problem. If Covad is able to isolate the trouble to Qwest's network, it opens a trouble ticket with Qwest. Covad does



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

not propose to charge Qwest for this initial trouble isolation. It is a routine cost of doing business.

61 Once the trouble ticket is opened, Qwest commits to run various tests to identify the problem. If Qwest determines that Covad mistakenly isolated the trouble to Qwest's network, it assesses a maintenance charge against Covad to cover its costs. If Qwest determines the problem exists on its network, no charge is assessed and Qwest initiates the repair. Covad agrees that Qwest should be allowed to assess a charge in cases where Covad mistakenly opens a trouble ticket, and Qwest can isolate the trouble to Covad's network.

62 In some circumstances, however, Qwest closes the trouble ticket claiming the trouble exists on the Covad network, and Covad is forced to demonstrate, for a second time, that the trouble is in fact isolated to the Qwest network. The costs incurred to isolate this trouble a second time are solely a result of Qwest's inability to properly perform their testing work the first time. Covad proposes that it be enabled to recover its actual costs to re-isolate the trouble to Qwest's network, not to exceed Qwest's costs.

63 Covad's proposal creates the proper economic incentive for Qwest to thoroughly test its network each time a trouble ticket is opened. Qwest would only incur costs if it failed to adequately test for network trouble, resulting in unnecessary additional costs to Covad. Covad's proposed language would level the playing field, and allow each Party to recover the actual costs incurred as a result of the other's error.

**ISSUE 8** (Sections 5.4.1, 5.4.2, 5.4.3, and 5.4.5)

**Issue:** Should provisions related to billing and billing dispute resolution more accurately reflect the reality of wholesale billing practices, and provide Covad adequate protection against disconnection of its customers?

64 Covad has proposed more realistic timeframes for payment of invoices by the Parties under the Agreement (within forty-five days of the invoice date), and more time before unpaid amounts are considered delinquent (ninety days after the payment due date). Qwest maintains that all invoices should be paid by the Parties within thirty days of the



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

invoice date, and if payment is not received within thirty days of the payment due date, the billing Party may discontinue the processing of new orders.

65 Processing, auditing, and paying wholesale invoices are complicated. While some bills are sent to Covad by Qwest in electronic format, others are sent in paper format only. Monthly invoices for wholesale services often number in the hundreds of pages, and skilled auditors must be employed to ensure their accuracy. Covad must complete the audit and verification process prior to processing payments to Qwest.

66 Despite the steps that must be undertaken, Qwest maintains that the payment intervals set forth in the Agreement should be roughly equivalent to the intervals allowed for residential customers to review and pay a bill for a single residential line. Given the enormous differences between the size and scope of the two tasks, this is inappropriate.

67 The short time frames contained in Qwest's proposal are also unreasonable because they provide Covad an impractically short time to identify amounts that should be withheld and disputed. Under Section 5.4.4 of the Agreement, a billed Party is afforded only fifteen days from the payment due date to inform the billing Party that it disputes specific amounts on an invoice. When combined with the time frames discussed above, this still does not provide Covad adequate time to review Qwest's invoices in all circumstances.

68 The billing time frames contained in the Agreement are critical given the severe consequences for late payment. Once an amount is considered past due, the billing Party may discontinue the processing of new orders and may eventually disconnect services. The time frames proposed by Qwest for these activities are unrealistically short, do not reflect the reality of the Parties' past billing relationship, and are inappropriate terms between Parties with an established business relationship.



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

69 Qwest maintains that because prior discussions in its 271 workshops were resolved with respect to these issues, that Covad's position should not be adopted.[13] This argument ignores several important facts. First, Covad, and presumably other CLECs, have far more experience reviewing and paying invoices generated by Qwest today than they did at the time of the 271 workshops. This experience instructs Covad that the additional time requested to review and pay invoices is a reasonable accommodation given the monumental monthly task of reviewing Qwest invoices.

70 Second, given recent developments in the industry, including several high profile cases in which CLECs have failed to pay Qwest for services, it is likely that Qwest will become more vigilant in enforcing the billing timeframes in the future. As a result, these billing timeframes are a more pressing issue than they were during the 271 workshops.

71 Third, Covad's billing responsibilities are likely to change in dramatic and fundamental ways as a result of the move toward line splitting arrangements, primarily as a result of recent regulatory decisions. To properly audit line splitting bills, Covad will have to work cooperatively with all partnering voice carriers, because only one carrier, either the voice carrier or Covad, is considered the "Customer of Record" by Qwest. Even if this coordination is smoothly and efficiently accomplished, it will undoubtedly increase the amount of time needed to review Qwest invoices. As explained above, these time frames are already burdensome and impractical.

72 Fourth, the 271 Workshops occurred years ago. They were never intended to operate as a legal waiver of a CLEC's right to seek alternate terms from Qwest in interconnection negotiations, and any utility they may have had in determining the practical importance of the issues discussed, and the significance of a given resolution, have faded in the years since these discussions were held. It should also be noted that, given the nearly

[13] Covad also notes that the legal standards against which the SGAT is measured for purposes of Section 271 compliance are significantly different than when the parties are arbitrating the specific terms and conditions of the agreement that will actually dictate their relationship.



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

unmanageable size and scope of the proceedings, all participants were forced to pick their issues carefully. At that time, Covad was more focused on mortal threats to its business resulting from Qwest's poor provisioning performance.

73 Covad's proposals strike a reasonable balance between Qwest's right to payment for properly invoiced services rendered and Covad's right to have sufficient time to review the invoices for accuracy. Despite their protestations otherwise, it is difficult for Covad to believe the moderately longer timeframes proposed by Covad will prejudice Qwest in any way, especially when they are being offered to an established wholesale customer.

### C. Proposed Contract Language Reflecting the Parties' Positions

74 Proposed contract language is reflected in Exhibit A to this Petition.

### D. Explanation of Petitioner's Position with Respect to Disputed Issues

75 An explanation of Covad's position with respect to the issues remaining in dispute is set forth above at Section G of this Petition.

### E. Terms and Conditions that the Petitioner Recommends Imposing

76 In order to resolve the remaining disputed issues, Covad recommends imposing the contract language for the sections referenced in Section G of this Petition, as set forth in Exhibit A.

### F. Proposed Schedule for Implementing Terms and Conditions Imposed in the Arbitration

77 Covad proposes that terms and conditions imposed in the arbitration take effect immediately upon their approval by the Commission.

### G. Recommendation as to What Information Other Parties to the Negotiation Should Provide

78 Covad does not anticipate the need for discovery in this matter, but reserves its right to seek such information as may become necessary for an adequate development of the record pertinent to the determination of the issue presented for resolution by the Commission.



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

**H. Proposed Agreement Reflecting Petitioner's Recommendation of Disputed Issues**

79 Please see Exhibit A

**I. Request for Protective Order**

80 Covad does not anticipate the need for a protective order at this time, but reserves its right to seek such an order as may be appropriate under the circumstances.

**J. List of Witnesses and Exhibits**

81 Covad will call Michael Zulevic and Megan Doberneck as its witnesses at the hearing.

82 Covad proposes to introduce the Direct Testimony of Michael Zulevic and Megan Doberneck and the Rebuttal Testimony of same as exhibits at the hearing.

**K. Request for Consolidation**

83 Covad does not request that this matter be consolidated with any other proceeding.

## REQUEST FOR RELIEF

84 WHEREFORE, Covad respectfully requests that the Commission grant the following relief:

85 1. Arbitrate the unresolved issues between Covad and Qwest.

86 2. Issue an order directing the Parties to submit an Agreement reflecting: (i) the agreed upon language in Exhibit A and (ii) the resolution in this arbitration proceeding of the unresolved issues in accordance with the recommendations made by Covad herein and in Exhibit A.

87 3. Retain jurisdiction of this arbitration until the Parties have submitted an Agreement for approval by the Commission in accordance with section 252(e) of the Act.

88 4. Further retain jurisdiction of this arbitration and the Parties hereto until Qwest has complied with all implementation time frames specified in the arbitrated Agreement and has fully implemented the Agreement.



MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

5. Take such other and further actions as it deems necessary and appropriate.

Respectfully submitted, this 25th day of May, 2004.

Miller Nash LLP

Brooks E. Harlow
4400 Two Union Square
601 Union Street
Seattle, Washington 98101-2352
Phone: (206) 622-8484
Fax: (206) 622-7485
Email: brooks.harlow@millernash.com

and

Karen Shoresman Frame
Senior Counsel
Covad Communications Company
7901 Lowry Boulevard
Denver, Colorado 80230
Phone: 720-208-1069
Fax: 720-208-3350
Email: kframe@covad.com

Attorneys for Covad Communications Company