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BEFORE THE ARIZONA CORPORATION COMMISSION

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4 MARC SPITZER
Chairman
5 WILLIAM MUNDELL
Commissioner
6 JEFF HATCH-MILLER
Commissioner
7 MIKE GLEASON
Commissioner
8 KRISTIN MAYES
9 Commissioner

Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION
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10 IN THE MATTER OF THE PETITION OF
11 DIECA COMMUNICATIONS, INC. dba
12 COVAD COMMUNICATIONS
13 COMPANY FOR ARBITRATION OF AN
14 INTERCONNECTION AGREEMENT
WITH QWEST CORPORATION.

DOCKET NO. T-03632A-04-0425

15 **QWEST CORPORATION'S MOTION TO DISMISS PORTIONS OF COVAD'S**
16 **PETITION FOR ARBITRATION**

17 **I. INTRODUCTION AND OVERVIEW**

18 Qwest Corporation ("Qwest") respectfully submits this motion to dismiss certain
19 requests which petitioner Dieca Communications, Inc. D/B/A Covad Communications
20 Company ("Covad") has raised in this arbitration under the Telecommunications Act of
21 1996 ("the Act"). Specifically, Qwest seeks an order from the Commission dismissing
22 Issue 2, as set forth in part G of Covad's petition ("Petition"), to the extent Covad seeks to
23 have this Commission (1) require Qwest to provide unbundled access to network elements
24 pursuant to section 271 of the Act; (2) set rates for any network elements that Qwest
25 provides under section 271; and (3) require Qwest to provide unbundled access to network
26 elements under state law that conflicts with the access the Federal Communications

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

2 The Act requires incumbent local exchange carriers ("ILECs") like Qwest to
3 provide network elements to other telecommunications carriers and gives the FCC the
4 authority to determine which elements the ILECs must provide. In making these network
5 unbundling determinations, the FCC must consider whether the failure to provide access
6 to an element "would impair the ability of the telecommunications carrier seeking access
7 to provide the services that it seeks to offer."² In the *TRO*, the FCC specifically declined
8 to require ILECs to provide access to certain network elements under section 251, ruling
9 that competitive local exchange carriers ("CLECs") are not "impaired" without access to
10 them. While the FCC did require ILECs to provide some unbundled network elements
11 ("UNEs"), in *United States Telecom Association v. FCC* ("*USTA II*"), the United States
12 Court of Appeals for the D.C. Circuit vacated substantial portions of those unbundling
13 requirements.

14 In this arbitration, Covad seeks to have the Commission impose unbundling
15 requirements that the FCC rejected in the *TRO* or that the D.C. Circuit vacated in *USTA II*.
16 Through the language it has proposed for its interconnection agreement ("ICA") with
17 Qwest, Covad is demanding access to network elements that the FCC has held ILECs do
18 not have to provide and access to other elements which Qwest is no longer required to
19 provide now that the D.C. Circuit has vacated unbundling requirements for those elements
20 in *USTA II*. Moreover, Covad is demanding that Qwest provide these elements at
21 TELRIC ("total long run incremental cost") rates, at least temporarily, despite clear
22 rulings in the *TRO* and *USTA II* establishing that TELRIC pricing does not apply to
23 network elements that Bell Operating Companies ("BOCs") provide under section 271.

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

² 47 U.S.C. § 251(d)(2).

1 Covad's attempt to raise these issues in this proceeding is puzzling, since Covad recently
2 dropped these same unbundling requests in its pending arbitration with Qwest in
3 Colorado. As implicitly reflected by its decision not to seek a ruling from the Colorado
4 Commission on these issues, Covad's attempt to circumvent the still valid unbundling and
5 pricing rulings in the *TRO* and the effect of *USTA II* is improper for multiple reasons.

6 First, the Act does not permit the Commission to create under state law or under
7 section 271 of the Act unbundling requirements that were either rejected in the *TRO* or
8 vacated in *USTA II*. Covad nonetheless attempts to achieve this impermissible result by
9 proposing ICA language under which it would argue for virtually limitless access to
10 network elements under state law and section 271. Second, the Commission does not
11 have the authority to make the impairment determinations that are essential to any
12 unbundling requirements imposed under section 251. Third, state commissions do not
13 have any decision-making authority under section 271 and, hence, do not have any
14 authority to impose unbundling requirements under that section. Fourth, consistent with
15 the absence of state decision-making authority under section 271, state commissions have
16 no jurisdiction to establish rates for section 271 network elements. The FCC alone has
17 that authority, and its ruling in the *TRO* that TELRIC does not apply to section 271
18 elements establishes the unlawfulness of Covad's pricing proposal.

19 Qwest respectfully submits that the Commission should grant this motion now
20 instead of deferring a ruling. The issues that the motion raises are purely legal and will
21 not be altered by testimony or the arbitration hearing. Moreover, no legitimate purpose
22 will be served by including in the arbitration issues that are beyond the Commission's
23 jurisdiction or by considering proposed requirements under state law that are inconsistent
24 with federal law. Granting Qwest's motion now will eliminate the waste of Commission
25 and other resources that will otherwise occur and allow the Commission and the parties to
26 focus on those issues that are properly before it.

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28

1 **II. BACKGROUND: COVAD'S UNBUNDLING DEMANDS**

2 Covad's sweeping unbundling proposals are built around its proposed definition of
3 "Unbundled Network Element," which Covad defines as "a Network Element to which
4 Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access, *for*
5 *which unbundled access is required under section 271 of the Act or applicable state law . .*
6 *. .*" (emphasis added). Consistent with this definition, Covad's proposed language for
7 section 9.1.1 would require Qwest to provide "any and all UNEs required by the
8 Telecommunications Act of 1996 (including, but not limited to Sections 251(b), (c),
9 252(a) and 271), FCC Rules, FCC Orders, and/or applicable state rules or orders"

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

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

23 Under this proposal, Covad could contend, for example, that Qwest is required to provide
24 unbundled access to OCn loops, feeder subloops, DS3 loops (in excess of two per
25 customer location), extended unbundled dedicated interoffice transport and extended
26 unbundled dark fiber, and other elements despite the FCC's fact-based findings in the *TRO*
27 that CLECs are not impaired without access to these elements.³

28 ³ 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

1 Covad also seeks to require Qwest to continue to provide access to certain network
2 elements under section 271 and state law despite possible rulings *in the future* that CLECs
3 are not impaired without access to those elements. Thus, its proposed section 9.2.1.3
4 provides:

5 In the event the Commission determines, in accordance with 47 CFR
6 519(a)(4)-(6) that requesting Telecommunications Carriers are not impaired
7 without access to DS1, DS3 or Dark Fiber Loops to a specific End User
8 Customer location pursuant to Section 251 of the Act, Qwest will provide
9 access to such loops pursuant to Section 271 of the Act and applicable
10 state law.

11 In addition to its attempt to nullify existing and future FCC findings of non-
12 impairment, Covad is demanding the use of TELRIC pricing, at least on a temporary
13 basis, for the network elements it claims Qwest must provide under section 271:

14 9.1.1.7 If, on the Effective Date of this Agreement, Qwest is providing to
15 CLEC, pursuant to orders placed in accordance with a Interconnection
16 Agreement, any of the Network Elements for which an independent
17 unbundling obligation exists under Section 271 of the Act, or applicable
18 state law, then Qwest shall bill for such UNEs and services *using the*
19 *Commission-approved TELRIC rates for such UNEs* until such time as new,
20 just, reasonable and non-discriminatory rates (as required by Sections 201
21 and 202 of the Act or applicable state law) are approved for the Section 271
22 or state law required UNEs. (emphasis added).

23 As discussed below, this proposal conflicts directly with the FCC's and the D.C.
24 Circuit's unequivocal rulings that TELRIC does not apply to elements provided under
25 section 271 and that such elements are to be priced under the just, reasonable, and non-
26 discriminatory criteria set forth in sections 201 and 202 of the Communications Act of
27 1934. Moreover, the proposal improperly assumes that state commissions have authority
28 to establish prices for section 271 elements. The pricing of these elements is within the
exclusive jurisdiction of the FCC, as the FCC itself made clear in the *TRO*.⁴

Issue 2, as set forth in Covad's arbitration petition, encompasses the ICA provisions

switching); ¶ 273 (fiber to the home loops); ¶ 560 (operator service and directory assistance), and ¶ 451
(unbundled switching at a DS1 capacity).

⁴ *TRO* at ¶ 664.

1 discussed above and several other provisions in Covad's proposed ICA.⁵ The dismissal of
2 Issue 2 will eliminate these improper proposals from this proceeding.

3 **III. ARGUMENT**

4 **A. Standard For Determining Motion To Dismiss**

5 Covad bears the burden of establishing that the Commission has jurisdiction to hear
6 its unbundling claims encompassed by Issue 2.⁶ “The test of jurisdiction is whether the
7 [Commission] has the power to enter upon the inquiry; not whether its conclusion in
8 course of it is right or wrong.”⁷ In meeting its burden, Covad cannot simply rest on a
9 conclusory allegation that jurisdiction exists, and the Commission’s first duty is to
10 determine whether it has jurisdiction over the matter.⁸ As shown below, Covad cannot
11 meet its burden.

12
13 **B. The Act Does Not Permit The Commission To Create Under State Law**
14 **Unbundling Requirements That The FCC Rejected In The *TRO* Or That The**
15 **D.C. Circuit Vacated In *USTA II*.**

16 Under section 251 of the Act, there is no unbundling obligation absent an FCC
17 requirement to unbundle and a lawful FCC impairment finding. As the Supreme Court
18 made clear in the *Iowa Utilities Board* case, the Act does not authorize “blanket access to
19 incumbents’ networks.”⁹ Rather, Section 251(c)(3) authorizes unbundling only “in
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21 ⁵ The ICA provisions in Covad's proposed agreement that implicate this issue include the
22 following sections: Section 4 definitions of "unbundled network element" and "251(c)(3) UNE;" 9.1.1;
23 9.1.1.6 (including sub-parts); 9.1.17; 9.1.5; 9.2.1.3; 9.2.1.4; 9.3.1.1; 9.3.1.2(b); 9.3.2.2; 9.3.2.2.1; 9.6(g);
9.6.1.5; 9.6.1.5.1; 9.6.1.6; 9.6.1.6.1; 9.21.2; and 9.1.1.7.

24 ⁶ *Moulton v. Napolitano*, 205 Ariz. 506, 511, ¶ 8, 73 P.3d 637, 642 (App. 2004); *Switchtenberg v.*
25 *Brimer*, 171 Ariz. 77, 82, 828 P.2d 1218, 1223 (App. 1991).

26 ⁷ *State v. Phelps*, 67 Ariz. 215, 220, 193 P.2d 921, 25 (1948), quoting *Tube City Min. & Mill Co.*
27 *v. Otterson*, 16 Ariz. 305, 146 P. 203 (1914).

28 ⁸ See, e.g., *State v. Phelps*, 67 Ariz. at 220, 193 P.2d at 924-25; *Macpherson v. Taglione*, 158 Ariz.
309, 311-12, 762 P.2d 596, 598-99 (App. 1988).

⁹ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 390 (1998) (“*Iowa Utilities Board*”).

1 accordance with . . . the requirements of this section [251].”¹⁰ Section 251(d)(2), in turn,
2 provides that unbundling may be required *only if the FCC determines* (A) that “access to
3 such network elements as are proprietary in nature is necessary” and (B) that the failure to
4 provide access to network elements “would impair the ability of the telecommunications
5 carrier seeking access to provide the services that it seeks to offer.”¹¹ The Supreme Court
6 and D.C. Circuit have held that the Section 251(d)(2) requirements reflect Congress’s
7 decision to place a real upper bound on the level of unbundling regulators may order.¹²

8 Congress explicitly assigned the task of applying the Section 251(d)(2) impairment
9 test and “determining what network elements should be made available for purposes of
10 subsection [251](c)(3)” to the FCC.¹³ The Supreme Court confirmed that as a
11 precondition to unbundling, Section 251(d)(2) “requires the [Federal Communications]
12 Commission to determine on a rational basis which network elements must be made
13 available, taking into account the objectives of the Act and giving some substance to the
14 ‘necessary’ and ‘impair’ requirements.”¹⁴ And the D.C. Circuit just confirmed rather
15 dramatically in *USTA II* that Congress did not allow the FCC to have state commissions
16 perform this work on its behalf.¹⁵

17 *USTA II*’s clear holding is that the FCC, not state commissions, must make the
18 impairment determination called for by Section 251(d)(3)(B) of the Act. As the Supreme
19 Court held in *Iowa Utilities Board*, “the Federal Government has taken the regulation of

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21 ¹⁰ 47 U.S.C. § 251(c)(3).

22 ¹¹ 47 U.S.C. § 251(d)(2).

23 ¹² See *Iowa Utilities Board*, 525 U.S. at 390 (“We cannot avoid the conclusion that if Congress
24 had wanted to give blanket access to incumbents’ networks on a basis as unrestricted as the scheme the
25 [FCC] has come up with, it would not have included §251(d)(2) in the statute at all.”); *United States
Telecom Ass’n v. FCC*, 290 F.3d 415, 427-28 (D.C. Cir. 2002) (“*USTA I*”) (quoting *Iowa Utilities Board*’s
26 findings regarding congressional intent and section 251(d)(2) requirements, and holding that unbundling
27 rules must be limited given their costs in terms of discouraging investment and innovation).

28 ¹³ 47 U.S.C. § 251(d)(2).

¹⁴ *Iowa Utilities Board*, 525 U.S. at 391-92.

¹⁵ See *USTA II*, 359 F.3d at 568.

1 local telephone competition away from the states,” and it is clear that the FCC must “draw
2 the lines to which [the states] must hew,” lest the industry fall into the “surpassing
3 strange” incoherence of “a federal program administered by 50 independent state
4 agencies” without adequate federal oversight.¹⁶

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

11 Based on the plain language of the statute, we conclude that
12 the state authority preserved by section 251(d)(3) is limited to
13 state unbundling actions that are consistent with the
requirements of section 251 and do not “substantially
prevent” the implementation of the federal regulatory regime.

14 ***

15 If a decision pursuant to state law were to require unbundling
16 of a network element for which the Commission has either
17 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
18 national basis, we believe it unlikely that such a decision
would fail to conflict with and “substantially prevent”
19 implementation of the federal regime, in violation of section
251(d)(3)(c).¹⁷

20 Federal courts interpreting the Act have reached the same conclusion.¹⁸

21 Covad's broad proposals for unbundling under state law reflect its erroneous view
22 that the Commission has plenary authority under state law to order whatever unbundling it
23 chooses. To support this argument, Covad cites various state law savings clauses

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25 ¹⁶ *Iowa Utilities Board*, 525 U.S. at 366, 378 n. 6.

26 ¹⁷ *TRO* at ¶¶ 193, 195.

27 ¹⁸ See *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (citing the above-
28 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).

1 contained in the Act. What Covad ignores is that these savings clauses preserve
2 independent state authority *only to the extent it is consistent with the Act*, including
3 section 251(d)(2)'s substantive limitations on the level of unbundling that may be
4 authorized. Section 251(d)(3), for example, protects only those state enactments that are
5 "consistent with the requirements of this section" — which a state law unbundling order
6 ignoring the Act's limits would clearly not be. Likewise, sections 261(b) and (c) both
7 protect only those state regulations that "are not inconsistent with the provisions of this
8 part" of the Act, which includes section 251(d)(2). Nor does section 252(e)(3) help
9 Covad; that simply says that "nothing in *this section*" — that is, section 252 — prohibits a
10 state from enforcing its own law, 47 U.S.C. § 252(e)(3) (emphasis added), but the relevant
11 limitations on the scope of permissible unbundling that are at issue are found in section
12 251.¹⁹

13 Thus, these savings clauses do not preserve the authority of state commissions to
14 adopt or enforce under state law unbundling requirements that have been rejected by the
15 FCC or vacated in *USTA II*. Indeed, the Supreme Court has "decline[d] to give broad
16 effect to savings clauses where doing so would upset the careful regulatory scheme
17 established by federal law."²⁰ The federal regulatory scheme that Congress has
18 established for unbundling recognizes that "unbundling is not an unqualified good,"
19 because it "comes at a cost, including disincentives to research and development by both
20 ILECs and CLECs, and the tangled management inherent in shared use of a common
21 resource."²¹ Therefore, as discussed above, Congress has mandated the application of
22 limiting principles in the determination of unbundling requirements that would reflect a
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25 ¹⁹ See 47 U.S.C. § 251(d)(2).

26 ²⁰ *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000).

27 ²¹ *USTA I*, 290 F.3d at 429. See also *AT&T Communs. Of Ill. v. Il. Bell Tel. Co.*, 2003 U.S. App.
28 LEXIS 22961 (7th Cir 2003) (explaining that unbundling obligations may have negative effect on
"investment and innovation").

1 balance of "the competing values at stake."²² That balance would plainly be upset if a
2 state commission could impose under state law unbundling requirements that have been
3 found by the FCC to be inconsistent with the Act and its objectives.

4 The clash between Covad's state law unbundling demands and the federal
5 unbundling scheme is demonstrated sharply by Covad's approach to the unbundling of
6 feeder subloops. In section 9.3.1.1 of its proposed ICA, Covad includes language that
7 would require Qwest to provide feeder subloops, notwithstanding the FCC's ruling in the
8 *TRO* that ILECs are not required to unbundle this network element.²³ The FCC
9 determined that an unbundling requirement for this facility would undermine the objective
10 of section 706 of the Act "to spur deployment of advanced telecommunications capability
11" ²⁴ The "obligation" to ensure adequate infrastructure investment incentives pursuant
12 to section 706," stated the FCC, "supports limitations on the unbundling of fiber-based
13 loops."²⁵

14 A state-imposed requirement to unbundle feeder subloops would plainly conflict
15 with this FCC determination and would seriously undermine the FCC's attempt to achieve
16 a fundamental objective of the Act – promoting investment in advanced
17 telecommunications facilities. This conflict with FCC rulings and policy determinations
18 would of course not be limited to feeder subloops, since Covad would contend that its
19 unbundling language reaches other network elements for which the FCC specifically
20 declined to require unbundling based on element-specific fact and policy determinations.

21 In sum, the relevant question is not, as Covad presumes, whether sweeping
22 unbundling obligations can be cobbled together out of state law, but rather whether any
23 such obligations would be consistent with *Congress's* substantive limitations on the
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25 ²² *Id.* See also *Iowa Utils. Bd.*, 535 U.S. at 388.

26 ²³ *TRO* at ¶ 253.

27 ²⁴ *Id.*

28 ²⁵ *Id.* at ¶ 236.

1 permissible level of unbundling, as authoritatively construed by the Supreme Court, the
2 D.C. Circuit, and the FCC. Covad's proposals for broad unbundling under state law
3 ignore these limitations and the permissible authority of state commissions to require
4 unbundling. Accordingly, the Commission should dismiss the portions of Issue 2 in
5 which Covad seeks to impose these impermissible state law unbundling requirements.²⁶

6 **C. The Commission Does Not Have The Ability To Make The Impairment**
7 **Determinations Required By The Act.**

8 Even if the Commission wanted to step into the FCC's shoes and make the
9 impairment determinations required by the Act, it could not as a practical matter do so.
10 This is so because the FCC has not sufficiently defined the impairment standard to allow
11 such determinations.

12 In *USTA II*, the D.C. Circuit decided not to review the Commission's impairment
13 standard since the standard "finds concrete meaning only in its application, and only in
14 that context is it readily justiciable."²⁷ However, the Court nonetheless noted significant
15 deficiencies in the standard. First, the Court criticized the FCC's impairment standard for
16 being so open-ended that it imposed no meaningful constraints on unbundling:

17 [W]e do note that in at least one important respect the Commission's
18 definition of impairment is *vague almost to the point of being empty*. The
19 touchstone of the Commission's impairment analysis is whether the
20 enumerated operationally and entry barriers "make entry into a market
21 uneconomic." Order P 84. Uneconomic by whom? By any CLEC, no
matter how inefficient? By an "average" or "representative" CLEC? By the
most efficient existing CLEC? By a hypothetical CLEC that used "the most

22 ²⁶ The broad access to network elements that Covad seeks under state law also exceeds the
23 unbundling required under the Commission's existing rules. An interconnection arbitration, which is an
24 adjudicative proceeding, is not the proper type of proceeding in which to alter the Commission's
25 unbundling requirements. Under Arizona's Administrative Procedures Act ("APA"), Title 51, Chapter 6, a
26 change in existing law must be implemented through a rulemaking proceeding and in accordance with the
27 APA's requirements relating to notice and the opportunity for public comment. These procedures are
28 designed to ensure that the Commission and other state agencies adhere to the requirements of due process
and act within the legal limits of their authority. Arizona's rulemaking process is designed to be non-
adversarial and to facilitate input from stakeholders and the general public so that agencies have a fully
developed body of information upon which to base their decisions concerning how to implement
legislative mandates and policy determinations.

²⁷ *USTA II*, 359 F.3d at 572.

1 efficient telecommunications technology currently available,” the standard
2 that is built into TELRIC? Compare 47 CFR § 51.505(b)(1). We need not
3 resolve the significance of this uncertainty, but we highlight it because we
suspect that the issue of whether the standard is too open-ended is likely to
arise again.²⁸

4 Second, the Court noted that the impairment standard failed to address impairment
5 in markets where state regulation holds rates below historic costs.

6 In making the impairment determination, the FCC is required to balance the
7 advantages of unbundling against the costs, both in terms of spreading the disincentive to
8 invest in innovation and creating complex issues of managing shared facilities.²⁹ *USTA II*
9 makes clear that the FCC’s impairment standard does not strike this balance. It is a
10 “looser concept of impairment” in which the costs of unbundling are “brought into the
11 analysis under §251(d)(2)’s ‘at a minimum’ language.”³⁰ Thus, not only is the
12 impairment definition open-ended, it is incomplete in that it fails to capture all of the
13 considerations that must be taken into account under Section 251(d)(2) before unbundling
14 can be required under federal or state law.

15 The Commission therefore has no legitimate way to determine which, if any,
16 network elements Qwest would be required to provide under Covad's state law
17 unbundling proposals. The FCC’s impairment standard is too open-ended and does not
18 contain guidance as to how to limit unbundling where the costs of unbundling outweigh
19 any benefits there may be. Moreover, since the FCC’s delegation of impairment decision-
20 making was vacated in *USTA II*, the proper definition of the "market" for purposes of
21 making the impairment determination also remains unresolved.

22 Adding to this uncertainty, with the limited exception noted above involving feeder
23 subloops, Covad's proposed ICA language fails to identify the specific network elements
24 that would be unbundled under state law. Even if there were a lawful impairment

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26 ²⁸ *Id.* at 574 (emphasis added).

27 ²⁹ *Id.* at 563.

28 ³⁰ *Id.* at 572.

1 standard for the Commission to apply, therefore, there would be no meaningful way to
2 apply the standard. In this sense, Covad's proposal lacks the "concrete meaning" that, in
3 the words of the D.C. Circuit, is necessary to make an impairment standard "readily
4 justiciable."³¹

5 Accordingly, since the FCC has not adequately defined impairment and Covad has
6 not identified the network elements it is seeking, it is inappropriate for the Commission to
7 attempt to make the impairment determinations that are required to be made by the FCC
8 before unbundling may be lawfully required.

9 **D. The Commission Does Not Have Authority To Require Unbundling Under**
10 **Section 271.**

11 Covad's Petition and ICA proposals assume incorrectly that state commissions
12 have authority to impose binding unbundling obligations under section 271. Section 271
13 confers no such authority. Section 271(d)(3) expressly confers upon the FCC, not state
14 commissions, the authority to determine whether Bell Operating Companies ("BOCs")
15 have complied with the substantive provisions of section 271, including the "checklist"
16 provisions upon which Covad purports to base its requests.³² State commissions have
17 only a non-substantive, "consulting" role in that determination.³³

18 Sections 201 and 202, which govern the rates, terms and conditions applicable to
19 the unbundling requirements imposed by section 271,³⁴ likewise provide no role for state
20 commissions. That authority has been conferred by Congress upon the FCC and federal
21 courts.³⁵ The FCC has thus confirmed that "[w]hether a particular [section 271] checklist

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23 ³¹ *Id.*

24 ³² 47 U.S.C. 271(d)(3).

25 ³³ 47 U.S.C. 271(d)(2)(B). *See also See Indiana Bell Tel. Co. v. Indiana Utility Regulatory*
26 *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).

27 ³⁴ *TRO* at ¶¶ 656, 662.

28 ³⁵ *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

1 element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry
2 that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application
3 for section 271 authority or in an enforcement proceeding brought pursuant to section
4 271(d)(6)."³⁶

5 The absence of any state commission decision-making authority under section 271
6 also is confirmed by the fundamental principle that a state administrative agency has no
7 role in the administration of federal law, absent express authorization by Congress. That
8 is so even if the federal agency charged by Congress with the law's administration
9 attempts to delegate its responsibility to the state agency.³⁷ *A fortiori*, where (as here)
10 there has been no delegation by the federal agency, a state agency has no authority to
11 issue binding orders pursuant to federal law.³⁸

12 Additionally, the process mandated by section 252, the provision pursuant to which
13 Covad filed its petition for arbitration, is concerned with implementation of an ILEC's
14 obligations under section 251, not section 271. In an arbitration conducted under section
15 252, therefore, state commissions only have authority to impose terms and conditions
16 relating to section 251 obligations, as demonstrated by the following provisions of the
17 Act.

18 (a) By its terms, the "duty" of an ILEC "to negotiate in good faith in accordance
19 with section 252 the particular terms and conditions of [interconnection]
20 agreements" is limited to implementation of "the duties described in paragraphs (1)
21

22 (authorizing FCC and federal courts to adjudicate complaints seeking damages for violations of the Act);
23 208(a) (authorizing FCC to adjudicate complaints alleging violations of the Act).

24 ³⁶ *TRO* at ¶ 664.

25 ³⁷ *USTA II*, 359 F.3d at 565-68. *See generally Qwest Corp. v. Scott*, 2003 WL 79054 (D. Minn.
26 2003) (state commission not authorized to regulate interstate or "mixed use" service where Congress has
entrusted such regulation to the FCC).

27 ³⁸ *See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13
28 (state commission not authorized by section 271 to impose binding obligations). *See also TRO* at ¶¶ 186-
87 ("states do not have plenary authority under federal law to create, modify or eliminate unbundling
obligations").

1 though (5) of [section 251(b)] and [section 251(c)]."³⁹

2 (b) Section 252(a) likewise makes clear that the negotiations it requires are
3 limited to "request[s] for interconnection, services or network elements *pursuant to*
4 *section 251*."⁴⁰

5 (c) Section 252(b), which provides for state commission arbitration of
6 unresolved issues, incorporates those same limitations through its reference to the
7 "negotiations under this section [252(a)]."⁴¹

8 (d) The grounds upon which a state commission may approve or reject an
9 arbitrated interconnection agreement are limited to non-compliance with section
10 251 and section 252(d).⁴²

11 (e) The final step of the section 252 process, federal judicial review of decisions
12 by state commissions approving or rejecting interconnection agreements (including

13
14 ³⁹ 47 U.S.C. 251(c)(1).

15 ⁴⁰ 47 U.S.C. 252(a)(emphasis added).

16 ⁴¹ See 47 U.S.C. 252(b)(1). The Fifth Circuit has ruled that state commissions may arbitrate
17 disputes regarding matters other than the duties imposed by section 251 if *both parties mutually agree* to
18 include those matters in their section 252(a) negotiations. *CoServ Limited Liability Corp. v. Southwestern*
19 *Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003). Even if correct, that ruling is not relevant here, for Qwest has
20 not included in its section 252(a) negotiations with Covad its duties under section 271. See *id.* at 488 ("an
21 ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the
22 Act when a CLEC requests negotiation pursuant to sections 251 and 252"). In the Qwest/Covad Colorado
23 and Minnesota arbitrations, administrative law judges in those states have recently ruled that Qwest and
24 Covad did negotiate Covad's request for unbundling under section 271. See *Petition of Qwest Corporation*
25 *for Arbitration of an Interconnection Agreement with Covad Communications Company Pursuant to 47*
26 *U.S.C. § 252(b)*, Colo. Commission Docket No. 04B-160T, Decision No. R04-0649-I (June 16, 2004);
27 *Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest*
28 *Corporation Pursuant to 47 U.S.C. § 252(b)*, Minn. Commission Docket No. P-5692, 421/C1-04-549,
29 Minn. Office of Administrative Hearings Docket No. 3-2500-15908-4, Order on Motion to Dismiss (June
30 4, 2004). In both cases, however, Qwest established that its negotiators consistently refused to negotiate
31 those issues and expressly told Covad's representatives that the issues were not properly part of the section
32 251/252 process. The rulings incorrectly find that Qwest opened the door to Covad's insertion of section
33 271 issues into the negotiations by proposing ICA language to implement the section 251 unbundling
34 obligations established by the *TRO*. However, Qwest itself never proposed any language relating to
35 section 271 unbundling obligations, and Qwest and Covad never discussed Covad's proposed language.
36 There was not, therefore, *mutual agreement* to address those issues in the negotiations, as is required under
37 *Coserv*.

38 ⁴² See 47 U.S.C. 252(e)(2)(b).

1 the arbitration decisions they incorporate), is likewise limited to "whether the
2 agreement . . . meets the requirements of section 251 and this section [252]."⁴³

3 It is thus clear that state commission arbitration of disputes over the duties imposed
4 by federal law is limited to those imposed by section 251, and excludes the conditions
5 imposed by section 271.

6 Accordingly, the Commission does not have the authority to require the section
7 271 network unbundling that Covad seeks or to establish prices for those elements.
8 Covad's claim for unbundling under this section, as set forth in its proposed ICA sections
9 encompassed by Issue 2, should be dismissed.

10 **E. Covad's Proposal To Use TELRIC Rates For Section 271 Elements Is**
11 **Unlawful.**

12 Under Covad's proposed section 9.1.1.7 of the ICA, existing TELRIC rates would
13 apply to network elements that Qwest provides pursuant to section 271 until new rates are
14 established in accordance with "Sections 201 and 202 of the Act or applicable state law."
15 This proposal assumes incorrectly that state commissions have authority to determine the
16 rates that apply to section 271 elements and also violates the FCC's express ruling that
17 TELRIC pricing does not apply to these elements.

18 The absence of state decision-making authority under sections 201, 202, and 271
19 establishes that state commissions are without authority to determine the prices that apply
20 to network elements provided under section 271. Thus, as noted above, the FCC ruled in
21 the *TRO* that it – not state commissions – will determine the lawfulness of rates that BOCs
22 charge for section 271 elements in connection with applications and enforcement
23 proceedings brought under that section. In requesting that the Commission adopt its rate
24 proposal, Covad is therefore asking the Commission to exercise authority it does not have
25 and that rests exclusively with the FCC. For this reason alone, Covad's pricing proposal is
26 improper and should be dismissed from this arbitration.

27
28

⁴³ 47 U.S.C. 252(e)(6).

1 In addition, Covad's demand for even the temporary application of TELRIC pricing
2 to section 271 elements violates the FCC's ruling in the *TRO* that TELRIC pricing does
3 not apply to these elements. The FCC ruled unequivocally that any elements an ILEC
4 unbundles pursuant to section 271 are to be priced based on the section 201-02 standard
5 that rates must not be unjust, unreasonable, or unreasonably discriminatory.⁴⁴ In so
6 ruling, the FCC confirmed, consistent with its prior rulings in section 271 orders, that
7 TELRIC pricing does not apply to these network elements.⁴⁵ In *USTA II*, the D.C. Circuit
8 reached the same conclusion, rejecting the CLECs' claim that it was "unreasonable for the
9 Commission to apply a different pricing standard under Section 271 " and instead stating
10 that "we see nothing unreasonable in the Commission's decision to confine TELRIC
11 pricing to instances where it has found impairment."⁴⁶

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

15 **IV. Conclusion**

16 For the reasons stated, the Commission should dismiss Issue 2 of Covad's petition.

17 RESPECTFULLY SUBMITTED this 21st day of July, 2004.

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27 ⁴⁴ *TRO* at ¶¶ 656-64.

28 ⁴⁵ *Id.*

⁴⁶ *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

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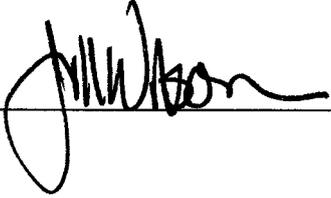
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