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BEFORE THE ARIZONA CORPORATION COMMISSION

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

**DOCKET NO. T-03632A-04-0425
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QWEST CORPORATION'S POST-HEARING REPLY BRIEF

Norman G. Curtright
Winslow B. Waxter
QWEST CORPORATION
4041 N. Central Ave., Suite 1100
Phoenix, Arizona 85012
(602) 630-2187

John M. Devaney
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)

Attorneys for Qwest Corporation

TABLE OF CONTENTS

INTRODUCTION.....	4
DISPUTED ISSUES	5
Issue 1: Retirement of Copper Facilities (Sections 9.1.15; 9.1.15.1 and 9.1.15.1.1).....	5
1. Covad's "Alternative Service" Proposal Is Unlawful.....	5
2. The Notice Of Copper Retirements That Qwest Has Agreed To Provide Complies Fully With The FCC's Notice Requirements.....	10
Issue 2: Unified Agreement/Defining Unbundled Network Elements (Sections 4.0 (Definition Of "Unbundled Network Element"), 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, 9.21.2).	11
1. It Is Improper To Include Terms Relating To Network Elements Provided Under Section 271 In An Interconnection Agreement.....	13
2. Covad Has Provided No Legal Support For Its Claim That State Commissions Have Decision-Making Authority Under Section 271 And Can Impose Unbundling Obligations Under That Provision Of The Act.	14
3. The Commission Does Not Have Authority To Establish Prices For Section 271 Elements.....	17
4. The Act Does Not Permit The Commission To Create Under State Law Unbundling Requirements That The FCC Rejected In The <i>TRO</i> Or That The D.C. Circuit Vacated In <i>USTA II</i>	20
5. Covad's Attempt To Raise A Line Splitting Issue At This Late Stage In The Arbitration Is Improper And Its Line Splitting Argument Is Substantively Flawed.	23
6. The ICA Should List Specific Non-251 Network Elements That Qwest Is Not Required to Provide Under The Agreement.	26
Issue 3: Commingling (Section 4.0 and Definition of "Section 251(c)(3) UNE," Section 9.1.1.1) - The ICA Should Not Require Qwest to Commingle Elements Provided Under Section 271 With Other Network Elements.....	27
Issue 5: CLEC-to-CLEC Channel Regeneration.....	28
1. Background	28
2. Qwest's Proposed Language.....	29

3.	Covad Is Wrong in Arguing That The FCC Rules Require Qwest to Provide CLEC-To-CLEC Regeneration	30
	Issue 8: Payment Due Date; Timing For Discontinuing Orders; and Timing For Discontinuing Services.	33
1.	Payment Due Date.	33
2.	Timing for Discontinuing Orders and Services.	37
	CONCLUSION.....	39

Qwest Corporation ("Qwest") submits this post-hearing reply brief in support of its positions in this interconnection arbitration under the Telecommunications Act of 1996 ("the Act") between Qwest and Covad Communications Company ("Covad").

INTRODUCTION

Qwest and Covad have been able to resolve most of their disputes through cooperative, good faith negotiations, leaving a relatively small number of disputed issues that the Commission must decide in this arbitration. As Qwest stated in its post-hearing brief, the parties' inability to resolve these remaining issues is largely attributable to Covad's adherence to overly aggressive demands that are without legal support. Covad continues this approach to the disputed issues in its post-hearing brief.

The absence of legal support for Covad's positions has been demonstrated by the recent decisions in the Covad/Qwest arbitrations in Colorado, Minnesota, Washington and Utah.¹ The commissions and administrative law judges in those states have ruled for Qwest on the majority of the issues, finding that a majority of Covad's positions lack legal and evidentiary support.²

¹ See *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Co.*, Colorado Commission Docket No. 04B-160T, Decision No. C04-1037, Initial Commission Decision (Colo. Commission Aug. 19, 2004) ("Colorado Arbitration Order"); *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Arbitrator's Report (Minn. Commission Dec. 15, 2004) ("Minnesota ALJ Order") *aff'd in part In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement With Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement (Minn. Commission March 14, 2005) ("Minnesota Arbitration Order"); *In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation*, Washington Commission Docket No. UT-043045, Order No. 06, Final Order Affirming in Part, Arbitrator's Report and Decision; Granting, In Part, Covad's Petition for Review; Requiring Filing of Conforming Interconnection Agreement (Wash. Commission Feb. 9, 2005) ("Washington Arbitration Order"); *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Utah Commission Docket No. 04-2277-02, Arbitration Report and Order (Utah Commission Feb. 8, 2005) ("Utah Arbitration Order").

² An exception is that the Colorado, Washington and Minnesota decisions require Qwest to commingle Section 271 network elements with unbundled network elements it provides under Section 251. In addition, the Minnesota Commission adopted the ALJ's rulings relating to billing and payment issues, except that it modified the ruling relating to the period within which Covad must pay invoices, finding that in certain circumstances, Covad will

There is thus now a substantial body of determinations and recommendations by neutral decision-makers relating to each of the disputed issues before the Commission in this proceeding. These decisions and recommendations demonstrate forcefully the significant flaws in Covad's proposals. In the discussion that follows, Qwest further demonstrates these flaws and explains why the Commission should adopt Qwest's proposals relating to each of the disputed issues.

DISPUTED ISSUES

Issue 1: Retirement of Copper Facilities (Sections 9.1.15; 9.1.15.1 and 9.1.15.1.1)³

1. Covad's "Alternative Service" Proposal Is Unlawful.

Qwest's post-hearing brief demonstrates that in the *TRO*,⁴ the FCC confirmed the right of ILECs to retire copper loops that they replace with fiber facilities.⁵ Covad's proposed ICA language would eviscerate this right by prohibiting Qwest from retiring copper unless it provides Covad with an alternative service at no increase in cost and with no degradation of service quality. Nothing in the *TRO* supports imposing this onerous condition, which conflicts directly with the Congressionally-mandated objective of encouraging the deployment of the fiber facilities that support advanced telecommunications services. It is not surprising, therefore, that in the four Qwest/Covad arbitrations in which this demand from Covad has already been

have 45 days to pay instead of 30. Also, the Colorado Commission did not address the Section 271 unbundling issues encompassed by arbitration issue No. 2, since Covad agreed to Qwest's ICA language in Colorado relating to those issues.

³ As noted in Covad's Post-Hearing Brief ("Covad Br."), Covad agreed to close Sections 9.2.1.2.3; 9.2.1.2.3.1; and 9.2.1.2.3.2. Covad Br. at 4. Accordingly, the only sections at issue are 9.1.15; 9.1.15.1; and 9.1.15.1.1. *Id.*

⁴ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (FCC 2003) ("*Triennial Review Order*" or "*TRO*"), *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) ("*USTA II*").

⁵ Qwest Corporation's Post-Hearing Brief ("Qwest Br.") at 3-4.

considered, it has been rejected outright.⁶

Covad attempts to support its demand by asserting that the *TRO* prohibits an ILEC from retiring a copper loop unless it continues to provide access to the loop facilities required under the FCC's rules.⁷ This assertion rests on a distorted reading of the *TRO*. In the *TRO*, the FCC ruled that ILECs must provide notice of planned copper retirements that involve replacements with fiber-to-the-home ("FTTH") loops, while confirming the right of ILECs to retire copper.⁸ At the same time, the FCC established a process for CLECs to object to planned retirements and established that CLEC objections will be deemed denied "[u]nless the copper retirement scenario suggests that competition will be denied access to the loop facilities required under our rules...."⁹

Covad turns this ruling on its head by arguing that ILECs cannot retire copper facilities without providing an alternative service. As the discussion above shows, that is not what the FCC ruled. Instead, the FCC confirmed the right to retire copper facilities and gave CLECs limited rights to object to retirements. The FCC's reference to "access to the loop facilities required under our rules," contrary to Covad's argument, refers only to an ILEC's continuing obligation to provide access to the narrowband portion of a loop.¹⁰ Qwest complies fully with that requirement by ensuring CLEC access to that portion of a loop, including access to a voice grade channel over the new, replacement loop facilities.¹¹

In its brief, Covad concedes that its "alternative service" requirement cannot apply to

⁶ See Qwest Br. at 4.

⁷ Covad Br. at 5.

⁸ *TRO* ¶ 282.

⁹ *Id.*

¹⁰ *Id.* ¶¶ 296-97.

¹¹ Qwest Exhibit 2 (Stewart Direct) at 7-8.

copper retirements involving FTTH replacements.¹² Covad's position is that its proposal applies only to the circumstance in which Qwest retires copper feeder and replaces it with fiber feeder, resulting in a hybrid copper/fiber loop.¹³ However, as Qwest discussed in its opening brief, the retirement rights the FCC granted for replacements of copper feeder with fiber feeder are even broader than those for replacements of copper loops with FTTH loops.¹⁴ There is thus no legal support whatsoever in the *TRO* for application of Covad's alternative service requirement to retirements involving fiber feeder replacements. Further, it is apparent that Covad's new proposal is, in reality, an attempt to gain unbundled access to hybrid loops, as evidenced by Covad's reference to these loops and its glaring failure to identify any specific service that would be an "alternative" to these loops.¹⁵ In the *TRO*, the FCC ruled unequivocally that ILECs are not required to provide unbundled access to the broadband capabilities of hybrid loops, confirming again that Covad's proposal conflicts directly with the *TRO*.¹⁶

Also, as Ms. Stewart explained in her direct and rebuttal testimony, Covad's proposal actually frustrates the goal of promoting the deployment of advanced telecommunications infrastructure and consumer choice because it "reduce[s] Qwest's economic incentive and ability to deploy fiber facilities."¹⁷ As she stated, "[a] requirement to provide an alternative service for which Qwest may not recover its costs would create an economic disincentive for deploying fiber."¹⁸ Thus, permitting Qwest to retire copper facilities and thereby providing incentive for it

¹² See e.g., Covad Br. at 1, 6, 9.

¹³ *Id.*

¹⁴ Qwest Br. at 5, 7-8.

¹⁵ Covad Br. at 3-17.

¹⁶ *TRO* at ¶ 288.

¹⁷ Qwest Exhibit 2 (Stewart Direct) at 10; Qwest Exhibit 3 (Stewart Rebuttal) at 6-7, 15-16.

¹⁸ Qwest Exhibit 2 (Stewart Direct) at 10.

to deploy fiber will affirmatively advance the policy goals of promoting advanced telecommunications deployment, as it will make advanced telecommunications services more widely available to Arizona consumers and will increase consumer choice by enabling Qwest to compete more effectively with cable companies. Accordingly, it is Covad's proposal, not Qwest's, that is inconsistent with public policy.

There also is no merit to Covad's contention that Arizona law requires Qwest to provide continued access to facilities and services that would permit Covad to still provide DSL service. The FCC expressly rejected precisely this type of demand in the *TRO* in confirming the right of ILECs to retire copper facilities.¹⁹ To the extent Covad is suggesting that Arizona law should be interpreted to prevent Qwest from retiring copper facilities, that interpretation would of course be inconsistent with federal law and thus impermissible.²⁰ In any case, Qwest already gives Covad different options for continuing to provide DSL to its customers in the unlikely event that Qwest retires a copper loop and affects service to a Covad customer.²¹

Covad argues that Qwest's concerns about the lack of cost recovery that would result from the "alternative service" requirement are unfounded. While making this argument, however, Covad does not dispute that its proposal would prohibit Qwest from charging anything above a monthly recurring rate of \$2.42 – the current recurring rate for line sharing in Arizona – regardless of the actual cost of the alternative service.²² This fact alone demonstrates the unlawfulness of Covad's proposal, which would inevitably prevent Qwest from recovering its costs in violation of the Act's requirement that ILECs recover the costs they incur to provide

¹⁹ *TRO* at ¶ 281 and n.822.

²⁰ *See* Qwest Br. at 20-25.

²¹ Qwest Exhibit 2 (Stewart Direct) at 7-8. It is undisputed that Qwest has never affected service to a Covad customer through the retirement of a copper loop. *See* Qwest Br. at 9.

unbundled network elements and interconnection.²³

Covad also proposes new language that would limit Qwest's "alternative service" obligation to situations where Qwest is retiring copper feeder "over which Qwest itself could provide a retail DSL service."²⁴ This proposal is fundamentally flawed. First, Covad's focus on loops over which Qwest "could provide a retail DSL service" suggests strongly that it is ultimately seeking access to the broadband capabilities of hybrid loops. However, in paragraphs 288 and 290 of the *TRO*, the FCC ruled that ILECs are not required to unbundle these capabilities, specifically rejecting Covad's arguments for such unbundling:

We decline to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market. AT&T, WorldCom, Covad, and others urge the Commission to extend our unbundling requirements to the packet-based and fiber optic portions of incumbent LEC hybrid loops. We conclude, however, that applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706. The rules we adopt herein do not require incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information. Moreover, the rules we adopt herein do not require incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as the xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market.²⁵

Second, even if the FCC had not expressly disallowed such access, Covad's proposal would not, contrary to its claims, result in parity with Qwest. Covad's use of the words loops

²² See Qwest Br. at 10.

²³ See 47 U.S.C. § 252(d)(1).

²⁴ Covad Br. at 4.

²⁵ *TRO* at ¶ 288 (Footnotes omitted).

"over which Qwest itself could provide a DSL service" reveals that Covad is apparently seeking access to the next-generation equipment of any Qwest loop over which Qwest *could* provide DSL service to its own customers, not just access to the equipment on loops that Qwest is actually using to provide DSL service. Accordingly, Covad is not seeking "parity" between its DSL customers and Qwest's customers; instead, it is seeking to require Qwest to provide Covad with access to next-generation equipment even in situations where Qwest's own customers are not served by such equipment.

Finally, Covad contends that if Qwest is permitted to retire copper loops, Covad's investment of "well over a billion dollars" in its DSL network could become stranded.²⁶ That is a gross exaggeration. Covad has expressly acknowledged that, at most, only a "handful" of its Arizona customers could ever be affected by Qwest's retirement of a copper loop and that, as of today, none of its customers has ever been affected by a copper retirement.²⁷ Covad's claim that its network investment is at risk is thus factually unsupported and legally irrelevant.

2. The Notice Of Copper Retirements That Qwest Has Agreed To Provide Complies Fully With The FCC's Notice Requirements.

Covad asserts in its post-hearing brief that Qwest's notices of copper retirements will not meet the requirements established by the FCC for notifying CLECs of changes in an ILEC's network.²⁸ This assertion ignores, however, in its proposed ICA language, that Qwest expressly commits to providing the notice required by the FCC's rules.

Covad's real desire appears to be a requirement for Qwest to notify Covad of the specific Covad customers that could be affected by the retirement of a copper loop, However, Qwest

²⁶ Covad Br. at 8-9.

²⁷ See Qwest Br. at 9.

²⁸ Covad Br. at 15-16.

does not know the services that Covad is providing to individual customers and, accordingly, does not have the information needed to determine the effect of copper retirements on individual customers.²⁹ Equally significant, Qwest already provides Covad with the information and tools it needs to determine for itself whether its customers may be affected by a copper retirement. By using Qwest's database known as the "raw loop data tool," Covad can determine the addresses of the customers within a specific geographic area – or "distribution area" – in which Qwest is retiring a copper loop and then compare those addresses to its customer records to determine whether any of its end-user customers will be affected by the retirement. Qwest developed this tool in response to CLEC demands during the Section 271 proceedings at an expense in the millions of dollars. Having invested in the raw loop data tool at the behest of CLECs, Qwest reasonably believes that CLECs should use it. The Minnesota Commission concurs with Qwest and has endorsed the use of the raw loop data tool by Covad to determine which of its customers will be affected by copper retirement.³⁰ As the Washington, Minnesota and Utah Commissions ruled, the burden of making these customer-specific determinations should not be shifted to Qwest – which does not have the information specific to Covad's individual customers – from Covad.³¹

Issue 2: Unified Agreement/Defining Unbundled Network Elements (Sections 4.0 (Definition Of "Unbundled Network Element"), 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, 9.21.2).

As Qwest demonstrated in its opening brief, the Act's "impairment" standard imposes important limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by

²⁹ See Qwest Br. at 13.

³⁰ Minnesota Arbitration Order at 10.

³¹ See Qwest Br. at 13; Minnesota Arbitration Order at 10.

the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*³² and the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating each of the FCC's three attempts at establishing lawful unbundling rules.³³ In this case, the unbundling obligations that Covad would have the Commission impose on Qwest ignore entirely these critical limitations and are based on the legally flawed assumption that a state commission may require unbundling under state law that the FCC has expressly rejected. As shown by its post-hearing brief, Covad does not recognize the Act's important limits on state law authority – namely, that such authority must be exercised consistently with Section 251 and the federal unbundling regime established by the FCC. Moreover, Covad is asking this Commission to order broad unbundling of network elements without having provided any evidence that it will be impaired in the absence of access to those elements. Covad's broad unbundling requests cannot be permitted without evidence of impairment and there is no such evidence in this record. Covad's unbundling demands are, therefore, improper.

Covad also improperly asks this Commission to require unbundling and set rates under Section 271, ignoring that states have no decision-making authority under that section. As discussed below, the FCC has exclusive jurisdiction to determine the network elements that BOCs are required to provide under Section 271 and to determine the rates that apply to those elements. The FCC cannot – and has not – delegated that authority to state commissions. Covad offers several strained readings of the Act to support its claim that states have unbundling authority under Section 271, but its interpretations are wrong and certainly do not come close to establishing that Congress has expressly conferred Section 271 decision-making authority on

³² 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

³³ See *USTA II*, *supra*; *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

state commissions.

The Washington Commission ruled correctly when it stated:

[T]his 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. . . . [and] any unbundling requirement based on state law would likely be preempted as inconsistent with federal law, regardless of the method the state used to require the element.³⁴

The Commission should rule likewise and find that Covad's requests are improper and without legal support.

1. It Is Improper To Include Terms Relating To Network Elements Provided Under Section 271 In An Interconnection Agreement.

As Qwest discussed in its opening brief, there is no statutory or other legal basis for including terms and conditions relating to network elements provided under Section 271 in a Section 252 interconnection agreement.³⁵ Indeed, the FCC has defined the "interconnection agreements" that must be submitted to state commissions for approval as "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) . . ."³⁶ Thus, the term "interconnection agreement" encompasses only terms and conditions relating to network elements and other services provided under Section 251 and does not include terms and conditions relating to elements provided under Section 271. As the Minnesota ALJ stated in a ruling recently upheld by the Minnesota Commission, "there is no legal authority in the Act, the TRO, or in state law that would require the inclusion of section 271 terms in the interconnection

³⁴ Washington Arbitration Order ¶ 37.

³⁵ Qwest Br. at 26-28.

³⁶ Memorandum Opinion and Order, *Qwest Communications Int'l Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, FCC 02-276, WC Docket No. 02-89 ¶ 8 n.26 (FCC Oct. 4, 2002) ("Declaratory Order").

agreement, over Qwest's objection."³⁷

Accordingly, for these reasons and those set forth in Qwest's opening brief, Covad's attempt to include Section 271 network elements in the ICA is improper and should be rejected. The terms and conditions relating to offerings under Section 271 are properly addressed in commercial agreements and tariffs, not ICAs. The Commission should reject Covad's proposals for the following ICA sections: Section 4.0 definition of "UNE," Sections 9.1.1; 9.1.5; 9.2.1.4; 9.3.1.1; 9.3.1.2; 9.3.2.2; 9.3.2.2.1; and 9.6(g). For each of these sections, the Commission should adopt Qwest's proposed language.

2. Covad Has Provided No Legal Support For Its Claim That State Commissions Have Decision-Making Authority Under Section 271 And Can Impose Unbundling Obligations Under That Provision Of The Act.

The Act does not give state commissions any substantive decision-making role in the administration and implementation of Section 271. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine if BOCs have complied with the substantive provisions of Section 271, including the 271 checklist provisions upon which Covad bases its arbitration demands for 271 unbundling. State commissions have only a non-substantive, consulting role in that determination. Accordingly, even if it were proper to address Section 271 issues in the context of a Section 252 arbitration, the Commission still would not have authority to impose affirmative obligations under that section.³⁸

Significantly, in its discussion of this issue, Covad fails to cite any provision or language in the Act giving a state commission decision-making authority under Section 271. Instead, Covad cites the requirement in Section 271 that the FCC "consult" with a state commission in

³⁷ Minnesota ALJ Order ¶ 46.

reviewing a BOC's compliance with that section in connection with applications for authority to provide long distance service.³⁹ That consulting authority, Covad asserts, "clearly" establishes that a state commission has authority to impose unbundling requirements under Section 271.⁴⁰ However, Covad's argument ignores the obvious difference between Congress's decision to give states *consulting authority* relating to BOCs' Section 271 applications and the complete absence of any Congressional delegation of *decision-making authority* under that provision.

As the D.C. Circuit made emphatically clear in *USTA II*, the only authority that state commissions have under the Act is that which Congress has clearly and expressly delegated to them.⁴¹ Under the Act, Congress and the FCC took over the regulation of local telephone service, leaving the states only with authority that Congress expressly granted. The Seventh Circuit recently described this regulatory regime:

In the Act, Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission (FCC). While the state utility commissions were given a role in carrying out the Act, Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act;" it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations.⁴²

Under this regime, states are not permitted to regulate local telecommunications competition "except by the express leave of Congress."⁴³ As described by the Third Circuit,

³⁸ See *Qwest Br.* at 25-28.

³⁹ *Covad Br.* at 20-21.

⁴⁰ *Id.* at 21.

⁴¹ *USTA II*, 359 F.3d at 565-68.

⁴² *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Comm'n*, 359 F.3d 493, 494 (7th Cir. 2004) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999)).

⁴³ *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3rd Cir. 2001) (internal citations omitted).

"[b]ecause Congress validly terminated the states' role in regulating local telephone competition and, having done so, then permitted the states to resume a role in that process, the resumption of that role by a state is a congressionally bestowed gratuity."⁴⁴ Thus, the court explained, a "state commission's authority to regulate comes from Section 252(b) and (e), not from its own sovereign authority."⁴⁵ Here, there has been no delegation of 271 decision-making authority to state commissions, and this Commission therefore has no authority to impose the Section 271 unbundling obligations that Covad seeks to impose through its proposed ICA unbundling language.

As Qwest discussed in its opening brief, in *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*,⁴⁶ a federal district court held that the consulting role given to states under Section 271 does not give a state commission substantive decision-making authority. *Indiana Bell* confirms the absence of a decision-making role for states under Section 271. The decision contrasts the substantive role that states have in administering Sections 251 and 252 with the "investigatory" and "consulting" role they have under Section 271.⁴⁷ In recognizing the different roles that Congress assigned states under these distinct provisions of the Act, the court noted that the Act does not include a "savings clause" that preserves the application of state law in the administration of Section 271.⁴⁸ By contrast, the court observed, Congress included a savings clause – Section 261(b) – that preserves the application of "consistent" state regulations

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 2003 WL 1903363 (S.D. Ind. 2003).

⁴⁷ See Qwest Br. at 25-26.

⁴⁸ *Id.*

in the administration of Sections 251 and 252.⁴⁹ As the court found, this contrast confirms further that Congress did not intend a substantive role for states in the administration of Section 271.⁵⁰

Further, Covad's suggestion that a state legislature may grant to its agencies the authority to administer federal law that Congress has withheld is frivolous.⁵¹ A state legislature may plainly confer authority to adopt and enforce state law. It may also permit the state's administrative agencies to exercise any authority conferred upon them by Congress. However, state legislatures may not confer authority to administer federal law that has been withheld by Congress. Covad cites no decision from any court or agency, federal or state, holding otherwise.

Finally, Covad's reliance on an order issued by the Maine Public Utilities Commission in a proceeding involving Verizon also provides no support for Covad's unbundling demands under section 271. Covad relied on this same order in its Minnesota arbitration with Qwest, and the ALJ in that proceeding correctly determined that the order does not support Covad's demands. As she explained, the *Verizon-Maine* decision "is distinguishable on its facts as it appears to be premised on enforcement of a specific commitment that Verizon made to the Maine Commission during 271 proceedings to include certain elements in its state wholesale tariff."⁵² For the same reason, the order is inapplicable here.

3. The Commission Does Not Have Authority To Establish Prices For Section 271 Elements.

Covad asserts that the Act and the *TRO* establish the authority of state commissions to set

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Covad Br. at 19-20.

⁵² Minnesota ALJ Order ¶ 46.

prices for Section 271 elements.⁵³ For several reasons, this argument is seriously flawed, as Qwest discusses in its opening brief.⁵⁴

First, the FCC was quite clear in the *TRO* that it has responsibility for setting prices for elements that BOCs provide under Section 271: "[w]hether a particular [Section 271] checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that *the Commission* [*i.e.*, 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)."⁵⁵

Second, Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271,⁵⁶ provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.⁵⁷ The FCC has not delegated that authority, and Congress has not permitted it to do so.

Third, the pricing authority that state commissions have under Section 252(d)(1) does not empower states to set rates for Section 271 elements. The authority granted by that provision is expressly limited to determining "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection [251(c)(2)] . . . [and] for network elements for purposes of subsection [251(c)(3)]."⁵⁸ Thus, the only network elements over which states have pricing authority are those that an ILEC provides pursuant to Section 251(c)(3). Nothing in the

⁵³ Covad Br. at 20-23.

⁵⁴ Qwest Br. at 28-30.

⁵⁵ *TRO* ¶ 664.

⁵⁶ *Id.* ¶¶ 656, 662.

⁵⁷ *See id.*; 47 U.S.C. §§ 201(b) (authorizing the FCC to prescribe rules and regulations to carry out the Act's provisions), 205 (authorizing FCC investigation of rates for services, etc. required by the Act), 207 (authorizing FCC and federal courts to adjudicate complaints seeking damages for violations of the Act), 208(a) (authorizing FCC to adjudicate complaints alleging violations of the Act).

⁵⁸ 47 U.S.C. § 252(d)(1).

Act extends that authority to Section 271 elements, as evidenced by Covad's inability to cite any statutory provision that even remotely suggests state commissions have such authority.

Significantly, as Qwest discussed in its opening brief, the FCC recently rejected substantially the same pricing argument in its opposition to the petitions for a *writ of certiorari* filed with the Supreme Court by NARUC, state commissions, and certain CLECs in connection with *USTA II*.⁵⁹ Addressing NARUC's contention that Section 252 gives state commissions exclusive authority to set rates for network elements, the FCC stated that the contention "rests on a flawed legal premise."⁶⁰ It explained that Section 252 limits the pricing authority of state commissions to network elements provided under section 251(c)(3).⁶¹

Fourth, Covad's claim that the Commission has authority to set TELRIC⁶² rates for Section 271 elements – which of course incorrectly assumes that state commissions have pricing authority over Section 271 elements – is directly refuted by the *TRO* and *USTA II*. In the *TRO*, the FCC ruled very clearly that any elements a BOC provides pursuant to Section 271 are to be priced based on the Section 201-02 standard that rates must not be unjust, unreasonable, or unreasonably discriminatory.⁶³ Consistent with its prior rulings in Section 271 orders, the FCC confirmed that TELRIC pricing does not apply to these network elements.⁶⁴ In *USTA II*, the D.C.

⁵⁹ Qwest Br. at 28-29.

⁶⁰ Brief for the Federal Respondents in Opposition to Petitions for Writ of Certiorari, *National Association of Regulatory Utility Commissioners v. United States Telecom Ass'n*, Supreme Court Nos. 04-12, 04-15, and 04-18 at 23 (filed Sept. 2004).

⁶¹ *Id.*

⁶² In its post-hearing brief, Covad advocates the use of the TSLRIC methodology referenced in Ariz. Admin. Code R14-2-1310 which, like TELRIC, is a forward-looking costing methodology. Covad Br. at 22. For all practicable purposes, however, the TSLRIC methodology and the TELRIC methodology are indistinguishable. To be consistent with its advocacy in Covad arbitrations in other states, Qwest will continue to reference the TELRIC methodology.

⁶³ *TRO* ¶¶ 656-64.

⁶⁴ *Id.*

Circuit reached the same conclusion, rejecting the CLECs' claim that it was "unreasonable for the Commission to apply a different pricing standard under Section 271" and instead stating that "we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment."⁶⁵

4. The Act Does Not Permit The Commission To Create Under State Law Unbundling Requirements That The FCC Rejected In The *TRO* Or That The D.C. Circuit Vacated In *USTA II*.

As Qwest demonstrated in its opening brief, under Section 251 of the Act, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]."⁶⁶ Section 251(d)(2), in turn, provides that unbundling may be required *only if the FCC determines* (A) that "access to such network elements as are proprietary in nature is necessary" and (B) that the failure to provide access to network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."⁶⁷

Congress explicitly assigned the task of applying the Section 251(d)(2) impairment test and "determining what network elements should be made available for purposes of subsection [251](c)(3)" to the FCC.⁶⁸ The Supreme Court confirmed that as a precondition to unbundling, Section 251(d)(2) "requires the [Federal Communications] Commission to determine on a rational basis which network elements must be made available, taking into account the objectives

⁶⁵ *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

⁶⁶ 47 U.S.C. § 251(c)(3).

⁶⁷ 47 U.S.C. § 251(d)(2).

⁶⁸ 47 U.S.C. § 251(d)(2).

of the Act and giving some substance to the 'necessary' and 'impair' requirements."⁶⁹ And *USTA II* establishes that Congress did not allow the FCC to have state commissions perform this work on its behalf.⁷⁰

Covad responds to this legal framework described in Qwest's opening brief as if it were not there, arguing that the Act, the *TRO*, and *USTA II* do not impose any meaningful limits on the authority of state commissions to require unbundling under state law. Thus, Covad asserts that the Commission is free to require Qwest to provide network elements that the FCC declined to require ILECs unbundle based on specific findings that CLECs are not impaired without them.⁷¹ Covad's argument fails to recognize that the Act's savings clauses preserve independent state authority only to the extent that authority is exercised in a manner consistent with the Act.⁷² This point was forcefully confirmed in the recent decision from the United States District Court for the District of Michigan discussed in Qwest's opening brief.⁷³

The fundamental problem with Covad's position, as confirmed by its brief, is that it requires unbundling regardless of consistency with the Act. As Qwest described in its opening brief, the inevitable conflicts with federal law that would result from adoption of Covad's position are demonstrated by the application of Covad's proposed unbundling language to feeder subloops.⁷⁴ Covad fails to respond to this striking example of how the virtually limitless unbundling obligations that would result from its language directly conflict with federal law and

⁶⁹ *Iowa Utilities Board*, 525 U.S. at 391-92.

⁷⁰ See *USTA II*, 359 F.3d at 568.

⁷¹ For example, Covad asserts that the Commission has authority to require access to "subloop arrangements" (Covad Br. at 24) even though the FCC expressly ruled in the *TRO* that CLECs are not impaired without access to feeder subloops and that ILECS are therefore not required to provide them. *TRO* ¶ 253.

⁷² Qwest Br. at 20-25.

⁷³ Qwest Br. at 22-23.

⁷⁴ Qwest Br. at 24 n.76.

the "federal regime" that the FCC alone has authority to implement. And this example would not be an isolated occurrence under Covad's unbundling language, as the language is broad enough for Covad to contend that Qwest is required to provide unbundled access to OCn loops, feeder subloops, DS3 loops (in excess of two per customer location), extended unbundled dedicated interoffice transport and extended unbundled dark fiber, and other elements despite the FCC's fact-based findings in the *TRO* that CLECs are not impaired without access to these elements.⁷⁵

Covad claims that Qwest's concerns regarding the inconsistency of Arizona law with the Act is unfounded because the Commission has already determined its rules are consistent with the Act.⁷⁶ Although the Commission did make such a statement in 1996, it also, in the same order, specifically recognized that "[t]he Act does not prohibit the Commission from continuing with its rulemaking efforts, as long as the Proposed Rules are consistent with the Act *and subsequent rules promulgated by the FCC.*"⁷⁷ Since 1996, there have been numerous "subsequent rules promulgated by the FCC," as well as Circuit Court decisions and Supreme Court decisions, affecting the unbundling obligations of ILECs. These subsequent rules and decisions call into question whether the Commission's broad and general finding is still accurate. Without doubt, the landscape regarding an ILEC's obligation to unbundle network elements has changed since 1996. Thus, Covad's simple reliance on the Commission's nine year old statement is unavailing.

⁷⁵ In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundle these and other elements under Section 251: ¶ 315 (OCn loops); ¶ 253 (feeder subloops); ¶ 324 (DS3 loops); ¶ 365 (extended dedicated interoffice transport and extended dark fiber); ¶¶ 388-89 (OCn and DS3 dedicated interoffice transport); ¶¶ 344-45 (signaling); ¶ 551 (call-related databases); ¶ 537 (packet switching); ¶ 273 (fiber to the home loops); ¶ 560 (operator service and directory assistance); and ¶ 451 (unbundled switching at a DS1 capacity).

⁷⁶ Covad Br. at 25.

⁷⁷ *Re Rules for Telecommunications Interconnection and Unbundling*, Decision No. 59761, Docket No. R-0000-96-001, 1996 WL 787939, at *2 (ACC July 22, 1996) (emphasis added).

In addition, as the FCC stated quite clearly in the *TRO*, the type of state law unbundling regime that Covad is proposing – one that ignores altogether FCC findings of non-impairment with respect to individual elements – "overlook[s] the specific restraints on state action taken pursuant to state law embodied in section 251(d)(3), and the general restraints on state actions found in sections 261(b) and (c) of the Act."⁷⁸ This approach to state law unbundling "ignore[s] long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy."⁷⁹ As the United States Court of Appeals for the Seventh Circuit stated, "we cannot now imagine" how a state could require unbundling of an element consistently with the Act where the FCC has not found the statutory impairment test to be satisfied.⁸⁰

Equally significant, any unbundling obligations imposed under state law would have to be supported by an express finding that Covad would be impaired without access to specific network elements. A finding of impairment is essential under Section 251, and any unbundling requirement that does not rest on such a finding is plainly unlawful. Covad's failure to provide any evidence of impairment is thus fatal to its unbundling demands, as the Commission has nothing in this evidentiary record upon which to base findings of impairment or requirements to unbundle.

5. Covad's Attempt To Raise A Line Splitting Issue At This Late Stage In The Arbitration Is Improper And Its Line Splitting Argument Is Substantively Flawed.

In its brief, Covad disputes Qwest's proposed Section 9.21.2 which simply affirms that Qwest has no obligation to provide line splitting in connection with UNE-Platform services or in

⁷⁸ *TRO* ¶ 192 (footnote omitted).

⁷⁹ *Id.*

connection with its commercial QPP product. Covad asserts that Qwest is trying to remove the ability of CLECs to engage in line splitting.⁸¹

Covad's attempt to raise its line splitting issue is procedurally improper and prejudicial. Covad admits that its line splitting issue is a distinct dispute "rais[ing] an entirely separate set of issues, apart from the broader unbundling dispute raised by Issue 2."⁸² In addition, Covad cannot dispute that it failed to adequately identify this dispute as a contested issue for arbitration until its post-hearing brief.⁸³ Despite knowing about Qwest's line splitting language for many months and having ample opportunity to raise the issue earlier, Covad elected to not raise the issue until now. Why Covad did not specifically address this issue in its Petition for Arbitration and waited so long to raise it is unknown. However, Covad should not be allowed to interject any new issues at its pleasure. Because Covad failed to properly and adequately identify this issue in its Petition for Arbitration, the Commission should reject its line splitting argument.

The Commission should also reject Covad's argument because allowing Covad to raise this issue now will prejudice Qwest. For example, Covad's request for access to line splitting relies in substantial part on its interpretation of a service agreement for a Qwest commercial product known as Qwest Platform Plus ("QPP"). Covad attaches a copy of a QPP agreement to

⁸⁰ *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d at 395.

⁸¹ Covad Br. at 33-34.

⁸² Covad Br. at 31.

⁸³ While the ICA section containing the line splitting language is listed in Covad's Petition for Arbitration and in the Joint Issue Matrix, Covad characterized the issue as a pure unbundled network element issue and not as "an entirely separate set of issues, apart from the broader unbundling dispute raise by Issue 2." Covad Br. at 31. In the Joint Issue Matrix, Covad summarized its position regarding Section 9.21.2 by stating "Notwithstanding any finding of non-impairment, existing UNEs must nevertheless be made available pursuant to Section 271 and state law. The Agreement should create an orderly process for the movement of UNEs from one category to another, rather than create uncertainty as to whether 271 or state law obligations apply." Joint Issue Matrix at 36. None of Covad's previous arguments, testimony, evidence or briefing has raised or addressed the precise issue it raises in its post-hearing brief.

its post-hearing brief and, based on its interpretation, argues that the 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."⁸⁴ This broad characterization of Qwest's position relating to line splitting is incomplete and wrong, which Qwest could have demonstrated through testimony relating to QPP. To raise this issue now when the time for presenting evidence has passed is highly prejudicial to Qwest.

Equally important, by raising this issue now and thereby denying Qwest the opportunity to respond with evidence, Covad is depriving the Commission of the complete record it must have to decide this or any other issue properly. Covad should not be asking the Commission to render a ruling on a record that is incomplete because of Covad's dilatory conduct. Accordingly, the Commission should deny Covad's petition on procedural grounds alone.

With respect to the substance of Covad's argument, Covad's request for the Commission to include line splitting in the ICA is without legal support. Most significantly, Covad is asking the Commission to exercise authority that it does not have. The line splitting that Covad seeks is among the network elements that the FCC has "de-listed" from section 251. As Covad itself described it, "the switching portion of line splitting arrangements is clearly no longer a section 251 UNE"⁸⁵ Because Qwest no longer has an obligation to provide this type of line splitting under Section 251, the only conceivable basis for Covad's request is Section 271 or state law. As discussed above, the Commission is without authority under either Section 271 or state law to require access to this type of "de-listed" element. Because the Commission is without authority to require line splitting, Covad's argument must be denied.

⁸⁴ Covad Br. at 32.

⁸⁵ Covad Br. at 34.

6. The ICA Should List Specific Non-251 Network Elements That Qwest Is Not Required to Provide Under The Agreement.

In its proposed ICA, Qwest includes several provisions listing the network elements that the FCC has ruled ILECs are not required to provide under Section 251. Qwest's proposed Section 9.1.1.6 lists 18 different elements and services that pursuant to rulings in the *TRO*, ILECs are not required to unbundle under Section 251. There is no dispute that Qwest's listing of these elements and services accurately reflects the FCC's *TRO* rulings. However, Covad clearly believes that Qwest's unbundling obligations are unlimited and include even the network elements for which the FCC has made findings of non-impairment and declined to impose an unbundling requirement. Given Covad's overreaching position, Qwest is very concerned that Covad will demand unbundling of these de-listed elements if the ICA does not state clearly that the elements are unavailable. To protect against this distinct possibility and the dispute that would result, the ICA should include the list of de-listed UNEs in Qwest's section 9.1.1.6, which all parties agree is accurate.⁸⁶

The Commission should also approve Qwest's language and not require Qwest to continue providing network elements that the FCC has de-listed as UNEs until the Commission approves an ICA amendment removing the UNEs from the ICA. The use of the amendment process for de-listed UNEs is improper because it would require Qwest to continue providing network elements at TELRIC rates potentially long after the FCC has ruled that ILECs are not required to provide the elements under Section 251. Accordingly, the Commission should adopt Qwest's proposed sections that would eliminate unbundling obligations upon non-impairment findings by the FCC.

⁸⁶ For the same reason, the Commission should adopt Qwest's proposed language for Sections 9.2.1.3; 9.6.1.5; 9.6.1.5.1; 9.6.1.6; 9.6.1.6.1; and 9.21.2. These sections establish that certain network elements will no

**Issue 3: Commingling (Section 4.0 and Definition of "Section 251(c)(3) UNE,"
Section 9.1.1.1) - The ICA Should Not Require Qwest to Commingle
Elements Provided Under Section 271 With Other Network Elements.**

Covad's argument for Section 271 commingling is premised on the *TRO*, but its arguments fail to account for provisions in the *TRO* that undercut its demand for this form of commingling. Covad bases its argument on the FCC's statement in paragraph 579 of the *TRO* that commingling involves connecting a UNE or UNE combination with a facility or service a CLEC has obtained from an ILEC "pursuant to any method other than unbundling under section 251(c)(3)."⁸⁷ An element provided under Section 271, it argues, is within the reach of this description.

The first flaw in this interpretation is that it eviscerates the FCC's clear ruling that BOCs are not required to combine network elements provided under Section 271. Covad improperly reads this ruling out of the *TRO*. The FCC's statement about commingling obligations must be harmonized with its very specific ruling relating to Section 271 elements. Since BOCs are not required to combine these elements, they cannot be required to commingle them.

The second flaw in Covad's interpretation is that it is contradicted by the FCC's express removal of a reference to section commingling in an errata to the *TRO*. The *TRO* originally listed Section 271 elements in the discussion of commingling obligations in paragraph 584 of the order. However, as Covad acknowledges, in the errata to the *TRO*, the FCC removed this reference, making it clear that commingling obligations do not extend to Section 271 elements.

Covad contends that the FCC's elimination of the *TRO*'s reference to Section 271 commingling was intended only to clarify the discussion of resale commingling in the order. But

longer be available under the ICA if the FCC rules that ILECs are not required to provide them under Section 251.

the FCC's decision to remove the reference should be read in the context of its ruling that ILECs are not required to combine Section 271 elements. The correction in the errata is consistent with and confirms that ruling - BOCs are not required to combine or commingle Section 271 elements.⁸⁸ Accordingly, consistent with the *TRO*, the Commission should reject Covad's request for Section 271 commingling.

Issue 5: CLEC-to-CLEC Channel Regeneration

1. Background

Qwest provides several methods for Covad to connect its facilities with other CLEC facilities in Qwest's central offices including direct connection and COCC-X. For direct connection, Covad is responsible for engineering, provisioning and designing the connecting circuit.⁸⁹ Qwest simply designates a path in its central office between Covad's and the connecting CLEC's collocation spaces to place the circuit.⁹⁰ When COCC-X is employed, Covad and the connecting CLEC are responsible for bringing their connections to a common interconnection distribution frame ("ICDF") where Qwest will provide a cross-connect or jumper wire connecting Covad and the CLEC.⁹¹

In both situations, when the length of a circuit prevents the transmission of the proper signal strength to the point such that there is degradation in signal quality, regeneration is

⁸⁷ Covad Br. at 35.

⁸⁸ As Qwest mentioned in its opening brief, the absence of any state decision-making authority under Section 271 also precludes state commissions from ordering the commingling of Section 271 elements. Qwest Br. at 33 n.107.

⁸⁹ Transcript Volume I (February 7, 2005) at 186-87.

⁹⁰ *Id.*

⁹¹ *Id.*

required.⁹² Although most connections do not require regeneration, regeneration can be accomplished from Covad's or the CLECs' collocation space or from a mid-span point between the collocations. Covad also has the option of purchasing from Qwest expanded interconnection channel termination ("EICT"). EICT is a finished service offered under Qwest's FCC 1 Access Tariff where Qwest designs and provides the connection including any required regeneration.⁹³

2. Qwest's Proposed Language

Qwest's proposal confirms that Qwest will not charge for regeneration between the Qwest network and Covad's collocation spaces. Further, Qwest is offering Covad language whereby Qwest will agree not to charge separately for regeneration for Covad to connect two of its non-contiguous collocation spaces. Qwest's language further clarifies that a CLEC may order the EICT product out of Qwest's FCC 1 Access tariff, which, as mentioned above, is a product that offers an end to end service connecting 2 CLECs including any necessary regeneration. The proposed language is as follows:

8.2.1.23.1.4 CLEC is responsible 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 by CLEC using the Design Layout Record (DLR) for the service connection. Regeneration may be required, depending on the distance parameters of the combination.

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 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".

⁹² Qwest Ex. 4 (Norman Direct) at 3.

⁹³ Transcript Volume I (February 7, 2005) at 187.

Given this language, the only issue in dispute is whether Covad should provide regeneration when it self-provisions CLEC-to-CLEC connections.

3. Covad Is Wrong in Arguing That The FCC Rules Require Qwest to Provide CLEC-To-CLEC Regeneration

The FCC has directly addressed CLEC-to-CLEC connections and its rules are clear and not subject, in the least, to Covad's interpretation. In its *Fourth Advanced Services Order*, the FCC discussed CLEC-to-CLEC connections and amended 47 C.F.R. 51.323(h) to specifically list the only situations in which an ILEC has an obligation to provide a connection between the collocated equipment of two CLECs.⁹⁴ Specifically, ILECs must provide a connection between two CLEC collocation spaces: 1) if the ILEC does *not* permit the CLECs to provide the connection for themselves⁹⁵; or 2) under section 201 when the requesting carrier submits certification that more than 10 percent of the amount of traffic will be interstate.⁹⁶ Here, however, Qwest *does* permit CLECs to connect to each other outside of their collocation space. As Mike Norman testified during the hearing, Qwest *does* allow CLECs like Covad full access to each of the Qwest Central Offices for the purpose of allowing the CLECs to provide these connections, and any necessary regeneration, themselves.⁹⁷ This critical fact was not disputed by Covad. In fact, Covad did not ask Mr. Norman a single question about this key issue. Covad seems to be distancing itself from the exception which Covad itself recognized in 47

⁹⁴ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order (Fourth Advanced Services Order)*, CC Docket No. 98-147, (FCC 01-204) Rel. August 8, 2001.

⁹⁵ Pursuant to 47 C.F.R. 51.323(h)(1), an ILEC is not required to provide a connection if "the incumbent LEC permits the collocating parties to provide the requested connection for themselves...."

⁹⁶ Pursuant to 47 C.F.R. 51.323(h)(2) "[a]n incumbent LEC is not required to provide a connection between the equipment in the collocated space of two or more telecommunications carriers if the connection is requested pursuant to section 201 of the Act.

⁹⁷ *See* Transcript Volume I (February 7, 2005) at 185-86; *see also* Transcript Volume I (February 7, 2005) at 116-17 (Covad's witness Mr. Zulevic admitting that Covad has access to its collocations spaces 24 hours a day,

C.F.R.51.323(h).⁹⁸ Since Qwest does permit Covad to make its own cross connection, and has thereby removed itself from Covad's relationship with a connecting CLEC, Qwest has no legal obligation to provide Covad to CLEC connection, much less regeneration of the connection.⁹⁹

Covad also claims that it is discriminatory for Qwest to charge for regeneration of a CLEC-to-CLEC connection because it is economically and technically infeasible. This argument is unfounded and illogical. First, in determining whether an ILEC must provision a CLEC-to-CLEC connection, cost is not the test. As stated above, the FCC very clearly enumerated those instances when an ILEC is required to provision a CLEC-to-CLEC connection, *i.e.*, if the ILEC does not permit the CLEC to self-provision. There is no mention of whether the CLEC must be financially able to self-provision or what the cost should be, but rather whether the ILEC permits the CLEC to self-provision. Had the FCC believed that the cost of self-provisioning should be considered, it would have said so in its rules. Absent a directive by the FCC, economics is not a factor in deciding this issue.

Moreover, Covad incorrectly bases its economic infeasibility claim upon section 251(c)(6) of the Telecommunications Act which requires that collocation be provided on terms that are just, reasonable and non-discriminatory.¹⁰⁰ Covad contends that Qwest's collocation policies are discriminatory and thus it is entitled to regeneration between CLECs for free. There is no dispute, however, that Qwest and Covad resolved their differences with respect to the language in the proposed interconnection agreement regarding assignment of collocation

seven days a week, three hundred and sixty five days a year).

⁹⁸ See, Covad Br. at 40.

⁹⁹ See Ex. Qwest 4 (Norman Direct) at 5-6.

¹⁰⁰ See Covad Br. at 44-47.

space.¹⁰¹ Qwest accepted Covad's language and the parties agree that Qwest must assign collocation space in an efficient manner.¹⁰² There is also no dispute that Covad has the opportunity to request a specific collocation space in a Qwest central office if such is available or to request a walk through of a central office to determine if a more desirable location is available.¹⁰³ Therefore, Qwest does not unilaterally determine where a CLEC will place its collocation, but rather it is a shared decision based upon a number of factors, which the parties do not dispute.¹⁰⁴ Thus, Covad's claim that Qwest's collocation assignment practices are discriminatory is groundless.

Further, Covad also seems to suggest that it is discriminatory to require Covad to pay for collocation space in order to place a mid-span repeater. This argument fails for a number of reasons. In requiring ILECs to make their network available to CLECs, the FCC determined that collocation was the means by which CLECs were to be given access to an ILEC's central offices. Collocation rates were established at TELRIC, which by definition, means they are cost-based, according to the FCC. Covad's suggestion that purchasing collocation space at a TELRIC price is discriminatory, is plainly wrong.

Finally, Covad's claims of technical infeasibility are based upon two hypothetical theories, neither of which were supported by any real evidence. Initially, Covad suggests that it is technically impossible for it to regenerate its own signal because mid-span collocation space *may* not be available. Covad also claims that it cannot regenerate a signal from its own collocation space when making a direct connection to a partner CLEC because of the *chance* of

¹⁰¹ Transcript Volume I (February 7, 2005) at 146-47.

¹⁰² *Id.*

¹⁰³ *See* Ex. Qwest 4 (Norman Direct) at 8-9.

¹⁰⁴ *Id.*

bleed over. Each of these hypothetical theories is unsupported by the record and is factually incorrect. Qwest witness, Mike Norman, confirmed that if Covad requested collocation space midway between its collocation and that of a partner CLEC, Qwest would provide space to accommodate the request.¹⁰⁵ Mr. Norman further testified that there should never be an issue with bleed over if a shielded cable was used which would protect the integrity of the signal.¹⁰⁶

The Minnesota Administrative Law Judge concisely framed the issue and the law in holding that “[b]ecause Qwest permits collocating carriers to provide their own cross connection, 47 C.F.R. §51.323(h) makes the connection and any required regeneration the responsibility of the collocating carriers, assuming that Qwest has otherwise complied with its obligation to provide collocation on terms and conditions that are just, reasonable, and nondiscriminatory.”¹⁰⁷ Here, Covad presented no evidence that Qwest fails to provide collocation on terms that are just, reasonable and nondiscriminatory. In fact, just the opposite is true. As mentioned above, Qwest and Covad settled all of their issues regarding collocation prior to hearing.

Issue 8: Payment Due Date; Timing For Discontinuing Orders; and Timing For Discontinuing Services.

1. Payment Due Date.

Covad's request to extend the payment due date from 30 days to 45 days rests entirely on its unsupported claim that it will be irreparably harmed if it has to pay the amounts it owes to

¹⁰⁵ Transcript Volume I (February 7, 2005) at 200-202. In this exchange, Mr. Norman testified that it was likely that collocation space could be made available if Covad made such a request, but that there were no guarantees. The lack of evidence that Qwest has ever denied a request for collocation space supports Mr. Norman's testimony that Qwest would work something out. In addition, as Mr. Zulevic admitted during the hearing, regeneration equipment does not have to be placed precisely at the midpoint of the two CLECs' collocation spaces. Transcript Volume I (February 7, 2005) at 123. Thus, there are options in identifying appropriate collocation space, which greatly diminishes the chances that Qwest would deny a collocation request by Covad. Finally, as mentioned above, cageless and virtual collocation options exist in addition to caged collocation.

¹⁰⁶ Qwest Ex. 5 (Norman Rebuttal) at 12.

¹⁰⁷ See Minnesota ALJ Order ¶ 80. The ALJ's ruling on this issue was upheld by the Minnesota Commission. Minnesota Arbitration Order at 5.

Qwest within 30 days because it will end up paying for improper charges. Covad's argument should be rejected because Covad does not offer any evidence that in the 5 plus years it has been abiding by the 30 day payment timeframe it has been forced to pay an improper charge due to insufficient time to review Qwest's bills. The facts simply do not justify Covad's attempt to expand the payment time period. Also, Covad conveniently ignores the remedies it has if this were to happen. The ICA contains provisions providing Covad with recourse including interest on any amounts wrongfully paid. Thus, Covad has a process whereby it can be made whole if it pays for improper charges.

Covad tries to support its argument by complaining of a number of separate and isolated billing practices. Covad, however, has not demonstrated that any of these actually prohibit Covad from reviewing and paying its bills within 30 days. For example, Covad complains that bills for non-recurring collocation charges are provided in hard copy, rather than electronically and some contain individual case basis ("ICB") charges. These bills, however, represent a minute percentage of the overall bills,¹⁰⁸ and Covad fails to suggest how an ICB charge is somehow defective or is Qwest's responsibility. More importantly, Covad fails to demonstrate why manual review of the collocation bills cannot be accomplished within 30 days. Similarly, Covad complains that Qwest uses unique identifiers, rather than circuit identification numbers, for purposes of billing line sharing. Covad has not demonstrated why validating a bill using a unique identifier necessitates a longer billing cycle, especially since Covad has been using this same unique identifier for five years.

Contrary to what one would expect, Covad has done nothing more than to provide numerous self-serving statements that it needs more than 30 days to review its bills. It appears as

¹⁰⁸ See Qwest Br. at 45.

though Covad believes that the more times they say they need more than 30 days, the stronger their position becomes. The reality is that Covad has not provided any compelling evidence demonstrating that Qwest's billing practices cause actual and material impediments to Covad's ability to operate under a 30-day payment cycle. To the contrary, the evidence in this proceeding has established that (1) the number of bills Covad needs to manually review is quite small,¹⁰⁹ (2) that other members of the industry have agreed to the thirty day time frame and have been able to comply with it,¹¹⁰ and (3) that Covad itself accepted the same time frames when it entered into the Commercial Line Sharing Agreement with Qwest in April 2004.¹¹¹ Moreover, Covad would have this Commission believe that Qwest's bills are defective, while in fact, the FCC endorsed Qwest's bills when it granted Qwest entry into the long distance market under section 271 of the Telecommunications Act.¹¹²

Covad could not refute Mr. Easton's testimony that, even if Covad incurred real and material impediments to reviewing bills, the 45 day period suggested by Covad would not address its concerns. Covad would continue to receive bills every 30 days. Without adding additional resources, or making existing resources more productive, Covad would be unable to address new bills at the same time old bills were being reviewed.

Furthermore, the language proposed by Covad is vague and subject to several interpretations. For example, one could read the Covad proposed language for section 5.4.1 to mean that Covad would have 45 days to pay the entirety of any bill if one of the exceptions is applicable to that bill. If such an interpretation was accepted, Covad would have gotten a 45 day

¹⁰⁹ See Qwest Ex. 7 (Easton Rebuttal) at 13.

¹¹⁰ See Qwest Ex. 6 (Easton Direct) at 6-9.

¹¹¹ See Qwest Ex. 6 (Easton Direct) at 6.

¹¹² See Qwest Ex. 7 (Easton Rebuttal) at 15-16.

payment due date, under the guise of only asking for an extended due date in certain instances. If the language is not interpreted as stated above, distinguishing between services having a 30 day payment due date and those having a 45 day payment due date would require significant manual effort on the part of Covad and Qwest. The parties would be required to manually determine how much money is due at any given time, and Covad would be cutting a check to Qwest every 15 days, not every 30 days as stated in its brief. Surely, such manual effort could be better directed toward reconciling its bills.

More importantly, however, the purpose of this arbitration process is to establish contract language that will assist the parties in their relationship with each other, not create confusion. Covad's proposed language can only create more problems, not solve them, while Qwest's proposal is commercially reasonable, is the industry standard, and has been agreed to by numerous CLECs including Covad as early as April of last year.

In contrast to its failure to prove actual impediments, Covad cannot dispute that the 45-day payment cycle will cause real and material harm to Qwest. Qwest will lose the funds that it would otherwise have available to it within 30 days, plus any interest that would be owed as a result of Covad's failure to pay the *undisputed* portion of its bill within that time. Thus, Covad's proposed language amounts to nothing more than a 15 day interest free loan. To the extent other CLECs demand to opt in to this agreement or demand a similar provision in interconnection arbitrations, this impact will be multiplied.

The new proposal proffered by Covad is unreasonable and should be rejected. As demonstrated by Qwest, there is no basis for extending the payment date for any product. Covad's proposal would require Qwest to make unique and costly permanent changes to its systems solely to address Covad's proposed change. The changes would affect all CLECs, which

may cause hardship to those CLECs who have processes in place to verify Qwest's bills as they exist today. The record does not support any justification for such a drastic approach.

Covad's claim that it is unable to address billing issues through the Change Management Process ("CMP") should be dismissed. Before late September, 2004 billing issues had never been subject to prioritization in CMP. Although, even absent a prioritization process, Qwest has always, and continues to, accept and implement billing change requests via the CMP. Moreover, in late September, Qwest agreed to change the long standing status quo and allow prioritization of billing issues. Covad cannot claim that Qwest changed its position to Covad's detriment or that there is currently any impediment to addressing its claims related to billing deficiencies in the CMP forum. Furthermore, if Covad is dissatisfied with Qwest's position regarding any particular change request, the CMP has provisions in place where disputes will be addressed and resolved with input from all CLECs.¹¹³

2. Timing for Discontinuing Orders and Services.

Covad does not effectively support its need for extending the time at which Qwest may discontinue processing orders and extending the time at which Qwest may disconnect orders. Contrary to Covad's assertions, Qwest demonstrated that the time periods proposed by Qwest are in accord with industry standards,¹¹⁴ and limit Qwest's financial exposure. Covad's premise for its alleged need for additional time is entirely vague and speculative. In essence, Covad hypothesizes regarding the potential need to *organize* requests for injunctive relief *or make other arrangements*.¹¹⁵ In fact, the language in the Covad ICA requires Qwest to provide notice to

¹¹³ See Exhibit G of the proposed ICA.

¹¹⁴ See Qwest 6 (Easton Direct) at 15-16, 18-19.

¹¹⁵ Covad Br. at 53-54.

Covad before Qwest can discontinue processing orders or disconnect service.¹¹⁶ So, to the extent that Covad somehow overlooked the fact that it was not paying its bills to Qwest, Covad cannot claim that Qwest can act in an arbitrary and harmful manner. Significantly, Covad fails to acknowledge that under the terms of the parties' proposed ICA Qwest can only pursue its discontinuance and disconnection remedies if Covad fails to pay the *undisputed* portion of its bill.¹¹⁷

Covad suggests that Qwest is adequately protected because of the deposit provision of the ICA. While Qwest is entitled to seek and receive a deposit in the amount of two times Covad's monthly billing amount, assuming Qwest is able to apply the deposit to the outstanding balance, Qwest's protection will be exhausted long before Qwest is able to begin seeking remedies to mitigate its financial risk. The following example is instructive. If Qwest issues a bill for services on January 1, Covad has 30 days (or approximately until February 1) to pay that bill. If Covad fails to dispute the bill, Qwest will expect payment on or about February 1. If Covad fails to pay the bill on February 1, under Covad's proposal, Qwest must wait until April 1 before it can seek to discontinue processing orders. Then, under Covad's proposal, Qwest must wait an additional 30 days before it can disconnect service to Covad. The discontinuance and disconnection remedies will not begin to apply until Qwest has continued to provide service to Covad for three and four months, respectively (i.e. discontinuing processing orders for failure to pay the January 1 bill will not be possible until April 1, and disconnection would not be available until May 1). Obviously, the two month deposit on the original bill due January 1 is exceeded, and Covad has continued to receive services and bills for which Qwest has no indication it will

¹¹⁶ See Qwest Ex. 6 (Easton Direct) at 14, 16-17.

¹¹⁷ See *id.* (quoting proposed ICA §§ 5.4 .2 and 5.4.3).

be paid.¹¹⁸

Covad admits that extending both dates would cause Qwest financial harm, e.g. if Covad refused or stopped paying Qwest.¹¹⁹ Failure to pay is a very real risk in the case of CLEC insolvency, and Covad has failed to identify any compelling reason to impose any increased financial risk on Qwest and its shareholders. Qwest works with each and every CLEC that runs into financial difficulties in order to assist that CLEC in paying its bills. Qwest does not jump to its discontinuance and disconnection remedies in an effort to put a company out of business. Qwest has every incentive to see that its wholesale customers are successful and pay their bills on time; however, the risk to Qwest of the extended time frames is much more than float on a monthly bill, it is complete non-payment. Once a CLEC stops paying its bills, it is likely that it has problems far exceeding a concern for its payment to Qwest. Therefore, the only reasonable conclusion that can be drawn is that a supplier (Qwest) should be able to protect itself from further exposure sooner rather than later.

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¹¹⁸ This also assumes that the deposit is enough to cover two months of billings. Under the parties' ICA Qwest is limited in its ability to request an additional deposit if two months of a CLEC's average monthly bill exceeds the deposit amount.

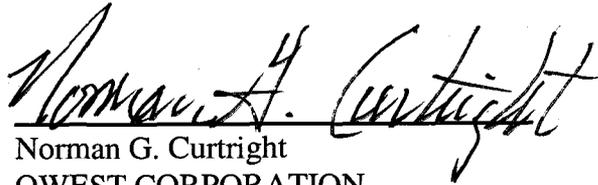
¹¹⁹ Covad Br. at 52.

CONCLUSION

For the reasons stated here and its post-hearing brief, Qwest respectfully requests that the Commission adopt Qwest's proposed language for each of the ICA provisions in dispute.

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Respectfully submitted,



Norman G. Curtright
QWEST CORPORATION
4041 N. Central Ave., Suite 1100
Phoenix, Arizona 85012
(602) 630-2187

John M. Devaney
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of **Qwest Corporation's Post-Hearing Brief Reply Brief** on March 28, 2005 to the following parties **via electronic and overnight mail:**

Gregory T. Diamond
Senior Counsel
Covad Communications, Inc.
7901 Lowry Blvd.
Denver, CO 80230
gdiamond@covad.com

Andrew R. Newell
Krys Boyle, P.C.
600 Seventeenth Street
Suite 2700
Denver, CO 80202
anewell@krysboyle.com

Via electronic and regular mail:

Michael W. Patten
Roshka Heyman & DeWulf, PLC
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, AZ 85004
mpatten@rhd-law.com

Maureen A. Scott, Esq.
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007
MScott@cc.state.az.us

By: