BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC. d/b/a COVAD COMMUNICATIONS COMPANY FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	Case No. TC05-056

QWEST CORPORATION'S RESPONSE TO DIECA COMMUNICATIONS, INC. d/b/a COVAD COMMUNICATIONS COMPANY'S PETITION FOR ARBITRATION

Pursuant to Section 252(b)(3) of the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("Act") and ARSD 20:10:32:30, Qwest Corporation ("Qwest") submits this response to DIECA Communications, Inc. d/b/a Covad Communications Company's ("Covad") Petition for Arbitration of an Interconnection Agreement With Qwest Corporation ("Petition").

INTRODUCTION

Through extensive and lengthy negotiations, Qwest and Covad have resolved all disputed issues regarding their proposed interconnection agreement except one. The single remaining issue concerns Covad's improper and unlawful attempt to use the Section 251/252 negotiation and arbitration process to force Qwest to provide access to unbundled network elements under Section 271 and state law.[1] Despite losing this same issue in Qwest/Covad arbitrations in

[1] Qwest disputes any suggestion by Covad that the parties have engaged in negotiations concerning access to network elements under Section 271 of the Act or state law. The negotiations leading to Covad's Petition were conducted pursuant to Sections 251 and 252 of the Act. The parties did not negotiate Covad's request for access to network elements pursuant to Section 271 or state law. Qwest's discussion of this issue should not be construed in any way as an acknowledgement that non-Section 251 obligations are a proper subject of this arbitration. Indeed, it is clear in the Act that while state commissions may have a consulting role, they do not have authority to make determinations under Section 271, and state commission authority in interconnection arbitrations is limited to issues relating to an ILEC's obligations under Sections 251(b) and (c).

Minnesota,[2] Washington,[3] and Utah[4] and voluntarily accepting Qwest's language for the parties' interconnection agreement in Colorado, Covad continues to attempt to demand that Qwest, through the parties' interconnection agreement, provide access to network elements it is not required to unbundle under Section 251. As discussed more fully below, Covad's attempt to invoke Section 271 in the Section 251/252 negotiation and arbitration process is improper, and the terms Covad seeks under that section cannot be granted in this arbitration. Similarly, Covad's reliance on South Dakota law to support its attempt to obtain broader network unbundling than the FCC allowed in the *Triennial Review Order* is improper. Accordingly, the South Dakota Public Utilities Commission ("Commission") should resolve the disputed issue in Qwest's favor.

BACKGROUND

As Covad accurately describes in its Petition, the parties have engaged in extensive good faith negotiations regarding the terms and conditions of the proposed interconnection agreement. Covad initiated negotiations with Qwest by a letter dated January 31, 2003. Pursuant to Covad's request, Qwest has been voluntarily negotiating interconnection agreements with Covad in states

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[2] Arbitrator's Report, *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. P-5692, 421/IC-04-549, OAH Docket No. 3-2500-15908-4 ¶¶ 46-50 (Minn. PUC December 16, 2004) ("Minnesota ALJ Order"), *aff'd in part* Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement, *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)*, Docket No. P-5692, 421/IC-04-549 at 5 (Minn. PUC March 14, 2005) ("Minnesota Arbitration Order").

[3] Arbitrator's Report and Decision, Order No. 04, *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 ¶¶ 54-60 (Wash. UTC November 2, 2004) ("Washington ALJ Order"), *aff'd in part* Final Order Affirming In Part Arbitrator's Report and Decision; Granting In Part Covad's Petition for Review; Requiring Filing of Conforming Interconnection Agreement, Order No. 06, *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 ¶ 37 (Wash. UTC February 9, 2005) ("Washington Arbitration Order").

throughout Qwest's service territory, including South Dakota. Beginning in approximately January 2003, Qwest and Covad met at least weekly, most often by telephone and sometimes in person, to review proposed terms and conditions of the interconnection agreement. To address specific substantive areas, subject matter experts from Qwest and Covad participated in the negotiations and also met separately to discuss open issues. The parties engaged in more than 50 negotiating sessions involving hundreds of hours. These substantial efforts have been productive. There are no unresolved issues relating to Sections 251 and 252 of the Act, and the parties have resolved all but one issue.

Due to the progress made during the negotiations, Qwest and Covad agreed several times to extend the effective date of Covad's negotiation request in order to continue their discussions and resolve disputed issues where possible. Under the most recent extension agreement, Qwest and Covad agreed that the final day for either party to seek arbitration would be March 28, 2005. Accordingly, Qwest agrees that Covad timely filed its Petition.

ISSUES RESOLVED BY THE PARTIES

The contract language that Qwest and Covad have agreed upon is contained in the agreement attached as Exhibit A to the Petition. The parties' competing language relating to the one issue in dispute is also included in Exhibit A and is identified separately from the agreed language. To the extent Covad raises other issues or attempts to dispute other provisions of the interconnection agreement, Qwest reserves the right to present evidence and arguments regarding those provisions.

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[4] Arbitration Report and Order, *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 at 19-21 (Utah PSC February 8, 2005) ("Utah Arbitration Order").

UNRESOLVED ISSUES NOT SUBMITTED FOR ARBITRATION

There is only one unresolved issue, and it is being submitted for arbitration.

POSITION OF THE PARTIES REGARDING UNRESOLVED ISSUE

While Covad included extensive arguments in its Petition, it did not include a complete summary of Qwest's position. Qwest, therefore, has summarized its position below. Because Covad detailed its position in its Petition, Qwest has not repeated Covad's arguments in this response. Qwest respectfully submits that its proposed contract language relating to the disputed issue meets the requirements of the Act and other applicable law, reflects sound public policy and should be adopted in full.

ISSUE 1 – Section 4 Definition of "Unbundled Network Element" and Sections 9.1.1; 9.1.1.6; 9.1.1.7; 9.1.1.8; 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; 9.6.1.5.1 (and related 9.6.1.5); 9.6.1.6.1 (and related 9.6.1.6); and 9.21.2.

The dispute concerns whether the parties' proposed Section 251/252 interconnection agreement should include provisions requiring Qwest to: (1) provide network elements and services not just under Section 251(c)(3), but also under Section 271; (2) provide access to network elements under state law that conflicts with the access the FCC required in the *Triennial Review Order*[5] and with the rulings of the United States Court of Appeals for the D.C. Circuit in *United States Telecom Association v. FCC* ("*USTA II*");[6] and (3) price network elements provided under Section 271 at total element long run incremental cost ("TELRIC") rates despite

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[5] 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 (FCC rel. Aug. 21, 2003) ("*Triennial Review Order*"), *vacated in part, remanded in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[6] 359 F.3d 554 (D.C. Cir. 2004).

rulings in the *Triennial Review Order* and *USTA II* establishing that TELRIC pricing does not apply to those elements.

As an initial matter, it is puzzling that Covad's Petition raises this issue. In a recent arbitration between Qwest and Covad in Colorado, Covad accepted Qwest's proposed interconnection agreement language for virtually all of the sections listed above. Why Covad would accept Qwest's proposal in Colorado but not in South Dakota is entirely unclear. Furthermore, when Covad raised the same dispute in other states, the ALJs and state commissions uniformly rejected its arguments. For example, the Washington State Utilities and Transportation Commission recently held that it "has no authority under Section 251 or Section 271 of the Act to require Qwest to include Section 271 elements in an interconnection agreement . . . [and] any unbundling requirement based on state law would likely be preempted as inconsistent with federal law, regardless of the method the state used to require the element."[7] The Utah Public Service Commission stated "Section 252 was clearly intended to provide mechanisms for the parties to arrive at interconnection agreements governing access to 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 addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law."[8] In a decision upheld by the Minnesota Commission, the Minnesota ALJ found that

[7] Washington Arbitration Order ¶ 37.

[8] Utah Arbitration Order 19-20.

"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."[9]

Although Covad has agreed to Qwest's language in Colorado and has had its proposed language rejected by all three state commissions that have considered the issue, here in South Dakota, Covad asserts that the interconnection agreement should contain language requiring Qwest to provide access to network elements pursuant to Section 271 and state law. For the reasons set forth below, the Commission should reject Covad's position and resolve the issue by approving Qwest's language.

I. Qwest's Proposed Language Complies With The Act, *USTA II*, and the *Triennial Review Order*.

In contrast to Covad's unbundling demands, Qwest's proposed language ensures that Covad will have access to the network elements that ILECs must unbundle under Section 251, while also establishing that Qwest is not required to provide elements for which there is no Section 251 obligation. In Section 4.0 of the proposed interconnection agreement, Qwest defines the UNEs available under the agreement as:

> [A] Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access 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.

Qwest's language also incorporates the unbundling limitations established by the Act, the courts, and the FCC by listing specific network elements that, per court and FCC rulings, ILECs are not required to unbundle under Section 251. For example, Qwest's proposed Section 9.1.1.6

[9] Minnesota ALJ Report ¶ 46; Minnesota Arbitration Order at 5.

lists 18 network elements that the FCC specifically found in the *Triennial Review Order* do not meet the "impairment" standard and do not have to be unbundled under Section 251.

While Qwest's proposed language properly recognizes the limitations on unbundling, its exclusion of certain network elements does not mean that those elements are unavailable to Covad and other CLECs. As the Commission is aware, Qwest is offering access to non-251 elements through commercial agreements. Because Qwest's proposed language complies with the Act as interpreted by the courts and the FCC and accurately describes Qwest's obligations under Section 251, the Commission should approve Qwest's proposed language.

II. Covad's Proposed Language Is Inconsistent With the Act, *USTA II*, and the *Triennial Review Order*.

In the *Triennial Review Order*, the FCC required ILECs to provide CLECs with access under Section 251 to certain unbundled network elements. At the same time, the FCC declined to require access to other network elements under Section 251, ruling that CLECs are not "impaired," as that term is defined in Section 251(d)(2)(B), without access to those elements. In *USTA II*, the D.C. Circuit vacated substantial portions of the affirmative unbundling requirements the FCC established in the *Triennial Review Order*. In response, the FCC recently issued its *Triennial Review Remand Order*[10] in which it adopted a more limiting unbundling standard than it had adopted in the *Triennial Review Order*. As described by the FCC, the new "more targeted" standard "imposes unbundling obligations only in those situations where we find

[10] Order on Remand, *In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313 (FCC rel. February 4, 2005) ("*Triennial Review Remand Order*").

that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition."[11]

Here, Covad seeks to have the Commission impose many of the same unbundling requirements that the FCC rejected in the *Triennial Review Order* and that the D.C. Circuit vacated in *USTA II*. Thus, while the FCC has narrowed the scope of permissible unbundling as required under *USTA II*, Covad is attempting to go in precisely the opposite direction by asking this Commission to impose virtually limitless unbundling. This attempt to circumvent the still valid unbundling rulings in the *Triennial Review Order*, the effect of *USTA II*, and the *Triennial Review Remand Order* is improper for the following reasons.

A. The Act Does Not Permit The Commission To Create Under State Law Unbundling Requirements That The FCC Rejected In The *Triennial Review Order* And The *Triennial Review Remand Order* Or That The D.C. Circuit Vacated In *USTA II*.

Under Section 251 of Act, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. As the Supreme Court made clear in the *Iowa Utilities Board* case, the Act does not authorize "blanket access to incumbents' networks."[12] Rather, Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]."[13] Section 251(d)(2) in turn provides that unbundling may be required *only if the FCC determines* (A) that "access to such network elements as are proprietary in nature is necessary" and (B) that the failure to provide access to network elements "would

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[11] *Id.* ¶ 2.

[12] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 390 (1998) ("*Iowa Utilities Board*").

[13] 47 U.S.C. § 251(c)(3).

impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[14]

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.[15] 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."[16] And the D.C. Circuit has confirmed in *USTA II* that Congress did not allow the FCC to have state commissions perform this work on its behalf.[17] *USTA II*'s clear holding is that the FCC, not state commissions, must make the impairment determination called for by Section 251(d)(3)(B) of the Act.

Iowa Utilities Board makes clear that the essential prerequisite for unbundling any given element under Section 251 is a formal finding by the FCC that the Section 251(d)(2) "impairment" test is satisfied for that element. If there has been no such FCC finding, the Act does not permit any regulator, federal or state, to require unbundling under Section 251. In the *Triennial Review Order*, the FCC reaffirmed this:

> 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.

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[14] 47 U.S.C. § 251(d)(2).

[15] 47 U.S.C. § 251(d)(2).

[16] *Iowa Utilities Board*, 525 U.S. at 391-92.

[17] *See USTA II*, 359 F.3d at 568.

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> 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).[18]

Federal courts interpreting the Act have reached the same conclusion.[19] Indeed, in a recent decision, the United States District Court of Michigan observed that in *USTA II*, the D.C. Circuit "rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations."[20] The court emphasized that while the Act permits states to adopt some "procompetition requirements," they cannot adopt any requirements that are inconsistent with the statute and FCC regulations. Specifically, the court held, a state commission "cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law."[21]

Moreover, the FCC recently ruled that state commissions are generally without authority to require ILECs to unbundle network elements that the FCC has declined to require ILECs to unbundle.[22] In its *BellSouth Declaratory Order*, the FCC addressed orders from four different state commissions that required BellSouth to provide DSL service over unbundled loops that

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[18] *Triennial Review Order* ¶¶ 193, 195.

[19] *See Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (citing the above-quoted discussion in the *TRO* and stating that "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).

[20] *Michigan Bell Tel. Co. v. Lark*, Case no. 04-60128, slip op. at 13 (E.D. Mich. Jan. 6, 2005).

[21] *Id.*

CLECs were using to provide voice service.[23] This requirement, the FCC determined, effectively obligated BellSouth to unbundle the low frequency portion of the loop ("LFPL") which the FCC had specifically refused to require ILECs to unbundle in the *Triennial Review Order*.[24]

In striking down the orders, the FCC emphasized the preeminence of its regulations under the Act over state laws and regulations: "except in limited cases, the [FCC's] prerogatives with regard to local competition supersede state jurisdiction over these matters."[25] State authority is preserved under the Act, the FCC stated, only to the extent state regulations are not inconsistent with the requirements of Section 251 and do not "substantially prevent implementation of the requirements of section 251 or the purposes of sections 251 through 261 of the Act."[26] Because it had refused to require ILECs to unbundle the LFPL in the *TRO*, the FCC held that the four state orders requiring such unbundling "directly conflict and are inconsistent with the Commission's Rules and Policies implementing section 251."[27] It explained further that "[s]tate requirements that impose on BellSouth a requirement to unbundle the LFPL do exactly what the Commission expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B)."[28]

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[22] Memorandum Opinion and Order and Notice of Inquiry, *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, FCC 05-78 ¶¶ 25-30 (FCC rel. March 25, 2005) ("*BellSouth Declaratory Order*").

[23] *Id.* ¶¶ 9-15.

[24] *Id.* ¶¶ 25-26.

[25] *Id.* ¶ 22.

[26] *Id.* ¶ 23.

[27] *Id.* ¶ 26.

[28] *Id.* ¶ 27.

Covad's broad proposals for unbundling under state law reflect its erroneous view that the Commission has plenary authority under state law and the savings clauses contained in the Act to order whatever unbundling it chooses. What Covad ignores and what the FCC has reaffirmed in its *BellSouth Declaratory Order* is that the Act's savings clauses preserve independent state authority *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. Thus, these savings clauses do not preserve the authority of state commissions to adopt or enforce under state law unbundling requirements that have been rejected by the FCC or vacated in *USTA II*.

Accordingly, the relevant question is not, as Covad presumes, whether sweeping unbundling obligations can be cobbled together out of state law, but rather whether any such obligations would be consistent with *Congress'* substantive limitations on the permissible level of unbundling, as authoritatively construed by the Supreme Court, the D.C. Circuit, and the FCC. Covad's proposals for unbundling under state law ignore these limitations and the permissible authority of state commissions to require unbundling.

B. The Commission Does Not Have Authority To Require Unbundling Under Section 271.

Covad's Petition and interconnection agreement proposal assumes incorrectly that state commissions have authority to impose binding unbundling obligations under Section 271. Section 271 confers no such authority. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine whether Bell Operating Companies ("BOCs") have complied with the substantive provisions of Section 271, including the "checklist" provisions

upon which Covad purports to base its requests.[29] State commissions have only a non-substantive "consulting" role in that determination.[30]

Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271,[31] likewise provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.[32] The FCC has thus 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)."[33]

Additionally, the process mandated by Section 252, the provision pursuant to which Covad filed its petition for arbitration, is concerned with implementation of an ILEC's obligations under Section 251, not Section 271. In an arbitration conducted under Section 252, therefore, state commissions only have authority to impose terms and conditions relating to Section 251 obligations, as demonstrated by the following provisions of the Act.

(a) By its terms, the "duty" of an ILEC "to negotiate in good faith in accordance with section 252 the particular terms and conditions of [interconnection]

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[29] 47 U.S.C. § 271(d)(3).

[30] 47 U.S.C. § 271(d)(2)(B). *See also* Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission, 2003 WL 1903363 at 13 ("Section 271 clearly contemplates an advisory role for the [state commission], not a substantive role").

[31] *Triennial Review Order* ¶¶ 656, 662.

[32] *See id*; 47 U.S.C. 201(b)(authorizing the FCC to prescribe rules and regulations to carry out the Act's provisions); 205 (authorizing FCC investigation of rates for services, etc. required by the Act); 207 (authorizing FCC and federal courts to adjudicate complaints seeking damages for violations of the Act); 208(a)(authorizing FCC to adjudicate complaints alleging violations of the Act).

[33] *Triennial Review Order* ¶ 664. The process mandated by Section 252 -- the provision pursuant to which Covad filed its Petition -- is concerned with implementation of an ILEC's obligations under Section 251, not Section 271. Accordingly, state commissions do not have authority to consider non-251 issues, including issues relating to Section 271, in Section 252 arbitrations.

agreements" is limited to implementation of "the duties described in paragraphs (1) through (5) of [section 251(b)] and [section 251(c)]."[34]

(b) Section 252(a) likewise makes clear that the negotiations it requires are limited to "request[s] for interconnection, services or network elements *pursuant to section 251*."[35]

(c) Section 252(b), which provides for state commission arbitration of unresolved issues, incorporates those same limitations through its reference to the "negotiations under this section [252(a)]."[36]

(d) The grounds upon which a state commission may approve or reject an arbitrated interconnection agreement are limited to non-compliance with Section 251 and section 252(d).[37]

(e) The final step of the Section 252 process, federal judicial review of decisions by state commissions approving or rejecting interconnection agreements (including the arbitration decisions they incorporate), is likewise limited to "whether the agreement . . . meets the requirements of section 251 and this section [252]."[38]

It is thus clear that state commission arbitration of disputes over the duties imposed by federal law is limited to those imposed by Section 251 and excludes the conditions imposed by Section 271. Accordingly, the Commission does not have the authority to require the Section 271 unbundling that Covad seeks or to establish prices for those elements.

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[34] 47 U.S.C. 251(c)(1).

[35] 47 U.S.C. 252(a)(emphasis added).

[36] *See* 47 U.S.C. 252(b)(1). The Fifth Circuit has ruled that state commissions may arbitrate disputes regarding matters other than the duties imposed by Section 251 if *both* parties *mutually agree* to include those matters in their section 252(a) negotiations. *CoServ Limited Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003). Even if correct, that ruling is not relevant here, for Qwest has not included in its Section 252(a) negotiations with Covad its duties under section 271. *See id.* at 488 ("an ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to sections 251 and 252"). In the Qwest/Covad Minnesota and Utah arbitrations, the commissions ruled that Qwest and Covad did negotiate Covad's request for unbundling under Section 271. In those cases, however, Qwest established that its negotiators consistently refused to negotiate those issues and expressly told Covad's representatives that the issues were not properly part of the section 251/252 process. The rulings incorrectly find that Qwest opened the door to Covad's insertion of section 271 issues into the negotiations by proposing ICA language to implement the section 251 unbundling obligations established by the *TRO*. Qwest itself, however, never proposed any language relating to section 271 unbundling obligations, and Qwest and Covad never discussed Covad's proposed language. There was not, therefore, *mutual agreement* to address those issues in the negotiations, as is required under *Coserv*.

[37] *See* 47 U.S.C. 252(e)(2)(b).

C. Covad's Proposal To Use TELRIC Rates for Section 271 Elements Is Unlawful.

Under Covad's proposed language, existing TELRIC rates would apply to network elements that Qwest provides pursuant to Section 271 until new rates are established in accordance with "Sections 201 and 202 of the Act or applicable state law." In addition, it is clear from Covad's filings in other states that Covad seeks permanent TELRIC-based prices for Section 271 elements.

The absence of state decision-making authority under Sections 201, 202, and 271 establishes that state commissions are without authority to determine the prices that apply to network elements provided under Section 271. Significantly, the FCC rejected the argument that the pricing authority granted to state commissions by Section 252(c)(2) to set rates for UNEs provided under Section 251 gives commissions authority to set rates for Section 271 elements. In its opposition to the petitions for a *writ of certiorari* filed with the Supreme Court in connection with *USTA II*, the FCC addressed the contention that Section 252 gives state commissions exclusive authority to set rates for network elements. It stated that the contention "rests on a flawed legal premise,"[39] explaining that Section 252 limits the pricing authority of state commissions to network elements provided under Section 251(c)(3):

> Section 252(c)(2) directs state commissions to "establish any rates for . . . network elements *according to subsection (d)*." 47 U.S.C. 252(c)(2) (emphasis added). Section 252(d) specifies that States set "the just and reasonable rate for network elements" *only* "for purposes of [47 U.S.C. 251(c)(3)]." 47 U.S.C. 252(d)(1).[40]

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[38] 47 U.S.C. 252(e)(6).

[39] Brief for the Federal Respondents in Opposition to Petitions for a Writ of Certiorari, *National Association of Regulatory Utility Commissioners v. United States Telecom Association*, Supreme Court Nos. 04-12, 04-15, and 04-18, at 23 (filed September 2004).

[40] *Id.* (emphasis in original).

Accordingly, the FCC emphasized, "[t]he statute makes no mention of a state role in setting rates for facilities or services that are provided by Bell companies to comply with Section 271 and are *not* governed by Section 251(c)(3)."[41]

In requesting that the Commission adopt its rate proposal, Covad is therefore asking the Commission to exercise authority it does not have and that rests exclusively with the FCC. In addition, Covad's demand for even the temporary application of TELRIC pricing to Section 271 elements violates the FCC's ruling in the *Triennial Review Order* that TELRIC pricing does not apply to these elements. 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 not be unjust, unreasonable, or unreasonably discriminatory.[42] In so ruling, the FCC confirmed, consistent with its prior rulings in Section 271 orders, that TELRIC pricing does not apply to these network elements.[43] 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" and instead stating that "we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment."[44]

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[41] *Id.* (emphasis in original). In the same brief, the FCC commented that the *TRO* does not express an opinion as to the precise role of states in connection with section 271 pricing. *Id.*

[42] *Triennial Review Order* ¶¶ 656-64.

[43] *Id.*

[44] *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

PROPOSED SCHEDULE FOR IMPLEMENTING THE TERMS AND CONDITIONS IMPOSED IN THE ARBITRATION

Qwest recommends that upon resolution of the dispute set forth in the Petition and this response, the Commission direct Covad and Qwest to finalize the Proposed Interconnection Agreement to conform to the Commission's order and file it within 30 days of issuance of the order.

RECOMMENDATION AS TO INFORMATION THAT SHOULD BE PROVIDED BY OTHER PARTIES TO THE NEGOTIATIONS

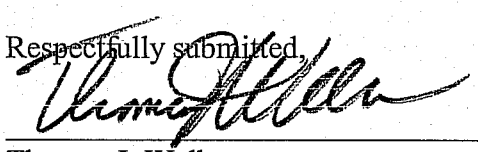
Qwest does not anticipate the need for discovery, but reserves its right to seek discovery and other information as may become necessary.

CONCLUSION AND REQUEST FOR RELIEF

Qwest urges the Commission to enter an order adopting Qwest's proposed language on the disputed issue for the interconnection agreement between Qwest and Covad.

DATED: April 22, 2005

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of April 2005, I caused to be served a true and correct copy of QWEST CORPORATION'S RESPONSE TO DIECA COMMUNICATIONS, INC. d/b/a COVAD COMMUNICATIONS COMPANY'S PETITION FOR ARBITRATION by U.S. mail and electronic mail to the following:

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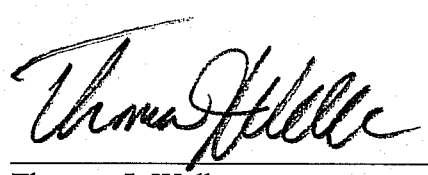

Thomas J. Welk