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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 INTER-CONNECTION AGREEMENT WITH QWEST CORPORATION	Docket No. T-03632A-04-0425 Docket No. T-01051B-04-0425

COVAD COMMUNICATIONS COMPANY'S
POST-HEARING BRIEF

TABLE OF CONTENTS

Page(s)

Introduction 1
Argument 3

ISSUE 1 - COPPER RETIREMENT 3

A. The FCC Specifically Limited The Application Of Its Copper Retirement Rules To Circumstances Where CLECs Would Not Be Denied Access To Loops 5

B. Arizona Law Requires Continued Access To Customer Loops In Most Circumstances, Notwithstanding Copper Retirement 7

C. The Commission Should Respect Covad's Investment In Next Generation Facilities And Protect It Where Legally Permissible 8

D. The Agreement Should Address Copper Feeder Retirement Scenarios 9

E. Qwest's Cost Recovery Arguments Are Unfounded 10

F. The FCC's Recent Decision in the *BellSouth Reconsideration Order* Is Instructive Regarding The Limits Of Incumbent LECs' Rights To Retire Copper 12

G. Qwest's Proposals Provide It An Unlimited Ability To Close Its Network To Competition, And Would Make Facilities-Based Competition Impossible 13

H. Covad's Proposals For Sufficient Notice Of Copper Retirements Should Be Adopted 15

ISSUE 2 – UNIFIED AGREEMENT – 271 AND STATE LAW ELEMENTS INCLUDED 17

A. Section 271 18

B. State Law Unbundling Authority 24

C. The Commission Should Preserve Language In The Agreement Regarding The Data Portion Of Line Splitting Arrangements To Avoid Unintended And Anti-Competitive Consequences For The Broadband Market 30

1. The FCC Has Confirmed That Line Splitting Must Still Be Provided By ILECs 31
2. Qwest Has Confirmed That Line Splitting Should Be Addressed In Interconnection Agreements 32
3. Adoption of Qwest's Language Will Lead To Anti-Competitive Results 33

ISSUE 3 - COMMINGLING 34

A. The *Triennial Review Order* Provides For The Commingling Of 271 Elements With 251(c)(3) UNEs 35

B. A Definition of "251(c)(3) UNE" Is Necessary To Accurately Reflect The FCC's Commingling Rules And To Maintain Consistency Within The Agreement 36

C. Other State Commissions Have Uniformly Adopted Covad's Position On Commingling 37

ISSUE 5 - REGENERATION REQUIREMENTS 38

A. The Act and FCC Rules Require Non-Discriminatory Access To Central Office Collocation, Including CLEC-to-CLEC Cross Connections 39

B. Covad Has No Practical Option To Self-Provision Cross Connects Requiring Regeneration 44

ISSUE 9 - BILLING ISSUES 47

A. Payment Due Date 47

1. There Are Inherent Deficiencies in Qwest's Billing Systems That Require Substantial Manual Verification Effort 47
2. Affording Covad Fifteen Additional Days To Review Qwest Bills Will Not Disrupt The Parties' Billing Relationship, And Will Promote Efficiencies 48
3. There is Substantial, Un-Refuted Evidence In The Record That Covad Should Be Afforded More Time To Review And Verify Qwest Bills 49
4. Qwest's Billing Deficiencies Are Unlikely To Be Resolved Within the Change Management Process 51
5. Qwest Has Already Agreed To Extended Payment Intervals 51

B. Timing for Discontinuation of Processing of Orders and Disconnection of Services (Sections 5.4.2 and 5.4.3) 52

1. Covad's Proposals Would Have Negligible Impact On Qwest's Receivables and Cash Flow 52
2. The Timing Of Qwest's Right To Receive Payment Should Be Balanced Against The Severity Of The Remedies Involved 53

Conclusion 54

Introduction

After hundreds of hours of negotiation and a nearly completed formal arbitration proceeding, DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") and Qwest Corporation ("Qwest") (collectively, the "Parties") have narrowed the issues in this docket to five.

Issue 1 involves Qwest's commitments to maintain wholesale service to Covad in the event that copper plant serving Covad and its customers is retired by Qwest and replaced with fiber optic facilities. Covad's proposal that Qwest provide an alternative service to Covad in the event that it retires copper feeder is applicable only to situations in which Qwest retires copper feeder subloops, creating mixed-media or "hybrid" copper/fiber loops. Covad has agreed that copper retirement resulting in a Fiber to the Home (FTTH) or Fiber to the Curb (FTTC) loop may be governed by the process established by the FCC's *Triennial Review Order.*[1]

Because of this change, any statements made by the Federal Communications Commission (FCC) in its *Triennial Review Order* regarding certain copper retirement activity are no longer relevant to the disputed issue. The *Triennial Review Order* and resulting FCC rules explicitly limit the scope of their new copper retirement provisions to situations involving the creation of FTTH loops, and are silent with respect to Qwest's rights and responsibilities with respect to the retirement of copper feeder resulting in service disruptions to Covad's customers. Covad's proposals are therefore critical to protecting both Covad and Arizona consumers from decreased access to bottleneck facilities when Qwest chooses to deploy hybrid loops.

Covad has also proposed improvements to Qwest's notice procedures for copper retirement activity, which are required by FCC rules. These improvements are required to lend meaning to Qwest's notices, and to comply with existing FCC standards.

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[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147, (rel. September 17, 2003) ("Triennial Review Order").

Issue 2 encompasses the Parties' disagreement regarding the availability of network elements that may, in the future, no longer be available under the FCC's application of the "necessary" and "impair" standard applicable to Section 251 of the Telecommunications Act of 1996 ("Act"),[2] but must nevertheless be unbundled by Regional Bell Operating Companies ("RBOCs" or "BOCs") pursuant to Section 271 of the Act. This Commission has clear authority to apply both state law and <u>all</u> provisions of the Act as it decides interconnection arbitration disputes. Qwest's argument that the Commission is preempted from enforcing provisions of Arizona law requiring access to these elements and Qwest's Section 271 obligations should be rejected.

Issue 3 involves the language in the Agreement describing permissible commingling arrangements. Covad has proposed language that is consistent with the FCC's statements regarding the commingling of unbundled network elements purchased under Section 271 of the Act: while Section 271 elements are not afforded status as Section 251 elements under the FCC's commingling rules, they are eligible for commingling with Section 251 elements just like any other telecommunications service.

Covad also proposes a definition of "251(c)(3) UNE." Covad believes that this definition is helpful in describing the precise group of unbundled network elements (those obtained pursuant to Section 251(c)(3) of the Act) that must be present in any commingling arrangement. This definition, rather than the general definition of "unbundled network element," is necessary because "unbundled network element" is used (and Covad believes will continue to be used) to describe not only UNEs purchased pursuant to Section 251 but also elements provided under other "Applicable Law,"[3] such as Arizona law.

Issue 5 involves the Parties' disagreement over Qwest's obligation to provide regeneration between CLEC-to-CLEC cross connections ordered by FCC rule. Covad believes Qwest should

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[2] Pub. L. 104-104, 110 Stat. 56 (1996).
[3] See Section 9.1.1 of the Agreement, as well as the Agreement's definition of "Applicable Law" contained in Section 4.

maintain a consistent regeneration policy as to both its ILEC-to-CLEC and CLEC-to-CLEC arrangements, and is certainly not permitted to refuse to provide a CLEC-to-CLEC connection solely because that connection requires regeneration.

Issue 9 involves the length of the period within which Covad may review Qwest's wholesale invoices prior to payment, and the timing of Qwest's remedies for non-payment. Covad has established a substantial record in this proceeding regarding the deficiencies of Qwest's bills, which slows down Covad's review and analysis of those bills. As a result of the current deficiencies of Qwest's bills, Covad requires additional time to adequately review certain portions of the UNE, collocation, and transport invoices it receives. With respect to Qwest's remedies for non-payment, Covad has no objections to the remedies themselves, but believes there are legitimate reasons to extend the timing of those remedies. Because the remedies have a potential to irreversibly damage Covad's business, the modest extensions of time Covad has proposed will allow Qwest to maintain the remedies to which it is entitled, while affording Covad sufficient time to either resolve payment issues with Qwest or seek appropriate relief from this Commission if necessary.

Argument

ISSUE 1 - COPPER RETIREMENT (Sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2)

The Parties' disagreement with respect to Issue 1 centers on the conditions under which Qwest may, under both FCC rules and this Commission's rules, retire copper plant when it is used to serve Covad's xDSL customers. Qwest believes its ability to retire copper plant is unlimited, and that it must merely provide notice to the FCC of such retirement ninety (90) days prior to implementation. Covad has noted that, in addition to being bad policy, allowing Qwest to effectively disconnect Covad's DSL customers when it retires copper plant violates Arizona law, and is, in any event, inconsistent with the FCC's *Triennial Review Order.* It is critical that this Commission not allow Qwest to over-read the FCC's new copper retirement rule. Allowing

Qwest to deny access to competitive LECs when Qwest chooses to retire copper feeder and replace it with fiber (thereby deploying a hybrid loop, rather than broadband capable FTTH loops) will not further the goal of broadband deployment, and would provide Qwest a blueprint to re-establish a monopoly for broadband services, in direct conflict with the Arizona's stated goal of encouraging competition and growth in the telecommunications industry and promoting economic development and investment in new telecommunications technologies, infrastructure and services. A.R.S. § 40-202 (A).

After the hearing in this matter, Covad made a minor modification to its copper retirement proposals. The language in bold type below has been added to Covad's proposed 9.1.15.1:

> 9.1.15.1 Continuity of Service During Copper Retirement. This section applies where Qwest retires copper feeder cable and the resultant loop is comprised of either (1) mixed copper media (i.e. copper cable of different gauges or transmission characteristics); or (2) mixed copper and fiber media (i.e. a hybrid copper-fiber loop) (collectively, "hybrid loops") **over which Qwest itself could provide a retail DSL service**. This section does not apply where the resultant loop is a fiber to the home (FTTH) loop or a fiber to the curb (FTTC) loop (a fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises) serving mass market or residential End User Customers.

This modification clarifies that Qwest will not ever, in order to comply with Covad's language, be required to make investments or incur costs that it had not already incurred to continue service to its existing retail customers. This ensures that Qwest will never experience increased costs to provide Covad an alternative service after retiring copper feeder loop.

In an effort to focus its core disagreement with Qwest's proposals to a minimum number of sections in the agreement, Covad has agreed to close sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2. The only sections of the agreement remaining open for Issue 1 are 9.1.15, 9.1.15.1, and 9.1.15.1.1.

A. The FCC Specifically Limited The Application Of Its Copper Retirement Rules To Circumstances Where CLECs Would Not Be Denied Access To Loops

Qwest has correctly pointed out that the FCC has adopted a streamlined notification process for the retirement of copper loops when those loops are replaced with fiber to the home (FTTH) loops. However, Qwest has conveniently ignored the FCC's stated pre-condition for the right of an ILEC to retire copper, that any such retirement must not deny competitors access to loop facilities:

> **Unless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules**, we will deem all such oppositions denied unless the Commission rules otherwise upon the specific circumstances of the case at issue within 90 days of the Commission's public notice of the intended retirement.

Triennial Review Order, ¶ 282.

The FCC also made clear that state commissions retained the authority to make the ultimate decision regarding copper retirements, stating that "Incumbent LECs also may not retire loops without state approval." *Triennial Review Order*, ¶ 777, n. 2309.

In other words, there are two methods by which the FCC intended to prevent copper retirement. First, if the retirement will deny access to loop facilities as required by the FCC's rules (xDSL capable loops meet this criterion), then the ILEC may not use the copper retirement provisions of the *Triennial Review Order* at all. Second, the FCC may issue a ruling with respect to any objections filed within the ninety (90) day period, in which case an ILEC "may not retire those copper loops or copper subloops at issue for replacement with fiber-to-the-home loops." 47 C.F.R. §51.333(f).

The clear intent of the FCC, based upon its statements in the *Triennial Review Order* and its adopted rules, was to deny ILECs an unconditional right to retire copper in circumstances where a CLEC's service to customers would be affected by a denial of access to loops:

> We note that, with respect to network modifications that involve copper loop retirements, the rules we adopt herein differ in two respects from the notification rules that apply to other types of network modifications. **First, we establish a right for parties to object to the incumbent LEC's proposed retirement of its copper loops for both short-term and long-term notifications as outlined in Part 51 of the Commission's rules. By contrast, our disclosure rules for other network modifications permit oppositions only for instances involving short-term notifications.**

Triennial Review Order, ¶ 283.

This is perhaps the most significant statement the FCC makes about copper retirement in the *Triennial Review Order*. By specifically recognizing that competitors may object to even a long-term notification of copper retirement, the FCC clarifies that, unlike other network modifications, a competitor can prevent the retirement altogether if their objection is upheld. In all other cases of network modification, CLECs only have the ability to request more time to prepare for the change, i.e., to request that a short-term notification be converted to a long-term notification.

The FCC's intent to protect xDSL capable loops in particular becomes clearer when read alongside the FCC's requirements for narrowband access to fiber loops. Because the FCC had already alleviated any concern regarding narrowband services by establishing specific access requirements for the provision of narrowband services by CLECs over newly deployed fiber loops,[4] the FCC could only have been referring to broadband services, including xDSL capable loops, when it discussed the "denial of access to loop facilities required under our rules."

As discussed above, Covad has elected to limit its "alternative service" proposals to fiber feeder retirement scenarios, which are clearly not subject to the FCC's new rule espoused in the *Triennial Review Order*. Covad will pursue any disputes related to FTTH retirements through the established FCC process. The FCC's position is important, however, in understanding that the FCC's intent was not to provide Incumbent LECs an opportunity to close their networks, but

[4] *See Triennial Review Order,* ¶¶ 296-297; 47 C.F.R. § 51.319(a)(2)(iii).

instead to clearly provide that such retirements should not deny access to loops that are required to be unbundled.[5]

B. Arizona Law Requires Continued Access To Customer Loops In Most Circumstances, Notwithstanding Copper Retirement

Prior to discussing this Commission's specific requirements regarding unbundled loops, it is worth noting that the FCC specifically noted that its streamlined procedures for copper retirement were not intended in any way to preempt state laws requiring access:

> As a final matter, we stress that we are not preempting the ability of any state commission to evaluate an incumbent LEC's retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements.

Triennial Review Order, ¶ 284.

This Commission adopted specific rules regarding access to loop facilities:

> B. The local exchange carrier's network facilities or services which are determined to be essential shall be provided on terms and under conditions that are equivalent to the terms and conditions under which a local exchange carrier provides such essential facilities or services to itself in the provision of the local exchange carrier's services. The pricing of essential facilities or services shall be pursuant to Rule R14-2-1310 on pricing.
>
> C. The following local exchange carrier network capabilities are classified as essential facilities or services:
>
> 1. Termination of local calls,
> 2. Termination of long distance calls,
> 3. Interconnection with E911 and 911 services,
> 4. Access to numbering resources,
> 5. Dedicated channel network access connections, and
> 6. **Unbundled loops.**

Ariz. Admin. Code R14-2-1307. [emphasis added]

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[5] It is also important to note that the FCC's findings of non-impairment with respect to next generation loop facilities were performed under section 251 of the Act, and in no way alter the responsibilities of RBOCs to make facilities available pursuant to section 271 of the Act and just and reasonable rates.

These rules clearly establish the Commission's finding that the access to loop facilities, which include feeder facilities and digital subscriber line facilities, is essential to promoting the policies of competition and consumer choice. Qwest must, therefore, provide unbundled access to these facilities regardless of the medium or technology used.

The Commission must continue to use its authority, clearly established by Commission rule, to protect competitors and consumers alike. Adopting Covad's copper retirement proposals is a critical component of this effort.

C. The Commission Should Respect Covad's Investment In Next Generation Facilities And Protect It Where Legally Permissible

The purpose of Covad's proposals is not to obtain unbundled access to Qwest's next generation facilities on some unlimited basis, as Qwest argues. Covad has invested in its own next generation facilities, and the purpose of its proposals is to protect its investment in those facilities that have been providing broadband service to Arizona consumers for the past four (4) years.

Covad has spent well over a billion dollars deploying its xDSL network throughout its operating territory, including Arizona.[6] This network is designed, in part, to transform Qwest's legacy last-mile copper facilities into a vital component of Covad's high-speed broadband platform. When Qwest deploys FTTH or copper-fiber hybrid loop facilities and retires legacy copper facilities, it has the potential of destroying Covad's investment in its own broadband network, which relies on copper facilities. As Qwest's Witness Karen Stewart pointed out, Qwest certainly takes its own DSL customers' needs into account when Qwest considers a retirement project,[7] and for good reason: Like Covad, Qwest has made substantial investments in its DSL network and its customers. It would be patently discriminatory and anti-competitive

[6] Exhibit Covad-1, p. 18, l. 437.
[7] Tr. Vol. I, 87:17 through 88:6.

for Qwest to mistreat consumers that have chosen Covad service while it accommodates its own retail customers.

At the very least, when faced with this impairment of its investment, Covad should maintain access to its current customers, and those customers' service should not be disrupted. Covad's investment, and incentive to invest in the future, should not be discounted as a significant component of serving the public interest and fostering the development and advancement of broadband capability and consumer choice in Arizona.

D. The Agreement Should Address Copper Feeder Retirement Scenarios

Covad is not so much concerned with Qwest's replacement of copper loops with FTTH loops, which fall within the FCC's new copper retirement rules, as it is concerned with the procedures governing the retirement and replacement of copper feeder with fiber feeder, hence its agreement to limit the impact of its proposals to copper feeder retirements.[8]

This fact was essentially confirmed by Qwest Witness Karen Stewart, when she testified that copper retirements are primarily driven by maintenance issues and growth.[9] In response to data requests issued by Covad, Qwest confirmed that it had not deployed a single FTTH loop in Arizona, but had deployed 286,000 loops containing some fiber.[10] While Qwest refused to directly answer questions regarding the capability of these loops to provide advanced services, the logical inference based upon Qwest's responses to discovery and the testimony of its witnesses is that most of the fiber deployed to date was deployed in response to maintenance problems or to increase *voice grade* capacity, and not to bring new services to Arizona consumers.

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[8] Covad does not believe Qwest is likely, in the near future, to retire copper to build FTTH loops. Qwest CEO Richard Notabaert stated earlier this year that, "It is hard for us to look at the economic model and invest in fiber to the home…There are lower cost alternatives to fiber." Wall Street Journal, January 20, 2004. If Qwest does choose to do so, Covad has remedies, as the FCC made clear in the *Triennial Review Order.*

[9] Tr. Vol. I, 84:12-25.

[10] Exhibit Covad-5, Qwest's Responses 01-001 through 01-005.

Unlike the investment in next generation facilities characteristic of FTTH deployments, copper feeder retirements do not necessarily lead to improved broadband service to any Arizona consumers. As Mr. Zulevic noted in his testimony, the retirement of fiber feeder is often a result of problems maintaining aging copper facilities:

> It may be a 3600 pair *feeder* cable in Minnesota or Washington that consistently gets wet, year after year, during the rainy season. Or it may be a 4200 pair *feeder* in Arizona or New Mexico that has finally succumbed to the desert heat. These problems, brought on by the elements, ultimately result in a significant customer service degradation and a constant increase in costs to Qwest for repair. In today's world, the final resolution is often replacement of the entire copper feeder cable with fiber and the placement of fiber fed digital loop carrier in the field.

Exhibit Covad-3 at p. 12, ll. 300-307.

Feeder retirements generally do not fall within the FCC's new copper retirement notice rules.[11] As a result, Covad has proposed language that would govern such feeder retirements, maintaining Covad's access to facilities serving its customers.[12] These proposals are critical, because an absence of language addressing feeder retirement will provide Qwest a path to driving competitors from its network. If Qwest can deny access to loops simply because it chooses to replace facilities that are damaged or are causing maintenance issues, it is only a matter of time before the entire Public Switched Telephone Network (PSTN) is again closed to broadband competition, frustrating the Commission's statutory mandates and the public interest.

E. Qwest's Cost Recovery Arguments Are Unfounded

At hearing, Qwest made clear that it believed Covad's proposal was unlawful because it denied Qwest an opportunity to recover the costs of providing wholesale access to Covad by

[11] *Triennial Review Order*, ¶ 283, n. 829.

[12] Contrary to Qwest's characterization, Covad's proposal does not mandate that Qwest maintain a parallel copper network. Under Covad's proposal, Qwest would have complete flexibility to choose a method to continue to allow Covad to provide an equivalent, alternative service to its customers affected by a copper retirement.

mandating that any "alternative service" be provided at the same cost line sharing, or unbundled loops, are currently being provided to Covad. This argument is both overstated and incorrect.

First, Qwest will make decisions to deploy fiber whether or not it must provide an alternative service to Covad for a handful of customers. The idea that such a substantial investment, and the revenue and cost savings associated with that investment, would be inhibited by a perceived loss related to Covad's customers is ludicrous.

Second, it is important to remember that Qwest has made the network modification decision. There is a policy choice to be made by this Commission with respect to that decision: should the result be neutral to competitors,[13] or should Qwest be permitted to raise competitors' costs, destroy the value of their infrastructure investment and essentially drive them from the market? If Qwest is permitted to retire copper feeder, and by doing so deny access to bottleneck loop facilities to competitors, no competitive carrier will invest in entry via the Public Switched Telephone Network (PSTN). This is clearly not what this Commission intended, notwithstanding Qwest's attempts to convince this Commission it is what the FCC intended.

Third, there is no valid reason to believe that Qwest's deployment of more efficient technology would raise, rather than lower, the incremental cost of providing wholesale service to Covad. Rather than attempt to prove this, Qwest points to its retail service offerings for DSL for the premise that it would lose money providing wholesale service to Covad. This is unavailing because the same is true today: there is no doubt that Qwest would make more money serving a retail customer than providing wholesale inputs to Covad. The fact that this would continue to be true after a copper retirement says nothing about Qwest's incentives to retire copper, or its recovery of costs, and everything about Qwest's desire to eliminate competition and drive wholesale competitors away from its network.

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[13] Covad believes this is a reasonable goal. By "neutral," Covad means the change provides no more or less access than competitors had under the previous network configuration, at prices that are neither higher nor lower than previously offered.

Finally, it was established at hearing through the un-rebutted testimony of Mr. Zulevic that Qwest itself does not change the price of its broadband offerings based upon the medium used to provide service, or whether remote switching technology is required.[14] Given the fact that Qwest is free to charge whatever it wishes for retail DSL service, it is curious that it does not charge more in these circumstances if it truly believes it suffers increased costs.

F. The FCC's Recent Decision in the *BellSouth Reconsideration Order* Is Instructive Regarding The Limits Of Incumbent LECs' Rights To Retire Copper

As the FCC stated in the *BellSouth Reconsideration Order*,[15] its ruling in the *Triennial Review Order* "required incumbent LECs to provide unbundled access to the features, functions, and capabilities of hybrid loops that are not used to transmit packetized information."[16] As Covad's proposal makes clear, it is not seeking unbundled access to the packet switching capability of Qwest's facilities, merely a method to make use of Covad's *own* packet switching capability.

Even as the FCC granted unbundling relief for Fiber to the Curb (FTTC) loops in many circumstances in the *BellSouth Reconsideration Order*, it recognized that :

> [D]eploying FTTC loops in overbuild situations 'enables an incumbent LEC to replace and ultimately deny access to the already-existing copper loops that competitive LECs were using to serve mass market customers.' Thus, in the overbuild context, we find that competitive LECs face impairment to a limited extent.

BellSouth Reconsideration Order, ¶ 12, *citing the Triennial Review Order,* ¶ 277.

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[14] Tr. Vol. I, 62:5-13.

[15] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338; 96-98; 98-147, Order on Reconsideration (rel. October 18, 2004) ("BellSouth Reconsideration Order").

[16] *Bell South Reconsideration Order,* ¶ 6, *citing the Triennial Review Order*, 18 FCC Rcd at 17149-90, paras. 288-89; 47 C.F.R. §§ 51.319(a)(2)(i), (ii).

It is therefore significant that, while the FCC expanded its non-impairment analysis to *FTTC loops,* it declined to do so for hybrid loops, and also recognized the impairment faced by competitors when copper plant is retired. Understanding that its rights to deny competitors' access to its hybrid loop facilities was limited by the FCC's actions in the *Triennial Review Order*, Qwest and another RBOC, SBC, petitioned the FCC for forbearance of these unbundling requirements. Before the FCC could take action on these petitions, both of them were withdrawn.[17] Qwest's obligation to provide unbundled access to these facilities, under both section 271 of the Act and Arizona law, therefore remains effective. This Commission can therefore act under its statutory authority to preserve competitive choices for the benefit of Arizona consumers by adopting Covad's proposal.

G. Qwest's Proposals Provide It An Unlimited Ability To Close Its Network To Competition, And Would Make Facilities-Based Competition Impossible

Qwest's proposals surrounding copper retirement, if adopted, would grant it a limitless ability to close its network, denying access to essential facilities to competitors, such as Covad. Qwest believes that the deployment of *any* amount of fiber in its loop plant exempts that plant from any unbundling obligations, and its proposals are designed to reflect this position.

This position is particularly troubling to Covad. While Covad is not concerned, at least in the near term, that Qwest will make substantial investments to retrofit its outside plant with fiber, even a company with scarce financial resources[18] is likely to scrounge together enough capital to place a few feet of fiber within its central offices, if doing so will eliminate its competitors.

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[17] *See* Exhibit Covad-11.
[18] *See* Al Lewis, "Qwest Thirsts For Ghost of a Chance," Denver Post, Friday December 17, 2004 at C1.

H. Covad's Proposals For Sufficient Notice Of Copper Retirements Should Be Adopted

47 C.F.R. § 51.327 prescribes the "minimum" standards for notices of network changes.[19] Qwest's current notifications, embodied by its proposals in this arbitration, do not even meet these "minimum" standards. For instance, notices must, according to the rule, include the "location(s) at which the changes will occur"[20] as well as the "reasonably foreseeable impact of the planned changes."[21]

Qwest's notice does not provide such vital information as what Covad customers, if any, will be impacted by the retirement project. In fact, the existing Qwest notices do not provide any customer-specific information at all. The vague notice proposed by Qwest would be useful only as a starting point for a major research project to determine whether a given retirement will impact Covad's customers. In response to each and every notice of a Qwest copper retirement project, Covad would have to determine whether any of its customers would actually be affected.[22]

Covad submits that any notice that can be read to comply with the FCC's rules must specifically inform competitive LECs whether the retirement threatens service to existing customers. The FCC rule clearly places the burden on ILECs to determine the "reasonably foreseeable impact" of its retirements. Qwest's proposal, which would not require specific

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[19] 47 C.F.R. § 51.327(a) uses the term "at a minimum" to describe the obligation to meet the listed public notice requirements.
[20] 47 C.F.R. § 51.327(a)(4).
[21] 47 C.F.R. § 51.327(a)(6).
[22] Mr. Zulevic explained at hearing the difficulties in working with the current notices, which, in addition to being uniformly deficient, are also inconsistent in their provision of information regarding specific retirements. Tr. Vol. I, 64:13 through 66:12.

notice to Covad that any Covad customers are affected, is so devoid of substance that it must be rejected as an unreasonable interpretation of the rule.

Furthermore, the FCC's rules regarding network modifications clearly require:

> A description of the type of changes planned (Information provided to satisfy this requirement must include, as applicable, but is not limited to, references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection)...

47 C.F.R. § 51.327(a)(5).

Covad's notice proposals embody this requirement, by specifying that notices contain information regarding "old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information."[23] Covad believes the information it seeks, and which Qwest refuses to provide, is clearly within the scope of the FCC rule. Not only is it within the scope of the rule, it is necessary to lend any meaning whatsoever to the notice requirement.

Even if this Commission does not believe the FCC has required the information Covad requests, the FCC has undoubtedly recognized this Commission's authority to add, or otherwise specify, the notice requirements requested by Covad in order to afford meaningful notice of Qwest retirement projects. In addition to the minimum requirements of 47 C.F.R. § 51.327, the FCC directs ILECs to comply with "any applicable state requirements" related to the retirement of copper loops and copper subloops.[24] While 47 C.F.R. § 51.327 should be read broadly enough to require what Covad seeks, additional state requirements are also clearly authorized.

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[23] Covad Proposed Section 9.1.15.
[24] 47 C.F.R. § 51.319(a)(3)(iii)(B).

At hearing, it was established that BellSouth presently provides not only a list of specific customer addresses to Covad when it retires copper plant, but commits to provide specific notifications to competitive LECs whose DSL customers may be disrupted.[25] BellSouth has done so without any additional orders from state utilities commissions, because it realizes, unlike Qwest, that this level of notification is required to meet the existing FCC standards.

Oddly enough, Qwest previously provided a similar, though still somewhat deficient, analysis of its planned retirements to competitive carriers. As Exhibit MZ-4, a sub-exhibit to Exhibit Covad-3 illustrates, Qwest previously provided CLECs with a statement regarding whether the planned retirement impacted the CLEC community. Qwest gathered this information by reviewing the cable counts impacted by the retirement for working CLEC circuits, and determining whether those circuits were providing Plain Old Telephone Service (POTS) or some other service that could not be cut over to the newly installed facilities.[26] Without any convincing explanation, Qwest now refuses to take these simple steps.

ISSUE 2 – UNIFIED AGREEMENT – 271 AND STATE LAW ELEMENTS INCLUDED (Section 4 Definitions of "Unbundled Network Element"; Sections 9.1.1, 9.1.1.6, 9.1.1.7, 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(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, and 9.21.2)

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") to provide all network elements listed in the provisions of Section 271 of the Telecommunications Act (the

[25] *See* Exhibit Qwest-1, and Mr. Zulevic's discussion of the specific BellSouth commitments contained at Tr. Vol. I, 66:13 through 67:21.
[26] *See* Exhibit MZ-5, a sub-exhibit to Exhibit Covad-3.

"Act") outlining specific RBOC obligations to maintain authority to provide in-region interLATA service (the "271 Checklist" or "Checklist").

Qwest's proposals with respect to the sections listed above demonstrate its desire to remove network elements provided pursuant to Section 271 of the Act from the Agreement. Covad, on the other hand, proposes that Qwest's obligations pursuant to Section 271 be memorialized in the Agreement, because there is no basis to treat Qwest's Section 271 obligations any differently than either Party's other obligations under the Act. For this reason, the Parties' Agreement is the appropriate document to establish these obligations, and this Commission has clear authority to arbitrate disputes that arise with respect to these obligations.

Perhaps more importantly, Qwest continues to be obligated under Arizona law to provide unbundled access to "essential facilities," which, by Commission rule, specifically include most, if not all, of the elements to which Covad seeks continued access in this arbitration. Furthermore, this Commission has already established rates for these essential facilities. Ariz. Admin. Code R14-2-1310.

Separate from the broader legal and policy issues surrounding this unbundling dispute, there is another set of competitive issues surrounding Qwest's refusal to provision the data portion of line splitting arrangements. As further explained below, the Commission should specifically address this issue to avoid unintended and anti-competitive consequences in the broadband market.

A. Section 271

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 Order* 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.

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 an RBOC 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.[27] 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.

Triennial Review Order, ¶ 654. [emphasis added]

Qwest does not attack this premise directly, but instead argues that this Commission does not have the authority to order the adoption of terms in an interconnection agreement that address compliance with Section 271. This position ignores the requirements of Section 271, as well as common sense. Recently, the Maine Public Utilities Commission rejected this argument and found that:

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[27] *See* 47 U.S.C. § 271(c)(2)(B).

> ...[S]tate commissions have the authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct. Section 271(c)(2)(A)(ii) requires that ILECs provide access and interconnection which meet the requirements of the 271 competitive checklist, i.e. includes the ILEC's 271 unbundling obligations. Thus, state commissions have the authority to arbitrate section 271 pricing in the context of section 252 arbitrations.

Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection* (PUC 20) *and Resold Services* (PUC 21), Order – Part II (September 3, 2004) ("Maine 271 Unbundling Order"). A copy of this order has been attached hereto as Attachment 1.

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, 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.[28]

The FCC has confirmed state commissions' enforcement role with respect to Section 271:

> We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into the long distance market in Arizona.

In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in Arizona, WC Docket No. 03-194, Memorandum Opinion and Order, FCC 03-309 (Rel. Dec. 3, 2003) ("Qwest 271 Order"), ¶61

The Maine Public Utilities Commission agreed:

> Indeed, it makes both procedural and substantive sense to allow state commissions, which are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to monitor ILEC compliance with section 271 by applying the standards prescribed by the FCC, i.e. ensuring that Verizon meets its Checklist Items No. 4, 5, 6, and 9 obligations.

Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection* (PUC 20) *and Resold Services* (PUC 21), Examiner's Report (July 23, 2004) ("Maine 271 Examiner's Report"), *affirmed by the Maine Public Utilities Commission in the Maine 271 Unbundling Order*. A copy of this order has been attached hereto as Attachment 2.

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. Specifically, this Commission has clearly been granted the authority to arbitrate provisions of interconnection

[28] *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).

agreements addressing Section 271 obligations, as well as set prices that comply with federal pricing standards:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions ... the FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in [section] 252(d) [of the Act]. It is the states that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.

AT&T v. Iowa Utils. Bd., 525 U.S. 366, 384, 142 L.Ed.2d 834, 876 (1999).

The FCC made it 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). Arizona has already established specific cost methodology for essential facilities to which Covad seeks continued access under state law: TSLRIC[29] (a methodology closely related to the FCC's chosen methodology for setting rates for UNEs, namely TELRIC).

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

[29] Ariz. Admin. Code R14-2-1310.

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.

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*,[30] there are various methodologies for the determination of forward-looking, long-run incremental cost. *Local Competition Order,* ¶ 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,* ¶¶ 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.[31]

Given the intense scrutiny that has been applied by this Commission in establishing rates for elements that may eventually be subject only to Section 271 unbundling obligations, adopting those rates, at least for an interim period, makes far more sense than any other result. In resolving this issue the Maine Public Utilities Commission stated:

> Until such time as we approve new rates for section 271 UNEs, adopt FCC-approved rates, or CLECs agree to section 271 UNE rates, Verizon must continue to provide all section 271 UNEs at existing TELRIC rates. We find this requirement necessary to ensure a timely transition to the new unbundling scheme. We have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the

[30] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (rel. August 8, 1996) ("Local Competition Order").

[31] 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,* ¶ 684.

> agreement of the parties. We note that the decision we reach today is consistent with the approach embodied in the FCC's Interim Rules, which require a six-month moratorium on raising wholesale rates.

Maine 271 Unbundling Order.

B. State Law Unbundling Authority

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. Not only does the Commission have this authority, it has already acted to mandate access to most, of not all,[32] of the elements Covad seeks:

> C. The following local exchange carrier network capabilities are classified as essential facilities or services:
>
> 1. Termination of local calls,
> 2. Termination of long distance calls,
> 3. Interconnection with E911and 911 services,
> 4. Access to numbering resources,
> 5. Dedicated channel network access connections, and
> 6. Unbundled loops.

Ariz. Admin. Code § R14-2-1307(C).

While Qwest has repeatedly argued in parallel proceedings that state commissions are preempted from enforcing their own unbundling regimes, or that those regimes are somehow inconsistent with the Act, this issue has already been settled in Arizona. In evaluating U S

[32] The record in this Commission's previous rulemakings appears to be unclear with respect to the definition of "dedicated channel network access connections," and whether that definition could encompass what is more commonly known as dedicated interoffice transport. If "dedicated channel network access connections" does not include interoffice transport, Covad submits that its proposed language constitutes a "bona fide request" pursuant to Ariz. Admin. Code R14-2-1307(E), and should be resolved by the Commission in this arbitration.

West's argument that the Commission's unbundling rules were inconsistent with the Act, the Commission provided the following analysis:

> Staff asserted that not only were the Act and the proposed rules not inconsistent, the Act actually gives the States great leeway in setting the terms of interconnection...
>
> We concur with Staff. We do not find that the Act precludes the issuance of the Proposed Rules. Although the Proposed Rules cover similar issues as the Act, we believe they are consistent.

Docket No. R-0000-96-001, *Re Rules for Telecommunications Interconnection and Unbundling*, Decision No. 59671 (July 22, 1996), ¶¶ 5-6.

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 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.

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.*

Any questions regarding this Commission's authority to impose additional unbundling obligations has been repudiated not only by the FCC in the *Local Competition First Report and Order,*[33] but also by every federal court passing judgment on the meaning of section 252(e)(3) of the Act.[34] Federal courts have routinely confirmed that the Act's savings clauses, especially 47 U.S.C. § 252(e)(3), provide state commissions with the requisite authority to enforce their own access obligations. They have likewise determined that for state requirements to be preempted, they must actually conflict with federal law, or thoroughly occupy the legislative field.[35] Congress effectively eliminated any argument supporting implied preemption by including the following language in the Act:

> (c) Federal, State, and Local Law.--
>
> (1) **No implied effect.**--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Pub. L. 104-104, title VI, Sec. 601(c), Feb. 8, 1996, 110 Stat. 143. [emphasis added]

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.

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[33] *See Local Competition First Report and Order,* ¶ 244.

[34] *See Southwestern Bell Telephone Co. v. Public Util. Comm'n of Texas,* 208 F.3d 475, 481 (5th Cir. 2000) ("The Act obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements."); *AT&T Communications v. BellSouth Telecommunications Inc.,* 238 F.3d 636, 642 (5th Cir. 2001) ("Subject to § 253, the state commission may also establish or enforce other requirements of state law in its review of an agreement." [citing § 252(e)(3)]); *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.,* 240 F.3d 279, 301-302 (4th Cir. 2001) ("Determinations made [by state commissions] pursuant to authority other than that conferred by § 252 are, by operation of § 601(c) of the 1996 Act, left for review by State courts. [citing 47 U.S.C. § 152 note]...Section 252(e) also permits State commissions to impose State-law requirements in its review of interconnection agreements.")

[35] *Cippillone v. Liggett Group, Inc.,* 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992).

> . . .
>
> [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.*

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 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 <u>not</u> *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).

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.

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

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.

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

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. 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.

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*, 323 F.3d 348, 359 (6^{th} Cir. 2003).

While Covad believes preemption of Arizona law mandating unbundling is unlikely, it is also irrelevant. This Commission should exercise its authority as it is delineated by Arizona 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 U.S. 361, 368; 94 S. Ct. 1160, 1166; 39 L. Ed. 2d 389, 398 (1974).

C. The Commission Should Preserve Language In The Agreement Regarding The Data Portion Of Line Splitting Arrangements To Avoid Unintended And Anti-Competitive Consequences For The Broadband Market

Qwest's proposals regarding the *data* portion of line splitting arrangements (unrelated to unbundled switching), adopted by the Decision, would make this product unavailable in all markets where switching is no longer available as a section 251 element.

The parties' dispute regarding line splitting raises an entirely separate set of issues, apart from the broader unbundling dispute raised by Issue 2. Neither the *Triennial Review Order* nor the *TRO Remand Order*[36] can be read to eliminate line splitting, notwithstanding the impairment determinations made pursuant to section 251 of the Act. In fact, the *Triennial Review Order* contains several discussions confirming that the continued availability of line splitting was a critical component in conducting its impairment analysis for other UNEs.[37] This makes line splitting clearly distinct from other elements Qwest seeks to eliminate in the parties' Agreement.

1. The FCC Has Confirmed That Line Splitting Must Still Be Provided By ILECs

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

> (ii) Line splitting. **An incumbent LEC shall provide a requesting telecommunications carrier that obtains an unbundled copper loop from the incumbent LEC with the ability to engage in line splitting arrangements** with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. Line splitting is the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop.
>
>> (A) **An incumbent LEC's obligation, under paragraph (a)(1)(ii) of this section, to provide a requesting telecommunications carrier with the ability to engage in line splitting applies regardless of whether the carrier providing voice service provides its own switching or obtains local circuit switching as an unbundled network element pursuant to paragraph (d) of this section.**

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[36] WC Docket No. 04-313; CC Docket No. 01-338, *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand (Rel. February 4, 2005) ("TRO Remand Order").

[37] *See Triennial Review Order*, ¶ 251-252, 255, 259, 260, 265, 270, 777 (n. 2309).

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

47 C.F.R. § 51.319(a)(1)(ii).

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

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

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

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

Service Exhibit 1 – Qwest Platform Plus Service ("QPP Agreement") at 1 (emphasis added). A copy of this agreement has been attached hereto as Attachment 3.

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

Despite this, Qwest's proposal for section 9.21.2 reads:

> On the effective date of a Commission determination that Qwest is no longer required to provide UNE-P Combination services in a market area, Line Splitting is also not available in that market area. To the extent CLEC has an embedded base of Line Splitting End User Customers on the effective date of the Commission determination, CLEC shall transition its embedded base of Line Splitting End User Customers in accordance with the Transition Timelines for unbundled switching, as described in Section 9.11.20.1. In such markets where Line Splitting is not available, Loop Splitting will continue to be available pursuant to Section 9.24 of this Agreement. (emphasis added)

As it stands, the two agreements, the Agreement being negotiated in this docket and Qwest's QPP Agreement, make no sense when read together and are also not compliant with the FCC's rules. On the one hand, the QPP Agreement clearly contemplates line splitting as a loop UNE, to be purchased from ICAs, while the ICA declares it unavailable. The Commission should therefore order the parties to amend the agreement to provide for the purchase of line splitting elements needed to provide the data portions of line splitting.

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

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

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

ISSUE 3 - COMMINGLING
(Section 4 Definitions of "Commingling" and "251(c)(3) UNE," 9.1.1.1, 9.1.1.4.2,[38] and 9.1.1.5 (and subsections))

The Parties' disagreement can be distilled to the following: Qwest believes the FCC intended to create a special category for elements that must be provisioned under Section 271 of the Act, and that such elements have a status inferior to all other wholesale telecommunications services, and cannot be commingled with any other wholesale services. Covad believes the FCC intended, and confirmed in its Errata to the *Triennial Review Order*, to treat Section 271 elements just like any other telecommunications service not purchased pursuant to Section 251(c)(3) of the Act.

[38] While the Parties have generally resolved their dispute with respect to rate ratcheting, Section 9.1.1.4.2 remains open due to the parties commingling dispute.

A. The *Triennial Review Order* Provides For The Commingling Of 271 Elements With 251(c)(3) UNEs

The FCC defines "commingling" as:

> the connecting, attaching, or otherwise linking of a UNE, or a UNE Combination,[39] to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC **pursuant to any method other than unbundling under section 251(c)(3) of the Act**, or the combining of a UNE or UNE combination with one or more such wholesale services.

Triennial Review Order, ¶ 579.

Originally, the FCC had specifically identified "elements unbundled pursuant to Section 271" in paragraph 584 of the *Triennial Review Order* in the midst of its discussion of ILECs' resale commingling obligations. Qwest apparently believes that the deletion of this phrase in paragraph 584 by the FCC's Errata to the *Triennial Review Order* somehow modifies the FCC's general statement in paragraph 579, cited above, which was not included in the Errata. Covad believes the more reasonable explanation is that paragraph 584 is dedicated exclusively to a discussion of the ILECs' obligations to commingle 251(c)(3) UNEs with resale services, and the introduction of 271 elements to that discussion was confusing. In fact, the inclusion of 271 elements, without the inclusion of other wholesale services, would have left the implication that such elements were to be treated differently than Section 271 elements. If the FCC had truly intended to exclude Section 271 elements from commingling eligibility as a "facilities or service [ ] that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act," it would have modified this language in paragraph 579.

Further supporting Covad's reading of the FCC's statements is the resulting FCC Rule:

> (e) Except as provided in Sec. 51.318 [the high-capacity EEL service eligibility criteria], an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled

[39] Unlike the Parties' Agreement, the FCC generally uses the term "UNE" to refer to a network element available pursuant to its analysis under section 251 of the Act.

> network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

47 C.F.R. § 51.309(e).

Any element provided pursuant to Section 271 is undoubtedly a "wholesale service" which may, under the FCC's rule, be commingled with "unbundled network elements." In fact, the FCC's use of the terms "an unbundled network element pursuant to Section 251(c)(3) of the Act" as well as the more generic term "unbundled network element,"[40] may create some question as to whether a network element that is not available under Section 251, but nevertheless is provided under Section 271 or state law, is in fact an "unbundled network element" according to the FCC. Covad's language does not go that far. For now, Covad is content with this Commission's recognition that a Section 271 element is undoubtedly a "wholesale service."

B. A Definition of "251(c)(3) UNE" Is Necessary To Accurately Reflect The FCC's Commingling Rules And To Maintain Consistency Within The Agreement

As noted above, the FCC made a distinction in paragraph 579 of the *Triennial Review Order* between elements purchased under Section 251(c)(3) of the Act, and elements "obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act." For this reason, Covad has introduced a new definition to the Agreement: "251(c)(3) UNE." This definition is relatively self-explanatory, and does not include non-251(c)(3) elements, which are arguably not "UNEs" for purposes of the FCC's commingling rules. By incorporating this definition, the Agreement can restrict commingling arrangements to the commingling of 251(c)(3) UNEs with elements "obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act."

Qwest's opposition to this definition raises larger questions. Apparently, Qwest believes that "unbundled network element," as used in the Agreement, can only mean elements provided

[40] *See* 47 C.F.R. § 51.309(d) and (e).

pursuant to Section 251(c)(3). In other words, the definition proposed by Covad is not so much incorrect as it is unnecessary. What Qwest overlooks is that the Agreement itself, in language agreed to by Qwest, contains a broader definition of UNEs:

> CLEC and Qwest agree that the UNEs identified in Section 9 are not exclusive and that pursuant to changes in FCC rules, state laws, or the Bona Fide Request Process, or Special Request Process (SRP) CLEC may identify and request that Qwest furnish additional or revised UNEs to the extent required under Section 251(c)(3) of the Act and other Applicable Laws.

Given this necessary vagueness as to what may be provided as an "unbundled network element" under the Agreement, Covad believes its more narrow definition of "251(c)(3) UNE" allows for the implementation of the FCC's commingling rules, and should be adopted by this Commission.

C. Other State Commissions Have Uniformly Adopted Covad's Position On Commingling

Other state commissions have uniformly adopted Covad's proposed language, as well as its interpretation of the *Triennial Review Order.* In agreeing with Covad's position in a parallel arbitration proceeding, the Colorado Public Utilities Commission stated:

> Notably, we agree with Covad that the plain and clear language in the TRO (e.g., in ¶ 579) and the FCC's commingling rule itself (47 CFR § 51.309(3)) supports its position. Those provisions plainly state that an ILEC shall permit a requesting carrier to commingle UNEs with facilities and services obtained at wholesale from the ILEC pursuant to a method other than unbundling under § 251(c)(3). Those provisions do not contain the restriction advocated by Qwest here. There can be no dispute that network elements obtained under § 271 are wholesale services. As such, the TRO allows for commingling of UNEs with § 271 elements.

Colorado Public Utilities Commission Docket No. 04B-160T, In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Company Pursuant to 47 U.S.C. § 252(b), Initial Commission Decision (Mailed: August 27, 2004) at ¶ 176.

In overturning an Arbitrator's Report deciding the issue in Qwest's favor, the Washington Utilities and Transportation Commission stated:

> The next question is whether the FCC has excluded Section 271 elements as a whole from commingling obligations, as Qwest asserts, or allows Section 251(c)(3) UNEs to be commingled with Section 271 elements, as Covad claims. We find Covad's interpretation of paragraph [584, footnote] 1990 persuasive, and reverse the Arbitrator's decision on this point as well. The FCC removed language from footnote 1990 that would support Qwest's expansive view prohibiting any commingling of Section 271 elements. The subject of the FCC's commingling definition is Section 251(c)(3) UNEs, not wholesale services. It is reasonable to infer that BOCs are not required to apply the commingling rule by commingling Section 271 elements with other wholesale elements, but that BOCs must allow requesting carriers to commingle Section 251(c)(3) UNEs with wholesale services, such as Section 271 elements.

Washington Utilities and Transportation Commission, Docket No. UT-043045, *In the Matter of the Petition for Arbitration of Covad Communications Company With Qwest Corporation*, Order No. 6 (Issued February 9, 2005) ("Washington Order") at 30.

While a written decision has not yet been issued, the Minnesota Public Utilities Commission, by unanimous voice vote, has also voted to adopt Covad's proposed language regarding this issue.

ISSUE 5 - REGENERATION REQUIREMENTS (Sections 8.2.1.23.1.4, 8.3.1.9, and 9.1.10)

Covad has proposed language for the agreement that clarifies that Qwest must provide regenerated cross connects between Covad collocations as well as between a Covad collocation and another CLEC's collocation ("CLEC-to-CLEC cross connections with regeneration") when requested by Covad. This language is supported by the Telecommunications Act's requirement that collocation be provided by incumbent LECs on terms that are just, reasonable, and nondiscriminatory.[41] While Covad can place its own CLEC-to-CLEC connections that do not require regeneration (and, incidentally, Qwest offers such connections as a wholesale product anyway), Qwest's collocation policies, in combination with industry standards, render the self-provision of *regenerated* cross connections technically and financially infeasible, leading to cases of clear discrimination.

A. The Act and FCC Rules Require Non-Discriminatory Access To Central Office Collocation, Including CLEC-to-CLEC Cross Connections

In his written testimony and at hearing, Qwest's witness Michael Norman maintained that Qwest should not have to offer CLEC-to-CLEC cross connections with regeneration because Qwest allows CLECs, such as Covad, to make the connection themselves, satisfying the exception contained in 47 C.F.R. § 51.323(h)(1). However, the scope of the FCC's cross-connection rule must be viewed in light of the FCC's written decision in its *Fourth Report and Order* adopting the rule, which reveals the FCC's intent to protect competitive LECs from any discrimination related to incumbent LEC collocation restrictions.

In requiring Incumbent LECs to provision cross-connections between CLECs, the FCC stated: "our action reflects our overriding concern than an incumbent LEC would be acting in an unreasonable and discriminatory manner if it refused to provide cross-connects between collocators,"[42] and that "an incumbent LEC's refusal to provide a cross-connect between two collocated carriers would violate the incumbent's duties under section 251(c)(6) to provide collocation 'on … terms and conditions that are just, reasonable, and nondiscriminatory.'"[43] The

[41] 47 U.S.C. § 251(c)(6).
[42] *Fourth Report and Order*, ¶ 79.
[43] *Id.*, ¶ 80.

FCC went on to find that an incumbent LEC's provisioning of cross-connects to two collocated carriers was required by section 251(c)(6) of the Act.[44]

The Washington Utilities and Transportation Commission (WUTC) recently agreed with Covad in a parallel arbitration proceeding, and held that Qwest must provide regeneration facilities at wholesale rates. The Commission concluded:

> We reject Qwest's argument that it has no obligation to provision required regeneration as a wholesale service if it allows CLECs to self-provision cross-connections at the ICDF under the FCC's exception. Regeneration may be necessary for the cross-connection to function, just as the FCC recognized that power cables may be necessary for collocation, as a whole, to function.

Washington Utilities and Transportation Commission, Docket No. UT-043045, *In the Matter of the Petition for Arbitration of Covad Communications Company With Qwest Corporation*, Order No. 6 (Issued February 9, 2005) ("Washington Order") at 43. A copy of this order is attached hereto as Attachment 4.

On this point, however, Qwest would have this Commission believe that the "exception" set forth in 47 C.F.R. § 51.323(h)(1) (which provides that CLECs can self provision the cross-connect with an ILEC's permission) excuses it from any obligation whatsoever from provisioning any facilities of any kind, including regeneration facilities. This interpretation of the exception does not pass muster. First, as noted above and as pointed out by the WUTC, it is inconsistent with the necessary logic of 47 C.F.R. § 51.323(h)(1). If the exception were construed as Qwest proposes, then the last clause of the rule would have no meaning. Secondly, and more importantly, the FCC has already interpreted the so-called "exception" contained in the rule and its interpretation does not square with the interpretation Qwest has proffered to the Commission. In its *Fourth Advanced Services Order*, the FCC concluded:

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[44] *Id.*, ¶ 82

> In addition, although we find no statutory support for requiring that an incumbent LEC permit competitive LEC-provisioned cross-connects outside of their physical collocation space, we believe that competitive LEC provisioning of cross-connects imposes a much lesser burden on the incumbent's property in certain circumstances, such as when the carriers being cross-connected occupy immediately adjacent collocation space, than when the cross-connects would traverse common areas of the incumbent LEC's premises.

Fourth Advanced Services Order, n. 158.

In its review of the foregoing footnote from the *Fourth Advanced Services Order*, the WUTC concluded that the FCC understood the self-provisioning "exception" to only cover instances where the Covad to CLEC cross-connect is between adjacent collocation spaces.[45] The WUTC concluded:

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

Washington Order at 42.

From the foregoing, it is clear that Qwest's broad reading of the exception is without support. In instances when the cross-connect is between two adjacent spaces, as was contemplated by the FCC in the *Fourth Advanced Services Order*, regeneration would obviously

[45] See also, Zulevic Rebuttal, 6:6-24; 7:1-3 in support of this conclusion.

not be required or necessary because the length of the cross-connect would fall well below the ANSI threshold for provision regeneration facilities for either a DS-1 or DS-3 circuit.

Given the FCC's prior decisions regarding central office regeneration in the expanded interconnection context, it is logical to assume that the FCC believes that collocators should never be charged for regeneration:

> 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.

CC Docket No. 93-162, *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, 12 FCC Rcd. 18,730 (Rel. June 13, 1997), ¶¶ 117-118.

When the "exception" contained in 47 C.F.R. § 51.323(h)(1) is read with this history in mind, the limitations on this language become more clear. To believe that the exception is as broad as Qwest argues, one would have to believe that the FCC intended not only to reverse its previous ruling that no regeneration charges should apply to physical collocators, but that *ILECs should not be required to provide it at all.* This is a nonsensical reading of the FCC's rules and prior decisions. At the time the *Fourth Advanced Services Order* was released, most incumbent LECs were refusing to allow any connections between CLECs in their central offices, and the D.C. Circuit had ruled that incumbent LECs were not obligated to allow CLECs to self-provision cross-connections in incumbent LEC central offices.[46] The issue of *self-provisioned, regenerated* cross-connections was not even a consideration at the time.

Finally, in those instances when Qwest must either provide the cross-connect or permits self-provision between CLECs, Qwest must provide regeneration facilities at TELRIC based or wholesale rates. This issue was laid to rest years ago. In the FCC's seminal *First Report and Order* regarding the implementation of the local competition provisions of the Act, including implementation of collocation under section 251(c)(6) of the Act, the FCC held as follows:

> We further conclude that, because section 251(c)(6) requires that incumbent LECs provide physical collocation on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory," which is identical to the standard for interconnection and unbundled elements in sections 251(c)(2) and (c)(3), collocation should be subject to the same pricing rules. We also note that, because collocation is a method of obtaining interconnection and access to unbundled network elements, collocation is properly treated under the same pricing rules.

CC Docket No. 96-98, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15816 (rel. August 8, 1996) ("First Report and Order"), ¶ 629.

The pricing rules the FCC refers to in the foregoing quote are the TELRIC based pricing rules it adopted in the very same *First Report and Order*. The FCC's adoption of TELRIC pricing for collocation, among other matters, was subsequently affirmed by the United States Supreme Court. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999).

Based on this analysis, it is clear that the FCC's goal in adopting its cross-connection rule was to ensure compliance with the non-discrimination requirements of section 251 of the Act, and that necessary cross-connections between competitive LECs were part of an incumbent

[46] *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

LEC's obligations to provide collocation pursuant to section 251(c)(6). The exception contained in 47 C.F.R. § 51.323(h)(1) assumes that competitive LECs could self-provision the desired connection under conditions that did not violate section 251(c)(6). Qwest must therefore provide regeneration facilities to Covad at rates derived from the TELRIC pricing standard.

B. Covad Has No Practical Option To Self-Provision Cross Connects Requiring Regeneration

The section 251(c)(6) standard for evaluating Qwest's claim that self-provisioned cross-connects are available should be the *practical* availability of this option, not simply its theoretical availability. While Mr. Norman argued that CLECs *can* regenerate their own cross connects, these claims are less convincing when the applicable engineering standards are examined closely.

First, Mr. Norman claimed that a CLEC could increase the strength, or "boost" a cross connected signal in order to overcome distance limitations. This suggestion fails to take into account, however, that finite engineering standards exist, which Covad must follow, that prevent significant boosting of the signal. As Mr. Norman admitted at hearing:

> Q. Now, in the proceedings in other states you testified that Covad could avoid the need for regeneration by increasing the power or boosting the signal as it leaves its collocation space. Do you still believe that's a viable solution to avoid the need to regenerate a cross-connection midspan?
>
> A. Well, I think there is a lot of scenarios in the central office. And I think what I meant by that is if Covad partnered with another CLEC and regeneration was required and the distance was such that the volume controls on both ends of the equipment were set too short, that it could be feasible to place regeneration in your own space and reset the regeneration equipment on your end, plus the other CLEC

would reset their DS-3 interface on their equipment to make the distance work.

Q. So was your thought limited to distances that were underneath the ANSI standard that Mr. Zulevic discussed, I believe 655 feet and 450 feet roughly?

A. I was thinking more around, you know, the ANSI standards were right at the breaking point, so it would either be 450 foot level on the DS-3, or 655 feet on the DS-1 level as Mr. Zulevic spoke to.

Q. So it is true that there are limits to the strengths that signals could be boosted under the ANSI standards that govern these connections, is that correct?

A. Yes.

Tr. Vol. I, 195:2 through 196:2.

In other words, boosting the signal to avoid regeneration is an illusory solution. In fact, the applicable ANSI standards provide a maximum signal strength that would prohibit significant boosting of a cross connection signal.[47] Mr. Norman therefore confirmed that the cable distance limitations contained in the ANSI standards are very real.[48] Beyond those prescribed cable distances, regeneration is required.

Mr. Norman's second solution, outlined in his testimony, is for CLECs to place regeneration equipment mid-span, between their two collocations. On cross examination, however, he agreed that there is no guarantee space will be available to place such equipment.[49] Mr. Norman also admitted he had no idea what a mid-span collocation arrangement to place regeneration equipment would cost.[50] On the other hand, Mr. Zulevic, Covad's witness

[47] Tr. Vol. I, 117:13 through 118:1.
[48] Tr. Vol. I, 195:24 through 196:2.
[49] Tr. Vol. I, 201:15-17.
[50] Tr. Vol. I, 202:7-11.

regarding this issue, provided detailed testimony regarding the substantial, infeasible costs of such an arrangement.[51]

At hearing, Mr. Norman agreed that another solution was available: Covad, or any other CLEC, could order interoffice transport to another central office, then order another transport circuit back to the original central office to complete the connection.[52] In fact, that solution may be more cost effective than Mr. Norman's other suggestions. It is therefore instructive that this solution was specifically rejected by the FCC as discriminatory in its *Fourth Report and Order*:

> For instance, for two competitive LECs collocated at the same central office to exchange traffic without a cross-connect, each competitive LEC would have to carry its own telecommunications traffic into its collocation space and then, in the typical case, have the incumbent LEC transport that traffic over incumbent-owned facilities to an interconnection point outside the incumbent's premises. From this interconnection point, the other competitive LEC would likely then carry the traffic back to its own collocation space in the same central office to be transported through the competitive LEC's network. **This approach creates additional potential points of failure, may require otherwise unnecessary signal boosting, and, perhaps most importantly and most dramatically, imposes significant wasteful economic costs on competitive LECs – costs that *incumbent* LECs *themselves* do not face...**

Fourth Report and Order, ¶ 64. [citation omitted]

Given the fact that (1) Central office cross-connections are required to avoid discrimination violating section 251(c)(6) of the Act, and (2) There is no practical method for Covad to self-provision these connections when they require regeneration, the Commission should confirm that Qwest must offer CLEC-to-CLEC cross connections requiring regeneration to Covad as a section 251(c)(6) collocation element. This element should be subject to the same

[51] *See* Exhibit Covad-3 at 45.
[52] Tr. Vol. I, 206:16-25.

pricing, terms and conditions as ILEC-to-CLEC regeneration, as the legal obligations and prescribed pricing standards for the two are indistinguishable.

ISSUE 9 - BILLING ISSUES
(Sections 5.4.1, 5.4.2, and 5.4.3)

A. Payment Due Date

Covad has requested that the payment interval included in Section 5.4.1 be forty-five (45) days for any invoices containing: (1) line splitting or loop splitting products, (2) a missing circuit ID, (3) a missing USOC, or (4) new rate elements, new services, or new features not previously ordered by Covad. Qwest maintains that the interval for payment on all invoices should be thirty (30) days. Covad's proposal for additional time is based upon specific and substantial deficiencies in Qwest's invoices which require manual verification effort. This manual effort requires additional time to perform.

1. There Are Inherent Deficiencies in Qwest's Billing Systems That Require Substantial Manual Verification Effort

As Covad witness Elizabeth Balvin explained both in her written and live testimony, Qwest's billing systems currently produce invoices to Covad that require substantial human effort to verify. This is true whether the included charges are correct or not, and whether the invoice is provided by Qwest in electronic format or not.[53] This is a direct result of specific deficiencies in Qwest's wholesale billing systems.

[53] This is not meant to minimize the additional difficulties created by inaccurate Qwest billing. As Ms. Balvin pointed out in her testimony, the Parties have resolved several billing errors in the past few years, leading to substantial repayments to Covad as well as payments by Qwest under its Performance Assurance Plan. Covad believes that these issues can be separated from the process deficiencies and other challenges mentioned above, which are not addressed by the foregoing remedies and bear specifically on Covad's ability to review Qwest bills prior to the Payment Due Date.

First of all, Covad typically receives its bills from Qwest five (5) to eight (8) days after the "invoice date," which starts the clock for the payment due date.[54] Also, Qwest's bills for non-recurring collocation charges continue to be provided in paper format.[55] In these circumstances, the bills must be hand-entered into Covad's billing systems before a review can even begin.[56] Then Covad employees must manually review the charges, many of which are individual case basis (ICB) charges, to verify them.

Qwest provides the Billing Telephone Number (BTN) rather than the circuit identification number for line-shared and line-split loops, making electronic verification impossible.[57] The precise scope of this problem is described in Ms. Balvin's direct testimony.[58] As Ms. Balvin, testified at hearing:

> Q. So with respect to Qwest's bills for shared loop products, what happens when those bills are run through Covad's billing system?
>
> A. All of our line shared orders are kicked out for manual handling, because they don't have a circuit ID in the bill. They provided it on the FOC but they don't provide it on the bill.
>
> Q. And what impact does that have on the amount of time it takes to validate the bills?
>
> A. Any manual handling just causes additional, I will term, man hours to actually physically look at the bill and make sure it is accurate.

Tr. Vol. II, 265:14-25.

2. Affording Covad Fifteen Additional Days To Review Qwest Bills Will Not Disrupt The Parties' Billing Relationship, And Will Promote Efficiencies

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[54] Exhibit Covad-1 at 7, lines 15-18.
[55] Tr. Vol. II, 257:12-23.
[56] Id.
[57] Id. Vol.II, 266:23 – 267:11.
[58] Exhibit Covad-1 at 10-11.

There is nothing inherently disruptive about a 45-day, rather than a 30-day payment interval. Qwest can continue to bill on a 30-day (or monthly) billing cycle, and will continue to receive payments from Covad every thirty (30) days. In other words, Qwest's only possible concern would be that if Covad refused to pay its final bill from Qwest, it would not realize this until fifteen (15) days later than if Qwest's proposal were adopted. This hardly creates the type of delinquency exposure Qwest has alleged in this proceeding. It should also be noted that Qwest bills recurring charges in advance, further limiting, if not eliminating, Qwest's financial exposure.[59]

In addition, affording Covad a meaningful amount of time to review Qwest bills will avoid inefficient results for both Parties, such as Covad relying on the audit process to conduct bill reviews, which would increase the cost of the billing relationship for both Parties. Covad could also dispute Qwest bills blindly, just to buy time to conduct a thorough review. This is an unrealistic remedy, however, because like the audit process, it is too time consuming and labor intensive to serve as an alternative to a reasonable payment interval. In addition, Covad would be forced to pay late payment charges for amounts it knew, at least in general, were legitimate and was willing to pay.

Rather than relying on remedies that are tantamount to digging a trench with a kitchen fork, the Parties should implement a payment interval that affords Covad enough time to verify the bills it receives from Qwest. This will ensure accurate payment and will minimize disputes and audits, thus saving both Parties time and money in the long run.

3. There is Substantial, Un-Refuted Evidence In The Record That Covad Should Be Afforded More Time To Review And Verify Qwest Bills

[59] Tr. Vol. I, 219:18-25.

Ms. Balvin's testimony in this proceeding, described above, provided detailed explanations of the time-consuming nature of the review and verification process, as well as Covad's inability to adequately perform these tasks in a 30-day period. This difficulty is not a result of Covad's unwillingness to dedicate adequate human resources to the task.

Qwest's arguments are not based upon any evidence presented, but instead rely on the premise that avenues other than this arbitration are available to resolve issues related to billing matters. First, Qwest argues that the issue at hand is the date payment is due, and that information regarding Qwest's billing deficiencies is irrelevant to establishing a payment due date. This ignores the plain fact that the amount of time needed to pay a bill is directly related to the amount of effort needed to review the bill. Covad, through Ms. Balvin, outlined the Qwest-specific deficiencies causing the delays in Covad's review.

While performance measurements contained in Qwest's Performance Assurance Plan may provide for remedies when incorrect bills are issued, outright errors are only part of the problem. Furthermore, a remedy for billing errors is useless if Covad is not afforded the time to identify those errors.

The Commission should also reject the premise that Covad should simply dedicate more manpower, or "increase productivity" to review Qwest's bills. This is an inequitable solution which ignores the true problem: the deficiencies in Qwest's billing systems. Covad could just as easily, and more justifiably, demand that Qwest dedicate more personnel, and become more productive, in generating wholesale bills to Covad. Instead, Covad only asks for an additional fifteen (15) days to sort through the deficient bills Qwest produces.

Notably, in making its arguments against Covad's proposals, Qwest did not question a single fact placed into evidence by Covad with respect to the billing relationship, or the time required to adequately review Qwest's bills. The facts in this case provide sufficient justification for this Commission to adopt Covad's proposed language.

4. Qwest's Billing Deficiencies Are Unlikely To Be Resolved Within the Change Management Process

Recently, Qwest rejected a change request submitted by Covad within the CMP to resolve the circuit ID issue discussed above. In rejecting the request, Qwest claimed that while it had identified systems changes that could be made, those changes cost more than Qwest cared to spend. This should not surprise the Commission, because Qwest has absolutely no motivation to fix its systems. Today, Qwest is able to force Covad to bear the entire burden of the deficiencies by requiring the payment of invoices within abbreviated time frames and forcing Covad to manually verify invoices. Until Qwest must share at least part of this burden, it is safe to say there will be no systems changes.

Qwest's position that its billing deficiencies will not be addressed within the CMP underscores the need for the Commission to address the issue in this forum. As an alternative to correcting each and every deficiency, Covad has proposed just an additional fifteen (15) days to conduct its review.

5. Qwest Has Already Agreed To Extended Payment Intervals

While Qwest describes its proposed payment interval as the "industry standard," it should be noted that Qwest has agreed to an alternate, extended payment intervals in the past. As Qwest's witness William Easton admitted at hearing, Qwest has executed agreements that calculate the thirty-day payment interval from the date the bill is actually received by the CLEC.[60] Based upon both Mr. Easton and Ms. Balvin's testimony regarding the delays in delivery of invoices by Qwest, this equates to an extension of as much as eight days beyond the interval proposed by Qwest in this proceeding. In light of these facts, Qwest's arguments that Covad's proposal will cause severe cash flow problems and systems issues appear quite insignificant.

[60] Tr. Vol. II, 296:6-20.

B. Timing for Discontinuation of Processing of Orders and Disconnection of Services (Sections 5.4.2 and 5.4.3)

Covad acknowledges Qwest's right to discontinue the processing of orders, and even to discontinue service in the event it does not receive payment from its wholesale customers, including Covad. The Parties' dispute is not with respect to the *right* of Qwest to take these remedial actions, but with respect to the *timing* for these actions. Covad believes that the time frames for employing these drastic remedies should not be so compressed as to allow either party to use them as leverage in billing disputes or other conflicts. Covad does not believe the modest extensions it has proposed will truly prejudice Qwest at all, and will allow both Parties some breathing room should a serious conflict develop.

1. Covad's Proposals Would Have Negligible Impact On Qwest's Receivables and Cash Flow

Covad has specifically proposed that the time period for Qwest to discontinue orders for failure to make full payment be set at sixty (60) days, rather than the thirty (30) days Qwest has suggested. In cases where Covad pays Qwest for services, either on time or late, this provision has no effect on Qwest's cash flow at all, because it has no impact on when payments are due, when payments are considered past due, or when Qwest could take action for a breach of the Agreement. The only circumstance where this provision could lead to increased losses for Qwest would be if Covad refused to pay Qwest and continued to order new services. In that case, Qwest's increased exposure would be limited to thirty (30) days' worth of new services ordered by Covad. This would constitute only a fraction of the amount Covad would owe Qwest if it was failing to pay its bills, and cannot seriously be considered to create true cash flow issues for Qwest.

For Section 5.4.3 of the Agreement, Covad proposes a ninety (90), rather than a sixty (60) day period after which Qwest may disconnect service if full payment is not received. In circumstances where Covad pays Qwest, this thirty (30) day difference would have no impact on

Qwest's cash flow or receivable amounts. If Covad were to stop paying Qwest, it would extend the time period for Qwest to disconnect service by thirty (30) days. This would have an effect on the total amount owed to Qwest in the event Covad failed to pay, but Qwest's advance billing of recurring charges does provide substantial protection against large unpaid balances.

2. The Timing Of Qwest's Right To Receive Payment Should Be Balanced Against The Severity Of The Remedies Involved

To understand Covad's proposals, it is important to realize that Covad is not concerned about its rights should it be unable or otherwise refuse to pay Qwest for services, though it does recognize *Qwest's* concerns in such situations. If Covad were truly unable to pay Qwest, Covad would have more pressing concerns than whether it could receive service for an additional thirty (30) days. Covad's concern is that a situation could arise in which Qwest refused to recognize a legitimate dispute that affected payment, and use the short disconnection interval it has proposed to obtain leverage in that dispute.

A disconnection of service, or even the refusal to process Covad's orders, would have a disastrous and likely irreversible impact on Covad's business. If Qwest were to wrongfully reject a billing dispute raised by Covad, it is true that Covad would have a legal remedy for such refusal. However, that legal remedy would be meaningless if Qwest were to disconnect service before that remedy was obtained. As a result, Covad must have sufficient time to organize requests for injunctive relief, or make other arrangements, prior to the time these remedies may be employed. Given the fact that Covad may not receive notice that Qwest intends to disconnect services until well into the time period under dispute, and the fact that Covad would likely be seeking remedies in multiple states, the modestly larger time frame proposed is reasonable. This additional time would allow Covad to file, and the Commission to act upon, a request for injunctive relief. Perhaps this situation will never arise. Perhaps there is little chance it could arise. The problem is that the cost of being wrong is unbearably high for Covad.

Qwest has offered no specific evidence in this proceeding as to how the Covad proposals would prejudice Qwest. Consequently, this Commission should balance Qwest's right to control its receivables and cash flow, which are legitimate concerns, though largely unexplored in this proceeding, with Covad's concern that unreasonably short time frames could be abused, and that the effect of such abuse could be extremely harmful to Covad. Covad believes that the time frames it has proposed for the discontinuance of order processing and the disconnection of services are the best balance of these competing interests.

Conclusion

For the reasons set forth above, Covad respectfully requests that this Commission adopt Covad's proposed language to resolve the issues set forth above, and enter an order consistent with this resolution.

Dated this 11th day of March, 2005.

Respectfully submitted,

DIECA COMMUNICATIONS, INC.,
d/b/a Covad Communications Company

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ATTACHMENT 1

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

September 3, 2004

ORDER – PART II

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we find that Verizon must include all of its wholesale offerings in its state wholesale tariff, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct). In addition, Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. "Total Element Long Run Incremental Cost (TELRIC)" for section 251 UNEs and "just and reasonable" rates pursuant to sections 201 and 202 of the Communications Act of 1934 for section 271 UNEs. We also find that we are not preempted from considering in this proceeding whether Verizon must continue to offer line sharing pursuant 35-A M.R.S.A. §§ 1306 and 7101.

II. BACKGROUND

In our Comments to the Federal Communications Commission (FCC) regarding Verizon's section 271 application for authority to enter the interLATA toll market (Verizon's 271 Application), we stated that the availability of a wholesale tariff or Statement of Generally Available Terms (SGAT) would greatly reduce the time required to effect a valid interconnection agreement and would also eliminate the perception shared by some CLECs that they were being "forced" to accept contract terms in their interconnection agreements that were unrelated to the terms that they were interested in negotiating.[1] Thus, in a March 1, 2002 letter from the Commission to Verizon (Commission's 271 Letter), we explicitly conditioned our support of Verizon's 271 Application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff. Verizon committed to meeting the Commission's conditions in a March 4, 2002 letter to the Commission (Dinan Letter),

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[1] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine,* CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) at 7.

and on November 1, 2002, Verizon submitted a schedule of terms, conditions and rates for Resold Services (P.U.C. No. 21) and the provision of Unbundled Network Elements and Interconnection Services (P.U.C. No. 20) along with cost studies for certain non-recurring charges and OSS-related issues.

In order to allow enough time to thoroughly examine the tariff, we suspended it on November 11, 2002. On November 13, 2002, the Hearing Examiner issued a Procedural Order requesting intervention and scheduling an initial case conference for December 10th. On December 4, 2002, prior to the case conference, the Hearing Examiner issued a second Procedural Order granting intervention to all parties that requested it[2] and proposing a schedule for processing this case. Between December 2002 and August 2003, the parties conducted some discovery and attempted to identify all the issues that need to be litigated.[3]

On August 11, 2003, the Hearing Examiner issued a Procedural Order setting a hearing date of October 2, 2003, and attaching a list of issues that the Advisors intended to explore at the hearing. Before a hearing could take place, however, on August 21, 2003, the FCC issued its *Triennial Review Order (TRO)*.[4] A case

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[2] The parties at that time included: the Office of the Public Advocate (OPA), Association of Communications Enterprises (ASCENT), MCI/WorldCom (MCI), Mid-Maine Telecommunications (Mid-Maine), and Oxford Networks (Oxford). Mid-Maine and Oxford filed joint briefs as the CLEC Coalition.

[3]At the Case Conference on December 10th, the proposed schedule was discussed and on December 17th the Hearing Examiner issued a Procedural Order to grant three additional interventions (Biddeford Internet Corporations d/b/a Great Works Internet (GWI), Conversent Communications (Conversent), and Cornerstone Communications (Cornerstone) and to set a preliminary schedule. On January 15, 17, and 23, and February 3, 2003, the Hearing Examiner issued Procedural Orders adjusting the case schedule and outlining further instructions and an initial list of issues to be litigated in the proceeding. On January 22nd, the CLEC Coalition and Cornerstone Communications also filed a list of initial issues. On February 3, 7, and 14, 2003, Verizon submitted responses to Staff's and other parties' issues and questions. On February 18, 2003, both Staff and the CLEC Coalition filed a list of issues that Verizon should attempt to address in its testimony. On February 24, 2003, the Hearing Examiner issued a Procedural Order establishing a schedule for testimony and discovery. On March 3, 2003, the Commission suspended the Verizon tariff for a second time to allow additional time to review it. On March 24, 2003, Verizon witnesses filed panel testimony. Staff issued its first set of data requests on the Verizon testimony on April 1, 2003, to which Verizon responded on April 22nd and 23rd. On May 20, 2003, Verizon issued discovery requests to GWI, to which GWI responded on May 27th.

[4]Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al.*, FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO)*.

conference was held on September 16, 2003, to discuss with the parties the potential impact of the *TRO* on the wholesale tariff. On September 18, 2003, the Examiner issued a Procedural Order summarizing the September 16th case conference and setting deadlines for Verizon to file new red-lined tariff schedules based on the changes required by the *TRO*.

On October 16, 2003, the CLEC Coalition filed a Motion for Issuance of Temporary Order. In its Motion, the CLEC Coalition objected to a letter sent by Verizon on October 2nd which stated that Verizon would be discontinuing the provisioning of certain UNEs in compliance with the *TRO*. On October 21, 2003, the Hearing Examiner issued a Procedural Order stating that Verizon had correctly identified those UNEs that the FCC eliminated from the TelAct's section 251 unbundling requirements and that while changes in terms and conditions caused by the *TRO* would be litigated in this proceeding, the Commission would not re-litigate the decision by the FCC to eliminate specific UNEs from section 251's requirements. Finally, the Examiner stated that the Commission had not anticipated the need to address Verizon's continuing obligations under section 271 in this proceeding and that the Advisors would further consider the issues and determine the next steps.

On December 16, 2003, a case conference was held. After discussion, the Hearing Examiner determined that before hearings on the substance of the Wholesale Tariff could be held, legal briefing was necessary on two issues: (1) whether the Commission had authority, under either state or federal law, to require Verizon to tariff its obligations to continue providing UNEs under section 271 of the TelAct and whether it could set the rates for those obligations; and (2) whether the Commission has the authority, under either state or federal law, to order Verizon to continue providing line-sharing at Commission-set TELRIC rates.

On January 16, 2004, Initial Briefs were filed by Verizon, the CLEC Coalition, and the Consolidated Intervenors (GWI, OPA and Cornerstone). The same parties filed Reply Briefs on January 30, 2004.

Before a decision could be reached by the Commission on the legal issues, the D.C. Circuit Court of Appeals issued its decision in *USTA II*, [5] the appeal of the *TRO*. Because *USTA II* was directly relevant to many of the legal issues raised in this Docket, the Hearing Examiner issued a Procedural Order on March 4, 2004, allowing all parties to supplement previously filed briefs to address the impact of the D.C. Circuit Court decision on their positions in this case. On March 26, the Consolidated Intervenors filed a supplemental brief, as did Verizon.

On July 23, 2004, the Hearing Examiner issued her Report recommending that we find that that Verizon must include all of its wholesale offerings, including UNEs

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[5] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II*).

provided pursuant to section 271, in its state wholesale tariff. The Examiner also recommended that we find that Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271. Finally, the Examiner recommended that we decline the opportunity to exercise any authority we might have to set rates for section 271 UNEs. In addition to serving her Report on the parties to this proceeding, the Examiner also served the Report on the parties to Docket No. 2004-135, Verizon's Request for Arbitration, pursuant to our June 11, 2004 decision in that case to consolidate the Arbitration proceeding with this Wholesale Tariff proceeding. All parties to both cases were given an opportunity to file exceptions.

On August 6, 2004, Verizon, Conversent, Cornerstone, the Association for Local Telecommunications Services (ALTS), Covad Communications (Covad), the CLEC Coalition, United Systems Access Telecom, Inc. (USA Telephone), AT&T Communications of New England, Inc. (AT&T), and GWI filed Exceptions to the Examiner's Report. The arguments from all parties in the three rounds of briefs and exceptions are summarized below along with our analysis and decision.

III. COMMISSION AUTHORITY TO REQUIRE TARIFFING OF SECTION 271 OFFERINGS

A. Introduction

As will be explained in detail below, at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under sections 251/252 of the TelAct were synonymous with its section 271 unbundling obligations. Thus, we made no distinction between the two potentially differing obligations; we simply required a wholesale tariff. Since that time, the *USTA I*[6] decision was released, the FCC issued its *TRO,* and, most recently, the *USTA II* decision was issued. The impact of these three decisions on the issue at hand can be summed up as follows: today an ILEC's 251/252 obligations are narrower (in most respects[7]) than its 271 obligations. The CLECs contend that Verizon must now amend its proposed wholesale tariff to include its section 271 unbundling obligations. Verizon argues that the FCC has exclusive jurisdiction over matters relating to its 271 obligations and that this Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations.

B. Applicable Law

[6]*United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) *(USTA I).*

[7]In a recent order in the *Skowhegan Online Proceeding,* we found that subloops were a requirement under Section 251 but not a requirement under Section 271. *Investigation of Showhegan Online's Proposal for UNE Loops,* Docket No. 2002-704, Order (April 20, 2004), and Order Denying Reconsideration (June 16, 2004).

1. Difference Between Section 251 and 271 UNEs

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard.[8] Thus, Checklist Item No. 2 requires an ILEC to meet all of the 251 and 252 unbundling and pricing standards, which the FCC limited in the *TRO* to specific types of loops, subloops, and transport.[9]

Checklist Items Nos. 4, 5, 6, and 10 require ILECs to provide unbundled access to loops, transport, switching and signaling. The FCC has explicitly found that, despite elimination of a number of UNEs under section 251, ILECs must continue to provide access to those UNEs under section 271.[10] However, none of these other checklist items, unlike Checklist Item No. 2, cross reference sections 251(c)(3) and 252(d)(1). Thus, according to the FCC in the *TRO*, UNEs unbundled under Checklist Items Nos. 4, 5, 6 and 9 must only meet the "just and reasonable" standard of 47 U.S.C. §§ 201-202 and not the TELRIC standard required under section 251.[11]

2. State Commission Authority in 271 Enforcement Matters

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[8]In the *TRO*, the FCC retained its earlier definition of "necessary" ("...a proprietary network element is 'necessary' within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.") and adopted a new definition of "impairment" ("A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.") *TRO* at ¶¶ 170, 84.

[9]*USTA II* vacated the *TRO*'s findings regarding mass market switching, thereby effectively eliminating switching as a 251 UNE.

[10]*TRO* at ¶ 653.

[11]*TRO* at ¶ 656.

In the FCC's Order granting Verizon 271 authority in Maine,[12] the FCC stated:

> Working in concert with the Maine Commission, we intend to monitor closely Verizon's post-approval compliance for Maine to ensure that Verizon does not "cease [] to meet any of the conditions required for [section 271] approval.[13]

The FCC referred readers of the *Maine 271 Order* to its *Kansas/Oklahoma 271 Order*, for a more complete description of the 271 enforcement process. The *Kansas/Oklahoma 271 Order* states:

> Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.[14]

(emphasis added). Thus, the FCC recognized the important role that state commissions would play in enforcing the requirements of section 271. Of more importance, however, is the *Kansas/Oklahoma 271 Order*'s citation to the *New York 271 Order*, [15] which made several relevant findings. First, while noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the *New York 271 Order* specifically endorsed state commission authority to enforce commitments made by Verizon (then Bell Atlantic) to the New York Public Service Commission. The FCC stated that:

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[12] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Maine*, CC Docket No. 02-61, Order, 17 FCC Rcd 11676 (June 19, 2002) (*Maine 271 Order*).

[13] *Maine 271 Order* at ¶ 65.

[14] *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Oklahoma/Kansas 271 Order*).

[15] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order*).

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, *should be directed to that state commission rather than the FCC.*[16]

(emphasis added). Thus, the FCC explicitly recognized the authority of state commissions to enforce 271-related commitments including, but not limited to, performance assurance plans (PAPs). Indeed, the FCC noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order."[17]

3. Verizon's 271 Commitments to the Commission

Turning to Verizon's commitments here in Maine, as stated above, Verizon committed to the following relevant conditions, contained in the March 1, 2002, letter from the Commission:

> 1. Verizon will file a wholesale tariff for Maine no later than October 1, 2002. In the interim, CLECs shall be allowed to amend their interconnection agreements with Verizon in such a manner that enables them to negotiate the inclusion of a single UNE (and any terms and conditions related to the single UNE) rather than be required to sign a multi-part or omnibus amendment which contains provisions unrelated to the single UNE.[18]

In our April 10, 2002 Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, we explicitly conditioned our support of Verizon's 271 application upon Verizon's compliance with the list of conditions contained in our March 1, 2002 letter to Verizon, including its commitment to file a wholesale tariff. Specifically, we stated:

> The MPUC finds, based upon the record before us, including the commitments made by Verizon in its March 4, 2002 letter

[16] *New York 271 Order* at ¶ 452.

[17] *New York 271 Order* at n. 1353.

[18] Commission's 271 Letter.

> to the MPUC, that Verizon meets the Section 271 Competitive Checklist.[19]

Verizon's commitment to file a wholesale tariff for Maine alleviated certain concerns we had regarding the ability of individual CLECs to negotiate interconnection agreements. Specifically, during the course of our 271 proceeding, we heard from a number of CLECs regarding the difficulties and delays they encountered with Verizon when trying to re-negotiate or amend their interconnection agreements. We found that requiring Verizon to submit a wholesale tariff would simplify the interconnection process for CLECs and provide a single forum for litigating disputes and thus we explained in our 271 Report to the FCC that:

> Unlike some other states, Verizon does not have a Statement of Generally Available Terms (SGAT) or wholesale tariff for the State of Maine. Availability of a wholesale tariff would greatly reduce the time required to effect a valid contract and would also eliminate the possibility of "tying" unrelated sections of an interconnection agreement together when trying to add new terms to an existing agreement. Thus, at our request, Verizon has agreed to file a wholesale tariff for our review by October 1, 2002. This will provide us an opportunity to review all of the terms and conditions that Verizon imposes on CLECs purchasing wholesale services.[20]

Thus, we found the filing of a wholesale tariff encompassing all of Verizon's wholesale obligations would benefit the CLECs, Verizon, and the Commission by consolidating our review of Verizon's wholesale terms and conditions.

C. Positions of the Parties

1. Verizon

Verizon's initial brief did not directly respond to the Hearing Examiner's question concerning Commission authority to require Verizon to tariff its 271 obligations. In its arguments concerning the availability of specific elements, Verizon

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[19]Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) (271 Report to FCC) at p. 1.

[20]271 Report to FCC at p. 7.

admitted that in paragraph 653 of the *TRO*, the FCC recognized that former Bell Operating Companies (BOCs) have ongoing access obligations under section 271 of the TelAct but argued that nothing in the TelAct gives a state commission any power to interpret or enforce section 271 requirements. According to Verizon, only the FCC may issue regulations relating to 271 UNEs and only the FCC may set rates for these UNEs. Verizon maintained that the pricing standard set by the FCC for 271 network elements, "just and reasonable," is not the same as the TELRIC standard used for section 251 UNEs.

In its reply brief, Verizon acknowledged that the Commission may play a role in enforcing 271 obligations – for example, by administering the PAP and Carrier to Carrier Guidelines – but argued that this in no way suggests that the FCC has delegated, or could delegate, to state commissions the authority to determine, in the first instance, whether section 271 requires the unbundling of a particular network element, independent of section 251 requirements. Finally, although Verizon did not specifically address state authority under section 271 in its Supplemental Brief, Verizon stated that the "Commission plainly has no authority to order additional unbundling of network elements under the TelAct."

In its Exceptions, Verizon argued that, even if the FCC orders cited by the Examiner contained a delegation of section 271 enforcement authority to state commissions, after *USTA II* any such delegation would be illegal. Verizon claimed that Congress had expressly limited the states' role in section 271 matters to consultation with the FCC during its review of a 271 application and that any "cooperative enforcement" envisioned by the FCC was limited to a monitoring role.

Verizon also argued that requiring it to file a wholesale tariff at the Commission violated federal law. Specifically, Verizon argued that two federal appellate decisions, *Wisconsin Bell, Inc. v. Bie, et al.*, 340 F.3d 441 (7th Cir. 2003) and *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002), had found that state commissions could not require an ILEC to tariff its TelAct unbundling and interconnection obligations with the state commissions. Verizon contended that the rationale motivating our desire for a state wholesale tariff, namely concerns with difficulties and delays associated with individual negotiations, had been struck down by both courts. Thus, according to Verizon, the two federal decisions "are cause for serious reservation" regarding whether the Commission should "continue to expend resources on state wholesale tariffing inquiries."

2. Consolidated Intervenors

In their initial brief, the Consolidated Intervenors stated that the FCC "took pains" to confirm that section 271 creates independent access obligations for BOCs and cited paragraphs 653 and 655 of the *TRO*. They also pointed to the fact that this Commission conditioned its support of Verizon's 271 Application to the FCC on Verizon's willingness to adhere to a number of requirements that it would not otherwise be required to meet under section 251.

In their reply brief, the Consolidated Intervenors urged the Commission to reject Verizon's argument that we do not have authority to enforce 271 obligations. They pointed to the history of this case, and the fact that Verizon filed the wholesale tariff in compliance with a condition set by the Commission during its 271 review, as evidence of the Commission's authority. They asserted that Verizon's argument that the Commission has no power to regulate its wholesale tariff "constitutes an outright repudiation of a fundamental premise of the agreement" in the 271 case.

In their Supplemental Brief, the Consolidated Intervenors stated that *USTA II* confirms that Verizon has section 271 obligations that are independent of its obligations under section 251. They also interpreted the *USTA II* decision to confirm that the *TRO* does not impact a state commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs.

The Consolidated Intervenors filed separate Exceptions, however, all three parties (GWI, OPA, and Cornerstone) concurred with the Examiner's analysis of the differing section 251 and section 271 unbundling obligations and her recommendation that Verizon be required to include its section 271 unbundling obligations in the wholesale tariff.

3. <u>CLEC Coalition</u>

In its brief, the CLEC Coalition stated that the authority for the Commission to require Verizon to tariff its UNE obligations under section 271 comes from the Congressional framework of section 271, Verizon's explicit agreement to the UNE tariffing obligations in Verizon's March 4, 2002 letter, and the plain and unambiguous declarations of the FCC in paragraphs 653-655 of the *TRO*. The CLEC Coalition also concluded that the FCC expressly found that it was the responsibility of both the FCC and state commissions to ensure compliance with section 271, including setting prices for UNEs established pursuant to section 271. Finally, the CLEC Coalition argued that the Commission must exercise its 271 authority over Verizon, because if the state does not, no one will; the FCC is simply without the resources. The absence of state action would have a drastic effect on the competitive landscape in Maine.

In their reply brief, the CLEC Coalition concurred with the Consolidated Intervenors and urged the Commission not to let Verizon break its agreement to meet the obligations it agreed to during the 271 approval process. The CLEC Coalition's exceptions generally supported the Examiner's Report and included specific comments on issues addressed in other sections of this order.

4. <u>Other CLECs</u>

ALTS, Covad, USA Telephone, AT&T, and Conversent, though they did not participate in the briefing phase of this proceeding, filed exceptions to the Report. ALTS and Covad filed joint exceptions which concurred with the Examiner's conclusion that we have authority to "ensure Verizon's ongoing compliance with the competitive checklist of section 271" and that we can, and should, require Verizon to file a wholesale tariff including all of its unbundling obligations. ALTS and Covad dismissed Verizon's arguments regarding exclusive FCC jurisdiction as contrary to the existing and continued authority of state commissions to enforce PAPs. USA Telephone's exceptions focused on pricing issues, though they did appear to support the recommendations regarding Commission authority to require a wholesale tariff.

Conversent's exceptions supported the Examiner's conclusion that Verizon should include all of its wholesale offerings, including section 271 UNEs, in its Maine wholesale tariff. Conversent claimed that such a requirement will reduce the risk that Verizon will unilaterally cease providing high-capacity DS1 and DS3 loops and dark fiber. Conversent countered Verizon's arguments concerning the voluntary nature of its PAP commitments and pointed out that if those commitments were entirely voluntary, Verizon could stop making payments at any time – a result not contemplated by the FCC, state commissions or CLECs. Conversent urged us to enforce the 271 conditions and commitments made by Verizon and to specifically require Verizon to include DS1 and DS3 high-capacity loops in its wholesale tariff. Conversent argued that neither the *USTA II* decision nor the Court's mandate eliminated the 251 unbundling requirement for high capacity DS1 and DS3 loops – the decisions only vacated the sub-delegation to the states and not the national finding of impairment. Conversent argued that we are not preempted from requiring Verizon to include those UNEs in the state wholesale tariff because such a requirement does not substantially prevent the implementation of section 251 or the purposes of the Act.

AT&T concurred with the Examiner's recommendations concerning our jurisdiction over 271 unbundling requirements and the need for Verizon to include all of its unbundling obligations in its wholesale tariff.

D. Analysis

As stated above, at the time of Verizon's 271 proceeding, Verizon's unbundling obligations under 251/252 of the TelAct were the same as its 271 unbundling obligations and thus there was no need to distinguish between the two types of requirements. Now that they are different, we must determine both the scope of Verizon's commitment to file a wholesale tariff and, if that commitment includes Verizon's 271 unbundling obligations under Checklist Items 4, 5, 6, and 10, our authority to enforce such a commitment.

1. Scope of Verizon's commitment

Interpretation of Verizon's commitment to file a wholesale tariff requires an examination of the language of the letters exchanged with Verizon during our 271 proceeding and as well as a review of the underlying purposes of the condition. Neither the Commission's 271 Letter nor the Dinan Letter contain any language that would limit Verizon's commitment to file a wholesale tariff to its 251 obligations. Thus we must turn to the underlying purposes of the condition for guidance. During our 271 proceeding, we heard numerous complaints from CLECs regarding the difficulties and delays associated with negotiating amendments to interconnection agreements with Verizon. Today, we continue to hear complaints from CLECs regarding difficulties with interconnection agreements. In the Verizon Arbitration proceeding,[21] CLECs complained that Verizon had not responded to requests from CLECs to negotiate amendments to their interconnection agreements.

We find that a reasonable interpretation of the condition we placed upon Verizon during our 271 proceeding, and the condition it committed to fulfill, requires Verizon to include both its section 251 and 271 unbundling obligations in its wholesale tariff filed in Maine. Indeed, the reasons underlying the condition apply even more today when the legal and regulatory landscape has become increasingly confusing and complex, making it difficult to completely address and negotiate all of the issues that may arise in an interconnection agreement negotiation.

2. Our authority to enforce Verizon's commitment

While Verizon is correct that section 271(d)(6) allows for continued enforcement of an ILEC's 271 obligations by the FCC, Verizon ignores the FCC's directives regarding enforcement of ILEC commitments to state commissions and fails to explain adequately why states have authority over some section 271 issues, such as PAPs, and not others. Verizon also does not address the requirement, pursuant to section 271(c)(2)(A)(ii), that its interconnection agreements, subject to state arbitration pursuant to section 252(b), include access and interconnection that meets the requirements of section 271(c)(2)(B) – the competitive checklist. We find, upon consideration of each of these factors, that we do have authority to enforce Verizon's commitment to file a wholesale tariff with us that includes both its section 251 and 271 obligations.

Under section 271, state commissions do not have authority to approve an ILEC's 271 application but are allowed to consult with the FCC concerning an ILEC's 271 application. In fulfilling that role, the FCC encouraged state commissions to conduct extensive fact-finding proceedings to ascertain whether the terms, conditions, and prices of an ILEC's wholesale operations met section 271's standards. While the FCC made the ultimate finding of compliance, it relied heavily upon the work of state commissions. Indeed, the FCC noted in its *Maine 271 Order*:

> 3. We wish to recognize the effort and dedication of the Maine Public Utilities Commission (Maine Commission). In smaller, more rural states, the section 271 process taxes the resources of the state commissions, even more heavily than

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[21] *Investigation Regarding Verizon Maine's Request for Consolidated Arbitration*, Docket No. 2004-135, Order (June 4, 2002).

> in other states. Yet, by diligently and actively conducting proceedings beginning in 1997 to set TELRIC prices, to implement performance measures, to develop a Performance Assurance Plan (PAP), and to evaluate Verizon's compliance with section 271 of the Act, the Maine Commission laid the necessary foundation for our review and approval. We are confident that the Maine Commission's efforts, culminating in the grant of this application, will reward Maine consumers by making increased competition in all markets for telecommunications services possible in the state.
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> . . .
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> 5. We rely heavily in our examination of this application on the work completed by the Maine Commission. . . .

Thus, the FCC explicitly acknowledged the prominent role the Commission played in evaluation of Verizon's 271 Application and the depth of the Commission's understanding of the particular circumstances of the competitive market in Maine.

As indicated above, the FCC has clearly stated that states may enforce commitments made to them by ILECs during the 271 process. The FCC's statement regarding enforcement of state 271 commitments and our significant experience with the issues associated with the wholesale tariff, provide us with legal authority and substantive expertise to enforce Verizon's wholesale tariff commitment. We will exercise this authority by requiring Verizon to honor the commitment it made to us in the 271 process to file a wholesale tariff which includes all of its unbundling requirements and then evaluating that tariff for compliance with state and federal standards. If a party believes the Commission has not applied the correct standard, the party may file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II*.[22]

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[22]We do not find Verizon's reliance upon the Sixth Circuit's *Verizon North v. Strand* decision and the Seventh Circuit's *Bie v. Worldcom* decision persuasive. In both the *Strand* and *Bie* cases, the issue before the court was whether a state commission could order a complete by-pass of the TelAct interconnection requirements – a matter not at issue in this case. Specifically, we never envisioned that our wholesale tariff would replace the need for an interconnection agreement, only that it would simplify the process by providing a "floor" of standard terms and conditions, which is consistent with Verizon's own practice of offering an interconnection agreement template with standard offerings. Further, we note that section 252 of the TelAct specifically provides that a state commission may consolidate the litigation associated with multiple arbitration

Verizon's express agreement to file a wholesale tariff, in its letter confirming that it would abide by the Commission's conditions for recommending Section 271 approval, provide us with an independent basis for requiring Verizon to file such a tariff now. We assume Verizon did not lightly make its commitment, and that Verizon understood that the Commission, in accepting that commitment, would not condone or allow conduct inconsistent with the obligations thus undertaken. It follows, then, that Verizon by its acceptance of the condition (for which Verizon obtained Commission support for its Section 271 application) granted to the Commission the authority to ensure that Verizon fully complied with the wholesale tariff obligation defined by Section 271. This is not to suggest that the Commission has the independent authority to define the scope of those obligations where the FCC has clearly spoken; merely that, in light of Verizon's commitment, the Commission has an independent role in determining whether those obligations have been met.

IV. COMMISSION AUTHORITY TO SET PRICES FOR § 271 OFFERINGS

A. Introduction

Having determined that Verizon must tariff its 271 obligations, we consider the extent of our authority to set rates for those 271 offerings. Under state law, our authority is clear: 35-A M.R.S.A. § 301 requires that rates be just and reasonable and gives the Commission the authority to determine whether a utility's rates meet this standard. The Commission's authority under federal law is not as clear and requires a review of sections 251 and 252 of the TelAct, the *TRO*, and *USTA II*.

B. Applicable Law

Section 252 of the TelAct requires state commissions to apply the pricing standards found in section 252(d) to set the rate for interconnection pursuant to section 251(c)(2) and for UNEs unbundled pursuant to section 251(c)(3). Section 252(d) requires that the rate be based upon cost, and be nondiscriminatory, and further provides that it may include a reasonable profit. This standard has been interpreted by the FCC (and upheld by the Supreme Court[23]) to require forward-looking TELRIC pricing for all UNEs unbundled pursuant to section 251 of the TelAct.

Section 271 does not contain its own pricing standard. Section 271(c)(2)(B)(ii) (Checklist Item No. 2) requires that ILECs make UNEs available "in

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requests. Given that Verizon's pending *Arbitration* proceeding involves over 100 carriers and the same issues associated with the wholesale tariff, we believe that our approach of consolidating the two proceedings and developing a baseline wholesale tariff as a first step in the interconnection agreement process achieves the underlying goal of the TelAct, i.e., encouragement of interconnection between competitors and ILECs.

[23] *See AT&T v. Iowa Utilities Bd.*, 525 U.S. 355 (1999)(*Iowa II*).

accordance with the requirements of section 251(c)(3) and 252(d)(1)" while sections 271(c)(2)(B)(iv, v, vi, and x) (Checklist Items Nos. 4, 5, 6 and 10), which provide for access to loops, switching, trunk side transport, and databases, make no reference to a pricing standard.

In the *TRO*, the FCC interpreted the pricing provisions of the TelAct as requiring TELRIC pricing for section 251(c)(3) elements only and "just and reasonable" rates for 271(c)(2)(B)(iv, v, vi, and x) elements. The FCC found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[24] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Communications Act empowered the Commission to adopt rules that implement the TelAct, the FCC found that it had authority to impose the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act. The FCC went even further and found that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[25] The FCC noted that prices similar to those currently charged in ILEC access tariffs would likely meet the standard, as would any prices negotiated through arms-length agreements.[26]

In its March 2004 decision in *UTSA II*, the D.C. Circuit affirmed the FCC's finding that the pricing standard for UNEs unbundled pursuant to § 271 is found in sections 201-202 of the TelAct and not section 251. Specifically, the court upheld the FCC's determination that TELRIC pricing was not required under section 271; all that was required was that the prices not be "unjust, unreasonable or discriminatory."[27] The Court did not address the FCC's assertion that it, rather than state commissions, should determine whether the price for a 271 element meets the just and reasonable standard. The Court did find, in the context of state unbundling authority, that claims relating to the preemptive scope of the *TRO* were not ripe, because no party had challenged a specific state decision.

Since the *USTA II* decision was released, several state commissions have directly addressed the issue of state authority to review pricing for 271 elements. The Massachusetts Department of Telecommunications and Electricity recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its §271 obligations because those services are

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[24] *TRO* at ¶ 656.

[25] *TRO* at ¶ 664.

[26] *Id.*

[27] *USTA II* at 53.

jurisdictionally intrastate.[28] On June 21, 2004, the Tennessee Regulatory Authority (TRA) issued an order which sets a 271 switching rate in the context of a section 252 arbitration proceeding.[29] Bellsouth has appealed that decision to the FCC and asked for an emergency declaratory ruling by the FCC that the action taken by the TRA violates the TelAct, FCC Orders, and federal precedent. The FCC has asked for comment on Bellsouth's petition.

C. Position of the Parties

1. Verizon

In its briefs, Verizon argued that the *TRO* makes clear that the FCC has exclusive jurisdiction over the pricing of 271 UNEs and that the "just and reasonable" standard, rather than TELRIC, should be applied to the rates for those elements. Verizon contended that even if TELRIC prices meet the "just and reasonable" standard, there is nothing that precludes Verizon from charging higher rates that also meet the "just and reasonable" standard. According to Verizon, the Commission would have no grounds for insisting on the lower TELRIC rate. Verizon also pointed out that while state commissions have authority to set rates for section 251 UNEs, there is no similar grant of authority for section 271 UNEs.

In its exceptions, Verizon urged us to clarify that all matters involving prices for section 271 elements are "deferred" to the FCC. Verizon argued that, because of its belief that we have no authority to define UNEs under section 271, we also would have no authority to set prices of any such UNEs. Verizon contested the grounds underlying the Examiner's finding that we have authority to set prices for section 271 UNEs, contending that the Examiner places too much significance on the Massachusetts DTE order cited above and that Verizon's petition for reconsideration of that order is still pending. Verizon also argued that Congress's silence on the issue of state enforcement of 271 obligations does not imply that states do, in fact, have any authority. Finally, Verizon alleged that *USTA II* "flatly rejected" any sub-delegation of FCC powers to state commissions.

Verizon also challenged the Examiner's recommendation that the Commission require Verizon to offer section 271 UNEs at TELRIC prices until Verizon obtained approval from the FCC of its 271 UNE rates. Verizon alleged that the FCC "ruled unequivocally" that TELRIC should not apply to section 271 UNEs and that the Examiner's recommendation was "based on a misunderstanding" of the process the

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[28] *Proceeding by the DTE on its own Motion to Implement the Requirements of the FCC's TRO Regarding Switching for Large Business Customers Serviced by High-Capacity Loops*, DTE 03-59-A (Jan. 23, 2004), fn. 9.

[29] *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-__ (July 1, 2004) at 1.

FCC intends to use for section 271 UNEs. Finally, Verizon urged the Commission to adopt the FCC's "safe harbor" pricing standards for section 271 UNEs, i.e. special access rates or commercially agreed upon prices.

2. CLECs

In its briefs, the CLEC Coalition argued that by agreeing to submit a wholesale tariff, Verizon agreed to file rate schedules for 271 UNEs which the Commission could review, accept, and/or reject. The Consolidated Intervenors did not directly address the Commission's authority to set prices for 271 UNEs because they believed, despite the specific questions posed in the Hearing Examiner's Procedural Order, that pricing issues would be addressed later.[30]

In their exceptions, a number of CLECs challenged the Examiner's analysis and recommendation that we refrain from exercising any section 271 pricing authority that we might have. The CLEC Coalition argued that the FCC's statements in paragraph 664 of the *TRO* should be viewed as a "limited statement" regarding the FCC's assertion of jurisdiction over section 271 pricing and that we should, in fact, exercise our 271 pricing authority. Specifically, the CLEC Coalition argued that paragraph 664's emphasis on pre-entry review by the FCC indicates a desire by the FCC not to "reach down to affect pricing in existing 271 approvals." The CLEC Coalition asserted that the FCC did not establish itself as the initial rate setting body in "a circumstance such as the one in Maine" but rather simply asserted its authority to review rates in the event of a disagreement between Verizon and the state commission. The CLEC Coalition urged us to exercise our authority to ensure that prices are conducive to competition and to provide reasonable transition for any rate changes. Finally, the CLEC Coalition endorsed the Examiner's recommendation that current TELRIC-based rates remain in place until we approve new 271 rates. The Coalition, however, urged us not to determine at this time that FCC-approved prices automatically be allowed to go into effect.

ALTS and Covad argued that the Supreme Court, in *Iowa II,* clearly held that while the FCC could establish the pricing methodology to be used for setting rates under section 252, it was the states that actually applied the methodology and set the rates. ALTS and Covad contended that we have an ongoing role in ensuring that the rates charged by Verizon under section 271 meet the appropriate standards. ALTS and Covad dispute the Examiner's "preemptive preemption" approach of finding preemption before finding an actual conflict with an FCC determination on the merits of an issue. They argued that the question is not whether a state pricing decision thwarts the policies of the *TRO* but, instead, whether it thwarts the requirements of section 251 and

[30]It is true that pricing issues were scheduled to be addressed later in the proceeding. However, parties should have reasonably expected that if a specific question relating to the legal underpinnings of the Commission's authority was posed for briefing, the question needed to be addressed.

271 of the TelAct. Finally, they argued that, contrary to Verizon's assertions, the FCC did not forbid the application of forward-looking pricing to section 271 UNES but rather only stated that TELRIC pricing was not required. Thus, a state commission could find that TELRIC pricing met the "just and reasonable" standard or that another forward-looking pricing methodology could be used.

USA Telephone also contended that we should exercise our authority to set prices for section 271 UNEs in order to protect the competitive environment in Maine and to meet the needs of Maine consumers. USA Telephone argued that we must be prepared to exercise our authority to encourage stability in the market. The current instability makes it very difficult for CLECs to secure the necessary capital to implement planned facility build-outs. While not suggesting a permanent status *quo*, USA Telephone did urge consideration of the competitive impacts during any transitions.

AT&T argued that the Examiner's recommendation that we refrain from exercising our pricing authority over section 271 UNEs was unwarranted because it was based upon the mistaken belief that the FCC had asserted exclusive jurisdiction in the *TRO.* AT&T pointed out that the Examiner's Report itself admitted that the FCC did not specifically preclude state commissions from evaluating compliance with the federal "just and reasonable" standard. AT&T urged us to preclude Verizon from raising its 271 UNE rates above TELRIC until it obtained specific approval for its new rates from the FCC.

D. Analysis

Determining the scope of the Commission's 271 pricing authority involves both interpretation of the *TRO* and a determination under both state and federal law of the Commission's authority to set rates for intrastate services and products. First, Verizon is correct that the FCC stated in the *TRO* that it would review rates for 271 UNEs in the context of 271 applications and enforcement proceedings. However, as described above, and as acknowledged by Verizon, the FCC has already delegated significant authority to state commissions to enforce 271-related requirements. While the FCC stated it would conduct the review, the FCC did not specifically preclude state commissions from also conducting such an evaluation. Thus, we find, for the reasons discussed below, that we have the authority to require Verizon to file prices for its section 271 UNEs in its wholesale tariff and that we may review those prices for compliance with the FCC's "just and reasonable" standard.[31]

There are a number of factors which generally support a state commission's authority to set prices for section 271 UNEs. First, the standard the FCC has announced for section 271 UNEs, "just and reasonable," is the same standard the Commission applies under 35-A M.R.S.A. § 301. Thus, the Commission has

[31] It is also possible that we may order Verizon to unbundle certain elements pursuant to state law, in which case we will use state law pricing standards to evaluate Verizon's proposed rates.

considerable experience in applying this standard to the rates of Verizon and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support an ILEC's claim that particular rates are just and reasonable. In addition, as both CLECs and the National Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the *TRO*, the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[32] clearly establish that states, not the FCC, set rates for UNEs. Indeed, the Supreme Court stated that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions .... The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[33]

Finally, state commissions have authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct. Section 271(c)(2)(A)(ii) requires that ILECs provide access and interconnection which meet the requirements of the 271 competitive checklist, i.e. includes the ILEC's 271 unbundling obligations. Thus, state commissions have the authority to arbitrate section 271 pricing in the context of section 252 arbitrations.

In addition to all of the supporting factors, we find that Verizon's commitment to file a wholesale tariff included a commitment to file prices for the elements included in the tariff. Indeed, if we do not require Verizon to file prices, its commitment to file a wholesale tariff becomes a hollow promise, given the complexities of the wholesale marketplace at this time. In addition, practical concerns, such as timely access to section 271 UNEs, require that we enforce Verizon's commitment by requiring it to file proposed rates for each of the section 271 UNEs. We do not foreclose the possibility that Verizon may also seek approval of such rates from the FCC. If it does obtain such approval, it may file those same rates with us and we will give the FCC's determination substantial weight during our review.

Until such time as we approve new rates for section 271 UNEs, adopt FCC-approved rates, or CLECs agree to section 271 UNE rates, Verizon must continue to provide all section 271 UNEs at existing TELRIC rates. We find this requirement necessary to ensure a timely transition to the new unbundling scheme. We have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the agreement of the parties. We note that the decision we reach

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[32] *Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000).

[33] *Iowa II,* 525 U.S. at 384.

today is consistent with the approach embodied in the FCC's Interim Rules, which require a six-month moratorium on raising wholesale rates.[34]

V. COMMISSION AUTHORITY TO ORDER LINE SHARING PURSUANT TO STATE LAW

A. Legal Authority

1. Line Sharing

In the *TRO*, the FCC overturned its earlier decision in the *UNE Remand Order*[35] and found that CLECs are not impaired without access to the high frequency portion of the loop (HFPL), i.e. access to line sharing. Specifically, the FCC shifted its focus from the revenues derived from a single service deployed using the HFPL to the potential revenues derived from all services that could be provided over the full functionality of the loop. Thus, the FCC concluded that the increased operational and economic costs of acquiring a stand-alone loop are offset by the increased revenue opportunities afforded by use of the whole loop for services such as voice, voice over xDSL, data and video services.[36] While the FCC declined to explicitly find that any decision by a state commission to require line sharing under state law was automatically preempted, in paragraph 264 it invited any party aggrieved by such a decision to seek a declaratory ruling from the FCC.

In *USTA II*, the D.C. Circuit upheld the FCC's line sharing decision, finding that:

> [E]ven if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment.[37]

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[34] Order and Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-338, FCC 03-313, (rel. August 20, 2004)(Interim Rules Order).

[35] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 (*UNE Remand Order*).

[36] *TRO at* ¶ 258.

[37] *USTA II at 45.*

Thus, under federal law, section 251 line sharing will only be available on a grandfathered basis for the next three years, with the price increasing each year until it reaches the full price of the loop, at which time unbundling will no longer be required.[38]

2. State authority to order unbundling

Recently, in the *Skowhegan OnLine* proceeding[39], we found that we have authority, pursuant to 35-A M.R.S.A. §§ 1306 and 7101, to order the unbundling of network elements not required by federal law when doing so meets a demonstrated need by CLECs and is consistent with both state and federal policies concerning broadband deployment. We predicated our decision in *Skowhegan Online* on an earlier decision in the *Mid-Maine Arbitration Case,*[40] in which we found that we had authority to order access to additional UNEs under section 252(d)(3) of the TelAct[41] and that 35-A M.R.S.A. § 1306[42] provided us with authority to designate additional UNEs so long as our actions did not conflict with federal law. We found in *Skowhegan Online* that section 1306 continued to provide us with independent authority under state law and that 35-A M.R.S.A. § 7101 provided additional authority to order unbundling where doing so will allow for further deployment of broadband, especially in rural areas. Thus, we found that unbundling pursuant to state law requires a showing that the lack of unbundling constitutes an unreasonable act or is insufficient when consideration is given to state law, public policy, and the potential impact of the unbundling on the availability of

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[38]Neither the *TRO* or *USTA II* directly addressed whether an ILEC's continuing unbundling obligations under section 271 include continued access to line sharing with the ILECs and we will not reach that issue in this Order.

[39]*Investigation of Skowhegan Online, Inc.'s Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004) and Order on Reconsideration (June 15, 2004).

[40]*Mid-Maine Telplus, Re: Request for Arbitration of an Interconnection Agreement with Bell Atlantic*, Order Addressing Subloop and Extended Link Issues (E3 and E7) – Part 2, Docket No. 98-593 (April 9, 1999) (*Mid-Maine*).

[41]Our holding was based upon the fact that there was nothing in the TelAct that provided the FCC with exclusive authority to designate UNEs. *Mid-Maine* at 3. Indeed, the FCC's *Local Competition Order* specifically provided that states had authority to order additional UNEs pursuant to state law and the FCC's Rules at that time specifically provided for state commission designation of additional UNEs during arbitration proceedings. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996). The *TRO* has since vacated both of those rules/findings.

[42]Section 1306 provides that, if the Commission determines that a term, condition, practice or act is unjust, unreasonable, insufficient, or unjustly discriminatory, the Commission may "establish or change terms, conditions, measurement, practice, service or acts, as it finds just and reasonable."

telecommunications services to Maine consumers. In addition, any decision to unbundle pursuant to state law must not conflict with federal law.

In our Order on Reconsideration in *Skowhegan Online*, we re-affirmed our earlier findings and pointed to other provisions of state law that supported our unbundling authority. Specifically, we found that the standards in 35-A M.R.S.A. § 301, requiring all utilities to provide "safe, reasonable and adequate facilities and service," as well as those set forth in 35-A M.R.S.A. § 711, granting us authority to order the joint use of wires and prescribe reasonable compensation and reasonable terms and conditions, supported unbundling. We emphasized section 7101's clear expression of the Legislature's policy objective of supporting broadband deployment throughout the state. Finally, we pointed out that the Law Court had already found that the Commission has all the implied and inherent powers necessary to implement the objective set forth in section 7101. *New England Telephone v. PUC*, 1997 ME 222. Thus, we found that the clear policy objectives contained in section 7101, when combined with our broad mandate to ensure that utility practices and rates are reasonable pursuant to section 1306, provided us with the necessary authority to require Verizon to unbundle its legacy copper network.

3. Federal Preemption

a. Definition of Preemption

The Supreme Court has held that "preemption will not lie unless it is 'the clear and manifest purpose of Congress.'"[43] If a federal statute contains an express preemption clause, the court will first focus on the plain wording of the clause, "which necessarily contains the best evidence of Congress' preemptive intent."[44] Similarly, savings clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."[45] Generally speaking, preemption will be found when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[46] What constitutes a sufficient obstacle, however, is a matter of judgment, informed by examining the statute as a whole and identifying its purpose and intended effects.[47]

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[43] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[44] *Id.*

[45] *Id.*

[46] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

[47] *Id.*

b. Language of the TelAct

Section 251(d)(3) of the TelAct states that the FCC may not preclude enforcement of any state commission decision establishing local exchange interconnection and access requirements which is consistent with section 251 and which "does not substantially prevent implementation of the requirements of this section." In the *TRO,* the FCC asserted that its interpretation of the requirements of section 251, i.e., its Rules, was intended by Congress to be included under the "requirements of this section" language of section 251(d)(3).[48] Thus, according to the FCC, any state decision that is inconsistent with the FCC's Orders or Rules (the so-called "federal regime") violates section 251(d)(3) and is preempted.

However, the FCC's assertion that its Rules are included in "the requirements of this section" language of section 251 was specifically rejected by the Eighth Circuit Court of Appeals in a decision concerning the FCC's *Local Competition Order,* which implemented the TelAct.[49] The Eighth Circuit held that section 251(d)(3) does not require state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.[50] It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."[51] While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eight Circuit's holding on section 251(d)(3).[52] Indeed, the FCC admits in footnote 611 of the *TRO* that the Eighth Circuit's interpretation of section 251(d)(3) is the law of the land and that mere inconsistency with the FCC's rules is not enough to trigger federal preemption. Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it automatically will be preempted. Instead, consideration must be given to whether the requirement is consistent with section 251 and whether it prevents its implementation.

In analyzing the legislative intent behind a statutory requirement that two mandates be consistent, courts have defined the word by its common usage, as found in the dictionary. *See e.g. Cross v. Warden, N.H. State Prison*, 644 A.2d 542, 543 (N.H. 1994)(the meaning of "consistent" is synonymous with "consonant" or "compatible."); *Ryan v. Roach Drug Co.*, 239 P. 912, 914 (Okla.1925)

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[48] *TRO* at 191.

[49] *See Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. on other grounds, AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999)(*Iowa I*).

[50] *Id.* at 806.

[51] *Id.*

[52] *See TRO* at ¶ 192, fn. 611.

("'Consistent' means not contradictory, compliable, accordant."). Courts have also concluded that two designs may be consistent even if one contains additional elements. *Lake City Corp. v. City of Mequon*, 558 N.W.2d 100, 104 (Wis.1997) ("so long as any issues addressed in both a master plan and an official map are not contradictory, the master plan is consistent with the official map").

The Supreme Court of Vermont addressed the meaning of section 251's "consistency" requirement in a challenge to an order of the Vermont Public Service Board requiring Verizon to make certain facilities or services available to CLECs pursuant to state law.[53] Verizon argued that the Board's order was inconsistent with federal law and not supported by independent state authority.[54] In holding that there was ample state authority to support the order and that the order did not contradict federal law, the Vermont court described how Congress intended the Act to work in conjunction with state regulatory commissions:

> The Telecommunications Act of 1996 fundamentally amends the Communications Act of 1934, the principal legislation that regulates telecommunications and established the FCC. . . . The use of a federal statute by a state board is consistent with the federal government's approach to telecommunications regulation, in which states are considered partners in regulation. In both the 1934 Act and the 1996 Act, Congress has taken pains to preserve the overlapping jurisdiction of the states and the federal government over the telecommunications industry. . . . Congress did not intend to occupy the field of telecommunications regulation, it took explicit steps to maintain the authority of state regulatory bodies to enforce and work within the Act.[55]

The court further explained that the "federal scheme does not outline any limitations on state authority to regulate above and beyond the minimum requirements of the Act . . . federal law sets only a floor, the requirements of which may be exceeded by state law."[56] Furthermore, the Vermont court emphasized that when

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[53] *In re Petition of Verizon New England Inc. d/b/a Verizon Vermont*, 795 A.2d 1196 (Vt. 2002).

[54] *Id.* at 1198.

[55] *Id.* at 1201.

[56] *Id.* at 1204.

compliance with a state commission's order does not interfere with a carrier's ability to comply with federal law, there is no conflict between the state and federal regulations.[57]

B. Positions of the Parties

1. Verizon

Verizon argued that the FCC has determined that CLECs are not impaired without unbundled access to line sharing. According to Verizon, where federal law sets forth the legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, "the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns." Citing section 251(d)(3) and "long-standing federal preemption principles," Verizon asserted that state commissions have no authority to override the FCC's determination that the unbundling of certain network elements is not required under the TelAct.

Verizon contended that the Commission has no independent authority under state law to impose additional unbundling requirements on Verizon, especially where the FCC has explicitly declared that the UNE is not required. Verizon further argued that the Commission does not have authority to order unbundling under section 271, but even if it did, Checklist Item No. 4 - the local loop - does not include separate access to the HFPL. Additionally, it argued that the pricing would not be TELRIC but would be "just and reasonable" which would require a "fact specific inquiry" conducted by the FCC.

In its Reply Brief, Verizon reiterated its position that "[t]he Commission is legally preempted from re-imposing unbundling obligations eliminated by the FCC's rulings in its *TRO*." In particular, Verizon disputed the CLECs' claim that the Commission has separate state authority to order line sharing and stated that, "where the FCC determines that an element should not be unbundled, a state may not lawfully override that determination." Verizon also refuted the CLECs' claim that the Commission can unbundle HFPL based on Maine specific facts.

In its Supplemental Brief, Verizon asserted that *USTA II* affirms the FCC's findings in the *TRO* on line sharing and unambiguously struck down the FCC's delegation of any unbundling authority to states.[58] Verizon also repeated its belief that the "Commission may not lawfully rely on state law to impose an unbundling obligation for line sharing, feeder subloops, OCN transport, entrance facilities or other UNEs expressly eliminated or curtailed by the FCC in the *TRO*." Referring to its previous statements concerning the absence of state law authorizing unbundling, Verizon argued that even if the state is authorized to order unbundling (which they insist, it is not), it

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[57] *Id.* at 1205.

[58] *USTA II* at 12.

may not do so in the case of line sharing because *USTA II* affirmed the FCC's decision in the *TRO* not to order line sharing because it discourages investment.

In its exceptions, Verizon objected to the Examiner's recommendation that we find that line sharing is a continuing 271 obligation under Checklist Item No. 4 but did not directly address state unbundling authority.

2. CLECs[59]

In their Brief, the Consolidated Intervenors pointed to the Commission's reliance upon Verizon's performance in Maine on the number of line sharing arrangements when it found Verizon in compliance with Checklist Item No. 4 during Maine's 271 proceeding. They contended that allowing Verizon to discontinue line sharing now effectively repudiates one of the conditions for the Commission's support and is anti-competitive. The Consolidated Intervenors argued that the FCC took pains to make clear that 271 requirements remain unaffected by the *TRO* (citing to ¶¶ 653, 655). They also suggested that the Commission follow the Pennsylvania Public Utilities Commission's lead in insisting that Verizon honor its 271 obligations. Finally, they cited 35-A M.R.S. A. § 7101 and argued that Verizon's proposal contradicts state telecommunications policy of promoting broadband, especially in rural areas, and urged us to order line sharing because it has been instrumental in creating and fostering competition in rural Maine.

In their Reply Brief, the Consolidated Intervenors again described how Verizon and the Commission relied on the provisioning of line sharing to show that Verizon had opened up its network to competition during the 271 review. The Consolidated Intervenors also cited paragraph 650 of the *TRO* which states that "Section 271(c)(2)(B) establishes an independent obligation for BOCs to provide access to loops...." and implored the Commission to enforce Verizon's 271 obligations and require continued line sharing.

In their Supplemental Brief, the Consolidated Intervenors stated that *USTA II* confirmed the FCC's conclusion that section 271's unbundling requirements for BOCs are independent of a BOC's section 251 requirements. They also argued that "the Court essentially held that the *TRO* has no impact whatsoever, from a legal standpoint, on a state Commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs."

As stated earlier, the Consolidated Intervenors filed separate exceptions. GWI argued that the Commission is not preempted from ordering line sharing and that, absent a court finding of preemption, the Commission should rely upon state law and policy to require unbundled line sharing. GWI argued that that no

[59]The CLEC Coalition did not brief the line sharing issues but "supports the arguments and conclusions set forth in the briefs on Line Sharing issues submitted by GWI, Conversant and the Office of the Public Advocate."

court had supported the FCC's proposition that any unbundling not required by the FCC's rules promulgated under section 251 is preempted by the "requirements of this section" language. GWI also pointed to the FCC's own acknowledgement of the limitations of the preemptive effect of the TelAct.

GWI's exceptions also addressed both the state policy supporting broadband deployment and the impact on that policy if line sharing is eliminated. GWI pointed out that the price for line sharing will rise in October and that if GWI has to raise its rates to cover increased costs, rural areas will be the hardest hit. GWI also argued that the FCC's line sharing decision was based upon a vision of the competitive landscape that does not match what is occurring in Maine and which has changed since the issuance of the *TRO* itself. Specifically, *USTA II* overturned the FCC's findings regarding the unbundling of mass market switching, which will limit the development of residential voice competition and the revenues associated with it.

GWI argued that the consequences of the FCC's actions seriously impact the future of competition in Maine, particularly for broadband services. According to GWI, while cable broadband service is available in urban and suburban areas, it is generally not available in rural areas. While Verizon broadband is available in many Verizon exchanges, over 40% of the customers are impacted by distance limitations. GWI asserted that there are ways to overcome those problems but they require CLEC access to Verizon line sharing and Verizon's cooperation in deploying the solutions. Thus, GWI urged us to exercise our authority to order line sharing and to set a fair rate for line sharing because failure to do so will result in constant litigation over interconnection agreement terms.

The OPA's exceptions urged us to order Verizon to continue to provide unbundled line sharing at affordable rates. The OPA argued that the FCC's decision regarding line sharing transition rates should not be interpreted as an FCC decision as to a just and reasonable rate under section 271 and that we should exercise our authority to make a determination regarding pricing. Absent Commission action, Maine consumers will be harmed by substantial increases in prices for xDSL and the potential destruction of the nascent broadband market in Maine.

Cornerstone's exceptions also recommended that we exercise our authority to order the continued availability of line sharing at reasonable rates. Cornerstone alleged that if the FCC's transition rates are allowed to go into effect, Cornerstone would not be able to serve many of the rural exchanges it intends to serve because it could not cover the exchange-specific costs. Cornerstone pointed out that if it and other Maine CLECs cannot economically serve these rural areas, it is unlikely that larger firms would be willing to invest in areas where the margins are so slim. For some of these exchanges, where neither Verizon nor the cable provider have deployed xDSL, this means that citizens and businesses in these areas will continue to lag behind more urban areas.

ALTS and Covad urged us to exercise our own authority to order line sharing under state law. They argued that sections 251 and 252 of the TelAct preserve the authority of state commissions to order unbundling and that the Supreme Court has refused to diminish the role of state commissions in overseeing local competition matters. Further, and contrary to the assertions of the FCC, the FCC cannot preempt state commissions by its orders or rules – the language of the TelAct preserving state authority controls. ALTS and Covad also pointed out that in the *TRO* the FCC did not preempt any existing state law unbundling requirements nor any future state law unbundling requirements – it acknowledged that such unbundling requirements may be consistent with the federal framework.

ALTS and Covad argued that facts supporting the FCC's decision not to unbundle line sharing on a national basis do not exist in Maine. Specifically, the FCC relied upon a carrier's ability to line-split with other carriers. However, in Maine, Verizon has not made line splitting operationally available in the same manner as its own retail voice and data bundles, thereby limiting CLECs' ability to line split. In addition, there are customer-impacting time constraints on line splitting, and different policies for submission of orders, and Verizon will not line split on resold voice service. Thus, ALTS and Covad urged the Commission to order the continued availability of line sharing at TELRIC rates.

AT&T supported the Hearing Examiner's determination that line sharing should be provided under section 271 but disagreed with the recommendation that we not exercise our authority to set prices for section 271 UNEs. Specifically, AT&T contended that the FCC had not asserted exclusive jurisdiction over section 271 pricing and that we need not refrain from exercising our section 271 authority in deference to a claim of exclusive jurisdiction that the FCC did not make.

C. Decision

We find that the FCC has not preempted our further consideration of whether to unbundle line sharing under state law. First, we agree with GWI that the Hearing Examiner essentially recommended preemptive preemption, i.e. that we not take action on the grounds that the FCC might attempt to preempt our action. We reject this approach because, as several parties pointed out, the FCC specifically declined to make a finding of preemption of both existing and future state unbundling decisions. While the FCC made clear that it might find preemption if the state decision met federal preemption standards, such a determination would need to be made based upon the specific circumstances of each case. The D.C. Circuit reached the same conclusion in *USTA II*, i.e., that claims relating to preemption were not ripe because no specific state decision had been challenged.

While we recognize the federal policies enunciated by the FCC in the *TRO*, we find that further exploration of the specific circumstances in Maine and state law policies and mandates are necessary in order to determine whether we should, in fact, exercise our authority under 35-A M.R. S.A. §§ 301, 711, 1306 and 7101 to order line sharing. As we stated in our *Skowhegan Online* decision, we take very seriously the Legislature's directive that all Maine citizens should have access to broadband services. The issues raised by GWI, Cornerstone, and the OPA concerning the viability of rural broadband deployment warrant a closer examination. It would be premature to find at this time, both on a factual and legal basis, that we have already been preempted by the FCC. In addition, there are several pending legal challenges at the FCC and in the courts which may provide further direction concerning the scope of any federal preemption relating to line sharing. Waiting for resolution of those proceedings, however, would mean delaying for an uncertain period a decision that might prevent a significant declaration in rural broadband deployment. Given our obligation to implement legislative directives. We think the more appropriate course is to proceed as expeditiously as possible to resolve the question of whether to order the unbundling of line sharing under state law.

If we decide to order line sharing pursuant to state law, we would also set the price for such sharing using state law standards, i.e., just and reasonable rates. We invite the parties to develop a record in this proceeding that would allow us to set rates at the conclusion of the proceeding.

VI. CONCLUSION

For the reasons discussed above, we order Verizon to include 271 UNEs and prices for those UNEs in its state wholesale tariff. We also determine that we have authority under state law to order the unbundling of line sharing and that we should proceed to investigate whether to exercise that authority.

Dated at Augusta, Maine, this 3rd day of September, 2004.

BY ORDER OF THE COMMISSION

____

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

ATTACHMENT 2

Attachment 2

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

July 23, 2004

EXAMINER'S REPORT

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before **noon on August 6, 2004**. It is expected that the Commission will consider this report at a special deliberative session on **August 12, 2004**.

I. SUMMARY

In this Order, we find that Verizon must include all of its wholesale offerings, including unbundled network elements (UNEs) provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct), in its state wholesale tariff. We also find that Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271. Finally, we decline the opportunity to exercise any authority we might have to set rates for section 271 UNEs.

II. BACKGROUND

In our Comments to the Federal Communications Commission (FCC) regarding Verizon's section 271 application for authority to enter the interLATA toll market (Verizon's 271 Application), we stated that the availability of a wholesale tariff or Statement of Generally Available Terms would greatly reduce the time required to effect a valid interconnection agreement and would also eliminate the perception shared by some CLECs that they were being "forced" to accept contract terms in their interconnection agreements that were unrelated to the terms that they were interested in negotiating.[1] Thus, in a March 1, 2002 letter from the Commission to Verizon (Commission's 271 Letter), we explicitly conditioned our support of Verizon's 271 Application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff. Verizon committed to meeting the Commission's conditions in a March 4, 2002 letter to the Commission and on November 1, 2002, Verizon submitted a schedule of terms, conditions and rates for Resold Services (P.U.C. No. 21) and the provision of Unbundled Network Elements and Interconnection Services (P.U.C. No. 20) along with cost studies for certain non-recurring charges and OSS-related issues.

In order to allow enough time to thoroughly examine the tariff, we suspended it on November 11, 2002. On November 13, 2002, the Hearing Examiner issued a Procedural Order requesting intervention and scheduling an initial Case Conference for December 10th. On December 4, 2002, prior to the Case Conference, the Hearing Examiner issued a second Procedural Order granting intervention to all parties that requested it[2] and proposing a schedule for processing this case. Between December

[1] *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine*, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) at 7.

[2] The parties include: OPA, ASCENT, WorldCom, Mid-Maine Telecommunications, and Oxford Networks. Mid-Maine and Oxford filed joint briefs as the CLEC Coalition.

2002 and August 2003, the parties conducted some discovery and attempted to identify all the issues that need to be litigated.[3]

On August 11, 2003, the Hearing Examiner issued a Procedural Order setting a hearing date of October 2, 2003, and attaching a list of issues that the Advisors intended to explore at the hearing. Before a hearing could take place, however, on August 21, 2003, the FCC issued its *Triennial Review Order (TRO)*.[4] A case conference was held on September 16, 2003, to discuss with the parties the potential impact of the *TRO* on the wholesale tariff. On September 18, 2003, the Examiner issued a Procedural Order summarizing the September 16th case conference and setting deadlines for Verizon to file new red-lined tariff schedules based on the changes required by the *TRO*.

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[3]At the Case Conference on December 10th, the proposed schedule was discussed and on December 17th the Hearing Examiner issued a Procedural Order to grant three additional interventions (Great Works Internet, Conversent Communications, and Cornerstone Communications) and to set a preliminary schedule. On January 15, 17, and 23, and February 3, 2003, the Hearing Examiner issued Procedural Orders adjusting the case schedule and outlining further instructions and an initial list of issues to be litigated in the proceeding. On January 22nd, the CLEC Coalition and Cornerstone Communications also filed a list of initial issues. On February 3, 7, and 14, 2003, Verizon submitted responses to Staff's and other parties' issues and questions. On February 18, 2003, both Staff and the CLEC Coalition filed a list of issues that Verizon should attempt to address in its testimony. On February 24, 2003, the Hearing Examiner issued a Procedural Order establishing a schedule for testimony and discovery. On March 3, 2003, the Commission suspended the Verizon tariff for a second time to allow additional time to review it. On March 24, 2003, Verizon witnesses filed panel testimony. Staff issued its first set of data requests on the Verizon testimony on April 1, 2003, to which Verizon responded on April 22nd and 23rd. On May 20, 2003, Verizon issued discovery requests to GWI, to which GWI responded on May 27th.

[4]Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al.*, FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order or TRO).*

On October 16, 2003, the CLEC Coalition filed a Motion for Issuance of Temporary Order. In its Motion, the CLEC Coalition objected to a letter sent by Verizon on October 2nd which stated that Verizon would be discontinuing the provisioning of certain UNEs in compliance with the *TRO*. On October 21, 2003, the Hearing Examiner issued a Procedural Order stating that Verizon had correctly identified those UNEs that the FCC eliminated from the TelAct's section 251 unbundling requirements and that while changes in terms and conditions caused by the *TRO* would be litigated in this proceeding, the Commission would not re-litigate the decision by the FCC to eliminate specific UNEs from section 251's requirements. Finally, the Examiner stated that the Commission had not anticipated the need to address Verizon's continuing obligations under section 271 in this proceeding and that the Advisors would further consider the issues and determine the next steps.

On December 16, 2003, a case conference was held. After discussion, the Hearing Examiner determined that before hearings on the substance of the Wholesale Tariff could be held, legal briefing was necessary on two issues: (1) whether the Commission had authority, under either state or federal law, to require Verizon to tariff its obligations to continue providing unbundled network elements (UNEs) under section 271 of the TelAct and whether it could set the rates for those obligations; and (2) whether the Commission has the authority, under either state or federal law, to order Verizon to continue providing line-sharing at Commission-set TELRIC rates.

On January 16, 2004, Initial briefs were filed by Verizon-Maine (Verizon), the CLEC Coalition, and the Consolidated Intervenors (Biddeford Internet Company d/b/a Great Works Internet (GWI), the Office of the Public Advocate (OPA) and Cornerstone

Communications (CC)). The same parties filed reply briefs on January 30, 2004.

Before a decision could be reached by the Commission on the legal issues, the D.C. Circuit Court of Appeals issued its decision in *USTA II*,[5] the appeal of the *TRO*. Because *USTA II* was directly relevant to many of the legal issues raised in this Docket, the Hearing Examiner issued a Procedural Order on March 4, 2004, allowing all parties to supplement previously filed briefs to address the impact of the D.C. Circuit Court decision on their positions in this case. On March 26, the Consolidated Intervenors filed a supplemental brief, as did Verizon. The arguments from all parties in the three rounds of briefs are summarized below along with our analysis and decision.

III. COMMISSION AUTHORITY TO REQUIRE TARIFFING OF SECTION 271 OFFERINGS

A. Introduction

As will be explained in detail below, at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under sections 251/252 of the TelAct were synonymous with its section 271 unbundling obligations. Thus, we made no distinction between the two potentially differing obligations; we simply required a wholesale tariff. Since that time, the *USTA I* decision was released, the FCC issued its *TRO*, and, most recently, the *USTA II* decision was issued. The impact of these three decisions on the issue at hand can be summed up as follows: today an ILEC's 251/252 obligations are narrower (in most

[5] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II*).

respects[6]) than its 271 obligations. The CLECs contend that Verizon must now amend its proposed wholesale tariff to include its section 271 unbundling obligations. Verizon argues that the FCC has exclusive jurisdiction over matters relating to its 271 obligations and that this Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations.

B. **Applicable Law**

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC pricing. Section 251(c)(3) also requires compliance with section 251(d)(2) which limits access to UNEs at TELRIC pricing to only those which meet the "necessary and impair" standard.[7] Thus, Checklist Item No. 2 requires an ILEC to meet

[6]In a recent order in the *Skowhegan Online Proceeding,* we found that subloops were a requirement under Section 251 but not a requirement under Section 271. *Investigation of Showhegan Online's Proposal for UNE Loops*, Docket No. 2002-704, Order (April 20, 2004), and Order Denying Reconsideration (June 16, 2004).

[7]In the *TRO,* the FCC retained its earlier definition of "necessary" ("...a proprietary network element is 'necessary' within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.") and adopted a new definition of "impairment" ("A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a

all of the 251 and 252 unbundling and pricing standards, which the FCC limited in the *TRO* to specific types of loops, subloops, and transport.[8]

Checklist Items Nos. 4, 5, 6, and 10 require ILECs to provide unbundled access to loops, transport, switching and signaling. The FCC has explicitly found that, despite elimination of a number of UNEs under section 251, ILECs must continue to provide access to those UNEs under section 271. However, none of these other checklist items, unlike Checklist Item No. 2, cross reference sections 251(c)(3) and 252(d)(1). Thus, according to the FCC in the *TRO*, UNEs unbundled under Checklist Items Nos. 4, 5, 6 and 9 must only meet the "just and reasonable" standard of 47 U.S.C. §§ 201-202 and not the TELRIC standard required under section 251.

In the FCC's Order granting Verizon 271 authority in Maine,[9] the FCC stated:

> *Working in concert with the Maine Commission*, we intend to monitor closely Verizon's post-approval compliance for Maine to ensure that Verizon does not "cease [] to meet any of the conditions required for [section 271] approval.[10]

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barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.") *TRO* at ¶¶ 170, 84.

[8]*USTA II* vacated the *TRO*'s findings regarding mass market switching, thereby effectively eliminating switching as a 251 UNE.

[9]*Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Maine*, CC Docket No. 02-61, Order, 17 FCC Rcd 11676 (June 19, 2002) (Maine 271 Order).

[10]*Maine 271 Order* at ¶ 65.

(emphasis added). The FCC referred readers of the *Maine 271 Order* to its *Kansas/Oklahoma 271 Order,* for a more complete description of the 271 enforcement process. The *Kansas/Oklahoma 271 Order* states:

> Furthermore, we are confident that *cooperative state and federal oversight and enforcement* can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets.[11]

(emphasis added). Thus, the FCC recognized the important role that state commissions would play in enforcing the requirements of section 271. Of more importance, however, is the *Kansas/Oklahoma 271 Order*'s citation to the *New York 271 Order,* which made several relevant findings. First, while noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the New York 271 Order specifically endorsed state commission authority to enforce commitments made by Verizon [then Bell Atlantic] to the New York Public Service Commission. The FCC stated that:

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.[12]

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[11] *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Oklahoma/Kansas 271 Order).*

[12] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York 271 Order)* at ¶ 452.

Thus, the FCC explicitly recognized the authority of state commissions to enforce 271-related commitments including, but not limited to, performance assurance plans (PAPs). Indeed, the FCC noted "with approval" the fact that the New York PAP "will be enforceable as a New York Commission order."[13]

Turning to Verizon's commitments here in Maine, as stated above, Verizon committed to the following relevant conditions, contained in the March 1, 2002, letter from the Commission:

> 1. Verizon will file a wholesale tariff for Maine no later than October 1, 2002. In the interim, CLECs shall be allowed to amend their interconnection agreements with Verizon in such a manner that enables them to negotiate the inclusion of a single UNE (and any terms and conditions related to the single UNE) rather than be required to sign a multi-part or omnibus amendment which contains provisions unrelated to the single UNE.[14]

In our April 10, 2002 Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of the Telecommunications Act of 1996, we explicitly conditioned our support of Verizon's 271 application upon Verizon's compliance with the list of conditions contained in our March 1, 2002 letter to Verizon, including its commitment to file a wholesale tariff. Specifically, we stated:

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[13] *New York 271 Order* at n. 1353.

[14] March 1, 2004 Letter from Commission to Edward Dinan, President, Verizon Maine.

> The MPUC finds, based upon the record before us, Including the commitments made by Verizon in its March 4, 2002 letter to the MPUC, that Verizon meets the Section 271 Competitive Checklist.[15]

Verizon's commitment to file a wholesale tariff for Maine alleviated certain concerns we had regarding the ability of individual CLECs to negotiate interconnection agreements. Specifically, during the course of our 271 proceeding, we heard from a number of CLECs regarding the difficulties and delays they encountered with Verizon when trying to re-negotiate or amend their interconnection agreements. We found that requiring Verizon to submit a wholesale tariff would simplify the interconnection process for CLECs and provide a single forum for litigating disputes and thus we explained in our Report to the FCC that:

> Unlike some other states, Verizon does not have a Statement of Generally Available Terms (SGAT) or wholesale tariff for the State of Maine. Availability of a wholesale tariff would greatly reduce the time required to effect a valid contract and would also eliminate the possibility of "tying" unrelated sections of an interconnection agreement together when trying to add new terms to an existing agreement. Thus, at our request, Verizon has agreed to file a wholesale tariff for our review by October 1, 2002. This will provide us an opportunity to review all of the terms and conditions that Verizon imposes on CLECs purchasing wholesale services.[16]

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[15]Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Selective Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Maine, CC Docket No. 02-61, Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271 of Telecommunications Act of 1996 (April 10, 2002) (271 Report to FCC) at p. 1.

[16]271 Report to FCC at p. 7.

Thus, we found the filing of a wholesale tariff encompassing all of Verizon's wholesale obligations would benefit the CLECs, Verizon, and the Commission by consolidating our review of Verizon's wholesale terms and conditions.

C. Positions of the Parties

1. Verizon.

Verizon's initial brief did not directly respond to the Hearing Examiner's question concerning Commission authority to require Verizon to tariff its 271 obligations. In its arguments concerning the availability of specific elements, Verizon admits that in paragraph 653 of the *TRO*, the FCC recognized that former Bell Operating Companies (BOCs) have ongoing access obligations under section 271 of the TelAct but argues that nothing in the TelAct gives a state commission any power to interpret or enforce section 271 requirements. According to Verizon, only the FCC may issue regulations relating to 271 UNEs and only the FCC can set rates for these UNEs. Verizon maintains that the pricing standard set by the FCC for 271 network elements, "just and reasonable," is not the same as a total element long run incremental cost methodology (TELRIC) used for section 251 UNEs.

In its reply brief Verizon acknowledged that the Commission may play a role in enforcing 271 obligations – for example, by administering the Performance Assurance Plan (PAP) and Carrier to Carrier Guidelines – but argued that this in no way suggests that the FCC has delegated, or could delegate, to state commissions the authority to determine, in the first instance, whether section 271 requires the unbundling of a particular network element, independent of section 251 requirements. Finally, although Verizon does not specifically address state authority under section 271 in its

Supplemental Brief, Verizon states that the "Commission plainly has no authority to order additional unbundling of network elements under the TelAct."

2. Consolidated Intervenors.

In their initial brief, the Consolidated Intervenors state that the FCC "took pains" to confirm that section 271 creates independent access obligations for BOCs and cites paragraphs 653 and 655 of the *TRO*. They also point to the fact that this Commission conditioned its support of Verizon's 271 Application to the FCC on Verizon's willingness to adhere to a number of requirements that it would not otherwise be required to meet under section 251.

In their reply brief, the Consolidated Intervenors urged the Commission to reject Verizon's argument that we do not have authority to enforce 271 obligations. They point to the history of this case, and the fact that Verizon filed the wholesale tariff in compliance with a condition set by the Commission during its 271 review as evidence of the Commission's authority. They assert that Verizon's argument that the Commission has no power to regulate its wholesale tariff "constitutes an outright repudiation of a fundamental premise of the agreement" in the 271 case.

In their Supplemental Brief, the Consolidated Intervenors state that *USTA II* confirms that Verizon has section 271 obligations that are independent of its obligations under section 251. They also interpret the *USTA II* decision to confirm that the *TRO* does not impact a state commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs.

3. CLEC Coalition.

In its brief, the CLEC Coalition states that the authority for the Commission to require Verizon to tariff its UNE obligations under section 271 comes from the Congressional framework of section 271, Verizon's explicit agreement to the UNE tariffing obligations in Verizon's March 4, 2002 letter, and the plain and unambiguous declarations of the FCC in paragraphs 653-655 of the *TRO.* The CLEC Coalition also concludes that the FCC expressly found that it was the responsibility of both the FCC and state commissions to ensure compliance with section 271. Here, the state should secure compliance by setting prices for UNEs established pursuant to section 271. Finally, the CLEC Coalition argues that the Commission must exercise its 271 authority over Verizon, because if the state does not, no one will; the FCC is simply without the resources. The absence of state action would have a drastic effect on the competitive landscape in Maine. In their reply brief, the CLEC Coalition concurred with the Consolidated Intervenors and urged the Commission not to let Verizon break its agreement to meet the obligations it agreed to during the 271 approval process.

D. Analysis

As stated above, at the time of Verizon's 271 proceeding, Verizon's unbundling obligations under 251/252 of the TelAct were the same as its 271 unbundling obligations and thus there was no need to distinguish between the two types of requirements. Now that they are different, we must determine both the scope of Verizon's commitment to file a wholesale tariff and whether this Commission has authority to require Verizon to file a tariff in Maine reflecting its 271 unbundling obligations, i.e. its obligations under Checklist Items 4, 5, 6, and 9.

First, with regard to the scope of Verizon's commitment to file a wholesale tariff in Maine, we examine the underlying purposes of the condition and find that the same reasons for requiring a wholesale tariff encompassing Verizon's 251 obligations apply equally to Verizon's 271 obligations. Indeed, they apply even more today when the legal and regulatory landscape has become increasingly confusing and complex, making it difficult to completely address and negotiate all of the issues that may come up in an interconnection agreement negotiation. In the Verizon Arbitration proceeding,[17] CLECs complained that Verizon has not responded to requests from CLECs to negotiate amendments to their interconnection agreements. These are the same types of complaints we heard during the 271 process which led us to adopt the wholesale tariff condition in this first place. Finally, Verizon has not argued to us that it did not commit to tariff all of its wholesale obligations. Instead, it focuses on the jurisdictional issues without examining the motivations and intentions behind its 271 commitment. We find that a reasonable interpretation of the condition we placed upon Verizon, and the condition it committed to fulfill, requires Verizon to include both its 251 and 271 unbundling obligations in its wholesale tariff filed in Maine.

We turn now to our authority to enforce that commitment. While Verizon is correct that section 271(d)(6) allows for continued enforcement of an ILEC's 271 obligations by the FCC, Verizon fails to explain adequately why states have authority over some 271 issues, such as performance assurance plans, and not others. Previously, state commissions did not have authority to approve an ILEC's 271

[17] *Investigation Regarding Verizon Maine's Request for Consolidated Arbitration*, Docket No. 2004-135, Order (June 4, 2002).

application but were allowed, indeed encouraged, by the FCC to conduct extensive fact-finding proceedings to ascertain whether the terms, conditions, and prices of an ILEC's wholesale operations met 271 standards. While the FCC made the ultimate finding of compliance, it relied heavily upon the work of state commissions. Indeed, the FCC noted in its *Maine 271 Order*:

> 3. We wish to recognize the effort and dedication of the Maine Public Utilities Commission (Maine Commission). In smaller, more rural states, the section 271 process taxes the resources of the state commissions, even more heavily than in other states. Yet, by diligently and actively conducting proceedings beginning in 1997 to set TELRIC prices, to implement performance measures, to develop a Performance Assurance Plan (PAP), and to evaluate Verizon's compliance with section 271 of the Act, the Maine Commission laid the necessary foundation for our review and approval. We are confident that the Maine Commission's efforts, culminating in the grant of this application, will reward Maine consumers by making increased competition in all markets for telecommunications services possible in the state.
>
> . . .
>
> 5. We rely heavily in our examination of this application on the work completed by the Maine Commission. . . .

We find that states have a similar role with regard to enforcement of 271 obligations. Indeed, it makes both procedural and substantive sense to allow state commissions, which are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to monitor ILEC compliance with section 271 by applying the standards prescribed by the FCC, i.e. ensuring that Verizon meets its Checklist Items No. 4, 5, 6, and 9 obligations.

As indicated above, the FCC has already clearly stated that states may enforce commitments made by ILECs during the 271 process. Here, where the commitment involves filing a wholesale tariff, we believe we also have authority to review that tariff for compliance with the applicable federal and state requirements. If a party believes the Commission has not applied the correct standard, the party may then file an action with the FCC pursuant to 47 U.S.C. §271(d)(6) and the FCC will have the benefit of the detailed factual record developed by us. Nothing about our review of Verizon's wholesale tariff preempts or invalidates the FCC's authority under section 271(d)(6). If the FCC disagrees with the position we take here, it can explain itself in any order issued on appeal. In the meantime, our decision will provide a single litigation proceeding to resolve the myriad of issues resulting from the *TRO* and *USTA II.*

In addition to the legal basis for our decision, our decision also addresses a significant practical consideration facing the Commission. Specifically, from a Commission resource perspective, it makes much more sense to litigate all of the issues associated with unbundling in one docket and develop a standard offer or Statement of Generally Available Terms (SGAT). A single litigated case ensures that we receive the benefit of briefing on an issue from all interested parties, rather than rely on individual litigants to brief issues that may, or may not, be important to them. Individual litigation diverts Commission resources from addressing matters that impact all carriers to issues that may only affect one or two carriers.

Finally, we note that 35-A M.R.S.A. § 304 requires that all utilities file schedules containing the rates, terms, and conditions for any service performed by it within the State. We have previously interpreted this provision to require filing of wholesale rates with the Commission, i.e. services which are resold to other carriers or special contracts made with specific customers. For example, Verizon has on file with the Commission a state access tariff through which it offers many UNE-like services, such as high capacity transport. Thus, subject to the specific finding below, we require Verizon to file both its terms and conditions and rates for all of its 251 and 271 obligations in its Maine wholesale tariff.

IV. COMMISSION AUTHORITY TO SET PRICES FOR § 271 OFFERINGS

A. Introduction

Now that we have determined that Verizon must tariff its 271 obligations, we must consider the extent of our authority to set rates for those 271 offerings. Under state law, our authority is clear: 35-A M.R.S.A. § 301 requires that rates be just and reasonable and gives the Commission the authority to determine whether a utility's rates meet this standard. The Commission's authority under federal law is not as clear and requires a review of sections 251 and 252 of the TelAct, the *TRO*, and *USTA II*.

B. Applicable Law

Section 252 of the TelAct requires state commissions to apply the pricing standards found in section 252(d) to set the rate for interconnection pursuant to section 251(c)(2) and for UNEs unbundled pursuant to section 251(c)(3). Section 252(d) requires that the rate be based upon cost, be nondiscriminatory, and may include a reasonable profit. This standard has been interpreted by the FCC (and upheld by the

Supreme Court[18]) to require forward-looking TELRIC pricing for all UNEs unbundled pursuant to section 251 of the TelAct.

Section 271 does not contain its own pricing standard. Section 271(c)(2)(B)(ii) (Checklist Item No. 2) requires that ILECs make UNEs available "in accordance with the requirements of section 251(c)(3) and 252(d)(1)" while sections 271(c)(2)(B)(iv, v, vi, and x) (Checklist Items Nos. 4, 5, 6 and 10), which provide for access to loops, switching, trunk side transport, and databases, make no reference to a pricing standard.

In the *TRO*, the FCC interpreted the pricing provisions of the TelAct as requiring TELRIC pricing for section 251(c)(3) elements only and "just and reasonable" rates for 271(c)(2)(B)(iv, v, vi, and x) elements. The FCC found that TELRIC pricing for non-251 UNEs "is neither mandated by statute nor necessary to protect the public interest."[19] Relying upon the Supreme Court's holding in *Iowa II* that section 201(b) of the Communications Act empowered the Commission to adopt rules that implement the TelAct, the FCC found that it had authority to impose the just and reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act. The FCC went even further and found that it would determine, based upon a fact-specific inquiry pursuant to a section 271 application or a 271 enforcement action, whether the price for a particular 271 element met the section 201/202 standard.[20] The FCC noted

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[18] *See AT&T v. Iowa Utilities Bd.*, 525 U.S. 355 (1999)(*Iowa II).*

[19] *TRO* at ¶ 656.

[20] *TRO* at ¶ 664.

that prices similar to those currently charged in ILEC access tariffs would likely meet the standard, as would any prices negotiated through arms-length agreements.[21]

In its March 2004 decision in *UTSA II*, the D.C. Circuit affirmed the FCC's finding that the pricing standard for UNEs unbundled pursuant to § 271 is found in sections 201-202 of the TelAct and not section 251. Specifically, the court upheld the FCC's determination that TELRIC pricing was not required under section 271; all that was required was that the prices not be "unjust, unreasonable or discriminatory."[22] The Court did not address the FCC's assertion that it, rather than state commissions, should determine whether the price for a 271 element meets the just and reasonable standard. The Court did find, in the context of state unbundling authority, that claims relating to the preemptive scope of the *TRO* were not ripe, because no party had challenged a specific state decision.

Since the *USTA II* decision was released, several state commissions have directly addressed the issue of state authority to review pricing for 271 elements. The Massachusetts Department of Telecommunications and Electricity recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its §271 obligations because those services are jurisdictionally intrastate.[23] On June 21, 2004, the Tennessee Regulatory Authority (TRA) issued an order which sets a 271 switching rate in the context of a section 252

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[21] *Id.*

[22] *USTA II* at 53.

[23] *Proceeding by the DTE on its own Motion to Implement the Requirements of the FCC's TRO Regarding Switching for Large Business Customers Serviced by High-Capacity Loops*, DTE 03-59-A (Jan. 23, 2004), fn. 9.

arbitration proceeding.[24] Bellsouth has appealed that decision to the FCC and asked for an emergency declaratory ruling by the FCC that the action taken by the TRA violates the TelAct, FCC Orders, and federal precedent. The FCC has asked for comment on Bellsouth's petition.

C. Position of the Parties

1. Verizon.

Verizon argues that the *TRO* makes clear that the FCC has exclusive jurisdiction over the pricing of 271 UNEs and that the "just and reasonable" standard, rather than TELRIC, should be applied to the rates for those elements. Verizon contends that even if TELRIC prices meet the "just and reasonable" standard, there is nothing that precludes Verizon from charging higher rates that also meet the "just and reasonable" standard. Verizon argues that the Commission would have no grounds for insisting on the lower TELRIC rate. Verizon also points out that while state commissions have authority to set rates for section 251 UNEs, there is no similar grant of authority for section 271 UNEs.

2. CLECs.

The CLEC Coalition argues that by agreeing to submit a wholesale tariff, Verizon agreed to file rate schedules for 271 UNEs over which the Commission would have the authority to review, accept, and/or reject. The Consolidated Intervenors did not directly address the Commission's authority to set prices for 271 UNEs because

[24] *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-__ (July 1, 2004) at 1.

they believed, despite the specific questions posed in the Hearing Examiner's Procedural Order, that pricing issues would be addressed later.[25]

D. Analysis

Determination of the scope of the Commission's 271 pricing authority requires both interpretation of the *TRO* and a determination under both state and federal law of the Commission's authority to set rates for intrastate services and products. First, Verizon is correct that the FCC stated in the *TRO* that it would review rates for 271 UNEs in the context of 271 applications and enforcement proceedings. However, as described above and as acknowledged by Verizon, the FCC has already delegated significant authority to state commissions to enforce 271-related requirements. While the FCC stated it would conduct the review, the FCC did not specifically preclude state commissions from also conducting such an evaluation.

There are a number of factors which could support a state commission's authority to set prices for section 271 UNEs. First, the standard the FCC has announced for section 271 UNEs, "just and reasonable," is the same standard the Commission applies under 35-A M.R.S.A. § 301. Thus, the Commission has considerable experience in applying this standard to the rates of Verizon and many other public utilities. Further, state commissions, and not the FCC, are most familiar with the detailed company-specific data that will be used to support an ILEC's claim that particular rates are just and reasonable. Finally, both CLECs and the National

[25]It is true that pricing issues were scheduled to be addressed later in the proceeding. However, parties should have reasonably expected that if a specific question relating to the legal underpinnings of the Commission's authority was posed for briefing, that the question needed to be addressed.

Association of Regulatory Utility Commissioners (NARUC) have argued in filings related to the appeal of the *TRO*, that the Supreme Court's decision in *Iowa II* and the Eighth Circuit's decision in *Iowa III*[26] clearly establish that states, not the FCC, set rates for UNEs. Indeed, the Supreme Court stated that:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions .... The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[27]

These same parties also point to a state commission's authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct as another source of authority to set rates for elements provided pursuant to section 271.

Notwithstanding these arguments in favor of Commission authority to set 271 UNE rates, we decline at this time to exercise that authority. While we do not necessarily agree with the FCC's assertion of exclusive jurisdiction over 271 UNE rates, it is, nonetheless, the current law of the land. Rather than add an additional layer of confusion to an already complex situation, we will allow time for the process envisioned by the FCC to work, i.e., for Verizon to file federal tariffs or for the parties to reach arms-length agreements. While we will not set the rates charged by Verizon, we will exercise our authority to require Verizon to file those rates with us in its wholesale tariff. Indeed, before Verizon may begin charging any CLEC 271 UNE rates which are higher than its current TELRIC rates, Verizon must first obtain the FCC's approval for the specific rates

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[26] *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000).

[27] *Iowa II*, 525 U.S. at 384.

(in whatever form necessary) and then must file the rates here pursuant to our usual tariffing process. We will suspend any rates filed with us which have not been specifically approved by the FCC.

We leave open today the possibility that in the future, perhaps after the FCC has ruled on the BellSouth Emergency Petition or if the Supreme Court takes the *TRO* appeal and reverses the *USTA II* decision, we might revisit the issues decided today. We also leave open the possibility that we will step in and take action if the FCC abdicates its authority, either explicitly or by taking an undue amount of time to exercise its authority. We firmly believe that *all* parties would greatly benefit from increased certainty concerning wholesale pricing and if the FCC does not actively assert its jurisdiction, we will assert ours so as to ensure the continued viability of local competition in Maine.

V. COMMISSION AUTHORITY TO ORDER LINE SHARING PURSUANT TO STATE LAW

A. Legal Authority

In the *TRO*, the FCC overturned its earlier decision in the *UNE Remand Order*[28] and found that CLECs are not impaired without access to the high frequency portion of the loop (HFPL), i.e. access to line sharing. Specifically, the FCC shifted its focus from the revenues derived from a single service deployed using the HFPL to the potential revenues derived from all services that could be provided over the full functionality of the loop. Thus, the FCC concluded that the increased operational and

[28] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 (*UNE Remand Order*).

economic costs of acquiring a stand-alone loop are offset by the increased revenue opportunities afforded by use of the whole loop for services such as voice, voice over xDSL, data and video services.[29] While the FCC declined to explicitly find that any decision by a state commission to require line sharing under state law was automatically preempted, in paragraph 264 it invited any party aggrieved by such a decision to seek a declaratory ruling from the FCC.

In *USTA II*, the D.C. Circuit upheld the FCC's line sharing decision, finding that:

> [E]ven if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment.

USTA II at 45. Thus, under federal law, section 251 line sharing will only be available on a grandfathered basis for the next three years, with the price increasing each year until it reaches the full price of the loop, at which time unbundling will no longer be required.

Neither the *TRO* or *USTA II* directly addressed whether an ILEC's continuing unbundling obligations under section 271 include continued access to line sharing with the ILECs. In its *Line Sharing Order,*[30] the FCC discussed the necessity of unbundling the HFPL as part of an ILEC's 251 unbundling obligations. In its *Oklahoma/Kansas 271 Order*, the first 271 Order issued after the *Line Sharing Order*,

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[29] *TRO at* ¶ 258.

[30] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

the FCC included its discussion of compliance with the line sharing requirement under its discussion of compliance with Checklist Item No. 4, access to local loops.[31] In the *Massachusetts 271 Order*, the FCC explicitly stated that:

> On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.[32]

Thus, the FCC appears to consider line sharing a form of access to the local loop that must be provided pursuant to section 271, regardless of whether it must also be provided pursuant to section 251.

B. Positions of the Parties

1. Verizon.

Verizon argues that in the *TRO*, the FCC determined that CLECs are not impaired without unbundled access to line sharing. Verizon argues that where federal law sets forth the legal and regulatory framework for accomplishing a lawful objective through the balancing of competing interests, "the states may neither alter that framework nor depart from the federal judgment regarding the proper balance of competing regulatory concerns." Citing section 251(d)(3) and "long-standing federal preemption principles," Verizon asserts that state commissions have no authority to override the FCC's determination that the unbundling of certain network elements is not required under the TelAct.

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[31] *Oklahoma/Kansas 271 Order* at ¶ 214.

[32] *In the Matter of Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 163 (*Verizon MA 271 Order*).

Verizon contends that the Commission has no independent authority under state law to impose additional unbundling requirements on Verizon. This is especially true where the FCC has explicitly declared that line sharing is not required. Verizon points out that the FCC authorized the state to perform "granular" review of specific elements only and that line sharing was not one of them.

Verizon further argues that the Commission does not have authority to order unbundling under section 271, but even if it did, Checklist Item No. 4 - the local loop - does not include separate access to the HFPL. Additionally, it argues that the pricing would not be TELRIC but would be "just and reasonable" which would require a "fact specific inquiry" conducted by the FCC.

In its Reply Brief, Verizon reiterated its position that "[t]he Commission is legally preempted from re-imposing unbundling obligations eliminated by the FCC's *rulings in its TRO.*" In particular, Verizon disputes the CLECs' claim that the Commission has separate state authority to order line sharing and states that, "where the FCC determines that an element should not be unbundled, a state may not lawfully override that determination." Verizon also refutes the CLECs' claim that the Commission can unbundle HFPL based on Maine specific facts. Since the FCC has already found no impairment, they conclude, the Commission is not free to order line sharing.

In its Supplemental Brief, Verizon asserts that *USTA II* affirms the FCC's findings in the *TRO* on line sharing and unambiguously struck down the FCC's delegation of any unbundling authority to states.[33] Verizon also repeats its belief that

[33]*USTA II* at 12.

the "Commission may not lawfully rely on state law to impose an unbundling obligation for line sharing, feeder subloops, OCN transport, entrance facilities or other UNEs expressly eliminated or curtailed by the FCC in the *Triennial Review Order.*" Referring to its previous statements concerning the absence of state law authorizing unbundling, Verizon argues that even if the state is authorized to order unbundling (which they insist, it is not), it may not do so in the case of line sharing because *USTA II* affirmed the FCC's decision in the *TRO* not to order line sharing because it discourages investment.

2. CLECs.[34]

In their Brief, the Consolidated Intervenors point to the Commission's reliance upon Verizon's performance in Maine on the number of line sharing arrangements when it found Verizon in compliance with Checklist Item No. 4 during Maine's 271 proceeding. They contend that allowing Verizon to discontinue line sharing now effectively repudiates one of the conditions for the Commission's support and is anti-competitive. The Consolidated Intervenors argue that the FCC took pains to make clear that 271 requirements remain unaffected by the *TRO* (citing to ¶¶ 653, 655). They suggest that the Commission follow the Pennsylvania Public Utilities Commission's lead in insisting that Verizon honor its 271 obligations. Finally, they cite 35-A M.R.S. A. § 7101 and argue that Verizon's proposal contradicts state telecommunications policy of promoting broadband, especially in rural areas. The Consolidated Intervenors argue that the Commission should order line sharing because it has been instrumental in creating and fostering competition in rural Maine.

[34]The CLEC Coalition did not brief the line sharing issues but "supports the arguments and conclusions set forth in the briefs on Line Sharing issues submitted by GWI, Conversant and the Office of the Public Advocate".

In their Reply Brief, the Consolidated Intervenors again describe how Verizon and the Commission relied on the provisioning of line sharing to show that Verizon had opened up its network to competition during the 271 review. The Consolidated Intervenors also cite to paragraph 650 of the *TRO* where the FCC states that "Section 271(c)(2)(B) establishes an independent obligation for BOCs to provide access to loops...." The Consolidated Intervenors implore the Commission to enforce Verizon's 271 obligations.

In their Supplemental Brief, the Consolidated Intervenors state that the decision in *USTA II* confirms the FCC's conclusion that section 271's unbundling requirements for BOCs are independent of a BOC's section 251 requirements. They also argue that "the Court essentially held that the *TRO* has no impact whatsoever, from a legal standpoint, on a state Commission's ability to exercise its power under state and federal law to add to the FCC's list of UNEs."

C. Decision

We find, based upon the language quoted above from the FCC's *Massachusetts 271 Order*, that Verizon must continue to provide CLECs with access to line sharing in order comply with Checklist Item No. 4 of section 271. As discussed above, however, we will not exercise any authority we might have to set rates for 271-based UNEs such as line sharing and will leave those issues to the FCC, which has already stated what it believes to be the fair rate, i.e. three years of transition rates leading to up to the full cost of the loop. While our decision today does not provide the CLECs with all of the relief they requested, it does provide them with the continued opportunity to share lines with Verizon, which retains the majority of local service lines in Maine.

We decline the opportunity to exercise any authority we have under either federal or state law to order line sharing at TELRIC rates at this time. While we do not concede the point as argued by Verizon, the FCC clearly intended to preempt state authority to order line sharing pursuant to section 251 or state law. Section 251(d)(3) of the TelAct states that the FCC may not preclude enforcement of any state commission decision establishing local exchange interconnection and access requirements which is consistent with section 251 and which "does not substantially prevent implementation of the requirements of this section." In the *TRO,* the FCC asserts that its interpretation of the requirements of section 251, i.e., its rules, was intended by Congress to be included under the "requirements of this section" language of section 251(d)(3).[35] Thus, according to the FCC, any state decision that is inconsistent with the FCC's Orders or Rules (the so-called "federal regime") violates section 251(d)(3) and is preempted. Any party aggrieved by a state decision to require line sharing after the effective date of the *TRO* can seek a declaratory ruling from the FCC

The Supreme Court has held that "preemption will not lie unless it is 'the clear and manifest purpose of Congress.'"[36] If the statute contains an express preemption clause, the court will first focus on the plain wording of the clause, "which necessarily contains the best evidence of Congress' preemptive intent."[37] Savings

[35] *TRO* at ¶ 191.

[36] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[37] *Id.*

clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."[38] Generally speaking, preemption will be found when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[39]

The FCC's assertion that its rules are included in "the requirements of this section" language of section 251 was specifically rejected by the Eighth Circuit Court of Appeals in *Iowa I.*[40] The Eighth Circuit held that section 251(d)(3) does not require state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.[41] It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."[42] While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eight Circuit's holding on section 251(d)(3).[43] Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it

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[38] *Id.*

[39] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

[40] *See Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8^{th} Cir. 1997), *rev'd sub nom. on other grounds, AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

[41] *Id.* at 806.

[42] *Id.* It further held that section 261(c) of the TelAct (which requires state commission decisions to be consistent with the FCC's regulations) applies only to state requirements that are not promulgated pursuant to section 251. *Id.* at 807.

[43] *See TRO* at ¶ 192, fn. 611.

automatically will be preempted. Instead, consideration must be given to whether the requirement is consistent with section 251 and whether it prevents its implementation.

We find that, with respect to line sharing, there has been a clear policy decision at the federal level that line sharing should not be made available at TELRIC pricing. Any decision on our part, whether based upon federal or state law, to require line sharing at TELRIC prices would directly contradict federal policy and would, in fact, substantially prevent implementation of section 251 as interpreted by the FCC.[44] We do not reach the issue of whether the FCC's interpretation of 251 would limit state authority in every instance but instead find that here, with regard to line sharing, and where the federal policy has been so clearly enunciated and upheld by the D.C. Circuit, that the most appropriate action at this time requires denial of the CLECs' request for state-ordered unbundling at TELRIC rates. We leave open the possibility that if, at some future date the Supreme Court overturns the FCC's interpretation of its powers of preemption and/or overturns the FCC's decision concerning line sharing, we might revisit this issue and reach a different result. Until such time, the only line sharing that will be available in Maine will be pursuant to section 271 at "just and reasonable rates" as determined by the FCC.

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[44] *But see*, *Investigation into Skowhegan Online's Request for UNE Loops*, Docket No. 2002-704, Orders (April 20, 2004 and June 16, 2004) where the Commission asserted its authority under 35-A M.R.S.A. §§ 301, 7101 and ordered Verizon to unbundle certain copper subloops not required under federal law.

VI. CONCLUSION

For the reasons discussed above, we order Verizon to include 271 UNEs in its state wholesale tariff and to continue to offer line sharing pursuant to Checklist Item No. 4 of section 271.

Respectfully submitted,

Trina M. Bragdon
Hearing Examiner

ATTACHMENT 3

Attachment 3

SERVICE EXHIBIT 1 - QWEST PLATFORM PLUS™ SERVICE

SERVICE EXHIBIT 1
QWEST PLATFORM PLUS™ (QPP™) SERVICE

1.0 Qwest shall provide QPP™ service offerings according to the following terms and conditions. CLEC may use QPP™ services to provide any telecommunications services, information services, or both that CLEC chooses to offer.

1.1 General QPP™ Service Description

QPP™ services shall consist of the Local Switching Network Element (including the basic switching function, the port, plus the features, functions, and capabilities of the Switch including all compatible and available vertical features, such as hunting and anonymous call rejection, provided by the Qwest switch) and the Shared Transport Network Element in combination, at a minimum to the extent available on UNE-P under the applicable interconnection agreement or SGAT where CLEC has opted into an SGAT as its interconnection agreement (collectively, "ICAs") as the same existed on June 14, 2004. Qwest Advanced Intelligent Network (AIN) services (such as Remote Access Forwarding/Call Following), Qwest Digital Subscriber Line (DSL), and Qwest Voice Messaging Services (VMS) may also be purchased with compatible QPP™ services. These Network Elements will be provided in compliance with all BellCore and other industry standards and technical and performance specifications and will allow CLEC to combine the QPP™ services with a compatible voicemail product and stutter dial tone. Access to 911 emergency services and directory listings will be provided by Qwest pursuant to the terms and conditions of CLEC's ICAs. As part of the QPP™ service, Qwest shall combine the Network Elements that make up QPP™ service with Analog/Digital Capable Loops, with such Loops (including services such as line splitting) being provided pursuant to the rates, terms and conditions of the CLEC's ICAs as described below.

QPP™ service shall be available in six different service arrangements, each of which is described more fully below: QPP™ Residential; QPP™ Business; QPP™ Centrex (including Centrex 21, Centrex Plus, and Centron in Minnesota only); QPP™ ISDN BRI; QPP™ PAL; and QPP™ PBX Analog DID and non-DID (one way and two way) trunks.

1.2 Combination of QPP™ Network Elements with Loops

The Loop will be provided by Qwest under the applicable ICAs in effect between Qwest and CLEC at the time the order is placed. As part of the QPP™ service, Qwest shall as described below combine the Local Switching and Shared Transport Network Elements with the Loop provided pursuant to the terms and conditions of CLEC's ICAs.

1.2.1 The following QPP™ service types will be combined with 2-wire loops: QPP™ Business; QPP™ Centrex (including Centrex 21, Centrex Plus, and Centron in Minnesota Only), QPP™ ISDN BRI; QPP™ PAL; QPP™ PBX Analog non-DID and 1-Way DID Trunks, and; QPP™ Residential.

1.2.2 The following QPP™ service type will be combined with 4 wire loops: QPP™ PBX Analog 2-Way DID Trunks.

1.3 Local Switching

The Local Switching Network Element of QPP™ service will be technically and functionally equivalent or superior to the Local Switching Network Element of the comparable UNE-P service provided by Qwest to CLEC under its ICAs as of June 14, 2004. The Local Switching Network Element of QPP™ service encompasses Line Side and Trunk Side facilities including without limitation the basic switching function, plus the features, functions, and all vertical features that are loaded in Qwest's End Office Switch. Vertical features are software attributes on End Office Switches and are listed in the PCAT.

Local Switching components include Analog Line Port, Digital Line Port Supporting BRI ISDN and Analog Trunk Ports.

1.3.1 Line Port attributes include but are not limited to: Telephone Number, Dial Tone, Signaling (Loop or ground start), On/Off Hook Detection, Audible and Power Ringing, Automatic Message Accounting (AMA Recording), and Blocking Options. Operator Services, and Directory Assistance are provided pursuant to the terms and conditions of CLEC's ICAs.

1.3.2 Digital Line Port Supporting BRI ISDN. Basic Rate Interface Integrated Services Digital Network (BRI ISDN) is a digital architecture that provides integrated voice and data capability (2 wire). A BRI ISDN Port is a Digital 2B+D (2 Bearer Channels for voice or data and 1 Delta Channel for signaling and D Channel Packet) Line Side Switch connection with BRI ISDN voice and data basic elements. For flexibility and customization, optional features can be added. BRI ISDN Port does not offer B Channel Packet service capabilities. The serving arrangement conforms to the internationally developed, published, and recognized standards generated by International Telegraph and Telephone Union (formerly CCITT).

1.3.3 Analog Trunk Port. DS0 Analog Trunk Ports can be configured as DID, DOD, and Two-way.

1.3.3.1 Analog Trunk Ports provide a 2-Way Analog Trunk with DID, E&M Signaling and 2-Wire or 4-Wire connections. This Trunk Side connection inherently includes hunting within the trunk group.

1.3.3.2 All trunks are designed as 4-Wire leaving the Central Office. For 2-Wire service, the trunks are converted at the End User Customer's location.

1.3.3.3 Two-way Analog DID Trunks are capable of initiating out going calls, and may be equipped with either rotary or Touchtone (DTMF) for this purpose. When the trunk is equipped with DID Call Transfer feature, both the trunk and telephone instruments must be equipped with DTMF.

1.3.3.4 Two-way Analog DID Trunks require E&M signaling. Qwest will use Type I and II E&M signaling to provide these trunks to the PBX. Type II E&M signaling from Qwest to the PBX will be handled as a Special Assembly request Via ICB.

1.4 Vertical Features and Ancillary Functions and Services

1.4.1 QPP™ service includes nondiscriminatory access to all vertical features that are loaded in Qwest's End Office Switch.

1.4.2 The Local Switching Network Element of QPP™ includes Qwest's signaling network for traffic originated from the Port, including the use of Qwest's call-related databases. In conjunction with QPP™ service, Qwest will provide Qwest's Service Control Points in the same manner, and via the same signaling links, as Qwest uses such service Control Points and signaling links to provide service to its End User Customers from that Switch. Qwest's call related databases include the Line Information Database (LIDB), Internetwork Calling Name Database (ICNAM), 8XX Database for toll free calling, Advanced Intelligent Network Databases (AIN), and Local Number Portability Database. CLEC shall not have access to Qwest's AIN based services that qualify for proprietary treatment, except as expressly provided for in this Agreement.

1.4.3 ICNAM and LIDB. Qwest will provide CLEC with non-discriminatory access to Qwest's LIDB database and ICNAM database as part of the delivery of QPP™ service.

1.4.4 The LIDB database is used to store various telephone line numbers and Special Billing Number (SBN) data used by operator services systems to process and bill Alternately Billed Services (ABS) calls. The operator services system accesses LIDB data to provide originating line (calling number), Billing number and terminating line (called number) information. LIDB is used for calling card validation, fraud prevention, Billing or service restrictions and the sub-account information to be included on the call's Billing record.

1.4.4.1 LIDB database provides information for use in processing Alternately Billed Services (ABS) calls including calling card, billed to third number, and collect calls.

1.4.5 The ICNAM database is used with certain End Office Switch features to provide the calling party's name to CLEC's End User Customer with the applicable feature capability. ICNAM database contains current listed name data by working telephone number served or administered by Qwest, including listed name data provided by other Telecommunications Carriers participating in Qwest's calling name delivery service arrangement.

1.4.5.1 Qwest will provide the listed name of the calling party that relates to the calling telephone number (when the information is actually available in Qwest's database and the delivery thereof is not blocked or otherwise limited by the calling party or other appropriate request).

1.4.5.2 For CLEC's QPP™ End User Customers, Qwest will load and update CLEC's QPP™ End User Customers' name information into the LIDB and ICNAM databases from CLEC's completed service orders. The process will be functionally equivalent to the process used for these databases with UNE-P as of June 14, 2004. CLEC is responsible for the accuracy of its End User Customers' information.

1.4.5.3 Qwest shall exercise reasonable efforts to provide accurate and complete LIDB and ICNAM information. The information is provided on an as-is basis with all faults. Qwest does not warrant or guarantee the correctness or the completeness of such information; however, Qwest will access the same database for CLEC's QPP™ End User Customers as Qwest accesses for its End User Customers. In no event shall Qwest have any liability for system outage or inaccessibility or for losses arising from the authorized use of the data by CLEC.

1.4.5.4 There is no charge for the storage of CLEC's QPP™ End User Customers' information in the LIDB or ICNAM databases.

1.4.6 CLEC Branded Operator Services and Directory Assistance will be available to CLEC with QPP™ service and will be provided pursuant to the terms and conditions of CLEC's ICAs.

1.5 Shared Transport

1.5.1 Qwest shall provide the Shared Transport Network Element as part of the QPP™ service. Transport beyond Qwest's local interoffice network will be carried on Qwest's IntraLATA Toll network and provided by Qwest to CLEC only if CLEC chooses Qwest to provide IntraLATA Toll services for its QPP™ End User Customers. The existing routing tables resident in the Switch will direct both Qwest and CLEC traffic over Qwest's interoffice message trunk network.

1.5.1.1 Qwest does not authorize CLEC to offer Qwest the ILEC as a Local Primary Interexchange Carrier (LPIC) to its existing or new QPP™ End User Customers. Where CLEC assigns Qwest as LPIC 5123 to CLEC's existing or new QPP™ End User Customers, Qwest will bill CLEC at the rates contained or referenced in the attached Rate Sheet.

1.5.1.2 If, during the term of this Agreement, Qwest offers toll service to CLEC's QPP™ End User Customers, Qwest must establish its own Billing relationship with such QPP™ End User Customers. Qwest may not bill CLEC, and CLEC shall have no obligation to pay Qwest, for toll service Qwest provides to CLEC's QPP™ End User Customers. In addition, CLEC shall have no obligation to bill CLEC QPP™ End User Customers for toll service provided by Qwest.

1.5.2 Qwest will provide Shared Transport to carry originating access traffic from, and terminating to, CLEC QPP™ End User Customers. CLEC traffic will be carried on the same transmission facilities between End Office Switches, between End Office Switches and Tandem Switches, and between Tandem Switches in its network facilities that Qwest uses for its own traffic.

1.5.3 Shared Transport usage will be billed in accordance with the rates provided in The Rate Sheet.

1.6 QPP™ Service Arrangement Descriptions

1.6.1 QPP™ Business is available to CLEC for CLEC's business end users and is offered in the following combination: Analog Line Side Port and Shared Transport provided pursuant to this Agreement combined with Analog - 2 Wire Voice Grade Loop provided pursuant to CLEC's ICAs.

1.6.2 QPP™ Centrex is available to CLEC for CLEC's business end users. QPP™ Centrex services include Centrex 21, Centrex Plus, and Centron and is offered in the following combination: Analog Line Side Port and Shared Transport provided pursuant to this Agreement combined with an Analog - 2 Wire Voice Grade Loop provided pursuant to CLEC's ICAs.

1.6.2.1 CLEC may request a conversion from Centrex 21, Centrex-Plus or Centron service to QPP™ Business or QPP™ Residential.

1.6.2.2 Qwest will provide access to Customer Management System (CMS) with QPP™-Centrex at the rates set forth in the Rate Sheet.

1.6.3 QPP™ ISDN BRI is available to CLEC for CLEC's end user customers and is offered in the following combination: Digital Line Side Port (Supporting BRI ISDN), and Shared Transport provided pursuant to this Agreement combined with a Basic Rate ISDN Capable Loop provided pursuant to CLEC's ICAs.

1.6.4 QPP™ PAL is available to CLEC for CLEC's Payphone Service Providers (PSPs) and is offered in the following combination: Analog Line Side Port, and Shared Transport provided pursuant to this Agreement combined with Analog - 2 Wire Voice Grade Loop provided pursuant to CLEC's ICAs.. QPP™ PAL may only be ordered for and provisioned to Payphone Service Providers (PSPs).

1.6.5 QPP™ PBX is available to CLEC for CLEC's business End User Customers. QPP™ PBX will be offered in the following combinations:

1.6.6 PBX Analog non-DID Trunk combination consists of Analog Line Side Port and Shared Transport provided pursuant to this Agreement combined with Analog - 2 wire Voice Grade Loop provided pursuant to CLEC's ICAs.

1.6.7 PBX with Analog 1-Way DID Trunks combination consists of DID Trunk Port and Shared Transport provided pursuant to this Agreement combined with Analog - 2 wire Voice Grade Loop provided pursuant to CLEC's ICAs.

1.6.8 PBX with Analog 2- Way DID Trunks combination consists of DID Trunk Port and Shared Transport provided pursuant to this Agreement combined with Analog – 4 wire Voice Grade Loop provided pursuant to CLEC's ICAs.

1.6.9 QPP™ Residential is available to CLEC for CLEC's residential End User Customers and is offered in the following combination: Analog Line Side Port and Shared Transport provided pursuant to this Agreement combined with Analog - 2 Wire Voice Grade Loop provided pursuant to CLEC's ICAs. QPP™ Residential may only be ordered for and provisioned for residential end user application. The definition of residential service shall be the same as in Qwest's retail tariffs as applied to Qwest's End User Customers.

2.0 **Additional Terms and Conditions and Service Features**

2.1 QPP™ services will be available only in Qwest's Incumbent Local Exchange Carrier service area within its fourteen-state region. QPP™ services will not be subject to any line limitations such as the Zone 1 four-line MSA restriction for unbundled switching. Qwest does not warrant the availability of facilities at any particular serving wire center, provided that Qwest warrants that CLEC shall be able to convert all CLEC UNE-P End User Customers as of the Effective Date to the QPP™ service. QPP™ services will not be available if facilities are not available. Notwithstanding the foregoing, Qwest represents and warrants that it will not otherwise restrict facilities eligible to provide QPP™ service and that any and all facilities that would otherwise be available for retail service to a Qwest End User Customer will be considered eligible for use by CLEC for QPP™ service to serve that same End User Customer.

2.2 Reserved.

2.3 This Agreement is not intended to change or amend existing intercarrier compensation arrangements between CLEC and Qwest. Nothing in this Agreement shall alter or affect CLEC's right to receive any applicable universal service subsidy or other similar payments.

2.3.1 Qwest shall provide to CLEC usage information within Qwest's control with respect to calls originated by or terminated to CLEC QPP™ End User Customers in the form of the actual information that is comparable to the information Qwest uses to bill its own End User Customers. Without limiting the generality of the foregoing, Qwest shall provide CLEC with the Daily Usage Feed billing information.

2.3.2 Qwest shall provide CLEC with usage information necessary for CLEC to bill for InterLATA and IntraLATA Exchange Access to the toll carrier (including Qwest where it is the toll carrier) in the form of either the actual usage or a negotiated or approved surrogate for this information. These Exchange Access records will be provided as Category 11 EMI records.

2.3.3 Qwest will provide DUF records for all usage billable to CLEC's QPP™ lines, including Busy Line Verify (BLV), Busy Line Interrupt (BLI), originating local usage, usage sensitive CLASS™ features, and Qwest-provided intraLATA toll. These records will be provided as Category 01 or Category 10 EMI records. Under this Agreement, terminating local usage records will not be provided. By agreeing to the foregoing, neither Party is foreclosed from advocating for the provision of local terminating records via an appropriate forum.

2.3.4 If CLEC chooses Qwest to provide IntraLATA Toll services for its QPP™ End User Customers, CLEC shall compensate Qwest for such services in accordance with the Rate Sheet.

2.4 QPP™ will include the capability for CLEC's End User Customers to choose their long distance service (InterLATA and IntraLATA) on a 2-PIC basis.

2.4.1 CLEC shall designate the Primary Interexchange Carrier (PIC) assignments on behalf of its End User Customers for InterLATA and IntraLATA services. CLEC shall follow all Applicable Laws, rules and regulations with respect to PIC changes and Qwest disclaims any liability for CLEC's improper PIC change requests.

2.4.2 Feature and InterLATA or IntraLATA PIC changes or additions for QPP™, will be processed concurrently with the QPP™ order as specified by CLEC.

2.5 Access to 911/E911 emergency services for CLEC's End User Customers shall be available pursuant to the terms and conditions of CLEC's ICAs. If Qwest becomes no longer obligated to provide access to 911/E911 emergency services pursuant to 47 U.S.C. §251, then Qwest shall thereafter provide such services under this Agreement with respect to all CLEC QPP™ service End User Customers and new QPP™ service End User Customers, to the same degree and extent that such 911/E911 emergency services were provided by Qwest prior to the elimination of 911/E911 emergency services as an obligation under 47 U.S.C. §251.

2.6 Reserved.

2.7 Qwest AIN, Qwest Voice Messaging Services and Qwest DSL (dependent upon service compatibility and end office availability) are offered on a commercial basis and may be purchased with QPP™ at the rates set forth in the attached Rate Sheet. Retail promotions may not be combined with QPP™. Non-recurring charges associated with Qwest DSL™ are not subject to discount. CLEC may order new or retain existing Qwest DSL service for End User Customers when utilizing QPP™-POTS, QPP™-Centrex, and QPP™-PBX (analog, non-DID trunks only) combinations, where Technically Feasible. The price for Qwest DSL provided with QPP™ service is included in the Rate Sheet to this Agreement.

2.8 Qwest DSL host service is not available with QPP™ service.

2.9 If Qwest develops and deploys new local switch features for its End User Customers, those switch features will be available in the same areas and subject to the same limitations with QPP™ service. The rates to be charged CLEC for such new local switch features will be negotiated but will not in any case be higher than the retail rate Qwest charges.

2.10 CLEC shall have the ability to combine the QPP™ service with a compatible voicemail product and stutter dial tone.

3.0 Rates and Charges

3.1 The recurring ("MRC") and nonrecurring ("NRC") rates for QPP™ services and all applicable usage-based rates and miscellaneous charges (other than applicable intercarrier compensation charges such as access charges and reciprocal compensation and MRCs and NRCs for elements and services provided pursuant to CLEC's ICAs) are set forth in the attached Rate Sheets. The rates for QPP™ services set forth in the attached Rate Sheets will be in addition to the applicable rates for elements and services provided under CLEC's ICAs.

3.2 The loop element combined with a QPP™ service will be provided pursuant to CLEC's ICAs with Qwest at the rates set forth in those ICAs. To the extent that the monthly recurring rate for the loop element in a particular state is modified on or after the Effective Date, the QPP™ port rate for that state in the Rate Sheet will be adjusted (either up or down) so that the total rate applicable to the QPP™ service and loop combination in that state (after giving effect to the QPP™ Port Rate Increases as adjusted for any applicable discount pursuant to Section 3.3 of this Service Exhibit) remains constant. The corresponding adjustment will be applied against the Port Rate Increases for the applicable state negotiated as a part of this Agreement and contained in the Rate Sheet. In no event shall any downward adjustment made on or after January 1, 2006 for a particular state under this section result in QPP™ Port Rate Increase of less than $1.00, nor shall any upward adjustment made on or after January 1, 2006 for a particular state result in a QPP™ Port Rate Increase of more than twice the scheduled increase. If the monthly recurring rate for the loop is modified by a shift in zone designation the parties shall use the difference in the statewide average loop rate as the basis for such adjustment, if any. Nothing in this Agreement shall affect the rates or any other terms and conditions for loops set forth in CLEC's ICAs with Qwest. For purposes of this Agreement, the Port Rate Increases refer to the increases in the Port rate reflecting pricing on the attached Rate Sheets.

Illustration 1: If the initial loop rate is $15, the initial Port rate is $3, and the scheduled Port Rate Increase is $2 for residential and $3 for business, an increase in the loop rate on January 1, 2006 of $1.50 to $16.50 will result in a corresponding reduction of the Port Rate Increase for residential to $1.00 (calculated: $2.00 - $1.50, but in no event less than $1.00) and a reduction of the Port Rate Increase for business of $1.50 (calculated: $3.00 - $1.50).

Illustration 2: If the initial loop rate is $15, the initial Port rate is $3, and the scheduled Port Rate Increase is $2 for residential and $3 for business, a decrease in the loop rate on January 1, 2006 of $2.50 to $12.50 will result in a corresponding upward adjustment of the Port Rate Increase for residential to $4.00 (calculated: $2.00 plus $2.50, but in no event greater than 2 X $2.00) and an upward adjustment of the Port Rate Increase for business to $5.50 (calculated: $3.00 plus $2.50).

3.3 The monthly recurring rates for the switch port in the attached Rate Sheets shall increase incrementally by the amount of the applicable QPP™ Port Rate Increase (as the same may be subsequently adjusted under Section 3.2) on January 1, 2005, January 1, 2006 and January 1, 2007. If the number of CLEC's QPP™ lines in service as of October 31, 2005 equals or exceeds 150,000, CLEC will be entitled to a discount off of the monthly recurring switch port rate applicable during calendar year 2006 equal to 10% of the QPP™ Port Rate Increases that take effect January 1, 2006 and to a discount off of the monthly recurring switch port rate applicable during calendar year 2007 equal to 10% of the QPP™ Port Rate Increases that take effect January 1, 2007. For purposes of this section, the number of QPP™ lines in service shall be calculated on a regionwide basis that includes all states in which this Agreement is in effect and, if necessary, the 150,000 threshold will be adjusted accordingly should QPP not be available as of October 1, 2005 in the same areas where QPP was available on the Effective Date of this Agreement.

3.4 CLEC shall be responsible for Billing its End User Customers served via QPP™ for all Miscellaneous Charges and surcharges required of CLEC by statute, regulation or otherwise required.

3.5 CLEC shall pay Qwest the PIC change charge associated with CLEC End User Customer changes of InterLATA or IntraLATA Carriers. Any change in CLEC's End User Customers' InterLATA or IntraLATA Carrier must be requested by CLEC on behalf of its End User Customer.

3.6 If an End User Customer is served by CLEC through a

QPP™ service, Qwest will not charge, assess, or collect Switched Access charges for InterLATA or IntraLATA calls originating or terminating from that End User Customer's phone.

3.7 Qwest shall have a reasonable amount of time to implement system or other changes necessary to bill CLEC for rates or charges associated with QPP™ services. Such system or other changes must be completed and operational no later than December 31, 2004.

3.8 QPP™ services have a one month minimum service period requirement for each CLEC End User Customer. The one month minimum service period is the period of time that CLEC is required to pay 100% of the monthly recurring price for the service even if CLEC does not retain service for the entire month. QPP™ services are billed month to month and shall after the one month minimum service period is satisfied be pro-rated for partial months based on the number of days service was provided.

3.9 To receive QPP™ Residential rates, CLEC must identify residential end users by working telephone number (WTN) via LSR as described in the QPP™ PCAT. CLEC will be permitted to begin submitting such LSRs in accordance with the agreed-upon QPP Service Residential End User Identification Project Plan. Qwest will not assess a nonrecurring charge for the processing of this records order to identify the installed base of residential end users. Following submission by CLEC of such LSRs, CLEC and Qwest shall cooperate to ensure that appropriate updates are reflected in Qwest's billing systems. QPP™ Business rates will apply to all WTNs not specifically identified as QPP™ Residential. Changes to the LSR process intended to implement the residential identifier for new orders going forward shall be implemented through the Change Management Process

3.9.1 To receive QPP™ Residential rates with an Effective Billing Date (EBD) of January 1, 2005, CLEC must identify their existing UNE-P residential end users by working telephone number (WTN) via LSR as described in the QPP™ PCAT by April 1, 2005. On April 1, 2005, Qwest will apply QPP™ Business rates, with an EBD of January 1, 2005, to all WTNs that were in service during this period. For those WTNs identified as residential end users on or before April 1, 2005, Qwest will process a one-time credit per WTN, per month for the period of time between January 1, 2005 and the later of (a) WTN installation date and (b) completion date of an order identifying the WTN as serving a residential end user. This one-time credit will be processed on one Billing Account Number (BAN) per state. After April 1, 2005, only WTNs identified as residential end users will be billed Residential rates (via the Residential End User Credit provided in the Rate Sheet), and CLEC shall waive any right to credits or discounts related to residential end users that were not so identified by such date.

3.9.2 **High Volume Performance Credit.** If, on January 1, 2005, the number of CLEC's QPP residential end user WTNs to be identified equals or exceeds 200,000, in consideration of the CLEC completion of the identification of such high volume of QPP residential end user WTNs via LSR by April 1, 2005, as described in 3.9.1 above, Qwest will provide an additional one-time high volume performance credit to CLEC in an amount equal to $1.65 per residential end user WTN for each WTN in service under UNE-P with Qwest as of January 1, 2005. If more than a de minimis number (i.e., one percent) of its residential user WTNs in service as of March 31, 2005 have not been identified by CLEC by April 1, 2005, and such failure was not caused by a negligent or willful act or omission of Qwest, CLEC shall be entitled to no incentive credit whatsoever. A WTN is identified for these purposes upon the submission of a complete LSR by the CLEC. For the elimination of doubt, Qwest operational support system (OSS) capacity limitations for entry of LSRs shall not be deemed a negligent intervening cause of CLEC's failure to identify its residential end user WTNs in a timely manner unless Qwest's OSS materially fails to allow CLEC to submit LSRs as set forth in the agreed-to project schedule described in Section 3.9 of this Agreement. This one-time performance credit will be processed on one Billing Account Number (BAN) per state. In any event, no credit shall be processed pursuant to this section for any residential end user WTNs identified after April 1, 2005 and the residential rates will be applied to these WTNs on a prospective basis only from the date of the identification.

3.10 The subsequent order charge is applicable on a per order basis when changes are requested to existing service, including changing a telephone number, initiating or removing Suspension or Service, denying or restoring service, adding, removing or changing features, and other similar requests.

4.0 Systems and Interfaces

4.1 Qwest and CLEC shall continue to support use of existing UNE-P OSS interfaces and current OSS business rules for QPP™ (including without limitation electronic ordering and flowthrough applicable to UNE-P on June 14, 2004) as the same may evolve over time.

4.2 QPP™ products and services are ordered via an LSR as described in the PCAT. Products and Services Ordering are found on the Qwest wholesale website.

4.3 Prior to placing an order on behalf of each End User Customer, CLEC shall be responsible for obtaining and have in its possession a Proof of Authorization as set forth in this Agreement.

4.4 When Qwest or another provider of choice, at the End User Customer's request, orders the discontinuance of the End User Customer's existing service with CLEC, Qwest will render its closing bill to CLEC effective with the disconnection. Qwest will notify CLEC by FAX, OSS interface, or other agreed upon processes when an End User Customer moves to Qwest or another service provider. Qwest shall not provide CLEC or Qwest retail personnel with the name of the other service provider selected by the End User Customer.

4.5 CLEC shall provide Qwest and Qwest shall provide CLEC with points of contact for order entry, problem resolution, repair, and in the event special attention is required on service request.

5.0 Billing

Qwest shall provide CLEC, on a monthly basis, within seven to ten (7 – 10) calendar days of the last day of the most recent Billing period, in an agreed upon standard electronic format, Billing information including (1) a summary bill, and (2) individual End User Customer sub-account information. To the extent CLEC needs additional or different billing information in order to properly bill its End Users or other Carriers (including without limitation Qwest), Qwest shall work with CLEC in good faith to deliver such information.

6.0 **Maintenance and Repair**

6.1 Qwest will maintain facilities and equipment that comprise the QPP™ service provided to CLEC. CLEC or its End User Customers may not rearrange, move, disconnect or attempt to repair Qwest facilities or equipment, other than by connection or disconnection to any interface between Qwest and the End User Customer, without the written consent of Qwest.

6.2 Qwest shall provide general repair and maintenance services on its facilities, including those facilities supporting QPP™ services purchased by CLEC. Without limiting the generality of the foregoing, Qwest shall repair and restore any equipment or any other maintainable component that may adversely impact CLEC's use of QPP™ service. Qwest and CLEC shall cooperate with each other to implement procedures and processes for handling service-affecting events. There shall be no charge for the services provided under this section except as set forth in the Rate Sheet.

7.0 **Performance Measures and Reporting, Performance Targets and Service Credits**

7.1 Each party shall provide suitably qualified personnel to perform its obligations under this Agreement and all QPP™ services hereunder in a timely and efficient manner with diligence and care, consistent with the professional standards of practice in the industry, and in conformance with all applicable laws and regulations. The QPP™ service attributes and process enhancements are not subject to the Change Management Process ("CMP"). CLEC proposed changes to QPP™ service attributes and process enhancements will be communicated through the standard account interfaces. Change requests common to shared systems and processes subject to CMP will continue to be addressed via the CMP procedures.

7.2 Qwest will provide commercial performance measurements and reporting against established performance targets with QPP™ service. The following performance measurements will apply to QPP™ Residential and QPP™ Business: (a) Firm Order Confirmations (FOCs) On Time, (b) Installation Commitments Met, (c) Order Installation Interval, (d) Out of Service Cleared within 24 Hours, (e) Mean Time to Restore, (f) Trouble Rate, (g) New Service Quality, and (h) Repair Repeat Report Rate. Commercial measurement definitions, methodologies, performance targets and reporting requirements are attached as Attachment A. Qwest will provide CLEC with the raw data necessary to allow CLEC to disaggregate results at the state level.

7.3 CLEC will be entitled to service credits only for each instance of a missed installation commitment and each instance of an out of service condition that is not cleared within 24 hours as described below. All such service credits shall be applied automatically by Qwest as credit against CLEC's bill for the billing period following the one in which the credits were accrued.

7.3.1 Installation Commitments Met. For each installation commitment that Qwest, through its own fault, fails to meet, Qwest will provide a service credit equal to 100% of the nonrecurring charge for that installation. In calculating the credit, Qwest shall use the state installation nonrecurring charge contained in this Agreement for that order type. The definition of a "missed installation commitment" and the associated exclusions are described in Attachment A.

7.3.2 Out of Service Cleared within 24 Hours. For each out-of-service condition that Qwest, through its own fault, fails to resolve within 24 hours, Qwest will provide a service credit equal to one day's recurring charge (monthly recurring charge divided by 30) for each day out of service beyond the first 24 hours. (For example, if the out-of-service condition exists for 25 to 47 hours, CLEC would be entitled to a credit equal to the monthly recurring charge divided by 30. If the out-of-service condition existed for 48 to 71 hours, the credit would equal two times the monthly recurring charge divided by 30). In addition, Qwest will pay double payments on the third and all the subsequent repeat trouble reports that result in out of service conditions greater than 24 hours that occur within sixty (60) days of the first occurrence of the same trouble. The definition of an "out of service condition" and the associated exclusions are described in Attachment A.

ATTACHMENT 4

Attachment 4

[Service Date Fe ruary 9, 2005]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

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

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

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

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

Communication Commission's (FCC) Triennial Review Order,[2] of a proposed Interconnection Agreement etween Covad and Qwest Corporation (Qwest). Ar i trator Ann E. Rendahl entered Order No. 04, the Ar it rator's Report and Decision (Ar it rator's Report), on Novem er 2, 2004.

3 Covad filed its Petition for Commission Review of Ar itrator's Report on Decem er 3, 2004. Qwest filed its Response on Decem e r 17, 2004. The parties also filed a complete, signed Interconnection Agreement on Decem er 17, 2004, which incorporated negotiated and ar itr ated terms consistent with the Ar i trator's Report.

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

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

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

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

MEMORANDUM

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

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

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

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

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

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

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

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

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

10 The ArJ itrator rejected Covad's proposed additional language, finding that Qwest has agreed to provide the information required J y FCC rule and that the information Covad requests Je put in an e-mail notice may J e Ju rdensome to Qwest.[5]

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

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

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

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

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

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

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

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

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

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

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

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

> Qwest will not retire copper facilities serving CLEC's End User Customers or CLEC, at any time prior to discontinuance Jy CLEC or CLEC's End User Customer of the service J eing provided J y CLEC, without first provisioning an alternative service over any availaJ le, compatiJ le facility (i.e. copper or fiJer) to CLEC or CLEC End User Customer. Such alternative service shall J e provisioned in a manner that does not degredate the service or increase the cost to CLEC or End User Customers of CLEC. Disputes over copper

> retirement shall J e suJ ject to the Dispute Resolution provisions of this Interconnection Agreement.

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

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

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

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

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

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

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

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

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

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

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

Qwest	Covad
Section 4.0 – Definitions: "UnJund led Network Element" (UNE) is a Network Element that has Jee n defined Jy the FCC or the Commission as a Network Element to which Qwest is oJ ligated under Section 251(c)(3) of the Act to provide unJu ndled access or for which unJ undled access is provided under this Agreement. UnJun dled Network Elements do not include those Network Elements Qwest is oJ ligated to provide only pursuant to Section 271 of the Act.	Section 4.0 – Definitions: "UnJund led Network Element" (UNE) is a Network Element that has Jee n defined Jy the FCC or the Commission as a Network Element to which Qwest is oJ ligated under Section 251(c)(3) of the Act to provide unJund led access, <u>for which unJund led access is required under section 271 of the Act or applicaJ le state law,</u> or for which unJu ndled access is provided under this Agreement. ~~UnJ undled Network Elements do not include those Network Elements Qwest is oJ ligated to provide only pursuant to Section 271 of the Act.~~

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

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

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

26 The ArJ itrator determined that network elements required to J e unJund led pursuant to Section 251(c)(3) and Section 271 should Je distinguished in the agreement.[31] The ArJi trator found that the network elements may J e the same, *i.e.*, loops, switching, and transport, J ut the foundation for their availaJ ility on an unJ undled J asis is different.[32] The ArJi trator required the parties to modify the definition of UnJun dled Network Element in Section 4 of the agreement to reflect this decision.

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[27] Covad proposes language seeking access to Section 271 elements at any technically feasiJ le point (§ 9.1.5), access to DS1, DS3, and dark fiJ er loops under Section 271 (§ 9.2.1.3), provisioning of more than two unJ undled loops for a single end user customer under Section 271 (§ 9.2.1.4), and access as Section 271 elements to feeder suJ loops (§9.3.1.1), DS1 feeder loops (§§ 9.3.1.2 and 9.3.2.2), unJ undled dedicated interoffice transport (UDIT) (§ 9.6, 9.6.1.5, 9.6.1.5.1), DS1 transport along a particular route (§§ 9.6.1.6, 9.6.1.6.1), and unJ undled switching and line splitting (§ 9.21.2).
[28] *Triennial Review Order*, ¶¶ 653-655.
[29] *USTA II*, 359 F.3d at 588.
[30] 47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), and (x).
[31] ArJ itrator's Report and Decision, ¶ 54.
[32] *Id.*

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

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

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

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

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

31 OJj ecting to the ArJi trator's decision that the Commission would J e required to engage in an impairment analysis J efore requiring additional unJund led elements, Covad asserts that it requests only that the Commission "recognize its authority under section 271 of the Act, Washington law, or Jot h, to order unJund ling consistent with the Competitive Checklist and the statutory directives of this Commission."[40] Covad asserts that the FCC and numerous state courts have consistently held that the savings clauses under the 1996 Act, in particular Section 252(e)(3), provide state commissions with the authority to enforce state access oJ ligations to the extent these oJ ligations do not directly conflict with section 251.[41] Covad also argues that no separate proceeding would Je necessary to determine whether to maintain under state law existing unJ undling requirements.[42]

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

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

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

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

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

35 Qwest asserts that the ArJ itrator reasonaJ ly concluded that it would not J e prudent to include Section 271 oJ ligations in an interconnection agreement as, the FCC was expected to enter a decision in DecemJ er concerning Qwest's forJe arance petition J efore the FCC.[50] In response to Covad's argument that an

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[45] *Id.*, ¶ 46.

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

[47] Covad Petition, ¶¶ 50-54.

[48] Qwest Response, ¶ 26.

[49] *Id.*, ¶¶ 27-28.

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

FCC forJ earance decision would not preclude a state unJ undling requirement, Qwest asserts that the savings clauses in the Act, *i.e.*, Sections 251(d)(3), 252(3)(3), and 261(J) and (c), require that any state requirements Je consistent with the provisions of Section 251.[51] Qwest asserts any state requirement to unJ undle network elements would Je inconsistent with the Act if the FCC has determined that the elements are not suJje ct to unJ undling.[52]

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

37 ***Decision.*** We reverse the ArJ itrator's decision that Issue No. Two was not an open issue suJ ject to arJi tration. On the merits of the issue, however, we determine that this Commission has no authority under Section 251 or Section 271 of the Act to require Qwest to include Section 271 elements in an interconnection agreement. We find the ArJ itrator's discussion of pending forJe arance petitions to J e dicta, and not a finding suJject to review. We uphold the ArJ itrator's decision concerning lack of an impairment analysis in this proceeding, J ut also find that any unJ undling requirement J ased on state law would likely J e preempted as inconsistent with federal law, regardless of the

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of Section 271, Order, WC Docket No. 03-260, DA 04-3845 (rel. Dec. 7, 2004).

[51] Qwest Response, ¶ 30.

[52] *Id.*, ¶¶ 31-33.

[53] *Id.*, ¶ 34.

[54] *Id.*, ¶¶ 34-36.

[55] *Id.*, ¶ 38.

[56] *Id.*, ¶ 37.

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

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

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

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

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

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

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

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

40 The issue of whether state commissions may require Section 271 network elements to J e included in arJ itrated interconnection agreements arises due to the FCC's decision that BOCs have an independent oJ ligation to provide access to loops, switching, transport, and signaling network elements under Section 271(c)(2)(B) (iv), (v), (vi) and (x), regardless of whether the elements are suJ ject to unJund ling under Section 251.[62] Covad requests that the Section 271 elements Je included in a "unified" definition of network elements, and that the proposed agreement include elements that have J een "delisted" or made unavailaJ le under Section 251(c)(3), pursuant to Section 271 or state law, in order to maintain the status quo.[63]

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

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

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

[63] TR. 384:22 – 385:12.

[64] 47 U.S.C. § 271(d)(3).

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

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

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

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[66] 47 U.S.C. § 271(d)(6).

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

[68] *See* Covad Petition, ¶ 54.

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

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

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

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

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

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

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

state law, in arJ itrating an interconnection agreement. Section 252 requires state commissions to limit their consideration of a petition for arJ itration to the issues included in the petition and any response. As discussed aJ ove, J oth Covad and Qwest addressed in their petition and response the issue of the inclusion in the agreement of network elements availaJ le pursuant to Section 271 and state law.

47 Section 252(c) estaJ lishes certain standards for arJ itration of interconnection agreements:

> In resolving Jy arJ itration under suJse ction(J) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescriJ ed J y the Commission pursuant to section 251;
> (2) estaJ lish any rates for interconnection, services, or network elements according to suJ section (d); and
> (3) provide a schedule for implementation of the terms and conditions J y the parties to the agreement.

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

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[72] *Indiana Bell*, 2003 WL 1903363 at 6, 8.
[73] *See Maine Order*, n.22.

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

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

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

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[74] *Id.*, at 19.
[75] *See Triennial Review Order*, ¶ 664.
[76] *In re Electric Lightwave*, 123 Wn.2d 530, 538-39, 869 P.2d 1045 (1994)

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

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

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

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

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

Court of Appeals.[81] The *Lark* decision finds that a state order is contrary to federal law where the order requires what a federal court has deemed to Je contrary to federal law.[82] The *McCarty* court addressed a decision of the Indiana Utility Regulatory Commission to include unJ undled packet switching in an interconnection agreement during Section 252 arJ itration. After noting that the FCC found in the Triennial Review Order that ILECs are not required to unJ undle packet switching, the court oJ served that "only in very limited circumstances, which we cannot now imagine, will a state Je aJ le to craft a packet switching unJund ling requirement that will comply with the Act."[83]

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

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

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

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

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

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

[85] *Triennial Review Order,* ¶ 579.

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

of UnJu ndled Network Elements, with one or more such facilities or services.	unJ undling under Section 251(c)(3) of the Act, or the comJ ination of an ~~UnJ undled Network Element,~~ a 251(c)(3) UNE or a ComJ ination of ~~UnJ undled Network Elements,~~ 251(c)(3) UNE's with one or more such facilities or services.
9.1.1 – See aJ ove	9.1.1 – See aJove . (Excerpt – not in Qwest's language): Qwest is required to connect or comJ ine 251(c)(3) UNEs with any and all of its service offerings, as required J y the Telecommunications Act of 1996, FCC Rules, FCC Orders and/or state law or orders. Qwest must provide all technically feasiJ le 251(c)(3) UNE comJ inations, including 251(c)(3) UNEs ordinarily comJ ined and new 251(c)(3) UNE comJ inations.
9.1.1.1 This Agreement does not provide for the purchase and/or provision of resold telecommunications services with unJ undled network elements provided pursuant to section 251(c)(3) of the Act, or for commingling of resale telecommunications services with other resale telecommunications services. At CLEC's request, the parties will negotiate an amendment to this Agreement governing resale and the commingling of resold telecommunications pursuant to ApplicaJ le Law.	9.1.1.1 Commingling - CLEC may commingle 251(c)(3) UNEs and comJ inations of 251(c)(3) UNEs with any other services oJ tained J y any method other than unJ undling under section 251(c)(3) of the Act, including switched and special access services offered pursuant to tariff and resale. Qwest will perform the necessary functions to effectuate such commingling upon request. This Agreement does not provide for the purchase and/or provision of resold telecommunications services with unJ undled network elements

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

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

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

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

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

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

> [A]n incumJ ent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE comJ ination *with one or more facilities or services that a requesting carrier has o tained at wholesale from an incum ent LEC pursuant to a method other than un undling under section 251(c)(3) of the Act*. In addition, upon request, an incumJ ent LEC shall perform the functions necessary to commingle a UNE or UNE comJ ination with one or more *facilities or services that a requesting carrier has o t ained at wholesale from an incum e nt LEC pursuant to a method other than un undling under section 251(c)(3) of the Act*. As a result, competitive LECs may

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

> connect, comJi ne, or otherwise attach UNEs and comJi nations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff), and incumJen t LECs shall not deny access to UNEs and comJi nations of UNEs on the grounds that such facilities or services are somehow connected, comJ ined, or otherwise attached to wholesale services.[97]

The FCC defines commingling as " the connecting, attaching, or otherwise linking of a UNE, or a UNE comJi nation, to one or more facilities or services that a requesting carrier has oJ tained at wholesale from an incumJent LEC pursuant to any method other than unJu ndling under Section 251(c)(3) of the Act, or the comJ ining of a UNE or UNE comJi nation with one or more such wholesale services."[98]

60 The FCC included the following discussion of ILEC commingling oJ ligations in paragraph 584 of the Triennial Review Order, as corrected J y the Errata to the Triennial Review Order:

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

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

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[97] *Triennial Review Order,* ¶ 579.

[98] *Id.*

[99] *Triennial Review Order,* ¶ 584, as modified J y *In the matter of Review of the Section 251 Un undling O ligations of Incum ent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capa ility*, CC Docket Nos. 01-338, 96098, 98-147, Errata, FCC 03-227 (rel. Sept. 17, 2003), ¶ 27 [hereinafter "*Errata*"].

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

> We decline to require BOCs, pursuant to section 271, to comJ ine network elements that are no longer required to Je u nJund led under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "comJining " and, as noted aJove , do not refer Jack to the comJin ation requirement set forth in section 251(c)(3). ~~We also decline to apply our commingling rule, set forth in Part VII.A. aJ ove, to services that must Je offered pursuant to these checklist items.~~[100]

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

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

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100 *Triennial Review Order*, n.1990, as modified J y *Errata*, ¶ 31.

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

64 The next question is whether the FCC has excluded Section 271 elements as a whole from commingling oJ ligations, as Qwest asserts, or allows Section 251(c)(3) UNEs to Je commingled with Section 271 elements, as Covad claims. We find Covad's interpretation of paragraph 1990 persuasive, and reverse the ArJi trator's decision on this point as well. The FCC removed language from footnote 1990 that would support Qwest's expansive view prohiJiti ng any commingling of Section 271 elements. The suJjec t of the FCC's commingling definition is Section 251(c)(3) UNEs, not wholesale services. It is reasonaJ le to infer that BOCs are not required to apply the commingling rule J y commingling Section 271 elements with other wholesale elements, Jut that BOCs must allow requesting carriers to commingle Section 251(c)(3) UNEs with wholesale services, such as Section 271 elements. The D.C. Circuit's decision in *USTA II* supports this finding. The D.C. Circuit approved the FCC's finding that "in contrast to ILEC oJ ligations under § 251, the independent § 271 unJ undling oJ ligations didn't include a duty to comJi ne network elements."[101]

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

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

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

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

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

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

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

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[102] *See* 47 C.F.R. § 51.5.

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

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

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

Qwest	**Covad**
8.2.1.23.1.4 CLEC is responsiJ le for the end-to-end service design that uses ICDF Cross Connection to ensure that the resulting service meets its Customer's needs. This is accomplished J y CLEC using the Design Layout Record (DLR) for the service connection.	8.2.1.23.1.4 CLEC is responsiJ le for the end-to-end service design that uses ICDF Cross Connection to ensure that the resulting service meets its Customer's needs. This is accomplished J y CLEC using the Design Layout Record (DLR) for the service connection. Depending on the distance parameters of the comJ ination, regeneration may Je required Jut Q west shall not charge CLEC for such regeneration, if there does not exist in the affected Premises, another Collocation space whose use Jy CLEC would not have required regeneration, and such a space would not have existed except for Qwest's reservation of the space

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

	ancillary services from the Collocation space, J ut if Ja sed on the ANSI Standard for caJ le distance limitations, regeneration would not J e required J ut is specifically requested J y CLEC, then the Channel Regeneration Charge would apply. If Channel Regeneration is required, J ased on the ANSI standard for caJ le distance limitations, Qwest will recover the costs indirectly and on a proportionate Jas is with equal sharing of the costs among all collocators and Qwest. CaJ le distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B."
9.1.10 Channel Regeneration. Qwest's design will ensure the caJ le J etween the Qwest provided active elements and the DSX will meet the proper signal level requirements. Channel Regeneration will not J e charged separately for Interconnection Je tween a collocation space and Qwest's network. CaJ le distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B".	~~9.1.10 Channel Regeneration. Qwest's design will ensure the caJ le J etween the Qwest provided active elements and the DSX will meet the proper signal level requirements. Channel Regeneration will not Je charged separately for Interconnection J etween a collocation space and Qwest's network. CaJ le distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B".~~

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

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

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

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

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

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

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

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

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[111] Covad Petition, ¶ 66.

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

[113] Covad Petition, ¶ 66.

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

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

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

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

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

78 Finally, Covad contests the ArJ itrator's decision to apply retail rates given an aJs ence of TELRIC rates for channel regeneration.[123] Covad asserts that the Commission-estaJ lished rate of $0.00 for channel regeneration *is* the applicaJ le TELRIC rate approved Jy the Commission.[124] Further, Covad asserts that applying the TELRIC rate rather than the retail rate in the FCC access tariff would J e a "more equitaJ le and legally acceptaJ le result."[125]

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

80 Qwest asserts that the record in the proceeding shows that CLECs have the aJ ility to cross-connect with each other in Qwest central offices J y creating a direct connection J etween collocation spaces or through a common ICDF (Interconnection DistriJuti on Frame).[129] Qwest asserts that CLECs have the aJ ility to self-provision regeneration, if necessary, Jy J oosting the signal from their own collocation spaces.[130]

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

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

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

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

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[131] *Id.,* ¶ 51.
[132] *Id.,* ¶ 52.
[133] *See* Exh. 45-T at 19: 9-21(Norman); Exh. 11-RT at 3-4 (Zulevic); TR. 200:21-201:10, 202:16-203:1 (Norman).

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

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

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[134] Exh. 71, § 8.2.1.23.1.1 (*emphasis added*).

[135] Exh. 51 at 23:13-20 (Norman testimony in Colorado proceeding).

[136] Exh. 45-T at 13:11-14:2 (Norman); *see also* Exh. 51 at 23:6-24:10 (Norman testimony in Colorado proceeding).

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

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

> IncumJ ent LEC-provisioned cross-connects are properly viewed as part of the terms and conditions of the requesting carrier's collocation in much the same way as the incumJ ent LEC provisions caJ les that provide electrical power to collocators. Once equipment is eligiJ le for collocation, the incumJe nt LEC must install and maintain power caJ les, *among other facilities and equipment*, to enaJ le the collocator to operate the collocated equipment. The power caJ les are not "collocated" merely J ecause the incumJent L EC installs and maintains these caJ les in areas outside the requesting carrier's immediate collocation space. Instead, the incumJen t provides the power caJ les as part of its oJ ligation to provide for interconnection and collocation "on rates, terms, and conditions that are just, reasonaJ le, and non-discriminatory." [Footnote omitted] *As with power ca les, an incum ent installs and maintains cross-connect ca les—or refuses to install and maintain them—as part of the terms and conditions under which the incum ent provides collocation.* Indeed, the Commission has long considered cross-connects to J e part of the terms and conditions under which LECs provide interconnection. [Footnote omitted][139]

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

[138] 47 U.S.C. § 251(c)(6).

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

88 The FCC found that "an incumJ ent LEC would J e acting in an unreasonaJ le and discriminatory manner if it refused to provide cross-connects J etween collocators."[140] The FCC further stated "[t]he provisioning of cross-connects within the incumJent's premises merely puts the collocator in position to achieve the same interconnection with other competitive LECs that the incumJe nt itself is aJ le to achieve."[141]

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

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

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

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

of situation present in this arJi tration, *i.e.*, a cross-connection that would traverse common areas and make use of a distriJu tion frame.

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

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

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

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

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

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

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

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

[146] *Id.*, at 29.

5) Payment Issues[147]

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

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

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

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

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

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

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

97 The ArJi trator found Covad's "new products exception" to Je unworkaJ le, noting that it may cause more delays and confusion that the current process. *Id.* The ArJi trator found it inappropriate to allow Covad an additional 15 days to address Ji lling issues relating to increased CLEC partnering in line-splitting arrangements, as such new arrangements are a cost of doing J usiness. *Id.*

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

99 Covad further disputes the ArJ itrator's decision that Ji ll review is merely a cost of Ju siness for Covad.[154] Covad argues that requiring one party to pay for another party's failings is cost-shifting.[155] Covad asserts that it requests additional time only to address proJ lems created J y Qwest's failure to meet industry norms for Ji lling.[156]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

2003. The parties could not resolve certain issues Jy negotiation and Covad requested arJit ration on May 25, 2004.

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

126 (7) The ArJi trator's decision that Qwest and Covad did not mutually agree to negotiate or arJi trate Issue No. Two was in error, as the decision was Ja sed on facts not in evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

THE COMMISSION ORDERS:

147 (1) The ArJ itrator's Report and Decision, Order No. 4 in this arJ itration proceeding, entered on NovemJe r 2, 2004, is affirmed with respect to the following issues contested on review:

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

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

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

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

148 (2) The ArJ itrator's Report and Decision, Order No. 4 in this arJ itration proceeding, entered on NovemJe r 2, 2004, is reversed with respect to the following issues contested on review:

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

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

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

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

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

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

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

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