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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF THE PETITION )  
 OF DIECA COMMUNICATIONS, INC., )  
 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 REPLY BRIEF

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## Introduction

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") provides the following arguments in response to the post-hearing brief filed by Qwest Corporation ("Qwest") in this proceeding.

By way of summary, Covad believes that Qwest has greatly underestimated the policymaking authority retained by this Commission to promote competition and the efficient investment in advanced telecommunications, even after the FCC's recent decisions to contract federal unbundling requirements.<sup>1</sup> This restrictive view of the Commission's authority underpins each and every argument against Covad's proposals for Issue 1 (Copper Retirement) and Issue 2 (271 and State Law Unbundling Authority).

With respect to Issue 3 (Commingling), Covad responds to the arguments promoted by Qwest, which counsel an untenable reading of the FCC's *Triennial Review Order*. Covad believes the FCC intended to draw clear distinctions between elements unbundled pursuant to section 252(c)(3) of the Act<sup>2</sup> on the one hand, and elements that must be made available by Regional Bell Operating Companies (RBOCs) pursuant to section 271 of the Act on the other, and has offered proposed commingling language that captures this distinction. Qwest, on the

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<sup>1</sup> See generally, *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"); and *In the Matters of Petition for Forbearance of Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order (rel. October 27, 2004) ("271 Forbearance Order"). 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").

<sup>2</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act").

other hand, proposes placing 271 elements in a category separate not only for elements available pursuant to section 251, but also separate from, and inferior to, all other wholesale services. In addition to being unsupported by the *Triennial Review Order*, Qwest's reading would render it difficult, if not impossible, to make use of the remaining unbundling obligations set forth in section 271 of the Act.

Qwest's arguments with respect to Issue 5 (Regeneration of Central Office Cross-Connects) are inconsistent with the FCC's treatment of this issue in establishing the minimum standards for collocation, and implementing the non-discrimination requirements of section 251(c)(6) of the Act. Because Qwest's offering of self-provisioned cross-connection is an impractical, discriminatory, and largely illusory solution in most circumstances, it does not meet FCC standards, and Qwest must continue to provision connections requiring central office regeneration under established collocation pricing standards.

Qwest's arguments regarding Issue 9 (Billing Issues) are offered to support a *status quo* that Covad clearly established, through evidence introduced in this proceeding, is not working. At least until Qwest can generate industry-compliant wholesale bills, it should not be allowed to cut short efforts to review its invoices. Covad should be allowed an adequate amount of time to both review and pay Qwest's invoices, as well as respond to any refusal by Qwest to recognize legitimate disputes. Covad's proposals strike a workable balance between Qwest's right to receive payment and exercise remedies for nonpayment, and Covad's right to pay only amounts it actually owes Qwest, and avoid potential attempts to extort payments from Covad.

## Argument

### **ISSUE 1 – COPPER RETIREMENT (Sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2)**

Qwest argues generally that the FCC has not acted to require the unbundling of fiber feeder plant, nor has it required the provision of an alternative service when copper feeder is retired by incumbent carriers. While this is strictly true, it misses the point: this Commission is charged with the interpretation and enforcement of Arizona law, as well as Qwest's compliance with section 271 of the Act. In order to do so effectively, it must act to preserve competitive access to customers affected by the retirement of copper feeder plant.

It is also important to note that Covad seeks limited relief through its proposals on copper retirement, narrowly calculated to preserve the *status quo* in the event that copper feeder plant is retired by Qwest in a manner that impairs Covad's investment in next generation facilities. Covad's proposals are far from the "unlimited" unbundling request Qwest portrays them to be.

Qwest's conflicting statements regarding when and how it will retire copper plant underscore the importance of resolving this issue. On the one hand, it argues that it will act to preserve copper plant where feasible, while on the other it claims that its proposals are supported by the economic necessity of retiring obsolete copper facilities when fiber is deployed. Qwest's attempts to provide economic justification for its positions, as well as illusory solutions to the problems created by them, must be rejected by this Commission if the consumer benefits of competition and choice are to be preserved, not to mention the protection of Covad's investments in the Arizona telecommunications market.

**A. The FCC's Copper Retirement Rules and Limitations on 251 Unbundling Authority are Irrelevant to Covad's Proposals**

Qwest's arguments against Covad's copper retirement proposals center on the FCC's application of the section 251 impairment standard, and the resulting decision not to require incumbent LECs to unbundle certain fiber facilities pursuant to section 251. This argument completely misunderstands the legal basis of Covad's proposals, as well as the continued existence of the authority possessed by this Commission to make the correct policy decision.

The FCC made clear that, while refusing to find impairment with respect to fiber facilities pursuant to section 251, Regional Bell Operating Companies (RBOCs) continue to be bound by the requirements of the section 271 checklist, including the obligation to unbundle loops, notwithstanding any impairment determination under section 251.<sup>3</sup> To the extent the FCC had left any doubt about an RBOC's obligation to unbundle fiber feeder plant under section 271, that doubt was removed by the FCC's recent *271 Forbearance Order*. The FCC elected to forbear from enforcement of RBOCs' 271 obligations to unbundle Fiber to the Home (FTTH) loops, Fiber to the Curb (FTTC) loops,<sup>4</sup> and the packet switching. *271 Forbearance Order*, ¶ 1. The FCC declined to forbear from the enforcement of any unbundling requirements inconsistent with its newly restrictive interpretation of section 251 embodied by the *Triennial Review Order*, specifically the relief requested by Qwest and SBC.<sup>5</sup> As a result, Qwest's argument that section 251 acts as a "real upper bound" to an RBOC's unbundling obligations has not been adopted by

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<sup>3</sup> *Triennial Review Order*, ¶ 653.

<sup>4</sup> The FCC had recently defined FTTC loops as loops comprised of fiber optic components extending to within 500 feet of a mass market customer. *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 and 98-147, Order on Reconsideration (rel. October 18, 2004), ¶ 10 ("FTTC Reconsideration Order").

<sup>5</sup> *271 Forbearance Order*, ¶ 12.

the FCC. The clear implication is that RBOCs must continue to unbundle fiber feeder pursuant to section 271.

Even so, Covad's copper retirement proposal does not seek the unbundling of fiber feeder elements. It merely requires that Qwest's fiber feeder deployments not disrupt service to Covad's customers by requiring that an *alternative service* be provisioned to those customers to avoid their disconnection. Covad thus is not asking for access to fiber feeder, but rather for the provision of an alternative service over any available compatible facility – whatever Qwest believes is the best option – in order to provide service to a customer that has selected Covad as its service provider, until the *customer* chooses to cancel its Covad service. Nothing in the *Triennial Review Order* or the *271 Forbearance Order* prohibits such a solution.

**B. This Commission Retains the Authority to Adopt Covad's Proposals, Because they Further State Statutory Goals that are Not Preempted by Federal Law**

The FCC has clearly permitted state utilities commissions to enforce their own copper retirement rules,<sup>6</sup> and despite the clear opportunity to do so in any number of recent proceedings, the FCC has done nothing to reverse its long-standing determination that section 251 unbundling requirements act as a national “floor” on unbundling, rather than an “upper bound.” In the *Local Competition First Report and Order*,<sup>7</sup> the FCC established the overall context for its application of section 251's unbundling requirements:

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<sup>6</sup> *Triennial Review Order*, ¶ 284.

<sup>7</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd. 15499 (rel. August 8, 1996) (“Local Competition First Report and Order”).

...[W]e adopt our tentative conclusion that states may impose additional unbundling requirements pursuant to section 252(e)(3), as long as such requirements are consistent with the 1996 Act and our regulations. This conclusion is consistent with the statement in section 252(e)(3) that 'nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement.'

*Local Competition First Report and Order*, ¶ 244.

Despite the dizzying number of controversies, court challenges, remands and complete confusion surrounding the FCC's "impairment" standard and the scope of section 251 (and now section 271) unbundling, nothing has disturbed this original decision on the meaning of national unbundling rules, and the remaining authority of state utilities commissions to add additional requirements grounded in state law. In 2003, the Sixth Circuit confirmed the continued right of state commissions to enforce state regulations. In confirming the Michigan Public Service Commission's right to enforce state tariff requirements related to unbundled elements, the court stated:

...[the Act] allows room for state regulation. The Act does not impliedly preempt Michigan's tariff regime. The [Michigan Public Service] Commission can enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.

*Michigan Bell Telephone Company v. MCI Metro Access Transmission Services, Inc.*, 323 F.3d 348, 359 (6<sup>th</sup> Cir. 2003).

This Commission has acted in the past to enforce its statutory directives to promote the efficient deployment of higher speed telecommunication services, encourage competition, and maintain just and reasonable rates. 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]

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.

Precisely the same policy objectives would be served by adopting Covad's copper retirement proposals. The proposals would ensure the continued existence of competition by allowing customers to continue to choose Covad as their provider of high speed telecommunications services at reasonable prices. Furthermore, the proposal would promote the efficient investment in higher speed telecommunication services. Given the fact that Covad has

already invested millions in providing these services in Arizona, nothing could be more *inefficient* than permitting Qwest to destroy this investment by replacing some copper cable with fiber cable. The inefficiency of Qwest's proposals are only underscored by the fact that, with the exception of a failed market trial,<sup>8</sup> *not a single inch* of fiber optic cable deployed by Qwest in Arizona has led to the provision of broadband services to Arizona consumers.<sup>9</sup>

### C. Qwest's Criticisms of Covad's Alternative Service Proposal are Misleading

Qwest makes two self-contradictory arguments regarding the financial ruin it alleges it would suffer if Covad's alternative service proposal is adopted. First, it argues that the Covad proposal would require it to maintain large copper feeder facilities to serve only a handful of Covad's customers, which would discourage Qwest from deploying fiber facilities. Even a cursory reading of Covad's proposal reveals that it would require no such thing. In fact, the proposal in no way restricts Qwest's right to retire copper feeder facilities. Maintaining copper facilities is merely an option available to Qwest, should Qwest deem it the most desirable way in which to avoid disrupting the service being provided by Covad to its customers. In fact, Qwest itself has argued that it is willing, in many cases, to maintain copper.<sup>10</sup> Qwest's argument in its

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<sup>8</sup> See Catherine Yang, *Cable vs. Fiber: In the Titanic Battle to Control the Flow of Data to U.S. Households, the Bells Fight Back by Offering Video via Phone Lines*, Businessweek, November 1, 2004 ("After failing to generate adequate returns by offering TV over fiber-to-copper networks in Colorado and Arizona, the No. 4 Bell, Denver-based Qwest Communications International, Inc. is sitting out the current [fiber deployment] craze. CEO Richard C. Notebaert says he's willing to install fiber only in new housing developments. 'When you go in to do a tear up or an overlay, the economics don't work,' he says.")

<sup>9</sup> Qwest's Responses to Covad's Data Requests 01-001, 01-002 and 01-003. In its responses, Qwest reveals that it has deployed a small number of FTTC loops capable of providing broadband service. Those loops appear to be associated with Qwest's market trial of its voice/data/video services in Arizona. Qwest further disclosed that it has deployed many more "hybrid" loops (fiber feeder with copper distribution longer than 500 feet) which do not appear to be capable of providing broadband service.

<sup>10</sup> Tr. Vol. I, 82:19 through 83:11.

Post-Hearing Brief that the retirement of copper is “standard practice” when fiber is deployed<sup>11</sup> is flatly contradicted by the Agreement, Qwest’s own witness, and Qwest’s prior statements to the FCC.<sup>12</sup>

Qwest also attacks Covad’s alternative service proposal, essentially on three grounds: First, it has no legal basis (this issue is addressed above); Second, it is so vague that it gives no direction to Qwest as to how to comply with its terms; and Third, that it would deny Qwest the right to recover its costs, as required by 252(d)(1). These arguments do not survive serious analysis.

Qwest’s second point, that the proposal is not properly defined, fails to take into account that the two critical characteristics of any alternative service, service quality and price stability, are clearly defined. Contrary to Qwest’s protestations otherwise, clear and obvious metrics exist to determine whether a given customer’s service is “degraded” by the move to an alternative service: availability of the connection, and the speed of that connection, measured in kilobits per second (kbps). Qwest’s professed ignorance as to what Covad’s proposal means is questionable at best, especially given the multitude of situations in which language in interconnection agreements has obvious, though not precisely explained implications. One need not look far to find an example- Qwest’s own proposal regarding copper retirement contains equally general language when it states that “Qwest and CLEC will jointly coordinate the transition of current working facilities to the new working facilities so that service interruption is held to a minimum.” This language can be read to mean that Qwest will provide access to fiber feeder

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<sup>11</sup> Qwest Post-Hearing Brief at 5.

<sup>12</sup> The FCC noted Qwest’s stated policy to maintain existing copper even after fiber facilities are deployed in the *Triennial Review Order*. *Triennial Review Order*, ¶ 296 (“Qwest explains that it ‘does not proactively remove copper facilities in the case of an overlay...’”)

and distribution facilities, even FTTH loops, or it can be read to mean that Qwest will provide something less. It is open to a certain level of interpretation, perhaps even a greater level than Covad's proposed language.

Qwest's third point is that Covad's proposal fails to provide Qwest with a means of recovering its costs for providing an alternative service. Implicit in this argument is an assumption that whatever means Qwest uses to provide the service will be more expensive than the current method of providing service to Covad. As an example of this, Qwest compares the rate it is permitted to charge for line sharing in Arizona (\$2.42) to the more expensive (yet somehow still undefined) alternative service. This is nothing more than a collateral attack on this Commission's rate for line sharing.

Qwest's argument also ignores the fact that all of the rates for its wholesale services are set on the basis of *average* costs. To the extent certain alternative arrangements raise Qwest's actual costs, this is best addressed in a review of Qwest's wholesale rates. Some specific arrangements may be more expensive, some less expensive. Qwest's overly literal interpretation of section 252(d)(1) would logically lead to the conclusion that every wholesale arrangement that, for whatever reason, falls below the average cost of providing that element would violate the Act. Such an analysis would make it impossible for this Commission to set wholesale rates at all.

More logical is Covad's proposal, which fundamentally stands for the proposition that Qwest cannot unilaterally change its wholesale rates, or eliminate competitors and customer choice, by re-configuring its network. If Qwest believes there are benefits to such a reconfiguration, it should be able to perform it, but allowing Qwest to shift all costs of

reconfiguration onto its competitors will distort its decisions, and replace marketplace thinking with regulatory calculations.

**D. Qwest's Arguments Regarding Economic Disincentives for Fiber Deployment are not Based in Reality, and Covad's Proposal Strikes a More Appropriate Balance Between Customer Choice and the Development of Next Generation Facilities**

Qwest's arguments for the unlimited right to retire copper are based upon the FCC's statements in the *Triennial Review Order* that impairment determinations must be balanced against the Act's clear policy objective of promoting the deployment of advanced telecommunications capability and infrastructure. Essentially, Qwest argues that any restrictions on the right to retire older copper technology, and replace it with newer fiber optic technology would be an impermissible disincentive for investment in advanced services. Qwest claims, therefore, that its right to retire copper facilities, and deny access to successor facilities, is vital to their decision to invest in Arizona.<sup>13</sup>

The misleading nature of Qwest's arguments are exposed by the following hypothetical: Suppose Qwest elected to replace all copper feeder cables in its Arizona network with fiber feeder, but left significant distances of copper distribution loops in place and did not deploy DSLAMs at the resulting remote terminals.<sup>14</sup> Under Qwest's proposal, Covad would be unable

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<sup>13</sup> This argument might be more persuasive if Qwest actually intended to deploy facilities capable of providing advanced services, such as the FTTH or FTTC loops envisioned by the FCC. Far from doing so, Qwest is merely attempting to parlay some routine maintenance activity into an anti-competitive closure of its existing copper plant to competition.

<sup>14</sup> Far from being an unrealistic hypothetical, this appears to follow the precise pattern of fiber deployment Qwest has followed in Arizona to date.

to serve any of its Arizona customers without deploying parallel loop facilities.<sup>15</sup> Arizona customers would receive no new services from Qwest, while at the same time Covad's entire Arizona investment would be lost.

The outcome of this hypothetical explains why Covad believes this Commission's decision to adopt Covad's copper retirement proposals is so critical. The fact of the matter is that Qwest's proposal would offer every incentive to Qwest to follow the deployment pattern described above, because it would allow Qwest to game the unbundling regime by making only incremental network modifications, driving Covad out of business, without offering customers a single new product or service.

Far from being merely a hypothetical concern, the possibility of the retirement scenario above is supported by Qwest's own statements and current retirement activity. While Covad routinely receives notices regarding Qwest's retirement of copper facilities (and their resulting unavailability), none of these retirements appears to be resulting in the deployment of additional advanced services to customers, and Qwest has made no pretense at proving otherwise, because it absolutely cannot. This is because Qwest has made a conscious decision not to upgrade its existing facilities for increased broadband capability, and instead is simply retiring copper for maintenance cost savings.

Maintenance decisions should not trump this Commission's directive to promote competition and efficient investment in advanced telecommunications services. Even the FCC's

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<sup>15</sup> The deployment of remote DSLAMs would not be technically feasible under this scenario, nor would Qwest be obligated to allow Covad to connect a remote DSLAM to the resulting hybrid loop, because Qwest's proposals are a condition to Covad's right to remote collocation and Field Connection Point (FCP) upon Qwest's placement of a remote DSLAM.

copper retirement policies are narrowly tailored to promote the deployment of FTTH and FTTC loops that carry with them the actual ability to provide enhanced broadband services to mass market customers, not to reward Qwest for making routine network modifications.<sup>16</sup>

On the other hand, Covad's proposal allows both Qwest and Covad to continue to *compete* for customers. If Qwest is willing to invest in FTTH or FTTC loops with significantly increased broadband capabilities, Covad's proposal is inapplicable and raises no investment disincentive issues. Furthermore, Covad's proposal does not require Qwest to offer any increased capabilities to Covad via any form of fiber access, and therefore preserves the value of any investment made by Qwest. In other words, Covad's proposal allows market forces to drive investment, rather than attempts to re-establish monopolies through regulatory gaming. For these reasons, Covad's proposal is not only more consistent with the goals of the Act, but also this Commission's directives under state law.

**E. Under Any Analysis of Qwest's Right to Retire Copper, its Proposed Notice of Such Retirement is Deficient**

While the parties have agreed to the fact that Qwest will provide notice of all copper retirement activity, including feeder retirements, Covad has proposed changes to the content of these notices in order to make them useful to competitors that must evaluate the impact of these retirements on their operations. Qwest opposes these changes, arguing that its current notice complies with FCC rules.

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<sup>16</sup> See generally, *Triennial Review Order*, ¶¶ 273-284 (discussing the capabilities of FTTH loops and the scope of incumbent LEC retirement obligations when FTTH loops are deployed); and *FTTC Reconsideration Order*, ¶¶ 1-14 (extending the FCC's reasoning to FTTC loops serving mass market customers). Notably, Qwest has made no effort whatsoever to limit its proposal or to provide evidence that it is deploying fiber for the purpose of providing advanced services to mass market customers, as opposed to enterprise customers.

47 C.F.R. § 51.327 prescribes the “minimum” standards for notices of network changes. Contrary to Qwest’s assertions in its Post-Hearing Brief, its current notifications 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”<sup>17</sup> as well as the “reasonably foreseeable impact of the planned changes.”<sup>18</sup>

Qwest chooses to read these requirements in an unreasonably narrow fashion, and has declined to provide such vital information as to what Covad customers, if any, will be impacted by the retirement project. The vague notices 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 copper retirement project, Covad would have to determine whether any of its customers would actually be affected.

Covad submits that any notice that can be read to comply with the FCC’s rules must specifically inform it 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 interpretation of this language, which would not require specific notice of the customers 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,

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<sup>17</sup> 47 C.F.R. § 51.327(a)(4).

<sup>18</sup> 47 C.F.R. § 51.327(a)(6).

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."<sup>19</sup> 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.<sup>20</sup>

Furthermore, it was established at hearing that Qwest's notice procedures are clearly inferior to those implemented by a similarly situated RBOC, namely BellSouth. Exhibit Qwest 1, admitted at hearing, clearly establishes that BellSouth provides CLECs a complete listing of customer addresses impacted by a retirement project, and provides specific notice to carriers that are providing DSL.

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

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<sup>19</sup> Covad Proposed Section 9.1.15.

<sup>20</sup> While Qwest appears to argue in its Post-Hearing Brief that it has committed to go beyond FCC requirements in providing notice of copper feeder retirements, this is clearly not the case. FCC rules require notice of all network changes that impact the ability of competitors to provide service. *See* 47 C.F.R. § 51.325(a)(1).

of copper loops and copper subloops.<sup>21</sup> While 47 C.F.R. § 51.327 should be read broadly enough to require what Covad seeks, additional state requirements are also clearly authorized.

**ISSUE 2 – UNIFIED AGREEMENT – 271 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)**

Qwest opposes the inclusion of terms in the Agreement describing its unbundling obligations under both section 271 of the Act and Arizona law, making four primary arguments against Covad’s proposals to include these elements: (1) Section 251 of the Act, as now interpreted by the FCC and *USTA II*,<sup>22</sup> describes the “real upper bound” of Qwest’s unbundling obligations, and this Commission has no authority to question these impairment determinations; (2) The Act’s state savings clauses do not preserve state utility commission authority to order further unbundling; (3) This Commission lacks the authority to enforce section 271 of the Act by enforcing the competitive checklist; and (4) Any access that is afforded to non-251 elements cannot lawfully be priced at forward-looking TELRIC rates. All four of Qwest’s arguments are hindered by the fact that they have been considered and rejected by the FCC and/or federal courts, as detailed below.

Furthermore, Qwest cites the decisions of other state commissions made in parallel arbitrations between the parties. Qwest improperly characterizes those decisions in an effort to convince this Commission that there has been a uniformity in analysis with respect to this issue, which is simply not the case.

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<sup>21</sup> 47 C.F.R. § 51.319(a)(3)(iii)(B).

<sup>22</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“USTA II”).

**A. Access Obligations Consistent with the Section 271 Competitive Checklist Cannot, as a Logical Matter, Conflict with the Act**

Qwest attempts to over-read the *Triennial Review Order* to stand for the proposition that any unbundling requirement not meeting the FCC's impairment standard is necessarily in conflict with the FCC's impairment determinations and the Act itself. This position ignores, however, the statements made by the FCC, and left undisturbed by the D.C. Circuit in its *USTA II* decision, that network elements contained in the section 271 Competitive Checklist<sup>23</sup> must be available notwithstanding any finding of non-impairment. The FCC specifically rejected the analysis proposed by Qwest in this proceeding:

Verizon asserts that an interpretation of the Act that recognizes the independence of sections 271 and 251(d)(2) places these sections in conflict with each other. We disagree. Verizon's reading of section 271 would provide no reason for Congress to have enacted items 4, 5, 6, and 10 [loop, transport, switching and signaling] of the checklist because item 2 [compliance with section 251] would have sufficed.

Triennial Review Order, ¶ 654.

If the additional unbundling requirements contained in the Competitive Checklist do not conflict with section 251, it is a logical impossibility that identical state access obligations could conflict with section 251. Therefore, any access obligation limited by the scope of the competitive checklist (such as those proposed by Covad), whether grounded in section 271 or Arizona law, cannot conflict with the Act and cannot be preempted.

**B. The Act Grants this Commission Clear Authority to Order Unbundling in Addition to the Minimum Requirements of Section 251**

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<sup>23</sup> See 47 U.S.C. § 271(c)(2)(B) ("Competitive Checklist").

Qwest makes three separate arguments regarding the lack of Commission authority to order unbundling beyond the FCC's current interpretation of section 251 of the Act: First, the Commission lacks any authority to perform the impairment analysis required by section 251; Second; that the Act does not preserve state commission authority to impose additional unbundling obligations; and Third, that the Commission lacks any authority to require unbundling consistent with section 271 of the Act.

Qwest's first argument, regarding the ability of this Commission to make impairment determinations, is misplaced. First of all, Covad has not proposed that this Commission perform an impairment analysis under section 251. Instead, Covad has asked this Commission to recognize its authority under section 271 of the Act, Arizona law, or both, to order unbundling consistent with the Competitive Checklist and the statutory directives of this Commission.

Qwest's second argument, that this Commission lacks the authority to impose additional unbundling obligations, has been repudiated not only by the FCC in the *Local Competition First Report and Order*,<sup>24</sup> but also by every federal court passing judgment on the meaning of section 252(e)(3) of the Act.<sup>25</sup> Contrary to Qwest's assertions that the Act's savings clauses designed to preserve state authority are ineffective in providing authority for state unbundling rules, federal courts have routinely confirmed that these savings clauses, especially 47 U.S.C. § 252(e)(3),

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<sup>24</sup> See *Local Competition First Report and Order*, ¶ 244, as well as the discussion of Issue 1, subsection B, above.

<sup>25</sup> See *Southwestern Bell Telephone Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 481 (5<sup>th</sup> 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 (5<sup>th</sup> 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 (4<sup>th</sup> 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.")

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

As discussed above, the FCC has, as recently as the *Triennial Review Order*, rejected the premise that access obligations exceeding those required by section 251's "impair" standard *directly* conflict with section 251,<sup>26</sup> and the Act itself prohibits implicit preemption determinations. As a result, Qwest's conflict preemption arguments are without merit.

### C. The Commission has Authority to Enforce Section 271 by Requiring Compliance with the Competitive Checklist

Qwest argues that even if section 271 can be read to create additional unbundling obligations, this Commission possesses no authority to enforce those obligations. For this

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<sup>26</sup> *Triennial Review Order*, ¶ 654. It should also be noted that the FCC exercised its *forbearance authority* in the *271 Forbearance Order* to refrain from requiring the unbundling of certain fiber facilities under section 271 of the Act. Inherent in this determination was the realization that notwithstanding their recent determination that competitors are not impaired without access to the broadband capabilities of FTTH and FTTC loops, section 271 required the unbundling of *all* loops. Only by electing to forbear from enforcement of these section 271 unbundling requirements could they relieve RBOCs of their obligation to unbundle these elements. Most notably, the FCC did not elect to forbear from enforcement of the unbundling obligations proposed by Covad in this arbitration, such as access to Feeder subloops, DS3 Loops, and DS3 Transport elements.

premise, it cites *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003). Qwest also claims that the role for state commissions envisioned by the Act with respect to section 271 is markedly different than that envisioned by sections 251 and 252, and that this Commission has no real power to enforce compliance with the Competitive Checklist.

Qwest's reliance on *Indiana Bell* misconstrues the court's holding in that case. The *Indiana Bell* court held that the Indiana Utility Regulatory Commission (IURC) did not have authority to order a specific performance and remedy plan as a condition of interLATA authority, because the FCC, not the IURC, had the ultimate authority to grant Indiana Bell's application. By ordering compliance with the remedy plan, the court ruled that the IURC "imposes additional obligations on Ameritech, beyond what is contemplated by Section 271 of the Act." (emphasis added) *Id.* at 6.

Notably, however, the court went to great lengths to explain that the IURC *did* have the authority to implement its performance and penalty plan *through the 252 interconnection process*. The court stated: "It is precisely because enforcement mechanisms are contemplated by Section 252 that they cannot be developed through the 271 Application process alone." In other words, the IURC had no need to require certain access standards as a condition of 271 approval, because it was free to require the same terms in its review of 252 interconnection agreements.

A proper reading of *Indiana Bell* affirms that this Commission may interpret and enforce the Competitive Checklist in its review of an interconnection agreement. In the current

proceeding, Covad does not propose additional obligations and penalties under the aegis of section 271, making the court's holding in *Indiana Bell* inapplicable.

Recently, the Maine Public Utilities Commission issued an order requiring Verizon to continue to provide elements on the Competitive Checklist through tariffs approved by that commission.<sup>27</sup> The Maine PUC also specifically found they possessed the authority to require compliance with the Competitive Checklist in the context of 252 arbitration proceedings. *Maine 271 Unbundling Order* at 19.

All of this is consistent with the clear direction provided by the FCC in approving RBOC 271 applications, which firmly support the enforcement authority of state utilities commissions with respect to the competitive checklist. In approving Qwest's 271 application for Arizona, the FCC stated:

Working in concert with the Arizona Commission, we intend to closely monitor Qwest's post-approval compliance for Arizona...

...

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 Arizona.

*In the Matter of Application of Qwest Communications International, Inc., for Authorization To Provide In-Region, InterLATA Services in Arizona*, WC Docket No. 03-194, Memorandum Opinion and Order, [18 FCC Rcd 25504] (rel. Dec. 3, 2003), ¶¶ 59 and 60.

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<sup>27</sup> See 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 decision is attached to Covad Communications Company's Post-Hearing Brief filed on March 11, 2005 as Attachment 1.

Logically attendant to this enforcement authority is the authority to interpret the requirements of section 271. Doing so in the context of a section 252 arbitration proceeding is the most obvious, expedient, and legally defensible method available to this Commission.

By incorporating its decisions in its order in this arbitration proceeding, the Commission would establish its own authority, separate from section 271, to enforce the requirements imposed. If Qwest were to refuse to comply with the Commission's order in this case, citing this Commission's lack of authority to interpret section 271, the Commission could enforce its order as it enforces any Commission order, as well as advise the FCC of Qwest's non-compliance with section 271 of the Act. Ultimately, only the FCC may judge whether non-compliance with the Competitive Checklist requires enforcement under section 271 of the Act, but this is clearly distinguishable from this Commission's authority to interpret and enforce interconnection agreements.

**D. TELRIC is a Permissible, Though Not Required, Pricing Methodology to Determine Fair, Just and Reasonable Rates in Compliance with 47 U.S.C. §§ 201 and 202 and Arizona Law**

Qwest argues that any application of TELRIC to establish rates for elements available pursuant to section 271 of the Act is *per se* unlawful. For this proposition, it cites a brief prepared by the FCC in connection with the appeal of the *USTA II* decision, in which the counsel for the FCC argues that section 252(d)(1) of the Act does not establish a state role in setting the rates for 271 elements, but only elements governed by section 251(c)(3).

First of all, statements made in a legal brief cannot be equated to an actual FCC decision. The FCC discussed the issue of pricing for 271 elements at length in the *Triennial Review Order*,

and never once did it act to preempt state commission authority to set rates for elements that must be made available pursuant to section 271. To the contrary, the FCC noted that BOCs that had already obtained section 271 approval would be required to continue to comply with any conditions of approval.<sup>28</sup> In the context of elements for which wholesale rates were established, and relied upon, by the FCC in granting Qwest's 271 application, the FCC has required continued access at current prices (TELRIC), absent a request made by Qwest to alter the conditions of its interLATA entry.<sup>29</sup>

To the extent the Commission approves Covad's proposals for Issue 2 based upon its state law authority, it should apply TELRIC, which clearly results in the setting of fair, just and reasonable rates as required by federal law. While forward-looking cost methodologies other than TELRIC are available, this Commission has already set TELRIC rates for the elements at issue, and those rates already comply with state and federal law. Covad proposes that they remain in place, while recognizing that the Commission is not required to keep them in place.

**E. Existing Decisions From Other Commissions Considering Issue 2 Provide No Consistent Guidance**

While no state commission has yet adopted Covad's proposed language regarding Issue 2, Qwest has grossly mischaracterized the conclusions reached by those commissions in an effort to paint them as fully supportive of its position. A careful reading of those decisions is in order.

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<sup>28</sup> *Triennial Review Order*, ¶ 665.

<sup>29</sup> *Id.*

The Minnesota ALJ Decision cited by Qwest (and recently upheld by the Minnesota Commission) rejected *both* parties' language regarding this issue. In fact, the Commission ordered the parties to adopt language consistent with its determination that it is premature to remove any section 251 elements from the Agreement. The practical effect of this decision is that the parties will be required to re-insert language into the agreement providing access to all of the elements Covad seeks, only pursuant to section 251 of the Act. While Qwest may seek changes to this language under the change in law provisions of the Agreement, the Commission has certainly not pre-determined any outcome on that issue.

The Decision in the Utah arbitration has likewise been mischaracterized by Qwest. Qwest selectively cites language from that decision for the proposition that section 271 and state law unbundling issues are inappropriate subjects of an interconnection agreement as a matter of law, when in fact the Utah decision states precisely the opposite. While the Commission ultimately declined to adopt Covad's language, it saw no legal impediment to doing so:

We agree with Covad's general proposition that states are not preempted as a matter of law from regulating in the field of access to network elements...we reject Qwest's apparent view that we are totally preempted by the federal system from enforcing Utah law requiring unbundled access to certain network elements.

...

The fact that **under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration** does not lead us to conclude it would be reasonable in this case to do so.

Utah PSC Docket No. 04-2277-02, *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*, Arbitration Report and Order (February 8, 2005) at 19-21. [emphasis added]

Covad was certainly bewildered by the conclusion reached by the administrative law judge, but the legal analysis preceding that conclusion supports Covad's position, not Qwest's.

The Washington Commission reached its decision on entirely different grounds than the Utah and Minnesota commissions. They engaged in a self-preemption analysis, and determined that any effort to enforce state unbundling laws would be preempted by federal law. This decision comes closest to supporting Qwest's position, but is legally flawed for reasons Covad has stated previously: state access requirements consistent with section 271 of the Act cannot be preempted as a logical matter, and in any event, administrative agencies lack the authority to engage in preemption analysis, and should instead enforce existing state law and administrative rules.

**ISSUE 3 – COMMINGLING  
(Section 4 Definitions of "Commingling" and "251(c)(3) UNE," 9.1.1 and 9.1.1.4.2)**

**A. The FCC Has Drawn Clear Distinctions Between Commingling and Combination Requirements**

Qwest has argued that there is no legal distinction between commingling and combining network elements or other wholesale services, and therefore Covad's commingling proposals violate the limitations placed upon UNE combinations in the *Triennial Review Order*, later upheld by the *USTA II* decision. This is nothing more than a collateral attack on the FCC's commingling rules established by the *Triennial Review Order*. Compounding the illogic of this argument is the fact that, central to Qwest's arguments with respect to Issues 1 and 2, Qwest believes that only the FCC possesses the authority to address unbundling matters. If that is so,

how does Qwest propose this Commission can overrule the commingling rules for 251 UNEs established by the FCC?<sup>30</sup>

With respect to Qwest's attack on the *Triennial Review Order*, the FCC made clear distinctions between UNE combinations and commingling. In addition to using the separate terms "combine" and "commingle," the FCC delineates the scope of its UNE Combination Rules,<sup>31</sup> then goes on to describe the very different requirements of incumbent LECs to commingle both UNEs obtained pursuant to section 251(c)(3) and combinations of such UNEs with one or more facilities or services "obtained at wholesale pursuant to a method other than unbundling under section 251(c)(3) of the Act."<sup>32</sup> Thus, Qwest's argument that the FCC has made a distinction without a difference is directly refuted by the *Triennial Review Order* itself.<sup>33</sup>

Qwest's position is all the more curious given the fact that even its own commingling proposals contemplate the commingling of 251(c)(3) UNEs with non-UNE telecommunications services.<sup>34</sup> It is hard to square this proposal with Qwest's argument that commingling is essentially a synonym for combining, given the fact that all parties agree that only 251(c)(3) UNEs are subject to the FCC's combination rules. If Qwest truly believed its own argument, it would have proposed the deletion of its commingling obligations altogether.

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<sup>30</sup> The FCC specifically cited 47 U.S.C. § 251(c)(3) as its authority to adopt rules permitting the commingling of UNEs and combinations of UNEs with wholesale services.

<sup>31</sup> *Triennial Review Order*, ¶¶ 573-578.

<sup>32</sup> *Triennial Review Order*, ¶¶ 579.

<sup>33</sup> Ultimately, Qwest's belief that there is no functional or network difference between combinations and commingling arrangements does not support any kind of argument that there is no legal distinction. In addition to the compelling argument presented by Covad above, there is a key distinction between the two arrangements that can never be ignored. That distinction is the jurisdictional nature of the traffic (local traffic v. interstate traffic) moving over a combination versus a commingled arrangement. And it is this key jurisdictional distinction that underlies the legal distinction that the FCC very clearly made between commingled arrangements and UNE combinations.

<sup>34</sup> See *Qwest's proposed Section 9.1.1.2* ("CLEC may commingle UNEs and combinations of UNEs with wholesale services and facilities...")

**B. A Reasonable Reading of the Triennial Review Order Requires the Adoption of Covad's Limited Commingling Proposal**

At the heart of the parties' dispute is whether network elements obtained pursuant to section 271 of the Act are "wholesale services" obtained "pursuant to a method other than unbundling under section 251(c)(3) of the Act," or whether the FCC intended to place 271 elements in a special category as neither a UNE nor a wholesale service, ineligible for either combination or commingling. Qwest argues for the latter, and claims that ¶ 655, footnote 1990 of the *Triennial Review Order* confirms its interpretation.'

To accept Qwest's argument, one must assume that footnote 1990 of the *Triennial Review Order* was intended to carve out 271 elements from the definition of "wholesale service," as that term was used seventy-six paragraphs earlier by the FCC in discussing commingling obligations in ¶ 579, despite the fact that no such comment or suggestion was made in ¶ 579 reflecting such a restrictive reading. The alternative reading, proposed by Covad, is that footnote 1990 was intended to clarify that elements available pursuant to section 271 would not be treated the same as elements available pursuant to section 251(c)(3) of the Act. In other words, while section 271 elements can be commingled with section 251(c)(3) UNEs,<sup>35</sup> a section 271 element may not be commingled or combined with another section 271 element.

This is a far more plausible interpretation, given that this meaning is consistent with the FCC's discussion at ¶ 655, which is entirely focused on the independence of the unbundling obligations contained in section 271 from section 251 (rather than the distinctions between 271 elements and other wholesale services). Furthermore, footnote 1990 clearly intends to deny

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<sup>35</sup> This distinction is the source of Covad's proposed definition of "251(c)(3) UNE." The definition is necessary to draw the same distinction drawn by the FCC in the *Triennial Review Order*.

section 271 elements a status equivalent to section 251(c)(3) elements when it states “[w]e decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251.”<sup>36</sup> Therefore, 271 elements are not to be treated as 251(c)(3) UNEs, and cannot be substituted as the “lynchpin” of a commingling arrangement. This interpretation, supported by Covad, lends the most logical meaning to the FCC’s statement that it declines to apply its commingling rule to 271 UNEs.<sup>37</sup> This is by far the most logical interpretation of footnote 1990, and the most consistent with the FCC’s commingling rules established in ¶ 579 of the *Triennial Review Order*.

This is a simple matter of interpreting the *Triennial Review Order* and resulting FCC rules. As mentioned in Covad’s Post-Hearing Brief, each and every Commission considering this issue has adopted Covad’s interpretation and proposed language.

#### **ISSUE 5 – REGENERATION REQUIREMENTS (Sections 8.2.1.23.1.4, 8.3.1.9, and 9.1.10)**

Qwest’s argument that it is entitled to charge whatever it wishes for regenerated central office cross-connections is premised upon the claim that it designs, and allows CLECs to construct, their own cross-connects within Qwest central offices, and that 47 C.F.R. 51.323(h)(1) creates a specific exception to any cross-connection requirements if it does so. 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*<sup>38</sup> adopting the rule, which reveals the FCC’s intent to protect competitive LECs from any discrimination related to incumbent LEC collocation restrictions. Furthermore, the standard for evaluating Qwest’s claim that self-provisioned cross-connects are available

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<sup>36</sup> *Triennial Review Order*, ¶ 655, fn. 1990.

<sup>37</sup> *Id.*

<sup>38</sup> *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 16 FCC Rcd. 15435, Fourth Report and Order (rel. August 8, 2001) (“Fourth Report and Order”).

should be the *practical* availability of this option, not simply its *theoretical* availability. Qwest's attack on this argument, that nowhere in the FCC's rules did it establish a "economic feasibility" test, ignores the plain language of section 251(c)(6) of the Act, which requires access to collocation elements on the same terms that access is offered to network elements. The economic infeasibility, as well as technical infeasibility, of Covad's options under Qwest's proposal plainly establish that collocation is not offered on terms that are just, reasonable and non-discriminatory.

In requiring Incumbent LECs to provision cross-connections between CLECs, the FCC stated: "our action reflects our overriding concern that an incumbent LEC would be acting in an unreasonable and discriminatory manner if it refused to provide cross-connects between collocators,"<sup>39</sup> 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."<sup>40</sup> The 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.<sup>41</sup>

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 LEC's obligations to provide collocation pursuant to section 251(c)(6). The exception contained

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<sup>39</sup> *Fourth Report and Order*, ¶ 79.

<sup>40</sup> *Id.*, ¶ 80.

<sup>41</sup> *Id.*, ¶ 82.

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).’

In many circumstances, it is possible for a competitive LEC to self-provision a cross-connect. However, in circumstances requiring regeneration, Qwest has read the “self-provisioning” exception in a way that clearly results in discrimination. While Qwest will make a technically feasible route available between collocators, it maintains that repeater equipment should be placed at both ends of the connection, rather than mid-span, if it is required to make the connection operable.<sup>42</sup> Qwest, on the other hand, regenerates its own signals at or near mid-span using equipment located near its distribution frame.

Not only are the conditions offered by Qwest discriminatory, Qwest has not established that its self-provisioning option is available in practical terms. At hearing, it was established that Qwest’s suggestion that competitive LECs could regenerate their own signals at both ends of the cross-connection was, *at best*, an inefficient engineering technique. Should the Commission believe that such an arrangement somehow meets the non-discrimination requirements of section 251(c)(6) (Covad believes it clearly does not), it must recognize the lack of evidence in the record regarding whether, as a practical matter, such a solution is workable. Covad believes that, at least in some situations, it will be practically impossible.

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<sup>42</sup> Tr. Vol. II, 129:3-17.

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

**A. Qwest's Reliance on a Stale "Consensus" in Prior 271 Proceedings and "Industry Standards" Does Not Override the Significant, Unrefuted Evidence of Wholesale Billing Difficulties Presented in This Proceeding**

Qwest continues to argue that the fact it reached consensus on billing issues in its 271 proceedings makes that resolution impervious to questioning and challenge in this proceeding. To the extent that consensus was reached in a prior proceeding, or that 30 days is, in most cases, a commercially reasonable time frame for payment of invoices, Qwest's language may enjoy a presumption of reasonableness. That is precisely why Covad introduced such detailed and extensive evidence, through Ms. Elizabeth Balvin, that there are compelling reasons to set aside that presumption. The evidence, left unrefuted by Qwest, demonstrated that Qwest's current wholesale invoices do not meet industry standards and these systemic problems make review within Qwest's proposed interval impossible. The evidence presented by Covad in this proceeding overcomes any presumption that might have been afforded to Qwest's proposed language, rendering any agreements reached in prior 271 proceedings irrelevant.

In addition to pointing to the consensus reached in prior 271 proceedings, Qwest points to its 30-day interval as "the wholesale industry standard." This is somewhat hypocritical, given the fact that Qwest cannot seem to follow other wholesale industry standards regarding billing, such as including circuit identification numbers on its bills to Covad. It should also be noted that the actual time Covad has to review Qwest's invoices is significantly less than thirty days. Qwest's bills typically arrive five to eight days after the invoice date printed on them.<sup>43</sup> The

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<sup>43</sup> Direct Testimony of Elizabeth Balvin (Exhibit Covad-1), 7:15-18.

invoice date, not the date Covad receives the bill, starts the clock on Qwest's proposed payment interval.

Qwest's argument that it was the first ILEC to implement line sharing, and therefore established the industry norm,<sup>44</sup> is equally specious. As the record in this case clearly indicates, no other ILECs have chosen to follow Qwest's lead in ordering, provisioning and billing for line sharing. Perhaps the other ILECs learned from Qwest's mistakes, but they have all recognized that Qwest's process is inferior, at least implicitly, by adopting alternate procedures. Billing procedures, in particular, are uniform among the other ILECs. Only Qwest clings to its inefficient line sharing process, primarily because its customers bear the entire burden of its inefficiency.

**B. The Technical Difficulties Alleged by Qwest in Providing for a 45-Day Payment Interval Must be Weighed Against the Technical Impossibility of Reviewing Deficient Qwest Invoices**

Qwest argues that it will suffer technical hardship if it is forced to alter its systems to accommodate both thirty (30) and forty-five (45) day payment intervals, as proposed by the Department and agreed to by Covad (Covad originally sought a uniform forty-five (45) day interval). Covad acknowledges that there may be some work involved on the part of Qwest to resolve the systems issues that will arise. This difficulty, however, must be weighed against the difficulties Covad experiences as a result of deficient Qwest wholesale invoices. Those difficulties make it completely impossible to review Qwest invoices in the time provided to Covad. In light of this fact, the Commission should not hesitate in extending the payment

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<sup>44</sup> See Qwest Post-Hearing Brief at 48.

deadline, as proposed by Covad, even if it complicates certain Qwest back-office systems. After all, Qwest would not be faced with this situation if it had been willing to fix its systemic billing problems and comply with industry standards.

Likewise, Qwest argues that Covad's proposal is vague, claiming that Covad's own witness could not explain how the language would be implemented. This is a mischaracterization of the testimony provided. It was established at hearing that Qwest bills for each product using separate Billing Account Numbers (BANs), and that these separate files, sorted by BAN, would provide a simple method to distinguish products subject to the forty-five day interval from those subject to the standard thirty-day interval.<sup>45</sup>

Qwest revealed its arrogance and complete lack of regard for its wholesale customers when it stated, in its Post-Hearing Brief, that "Covad acknowledged that it currently has no process in place to make this determination [identifying invoices due in 45 days] and would need to make manual accommodations. Surely such manual effort could be better directed toward Covad's reconciling of its bills."<sup>46</sup> Essentially, Qwest is lecturing Covad regarding how it should best deploy its resources to make up for Qwest's billing deficiencies. Not only is this statement unbelievable, it ignores the obvious fact that determining when to pay an invoice is not time consuming at all; especially when compared to verifying enormous invoices manually. One of the primary purposes of the Act was to ensure that ILECs did not treat new entrants in the telecommunications industry as captive customers of an obstinate monopoly, hence the requirement that unbundled network elements (such as line sharing) be provided on just, reasonable and non-discriminatory terms, and subject to state commission review in

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<sup>45</sup> Tr. Vol. II, 266:13-22.

<sup>46</sup> Qwest Post-Hearing Brief at 43.

interconnection arbitrations. This Commission has a prime opportunity to fulfill the goals of the Act by rejecting Qwest's behavior and positions on this billing issue.

**C. The Intervals for Discontinuance and Disconnection Must Allow Covad Sufficient Time to Organize Requests for Commission Relief**

The sole issue regarding sections 5.4.2 (discontinuance of order processing) and 5.4.3 (disconnection) is whether the intervals proposed by Qwest provide Covad sufficient time after identifying a dispute to ensure that Qwest acknowledges that dispute, and if not, prepare to request injunctive relief from appropriate tribunal. If Covad's request is ultimately meritless, there is only a minimal increase in financial exposure for Qwest. This must be weighed against the potential that Qwest can use the short time frames and refusals to acknowledge disputes to extort payments of disputed amounts from Covad. Covad believes its slightly longer intervals allow these sections to function as they should, as a clear deterrent to non-payment of invoices, but not as a tool to extort disputed amounts from competitors.

Qwest has claimed that it has, on several occasions, been left with large unpaid wholesale bills, and its language will provide it protection from this eventuality in the future. This argument ignores the fact that those losses sustained by Qwest occurred *under its own proposed intervals*, and furthermore, were not a result not of the waiting periods established by the sections at issue here. Instead, those losses were a result of Qwest's inattention to the unpaid balances and/or voluntary agreements to extend disconnection deadlines. The proper place to deal with payment risks is in the provisions of the Agreement addressing deposits, not provisions that could have extremely negative impact on innocent end-user customers.

**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 28<sup>th</sup> day of March, 2005.

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