

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

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Chairman
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Arizona Corporation Commission  
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8 IN THE MATTER OF THE PETITION OF DIECA  
 9 COMMUNICATIONS, INC. dba COVAD  
 10 COMMUNICATIONS COMPANY FOR  
 11 ARBITRATION OF AN INTERCONNECTION  
 12 AGREEMENT WITH QWEST CORPORATION

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

**STAFF OPPOSITION TO QWEST MOTION TO DISMISS  
 PORTIONS OF COVAD'S PETITION FOR ARBITRATION**

**I. INTRODUCTION**

15 On July 21, 2004, Qwest Corporation ("Qwest") filed a Motion to Dismiss portions of Covad  
 16 Communications Company's ("Covad") Petition for Arbitration. More specifically, Qwest requests  
 17 that Issue 2 of Covad's Petition relating to access to network elements pursuant to Section 271 of the  
 18 Telecommunications Act of 1996 ("Federal Act") and Arizona law, as well as Section 251 of the  
 19 Federal Act be stricken. Qwest predicates its Motion on an alleged lack of authority by the Arizona  
 20 Corporation Commission ("ACC" or "Commission") to act on these matters. Because Staff believes  
 21 that the Commission has jurisdiction over the issues raised and that they are appropriately resolved  
 22 within the context of a Section 252 arbitration proceeding, Staff opposes Qwest's Motion.

**II. DISCUSSION**

24 Issue 2 of Covad's Petition for Arbitration asks: Should the Parties' Agreement provide for a  
 25 access to network elements pursuant to Section 271 of the Telecommunications Act of 1996 and  
 26 Arizona, as well as Section 251 of the Telecommunications Act of 1996? Staff believes that the  
 27 Commission has the jurisdiction to make determinations with respect to both of these issues under the  
 28

1 authority given it in Section 252 of the Federal Act, and therefore, the issues raised by Covad should  
2 not be dismissed from the arbitration, on jurisdictional grounds.

3  
4 **1. The Commission has the Jurisdiction Under Section 252 of the Federal Act to  
Resolve the Issues Raised By Covad.**

5 **A. The Commission's Authority Under Section 252 Is Very Broad Extending  
6 to Voluntary, Mediated and Arbitrated Agreements Covering A Wide  
7 Array of Arrangements Between Carriers.**

8 One issue raised by Qwest's Motion concerns what is encompassed within the term  
9 "interconnection agreement" and subject to review or arbitration by State commissions. The Staff,  
10 therefore, believes it is important in resolving the first issue raised by Qwest (the availability of  
11 network elements under Section 271) to initially consider the scope of the Commission's jurisdiction  
12 under Section 252, the definition of an interconnection agreement, the types of services included  
13 therein, and what types of agreements are required to be filed for review and approval by the  
14 Commission.

15 Under Section 252 of the Federal Act, State commissions are given broad authority to review  
16 and approve "interconnection agreements" between carriers. The Act encourages carriers to undertake  
17 voluntary negotiations and to enter into voluntary binding agreements without regard to the standards  
18 set forth in subsections (b) and (c) of Section 251 of the Act.<sup>1</sup> If disputes arise, the State commission  
19 resolves them through an arbitration which is binding on both parties. In addition, the State  
20 commissions are the designated repository for all such agreements, whether arrived at through  
21 arbitration or voluntary negotiation.

22 The FCC has addressed the types of agreements which fall within the scope of Section 252  
23 several times, the most recent being in response to a Petition for Declaratory Ruling filed by Qwest.  
24 In its Declaratory Ruling<sup>2</sup> in response to Qwest's Petition, the FCC stated that if the agreement  
25 pertained to an ongoing obligation pertaining to resale, number portability, dialing parity, access to  
26 rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation,

27 <sup>1</sup> See 47 U.S.C. Section 252(a)(1).

28 <sup>2</sup> *In the Matter of Qwest Communications International, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd. 19337 at  
para. 8 (rel. October 4, 2002) ("Qwest Declaratory Order").

1 it was an interconnection agreement over which the State commission has jurisdiction. In the *Local*  
2 *Competition First Report and Order*<sup>3</sup>, the FCC also interpreted the term “interconnection agreement”  
3 very broadly. The FCC, in its *Local Competition First Report and Order* went so far as to require  
4 agreements between neighboring noncompeting LECs to be filed with the State commission.<sup>4</sup>

5 The FCC also stated that the State commissions should be responsible for applying, in the first  
6 instance, the statutory interpretation to the terms and conditions of specific agreements.<sup>5</sup> The FCC  
7 went on to state that “...we believe this is consistent with the structure of section 252, which vests in  
8 the states the authority to conduct fact-intensive determinations relating to interconnection  
9 agreements.”<sup>6</sup> It will also be important in resolving the first issue raised by Qwest, to consider that  
10 Section 252(e)(1) requires “any” agreement for interconnection to be filed with and reviewed by the  
11 State commission. Section 252(e)(1) provides:

12 “Any interconnection agreement adopted by negotiation or arbitration shall be  
13 submitted for approval to the State commission. A State commission to which an  
14 agreement is submitted shall approve or reject the agreement, with written findings as  
to any deficiencies.” (Emphasis added).

15 The importance of the Section 252 review and filing requirements was underscored by the  
16 FCC in the following passage from their *Local Competition First Report and Order*:

17 State commissions should have the opportunity to review all agreements, including  
18 those that were negotiated before the new law was enacted, to ensure that such  
19 agreements do not discriminate...and are not contrary to the public  
20 interest...Requiring all contracts to be filed also limits an incumbent LEC’s ability to  
21 discriminate among carriers, for at least two reasons. First, requiring public filing of  
22 agreements enables carriers to have information about rates, terms, and conditions that  
23 an incumbent LEC makes available to others. Second, any interconnection, service or  
24 network element provide under an agreement approved by the state commission under  
25 section 252 must be made available to any other requesting telecommunications carrier  
26 upon the same terms and conditions, in accordance with section 252(i)...Conversely,  
27 excluding certain agreements from public disclosure could have anticompetitive  
28 consequences.<sup>7</sup>

24 <sup>3</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,*  
25 *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499  
(rel. 1966)(“*Local Competition First Report and Order*”).

26 <sup>4</sup> *Local Competition First Report and Order* at para. 168.

27 <sup>5</sup> *Qwest Declaratory Ruling* at para. 7.

28 <sup>6</sup> *Id.*

<sup>7</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,*  
*Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499  
at para. 167 (rel. 1966)(“*First Local Competition Order*”).

1           Against this backdrop, Qwest's first issue, i.e., whether the Commission has the authority  
2 under Section 252 to arbitrate issues regarding Qwest's continuing obligation under Section 271 to  
3 make network elements, interconnection or access available to competitors such as Covad, will be  
4 discussed.

5           **B. Section 252 Extends to the Interconnection and Access Obligations of Qwest**  
6           **Under Section 271 of the Act, and Therefore, this Issue Should Not be Dismissed on**  
7           **Jurisdictional Grounds.**

8           Covad seeks through Issue 2 of its arbitration to include provisions which more specifically  
9 define Qwest's interconnection and access obligations under Section 271(c). The provisions of  
10 Section 271 at issue are contained at 47 U.S.C. Section 271(c)(2)(B) which is entitled "SPECIFIC  
11 INTERCONNECTION REQUIREMENTS—", and provide in relevant part that access or  
12 interconnection provided or generally offered by a Bell operating company to other  
telecommunications carriers meets the requirements of the 271 Competitive Checklist if it includes:

- 13           “(iv) Local loop transmission from the central office to the customer's premises,  
14           unbundled from local switching or other services.  
15           (v) Local transport from the trunk side of a wireline local exchange carrier switch  
16           unbundled from switching or other services.  
17           (vi) Local switching unbundled from transport, local loop transmission, or other  
18           services.”

19           As the FCC acknowledged, these provisions require Qwest to continue to provide certain  
20 network elements, irrespective of any findings of impairment under Section 251(d)(2):

21           “[W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an  
22 independent obligation for BOCs to provide access to loops, switching, transport, and  
23 signaling regardless of any unbundling analysis under section 251.”<sup>8</sup>

24           Therefore, while the D.C. Circuit Court's vacatur may ultimately affect the availability of  
25 mass market switching, shared and dedicated transport under Section 251(d)(2), the BOCs will still  
26 be required to make these elements available under Section 271(c)(2)(B). In the FCC's recently  
27 released *Interim Unbundling Order*<sup>9</sup>, carriers are required to continue to provide these network  
28 elements at their current rates (to the extent they are offered in an interconnection agreement with the

<sup>8</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 at para. 653 (2003)(“TRO”), *aff'd in part and rev'd and vacated in part, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(“USTA II”).

<sup>9</sup> *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, Order and Notice of Proposed Rulemaking (Rel. August 20, 2004)(“*Interim Unbundling Order*”).

1 CLEC in effect as of June 15, 2004), for the next 6 months (from the date of publication of the FCC  
2 Order in the Federal Register) or until the FCC issues new rules, whichever occurs first. However,  
3 availability of elements, interconnection or access under Section 271 will continue to be important for  
4 elements affected by the Court's vacatur, and others, particularly if after its 6 month review the FCC  
5 finds "non-impairment" under Section 251(d)(2) for any of these network elements. In that event, the  
6 CLEC is entitled to obtain access to many of these elements under Section 271.

7 Qwest requests dismissal of this issue because it states that this Commission has no authority  
8 to require Qwest to make elements available under Section 271 of the Act. However, the  
9 Commission is not requiring Qwest to make any elements available that it is not already required to  
10 make available under the provisions of the Federal Act itself. Qwest is required under the  
11 Competitive Checklist to make certain elements, interconnection and access available to CLECs, as a  
12 condition of it receiving Section 271 authority.

13 Qwest also argues that only interconnection or unbundled network elements provided under  
14 Section 251 fall within the State commission's authority under Section 252. Qwest relies primarily  
15 upon the language of Section 252(a)(1) which states: "Upon receiving a request for interconnection,  
16 services, or network elements **pursuant to section 251**, an incumbent local exchange carrier may  
17 negotiate and enter into a binding agreement with the requesting telecommunications carrier or  
18 carriers without regard to the standards set forth in subsections (b) and (c) of section 251."  
19 However, this language addresses only voluntary requests for interconnection, services or network  
20 elements and is not meant to limit the scope of the review authority of state commissions under the  
21 Act. In addition, the language of this section itself states that the ILEC may negotiate and enter into  
22 a binding agreement **without regard to** the standards set forth in section 251.

23 The section that defines the Commission's review and approval authority is Section 252(e).  
24 Under Section 252(e), the Commission is given review and approval authority over **any**  
25 interconnection agreement. There is no limiting language as Qwest suggests that only  
26 interconnection agreements addressing network elements, interconnection or access under Section  
27 251 must be filed with, reviewed and approved by the Commission. Had Congress intended to limit  
28 the scope of the filing obligation or the State commission's review and approval authority in this

1 fashion, it is presumed that Congress would merely have added the same language to Section 252(e),  
2 which it did not. The fact that Congress did not underscores that the Commission's review authority  
3 under Section 252 is very broad and extends to **any** agreement which addresses an ongoing obligation  
4 relating to interconnection, network elements or access.

5         There can be little doubt that the obligations contained in Section 271 of the Act are  
6 "interconnection" and "access" obligations which are properly included in an interconnection  
7 agreement under Section 252. In fact this is supported by the plain language of Section 271. The  
8 title of the 271 Section in which these specific unbundling obligations are contained is entitled  
9 "SPECIFIC INTERCONNECTION REQUIREMENTS". Moreover, under sub-part (A) of Section  
10 271(c)(2), the BOC is deemed to meet the requirements of that section if it is providing such access  
11 or interconnection in a Statement of Generally Available Terms and Conditions ("SGAT") or an  
12 Interconnection Agreement. Under Section 252, the State commission is given authority to review  
13 and approve both the SGAT and all interconnections agreements entered into between carriers  
14 operating within the State's jurisdiction. No separate review and approval process for interconnection  
15 agreements or SGAT provisions containing 271 related provisions was established in Section 271,  
16 therefore it must be presumed that Congress intended this review to take place in the context of the  
17 regular Section 252 review process by State commissions.

18         In addition, State commission review in the Section 252 arbitration process is not precluded  
19 even if elements previously made available under Section 251(d)(2) can now arguably be classified  
20 as "interstate" in nature because the BOC must continue to provide them under Section 271. In the  
21 *Local Competition First Report and Order*, the FCC discussed its role with that of the states over  
22 local competition matters:

23                 "We conclude that, in enacting sections 251, 252, and 253, Congress created a  
24 regulatory system that differs significantly from the dual regulatory system it  
25 established in the 1934 Act. (cite omitted). That Act generally gave jurisdiction over  
26 interstate matters to the FCC and over intrastate matters to the states. The 1996 Act  
27 alters this framework, and expands the applicability of both national rules to  
28 historically intrastate issues, and state rules to historically interstate issues. Indeed,  
many provisions of the 1996 Act are designed to open telecommunications markets to  
all potential service providers, without distinction between interstate and intrastate  
services.

1 For the reasons set forth below, we hold that section 251 authorizes the FCC to  
2 establish regulations regarding both interstate and intrastate aspects of interconnection,  
3 services, and access to unbundled elements. We also hold that the regulations the  
4 Commission establishes pursuant to section 251 are binding upon states and carriers  
5 and section 2(b) does not limit the Commission's authority to establish regulations  
6 governing intrastate matters pursuant to section 251. **Similarly, we find that the  
7 states' authority pursuant to section 252 also extends to both interstate and  
8 intrastate matters.** Although we recognize that these sections do not contain an  
9 explicit grant of intrastate authority to the Commission or of interstate authority to the  
10 states, we nonetheless find that this interpretation is the only reasonable way to  
11 reconcile the various provisions of sections 251 and 252, and the statute as a whole."<sup>10</sup>  
12 (Emphasis added).<sup>11</sup>

13 Qwest also argues that this Commission has no authority to set prices for the network  
14 elements Qwest is obligated to continue to make available under Section 271. While this is still an  
15 open issue at the federal level, Staff believes that this Commission does have such authority under  
16 Section 252. While the FCC stated in the TRO that such elements are to be priced under the just,  
17 reasonable, and nondiscriminatory criteria (as set forth in sections 201 and 202 of the  
18 Communications Act), that does not mean that they are not subject to the Section 252 arbitration and  
19 interconnection agreement process. As discussed earlier, the FCC has stated that the only reasonable  
20 construction of the States' authority under Section 252 is that it extends to both intrastate and  
21 interstate matters.

22 Further, under Section 252, the Commission was given the authority to review pricing for  
23 interconnection, network access and network elements. The standard contained in Section 252(d) is  
24 also a "just and reasonable" standard. Presumably, the Commission in the absence of FCC rules, or  
25 the FCC, could either accept the TELRIC standard or another standard for network elements or  
26 access and interconnection the Company is required to continue to provide under Section 271. But,  
27 given this Commission's authority under Section 252, it is the Commission's responsibility to ensure  
28 that arbitrated agreements meet the requirements of the Act, including its pricing standards.

This Commission, as part of its Section 252 responsibilities, has in the past assumed  
jurisdiction and reviewed market based pricing proposed by Qwest for delisted unbundled network

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<sup>10</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom. AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*Iowa Utilities Board*).

<sup>11</sup> See *Local Competition First Report and Order* at paras. 83-84.

1 elements (elements no longer required under the impairment standard of Section 251). In the last  
2 wholesale pricing docket in Arizona, this Commission reviewed the market-based pricing proposed  
3 by Qwest for several unbundled network elements that had been subsequently delisted by the FCC.<sup>12</sup>

4 Other State commissions have found that interconnection agreements containing terms and  
5 conditions relating to the continued offering of network elements by BOCs (some of which would  
6 presumably fall under the BOC's continuing obligation under 271) are subject to their jurisdiction  
7 under Section 252.<sup>13</sup>

8 In summary, Covad, as part of its arbitration, has every right to raise this issue and obtain a  
9 determination regarding Qwest's obligations under Section 271 to make certain unbundled network  
10 elements available under the provisions of the Federal Act. This Commission's rulings would be  
11 binding unless ultimately preempted by the FCC. Accordingly, this issue should not be dismissed on  
12 jurisdictional grounds.

13 **C. 47 U.S.C. Section 251(d) Expressly Recognizes and Authorizes Unbundling**  
14 **Determinations by This Commission Under State Law.**

15 Qwest also challenges the Commission's unbundling authority under State law. Qwest  
16 contends that this Commission has no authority to create unbundling requirements under state law  
17 that the FCC rejected in the TRO or that the D.C. Circuit vacated in *USTA II*. Qwest Motion at p. 6.  
18 Staff concedes that this Commission cannot require Qwest to unbundle elements that are inconsistent  
19 with the Federal Act or would substantially prevent implementation of the provisions of the Act or  
20 FCC implementing regulations.

21 Staff does not agree, however, that the Commission cannot establish unbundling obligations  
22 for elements that the D.C. Circuit vacated in *USTA II*. Those elements were vacated only because the  
23 Court found that the sub-delegation to the states was unlawful; and absent the states' review, the

24 \_\_\_\_\_  
25 <sup>12</sup> In the Matter of the Investigation Into Qwest Corporation's Compliance with Certain Wholesale Pricing Requirements  
26 for Unbundled Network Elements and Resale Discounts, Docket No. T-00000A-00-0194, Phase II Opinion and Order, at  
27 p. 75, Decision No. 64922 (rel. June 12, 2002).

28 <sup>13</sup> See, *In the Matter of the Request for Commission Approval of an Interconnection Agreement between SBC Michigan  
and Sage Telecom, Inc., Case No. U-13513, and In the Matter, On the Commission's Own Motion to Require SBC  
Michigan and Sage Telecom, Inc., to Submit Their Interconnection Agreement for Review and Approval, Case No. U-  
14121, Michigan Public Service Commission (April 28, 2004); See also Investigation into the Obligations of Incumbent  
Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Pennsylvania Public Utility  
Commission Docket No. I-00030100, Reconsideration Order (May 27, 2004).*

1 FCC's record was alone (without the states' findings) not sufficient to support its findings with regard  
2 to the elements. Qwest is attempting to inaccurately portray and interpret this as a finding of non-  
3 impairment by the Court. The Court made no such finding.

4 The FCC has itself acknowledged the authority of State commissions to make unbundling  
5 determinations under state law that do not conflict with federal determinations. Specifically, 47  
6 U.S.C. 251(d)(3) provides:

7  
8 "PRESERVATION OF STATE ACCESS REGULATIONS—In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

- 9 (A) establishes access and interconnection obligations of local  
10 exchange carriers;  
11 (B) is consistent with the requirements of this section; and  
12 (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part."

13 In this case, there are no federal determinations yet for any rulings by this Commission to  
14 conflict with. The FCC has not yet acted on the issues stemming from the D.C. Circuit's opinion  
15 (except to impose what amounts to a stand-still order for 6 months). In addition, the FCC did not  
16 preempt further state unbundling; but rather determined that such state determinations should be  
17 subject to review on a case by case basis. In fact, this Commission adopted state unbundling rules  
18 years ago.<sup>14</sup>

19 It is also important to note that the FCC had found impairment for all of the elements  
20 ultimately vacated by the D.C. Circuit, subject to state findings to the contrary. Staff's own review  
21 of the record in the TRO docket in Arizona to-date supports a finding of impairment in many  
22 markets. In fact, Qwest did not even challenge the nationwide impairment determinations in Arizona  
23 for dedicated high-capacity transport and loops. To argue that the State commission cannot adopt  
24 unbundling rules that give recognition to the impairment in Arizona markets, flies in the face of  
25 Section 251(d)(3) of the Federal Act.

26  
27  
28 <sup>14</sup> See A.A.C. R14-2-1502 *et. seq.*

1 Absent federal unbundling rules, state unbundling rules or requirements would provide  
2 needed certainty in Arizona telecommunications markets. To this point, the FCC recently issued *its*  
3 *Interim Unbundling Order* which contemplates action by the FCC in 6 months on new rules. While  
4 the FCC's *Interim Unbundling Order* does not explicitly preclude state unbundling determinations,  
5 nor can it preclude determinations which are consistent with the Federal Act, it essentially imposes  
6 what amounts to a "stand-still" order (subject to a few exceptions) for the next 6 months, or until the  
7 FCC comes out with new unbundling rules, whichever occurs earlier. The parties will address the  
8 FCC's *Interim Unbundling Order* in supplemental comments to be filed next month.

9 In summary, the Commission has the jurisdiction to determine that certain elements must be  
10 made available under state law. The Commission's ruling would only ultimately be subject to federal  
11 preemption to the extent it conflicted with federal law. Thus, dismissal of this issue on jurisdictional  
12 grounds would not be appropriate.

13 **1. The Agreements Negotiated/Arbitrated by State Commissions Under Section**  
14 **252 Encompass State Unbundling Determinations.**

15 Once again, the unbundling determinations made by State commissions fall within the realm  
16 of the state's own authority under state law and is expressly recognized in Section 252(d)(3). Thus,  
17 these issues are properly addressed in a state arbitration proceeding under Section 252. In addition to  
18 Section 251(d)(3), Section 252(e) provides that nothing prohibits a State commission from  
19 establishing or enforcing other requirements of State law in its review of an agreement, including  
20 requiring compliance with intrastate telecommunications service quality standards or requirements.  
21 Thus, the issues raised by Covad regarding state unbundling determinations should not be dismissed  
22 on jurisdictional grounds.

23 **D. These Issues Also Fall Under the ACC's Unbundling Rules and are Appropriate**  
24 **for Commission resolution under State Law.**

25 A.A.C. R14-2-1502 defines an "Interconnection Service" as "those features and functions of a  
26 local exchange carrier's network that enable other local exchange carriers to provide local exchange  
27 and exchange access services. Interconnection services include, but are not limited to, those services  
28

1 offered by local exchange carriers which have been classified by the Commission as essential  
2 services.”

3 To the extent the interconnection, access and network elements to be provided (under Issue 2  
4 of Covad’s arbitration) consists primarily of local network elements that would enable Covad to  
5 provide competitive local exchange and exchange access services, they would fall within the  
6 requirements of State law, or A.A.C. R14-2-1502 *et seq.*

7 **III. CONCLUSION**

8 Qwest’s Motion to Dismiss Issue 2 of Covad’s arbitration should be denied.

9 RESPECTFULLY SUBMITTED this 31st day of August, 2004.

10  
11 By 

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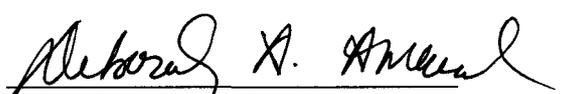
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