

OPEN MEETING ITEM
ORIGINAL



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JEFF HATCH-MILLER - Chairman
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MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES



ARIZONA CORPORATION COMMISSION

22

DATE: December 9, 2005
DOCKET NOS: T-03632A-04-0425 and T-01051B-04-0425
TO ALL PARTIES:

Enclosed please find the recommendation of Assistant Chief Administrative Law Judge Dwight D. Nodes. The recommendation has been filed in the form of an Opinion and Order on:

DIECA COMMUNICATIONS, INC. dba COVAD COMMUNICATIONS
COMPANY/QWEST CORPORATION
(ARBITRATION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

DECEMBER 19, 2005

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Open Meeting to be held on:

JANUARY 24 AND 25, 2006

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

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
DOCKET NO. T-01051B-04-0425

DECISION NO. _____

OPINION AND ORDER

DATES OF HEARING: February 7 and 18, 2005
PLACE OF HEARING: Phoenix, Arizona
ARBITRATOR: Dwight D. Nodes
APPEARANCES: Michael W. Patten, ROSHKA, HEYMAN & DeWULF, P.L.C.; Andrew R. Newell, KRYS BOYLE, P.C.; and Karen Shoresman Frame, on behalf of Covad Communications Company; and
John M. Devaney, PERKINS COIE, L.L.P.; Timothy Berg, FENNEMORE CRAIG, P.C.; and Norman G. Curtright and Winslow B. Waxter, on behalf of Qwest Corporation.

BY THE COMMISSION:

On June 8, 2004, DIECA Communications, Inc., dba Covad Communications Company ("Covad") filed with the Arizona Corporation Commission ("Commission") a Petition for Arbitration ("Petition") of a proposed interconnection agreement with Qwest Corporation ("Qwest") pursuant to A.A.C. R14-2-1505 and Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Telecom Act" or "Act").

On July 6, 2004, Qwest filed a Response to the Petition for Arbitration. On July 21, 2004, Qwest filed a Motion to Dismiss Portions of Covad's Petition for Arbitration. Qwest's Motion requested a Commission Order dismissing Issue 2 in Part G of Covad's Petition, to the extent Covad seeks Commission authority to: require Qwest to provide unbundled network elements ("UNEs")

1 pursuant to Section 271 of the Act; set UNE rates that Qwest provides under Section 271; or require
2 Qwest to provide UNEs under state law in a manner that conflicts with the access ordered by the
3 Federal Communications Commission ("FCC") in its *Triennial Review Order*.¹

4 A Procedural Conference was conducted on August 9, 2004 to discuss scheduling and other
5 procedural issues. The parties agreed on dates for filing testimony, conducting the hearing, and filing
6 of briefs. A schedule for filing pleadings regarding Qwest's Motion to Dismiss, and for oral
7 argument on the Motion, was also discussed.

8 Pursuant to the schedule established at the August 9, 2004 Procedural Conference, Covad
9 filed its Response to Qwest's Motion to Dismiss on August 16, 2004; the Commission's Utilities
10 Division Staff ("Staff") filed its Opposition to Qwest's Motion to Dismiss on August 31, 2004; and
11 Qwest filed its Combined Reply to the Responses of Staff and Covad on September 10, 2004. On
12 September 29, 2004, Qwest, Covad, and Staff filed their respective Comments regarding the effect on
13 this proceeding of the FCC's interim unbundling rules and Notice of Proposed Rulemaking².

14 By Procedural Order issued October 6, 2004, in accordance with the schedule requested by
15 the parties, oral argument on Qwest's Motion to Dismiss was set for December 15, 2004³, and the
16 hearing was scheduled to commence on February 7, 2005. The Procedural Order also set dates for
17 submitting pre-filed testimony.

18 On December 20, 2004, Covad filed the Direct Testimony of Michael Zulevic and Elizabeth
19 Balvin, and Qwest filed the Direct Testimony of William Easton, Karen Stewart, and Michael
20 Norman.

21 A Procedural Conference was conducted on January 6, 2005 to discuss scheduling of
22 witnesses and the status of the previously scheduled oral argument. During the Conference, Covad
23 and Qwest agreed that no ruling on the Motion to Dismiss should be made prior to the February 7,
24

25 ¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* ("Triennial Review Order" or
26 "TRO"), 18 FCC Rcd. 16978 (2003), *aff'd in part and rev'd and vacated in part, United States Telecom Association v.*
27 *FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

28 ² *Triennial Review Order, supra*; Order and Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling*
Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel.
Aug. 20, 2004).

³ By Procedural Order issued December 7, 2004, the oral argument was cancelled at the request of the parties due to the
expectation that the FCC would be issuing revised rules in accordance with the *USTA II* decision.

1 2005 arbitration hearing, and the parties would brief the issues raised by Qwest's Motion to Dismiss
2 as part of their post-hearing briefs on all of the disputed arbitration issues.

3 On January 18, 2005, Covad filed the Rebuttal Testimony of Michael Zulevic and Elizabeth
4 Balvin, and Qwest filed the Rebuttal Testimony of William Easton, Karen Stewart, Renee
5 Albersheim, and Michael Norman.

6 On January 31, 2005, Covad filed the Joint Issues Matrix setting forth the issues that had been
7 resolved through negotiation and the issues that remained in dispute.

8 Hearings were held February 7 and 18, 2005 at the Commission's offices in Phoenix, Arizona.

9 Post-hearing briefs were filed by Covad and Qwest on March 11, 2005. Reply briefs were
10 filed on March 28, 2005.

11 On June 3, 2005, Qwest filed Supplemental Authority in the form of an Arbitration Order
12 issued by the Iowa Utilities Board (Covad/Qwest Arbitration Docket No. ARB-05-01, Issued May
13 24, 2005).

14 On July 20, 2005, Covad filed Supplemental Authority from an Arbitration Order issued on
15 July 11, 2005 by the Missouri Public Service Commission (*Southwestern Bell Telephone dba SBC*
16 *Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection*
17 *Agreement*, Case No. TO-2005-0336).

18 On July 20, 2005, Qwest filed additional Supplemental Authority from an Order issued on
19 July 18, 2005 by the Idaho Public Utilities Commission (Covad/Qwest Arbitration Docket No. CVD-
20 T-05-01, Order No. 29825) and an oral ruling by the South Dakota Public Service Commission on
21 July 12, 2005.

22 On August 1, 2005, Qwest filed Supplemental Authority in the form of an Order issued by the
23 South Dakota Public Service Commission (Covad/Qwest Arbitration Docket TC05-056, *Arbitration*
24 *Order* issued July 26, 2005).

25 By Procedural Order issued August 12, 2005, Covad, Qwest and Staff were directed to file
26 statements by August 26, 2005 regarding the impact on this proceeding, if any, of the FCC's August
27 5, 2005 press release regarding its decision to eliminate facilities sharing requirements on facilities-
28 based wireline broadband Internet access service providers.

1 On August 26, 2005, Covad filed a Statement indicating that the FCC's Decision would have
2 no impact on any of the issues in this arbitration docket.

3 On August 26, 2005, Qwest filed a Statement that the FCC's Decision potentially would have
4 a profound effect of this proceeding, and further deliberation should be undertaken once the FCC's
5 Decision is issued.

6 On August 26, 2005, Staff filed a Request for Extension to File Comments. Staff stated that it
7 would need at least three weeks from the date the FCC's Decision was issued to offer a response on
8 the effect of the FCC's Decision.

9 By Procedural Order issued August 30, 2005, Staff's request for an extension of time was
10 granted.

11 On September 22, 2005, Qwest filed a Fourth Notice of Supplemental Authority in the form
12 of an Order issued by the Oregon Public Utility Commission (Order No. 05-980, issued September 6,
13 2005, *In the Matter of Covad Communication Company Petition for Arbitration*).

14 On October 24, 2005, Qwest filed a Fifth Notice of Supplemental Authority in the form of a
15 Recommended Decision of the Hearing Examiner of the New Mexico Public Regulation Commission
16 (Case No. 04-00208-UT, issued October 14, 2005, *In the Matter of Covad Communication Company*
17 *Petition for Arbitration*).

18 On November 3, 2005, Staff filed a Request for Procedural Order. Staff stated that the FCC
19 had issued the anticipated Decision on September 23, 2005⁴, and Staff therefore requested that a
20 Procedural Order should be issued allowing two additional weeks for the parties to comment on the
21 impact of the FCC's Order on the issues raised in this proceeding.

22 On November 7, 2005, a Procedural Order was issued directing Staff, Covad, and Qwest to
23 file comments regarding the impact of the FCC's Order on this proceeding, by no later than
24 November 21, 2005.

25 On November 21, 2005, Covad filed a Second Notice of Supplemental Authority in the form
26 of an Arbitration Order issued by the Tennessee Regulatory Authority (Docket No. 03-00119, issued
27

28 ⁴ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and
Order and Notice of Proposed Rulemaking, CC Docket No. 02-33 et al. (Rel. September 23, 2005) ("*Broadband Order*").

1 October 20, 2005, *Petition for Arbitration of ITC Deltacom Communications, Inc. with Bellsouth*
2 *Telecommunications, Inc.*).

3 On November 21, 2005, Covad filed its Comments Regarding the FCC's *Broadband Order*.
4 Covad contends that nothing in the *Broadband Order* affects the issues presented in the arbitration
5 petition that is before the Commission in this docket.

6 On November 21, 2005, Qwest filed its Comments Relating to the FCC's *Wireline*
7 *Broadband Order*. Qwest argues that the FCC's *Broadband Order* does affect the arbitration issues,
8 especially with respect to Covad's "alternative service" proposal for copper loop retirements. Qwest
9 also claims that the *Broadband Order* draws into question whether Covad is a telecommunications
10 carrier entitled to an interconnection agreement, or whether Covad is an information services
11 provider.

12 On November 21, 2005, Staff filed a Statement regarding the *Broadband Order's* effect on
13 this arbitration proceeding. According to Staff, the *Broadband Order* "would have no impact on the
14 unbundling issues raised in this case, to the extent Covad seeks the unbundled network elements to
15 provide a telecommunications service." Staff cites to the FCC's statement that "nothing in this Order
16 changes a requesting telecommunications carrier's UNE rights under section 251 and our
17 implementing rules" (*Broadband Order*, at ¶127).

18 On December 2, 2005, Covad filed a *Reply to Qwest's Comments Regarding the FCC's*
19 *Broadband Order*. Covad contends that the FCC has already responded to the question raised by
20 Qwest and found that the *Broadband Order* has no effect on Covad's rights under 47 U.S.C. §251
21 and, by extension, 47 U.S.C. §252. Covad claims that Qwest's arguments ignore the FCC's specific
22 statement that the *Broadband Order* does not impact UNE and interconnection issues. Covad also
23 argues that the Commission has already determined that Covad is a telecommunications carrier
24 pursuant to the granting of a CC&N for the provision of such services.

25 Having reviewed the various arguments regarding the impact of the FCC's *Broadband Order*
26 on the issues presented herein for arbitration, we believe the arbitration issues are properly before us
27 for consideration in this proceeding. We will therefore proceed to a determination of those issues
28 based on the record presented through testimony and exhibits at the arbitration hearing.

ISSUES FOR ARBITRATION

Covad's Petition contains five remaining disputed issues: 1) copper retirement requirements; 2) unified agreement/unbundled network elements; 3) commingling; 4) regeneration of Competitive Local Exchange Carrier ("CLEC") signals; and 5) billing/payment issues.

Issue No. 1: What are Qwest's obligations when it retires copper facilities?

Positions of the Parties

Covad and Qwest are in agreement with a portion of the language set forth below in Section 9.1.15. However, Covad proposes additional language for Section 9.1.15, as well as adding additional subsections (9.1.15.1 and 9.1.15.1.1). The language proposed by each of the parties is set forth below, with proposed deletions shown in "strike-through" format and proposed additions underlined.

| Qwest Proposed Language | Covad Proposed Language |
|---|--|
| <p>9.1.15 In the event Qwest decides to retire a copper loop, copper feeder or copper subloop and replace it with fiber, Qwest will: (i) provide notice of such planned retirement on its website (www.qwest.com/disclosures); and (ii) provide e-mail notice of such planned retirement to CLECs; and (iii) provide public notice of such planned replacement to the FCC. Qwest can proceed with copper retirement at the conclusion of the applicable FCC notice process as identified in FCC rules unless retirement was explicitly denied (or otherwise delayed or modified). Such notices shall be in addition to any applicable state commission requirements.</p> | <p>9.1.15 In the event Qwest decides to retire a copper loop, copper feeder or copper subloop and replace it with fiber, Qwest will: (i) provide notice of such planned retirement on its website (www.qwest.com/disclosures); and (ii) provide e-mail notice of such planned retirement to CLECs; and (iii) provide public notice of such planned replacement to the FCC. Qwest can proceed with copper retirement at the conclusion of the applicable FCC notice process as identified in FCC rules unless retirement was explicitly denied (or otherwise delayed or modified). Such notices shall be in addition to any applicable state commission requirements.</p> <p><u>The e-mail notice provided to each CLEC shall include the following information: city and state; wire center; planned retirement date; the FDI address; a listing of all impacted addresses in the DA; a listing of all CLEC's customer impacted addresses; old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information.</u></p> <p><u>9.1.15.1 Continuity of Service During Copper Retirement. This section applies where Qwest</u></p> |

1 retires copper feeder cable and the resultant loop
 2 is comprised of either (1) mixed copper media
 3 (i.e., copper cable of different gauges or
 4 transmission characteristics); or (2) mixed
 5 copper and fiber media (i.e., hybrid copper-fiber
 6 loop)(collectively, "hybrid loops") over which
 7 Qwest itself could provide a retail DSL service.
 8 This section does not apply where the resultant
 9 loop is a fiber to the home (FTTH) loop or a
 10 fiber to the curb (FTTC) loop (a fiber
 11 transmission facility connecting to copper
 12 distribution plant that is not more than 500 feet
 13 from the customer's premises) serving mass
 14 market or residential End User Customers.

15 9.1.15.1.1 When Qwest retires copper feeder for
 16 loops serving CLEC-served End User Customers
 17 or the CLEC at the time such retirement is
 18 implemented, Qwest shall adhere to all
 19 regulatory and legal requirements pertaining to
 20 changes in the Qwest network. Qwest will not
 21 retire copper facilities serving CLEC's End User
 22 Customers or CLEC, at any time prior to
 23 discontinuance by CLEC or CLEC's End User
 24 Customer of the service being provided by
 25 CLEC, without first provisioning an alternative
 26 service over any available, compatible facility
 27 (i.e., copper or fiber) to CLEC or CLEC End
 28 User Customer. Such alternative service shall
be provisioned in a manner that does not
degrade the service or increase the cost to CLEC
or End User Customers of CLEC. Disputes over
copper retirement shall be subject to the Dispute
Resolution provisions of this Interconnection
Agreement.

22 **Covad**

23 Covad states that the dispute on this issue centers on the conditions under which Qwest may
 24 retire copper plant that is used to serve Covad's digital subscriber line ("xDSL") customers. Covad
 25 contends that the FCC limited application of its copper retirement rules to situations where CLECs
 26 would not be denied access to loops. According to Covad, the TRO addressed only copper retirement
 27 and fiber replacement regarding fiber to the home ("FTTH") and fiber to the curb ("FTTC"). Covad
 28

1 claims that it has made substantial investments in deploying its xDSL network and Qwest's
2 retirement of copper facilities has the potential to destroy Covad's investment which relies on copper
3 facilities.

4 Covad also argues that the Commission has authority pursuant to Arizona Administrative
5 Code ("A.A.C.") R14-2-1307⁵ to enforce additional requirements regarding the retirement of copper
6 facilities. Covad asserts that the Commission's policy objectives of protecting both competitors and
7 consumers would be furthered by adopting Covad's copper retirement proposals because Qwest is not
8 provisioning broadband services to Arizona customers over fiber cable that has replaced retired
9 copper facilities.

10 Covad further contends that, contrary to Qwest's assertions, its alternative service proposal is
11 sufficiently defined because it includes parameters for service quality and price stability. According
12 to Covad, there are means to determine if service has been degraded by a copper retirement and the
13 current wholesale rate for line sharing should be maintained for any alternative service necessary for
14 Covad to serve its customers in the event copper facilities are replaced with fiber.

15 Covad also argues that Qwest's proposed notice provisions are inadequate when copper
16 retirements are contemplated. Covad asserts that Qwest's proposed notice fails to provide CLECs
17 with specific customer information that would enable the CLECs to readily determine if specific
18 customers would be affected by the retirement. Covad contends that Qwest's proposed notice is
19 inferior to the procedures employed in Bellsouth's territory, in which specific customer addresses are
20 provided to affected DSL providers. Covad argues that even if the Commission believes that FCC
21 rules do not require the type of notice proposed by Covad, the Commission should assert its authority
22 to require the notice requirements requested by Covad.

23 **Qwest**

24 According to Qwest, this issue arises from the practice of Incumbent Local Exchange Carriers
25 ("ILECs") retiring copper facilities and replacing them with fiber. Qwest witness Karen Taylor
26 testified that the ability to retire copper facilities is important from a cost perspective because,

27 ⁵ A.A.C. R14-2-1307 requires ILECs to provide "essential facilities or services" (including unbundled loops) under terms
28 and conditions that are equivalent to the terms and conditions under which the ILEC provides such facilities and services
to itself.

1 otherwise, ILECs would be required to maintain redundant copper and fiber networks when fiber
 2 facilities are installed to replace copper (Qwest Ex. 2, at 2). Ms. Taylor also stated that being able to
 3 replace copper with fiber advances the FCC's objective of increasing economic incentives for carriers
 4 to deploy fiber facilities (*Id.* at 4-5).

5 Qwest contends that the FCC's *Triennial Review Order* confirms the right of ILECs to retire
 6 copper facilities that are replaced with fiber facilities. In Paragraph 271 of the *TRO*, the FCC stated:
 7 "we decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have
 8 replaced with fiber." Qwest argues that Covad's proposal to prohibit Qwest from retiring copper
 9 facilities unless it provides Covad, or Covad's end-users, with an alternative service is inconsistent
 10 with the FCC's rules and is ambiguous to the point of being incapable of implementation with respect
 11 to what constitutes an acceptable alternative service. Qwest argues that Covad's proposed
 12 interconnection agreement ("ICA") does not define the "alternative service" that would have to be
 13 provided and Qwest would have no way of knowing what service to provide to comply with the ICA.
 14 According to Qwest, state regulatory commissions in Colorado, Minnesota, Utah, and Washington
 15 have rejected Covad's proposal regarding retirement of copper facilities.

16 Qwest also asserts that, contrary to Covad's contention, there is no FCC limitation on copper
 17 retirements only for FTTH and FTTC replacements. Qwest cites a decision by the Colorado
 18 Commission⁶ which rejected the same argument raised by Covad.

19 Regarding the practical effects of copper retirements, Qwest claims that no Covad customer
 20 has ever been disconnected in Arizona or anywhere in Qwest's region due to a copper loop
 21 retirement. Ms. Stewart testified that Qwest routinely leaves copper loops in place when it deploys
 22 fiber and out of the approximately 286,000 copper/fiber hybrid loops installed in Arizona, Qwest has
 23 never disconnected a Covad line sharing customer as a result of hybrid loop installation (Tr. 76).
 24 Qwest contends that, even if Covad customers were affected by a copper loop retirement, Covad
 25 could continue serving the affected customers by purchasing other services from Qwest (Qwest Ex. 2,
 26 at 18).

27 ⁶ *Petition of Qwest Corporation for Arbitration of an Interconnection Agreement*, Docket No. 04B-160T, Decision No.
 28 C04-1348, Colorado Public Utilities Commission *Order Granting in Part and Denying in Part Application for Rehearing,*
Reargument, or Reconsideration (Nov. 16, 2004), at ¶35.

1 With respect to notice, Qwest claims that the only condition placed on retirement of copper
2 facilities is the requirement that ILECs provide notice of intent to retire specific copper facilities
3 when those facilities are being replaced with FTTH loops, so that CLECs can object to the FCC.
4 Qwest contends that its proposed language goes beyond the FCC's requirements by providing CLECs
5 with notice of *all* planned copper retirements, not just FTTH replacements. Qwest asserts that the
6 *TRO* requires only the filing of a public notice with the FCC or notice through industry publications
7 or an accessible internet site. However, Qwest's proposed ICA would provide notice of copper
8 retirements through Qwest's website, by a public filing with the FCC, and through an e-mail notice to
9 CLECs, as well as any additional notices required under state law. According to Qwest, its proposed
10 language provides additional protection for Covad and other CLECs by Qwest's commitment to leave
11 copper loops and subloops in service where technically feasible, and by coordinating with Covad the
12 transition from old to new facilities to keep service interruption to a minimum.

13 Qwest also disputes Covad's contention that FCC rules require Qwest to identify specific
14 Covad customers affected by copper retirements. Ms. Stewart testified that Qwest's database
15 provides a "raw loop data tool" from which Covad can determine the addresses of its customers that
16 are affected by the retirements (Tr. 77-78).

17 Resolution of Issue No. 1

18 We agree with Qwest that Covad's copper retirement proposals are not supported by FCC
19 rules. As Qwest points out, the FCC's *TRO* rejected CLEC arguments that ILECs should be
20 precluded from retiring copper loops, stating: "we decline to prohibit incumbent LECs from retiring
21 copper loops or copper subloops that they have replaced with fiber" (*TRO* ¶271). The ability of
22 ILECs, subject to proper notice requirements, to replace copper facilities with fiber is consistent with
23 the FCC's, as well as this Commission's, policy of encouraging deployment of advanced
24 telecommunications services. We also believe that Covad's "alternative service" proposal (which
25 would prohibit Qwest from retiring copper facilities unless the cost to Covad or its customers is not
26 increased or the quality of service is not degraded) is insufficiently defined to allow any meaningful
27 ability of the parties or the Commission to determine if the standard proposed by Covad has been
28 satisfied on a case-by-case basis. There is no such requirement in any FCC Order, and state

1 commissions in Colorado, Minnesota, Washington, and Utah have rejected Covad's proposal on this
2 issue.

3 Imposition of the type of requirement suggested by Covad would potentially saddle Qwest
4 with the obligation to maintain duplicative copper and fiber facilities, a result that is inconsistent with
5 sound public policy and encouragement of investment in forward-looking technology. Although
6 there is no requirement for Qwest to maintain duplicative facilities, Qwest's witness Karen Stewart
7 pointed out that "when Qwest puts overlay facilities in its network it tends to leave the copper
8 facilities in place when it is technically feasible" (Tr. 76). Indeed, Covad witness Michael Zulevic
9 conceded that Qwest has never retired a copper loop anywhere in Qwest's 14-state region, including
10 Arizona, that resulted in Covad losing service to a customer (*Id.* at 27-28). Even if such were to
11 occur, Ms. Stewart testified that Covad would be able to maintain service to its affected customer by
12 purchasing other services from Qwest (Qwest Ex. 3, at 13-14).

13 We also find that Qwest's proposed notice provisions comply with applicable requirements.
14 As set forth in the *TRO*, an ILEC must provide notice of planned modifications to its network by
15 either filing a public notice to the FCC, or through industry publications or an accessible internet site
16 (*TRO* ¶¶ 273 and 288). Qwest's proposed form of notice would list planned copper retirements on
17 Qwest's website, through a public filing with the FCC, and by an e-mail notice to CLECs. Qwest has
18 also agreed to provide any additional notices that may be required by Arizona law. We do not
19 believe it is appropriate to impose a requirement on Qwest to inform Covad whether service to
20 Covad's customers may be affected by retirement of copper facilities. Such a condition could require
21 speculation by Qwest as to potential impacts on specific Covad customers, a requirement that is not
22 contemplated by the FCC's rules, and would improperly shift responsibility from Covad to Qwest.
23 Qwest's witness indicated that CLECs can determine the addresses of their customers affected by the
24 copper facilities retirement by accessing Qwest's "raw loop data tool" and comparing those addresses
25 to the CLEC's customer records. With respect to Covad's claim that specific address information is
26 provided in Bellsouth's territory, the document submitted in the record (Qwest Ex. 1) shows only that
27 a list of all customers in a given distribution area, and not Covad-specific customer information, is
28 provided where copper retirements are planned (Tr. 49-50).

1 Based on the record and applicable rules and regulations, we find that Qwest's proposed
2 copper retirement proposal, including notice requirements, is reasonable and should be adopted.

3 **Issue No. 2: May Section 271 Elements and Unbundled Elements Under State Law be**
4 **Included in the Interconnection Agreement?**⁷

5 Section 251(c)(3) of the 1996 Telecom Act requires ILECs to provide access to their networks
6 (via unbundled network elements), and Section 252(d)(1) sets the pricing standard to be employed for
7 the UNEs (*i.e.*, through total element long run incremental cost ("TELRIC") pricing). Section
8 251(c)(3) also requires compliance with Section 251(d)(2) which requires access only for those UNEs
9 that meet the so-called "necessary and impair" standard⁸.

10 Section 271 of the 1996 Telecom Act details the specific requirements that ILECs must meet
11 as a condition of being permitted to provide interLATA toll services. Under Section 271, state
12 commissions reviewed the 14 competitive checklist items prior to approval being granted by the
13 FCC. Section 271 Checklist Item No. 2 requires ILECs to provide nondiscriminatory access to UNEs
14 in accordance with the requirements of Sections 251(c)(3) and 252(d)(1). In the *TRO*, the FCC
15 limited the Section 251 and 252 unbundling and pricing standards to specific types of loops,
16 subloops, and transport (although the *USTA II* decision overturned the *TRO*'s mass market switching
17 requirements, thus eliminating switching as a Section 251 UNE for all practical purposes).

18 Section 271 Checklist Items 4, 5, 6, and 10 require ILECs to provide access to loops,
19 transport, switching and signaling. Although a number of Section 251 UNEs were eliminated,
20 Paragraph 653 of the *TRO* stated that an independent obligation continues to exist for ILECs to
21 provide access to those UNEs pursuant to Section 271. Unlike Checklist Item 2, the other checklist
22 items do not cross-reference Sections 251(c)(3) and 252(d)(1) and, therefore, UNEs unbundled under

23 _____
24 ⁷ As noted above, Qwest moved to dismiss Issue No. 2 as a matter beyond the Commission's jurisdiction. Prior to the
25 hearing, Covad and Qwest agreed that there was no need for the Commission to separately rule on the Motion to Dismiss
26 prior to the hearing because the Commission could address the issue as part of the Order in this proceeding. Due to the
27 fact that Issue No. 2 is a legal issue, the parties did not submit testimony on this issue but relied on post-hearing briefs to
28 support their positions.

⁸ The *TRO* maintained the prior definition of "necessary" (where lack of access to a given UNE would as a practical,
economic, and operational matter preclude the requesting carrier from providing the services it seeks to offer)(*TRO* ¶170).
The definition of "impairment" was modified by the *TRO* to situations where "lack of access to an incumbent LEC
network poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into
a market uneconomic" (*TRO* ¶84).

1 Checklist Items 4, 5, 6, and 10 need only meet the “just and reasonable” set forth in 47 U.S.C. ¶¶
2 201-202, as opposed to the TELRIC pricing standard under Section 251 (*TRO* ¶656).

3 Positions of the Parties

4 Covad

5 Covad and Qwest disagree regarding whether Qwest has a continuing obligation to provide
6 certain network elements, including certain unbundled loops (including high capacity loops, line
7 splitting, and subloop elements), and dedicated transport, after the FCC’s *TRO* decision. Covad
8 contends that Qwest’s obligations to provide network elements pursuant to Section 271 of the 1996
9 Telecom Act should be memorialized in the interconnection agreement and this Commission has
10 authority to arbitrate disputes regarding such obligations. Covad also argues that Qwest continues to
11 be obligated to provide unbundled access to “essential facilities” under Arizona law, pursuant to
12 A.A.C. R14-2-1310.

13 This issue arises due to differences in interpretation of the FCC’s statements in the *TRO* and
14 the *USTA II* decision. The FCC determined that Bell Operating Companies (“BOCs”) have an
15 independent obligation under Section 271 to provide unbundled access to certain network elements
16 set forth in the Section 271 checklist (*TRO* ¶¶ 653-655). The court in *USTA II* upheld the FCC’s
17 decision on this point (*USTA II*, at 588), and thus BOCs remain obligated to provide access to local
18 loops, local transport, local switching, and databases and signaling for call routing and completion in
19 accordance with Section 271 checklist items 4, 5, 6, and 10 (47 U.S.C. §271(c)(2)(B)(iv),(v),(vi), and
20 (x)). Thus, according to Covad, separate and distinct unbundling obligations remain in place under
21 Sections 251 and 271.

22 Covad argues that the *TRO* made clear that Section 271 created independent access
23 obligations for BOCs regardless of the FCC’s analysis of competitor impairment and unbundling
24 obligations for ILECs under Section 251. The *TRO* stated that [Section 271] “Checklist items 4, 5, 6,
25 and 10 separately impose access requirements regarding loop, transport, switching, and signaling,
26 without mentioning Section 251” (*TRO* ¶654). Covad relies on a decision by the Maine Public
27 Utilities Commission which found that state commissions have the authority to arbitrate Section 271
28 pricing in the context of Section 252 arbitrations. *See, Order – Part II, Verizon-Maine Proposed*

1 *Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC*
2 *20) and Resold Services (PUC 21)*, Maine PUC Docket No. 2002-682 (September 3, 2004).

3 According to Covad, the Commission's enforcement of Qwest's 271 checklist obligations
4 would not conflict with any other provision of the 1996 Telecom Act and therefore no federal
5 preemption concerns are implicated. Covad cites to Section 271(d)(2)(B), which requires the FCC to
6 consult with state commissions in reviewing BOC compliance with the Section 271 checklist, as well
7 as the FCC's Order approving Qwest's ability to offer interLATA services in Arizona, which refers
8 to "cooperative state and federal oversight" over Qwest's entry into the long distance market in
9 Arizona⁹.

10 With respect to pricing of Section 271 UNEs, Covad concedes that the *TRO* applies a
11 different legal standard (*i.e.*, "just and reasonable") than is required for Section 251 UNEs
12 ("necessary and impair"). However, Covad argues that the Arizona Commission has already
13 established through its rules (A.A.C. R14-2-1310) that TSLRIC is the cost methodology to be
14 employed for pricing essential facilities sought by CLECs. Covad claims that TSLRIC is a forward-
15 looking cost methodology that is closely related to the TELRIC standard in place for Section 251
16 UNEs and, therefore, the Section 271 UNEs should continue to be priced at existing TELRIC rates
17 until new 271 rates are established for those UNEs (*See, Verizon-Maine 271 Order*, at 19-20).

18 Covad also contends that existing state rules authorize the Commission to require access to
19 loops, including high capacity loops, line splitting arrangements, and subloop arrangements, as well
20 as dedicated transport. Covad cites A.A.C. R14-2-1307(C), which lists "essential facilities or
21 services" as termination of local and long-distance calls; interconnection with 911 calls; access to
22 numbering resources; dedicated channel network access connections; and unbundled loops.
23 According to Covad, the issue of whether the Commission's rules are preempted by the 1996
24 Telecom Act has already been decided in the Commission's Order enacting the unbundling rules. In
25 that Decision, the Commission stated the 1996 Telecom Act did not preclude issuance of the
26 Commission's rules and that "[a]lthough the Proposed Rules cover similar issues as the Act, we

27 ⁹ *In the Matter of the Application of Qwest Communications International, Inc. for Authorization to Provide In-Region,*
28 *InterLATA Services in Arizona*, WC Docket No. 03-194, Memorandum Opinion and Order, FCC 03-309 (December 3,
2003) ("*Qwest 271 Order*"), ¶61.

1 believe they are consistent.” Decision No. 59671 (July 22, 1996), ¶ 6.

2 Citing Paragraphs 191 and 192 of the *TRO*, Covad also argues that the FCC specifically
3 recognized that Congress did not intend to preempt the states with respect to access to UNEs. Covad
4 asserts that the savings clause of Section 251 limits preemption only to those instances where state
5 actions “substantially prevent” the implementation of the federal regulatory regime and that “merely
6 an inconsistency” between state and federal regulations was not sufficient for FCC preemption under
7 Section 251(d)(3). *TRO* ¶ 192. According to Covad, the FCC’s statements regarding preemption are
8 consistent with existing boundaries between state and federal regulations. Covad also claims that the
9 FCC established a process for parties to seek a declaratory ruling in situations where they believe
10 state regulations overstep or conflict with federal law.

11 Finally, Covad argues that although this Commission’s unbundling rules are not likely to be
12 preempted, the Commission should refrain from “adjudication of the constitutionality of legislative
13 enactments” because such action is beyond the jurisdiction of administrative agencies.

14 Qwest

15 Qwest disputes the arguments raised by Covad regarding interpretation of federal standards
16 and the ability of state commissions to impose additional unbundling obligations on ILECs in an
17 arbitration proceeding. Qwest claims Covad fails to recognize the 1996 Telecom Act’s limits on state
18 law authority, which must be exercised in accordance with Section 251 and the FCC’s federal
19 unbundling regime. Qwest contends that Covad is seeking access to network elements without any
20 showing that it will be impaired without access to those elements. Qwest also asserts that Covad is
21 improperly seeking the Commission’s authority to require unbundling and set rates under Section
22 271, given the FCC’s exclusive jurisdiction over the availability and pricing of Section 271 UNEs.
23 Qwest cites an Order by the Washington Commission which decided that it “has no authority under
24 Section 251 or Section 271 of the Act to require Qwest to include Section 271 elements in an
25 interconnection agreement.” The Washington Commission also concluded that “any unbundling
26 requirement based on state law would likely be preempted as inconsistent with federal law, regardless
27
28

1 of the method the state used to require the element.”¹⁰

2 According to Qwest, there is no statutory or legal basis for including terms and conditions for
3 network elements under Section 271 in a Section 252 interconnection agreement. Qwest claims that
4 the FCC has defined the “interconnection agreements” that must be submitted to state commissions
5 for approval as “only those agreements that contain an ongoing obligation relating to section 251(b)
6 or (c) ...”¹¹ Therefore, Qwest contends that only Section 251 elements must be included in
7 interconnection agreements and that Section 271 UNEs are properly addressed only through
8 commercial agreements and tariffs.

9 Qwest argues further that there is no legal authority for Covad’s claim that state commissions
10 have authority to impose unbundling obligations under Section 271. Qwest asserts that Section
11 271(d)(3) confers exclusive authority on the FCC to determine if BOCs have complied with Section
12 271 checklist items, and state commissions have only a non-substantive, consulting role in that
13 determination. Qwest contends that *USTA II* made clear that the only authority that state
14 commissions have under the Act is that which Congress has expressly delegated. *USTA II, supra*, at
15 565-568. Qwest also cites decisions by federal courts in the 7th and 3rd Circuits to support its
16 arguments that state commissions have no independent sovereign authority under the Act. *See,*
17 *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Comm’n*, 359 F.3d, 493, 494 (7th Cir.
18 2004); *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3rd Cir.
19 2001). Qwest claims that these decisions make clear that state commissions have only investigative
20 and consulting roles under Section 271, compared to the substantive authority assigned to the states
21 under Sections 251 and 252. Qwest argues that adoption of Covad’s claim of independent state
22 unbundling authority would result in an impermissible conflict with federal law and the federal
23 scheme of regulation, and is therefore barred under the doctrine of federal preemption.

24 With respect to pricing, Qwest claims that Covad’s arguments are flawed because states have
25 no power to set rates for Section 271 elements. According to Qwest, the only network elements over

26 ¹⁰ *In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation*, Washington
27 State Utilities and Transportation Commission Docket No. UT-043045, Order No. 06 (February 9, 2005), at 15-16.

28 ¹¹ Memorandum Opinion and Order, *Qwest Communications International, 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 (October 2, 2004) (“*Qwest Declaratory Order*”).

1 which states have pricing authority are those elements provided by an ILEC pursuant to Section
2 251(c)(3). Qwest also disputes Covad's contention that state commissions may use TELRIC pricing
3 for Section 271 elements. Qwest cites the *TRO* where the FCC stated that Section 271 rate elements
4 are to be priced based on the Section 201-202 standard that such rates must not be unjust,
5 unreasonable, or unreasonably discriminatory and that TELRIC pricing standards are not applicable
6 to Section 271 elements (*TRO*, ¶¶ 656-664). Qwest also quotes the *USTA II* decision which found
7 that there was "nothing unreasonable in the [FCC's] decision to confine TELRIC pricing to instances
8 where it has found impairment." *USTA II, supra*, at 589.

9 Qwest also opposes Covad's attempt to raise the issue of line-splitting in this proceeding.
10 Qwest claims that Covad failed to raise line-splitting as a contested issue for arbitration until its post-
11 hearing brief and thus consideration of the issue is procedurally improper. Qwest disputes Covad's
12 contention that Qwest has acceded line-splitting as a loop-based product through its position
13 regarding commercial agreements. Qwest argues that Covad's claims about Qwest's position are
14 factually incorrect and, if given a chance to present testimony on the issue, Qwest could have shown
15 why Covad's arguments are incorrect. Qwest asserts that consideration of this issue without an
16 evidentiary record would be prejudicial to Qwest, and Covad's attempt to introduce the issue for
17 consideration by the Commission should therefore be rejected.

18 Finally, Qwest contends that the Commission should adopt Qwest's proposed listing of
19 network elements that the FCC has ruled ILECs are not required to provide under Section 251.
20 Qwest points to its proposed language in Section 9.1.1.6 of the ICA, which lists 18 separate elements
21 and services that Qwest contends ILECs are not required to unbundle pursuant to the *TRO*. Qwest
22 asserts that, absent a specific delineation of the "de-listed" UNEs in the ICA, Covad is likely to
23 demand unbundling of those elements. Therefore, Qwest seeks adoption of its proposed language.

24 Resolution of Issue No. 2

25 Unresolved Issue No. 2 seeks a decision regarding whether the Commission has authority to
26 require Qwest to unbundle certain network elements under the provisions of Section 271 and Arizona
27 rules pertaining to competitive telecommunications services. In determining the proper scope of the
28 Commission's review of this issue, it is appropriate to discuss what constitutes an "interconnection

1 agreement” and what types of interconnection agreements are required to be filed.

2 47 U.S.C. §252(a)(1) encourages ILECs and competitive carriers to voluntarily negotiate
3 agreements for interconnection, services, or network elements without regard to the standards set
4 forth in subsections (b) and (c) of Section 251¹². In the event disputes arise with respect to negotiated
5 agreements, any party may seek arbitration of the disputed issues by a state commission (Section
6 252(b)).

7 Section 252(e)(1) requires that “any interconnection agreement adopted by negotiation or
8 arbitration shall be submitted for approval to the State commission” (emphasis added). Pursuant to
9 Section 252(c), the applicable standards of review by state commissions for consideration of an
10 arbitration request are as follows:

11 In resolving by arbitration under subsection (b) of this section any open
12 issues and imposing conditions upon the parties to the agreement, a State
Commission shall-

- 13 (1) ensure that such resolution and conditions meet the requirements of
14 section 251 of this title, including the regulations prescribed by the
Commission pursuant to section 251 of this title;
15 (2) establish any rates for interconnection, services, or network elements
according to subsection (d) of this section; and
16 (3) provide a schedule for implementation of the terms and conditions by
the parties to the agreement.

17 In a request for a declaratory ruling by Qwest, the FCC addressed the types of agreements that
18 must be filed under Section 252, stating that:

19 [A]n agreement that creates an *ongoing* obligation pertaining to resale,
20 number portability, dialing parity, access to rights-of-way, reciprocal
21 compensation, interconnection, unbundled network elements, or
collocation is an interconnection agreement that must be filed pursuant to
22 section 252(a)(1). (emphasis original)¹³

23 The *Qwest Declaratory Order* also stated that state commissions “should be responsible for applying,
24 in the first instance, the statutory interpretation...to the terms and conditions of specific agreements”
25 (*Declaratory Order* at ¶ 7). The FCC stated that its Decision is “consistent with the structure of
26 section 252, which vests in the states the authority to conduct fact-intensive determinations relating to

27 ¹² Subsections (b) and (c) of Section 251 describe the obligations of all local exchange carriers and incumbent local
exchange carriers, respectively, with regard to interconnection.

28 ¹³ *Qwest Declaratory Order, supra.*

1 interconnection agreements” (*Id.*).

2 Through its arbitration request on this issue, Covad seeks to include provisions in its
3 interconnection agreement defining Qwest’s interconnection and access obligations under 47 U.S.C.
4 § 271 of the 1996 Telecom Act. Section 271 includes Specific Interconnection Requirements that
5 must be provided by a BOC to comply with the Competitive Checklist prerequisites of Section 271
6 (47 U.S.C. §271(c)(2)(B)). This provision requires, among other things, that the BOC must provide:

- 7 (iv) Local loop transmission from the central office to the customer’s
- 8 premises, unbundled from the local switching or other services.
- 9 (v) Local transport from the trunk side of a wireline local exchange
- 10 carrier switch unbundled from switching or other services.
- (vi) Local switching unbundled from transport, local loop transmission,

11 In the *TRO*, the FCC reinforced these ongoing requirements for BOCs pursuant to Section 271 stating
12 that “the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to
13 provide access to loops, switching transport, and signaling regardless of any unbundling analysis
14 under section 251” (*TRO*, ¶ 653).

15 Qwest relies heavily on the language of Section 252(a)(1), which states in relevant part:

16 “Upon receiving a request for interconnection, services, or network
17 elements *pursuant to section 251*, an incumbent local exchange carrier
18 may negotiate and enter into a binding agreement with the requesting
19 telecommunications carrier or carriers without regard to the standards set
20 forth in subsections (b) and (c) of section 251.” (emphasis added)

21 Qwest’s reliance on this language ignores the fact that Qwest is obligated pursuant to Section 271 to
22 make network elements available independent of its Section 251 obligations. Moreover, the language
23 cited by Qwest clearly states that ILECs may negotiate binding agreements *without regard to the*
24 *standards* set forth in Section 251.

25 The Commission’s authority to review and approve interconnection agreements is set forth in
26 Section 252(e) which requires that “*Any* interconnection agreement adopted by negotiation or
27 arbitration *shall be submitted for approval to the State commission.*” (Section 252(e)(1), emphasis
28 added). Contrary to Qwest’s assertions, there is no constraint in Section 252(e)(1) that would limit

1 the types of negotiated agreements that must be approved by state commissions to only those
 2 addressing network elements, interconnection, or access under Section 251. Rather, Section 252 is
 3 clear on its face that "any interconnection agreement" must be submitted for state commission
 4 approval. If the drafters of the 1996 Telecom Act had intended the type of limitation suggested by
 5 Qwest, they could easily have added the same language to Section 252 that is contained in Section
 6 251. The absence of such language is a clear indication that the Telecom Act intended broad review
 7 authority for state commissions.

8 When read in conjunction with the entirety of the Telecom Act, the Section 271 obligations
 9 described above must be considered the type of interconnection and access requirements
 10 contemplated under Section 252. Indeed, Section 271(c)(2) is titled "SPECIFIC
 11 INTERCONNECTION REQUIREMENTS" and, under subsection (A) of that provision, the
 12 requesting BOC is considered to have met the requirements of the section if it is providing access or
 13 interconnection pursuant to its SGAT or an interconnection agreement, both of which require state
 14 commission approval under Section 252. Since Section 271 does not contain any separate provisions
 15 for approval of interconnection agreements or SGAT provisions, it must be presumed that the review
 16 process of such Section 271 provisions would occur within the Section 252 review process.

17 We are also cognizant of the fact that, in approving Qwest's Section 271 application, the FCC
 18 intended an ongoing role for the Arizona Commission in monitoring Qwest's operations with respect
 19 to the provision of interLATA services in Arizona. In approving Qwest's application, the FCC
 20 stated:

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

23 ...
 24 We are confident that cooperative state and federal oversight and
 25 enforcement can address any backsliding that may arise with respect to
 26 Qwest's entry into Arizona¹⁴.

27 We believe that our ongoing oversight and monitoring role may be exercised in any
 28 appropriate proceeding before the Commission, including this Section 252 arbitration matter, wherein
 Qwest's actions are being reviewed with respect to compliance with the provision of services being

¹⁴ Qwest 271 Order, *supra*, ¶¶ 59-60.

1 provided to competitive carriers. We believe that our exercise of jurisdiction in this matter is
2 consistent with the joint state and federal scheme of ensuring compliance by Qwest with the Section
3 271 checklist requirements, in conjunction with the FCC's authority to hold Qwest accountable for
4 deviations from the FCC's Section 271 approval.

5 Qwest also argues that the Commission has no jurisdiction to impose unbundling
6 requirements under Arizona law that the *TRO* or *USTA II* decisions struck down. We disagree with
7 Qwest's assertions and believe that our independent authority under state law is not preempted by the
8 FCC's *TRO* decision or *USTA II*. Section 251(d)(3) specifically prohibits the FCC from preventing
9 "the enforcement of any regulation, order, or policy of a State commission that – (A) establishes
10 access and interconnection obligations of local exchange carriers; (B) is consistent with the
11 requirements of this section; and (C) does not substantially prevent implementation of the
12 requirements of this section and the purposes of this part." Absent some evidence that this
13 Commission's Rules related to interconnection and access conflict with federal law, we do not
14 believe that the Rules are preempted.

15 Pursuant to A.A.C. R14-2-1506(A), interconnection agreements must be submitted to the
16 Commission for approval under 47 U.S.C. §252(e) within 30 days of a Commission Order regarding
17 an arbitration petition or within 30 days of execution of a negotiated agreement. Under the
18 Commission's Rules, an Interconnection Agreement is defined as a "formal agreement between any
19 telecommunications carriers providing or intending to provide telecommunications services in
20 Arizona, setting forth the particular terms and conditions under which interconnection and resale
21 services, as appropriate, will be provided." A.A.C. R14-2-1502. With respect to whether the
22 agreement contains "interconnection services," A.A.C. R14-2-1302 defines such services as "those
23 features and functions of a local exchange carrier's network that enable other local exchange carriers
24 to provide local exchange and exchange access services. Interconnection services include, but are not
25 limited to, those services offered by local exchange carriers which have been classified by the
26 Commission as essential services."

27 Although Qwest cites decisions by other in-region state commissions in support of its
28 arguments, those decisions reflect a variety of conclusions with respect to assertion of state

1 jurisdiction. For example, the Utah Public Service Commission declined to adopt Covad's proposed
 2 language on this issue, but also specifically declined to accept Qwest's argument that the Utah
 3 Commission was preempted from asserting jurisdiction under state law. The Utah Commission
 4 stated:

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

9 The fact that under a careful reading of the law the Commission may
 10 under certain circumstances impose Section 271 or state law obligations in
 a Section 252 arbitration does not lead us to conclude it would be
 reasonable in this case to do so.¹⁵

11 In its Covad/Qwest arbitration proceeding, the Minnesota Public Utilities Commission
 12 rejected the language proposed by both Covad and Qwest regarding this issue. The Minnesota
 13 Commission directed the parties to adopt language consistent with its conclusion that it is premature
 14 to remove any Section 251 elements from the ICA¹⁶. Covad contends that the net effect of this
 15 decision is that the parties are required to re-insert language into the ICA providing access to all of
 16 the elements Covad seeks, but pursuant to Section 251 of the Act, rather than Section 271.

17 The decision by the Washington Commission most closely aligns with Qwest's preemption
 18 arguments. The Washington Commission concluded that any effort by the state to enforce state
 19 unbundling laws would be preempted by federal law¹⁷.

20 For the reasons described above, we disagree that state law unbundling requirements are
 21 necessarily preempted under existing federal law and we therefore decline to follow the reasoning set
 22

23 _____
 24 ¹⁵ *In the Matter of the Petition of DIECA Communications, Inc., DBA Covad Communications Company, for Arbitration
 to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Arbitration Report and Order, Utah
 PSC Docket No. 04-2277-02 (February 8, 2005), at 19-21.

25 ¹⁶ *In the Matter of the Petition of Covad Communications Co. for Arbitration of an Interconnection Agreement with
 Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Minnesota Public Utilities Commission Docket No. P-5692, 421/IC-
 04-549, Arbitrator's Report (December 16, 2004), at 15-16; Order Resolving Arbitration Issues and Requiring Filed
 26 Interconnection Agreement (March 14, 2005), at 5.

27 ¹⁷ *In the Matter of the Petition for Arbitration of Covad Communications Co. with Qwest Corporation Pursuant to 47
 U.S.C. § 252 and the Triennial Review Order*, Washington State Utilities and Transportation Commission Docket No.
 28 UT-043045, Final Order Affirming, in Part, Arbitrator's Report and Decision; Granting, in Part, Covad's Petition for
 Review; Requiring Filing of Conforming Interconnection Agreement (February 9, 2005), at 15-23.

1 forth in the Washington Commission’s Order.

2 With respect to pricing of Section 271 elements, we agree with Covad that the current
3 TELRIC pricing of those network elements should remain in place because they have previously been
4 found to have complied with state and federal law. As Covad points out, the FCC has required
5 continued access at current (TELRIC) wholesale prices for those elements for which wholesale prices
6 were established and relied upon in the FCC’s granting of Qwest’s Section 271 application (*TRO*
7 ¶665). The previously established prices for these elements would clearly qualify as fair, just and
8 reasonable rates, and should be continued absent a request by Qwest to alter the conditions of its
9 interLATA entry into the Arizona market.

10 **Issue No. 3: What are Qwest’s obligations regarding “commingling” of network elements?**

11 “Commingling” is the “connecting, attaching, or otherwise linking of a UNE, or a UNE
12 combination, to one or more facilities or services that a requesting carrier has obtained at wholesale
13 from an incumbent LEC *pursuant to any method other than unbundling under section 251(c)(3) of*
14 *the Act*, or the combining of a UNE or UNE combination with one or more such wholesale services”
15 (*TRO* ¶579, emphasis added). The *TRO* permits “requesting carriers to commingle UNEs and
16 combinations of UNEs with services (e.g., switched and special access services offered pursuant to
17 tariff), and to require incumbent LECs to perform the necessary functions to effectuate such
18 commingling upon request” (*Id.*). As explained below, this issue requires consideration of the FCC’s
19 definition of “commingling” and other parts of the *TRO* related to ILEC obligations to provide
20 elements under Section 271.

21

| 22 Qwest Proposed Language | 23 Covad Proposed Language |
|--|--|
| 24 “Commingling” means the connecting, attaching, or otherwise linking of an Unbundled Network Element, or a Combination of Unbundled Network Elements, to one or more facilities or services that a requesting Telecommunications Carrier has obtained at wholesale from Qwest, or the combination of an Unbundled Network Element, or a Combination of Unbundled | 25 <u>“251(c)(3) UNE” means any unbundled network element obtained by CLEC pursuant to Section 251 of the Act.</u> 26 “Commingling” means the connecting, attaching, or otherwise linking of an Unbundled Network Element , <u>251(c)(3) UNEs</u> or a Combination of Unbundled Network Elements , 251(c)(3) UNEs |

28

1 Network Elements, with one or more such
2 facilities or services.

to one or more facilities or services that a
requesting Telecommunications Carrier has
obtained at wholesale from Qwest, pursuant to
any method other than unbundling under Section
251(c)(3) of the Act, or the combination of an
Unbundled Network Element, 251(c)(3) UNE or
a Combination of ~~Unbundled Network Elements,~~
251(c)(3) UNEs with one or more such facilities
or services.

6 9.1.1.1 This Agreement does not provide for the
7 purchase and/or provision of resold
8 telecommunications services with unbundled
9 network elements provided pursuant to section
10 251 (c)(3) of the Act, or for commingling of
11 resale telecommunications services with other
12 resale telecommunications services. At CLEC's
13 request, the parties will negotiate an amendment
14 to this Agreement governing resale and the
15 commingling of resold telecommunications
16 pursuant to Applicable Law.

9.1.1.1 Commingling - CLEC may commingle
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. Qwest will perform the necessary
functions to effectuate such commingling upon
request. This Agreement does not provide for the
purchase and/or provision of resold
telecommunications services with unbundled
network elements provided pursuant to section
251 (c)(3) of the Act, or for commingling of
resale telecommunications services with other
resale telecommunications services. At CLECs
request, the parties will negotiate an amendment
to this Agreement governing resale and the
commingling of resold telecommunications
pursuant to Applicable Law.

18 Positions of the Parties

19 Covad

20 Covad concedes that Section 271 elements are not required to be commingled with other
21 Section 271 elements. However, Covad contends that Section 271 elements should be considered
22 wholesale facilities and services that may be commingled with Section 251(c)(3) UNEs. Covad
23 asserts that paragraph 579 and footnote 1990 of the *TRO* require BOCs to commingle Section
24 251(c)(3) UNEs based on the distinct nature of Section 271 elements as wholesale services.

25 Qwest

26 Qwest argues that the *TRO* does not require BOCs to commingle or combine Section 271
27 elements with other Section 271 elements or with Section 251(c)(3) UNEs. According to Qwest, the
28

1 FCC's definition of commingling obligations for Section 251(c)(3) UNEs must be read in
 2 conjunction with its determination that Section 271 elements are not required to be combined. Qwest
 3 claims that Covad's interpretation of paragraph 579 of the *TRO* is incorrect because Section 271
 4 Checklist Items 4, 5, 6, and 10 do not cross-reference the combination requirements set forth in
 5 Section 251.

6 Resolution of Issue No. 3

7 Paragraph 579 of the FCC's *TRO* states, in part, that:

8 An incumbent LEC shall permit a requesting telecommunications carrier
 9 to commingle a UNE or a UNE combination with one or more facilities or
 10 services that a requesting carrier has obtained at wholesale from an
 11 incumbent LEC pursuant to a method other than unbundling under section
 12 251(c)(3) of the Act. In addition, upon request, an incumbent LEC shall
 13 perform the functions necessary to commingle a UNE or UNE
 14 combination with one or more facilities or services that a requesting
 15 carrier has obtained at wholesale from an incumbent LEC pursuant to a
 16 method other than unbundling under section 251(c)(3) of the Act. As a
 17 result, competitive LECs may connect, combine, or otherwise attach
 18 UNEs and combinations of UNEs to wholesale services (e.g., switched
 19 and special access services offered pursuant to tariff), and incumbent
 20 LECs shall not deny access to UNEs and combinations of UNEs on the
 21 grounds that such facilities or services are somehow connected, combined,
 22 or otherwise attached to wholesale services.

23 Paragraph 584 addressed ILEC commingling obligations with respect to Section 251(c)(3) as
 24 they relate to resale services provided under Section 251(c)(4). Paragraph 584, as amended by a
 25 subsequent errata to the *TRO* (errata shown in strike through form), also includes the following
 26 discussion of ILEC commingling obligations:

27 As a final matter, we require that incumbent LECs permit commingling of
 28 UNEs and UNE combinations with other wholesale facilities and services,
 including ~~any network elements unbundled pursuant to section 271 and~~
 any services offered for resale pursuant to section 251(c)(4) of the Act.¹⁸

In considering whether state commissions may independently require ILECs to commingle
 Section 271 elements with Section 251(c)(3) UNEs, we must first determine whether Section 271

¹⁸ *TRO*, ¶584, as modified by Errata Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-098, 98-147, FCC 03-227 (September 17, 2003), at ¶27 ("Errata Order").

1 elements are “wholesale” services under the FCC’s commingling definition. We agree with Covad
 2 that Section 271 elements are wholesale facilities or services that are obtained from an ILEC by a
 3 method other than unbundling under Section 251(c)(3).

4 With respect to whether the FCC intended to exclude Section 271 elements from
 5 commingling obligations entirely, we agree with Covad’s interpretation of the *TRO*’s footnote 1990
 6 which (as amended in the *Errata Order*) provides as follows:

7 We decline to require BOCs, pursuant to section 271, to combine network
 8 elements that are no longer required to be unbundled under section 251.
 9 Unlike section 251(c)(3), items 4-6 and 10 of section 271’s competitive
 10 checklist contain no mention of “combining” and, as noted above, do not
 11 refer back to the combination requirement set forth in section 251(c)(3).
~~We also decline to apply our commingling rule, set forth in Part VII.A.~~
~~above, to services that must be offered pursuant to these checklist items.¹⁹~~

12 Given the FCC’s removal of the language cited above, it is reasonable to conclude that
 13 although ILECs are not required to commingle 271 elements, they must permit requesting carriers to
 14 commingle Section 251(c)(3) UNEs with wholesale services such as Section 271 elements. It is also
 15 reasonable to conclude that the FCC’s removal of the phrase “any network elements unbundled
 16 pursuant to section 271” from paragraph 584 of the *TRO* was not intended to indicate that Section
 17 271 elements are not wholesale services that may be commingled with Section 251 UNEs. We
 18 believe it is appropriate for the interconnection agreement to include language regarding
 19 commingling of Section 251(c)(3) UNEs with Section 271 elements and we therefore adopt Covad’s
 20 proposed language regarding commingling of network elements.

21 **Issue No. 5: What are Qwest’s obligations regarding channel regeneration between CLEC**
 22 **collocation sites?**

23 Regeneration refers to the “boosting” of a digital signal to meet applicable technical standards
 24 for a particular type of loop or service (Covad Ex. 3, at 32). Regeneration of a signal is sometimes
 25 required if the distance is too great between two CLEC collocation spaces or between a CLEC and an
 26 ILEC’s switch within the central office. The issue in dispute is whether Qwest is required to provide
 27 channel regeneration for CLEC-to-CLEC connections as a wholesale product, as Covad argues, or

28 ¹⁹ *Errata Order*, ¶31.

1 whether the FCC's rules and decisions except ILECs from this regeneration obligation (Qwest Ex. 4,
 2 at 2). The parties' proposed language is set forth below.

| 4 Qwest Proposed Language | 4 Covad Proposed Language |
|--|---|
| 6 8.2.1.23.1.4 CLEC is responsible for the end-to- 7 end service design that uses ICDF Cross 8 Connection to ensure that the resulting service 9 meets its Customer's needs. This is 10 accomplished by CLEC using the Design Layout 11 Record (DLR) for the service connection. 12 Regeneration may be required, depending on the 13 distance parameters of the combination. | 6 8.2.1.23.1.4 CLEC is responsible for the end-to- 7 end service design that uses ICDF Cross 8 Connection to ensure that the resulting service 9 meets its Customer's needs. This is 10 accomplished by CLEC using the Design Layout 11 Record (DLR) for the service connection. 12 <u>Depending on the distance parameters of the combination, regeneration may be required. Qwest shall assess charges for CLEC to CLEC regeneration, if any, on the same terms and conditions, and at the same rates as ILEC to CLEC regeneration.</u> |
| 14 8.3.1.9 Channel Regeneration Charge. Required 15 when the distance from the leased physical space 16 (for Caged or Cageless Physical Collocation) or 17 from the collocated equipment (for Virtual 18 Collocation) to the Qwest network is of sufficient 19 length to require regeneration. Channel 20 Regeneration will not be charged separately for 21 Interconnection between a Collocation space and 22 Qwest's network or between non-contiguous 23 Collocation spaces of the same CLEC. Qwest 24 shall charge for regeneration requested as a part 25 of CLEC-to-CLEC Cross Connections under the 26 FCC Access No. 1 tariff, Section 21.5.2. (EICT). 27 Cable distance limitations are addressed in ANSI 28 Standard T1.102-1993 "Digital Hierarchy- Electrical Interface; Annex B". | 14 <u>8.3.1.9 Channel Regeneration Charges.</u> 15 <u>Required when the distance from CLEC's leased</u> 16 <u>physical space (for Caged or Cageless Physical</u> 17 <u>Collocation) or from the collocated equipment</u> 18 <u>(for Virtual Collocation) to the Qwest network</u> 19 <u>("ILEC to CLEC regeneration"), to CLEC's non-</u> 20 <u>contiguous Collocation space ("CLEC to CLEC</u> 21 <u>regeneration"), or to the Collocation space of</u> 22 <u>another CLEC ("CLEC to CLEC regeneration")</u> 23 <u>is of sufficient length to require regeneration</u> 24 <u>based on the ANSI Standard for cable distance</u> 25 <u>limitations. Channel Regeneration Charges shall</u> 26 <u>not apply until the Commission approves a</u> 27 <u>wholesale Channel Regeneration Charge. After</u> 28 <u>approval of such charge, Channel Regeneration</u> <u>Charges shall be assessed for ILEC to CLEC and</u> <u>CLEC to CLEC regeneration on the same terms</u> <u>and conditions, and at the same rates. If CLEC</u> <u>requests Channel Regeneration in spite of the fact</u> <u>that it is not required to meet ANSI standards,</u> <u>Qwest will provide such regeneration, and CLEC</u> <u>will pay the Channel Regeneration Charge</u> <u>described herein.</u> |

1 9.1.10 Intentionally left blank

2 ~~9.1.10 Channel Regeneration. Qwest's design~~
 3 ~~will ensure the cable between the Qwest provided~~
 4 ~~active elements and the DSX will meet the proper~~
 5 ~~signal level requirements. Channel Regeneration~~
 6 ~~will not be charged separately for Interconnection~~
 7 ~~between a collocation space and Qwest's~~
 8 ~~network. Cable distance limitations are~~
 9 ~~addressed in ANSI Standard T1.102 1993~~
 10 ~~"Digital Hierarchy Electrical Interface; Annex~~
 11 ~~B".~~

7
8 **Positions of the Parties**

9 **Covad**

10 Covad has proposed language for the interconnection agreement that would require Qwest to
 11 provide regenerated cross connects between Covad collocations, as well as between a Covad
 12 collocation and another CLEC's collocation, when requested by Covad. Covad claims that the FCC's
 13 cross-connection rules must be viewed in the context of the FCC's intent to protect CLECs from
 14 discrimination related to ILEC collocation restrictions. Covad argues that Qwest's proposed
 15 language would impose technically infeasible and/or costly requirements on CLECs needing
 16 regeneration of cross connects between CLEC collocation spaces. According to Covad, Qwest's
 17 requirement that CLECs must self-provision regeneration is contrary to Section 251(c)(6), which
 18 requires ILECs to provide physical collocation on terms and conditions that are "just, reasonable, and
 19 nondiscriminatory."

20 Covad cites to the FCC's *Fourth Report and Order*²⁰ to support its argument that ILECs must
 21 provision cross-connections between CLECs. In that Order, the FCC stated its concern that ILECs
 22 would be acting in an unreasonable and discriminatory manner if they refused to provide cross-
 23 connects between collocators and that an ILEC's "refusal to provide a cross-connect between two
 24 collocated carriers would violate the [ILEC's] duties under section 251(c)(6)" (*Id.* at ¶¶79-80).

25 Covad claims that the exception to the ILEC cross-connect requirement contained in 47
 26

27
 28 ²⁰²⁰ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order ("Fourth Report and Order")* CC Docket No. 98-147, FCC 01-204 (August 8, 2001).

1 C.F.R. Sec. 51.323(h)(1)²¹ assumes that CLECs could self-provision the necessary cross-connects
 2 under conditions that would not violate the just and reasonable standards set forth in Section
 3 251(c)(6). Covad contends that although Qwest may make a technically feasible route available
 4 between collocators, unlike the facilities available to collocators, Qwest regenerates its own signals at
 5 or near mid-span using equipment located near its distribution frame. As a result, Covad argues that
 6 Qwest's cross-connect requirements are discriminatory and should be rejected.

7 **Qwest**

8 According to Qwest, it currently provides several methods for Covad to connect its facilities
 9 with other CLEC facilities in Qwest central offices, including by a direct connection and by COCC-
 10 X²². Qwest witness Michael Norman testified that, for direct connections with another CLEC, Covad
 11 is responsible for engineering, provisioning, and designing the connection circuit (Tr. 186-187).
 12 When COCC-X is used, Covad and the connecting CLEC are responsible for bringing their
 13 connections to a common ICDF in the central office, where Qwest provides a cross-connect or
 14 jumper wire connecting the Covad and connecting CLEC facilities (*Id.*). Mr. Norman testified that,
 15 in both types of connections, if the circuit length prevents adequate signal strength between the
 16 CLEC facilities, regeneration of the signal would be required (Qwest Ex. 4, at 3). Mr. Norman
 17 indicated that Covad's collocated facilities have never required regeneration of a signal at any of
 18 Qwest's Arizona offices. If regeneration were required, Mr. Norman stated that Covad could
 19 purchase a regeneration product called expanded interconnection channel termination ("EICT"),
 20 which is available through Qwest's FCC access tariff (Tr. 187).

21 As set forth above, Qwest's proposed language provides that Qwest will not charge for
 22 regeneration between Qwest's network and Covad's collocation spaces; that Qwest will not charge
 23 separately for regeneration for Covad to connect two of its non-contiguous collocation spaces; and
 24 that a connecting CLEC may order the EICT product out of Qwest's FCC 1 Access tariff (Qwest
 25

26 ²¹ This section states that an ILEC must provide, at the request of a collocating telecommunications carrier, "a connection
 27 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."

28 ²² COCC-X refers to "cross-connection" of facilities on the same interconnection distribution frame ("ICDF") (Tr. I, 186).

1 proposed ICA Section 8.3.1.9).

2 Qwest argues that the FCC has clearly addressed ILEC obligations for regeneration in its
3 *Fourth Report and Order, supra*. Qwest claims that ILECs are required to provide a connection
4 between two CLEC collocation spaces in only two specific instances: 1) if the ILEC does not permit
5 the CLEC to provide the connection for themselves; and 2) pursuant to Section 201 where the
6 requesting carrier submits certification that more than 10 percent of the amount of traffic will be
7 interstate. Qwest contends that since it permits Covad to make its own cross connections, Qwest has
8 no legal obligation to provide connections, or regeneration of the connection's signal between Covad
9 and another CLEC (Qwest Ex. 4, at 5-6).

10 Qwest disputes Covad's contention that it is discriminatory for Qwest to charge for
11 regeneration of a CLEC-to-CLEC connection due to economic infeasibility. According to Qwest, the
12 FCC has clearly defined the only instances where regeneration must be provided by ILECs, and cost
13 to the CLEC is not a factor to be considered. Qwest contends that it makes its collocation space
14 available in a non-discriminatory manner and there is no basis for Covad to claim otherwise. Qwest
15 witness Norman testified that in the event Covad requested collocation space midway between its
16 collocation space and the space of a partnering CLEC, Qwest would make every attempt to
17 accommodate the request subject to space availability (Tr. 200-202). Therefore, Qwest requests that
18 its proposed language on regeneration be adopted in this proceeding.

19 **Resolution of Issue No. 5**

20 The FCC's rules (47 C.F.R. 51.323(h)(1)) regarding CLEC-to-CLEC connections provide in
21 relevant part:

22 (h) As described in paragraphs (1) and (2) of this section, an incumbent
23 LEC shall permit a collocating telecommunications carrier to interconnect
24 its network with that of another collocating telecommunications carrier at
25 the incumbent LEC's premises and to connect its collocated equipment to
26 the collocated equipment of another telecommunications carrier within the
27 same premises, provided that the collocated equipment is also used for
28 interconnection with the incumbent LEC or for access to the incumbent
LEC's unbundled network elements.

(1) 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*

1 *the extent the incumbent LEC permits the collocating parties to provide*
 2 *the requested connection for themselves or a connection is not required*
 3 *under paragraph (h)(2) of this section. Where technically feasible, the*
 4 *incumbent LEC shall provide the connection using copper, dark fiber, lit*
 5 *fiber, or other transmission medium, as requested by the collocating*
 6 *telecommunications carrier. (emphasis added)*

7 There is no dispute that Qwest permits collocating CLECs to provide their own cross
 8 connections and thus the FCC's rules make such connections, as well as necessary regeneration, the
 9 responsibility of the collocating CLECs. This CLEC responsibility for regeneration of cross connects
 10 assumes that the ILEC is in compliance with the requirement set forth in Section 251(c)(6), that the
 11 ILEC provides collocation on terms and conditions that are just, reasonable, and nondiscriminatory.
 12 The evidence supports Qwest's contention that it provides collocation in accordance with Section
 13 252(c)(6) and we agree, therefore, that Qwest's proposed language on this issue should be adopted.

14 **Issue No. 8: What are the appropriate terms for billing and payment due dates, and timing**
 15 **for discontinuance of orders and discontinuance of service for non-payment?**

16 Covad has requested that the due date for payment of bills issued by Qwest should be 45 days
 17 for invoices containing: line splitting or loop splitting products; bills without a circuit ID or USOC;
 18 or new rate elements, new services, or new features not previously ordered by Covad. Qwest
 19 maintains that the payment due date should remain 30 days for all services rendered by Qwest to
 20 Covad. The parties' respective proposed language is described below.

| Qwest Proposed Language | Covad Proposed Language |
|---|--|
| 21 5.4.1 Amounts payable under this Agreement are 22 due and payable within thirty (30) calendar Days 23 after the date of invoice, or within twenty (20) 24 calendar Days after receipt of the invoice, 25 whichever is later (payment due date). If the 26 payment due date is not a business day, the 27 payment shall be due the next business day. 28 | 21 5.4.1 Amounts payable for any invoice 22 containing (1) line splitting or loop splitting 23 products, (2) a missing circuit ID, (3) a missing 24 USOC, or (4) new rate elements, new services, or 25 new features not previously ordered by CLEC 26 (collectively "New Products") (hereinafter 27 collectively referred to as "Exceptions") are due 28 and payable within forty-five (45) calendar Days after the date of invoice, or within twenty (20) calendar days after receipt of the invoice, whichever is later (payment due date) with respect to the New Products Exception, the forty- five (45) day time period shall apply for twelve (12) months. After twelve (12) months' experience, such New Products shall be subject to the thirty (30) day time frame hereinafter |

| | |
|---|--|
| <p>1 2 3 4</p> | <p>discussed. Any invoice that does not contain any of the above Exceptions are due and payable within thirty (30) calendar Days after the date of invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later. If the payment due date is not a business day, the payment shall be due the next business day.</p> |
| <p>5 6 7 8 9 10 11 12 13 14 15 16 17 18 19</p> <p>5.4.2 One Party may discontinue processing orders for the failure of the other Party to make full payment for the relevant services, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the relevant services provided under this Agreement within thirty (30) calendar Days following the payment due date. The Billing Party will notify the other Party in writing at least ten (10) business Days prior to discontinuing the processing of orders for the relevant services. If the Billing Party does not refuse to accept additional orders for the relevant services on the date specified in the ten (10) business Days notice, and the other Party's non-compliance continues, nothing contained herein shall preclude the Billing Party's right to refuse to accept additional orders for the relevant services from the non-complying Party without further notice. For order processing to resume, the billed Party will be required to make full payment of all charges for the relevant services not disputed in good faith under this Agreement. Additionally, the Billing Party may require a deposit (or additional deposit) from the billed Party, pursuant to this section. In addition to other remedies that may be available at law or equity, the billed Party reserves the right to seek equitable relief including injunctive relief and specific performance.</p> | <p>5.4.2 One Party may discontinue processing orders for the failure of the other Party to make full payment for the relevant services, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the relevant services provided under this Agreement within thirty (30) <u>sixty (60)</u> calendar Days following the payment due date. The Billing Party will notify the other Party in writing at least ten (10) business Days prior to discontinuing the processing orders for the relevant services. If the Billing Party does not refuse to accept additional orders for the relevant services on the date specified in the ten (10) business Days notice, and the other Party's non-compliance continues, nothing contained herein shall preclude the Billing party's right to refuse to accept additional orders for the relevant services from the non-complying Party without further notice. For order processing to resume, the billed Party will be required to make full payment of all charges for the relevant services not disputed in good faith under this Agreement. Additionally, the Billing Party may require a deposit (or additional deposit) from the billed Party, pursuant to this section. In addition to other remedies that may be available at law or equity, the billed Party reserves the right to seek equitable relief including injunctive relief and specific performance.</p> |
| <p>20 21 22 23 24 25 26 27 28</p> <p>5.4.3 The Billing Party may disconnect any and all relevant services for failure by the billed Party to make full payment, less any disputed amount as provided for in Sections 5.4.4 of this Agreement, for the relevant services provided under this Agreement within sixty (60) calendar Days following the payment due date. The billed Party will pay the applicable reconnect charge set forth in Exhibit A required to reconnect each resold End User Customer line disconnected pursuant to this paragraph. The Billing Party will notify the billed Party at least ten (10) business Days prior to disconnection of the unpaid service(s). In case of such disconnection, all applicable undisputed charges, including termination charges, shall become due. If the Billing Party does not disconnect the billed</p> | <p>5.4.3 The Billing Party may disconnect any and all relevant services for failure by the billed Party to make full payment, less any disputed amount as provided for in Section 5.4.4 of this Agreement, for the relevant services within <u>ninety (90)</u> calendar Days following the payment due date. The billed Party will pay the applicable reconnect charge set forth in Exhibit A required to reconnect each resold End User Customer line disconnected pursuant to this paragraph. The Billing Party will notify the billed Party at least ten (10) business Days prior to disconnection of the unpaid service(s). In case of such disconnection, all applicable undisputed charges, including termination charges, shall become due. If the Billing Party does not disconnect the billed Party's service(s) on the date specified in the ten</p> |

1 Party's service(s) on the date specified in the ten
 2 (10) business Days notice, and the billed Party's
 3 noncompliance continues, nothing contained
 4 herein shall preclude the Billing Party's right to
 5 disconnect any or all relevant services of the non-
 6 complying Party without further notice. For
 7 reconnection of the non-paid service to occur, the
 8 billed Party will be required to make full
 9 payment of all past and current undisputed
 10 charges under this Agreement for the relevant
 11 services. Additionally, the Billing Party will
 12 request a deposit (or recalculate the deposit) as
 13 specified in Section 5.4.5 and 5.4.7 from the
 14 billed Party, pursuant to this Section. Both
 15 Parties agree, however, that the application of
 16 this provision will be suspended for the initial
 17 three (3) Billing cycles of this Agreement and
 18 will not apply to amounts billed during those
 19 three (3) cycles. In addition to other remedies
 20 that may be available at law or equity, each Party
 21 reserves the right to seek equitable relief,
 22 including injunctive relief and specific
 23 performance.

(10) business Days notice, and the billed Party's
 noncompliance continues, nothing contained
 herein shall preclude the Billing Party's right to
 disconnect any or all relevant services of the non-
 complying Party without further notice. For
 reconnection of the non-paid service to occur, the
 billed Party will be required to make full
 payment of all past and current undisputed
 charges under this Agreement for the relevant
 services. Additionally, the Billing Party will
 request a deposit (or recalculate the deposit) as
 specified in Section 5.4.5 and 5.4.7 from the
 billed Party, pursuant to this Section. Both
 Parties agree, however, that the application of
 this provision will be suspended for the initial
 three (3) Billing cycles of this Agreement and
 will not apply to amounts billed during those
 three (3) cycles. In addition to other remedies
 that may be available at law or equity, each Party
 reserves the right to seek equitable relief,
 including injunctive relief and specific
 performance.

Positions of the Parties

Covad

16 Covad argues that Qwest's wholesale billing system currently produces invoices that require
 17 substantial human effort to process and verify. Covad witness Elizabeth Balvin testified that Qwest's
 18 invoices are not received by Covad for 5 to 8 days after they are issued (Covad Ex. 1, at 7). Covad
 19 also criticizes the fact that Qwest provides only the Billing Telephone Number ("BTN"), rather than
 20 the Circuit Identification Number ("CIN"), for line-shared and line-split loops, making electronic
 21 verification by Covad impossible (Tr. 266). Covad claims that allowing a 45-day period for review
 22 and payment of wholesale bills would enable Covad a meaningful amount of time to review and audit
 23 bills for accuracy, which would be beneficial to both parties.

24 Covad disagrees with Qwest's assertion that this issue should be resolved through the Change
 25 Management Process ("CMP"), rather than through arbitration. According to Covad, Qwest has
 26 previously refused a request through the CMP to include the CIN on bills issued to Covad. Covad
 27 also claims that Qwest has previously agreed to a billing arrangement whereby payment would be
 28 due 30 days following receipt by the CLEC (Tr. 296). Qwest witness William Easton conceded that

1 this arrangement was in effect in a prior agreement with AT&T, but stated that AT&T has now
2 agreed to the same payment terms proposed by Qwest in this proceeding (*Id.* at 296-297).

3 Covad agrees that Qwest should have the ability to discontinue processing orders from Covad,
4 and discontinue service to Covad, in the event that Qwest does not receive payment from Covad.
5 However, Covad disagrees with the timing of Qwest's right to discontinue order processing or
6 disconnect. Covad proposes that the time period for such actions should be extended from the 30
7 days proposed by Qwest to 60 days for discontinuance of order processing, and from Qwest's
8 proposed 60 days to 90 days before Qwest could discontinue service to Covad altogether. Covad
9 argues that its proposal would have only a minimal impact on Qwest's cash flow, compared to the
10 devastating impact on Covad's business if Qwest were to stop processing orders or discontinue
11 service.

12 Qwest

13 Qwest claims that its proposed language regarding payment due dates is consistent with
14 industry standards, and that Covad has abided by the current 30-day timeframe for more than 5 years
15 without adverse impact. Qwest also contends that Covad has ample remedies available for improper
16 billing, including interest paid to Covad on amounts wrongfully paid. Qwest asserts that Covad has
17 not established that Qwest's billing practices prevent Covad from processing and paying bills within
18 the current 30-day time period.

19 According to Qwest, although the number of bills subject to manual review by Covad is
20 minimal, other CLECs have agreed to the 30-day timeframe without problem, and Covad itself has
21 accepted the 30-day payment due date when it entered into a Commercial Line Sharing Agreement
22 with Qwest in April 2004²³ (Qwest Ex. 6, at 6-9; Qwest Ex. 7, at 13). Qwest contends that Covad's
23 proposed language would effectively result in a 15-day interest free loan by Qwest to Covad, and if
24 other CLECs were to opt-in to such terms, the effect on Qwest would be exacerbated. Qwest argues
25 that its proposal is commercially reasonable, is consistent with industry standards, and has been
26 agreed to by numerous CLECs.

27 ²³ According to Qwest witness Renee Albersheim, the terms of the ICA approved in this proceeding will apply only to
28 grandfathered Covad accounts established prior to October 1, 2003, a customer base that will continue to shrink over
time. The Commercial Agreement referenced above applies to all Covad accounts after that date (Tr. II, 321).

1 With respect to the timing of discontinuance of order processing and disconnection of service,
2 Qwest claims that its proposed language is in accord with industry standards and would limit Qwest's
3 financial exposure due to unpaid bills. Mr. Easton pointed out that the potential harm to Covad is
4 minimized due to the requirement that Qwest must provide notice to Covad prior to discontinuance or
5 disconnection (Qwest Ex. 6, at 14, 16-17). In addition, Qwest may pursue the discontinuance and
6 disconnection remedies only if Covad fails to pay the undisputed portion of its bills (*Id.*). Qwest
7 argues that Covad's proposal would place an unfair burden on Qwest, by increasing the risk that
8 Qwest would fail to be made whole in the event of a CLEC's insolvency. Qwest requests that its
9 proposed language on payment of bills, as well as discontinuance of order processing and
10 disconnection of service, be adopted by the Commission.

11 **Resolution of Issue No. 8**

12 We believe that Qwest has set forth credible arguments regarding the appropriateness of the
13 30-day payment due date. Qwest points out that the 30-day due date is the industry standard, and that
14 Covad has agreed to that same standard in its 2004 Commercial Agreement with Qwest. The 30-day
15 standard is also employed in numerous other CLEC agreements and is contained in Qwest's SGAT.
16 Covad's attempt to limit its proposed 45-day timeframe only to billing for certain circumstances (*i.e.*,
17 new services and missing CINs and USOCs) would likely lead to even further delays and confusion
18 in the processing of bills and payments. We will therefore adopt Qwest's proposed language with
19 respect to payment of bills issued to Covad.

20 Regarding the discontinuance and disconnection issue, we agree with Qwest that its proposed
21 language is appropriate. As discussed above, Covad does not oppose Qwest's ability to discontinue
22 processing of orders or discontinuance of service for non-payment. Covad simply seeks an additional
23 30 days beyond what is proposed by Qwest for each of these remedies. As discussed above, Qwest
24 may seek the discontinuance and disconnection remedies only in instances where Covad fails to pay
25 the undisputed portion of its bills and, further, Qwest must provide notice prior to taking such action
26 thereby mitigating the chance that discontinuation or disconnection would occur if Covad failed to
27 pay its bills due to an oversight. We believe that the Qwest proposal is consistent with industry
28 standards and, after weighing the concerns expressed by Covad with the potential financial risk to

1 Qwest for non-payment, we agree that Qwest's language should be adopted.

2 * * * * *

3 Having considered the entire record herein and being fully advised in the premises, the
4 Commission finds, concludes, and orders that:

5 **FINDINGS OF FACT**

6 1. On June 8, 2004, Covad filed with the Commission its Petition pursuant to 47 U.S.C.
7 §252(b) of the 1996 Telecom Act.

8 2. Covad is a Virginia corporation authorized to provide local exchange service in
9 Arizona, and is a competitive local exchange carrier under the Act.

10 3. Qwest is a Colorado corporation providing local exchange and other services in
11 Arizona, and is a Bell Operating Company and incumbent local exchange carrier under the terms of
12 the Act.

13 4. On July 6, 2004, Qwest filed a Response to Petition for Arbitration. On July 21, 2004,
14 Qwest filed a Motion to Dismiss Portions of Covad's Petition for Arbitration. Qwest's Motion
15 requested a Commission Order dismissing Issue 2 in Part G of Covad's Petition, to the extent Covad
16 seeks Commission authority to: require Qwest to provide unbundled network elements pursuant to
17 Section 271 of the Act; set UNE rates that Qwest provides under Section 271; or require Qwest to
18 provide UNEs under state law in a manner that conflicts with the access ordered by the Federal
19 Communications Commission in its Triennial Review Order.

20 5. A Procedural Conference was conducted on August 9, 2004 to discuss scheduling and
21 other procedural issues. The parties agreed on dates for filing testimony, conducting the hearing, and
22 filing of briefs. A schedule for filing pleadings regarding Qwest's Motion to Dismiss, and for oral
23 argument on the Motion, was also discussed.

24 6. Pursuant to the schedule established at the August 9, 2004 Procedural Conference,
25 Covad filed its Response to Qwest's Motion to Dismiss on August 16, 2004; the Commission's
26 Utilities Division Staff filed its Opposition to Qwest's Motion to Dismiss on August 31, 2004; and
27 Qwest filed its Combined Reply to the Responses of Staff and Covad on September 10, 2004. On
28 September 29, 2004, Qwest, Covad, and Staff filed their respective Comments regarding the effect on

1 this proceeding of the FCC's interim unbundling rules and Notice of Proposed Rulemaking.

2 7. By Procedural Order issued October 6, 2004, in accordance with the schedule
3 requested by the parties, oral argument on Qwest's Motion to Dismiss was set for December 15,
4 2004, and the hearing was scheduled to commence on February 7, 2005. The Procedural Order also
5 set dates for submitting pre-filed testimony.

6 8. On December 20, 2004, Covad filed the Direct Testimony of Michael Zulevic and
7 Elizabeth Balvin, and Qwest filed the Direct Testimony of William Easton, Karen Stewart, and
8 Michael Norman.

9 9. A Procedural Conference was conducted on January 6, 2005 to discuss scheduling of
10 witnesses and the status of the previously scheduled oral argument. During the Conference, Covad
11 and Qwest agreed that no ruling on the Motion to Dismiss should be made prior to the February 7,
12 2005 arbitration hearing, and the parties would brief the issues raised by Qwest's Motion to Dismiss
13 as part of their post-hearing briefs on all of the disputed arbitration issues.

14 10. On January 18, 2005, Covad filed the Rebuttal Testimony of Michael Zulevic and
15 Elizabeth Balvin, and Qwest filed the Rebuttal Testimony of William Easton, Karen Stewart, Renee
16 Albersheim, and Michael Norman.

17 11. On January 31, 2005, Covad filed the Joint Issues Matrix setting forth the issues that
18 had been resolved through negotiation and the issues that remained in dispute.

19 12. Hearings were held February 7 and 18, 2005 at the Commission's offices in Phoenix,
20 Arizona.

21 13. Post-hearing briefs were filed by Covad and Qwest on March 11, 2005. Reply briefs
22 were filed on March 28, 2005.

23 14. On June 3, 2005, July 20, 2005, and August 1, 2005 Qwest and Covad filed various
24 decisions by other state commissions as Supplemental Authority.

25 15. By Procedural Order issued August 12, 2005, Covad, Qwest and Staff were directed to
26 file statements by August 26, 2005 regarding the impact on this proceeding, if any, of the FCC's
27 August 5, 2005 decision to eliminate facilities sharing requirements on facilities-based wireline
28 broadband Internet access service providers.

1 16. On August 26, 2005 Covad filed a Statement indicating that the FCC's decision will
2 have no impact on any of the issues in this arbitration docket.

3 17. On August 26, 2005, Qwest filed a Statement that the FCC's Decision potentially
4 would have a profound effect of this proceeding, and further deliberation should be undertaken once
5 the FCC's Decision is issued.

6 18. On August 26, 2005, Staff filed a Request for Extension to File Comments. Staff
7 stated that it would need at least three weeks from the date the FCC's Decision was issued to offer a
8 response on the effect of the FCC's Decision.

9 19. By Procedural Order issued August 30, 2005, Staff's request for an extension of time
10 was granted.

11 20. On September 22, 2005, Qwest filed a Fourth Notice of Supplemental Authority in the
12 form of an Order issued by the Oregon Public Utility Commission (Order No. 05-980, issued
13 September 6, 2005, *In the Matter of Covad Communication Company Petition for Arbitration*).

14 21. On October 24, 2005, Qwest filed a Fifth Notice of Supplemental Authority in the
15 form of a Recommended Decision of the Hearing Examiner of the New Mexico Public Regulation
16 Commission (Case No. 04-00208-UT, issued October 14, 2005, *In the Matter of Covad*
17 *Communication Company Petition for Arbitration*).

18 22. On November 3, 2005, Staff filed a Request for Procedural Order. Staff stated that the
19 FCC had issued the anticipated Decision on September 23, 2005, and Staff therefore requested that a
20 Procedural Order should be issued allowing two additional weeks for the parties to comment on the
21 impact of the FCC's Order on the issues raised in this proceeding.

22 23. On November 7, 2005, a Procedural Order was issued directing Staff, Covad, and
23 Qwest to file comments regarding the impact of the FCC's Order on this proceeding, by no later than
24 November 21, 2005.

25 24. On November 21, 2005, Covad filed a Second Notice of Supplemental Authority in
26 the form of an Arbitration Order issued by the Tennessee Regulatory Authority (Docket No. 03-
27 00119, issued October 20, 2005, *Petition for Arbitration of ITC Deltacom Communications, Inc. with*
28 *Bellsouth Telecommunications, Inc.*).

1 25. On November 21, 2005, Covad filed its Comments Regarding the FCC's *Broadband*
2 *Order*. Covad contends that nothing in the *Broadband Order* affects the issues presented in the
3 arbitration petition that is before the Commission in this docket.

4 26. On November 21, 2005, Qwest filed its Comments Relating to the FCC's *Wireline*
5 *Broadband Order*. Qwest argues that the FCC's *Broadband Order* does affect the arbitration issues,
6 especially with respect to Covad's "alternative service" proposal for copper loop retirements. Qwest
7 also claims that the *Broadband Order* draws into question whether Covad is a telecommunications
8 carrier entitled to an interconnection agreement, or whether Covad is an information services
9 provider.

10 27. On November 21, 2005, Staff filed a Statement regarding the *Broadband Order's*
11 effect of this arbitration proceeding. According to Staff, the *Broadband Order* "would have no
12 impact on the unbundling issues raised in this case, to the extent Covad seeks the unbundled network
13 elements to provide a telecommunications service." Staff cites to the FCC's statement that "nothing
14 in this Order changes a requesting telecommunications carrier's UNE rights under section 251 and
15 our implementing rules" (*Broadband Order*, at ¶127).

16 28. On December 2, 2005, Covad filed a *Reply to Qwest's Comments Regarding the*
17 *FCC's Broadband Order*. Covad contends that the FCC has already responded to the question raised
18 by Qwest and found that the *Broadband Order* has no effect on Covad's rights under 47 U.S.C. §251
19 and, by extension, 47 U.S.C. §252. Covad claims that Qwest's arguments ignore the FCC's specific
20 statement that the *Broadband Order* does not impact UNE and interconnection issues. Covad also
21 argues that the Commission has already determined that Covad is a telecommunications carrier
22 pursuant to the granting of a CC&N for the provision of such services.

23 29. Based on review of the various arguments regarding the impact of the FCC's
24 *Broadband Order* on the issues presented herein for arbitration, the arbitration issues are properly
25 before the Commission for consideration in this proceeding.

26 30. The parties submitted five issues to be arbitrated in this proceeding. The Commission
27 has analyzed the evidence presented at the hearing, as well as the legal arguments raised in the briefs
28 filed in this docket, and has resolved the issues as stated in the Discussion above.

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IT IS FURTHER ORDERED that Qwest's Motion to Dismiss is denied in accordance with the discussion and resolution set forth hereinabove regarding Issue 2 in Covad's Petition for Arbitration.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this ____ day of _____, 2006.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

1 SERVICE LIST FOR:

DIECA COMMUNICATIONS, INC., dba COVAD
COMMUNICAITONS COMPANY and QWEST
CORPORATION

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T-03632A-04-0425 and T-01051B-04-0423

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