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June 23, 2005

VIA UPS OVERNIGHT

Pam Bonrud, Executive Director
South Dakota Public Utilities Commission
500 East 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 (TC05-056)
Our File No. 2104.137

Dear Ms. Bonrud:

Please find enclosed for filing the original and ten (10) copies of Qwest Corporation's Reply Brief. By copy of this letter we are serving the same on all counsel.

Sincerely yours,

BOYCE, GREENFIELD, PASHBY & WELK, L.L.P.

Thomas J. Welk
TJW/vjj
Enclosure

cc: Brett Koenecke
Gregory Diamond
Melissa Thompson
John Devaney

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 REPLY BRIEF

Qwest Corporation ("Qwest") submits this reply brief in support of its positions in this interconnection arbitration under the Telecommunications Act of 1996 (the "Act") between Qwest and DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad").

INTRODUCTION

Qwest and Covad have been able to resolve most of their disputes through cooperative, good faith negotiations, leaving only one disputed issue that the South Dakota Public Utilities Commission ("Commission") must decide in this arbitration. As Qwest stated in its initial brief, the parties' inability to resolve this remaining issue is largely attributable to Covad's adherence to overly aggressive demands that are without legal support. Covad continues this approach in its opening brief.

The absence of legal support for Covad's arguments is demonstrated by Covad's willingness to voluntarily accept Qwest's language in the Colorado Covad/Qwest arbitration and

the recent decisions in the Covad/Qwest arbitrations in Iowa, Minnesota, Washington, and Utah.[1] The commissions and administrative law judges in those states have uniformly ruled for Qwest on the single issue in this arbitration, finding that Covad's position lacks legal and evidentiary support. Thus, there is now a substantial body of determinations and recommendations by neutral decision-makers relating to the disputed issue that the Commission must decide in this proceeding. These decisions and recommendations demonstrate forcefully the significant flaws in Covad's proposal. In the discussion that follows, Qwest further demonstrates these flaws and explains why the Commission should adopt Qwest's proposal.

Before turning to the merits of Qwest's reply to Covad's opening brief, it is important to emphasize that Qwest provides competitive local exchange carriers ("CLECs"), including Covad, with access to network elements through means other than Section 251 interconnection agreements ("ICAs"). For example, under commercial agreements that Qwest and Covad have entered into throughout Qwest's region, Covad continues to have access to line sharing despite the FCC's ruling that "de-listed" line sharing as a Section 251 unbundled network element ("UNE"). Similarly, pursuant to multi-state commercial agreements between the parties

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[1] *See In re Arbitration of DIECA Communications, Inc. d/b/a Covad Communications Company v. Qwest Corporation*, Iowa Board Docket No. ARB-05-1, Arbitration Order at 7-9 (Iowa Utilities Board May 24, 2005) ("Iowa Arbitration 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*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Arbitrator's Report ¶¶ 46-50 (Minn. PUC Dec. 16, 2004) ("Minnesota ALJ Order") *aff'd in part 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)*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement at 5 (Minn. PUC March 14, 2005) ("Minnesota Arbitration Order"); *In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation*, Washington Commission Docket No. UT-043045, Order No. 06, Final Order Affirming in Part, Arbitrator's Report and Decision; Granting, In Part, Covad's Petition for Review; Requiring Filing of Conforming Interconnection Agreement ¶ 37 (Wash. UTC Feb. 9, 2005) ("Washington Arbitration 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*, Utah Commission Docket No. 04-2277-02, Arbitration Report and Order at 19-21 (Utah Commission Feb. 8, 2005) ("Utah Arbitration Order").

involving a product known as "Qwest Platform Plus," Covad still has access to switching and shared transport, neither of which incumbent local exchange carriers ("ILECs") are required to provide as UNEs under Section 251. Under these agreements, Qwest provides access to network elements and services based on commercially negotiated terms and rates, not based on the pricing and other terms that the Act mandates for UNEs.

In addition, Qwest provides CLECs with access to many of its network elements, including loops and dedicated transport, through Qwest's FCC1 Access Service Tariff. For example, Section 6 of Qwest's tariff provides CLECs with general Switched Access Service, which includes loops and is defined as "a two-point electrical communications path between a customer's premises and an end user's premises . . . ." Section 6.1.2.A specifically addresses switched transport and allows CLECs to obtain "transmission facilities between the customer's premises and the end office switch(es) where the customer's traffic is switched to originate or terminate its communications." Under switched transport, CLECs also may purchase direct trunk transport, which is a transmission path on circuits dedicated to the use of a single customer. FCC1 Access Service Tariff § 6.1.2.A.1(b). Thus, network elements Covad seeks are available through Qwest's tariffs in addition to commercial agreements.

Accordingly, a ruling by this Commission that the ICA between Qwest and Covad should only include access to UNEs that Qwest is required to provide under Section 251 – as the Iowa, Minnesota, Utah, and Washington commission have ruled – does not mean that Covad will be without access to any non-251 network elements and services. Consistent with the Act's

fundamental objective of, as described in the FCC's *Triennial Review Order* ("*TRO*"),[2] transitioning the telecommunications industry away from a regime of extensive regulation and toward a more market-driven, deregulatory structure, Covad will still have access to multiple non-251 elements through commercially negotiated agreements and tariffs.

ARGUMENT

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.

As Qwest demonstrated in its initial brief, the Act's "impairment" standard imposes important limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*[3] and the D.C. Circuit's decisions in *USTA I*[4] and *USTA II*[5] invalidating three of the FCC's attempts at establishing lawful unbundling rules. In this case, the unbundling obligations that Covad would have the Commission impose on Qwest ignore entirely these critical limitations and are based on the legally flawed assumption that a state commission may require unbundling under state law that the FCC has expressly rejected. As shown by its opening brief, Covad does not recognize the Act's important limits on state law authority – namely, that such authority must be exercised consistently with Section 251 and the federal unbundling regime established by the FCC. Moreover, Covad is asking this Commission to order broad unbundling of network elements without having provided any evidence that it will be impaired in the absence of access to those

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[2] 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*, 18 FCC Rcd. 16978, ¶ 62, n.198 (2003) ("*Triennial Review Order*" or "*TRO*").

[3] 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

[4] *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

elements. Covad's broad unbundling requests cannot be permitted without evidence of impairment, and there is no such evidence before the Commission.

Covad also improperly asks this Commission to require unbundling and set rates under Section 271, ignoring that states have no decision-making authority under that section. As discussed below, the FCC has exclusive jurisdiction to determine the network elements that BOCs are required to provide under Section 271 and to determine the rates that apply to those elements. The FCC cannot – and has not – delegated that authority to state commissions. Covad offers several strained readings of the Act to support its claim that states have unbundling authority under Section 271, but its interpretations are wrong and certainly do not come close to establishing that Congress has expressly conferred Section 271 decision-making authority on state commissions.

As Qwest discussed in its initial brief, the state commissions of Iowa, Minnesota, Utah and Washington have uniformly rejected as unlawful Covad's proposed ICA language relating to this issue and have adopted Qwest's language in full or substantial part. For example, the Iowa Utilities Board, in addressing Covad's claim for unbundling under Section 271, emphasized that in an interconnection arbitration, "a state commission only has the authority to impose terms and conditions related to . . . § 252 obligations," which encompass access to network elements only pursuant to Section 251.[6] Accordingly, the Board held that it "lacks jurisdiction or authority to require that Qwest include [§ 271] elements in an interconnection arbitration brought pursuant to § 252."[7] In rejecting Covad's claim for unbundling under state law, the Board concluded that a

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

[6] Iowa Arbitration Order at 7.

[7] *Id.*

requirement under state law for Qwest to unbundle network elements "may not be appropriate where the FCC has found that access to the element is not impaired."[8] The Board held further that, just as in this case, Covad had not presented any evidence to support an unbundling requirement under state law.[9]

> Likewise, the Washington Commission ruled correctly when it recently stated:
>
> [T]his Commission has no authority under Section 251 or Section 271 of the Act to require Qwest to include Section 271 elements in an interconnection agreement. . . . [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.[10]

Every commission that has considered this issue has ruled for Qwest and against Covad. Consistent with the governing law, this Commission should reach the same result.

A. It Is Improper To Include Terms Relating To Network Elements Provided Under Section 271 In An Interconnection Agreement.

As Qwest discussed in its initial brief, there is no statutory or other legal basis for including terms and conditions relating to network elements provided under Section 271 in a Section 252 interconnection agreement.[11] Indeed, the FCC has defined the "interconnection agreements" that must be submitted to state commissions for approval as "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) . . ."[12] Thus, the term "interconnection agreement" as used in Section 252 encompasses only terms and conditions

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[8] *Id.* at 9.

[9] *Id.*

[10] Washington Arbitration Order ¶ 37.

[11] Qwest Corporation's Initial Brief ("Qwest Br.") at 15-18.

[12] Memorandum Opinion and Order, *Qwest Communications Int'l Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, FCC 02-276, WC Docket No. 02-89 ¶ 8 n.26 (FCC Oct. 4, 2002) ("*Declaratory Order*").

relating to network elements and other services provided under Section 251 and does not include terms and conditions relating to elements provided under Section 271.

The correctness of this interpretation of "interconnection agreement" was confirmed in a decision issued just two weeks ago by a federal district court of Montana in which the court ruled that the only agreements state commissions have authority to approve under Section 252 are interconnection agreements "that contain section 251 obligations."[13] The court held that agreements relating to network elements that ILECs are not required to provide under Section 251 – such as the Section 271 elements that are a primary focus of Covad's unbundling demands – are not subject to state commission approval under Section 252.[14] This ruling is consistent with and relies upon a prior determination by the FCC that "only those agreements that contain an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1)."[15] These rulings confirm that the interconnection agreement resulting from this Section 252 interconnection arbitration should only include terms and conditions relating to Section 251 obligations and should not include unbundling obligations under Section 271.

As the Iowa Commission recently ruled:

> Clearly, the provisions that are at issue in this arbitration are unbundling obligations pursuant to § 271, rather than § 251 obligations. Therefore, the Board lacks jurisdiction or authority to require that Qwest include these elements in an interconnection agreement arbitration brought pursuant to § 252.[16]

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[13] *Qwest Corporation v. Montana Public Service Commission*, CV-04-053-H-CSO, Order on Qwest's Motion for Judgment on Appeal, slip op. at 14 (D. Mont. June 9, 2005). A copy of this order is attached to this brief as Attachment A.

[14] *Id.* at 14-16.

[15] Order, *Qwest's Petition for Ruling on Scope of Duty to File,* WC Docket No. 02-89, 17 FCC Rcd 19337 at ¶ 8 (2002) (italics in original).

[16] Iowa Arbitration Order at 7.

Similarly, the Minnesota ALJ stated in a ruling recently upheld by the Minnesota Commission, "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."[17]

Accordingly, for these reasons and those set forth in Qwest's initial brief, Covad's attempt to include Section 271 network elements in the ICA is improper and should be rejected. The terms and conditions relating to offerings under Section 271 are properly addressed in commercial agreements and tariffs, not ICAs. The Commission should reject Covad's proposals for the following ICA sections: Section 4.0 definition of "UNE," Sections 9.1.1; 9.1.5; 9.2.1.4; 9.3.1.1; 9.3.1.2; 9.3.2.2; 9.3.2.2.1; and 9.6. For each of these sections, the Commission should adopt Qwest's proposed language.

B. Covad Has Provided No Legal Support For Its Claim That State Commissions Have Decision-Making Authority Under Section 271 And Can Impose Unbundling Obligations Under That Provision Of The Act.

The Act does not give state commissions any substantive decision-making role in the administration and implementation of Section 271. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine if BOCs have complied with the substantive provisions of Section 271, including the Section 271 checklist provisions upon which Covad bases its arbitration demands for Section 271 unbundling. State commissions have only a non-substantive, consulting role in that determination. Accordingly, even if it were proper to

[17] Minnesota ALJ Order ¶ 46. In arbitration proceedings in other states, Covad has asserted that Qwest has mischaracterized the Minnesota ALJ's decision, and that the Minnesota ALJ rejected both Covad's and Qwest's language relating to the issue of ICA language for network unbundling. However, it is Covad's description of the decision, not Qwest's, that is inaccurate. While the Minnesota ALJ specifically rejected all of Covad's proposed language relating to this issue, she accepted Qwest's definition of "UNE" and eight other unbundling provisions that Qwest proposed. Minnesota Arbitration Order at ¶ 47. Covad's statement that the ALJ rejected all of Qwest's language is simply inaccurate.

address Section 271 issues in the context of a Section 252 arbitration, the Commission still would not have authority to impose affirmative obligations under that section.[18]

Significantly, in its discussion of this issue, Covad fails to cite any provision or language in the Act giving a state commission decision-making authority under Section 271. While Section 271 requires the FCC to "consult" with a state commission in reviewing a BOC's compliance with that section in connection with applications for authority to provide long distance service, there is an obvious difference between Congress's decision to give states *consulting authority* relating to BOCs' Section 271 applications and the complete absence of any Congressional delegation of *decision-making authority* under that provision.

As the D.C. Circuit made emphatically clear in *USTA II*, the only authority that state commissions have under the Act is that which Congress has clearly and expressly delegated to them.[19] Under the Act, Congress and the FCC took over the regulation of local telephone service, leaving the states only with authority that Congress expressly granted. The Seventh Circuit recently described this regulatory regime:

> In the Act, Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission (FCC). While the state utility commissions were given a role in carrying out the Act, Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act;" it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations.[20]

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[18] Qwest Br. at 15-18.

[19] *USTA II*, 359 F.3d at 565-68.

[20] *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Comm'n*, 359 F.3d 493, 494 (7th Cir. 2004) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999)).

Under this regime, states are not permitted to regulate local telecommunications competition "except by the express leave of Congress."[21] As described by the Third Circuit, "[b]ecause Congress validly terminated the states' role in regulating local telephone competition and, having done so, then permitted the states to resume a role in that process, the resumption of that role by a state is a congressionally bestowed gratuity."[22] Thus, the court explained, a "state commission's authority to regulate comes from Section 252(b) and (e), not from its own sovereign authority."[23] Here, there has been no delegation of 271 decision-making authority to state commissions, and this Commission therefore has no authority to impose the Section 271 unbundling obligations that Covad seeks to impose through its proposed ICA unbundling language.

As Qwest discussed in its initial brief, in *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*,[24] a federal district court held that the consulting role given to states under Section 271 does not give a state commission substantive decision-making authority. *Indiana Bell* confirms the absence of a decision-making role for states under Section 271. The decision contrasts the substantive role that states have in administering Sections 251 and 252 with the "investigatory" and "consulting" role they have under Section 271.[25] In recognizing the different roles that Congress assigned states under these distinct provisions of the Act, the court noted that the Act does not include a "savings clause" that preserves the application of state law

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[21] *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3rd Cir. 2001) (internal citations omitted).

[22] *Id.*

[23] *Id.*

[24] 2003 WL 1903363 (S.D. Ind. March 11, 2003).

[25] *Id.* at *11.

in the administration of Section 271.[26] By contrast, the court observed, Congress included a savings clause – Section 261(b) – that preserves the application of "consistent" state regulations in the administration of Sections 251 and 252.[27] As the court found, this contrast confirms further that Congress did not intend a substantive role for states in the administration of Section 271.[28]

Further, Covad's suggestion that a state legislature may grant to its agencies the authority to administer federal law that Congress has withheld is frivolous.[29] A state legislature may plainly confer authority to adopt and enforce state law if Congress has not preempted the law's subject. It may also permit the state's administrative agencies to exercise any authority conferred upon them by Congress. However, state legislatures may not confer authority to administer federal law that has been withheld by Congress. Covad cites no decision from any court or agency, federal or state, holding otherwise.

In addition, the provisions of South Dakota law that Covad cites do not even remotely purport to give the Commission authority to engage in substantive decision-making under Section 271 or to require unbundling of network elements that the FCC has declined to require ILECs to unbundle.[30] Specifically, Covad cites South Dakota Codified Laws Section 49-31-15 for the proposition that "Qwest must make loops and transport in South Dakota available to Covad on an unbundled basis."[31] This statute, however, does not address or even mention

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Covad's Opening Brief ("Covad Br.") at 1-6.

[30] Covad Br. at 9.

[31] Covad Br. at 9.

Section 271 and, as discussed more fully below, cannot be implemented in manner that conflicts with the FCC's unbundling determinations.

The orders issued by the Maine and New Hampshire Commissions in tariff proceedings involving Verizon, which Covad relies upon in its brief ,[32] are also plainly distinguishable and do not support Covad's unbundling demands under Section 271. As the Minnesota ALJ found in the Qwest/Covad arbitration in that state, the *Verizon-Maine* decision "is distinguishable on its facts as it appears to be premised on enforcement of a specific commitment that Verizon made to the Maine Commission during 271 proceedings to include certain elements in its state wholesale tariff."[33]

Indeed, *Verizon-Maine* did not involve an interconnection arbitration under Section 252 and thus did not present the issue presented here – whether a state commission serving as an arbitrator in a Section 252 arbitration has authority to impose Section 271 unbundling in an ICA. Instead, the issue in that proceeding was whether the Maine Commission could require Verizon to honor unbundling commitments it made during the Section 271 approval process by ordering it to amend a wholesale tariff to include network elements that the FCC had de-listed from Section 251 in the *TRO*. The Commission ruled that it had the authority to require Verizon to amend the tariff because, as a condition to receiving approval for entry into the Maine long distance market, Verizon had specifically agreed to include its unbundling obligations under both Section 251 and 271 in the tariff: "We find, upon consideration of each of these factors, that we do have authority to enforce Verizon's commitment to file a wholesale tariff with us that includes

[32] Covad Br. at 4-5. These orders were attached to Covad's Opening Brief.

[33] Minnesota ALJ Order ¶ 46.

both its section 251 and 271 obligations."[34] Significantly, the Commission also recognized that it does not have authority independent of the FCC to determine the scope of Section 271 obligations: "This is not to suggest that the Commission has the independent authority to define the scope of [Section 271] obligations where the FCC has clearly spoken; merely that, in light of Verizon's commitment, the Commission has an independent role in determining whether those obligations have been met."[35]

The New Hampshire order also involved an amendment to a Verizon state tariff, not a Section 252 interconnection arbitration. As it did in connection with the Maine Section 271 approval process, Verizon had committed to the New Hampshire Commission during the Section 271 proceeding that it would list all of its unbundling obligations in a wholesale state tariff. That commitment was integral to the New Hampshire Commission's approval of Verizon's Section 271 application. Accordingly, relying on the reasoning of the Maine Commission, the New Hampshire Commission found that it has "the authority to determine whether Verizon's wholesale tariff, including any changes proposed by Verizon, remains in compliance with the obligations Verizon voluntarily undertook in exchange for the right to offer interLATA service."[36] In so finding, the New Hampshire Commission emphasized that it was not claiming independent authority to determine Verizon's obligations under Section 271 but, instead, was "performing [its] duty as the initial arbiter of disputes over whether Verizon continues to meet

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[34] *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Service (PUC 21)*, Dkt. No. 2002-682, Order-Part II at 12 (Maine PUC Sept. 3, 2004).

[35] *Id.* at 14.

[36] *Verizon New Hampshire Segtel, Inc. Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions) Petition for Declaratory Order re Line Sharing*, DT 03-201 and ST 04-176, Order No. 24,442 at 42 (NH PUC March 11, 2005).

the specific commitments previously made to this Commission as a condition for its recommendation that Verizon receive section 271 interLATA authority."[37]

Here, unlike in the Maine and New Hampshire proceedings, Covad is specifically asking this Commission to exercise independent unbundling authority under Section 271, not to enforce a commitment made during the Section 271 approval process. The Commission does not have that authority, and the Maine and New Hampshire orders do not suggest otherwise.

C. The Commission Does Not Have Authority To Establish Prices For Section 271 Elements.

Covad asserts that the Act and the FCC's *TRO* establish the authority of state commissions to set prices for Section 271 elements.[38] For several reasons, this argument is seriously flawed, as Qwest discusses in its initial brief.[39]

First, the FCC was quite clear in the *TRO* that it has responsibility for setting prices for elements that BOCs provide under Section 271: "[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)."[40]

Second, Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271,[41] provide no role for state commissions.

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[37] *Id.* at 43.

[38] Covad Br. at 6-8.

[39] Qwest Br. at 18-20.

[40] *TRO* ¶ 664.

[41] *Id.* ¶¶ 656, 662.

That authority has been conferred by Congress upon the FCC and federal courts.[42] The FCC has not delegated that authority, and Congress has not permitted it to do so.

Third, the pricing authority that state commissions have under Section 252(d)(1) does not empower states to set rates for Section 271 elements. The authority granted by that provision is expressly limited to determining "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection [251(c)(2)] . . . [and] for network elements for purposes of subsection [251(c)(3)]."[43] Thus, the only network elements over which states have pricing authority are those that an ILEC provides pursuant to Section 251(c)(3). Nothing in the Act extends that authority to Section 271 elements, as evidenced by Covad's inability to cite any statutory provision that even remotely suggests state commissions have such authority.

Significantly, as Qwest discussed in its initial brief, the FCC recently rejected substantially the same pricing argument in its opposition to the petitions for a *writ of certiorari* filed with the Supreme Court by NARUC, state commissions, and certain CLECs in connection with *USTA II*.[44] Addressing NARUC's contention that Section 252 gives state commissions exclusive authority to set rates for network elements, the FCC stated that the contention "rests on

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[42] *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), and 208(a) (authorizing FCC to adjudicate complaints alleging violations of the Act).

[43] 47 U.S.C. § 252(d)(1).

[44] Qwest Br. at 19-20.

a flawed legal premise."[45] It explained that Section 252 limits the pricing authority of state commissions to network elements provided under section 251(c)(3).[46]

Fourth, Covad's claim that the Commission has authority to set TELRIC rates for Section 271 elements – which of course incorrectly assumes that state commissions have pricing authority over Section 271 elements – is directly refuted by the *TRO* and *USTA II.* In the *TRO*, the FCC ruled very clearly that any elements a BOC provides 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.[47] Consistent with its prior rulings in Section 271 orders, the FCC confirmed that TELRIC pricing does not apply to these network elements.[48] 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."[49]

Accordingly, Covad has failed to demonstrate that state commissions have pricing authority over Section 271 elements or that those elements can be priced using a TELRIC-like methodology.

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

[46] *Id.*

[47] *TRO* ¶¶ 656-64.

[48] *Id.*

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

D. The Act Does Not Permit The Commission To Create Under State Law Unbundling Requirements That The FCC Rejected In The *TRO* Or That The D.C. Circuit Vacated In *USTA II*.

As Qwest demonstrated in its initial brief, under Section 251 of the Act, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]."[50] 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 impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[51]

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.[52] 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."[53] And *USTA II* establishes that Congress did not allow the FCC to have state commissions perform this work on its behalf.[54] Consistent with these rulings, as Qwest discussed in its initial brief, the FCC recently ruled in the *BellSouth Declaratory Order* that state commissions are generally without

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[50] 47 U.S.C. § 251(c)(3).

[51] 47 U.S.C. § 251(d)(2).

[52] 47 U.S.C. § 251(d)(2).

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

authority to require ILECs to unbundle network elements that the FCC has declined to require ILECs to unbundle.[55]

Covad responds to the legal framework established by these authorities and those described in Qwest's initial brief as if it were not there, arguing that the Act, the *TRO*, and *USTA II* do not impose any meaningful limits on the authority of state commissions to require unbundling under state law. Thus, Covad asserts that the Commission is free to require Qwest to provide network elements that the FCC declined to require ILECs unbundle based on specific findings that CLECs are not impaired without them.[56] Covad's argument fails to recognize that the Act's savings clauses preserve independent state authority only to the extent that authority is exercised in a manner consistent with the Act.[57] This point was forcefully confirmed in the recent decision from the United States District Court for the District of Michigan discussed in Qwest's initial brief.[58]

The fundamental problem with Covad's position, as confirmed by its brief, is that it requires unbundling regardless of consistency with the Act. As Qwest described in its initial brief, the inevitable conflicts with federal law that would result from adoption of Covad's position are demonstrated by the application of Covad's proposed unbundling language to feeder subloops.[59] Covad fails to respond to this striking example of how the virtually limitless

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

[55] Qwest Br. at 12-13.

[56] For example, Covad asserts that the Commission has authority to require access to "subloop elements" (Covad Br. at 2) even though the FCC expressly ruled in the *TRO* that CLECs are not impaired without access to feeder subloops and that ILECS are therefore not required to provide them. *TRO* ¶ 253.

[57] Qwest Br. at 13-15.

[58] Qwest Br. at 11-12.

[59] Qwest Br. at 15 and n.44.

unbundling obligations that would result from its language directly conflict with federal law and the "federal regime" that the FCC alone has authority to implement. And this example would not be an isolated occurrence under Covad's unbundling language, as the language is broad enough for Covad to contend that Qwest is required to provide unbundled access to OCn loops, feeder subloops, DS3 loops (in excess of two per customer location), extended unbundled dedicated interoffice transport and extended unbundled dark fiber, and other elements despite the FCC's fact-based findings in the *TRO* that CLECs are not impaired without access to these elements.[60]

As the FCC stated quite clearly in the *TRO*, the type of state law unbundling regime that Covad is proposing – one that ignores altogether FCC findings of non-impairment with respect to individual elements – "overlook[s] the specific restraints on state action taken pursuant to state law embodied in section 251(d)(3), and the general restraints on state actions found in sections 261(b) and (c) of the Act."[61] This approach to state law unbundling "ignore[s] long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy."[62] As the United States Court of Appeals for the Seventh Circuit stated, "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.[63]

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[60] In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundled these and other elements under Section 251: ¶ 315 (OCn loops); ¶ 253 (feeder subloops); ¶ 324 (DS3 loops); ¶ 365 (extended dedicated interoffice transport and extended dark fiber); ¶¶ 388-89 (OCn and DS3 dedicated interoffice transport); ¶¶ 344-45 (signaling); ¶ 551 (call-related databases); ¶ 537 (packet switching); ¶ 273 (fiber to the home loops); ¶ 560 (operator service and directory assistance); and ¶ 451 (unbundled switching at a DS1 capacity).

[61] *TRO* ¶ 192 (footnote omitted).

[62] *Id.*

[63] *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004).

Equally significant, any unbundling obligations imposed under state law would have to be supported by an express finding that Covad would be impaired without access to specific network elements. A finding of impairment is essential under Section 251, and any unbundling requirement that does not rest on such a finding is plainly unlawful. Covad's failure to provide any evidence of impairment is thus fatal to its unbundling demands, as the Commission has no evidentiary record upon which to base findings of impairment or requirements to unbundle.

Relying on an inaccurate interpretation of a ruling by the Illinois Commerce Commission that is expressly based on Illinois law, Covad asserts that this Commission must apply South Dakota law relating to network unbundling without concern for whether the results conflict with the 1996 Act and FCC orders and rules implementing the Act.[64] This argument is meritless. The Illinois Commission ruled only that as a creation of the Illinois legislature, that Commission's powers are limited to those that the legislature expressly conferred.[65] Contrary to Covad's incomplete description of the ruling, the Illinois Commission also concluded that it does have authority to construe and apply Illinois law relating to network unbundling to avoid inconsistency with the 1996 Act and FCC orders.[66] The 1996 Act establishes that any exercise of state authority must be consistent with the federal law, and any unbundling requirements imposed under state law that conflict with FCC rulings are, therefore, unlawful.[67]

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[64] Covad Br. at 10-11.

[65] *Illinois Bell Telephone Co.; Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act*, Docket No. 01-0614, Order on Remand (Phase I) at 61 (Ill. Commission Apr. 20, 2005).

[66] *Id.* at 62 ("[W]e have some latitude to a make appropriate changes [to state law] to achieve consistency with federal law.").

[67] *See* Qwest Br. at 13-14.

Finally, Covad incorrectly implies that Qwest's position is that state commissions are entirely without authority to regulate unbundled network elements under the Act. However, Qwest is not arguing that state commissions are without authority to regulate under the Act. Instead, as described here and in Qwest's initial brief, states are permitted to regulate but only with respect to the specific areas identified by Congress in the Act and only to the extent their regulations are consistent with federal law, including FCC orders and rules. Here, Covad is asking the Commission to regulate in a manner that is inconsistent with federal law by requiring network unbundling that the FCC has specifically rejected. The Commission does not have that authority and, accordingly, Covad's request is unlawful.

E. The ICA Should List Specific Non-251 Network Elements That Qwest Is Not Required to Provide Under The Agreement.

In its proposed ICA, Qwest includes several provisions listing the network elements that the FCC has ruled ILECs are not required to provide under Section 251. Qwest's proposed Section 9.1.1.6 lists 18 different elements and services that pursuant to rulings in the *TRO*, ILECs are not required to unbundle under Section 251. There is no dispute that Qwest's listing of these elements and services accurately reflects the FCC's *TRO* rulings. However, Covad clearly believes that Qwest's unbundling obligations are unlimited and include even the network elements for which the FCC has made findings of non-impairment and declined to impose an unbundling requirement. Given Covad's overreaching position, Qwest is very concerned that Covad will demand unbundling of these de-listed elements if the ICA does not state clearly that the elements are unavailable. To protect against this distinct possibility and the dispute that would result, the ICA should include the list of de-listed UNEs in Qwest's section 9.1.1.6, which all parties agree is accurate.

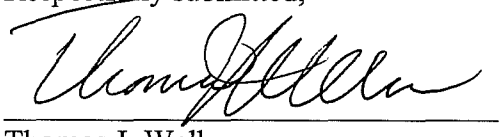
The Commission should also approve Qwest's language and not require Qwest to continue providing network elements that the FCC has de-listed as UNEs until the Commission approves an ICA amendment removing the UNEs from the ICA. The use of the amendment process for de-listed UNEs is improper because it would require Qwest to continue providing network elements at TELRIC rates potentially long after the FCC has ruled that ILECs are not required to provide the elements under Section 251. Accordingly, the Commission should adopt Qwest's proposed sections that would eliminate unbundling obligations upon non-impairment findings by the FCC.

CONCLUSION

For the reasons stated here and in its initial brief, Qwest respectfully requests that the Commission adopt Qwest's proposed language for each of the ICA provisions in dispute.

DATED: June 23rd, 2005

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of June 2005, I caused to be served a true and correct copy of QWEST CORPORATION'S REPLY BRIEF by U.S. mail and electronic mail to the following:

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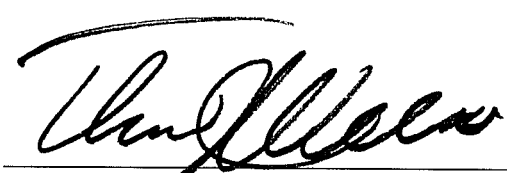

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

QWEST CORPORATION, a Colorado corporation, Plaintiff, vs. THOMAS J. SCHNEIDER, GREG JERGESON, MATT BRAINARD, JAY STOVALL, and BOB ROWE in their official capacities as Commissioners of the Montana Public Service Commission, and THE MONTANA PUBLIC SERVICE COMMISSION, a regulatory agency of the State of Montana, Defendants.	CV-04-053-H-CSO **ORDER ON QWEST'S MOTION FOR JUDGMENT ON APPEAL**

Plaintiff Qwest Corporation ("Qwest") initiated this action seeking declaratory and injunctive relief against the Montana Public Service Commission ("PSC") and the PSC Commissioners in

their official capacities. Qwest challenges a PSC order concerning an agreement between Qwest and DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"). Qwest generally alleges that the PSC exceeded its authority under the Federal Telecommunications Act of 1996 ("FTA") by requiring Qwest to file the agreement, and by ordering a substantive change to its terms and conditions.[1]

In seeking federal judicial review of the PSC's decision, Qwest relies upon 47 U.S.C. § 252(e)(6) of the FTA,[2] and relies upon that provision and 28 U.S.C. § 1331 in invoking the Court's jurisdiction.[3] By Order filed February 22, 2005, Chief Judge Molloy, with the parties' consent, assigned this case to the undersigned for all purposes.[4]

Before the Court is Qwest's Motion for Judgment on Appeal.[5]

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[1]Complaint ("Cmplt.") (Court's Doc. No. 1) at 1, 12-23.

[2]Id. at 3. 47 U.S.C. § 252(e)(6) provides, in relevant part:

> (e) Approval by State commission
>
> * * *
>
> (6) Review of State commission actions
>
> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

[3]Cmplt. at 3.

[4]Court's Doc. No. 28.

[5]Plaintiff Qwest Corporation's Motion for Judgment on Appeal ("Qwest's Mtn.") (Court's Doc. No. 31).

On June 1, 2005, following submission of the parties' briefs,[6] the Court heard oral argument on Qwest's motion. Having reviewed the record, and having considered the parties' arguments, the Court is prepared to rule.

I. THE TELECOMMUNICATIONS ACT OF 1996.

"Congress passed the [FTA] to foster competition in local and long distance telephone markets by neutralizing the competitive advantage inherent in incumbent carriers' ownership of the physical networks required to supply telecommunications services."[7] To accomplish this objective, Congress, through the FTA, changed significantly the regulatory scheme that governed local telephone service. The FTA "restructured local telephone markets by eliminating state-granted local service monopolies," and replaced exclusive state regulation of local monopolies with a competitive scheme set forth in 47 U.S.C. §§ 251 and 252.[8]

The FTA, under sections 251 and 252,[9] requires established

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[6]On March 2, 2005, Qwest filed Qwest Corporation's Opening Brief in Support of Judgment on Appeal ("Qwest's Opening Brief"). On April 29, 2005, Defendants filed their Response Brief of Defendants Montana Public Service Commission and Bob Rowe, Thomas J. Schneider, Matt Brainard, Jay Stovall and Greg Jergeson ("PSC's Brief") (Court's Doc. No. 34). On May 17, 2005, Qwest filed Qwest Corporation's Reply Brief in Support of Judgment on Appeal ("Qwest's Reply") (Court's Doc. No. 35).

[7]Pacific Bell v. Pac-West Telecomm., Inc., 325 F.3d 1114, 1117-18 (9th Cir. 2003) (citations and footnotes omitted).

[8]MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 498 (3d Cir. 2001)("MCI Telecomm.")(citing AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 370 (1999) ("Iowa Util.")).

[9]Hereafter, all references to code sections are to sections of Title 47 of the United States Code unless otherwise indicated.

incumbent local exchange carriers ("ILECs") (defined in 47 U.S.C. § 251(h)(1)) to allow competitive local exchange carriers ("CLECs") access to the ILECs' existing networks or services to permit the CLECs to compete in providing local telephone services.[10]

Generally, both ILECs and CLECs have the duty under section 251(a) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]"[11] Sections 251 and 252 also set forth specific requirements.

Section 251(b) imposes requirements on both ILECs and CLECs. It requires them to: (1) allow resale of their telecommunications services; (2) provide number portability; (3) provide dialing parity; (4) provide access to rights-of-way; and (5) establish reciprocal compensation arrangements.[12]

Section 251(c) imposes requirements applicable only to ILECs. It requires ILECs to: (1) provide interconnection of the ILEC's network to other networks; (2) provide access to unbundled network elements ("UNEs")[13]; (3) allow CLECs to resell services at wholesale rates; and (4) provide for collocation of CLEC

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[10] Pacific Bell, 325 F.3d at 1118; see also US West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1116 (9th Cir. 1999).

[11] Section 251(a)(1).

[12] Sections 251(b)(1)-(5).

[13] UNEs are discrete components of an existing ILEC's network. US West Communications v. Jennings, 304 F.3d 950, 954 (9th Cir. 2002).

equipment in ILEC buildings.[14] Also, section 251(c)(1) requires ILECs to "negotiate in good faith" the "terms and conditions of agreements" that permit CLECs to share the network and to provide service.[15]

Section 252 governs the process for establishing interconnection agreements between ILECs and CLECs, and provides that negotiated or arbitrated interconnection agreements must be submitted to state public utility commissions for approval. Section 252 provides, in relevant part, as follows:

> (a) Agreements arrived at through negotiation
>
> (1) Voluntary negotiations
>
> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.
>
> * * *
>
> (e) Approval by State commission
>
> (1) Approval required

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[14]Sections 251(c)(2)-(4) and (6).

[15]Section 251(c)(1).

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.[16]

Congress empowered the Federal Communications Commission ("FCC") to promulgate regulations to implement the FTA's requirements.[17] "[T]he FCC's implementing regulations ... must be considered part and parcel of the requirements of the [FTA]."[18]

II. BACKGROUND.

The parties do not dispute the underlying facts.[19] Under the FTA, Qwest is an ILEC and Covad is a CLEC. In early 2004, Qwest and Covad successfully negotiated a line-sharing agreement.[20] Line sharing involves simultaneous use of both the high frequency and low frequency portions of the copper wire or "loop" that connects an end user to a telecommunications network.[21] Companies like Qwest provide high-speed access to the Internet through a service known as a Digital Subscriber Line

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[16]Sections 252(a)(1) and 252(e)(1).

[17]Section 251(d)(1); Iowa Util., 525 U.S. at 384.

[18]Jennings, 304 F.3d at 957.

[19]See Qwest's Preliminary Pretrial Statement (Court's Doc. No. 23) at 2; Preliminary Pretrial Statement of Defendants (Court's Doc. No. 22) at 3.

[20]Complaint Exhibit ("Cmplt. ex.") 2; PSC's Brief at ex. 5.

[21]Qwest's Opening Brief at 14.

("DSL"). DSL service is provided by equipment that splits the frequency of the loop, allowing simultaneous use of the high frequency portion for connection to the Internet, and the low frequency portion for voice communications. The line sharing agreement between Qwest and Covad gives Covad access to line sharing in Qwest's 14-state region for a period that commenced on October 2, 2004.[22]

On May 19, 2004, Qwest and Covad filed with the PSC their agreement, which is titled "Terms and Conditions for Commercial Line Sharing Arrangements" ("Commercial Line Sharing Agreement" or "CLSA").[23] In a separate letter,[24] Qwest informed the PSC that it filed the agreement "for informational purposes only," and that it was not filing the agreement for approval under section 252's requirement that agreements be submitted to state commissions for approval.

On June 3, 2004, the PSC issued an Order to Show Cause and Request for Information[25] directing Qwest and Covad, and allowing any interested parties, to comment about why the CLSA should not be filed and considered by the PSC under sections 251 and 252.

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[22]Id. at 18.

[23]Cmplt. ex. 2.

[24]Cmplt. ex. 1.

[25]Cmplt. ex. 3.

On June 18, 2004, Qwest, Covad and others filed comments.[26]

On July 9, 2004, the PSC entered a Notice of Application for Approval of Commercial Line Sharing Agreement for DSL Services ("Notice").[27] In the Notice, the PSC concluded that the CLSA "is a negotiated agreement pursuant to §§ 251 and 252 of the [FTA,]" stated that it requires PSC approval prior to implementation and set a procedural schedule for considering whether to approve or reject the CLSA. On July 28, 2004, Qwest filed with the PSC a Motion for Reconsideration and to Dismiss.[28]

On September 22, 2004, the PSC issued its Final Order and Order on Reconsideration ("Final Order").[29] The PSC approved the CLSA with the exception of one provision that dealt with the timing of notice required before disconnection of services.

On October 21, 2004, Qwest filed the instant action.[30] Qwest seeks: (1) a declaratory ruling that the Final Order violates section 252; and (2) entry of a permanent injunction to prevent the PSC from enforcing the Final Order against Qwest with

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[26]Cmplt. exs. 4 (Qwest's comments), 5 (Covad's comments) and 6 (Qwest's reply comments). Other entities' comments are found in the Notice of Transmittal of Administrative Record (Court's Doc. No. 14).

[27]Cmplt. ex. 7.

[28]Cmplt. ex. 8.

[29]Cmplt. ex. 9.

[30]Cmplt. at 1.

respect to the CLSA.[31]

III. STANDARD OF REVIEW.

The Court must consider de novo the Montana PSC's interpretation of the FTA and of the FCC's implementing regulations.[32]

IV. DISCUSSION.

The narrow legal issue before the Court is whether the CLSA is an "interconnection agreement" that must be submitted to the PSC for approval under the FTA. The issue of whether the PSC may require agreements to be filed is not before the Court, and the Court takes no position herein on that issue.[33]

The parties agree that line sharing does not fall within the obligations of an ILEC as set forth in sections 251(b) and (c), *i.e.*, line sharing is not a UNE under section 251(c)(3).[34] The

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[31]Qwest's Opening Brief at 1; Cmplt. at 16-23.

[32]US West Communications v. MFS Intelenet, Inc., 193 F.3d at 1117 (citing Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997), for proposition that state agency's interpretation of a federal statute is considered de novo).

[33]See, e.g., Order Directing Qwest to File Commercial Agreements, In the Matter of the Commission Investigation Regarding the Status of the Commercial Line Sharing Agreement Between Qwest Corporation and DIECA Communications d/b/a Covad, 2004 WL 2465819 (Minn. PUC, September 27, 2004)(Minnesota Public Utilities Commission directing "Qwest to file its commercial agreements with the Commission, whether or not those agreements constitute 'interconnection agreements' for purposes of the [FTA]" noting, *inter alia*, that "[r]eviewing such agreements will provide the Commission with information about the evolution of competition in the state generally.").

[34]Counsel for the PSC conceded this point at oral argument. The PSC's concession is consistent with the FCC's determination that ILECs are not

parties disagree, however, with respect to the issue of whether the line sharing agreement between Qwest and Covad is nevertheless an interconnection agreement that must be submitted to the PSC for approval.

Qwest generally argues that it has no obligation to file any agreements that relate to services that it, as an ILEC, is not required to provide,[35] and that state commissions have no authority to impose requirements upon ILECs that the FTA does not impose. Qwest argues that the PSC, in taking action with respect to Qwest's CLSA with Covad, "improperly asserted authority over an agreement that does not address a section 251(b) or (c) service or element and hence is not an 'interconnection agreement' governed by that section of the [FTA]."[36]

It is Qwest's position that "[a] simple analysis of the interplay between sections 251 and 252 demonstrate[s] that there is no statutory basis to conclude that the [CLSA] must be filed."[37] Specifically, Qwest argues that there are only two

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required to provide line sharing as an unbundled network element under section 251(c)(3), 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, 18 FCC Rcd 16978, ¶¶ 255, et seq. (2003) ("Triennial Review Order" or "TRO"), a conclusion that the D.C. Circuit Court of Appeals has expressly upheld. United States v. Telecom Ass'n v. FCC, 359 F.3d 554, 584-85 (D.C. Cir. 2004) ("USTA II").

[35]Qwest's Opening Brief at 7.

[36]Id. at 10.

[37]Id. at 24-25.

provisions of section 252 that discuss the obligation of parties to file agreements with state commissions, and neither requires submission of the CLSA to the PSC.

The first provision is section 252(a)(1). Qwest argues that the provision's requirement that an agreement be submitted to the state commission is expressly premised on the agreement being for services or elements provided "pursuant to section 251." Because line sharing is not a service or element provided pursuant to section 251, Qwest argues, the CLSA need not be submitted to the PSC for approval.

The second provision is section 252(e)(1). As noted *supra*, it provides that any "interconnection agreement adopted by negotiation ... shall be submitted to the State commission." Qwest argues that the reference to agreements "adopted by negotiation" refers to section 252(a)(1) agreements which, as already discussed, relate only to services or elements provided pursuant to section 251. Again, because line sharing is not a service or element provided pursuant to section 251, Qwest argues, the CLSA need not be submitted to the PSC for approval.

In sum, Qwest argues that because it and Covad were not obligated to submit their CLSA to the PSC for approval, the PSC exceeded its authority when it took action on the CLSA.

The PSC first argues that section 252's plain language

dictates that the CLSA must be submitted to it for approval.[38] The PSC argues that the purpose of section 252(a)(1)'s first sentence "is to reward carriers for independently contracting for interconnection and provisioning of goods and services" and to relieve them from the substantive requirements of sections 251(b) and (c).[39] The sentence, the PSC argues, does not relieve carriers entering voluntary agreements from submitting their agreements to the state commissions for approval. Also, the PSC argues that "[n]othing in section 252(e)(1) limits the filing requirement of interconnection agreements to those that implement duties contained in §§ 251(b) and (c)."[40]

Second, the PSC argues that FCC orders support its position that the CLSA must be submitted to it for approval. The PSC argues that the FCC, in its order on the scope of section 252(a)(1)'s requirement for submission of agreements to state commissions for approval, encouraged state commissions to decide in the first instance which sorts of agreements must be submitted.[41] The PSC argues that the FCC, in a subsequent order, "reiterated the role of state commissions in determining in the

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[38]PSC's Brief at 8-14.

[39]Id. at 9.

[40]Id. at 12.

[41]Id. at 14-18 (citing Memorandum Opinion and Order, In the Matter of Qwest Communications International, Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89, 17 FCC Rcd 19337, 2002 WL 31204893 (Oct. 4, 2002) ("Declaratory Order")).

first instance what interconnection agreements must be filed."[42]

Third, the PSC argues that the CLSA is subject to section 252's submission requirement because the networks of Qwest and Covad are physically linked. This physically linking, the PSC argues, makes the CLSA an "interconnection agreement" under section 251, and thus subject to submission to the PSC under section 252.

Fourth, the PSC argues that its interpretation of section 252 is entitled to the Court's deference under Chevron USA Inc. v. Natural Resources Defense Council, Inc.[43] The PSC argues that because its interpretation of section 252 is reasonable, the Court should afford that interpretation deference.

Finally, the PSC argues that section 252's requirement for submission of agreements is not limited to agreements that contain the FCC's current list of unbundled network elements. The PSC argues that it and other state commissions are permitted to expand the list of network elements that must be made available to CLECs "as long as state requirements are consistent with and do not substantially prevent implementation of § 251 and the purposes of the [FTA]."[44]

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[42]Id. (citing In the Matter of Qwest Corporation Apparent Liability for Forfeiture, File No. EB-03-IH-0263 (March 12, 2004)("NAL")).

[43]Id. at 22-26 (citing Chevron, 467 U.S. 837, 842-43 (1984)).

[44]Id. at 27.

Having considered all of the parties' arguments, the Court concludes that section 252's language limits the requirement that agreements be submitted to state commissions for approval to those agreements that contain section 251 obligations. Because line sharing, which is the subject of Qwest's CLSA with Covad, is not an element or service that must be provided under section 251, there is no obligation to submit the CLSA to the PSC for approval under section 252.

As Qwest argues, section 252(a)(1)'s requirement that an agreement be submitted to a state commission is expressly premised on the agreement being for interconnection, services or network elements provided "pursuant to section 251." Here, as the parties agree and as relevant authority establishes, line sharing is not a service or element provided pursuant to section 251. Therefore, Qwest's CLSA with Covad is not the type of agreement contemplated in section 252(a)(1) that must be submitted to the PSC for approval.

Similarly, section 252(e)(1) requires submission to the state commission any "interconnection agreement adopted by negotiation ...." The reference to any agreement "adopted by negotiation" refers to section 252(a)(1) agreements which, as noted, involve only those services provided "pursuant to section 251." Again, line sharing is not a service or element provided pursuant to section 251. Thus, the CLSA at issue is not an "interconnection agreement" as contemplated in section 252, and

thus need not be submitted to the PSC for approval. The PSC's argument that section 252's language dictates a contrary result is unpersuasive.

The Court believes that its conclusion that the CLSA at issue need not be submitted to the PSC for approval is consistent with the FCC's interpretation of the statute's language. In the Declaratory Order, the FCC expressly concluded that "only those agreements that contain an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1)."[45] The PSC's argument that the FCC's orders support its position ignores the clear language of the Declaratory Order, and thus fails.

The Court notes that its conclusion that the CLSA need not be submitted to the PSC for approval is consistent with the conclusion of a another state commission that recently addressed the issue. The commission for the state of Washington recently concluded that an agreement markedly similar to the CLSA submitted to the PSC here is not subject to section 252.[46] Although this decision is not binding on the Court, it is instructive with respect to how another state regulatory body views line sharing agreements in relation to section 252.

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[45]Declaratory Order, ¶ 8, n.26 (emphasis in original).

[46]See Order No. 02: Dismissing Petition, In the Matter of the Petition of Multiband Communications, LLC, for Approval of Line Sharing Agreement with Qwest Corporation Pursuant to Section 252 of the Telecommunications Act of 1996, Docket No. UT-053005 (WUTC April 19, 2005)("Washington commission order")(attached to Qwest's Reply at attachment 1).

Finally, the Court believes that its conclusion herein is consistent with the intent of the FTA. Congress, in enacting the FTA, sought to promote competition by removing unnecessary impediments to commercial agreements entered between ILECs and CLECs, and also to recognize certain ongoing obligations for interconnection agreements. The result reached here is not at odds with either of Congress' purposes in enacting the FTA.[47]

V. CONCLUSION.

Based on the foregoing, the Court concludes that the CLSA is not a negotiated interconnection agreement that must be submitted to the PSC for approval under section 252. Accordingly,

IT IS ORDERED that Qwest's Motion for Judgment on Appeal[48] is GRANTED in part and DENIED in part as follows:

1. The CLSA[49] at issue herein is not subject to review and

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[47]The Court finds unpersuasive the PSC's argument that the physical linking of Qwest's and Covad's networks makes the CLSA an "interconnection agreement." The CLSA concerns only line sharing which, as already noted, is not a service or element that must be included in an interconnection agreement.

The Court also declines to afford the PSC's decision Chevron deference. The Ninth Circuit has ruled that a state commission's interpretations of the FTA are subject to de novo review. US West Communications v. MFS Intelenet, 193 F.3d at 1117. The Court declines the PSC's invitation to "revisit the standard of review that should be applied to a state commission's authority to require an interconnection agreement to be filed."

Finally, the Court finds moot the PSC's argument that it may add to the list of required UNEs. Even if this argument had a legal basis, there is no evidence before the Court that the PSC has formally decided to add line sharing to the list of UNEs. Thus, the issue is moot.

[48]Court's Doc. No. 31.

[49]Cmplt. ex. 2.

approval by the Defendants under section 252 of the FTA.

2. The PSC's Final Order and Order on Reconsideration[50] issued on September 22, 2004, is therefore VACATED.

3. All other requested relief is DENIED. The Court determines that Qwest's request for prospective injunctive relief is overly broad and goes beyond the narrow issue presented in this action.

The Clerk of Court shall enter Judgment accordingly.

DATED this 9th day of June, 2005.

Carolyn S. Ostby
United States Magistrate Judge

CERTIFICATE OF MAILING
DATE: 6/10/05 BY:
I hereby certify that a copy of this order was mailed to:
James Raine
Ted Smith
Monica Pearl

[50] Cmplt. ex. 9.

FILED, ENTERED AND NOTED IN
CIVIL JUDGMENT BOOK 38
JUNE 10, 2005
PATRICK E. DUFFY, CLERK
By

United States District Court

FOR THE DISTRICT OF MONTANA
HELENA DIVISION

QWEST CORPORATION, a Colorado corporation Plaintiffs, vs. **THOMAS J. SCHNEIDER, GREG JERGESON, MATT BRAINARD, JAY STOVALL, and BOB ROWE in their official capacities as Commissioners of the Montana Public Service Commission, and THE MONTANA PUBLIC SERVICE COMMISSION, a regulatory agency of the State of Motnana** Defendants.	**JUDGMENT IN A CIVIL CASE** **CASE NUMBER: CV-04-053-H-CSO**

IT IS ORDERED AND ADJUDGED that Qwest's Motion for Judgment on Appeal is GRANTED in part and DENIED in part as follows:

(1) The CLSA at issue herein is not subject to review and approval by the Defendants under section 252 of the FTA.

(2) The PSC's Final Order and Order on Reconsideration issued on September 22, 2004, is therefore VACATED.

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IN CIVIL JUDGMENT BOOK
VOLUME , PAGE

(3) All other requested relief is DENIED. The Court determines that Qwest's request for prospective injunctive relief is overly broad and goes beyond the narrow issue presented in this action.

Dated this 9th day of June, 2005.

PATRICK E. DUFFY, CLERK

BY RENATE WELDELE COURT SEAL

RENATE WELDELE, DEPUTY CLERK