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June 2, 2005

Pam Bonrud
Executive Director
Public Utilities Commission of the State of South Dakota
500 East Capitol Avenue
Pierre, South Dakota 57501

Re: Case No. TC05-056: Arbitration Orders Cited in Qwest Corporation's Initial Brief on the Merits

Dear Ms. Bonrud:

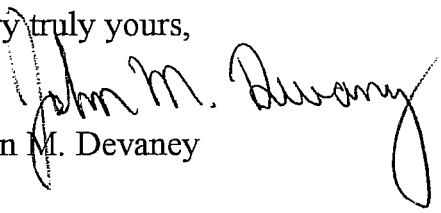
In the arbitration proceeding referred to above between Qwest Corporation and Covad Communications Company, Qwest filed its Initial Brief on the Merits today. In its brief, Qwest relies upon arbitration decisions from several other state commissions that have issued orders in arbitrations between Qwest and Covad. With this letter, I am providing 10 copies of those orders, as follows:

(1) the Iowa Utilities Board's Arbitration Order dated May 24, 2005,
(2) excerpts from the Minnesota Arbitrator's Report dated December 16, 2004,
(3) the Minnesota Commission's Order Resolving Arbitration Issues dated March 14, 2005,
(4) excerpts from the Utah Commission's Arbitration Report and Order dated February 8, 2005, and
(5) excerpts from the Washington Commission's Final Order dated February 9, 2005.

[13141-0675/DA051530.029]

If you have any questions, please do not hesitate to contact me. Thank you for your assistance.

Very truly yours,



John M. Devaney

Enclosures

cc: Brett Koenecke
Melissa Thompson
Gregory Diamond
Thomas Welk

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE ARBITRATION OF: DIECA COMMUNICATIONS, INC., d/b/a COVAD COMMUNICATIONS COMPANY, Petitioning Party, vs. QWEST CORPORATION, Responding Party.	DOCKET NO. ARB-05-1

ARBITRATION ORDER

(Issued May 24, 2005)

PROCEDURAL BACKGROUND

On January 31, 2005, Dieca Communications, Inc., d/b/a Covad Communications Company (Covad), filed a petition with the Utilities Board (Board) requesting the Board arbitrate certain terms and conditions of a proposed interconnection agreement between Covad and Qwest Corporation (Qwest). The petition was filed pursuant to the provisions of 199 IAC 38.4(3) and 38.7(3) and § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 101-104, 110 Stat. 56 (1996) (hereinafter referred to as the "Act"). The petition was identified as Docket No. ARB-05-1.

On February 11, 2005, the Board issued an order directing a telephone conference to be held to determine a procedural schedule, clarify the issues to be resolved, identify additional information needed to reach a decision on the issues, schedule production of documents and other information, and to consider any other matters that would expedite the arbitration process as required by 199 IAC 38.7(3)"f."

The telephone conference was held on February 21, 2005. The parties agreed that the only issue for arbitration is a legal issue that does not require presentation of factual evidence and that no hearing was necessary. The parties agreed to a briefing schedule that was adopted by the Board. Initial briefs were filed on March 23, 2005. Reply briefs were filed on April 15, 2005.

OVERVIEW

In its initial brief, Covad describes the issues in this arbitration as follows:

A. Does the Board have authority pursuant to § 271 of the Telecommunications Act of 1996 (1996 Act) to order Qwest to unbundle certain network elements as part of the arbitration of an interconnection agreement?[1]

B. Can the Board, pursuant to Iowa law, order Qwest to unbundle certain network elements in this arbitration?

Both of these issues can be summarized into one question for the Board's determination: Is Qwest required to provide access to unbundled network elements

[1] Section 271 of the Act generally prohibits Bell operating companies from providing interLATA long distance service in their "in-region" states. This prohibition can be lifted if a Bell operating company can show, among other things, that it offers access or other interconnection to other telecommunications carriers in a manner that satisfies a statutory checklist, set out at § 271(c)(2)(B). In Iowa, the Bell operating company is Qwest, which has made the necessary showing for lifting the § 271 prohibition.

under either § 271 or state law, even if it is not required to provide that access pursuant to § 251?

Covad's argument starts with the contention that when the Federal Communications Commission (FCC) lifted Qwest's § 271 prohibition, it explicitly directed that Qwest must continue to provide all network elements listed in § 271 of the Act, which outlines specific Regional Bell Operating Company (RBOC) obligations (the 271 checklist) in order to maintain its authority to provide in-region interLATA service. Further, Covad asserts that Qwest continues to be obligated under Iowa law to provide unbundled access to network elements (essential facilities) pursuant to Iowa Code § 476.100(2) (2005) and that the pricing methodology for such access has been established by 199 IAC 38.5(2).

Qwest maintains that Covad is attempting to impose obligations on Qwest that conflict with rulings by the FCC and that are inconsistent with the 1996 Act. According to Qwest, adopting Covad's proposed interconnection agreement language regarding the definition of unbundled network elements (UNEs) would require it to provide almost unlimited access to the elements in Qwest's Iowa telecommunications network. This would be contrary to the FCC's findings in the *Triennial Review Order (TRO)*[2] that competitive local exchange carriers (CLECs) are

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[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, "Report and Order and Order on Remand and Further Notice of Proposed Rulemaking," 18 FCC Rcd. 16978 (*Triennial Review Order* or *TRO*), vacated in part, remanded in part; *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

not impaired without access to many network elements and that incumbent local exchange carriers (ILECs) are therefore not required to unbundle them.

SUMMARY OF COVAD ARGUMENTS

Covad cites the FCCs *Triennial Review Order* and argues that the FCC held that § 271 creates an independent access obligation for the RBOCs, including Qwest. In that order, the FCC stated:

> [W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for Bell Operating Companies (BOCs) to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.[3]

Further, the FCC noted that items 4, 5, 6, and 10 on the § 271 checklist separately impose access requirements regarding loop, transport, switching, and signaling on RBOCs that are not imposed on all ILECs. The FCC stated:

> Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs. In fact, section 271 places specific requirements on BOCs that were not listed in section 251.[4]

Covad asserts that Qwest does not directly disagree with the premise. Covad points out, however, that Qwest has instead argued that the Board does not have the authority to order the adoption of terms in an interconnection agreement that address compliance with § 271.

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[3] *Id.* at ¶ 653.
[4] *Id.* at ¶ 655.

Covad also argues that the question of unbundling under state law is clear, pursuant to 199 IAC 38.4(1)"b," which was promulgated in accordance with Iowa legislation passed in 1995, prior to the enactment of the 1996 Act. That rule provides:

> 199 IAC 38.4(1)"b" *Initial list of unbundled essential facilities.* Each local exchange carrier's initial tariff filing shall, at a minimum, unbundle the following essential facilities, services, features, functions, and capabilities: loops, ports, signaling links, signal transfer points, facilities to interconnect unbundled links at the central office, interoffice transmission facilities, directory listings in white pages, directory listings in yellow pages, listings in the directory assistance database, inbound operator services including busy line verification and call interrupt, interconnection to the 911 system, and interconnection to the tandem switch for routing to other carriers.

SUMMARY OF QWEST'S ARGUMENTS

Pursuant to § 251(c) of the Act, ILECs, like Qwest, are required to provide other telecommunications carriers with access to the ILEC's "unbundled network elements," but only when the FCC concludes that failure to provide that access "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." § 251(c)(2). Qwest argues that Covad's arguments ignore FCC findings that this impairment test is no longer satisfied for some network elements, such that the ILECs no longer have to offer access to them. In other words, according to Qwest, Covad is trying to obtain access to elements

pursuant to § 271 or state law when the FCC has said that access is no longer required by § 251.

Qwest points out that the dispute arises because of Covad's insistence upon language in the interconnection agreement that would require Qwest to provide almost unlimited access to network elements in violation of the unbundling limitations established by court decisions, the 1996 Act, and the *TRO*. Qwest asserts that Covad's objective is to obtain access to all elements of Qwest's network that Covad may desire at the lowest rates possible.

This issue has been litigated and decisions have been rendered by the public utility regulatory commissions in Minnesota,[5] Utah,[6] and Washington.[7] In each of those states, Covad's proposed unbundling language has been rejected. In the Washington, Utah, and Minnesota orders, the Commissions determined that it would be improper to include terms and conditions relating to network elements that Qwest provides under § 271 in a § 251/252 interconnection agreement, as proposed by

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[5] *In the Matter of the Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement With Qwest Corporation*, MPUC Docket No. P-5692,421/IC-04-549, OAH Docket No. 3-2500-15908-4, Arbitrator's Report (Minn. PUC Dec. 15, 2004).

[6] *In the Matter of the Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Docket No. 04-2277-02, Arbitration Report and Order (Utah PSC Feb. 8, 2005).

[7] *In the Matter of the Petition for Arbitration of Covad Communications Company With Qwest Corporation Pursuant to 47 U.S.C. Section 252(b) and the Triennial Review Order*, Docket No. UT-043045, Final Order Affirming, In Part, Arbitrator's Report and Decision (Wash. UTC Feb. 9, 2005).

Covad, according to Qwest. Qwest further notes that in Colorado, Covad accepted Qwest's proposed language related to unbundled network elements and did not raise this issue in that state.

BOARD ANALYSIS

The first question is whether the Board has the authority, when arbitrating an interconnection agreement pursuant to § 252, to impose unbundling obligations pursuant to § 271. Section 271(d)(3) of the Act gives the FCC the authority to determine whether an RBOC has complied with the substantive provisions of § 271, including the "checklist" provisions that are cited by Covad. The 1996 Act gave state commissions only a consulting role in that determination.

The arbitration process that is mandated by § 252 is concerned only with the implementation of an ILEC's obligations under § 252. In arbitrations, then, a state commission only has the authority to impose terms and conditions related to those § 252 obligations. Section 252(a) specifically states that the negotiations it requires are limited to "request[s] for interconnection, service or network elements pursuant to section 251." (Emphasis added.)

Clearly, the provisions that are at issue in this arbitration are unbundling obligations pursuant to § 271, rather than § 251 obligations. Therefore, the Board lacks jurisdiction or authority to require that Qwest include these elements in an interconnection agreement arbitration brought pursuant to § 252.

The U.S. Supreme Court has stated that the 1996 Act does not authorize "blanket access to incumbents' networks."[8] Rather, that § 251(c)(3) authorizes unbundling only as required by § 251.[9] Following that, § 251(d)(2) provides that unbundling may be required only if the FCC determines that access to such network elements is necessary and that the failure to provide access to network elements would impair the ability of a telecommunications carrier seeking access to provide the services that it seeks to offer.

The second question is whether the Board has the authority to impose these unbundling requirements under state law.

An examination of § 476.100 provides a listing of prohibited acts, and states, in part, that a local exchange carrier may not:

> 2. Discriminate against another provider of communications services by refusing or delaying access to **essential facilities** on terms and conditions no less favorable than those the local exchange carrier provides to itself and it's affiliates. A local telecommunications facility, feature, function, or capability of the local exchange carrier's network is an essential facility if all of the following apply:
>
> a. Competitors cannot practically or economically duplicate the facility, feature, function, or capability, or obtain the facility, feature, function, or capability from another source.
>
> b. The use of the facility, feature, function, or capability by potential competitors is technically and economically feasible.
>
> c. Denial of the use of the facility, feature, function, or capability by competitors is unreasonable.
>
> d. The facility, feature, function, or capability will enable competition. (Emphasis added).

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[8] *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366 at 390 (1998).
[9] *Id.*

A finding that the facility is not capable of being duplicated or obtained elsewhere is required by § 476.100(2) for the Board to find that an element is an "essential service" and require Qwest to provide the element. Such a finding may not be appropriate where the FCC has found that access to the element is not impaired; at least, there is no evidence here that would support such a finding. Thus, in this case, state law does not provide a separate basis for requiring that Qwest provide access to unbundled network elements.

IT IS THEREFORE ORDERED:

The petition for arbitration filed January 31, 2005, by Dieca Communications, Inc., d/b/a Covad Communications Company, is granted. The Board rules that Qwest is not required, as a part of a 47 U.S.C. § 252 interconnection agreement, to provide access to unbundled network elements pursuant to § 271 or state law.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 24th day of May, 2005.

OAH Docket No. 3-2500-15908-4
MPUC Docket No. P-5692,421/IC-04-549

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation

ARBITRATOR'S REPORT

The above-entitled matter was arbitrated by Administrative Law Judge Kathleen D. Sheehy on September 20-22, 2004, in the Small Hearing Room of the Public Utilities Commission in St. Paul, Minnesota. The record closed on November 8, 2004, upon receipt of reply briefs.

Jason Topp, Esq., 200 South Fifth Street, Room 395, Minneapolis, Minnesota 55402; Winslow Waxter, Esq., 1005 17th Street, Room 200, Denver, Colorado 80202; and John Devaney, Esq., Perkins Coie, LLP, 607 14th Street NW, Washington, D.C. 20005, appeared for Qwest Corporation (Qwest).

Karen Shoresman Frame, Esq., 7901 Lowry Boulevard, Denver, Colorado 80230, appeared for Covad Communications (Covad).

Linda S. Jensen, Assistant Attorney General, 1400 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared for the Department of Commerce (the Department).

Kevin O'Grady appeared for the staff of the Public Utilities Commission.

Procedural History

1. Covad and Qwest first entered into an interconnection agreement on May 3, 1999. For purposes of this arbitration they have agreed that negotiations on a new agreement began on October 29, 2003.[1] Covad filed a petition for arbitration of the unresolved issues on April 6, 2004. Pursuant to 47 U.S.C. § 252(b)(4)(C), the original deadline for the Commission's decision was nine months from the request for negotiations, or July 29, 2004. The parties subsequently agreed to waive this deadline: first it was extended to October 29, 2004, during the initial prehearing conference[2]; then

[1] Qwest Response to Covad's Revised Petition for Arbitration (June 1, 2004) at 2-3.
[2] Prehearing Order (May 12, 2004).

Issue No. 2: Section 271 Obligations

A. Issue

26. In the *TRO*, the FCC relieved ILECs from the obligation to provide unbundled access to certain network elements under 47 U.S.C. § 251(c)(3) because competitive carriers are not impaired without access to these elements at cost-based rates. The FCC also determined that RBOCs have an independent obligation, under section 271, to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates. Section 271 contains the competitive checklist items that an RBOC must satisfy in order to obtain authority to provide long-distance service. The FCC reasoned that although checklist Item 2 specifically requires compliance with the unbundling requirements of section 251, other checklist items (4, 5, 6, and 10) separately impose access requirements to particular network elements without reference to whether they are required to be unbundled pursuant to section 251. The appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable, and not unreasonably discriminatory basis pursuant to sections 201 and 202, not the TELRIC rates required under section 252.[35]

27. The issue here is whether the parties' interconnection agreement should provide for access to network elements pursuant to section 271. In various sections of the proposed agreement, Covad has urged language referencing Qwest's obligation to provide elements pursuant to section 271 or state law obligations; Qwest has proposed alternate language that focuses on elements that Qwest is not required to provide under the terms of the *TRO*. Qwest maintains that any access to section 271 elements should be addressed in a separate agreement.

B. Position of Parties

28. Covad contends that state commissions should include section 271 obligations in interconnection agreements because Qwest remains obligated to provide access to those elements even if CLECs are not impaired in their ability to provide services under section 251.[36]

29. Covad has proposed to define an unbundled network element in § 4.0 of the interconnection agreement as one that Qwest is obligated to provide access to under § 251(c)(3) and "for which unbundled access is required under section 271 of the Act or applicable state law." In § 9.1.1, Covad proposes language that would require Qwest to provide "any and all UNEs required by the Telecommunications Act of 1996 (including, but not limited to Sections 251(b), (c), 252(a) and 271), FCC Rules, FCC Orders, and/or applicable state rules or orders, or which are ordered by the FCC, any state commission or any court of competent jurisdiction." In § 9.1.1.6, Covad's language provides that Qwest "will continue providing access to certain network

[35] *TRO* ¶¶ 649-56.
[36] *TRO* ¶¶ 653-655.

elements as required by Section 271 or state law, regardless of whether access to such UNEs is required by Section 251 of the Act. This Agreement sets forth the terms and conditions by which network elements not subject to Section 251 obligations are offered to CLEC." Finally, with regard to pricing, Covad's language would require Qwest to bill for section 271 elements or services "using the Commission-approved TELRIC rates for such UNEs until such time as new, just, reasonable and non-discriminatory rates (as required by Sections 201 and 202 of the Act or applicable state law) are approved for the Section 271 or state law required UNEs."[37]

30. Covad contends that state commissions have authority under the Act and under state law to enforce section 271 obligations in an interconnection agreement. For example, section 251(c)(3) preserves state authority under Minn. Stat. § 237.16 to establish or enforce other requirements of state law in its review of an interconnection agreement, including intrastate service quality standards or requirements. Covad also cites to the decision in *Verizon Maine,*[38] in which the Maine Public Utility Commission determined, among other things, that it had authority to require Verizon to include all of its wholesale offerings in its state wholesale tariff, including unbundled network elements provided pursuant to section 271. In addition, the Maine Commission determined that it had the authority to require Verizon to file prices for all offerings contained in the wholesale tariff for review and compliance with federal pricing standards. Covad also argues that the *TRO* requires Qwest to provide continued access at TELRIC rates absent a request by Qwest to alter the conditions of its interLATA entry.[39] Finally, Covad contends that TELRIC is a permissible pricing methodology for any elements that must be unbundled pursuant to state law.[40]

31. Qwest maintains that Covad's sweeping unbundling proposals would require it to provide access to network elements for which the FCC has specifically refused to require unbundling.[41] Moreover, Qwests maintains that Covad's proposed language would unlawfully require the provision of those elements at TELRIC rates until such time as different rates are set.

32. Qwest argues that the Commission has no legal authority under the Act to impose unbundling obligations under section 271. It argues that section 271(d)(3)

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[37] Other sections proposed by Covad address access to section 271 elements at any technically feasible point (9.1.5); access to DS1, DS3, and dark fiber loops as section 271 elements in the event that the FCC determines there is no impairment to these elements under section 251 (9.2.1.3); provision of more than two DS3 loops for a single end user customer under § 271 (9.2.1.4); access to feeder subloops under section 271 (9.3.1.1); and access to DS1 feeder loop (9.3.2.2) unbundled dedicated interoffice transport (UDIT) (9.6 and 9.6.1.5, 9.6.1.5.1), DS1 transport along a particular route (9.6.1.6, 9.6.1.6.1), and switching and line splitting (9.21.2) as section 271 elements.

[38] *Verizon-Maine Proposed Schedules, Terms, Conditions, and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Maine PUC Docket No. 2002-682, Order-Part II (September 3, 2004).

[39] *TRO* ¶ 655.

[40] Minn. Stat. § 237.12, subd. 4.

[41] For example, in section 9.3.1.1 of its proposed ICA, Covad includes language that would obligate Qwest to provide feeder subloops, notwithstanding the FCC's ruling in the *TRO* that ILECs are not required to unbundle this network element. *See* TRO at ¶ 253.

expressly confers upon the FCC, not state commissions, the authority to determine whether BOCs have complied with the substantive provisions of section 271, including the "checklist" provisions.[42] It argues that state commissions have only a non-substantive, "consulting" role in that determination.[43]

33. Qwest further argues that the Commission lacks authority to arbitrate the terms and conditions of access to section 271 elements under state law. Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by section 271,[44] provide no role for state commissions. The FCC has confirmed that "[w]hether a particular [section 271] checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6)."[45]

34. To the extent that Covad's language concerning section 271 would require the Commission to unbundle elements that the FCC has declined to unbundle under section 251, Qwest further argues that the Commission lacks authority to do so. Qwest contends that Congress explicitly assigned the task of applying the section 251(d)(2) impairment test and "determining what network elements should be made available for purposes of subsection [251](c)(3)" to the FCC.[46] The Supreme Court confirmed that as a precondition to unbundling, Section 251(d)(2) "requires the [Federal Communications] Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[47] The D.C. Circuit confirmed in *USTA II* that Congress did not allow the FCC to have state commissions perform this work on its behalf.[48]

35. In Qwest's view, independent state commission authority is preserved in the savings clauses in the Act *only to the extent it is consistent with the Act*, including Section 251(d)(2)'s substantive limitations on the level of unbundling that may be authorized.[49] Section 251(d)(3), for example, protects only those state enactments that are "consistent with the requirements of this section."[50] Likewise, sections 261(b) and (c) protect only those state regulations that "are not inconsistent with the provisions of

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[42] 47 U.S.C. 271(d)(3).
[43] 47 U.S.C. 271(d)(2)(B). *See also Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by section 271 to impose binding obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004) (a "savings clause" is not necessary for Section 271 because the state commissions' role is investigatory and consulting, not substantive, in nature).
[44] *TRO* at ¶¶ 656, 662.
[45] *TRO* at ¶ 664 (emphasis added).
[46] 47 U.S.C. § 251(d)(2).
[47] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 391-92 (1998).
[48] *See United States Telecom Assoc. v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004) (*USTA II*).
[49] *TRO* ¶¶ 193-95. *See also Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) ("we cannot now imagine" how a state could require unbundling of an element consistently with the Act where the FCC has not found the statutory impairment test to be satisfied).
[50] 47 U.S.C. § 251(e)(2)(B).

this part" of the Act or the Commission's regulations to implement this part. Nor, Qwest argues, does Section 252(e)(3) help Covad; that simply says that "nothing in *this section*" — that is, Section 252 — prohibits a state from enforcing its own law, 47 U.S.C. § 252(e)(3) (emphasis added), but the relevant limitations on the scope of permissible unbundling that are at issue are found in section 251.[51]

36. In addition, Qwest argues that even if the Commission had the authority to make the impairment determinations that must precede any decision to unbundle a particular element, the impairment standard cannot be implemented absent further guidance from FCC. The FCC's impairment standard was sharply criticized in *USTA II* as being "vague almost to the point of being empty."[52]

37. Finally, Qwest argues that Covad's proposal to price section 271 elements at TELRIC rates is unlawful. It argues that the FCC ruled unequivocally that any elements an ILEC unbundles pursuant to section 271 are to be priced based on the section 201-02 standard that rates must be just, reasonable, and nondiscriminatory.[53] In so ruling, the FCC confirmed, consistently with its prior rulings in section 271 orders, that TELRIC pricing does not apply to these network elements.[54] In *USTA II*, the D.C. Circuit reached the same conclusion, rejecting the CLECs' claim that it was "unreasonable for the Commission to apply a different pricing standard under Section 271" on the basis that "we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment."[55] Qwest further contends that the FCC has exclusive authority to determine whether rates are just and reasonable under section 202 of the Act.

38. The Department contended, and the Commission agreed, in the recent *Covad/Qwest Commercial Line Sharing Agreement* docket,[56] that under the Act, there is no federal requirement that Qwest's ongoing section 271 obligations need to be addressed in an interconnection agreement over Qwest's objection. This is because there is no obligation to place section 271 obligations in an interconnection agreement, with its concurrent procedures for formal negotiation, arbitration, and approval. The Department does not recommend that the Commission require language in this agreement regarding Qwest's section 271 obligations. The Department recommends that the Commission adopt the Qwest definition of UNE in Section 4.0 and Qwest's proposed language for Section 9.1.1.

39. For the same reasons, the Department recommends that the Commission adopt the Qwest language for the following sections: section 9.1.5 (concerning access to 271 elements at any technically feasible point); section 9.2.1.4 (access to more than

[51] *See* 47 U.S.C. § 251(d)(2).
[52] *USTA II*, 359 F.3d at 572.
[53] *TRO* at ¶¶ 656-64.
[54] *Id.*
[55] *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.
[56] *In the Matter of a Commission Investigation Regarding the Status of the Commercial Line Sharing Agreement Between Qwest Corporation and DIECA Communications d/b/a Covad*, Docket No. P-5692, 421/CI-04-804, Order Directing Qwest to File Commercial Agreements (September 27, 2004).

two DS3 loops under 271); sections 9.3.1.1, 9.3.1.2, 9.3.2.2, and 9.3.2.2.1 (availability of feeder subloops as 271 elements)[57]; and section 9.6 (g) (access to UDIT on routes where PUC has found no impairment).

40. The Department has different recommendations with regard to section 9.1.1.7. This section addresses pricing for section 271 elements. Although Qwest wants no mention in the agreement of its obligations under section 271 or state law, Qwest proposes language in this section establishing that on the effective date of the interconnection agreement it will charge prices from its website or tariff for elements for which it has a section 271 obligation that have been removed from the list of section 251 elements. The Department recommends that this issue be addressed in a separate commercial agreement or through the use of the change-of-law provision of the interconnection agreement. Unless the parties have agreed to it, the Department recommends that there be no language concerning pricing of elements no longer required under section 251. The Department accordingly recommends that Section 9.1.1.7 be deleted.

41. Section 9.1.1.6 addresses the provision of elements that, under the TRO, are no longer required to be offered as UNEs under section 251. Covad proposes language that would require Qwest to continue providing these elements pursuant to section 271 or state law; Qwest proposes language that would expressly omit from the agreement all elements that it believes that it need not offer as UNEs under section 251. The Department does not believe that the language proposed by either party for section 9.1.1.6 is appropriate. The Department recommends that, as to elements that Qwest is not required to offer under section 251, the simple omission of language is sufficient to exclude them from the interconnection agreement. As to elements that, as a result of FCC or court decisions, may in the future be removed from the class of elements that are required to be offered under section 251, the Department contends that the change of law provision in the interconnection agreement should be sufficient to address the issue. The Department recommends the following language:

> 9.1.1.6 If on the Effective Date of this Agreement, Qwest is no longer obligated to provide to the CLEC one or more Network Elements that had formerly been required to be offered pursuant to Section 251 of the Act, Qwest will continue to provide the Network Element(s) already in service until an amendment is accepted by the Commission that includes a description of the Network Element(s) and gives a transition plan describing when the Network Element(s) will no longer be available.

42. For the same reasons, the Department recommends that neither party's language should be adopted for the following six sections: section 9.2.1.3 (access to

[57] Under the *TRO*, ILECs need not provide access to their fiber feeder loop plant as stand-alone UNEs; rather, ILEC subloop unbundling to is limited distribution loop plant UNEs. *See TRO* ¶¶ 253-54. Instead of offering UNEs, the FCC stated that it "expect[s] that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops." *TRO* ¶ 253.

high capacity loop elements as 251 elements may be restricted); section 9.6.1.5 (access to DS3 UDIT, if access to dedicated DS3 transport along certain routes is no longer available under section 251); sections 9.6.1.5.1 and 9.6.1.6.1 (regarding a website giving the DS3 and DS1 routes where the UNE is not required); section 9.6.1.6 (access to DS1 UDIT, if access to dedicated DS1 transport along certain routes is no longer available under section 251); and section 9.21.2 (access to UNE-P, if access to UNE-P is no longer available under section 251). Instead, as to elements that Qwest is not required to offer under section 251, the interconnection agreement should simply omit the elements. As to elements that are excluded from the list of section 251 elements in the future by FCC or court decisions, the change of law provision in the interconnection agreement is sufficient to address the issue. For these sections, the Department recommends that the parties should provide language in a compliance filing consistent with these recommendations.[58]

C. Applicable Law

43. Section 252(b) of the Act provides for state commission arbitration of unresolved issues related to negotiations for interconnection, resale and access to unbundled network elements. Specifically, it authorizes the Commission to "resolve each issue set forth in [an arbitration] petition and the response, if any, by imposing appropriate conditions . . .."[59] In resolving the open issues and imposing appropriate conditions, the Commission must ensure that the resolution meets the requirements of section 251, including the regulations adopted pursuant to section 251; must establish any rates for interconnection, services, or network elements according to subsection (d); and must provide a schedule for implementation of the terms and conditions by the parties to the agreement.

44. Interconnection agreements have been broadly defined by the FCC as agreements that create "ongoing obligation[s] pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation"[60] or that otherwise contain "an ongoing obligation relating to section 251 (b) or (c)."[61] Section 252(e) of the Act contemplates that interconnection agreements must be submitted to state commissions for approval or rejection. The term interconnection agreement, for this purpose, excludes obligations that solely relate to non-251 network elements. The *TRO* contemplates that, as to non-

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[58] The change of law provision in the draft agreement that was filed with the petition for arbitration was in section 9.1.1.8. There, Covad proposed a reference to the amendment process in section 5 of the agreement that appears to be similar to the language offered by the Department here. In the most recent version of the draft interconnection agreement, section 9.1.1.8 is described as being intentionally omitted. The Department states in its brief that the parties have agreed to incorporate the change of law provision that was in their previous interconnection agreement and that this language is acceptable to the Department, but it is not clear where this language is now located within the agreement.

[59] 47 U.S.C. § 252(b)(4)(C).

[60] *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)*, Memorandum Opinion and Order, FCC 02-276 ¶ 8 (Oct. 4, 2002) (*Declaratory Order*).

[61] *Declaratory Order*, n. 26.

251 elements, parties would negotiate alternative long-term arrangements, other than interconnection agreements.[62]

45. Section 271 of the Act addresses an RBOC's authority to provide interLATA services. An RBOC may apply to the FCC for authorization to provide interLATA services.[63] Before making a determination on the application, the FCC must consult with the state commission of any state that is the subject of the application in order to verify the BOC's compliance with checklist items.[64] The FCC is authorized to take enforcement action if a BOC ceases to meet the conditions required for approval and is required to establish procedures to review such complaints in an expeditious manner.[65]

D. Decision

46. The Administrative Law Judge agrees with the Department that there is no legal authority in the Act, the *TRO*, or in state law that would require the inclusion of section 271 terms in the interconnection agreement, over Qwest's objection. The authority of a state commission must be exercised consistently with the Act; both the Act and the *TRO* make it clear that state commissions are charged with the arbitration of section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to section 271. Although this is an "open issue" for purposes of determining what issues are subject to arbitration, the law provides no substantive standard that would permit the language Covad proposes. Furthermore, to the extent the *Verizon-Maine* decision stands for the proposition that a state commission has authority to arbitrate section 271 claims, the decision is distinguishable on its facts as it appears to be premised on enforcement of a specific commitment that Verizon made to the Maine Commission during 271 proceedings to include certain elements in its state wholesale tariff.

47. Accordingly, the interconnection agreement should incorporate Qwest's definition of UNE in Section 4.0 and Qwest's proposed language for Section 9.1.1, as well as sections 9.1.5 (concerning access to 271 elements at any technically feasible point); section 9.2.1.4 (access to more than two DS3 loops under 271); sections 9.3.1.1, 9.3.1.2, 9.3.2.2, and 9.3.2.2.1 (availability of feeder subloops as 271 elements); and section 9.6 (access to UDIT on routes where PUC has found no impairment).

48. The Administrative Law Judge also agrees with the Department that there should be no language in the agreement concerning the availability or pricing of elements no longer required under section 251. The *TRO* contemplates that the parties would negotiate alternative long-term arrangements, other than interconnection agreements, to address provision of these elements. But if Qwest chooses to exclude

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[62] *See, e.g., TRO* ¶265 as to line sharing, which the FCC contemplated being removed from the class of section 251 UNEs.
[63] 47 U.S.C. § 271(d)(1).
[64] *Id.*, § 271(d)(2)(B).
[65] *Id.*, § 271(d)(6).

these elements from the scope of the interconnection agreement, which is its right, Qwest should not be permitted to use the interconnection agreement to establish its section 271 rights or the prices it is permitted to charge for these elements, thereby short-circuiting the process it would have to go through to negotiate a separate commercial agreement. The pricing of these elements and the effective date of these prices should be addressed in a separate agreement. Section 9.1.1.7 of the proposed agreement should be deleted.

49. With regard to elements that may in the future become unavailable pursuant to section 251, the Administrative Law Judge agrees that a separate commercial agreement or the change of law provision in the interconnection agreement should control provision and pricing of these elements. Until the FCC releases its final rules, it is simply not a useful exercise to draft language for this interconnection agreement that would attempt to predict what elements may be removed from the section 251 obligation or what "271 access" really means. As to elements that Qwest is not required to offer under section 251, the interconnection agreement should simply omit reference to the elements. As to elements that become excluded from the list of section 251 elements in the future by FCC or court decisions, the change of law provision in the interconnection agreement is sufficient to address the issue.[66]

50. For the following sections, the parties should provide language in a compliance filing that is consistent with the above recommendations: section 9.2.1.3 (access to high capacity loop elements); section 9.6.1.5 (access to DS3 UDIT); sections 9.6.1.5.1 and 9.6.1.6.1 (regarding a website giving the DS3 and DS1 routes); section 9.6.1.6 (access to DS1 UDIT); and section 9.21.2 (access to UNE-P).

Issue No. 3: Commingling of Section 271 Elements

A. Issue

51. The only disputed issue for the Commission to decide in connection with Issue 3 is whether Qwest is required to combine or commingle unbundled network elements provided under section 251 with elements or services provided under section 271 (involving section 9.1.1.1 and Covad's definition of a "Section 251(c)(3) UNE" within section 4.0 of the proposed agreement).

B. Position of Parties

52. Covad's proposed language defines commingling in section 4.0 as the "connecting, attaching, or otherwise linking of a 251(c)(3) UNE . . . 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 . . .." Covad's reference to facilities obtained "pursuant to any

[66] The parties should clarify in a compliance filing where the change of law provision is within the agreement and what the agreed-upon language is, if the amendment process is different than that proposed by the Department for section 9.1.1.6. If the Department's proposed language for section 9.1.1.6 is consistent with the agreed-upon language, it should be included in the agreement.

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Ken Nickolai	Commissioner
Marshall Johnson	Commissioner
Phyllis Reha	Commissioner
Thomas Pugh	Commissioner

In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)

ISSUE DATE: March 14, 2005

DOCKET NO. P-5692, 421/IC-04-549

ORDER RESOLVING ARBITRATION ISSUES AND REQUIRING FILED INTERCONNECTION AGREEMENT

PROCEDURAL HISTORY

Since 1999, DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) has operated in Minnesota pursuant to an interconnection agreement (ICA) with US WEST Communications, Inc. (US WEST), and its successor Qwest Corporation (Qwest).[1] That agreement has expired, but Covad and Qwest agreed to continue to honor its terms as they worked to revise it.

On April 6, 2004, after the parties failed to reach agreement on twelve issues, Covad petitioned the Commission to arbitrate these matters.

On April 12, 2004, Qwest petitioned to dismiss portions of Covad's petition.

On April 20, 2004, the Minnesota Department of Commerce (the Department), Covad and Qwest filed comments.

On April 28, 2004, the Commission issued its ORDER DENYING MOTION TO DISMISS WITHOUT PREJUDICE AND ASSIGNING ARBITRATOR, which referred all issues for arbitration before Administrative Law Judge (ALJ) Kathleen D. Sheehy of the Office of Administrative Hearings. The Department intervened in the case.[2]

On September 20-22, 2004, the ALJ conducted arbitration hearings in St. Paul, Minnesota.

On October 15, 2004, the parties filed an Updated Joint Disputed Issues List. This document contains, among other things, Covad's proposed list of information that Qwest must provide to competitors when it retires copper facilities in favor of fiber-optic ones.

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[1] *In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b)*, Docket No. P-5692, 421/M-99-196.

[2] The Department's petition to intervene is granted as a matter of right. Minn. Stat. § 216A.07, subd. 3; Minn. Rules part 7812.1700, subp. 10.

On December 16, 2004, the ALJ filed her Arbitrator's Report making recommendations for addressing five substantive issues, the remainder having been resolved by the parties.

On January 10, 2005, the Commission received exceptions to the Arbitrator's Report from Covad, the Department and Qwest.

The Commission met on January 27, 2004, to consider this matter. The record of this case closed on that date.

FINDINGS AND CONCLUSIONS

I. BACKGROUND

A. Procedure

The federal Telecommunications Act of 1996 (1996 Act)[3] was designed to open telecommunications markets to competition, including the local exchange market. (Conference Report accompanying S. 652). The 1996 Act opens markets by requiring each incumbent local exchange carrier (ILEC) to –

- permit competitive local exchange carriers (CLECs) to purchase its services at wholesale prices and resell them to retail customers ("end use customers");
- permit CLECs to interconnect with its network on just, reasonable and nondiscriminatory terms; and
- offer unbundled network elements (UNEs) – that is, offer to rent elements of its network to CLECs without requiring the CLEC to also rent unwanted elements – on just, reasonable, and nondiscriminatory terms.[4]

A CLEC desiring to provide local exchange service can seek agreements with an ILEC related to interconnection with the ILEC's network, the purchase of finished services for resale, and the purchase of the ILEC's UNEs.[5] If the ILEC and the CLEC cannot reach agreement, either party may ask the State commission to arbitrate unresolved issues and to order terms consistent with the 1996 Act.[6] In particular, parties may ask a state Commission to determine the total element long-

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[3] Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

[4] 47 U.S.C. § 251(c).

[5] 47 U.S.C. §§ 251(c), 252(a).

[6] 47 U.S.C. § 252(b).

run incremental cost (TELRIC) of UNEs, interconnection, and methods of obtaining access to UNEs.[7] This Commission has resolved many interconnection disputes through arbitration.[8]

B. Decision Standard

In resolving the issues in this arbitration and imposing conditions, the Commission must (1) ensure that the resolution meets the requirements of § 251 of the 1996 Act, including any legally enforceable regulations prescribed by the Federal Communications Commission (FCC) pursuant to § 251; (2) establish any rates for interconnection, services or network elements according to § 252(d) of the 1996 Act; and (3) provide a schedule for implementation by the parties.[9]

The Commission may also establish and enforce other requirements of state law when addressing issues related to intercompany agreements under § 252.[10] The Minnesota Legislature directs the Commission to encourage, among other things, economically efficient deployment of infrastructure for higher speed telecommunication services, fair and reasonable competition for local exchange telephone service, improved service quality, and customer choice.[11] In addition, the Commission must adopt policies "using any existing federal standards as minimum standards and incorporating any additional standards or requirements necessary to ensure the provision of high-quality telephone services throughout the state."[12] These policies must facilitate the kind of interconnection that "the commission considers necessary to promote fair and reasonable

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[7] 47 C.F.R. §§ 51.501, 51.505.

[8] See, for example, *In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with U S WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Docket No. P-442, 421/M-96-855; P-5321, 421/M-96-909; P-3167, 421/M-96-729 (*Consolidated Arbitration*); *In the Matter of a Generic Investigation of US West Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements*, Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540 (*Generic Cost Case*); *In the Matter of the Commission Review and Investigation of Qwest's Unbundled Network Elements Prices*, Docket No. P-421/CI-01-1375; *In the Matter of the Commission's Review and Investigation of Certain Unbundled Network Element Prices of Qwest*, Docket No. P-442, 421, 3012/M-01-1916; *In the Matter of the Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No. P-442, 421/IC-03-759.

[9] 47 U.S.C. § 252(c).

[10] 47 U.S.C. §§ 251(d)(3), 252(e)(3), 253(b), 261 and 601(c)(1); *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 13042 (1996) (*Local Competition First Report and Order*) at ¶¶ 233, 244.

[11] Minn. Stat. § 237.011.

[12] Minn. Stat. § 237.16, subd. 8(a).

competition"[13] and, in particular, must "prescribe appropriate regulatory standards for new local telephone service providers that facilitate and support the development of competitive services...."[14]

To these ends, the Legislature authorizes the Commission to remedy unreasonable or insufficient services or omissions[15] by making any just and reasonable order necessary, up to and including revoking a carrier's authority to provide service.[16]

In short, the Commission must impose terms and conditions in this proceeding that are just, reasonable, nondiscriminatory and fair to both the new entrants and the incumbent, consistent with the requirements of federal and state law.

II. FUTURE PROCEEDINGS

The 1996 Act requires parties to submit "any interconnection agreement adopted by negotiation or arbitration . . . for approval to the State commission."[17] The State commission must then approve or reject the agreement within 90 days as to a negotiated agreement and 30 days as to an arbitrated contract.[18]

The 1996 Act does not establish any deadline by which parties must submit a final ICA. It leaves this to State commissions, directing them to provide in their arbitration decisions a schedule for implementation.[19]

The Commission will require the parties in this arbitration to submit their final ICAs, containing all arbitrated and negotiated terms, within 30 days of this Order. The parties shall put their entire ICAs together and craft any additional language that the Commission has not specifically ordered in this arbitration.

The approval proceeding will enable the Commission to (1) review, for the first time, provisions arrived at through negotiations; (2) make any necessary adjustments to the arbitrated terms; and (3) ensure that the final ICA language comports with the Commission's decisions in this arbitration. The Commission will review the entire agreement for compliance with the relevant law and consistency with the public interest as required by the 1996 Act.[20]

SPECIFIC FINDINGS AND CONCLUSIONS

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[13] *Id.* at subd. 8(a)(2).

[14] *Id.* at subd. 8(a)(6).

[15] Minn. Stat. § 237.081.

[16] Minn. Stat. § 237.16, subd. 5.

[17] 47 U.S.C. § 252(e)(1).

[18] 47 U.S.C. § 252(e)(4).

[19] 47 U.S.C. § 252(c).

[20] See 47 U.S.C. § 252(e).

Covad and Qwest initially identified 12 unresolved issues for arbitration. Further negotiations reduced this list to the following:

Issue No. 1.A: If Qwest retires a copper facility serving Covad's retail customers, must Qwest offer an alternative service that does not degrade service or increase Covad's costs?

Issue No. 1.B: If Qwest retires a copper facility serving Covad's retail customers, what information must Qwest provide to Covad?

Issue No. 2: How should the ICA address the obligations that Qwest agreed to undertake as part of securing FCC approval to enter the long-distance telecommunications market pursuant to § 271?

Issue No. 3: If Covad asks Qwest to "commingle" § 251 and § 271 elements, must Qwest comply?

Issue No. 5: If a) Qwest's central office has space to permit CLECs to collocate their equipment sufficiently close together to communicate without the need of regenerating their signals to each other, b) Qwest denies the CLECs the opportunity to locate their equipment in such proximity, causing them to collocate their equipment further apart, and c) the CLECs ask Qwest to regenerate their signals to each other, then may Qwest charge the CLECs for the regeneration service?

Issue No. 9: How soon after rendering a bill may Qwest begin imposing late-payment fees? How long must Qwest wait after payment is due before Qwest may stop processing Covad's orders? How long must Qwest wait after payment is due before Qwest may disconnect service to Covad?

The Commission will consider these arbitrated issues below.

I. ARBITRATOR's REPORT

Having reviewed the full record of this proceeding and provided an opportunity for all parties to be heard, the Commission generally finds the recommendations of the Arbitrator's Report to be a thorough and reasonable analysis of the issues. Except as otherwise specified below, the Commission concurs in the ALJ's analysis, findings and recommendations, and will accept, adopt and incorporate them into this agreement. In particular, the Commission adopts the ALJ's recommendations regarding Issue No. 2 (excluding both Covad's and Qwest's language pertaining to § 271 elements),[21] No. 3 (requiring Qwest to comply with requests to commingle § 251 and § 271 elements) and No. 5 (permitting Qwest to charge a fee for providing regeneration service).

II. ISSUES

[21] While concurring in the ALJ's recommendations, the Commission clarifies that it has not surrendered any of its jurisdiction to determine which topics are properly the subject of interconnection agreements, or to review those agreements. In particular, the Commission refrains from adopting the ALJ's conclusions regarding the definition of ICAs, the relationship between ICAs and "commercial agreements," or filing obligations, which are the subject of other dockets pending before the Commission.

Issue 1.A: If Qwest retires a copper facility serving Covad's retail customers, must Qwest offer an alternative service that does not degrade service or increase Covad's costs? (ICA Section 9.1.15)

A. The Issue

Traditionally telephone lines were used to transmit a single voice signal over each circuit, but the lines have the capacity to transmit multiple signals simultaneously. Using digital subscriber line (DSL) technology, a subscriber may use the capacity of a standard copper phone line to send and receive packets of data (enabling the subscriber to use the internet, for example) over some capacity while leaving other capacity free for traditional voice service. Qwest offers DSL service to its retail customers. Covad, by leasing the use of capacity on Qwest's lines,[22] is able to compete with Qwest in delivering high-capacity DSL service to retail customers.

To achieve even greater transmission capacity, a telephone company may install fiber-optic cables.[23] To encourage the deployment of these lines, the FCC has refrained from requiring incumbent telephone companies to permit competitors to lease the use of a company's fiber-optic cables.[24]

In the course of modernizing its system, Qwest may install fiber-optic cables to carry signals that used to be carried by copper lines. If Qwest were to use fiber-optic cables at some point in a line over which Covad provides DSL service, Covad's service would be impeded. Consequently, whenever Qwest replaces all or a part of a copper line with fiber optics, Covad proposes that Qwest be compelled to offer an alternative service that does not degrade Covad's DSL service or increase Covad's costs. Qwest opposes this proposal.

B. The ALJ's Recommendation

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[22] ILECs must permit CLECs to lease the use of a customer's line. The FCC used to require ILECs to give the CLECs the additional option of leasing only enough capacity to provide DSL service. *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*) at 20931-38, ¶¶ 38-53 (1999). The FCC is now phasing out this policy, although CLECs may continue the practice regarding their existing customers. CLECs retain the discretion to lease the entire line's capacity. *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 Capacity,* Report and Order and Order on Remand and a Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98 and 98-147 (September 17, 2003) (*Triennial Review Order* or *TRO*) at ¶¶ 255-279.

[23] See, for example, TRO ¶ 278 ("While copper loops enable carriers to deliver xDSL-based broadband services, FTTH loops significantly enhance the broadband capabilities a carrier can deliver to consumers.")

[24] TRO ¶¶ 272-297.

Noting that the FCC does not require ILECs to provide the remedies Covad suggests, the ALJ recommended that the Commission adopt Qwest's proposed language instead. This language requires Qwest, when it plans to replace a copper facility with a fiber facility, to send an electronic notice to CLECs, to post a public notice on its site on the World Wide Web, to file a public notice with the FCC and to comply with any state-mandated requirements. But the language does not provide any additional remedies.

The Department and Qwest support the ALJ's recommendation. Qwest argues that the FCC has already ruled on this question. Moreover, Qwest emphasizes the benefits that consumers will receive from the voice, internet and video services that a fiber-optic network extending all the way to a customer's curb ("fiber to the curb" or "FTTC") or home ("fiber to the home or "FTTH") can provide. On this basis, Qwest discourages the Commission from taking any action that could burden the deployment of such a network. Moreover, Qwest argues that Covad's proposed language is too ambiguous to be workable.

Covad opposes the ALJ's recommendation, arguing that its own proposal would better promote competition and Minnesota state policy. Covad acknowledges that the FCC does not require incumbent telephone companies to provide the remedy Covad is seeking, but argues that the FCC has not precluded states from requiring it. Covad denies that it is asking the Commission to mandate copper loops, and notes that its proposed language explicitly exempts FTTC and FTTH lines.

C. Applicable Law

An ILEC that proposes to change its network in a manner that would affect a CLEC's service must provide at least six months notice, or provide the CLEC with an opportunity to object.[25]

States retain jurisdiction over an ILEC's operations.[26] The FCC notes:

> We stress that we are not preempting the ability of any state commission to evaluate an incumbent LEC's retirement of this copper loops to ensure such retirement compiles with any applicable state legal or regulatory requirements.... We understand that many states have their own requirements related to discontinuance of service, and our rules do not override these requirements. We expect that the state review process, working in combination with the Commission's network disclosure rules noted above, will address the concerns ... regarding the potential impact of an incumbent LEC retiring its copper loops.[27]

The Commission is authorized to prescribe the terms and conditions of service delivery for the

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[25] 47 U.S.C. § 251(c)(5), 47 C.F.R. §§ 51.325-335.

[26] 47 U.S.C. §§ 251(d)(3); § 261(b), (c); 1996 Act § 601(c)(1). The Conference Committee Report for the 1996 Act expounds on the purpose of the uncodified language at § 601(c)(1) as follows: "The conference agreement adopts the House provision stating that the bill does not have any effect on any other ... State or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws." H. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 201 (1996), reprinted in 1996 U.S.C.C.A.N. 215.

[27] TRO ¶ 284; see also ¶ 271.

purpose of bringing about fair and reasonable competition for local exchange telephone services.[28] The Commission should exercise its authority to, among other objectives, encourage economically efficient deployment of infrastructure for higher speed telecommunications services, maintain or improve service quality, promote customer choice, and ensure consumer protections.[29]

D. Commission Decision

The Commission concurs with the ALJ's recommendation and will adopt it. Covad's proposed language contains too many ambiguities to constitute a workable interconnection term. Moreover, the Commission is not persuaded that Covad's proposed remedies are warranted at this time.

The Commission acknowledges the concern that an ILEC might use its discretion to retire copper facilities for the purpose of disadvantaging competitors that rely on those facilities.[30] To guard against this possible anti-competitive behavior, the FCC adopted specific notice requirements and the parties propose notice provisions as part of this ICA, as discussed below. The FCC provides a mechanism to appeal an ILEC's decision; this is in addition to the complaint process offered under Minnesota law. Furthermore, Qwest has indicated that it has no plans to retire copper facilities as it deploys fiber-optic facilities.[31] The record indicates that Qwest has never ended service to any of Covad customer, in Minnesota or beyond, due to the retirement of a copper loop.[32]

When Covad receives notice that Qwest is planning to deploy fiber-optic facilities, and Covad concludes that the deployment is anti-competitive, the Commission's complaint process provides the appropriate forum for seeking redress. Given Qwest's past practice and assurances, and the notices required by federal law and this ICA, the Commission concludes that no additional safeguards are required in this agreement.

Issue 1.B: Should the ICA specify the content of the notice Qwest sends to Covad announcing Qwest's intention to retire a copper facility serving

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[28] Minn. Stat. § 237.16, subd. 1(a).

[29] Minn. Stat. § 237.011.

[30] For example, the FCC states in the TRO at ¶ 277:

> The record indicates that deployment of overbuild FTTH loops could act as an additional obstacle to competitive LECs seeking to provide certain services to the mass market. By its nature, an overbuild FTTH deployment enables an incumbent LEC to replace and ultimately deny access to the already-existing copper loops that competitive LECs were using to serve mass market customers. In this regard, incumbent LECs potentially have an entry barrier within their sole control (i.e., the decision to replace pre-existing copper loops with FTTH)."

[31] Proposed ICA section 9.2.1.2.3.1; Tr. 3:92-93; *TRO* at ¶ 249, n. 746 ("[T]he construction of new facilities does not in itself alter a competitive LEC's ability to use the incumbent LEC's network. Qwest explains that it 'does not proactively remove copper facilities in the case of an overlay' so that requesting carriers should be able to continue providing services in these circumstances.")

[32] Tr. 2:165-66.

Covad's retail customers and replace it with a fiber-optic facility? (ICA Section 9.1.15)

A. The Issue

All parties agree that Qwest should notify Covad when Qwest plans to retire a copper facility that Covad uses to serve its customers. But they disagree about the content of that notice. Covad proposes a list of items the notice should include; in particular, Covad asks that the notice list the street addresses of the customers to be affected by the proposed network change.

Qwest proposes to continue its practice of identifying the "distribution area" in which the facilities will be retired. With this information, Covad can identify the street addresses of affected parties through the use of Qwest's "raw loop data tool" available at Qwest's site on the World Wide Web. Covad alleges that each time Qwest announces another facility retirement, Covad must conduct up to six hours of research to determine whether any Covad customers will be affected. In contrast, Qwest claims that a search should take only 10 - 20 minutes.

B. Applicable Law

The Commission is authorized to prescribe the terms and conditions of service delivery for the purpose of bringing about fair and reasonable competition for local exchange telephone services.[33]

When an ILEC makes changes to its network that will affect a CLEC's performance or ability to serve customers, the ILEC must give public notice that includes, among other things,

- "the location(s) at which the changes will occur,"
- a "description of the reasonably foreseeable impact of the planned changes" and
- the name and telephone number of someone at the ILEC who can provide additional information.[34]

C. The ALJs' Recommendation

Covad's proposed language on this issue first appears in the record of the case weeks after the hearing.[35] Whether for this reason or another, the ALJ observed that the record contains little information regarding why Qwest does not provide the addresses, and why it is burdensome for Covad to acquire them through the use of the raw loop data tool.

The ALJ reasoned that a notice should contain information sufficient to allow a CLEC to determine the street addresses that would be affected by a change. Nevertheless, the ALJ did not recommend adopting the Department's proposal to include such a statement in the ICA. The ALJ concluded that this language is too general to guide the parties' business relationship. Given that Qwest's notices identify the distribution area where the retirement will occur, along with the name and phone number of a person who can provide additional information, the ALJ

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[33] Minn. Stat. § 237.16, subd. 1(a).

[34] 47 C.F.R. §§ 51.325 - .327.

[35] See Updated Joint Disputed Issues List (October 15, 2004) at 1-2.

concluded that Qwest has fulfilled its duty to provide Covad with all the tools necessary to learn which customers will be affected. The ALJ recommended rejecting Covad's proposed list of items to include in the retirement notices.

Covad and the Department oppose the recommendation. Covad argues that unless Qwest identifies which customers will be affected by a proposed network change, Qwest fails to fulfill its duty to identify the location of the network changes and the reasonably foreseeable impacts. Covad and the Department observe that another Bell Operating Company ILEC is able to provide customer address information with its notices. Covad and the Department argue that Qwest has, in effect, shifted to Covad the burden of determining the impact of proposed network changes. This burden is not relieved by the fact that Qwest includes a contact person and phone number in its notices.

Qwest supports the Arbitrator's recommendation. Qwest argues that Covad's list of requirements would be unduly burdensome. In the interest of removing one of Covad's objections, Qwest offers to provide training in the use of its raw loop data tool.

D. Commission Decision

The Commission appreciates the concerns raised by all parties. As the ALJ realized, however, the conflicting record of this issues does not lend itself to a highly-prescriptive remedy. Qwest claims that it can determine which customer addresses are served in a distribution area within 10 - 20 minutes; Covad claims the process takes up to six hours. And neither side is able to justify its own estimate or knowledgeably criticize the others'.

Lacking a more definitive record, the Commission concurs in the ALJ's recommendation to decline Covad's detailed language and to adopt Qwest's simpler terms. But in addition, the Commission will also adopt language similar to the Department's proposal: When planning to retire a copper facility, the notice that Qwest provides to CLECs shall contain sufficient information to enable a CLEC, upon the taking of reasonable actions, to accurately identify the address of each end user customer affected by the retirement. While the ALJ approved of this policy, she found the language to be more general than most ICA language. The Commission concurs with Covad and the Department, however, that Covad should not be expected to expend unreasonable effort to identify which customers will be affected by changes to Qwest's plant. This language expresses the appropriate public policy with as much specificity as the record will support.

Finally, the Commission is gratified by Qwest's offer to provide training in the use of its raw loop data tool. Concerns about whether all parties are bearing their appropriate burdens can be reduced if the burdens themselves can be reduced. If Covad can determine within 20 minutes which of its customers will be affected by a plant retirement, much of the concern about this issue will be eliminated.

Issue No. 9: Timelines (ICA Sections 5.4.1, 5.4.2, 5.4.3)

A. The Issue

If a billed party does not pay undisputed amounts due under the ICA, how long must the billing party wait before pursuing remedial actions such as imposing late-payment charges, or refraining from processing new orders from the billed party, or discontinuing service to the billed party?

(While the proposed language would apply to Covad and Qwest equally, in practice Covad anticipates buying more elements and services from Qwest than Qwest anticipates buying from Covad. For ease of exposition, "billing party" is hereafter referred to as Qwest, and "billed party" as Covad.)

B. Applicable Law

Section 252(b) of the 1996 Act authorizes the Commission to arbitrate unresolved issues and order terms consistent with the Act. In addition, Minnesota Statutes § 237.16, subdivision 1(a), authorizes the Commission to prescribe the terms and conditions of service delivery for the purpose of bringing about fair and reasonable competition for local exchange telecommunications services.

C. The ALJs' Recommendation

The ALJ recommended that the Commission permit Qwest to –

- begin imposing a late-payment charge if Covad does not pay the amounts due under the ICA by the "payment due date" 30 days after Qwest produces an invoice or 20 days after Covad receives the invoice, whichever is later (ICA Section 5.4.1),
- stop processing Covad's orders if Covad fails to pay undisputed sums to Qwest for 60 days after the payment due date (ICA Section 5.4.2), and
- discontinue service to Covad, subject to Commission approval, if Covad fails to pay undisputed sums to Qwest for 90 days after the payment due date (ICA Section 5.4.3.).

Regarding Section 5.4.1, the ALJ concluded that permitting Qwest to begin imposing late-payment charges 30 days after the billing date is reasonable. Granting a longer review period might benefit Covad's cash flow but not its bill review process, the ALJ reasoned, because as a practical matter Covad will not be able to spend more than 30 days reviewing any bill before the next month's bill arrives. The ALJ also concluded that having separate payment due dates for various aspects of a bill would create administrative burdens. Qwest supports the ALJ's position, and opposes any exceptions.

The Department generally supports a 30-day period, but recommends extending the payment due date to 45 days for three types of items: 1) line splitting or loop splitting products,[36] 2) a missing

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[36] "Loop splitting" and "loop splitting" both involve a local service provider offering voice service and separate local service provider offering DSL service over the same line. *Line Sharing Order*, 14 FCC Rcd at 20932-35, ¶¶ 39-43.

circuit identification number (circuit ID), and 3) a missing Universal Service Ordering Code (USOC). Covad supports the Department's position, but also recommends a 45-day payment due date for "new products" to apply only for the first 12 months that Covad would order such products. Throughout the seven-state region where Covad has interconnection agreements with Qwest, Covad notes that its collocation bills run 500-700 pages, its transport bills run 850-1260 pages, and its UNE bills fill 30 boxes each month. Auditing these bills is a time-consuming process under the best of circumstances, Covad argues; missing identifying data or unfamiliar products will unavoidably prolong the process.

Regarding Section 5.4.2, Covad and the Department support the ALJ's recommendation to provide 60 days to resolve payment disputes before Qwest could cease processing Covad's new orders. Qwest asks for a 30-day period, whereas Covad initially sought 90 days. The Department argued that 60 days represented a fair balancing of Qwest's interest in prompt payment and the interests of Covad and its customers in having its orders processed; Covad subsequently conceded the merits of the Department's position.

Regarding Section 5.4.3, Covad and the Department support the ALJ's recommendation to provide 90 days to resolve payment disputes before Qwest could discontinue service to Covad. The parties' positions on this section are similar to their positions regarding Section 5.4.2. Qwest asks for a 60-day period, whereas Covad initially sought 120 days. The Department argued that 90 days represented a fair balancing of Qwest's interest in prompt payment and the interest of Covad and its customers in avoiding disconnection; again, Covad subsequently conceded the merits of the Department's position.

Qwest argues that it should be able to stop processing Covad's orders if Covad fails to pay undisputed sums for 30 days after the payment due date, and to discontinue Covad's service if Covad fails to pay undisputed sums for 60 days after the payment due date. Qwest asserts that these periods are commercially reasonable, reflect industry standards, and are incorporated into Qwest's own Statement of Generally Available Terms (SGAT). Qwest argues that the 60-day and 90-day periods give Covad insufficient motivation to make prompt payment, and leaves Qwest exposed to increased risk that Covad will incur a sizable debt and then default.

Covad and the Department counter that late-payment charges already provide an incentive to make timely payments, and that deposit requirements substantially offset the risk of default.

D. Commission Decision

Regarding Section 5.4.1, the parties are in agreement with the ALJ's recommendation that late-payment charges may apply generally 30 days after Qwest's invoice date. The Commission finds this policy reasonable as well. However, Covad and the Department are justified in saying that certain types of bills can be expected to take longer to audit. Specifically, it is clear that bills lacking a circuit ID will take longer to audit because, according to Covad, the first step in the audit is to ask Qwest to identify the relevant circuits for which the bill was rendered. The Commission finds it reasonable to grant 15 additional days for Covad to review these bills. To the extent that Qwest is concerned about the cash-flow consequences of the additional 15 days, Qwest can use greater efforts to ensure that its bills contain the appropriate identifying information.

While Covad and the Department argue to adjust the payment due date for line splitting or loop splitting products, and bills lacking a USOC, Qwest makes persuasive counter-arguments. Qwest

notes that it assigns a unique identifying number to each line over which Covad provides DSL service, and Qwest provides this number to Covad as part of the Firm Order Confirmation and the Customer Service Record. This identifying number can permit Covad to verify the line-sharing products and services for which it is billed.

Regarding missing USOCs, Qwest notes that this is an issue only in its Western region, which does not include Minnesota.

Covad also seeks an additional 15 days for "new products," but the meaning of and the purpose for this proposal are not well developed in the record. Moreover, while Qwest argues that any adjustment to the payment due date will cause administrative burdens, Qwest's strongest objections are to the idea of temporary adjustments for new products. Implementing this system would require Qwest not only to identify when Covad orders a product it had not ordered before, but to track how long Covad had been ordering each new product it tries, and to adjust the payment due date accordingly. The Commission will decline to grant any additional variations to the 30-day payment due date at this time.

The ALJ expressed doubt that Covad could benefit from having more than 30 days in which to review monthly bills, given the flow of new bills. However, the record demonstrates that bill review is a complex and time-consuming process involving constant back-and-forth communication between Covad and Qwest; Covad's staff may be working on February's billing statement while awaiting Qwest's reply to inquiries about January's statement. Covad and the Department reason that additional time would help ameliorate some of the challenges posed by billing items that lack a circuit ID code. The Commission finds that extending the payment due date by 15 days for such billing items, while retaining a 30-day billing period for other items, represents a reasonable balancing of all parties' concerns.

Regarding Sections 5.4.2 and 5.4.3, the Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order.

ORDER

1. The Commission decides the arbitrated issues as discussed in the body of this Order. In summary, the Commission adopts the recommendations of the Arbitrator's Report except as follows.

   Issue 1.B: Regarding the retirement of copper facilities, Qwest shall –

   - provide adequate training to Covad on the use of Qwest's raw loop data tool to enable Covad to promptly identify the address of customers affected by the proposed retirement of a copper facility, and

   - when proposing to retire a copper facility, provide a retirement notice to Covad containing sufficient information to enable a competitive local exchange carrier, upon the taking of reasonable actions, to accurately identify the address of each end user customer affected by the retirement.

   Issue 9: Regarding the length of time a billing party must wait before imposing late-

payment fees, withholding the processing of orders, or withholding service –

- a billing party shall wait at least 45 days after a bill is rendered before imposing a late-payment fee for an item missing a circuit identification number, or 30 days after a bill is rendered for any other item,
- a billing party shall wait at least 60 days after reaching a billing dispute before the party may cease processing orders for the non-paying party, and
- a billing party shall wait at least 90 days after the date payment is due before disconnecting service to a non-paying party's retail customers.

2. The parties shall submit final ICAs containing all arbitrated and negotiated terms to the Commission for review pursuant to 47 U.S.C. § 252(e) within 30 days of this Order.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of DIECA Communications, Inc., D/B/A Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation	)	DOCKET NO. 04-2277-02 ARBITRATION REPORT AND ORDER

ISSUED: February 8, 2005

By the Commission

PROCEDURAL HISTORY

On April 27, 2004, DIECA Communications D/B/A Covad Communications (Covad) filed a Petition pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act), seeking arbitration of a proposed interconnection agreement (ICA) between Covad and Qwest Corporation (Qwest).

Pursuant to the parties' agreement, the Administrative Law Judge issued a scheduling order on July 6, 2004, under which Covad and Qwest filed their Direct Testimony by October 8, 2004, and Rebuttal Testimony by November 12, 2004. The parties having agreed to waive the final adjudication deadline established for this proceeding under Section 252(b)(4)(C) of the Act, hearings were scheduled to commence on December 8, 2004, with written briefs to be filed by January 10, 2005, and Commission Order to issue by February 11, 2005. Hearing on this matter was held before the Administrative Law Judge December 8-9, 2004. Pursuant to mutual request of the parties filed on January 4, 2005, the deadline for submission of briefs was

contention that hybrid loops should be treated differently under the FCC's copper retirement rules than are FTTH or FTTC loops. The FCC has made clear that ILECs may retire copper facilities, presumably *any* copper facilities, so long as they comply with the FCC's notice requirements. Nor are we persuaded by Covad's state law argument. Covad correctly notes that Utah law and Commission policies seek to foster competition by protecting CLEC access to essential facilities, but we decline to extend that protection to situations in which technical or economic considerations necessitate the retirement of copper feeder facilities by an incumbent LEC. We find nothing in federal or state law that would impose an obligation on Qwest to provide an alternative service at current costs for an xDSL provider prior to retirement of copper facilities. Qwest has a right to retire its copper facilities and replace them with fiber. We will not impinge on this right by requiring Qwest to provide "alternative services" at Qwest expense to CLECs whose operations may be affected by such retirements. It is sufficient that Qwest comply with the FCC notice requirements and those additional notice requirements ordered above.

Issue 2. Unified Agreement-Section 271 and State Law Elements Included (Section 4 Definition of "Unbundled Network Element"; Sections 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, and 9.21.2)

In accordance with prior agreement of the parties and in recognition that this issue presents no factual dispute, the parties briefed this issue but no evidence or testimony was presented at hearing.

Qwest proposes the following language for the ICA Section 4.0 definition of

"Unbundled Network Element":

> "Unbundled Network Element" (UNE) is a Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access or for which unbundled access is provided under this Agreement. Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act.

Covad's proposed language for the same section is:

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

As is the case with each of the disputed Sections encompassed under this Issue, the parties' disagreement centers on whether the ICA should acknowledge Qwest's continuing obligation to provide access to certain network elements under Section 271 of the Act and applicable Utah law, and require Qwest to provide those elements even though it may be no longer required to do so under FCC orders and regulations.

Covad Position

In arguing for inclusion of Section 271 and state law elements in the ICA, Covad first points out that the *TRO* specifically acknowledged and approved the Bell Operating Companies' (BOCs) continuing independent access obligations under Section 271:

> [W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under Section 251.

TRO, & 653.

> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the Section 251 unbundling analysis.

TRO, & 655

Thus, argues Covad, there is no doubt that Qwest retains an independent statutory duty to provide unbundled access to the network elements listed in the Section 271 checklist at 47 U.S.C. ' 271(c)(2)(B):

> Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning Section 251.

TRO, & 654

Covad then argues that this Commission has the authority to arbitrate Section 271 and state law requirements in a Section 252 proceeding. Covad points to a recent decision by the Maine Public Utilities Commission finding that:

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

Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection* (PUC 20) *and Resold Services* (PUC 21), Order B Part II (September 3, 2004).

Covad argues that this Commission retains independent authority under state law[6] and our own rules[7] to require continued unbundling of network elements no longer required by the FCC under Section 251. Covad notes that R747-348-7 lists network elements that we have already determined to be "essential facilities" to which access is mandated under Utah statute, and that this list of essential facilities contains every one of the network elements to which Covad seeks access in the proposed ICA.

Covad insists that Commission enforcement of Qwest's Section 271 and state law obligations in this arbitration is not preempted because the Commission's action would not impair federal regulatory interests.[8] Covad further argues that the Commission has been granted the authority to arbitrate provisions of interconnection agreements addressing Section 271 obligations, and to set prices in accordance with federal pricing standards. Covad points to the Supreme Court's decision in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999) in support for this proposition:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions ... the FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing

[6]UCA ' 54-8b-2.2.

[7]R746-348-7.

[8]Citing *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

> standards' set forth in [Section] 252(d) [of the Act]. It is the states that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.

Covad also points to the savings clauses of Sections 251(d)(3) and 252(e)(3) as proof of Congressional intent that the Act's regulatory scheme respecting UNEs should not preempt state enforcement of state unbundling requirements. Covad notes that the FCC[9] and various federal courts[10] have acknowledged that state action in this area is not preempted as a matter of law.

Covad acknowledges the FCC's recognition that the proper pricing standard for Section 271 elements is provided in the just, reasonable, and nondiscriminatory language of Sections 201 and 202 of the Act[11] and that Section 271 does not require TELRIC pricing.[12] However, Covad argues that the FCC has not prohibited TELRIC pricing for Section 271. Covad urges the Commission, given its lengthy experience in establishing rates for elements that may be

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[9] *TRO, &&* 191-92.

[10] *Southwestern Bell Telephone Co. v. Public Util.* Comm'm of Texas, 208 F.3d 475, 481 (5th Cir. 2000); *AT&T Communications v. BellSouth Telecommunications Inc.*, 238 F.3d 636, 642 (5th Cir. 2001); *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 301-302 (4th Cir. 2001).

[11] *TRO*, & 656.

[12] TRO, & 659.

subject to Section 271 unbundling, to order, as has the Maine Public Utilities Commission, that Qwest continue to provide Section 271 elements under the ICA at TELRIC rates until such time as new rates are adopted.

Qwest Position

Qwest urges this Commission to adopt its ICA Section 4.0 UNE definition because, in Qwest's view, its language makes clear that Qwest will continue to provide those Section 251 elements that it is required to provide while also making clear that it is not required under the ICA to provide elements for which it has no Section 251 obligation. Qwest's proposed ICA Section 9.1.1.6 takes this definition a step further by listing, and making unavailable under the ICA, those eighteen network elements that the FCC rejected in the *TRO* or that the D.C. Circuit vacated in *USTA II*[13] and which Qwest therefore need not unbundle under Section 251. Qwest points out that CLECs such as Covad will retain access to these elements through various commercial agreements and tariffs; it is only in the context of the proposed ICA that these elements will no longer be available.

Qwest argues that the Act does not permit this Commission to create or enforce unbundling obligations under Section 271 or state law for elements rejected by the FCC in the *TRO* or vacated by the court in *USTA II*. Unbundling a network element may only be required, argues Qwest, if the FCC has made the "impairment" finding required by Section 251(d)(2); absent such a finding by the FCC, the state commission is powerless to order the unbundling of

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

that element under Section 271 or state law. Qwest cites familiar language from the *TRO* in support of this position:

> Based on the plain language of the statute, we conclude that the state authority preserved by Section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of Section 251 and do not "substantially prevent" the implementation of the federal regulatory regime.
>
> ***
>
> If a decision pursuant to state law were to require unbundling of a network element for which the Commission has either found no impairment-and thus has found that unbundling that element would conflict with the limits of Section 251(d)(2))-or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of Section 251(d)(3)(c).[14]

Qwest further argues that this Commission does not have the authority to order unbundling under Section 271 and that Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine whether BOCs have complied with the requirements of Section 271. With regard to pricing Section 271 elements, Qwest points out that

> [w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that the [FCC] will undertake in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6).

TRO at & 664.

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[14] *TRO* at && 193, 195. Qwest also cites *Michigan Bell Tel. Col v. Lark*, Case no. 04-60128, slip op. at 13 (E.D. Mich. Jan. 6, 2005), interpreting the D.C. Circuit in *USTA II* as rejecting Athe argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations.@

Qwest also notes that the FCC has previously determined that the Section 201-02 requirement that prices must not be unjust, unreasonable, or discriminatory controls pricing decisions for Section 271 elements; TELRIC pricing does not apply to these network elements.[15]

Division Position

The Division notes that many uncertainties currently exist with regard to federal regulation of UNEs under the Act. The Division also notes that it is not at all clear that an arbitration proceeding under Section 252 in any way authorizes this Commission to impose Section 271 unbundling obligations without both parties' consent. The Division therefore recommends that the Commission adopt Qwest's proposed language for ICA Section 4.0, thereby limiting the definition of UNEs to those required under Section 251. The Division notes that if the ICA does not address Section 271 issues then there would be no need for Qwest's proposed Section 271 pricing language in ICA Section 9.1.1.7. Nor, since the definition of UNEs is limited to only those elements required under Section 251(c)(3), does the Division believe that it is necessary to include in ICA Section 9.1.1.6. Qwest's proposed list of elements no longer required under Section 251. In general, the Division believes that since a basic understanding exists concerning the elements that are required under Sections 251 and 271, as well as what prices should be paid for those elements, the ICA should not try to anticipate what regulations

[15] *TRO* at && 656-664.

may issue in the future but should simply rely on its change of law provisions to address changes when they occur.

Decision

We agree with Covad's general proposition that states are not preempted as a matter of law from regulating in the field of access to network elements. Clearly, Congress did not intend such preemption or it would not have included the various savings clauses in the Act. The FCC has recognized on numerous occasions that room remains within the federal scheme for reasonable state regulation consistent with the Act. While we agree with Qwest's view that only an FCC finding of impairment renders a network element available under Section 251, we reject Qwest's apparent view that we are totally preempted by the federal system from enforcing Utah law requiring unbundled access to certain network elements. Clearly, where the FCC has issued no impairment finding with respect to a given element, there is no federal regulation with which our action under Utah law could conflict.[16]

While we see a continuing role for Commission regulation of access to UNEs under state law, we differ with Covad in its belief that we should therefore impose Section 271 and state law requirements in the context of a Section 252 arbitration. Section 252 was clearly intended to provide mechanisms for the parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the

[16]Given our decision below, it is unnecessary for us in this docket to address whether state action requiring access is preempted by an FCC finding of no impairment on a national basis.

addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law.

Nor has Covad offered any legal authority that would require this Commission to consider Section 271 or state law obligations in a Section 252 arbitration proceeding. Indeed, Section 271 on its face makes quite clear that the FCC retains authority over the access obligations contained therein. Furthermore, Section 251 elements are distinguishable from Section 271 elements precisely because the access obligations regarding these elements arise from separate statutory bases. The fact that under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration does not lead us to conclude that it would be reasonable in this case for us to do so.

We therefore decline in this proceeding to require the inclusion in the proposed ICA of language referencing Qwest's Section 271 and state law unbundling obligations. Qwest's Section 271 and state law unbundling obligations remain in effect and we expect Qwest to continue to abide by them. However, given the current uncertainty of the federal regulatory regime and the fact that this docket is the product of a Section 252 action intended to arbitrate Section 251 obligations, we conclude it is reasonable to limit the parties' obligations under the resultant ICA to those mandated by Section 251 and the FCC's implementing regulations. We therefore adopt Qwest's proposed language for ICA Section 4.0.[17]

[17]We recognize that, in response to Qwest's Motion to Dismiss earlier in these proceedings, we determined that the parties' negotiations had rendered certain Section 271 elements "open issues" subject to arbitration. However, our recognition that these issues are justiciable within this arbitration proceeding does not mean that we must decide in Covad's favor on the merits and thereby include those elements in the resultant ICA. Having reviewed the facts on the record and the state of applicable law, and having fully considered the arguments of each

Because we determine not to require provision of Section 271 or state law network elements in this interconnection agreement, we reject all Covad language referencing Section 271 and state law requirements and specifically adopt Qwest's proposed language for ICA Sections 9.1.1, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, and 9.21.2.

We agree with the Division that the best way to avoid conflicts with the FCC's rules and any future FCC or judicial pronouncements is to stick to the plain language of the ICA which limits access to only Section 251 elements. We therefore conclude that the list of "former Network Elements" included in Qwest's proposed ICA Section 9.1.1.6 may ultimately prove confusing and is in any event redundant since only those elements required under Section 251 will be available under the ICA. We therefore adopt Qwest's proposed language for this section, but order the deletion of subsections (a) through (r).

Issue 3. Section 4 Definitions of "Commingling" and "251(c)(3) UNE", and 9.1.1.4.2

In accordance with prior agreement of the parties and in recognition that this issue presents no factual dispute, the parties briefed this issue but no evidence or testimony was presented at hearing.

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party, we conclude that it is reasonable to exclude these elements from the ICA, limiting its terms to only those elements required under Section 251. We believe there exist sufficient mechanisms outside of the Section 252 arbitration framework for this Commission, as well as parties such as Covad, to seek enforcement of Section 271 and state law obligations.

[Service Date February 9, 2005]

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

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

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

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

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

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

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

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

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

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

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

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

Qwest	Covad
Section 4.0 – Definitions: "Unbundled Network Element" (UNE) is a Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access or for which unbundled access is provided under this Agreement. Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act.	Section 4.0 – Definitions: "Unbundled Network Element" (UNE) is a Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access, for which unbundled access is required under section 271 of the Act or applicable state law, or for which unbundled access is provided under this Agreement. ~~Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act.~~.

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

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

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

26 The Arbitrator determined that network elements required to be unbundled pursuant to Section 251(c)(3) and Section 271 should be distinguished in the agreement.[31] The Arbitrator found that the network elements may be the same, *i.e.*, loops, switching, and transport, but the foundation for their availability on an unbundled basis is different.[32] The Arbitrator required the parties to modify the definition of Unbundled Network Element in Section 4 of the agreement to reflect this decision.

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[27] Covad proposes language seeking access to Section 271 elements at any technically feasible point (§ 9.1.5), access to DS1, DS3, and dark fiber loops under Section 271 (§ 9.2.1.3), provisioning of more than two unbundled loops for a single end user customer under Section 271 (§ 9.2.1.4), and access as Section 271 elements to feeder subloops (§9.3.1.1), DS1 feeder loops (§§ 9.3.1.2 and 9.3.2.2), unbundled dedicated interoffice transport (UDIT) (§ 9.6, 9.6.1.5, 9.6.1.5.1), DS1 transport along a particular route (§§ 9.6.1.6, 9.6.1.6.1), and unbundled switching and line splitting (§ 9.21.2).

[28] *Triennial Review Order*, ¶¶ 653-655.

[29] *USTA II*, 359 F.3d at 588.

[30] 47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), and (x).

[31] Arbitrator's Report and Decision, ¶ 54.

[32] *Id.*

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

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

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

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

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

31 Objecting to the Arbitrator's decision that the Commission would be required to engage in an impairment analysis before requiring additional unbundled elements, Covad asserts that it requests only that the Commission "recognize its authority under section 271 of the Act, Washington law, or both, to order unbundling consistent with the Competitive Checklist and the statutory directives of this Commission."[40] Covad asserts that the FCC and numerous state courts have consistently held that the savings clauses under the 1996 Act, in particular Section 252(e)(3), provide state commissions with the authority to enforce state access obligations to the extent these obligations do not directly conflict with section 251.[41] Covad also argues that no separate proceeding would be necessary to determine whether to maintain under state law existing unbundling requirements.[42]

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

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

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

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

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

35 Qwest asserts that the Arbitrator reasonably concluded that it would not be prudent to include Section 271 obligations in an interconnection agreement as, the FCC was expected to enter a decision in December concerning Qwest's forbearance petition before the FCC.[50] In response to Covad's argument that an

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[45] *Id.*, ¶ 46.

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

[47] Covad Petition, ¶¶ 50-54.

[48] Qwest Response, ¶ 26.

[49] *Id.*, ¶¶ 27-28.

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

FCC forbearance decision would not preclude a state unbundling requirement, Qwest asserts that the savings clauses in the Act, *i.e.*, Sections 251(d)(3), 252(3)(3), and 261(b) and (c), require that any state requirements be consistent with the provisions of Section 251.[51] Qwest asserts any state requirement to unbundle network elements would be inconsistent with the Act if the FCC has determined that the elements are not subject to unbundling.[52]

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

37 ***Decision.*** We reverse the Arbitrator's decision that Issue No. Two was not an open issue subject to arbitration. On the merits of the issue, however, we determine that this Commission has no authority under Section 251 or Section 271 of the Act to require Qwest to include Section 271 elements in an interconnection agreement. We find the Arbitrator's discussion of pending forbearance petitions to be dicta, and not a finding subject to review. We uphold the Arbitrator's decision concerning lack of an impairment analysis in this proceeding, but also find that any unbundling requirement based on state law would likely be preempted as inconsistent with federal law, regardless of the

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

[51] Qwest Response, ¶ 30.

[52] *Id.*, ¶¶ 31-33.

[53] *Id.*, ¶ 34.

[54] *Id.*, ¶¶ 34-36.

[55] *Id.*, ¶ 38.

[56] *Id.*, ¶ 37.

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

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

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

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

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

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

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

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

40 The issue of whether state commissions may require Section 271 network elements to be included in arbitrated interconnection agreements arises due to the FCC's decision that BOCs have an independent obligation to provide access to loops, switching, transport, and signaling network elements under Section 271(c)(2)(B) (iv), (v), (vi) and (x), regardless of whether the elements are subject to unbundling under Section 251.[62] Covad requests that the Section 271 elements be included in a "unified" definition of network elements, and that the proposed agreement include elements that have been "delisted" or made unavailable under Section 251(c)(3), pursuant to Section 271 or state law, in order to maintain the status quo.[63]

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

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

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

[63] TR. 384:22 – 385:12.

[64] 47 U.S.C. § 271(d)(3).

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

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

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

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[66] 47 U.S.C. § 271(d)(6).

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

[68] *See* Covad Petition, ¶ 54.

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

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

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

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

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

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

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

state law, in arbitrating an interconnection agreement. Section 252 requires state commissions to limit their consideration of a petition for arbitration to the issues included in the petition and any response. As discussed above, both Covad and Qwest addressed in their petition and response the issue of the inclusion in the agreement of network elements available pursuant to Section 271 and state law.

47 Section 252(c) establishes certain standards for arbitration of interconnection agreements:

> In resolving by arbitration under subsection(b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

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

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[72] *Indiana Bell*, 2003 WL 1903363 at 6, 8.

[73] *See Maine Order*, n.22.

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

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

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

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[74] *Id.*, at 19.

[75] *See Triennial Review Order*, ¶ 664.

[76] *In re Electric Lightwave*, 123 Wn.2d 530, 538-39, 869 P.2d 1045 (1994)

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

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

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

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

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

Court of Appeals.[81] The *Lark* decision finds that a state order is contrary to federal law where the order requires what a federal court has deemed to be contrary to federal law.[82] The *McCarty* court addressed a decision of the Indiana Utility Regulatory Commission to include unbundled packet switching in an interconnection agreement during Section 252 arbitration. After noting that the FCC found in the Triennial Review Order that ILECs are not required to unbundle packet switching, the court observed that "only in very limited circumstances, which we cannot now imagine, will a state be able to craft a packet switching unbundling requirement that will comply with the Act."[83]

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

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

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

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