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BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
 Chairman
 WILLIAM MUNDELL
 Commissioner
 JEFF HATCH-MILLER
 Commissioner
 MIKE GLEASON
 Commissioner
 KRISTIN MAYES
 Commissioner

Arizona Corporation Commission
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**IN THE MATTER OF THE PETITION
 OF DIECA COMMUNICATIONS, INC.
 dba COVAD COMMUNICATIONS
 COMPANY FOR ARBITRATION OF
 AN INTERCONNECTION
 AGREEMENT WITH QWEST
 CORPORATION.**

**DOCKET NO. T-03632A-04-0425
 T-01051B-04-0425**

**QWEST CORPORATION'S COMBINED REPLY TO THE RESPONSES OF
 COVAD COMMUNICATIONS AND COMMISSION STAFF IN OPPOSITION TO
 QWEST'S MOTION TO DISMISS**

I. INTRODUCTION AND OVERVIEW

Qwest Corporation ("Qwest") respectfully submits this reply to the responses of Covad Communications ("Covad") and Staff of the Arizona Corporation Commission ("Staff") in opposition to Qwest's motion to dismiss. Qwest's motion seeks an order from the Commission dismissing Issue 2, as set forth in part G of Covad's arbitration petition ("Petition"), to the extent Covad seeks to have the Arizona Corporation Commission ("Commission") (1) require Qwest to provide unbundled access to network elements pursuant to section 271 of the Act; (2) set rates for any network element that Qwest provides under section 271; and (3) require Qwest to provide unbundled access to network elements under state law that conflicts with the access required by the Federal

1 Communications Commission ("FCC") in the *Triennial Review Order* ("TRO").¹

2 As Qwest demonstrated in its opening brief, the Act's "impairment" standard
3 imposes important limitations on ILECs' unbundling obligations, as has been forcefully
4 demonstrated by the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*² and
5 the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating each of the FCC's three
6 attempts at establishing lawful unbundling rules.³ In this case, the unbundling obligations
7 that Covad would have the Commission impose on Qwest ignore entirely these critical
8 limitations and are based on the legally flawed assumption that a state commission may
9 require unbundling under state law, which the FCC has expressly rejected. As shown by
10 their responses to Qwest's motion, neither Covad nor Staff recognizes the Act's important
11 limits on state law authority – namely, that such authority must be exercised consistent
12 with section 251 and the federal unbundling regime established by the FCC.

13 Moreover, Covad and Staff improperly ask this Commission to require unbundling
14 and set rates under section 271, ignoring that states have no decision-making authority
15 under section 271. As discussed below, the FCC has exclusive jurisdiction to determine
16 the network elements that Regional Bell Operating Companies ("BOCs") are required to
17 provide under section 271 and to determine the rates that apply to those elements. The
18 FCC cannot – and has not – delegated that authority to state commissions. Covad and
19 Staff offer several strained readings of the Act to support their claim that states have
20 unbundling authority under section 271, but their interpretations are wrong and certainly
21 do not come close to establishing that Congress has expressly conferred section 271
22 decision-making authority on state commissions.

23
24 ¹ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*,
25 18 FCC Rcd. 16978 (2003) ("TRO"), *aff'd in part and rev'd and vacated in part, United States Telecom*
26 *Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA I*"). Although *USTA II* vacated the FCC's
determinations to require access to certain UNEs, it affirmed the FCC's determinations not to require
access to other UNEs.

27 ² 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

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

1 Finally, the FCC's recently issued interim unbundling rules and Notice of Proposed
2 Rulemaking ("*Interim Rules*" and "*Unbundling NPRM*") establish additional legal and
3 practical limitations on Covad's ability to obtain the broad unbundling it seeks.⁴ As
4 discussed below, these recent FCC pronouncements provide additional reason for
5 rejecting Covad's limitless unbundling demands and dismissing Issue 2.

6 **II. ARGUMENT**

7 **A. Covad's Network Unbundling Proposals Are Inconsistent With The** 8 **FCC's *Interim Unbundling Rules* and the *Unbundling NPRM*.**

9 Under the FCC's *Interim Rules*, the extent of Covad's access to switching,
10 enterprise market loops, and dedicated transport is governed by and limited to the terms
11 and conditions that applied under the Qwest/Covad interconnection agreement ("*ICA*")
12 that existed as of June 15, 2004.⁵ Through the unlimited unbundling language it has
13 proposed, Covad is asking the Commission to impose certain terms and conditions for
14 access to these elements that did not exist in the parties' *ICA* as of June 15. The *Interim*
15 *Rules* very clearly prohibit state commissions from imposing such terms and conditions.

16 Equally important, the FCC expressed its intent in the *Unbundling NPRM* to
17 formulate permanent unbundling rules "on an expedited basis," perhaps by the end of the
18 year.⁶ The likelihood of impermissible conflicts between Covad's unbundling proposals
19 and the FCC's impairment determinations has risen substantially with the FCC's issuance
20

21
22 ⁴ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*,
23 18 FCC Rcd. 16978 (2003) ("*TRO*"), *aff'd in part and rev'd and vacated in part, United States Telecom*
24 *Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA IP*"); Order and Notice of Proposed
25 Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*,
26 WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004). On August 23, 2004,
27 Qwest, Verizon, and the United States Telecom Association challenged the lawfulness of the *Interim Rules*
28 in a petition for a *writ of mandamus* filed with the D.C. Circuit. While Qwest strongly believes that the
Interim Rules are unlawful and that a *writ of mandamus* should issue, the rules are of course still in effect
Accordingly, this brief discusses the legal effects of the *Interim Rules* on Covad's unbundling demands,
notwithstanding the pending petition for mandamus.

⁵ *Interim Rules* at ¶ 2.

⁶ *Unbundling NPRM* at ¶ 18.

1 of the *Unbundling NPRM* and the FCC's expressed objective of expeditiously establishing
2 final unbundling rules. Given the D.C. Circuit's vacatur of substantial portions of the
3 FCC's unbundling rules and the court's findings in both *USTA I* and *USTA II* that the FCC
4 has misapplied the impairment standard, there is at least a reasonable likelihood that the
5 final unbundling rules will require less network unbundling than the *TRO* imposed. In
6 contrast to this probable decrease in federally imposed unbundling requirements, Covad's
7 language seeks to expand Qwest's unbundling obligations without any meaningful limits
8 and far beyond what the FCC required in the *TRO*. In other words, Covad is headed in a
9 direction precisely opposite to that the FCC is apparently taking, resulting in a high
10 probability of impermissible conflicts with federal unbundling laws if the Commission
11 were to adopt Covad's language.

12 In these circumstances, Qwest respectfully suggests that the prudent course for the
13 Commission is to reject Covad's aggressive unbundling demands while the FCC
14 formulates final unbundling rules. This path recognizes the deference that must be given
15 to the FCC as the regulatory body with primary responsibility for administering the Act.
16 As the Eighth Circuit has stated, "[t]he new regime for regulating competition in this
17 industry is federal in nature . . . and while Congress has chosen to retain a significant role
18 for state commissions, *the scope of that role is measured by federal, not state law.*"⁷ To
19 avoid impermissible conflicts, the federal law relating to unbundling should be known and
20 established before a state commission should even consider imposing the type of far-
21 reaching unbundling obligations that Covad proposes.

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

24 A state administrative agency has no role in the administration of federal law,
25 absent express authorization by Congress. That is so even if the federal agency charged
26 by Congress with the law's administration attempts to delegate its responsibility to the

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28 ⁷ *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000) (emphasis added).

1 state agency.⁸ As Qwest demonstrated in its opening brief, no provision of the Act
2 authorizes state commissions to impose or enforce obligations under section 271.⁹ Section
3 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to
4 determine whether BOCs have complied with the substantive provisions of section 271,
5 including the "checklist" provisions upon which Covad and Staff base their argument. 47
6 U.S.C. 271(d)(3). State commissions have only a non-substantive, "consulting" role in
7 that determination. 47 U.S.C. 271(d)(2)(B).¹⁰ As one court has explained, a state
8 commission has a fundamentally different role in implementing section 271 than it does in
9 implementing sections 251 and 252:

10
11 Sections 251 and 252 contemplate state commissions may take affirmative
12 action towards the goals of those Sections, *while Section 271 does not*
13 *contemplate substantive conduct on the part of state commissions*. Thus, a
14 "savings clause" is not necessary for Section 271 because the state
15 commissions' role is investigatory and consulting, not substantive, in
16 nature.¹¹

17 Notwithstanding the clear absence of state commission decision-making authority
18 under section 271, Covad and Staff contend that the Commission has authority to require
19 Qwest to provide section 271 network elements through the adoption of Covad's proposed
20 unbundling language that would impose that obligation. Unable to cite to any language in

21 ⁸ *USTA II*, 359 F.3d at 565-68.

22 ⁹ Qwest Opening Br. at 13-16. *See also Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*,
23 2003 WL 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by section 271 to impose binding
24 obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004). *See also TRO* at ¶¶ 186-87 ("states do not have plenary authority
25 under federal law to create, modify or eliminate unbundling obligations").

26 ¹⁰ *See also Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 ("section 271
27 clearly contemplates an advisory role for the [state commission], not a substantive role"). Sections 201 and 202,
28 which govern the rates, terms and conditions applicable to the unbundling requirements imposed by section 271,
likewise provide no role for state commissions. That authority has been conferred by Congress upon the FCC and
federal courts. *See* 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). 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).*" *TRO* at ¶ 664.

¹¹ *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 11 (emphasis
added).

1 the Act that confers section 271 decision-making authority on state commissions, they
2 present several arguments that they claim inferentially establish the authority of states to
3 impose section 271 obligations. An inferential argument that states have authority cannot
4 substitute for the express grant of authority that is required for states to be able to
5 administer provisions of federal law. Moreover, the provisions of the Act they rely upon
6 are not reasonably susceptible to the inferences they seek to draw.

7 Covad and Staff assert first that the Act gives state commissions the authority to
8 review and approve agreements containing section 271 obligations and that the conferral
9 of that authority implicitly empowers state commissions to require section 271
10 unbundling. This argument fundamentally misstates the authority of state commissions to
11 approve interconnection agreements under the Act. Section 252(e)(1) authorizes state
12 commissions to review interconnection agreements adopted by arbitration only to
13 determine if the agreements "meet the requirements of section 251, including the
14 regulations prescribed by the [FCC] pursuant to section 251, or the standards set forth in
15 subsection [252(d)]." The scope of state authority to review arbitrated interconnection
16 agreements is thus expressly limited under section 252(e)(1) to ensuring compliance with
17 section 251 and 252(d). There is no mention anywhere in sections 251, 252, or 271 of
18 state authority to review agreements addressing section 271 obligations.

19 The absence of state authority to review agreements containing terms and
20 conditions relating to section 271 obligations is supported further by section 252(e)(6) of
21 the Act, which grants parties the right to seek judicial review of state commission
22 determinations relating to interconnection agreements. That section limits judicial review
23 to "whether the agreement . . . meets the requirements of section 251 and this section."
24 Significantly, Congress did not authorize courts to review agreements for compliance with
25 section 271, demonstrating that Congress did not intend that state commissions would
26 make any determinations relating to agreements that address section 271 obligations. If
27 Congress had intended otherwise, it easily could have stated as much.

28 Equally significant, in its *Declaratory Ruling* defining the agreements that carriers

1 must file with state commissions for approval, the FCC established that "only those
2 agreements that contain an ongoing obligation *relating to section 251(b) or (c) must be*
3 *filed under 252(a)(1).*"¹² Notably, the FCC did not require carriers to file agreements
4 containing obligations relating to section 271. Staff's assertion that the *Declaratory*
5 *Ruling* establishes state jurisdiction over *any* agreement relating to interconnection or
6 UNEs is based on a flawed reading of the FCC's ruling. In the FCC's *Notice of Apparent*
7 *Liability* issued in conjunction with the *Declaratory Ruling*, the FCC carefully limited the
8 Section 252(a)(1) filing requirement to only those agreements that contain an ongoing
9 obligation relating to network elements offered pursuant to Section 251.¹³ Thus, the
10 *Declaratory Ruling* is consistent with – and confirms – the lack of state authority over
11 agreements containing section 271 obligations.

12 Staff asserts next that state authority to require access to section 271 elements can
13 be inferred from the requirement in section 271(c)(2)(A) that a BOC's network access and
14 interconnection obligations be set forth in an agreement or a statement of generally
15 available terms ("SGAT") that has been approved by a state commission. This
16 requirement, Staff apparently infers, presumes that the agreements or SGATs that state
17 commissions approve may include terms and conditions relating to the network access and
18 interconnection obligations imposed by section 271's competitive checklist.¹⁴ However,
19 Staff's argument overlooks the fact that the "agreements" referred to in section
20 271(c)(2)(A) are expressly defined in section 271(c)(1)(A) as "agreements that have been
21 approved *under section 252.*" It is thus clear that the agreements referred to in that section
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24 ¹² See Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc.*
25 *Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated*
26 *Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd. 19337, 2002 FCC Lexis
27 4929 at ¶8 n.26 (October 4, 2002) ("*Declaratory Order*") (Emphasis added).

28 ¹³ *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, File No. EB-03-IH- 0263, NAL
Account No. 200432080022, FRM No. 0001-6056-25, at 13 n.70. ("The sentence quoted in the text is a summary of
the interconnection obligations listed in section 251 of the Act. 47 U.S.C. § 251....").

¹⁴ See section 271(c)(2)(B) (listing the competitive checklist items).

1 are those that relate to section 252 – not section 271 – obligations.¹⁵ As discussed above,
2 the FCC established in its *Declaratory Ruling* that the scope of section 252 agreements is
3 limited to terms and conditions relating to the obligations imposed by sections 251(b) and
4 (c). Accordingly, the reference in section 271(c)(1)(A) to agreements "approved under
5 section 252" is limited to agreements that address section 251(b) and (c) obligations and
6 does not include commercial agreements that address terms and conditions relating to
7 section 271.¹⁶

8 Finally, without citing to any provision of the Act, Covad asserts that state
9 commissions have "independent authority to enforce these Section 271 RBOC
10 obligations," claiming that this asserted authority empowers state commissions to require
11 network unbundling under section 271.¹⁷ However, the Act expressly gives the FCC, not
12 state commissions, the enforcement authority relating to non-251 obligations following
13 the BOC's receipt of authorization to provide InterLATA service in the state. *See* 47
14 U.S.C. § 271(d)(6). The Act does not provide a role for state commissions relating to
15 those issues. Moreover, even if it were lawful for the FCC to delegate to state
16 commission's its responsibilities – which it has not – the FCC has not even attempted such
17 delegation. To the contrary, the FCC has stated that it will make any determinations
18 under section 271 that should thereafter be necessary.¹⁸

19 In sum, the Act contains neither an express nor an implicit grant of authority to
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21 ¹⁵ The same analysis applies to the SGATs addressed in section 271(c)(1)(B). That section
22 permits BOCs seeking entry into long distance markets to rely on SGATs setting forth the terms and
23 conditions of the "access and interconnection described in subparagraph [271(c)(1)(A)]" As noted,
the access and interconnection described in subparagraph 271(c)(1)(A) is limited to that which is required
under section 252 and does not include obligations under section 271.

24 ¹⁶ Section 271(c)(1)(A) also does not impose any filing requirements for agreements. Instead, it
25 only establishes as a requirement for obtaining long distance relief under Track A that there be a
"facilities-based competitor" with whom the BOC has a binding agreement approved under section 252.

26 ¹⁷ Covad Br. at 7-8.

27 ¹⁸ *TRO* at ¶ 665 ("[S]ection 271(d)(6) grants *the Commission* enforcement authority to ensure that
28 the BOC continues to comply with the market opening requirements of section 271. In particular, this
section provides *the Commission* with enforcement authority where a BOC 'has ceased to meet any of the
conditions required for such approval.'" (emphasis added) (footnote omitted)..

1 state commissions to make network unbundling determinations under section 271.
2 Covad's and Staff's arguments to the contrary are without merit.

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

5 Staff and Covad assert that the authority of state commissions to set prices for
6 section 271 elements is "an open issue at the federal level," but that the Arizona
7 Commission ("Commission") nonetheless has such authority.¹⁹ They are wrong.

8 First, the FCC was quite clear in the *TRO* that it has responsibility for setting prices
9 for elements that BOCs provide under section 271: "[w]hether a particular [section 271]
10 checklist element's rate satisfies the just and reasonable pricing standard is a fact specific
11 inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's
12 application for section 271 authority or in an enforcement proceeding brought pursuant to
13 section 271(d)(6)."²⁰

14 Second, sections 201 and 202, which govern the rates, terms and conditions
15 applicable to the unbundling requirements imposed by section 271,²¹ provide no role for
16 state commissions. That authority has been conferred by Congress upon the FCC and
17 federal courts.²² The FCC has not delegated that authority, and Congress has not
18 permitted it to do so.

19 Third, the pricing authority that state commissions have under section 252(d)(1)
20 does not, as Staff claims, empower states to set rates for section 271 elements.²³ The
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23 ¹⁹ Staff Br. at 7.

24 ²⁰ *TRO* at ¶ 664.

25 ²¹ *TRO* at ¶¶ 656, 662.

26 ²² *See id.*; 47 U.S.C. 201(b) (authorizing the FCC to prescribe rules and regulations to carry out the
27 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);
28 208(a) (authorizing FCC to adjudicate complaints alleging violations of the Act).

²³ Staff Br. at 7.

1 authority granted by that provision is expressly limited to "determining the just and
2 reasonable rate[s] for interconnection for purposes of subsection [251(c)(2)] . . . [and] for
3 network elements for purposes of subsection [251(c)(3)]." Thus, the only network
4 elements over which states have pricing authority are those that an ILEC provides
5 pursuant to section 251(c)(3). Nothing in the Act extends that authority to section 271
6 elements, as evidenced by Staff's inability to cite any statutory provision that even
7 remotely suggests state commissions have such authority.

8 Significantly, the FCC recently rejected substantially the same pricing argument
9 that Staff has offered here in its opposition to the petitions for a *writ of certiorari* filed
10 with the Supreme Court by NARUC, state commissions, and certain CLECs in connection
11 with *USTA II*. Addressing NARUC's contention that section 252 gives state commissions
12 exclusive authority to set rates for network elements, the FCC stated that the contention
13 "rests on a flawed legal premise."²⁴ It explained that section 252 limits the pricing
14 authority of state commissions to network elements provided under section 251(c)(3):

15
16 Section 252(c)(2) directs state commissions to "establish any rates for * * *
17 network elements *according to subsection (d)*." 47 U.S.C. 252(c)(2)
18 (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).²⁵

19 Accordingly, the FCC emphasized, "[t]he statute makes no mention of a state role
20 in setting rates for facilities or services that are provided by Bell companies to comply
21 with Section 271 and are *not* governed by Section 251(c)(3)."²⁶

22 Finally, Staff's claim that the Commission has authority to set TELRIC rates for
23 section 271 elements – which of course incorrectly assumes that state commissions have

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25 ²⁴ Brief for the Federal Respondents in Opposition to Petitions for a Writ of Certiorari, *National*
26 *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).

27 ²⁵ *Id.* (emphasis in original).

28 ²⁶ *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.*

1 pricing authority over section 271 elements – is directly refuted by the *TRO* and *USTA*
2 *II*.²⁷ In the *TRO*, the FCC ruled very clearly that any elements a BOC provides pursuant to
3 section 271 are to be priced based on the section 201-02 standard that rates must not be
4 unjust, unreasonable, or unreasonably discriminatory.²⁸ Consistent with its prior rulings in
5 section 271 orders, the FCC confirmed that TELRIC pricing does not apply to these
6 network elements.²⁹ In *USTA II*, the D.C. Circuit reached the same conclusion, rejecting
7 the CLECs' claim that it was "unreasonable for the Commission to apply a different
8 pricing standard under Section 271" and instead stating that "we see nothing unreasonable
9 in the Commission's decision to confine TELRIC pricing to instances where it has found
10 impairment."³⁰

11 For these reasons, Covad's pricing proposal set forth in its proposed section 9.1.1.7
12 of the ICA is jurisdictionally improper and unlawful, and this claim should therefore be
13 dismissed from the arbitration.³¹

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

17 As Qwest demonstrated in its opening brief, under section 251 of the Act, there is
18 no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC
19 impairment finding. Section 251(c)(3) authorizes unbundling only "in accordance with
20 . . . the requirements of this section [251]."³² Section 251(d)(2), in turn, provides that

21 ²⁷ *See id.* at 7-8.

22 ²⁸ *TRO* at ¶¶ 656-64.

23 ²⁹ *Id.*

24 ³⁰ *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

25 ³¹ Covad asserts that Qwest has misstated Covad's position concerning whether TELRIC rates
26 should apply to UNEs, claiming that its position is not that TELRIC pricing is mandatory but that it is
27 among the various pricing options that are available for section 271 elements. Covad Br. at 2-3. Qwest
28 has not misstated Covad's position, as evidenced by the fact that under Covad's proposed section 9.1.1.7,
TELRIC pricing would apply to elements provided under section 271 at least for some period of time.
That result is impermissible under the *TRO* and *USTA II*.

³² 47 U.S.C. § 251(c)(3).

1 unbundling may be required *only if the FCC determines* (A) that “access to such network
2 elements as are proprietary in nature is necessary” and (B) that the failure to provide
3 access to network elements “would impair the ability of the telecommunications carrier
4 seeking access to provide the services that it seeks to offer.”³³

5 Congress explicitly assigned the task of applying the Section 251(d)(2) impairment
6 test and “determining what network elements should be made available for purposes of
7 subsection [251](c)(3)” to the FCC.³⁴ The Supreme Court confirmed that as a
8 precondition to unbundling, Section 251(d)(2) “requires the [Federal Communications]
9 Commission to determine on a rational basis which network elements must be made
10 available, taking into account the objectives of the Act and giving some substance to the
11 ‘necessary’ and ‘impair’ requirements.”³⁵ And *USTA II* establishes that Congress did not
12 allow the FCC to have state commissions perform this work on its behalf.³⁶

13 Covad responds to this legal framework described in Qwest's opening brief as if it
14 were not there, arguing that the Act, the *TRO*, and *USTA II* do not impose any meaningful
15 limits on the authority of state commissions to require unbundling under state law. Thus,
16 Covad asserts that the Commission is free to require Qwest to provide network elements
17 that the FCC declined to require ILECs unbundle based on specific findings that CLECs
18 are not impaired without them.³⁷ Covad's argument fails to recognize that the Act's
19 savings clauses preserve independent state authority only to the extent that authority is
20 exercised in a manner consistent with the Act. Thus, section 251(d)(3) expressly protects
21 only those state enactments that are “consistent with the requirements of this section,” and

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23 ³³ 47 U.S.C. § 251(d)(2).

24 ³⁴ 47 U.S.C. § 251(d)(2).

25 ³⁵ *Iowa Utilities Board*, 525 U.S. at 391-92.

26 ³⁶ See *USTA II*, 359 F.3d at 568.

27 ³⁷ For example, Covad asserts that the Commission has authority to require access to "subloop
28 arrangements" (Covad Br. at 10) 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 at ¶ 253.

1 sections 261(b) and (c) only allow state regulations that “are not inconsistent with the
2 provisions of this part” of the Act, which includes section 251(d)(2).

3 The fundamental problem with Covad's proposed unbundling language in this case
4 – and one of the reasons why Qwest is compelled to file its motion to dismiss – is that it
5 requires unbundling regardless of consistency with the Act. As Qwest described in its
6 opening brief, the inevitable conflicts with federal law that would result from adoption of
7 Covad's position are demonstrated by the application of Covad's proposed unbundling
8 language to feeder subloops.³⁸ Covad's proposed section 9.3.1.1 of the ICA would require
9 Qwest to provide access to feeder subloops despite the FCC's ruling in the *TRO* that
10 ILECs are not required to unbundle this network element.³⁹ The FCC determined that an
11 unbundling requirement for this facility would undermine the objective of section 706 of
12 the Act “to spur deployment of advanced telecommunications capability”⁴⁰ An
13 unbundling requirement under state law for this facility – which is what Covad would
14 have this Commission impose – is precisely the type of state interference with “the
15 implementation of the federal regime” that the FCC held in the *TRO* would be
16 impermissible.⁴¹

17 Neither Covad nor Staff responds to this striking example of how the virtually
18 limitless unbundling obligations that would result from Covad's language directly conflict
19 with federal law and the “federal regime” that the FCC alone has authority to implement.
20 And this example would not be an isolated occurrence under Covad's unbundling
21 language, as the language is broad enough for Covad to contend that Qwest is required to
22 provide unbundled access to OCn loops, feeder subloops, DS3 loops (in excess of two per
23 customer location), extended unbundled dedicated interoffice transport and extended
24

25 ³⁸ Qwest Opening Br. at 10.

26 ³⁹ *TRO* at ¶ 253.

27 ⁴⁰ *Id.*

28 ⁴¹ *Id.* at ¶ 192 n. 611.

1 unbundled dark fiber, and other elements despite the FCC's fact-based findings in the *TRO*
2 that CLECs are not impaired without access to these elements.⁴²

3 As the FCC stated quite clearly in the *TRO*, the type of state law unbundling
4 regime that Covad is proposing – one that ignores altogether FCC findings of non-
5 impairment with respect to individual elements – "overlook[s] the specific restraints on
6 state action taken pursuant to state law embodied in section 251(d)(3), and the general
7 restraints on state actions found in sections 261(b) and (c) of the Act."⁴³ This approach to
8 state law unbundling "ignore[s] long-standing federal preemption principles that establish
9 a federal agency's authority to preclude state action if the agency, in adopting its federal
10 policy, determines that state actions would thwart that policy."⁴⁴ Accordingly, the FCC
11 determined in the *TRO* that state law requirements to unbundle elements for which the
12 FCC found no impairment would likely be preempted:

13
14 If a decision pursuant to state law were to require unbundling
15 of a network element for which the Commission has either
16 found no impairment—and thus has found that unbundling
17 that element would conflict with the limits of section
18 251(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).⁴⁵

19
20 ⁴² In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundle
21 these and other elements under section 251: ¶ 315 (OCn loops); ¶ 253 (feeder subloops); ¶ 324 (DS3
22 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).

23 ⁴³ *TRO* at ¶ 192 (footnote omitted).

24 ⁴⁴ *Id.*

25 ⁴⁵ *TRO* at ¶ 195. Covad attempts to minimize the significance of this statement from the FCC by
26 asserting that the FCC was referring only to "future state rules," implying that state actions taken outside a
27 rulemaking context and existing state rules are largely immune from preemption. Covad Br. at 13. This
28 argument is baseless. First, the FCC specifically ruled that the restraints on state unbundling authority
apply to both rulemakings and state actions taken in connection with individual interconnection
agreements. *TRO* at ¶ 194. Second, existing state rules can of course be applied in a manner that conflicts
with federal law, and there is thus no authority for Covad's suggestion that such rules are somehow exempt

1 As the United States Court of Appeals for the Seventh Circuit stated, "we cannot now
2 imagine" how a state could require unbundling of an element consistently with the Act
3 where the FCC has not found the statutory impairment test to be satisfied.⁴⁶

4 Finally, the expansive state law unbundling that Covad and Staff advocate is
5 inconsistent with the *Unbundling NPRM* and the *Interim Rules*. As discussed above, the
6 FCC expressed its intent in the *NPRM* to issue permanent unbundling rules expeditiously.
7 If the Commission were to adopt Covad's state law unbundling proposal in this arbitration,
8 there would be certain conflicts between the Commission's ruling and the permanent rules
9 that the FCC will issue. The Commission should avoid these conflicts by rejecting
10 Covad's proposal and permitting the federal agency responsible for administering the Act
11 to establish permanent unbundling rules. In addition, in Staff's words, the *Interim Rules*
12 "essentially impose[] a 'stand-still' order . . . for the next six months, or until the FCC
13 comes out with new unbundling rules" ⁴⁷ With this "stand-still" in place, there is no
14 legal basis for the Commission to order the significant increase in network unbundling
15 that would be required under Covad's proposal.

16 **E. Covad's Unbundling Demands Under Section 271 And State Law Are**
17 **Not A Proper Subject For A Section 252 Arbitration.**

18 Covad inexplicably asserts that Qwest does not appear to be challenging the
19 Commission's jurisdiction to address in the context of a section 252 arbitration the issue of
20 unbundling under section 271 or Arizona law.⁴⁸ On the contrary, in its opening brief,
21 Qwest addressed in detail the reasons why the Commission is without authority to address
22 Covad's unbundling demands.⁴⁹

23 from full application of preemption principles. Nothing in the quoted statement from the FCC suggests
24 otherwise.

25 ⁴⁶ See *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d at 395.

26 ⁴⁷ Staff Br. at 10.

27 ⁴⁸ Covad Br. at 2.

28 ⁴⁹ Qwest Br. at 14-16. Because Qwest addressed this issue in its opening brief, there is no basis
for Covad's assertion that it should be permitted to address it in a surreply.

1 Specifically, the process mandated by section 252, the provision pursuant to which
2 Covad filed its petition for arbitration, is concerned with implementation of an ILEC's
3 obligations under section 251, not section 271. In an arbitration conducted under section
4 252, therefore, state commissions only have authority to impose terms and conditions
5 relating to section 251 obligations. Rather than repeat those arguments here, Qwest refers
6 the Commission to its opening brief.⁵⁰

7 Covad attempts to avoid the Act's clear limitation of arbitrable issues to those set
8 forth in section 251(b) and (c) by asserting that during their negotiations, Qwest and
9 Covad "negotiated" Covad's section 271 unbundling demands. Relying on *CoServ*
10 *Limited Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003), Covad
11 asserts that this negotiation made the issue arbitrable even though it does not relate to any
12 duties imposed by sections 251(b) or (c). However, Qwest did not include in its section
13 252(a) negotiations with Covad its duties under section 271 and strongly disputes Covad's
14 assertion that the parties negotiated that issue.⁵¹ Indeed, Qwest itself never proposed any
15 language relating to section 271 unbundling obligations, and Qwest and Covad never
16 discussed Covad's proposed language. There was not, therefore, *mutual agreement* to
17 address those issues in the negotiations, as is required to make an issue arbitrable under
18 *Coserv*.

19
20
21 ⁵⁰ *See id.*

22 ⁵¹ As Qwest noted in its opening brief, in the Qwest/Covad Colorado and Minnesota arbitrations,
23 administrative law judges in those states ruled that Qwest and Covad did negotiate Covad's request for
24 unbundling under section 271. *See Petition of Qwest Corporation for Arbitration of an Interconnection*
25 *Agreement with Covad Communications Company Pursuant to 47 U.S.C. § 252(b)*, Colo. Commission
26 Docket No. 04B-160T, Decision No. R04-0649-I (June 16, 2004); *Petition of Covad Communications*
27 *Company for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C.*
28 *§ 252(b)*, Minn. Commission Docket No. P-5692, 421/C1-04-549, Minn. Office of Administrative
Hearings Docket No. 3-2500-15908-4, Order on Motion to Dismiss (June 4, 2004). However, the
Colorado Commission recently vacated the ALJ's order on mootness grounds. And, in the Minnesota
arbitration, Qwest established that its negotiators consistently refused to negotiate those issues and
expressly told Covad's representatives that the issues were not properly part of the section 251/252
process. The ruling in that case incorrectly found that Qwest opened the door to Covad's insertion of
section 271 issues into the negotiations by proposing ICA language to implement the section 251
unbundling obligations established by the *TRO*.

1 Accordingly, the Commission does not have the authority to address the section
2 271 network unbundling and state law unbundling in excess of the requirements of section
3 251 that Covad seeks.

4 **F. Covad's Presentation Of Its Unbundling Demands In The Context Of**
5 **An Interconnection Arbitration Violates Applicable Arizona**
6 **Procedural Requirements.**

7 As Qwest discussed in its opening brief, the broad access to network elements that
8 Covad seeks under state law also exceeds the unbundling required under the
9 Commission's existing rules.⁵² An interconnection arbitration, which is an adjudicative
10 proceeding, is not the proper type of proceeding in which to alter the Commission's
11 unbundling requirements. Under Arizona's Administrative Procedures Act ("APA"), Title
12 51, Chapter 6, a change in existing law must be implemented through a rulemaking
13 proceeding and in accordance with the APA's requirements relating to notice and the
14 opportunity for public comment.

15 Covad and Staff do not address these procedural flaws that are raised by Covad's
16 unbundling demands. Indeed, in addition to violating the APA, Covad's presentation of
17 its unbundling demands in the context of an arbitration violate this Commission's own
18 procedural rules relating to network unbundling. In Rule 14-2-1307(C), the Commission
19 identifies the "essential facilities" that it requires local exchange carriers ("LECs") to
20 provide on an unbundled basis. If a CLEC desires access to network facilities that are not
21 listed in Rule 14-2-1307(C), as Covad does in this case, it must submit a "bona fide
22 request" to the ILEC pursuant to Rule 14-2-307(E). That rule sets forth clearly defined
23 procedures for the submission and resolution of such a request, none of which Covad has
24 followed. Significantly, the rule does *not* provide that CLEC requests for additional
25 unbundling are to be resolved through an arbitration process.

26 Accordingly, Covad's request in this arbitration for the Commission to effectively
27 expand the unbundling required under the Commission's unbundling rules and to require

28

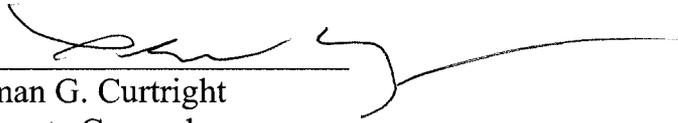
⁵² Qwest Opening Br. at 11 n.26.

1 Qwest to provide access to more elements than is required under the rules is procedurally
2 improper. The request violates both the Arizona APA and this Commission's procedural
3 rules that govern CLEC requests for access to ILEC's network elements.

4 **III. Conclusion**

5 For the reasons stated here and in Qwest's opening brief in support of its motion,
6 the Commission should dismiss Issue 2 of Covad's petition.
7

8 RESPECTFULLY SUBMITTED this 10th day of September, 2004.
9

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