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June 2, 2005

Pam Bonrud, Executive Director
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

VIA UPS OVERNIGHT

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 Initial Brief. The exhibits are being filed under separate cover by John Devaney. 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 INITIAL BRIEF

Qwest Corporation ("Qwest") respectfully submits this initial brief on the merits in this interconnection arbitration between Qwest and DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") under the Telecommunications Act of 1996 ("Act").

INTRODUCTION

This interconnection agreement arbitration demonstrates that the negotiation/arbitration process set forth in Sections 251 and 252 can work fairly and efficiently. Through their good faith negotiations, Qwest and Covad were able to agree upon almost all of the contractual provisions in the multi-hundred page interconnection agreement ("ICA") that is the subject of this arbitration. As a result, the parties have submitted only one disputed issue to the South Dakota Public Service Commission ("Commission") for resolution.

While Qwest appreciates Covad's good faith conduct in the negotiations, the one unresolved issue is attributable to Covad's attempt to impose network unbundling obligations on Qwest that conflict with rulings by the FCC and that are inconsistent with the Act. Covad's proposed ICA language regarding the definition of unbundled network elements ("UNEs") would require Qwest to provide almost unlimited unbundled access to the elements in Qwest's South Dakota telecommunications network. This proposal ignores the FCC's findings in the *Triennial*

Review Order[1] ("*TRO*") and the *Triennial Review Remand Order*[2] ("*TRRO*") that CLECs are not impaired without access to many network elements and that ILECs are therefore not required to unbundle them. As the FCC described in the *TRRO*, the FCC's new, "more targeted" unbundling standard "imposes unbundling obligations only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition."[3] The almost limitless unbundling that Covad proposes ignores this standard entirely.

Covad's broad unbundling demands also violate the rulings of the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit in which those courts struck down FCC unbundling requirements while confirming in the most forceful terms that the Act imposes real and substantial limitations on ILEC unbundling obligations. In addition, Covad's proposed unbundling language assumes incorrectly that state commissions have authority to require Bell Operating Companies ("BOCs") to provide network elements pursuant to Section 271, to determine pricing for those elements, and to include them in Section 252 ICAs.

The flawed nature of Covad's proposal is confirmed by the recent decisions in the Covad/Qwest arbitrations in Iowa, Minnesota, Utah, and Washington. Each of these

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[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36 (FCC rel. Aug. 21, 2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part, remanded in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

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

[3] *Id.* ¶ 2.

commissions has rejected Covad's position and proposed ICA language.[4] The consistency among these decision-makers is not a coincidence – Covad's proposal is without legal support. The infirmities of Covad's arguments are further demonstrated by Covad's willingness to voluntarily accept Qwest's language in the Colorado Covad/Qwest arbitration. In that proceeding, Covad elected to not raise the unbundling issue it now disputes here.[5]

In contrast to Covad's demands, Qwest's ICA proposal is specifically based upon the FCC's rulings in the *TRO* and other governing law. To ensure that the ICA complies with governing law and the policies underlying the Act, the Commission should adopt Qwest's proposed ICA language for the disputed issue.

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[4] Qwest is providing copies of these orders in a separate letter to the Commission. *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 (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 (Minn. Commission Dec. 15, 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)*, Docket No P-5692, 421/IC-04-549, Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement (Minn. Commission 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 (Wash. Commission 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 (Utah Commission Feb. 8, 2005) ("Utah Arbitration Order").

[5] *See In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Co.*, Colorado Commission Docket No. 04B-160T, Decision No. C04-1037, Initial Commission Decision (Colo. Commission Aug. 19, 2004) ("Colorado Arbitration Order").

ARGUMENT

Issue 1: Section 4.0 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, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, and 9.21.2.[6]

The Act requires ILECs to provide UNEs to other telecommunications carriers and gives the FCC the authority to determine which elements the ILECs must provide. In making these network unbundling determinations, the FCC must consider whether the failure to provide access to an element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[7] This "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*[8] and the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating three of the FCC's attempts at establishing lawful unbundling rules.[9]

The disputed issue arises because of Covad's insistence upon ICA language that would require Qwest to provide almost unlimited access to network elements in violation of the unbundling limitations established by these decisions, the Act, the *TRO*, and the *TRRO*. Covad's clear objective is to obtain access to all elements of Qwest's network that Covad may desire at the lowest rates possible. Not surprisingly, the commissions in Iowa, Minnesota, Utah, and Washington have rejected Covad's unbundling language, finding that it is plainly unlawful.[10]

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[6] By agreement of the parties, this issue is being submitted exclusively through briefs, not through any pre-filed testimony. The parties agree that these issues involve pure questions of law, not issues of fact.

[7] 47 U.S.C. § 251(d)(2).

[8] 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

[9] *USTA II*, *supra*; *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427-28 (D.C. Cir. 2002) ("*USTA I*").

[10] Because Covad accepted Qwest's language relating to unbundled network elements in the Colorado arbitration, the Colorado Commission did not address Covad's proposed unbundling language.

Each of these commissions determined correctly that it would be improper to include in a Section 251/252 ICA terms and conditions relating to network elements that Qwest provides under Section 271. As the Washington Commission 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.[11]

Likewise, the Utah Commission held:

> [W]e differ with Covad in its belief that we should therefore impose Section 271 and state law requirements in the context of a Section 252 arbitration. Section 252 was clearly intended to provide mechanisms for the parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law.[12]

Consistent with this statement, in a decision adopted by the Minnesota Commission, the Minnesota ALJ ruled that "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."[13] She explained further that "both the Act and the *TRO* make it clear that state commissions are charged with the arbitration of Section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to Section 271."[14]

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[11] Washington Arbitration Order ¶ 37.

[12] Utah Arbitration Order at 19-20.

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

[14] Minnesota ALJ Order ¶ 46. In an arbitration pending in another state, Covad recently 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 ALJ Order ¶ 47. Covad's statement that the ALJ rejected all of Qwest's language is thus entirely inaccurate.

And, in a decision issued last week, the Iowa Utilities Board 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.[15] 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."[16] In rejecting Covad's claim for unbundling under state law, the Board concluded that a 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."[17] The Board held further that, just as in this case, Covad had not presented any evidence to support an unbundling requirement under state law.[18]

These rulings, which address the same Covad unbundling language at issue here, confirm the unlawfulness of Covad's proposals. As is discussed further below, neither the Act nor the *TRO* permits including Section 271 unbundling obligations in a Section 251/252 ICA. Further, just as it failed to do in the prior arbitrations, Covad is not providing any evidence of impairment in this case to support its demands for unbundling under state law. There is thus no factual foundation for the impairment analysis that is required under Section 251 and therefore no basis for imposing unbundling obligations under state law.

Accordingly, for the reasons articulated by the other commissions that have considered this same issue, the Commission should resolve this issue in Qwest's favor and reject Covad's unbundling language.

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[15] Iowa Arbitration Order at 7.

[16] *Id.*

[17] *Id.* at 9.

[18] *Id.*

A. Summary of Qwest's And Covad's Conflicting Unbundling Proposals.

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

> [A] Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access or for which unbundled access is provided under this Agreement. Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act.

Qwest's language also incorporates the unbundling limitations established by the Act, the courts, and the FCC by listing specific network elements that, per court and FCC rulings, ILECs are not required to unbundled under Section 251. For example, Qwest's proposed Section 9.1.1.6 lists 18 network elements that the FCC specifically found in the *TRO* do not meet the "impairment" standard and do not have to be unbundled under Section 251.

While Qwest's ICA language properly recognizes the limitations on unbundling, its exclusion of certain network elements does not mean that those elements are unavailable to Covad and other CLECs. As the Commission is aware, Qwest is offering access to non-251 elements through commercial agreements and tariffs, including, for example, multi-state line sharing agreements with Covad.

Covad's sweeping unbundling proposals are built around its proposed definition of "Unbundled Network Element," which Covad defines as "a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access, *for which unbundled access is required under section 271 of the Act or applicable state law* . . . ." (emphasis added). Consistent with this definition, Covad's language for Section 9.1.1 would require Qwest to

provide "any and all UNEs required by the Telecommunications Act of 1996 (including, but not limited to Sections 251(b), (c), 252(a) and 271), FCC Rules, FCC Orders, and/or applicable state rules or orders . . . ."

Its proposal leaves no question that Covad is seeking to require Qwest to provide access to network elements for which the FCC has specifically refused to require unbundling and for which unbundling is no longer required as a result of the D.C. Circuit vacatur of unbundling requirements in *USTA II*. In Section 9.1.1.6, for example, Covad proposes language that would render irrelevant the FCC's non-impairment findings in the *TRO* and the D.C. Circuit's vacatur of certain unbundling rules:

> On the Effective Date of this Agreement, Qwest is no longer obligated to provide to CLEC certain Network Elements pursuant to Section 251 of the Act. Qwest will continue providing access to certain network elements as required by Section 271 or state law, regardless of whether access to such UNEs is required by Section 251 of the Act. This Agreement sets forth the terms and conditions by which network elements not subject to Section 251 unbundling obligations are offered to CLEC.

Under this proposal, Covad could contend, for example, that it can obtain unbundled access to OCn loops, feeder subloops, signaling and other elements despite the FCC's fact-based findings in the *TRO* that CLECs are not impaired without access to these elements.[19]

In addition to these demands, in its proposed Section 9.1.1.7, Covad is seeking TELRIC ("total element long run incremental cost") pricing for the network elements it claims Qwest

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[19] In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundle 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).

must provide under Section 271.[20] While its proposed language suggests that Covad is seeking TELRIC pricing only on a temporary basis, Covad's filings in this proceeding and in other states reveal that Covad is actually requesting that the permanent prices to be set under Sections 201 and 202 for Section 271 elements be based on TELRIC.[21]

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

Under Section 251, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. As the Supreme Court made clear in the *Iowa Utilities Board* case, the Act does not authorize "blanket access to incumbents' networks."[22] Rather, Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]."[23] 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."[24] The Supreme Court and D.C. Circuit have held that the Section 251(d)(2) requirements

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[20] In its Petition for Arbitration, Covad advocates the use of a "forward-looking, long-run incremental cost methodology," such as "TSLRIC," and argues that the FCC has not prohibited the use of TELRIC pricing for Section 271 elements. Covad's Petition for Arbitration at 8-9. It is thus clear that Covad is advocating the use of TELRIC or a similar pricing methodology.

[21] *See* Covad's Petition for Arbitration at 9 (advocating the use of "forward-looking, long-run incremental cost methodologies" for Section 271 elements and arguing that the FCC does not "forbid" TELRIC pricing for these elements).

[22] *Iowa Utilities Board*, 525 U.S. at 390.

[23] 47 U.S.C. § 251(c)(3).

[24] 47 U.S.C. § 251(d)(2).

reflect Congress's decision to place a real upper bound on the level of unbundling regulators may order.[25]

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.[26] 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."[27] And the D.C. Circuit confirmed in *USTA II* that Congress did not allow the FCC to have state commissions perform this work on its behalf.[28] *USTA II*'s clear holding is that the FCC, not state commissions, must make the impairment determination called for by Section 251(d)(3)(B) of the Act.

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

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are

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[25] *See Iowa Utilities Board*, 525 U.S. at 390 ("We cannot avoid the conclusion that if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] has come up with, it would not have included §251(d)(2) in the statute at all."); *USTA* I, 290 F.3d at 427-28 (quoting *Iowa Utilities Board*'s findings regarding congressional intent and section 251(d)(2) requirements, and holding that unbundling rules must be limited given their costs in terms of discouraging investment and innovation).

[26] 47 U.S.C. § 251(d)(2).

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

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

consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime.

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If a decision pursuant to state law were to require unbundling of a network element for which the Commission has either found no impairment—and thus has found that unbundling that element would conflict with the limits of section 251(d)(2))—or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(c).[29]

Federal courts interpreting the Act have reached the same conclusion.[30] Indeed, in a recent decision, the United States District Court of Michigan observed that in *USTA II*, the D.C. Circuit "rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations."[31] The court emphasized that while the Act permits states to adopt some "procompetition requirements," they cannot adopt any requirements that are inconsistent with the statute and FCC regulations. Specifically, the court held, a state commission "cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law."[32]

Consistent with these rulings, the FCC recently ruled that state commissions are generally without authority to require ILECs to unbundle network elements that the FCC has declined to

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[29] *TRO* ¶¶ 193, 195.

[30] *See Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (citing the above-quoted discussion in the *TRO* and stating that "we cannot now imagine" how a state could require unbundling of an element consistently with the Act where the FCC has not found the statutory impairment test to be satisfied).

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

[32] *Id.*

require ILECs to unbundle.[33] In its *BellSouth Declaratory Order*, the FCC addressed orders from four different state commissions that required BellSouth to provide DSL service over unbundled loops that CLECs were using to provide voice service.[34] This requirement, the FCC determined, effectively obligated BellSouth to unbundle the low frequency portion of the loop ("LFPL") which the FCC had specifically refused to require ILECs to unbundle in the *Triennial Review Order*.[35]

In striking down the orders, the FCC emphasized the preeminence of its regulations under the Act over state laws and regulations: "except in limited cases, the [FCC's] prerogatives with regard to local competition supersede state jurisdiction over these matters."[36] State authority is preserved under the Act, the FCC stated, only to the extent state regulations are not inconsistent with the requirements of Section 251 and do not "substantially prevent implementation of the requirements of section 251 or the purposes of sections 251 through 261 of the Act."[37] Because it had refused to require ILECs to unbundle the LFPL in the *TRO*, the FCC held that the four state orders requiring such unbundling "directly conflict and are inconsistent with the Commission's Rules and Policies implementing section 251."[38] It explained further that "[s]tate requirements that impose on BellSouth a requirement to unbundle the LFPL do exactly what the

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

[34] *Id.* ¶¶ 9-15.

[35] *Id.* ¶¶ 25-26.

[36] *Id.* ¶ 22.

[37] *Id.* ¶ 23.

[38] *Id.* ¶ 26.

Commission expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B)."[39]

Covad's broad proposals for unbundling under state law reflect its erroneous view that the Commission has plenary authority under state law to order whatever unbundling it chooses. What Covad ignores and what the FCC has reaffirmed in its *BellSouth Declaratory Order* is that the Act's savings clauses preserve independent state authority *only to the extent that the exercise of that authority is consistent with the Act*, including Section 251(d)(2)'s substantive limitations on the level of unbundling that may be authorized. Section 251(d)(3), for example, protects only those state enactments that are "consistent with the requirements of this section" — which a state law unbundling order ignoring the Act's limits would clearly not be. Likewise, Sections 261(b) and (c) both protect only those state regulations that "are not inconsistent with the provisions of this part" of the Act, which includes Section 251(d)(2). Nor does Section 252(e)(3) help Covad; that simply says that "nothing in this section" — that is, Section 252 — prohibits a state from enforcing its own law, but that section must be applied in accordance with the relevant limitations on the scope of permissible unbundling that are found in Section 251.[40]

Thus, these savings clauses do not preserve the authority of state commissions to adopt or enforce under state law unbundling requirements that have been rejected by the FCC or vacated in *USTA II*. Indeed, the Supreme Court has "decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law."[41] Congress has mandated the application of limiting principles in the determination of unbundling

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[39] *Id.* ¶ 27.

[40] *See* 47 U.S.C. § 251(d)(2).

[41] *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000).

requirements that reflect a balance of "the competing values at stake."[42] That balance would plainly be upset if a state commission could impose under state law unbundling requirements that have been found by the FCC to be inconsistent with the Act.

The limitations on state unbundling authority were recently recognized by the Oregon Commission in response to substantially the same arguments that Covad is presenting here. As that commission correctly concluded, a state commission "may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been eliminated by the *TRO* or *USTA II*."[43] Yet, that is precisely what Covad is requesting this Commission to do through its proposed unbundling language. As the Oregon Commission concluded, any unbundling a state commission requires must be based upon a fact-specific impairment analysis required by Section 251(d). Here, Covad is requesting that the Commission require blanket unbundling without an impairment analysis and without providing any evidence that it would be impaired without the multitude of network elements it is seeking.[44]

In addition, with the limited exception noted above involving feeder subloops, Covad's proposed ICA language fails to identify the specific network elements that would be unbundled under state law. With no identification of these elements, it is of course impossible for this

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[42] *Id. See also Iowa Utils. Bd.*, 535 U.S. at 388.

[43] *In the Matter of the Investigation to Determine Whether Impairment Exists in Particular Markets if Local Circuit Switching is no longer available*, Oregon Docket UM-1100, Order Denying CLEC Motion at 6 (Oregon P.U.C. June 11, 2004). The Oregon Commission adopted the order issued by an Oregon administrative law judge.

[44] The clash between Covad's state law unbundling demands and the federal unbundling scheme is demonstrated sharply by Covad's language in section 9.3.1.1 that would require Qwest to unbundle feeder subloops. In the *TRO*, the FCC refused to give CLECs unbundled access to this network element, finding that such access would undermine the objective of Section 706 of the Act "to spur deployment of advanced telecommunications capability . . . ." *TRO* ¶ 253. A state-imposed requirement to unbundle feeder subloops would plainly conflict with this FCC determination and would undermine the FCC's attempt to achieve a fundamental objective of the Act – promoting investment in advanced telecommunications facilities. This conflict would of course not be limited to feeder subloops, since Covad contends that its unbundling language reaches other network elements for which the FCC specifically rejected CLEC unbundling requests.

Commission to conduct the element-specific impairment analysis required under Section 251. In this sense, Covad's proposal lacks the "concrete meaning" that, in the words of the D.C. Circuit, is necessary to make an impairment standard "readily justiciable."

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

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

Covad's unbundling proposals also assume incorrectly that state commissions have authority to impose binding unbundling obligations under Section 271. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine whether BOCs have complied with the substantive provisions of Section 271, including the "checklist" provisions upon which Covad purports to base its requests.[45] State commissions have only a non-substantive, "consulting" role in that determination.[46] As one court has explained, a state commission has a fundamentally different role in implementing Section 271 than it does in implementing Sections 251 and 252:

> Sections 251 and 252 contemplate state commissions may take affirmative action towards the goals of those Sections, *while Section 271 does not contemplate substantive conduct on the part of state commissions*. Thus, a "savings clause" is not necessary for

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[45] 47 U.S.C. 271(d)(3).

[46] 47 U.S.C. 271(d)(2)(B).

Section 271 because the state commissions' role is investigatory and consulting, not substantive, in nature.[47]

Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271,[48] likewise provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.[49] The FCC has thus confirmed that "[w]hether a particular [section 271] checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6)."[50]

The absence of any state commission decision-making authority under Section 271 also is confirmed by the fundamental principle that a state administrative agency has no role in the administration of federal law, absent express authorization by Congress. That is so even if the federal agency charged by Congress with the law's administration attempts to delegate its responsibility to the state agency.[51] *A fortiori*, where (as here) there has been no delegation by the federal agency, a state agency has no authority to issue binding orders pursuant to federal law.[52]

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[47] *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by Section 271 to impose binding obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004) (emphasis added).

[48] *TRO* ¶¶ 656, 662.

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

[50] *TRO* ¶ 664.

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

[52] *See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (state commission not authorized by Section 271 to impose binding obligations). *See also TRO* ¶¶ 186-87 ("states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations").

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

(a) By its terms, the "duty" of an ILEC "to negotiate in good faith in accordance with Section 252 the particular terms and conditions of [interconnection] agreements" is limited to implementation of "the duties described in paragraphs (1) though (5) of [Section 251(b)] and [Section 251(c)]."[53]

(b) Section 252(a) likewise makes clear that the negotiations it requires are limited to "request[s] for interconnection, services or network elements *pursuant to section 251*."[54]

(c) Section 252(b), which provides for state commission arbitration of unresolved issues, incorporates those same limitations through its reference to the "negotiations under this section [252(a)]."[55]

(d) The grounds upon which a state commission may approve or reject an arbitrated interconnection agreement are limited to non-compliance with Section 251 and Section 252(d).[56]

(e) The final step of the Section 252 process, federal judicial review of decisions by state commissions approving or rejecting interconnection agreements (including the arbitration decisions they incorporate), is likewise limited to "whether the agreement . . . meets the requirements of section 251 and this section [252]."[57]

It is thus clear that state commission arbitration of disputes over the duties imposed by federal law is limited to those imposed by Section 251, and excludes the conditions imposed by

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[53] 47 U.S.C. 251(c)(1).

[54] 47 U.S.C. 252(a) (emphasis added).

[55] *See* 47 U.S.C. 252(b)(1).

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

[57] 47 U.S.C. 252(e)(6).

Section 271. That is the conclusion that the commissions in Iowa, Minnesota, Utah, and Washington have reached, as reflected by the summaries of their arbitration orders set forth above.

D. Covad's Proposal To Use TELRIC Rates For Section 271 Elements Is Unlawful.

Under Covad's proposed Section 9.1.1.7 of the ICA, existing TELRIC rates would apply to network elements that Qwest provides pursuant to Section 271 until new rates are established in accordance with "Sections 201 and 202 of the Act or applicable state law." In addition, it is clear from Covad's arbitration petition and its filings in other states that Covad is ultimately seeking permanent TELRIC-based prices for Section 271 elements.[58]

The absence of state decision-making authority under Sections 201, 202, and 271 establishes that state commissions are without authority to determine the prices that apply to network elements provided under Section 271. Thus, as noted above, the FCC ruled in the *TRO* that it will determine the lawfulness of rates that BOCs charge for Section 271 elements in connection with applications and enforcement proceedings brought under that section.

Significantly, the FCC recently rejected the argument that the pricing authority granted to state commissions by Section 252(c)(2) to set rates for UNEs provided under Section 251 gives commissions authority to set rates for Section 271 elements. In its opposition to the petitions for a *writ of certiorari* filed with the Supreme Court in connection with *USTA II*, the FCC addressed the contention that Section 252 gives state commissions exclusive authority to set rates for network elements. It stated that the contention "rests on a flawed legal premise,"[59] explaining

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[58] *See* Covad's Petition for Arbitration at 8-9.

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

that Section 252 limits the pricing authority of state commissions to network elements provided under Section 251(c)(3):

> Section 252(c)(2) directs state commissions to "establish any rates for * * * network elements *according to subsection (d)*." 47 U.S.C. 252(c)(2) (emphasis added). Section 252(d) specifies that States set "the just and reasonable rate for network elements" *only* "for purposes of [47 U.S.C. 251(c)(3)]." 47 U.S.C. 252(d)(1).[60]

Accordingly, the FCC emphasized, "[t]he statute makes no mention of a state role in setting rates for facilities or services that are provided by Bell companies to comply with Section 271 and are *not* governed by Section 251(c)(3)."[61]

In requesting that the Commission adopt its rate proposal, Covad is therefore asking the Commission to exercise authority it does not have and that rests exclusively with the FCC. In addition, Covad's demand for even the temporary application of TELRIC pricing to Section 271 elements violates the FCC's ruling in the *TRO* that TELRIC pricing does not apply to these elements. The FCC ruled unequivocally that any elements an ILEC unbundles pursuant to Section 271 are to be priced based on the Section 201-02 standard that rates must not be unjust, unreasonable, or unreasonably discriminatory.[62] In so ruling, the FCC confirmed, consistent with its prior rulings in Section 271 orders, that TELRIC pricing does not apply to these network elements.[63] 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

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

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

[62] *TRO* ¶¶ 656-64.

[63] *Id.*

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."[64]

CONCLUSION AND REQUEST FOR RELIEF

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

DATED: June 2, 2005

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of June 2005, I caused to be served a true and correct copy of QWEST CORPORATION'S INITIAL BRIEF ON THE MERITS by U.S. mail and electronic mail to the following:

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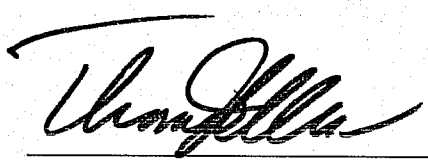

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