

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 04B-160T

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IN THE MATTER OF PETITION OF QWEST CORPORATION FOR ARBITRATION OF AN  
INTERCONNECTION AGREEMENT WITH COVAD COMMUNICATIONS COMPANY  
PURSUANT TO 47 U.S.C. § 252(B).

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**INTERIM ORDER OF  
ADMINISTRATIVE LAW JUDGE  
MANA L. JENNINGS-FADER  
DENYING MOTION TO DISMISS OR,  
ALTERNATIVELY, FOR SUMMARY  
JUDGMENT; DENYING MOTION TO  
STRIKE TESTIMONY; GRANTING IN  
PART MOTION FOR LEAVE TO FILE  
REPLY; AND GRANTING REQUEST  
TO WAIVE RESPONSE TIME**

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Mailed Date: June 16, 2004

**I. STATEMENT**

1. On April 6, 2004, Qwest Corporation (Qwest) filed a Petition for Arbitration of an Interconnection Agreement with DIECA Communications, Inc., doing business as Covad Communications Company (Covad). Staff of the Commission (Staff) intervened of right. Covad responded to the Petition.

2. This matter is assigned to the undersigned Administrative Law Judge (ALJ) for hearing. The Commission will issue an initial decision. See Decision No. C04-0393. Hearing in this matter is scheduled for June 21 and 22, 2004.

3. On May 24, 2004, Qwest filed a Motion to Dismiss or, Alternatively, for Summary Judgment Relating to Portions of Issues Submitted by Covad Communications

Company for Arbitration (Qwest Motion).<sup>1</sup> On June 7, 2004, Staff and Covad each filed a response to the Qwest Motion. Covad opposed the Qwest Motion,<sup>2</sup> as did Staff.

4. On June 11, 2004, Qwest filed a Motion for Leave to File Reply to Responses to Qwest Corporation's Motion to Dismiss (Motion for Leave).<sup>3</sup> Qwest's Reply in Support of its Motion to Dismiss (Qwest Reply) accompanied the Motion for Leave. The Motion for Leave will be granted in part. Argument A presented in the Qwest Reply at 2-7 addresses an issue not raised in the Qwest Motion, *see* discussion *infra*. As to Argument A, the Motion for Leave will be denied; and, therefore, Argument A will not be considered.<sup>4</sup> Argument B presented in the Qwest Reply at 7-11 fairly addresses the issue raised in the Qwest Motion. As to Argument B, the Motion for Leave will be granted; and, therefore, Argument B will be considered.

5. On May 28, 2004, Covad filed a Motion to Strike Direct Testimony of Paul R. McDaniel (Covad Motion). On June 4, 2004, Qwest filed its response in opposition to the Covad Motion.

6. The Qwest Motion and the Covad Motion, for the reasons discussed below, will each be denied.

7. Turning first to the Qwest Motion, Qwest filed the Petition after Qwest and Covad failed in their attempt to reach agreement, through voluntary negotiations, on an Interconnection Agreement to replace their 1999 Interconnection Agreement which is now in effect in Colorado.

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<sup>1</sup> Qwest submitted the Affidavit of Linda C. Miles in support of the motion.

<sup>2</sup> Covad submitted the Affidavit of Michael Zulevic (Zulevic Aff.) and the Affidavit of Charles E. Watkins (Watkins Aff.) in support of its response to the Qwest Motion.

<sup>3</sup> Qwest also requested waiver of response time to the Motion for Leave. In view of the fast-approaching hearing date and the need to issue as soon as possible this Order deciding the Qwest Motion, the request to waive response time will be granted.

<sup>4</sup> This includes reference to or summary of Argument A found anywhere in the Qwest Reply.

Qwest filed the Petition pursuant to § 252(b)(1) of the Telecommunications Act of 1996 (Act) and Rule 4 *Code of Colorado Regulations* (CCR) 723-46-3. In the Petition, Qwest identified a total of 17 open issues, most of which involve numerous sections or subsections of the Agreement Being Negotiated (ABN), which Qwest asks the Commission to arbitrate.<sup>5</sup> See Petition at 6-34. Of these, five explicitly pertain to the Federal Communications Commission's (FCC) *Triennial Review Order*<sup>6</sup> and are labeled "TRO Issues."<sup>7</sup>

8. The Qwest Motion "seeks an order from the Commission dismissing portions of TRO Issues 1, 2, 3 and 4 in which Covad seeks to arbitrate: (1) the availability of network elements under section 271 of the Act, and (2) access under state law to network elements that, per the FCC's rulings in the *Triennial Review Order*, incumbent local exchange carriers ('ILECs') are not required to unbundle under section 251 of the Act." Qwest Motion at 1 (footnote omitted). Qwest and Covad have identified 23 sections or subsections of the ABN<sup>8</sup> as at issue with respect to the four TRO Issues which are the subject of the Qwest Motion. The Qwest Motion does not specify the exact portions of the four TRO Issues which Qwest seeks to dismiss or as to which Qwest seeks summary judgment.<sup>9</sup>

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<sup>5</sup> Since the Petition was filed, Qwest and Covad have resolved some (but not all) of these open issues.

<sup>6</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *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 Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36 (rel. Aug. 21, 2003) (*Triennial Review Order* or *TRO*), *vacated in part, remanded in part, United States Telecom Association v. Federal Communications Commission*, 369 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

<sup>7</sup> From review of the Petition, Covad's response, and the Preliminary Joint Disputed Issues List filed in this docket, it appears that the *TRO* is or may be a factor in other issues as well.

<sup>8</sup> Some of the sections include numerous subsections which are not counted in this total.

<sup>9</sup> Qwest thus leaves it to the Commission to ferret out the "portions" of the four TRO Issues which are the subject of the motion. It is the responsibility of a party to inform the Commission of the scope of the relief sought, and Qwest ought to have identified with specificity the exact portions of the issues which it sought to dismiss or as to which it sought summary judgment. Given the denial of the Qwest Motion, however, this failure to be specific need not be addressed further or remedied.

9. In support of its motion, Qwest argues that the Commission cannot arbitrate portions of the TRO Issues because Qwest did not negotiate those issues and, therefore, the issues are not open issues subject to compulsory arbitration pursuant to § 252(b)(1) of the Act.<sup>10</sup> See Qwest Motion at 4-7; Affidavit of Linda C. Miles (Miles Aff.). In support of this proposition, Qwest relies on *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*, 350 F.3d 482 (5th Cir. 2003) (*Coserv*).<sup>11</sup> Qwest also argues that administrative efficiency supports granting the Qwest Motion because that action will save the time and the resources of the Commission and of the parties. See Qwest Motion at 7-8.

10. Covad responds that, contrary to Qwest's assertion, the parties did negotiate the TRO Issues and, thus, they are properly the subject of compulsory arbitration as open issues. See Covad's Response at 9-11; Affidavit of Michael Zulevic (Zulevic Aff.); Affidavit of Charles E. Watkins. In support of this position Covad relies, *inter alia*, on a June 4, 2004, order issued by an administrative law judge in Minnesota (June 4th Minnesota ALJ Order) which found that Qwest and Covad negotiated issues outside the parameters of § 251 of the Act and thus denied a Qwest motion to dismiss.<sup>12</sup> See Covad Response at Exhibit 4. Covad champions the Commission's subject matter jurisdiction with respect to arbitration of the TRO Issues.

11. In its response at 1-2, Staff notes that in the Petition and other filings in this docket both Qwest and Covad have identified the TRO Issues as open issues. Staff observes that,

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<sup>10</sup> Section 252(b)(1) of the Act states, in pertinent part, that a party to a voluntary negotiation "may petition a State commission to arbitrate any open issues."

<sup>11</sup> Qwest also relies on "a recommended decision issued last February by a Minnesota administrative law judge in an interconnection arbitration[.]" Qwest Motion at 4. Because Qwest did not provide a copy of this recommended decision as required by Rule 4 CCR 723-1-22(d)(3), the ALJ was not able to read, and therefore did not consider, the February Minnesota recommended decision.

<sup>12</sup> This decision addressed the same negotiation as the one at issue here. Because this Order on the Qwest Motion rests on the facts as presented in this proceeding, the ALJ did not rely on the June 4th Minnesota ALJ Order in arriving at her decision.

as a practical matter, the Petition, Covad's Response to the Petition, the testimony of the parties, and the Preliminary Joint Disputed Issues List contain a full discussion of the TRO Issues, including both the legal issues and policy considerations. Staff states that the issues are ripe for determination and that it would be counter-productive and administratively inefficient not to decide these already-developed legal and policy issues in this arbitration. Staff also observes that the Commission will need to determine at some point (for example, when it is submitted for Commission approval pursuant to § 252(e)(1) of the Act) whether the interconnection agreement that results from the voluntary negotiations and this arbitration passes muster under § 252(e)(2) of the Act. Staff states that this approval review entails consideration of, for example, requirements which may be imposed by § 271 of the Act, by state unbundling requirements, or by both. Given the already-existing development of these issues in this proceeding, Staff states that administrative efficiency supports looking at these issues now. Staff urges the Commission to address these issues "up front in the arbitration process, rather than [leaving them] to linger until the [interconnection agreement] approval phase." Staff Response at 3.

12. In its reply, Qwest continues to assert that it did not negotiate the TRO Issues with Covad and presents arguments to counter Covad's Response and Staff's Response. Qwest urges the Commission not to rely upon the June 4th Minnesota ALJ Order; again advances the *Coserv* decision as support for Qwest's refusal to negotiate with Covad concerning obligations arising under § 271 of the Act and under state law (*i.e.*, the TRO Issues); and disputes the Staff assertion that filings in this docket support the Commission's jurisdiction to decide issues in addition to those arising under § 251 of the Act.

13. Before deciding the Qwest Motion, the ALJ must determine: (a) what type of motion to dismiss the Qwest Motion is;<sup>13</sup> and (b) the scope of that motion and the issues presented. Based on Qwest's assertion that the Commission lacks the authority under § 252(b) of the Act to arbitrate the TRO Issues, the ALJ finds that the Qwest Motion is a motion to dismiss for lack of subject matter jurisdiction.<sup>14</sup> See Colo.R.Civ.P. 12(b)(1). For the reasons discussed below, the ALJ finds that the only issue raised by the Qwest Motion is the fact-based question of whether Qwest and Covad negotiated the TRO Issues during their voluntary negotiations so that the TRO Issues are open issues subject to arbitration pursuant to § 252(b) of the Act.

14. In its response, Covad presents a legal argument in support of its position that the Commission has authority under § 271 of the Act and under state law to arbitrate the TRO Issues and argues that granting the Qwest Motion would be tantamount to accepting Qwest's proposed ICA language over that of Covad, thus *de facto* deciding a disputed issue in Qwest's favor without the benefit of a full arbitration. See Covad Response at 2-8. Staff also addresses the Commission's authority and states its opinion that the Commission has authority to require Qwest to include in an interconnection agreement at least existing state unbundling requirements to the extent they meet the parameters established in § 251(d)(3) of the Act. See Staff Response at 2-4. Qwest did not address these issues in its motion, other than a general statement at page 2 and statements in footnotes.<sup>15</sup>

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<sup>13</sup> That is, whether the Qwest Motion is a motion to dismiss for lack of subject matter jurisdiction or a motion to dismiss for failure to state a claim upon which relief can be granted. See Colo.R.Civ.P. 12(b).

<sup>14</sup> Admittedly the procedural posture of this case is peculiar in that petitioner Qwest raises this issue and not, as is the usual case, a respondent or defendant. Nonetheless, the same legal principles and analysis apply.

<sup>15</sup> As discussed above, Qwest did present a legal argument on this issue in its Reply. For the reasons discussed *supra*, however, that portion of the Reply is not considered.

15. Of critical importance in determining the scope of the Qwest Motion is Qwest's explicitly stated view of the scope of its motion: "Because the lack of negotiations relating to Covad's section 271 and state law unbundling requests, as well as Covad's failure to identify any specific network element(s) for which it seeks unbundling, require the dismissal of Covad's requests, *Qwest does not address here the separate question of the Commission's authority to order any such unbundling.*" Qwest Motion at footnote 16 (emphasis supplied). Thus, for purposes of deciding the Qwest Motion, the ALJ takes Qwest at its word and determines that the question of the Commission's authority under § 271 of the Act and under state law to arbitrate the TRO Issues is not at issue in the motion. Thus, for purposes of deciding the Qwest Motion, the ALJ focuses only on the factual issue of whether the TRO Issues were negotiated by the parties during the voluntary negotiations. The ALJ -- like Qwest -- leaves any other issue of the Commission's authority for another day.

16. The Qwest Motion is denominated a Motion to Dismiss or, Alternatively, for Summary Judgment. Qwest and Covad have each provided affidavits in support of their positions. If necessary to resolve a motion to dismiss for lack of subject matter jurisdiction, the Commission may consider evidence outside the Petition. *Smith v. Town of Snowmass Village*, 919 P.2d 868, 871 (Colo. App. 1996). Thus, the affidavits do not change the nature of the Qwest Motion: it is a motion to dismiss for lack of subject matter jurisdiction.

17. When considering a motion to dismiss for lack of subject matter jurisdiction, the following principles apply: Once the question of subject matter jurisdiction is at issue, the party supporting jurisdiction bears the burden of proving the existence of the Commission's jurisdiction to hear the case. *Pfenninger v. Exempla, Inc.*, 12 P.3d 830, 833 (Colo. App. 2000). If that party fails to establish that the Commission has subject matter jurisdiction, the Commission

must dismiss the action.<sup>16</sup> *City of Boulder v. Public Service Company of Colorado*, 996 P.2d 198, 203 (Colo. App. 1997).

18. With these standards in mind, the ALJ now finds the following facts, which are made for the purpose of deciding the Qwest Motion, which are derived from the filings in this proceeding and the Affidavits of Ms. Miles (on behalf of Qwest) and Messrs. Zulevic and Watkins (on behalf of Covad), and which are undisputed at this time:

(a) Covad requested negotiations by a letter to Qwest dated January 31, 2003.<sup>17</sup>

(b) Qwest responded by proposing its Statement of Generally Available Terms and Conditions (SGAT) as the negotiations template from which a new interconnection agreement would be developed. The SGAT included the terms and conditions for interconnection and for access to unbundled network elements (UNEs), including the UNEs which are the subject of the TRO Issues at the heart of the dispute here.

(c) Covad proposed changes to the SGAT language. The parties then commenced their voluntary negotiations using the SGAT as a template.

(d) In May 2003 Ms. Miles informed Covad that Qwest proposed postponing their negotiations pertaining to Section 9 of the SGAT<sup>18</sup> (*i.e.*, UNEs) pending issuance of the *TRO*. Ms. Miles agreed to negotiate Section 9 before issuance of the *TRO* if Covad “insisted”

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<sup>16</sup> In this case, only a portion of the Petition would be dismissed if the Qwest Motion were granted.

<sup>17</sup> Qwest and Covad later agreed that, for purposes of the statutory requirements of § 252(b) of the Act regarding the time for arbitration, the request for negotiation date was October 29, 2003. See letter dated April 9, 2004, and addressed to Bruce N. Smith, Director, from Paul R. McDaniel of Qwest.

<sup>18</sup> This is the section primarily at issue in the TRO Issues which are the subject of the Qwest Motion.



and expressly reserved Qwest's right "to propose *modified SGAT language*" with respect to Section 9 after the FCC issued the *TRO*. See Zulevic Aff. at Exhibit A (emphasis supplied).

(e) On August 21, 2003, the FCC released the *TRO*.

(f) On December 1, 2003, Qwest presented Covad with proposed language changes to the SGAT which pertained specifically to implementation of the *TRO* and which set out Qwest's obligations under §§ 251(b) and 251(c) of the Act as Qwest saw them based on its reading of the *TRO*. Among other things, the proposed language eliminated or changed some of the products or services, terms, and conditions contained in Section 9 (among others) of the SGAT<sup>19</sup> which had been used by the parties as their negotiating template. The Qwest proposal changed the list of products which had been included in, and thus made available through, Qwest's previous proposals.

(g) From the beginning of the voluntary negotiations, Qwest maintained and produced an Issue List which reflected the open issues being discussed by Covad and Qwest. This Issue List was the document used by the negotiating teams to keep track of disputed or not-yet-resolved items. As late as January 12, 2004, the Qwest-prepared Covad Open Negotiations List identified the *TRO* Issues as among the open issues. See Zulevic Aff. at Exhibit A. Qwest stopped producing the Covad Open Negotiations List in March, 2004.

(h) On January 22, 2004, Covad responded to Qwest's December 1, 2003, document by proposing modifications, including some addressing Section 9 of the SGAT, to Qwest's proposed language. After review of the proposals, Qwest determined that "Covad's

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<sup>19</sup> The Zulevic Aff. and the Watkins Aff. each contain a list of the eliminated Qwest UNEs.

written modifications to Qwest's *TRO* language included language that would have required Qwest to unbundle network elements under section 271 [of the Act] and to unbundle elements under state law that the FCC had ruled were not required to [be] unbundle[d] under section 251" of the Act.<sup>20</sup> Miles Aff. at ¶ 6. Based on this determination, Qwest informed Covad that Covad's proposed modifications were not appropriate and that Qwest "would not discuss them." *Id.*

(i) On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit released its opinion in *USTA II*.<sup>21</sup>

(j) On March 11, 2004, counsel for Qwest wrote to counsel for Covad as follows: "While Qwest acknowledges that Covad has consistently sought to include such 'non-251 elements or services' [referring to Covad's proposed language addressing, at least in part, the *TRO* Issues] in the parties' interconnection agreement, Qwest has, with similar consistency, indicated its unwillingness to agree to such proposals or to negotiate in these negotiations the terms and conditions which may relate to such non-251 services." Miles Aff. at Attachment A.

(k) Qwest and Covad discussed during their negotiations Qwest's proposed *TRO* language. Covad resisted Qwest's proposals. The parties did not discuss the substance of Covad's *TRO* counter-proposals because Qwest refused to discuss them directly. The parties did discuss the legal basis for Covad's *TRO* counter-proposals.

(l) Qwest filed the Petition on April 6, 2004. As required by Rule 4 CCR 723-46-3.2.2, the Petition contains identification of all Open Issues. Qwest included, *inter alia*,

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<sup>20</sup> Inclusion of this statement is not a determination that Qwest's opinion was or is correct. That determination will be made at a later date.

<sup>21</sup> That opinion vacated substantial portions of the *TRO* but left intact the FCC's construction of § 271 of the Act as imposing unbundling requirements for checklist items four, five, six, and ten "independent of the unbundling requirements imposed by §§ 251-52" of the Act. *USTA II*, 359 F.3d at 588; see *TRO* at ¶¶ 654, 656.

the TRO Issues and a recitation of each party's position with respect to each TRO Issue. *See* Petition at pages 21-33; *see also* Petition at Exhibit A (the ABN).<sup>22</sup> Qwest stated that its inclusion of the TRO Issues was not an acknowledgment that issues outside § 251 of the Act are within the scope of an arbitration pursuant to § 252 of the Act. *See* Petition at 6-7.

(m) On May 3, 2004, Covad filed its Response to the Petition. Included at 15-27 is a discussion of the TRO Issues.

(n) Qwest and Covad have made several filings, both individually and jointly, since the Petition was filed. Those subsequent filings identify and discuss the TRO Issues as Open Issues in this arbitration.

19. Based on these facts, the ALJ finds and concludes that Qwest and Covad did negotiate the TRO Issues and that, as a result, the Commission has jurisdiction to arbitrate those issues in this proceeding. Qwest offered the SGAT as the basis for negotiations (that is, as the template for a new interconnection agreement with Covad), and the parties began negotiating changes to that document in an attempt to reach voluntary agreement on an interconnection agreement. As part of that process, on December 1, 2003, Qwest proposed changes to the language of the disputed sections and subsections (*i.e.*, the TRO Issues) and, by so doing, put those provisions at issue in the negotiations. Covad did not accept Qwest's proposed changes and offered its own proposed language. Qwest then refused to discuss Covad's proposed language and insisted on inclusion of its own language to the exclusion of any other proposal.

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<sup>22</sup> At each section or subsection at issue (including the TRO Issues), the ABN designates the section or subsection as "open," shows the disputed language and the nature of the dispute, and identifies the proponent of that language. *See, e.g.*, ABN at § 9.21.2.

20. Qwest's refusal to discuss anything but its own language does not, and cannot, alter this basic fact: The incumbent local exchange carrier (Qwest), and not the competitive local exchange carrier (Covad), interjected the TRO Issues into the negotiations. This key fact distinguishes the present case from *Coserv*, the case so heavily relied upon by Qwest. In *Coserv* the competitive local exchange carrier (CLEC) introduced the issue which the incumbent local exchange carrier (ILEC) refused to discuss during the voluntary negotiations. *Coserv*, 350 F.3d at 486. It is in that factual context that the Fifth Circuit decided the case. In the case at bar, however, the ILEC introduced the TRO Issues and the CLEC responded, clearly signaling its willingness to discuss (*i.e.*, to negotiate) the issues. As a result of this simple but significant difference in the underlying facts, the ALJ finds that *Coserv* is neither controlling nor persuasive.<sup>23</sup>

21. The ALJ will not adopt Qwest's position that its refusal to discuss the very TRO Issues which Qwest introduced into the negotiations means that, *mirabile dictu*, the issues were never part of the issues raised during, and left unresolved at the conclusion of, the negotiations. To decide otherwise would undercut, and perhaps eviscerate, the Commission's ability to carry out its arbitration functions pursuant to § 252(b) of the Act because an ILEC could defeat Commission subject matter jurisdiction by the simple expedient of refusing to discuss CLEC language offered in response to an ILEC-proposed language change. Such a result would cede to the ILEC virtually total control over the issues to be arbitrated and would frustrate the purpose of compulsory arbitration, which is the submission for arbitration of the issues the parties were unable to resolve during voluntary negotiations.

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<sup>23</sup> The ALJ emphasizes that this Order is based on the facts of the case before the Commission in this docket and does not address the situation in which the Commission is presented with facts that are like, or more similar to, those in the *Coserv* case. The ALJ leaves that to another proceeding.

22. Having brought the TRO Issues into the voluntary negotiations, Qwest cannot now be heard to object to Commission arbitration of those very issues, even if the issues are outside the parameters of § 251 of the Act. The Commission has jurisdiction to arbitrate all issues voluntarily negotiated and left unresolved or open. As the Fifth Circuit held in *Coserv*, 350 F.3d at 487:

where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations.

23. As another basis for its motion, Qwest argues that Covad failed sufficiently to identify the UNEs or the precise scope of its proposed language, thus preventing any negotiations of the Covad proposals. Under the facts of this case, the ALJ finds this argument unavailing. Qwest refused to discuss Covad's proposed language, thus depriving Covad of the opportunity to learn of Qwest's concern and to address it during negotiations. Qwest cannot now argue that Covad failed to provide sufficient information on which to negotiate.

24. Finally, the ALJ agrees with Staff that, either in this proceeding or during the approval process, the Commission will need to address the legal issues and policy considerations raised by the TRO Issues.<sup>24</sup> Qwest and Covad have developed those issues in their prefiled testimony and exhibits and will be able to explore those questions in cross-examination during the hearing and in post-hearing statements of position. In addition, the hearing will provide the ALJ with an opportunity to ask questions about these issues. Thus, the present proceeding

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<sup>24</sup> This was not a consideration in arriving at the decision on the Qwest Motion.

provides a readily-available forum in which to develop the record on these issues. Considering these questions now, rather than later, is more efficient.

25. The ALJ concludes that the Commission has subject matter jurisdiction. The Qwest Motion will be denied.

26. Turning now to the Covad Motion, Covad asks the Commission to strike in its entirety the direct testimony of Qwest witness Paul R. McDaniel because a substantial portion of that testimony “explains Qwest’s legal position in the current arbitration.” *Id.* at ¶ 2. Covad argues that, in accordance with Colo.R.Evid. 701 and 702 and notwithstanding Rule 4 CCR 723-1-81, Mr. McDaniel’s testimony “must be stricken because it does not provide the Commission any assistance in the determination of *any facts in issue.*” Covad Motion at ¶ 4 (emphasis in original). In response, Qwest argues that an arbitration has a “unique nature” (Response at 1) which makes Mr. McDaniel’s “discussion of section 251-related law and policy objections ... essential” to resolution of the issues presented. *Id.* at 2.

27. Whether to grant a motion to strike testimony is discretionary. In this case, the ALJ determines that Mr. McDaniel’s testimony is appropriate and, therefore, will deny the Covad Motion. First, an arbitration under § 252(b) of the Act presents for resolution issues in which law, fact, and policy are inextricably intertwined. Mr. McDaniel’s testimony addresses precisely those types of questions. Second, presentation of the parties’ views and analyses in testimony allows the presiding official (whether an ALJ, a Hearing Commissioner, or the Commission) to ask questions about and to probe the parameters of, and the impact of adopting, a party’s legal or policy positions. This is a crucial aspect of the process in light of the intricacies of the issues presented and the short time within which the arbitration must be concluded. The Commission

would be hampered in performing its arbitration responsibilities without this opportunity. Third and finally, Mr. McDaniel's testimony is of the same type as that which the Commission has allowed in prior arbitrations and has found useful. The ALJ sees no reason not to permit this type of testimony in this arbitration.

## **II. ORDER**

### **A. It Is Ordered That:**

1. The Motion to Dismiss or, Alternatively, for Summary Judgment Relating to Portions of Issues Submitted by Covad Communications Company for Arbitration is denied.
2. The Motion to Strike Direct Testimony of Paul R. McDaniel is denied.
3. The Motion for Leave to File Reply to responses to Qwest Corporation's Motion to Dismiss is granted in part and denied in part, consistent with the discussion above.
4. The Request to Waive Response Time to the Motion for Leave to File Reply to responses to Qwest Corporation's Motion to Dismiss is granted.
5. Response time to the Motion for Leave to File Reply to responses to Qwest Corporation's Motion to Dismiss is waived.
6. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Administrative Law Judge