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June 23, 2005

Via UPS Overnight Delivery
Pam Bonrud, Executive Director
South Dakota Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

Re: ***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***

Dear Ms. Bonrud:

Enclosed for filing in the above-referenced matter, please find the original and ten copies of Covad Communications Company's Reply Brief. A Certificate of Service is attached to the brief.

Please feel free to contact me if you have any questions.

Very truly yours,

Lynn Hankins

Lynn Hankins

Enclosures

cc: Service list *(with enclosures)*

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** **COVAD'S REPLY BRIEF**

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), through its undersigned counsel, presents this reply brief in support of its petition for arbitration:

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), through its undersigned counsel, presents this response brief in support of its petition for arbitration:

INTRODUCTION

Qwest's initial brief understates and distorts the authority retained by the Commission under both state and federal law to promote competition and the efficient investment in advanced telecommunications, notwithstanding the Federal Communications Commission's ("FCC's") recent decisions to constrict federal unbundling requirements under only section 251 of the Telecommunications Act of 1996 (the "Act").[1] Contrary to established precedent, Qwest would have the Commission

[1] *See generally, 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,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147, (rel. September 17, 2003) ("*Triennial Review Order*"); and *In the Matters of Petition for Forbearance of Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc.*

conclude, erroneously, that, as a matter of established black letter law, it has absolutely no authority whatsoever to require Qwest to unbundle any network elements. This simply attempts to draw the line far more narrowly than is actually allowed under state and federal law.

Rather, Covad asserts the FCC intended to draw clear distinctions between elements unbundled pursuant to section 252(c)(3) of the Act on the one hand, and elements that must be made available by Regional Bell Operating Companies ("RBOCs") pursuant to section 271 of the Act and state law on the other. In contrast, Qwest proposes placing 271 elements in a category separate not only for elements available pursuant to section 251, but also separate from, and inferior to, all other wholesale services. In addition to being unsupported by the *Triennial Review Order*, Qwest's reading would render it difficult, if not impossible, to make use of the remaining unbundling obligations set forth in section 271 of the Act, as well as other requirements clearly provided by South Dakota law.

Moreover, if Qwest's position were to carry the day, it's independent obligation to provide access to network elements identified in Section 271 would be eviscerated, notwithstanding the fact that it obtained authority from the FCC to provide in-region interLATA service on the condition that it would continue to make section 271 elements available to competing carriers. This Commission has no authority to undercut the

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Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order (rel. October 27, 2004) ("*271 Forbearance Order*"). WC Docket No. 04-313; CC Docket No. 01-338, *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand (Rel. February 4, 2005) ("*TRO Remand Order*").

decision of the FCC to grant permission to Qwest to provide in-region long distance service so long as Qwest continued to provide access to section 271 network elements.

ARGUMENT

Qwest opposes the inclusion of terms in the Agreement describing its unbundling obligations under both section 271 of the Act and South Dakota law. In its initial brief, Qwest makes four overarching arguments against Covad's proposals for the unbundling of network elements: (1) Section 251 of the Act, as now interpreted by the FCC and *USTA II*,[2] describes the "real upper bound" (Qwest Initial Brief, p. 9) of Qwest's unbundling obligations, and this Commission has no authority to question these impairment determinations; (2) The Act's state savings clauses do not preserve state utility commission authority to order further unbundling; (3) The Commission lacks the authority to enforce section 271 of the Act by enforcing the competitive checklist; and (4) Any access that is afforded to non-251 elements cannot lawfully be priced at forward-looking TELRIC rates. All four of these arguments are without merit. They have been considered and rejected by the FCC and/or federal courts, as detailed below.

Qwest also cites the decisions of other state commissions made in parallel arbitrations between the parties. Qwest improperly characterizes those decisions in an effort to convince the Commission that there has been unanimity in state commission review with respect to this issue. As detailed below, this is hardly the case. Very recent state commission decisions support Covad's position, and none of the other state commissions was able to apply the unique provisions of South Dakota state law.

It is also important to note at the outset one additional glaring error in Qwest's initial brief. Qwest would have the Commission believe that Covad's proposals for

[2] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

unbundling would "require Qwest to provide almost unlimited unbundled access to the elements in Qwest's South Dakota telecommunications network." Qwest Initial Brief, p. 1 (emphasis added). This assertion is blatantly false. As detailed in Covad's petition and initial brief, Covad has carefully defined "network element" to fall clearly within the limits of applicable law, including section 271, not "unlimited access" to all elements in Qwest's network. See section 4 of the draft Interconnection Agreement. Covad has also proposed additional provisions for inclusion in the interconnection agreement (as fully detailed in Covad's initial brief and the petition) that place a clear limitation on the scope of network elements available to Covad. See sections 9.1.1, 9.1.1.6 and 9.1.1.7 of the draft Agreement.

Finally, Qwest's heavy reliance upon the Federal Communication Commission's ("FCC") recent decision in the *BellSouth Declaratory Order* is grossly misplaced.[3] Qwest simply reads the very narrow holding of the FCC decision in that docket far too broadly. When read properly, the decision has no application to this docket.

A. Access Obligations Consistent with the Section 271 Competitive Checklist Cannot, as a Logical Matter, Conflict with the Act

Qwest over-states the breadth of the *Triennial Review Order* and claims it stands for the proposition that any unbundling requirement not meeting the FCC's impairment standard is necessarily in conflict with the FCC's impairment determinations and the Act itself. This position ignores, however, the statements made by the FCC, and left undisturbed by the D.C. Circuit in its *USTA II* decision, that network elements contained

[3] Memorandum Opinion and Order of Notice of Inquiry, *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling,* WC Docket No. 03-251, FCC 05-78 (FCC rel. March 25, 2005) ("*BellSouth Declaratory Order*").

in the section 271 Competitive Checklist[4] must be available notwithstanding any finding of non-impairment. The FCC specifically rejected the very same analysis proposed by Qwest in this proceeding:

> Verizon asserts that an interpretation of the Act that recognizes the independence of sections 271 and 251(d)(2) places these sections in conflict with each other. We disagree. Verizon's reading of section 271 would provide no reason for Congress to have enacted items 4, 5, 6, and 10 [loop, transport, switching and signaling] of the checklist because item 2 [compliance with section 251] would have sufficed.

Triennial Review Order, ¶ 654.

If the additional unbundling requirements contained in the Competitive Checklist do not conflict with section 251, it follows logically that identical state access obligations would not conflict with section 251. Therefore, any access obligation limited by the scope of the Competitive Checklist (such as those proposed by Covad), whether grounded in section 271 or South Dakota law, cannot conflict with the Act and cannot be preempted.

B. The Act Grants this Commission Clear Authority to Order Unbundling in Addition to the Minimum Requirements of Section 251

Qwest makes three separate arguments regarding the lack of Commission authority to order unbundling beyond the FCC's current interpretation of section 251 of the Act: First, the Commission lacks any authority to perform the impairment analysis required by section 251; Second, that the Act does not preserve state commission authority to impose additional unbundling obligations; and Third, that the Commission lacks any authority to require unbundling consistent with section 271 of the Act.

[4] *See* 47 U.S.C. § 271(c)(2)(B) ("Competitive Checklist").

Qwest's first argument, regarding the ability of the Commission to make impairment determinations, is wrong. First of all, Covad has not proposed that this Commission perform an impairment analysis under section 251. Instead, Covad has asked the Commission to recognize its authority under section 271 of the Act, South Dakota law, or both, to order unbundling consistent with the Competitive Checklist and the statutory prerogatives of the Commission. Notwithstanding its view that the Commission has no authority to make impairment determinations, Qwest argues that Covad has offered no evidence of impairment in any event. This argument misses the point. Neither section 271 nor South Dakota law imposes or defines impairment as a standard under which to make an unbundling determination.

Qwest's second argument, that the Commission lacks the authority to impose additional unbundling obligations, has been repudiated not only by the FCC in the *Local Competition First Report and Order*,[5] but also by every federal court passing judgment on the meaning of section 252(e)(3) of the Act.[6] Contrary to Qwest's assertions that the Act's savings clauses designed to preserve state authority are ineffective in providing authority for state unbundling rules, these federal courts have routinely confirmed that these savings clauses, especially 47 U.S.C. § 252(e)(3), provide state commissions with the requisite authority to enforce their own access obligations.

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[5] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (rel. August 8, 1996) *Local Competition First Report and Order,* ¶ 244.

[6] *See Southwestern Bell Telephone Co. v. Public Util. Comm'n of Texas,* 208 F.3d 475, 481 (5th Cir. 2000) ("The Act obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements."); *AT&T Communications v. BellSouth Telecommunications Inc.,* 238 F.3d 636, 642 (5th Cir. 2001) ("Subject to § 253, the state commission may also establish or enforce other requirements of state law in its review of an agreement." [citing § 252(e)(3)]); *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.,* 240 F.3d 279, 301-302 (4th Cir. 2001) ("Determinations made [by state commissions] pursuant to authority other than that conferred by § 252 are, by operation of § 601(c) of the 1996 Act, left for review by State courts. [citing 47 U.S.C. § 152 note]...Section 252(e) also permits State commissions to impose State-law requirements in its review of interconnection agreements.")

Nonetheless, Qwest appears to argue implicitly (and would have the Commission conclude) that because of the unbundling limitations the FCC has made pursuant to section 251(c)(3) of the Act, the Commission is preempted from ordering unbundling. This is clearly not the case. As Covad argues in copious detail in its initial brief, the Commission is not preempted under any theory from making its own unbundling determinations under section 271 of the Act or South Dakota's unbundling law. In order for state requirements to be preempted, they must actually conflict with federal law, or federal law must thoroughly occupy the legislative field. *Cippillone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992). Congress effectively eliminated any argument supporting implied preemption by including the following language in the Act:

> (c) Federal, State, and Local Law.--
>
> (1) **No implied effect**.--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Pub. L. 104-104, title VI, Sec. 601(c), Feb. 8, 1996, 110 Stat. 143. (emphasis added).

As discussed above, the FCC has, as recently as the *Triennial Review Order*, rejected the premise that access obligations exceeding those required by section 251's "impair" standard *directly* conflict with section 251,[7] and the Act itself prohibits implicit

[7] *Triennial Review Order*, ¶ 654. It should also be noted that the FCC exercised its forbearance authority in the *271 Forbearance Order* to refrain from requiring the unbundling of certain fiber facilities under section 271 of the Act. Inherent in this determination was the realization that notwithstanding their recent determination that competitors are not impaired without access to the broadband capabilities of FTTH and FTTC loops, section 271 required the unbundling of *all* loops. Only by electing to forbear from enforcement of section 271 unbundling requirements could they relieve RBOCs of their obligation to unbundle these elements. Most notably, the FCC did not elect to forbear from enforcement of the unbundling obligations proposed by Covad in this arbitration, such as access to Feeder subloops, DS3 Loops, and DS3 Transport elements.

preemption determinations. As a result, Qwest's veiled attempt at a preemption argument is without merit.

Qwest's reliance upon the *BellSouth Declaratory Order* on this same point is misplaced. In that decision, the FCC was confronted with, in its words, the "discreet issue" of whether requiring an ILEC to provide digital subscriber line service on the high frequency portion of the loop constitutes impermissible unbundling of the low frequency portion of the loop ("LFPL") when another carrier provides voice grade service on the LFPL.[8] The FCC concluded that because it had already ruled in prior orders that an ILEC was not required to unbundle the LFPL that several state commissions holdings to the contrary were "inconsistent with federal law" under section 251(d)(3) of the Act.

Notwithstanding the narrow scope of this decision, Qwest reads the *BellSouth Declaratory Order* for the proposition that the FCC has 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." (Qwest Initial Brief, p. 11-12). This is an overly broad reading of the FCC's decision. The FCC specifically notes in the same order that it had previously rejected the argument that "states are preempted from [issuing unbundling requirements] as a matter of law".[9] Nonetheless, Qwest would have this Commission believe that in all instances and as matter of law that state commissions have no authority to add to the national list of unbundled network elements. They clearly do as articulated here and in Covad's initial brief and petition.

Moreover, when properly understood, the *BellSouth Declaratory Order* is not applicable to this docket. In this docket, Covad does not seek the unbundling of any network element that the FCC has specifically concluded an ILEC is not required to unbundle. More specifically, Covad does not even seek in this proceeding the unbundling of the LFPL, the only network element at issue in the *BellSouth Declaratory*

[8] *BellSouth Declaratory Order*, ¶37
[9] *BellSouth Declaratory Order*, ¶23, n. 71.

Order. In addition, the FCC did not consider, even in passing, whether an ILEC has separate and stand alone unbundling obligations under section 271 of the Act or state law. Here, Covad only seeks to require Qwest to unbundle those elements set forth in section 271 and any elements it is required to unbundle under state law. Hence, the only rule of law that can be read from the *BellSouth Declaratory Order* cannot be properly applied in this matter.[10]

C. The Commission has Authority to Enforce Section 271 by Requiring Compliance with the Competitive Checklist

Qwest goes on to argue that even if section 271 can be read to create additional unbundling obligations, this Commission possesses no authority to enforce those obligations. For this premise, it cites *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003). Qwest also claims that the role for state commissions envisioned by the Act with respect to section 271 is markedly different than that envisioned by sections 251 and 252, and that this Commission has no real power to enforce compliance with the Competitive Checklist.

Qwest's reliance on *Indiana Bell* misconstrues the court's holding in that case. The *Indiana Bell* court held that the Indiana Utility Regulatory Commission (IURC) did not have authority to order a specific performance and remedy plan as a condition of interLATA authority, because the FCC, not the IURC, had the ultimate authority to grant Indiana Bell's application. By ordering compliance with the remedy plan, the court ruled that the IURC "*imposes additional* obligations on Ameritech, beyond what is contemplated by Section 271 of the Act." (emphasis added) *Id.* at 6.

[10] It should be noted that Qwest makes no effort in its initial brief to contest the Covad petition that state law also provides for the unbundling of network elements. In Covad's initial brief, it cites to specific South Dakota law granting authority to the Commission to compel unbundling of network elements. Qwest ignores this point altogether and thus appears to concede the argument to Covad.

Notably, however, the court went to great lengths to explain that the IURC *did* have the authority to implement its performance and penalty plan *through the 252 interconnection process*. The court stated: "It is precisely because enforcement mechanisms are contemplated by Section 252 that they cannot be developed through the 271 Application process alone." In other words, the IURC had no need to require certain access standards as a condition of 271 approval, because it was free to require the same terms in its review of 252 interconnection agreements. A proper reading of *Indiana Bell* affirms that this Commission may interpret and enforce the Competitive Checklist in its review of an interconnection agreement. In the current proceeding, Covad does not propose additional obligations and penalties under the aegis of section 271, making the court's holding in *Indiana Bell* inapplicable.

Recently, the Maine Public Utilities Commission issued an order requiring Verizon to continue to provide elements on the Competitive Checklist through tariffs approved by that commission.[11] The Maine PUC also specifically found it possessed the authority to require compliance with the Competitive Checklist in the context of section 252 arbitration proceedings. *Maine 271 Unbundling Order* at 19. Very recently, the Public Utilities Commission of New Hampshire forcefully echoed the FCC's determination that section 251 of the Act is not the limit of Qwest's unbundling obligation. Rather, section 271 continues to require Qwest to unbundle the listed network elements:

> We address first Verizon's general argument that the FCC's determination of an element as a section 251 obligation allows Verizon to remove that

[11] *See* Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Order – Part II (September 3, 2004) ("*Maine 271 Unbundling Order*"). A copy of this order is attached as Attachment 1 to Covad's Initial Brief.

> element from its wholesale tariff altogether. The FCC made clear in the TRO [*Triennial Review Order*] that the removal of a UNE from the list of section 251 obligations because of lack of impairment did not automatically resolve the question of whether an RBOC must still make that UNE available under section 271. *See TRO* at ¶¶652-655. The FCC's *TRO* has in fact rejected Verizon's argument that once the FCC determined that a UNE is not necessary under section 251, the corresponding 271 checklist item should be construed as being satisfied. In rejecting this position, the FCC made it clear in the TRO that "the BOCs have an independent obligation under section 271 (c)(2)(B) to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at reasonable rates." The FCC further concludes that RBOC obligations pursuant to section 271 are "not necessarily relieved based on any determination [by the FCC] under the section 251 unbundling analysis." *Id.* at ¶ 655.

Proposed Revisions to Tariff NHPUC No. 84, p. 39, Dckt. DT 03-201, 04-176, Order No. 24,222 (March 11, 2005). In disposing of the docket, the New Hampshire commission ordered Verizon, through its tariff, to continue to provide line sharing to several competing carriers, including Covad, on an unbundled basis.

Moreover, as recently as May 9, 2005, an administrative law judge for the Illinois Commerce Commission reaffirmed that commission's previous holding that "Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis." *In Re: Cbeyond Communications, LLP et.al v. Illinois Bell Telephone Company*, Illinois Commerce Commission, Dockets 05-154, 050156 & 05-174, Administrative Law Judge Decision, p. 23 (May 9, 2005) citing *XO Illinois, Inc. Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone*, Docket 04-0371, Order, Sept. 9, 2004, at p. 47.

The foregoing is consistent with the clear direction provided by the FCC in approving RBOC 271 applications, which firmly support the enforcement authority of

state utilities commissions with respect to the competitive checklist. In approving Qwest's 271 application for Arizona, the FCC stated:

> Working in concert with the Arizona Commission, we intend to closely monitor Qwest's post-approval compliance for Arizona...
>
> ...
>
> We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into Arizona.

In the Matter of Application of Qwest Communications International, Inc., for Authorization To Provide In-Region, InterLATA Services in Arizona, WC Docket No. 03-194, Memorandum Opinion and Order, [18 FCC Rcd 25504] (rel. Dec. 3, 2003), ¶¶ 59 and 60.

Logically attendant to this enforcement authority is the authority to interpret the requirements of section 271. Doing so in the context of section 252 arbitration proceeding is the most obvious, expedient, and legally defensible method available to this Commission. By incorporating its decisions in its order in this arbitration proceeding, the Commission would establish its own authority, separate from section 271, to enforce the requirements imposed. If Qwest were to refuse to comply with the Commission's order in this case, citing this Commission's lack of authority to interpret section 271, the Commission could enforce its order as it enforces any Commission order, as well as advise the FCC of Qwest's non-compliance with section 271 of the Act. Ultimately, only the FCC may judge whether non-compliance with the Competitive Checklist requires enforcement under section 271 of the Act, but this is clearly distinguishable from this Commission's authority to interpret and enforce interconnection agreements.

D. TELRIC is a Permissible Pricing Methodology to Determine Fair, Just and Reasonable Rates in Compliance with 47 U.S.C. §§ 201 and 202 and South Dakota Law

Qwest argues that any application of TELRIC to establish rates for elements available pursuant to section 271 of the Act is unlawful. For this proposition, it cites a brief prepared by the FCC in connection with the appeal of the *USTA II* decision, in which the counsel for the FCC argues that section 252(d)(1) of the Act does not establish a state role in setting the rates for 271 elements, but only elements governed by section 251(c)(3). These comments, however, are inconsistent with FCC orders. The FCC discussed the issue of pricing for 271 elements at length in the *Triennial Review Order*, and never once did it act to preempt state commission authority to set rates for elements that must be made available pursuant to section 271. To the contrary, the FCC noted that RBOCs that had already obtained section 271 approval would be required to continue to comply with any conditions of approval.[12] In the context of elements for which wholesale rates were established, and relied upon, by the FCC in granting Qwest's 271 application, the FCC has required continued access at current prices (TELRIC), absent a request made by Qwest to alter the conditions of its interLATA entry.[13] To the extent the Commission approves Covad's proposals for unbundling based upon its state law authority, it should apply TELRIC, which clearly results in the setting of fair, just and reasonable rates as required by federal law.[14]

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[12] *Triennial Review Order*, ¶ 665.
[13] *Id.*
[14] 47 U.S.C. sec. 201 & 202

E. Existing Decisions From Other Commissions Considering Unbundling Provide No Consistent Guidance

Qwest has grossly mischaracterized the conclusions reached by other state commissions in an effort to paint them as fully supportive of its position. A careful reading of those decisions contradicts Qwest's conclusions.

The Minnesota ALJ Decision cited by Qwest (and recently upheld by the Minnesota Commission) rejected *both* parties' language regarding this issue. In fact, the Commission ordered the parties to adopt language consistent with its determination that it is premature to remove any section 251 elements from the agreement. The practical effect of this decision is that the parties will be required to re-insert language into the agreement providing access to all of the elements Covad seeks, only pursuant to section 251 of the Act. While Qwest may seek changes to this language under the change in law provisions of the Agreement, the Commission has certainly not pre-determined any outcome on that issue.

The Decision in the Utah arbitration has likewise been mischaracterized by Qwest. Qwest selectively cites language from that decision for the proposition that section 271 and state law unbundling issues are inappropriate subjects of an interconnection agreement as a matter of law, when in fact the Utah decision states precisely the opposite. While the Commission ultimately declined to adopt Covad's language, it saw no legal impediment to doing so:

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

...

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

Utah PSC Docket No. 04-2277-02, *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*, Arbitration Report and Order (February 8, 2005) at 19-21. (emphasis added).

The Washington Commission reached its decision on entirely different grounds than the Utah and Minnesota commissions. That commisison engaged in an unlawful self-preemption analysis, and determined that any effort to enforce state unbundling laws would be preempted by federal law. This decision comes closest to supporting Qwest's position, but is legally flawed for reasons Covad has stated previously: state access requirements consistent with section 271 of the Act cannot be preempted as a logical matter, and in any event, administrative agencies lack the authority to engage in preemption analysis, and should instead enforce existing state law and administrative rules. As Covad notes in its initial brief, only the FCC may engage in preemption analysis and has directed affected parties that the proper course of action is to seek declaratory relief from the FCC on the issue of preemption, not to oppose unbundling in state arbitration proceedings.

The recent decision of the Iowa Utilities Board is equally defective. The Board concluded erroneously that it has no authority under section 271 of the Act to order unbundling of network elements set out in the Competitive Checklist. This conclusion

makes no sense. The Board completely ignored the undisputed holding of the FCC in the *Triennial Review Order*, which bears repeating here again:

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

Triennial Review Order, ¶ 653 (emphasis added). Because the FCC has already concluded that Qwest has a duty to unbundle under section 271, this Commission need not decide whether it has some novel or unprecedented authority to do so in the first instance. It already has such authority.

Thus, this Commission may properly disregard the decisions of the other state commissions that have ruled on the question of section 271 unbundling.

CONCLUSION

For the reasons set forth above, in its initial brief and petition, Covad respectfully requests that the Commission adopt Covad's proposed language to resolve the issues set forth above, and enter an order consistent with this resolution.

Dated this 23th day of June, 2005.

RESPECTFULLY SUBMITTED,

DIECA COMMUNICATIONS, INC.,
d/b/a Covad Communications Company

By _____

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CERTIFICATE OF SERVICE

Case No. TC05-056

I HEREBY CERTIFY that on the 24th day of June, 2005 a true and correct copy of the foregoing Covad's Reply Brief was sent via e-mail and United States mail, first class, postage prepaid, to the following:

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