

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Ken Nickolai
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Thomas Pugh

Chair
Commissioner
Commissioner
Commissioner
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.

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-

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

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 omissions¹⁵ 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

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

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 complies 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

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

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

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

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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