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BEFORE THE ARIZONA CORPORATION C

JEFF HATCH-MILLER  
Chairman

WILLIAM MUNDELL  
Commissioner

MARC SPITZER  
Commissioner

MIKE GLEASON  
Commissioner

KRISTIN MAYES  
Commissioner

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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  
T-01051B-04-0425**

**QWEST CORPORATION'S FIFTH  
NOTICE OF SUPPLEMENTAL  
AUTHORITY**

Qwest Corporation ("Qwest") hereby provides notice of a recommended decision issued October 14, 2005, by the hearing examiner in the New Mexico interconnection arbitration between Qwest and Covad Communications Company ("Covad").<sup>1</sup> A copy of the order is attached.

The New Mexico arbitration involves the same issues presented in this case. The hearing examiner's decision recommends the following results with respect to each issue: (1) in connection with Arbitration Issue No. 1 (Copper Retirement), the hearing examiner rejects Covad's proposed interconnection agreement ("ICA") language that would require Qwest to provide an "alternative service" upon retiring a copper facility and adopts, in substantial part, Covad's proposed language relating to the notice Qwest will provide before retiring a copper facility; (2) the hearing examiner accepts Qwest's positions and adopts all of Qwest's proposed language relating to Arbitration Issue No. 2 ("Unified Agreement/Defining Unbundled Network

<sup>1</sup> *In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Case No. 04-00208, Recommended Decision of the Hearing Examiner (N.M.)

Elements"); (3) in connection with Arbitration Issue No. 3 (Commingling of Network Elements), the hearing examiner adopts Covad's position and proposed ICA language; (4) in connection with Arbitration Issue No. 5 ("CLEC-to-CLEC channel regeneration"), the hearing examiner requires Qwest to provide CLEC-to-CLEC channel regeneration and permits Qwest to charge a TELRIC rate for that service; and (6) the hearing examiner adopts Qwest's positions and proposed ICA language relating to payment due dates and the time for discontinuing orders and disconnecting services (Arbitration Issue No. 8).

In addressing the network unbundling issues presented by Arbitration Issue No. 2, the hearing examiner ruled that a state commission is without authority to impose obligations relating to Section 271 in a Section 252 interconnection agreement.<sup>2</sup> The hearing examiner also rejected Covad's demands for unbundling under state law, emphasizing that any state-imposed unbundling requirements must be consistent with federal law, including Section 251 of the Telecommunications Act of 1996 ("the Act").<sup>3</sup> Because Section 251 requires a fact-based finding of impairment before an unbundling requirement can be imposed, the hearing examiner concluded that an unbundling requirement under state law also must be supported by evidence of impairment. Since Covad did not present any factual evidence relating to impairment, the hearing examiner ruled that there was no support for Covad's request for unbundling under New Mexico law.<sup>4</sup> Finally, the hearing examiner rejected Covad's claim that TELRIC prices should apply to Section 271 network elements. The hearing examiner recognized that the FCC has specifically held that TELRIC prices do not apply to Section 271 elements, and, accordingly, he

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Commission Oct. 14, 2005) ("New Mexico decision").

<sup>2</sup> *Id.* 37-38.

<sup>3</sup> *Id.* at 37.

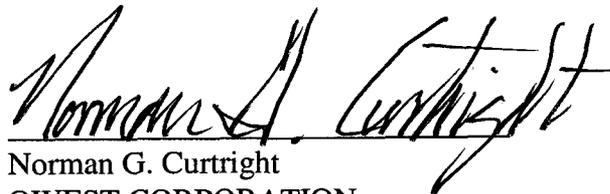
<sup>4</sup> *Id.*

ruled that Qwest "is not required to [provide Section 271 elements] as part of a Section 251 [interconnection agreement] or at TELRIC rates."<sup>5</sup>

The parties are required to file any exceptions to the New Mexico decision by October 27, 2005.

DATED: October 24, 2005

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*

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<sup>5</sup> *Id.* at 38.

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of **Qwest Corporation's Fifth Notice of Supplemental Authority** on October 24, 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](mailto:gdiamond@covad.com)

Andrew R. Newell  
Krys Boyle, P.C.  
600 Seventeenth Street, Suite 2700  
Denver, CO 80202  
[anewell@krysboyle.com](mailto:anewell@krysboyle.com)

**Via electronic and regular mail:**

Michael W. Patten  
Roshka Heyman & De Wulf, PLC  
One Arizona Center  
400 East Van Buren Street, Suite 800  
Phoenix, AZ 85004  
[mpatten@rhd-law.com](mailto:mpatten@rhd-law.com)

Maureen A. Scott, Esq.  
Legal Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007  
[mScott@cc.state.az.us](mailto:mScott@cc.state.az.us)

  
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**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE PETITION OF )  
DIECA COMMUNICATIONS, INC. D/B/A )  
COVAD COMMUNICATIONS COMPANY )  
FOR ARBITRATION OF AN )  
INTERCONNECTION AGREEMENT WITH )  
QWEST CORPORATION )

Case No. 04-00208-UT

**RECOMMENDED DECISION OF THE HEARING EXAMINER**

William J. Herrmann, Hearing Examiner for this case submits this Recommended Decision to the New Mexico Public Regulation Commission ("Commission") pursuant to 17.1.2.32.E(4) and 17.1.2.39.B NMAC. The Hearing Examiner recommends that the Commission adopt the following Statement of the Case and Discussion.

**STATEMENT OF THE CASE**

On June 22, 2004, DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") filed a Petition for Arbitration ("Petition") pursuant to 17.11.18.19 NMAC and Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, (hereinafter the "ACT") requesting arbitration of certain terms and conditions of a proposed interconnection agreement with Qwest Corporation ("Qwest"). The Petition states that Covad and Qwest agree that the negotiation request date is January 14, 2004.

On July 22, 2004, the Commission issued its Order Docketing Proceeding and Designating Hearing Examiner.

On July 19, 2004, Qwest filed Qwest's Corporation's Response to Petition for Arbitration.

A pre-hearing conference was convened on August 31, 2004 attended by Covad, Qwest and the Telecommunications Bureau Staff of the Utility Division ("Staff"). At the pre-hearing conference, Covad and Qwest agreed to waive the nine-month period for the Commission to decide the disputed issues, as set forth in Section 252(b)(4)(c), which would expire on October 14, 2004. The parties also agreed to a procedural schedule that was reflected in the Procedural order issued on August 31, 2004. The Hearing Examiner subsequently issued two orders amending the schedule with a final hearing date set for March 15, 2005.

A Protective Order was issued on December 13, 2004.

A public hearing commenced on March 16, 2005. The March 15, 2005 hearing date was continued due to a winter storm. The public hearing continued on March 17, 2005 and concluded on March 29, 2005. Previously motions for admission pro hac vice were granted and local counsel were excused from attending the hearing. The following appearances were entered:

**For Covad:**

Andrew R. Newell, Esq.  
Greg Diamond, Esq.

**For Qwest:**

John M. Devaney, Esq.  
George Baker Thomson, Esq.

**For Staff:**

Nancy Burns, Esq.

The following witnesses appeared at the hearing and were examined on their respective testimony.

**For Covad:**

Michael Zulevic  
Elizabeth Balvin

**For Qwest:**

Michael Norman  
William R. Easton  
Renee Albersheim  
Karen Stewart

**For Staff:**

Michael Ripperger

The parties filed briefs on May 16, 2005 and reply briefs on June 2, 2005. Qwest filed a Motion to File a Surreply Brief and its brief on June 20, 2005. Qwest's Motion is granted. Qwest filed Motion to Strike on June 23, 2005. Covad's response to Qwest's Motion was submitted on July 1, 2005. Covad filed a Notice of Supplemental Authority on July 20, 2005.

**BACKGROUND**

Covad has petitioned the Commission to arbitrate certain terms and conditions of an interconnection agreement ("ICA" or the "Agreement") under Section 252(b) of the Act. Pursuant to Sections 252(b)(4) and (c) of the Act, the Commission is authorized to resolve, through arbitration, any unresolved issues concerning ICAs that the parties are unable to resolve through voluntary negotiations pursuant to Section 252(a) of the Act. Section 252(c) requires state commissions to conclude the resolution of any unresolved issues within nine months after the date on which the incumbent local exchange carrier ("incumbent LEC") received the request for negotiations. Covad and Qwest, however, waived this statutory period.

Covad is a "telecommunications carrier" as defined in Section 153(44) of the Act, 47 U.S.C. § 153(44). In that capacity, Covad is currently a party to an interconnection agreement with Qwest, approved by Final Order entered by the Commission on May 4, 1999 in Utility Case No. 2955, and subsequently amended by those parties numerous

times and approved by the Commission. Covad is also party to a commercial line sharing arrangement agreement ("CLSA") with Qwest. Covad is a local exchange carrier ("LEC") under the Act.

Covad is the largest nationwide provider of DSL service in the country. Covad is not certificated by this Commission and primarily is a provider of wholesale DSL (digital subscriber loop) services in New Mexico. DSL is a high-speed data or broadband Internet Service. Covad provides wholesale DSL service to approximately 41 Internet service providers ("ISPs") in the state of New Mexico through approximately 17 Qwest central offices. Covad is Qwest's single largest collocator customer in the state of New Mexico. Covad is a facilities-based provider that has collocated facilities in seven (7) of the fourteen (14) states in Qwest's operating territory. On region-wide basis, Covad pays Qwest approximately one (1) million dollars per month for collocation and services.

Qwest is an incumbent local exchange carrier under the Act ("ILEC") and operates within its Commission-authorized local exchange areas. As an ILEC, Qwest is required to allow competitive LECs to interconnect, collocate and have access to certain unbundled network elements pursuant to Sections 251 and 252 of the Act and associated FCC Rules and Orders implementing those sections. In addition to leasing collocation space to Covad, Qwest leases Covad the HFPL (high frequency portion of the local loop) through the parties ICA and CLSA and in some instances dedicated interoffice transport.

Through voluntary negotiations, Covad and Qwest were able to agree on most of the terms and conditions to include in their ICA. For example, through negotiations, the parties have reduced the original list of some 72 disputed issues to the five (5) disputed

issues (including sub issues), which are being arbitrated in this case. The parties' ICA sets forth the basis under which Covad will be able to establish a collection within one or more Qwest central offices and to interconnect with Qwest for the purpose of providing local telecommunications services within Qwest's local service areas.

The parties have arbitrated or are arbitrating some or all of the disputed issue in this case before seven state commissions in Qwest's fourteen state operating territory, including this case, Washington, Utah, Minnesota, Colorado, Arizona and Oregon. Final orders in those state commission proceedings have been issued in Washington, Utah, Minnesota and Colorado at the time of the filing of the initial briefs. Recently a final order has been issued in Oregon. Additionally, Covad and Qwest will brief the legal issues in Disputed Issue No. 2 in proceedings before the remaining seven state commissions. South Dakota, Idaho and Iowa have issued decisions on that legal issue.

The five issues are numbered in accordance with the original list of 72 issues and are:

- Disputed Issue No. 1: Copper Loop Retirement;
- Disputed Issue No. 2: Inclusion of 271 Elements;
- Disputed Issue No. 3: Commingling;
- Disputed Issue No. 5: Channel Regeneration; and
- Disputed Issue No. 8: Billing Due Dates and Time Frames.

#### **JOINT STATEMENT OF ISSUES**

Pursuant to the Hearing Examiner's order governing post-hearing briefs Qwest and Covad submitted a joint statement of issues. The intent of this submission is to provide the Commission with a neutral and objective summary of the arbitration issues and the parties' positions on those issues and does not reflect any findings and conclusions of the Commission.

**Issue 1: Copper Retirement**

**Issues:** Whether Qwest should be permitted to retire copper loops it has replaced with fiber loops only if it provides an alternative service to Covad at no increase in cost and with no degradation in the quality of the DSL service Covad provides to its customers? Whether Qwest should provide notices of planned copper retirements that include information in addition to the information required under the FCC's notice rules relating to network modifications?

This issue involves a dispute concerning the terms and conditions that should apply when Qwest retires copper loops in its New Mexico network and replaces them with fiber loops. As telecommunications carriers have moved from copper to fiber loops, it has become increasingly common for them to retire copper loops when they deploy fiber loops. In the *Triennial Review Order ("TRO")*,<sup>1</sup> the FCC discusses the rights of ILECs to retire copper loops. The parties' dispute involves conflicting interpretation and implementation of the FCC's discussion of this issue and also conflicting interpretation of ILECs' copper retirement rights in general.

In general, Covad's position is that Qwest should be permitted to retire a copper loop that Covad is using to provide DSL service only if Qwest provides Covad with an alternative service at no increase in cost and with no degradation in the quality of service. Covad's position is that the right of an ILEC to retire a copper facility is limited to situations where an ILEC deploys a fiber-to-the-home ("FTTH") loop or a fiber-to-the-curb ("FTTC") loop. Accordingly, under Covad's proposal, the "alternative service" requirement would not apply when Qwest replaces a copper loop with a fiber-to-the-home ("FTTH") loop or with a fiber-to-the-curb ("FTTC") loop. Covad's position also is

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<sup>1</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003), *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*").

that the notice of planned copper retirements that Qwest provides to Covad and other CLECs should include information required by the FCC's rules relating to network notices and, in addition, other information that Covad states it needs to determine if its customers may be affected by the planned retirement.

Qwest's position is that it has the right to retire copper loops that it replaces with any fiber facility, not just with FTTH and FTTC loops. Qwest's position also is that it is not required under the TRO or any other FCC order to provide Covad with an alternative service before retiring a copper loop. In addition, Qwest asserts that the proposed requirement of providing an alternative service "at no increase in cost" violates its right under the Act to recover the costs it incurs to provide interconnection and access to unbundled network elements ("UNEs"). Qwest also states that it makes every effort not to retire copper loops that Covad and other CLECs are using to provide DSL service, and, in this regard, points to the fact that it has never disconnected a Covad DSL customer by retiring a copper loop. With respect to the issue of notice of planned copper retirements, Qwest's position is that the notice it is agreeing to provide under the ICA complies with the FCC's notice rules and thus satisfies Qwest's legal obligations. Qwest's position also is that Covad, not Qwest, should have the ultimate responsibility for determining whether a Covad customer may be affected by a copper retirement.

**Other recent state commission arbitration rulings between Covad and Qwest:**

Colorado: Denied Covad's request for "alternative service" condition to copper retirements. Adopted Qwest's proposed ICA language relating to notice of copper retirements, except modified language relating to notice of planned retirements to impose additional requirement.

Washington: Denied Covad's request for "alternative service" condition to copper retirements. Adopted Qwest's proposal relating to notice of copper retirements, with modifications to proposal.

Minnesota: Denied Covad's request for "alternative service" condition to copper retirements. Adopted Qwest's proposal relating to notice of copper retirements, with modifications to proposal.

Utah: Denied Covad's request for "alternative service" condition to copper retirements. Accepted Covad's proposal relating to notice of planned copper retirements, with modifications to proposal.

**Issue 2: Section 271 and state law unbundling**

**Issue: Whether the New Mexico Public Regulation Commission ("Commission") has authority pursuant to Section 271 of the Telecommunications Act of 1996 ("Act") or New Mexico law to require Qwest to unbundle certain network elements and make them available to Covad at wholesale rates.**

This dispute concerns the parties' competing ICA proposals relating to the network elements that Qwest will provide to Covad under the ICA. The parties agree that this is an issue of law only and, accordingly, did not present any evidence relating to it.

Covad contends that pursuant to section 271(c)(2)(B) of the Act (known as the Competitive Checklist), the Commission has authority, in the context of an arbitration proceeding, to order an incumbent local exchange carrier, such as Qwest to unbundle certain network elements and make them available to Covad at wholesale rates. In particular, Covad contends that Qwest is obliged to provision high capacity loops and interoffice transport to Covad at wholesale rates. In addition, Covad contends that

under New Mexico law<sup>2</sup>, the Commission also has the same unbundling authority with respect to high capacity loops and interoffice transport as that provided under the Act.

Qwest contends that the Commission does not have authority to require Qwest and Covad to include in a Section 251 interconnection agreement network elements provided under Section 271. Qwest contends further that the Commission does not have authority under New Mexico law to require Qwest to unbundle network elements that the FCC has found ILECs are not required to unbundle under Section 251. Qwest contends that no provision of the Act authorizes the Commission to impose or enforce obligations under section 271. Qwest contends further that arbitration of disputes regarding the duties imposed by federal law is limited to those imposed by Section 251 of the Act and does not include the conditions imposed by Section 271. Qwest also contends that any exercise of state unbundling authority must be consistent with the network unbundling required under the Act and FCC interpretations of the Act and that the Commission is therefore precluded from imposing unbundling requirements under New Mexico law that the FCC has rejected.

Other recent state commission arbitration rulings between Covad and Qwest:

Washington: Request for 271/state law unbundling denied

Minnesota: Request for 271/state law unbundling denied

Utah: Request for 271/state law unbundling denied

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<sup>2</sup> At a minimum, ILECs shall unbundle their networks to the extent required by the FCC in 47 C.F.R. Sections 51.307 through 51.321. Nothing in this rule precludes the Commission from requiring ILECs to undertake further unbundling of their networks, including further unbundling of network elements pursuant to 17.11.18.8 NMAC through 17.11.18.13 NMAC. 17.11.18.12A(1) NMAC.

**Issue 3: Commingling**

**Issue: Whether the *Triennial Review Order* requires Qwest to commingle network elements and services it provides under Section 271 with unbundled network elements that Qwest provides pursuant to Section 251?**

Issue No. 3 involves a dispute concerning the extent of Qwest's obligation to "commingle" network elements and services provided under Section 271 with UNEs provided under Section 251. The FCC defines commingling as "the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services." *TRO*, ¶ 579; see also 47 C.F.R. § 51.5 (definition of "commingling"). The parties' competing proposals relating to this issue are based upon their conflicting interpretations of the commingling rights and obligations established by the *TRO*.

Covad contends that under the *TRO*, a Regional Bell Operating Company ("RBOC")-like Qwest must commingle for CLECs Section 251(c)(3) UNEs and combinations of 251(c)(3) UNEs with any other services obtained by any method other than unbundling under Section 251(c)(3) of the Act, including switched and special access services offered pursuant to tariff and resale. Covad contends that the obligation of an RBOC to commingle UNEs with services obtained by any method other than unbundling under Section 251(c)(3) establishes that Qwest must commingle Section 271 elements and services with Section 251(c)(3) UNEs.

Qwest contends that the *TRO* does not require RBOCs to commingle Section 271 elements and services with Section 251(c)(3) UNEs, relying in part on the FCC's

errata to the *TRO* that eliminated a reference to commingling of Section 271 elements that was in the original version of the *TRO*. Qwest also contends that an order requiring it to commingle Section 271 UNEs and services would impermissibly conflict with the FCC's ruling in the *TRO* that RBOCs are not required to combine Section 271 elements with Section 251(c)(3) UNEs, since there is no difference between the physical act of combining and that of commingling.

**Other recent state commission arbitration rulings between Covad and Qwest:**

Colorado: Required commingling of Section 271 elements and services with Section 251(c)(3) UNEs.

Washington: Required commingling of Section 271 elements and services with Section 251(c)(3) UNEs.

Minnesota: Required commingling of Section 271 elements and services with Section 251(c)(3) UNEs.

Utah: Required commingling of Section 271 elements and services with Section 251(c)(3) UNEs.

**Issue 5: Regeneration**

**Issues: Whether Qwest is required to provision to Covad regeneration facilities for a cross-connection within a Qwest central office between one CLEC collocation site and another CLEC collocation site within the same central office? Whether Qwest is required to provision such facilities to Covad at wholesale rates?**

To provision service to its customers, it may become necessary for a competitive local exchange carrier ("CLEC") such as Covad to place its own telecommunications and other equipment within the confines of a Qwest central office. This is known as collocation. A CLEC that collocates within a central office will connect its equipment to Qwest equipment and may, from time to time, connect its equipment to the equipment

of another CLEC collocated within the same central office. To establish a CLEC-to-CLEC connection within a Qwest central office, it is necessary to run a transmission facility (i.e., cabling equipment) between the collocation sites of the two CLECs. Once that transmission facility (frequently called a cross-connect) is in place, either CLEC may then send voice or data signals, as the case may be, from one collocation site to the other. In some instances, however, the distances between the two CLEC collocation sites within the same central office may be so great that the signal can become weak or degraded. Under established technical standards, when the distance between two collocation sites exceeds a certain distance, it becomes necessary to regenerate the signal so it does not weaken or degrade during transmission from one collocation site to the other. This issue involves the rates, terms, and conditions under which Qwest will provide regeneration to Covad for CLEC-to-CLEC cross-connects in the event that Covad decides not to self-provision that service.

Covad contends that because federal law requires<sup>3</sup> Qwest to provide a connection between its collocation site and the collocation site of another CLEC within a central office, it necessarily follows that Qwest must also provide regeneration equipment (when required as described above) in order to make the connection function properly.

Qwest contends that because it allows Covad to self-provision the cross-connect between its collocation site and the collocation site of another CLEC, federal law does

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<sup>3</sup> An incumbent LEC shall provide, at the request of a collocating telecommunications carrier, a connection between the equipment in the collocated spaces of two or more telecommunications carriers, except to the extent the incumbent LEC permits the collocating parties to provide the requested connection for themselves or a connection is not required under paragraph (h)(2) of this section. Where technically feasible, the incumbent LEC shall provide the connection using copper, dark fiber, lit fiber, or other transmission medium, as requested by the collocating telecommunications carrier. 47 C.F.R. sec. 51.323(h)(1)

not require it to provision that cross-connect or any regeneration facilities if required as described above (see the self-provisioning exception set forth in footnote 4 below).

Covad contends that under section 251(c)(6) of the Act, Qwest is required to provide regeneration facilities to Covad at wholesale rates if regeneration is required as described above. Qwest contends it has no obligation to provide regeneration facilities to Covad at wholesale rates. Qwest further contends that despite permitting Covad to self-provision a CLEC-to-CLEC cross-connect, it will provision this cross-connection as a finished service and, if regeneration is required on such a connection, Qwest will charge the rate set forth in its FCC 1 Access Tariff.

**Other recent state commission arbitration rulings between Covad and Qwest:**

Washington: Request for regeneration at wholesale rates granted.

Minnesota: Request for regeneration at wholesale rates denied.

Colorado: Request for regeneration at wholesale rates denied.

Utah: Request for regeneration denied.<sup>4</sup>

**Issue 9: Billing and Payment Dates— Payment due dates/discontinue orders/disconnection of service**

**Issues: Whether payments under the interconnection agreement should be due 30 days (Qwest) or 45 days (Covad) after the date of invoice? Whether Qwest should be permitted to discontinue orders within 30 days (Qwest) or 60 days (Covad) following the payment due date? Whether Qwest may disconnect services within 60 days (Qwest) or 90 days (Covad) following the payment due date?**

<sup>4</sup> Utah order further provides, however, as follows: We do, however, take issue with Qwest's apparent intent to charge for regeneration according to its FCC 1 Access Tariff when regeneration is requested by a CLEC. We fail to see how regeneration of a signal originating and terminating in a Qwest central office located in Utah could possibly implicate interstate commerce such that Qwest's FCC tariff would apply. We note that we have not previously established a CLEC-to-CLEC signal regeneration charge, nor do we have sufficient evidence in this docket to permit us to do so. Therefore, the parties are directed that any rate Qwest may charge for CLEC-to-CLEC regeneration pending Commission action establishing a reasonable rate would be an interim rate subject to true-up.

These billing/payment issues involve (1) the time frame within which Covad should be required to pay certain invoices it receives from Qwest (30 or 45 days); (2) the period of time that should elapse after the payment due date of an invoice before Qwest can stop processing orders from Covad as a result of Covad's non-payment of an undisputed invoice; and (3) the period of time that should elapse after the payment due date of an invoice before Qwest can discontinue service to Covad as a result of Covad's non-payment of an undisputed invoice.

**A. Payment due date**

Covad contends that a slightly longer time frame is appropriate for the payment due date of certain invoices that are described in the parties' post-hearing briefs. Covad contends that the review of wholesale invoices is a complicated task. If the time frame for payment is unreasonably short, Covad's ability to audit Qwest invoices will be compromised.

Qwest contends that a 30-day time frame for payment of invoices is consistent with industry standards and is applicable to all CLECs. This time frame, according to Qwest, balances a CLEC's need for time to analyze monthly bills with Qwest's right to timely payment.

**B. Discontinuance of orders**

Covad contends that discontinuing orders is a drastic remedy. Covad asserts that the additional time Covad has requested will avoid the need for additional agreements regarding payment and will allow each party a reasonable amount of time to agree that certain amounts are disputed or seek other remedies under the agreement to either receive payment or maintain the processing of orders.

Qwest contends that it is entitled to timely payment and take remedial action if the risk of non-payment is apparent. Qwest's proposal gives Covad a full 60 days from the date of invoice before Qwest can discontinue processing orders. Allowing Covad to continue to incur debt for months before Qwest can take appropriate action to protect itself is unreasonable.

**C. Disconnection of Services**

Covad contends that the impact disconnection will have on its business, as well as innocent third party subscribers or customers, should be balanced against Qwest's right to receive payment. Covad contends that the difference between the parties' proposals (60 days) ensures that disconnection is never used as leverage in a billing dispute. Moreover, given the billing and payment history between the parties, Covad asserts that the risk of non-payment is relatively small.

Qwest contends that it is entitled to timely payment and take remedial action if the risk of non-payment is apparent. Qwest's proposal gives Covad a full 90 days from the date of invoice before Qwest can disconnect services. Allowing Covad to continue to incur debt for months before Qwest can take appropriate action to protect itself is unreasonable.

**Other recent state commission arbitration rulings between Covad and Qwest:**

Minnesota:	Payment due date: 45 days (for certain invoices)
	Discontinue orders: 60 days
	Disconnect service: 90 days
Colorado:	Payment due date: 30 days
	Discontinue orders: 30 days
	Disconnect service: 60 days

Washington: Payment due date: 30 days  
Discontinue orders: 30 days  
Disconnect service: 60 days

Utah: Payment due date: 45 days (for certain invoices)  
Discontinue orders: 30 days  
Disconnect service: 60 days

## **SUMMARY OF ARGUMENTS**

The following summarizes is the arguments of Covad, Qwest and Staff on the disputed issues. This summary is taken directly from the parties and does not reflect any findings and conclusions of the Commission.

### **COVAD**

Issue 1 involves Qwest's commitments to maintain wholesale service to Covad in the event that copper plant serving Covad and its customers is retired by Qwest and replaced with fiber optic facilities. Covad's proposal that Qwest provide an alternative service to Covad in the event that it retires copper feeder is applicable only to situations in which Qwest retires copper feeder subloops, creating mixed-media or "hybrid" copper/fiber loops. Covad has agreed that copper retirement resulting in a Fiber to the Home (FTTH) or Fiber to the Curb (FTTC) loop may be governed by the process established by the FCC's *Triennial Review Order*.<sup>5</sup>

Because of this agreement, any statements made by the FCC in its *Triennial Review Order* regarding certain copper retirement activity are no longer relevant to the disputed issue. The *Triennial Review Order* and resulting FCC rules explicitly limit the

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<sup>5</sup> *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").*

scope of their new copper retirement provisions to situations involving the creation of FTTH loops, and are silent with respect to Qwest's rights and responsibilities with respect to the retirement of copper feeder resulting in service disruptions to Covad's customers. Covad's proposals are therefore critical to protecting both Covad and New Mexico consumers from decreased access to bottleneck facilities when Qwest chooses to deploy hybrid loops. It is also important to note that, while the FCC has declined to find impairment for certain subloop elements involved in hybrid loops, these elements are nevertheless still building blocks under New Mexico law. This state law authority, consistent with the Act, forms the legal foundation for the alternative service requirement proposed by Covad.

Covad has also proposed improvements to Qwest's notice procedures for copper retirement activity, which are required by FCC rules. These improvements are required to lend meaning to Qwest's notices, and to comply with existing FCC standards. This issue is positively critical to ensuring that New Mexicans do not lose telecommunications service unexpectedly.

Issue 2 encompasses the Parties' disagreement regarding the availability of network elements that may no longer be available under the FCC's application of the "necessary" and "impair" standard applicable to Section 251 of the Telecommunications Act of 1996 ("Act"),<sup>6</sup> but must nevertheless be unbundled by Regional Bell Operating Companies ("RBOCs" or "BOCs") pursuant to Section 271 of the Act and New Mexico law. This Commission has clear authority to apply both state law and all provisions of the Act as it decides interconnection arbitration disputes. Qwest's argument that the

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<sup>6</sup> Pub. L. 104-104, 110 Stat. 56 (1996).

Commission is preempted from enforcing provisions of New Mexico law requiring access to these elements and Qwest's Section 271 obligations should be rejected.

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

Covad also proposes a definition of "251(c)(3) UNE." Covad believes that this definition is helpful in describing the precise group of unbundled network elements (those obtained pursuant to Section 251(c)(3) of the Act) that must be present in any commingling arrangement. This definition, rather than the general definition of "unbundled network element," is necessary because "unbundled network element" is used (and Covad believes will continue to be used) to describe not only UNEs purchased pursuant to Section 251 but also elements provided under other "Applicable Law,"<sup>7</sup> such as New Mexico law. This definition is especially important in New Mexico, where this Commission has already determined that certain additional building blocks may be required from ILECs, so long as their provision is consistent with federal law.

Issue 5 involves the Parties' disagreement over Qwest's obligation to provide regeneration between CLEC-to-CLEC cross connections ordered by FCC rule. Covad believes Qwest should maintain a consistent regeneration policy as to both its ILEC-to-CLEC and CLEC-to-CLEC arrangements, and is certainly not permitted to refuse to

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<sup>7</sup> See Section 9.1.1 of the Agreement, as well as the Agreement's definition of "Applicable Law" contained in Section 4.

provide a CLEC-to-CLEC connection solely because that connection requires regeneration.

Issue 8 involves the length of the period within which Covad may review Qwest's wholesale invoices prior to payment, and the timing of Qwest's remedies for non-payment. Covad has established a substantial record in this proceeding regarding the deficiencies of Qwest's bills, which slows down Covad's review and analysis of those bills. As a result of the current deficiencies of Qwest's bills, Covad requires additional time to adequately review certain portions of the UNE, collocation, and transport invoices it receives. With respect to Qwest's remedies for non-payment, Covad has no objections to the remedies themselves, but believes there are legitimate reasons to extend the timing of those remedies. Because the remedies have a potential to irreversibly damage Covad's business, the modest extensions of time Covad has proposed will allow Qwest to maintain the remedies to which it is entitled, while affording Covad sufficient time to either resolve payment issues with Qwest or seek appropriate relief from this Commission if necessary.

#### QWEST

The five unresolved issues that remain after the parties' negotiations are largely attributable to Covad attempting to impose obligations on Qwest that either conflict with rulings by the FCC or are inconsistent with the Act. These deviations from governing law are sharply demonstrated by Covad's demands and proposed ICA language relating to implementation of the FCC's rulings in the *TRO*.

For example, although the *TRO* confirms Qwest's right to retire copper facilities, Covad asks the Commission to gut that right by imposing onerous conditions that are

nowhere found in the *TRO* and that conflict directly with the FCC's Congressionally-mandated obligation to encourage investment in the fiber facilities that support broadband services. Similarly, despite the FCC's pronouncements that Bell Operating Companies ("BOCs") are not required under the Act to commingle or combine network elements provided under Section 271, Covad proposes language that would require Qwest to do just that.

Covad's departures from governing law are perhaps most sharply demonstrated by its proposed ICA language that would require Qwest to provide almost unlimited access to the elements in Qwest's New Mexico telecommunications network. These proposals ignore FCC findings in the *TRO* and the *Triennial Review Remand Order* ("*TRRO*") that CLECs are not impaired without access to many network elements and that ILECs are therefore not required to unbundle them. Covad's broad unbundling demands also violate the rulings of the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit in which those courts struck down FCC unbundling requirements while confirming in the most forceful terms that the Act imposes real and substantial limitations on ILEC unbundling obligations. In addition, Covad's proposed unbundling language assumes incorrectly that state commissions have authority to require BOCs to provide network elements pursuant to Section 271, to determine pricing for those elements, and to include them in Section 252 ICAs.

The flawed nature of Covad's arguments is confirmed by recent decisions in the Covad/Qwest arbitrations in Colorado, Minnesota, Washington, and Utah. In those arbitrations, the commissions rejected Covad's positions and proposed ICA language relating to a majority of these *TRO-related* issues in dispute here. This consistency

among the four decision-makers that have addressed these issues is not a coincidence – Covad's proposals relating to the disputed issues are without legal or factual support.

In contrast to Covad's demands, Qwest's ICA proposals are specifically based upon the FCC's rulings in the *TRO*, the *TRRO* and other governing law. To ensure that the ICA complies with governing law and is consistent with the policy objectives of the Commission and the FCC, the Commission should adopt Qwest's proposed ICA language for each of the disputed issues.

Finally, like its positions relating to the *TRO* issues, Covad's positions relating to channel regeneration and payment/billing deviate from governing law and industry practice.

#### **STAFF**

Issue 1: Staff recommends that the Commission adopt Covad's proposal for Section 9.1.15 regarding notice requirements for copper loop retirements. Staff also recommends that the Commission adopt Covad's proposed language for Section 9.1.15.1 requiring Qwest to provide Covad and Covad's embedded customer base with continuity of service in circumstances where Qwest retires copper feeder cable and the resultant loop is a hybrid loop over which Qwest itself can provision DSL. Additionally, Staff recommends that the Commission reject Covad's proposed ICA language in Section 9.1.15.1.1 regarding alternative service at no increased cost and no degradation of service quality to Covad and its existing customers. Lastly, Staff recommends that the Commission order the agreement being arbitrated to contain language that provides that either party may bring a proceeding before the Commission to review a planned copper retirement that may cause a disruption or discontinuance of

service to either party or their embedded customer base as a result of the planned copper retirement.

Issue 2: Initially, Staff recommended that Commission order that the ICA being arbitrated contain no references to section 271 elements not disputed in the proceeding; that it contain no references to the availability or pricing of elements no longer required under section 251(c)(3); and that it contain no references the future unavailability of network elements the appropriate place to address the future pricing and availability of these elements is pursuant to the ICA's change of law provision and commercial agreement negotiations. Accordingly, Staff recommends that the Commission adopt Qwest's proposals for Section 4.0, regarding the definition of "Unbundled Network Element" or "UNE"; 9.1.1 (UNE Definition), 9.1.5 (concerning access to 271 elements at any technically feasible point), 9.2.1.4 (access to more than two DS3 loops under 271), and sections 9.3.1.1, 9.3.1.2, 9.3.2.2, and 9.3.2.2.1 (availability of feeder subloops as 271 elements). Staff recommends the deletion of Sections 9.1.1.6 (unavailable 251 UNEs) and 9.1.1.7 (pricing of unavailable 251 UNEs). Lastly, Staff recommends that the Commission order a compliance filing consistent with the above recommendations for Sections 9.2.1.3 (access to high capacity loops), 9.6(g) (access to UDIT on routes where Commission has found no impairment), 9.6.1.5 (access to DS3 UDIT); 9.6.1.5.1, 9.6.1.6.1 (regarding website giving the DS3 and DS1 route), 9.6.1.6 (access to DS1 UDIT), and 9.21.2 (access to UNE-P and line splitting).

Issue 3: Staff recommends that the Commission adopt Qwest's Section 4.0 regarding the definition of Commingling and Covad's proposal for Section 9.1.1.1 regarding Qwest's obligation to permit Covad to commingle section 251(c)(3) UNEs with

wholesale services obtained pursuant to any method other than section 251(c)(3) including section 271 elements.

Issue 5: Staff recommends that the Commission adopt Covad's proposals for Sections 8.2.1.23.1-4, 8.3.1.9 and 9.1.10 requiring Qwest to provision channel regeneration on a wholesale basis at Commission approved TELRIC rates that are no higher than the rates Qwest charges for ILEC to CLEC channel regeneration, except that Staff recommends deletion of the last sentence of Covad's proposal for Section 8.3.1.9 that requires Qwest to provision channel regeneration where it is not required to meet ANSI standards.

Issue 8: Staff recommends that the Commission adopt Qwest's proposal for Section 5.4.1 regarding payment due dates. Staff also recommends that the Commission order Qwest to include circuit ID numbers on its billing to Covad. Lastly, Staff recommends that the Commission adopt Covad's proposals for Sections 5.4.2 and 5.4.3 regarding the time frames for discontinuance of order and disconnection of service.

## **DISCUSSION**

### **Issue 1: Retirement of Copper Facilities**

There are two main components to this disputed issue: (a) whether Qwest should provide notices of planned copper retirements that include information in addition to the information required under the FCC's notice rules relating to network modifications; and (b) whether Qwest should be permitted to retire copper loops it has replaced with fiber loops only if it provides an alternative service to Covad at no

increase in cost and with no degradation in the quality of the DSL service Covad provides to its customers.

**(a) Notice Requirements**

Qwest notes that as these arbitrations have progressed Qwest has significantly expanded its copper retirement notice obligations under the ICA by agreeing to: (1) provide notice when it intends to retire copper loops, subloops, and copper feeder; (2) provide notice whenever a copper facility is being replaced with any fiber facility (including fiber feeder); and (3) provide e-mail notice of planned retirements to CLECs. Furthermore, Qwest contends that its proposed notice commitments meet the FCC's notice requirements because its proposed language requires Qwest to provide notice of planned retirements in accordance with FCC Rules and New Mexico law.

Qwest argues that by agreeing to provide notice in accordance with FCC and state rules, Qwest is committing to provide detailed information about copper retirements with its notices, including, for example, the date of the planned retirement, the location, a description of the nature of the network change, and a description of foreseeable impacts resulting from the network change. According to Qwest, this information ensures that Covad will have timely and complete notice of any copper retirements.

Covad argues that the FCC rule cited by Qwest prescribes the minimum standards for notices of network changes and that Qwest's current notification proposal do not even meet these minimum standards. For example, Covad avers that notices must, according to the rule, include the "location(s) at which the changes will occur" as well as the "reasonably foreseeable impact of the planned changes" yet Qwest's notice

does not describe what Covad customers, if any, will be impacted by the retirement project. Covad claims that the notice proposed by Qwest would only serve as a starting point for a major research project to determine whether a given retirement will impact Covad's customers, and that this process will have to be repeated each and every time Covad received a copper retirement from Qwest. Covad believes that Qwest's notice must specifically inform competitive LECs whether the retirement threatens service to existing customers if it is to comply with the FCC's rule. Covad states that, if the Commission does not believe the FCC has required the information Covad requests, the FCC has recognized this Commission's authority to require the notice requirements requested by Covad.

According to Qwest, Covad's claim that Qwest's notices will not meet the FCC's requirements ignores the fact that Qwest's proposed ICA language expressly commits to providing the notice required by the FCC's rules. With respect to Covad's request for customer specific information, Qwest claims it 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. Furthermore, Qwest alleges that by using Qwest's database known as the "raw loop data tool", which Qwest developed in response to CLEC demands during the Section 271 proceedings, Covad can determine the addresses of the customers within a specific distribution area ("DA") 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. In sum, Qwest's position is that Covad, not Qwest,

should have the ultimate responsibility for determining whether a Covad customer may be affected by a copper retirement.

Staff argues that Qwest's current form of copper retirement notice lacks specificity regarding technical specifications, protocols and standards, and in many instances, does not even specify whether the replacement will be copper or fiber. Staff states that Qwest's own witness acknowledged that in many instances Qwest's current copper retirement notice do not contain a detailed technical description of planned retirements or a description of the foreseeable impact of the planned change so Covad must make follow up phone calls to ascertain this information. Thus, Staff maintains the record indicates that without the information contained in Covad's proposed notice Covad must expend an unreasonable amount of time to determine the impact of a Qwest planned copper retirement on its customers. Staff contends that the record is undisputed that Qwest has the information requested by Covad and that it can provide Covad that information with reasonable efforts. Staff avers that until a few months ago Qwest was providing Covad with a notice that notified Covad of whether a planned copper retirement would or would not impact Covad's end users customers.

**Recommendation For Issue 1(a)**

Since the parties have agreed that Qwest's notice must comply with the FCC's rules and applicable state requirements, the only disputed issue is whether Qwest or Covad should determine which Covad customer addresses may be affected by the retirement of a copper loop. The arguments posed by Covad and Staff are persuasive. The record indicates that it would be difficult for Covad to determine which, if any, of its customers will be impacted, and that Qwest has the customer specific information

requested by Covad which it can provide without unreasonable efforts. Thus, this section of the ICA is resolved in favor of Covad's proposed language with minor modifications as the totality of the information requested by Covad may be excessive and unduly burdensome for Qwest to provide. Therefore, Covad's proposed language with respect to the email notice should be amended to reflect the following:

The email notice provided to each CLEC shall include the following information: city and state; wire center; planned retirement date; the FDI address; old and new cable media; a listing of all of the recipient's impacted customer addresses; and the wholesale rate element associated with each address.

The approval of this language does not require Qwest to speculate as to the services Covad is providing its retail customers. Rather, Covad will be left to make the final determination as to the effect of the impending retirement based on the information provided in Qwest's notice. Qwest should be permitted to file a cost study identifying the costs it incurs to determine the list of CLEC's customer addresses impacted by a copper loop retirement so the Commission can establish a rate element and cost for this service. Until such time the interim cost for this rate element will be zero.

**(b) Alternate Service for Copper Loop Retirement.**

This portion of the dispute concerns Covad's position that Qwest should be permitted to retire a copper loop that Covad is using to provide DSL service only if Qwest provides Covad with an alternative service at no increase in cost and with no degradation in the quality of service.

According to Qwest, the TRO confirms that ILECs have a right to retire copper facilities that they replace with fiber facilities. Qwest, citing TRO ¶1271, argues that the FCC specifically rejected attempts by CLECs to preclude ILECs from retiring copper

loops. Qwest maintains that this ruling is consistent with the FCC's Congressionally-mandated policy of encouraging the deployment of fiber facilities that carriers use to provide advanced telecommunications services since the retirement of copper facilities and the resulting elimination of the maintenance expenses associated with those facilities increases an ILEC's economic incentive to install fiber. In sum, Qwest's position is that it has the right to retire copper loops that it replaces with any fiber facility so long as it complies with the FCC's notice requirements.

Covad claims that allowing Qwest to deny access to competitive LECs when Qwest chooses to retire copper feeder and replace it with fiber (thereby deploying a hybrid loop) fails to further the goal of broadband deployment, and provides Qwest a blueprint to re-establish a monopoly for broadband services, in direct conflict with New Mexico's stated goal to "permit a regulatory framework that will allow an orderly transition from a regulated telecommunications industry to a competitive market environment." NMSA 1978, Section 63-9A-2. Thus, Covad proposes that Qwest only be permitted to retire a copper loop that Covad is currently using to provide DSL service if Qwest provides Covad with an 'alternative service' at no increase in cost and with no degradation in the quality of service. Covad's 'alternative service' proposal does not apply when Qwest replaces a copper loop with a fiber-to-the-home or fiber-to-the-curb loop, but only when Qwest has deployed a hybrid loop. Covad maintains that its 'alternative service' proposal would only apply to loops over which Qwest itself could provide a retail DSL service. This allegedly ensures that Qwest will never experience increased costs to provide CLECs an alternative service after retiring copper feeder loop.

Qwest maintains that the FCC explicitly rejected CLEC proposals that would have required ILECs to provide alternative forms of access and to obtain regulatory approval before retiring copper facilities. Specifically, Qwest asserts that Covad's proposed requirement that Qwest provide an 'alternative service' suggests that CLECs should have access to the broadband capabilities of hybrid loops which is contrary to the FCC's explicit ruling in the TRO. Furthermore, Qwest argues that Covad's proposal that the alternative service be provided 'at no increase in cost' violates Qwest's right under the Act to recover the costs it incurs to provide interconnection and access to unbundled network elements because it would prohibit Qwest from charging anything above a monthly recurring rate of \$4.00 – the current recurring rate for line sharing in New Mexico – regardless of the actual cost of the alternative service. Qwest declares that Covad's proposed copper retirement conditions are not found in the TRO or in any other FCC order, and for these reasons, have been uniformly rejected by the Colorado, Minnesota, Utah, and Washington Commissions.

Covad claims that Qwest's cost recovery concerns are unfounded because there is no valid reason to believe that Qwest's deployment of more efficient fiber technology would raise, rather than lower, the incremental cost of providing wholesale service to Covad. Covad maintains that this Commission retains the authority to adopt Covad's proposal because it furthers state statutory goals that are not preempted by federal law. Specifically, Covad argues that the FCC permits state commissions to enforce their own copper retirement rules, and 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", as suggested by Qwest.

Staff acknowledges that Covad's alternative service proposal may be contrary to Qwest's unbundling obligations given the specific facts and circumstances of a particular copper retirement and in light of the pro competitive purposes and intent of the 1996 Act, the TRO, and the New Mexico Telecommunications Act. Nevertheless, Staff recommends that the Commission order ICA language that requires Qwest to provide Covad with continuity of service in the limited circumstances proposed by Covad without restricting the parties' right to negotiate the rates, terms or conditions of this alternative service or the Commission's right to address the rates, terms or conditions of this alternative service in a future proceeding upon request of either party.

Staff also suggests that the Commission order ICA language that specifically provides for Commission review of disputed Qwest copper retirements plans on a case-by-case basis if requested by either party so that this Commission can safeguard consumer choice, continuity of service, and the promotion of competition in New Mexico.

#### **Recommendation For Issue 1(b)**

Consistent with Qwest's argument, the record indicates that the FCC explicitly rejected attempts by CLECs to preclude ILECs from retiring copper loops. Covad agrees 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. Covad however, maintains that this Commission should nevertheless impose such requirement upon Qwest in order to further the goals of the state to promote advanced services and preserve Covad's existing broadband investments. Covad is correct that this Commission's authority to unbundle network

elements is not completely preempted by federal law, but, this authority is not as boundless as Covad suggests. Thus, Covad's proposed language must be rejected as it would require this Commission to unbundle network elements that the FCC specifically declined to unbundle, and thus, would be inconsistent with the Act.

Similarly Staff, while recognizing that the FCC has eliminated Qwest's obligation to provide Covad with unbundled access to the packetized portions of its hybrid loops for the provision of broadband services, inexplicably suggests that the Commission adopt Covad's proposed ICA language requiring Qwest to provide Covad with continuity of service for its existing customers over hybrid loops over which Qwest itself could provision DSL service. Although Staff has not recommended adoption of the pricing and quality of service components of Covad's proposal Staff's alternate recommendation must be rejected as it ultimately suggests that Qwest should be required to unbundle the packetized portions of its network which the TRO and federal rules explicitly prohibited.

Qwest testified that it makes every effort not to retire copper loops that Covad and other CLECs are using to provide DSL service, and, in this regard, pointed to the fact that it has never disconnected a Covad DSL customer by retiring a copper loop. If Covad's ability to provide service in New Mexico is seriously impacted by copper loop retirements Covad should file its objections with the FCC and/or negotiate the terms of an alternative service with Qwest. This section of the agreement is resolved in favor of Qwest's proposed language.

#### **Issue 2: Section 271 and State Law Unbundling**

This dispute concerns the parties' competing proposals relating to the network elements that Qwest will provide to Covad under the ICA. Specifically, the dispute involves the definition of "Unbundled Network Element" and the specific network elements Qwest will make available pursuant to the ICA and the price Qwest will be permitted to charge for these network elements.

Covad contends that state commissions have the authority in the context of an arbitration proceeding to order ILECs such as Qwest to unbundle network elements pursuant to section 271(c)(2)(B) of the Act and make these UNEs available to Covad at TELRIC rates. Covad also maintains that the Commission has comparable unbundling authority under New Mexico law. Consistent with these arguments Covad proposed language that defines UNE as:

"a Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access, for which unbundled access is required under section 271 of the Act or applicable state law, or for which unbundled access is provided under this Agreement."

Qwest's proposed language for this section contrasts with Covad's in that it specifically states that "Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act." Furthermore, to protect against the possibility that Covad will demand unbundling of network elements no longer required under Section 251, but still required under Section 271, Qwest maintains that the ICA should include the list of 'de-listed' UNEs. Similarly, Qwest proposes the Commission adopt its 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 longer be available under the ICA if the FCC rules that ILECs are no longer required to provide them under Section 251.

With regards to elements that may in the future become unavailable pursuant section 251, Staff suggested that the negotiations of a separate commercial agreement or the change of law provision in the interconnection agreement should control the provisions and pricing of these elements.

Qwest argues that because the change of law process often requires many months to complete, a ruling that removes network elements from Section 251 should be incorporated into the ICA immediately upon the ruling itself becoming effective. Otherwise, Qwest will be required to continue providing network elements at TELRIC rates potentially long after the FCC has ruled that ILECs are not required to provide elements under Section 251.

As noted above, Covad suggests that the Act and the TRO establish the authority of state commissions to unbundle and set prices for Section 271 network elements, including those 'de-listed' by the FCC. For example, Covad argues that because the FCC determined in the TRO that Section 271 of the Act creates "an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251"<sup>8</sup> and that the Act expressly preserves a state role in the review of a RBOC's compliance with its Section 271 checklist obligations, it follows then that state commissions possess the authority to enforce Qwest's obligations to provide unbundled access to loops and dedicated transport under Section 271.

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<sup>8</sup> TRO ¶653.

Covad acknowledges that the FCC concluded in the TRO that a different pricing standard applies to network elements required to be unbundled under Section 271 as opposed to network elements unbundled under Section 251 of the Act. That is, "Section 271 requires RBOCs to provide unbundled access to elements not required to be unbundled under Section 251, but does not require TELRIC pricing."<sup>9</sup> However, Covad argues that nowhere does the FCC forbid the use of TELRIC prices or suggest that the two different legal standards that apply to Section 251 and Section 271 network elements may not result in the same rate-setting methodology.

Staff takes similar views on the Commission's authority under Section 271 of the Act. For example, Staff argues that the Commission expressly conditioned its recommendation that Qwest receive section 271 interLATA authority on Qwest's filing of an SGAT or wholesale tariff that conforms with the Commission orders in its section 271 related proceedings, including the rates for wholesale services and network element recently set in Phase B of the Cost Docket in NMPRC Case No. 3495. Therefore, Staff argues that the Commission has the authority and duty, as the initial arbitrator of disputes over Qwest's compliance with its 271 obligations, to arbitrate subsequent disputes regarding Qwest's section 271 compliance, including the authority to set pricing for wholesale services and network elements that complies with federal pricing standards.

Furthermore, Staff argues that the Commission should clarify that it has the authority to regulate jurisdictionally intrastate wholesale services and network elements, including the authority to set prices for jurisdictionally wholesale services absent a

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<sup>9</sup> TRO ¶659.

specific determination of effective competition in a specific market area after a public hearing.

Staff argues that Section 252(d)(3) the Act specifically permits state commissions to impose state law unbundling requirements in the context of a section 252 arbitration that are consistent with the Act and do not substantially prevent implementation of the Act. According to Staff, pursuant to this preservation of state authority provision, this Commission enacted NMPRC Rule 17.11.18 NMAC which provides that the Commission may require unbundling in addition to that required under federal law.

Thus, for the aforementioned reasons Staff argues that the Commission should conclude that it has the authority to establish pricing for section 271 elements, including the Commission's TELRIC based rates contained in Qwest's SGAT Exhibit A, until the Commission either sets just and reasonable rates for section 271 elements, approves just and reasonable FCC approved rates for section 271 elements or until Qwest and CLECs agree upon rates for section 271 elements.

Qwest argues that Covad and Staff failed to provide legal support for their claim that state commissions have decision-making authority under section 271 of the Act. Qwest argues that Section 271(d)(3) of the Act 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. Qwest claims that state commissions have only a non-substantive, consulting role in that determination.

Qwest maintains that 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. Qwest states that 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) . . ."<sup>10</sup> Thus, Qwest avers that 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.

Qwest maintains that this Commission has no authority to set prices under Section 271 of the Act for the following reasons. First, Qwest claims that the FCC was quite clear in the TRO that determining "[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)."<sup>11</sup>

Second, Qwest claims that Sections 201 and 202 of the Act, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271, provide no role for state commissions.

Third, the only network elements over which states have pricing authority are those that an ILEC provides pursuant to Section 251(c)(3). Qwest claims nothing in the Act extends that authority to Section 271 elements, as evidenced by Covad's inability to cite any statutory provision supporting its argument.

<sup>10</sup> 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").

<sup>11</sup> Qwest cites TRO ¶664.

Fourth, Qwest maintains that the FCC confirmed at ¶¶656-664 of the TRO that TELRIC pricing does not apply to Section 271 network elements. Further, Qwest argues that the D.C. Circuit court reached the same conclusion when it rejected the claim that it was unreasonable for the Commission to apply a different pricing standard under Section 271 and instead stated that there was nothing unreasonable in the FCC's decision to confine TELRIC pricing to instances where it has found impairment.<sup>12</sup>

#### **Recommendation For Issue 2**

This dispute presents two primary issues to resolve. First, does this Commission, in the context of a Section 251 ICA, have the authority to require Qwest to include network elements pursuant to section 271(c)(2)(B) of the Act and, if so, must Qwest make section 271 UNEs available to Covad at TELRIC rates.

State unbundling is permitted so long as it is consistent with the goals of the Act. Consistent with Qwest's argument however, the Act places 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. Thus, in order to justify state commission unbundling of network elements there must be evidence that Covad will be impaired in the absence of access to those elements. Since the parties agreed that this issue was a matter of law and no impairment related arguments were made or evidence proffered, this Commission cannot find that Covad is impaired.

Furthermore, consistent with Qwest's arguments, the FCC and courts have made it clear that a state commission's jurisdiction is limited to the network elements required

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<sup>12</sup> USTA II, 359 F3d at 589; see generally *id.* At 588-90.

through Section 251 of the Act because "that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)."<sup>13</sup>

Similarly, at ¶ 659 of the TRO the FCC was explicit about TELRIC pricing not being applicable to Section 271 elements:

659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

Thus, while Qwest must provide access to 271 elements it is not required to do so as part of a Section 251 ICA or at TELRIC rates. This issue is resolved in favor of Qwest's proposed language.

### **Issue 3: Commingling**

There are two main components to this disputed issue: (a) the appropriate definition of "commingling." and (b) the extent of Qwest's obligation to commingle network elements and services provided under Section 271 with UNEs provided under Section 251. The parties' proposals relating to this issue are based upon their conflicting interpretations of the commingling rights and obligations established by the TRO.

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<sup>13</sup> Declaratory Order ¶8, note 26.

At ¶579 of the TRO the FCC defined commingling as the "connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."<sup>14</sup> The FCC also concluded that "an incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act."<sup>15</sup>

Covad maintains that paragraph 579 of the TRO supports the conclusion that the network elements Qwest must provide under section 271 are facilities or services that it obtains at wholesale pursuant to a method other than unbundling under section 251(c)(3) of the Act, and thus, Qwest is obligated to commingle.

Qwest argues that the FCC's ruling in the TRO relating to commingling must be harmonized with its ruling that BOCs are not required to combine network elements provided under Section 271. According to Qwest, while the FCC ruled in the TRO that BOCs have an obligation under Section 271 (independent of Section 251) to provide access to loops, transport, switching, and signaling, it also ruled that a BOC is not required to combine those elements when it provides them under that section of the Act. Qwest avers that the FCC explained that checklist items that impose the independent unbundling obligation do not include any cross-reference to the combination

<sup>14</sup> TRO ¶579; see also 47 C.F.R. § 51.5.

<sup>15</sup> TRO ¶579; see also 47 C.F.R. § 51.5.

requirement set forth in Section 251(c)(3) and thus, if Congress had intended any Section 251 obligations to apply to those Section 271 elements, in the words of the FCC, "it would have explicitly done so," just as it did with checklist item 2.<sup>16</sup> Qwest contends that the FCC ruled that it "decline[s] to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."<sup>17</sup> Qwest claims that in USTA II, the D.C. Circuit expressly upheld this limitation on ILEC combining obligations.

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

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<sup>16</sup> Qwest cites TRO ¶654.

<sup>17</sup> Qwest cites TRO at footnote 1990.

under section 251(c)(3) of the Act," it would have modified this language in paragraph 579.

Covad maintains that while the TRO may require interpretation the FCC's rules support Covad's reading of the FCC's statements as Rule 51.309(e) provides:

(e) Except as provided in Sec. 51.318 [the high-capacity EEL service eligibility criteria], an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

47 C.F.R. § 51.309(e).

Consistent with the decisions of the Colorado, Washington and Minnesota Commissions Staff argues that based the plain language of the TRO and the applicable federal commingling rule require Qwest to permit Covad to commingle section 251 UNEs with all wholesale services, including section 271 elements. Staff however, maintains that Qwest is not required to permit Covad to commingle 271 elements with elements Qwest is no longer required to provide under section 251.

Because Staff believes that Qwest is required to permit Covad to commingle section 251 elements with section 271 elements, Staff's recommends that the parties' ICA distinguish between section 251(c)(3) UNEs and wholesale services obtained pursuant to any other method, including 271. Thus, Staff recommends Covad's proposed language.

### **Recommendation For Issue 3**

The FCC rule cited by Covad is clear that an element provided pursuant to Section 271 is undoubtedly a "wholesale service" which may, under the FCC's rule, be

under section 251(c)(3) of the Act," it would have modified this language in paragraph 579.

Covad maintains that while the TRO may require interpretation the FCC's rules support Covad's reading of the FCC's statements as Rule 51.309(e) provides:

(e) Except as provided in Sec. 51.318 [the high-capacity EEL service eligibility criteria], an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

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Because Staff believes that Qwest is required to permit Covad to commingle section 251 elements with section 271 elements, Staff's recommends that the parties' ICA distinguish between section 251(c)(3) UNEs and wholesale services obtained pursuant to any other method, including 271. Thus, Staff recommends Covad's proposed language.

### **Recommendation For Issue 3**

The FCC rule cited by Covad is clear that an element provided pursuant to Section 271 is undoubtedly a "wholesale service" which may, under the FCC's rule, be

commingled with "unbundled network elements." Thus, this dispute is resolved in favor of Covad's proposed language.

#### **Issue 5: CLEC-to-CLEC Channel Regeneration**

This issue involves the rates, terms, and conditions under which Qwest will provide regeneration to Covad for CLEC-to-CLEC cross-connects in the event that Covad decides not to self-provision that service. There are two issues to be resolved: (a) whether Qwest is required to provision to Covad regeneration facilities for a cross-connection within a Qwest central office between one CLEC collocation site and another CLEC collocation site within the same central office; and (b) whether Qwest is required to provision such facilities to Covad at wholesale rates or off of Qwest's FCC 1 Access Tariff.

To establish a CLEC-to-CLEC connection within a Qwest central office, it is necessary to run a cabling between the collocation sites of the two CLECs. Under established technical standards, when the distance between two collocation sites exceeds a certain distance, it becomes necessary to regenerate the signal so it does not weaken or degrade during transmission from one collocation site to the other. When required, Qwest has agreed to provide regeneration of cross connects between a CLEC and the Qwest network, as well as regeneration when a single CLEC connects two of its own collocation areas within the same central office. Although the New Mexico Commission established a TELRIC rate for this service Qwest currently provides both of these types of regeneration at no charge, however, when regeneration is necessary for a connection between two different CLECs within the same central office

(referred to by the parties as CLEC-to-CLEC regeneration) Qwest proposes to provide this as a finished service whose price is based on Qwest's FCC 1 Access Tariff.

According to Covad, because federal law requires Qwest to provide a connection between its collocation site and the collocation site of another CLEC within a central office, it necessarily follows that Qwest must also provide regeneration equipment (when required) in order to make the connection function properly. Thus, Covad has proposed language for the ICA that clarifies that Qwest must provide CLEC-to-CLEC cross connections with regeneration at the same rates Qwest charges for regeneration of cross connects between Covad and the Qwest network.

Qwest maintains that the FCC's Fourth Advanced Services Order<sup>18</sup> and resulting amendment of 47 C.F.R. 51.323 are clear in that the FCC only requires ILECs to provision CLEC-to-CLEC cross connections in circumstances where the ILEC does not allow CLECs to self-provision CLEC-to-CLEC connections. Qwest argues that since it permits CLECs to self provision cross connects, the exception contained in 47 C.F.R. 51.323(h)(1) applies, and thus, Qwest has no obligation to provide CLEC-to-CLEC regeneration at any rate. Qwest contends it will offer CLEC-to-CLEC channel regeneration as an EICT product, which is a finished service out of Qwest's FCC 1 Access Tariff, at a monthly rate of \$52.50 or approximately 8 to 12 cents per channel on a DS3 circuit.<sup>19</sup>

Covad argues that Qwest's interpretation of 47 C.F.R. 51.323 is off the mark. According to Covad, the standard for evaluating Qwest's claim that self-provisioned

<sup>18</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").

<sup>19</sup> EICT is an end-to-end service that provides CLECs with interconnection facilities between each other and includes regeneration if it is needed.

cross-connects are available should be the practical availability of this option, not simply its theoretical availability. Covad maintains that Qwest's attack on this argument, that nowhere in the FCC's rules did it establish an "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. Covad asserts that the economic and technical infeasibility of Covad's options under Qwest's proposal establish that collocation is not offered on terms that are just, reasonable and non-discriminatory.

Staff position is that applicable law requires Qwest to provide CLEC channel regeneration to Covad on a wholesale basis pursuant to its section 251(c)(6) collocation obligations on rates, terms and conditions that are just, reasonable, nondiscriminatory, and consistent with TELRIC pricing standards.

Staff also disputes Qwest's claim that it permits CLECs to perform CLEC cross-connections at the ICDF ("Interconnection Distribution Frame") because the record suggests that Qwest has a past practice of not permitting CLECs to do so. Further, Staff contends that it is inefficient, wasteful, and often infeasible for Covad to collocate its own mid-point regeneration equipment. According to Staff the record indicates the costs to Covad for a mid-point collocation site alone would be approximately \$36,000 and would require in excess of 100 days to complete.

Staff argues that Qwest's other proposal, which would require it to charge Covad an interstate access rate for channel regeneration on a CLEC to CLEC cross-connection while charging a third party CLEC zero for the same service on an Qwest to

CLEC cross-connection provides Qwest with a competitive pricing advantage that discriminates against CLECs who interconnect with each other.

Staff recommends that the Commission adopt Covad's proposals for Sections 8.2.1.23.1.4 and 9.1.10 as reflected in the Parties' Joint Issue Matrix and that the Commission adopt Covad's proposal for Section 8.3.1.9 as modified below:

**8.3.1.9 Channel Regeneration Charge.** Required when the distance from CLEC's leased physical space (for Caged or Cageless Physical Collocation) or from the collocated equipment (for Virtual Collocation) to the Qwest network ("ILEC to CLEC regeneration"), or to the CLEC's noncontiguous Collocation space ("CLEC to CLEC regeneration"), or the Collocation space of another CLEC ("CLEC to CLEC regeneration") is of sufficient length to require regeneration based on the ANSI Standard for cable distance limitations. Channel Regeneration Charges shall not apply until the Commission approves a wholesale Channel Regeneration Charge. After approval of such charge, Channel Regeneration Charges shall be assessed for ILEC to CLEC and CLEC to CLEC regeneration on the same terms and conditions, and at the same rates.

#### **Recommendation For Issue 5**

This dispute presents two primary issues to resolve. First, whether Qwest is obligated to provision regeneration as a part of a CLEC-to-CLEC cross connection, and second, whether Qwest may charge CLECs for regeneration as an access service, at TELRIC rates, or at the same rate assessed for ILEC to CLEC regeneration; currently zero.

Qwest is correct that the FCC's rules require ILECs to provision CLEC-to-CLEC cross connections only in circumstances where the ILEC does not allow CLECs to self-provision CLEC-to-CLEC connections. As argued by Covad and Staff, the record, however, indicates that it is technologically infeasible and cost prohibitive for Covad to collocate its own mid-point regeneration equipment. Thus, Qwest's proposed ICA

language is rejected because it fails to meet the non-discrimination provisions of Section 251(c)(6) to provide regeneration for CLEC-provisioned cross-connections on terms that are just, reasonable, and non-discriminatory.

With respect to the second part of the dispute, Qwest should be permitted to charge the Commission approved TELRIC regeneration rates for CLEC to CLEC if it so chooses so long as it provides the Commission and CLECs sufficient notice.

**Issue 8: Payment Due Date; Timing for Discontinuing Orders; and Timing for Disconnecting Services**

There are three parts to this disputed issue: (a) whether payments under the interconnection agreement should be due 30 days (Qwest) or 45 days (Covad) after the date of invoice; (b) whether Qwest should be permitted to discontinue orders within 30 days (Qwest) or 60 days (Covad) following the payment due date; and (c) whether Qwest may disconnect services within 60 days (Qwest) or 90 days (Covad) following the payment due date.

Qwest maintains that billing and payment issues were discussed at length in the Section 271 proceedings relating to Qwest's applications for entry into the long distance markets. According to Qwest, while addressing these issues in the Section 271 workshops Qwest and the CLEC community (which included Covad) reached a consensus on language addressing each of the issues Covad now disputes. Qwest states that its proposed language on these issues is virtually identical to that consensus language, which now appears in Qwest's New Mexico SGAT and the Commercial Line Sharing Agreement which Covad negotiated with Qwest in April of 2004. Qwest claims that even though no new facts justify departures from the consensus time frames set

during the Section 271 process Covad now seeks significant departures from the industry norm and Covad's existing ICA and line sharing agreement.

Covad disputes Qwest's claim that billing issues should not be revisited in this proceeding because the parties reached a consensus on these issues in Qwest's 271 proceedings. Covad admits, 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 the payment of invoices, Qwest's language may enjoy a presumption of reasonableness, Covad however, claims that the evidence it presented in this proceeding overcomes any presumption that might have been afforded to Qwest's proposed language, rendering the agreements reached in prior 271 proceedings irrelevant.

#### **Payment Due Dates**

Covad requests that the payment interval included in this section of the ICA be 45 days for any invoices containing: (1) line splitting or loop splitting products, (2) a missing Circuit ID, or (3) new rate elements, new services, or new features not previously ordered by Covad. Qwest maintains that the interval for payment on all invoices should be 30 days.

Qwest notes that under Covad's proposal, new products would include products Qwest has been offering to other CLECs for years but that Covad has not previously ordered. Qwest claims that Covad has not provided any evidence of billing problems with products it has not previously ordered from Qwest and thus has failed to establish any foundation for its request to increase payment due dates for these items. Furthermore, Qwest argues that Covad's proposal ignores the fact that while Covad

may not have been ordering certain products from Qwest, other CLECs have been, and Qwest therefore already has established billing processes for those products. According to Qwest, Covad's failure to provide a meaningful definition of "new products" is fatal to its proposal, as there would be no way for Qwest to implement the proposal given this ambiguity. Further, Qwest maintains that Covad's "new product" exception would impose significant and unnecessary billing system changes and cost. Qwest would have to modify its systems to track when the payment period would change from 45 to 30 days. Qwest argues that these costs are not included in the operation support system ("OSS") charges this Commission established in its wholesale cost docket, and Covad has not agreed to compensate Qwest for these additional costs.

Qwest asserts that it is also important to consider that CLECs with deficient payment histories will be able to opt into the Qwest/Covad ICA and, if Covad's proposal is adopted, will obtain the benefit of the extended payment period. Thus, Qwest maintains that the 45-day period Covad proposes will unreasonably increase Qwest's financial exposure relating to these opt-in CLECs.

Covad argues that because Qwest's current wholesale invoices provide a unique sub-account number for each shared line ordered, rather than the industry standard of including the Circuit ID on both the firm order conformation and monthly bills, Qwest makes it all but impossible for Covad to quickly validate bills against orders using its computerized billing systems. Rather, with a Qwest bill, Covad states that it must engage in a costly and very time consuming manual process to audit bills placed with Qwest to confirm that the bill corresponds to an actual service or facility ordered. Covad

asserts that it simply cannot perform a manual audit function within a 30-day billing interval.

Covad also notes that Qwest's bills for non-recurring collocation charges continue to be provided in paper format so the bills must be hand-entered into Covad's billing systems before the charges, many of which are individual case basis ("ICB") charges, can be manually reviewed. Furthermore, Covad states that the actual time it has to review Qwest's invoices is significantly less than thirty days because bills typically arrive five to eight days after the invoice date printed on them and the invoice date, not the date Covad receives the bill, starts the clock on Qwest's proposed payment interval.

Qwest dismisses Covad's complaints that it cannot meet the 30-day timeframe because bills for non-recurring collocation charges are provided in hard copy, rather than electronically, and that some contain ICB charges. Qwest maintains that these bills represent a minute percentage of the overall bills, and Covad failed to suggest how an ICB charge is somehow defective or is Qwest's responsibility. Moreover, Qwest claims that Covad failed to demonstrate why manual review of the collocation bills cannot be accomplished within 30 days. Similarly, Qwest argues that Covad has not demonstrated why validating a bill using a unique identifier, rather than the Circuit ID, necessitates a longer billing cycle, especially since Covad has been using this same unique identifier for five years.

Qwest asserts that it was the first ILEC in the nation to offer line sharing and thus, in conjunction with Covad and other CLECs, established the industry standards for this product in 2000. Given Covad's involvement in that joint effort and Covad's

agreement that Qwest should use an expedited ordering process that would not generate Circuit IDs, Qwest claims it is both unfair and disingenuous for Covad to argue now that it is being prejudiced by the absence of Circuit IDs.

According to Qwest, several facts in the record establish that Covad's claim of billing difficulties arising from the absence of Circuit IDs on invoices is disingenuous. For example, Qwest avers that Covad has been paying Qwest line sharing invoices without Circuit IDs since 1999, but it only recently decided to raise this as an issue. Second, in explaining why it desired 45 days in the arbitration petition it filed in this case, Covad allegedly failed to mention Circuit IDs as being relevant to its request. Qwest maintains that if Circuit IDs were truly the driving force behind Covad's demand for an additional 15 days, Covad would have referred to the issue in its petition. Third, although it has been paying Qwest's line sharing bills since 1999, it was not until October 2004 -- after it filed its arbitration petition in this case -- that Covad first raised the issue of Circuit IDs as part of the Qwest- CLEC Change Management Process ("CMP") that was established during Qwest's Section 271 application process. Qwest contends that if the issue were as material as Covad it now claims, Covad would have long ago raised it in the CMP.

Qwest argues that Covad's request to extend the payment due date rests entirely on its unsupported claim that it will be irreparably harmed if it has to pay the amounts it owes to Qwest within 30 days because it will end up paying for improper charges. Qwest states that Covad's argument should be rejected because Covad did not offer any evidence that the 30-day payment timeframe has ever forced Covad to pay an improper charge due to insufficient time to review Qwest's bills. Qwest also claims that

Covad's proposal ignores provisions contained in the ICA which provide Covad with recourse including interest on any amounts wrongfully paid.

Covad responds that while performance measurements contained in Qwest's Performance Assurance Plan may provide for remedies when incorrect bills are issued, outright errors are only part of the problem and remedies for billing errors are useless if Covad is not afforded a sufficient amount of time to identify those errors. Furthermore, Covad maintains that Qwest's billing deficiencies are unlikely to be resolved within the CMP, as evidenced by Qwest's recent rejection of Covad's change request submitted within the CMP because Qwest concluded that adjusting its billing systems to include Circuit ID numbers was not cost effective. Covad claims that Qwest has absolutely no motivation to fix its billing systems because it is currently able to force Covad to bear the entire burden of its deficiencies by requiring the payment of invoices within abbreviated time frames and forcing Covad to manually verify invoices.

Staff recommends the adoption of Qwest's proposal for payment due date as it is an industry standard. Furthermore, Staff argues that from an administrative point of view, it would be difficult for both Covad and Qwest to separate billings for Covad's proposed 'New Product' exceptions from other invoices and two billing cycles. Staff however, suggests that the Commission require Qwest to update its billing systems to include Circuit ID numbers on all billed items. As with its previous recommendations, Staff maintains that this recommendation is consistent with industry standards as Qwest is the only ILEC that currently does not include Circuit ID numbers on its wholesale bills.

Qwest claims that Staff's recommendation to order Qwest to spend the nearly \$1 million needed to implement Circuit IDs ignores the procedural framework for

interconnection arbitrations conducted under Section 252 of the Act and the fact that Covad, as the petitioning party in this arbitration, has expressly stated that it is not seeking such relief. Qwest alleges that the absence of any mention of the Circuit ID issue in Covad's arbitration petition gives rise to fundamental issues of notice and due process should the Commission agree with Staff's suggestion. Furthermore, Qwest maintains that it would be bizarre for the Commission to order a form of relief that both parties to the arbitration agree should not be included in their ICA.

#### **Recommendation for Issue 8(a)**

The record indicates that Covad's billing systems cannot correlate bills back to orders using the sub-account number because Covad relies upon the current industry standard of using a Circuit ID to track bills back to orders, Qwest, though, demonstrated that when Qwest and various CLECs (including Covad) first negotiated the terms and conditions under which line sharing would be offered, a consensus was reached that line sharing would be provided through an expedited design process where no Circuit ID information would be made available. The fact that other ILECs have since adopted different processes does not lead to the conclusion that Qwest should be required to modify its billing systems to match those of the other ILECs.

Covad has long been aware of the information Qwest would provide on its wholesale bills, and thus, had ample opportunity to implement its own billing systems that could accommodate this information. Covad's failure to implement internal systems that could validate bills under the terms it negotiated with Qwest in 2000 does not suggest Qwest is at fault. Furthermore, Covad has not shown why it is unable to use the unique sub account numbers provided by Qwest to validate bills on a timely basis or

why the lack of Circuit ID numbers on Qwest's bills necessitates a longer billing cycle. Covad failed to demonstrate that the industry standard 30-day payment timeframe has ever forced it to pay an improper charge due to insufficient time to review Qwest's bills.

Consistent with the arguments of Qwest and Staff, the record indicates that Covad's proposal to apply longer time intervals to new rate elements, new services, or new features not previously ordered by Covad is unduly burdensome. Covad's 'new service' proposal is ill defined and may cause significant confusion as to when the longer time frames apply. For example, Qwest argues that Covad's proposed language could be interpreted 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 a 45 day 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 additional manual effort on the part of Covad and Qwest to determine how much money is due at any given time, and would also require Covad to pay Qwest for services every 15 days. These outcomes serve to complicate the parties' relationship, not streamline it as suggested by Covad. In addition to the many problems created by the mismatch in due dates, Covad's proposal is rejected because there is nothing to prevent carriers with less favorable payment histories to opt into this agreement, thus placing additional payment risk upon Qwest as it must wait an additional 15 days to be paid for services rendered. In summary, Covad has failed to demonstrate why it is reasonable or even necessary to

deviate from the industry standard payment time frames to which the parties previously agreed. This section of the ICA is resolved in favor of Qwest's proposed language.

#### **Discontinuance of Orders and Disconnection of Service**

The two remaining disputed payment issues are: 1) the period of time that should elapse after the payment due date of an invoice before Qwest can stop processing orders from Covad as a result of Covad's non-payment of an undisputed invoice; and (2) the period of time that should elapse after the payment due date of an invoice before Qwest can discontinue service to Covad as a result of Covad's non-payment of an undisputed invoice. Qwest proposes that it be permitted to discontinue processing orders after 30 days; Covad proposes 60 days. Qwest proposes that it be permitted to discontinue service after 60 days; Covad proposes 90 days.

Qwest claims that its proposed time frames are consistent with the industry standard, commercially reasonable, and balance the legitimate needs of both parties. Qwest maintains that these time frames are also consistent with the language agreed to by industry participants, including Covad, during the Section 271 workshop process and are identical to the time frames in Qwest's New Mexico SGAT and the Qwest/Covad commercial line sharing agreement.

Covad acknowledges Qwest's right to discontinue the processing of orders, and discontinue service in the event it does not receive payment from its wholesale customers. Covad argues, however, that its longer proposed times for employing the aforementioned remedies ensures that the time frames are not so compressed as to allow either party to use them as leverage in billing disputes or other conflicts.

Covad suggests that its longer time frames are necessary because a situation could arise in which Qwest refused to recognize a legitimate dispute that affected payment, and use the shorter disconnection interval to obtain leverage in that dispute. Covad asserts that disconnection of service, or even the refusal to process Covad's orders, would have a disastrous and likely irreversible impact on Covad's business in New Mexico.

Covad acknowledges that if Qwest were to wrongfully reject a billing dispute Covad would have a legal remedy for such refusal, but Covad argues that its legal remedy would be meaningless if Qwest were to disconnect service before that remedy was obtained. Thus, Covad states that longer time frames are necessary to ensure that it has sufficient time to organize requests for injunctive relief, or make other arrangements prior to the time the remedies for non-payment of an undisputed invoice may be employed.

Qwest claims that the premise for Covad's alleged need for additional time is vague and speculative. Qwest contends that Covad is merely hypothesizing regarding the potential need to organize requests for injunctive relief or make other arrangements when, in fact, the language in the ICA requires Qwest to provide notice to Covad before Qwest can discontinue processing orders or disconnect service. Thus, 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.

Qwest argues that no business should be forced to continue processing orders for customers that have undisputed amounts that are as much as 59 days past due; nor should any carrier be required to continue providing service to a customer that has

failed to pay undisputed amounts that are almost three months overdue. According to Qwest, Covad has not provided any basis for imposing these longer time frames on Qwest, and as such, the Commission should reject them.

According to Staff, given the extreme nature of the remedies for non-payment, Covad should have extra time to address and resolve any billing disputes, and to prepare for regulatory review before this Commission. Staff contends that Qwest will not be harmed by the extended timeframes due to Covad's undisputed timely payment history to Qwest.

#### **Recommendation For Issues 8(b) and (c)**

The record indicates that the concerns raised by Covad do not outweigh the potential financial risk taken on by Qwest if it required abide by the longer time frames. Furthermore, Covad has failed to demonstrate why it is necessary or even reasonable to deviate from the industry standard time frames to which the parties previously agreed. Staff's claim that Qwest will not be harmed by the extended time frames due to Covad's payment history fails to recognize that other CLECs also have the ability to opt-in to the Qwest-Covad ICA. These sections of the ICA are resolved in favor of Qwest's proposed language.

The Hearing Examiner recommends that the Commission **FIND** and **CONCLUDE** that:

1. The foregoing Statement of the Case and Discussion, and all findings and conclusions contained therein, are incorporated by reference herein as findings of fact and conclusions of law of the Commission.

2. The Commission has jurisdiction over the parties and the subject matter of this case.

3. The resolution of the disputed issues and subparts are reflected in the Discussion portion of the Recommended Decision and should be resolved as described therein.

The Hearing Examiner recommends that the Commission **ORDER** that:

A. The resolution of the five disputed issues and their subparts are described in the Discussion portion of the Recommended Decision and are hereby adopted.

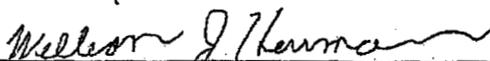
B. This Order is effective immediately.

C. Copies of this Order shall be sent to all persons on the attached Certificate of Service.

D. This Docket remains open until the parties have filed the Interconnection Agreement as ordered.

**ISSUED** at Santa Fe, New Mexico this 14th day of October, 2005.

**NEW MEXICO PUBLIC REGULATION COMMISSION**

  
\_\_\_\_\_  
**WILLIAM J. HERRMAN**  
Hearing Examiner

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE PETITION OF )  
DIECA COMMUNICATIONS, INC. D/B/A )  
COVAD COMMUNICATIONS COMPANY )  
FOR ARBITRATION OF AN )  
INTERCONNECTION AGREEMENT WITH )  
QWEST CORPORATION )

Case No. 04-00208-UT

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Recommended Decision of the Hearing Examiner, issued October 14, 2005, was mailed first-class, postage prepaid, to the following:

Thomas W. Olson, Esq.  
Montgomery & Andrews, P.A.  
PO Box 2307  
Santa Fe, NM 87504-2307

Patricia Salazar Ives, Esq.  
Cuddy, Kennedy, Albetta & Ives, LLP  
PO Box 4160  
Santa Fe, NM 87502-4160

John Devaney, Esq.  
Mary Rose Hughes, Esq.  
Perkins Coie, LLP  
607 Fourteenth St, NW, Ste 800  
Washington, D.C. 20005-2011

Gregory T. Diamond  
Senior Counsel  
Covad Communications Co  
7901 Lowry Blvd.  
Denver, CO 80230

Winslow B. Waxter, Esq.  
Qwest Services Corp.  
1005 17<sup>th</sup> St, Ste 200  
Denver, CO 80209

Andrew R. Newell, Esq.  
Krys Boyle, P.C.  
600 17<sup>th</sup> Street, Suite 2700  
Denver, CO 80202

**and hand-delivered to:**

Nancy Burns, Esq.  
Staff Counsel  
NM Public Regulation Commission  
224 East Palace Avenue – Marian Hall  
Santa Fe, NM 87501

**DATED this 14th day of October, 2005.**

**NEW MEXICO PUBLIC REGULATION COMMISSION**

  
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Elizabeth Saiz, Law Clerk