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BEFORE THE ARIZONA CORPORATION COMMISSION  
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2004 SEP 29 P 3: 54

Arizona Corporation Commission

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AZ CORP COMMISSION  
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SEP 29 2004

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

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

Staff's Comments On The FCC Interim Unbundling Order

**I. Introduction**

Pursuant to the schedule agreed to by the parties, Staff files these brief comments on the impact of the FCC's *Interim Unbundling Order*<sup>1</sup> on the issues raised in Qwest's Motion to Dismiss Issue 2 of Dieca Communications, Inc. dba Covad Communications Company's ("Covad") Petition for Arbitration. Specifically, Issue 2 of Covad's Petition seeks a determination from the Commission as to whether: (1) Qwest is required to provide unbundled access to certain network elements under section 271 of the Act; (2) the rates that Qwest would be allowed to charge for such elements, and, (3) the extent to which Qwest is required to provide certain elements under State law.

**II. Discussion**

In its Combined Reply to the Staff and Covad Responses to Qwest's Motion to Dismiss, Qwest argues that Covad's unbundling proposals are inconsistent with the FCC's *Interim Unbundling Order*. Qwest's argument is interesting because Qwest on the one hand relies on the FCC's *Interim Unbundling Order* at the state level to dismiss an issue in Covad's arbitration, yet on the other hand it

<sup>1</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order and Notice of Proposed Rulemaking*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004) ("Interim Unbundling Order").

1 is attacking the FCC's *Interim Unbundling Order* at the federal level attempting to get it overturned  
2 by the D.C. Circuit Court of Appeals.

3 Moreover, Qwest's reliance on the FCC's *Interim Unbundling Order* to dismiss the Section  
4 271 issues raised in Covad's Petition for Arbitration is misplaced. The FCC's Interim Plan only  
5 applies to elements vacated by the D.C. Circuit's *USTA II* Order<sup>2</sup>. Elements provided under Section  
6 271 are not addressed by the *Interim Unbundling Order*. While the FCC is seeking comment on the  
7 State's role with regard to Section 271 interconnection and access requirements in its rulemaking, it  
8 has made no determinations that would preclude a State from deciding these issues at this time.  
9 Indeed, given that Qwest's entry into the 271 market was predicated on its compliance with the  
10 Competitive Checklist, Staff believes that these determinations need to be made.

11 The State's authority under Section 251(d)(3) is similarly not addressed by the FCC's *Interim*  
12 *Unbundling Order*. While the Commission has jurisdiction to address the issues raised by Covad  
13 under State law, the risk, as noted by Qwest, is that when the FCC finally takes action and adopts  
14 permanent unbundling rules, State requirements may be subject to preemption to the extent they are  
15 inconsistent with the Federal unbundling requirements. As Qwest notes, however, the FCC has  
16 committed to promulgate permanent unbundling rules in December, 2004, which will likely be well  
17 before the date of a Commission Order in this Docket. However, this issue is far different from the  
18 argument made by Qwest which forms the basis for its Motion To Dismiss, i.e., that the Commission  
19 has no authorization to make unbundling determinations under State law. See Qwest's Combined  
20 Response at p. 11.

### 21 **III. Conclusion**

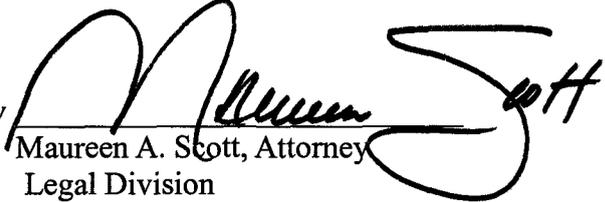
22 The Commission should reject Qwest's Motion to Dismiss Issue 2 of Covad's Petition for  
23 Arbitration on jurisdictional grounds. Qwest's arguments to the contrary notwithstanding,  
24 Commission review of the issues raised by Covad would not be inconsistent with the FCC's *Interim*  
25 *Unbundling Order*. The FCC's *Interim Unbundling Order* did not address State jurisdiction to order  
26  
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28 <sup>2</sup> *United States Telecom Association v. FCC*, 359 F.3d 554f (D.C.Cir. 1004)(“*USTA II*”)

1 unbundling and the effect of Section 251(d)(3)'s savings clause with respect to State enactments.

2  
3 RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of September, 2004.

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5  
6 By 

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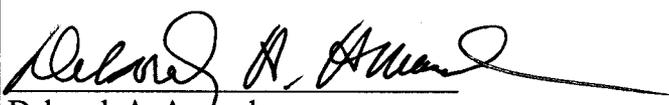
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