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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS  
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Arizona Corporation Commission

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IN THE MATTER OF THE PETITION OF DIECA ) DOCKET NO. T-03632A-04-0425  
COMMUNICATIONS, INC. dba COVAD ) DOCKET NO. T-01051B-04-0425  
COMMUNICATIONS COMPANY FOR )  
ARBITRATION OF AN INTERCONNECTION )  
AGREEMENT WITH QWEST CORPORATION. )

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

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), through its undersigned counsel, hereby responds to Qwest's Motion to Dismiss Portions of Covad's List of Issues Submitted for Arbitration (the "Qwest Motion" or "Motion").

**I. INTRODUCTION**

Qwest's Motion to Dismiss addresses the legal issue of whether the Arizona Corporation Commission ("Commission") can require unbundling of network elements outside of Section 251 of the Telecommunications Act of 1996,<sup>1</sup> i.e., issues related to Section 271 and state unbundling laws. The Qwest Motion is flawed for two key reasons. First, Qwest ignores unambiguous federal law, interpreted by federal courts, that is directly on point. That law provides that: (i) state commissions can arbitrate issues outside of Section 251 if the parties negotiated those issues and, (ii) state commissions have authority to apply state law in Section 252 arbitrations. Second, Qwest

<sup>1</sup> Pub. Law No. 104-104, 110 Stat. 56 (the "1996 Act" or "Act").

1 presents an internally inconsistent argument for preemption. The unbundling obligations that  
2 Qwest claims are precluded by recent interpretations of Section 251 of the Act are nonetheless still  
3 contained in Section 271 of the Act. An unbundling obligation clearly set forth in federal law (see  
4 Section 271) cannot frustrate the implementation of that federal law.<sup>2</sup> Nor should it frustrate state  
5 law unbundling requirements similar to Section 271 requirements. This Commission can – and  
6 should – arbitrate the issue of unbundling under both Section 271 and Arizona law.  
7

8 Qwest does not appear to be asserting that the Commission does not have jurisdiction to  
9 address the issue of unbundling under Section 271 or Arizona law.<sup>3</sup> Covad and Qwest did  
10 negotiate unbundled access under Section 271 and Arizona law. As a result, under the Fifth  
11 Circuit’s ruling in *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Corp.*, 350 F.3d  
12 482 (5<sup>th</sup> Cir. 2003), those issues (i.e., Issue 2 in Covad’s Petition) should be addressed on the  
13 merits in this arbitration. Rather, Qwest proceeds directly to arguing why it believes that this  
14 Commission has no ability to enforce the unbundling obligations established by either Section 271  
15 of the 1996 Act or Arizona law.<sup>4</sup>  
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17 Qwest also has misstated Covad’s position on UNE pricing under Section 271. Covad  
18 does not assert that such pricing must be at TELRIC rates. Rather, the law does not preclude  
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21 <sup>2</sup> Qwest cryptically notes in its Motion at 3 that Covad “dropped these same unbundling requests in its pending  
22 arbitration with Qwest in Colorado.” That is irrelevant to the arbitration in this Docket. Covad is still asserting these  
23 unbundling requests here. Moreover, business needs vary from area to area and from state to state. As a consequence,  
24 Covad makes business and operating decisions based on each area and state. Just because Covad withdrew its  
25 proposed language for many of the sections in Issue 2 in Colorado does not create precedent or have any binding effect  
26 in any other jurisdiction. Business needs in Colorado are different than business needs in Arizona. Covad did not  
27 waive or concede any of its arguments regarding Issue 2 in withdrawing its proposed language in Colorado.

<sup>3</sup> As indicated in Footnote 41 on page 15 of the Qwest Motion, Qwest had filed motions to dismiss in Colorado,  
Minnesota and Utah asserting that Qwest had not even negotiated unbundling under Section 271 and, therefore, the  
state commission could not arbitrate that issue on the merits. However, the Colorado and Minnesota commissions  
found that Qwest had negotiated unbundling under Section 271 with Covad and denied the motion to dismiss. Qwest  
withdrew its motion in Utah.

<sup>4</sup> To the extent Qwest is arguing that the Commission lacks jurisdiction to even consider the issue of unbundling under  
Section 271 or Arizona law, that argument fails. Should Qwest expressly raise that issue in its reply, Covad reserves  
the right to file a sur-reply addressing the issue.

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1 pricing of elements unbundled under Section 271 at TELRIC. The Commission is free to  
2 determine the just and reasonable rates for such elements – rates could be TELRIC rates, TSLRIC  
3 rates or some other appropriate rates.

4 Finally, Qwest presents a confusing statement about the “burden of proof.” Qwest’s  
5 Motion, however, has presented only issues of law, not issues of fact. The arbitrator must base its  
6 ruling on the Motion on the applicable law – it need not decide factual issues. Burden of proof is  
7 irrelevant here.<sup>5</sup>  
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<sup>5</sup> Covad believes that the ruling on the issues of law raised by Qwest’s Motion should ultimately be included in the final proposed order in this docket.

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2 **II. THE QWEST MOTION FAILS AS A MATTER OF LAW BECAUSE THIS**  
3 **COMMISSION HAS AUTHORITY TO ARBITRATE THE ISSUES IN QUESTION**  
4 **AND TO REQUIRE UNBUNDLING UNDER BOTH SECTION 271 AND**  
5 **ARIZONA LAW**

6 The 1996 Act has unquestionably afforded state commissions the ability to apply state law  
7 in Section 252 arbitrations:

8 ...[N]othing in this section [252] shall prohibit a State  
9 commission from establishing or enforcing other  
10 requirements of State law in its review of an agreement,  
including requiring compliance with intrastate  
telecommunications service quality standards or  
requirements.

11 47 U.S.C. § 252(e)(3).

12 Federal courts have clearly, and repeatedly, upheld state commissions' authority under  
13 Section 252 to apply state law in interconnection negotiations:

14 The Act obviously allows a state commission to consider  
15 the requirements of state law when approving or rejecting  
16 interconnection agreements. 47 U.S.C. § 252(e)(3), (f)(2).  
17 But whether, in addition to jurisdiction to review for  
18 compliance with requirements of the Act, a federal court is  
authorized to review any and every question of state law  
that a state commission may have addressed is an issue on  
which the circuits are split.

19 *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475, 481 (5<sup>th</sup>  
20 Cir. 2000).

21 In fact, federal courts have afforded state commissions considerable deference in reviewing  
22 their application of state law in the Section 252 arbitration context.<sup>6</sup> Under any standard of review  
23 adopted by the various federal circuits, it is universally accepted that state commissions may apply  
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26 <sup>6</sup> The Seventh Circuit has decided that federal court review of a state commission's decisions on state law issues is  
27 limited to whether those decisions violate federal law. See *Illinois Bell Tel. v. Worldcom*, 179 F.3d 566, 571. The  
Fifth and Ninth Circuits have held that these decisions may be reviewed under an "arbitrary and capricious" standard.  
See *U.S. West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117, 1124 n. 15 (9<sup>th</sup> Cir. 1999); *Southwestern*

1 state law (and presumably federal law other than Section 251) in their review of interconnection  
2 agreements.<sup>7</sup>

3 Moreover, Section 252(b)(1) does not limit arbitrable issues to Section 251(b) and (c)  
4 issues. *See Coserv*, 350 F.3d at 487. It certainly does not expressly preclude Section 271  
5 unbundling issues from arbitration if those issues have been negotiated by the parties. That  
6 Section also is not the sole source of the Commission's authority to resolve the disputed  
7 unbundling issues. Clear authority exists under state and federal law to order the unbundling  
8 requested by Covad. Those statutory provisions – in addition to Section 252(b)(1) -- is the source  
9 of the Commission's authority to resolve the disputed unbundling issues. The analysis the  
10 Commission should undertake in determining whether to arbitrate an issue is as follows:  
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- 12 (1) Have the parties agreed on the issue? If so, the  
13 Commission may only approve or reject the  
14 proposed terms, consistent with the standards set  
15 forth in Section 252(e)(2). If the parties have not  
16 agreed;
- 17 (2) Does the issue relate to either parties' obligations  
18 pursuant to state or federal law? If so, the  
19 Commission should resolve the issue, provided it  
20 has subject matter jurisdiction.<sup>8</sup> If not;
- 21 (3) Employ *Coserv* analysis. Did the parties agree to  
22 negotiate the issue? If so, then the Commission has

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23 *Bell*, 208 F.3d 475, 482. The Fourth Circuit reviews state commissions' findings of fact under the substantial evidence  
24 standard. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4<sup>th</sup> Cir. 1999).

25 <sup>7</sup> To Covad's knowledge, no court has yet interpreted Section 252 to determine whether other provisions of the Act  
26 may be applied in the context of an interconnection arbitration. However, based on the decisions cited above and  
27 common sense, one can reasonably believe that a commission may apply *all* applicable law. The alternative  
28 resolution, that a commission could apply state law and only selected provisions of federal law, is an absurd result. If  
29 Congress intended this absurd result, it can clarify the Act. *See Illinois Bell Tel. v. Worldcom*, 179 F.3d 566, 574  
30 ("...as the Supreme Court observed in *Iowa Utilities Board*, the 1996 Act has its share of glitches, and if this is  
31 another, then legislature can provide a repair.")

<sup>8</sup> If an issue were related to a state or federal law the Commission did not have subject matter to enforce (i.e., a statute  
not contained within state utilities laws or the Act), the Commission may lack subject matter jurisdiction. For instance,  
one party to an arbitration could not force another to resolve a dispute over damages related to a car accident between  
its employees that destroys company property.

1                   been granted jurisdiction to resolve the issue  
2                   pursuant to Section 252(b)(1). If not, the  
3                   Commission possesses no jurisdiction to decide the  
4                   matter, and it should be excluded from any  
5                   arbitration decision.

6                   Therefore, because Covad and Qwest negotiated the issues of unbundling under both  
7                   Section 271 and Arizona law, those issues are “open issues” subject to arbitration before this  
8                   Commission under Section 252(b) of the Act. Qwest continues to have unbundling obligations  
9                   under Section 271. Nothing in the TRO or USTA II excused RBOCs from the Section 271  
10                  requirements. Indeed, Section 252 provides the Commission with the arbitration authority to  
11                  enforce unbundling obligations under Section 271 – there is no need for parallel or supplemental  
12                  *arbitration* authority within Section 271 itself. Furthermore, Qwest continues to be obligated  
13                  under Arizona law to provide unbundled access to network elements (essential facilities) pursuant  
14                  to Ariz. Admin. Code R14-2-1307, and that the pricing methodology for such access has been  
15                  established by Ariz. Admin. Code R14-2-1310. Again, this Commission has authority under  
16                  Section 252 and Arizona law to arbitrate issues related to unbundling obligations under Arizona  
17                  law.<sup>9</sup>

17                  **A. Section 271**

18                  This Commission can, and should, use its arbitration authority to enforce the unbundling  
19                  requirements of Section 271 of the Act. The FCC made clear in the *Triennial Review* that Section  
20                  271 creates independent access obligations for the RBOCs:

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

25                  *Triennial Review Order*, ¶ 653.

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27                  <sup>9</sup> Qwest argues (at 11) that the Commission does not have the ability to make impairment determinations. Covad notes, however, that the impairment analysis Qwest argues about is relevant only to Section 251 unbundling, not to unbundling under Section 271 or Arizona law.

1  
2 Section 271 was written for the very purpose of establishing specific  
3 conditions of entry into the long distance [market] (sic) that are  
4 unique to the BOCs. As such, BOC obligations under Section 271  
are not necessarily relieved based on any determination we make  
under the section 251 unbundling analysis.

5 *Triennial Review Order*, ¶ 655.

6  
7 Thus, there is no question that, regardless of the FCC's analysis of competitor impairment  
8 and corresponding unbundling obligations under Section 251 for *ILECs*, as a Bell Company Qwest  
9 retains an independent statutory obligation under Section 271 of the Act to provide competitors  
10 with unbundled access to the network elements listed in the Section 271 checklist.<sup>10</sup> Other states  
11 have begun enforcing Section 271 unbundling obligations, and have denied RBOCs' attempts to  
12 discontinue unbundled offerings as a result of the *Triennial Review Order*. See *Investigation into*  
13 *the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for*  
14 *the Enterprise Market*, Pennsylvania Public Utility Commission Docket No. I-00030100,  
15 Reconsideration Order (May 27, 2004) at 4 (upholding a prior order determining that the *Triennial*  
16 *Review Order* relieved Verizon of its Section 251 obligation to provide certain elements, but  
17 upholding its determination that access to those elements remained under as a result of Verizon's  
18 Section 271 long distance entry and state law).

19 Moreover, there is no question that these obligations include the provision of unbundled  
20 access to loops and dedicated transport under checklist item #4:

21 Checklist items 4, 5, 6, and 10 separately impose access  
22 requirements regarding **loop, transport, switching**, and signaling,  
without mentioning section 251. [emphasis added]

23 *Triennial Review Order*, ¶ 654.

24  
25 In addition, the Commission has independent authority to enforce these Section 271 RBOC  
26 obligations. This enforcement authority encompasses the authority to ensure that Qwest fulfills its

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<sup>10</sup> See 47 U.S.C. § 271(c)(2)(B).

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1 statutory duties under Section 271, including its ongoing unbundling obligations, as analyzed in  
2 the Commission's Evaluation filed with the FCC. *In the Matter of Application of QWEST*  
3 *Arizona, Inc., et al., for Authorization Under Section 271 of the Communications Act to Provide*  
4 *In-Region, InterLATA Service in the State of Arizona*, WC Docket No. 03-194, Evaluation of the  
5 Arizona Corporation Commission (September 24, 2003). Furthermore, the Commission's  
6 enforcement of Qwest's Section 271 checklist obligations would substantially prevent the  
7 implementation of any provision of the Act. Indeed, where state enforcement activities do not  
8 impair federal regulatory interests, concurrent state enforcement activity is clearly authorized.  
9 *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217 (1963). Courts have  
10 long held that federal regulation of a particular field is not presumed to preempt state enforcement  
11 activity "in the absence of persuasive reasons – either that the nature of the regulated subject  
12 matter permits no other conclusion, or that the Congress has unmistakably so ordained." *De*  
13 *Canas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 936, (1976) (quoting *Florida Avocado Growers*,  
14 373 U.S. at 142, 83 S.Ct. at 1217). The Act, however, hardly evinces an unmistakable indication  
15 of Congressional intent to preclude state enforcement of federal 271 obligations. Far from doing  
16 so, the Act expressly preserves a state role in the review of a RBOC's compliance with its Section  
17 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a  
18 RBOC's Section 271 compliance.<sup>11</sup> Thus, the Commission clearly has the authority to enforce  
19 Qwest's obligations to provide unbundled access to loops (including high capacity loops, line  
20 splitting arrangements, and subloop elements) and dedicated transport under Section 271 checklist  
21 item #4.

22 The FCC did make clear in the *Triennial Review Order* that a different pricing standard  
23 might be applied to network elements required to be unbundled under Section 271 as opposed to  
24 network elements unbundled under Section 251 of the Act. Specifically, the FCC stated that "the  
25 appropriate inquiry for network elements required only under Section 271 is to assess whether they  
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<sup>11</sup> See 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing RBOC compliance with the 271 checklist).

1 are priced on a just, reasonable, and not unreasonably discriminatory basis – the standards set forth  
2 in sections 201 and 202.” *Triennial Review Order*, ¶ 656. In other words, according to the FCC,  
3 the *legal standard* under which pricing for Section 271 checklist items should be determined is a  
4 different *legal standard* than that applied to price Section 251 UNEs. Thus, “Section 271 requires  
5 RBOCs to provide unbundled access to elements not required to be unbundled under Section 251,  
6 but does not *require* TELRIC pricing.” *Triennial Review Order*, ¶ 659 (emphasis added).  
7 Therefore, pricing could be – but is not required to be – TELRIC pricing.

8 Moreover, Arizona has already established a cost methodology for network elements  
9 available under state law, requiring incumbent LECs to:

10 [E]stablish the price of each interconnection service, including  
11 access to databases and other network functions as described in R14-  
12 2-1306, at a level equivalent to its TSLRIC-derived costs which may  
13 include an assignment of verifiable indirect costs or a 10% addition  
14 for indirect costs to the TSLRIC direct costs at the choice of the  
15 incumbent LEC.

16 Ariz. Admin. Code R14-2-1310(B)(1).

17 Again, notably, in the *Triennial Review*, the FCC nowhere forbids the application of such  
18 pricing of network elements required to be unbundled under Section 271. Rather, the FCC merely  
19 states that unbundled access to Section 271 checklist items is not *required* to be priced pursuant to  
20 the particular forward-looking cost methodology specified in the FCC’s rules implementing  
21 Section 252(d)(1) of the Act – namely, TELRIC. The FCC states that the appropriate legal  
22 standard to determine the correct price of Section 271 checklist items is found in Sections 201 and  
23 202. However, nowhere does the FCC state these two different legal standards may not result in  
24 the same, or similar, rate-setting methodology. In fact, the FCC itself has allowed the use of  
25 forward-looking economic costs to establish the rates for tariffed interstate telecommunications  
26 services regulated under Sections 201 and 202 of the Act – services which are not subject to the  
27

1 pricing standards in Section 252(d)(1) of the Act. *See, e.g., Access Charge Reform*, CC Docket  
2 No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962, 12984, ¶ 57 (2000).

3 Furthermore, the FCC does not preclude the use of forward-looking, long-run incremental  
4 cost methodologies *other than TELRIC* to establish the prices for access to Section 271 checklist  
5 items. As the FCC made clear when it adopted the TELRIC pricing methodology in its *Local*  
6 *Competition Order*, there are various methodologies for the determination of forward-looking,  
7 long-run incremental cost. *Local Competition Order*, FCC 96-325, ¶ 631. TELRIC describes only  
8 one variant, established by the FCC for setting UNE prices under Section 252(d)(1), derived from  
9 a family of cost methodologies consistent with forward-looking, long-run incremental cost  
10 principles. *See Local Competition Order*, FCC 96-325, at ¶¶ 683-685 (defining “three general  
11 approaches” to setting forward-looking costs). Thus, the FCC’s *Triennial Review Order* does not  
12 preclude the use of a forward-looking, long-run incremental cost standard *other than TELRIC* in  
13 establishing prices consistent with Sections 201 and 202 of the Act.<sup>12</sup>

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15  
16 **B. State Law Unbundling Authority**

17 This Commission has the requisite authority to require access to loops, including high  
18 capacity loops, line splitting arrangements, and subloop arrangements, as well as dedicated  
19 transport, under independent, state law authority and has enacted specific rules to do so. Ariz.  
20 Admin. Code R14-2-1307. This independent state law authority is not preempted by the FCC’s  
21 recent *Triennial Review Order*. Nowhere does Section 251 of the Act evince any general  
22 Congressional intent to preempt state laws or regulations providing for competitor access to  
23 unbundled network elements or interconnection with the ILEC. In fact, as recognized by the FCC  
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26  
27 <sup>12</sup> For example, where the 271 checklist item for which rates are being established is not legacy loop plant but next-generation loop plant, incumbents might argue for the use of a forward-looking, long-run incremental cost methodology based on their *current network technologies* – in other words, a non-TELRIC but nonetheless forward-looking, long-run incremental cost methodology. *See, e.g., Local Competition Order*, FCC 96-325, ¶ 684.

1 in its *Triennial Review Order*, several provisions of the Act expressly indicate Congress' intent not  
2 to preempt such state regulation, and forbid the FCC from engaging in such preemption:

3 Section 252(e)(3) preserves the states' authority to establish or  
4 enforce requirements of state law in their review of interconnection  
5 agreements. Section 251(d)(3) of the 1996 Act preserves the states'  
6 authority to establish unbundling requirements pursuant to state law  
7 to the extent that the exercise of state authority does not conflict  
with the Act and its purposes or our implementing regulations.  
Many states have exercised their authority under state law to add  
network elements to the national list.

8 *Triennial Review Order*, ¶ 191.

9 As the FCC further acknowledges in the *Triennial Review Order*, Congress expressly  
10 declined to preempt states in the field of telecommunications regulation:

11 We do not agree with incumbent LECs that argue that the states are  
12 preempted from regulating in this area as a matter of law. If  
13 Congress intended to preempt the field, Congress would not have  
included section 251(d)(3) in the 1996 Act.

14 *Triennial Review Order*, ¶ 192.

15 In fact, the FCC only identified a narrow set of circumstances under which federal law  
16 would act to preempt state laws and rules providing for competitor access to ILEC facilities:

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

20 [W]e find that the most reasonable interpretation of Congress' intent  
21 in enacting sections 251 and 252 to be that state action, whether  
22 taken in the course of a rulemaking or during the review of an  
interconnection agreement, must be consistent with section 251 and  
23 must not "substantially prevent" its implementation.

24 *Triennial Review Order*, ¶¶ 192, 194.

25 Notably, in reaching these conclusions, the FCC was simply restating existing, well-known  
26 precedents governing the law of preemption. Specifically, the long-standing doctrine of federal  
27 conflict preemption provides for exactly the limited sort of federal preemption acknowledged by

1 the FCC's *Triennial Review Order*. Courts have long held that state laws are preempted to the  
2 extent that they actually conflict with federal law. As noted by the FCC's *Triennial Review Order*,  
3 such conflict exists where compliance with state law "stands as an obstacle to the  
4 accomplishments and execution of the full purposes and objectives of Congress." *Triennial*  
5 *Review Order*, ¶ 192 n. 613 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Even more  
6 notably, in its *Triennial Review Order*, the FCC did not act to preempt any existing state law or  
7 regulation inconsistent with the FCC's rules, nor did it act to preclude the adoption of future state  
8 laws or regulations governing the access of competitors to ILEC facilities which are inconsistent  
9 with the FCC's rules. In fact, following the governing law set out in the Eighth Circuit's *Iowa*  
10 *Utilities Board I* decision, the FCC specifically recognized that state laws or regulations which are  
11 inconsistent with the FCC's unbundling rules are not ipso facto preempted:

12 That portion of the Eighth Circuit's opinion reinforces the language  
13 of [Section 251(d)(3)], *i.e.*, that state interconnection and access  
14 regulations must "substantially prevent" the implementation of the  
15 federal regime to be precluded and that "merely an inconsistency"  
between a state regulation and a Commission regulation was not  
sufficient for Commission preemption under section 251(d)(3).

16 *Triennial Review Order*, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

17  
18 In so doing, the FCC made clear that it was acting in conformance with the governing law  
19 set out in the *Iowa Utilities Board I* decision:

20 We believe our decision properly balances the broad authority  
21 granted to the Commission by the 1996 Act with the role preserved  
22 for the states in section 251(d)(3) and is fully consistent with the  
Eighth Circuit's interpretation of that provision.

23 *Id.*

24 Thus, far from taking any specific action to preempt any state law or regulation governing  
25 competitor access to incumbent facilities, the FCC merely acted in the *Triennial Review* to restate  
26 the already-existing bounds on state action recognized under existing doctrines of conflict  
27 preemption. Furthermore, the FCC's *Triennial Review Order* recognized that "merely an

1 inconsistency” between state rules providing for competitor access and federal unbundling rules  
2 would be insufficient to create such a conflict. Instead, consistent with existing doctrines of  
3 conflict preemption, the FCC recognized that the state laws would have to “substantially prevent  
4 implementation” of Section 251 in order to create conflict preemption.

5 Of course, the FCC’s *Triennial Review Order* could not have concluded that all state rules  
6 unbundling network elements not required to be unbundled nationally by the FCC create conflict  
7 preemption. Had the FCC reached such a conclusion, the FCC would have rendered Section  
8 251(d)(3)’s savings provisions a nullity, never operating to preserve any meaningful state law  
9 authority in any circumstance. Rather than reaching such a conclusion, the FCC created a process  
10 for parties to determine whether a “particular state unbundling obligation” requiring the  
11 unbundling of network elements not unbundled nationally by FCC rules creates a conflict with  
12 federal law. The *Triennial Review Order* invited parties to seek declaratory rulings from the FCC  
13 regarding individual state obligations. An invitation to seek declaratory ruling, however, hardly  
14 amounts to preemption in itself – it merely creates a process for interested parties to establish in  
15 future proceedings before the FCC whether or not a particular state rule conflicts with federal law.

16 The FCC did give interested parties some indication of how it might rule on such petitions.  
17 Specifically, the FCC stated that it was “*unlikely*” that the FCC would refrain from finding conflict  
18 preemption where future state rules required “unbundling of network elements for which the  
19 Commission has either found no impairment ... or otherwise declined to require unbundling on a  
20 national basis.” *Triennial Review Order*, ¶ 195. The FCC’s statement, however, that such future  
21 rules were merely “*unlikely*” – as opposed to simply unable – to withstand conflict preemption  
22 leads to the inevitable conclusion that there are some circumstances in which the FCC would find  
23 that such future rules were not preempted. Moreover, with respect to state rules in existence at the  
24 time of the *Triennial Review Order*, the FCC’s indications that it might find conflict preemption  
25 are even more muted. Specifically, the FCC merely stated that “in *at least some circumstances*  
26 existing state requirements will not be consistent with our new framework and may frustrate its  
27 implementation.” *Triennial Review Order*, ¶ 195.

1           Thus, while the FCC's *Triennial Review Order* indicates that under some circumstances  
2 the FCC would find conflict preemption for state rules requiring the unbundling of network  
3 elements not unbundled nationally under federal law, the decision also indicates that in some  
4 circumstances the FCC would decline to find that such state rules substantially prevent  
5 implementation of Section 251.<sup>13</sup> In fact, the FCC's decision gives some direction on the  
6 circumstances that would lead the FCC to decline a finding of conflict preemption for state rules  
7 unbundling network elements the FCC has declined to unbundle nationally. Specifically, in its  
8 discussion of state law authority to unbundle network elements, the FCC states that "the  
9 availability of certain network elements may vary between geographic regions." *Triennial Review*  
10 *Order*, ¶ 196. Indeed, according to the FCC, such a granular "approach is required under *USTA*."  
11 *Triennial Review Order*, ¶ 196 (citing *USTA*, 290 F.3d at 427). Thus, if the requisite state-specific  
12 circumstances exist in a particular state, state rules unbundling network elements not required to  
13 be unbundled nationally are permissible in that state, and would not substantially prevent the  
14 implementation of Section 251.

15           In addition, state determinations to require the unbundling of elements that are also subject  
16 to the unbundling requirements of Section 271 of the Act, such as switching, dedicated transport  
17 and loops, could not, as a matter of law, be subject to preemption analysis. The inclusion of these  
18 requirements in the Act clearly indicates that, far from frustrating the implementation of the Act,  
19 these unbundling requirements are critical components of the Act.

20           This Commission should exercise its authority as it is delineated by Arizona law,  
21 irrespective of any preemption analysis, as the adjudication of the constitutionality of such  
22 enactments is generally beyond the jurisdiction of administrative agencies. *See Johnson,*  
23 *Administrator of Veterans' Affairs, et. al. v. Robison*, 415 U.S. 361, 368 94 S. Ct. 1160, 1166

24 \_\_\_\_\_  
25 <sup>13</sup> Notably, the FCC's statements indicating when it is 'likely' to find preemption for particular state rules appear to  
26 conflict with a recent Sixth Circuit decision. The Sixth Circuit has stated that "as long as state regulations do not  
27 prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." The  
court further noted that a state commission is permitted to "enforce state law regulations, even where those regulations  
differ from the terms of the Act or an interconnection agreement" entered into pursuant to section 252 of the Act, "as  
long as the regulations do not interfere with the ability of new entrants to obtain services." *See Michigan Bell v.*  
*MCIMetro*, 2003 WL 909978, at 9 (6<sup>th</sup> Cir. 2003).

1 (1974). An aggrieved party can seek appropriate recourse in the courts if it truly believes the  
2 Commission's actions are pre-empted.

3 **III. QWEST'S PREEMPTION ARGUMENT COLLAPSES ON ITSELF: SECTION**  
4 **271 AND STATE LAW CONTINUE TO PROVIDE AUTHORITY FOR THE**  
5 **COMMISSION TO REQUIRE UNBUNDLING.**

6 In its Motion, Qwest has not refuted its obligation to provide certain network elements  
7 under Section 271, even if those elements are found, at some point in the future, not to meet the  
8 FCC's new impairment standard pursuant to Section 251 of the Act. All reasonable observers  
9 (including, on Covad's information and belief, Qwest) accept that section 271 imposes parallel  
10 unbundling obligations on Bell Operating Companies (BOCs) such as Qwest, and those  
11 unbundling obligations are not limited by the impairment standard contained in Section 251.

12 At the same time, Qwest argues that any unbundling in addition to Section 251 is  
13 precluded. This begs the questions: (1) How may one federal statute be preempted by another,  
14 and (2) How may state laws requiring similar unbundling obligations as those contained in existing  
15 and effective federal law be preempted?

16 It is logically inconsistent to suggest that a state law requiring the same unbundling as a  
17 federal statute (Section 271, in this case) frustrates the federal unbundling regime and is therefore  
18 preempted. A review of Covad's proposed language reveals that, although its unbundling  
19 language relies on both state law and Section 271, each and every proposal represents an  
20 unbundling requirement contained in Section 271. This forecloses, as a matter of law, the  
21 possibility that the unbundling requested may be preempted.

22 Moreover, as set forth in more detail above in Section II.B, both the Act and the FCC have  
23 been very deferential to state regulation in areas touched by the Act. On their face, the  
24 Commission's unbundling rules are not preempted. Therefore, this Commission's arbitration of  
25 state law unbundling requirements is not preempted unless the Commission takes action, based on  
26 state law, that is wholly contrary to the Act.

27

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1  
2 **IV. CONCLUSION.**

3  
4 Arbitration of unbundling issues under either Section 271 and/or Arizona law clearly is  
5 within this Commission's jurisdiction. Applicable law – as well as the public interest – provides  
6 this Commission with the authority to require unbundling of network elements pursuant to both  
7 Section 271 and Arizona law. Qwest's narrow and limiting interpretation of the Commission's  
8 authority is contrary to law and the public interest and Qwest's Motion to Dismiss should be  
9 denied.

10  
11 RESPECTFULLY SUBMITTED this 16th day of August, 2004.

12 **DEICA COMMUNICATIONS, INC. dba**  
13 **COVAD COMMUNICATIONS COMPANY**

14  
15 By 

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