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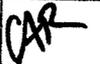
BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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**IN THE MATTER OF THE PETITION OF
DIECA COMMUNICATIONS, INC. dba
COVAD COMMUNICATIONS COMPANY
FOR ARBITRATION OF AN
INTERCONNECTION AGREEMENT
WITH QWEST CORPORATION**

DOCKET NO. T-03632A-04-0425
**QWEST CORPORATION'S
RESPONSE TO PETITION FOR
ARBITRATION**

INTRODUCTION

Pursuant to section 252(b)(3) of the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (the "Act") and Ariz. Admin. Code R14-2-1505, Qwest Corporation ("Qwest") submits this Response to the Petition of DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), for Arbitration of an Interconnection Agreement with Qwest ("Petition").

As Covad accurately describes in its Petition, the parties have engaged in good faith, extensive negotiations over the proposed terms and conditions of a successor interconnection agreement to replace the parties' 1999 agreement currently in effect in Arizona. These negotiations, encompassing hundreds of hours in both telephonic and face-to-face meetings, have resulted in the resolution of the vast majority of the issues raised during negotiations. Indeed, because negotiations were largely successful in achieving the objective of resolving issues completely or narrowing the scope of the disputes considerably, the parties extended by mutual agreement the effective negotiation

1 request dates several times in order to continue negotiations. As set forth below, the
2 parties are continuing to negotiate while this arbitration is pending. Qwest reserves the
3 right to submit revised language for the proposed interconnection agreement attached as
4 Exhibit A to Covad's Petition (the "Proposed Interconnection Agreement") to reflect the
5 results of further negotiations as well as to reflect any changes in existing law during the
6 pendency of this arbitration that may affect the appropriate terms and conditions of the
7 parties' relationship.

8 **I. BACKGROUND**

9 **A. The Parties And Negotiation History**

10 In general, Qwest does not dispute Covad's summary of the history of the parties'
11 negotiations.¹ Qwest does, however, dispute Covad's inclusion of maintenance charges in
12 its description of the issues as to which the parties have not been able to reach agreement.²
13 As set forth below, the parties have now resolved their disputes relating to maintenance
14 charges.³ As Covad recites, Covad initiated negotiations with Qwest by its letter dated
15 January 31, 2003. Pursuant to Covad's request, the parties have been voluntarily
16 negotiating interconnection agreements in states throughout Qwest's service territory,
17 including Arizona. A number of times during the course of the negotiations, Covad and
18 Qwest agreed to extend the effective negotiation request dates in order to continue
19 negotiations, with the objective of trying to resolve disputes where possible. Under the
20 most recent agreement, Covad and Qwest agreed that the negotiation request date for
21 Arizona is December 31, 2003.

22
23 ¹ To the extent that Covad's Petition suggests the parties have engaged in negotiations concerning access to network
24 elements under Section 271 of the Act, or under state law, Qwest disagrees with that characterization. The
25 negotiations leading to Covad's Petition were conducted pursuant to sections 251 and 252 of the Act, and the parties
26 did not negotiate Covad's request for access to network elements pursuant to Section 271 and/or state law.

² Petition at 3.

³ See discussion under Issue 7, *supra*.

1 With the last extension and pursuant to the timeline established by the Act,
2 arbitration must be requested from May 14, 2004 (the 135th day after Covad's request for
3 negotiations) through June 8, 2004 (the 160th day after Covad's request for negotiations).
4 Accordingly, Qwest agrees that Covad has timely filed its Petition and that the nine-month
5 period for the Arizona Corporation Commission ("Commission") to decide the disputed
6 issues, as set forth in section 252(b)(4)(c), expires on September 30, 2004.

7 **B. Resolved Issues**

8 The Proposed Interconnection Agreement attached to the Petition as Exhibit A
9 contains the contract language negotiated by the parties. As set forth elsewhere in this
10 response, since the filing of the Petition, the parties have continued to negotiate and have
11 reached agreement on some disputed issues or parts of disputed issues. Accordingly,
12 while Exhibit A to Covad's Petition reflects the contract language negotiated between the
13 parties as of June 3, 2004, it does not reflect contract language negotiated since June 3,
14 2004.

15 **II. DISPUTED ISSUES**

16 Qwest and Covad resolved numerous substantive issues to their mutual satisfaction
17 through negotiation. Since approximately January 2003, Qwest and Covad have met at
18 least weekly, most often by telephone, and sometimes in person, to review proposed terms
19 and conditions of the successor interconnection agreement. To address specific
20 substantive areas, subject matter experts from Qwest and Covad have participated in the
21 negotiation sessions and have met separately from the negotiations to discuss open issues.
22 At this point, more than 50 sessions have taken place, involving hundreds of hours. These
23 substantial efforts have been productive, as the parties have resolved numerous issues,
24 leaving only a relatively small number of issues to be arbitrated. There are no unresolved
25 issues relating to Sections 251 and 252 of the Act that are not being submitted for
26 arbitration.

1 In light of the progress made by the parties during negotiations, relatively few
2 issues (including several issues relating to the *Triennial Review Order*)⁴ remain
3 unresolved and constitute “open issues” for the Commission’s resolution pursuant to
4 Section 252(b) of the Act. As discussed below, Covad is requesting that the Commission
5 address its requests for access to network elements under section 271 and under state law,
6 but those requests do not constitute “open issues” under the arbitration provisions of the
7 Act. For the reasons set forth below, these unbundling requests exceed the permissible
8 scope of this arbitration and are not within the Commission’s authority. Covad’s attempt
9 to enlarge the scope of this arbitration to include issues that do not arise under
10 Sections 251(b) and (c) should be rejected.

11 The parties’ proposed language for each unresolved issue as of June 3, 2004 is set
12 forth in the Proposed Interconnection Agreement. As noted, Covad has requested the
13 inclusion of provisions in the Proposed Interconnection Agreement that would impose
14 network unbundling obligations on Qwest under Section 271, the section of the Act that
15 governs the entry of the Regional Bell Operating Companies (“RBOCs”) into long
16 distance markets, and/or under Arizona law. Covad’s insistence upon raising these issues
17 here is perplexing, since Covad recently abandoned these same unbundling demands in
18 the Qwest/Covad arbitration in Colorado. In that proceeding, Covad accepted all of
19 Qwest’s unbundling proposals.

20 In any case, as more fully discussed below, Covad’s attempt to invoke Section 271
21 in the Section 251/252 negotiation and arbitration process is improper, and the terms
22 Covad seeks under that section cannot be granted in this arbitration. Similarly, Covad’s

23 ⁴ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the*
24 *Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local*
25 *Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced*
26 *Telecommunications Capability*, CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. Aug. 21, 2003) (“*Triennial*
Review Order”), *vacated in part, remanded in part, U.S. Telecom. Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)
 (“*USTA II*”).

1 reliance on Arizona law in support of its attempt to obtain broader network unbundling
2 than the FCC allowed in the *Triennial Review Order* is improper, and its request for that
3 unbundling under state law is not a proper subject of this arbitration. Qwest's discussion
4 of this issue should not be construed in any way as an acknowledgement that non-Section
5 251 obligations are a proper subject of this arbitration; indeed, it is clear in the Act that
6 state commissions do not have authority to make determinations under Section 271 and
7 that their authority in interconnection arbitrations is limited to issues relating to an ILEC's
8 obligations under Sections 251(b) and (c).

9 Negotiations are continuing, and Qwest will apprise the Commission of the parties'
10 progress. Indeed, since Covad filed its Petition, the parties have reached agreement
11 regarding certain of the issues raised in the Petition. Accordingly, in an attempt to
12 accurately reflect the status of the parties' negotiations as of the filing of this response,
13 Qwest has discussed the issues in the order in which they appear in Covad's Petition and
14 noted the issues or portions thereof that have been resolved, as appropriate.

15 Qwest respectfully requests that the Commission adopt Qwest's positions and
16 proposed contract language.

17 **III. POSITIONS OF THE PARTIES**

18 While Covad included extensive argument regarding its positions in the Petition, it
19 did not include a summary of Qwest's positions for most of the issues it described. Qwest
20 has therefore summarized its position on each disputed issue below. Because Covad
21 detailed its positions in its Petition, Qwest has not repeated Covad's positions in this
22 response. The parties have continued negotiating, however, and will provide a matrix of
23 the outstanding issues incorporating the parties' proposed language and summaries of
24 their positions to assist the Administrative Law Judge ("ALJ") in reviewing these issues in
25 this proceeding.

26

1 Qwest respectfully submits that Qwest's positions on the disputed issues meet the
2 requirements of the Act and other applicable law, reflect sound public policy, and should
3 be adopted in full here.

4 **Issue 1: Retirement of Copper Facilities (Sections 9.2.1.2.3, 9.2.1.2.3.1,**
5 **and 9.2.1.2.3.2).**

6 The *Triennial Review Order* confirms that ILECs have the right to retire copper
7 loops and subloops that have been replaced with fiber.⁵ The dispute underlying this issue
8 arises because of Covad's demand for provisions in the Proposed Interconnection
9 Agreement that would significantly dilute Qwest's right to retire copper loops.
10 Specifically, in its proposed Section 9.2.1.2.3.1, Covad seeks to condition the retirement
11 of these facilities on Qwest providing an alternative service over a "compatible facility" to
12 Covad or Covad's end-user customer. Under Covad's demanded language, the alternative
13 service must not "degrade the service or increase the cost" to Covad or its end-user
14 customer.

15 The *Triennial Review Order* does not impose these or other conditions on an
16 ILEC's right to retire copper facilities. Covad's proposal for adoption of these
17 unauthorized conditions would effectively prevent Qwest from retiring copper facilities in
18 many situations and would significantly dilute this important right. The proposal also
19 conflicts directly with the FCC's stated objective of encouraging the deployment of
20 facilities that can be used to provide advanced telecommunications services, as the
21 onerous conditions Covad is proposing would reduce Qwest's economic incentive to
22 deploy fiber facilities in some situations. For these reasons, Covad's proposal should be
23 rejected.

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⁵ *Triennial Review Order* at ¶ 281; see also 47 C.F.R. § 51.319(a)(3)(iii) (2003).

1 In confirming that ILECs have the right to retire copper loops, the FCC rejected
2 CLEC proposals that would have required ILECs to obtain regulatory approval before
3 retiring these facilities.⁶ Thus, ILECs are permitted to retire copper loops and subloops,
4 as long as they comply with the FCC's notice requirements relating to network changes.⁷

5 The conditions Covad would have this Commission impose are not found
6 anywhere in the *Triennial Review Order*. Indeed, the FCC rejected multiple CLEC
7 proposals that would have conditioned an ILEC's retirement rights in ways quite similar
8 to what Covad is proposing here.⁸ The FCC found that these conditions are unnecessary
9 because its existing notice rules for network changes provide "adequate safeguards" for
10 CLECs.⁹

11 By confirming that ILECs have an unconditional right to retire copper facilities, the
12 FCC advanced its objective of increasing the economic incentive for ILECs to deploy
13 fiber facilities. Covad's proposed retirement conditions would undermine that objective
14 and result in the type of onerous retirement scheme that the FCC considered and rejected
15 in the *Triennial Review Order*.

16 In contrast to Covad's proposal, Qwest's proposed Sections 9.2.1.2.3.1 and
17 9.2.1.2.3.2 are consistent with the *Triennial Review Order*. Moreover, Qwest's language
18 provides Covad with further protection than required under the *Triennial Review Order* by
19 establishing that: (1) Qwest will leave copper loops and subloops in service where it is
20 technically feasible to do so; and (2) Qwest will coordinate with Covad the transition to
21 new facilities "so that service interruption is held to a minimum." Because Qwest's

22 ⁶ *Id.*

23 ⁷ After receiving notice from the FCC of an ILEC's intent to retire a copper facility, a CLEC is permitted to object to
24 the retirement in a filing with the FCC. Unless the FCC affirmatively allows the objection, it is deemed denied 90
25 days after the FCC's issuance of the retirement notice. *Triennial Review Order* at ¶ 282; 47 C.F.R. § 51.333(c) and
26 (f).

⁸ See *Triennial Review Order* at ¶ 281 & n.822.

⁹ *Id.*

1 language - - unlike Covad's - - complies with the *Triennial Review Order* and provides
2 Covad with protections not required by the FCC, the Commission should adopt Qwest's
3 proposals relating to this issue.

4 **Issue 2: Unified Agreement/Defining Unbundled Network Elements**
5 **(Sections 4.0 (Definitions of "251(c)(3)" and "Unbundled**
6 **Network Element"), 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.1.8, 9.1.5, 9.2.1.3,**
7 **9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5.1 (and**
8 **related 9.6.1.5), 9.6.1.6.1 (and related Section 9.6.1.6), and 9.21.2).**

9 It is puzzling that Covad's Petition identifies the sections listed above as being
10 disputed. In the recent arbitration between Qwest and Covad in Colorado, Covad
11 accepted Qwest's proposed interconnection agreement language for virtually all of these
12 provisions.¹⁰ Why Covad would accept Qwest's proposals in Colorado but not in Arizona
13 is entirely unclear. In any case, Covad's agreement to Qwest's language for these sections
14 in Colorado reveals the emptiness of its assertions in the Petition that Qwest's proposals
15 are unlawful.

16 Its Colorado agreement notwithstanding, the dispute that Covad attempts to raise
17 through Issue 2 concerns whether the Section 251/252 interconnection agreement should
18 include provisions requiring Qwest to: (1) provide network elements and services not just
19 under Section 251(c)(3), but also under Section 271; (2) provide access to network
20 elements under state law that conflicts with the access the FCC required in the *Triennial*
21 *Review Order* and with the rulings of the United States Court of Appeals for the D.C.
22 Circuit in *United States Telecom Association v. FCC* ("*USTA II*");¹¹ and (3) price network
23 elements provided under Section 271 at TELRIC ("total element long run incremental
24 cost") rates despite rulings in the *Triennial Review Order* and *USTA II* establishing that
25 TELRIC pricing does not apply to those elements.

26 ¹⁰ The parties have resolved their dispute relating to section 9.1.1.8. In the Colorado arbitration, Covad accepted Qwest's language for each of the sections listed above, with the exception of the definition of "251(c)(3) UNE" and section 9.1.1.8.

¹¹ 359 F.3d 554 (D.C. Cir. 2004).

1 In the *Triennial Review Order*, the FCC required ILECs to provide CLECs with
2 access under Section 251 to certain unbundled network elements. At the same time, the
3 FCC declined to require access to other network elements under section 251, ruling that
4 CLECs are not “impaired,” as that term is defined in section 251(d)(2)(B), without access
5 to those elements. In *USTA II*, the D.C. Circuit vacated substantial portions of the
6 affirmative unbundling requirements the FCC established in the *Triennial Review Order*.
7 Here, Covad seeks to have the Commission impose many of the same unbundling
8 requirements that the FCC rejected in the *Triennial Review Order* and that the D.C.
9 Circuit vacated in *USTA II*. Through the language it has proposed for the interconnection
10 agreement with Qwest, Covad is demanding access to network elements that the FCC has
11 not required ILECs to provide and access to elements for which the D.C. Circuit vacated
12 the FCC’s unbundling requirements in *USTA II*. This attempt to circumvent the still valid
13 unbundling rulings in the *Triennial Review Order* and the effect of *USTA II* is improper
14 for multiple reasons.

15 First, the Act does not permit the Commission to create under state law or under
16 Section 271 unbundling requirements that were either rejected in the *Triennial Review*
17 *Order* or vacated in *USTA II*. Second, the Commission does not have the authority to
18 make the impairment determinations that are essential to any unbundling requirements
19 imposed under Section 251. Third, state commissions do not have any decision-making
20 authority under Section 271 and, hence, do not have any authority to impose unbundling
21 requirements under that section. Fourth, under the plain language of the Act, the
22 Commission only has authority in this interconnection arbitration conducted under Section
23 252 to decide issues relating to the duties imposed upon ILECs and CLECs under Sections
24 251(b) and (c). Covad’s requests for impermissible unbundling under state law and for
25 access to network elements under Section 271 do not relate to any Section 251 duties and,
26 therefore, are not within the Commission’s arbitration authority. Fifth, Covad’s attempt to

1 use this adjudicative process to determine the scope of Arizona unbundling requirements
2 does not comply with governing Arizona rulemaking requirements.¹²

3 For each of these reasons, the Commission should dismiss Issue 2 in Covad's
4 Petition to the extent that portion of the Petition requests network unbundling that is
5 impermissible or beyond the authority of this Commission. Qwest anticipates that it will
6 soon file a motion explaining in further detail the reasons in support of this requested
7 relief.

8
9 **A. The Act Does Not Permit The Commission To Create Under State Law
10 Unbundling Requirements That The FCC Rejected In The *Triennial
Review Order* Or That The D.C. Circuit Vacated In *USTA II*.**

11 Under section 251 of Act, there is no unbundling obligation absent an FCC
12 requirement to unbundle and a lawful FCC impairment finding. As the Supreme Court
13 made clear in the *Iowa Utilities Board* case, the Act does not authorize “blanket access to
14 incumbents’ networks.”¹³ Rather, Section 251(c)(3) authorizes unbundling only “in
15 accordance with . . . the requirements of this section [251].”¹⁴ Section 251(d)(2) in turn
16 provides that unbundling may be required *only if the FCC determines* (A) that “access to
17 such network elements as are proprietary in nature is necessary” and (B) that the failure to
18 provide access to network elements “would impair the ability of the telecommunications
19 carrier seeking access to provide the services that it seeks to offer.”¹⁵ The Supreme Court
20 and D.C. Circuit have held that the Section 251(d)(2) requirements reflect Congress’s
21

22 ¹² Covad's request for the Commission to provide unbundling not authorized under the Commission's existing
23 unbundling rules is not a proper subject for this arbitration. Under Arizona's Administrative Procedures Act, Title
24 51, Chapter 6 (“APA”), such a change in existing law must be carried out through a rulemaking proceeding, not an
25 adjudicatory proceeding. Covad's unbundling proposals ignore this fundamental procedural requirement.

26 ¹³ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 390 (1998) (“*Iowa Utilities Board*”).

¹⁴ 47 U.S.C. § 251(c)(3).

¹⁵ 47 U.S.C. § 251(d)(2).

1 decision to place a real upper bound on the level of unbundling regulators may order.¹⁶

2 Congress explicitly assigned the task of applying the Section 251(d)(2) impairment
3 test and “determining what network elements should be made available for purposes of
4 subsection [251](c)(3)” to the FCC.¹⁷ The Supreme Court confirmed that as a
5 precondition to unbundling, Section 251(d)(2) “requires the [Federal Communications]
6 Commission to determine on a rational basis which network elements must be made
7 available, taking into account the objectives of the Act and giving some substance to the
8 ‘necessary’ and ‘impair’ requirements.”¹⁸ And the D.C. Circuit has confirmed in *USTA II*
9 that Congress did not allow the FCC to have state commissions perform this work on its
10 behalf.¹⁹

11 *USTA II*'s clear holding is that the FCC, not state commissions, must make the
12 impairment determination called for by Section 251(d)(3)(B) of the Act. As the Supreme
13 Court held in *Iowa Utilities Board*, “the Federal Government has taken the regulation of
14 local telephone competition away from the states,” and it is clear that the FCC must “draw
15 the lines to which [the states] must hew,” lest the industry fall into the “surpassing
16 strange” incoherence of “a federal program administered by 50 independent state
17 agencies” without adequate federal oversight.²⁰

18 *Iowa Utilities Board* makes clear that the essential prerequisite for unbundling any
19 given element under section 251 is a formal finding by the FCC that the Section 251(d)(2)

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21 ¹⁶ See *Iowa Utilities Board*, 525 U.S. at 390 (“We cannot avoid the conclusion that if Congress had wanted to give
22 blanket access to incumbents’ networks on a basis as unrestricted as the scheme the [FCC] has come up with, it
23 would not have included §251(d)(2) in the statute at all.”); *United States Telecom Association v. FCC*, 290 F.3d 415,
418, 427-28 (D.C. Cir. 2002)(quoting *Iowa Utilities Board*’s findings regarding congressional intent and section
251(d)(2) requirements, and holding that unbundling rules must be limited given their costs in terms of discouraging
investment and innovation).

24 ¹⁷ 47 U.S.C. § 251(d)(2).

25 ¹⁸ *Iowa Utilities Board*, 525 U.S. at 391-92.

26 ¹⁹ See *USTA II*, 359 F.3d at 568.

²⁰ *AT&T v. Iowa Utilities Board*, 525 U.S. at 366, 378 n. 6.

1 “impairment” test is satisfied for that element. If there has been no such FCC finding (or
2 if the FCC has affirmatively found that the statutory impairment test is not satisfied for
3 that element), the Act does not permit any regulator, federal or state, to require
4 unbundling under section 251. In the *Triennial Review Order*, the FCC reaffirmed this:

5 Based on the plain language of the statute, we conclude that
6 the state authority preserved by section 251(d)(3) is limited to
7 state unbundling actions that are consistent with the
8 requirements of section 251 and do not “substantially
9 prevent” the implementation of the federal regulatory regime.

10 ***

11 If a decision pursuant to state law were to require unbundling
12 of a network element for which the Commission has either
13 found no impairment—and thus has found that unbundling
14 that element would conflict with the limits of section
15 251(d)(2)—or otherwise declined to require unbundling on a
16 national basis, we believe it unlikely that such a decision
17 would fail to conflict with and “substantially prevent”
18 implementation of the federal regime, in violation of section
19 251(d)(3)(c).²¹

20 Federal courts interpreting the Act have reached the same conclusion.²²

21 Covad’s broad proposals for unbundling under state law reflect its erroneous view
22 that the Commission has plenary authority under state law to order whatever unbundling it
23 chooses. To support this argument, Covad cites various state law savings clauses
24 contained in the Act. What Covad ignores is that these savings clauses preserve
25 independent state authority *only to the extent it is consistent with the Act*, including
26 section 251(d)(2)’s substantive limitations on the level of unbundling that may be
27 authorized. Thus, these savings clauses do not preserve the authority of state
28 commissions to adopt or enforce under state law unbundling requirements that have been

29 ²¹ *Triennial Review Order* at ¶¶ 193, 195.

30 ²² See *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (citing the above-quoted discussion in the
31 *Triennial Review Order* and stating that “we cannot now imagine” how a state could require unbundling of an
32 element consistently with the Act where the FCC has not found the statutory impairment test to be satisfied).

1 rejected by the FCC or vacated in *USTA II*.

2 Accordingly, the relevant question is not, as Covad presumes, whether sweeping
3 unbundling obligations can be cobbled together out of state law, but rather whether any
4 such obligations would be consistent with *Congress's* substantive limitations on the
5 permissible level of unbundling, as authoritatively construed by the Supreme Court, the
6 D.C. Circuit, and the FCC. Covad's sweeping proposals for unbundling under state law
7 ignore these limitations and the permissible authority of state commissions to require
8 unbundling.

9 **B. The Commission Does Not Have The Ability To Make The Impairment**
10 **Determinations Required By The Act.**

11 Even if the Commission wanted to step into the FCC's shoes and make the
12 impairment determinations required by the Act, it could not as a practical matter do so.
13 This is so because the FCC has not sufficiently defined the impairment standard to allow
14 such determinations.

15 In *USTA II*, the D.C. Circuit decided not to review the Commission's impairment
16 standard since the standard "finds concrete meaning only in its application, and only in
17 that context is it readily justiciable."²³ However, the Court nonetheless noted significant
18 deficiencies in the standard. First, the Court criticized the FCC's impairment standard for
19 being so open-ended that it imposed no meaningful constraints on unbundling. Second,
20 the Court noted that the impairment standard failed to address impairment in markets
21 where state regulation holds rates below historic costs.²⁴

22 In making the impairment determination, the FCC is required to balance the
23 advantages of unbundling against the costs, both in terms of spreading the disincentive to
24

25 ²³ *USTA II*, 359 F.3d at 572.

26 ²⁴ *Id.* at 574.

1 invest in innovation and creating complex issues of managing shared facilities.²⁵ *USTA II*
2 makes clear that the FCC’s impairment standard does not strike this balance. It is a
3 “looser concept of impairment” in which the costs of unbundling are “brought into the
4 analysis under § 251(d)(2)’s ‘at a minimum’ language.”²⁶ Thus, not only is the
5 impairment definition open-ended, it is incomplete in that it fails to capture all of the
6 considerations that must be taken into account under Section 251(d)(2) before unbundling
7 can be required under federal or state law.

8 The Commission therefore has no legitimate way to determine which, if any,
9 network elements Qwest would be required to provide under Covad’s state law
10 unbundling proposals. The FCC’s impairment standard is too open-ended and does not
11 contain guidance as to how to limit unbundling where the costs of unbundling outweigh
12 any benefits there may be. Adding to this uncertainty, with limited exception, Covad’s
13 proposed interconnection agreement language fails to identify the specific network
14 elements that would be unbundled under state law. Even if there were a lawful
15 impairment standard for the Commission to apply, there would be no meaningful way to
16 apply the standard.

17 **C. The Commission Does Not Have Authority To Require Unbundling**
18 **Under Section 271.**

19 Covad’s Petition and interconnection agreement proposals assume incorrectly that
20 state commissions have authority to impose binding unbundling obligations under section
21 271. Section 271 confers no such authority. Section 271(d)(3) expressly confers upon the
22 FCC, not state commissions, the authority to determine whether Bell Operating
23 Companies (“BOCs”) have complied with the substantive provisions of section 271,
24 including the “checklist” provisions upon which Covad purports to base its requests. 47

25 ²⁵ *Id.* at 563.

26 ²⁶ *USTA II*, 559 F.3d at 572.

1 U.S.C. 271(d)(3). State commissions have only a non-substantive, “consulting” role in
2 that determination. 47 U.S.C. 271(d)(2)(B).²⁷

3 Sections 201 and 202, which govern the rates, terms and conditions applicable to
4 the unbundling requirements imposed by section 271,²⁸ likewise provide no role for state
5 commissions. That authority has been conferred by Congress upon the FCC and federal
6 courts.²⁹ The FCC has thus confirmed that “[w]hether a particular [section 271] checklist
7 element’s rate satisfies the just and reasonable pricing standard is a fact specific inquiry
8 that *the Commission* [i.e., the FCC] will undertake in the context of a BOC’s application
9 for section 271 authority or in an enforcement proceeding brought pursuant to section
10 271(d)(6).”³⁰

11 **D. Covad’s Pricing Proposal For Network Elements Provided Pursuant To**
12 **Section 271 Violates The *Triennial Review Order* And *USTA II*.**

13 Covad’s Petition reveals two basic flaws in its position relating to the pricing of
14 any network elements that Qwest provides pursuant to Section 271. First, Covad assumes
15 erroneously that state commissions have authority to set prices for these elements. They
16 do not, as the pricing of Section 271 elements is within the FCC’s exclusive jurisdiction.
17 Second, Covad claims incorrectly that the FCC has authorized the application of TELRIC-
18 like pricing principles to Section 271 elements. The FCC and the D.C. Circuit have both
19 ruled that TELRIC pricing does not apply to network elements that BOCs provide under

20 ²⁷ See also *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (“section 271
21 clearly contemplates an advisory role for the [state commission], not a substantive role”).

22 ²⁸ *Triennial Review Order* at ¶¶ 656, 662.

23 ²⁹ See *id.*; 47 U.S.C. 201(b)(authorizing the FCC to prescribe rules and regulations to carry out the Act’s provisions);
24 205 (authorizing FCC investigation of rates for services, etc. required by the Act); 207 (authorizing FCC and federal
25 courts to adjudicate complaints seeking damages for violations of the Act); 208(a)(authorizing FCC to adjudicate
26 complaints alleging violations of the Act).

³⁰ *Triennial Review Order* at ¶ 664. The process mandated by Section 252 -- the provision pursuant to which Covad
filed its Petition -- is concerned with implementation of an ILEC’s obligations under Section 251, not Section 271.
Accordingly, state commissions do not have authority to consider non-251 issues, including issues relating to Section
271, in Section 252 arbitrations.

1 Section 271 and that the prices for such elements are to be set by the FCC based on the
2 standards in Sections 201 and 202 of the Communications Act of 1934.

3 The FCC ruled unequivocally in the *Triennial Review Order* that any elements an
4 ILEC unbundles pursuant to Section 271 are to be priced based on the Section 201-02
5 standard that rates must not be unjust, unreasonable, or unreasonably discriminatory.³¹ In
6 so ruling, the FCC confirmed, consistent with its prior rulings in Section 271 orders that
7 TELRIC pricing does not apply to network elements provided under Section 271.³² In
8 *USTA II*, the D.C. Circuit reached the same conclusion, rejecting the CLECs' claim that it
9 was "unreasonable for the Commission to apply a different pricing standard under Section
10 271 " and instead stating that "we see nothing unreasonable in the Commission's decision
11 to confine TELRIC pricing to instances where it has found impairment."³³

12 The FCC has made it clear that it, not state commissions, has exclusive jurisdiction
13 to determine rates for elements and services provided under Section 271:

14 Whether a particular checklist element's rate satisfies the just and
15 reasonable pricing standard of section 201 and 202 is a fact-specific inquiry
16 that the *Commission will undertake* in the context of a BOC's application
for section 271 authority or in an enforcement proceeding brought pursuant
to section 271(d)(6). (Emphasis added).

17 Thus, only the FCC has decision-making authority under Section 271.

18 Qwest's proposed language for Section 9.1.1.7 reflects this pricing scheme for any
19 elements and services provided pursuant to Section 271. Specifically, Qwest's language
20 provides that, absent agreement to the contrary, Qwest will bill for elements provided
21 under Section 271 "in accordance with prices and terms that will be described on Qwest's
22 website or applicable Tariff." This language is consistent with Section 271, the *Triennial*
23 *Review Order*, and *USTA II*.

24 ³¹ *Triennial Review Order* at ¶¶ 656-64.

25 ³² *Id.*

26 ³³ *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

1 In violation of the rulings in the *Triennial Review Order* and *USTA II*, Covad's
2 proposed language would apply TELRIC rates to elements and services provided under
3 Section 271.³⁴ Moreover, Covad assumes incorrectly that state commissions are permitted
4 to set rates for elements and services provided under Section 271. This proposal conflicts
5 with the FCC's statement that it, not state commissions, will determine whether ILEC
6 prices for these elements and services meet the pricing standard of Sections 201 and 202.
7 As discussed above, Sections 201 and 202 do not contemplate any role for state
8 commissions in defining, implementing or enforcing carriers' obligations thereunder. The
9 FCC has not delegated any authority under these Sections, and *USTA II* establishes that
10 such a delegation would be unlawful.³⁵

11 Covad's position is not supported by state law. Even if a state law existed to
12 confer authority on a state commission to set prices for Section 271 elements, it would
13 plainly be preempted by the Act's conferral of jurisdiction to the FCC to make the
14 determinations relating to the provision of elements under Section 271. In addition,
15 contrary to governing federal law, Covad claims that the application of state law would

16 ³⁴ Relying on the FCC's statement in the *Triennial Review Order* that Section 271 "does not require TELRIC pricing"
17 (*Triennial Review Order* at ¶ 659 (emphasis added)), Covad argues that TELRIC-based pricing is nonetheless
18 permitted for elements provided under section 271. Petition at 9-11. This argument plainly misstates the FCC's
19 ruling and is based on nothing more than semantic gamesmanship. In paragraphs of the *Triennial Review Order* that
20 Covad ignores, the FCC could not have been clearer that Section 252 TELRIC pricing does not apply to elements
21 provided under Section 271. Thus, in paragraph 656, the FCC stated: "[W]e find 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." Similarly, in paragraph 661, the
FCC acknowledged its "recognition that pricing pursuant to section 252 [TELRIC] does not apply to network
elements that are not required to be unbundled"

22 In its transparent attempt to avoid the controlling effect of these rulings, Covad suggests that the "forward-looking"
23 pricing standards it is proposing for section 271 elements are different from TELRIC pricing. Petition at 11.
24 However, as the FCC and the D.C. Circuit have established, the pricing standards of Sections 201 and 202 govern,
25 and those standards do not include any reference to "forward-looking pricing." Moreover, the forward-looking
26 standard that Covad describes in its Petition is, in the end, indistinguishable from TELRIC standards.

³⁵ While *USTA II* focused on the FCC's unlawful delegation of authority to states to determine the UNEs to which
ILECs must provide access under Section 251(c)(3), the court's reasoning that delegation to state commissions is
impermissible in the absence of express statutory authorization is equally applicable to determinations under Sections
271, 201, and 202.

1 result in TELRIC prices for Section 271 elements. As discussed above, the FCC and the
2 D.C. Circuit have both ruled that TELRIC pricing does not apply to network elements
3 provided under Section 271.

4 **E. Covad’s Continuing Request For Access To Fiber Subloops Violates**
5 **The *Triennial Review Order*.**

6 In the *Triennial Review Order*, after careful consideration of the standards set forth
7 in Section 251(d)(2) and the policies reflected in the Act, the FCC determined that ILECs
8 are not required to provide unbundled access to fiber subloops.³⁶ Notwithstanding this
9 unequivocal ruling, Covad’s proposals for the provisions of the agreement listed above
10 would require Qwest to provide access to these facilities. This demand incorrectly
11 assumes that state commissions have authority to require unbundling under Section 271
12 and can impose unbundling requirements that the FCC has specifically rejected.

13 In ruling that ILECs are not required to unbundle feeder subloops, the FCC found
14 that an unbundling requirement for these facilities would undermine the objective of
15 Section 706 of the Act “to spur deployment of advanced telecommunications
16 capability.”³⁷ The FCC recognized that access to ILECs’ fiber feeder may be necessary
17 for CLECs to obtain access to unbundled copper subloops, but it nevertheless did not
18 require feeder unbundling. Instead, it encouraged carriers to negotiate arrangements for
19 obtaining access to copper subloops, stating it “expect[s] that incumbent LECs will
20 develop wholesale service offerings for access to their fiber feeder to ensure that
21 competitive LECs have access to copper subloops.”³⁸ Importantly, and consistent with its
22 ruling that ILECs are not required to unbundle feeder subloops, the FCC emphasized that
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24 ³⁶ *Triennial Review Order* at ¶ 253; see also 47 C.F.R. § 51.319(b).

25 ³⁷ *Triennial Review Order* at ¶ 253.

26 ³⁸ *Id.*

1 “the terms and conditions of such access would be subject to sections 201 and 202 of the
2 Act.”³⁹

3 For the reasons discussed above, Covad’s demand for unbundled access to feeder
4 subloops must be rejected. Specifically, as discussed, state commissions are without
5 authority to impose any unbundling or other obligations under Section 271; Covad’s
6 request that this Commission require feeder subloop unbundling under that section
7 assumes authority that does not exist. In addition, any attempt to impose feeder subloop
8 unbundling under state law would be preempted by the FCC’s clearly expressed finding
9 that unbundling this network element would undermine the federal law and policy
10 reflected in Section 706.

11 **Issue 3: Commingling, Ratcheting, Pricing (Sections 4.0 (Definitions of**
12 **“251(c)(3)” and “Commingling”), 9.1.1, 9.1.1.1, 9.1.1.4 (and**
subsections), and 9.1.1.5 (and subsections).

13 This issue concerns the parties’ disagreements regarding the language needed in
14 the Proposed Interconnection Agreement to implement the FCC’s rulings in the *Triennial*
15 *Review Order* relating to: (1) commingling of UNEs and wholesale tariffed services, such
16 as interstate access; and (2) the prices ILECs can charge for these commingled UNEs and
17 services. For the reasons described below, the Commission should adopt Qwest’s
18 language relating to these issues.

19 **A. Commingling**

20 The parties recognize the basic commingling requirements established in the
21 *Triennial Review Order*, but Covad has proposed language that goes beyond those
22 requirements and would impose obligations that do not exist under the FCC’s rules.
23 Covad also has refused to accept language proposed by Qwest that implements important
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26 ³⁹ *Id.*

1 limitations on Qwest's commingling obligations required under the *Triennial Review*
2 *Order*.

3 The *Triennial Review Order* permits "requesting carriers to commingle UNEs and
4 combinations of UNEs with services (e.g., switched and special access services offered
5 pursuant to tariff), and to require incumbent LECs to perform the necessary functions to
6 effectuate such commingling upon request."⁴⁰ The commingling required under the
7 *Triennial Review Order* is defined specifically as "the connecting, attaching, or otherwise
8 linking of a UNE, or a UNE combination, to one or more facilities or services that a
9 requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any
10 method other than unbundling under section 251(c)(3) of the Act, or the combining of a
11 UNE or UNE combination with one or more such wholesale services."⁴¹ The permissible
12 commingling under the *Triennial Review Order* also includes commingling with resale
13 services offered under section 251(c)(4): "As a final matter, we require that incumbent
14 LECs permit commingling of UNEs and UNE combinations with other wholesale
15 services, including any services offered for resale pursuant to section 251(c)(4) of the
16 Act."⁴²

17 Of relevance to the *Triennial Review Order's* commingling requirements, the
18 *Triennial Review Order* established specific eligibility criteria for high-capacity EELs.
19 These facilities are defined as "combinations of high-capacity (DS1 and DS3) loops and
20 interoffice transport."⁴³ The FCC found that service eligibility criteria are needed for
21 these facilities to prevent "gaming" by non-qualifying providers, with gaming defined as
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23 ⁴⁰ *Triennial Review Order* at ¶ 579; see also 47 C.F.R. § 51.309(e) and (f).

24 ⁴¹ *Triennial Review Order* at ¶ 579; see also 47 C.F.R. § 51.5 (definition of "commingling").

25 ⁴² *Triennial Review Order* at ¶ 584 (as amended by *Triennial Review Order Errata*, ¶ 27, released September 17,
2003) ("*Triennial Review Order Errata*").

26 ⁴³ *Id.* at ¶ 591; see also 47 C.F.R. § 51.318(b).

1 “a provider of exclusively non-qualifying service obtaining UNE access in order to obtain
2 favorable rates or to otherwise engage in regulatory arbitrage.”⁴⁴

3 The service eligibility criteria that apply to these high-capacity facilities are: (1)
4 the requesting carrier “must have a state certification of authority to provide local voice
5 service;” (2) the requesting carrier must “demonstrate that it actually provides a local
6 voice service to the customer over a DS1 circuit” by having “at least one local number
7 assigned to each circuit and must provide 911 or E911 capability to each circuit;” and (3)
8 there must be specifically defined, circuit-specific architectural safeguards in place to
9 prevent gaming. These safeguards are (i) “each circuit must terminate into a collocation
10 governed by section 251(c)(6) at an incumbent LEC central office within the same LATA
11 as the customer premises;” (ii) “each circuit must be served by an interconnection trunk in
12 the same LATA as the customer premises served by the EEL for the meaningful exchange
13 of local traffic;” (iii) “for every 24 DS1s or the equivalent, the requesting carrier must
14 maintain at least one active DS1 local service interconnection trunk;” and (iv) “each
15 circuit must be served by a Class 5 switch or other switch capable of providing local voice
16 traffic.”⁴⁵ A provider must satisfy each of these service eligibility criteria “(1) to convert
17 a special access circuit to a high-capacity EEL; (2) to obtain a new high-capacity EEL; or
18 (3) to obtain at UNE pricing part of a high-capacity loop-transport combination
19 (commingled EEL).”⁴⁶

20 Qwest’s proposed language for the sections listed above captures fully and
21 accurately the commingling obligations imposed by the *Triennial Review Order*. As
22 proposed by Qwest, these sections of the interconnection agreement establish that Covad
23 can obtain from Qwest UNEs and UNE combinations commingled with wholesale

24 ⁴⁴ *Triennial Review Order* at ¶ 591.

25 ⁴⁵ *Id.* at ¶ 597; *see also* 47 C.F.R. § 51.318(b)(2).

26 ⁴⁶ *Triennial Review Order* at ¶ 593.

1 services and facilities, and that Covad can request Qwest to perform the functions to
2 provision such commingling. In addition, Qwest's proposed language permits Covad to
3 commingle telecommunications services purchased on a resale basis with UNEs and UNE
4 combinations. Consistent with the rulings in the *Triennial Review Order* relating to high-
5 capacity EELs, Qwest's language also establishes that the service eligibility criteria for
6 high-capacity EELs apply to any commingling of services that includes a high-capacity
7 loop and a transport facility or service.

8 In rejecting substantial portions of Qwest's commingling language, Covad is
9 offering positions that are not supported by the *Triennial Review Order* and is proposing
10 to omit several interconnection agreement provisions that are necessary to a clear
11 definition of Qwest's commingling obligations. For example, Covad has rejected Qwest's
12 language that specifically enumerates the service eligibility requirements for high-
13 capacity EELs. The important limitation on Qwest's commingling obligations established
14 by these criteria should be expressly stated in the agreement to avoid any disputes relating
15 to high capacity EELs.

16 Covad is also seeking to expand Qwest's commingling obligations beyond what
17 the FCC has required by proposing language that would obligate Qwest to commingle
18 UNEs and UNE combinations with network elements and services for which unbundling
19 is not required under Section 251 but that are provided under Section 271. That the
20 *Triennial Review Order* does not require commingling with elements and services
21 provided under Section 271 is confirmed by the *Triennial Review Order Errata*. In the
22 original version of the *Triennial Review Order*, paragraph 584 instructed that ILECs'
23 commingling obligations included permitting the commingling of UNEs and UNE
24 combinations with network elements provided under Section 271. However, in the
25 *Errata*, the FCC removed this language, thereby eliminating the requirement that ILECs

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1 permit commingling with Section 271 elements and services. Covad's position fails to
2 acknowledge this critical change to the *Triennial Review Order*.

3 Covad also ignores Congress's conscious decision (acknowledged by the FCC and
4 the D.C. Circuit) to *omit* Section 251's combination duties (of which the commingling
5 rules are simply a broader implementation) from the terms by which BOCs must offer
6 facilities under Section 271. In the section of the *Triennial Review Order* specifically
7 discussing what Section 271 obligations BOCs have with respect to facilities taken off the
8 Section 251 unbundling list, the FCC made clear that BOCs have no obligation to
9 combine such de-listed facilities with the UNEs that BOCs must continue to provide
10 under Section 251: "We decline to require BOCs, pursuant to section 271, to combine
11 network elements that no longer are required to be unbundled under section 251."⁴⁷
12 Covad's interpretation of the *Triennial Review Order's* commingling requirements would
13 stretch a section of the *Triennial Review Order* having nothing to do with Section 271 to
14 render the *Triennial Review Order's* specific decision *not* to require Section 251/271
15 combinations as surplusage.

16 Covad's improper demand for this Commission to order commingling with Section
17 271 elements and services also assumes incorrectly that state commissions have authority
18 to determine obligations relating to Section 271. As discussed above in connection with
19 Issue 2, states do not have any decision-making authority under this section of the Act and
20 therefore cannot order ILECs to provide or commingle Section 271 elements or services.
21 Moreover, any obligations that Qwest has under Section 271 are beyond the scope of this
22 Section 252 arbitration, which is expressly limited to issues involving Qwest's duties
23 under Sections 251(b) and (c).

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26 ⁴⁷ *Triennial Review Order* at ¶ 655 n.1990.

1 Covad also has not included language in the interconnection agreement that is
2 necessary to define clearly the scope of Qwest's obligation to provide commingling with
3 wholesale resale services. In Section 9.1.1.1, Qwest proposes language establishing its
4 obligation to provide commingling with resale services. An essential part of this section
5 is Qwest's language identifying certain services and facilities that are not available for
6 resale commingling, including non-telecommunications services, enhanced or information
7 services, features or functions not offered for resale on a stand-alone basis or separate
8 from basic exchange service, and network elements offered pursuant to Section 271.
9 These services and facilities are not among the "telecommunications services" that Qwest
10 is required to make available for resale under Section 251(c)(4). To eliminate any
11 ambiguity and future disputes about the wholesale resale services that are available for
12 commingling, the agreement should include these exclusions.

13 **B. Pricing Of Commingled Facilities And Services ("Rate Ratcheting")**

14 While the *Triennial Review Order* permits CLECs to commingle UNEs and
15 wholesale services, in conjunction with that ruling, the FCC rejected rate "ratcheting" for
16 these UNE/wholesale service combinations.⁴⁸ As explained by the FCC, ratcheting is a
17 pricing mechanism that involves billing a single circuit at multiple rates to develop a
18 single, blended rate for the circuit as a whole. For example, ratcheting leads to a
19 reduction in special access charges by 1/24th for each switched access voice-grade circuit
20 on a special access DS1.⁴⁹

21 In rejecting ratcheting, the FCC stated that ILECs are permitted "to assess the rates
22 for UNEs (or UNE combinations) commingled with tariffed access services on an
23 element-by-element and a service-by-service basis."⁵⁰ This result, the FCC explained,

24 ⁴⁸ *Triennial Review Order* at ¶ 582.

25 ⁴⁹ See *Triennial Review Order* at ¶ 582 and n.1793.

26 ⁵⁰ *Id.* at ¶ 582.

1 “ensures that competitive LECs do not obtain an unfair discount off the prices for
2 wholesale services, while at the same time ensuring that competitive LECs do not pay
3 twice for a single facility.”⁵¹ Qwest and Covad disagree concerning the language needed
4 for the agreement to implement the FCC’s ratcheting ruling.

5 Qwest’s proposed language for Sections 9.1.1.4 and 9.1.1.4.1 implements the
6 FCC’s ratcheting ruling in clear, straightforward terms. Qwest’s language establishes the
7 following principles that are based directly on the FCC’s ruling: (1) a circuit or facility
8 that includes a mix of UNEs and other services will be ordered and billed under the terms
9 of the applicable Qwest tariff or the resale provisions of the Proposed Interconnection
10 Agreement; (2) mixed-use circuits or facilities will not be ordered or billed as UNEs; (3)
11 Qwest is not required to bill for mixed-use circuits or facilities at blended or multiple
12 rates; and (4) if a multiplexer is included in the commingled circuit, it will be ordered and
13 billed at the UNE rate (instead of a tariff rate) only if all the circuits entering the
14 multiplexer are UNEs.

15 Qwest’s language fully and accurately implements both the letter and the intent of
16 the FCC’s ratcheting ruling. Specifically, under Qwest’s language, it is clear that Qwest
17 will be permitted to assess rates for UNEs commingled with tariffed access services on an
18 element-by-element and a service-by-service basis.

19 By contrast, Covad’s proposed language for ratcheting, set forth in Section 9.1.1.4
20 and four additional sub-sections, does not accurately reflect the FCC’s ruling. Covad’s
21 language improperly suggests that UNEs that carry non-qualifying services would be
22 priced at TELRIC rates. In the recent Colorado arbitration, Covad acknowledged that the
23 language relating to ratcheting should make it clear that UNEs carrying non-qualifying
24 services are to be priced at tariffed rates, not TELRIC rates. Covad’s language fails to do

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26 ⁵¹ *Id.*

1 so. Moreover, Covad's proposed language is both unnecessarily complex and ambiguous.
2 This complexity and ambiguity apparently arise from Covad's concern that Qwest will
3 charge non-TELRIC rates for UNEs that only carry qualifying services. Its concern is
4 unfounded, since Qwest's language in Section 9.1.1.4 clearly provides that UNEs
5 connected to mixed-use circuits will be charged based on the TELRIC rates listed in
6 Exhibit A of the Proposed Interconnection Agreement. There is, therefore, no need for
7 Covad's detailed, complex language that apparently is intended to ensure that these UNEs
8 are charged at TELRIC rates. The parties agree that TELRIC rates apply to these UNEs,
9 and Qwest's straightforward language properly reflects that agreement.

10 **Issue 4: Collocation Space Provisioning (Sections 8.1.1.3 and 8.3.1.9).**

11 Issue 4 relates to Covad's proposal to include the following provision in Section
12 8.1.1.3, Cageless Physical Collocation: "Qwest shall provide such space in an efficient
13 manner that minimizes the time and costs."

14 Qwest opposes Covad's proposed language because it is vague, ambiguous, and
15 unreasonable. The language does not define "efficient" or identify the party's whose time
16 and costs are to be minimized. Further, it does not state whether both the "time and costs"
17 to be minimized should be evaluated from a single party's perspective. For example, it is
18 not clear how Qwest should provision space if the quickest or cheapest alternative for
19 Qwest would require Covad to invest more time or money. Even if only one party's time
20 and costs are considered, Covad's proposal provides no guidance regarding how Qwest
21 should provision space if the less expensive option would take more time -- or the
22 costliest would be quicker. The collocation configuration that is most efficient from
23 Covad's perspective may not be efficient from Qwest's perspective or, for that matter,
24 other CLECs' perspectives. Indeed, read literally, Covad's proposed language could
25 require Qwest to provision in a way that minimizes Covad's time and costs at the expense
26 of Qwest and all other collocating CLECs.

1 These issues become infinitely more complex when considered in the context in
2 which Covad offered the proposal: Covad wants Qwest to provision collocation space in
3 such a way that Covad's access to other CLECs is more efficient. If the Commission
4 were to adopt Covad's proposal and one or more CLECs opt in to the language, it literally
5 will be impossible for Qwest to minimize every party's time and costs. If collocation
6 space were available near CLEC A, for example, and both CLEC B and CLEC C desired
7 to be as near to CLEC A as possible, Covad's proposal would impose conflicting duties
8 on Qwest to mediate irreconcilable interests.

9 Qwest's existing processes already accommodate CLEC requests in a reasonable
10 manner. Qwest's space planning processes are designed to take into consideration a
11 variety of CLEC concerns. Qwest requests from each CLEC a forecast of its potential
12 growth, based on its own business model, and considers that information when space is
13 requested. Qwest also provides to CLECs maps and other detailed information regarding
14 occupied and available space for consideration in making their collocation requests.
15 Collocation space is offered on a first-come, first-served basis. Space is not planned in
16 pre-defined sections on each floor because the amount of space varies per request. To the
17 extent possible, Qwest will make contiguous space available when a CLEC requests an
18 expansion of existing collocation space. When adjoining space is not available, Qwest
19 will engineer a route, if feasible, for a CLEC to provide facilities between its non-
20 adjoining collocation spaces. In addition, Qwest maintains, for 24 months, records
21 specifying the date on which physical space becomes unavailable at any Qwest premises
22 and the circumstance causing the exhaust. These processes reasonably and adequately
23 address Covad's concerns.

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1 **Issue 5: **Regeneration Requirements (Sections 8.2.1.23.1.4, 8.3.1.9, and**
2 **9.1.10).****

3 Issue 5 involves Covad's proposal to require Qwest to provide channel
4 regeneration for CLEC-to-CLEC connections.

5 Qwest's proposed language on this issue, which reflects Qwest's current policy,
6 provides that Qwest will provide regeneration without charge between Covad's
7 collocation space and Qwest's network. This proposal is consistent with this
8 Commission's orders arising from the Section 271 workshops, in which the Commission
9 found that Qwest must furnish any regeneration required in cross-connection between
10 itself and CLECs.⁵² These orders do not impose the obligations on Qwest to provide the
11 CLEC-to-CLEC regeneration that Covad seeks here. Because the parties' dispute on this
12 issue relates only to regeneration for CLEC-to-CLEC connections, rather than connections
13 between Qwest and Covad, these orders do not address the current dispute. Similarly, the
14 FCC order Covad cites in its Petition does not address CLEC-to-CLEC connections and,
15 therefore, does not apply to the parties' dispute.⁵³ Qwest has no obligation under the Act
16 to manage Covad's access to or interface with the networks of third party CLECs.
17 Instead, Qwest provides CLECs with access to Qwest's central offices and collocation
18 space to allow CLECs to engineer cabling and cross-connections between CLECs without
19 Qwest's involvement. These connections do not typically require regeneration. Although
20 Qwest has no obligation to provide CLEC-to-CLEC channel regeneration under the Act,
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22 ⁵² *Arizona Corporation Commission Order on Checklist Item No. 2*, Docket No. T-00000A-97-0238, Decision No.
23 64630 (March 15, 2002), at ¶¶ 53-56; and *Arizona Corporation Commission Order on Checklist Item No.5*, Docket
No. T-00000A-97-0238, Decision No. 64216 (November 20, 2001), at ¶¶ 23-35.

24 ⁵³ Petition at 20, *citing* Second Report and Order, *Local Exchange Carriers' Rates, Terms and Conditions for*
25 *Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No.
26 93-162, FCC 97-208 (rel. June 13, 1997), at ¶¶ 117-118. This order's applicability and usefulness are limited because
it arose from a proceeding that was initiated 11 years ago -- 3 years prior to the inception of the 1996 Act -- and is
based on a factual record that was developed more than 7 years ago.

1 Qwest offers channel regeneration as a finished service. Thus, regeneration is available if
2 a CLEC desires to purchase it.

3 Further, this issue is closely related to Issue 4. Covad's rationale for its proposed
4 language regarding regeneration is based on an extension of its claim with regard to Issue
5 4 that Qwest should maximize Covad's efficiencies in assigning collocation space. Covad
6 claims that, because Qwest is in a position to maximize efficiencies for Covad's CLEC-to-
7 CLEC connections, Qwest should provide regeneration if it is required for such
8 connections because, Covad reasons, regeneration is only required when Qwest fails to
9 maximize Covad's efficiencies. This argument fails because it is based on the
10 fundamentally unreasonable notion that Qwest should have the obligation to maximize
11 efficiencies for the benefit of Covad and to the detriment of Qwest and other collocating
12 CLECs. Because Covad's regeneration proposal is squarely based on this flawed
13 foundation, its regeneration proposal is also unreasonable and should be rejected.

14 **Issue 6: Single LSR (Sections 9.21.1, 9.21.4.1.6, and 9.24.1).**

15 This issue relates to the timing of a system change that will allow orders for the
16 unbundled network element platform ("UNE-P") with line splitting or unbundled loop
17 with loop splitting to be submitted on a single local service request ("LSR").

18 In Sections 9.21.1 and 9.21.4.1.6, Covad seeks to include language stating that
19 orders for UNE-P with line splitting may be submitted on a single LSR. In Section 9.24.1,
20 Covad adds the same language that orders for unbundled loop with loop splitting may be
21 submitted on a single LSR.

22 Qwest itself initiated the Change Requests ("CRs") in Qwest's Change
23 Management Process ("CMP") to establish the capability to order UNE-P and line
24 splitting or unbundled loop and loop splitting on a single LSR, and CLECs have given
25 these CRs a high priority. Qwest has already implemented single LSR ordering for new
26 connections in IMA Release 15.0, which was deployed on April 19, 2004. Single LSR

1 ordering for product conversions is scheduled in IMA Release 16.0, to be implemented in
2 October 2004. Accordingly, much of this dispute is moot by the system changes that are
3 already in place. The remainder of this dispute will be moot with the implementation of
4 the system changes now in progress. Because, however, single LSR ordering does not
5 currently exist for conversions, language in the interconnection agreement regarding the
6 ability to submit line splitting and loop splitting requests on a single LSR must include a
7 qualifier that single LSR ordering will be permitted once the functionality is made
8 available in IMA. Covad's absolutist language is only acceptable if it is qualified with the
9 phrase "when that capability becomes available through an IMA release." Covad,
10 however, refuses to agree to this qualification necessary to make the language accurate.

11 Covad argues that an IMA change is not necessary to implement single LSR
12 processing because Covad now claims that single LSR processing can be done manually.
13 Covad ignores, however, the fact that such a manual process would have to go through
14 CMP and that no CLEC, including Covad, has requested that CMP consider such a
15 process change, and that the IMA Release 16.0 is on track to provide Covad with the
16 capability it requests. Finally, Covad is simply wrong in suggesting that Qwest's
17 provisioning of line splitting or loop splitting is delayed by the two LSR order process. In
18 fact, since August of 2003, Covad has had the ability to submit the two LSRs one right
19 after the other. There is no requirement that the voice LSR be provisioned before the data
20 LSR can be submitted. All that is required is that the voice LSR be submitted first. The
21 data LSR may be submitted immediately following the voice LSR, and can be provisioned
22 at the same time as the voice request.

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1 **Issue 7:** **Reciprocal Application of Maintenance Charges (Sections 4.0**
2 **(Definition of “Maintenance of Service Charge”), 9.2.2.9.11,**
3 **12.3.4.2, 12.3.4.3, and 12.3.6.5; and Charges Assessed by the**
4 **Parties (Sections 9.4.4.4.1, 9.4.6.3.1, 9.4.6.3.3, 9.21.3.3.1,**
5 **9.21.6.3.3, and 9.24.3.3.1).**

6 Issue 7 relates to Covad’s desire to charge Qwest maintenance of service charges
7 and trouble isolation charges under certain circumstances. The parties have resolved their
8 disputes on this issue, leaving no unresolved issues regarding those sections for
9 determination by the Commission. If Covad raises any disputes relating to this issue in
10 this proceeding, Qwest reserves the right to respond to such issues.

11 **Issue 8:** **Payment and Billing Issues (Sections 5.4.1, 5.4.2, 5.4.3, and 5.4.5).**

12 This issue has four subparts relating to the following: the due date for billed
13 amounts, the time at which a party may discontinue processing orders due to the other
14 party’s failure to make full payment, the time at which a party may disconnect service due
15 to the other party’s failure to make full payment, and the relevant time period for
16 determining whether a payment is late for purposes of defining “repeatedly delinquent.”
17 At the core of the parties’ dispute is Covad’s desire to extend the due dates for amounts
18 payable and to extend the time when Qwest may discontinue taking orders or may
19 disconnect services. Covad’s proposed extended times are at odds with the consensus that
20 was reached during the 271 process, at odds with standard, commercial practice, and
21 would improperly require Qwest to continue to provide services to Covad for extended
22 periods without payment even though Covad does not dispute the amount owed. Covad’s
23 allegations that it needs more time to analyze and process Qwest’s bills because of alleged
24 deficiencies in these bills are belied by the fact that Covad has had years of experience
25 with Qwest’s bills and has had ample opportunity to raise in the appropriate fora any
26 specific concerns about its ability to efficiently analyze and process these bills within the
time frame allotted for payment of them. Each of these billing issues is discussed below.

1 **Due Date for Billed Amounts.** Qwest proposes that amounts payable under the
2 contract be due within 30 days from the date of the invoice.⁵⁴ This 30-day period, which
3 is in numerous interconnection agreements between Qwest and CLECs and which is in all
4 of Qwest's SGATs, balances a CLEC's need for sufficient time to analyze monthly bills
5 with Qwest's right to timely compensation for services rendered. The 30-day due date is
6 the industry standard and, because Qwest offers its bills in a variety of electronic formats
7 that are readily searchable, that period provides a reasonable amount of time for Covad to
8 review its bills. Indeed, the parties' existing agreement – under which the parties have
9 been operating since 1999 – provides that payments are due within 30 days from the
10 invoice date. During the Section 271 workshops, in which Covad actively participated,
11 the issue of allowing CLECs appropriate time to analyze monthly bills was discussed at
12 length. Ultimately, all payment issues were resolved in a manner satisfactory to CLECs,
13 including Covad. The language that Qwest proposes here -- specifying that amounts
14 payable are due within 30 days from the invoice date – is identical to the consensus
15 language that emerged from the 271 process and was acceptable to Covad.

16 **Timing for Discontinuing Orders.** Qwest is entitled to timely payment for
17 services rendered and to take remedial action if the risk of nonpayment is apparent.
18 Although the language in section 5.4.2 is written as if it applies to either party, in practice,
19 it applies only to Qwest because Qwest is the only party that is processing orders under
20 the agreement. Therefore, this section only restricts Qwest's ability to discontinue
21 processing Covad's orders if Covad fails to pay. Qwest's proposal provides Covad with
22 30 days before the billed amount is due and another 30 days before Qwest would
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24 ⁵⁴ Section 5.4.1 actually allows CLECs a minimum of 30 days from the date of the invoice. That period could be
25 extended if the CLEC receives the bill later than the 10th day after the invoice date, in which case the CLEC must
26 pay the invoice within 20 days after receiving it. Section 5.4.1 states as follows: "Amounts payable under this
Agreement are due and payable within thirty (30) calendar Days after the date of invoice, or within twenty (20)
calendar Days after receipt of the invoice, whichever is later (payment due date)."

1 discontinue processing orders if Covad failed to pay. Further, section 5.4.4 sets forth a
2 dispute resolution process that Covad may invoke if it has a good faith dispute about its
3 bill. Under this process, Covad is not required to pay disputed amounts until the dispute is
4 resolved. Taken together, Covad's proposals would prevent Qwest from taking action in
5 cases of non-payment until 135 days after Qwest provided the service because Covad
6 seeks 45 days until payment is due plus an additional 90 days before Qwest could stop
7 processing orders. Allowing Covad to continue to incur debt for months before Qwest
8 can take appropriate action to protect itself is unreasonable. Again, during the Section
9 271 workshops in which Covad actively participated, this issue was discussed at length.
10 Ultimately the issue was resolved to the satisfaction of CLECs, including Covad, resulting
11 in the language specifying the 30-day period Qwest proposes here.

12 **Timing for Disconnecting Services.** This issue is related to the timing for
13 discontinuing orders. As with Section 5.4.2, discussed above, although the language in
14 Section 5.4.3 is written as if it applies to either party, in practice it applies only to Qwest
15 because Qwest is the only party that is providing services under the agreement.
16 Therefore, this section only restricts Qwest's ability to disconnect service if Covad fails to
17 pay. Again, Qwest is entitled to timely payment for services rendered and to take
18 remedial action if risk of nonpayment is apparent. Qwest's proposal provides Covad with
19 30 days before the billed amount is due and another 60 days before Qwest would
20 disconnect service for nonpayment. If Covad disputes its bill in good faith, it can invoke
21 the dispute resolution process in Section 5.4.4, which provides that Covad is not required
22 to pay disputed amounts until the dispute is resolved. Taken together, Covad's proposals
23 would prevent Qwest from taking action in cases of non-payment until 165 days after
24 service was provided because Covad seeks 45 days until payment is due plus an additional
25 120 days before Qwest could disconnect service. Allowing Covad to continue to incur
26 debt for months before Qwest can take appropriate action to protect itself is unreasonable.

1 Again, this issue was discussed at length during the Section 271 workshops in which
2 Covad actively participated. The issue was resolved to CLECs' satisfaction in language
3 with the same 60-day timeframe that Qwest proposes here.

4 **"Repeatedly Delinquent."** Under Section 5.4.5 of the Proposed Interconnection
5 Agreement, a party that is "repeatedly delinquent" in making payments may be required to
6 submit a deposit before orders will be provisioned and completed, or reconnected.
7 Consistent with its 30 day due date proposal in Section 5.4.2, Qwest's proposal for this
8 section provides that "repeatedly delinquent" means "any payment received 30 calendar
9 Days or more after the payment due date, three (3) or more times during a twelve (12)
10 month period." Qwest's proposal is reasonable and is identical to the "repeatedly
11 delinquent" definition, which was reviewed and approved in the Section 271 workshops.

12 **IV. PROPOSED CONDITIONS**

13 The proposed conditions Qwest recommends are contained in Qwest's proposed
14 contract language in the Proposed Interconnection Agreement attached as Exhibit A to
15 Covad's Petition.

16 **V. PROPOSED SCHEDULE FOR IMPLEMENTING THE TERMS AND** 17 **CONDITIONS IMPOSED IN THE ARBITRATION**

18 Qwest recommends that upon resolution of the disputes set forth in the Petition and
19 this response, the Commission direct Covad and Qwest to finalize the Proposed
20 Interconnection Agreement to conform to the Commission's order and file it within 30
21 days of issuance of the order.

22 **VI. RECOMMENDATION AS TO INFORMATION THAT SHOULD BE** 23 **REQUESTED FROM COVAD BY THE ADMINISTRATIVE LAW JUDGE** 24 **PURSUANT TO SECTION 252(B)(4)(B)**

25 Qwest has no specific recommendation at this time as to information that should be
26 requested from Covad by the ALJ pursuant to Section 252(b)(4)(B). Qwest anticipates

1 that the parties will engage in discovery concerning matters that the parties believe should
2 be brought to the ALJ's attention.

3 **VII. PROPOSED INTERCONNECTION AGREEMENT**

4 It is Qwest's understanding that the Proposed Interconnection Agreement attached
5 as Exhibit A to Covad's Petition is an unmodified copy of the document Qwest has
6 maintained throughout the parties' negotiations, which Qwest provided to Covad so that
7 Covad could attach it to the Petition. Based on this understanding, Qwest believes that
8 Exhibit A accurately describes the parties' competing language proposals as of the time
9 Qwest provided it to Covad. As noted above, the parties' continuing negotiations have
10 already resulted in resolution of certain issues. Accordingly, Qwest reserves the right to
11 submit revised language for the Proposed Interconnection Agreement to reflect any
12 further negotiations, as well as to correct errors or reflect any changes in existing law
13 during the pendency of this arbitration that may affect the appropriate terms and
14 conditions of the parties' relationship.

15 **VIII. DOCUMENTATION RELEVANT TO THE DISPUTE**

16 Covad has appended the Proposed Interconnection Agreement to its Petition. As
17 described above, this document captures the agreed-upon agreement language and the
18 disputed language that is before the Commission for resolution. Additional
19 documentation relevant to Qwest's positions concerning the disputed issues will be
20 provided by Qwest in accordance with the prehearing orders and Commission rules
21 governing this arbitration proceeding.

22 **IX. REQUEST FOR A PROTECTIVE ORDER**

23 Qwest believes that a protective order is appropriate to protect any privileged,
24 confidential, and/or trade secret information that may be exchanged.

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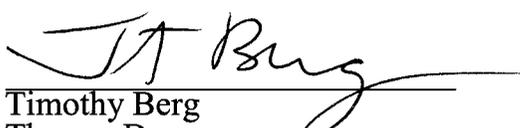
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CONCLUSION AND REQUEST FOR RELIEF

Qwest urges the Commission to enter an order adopting Qwest's proposed language on all disputed issues.

RESPECTFULLY SUBMITTED this 6th day of July, 2004.

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