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BEFORE THE ARIZONA CORPORATION COMMISSION

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2005 NOV 21 P 4: 08

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IN THE MATTER OF THE PETITION )  
OF DIECA COMMUNICATIONS, INC., )  
D/B/A COVAD COMMUNICATIONS )  
COMPANY, FOR ARBITRATION TO )  
RESOLVE ISSUES RELATING TO AN )  
INTER-CONNECTION AGREEMENT )  
WITH QWEST CORPORATION )

Docket No. T-03632A-04-0425  
T-01051B-04-0425

**COVAD'S COMMENTS REGARDING THE FCC'S  
BROADBAND ORDER**

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") submits these comments regarding the Federal Communications Commission's ("FCC") recent *Broadband Order*:

On September 23, 2005, the FCC issued its Report and Order and Further Notice of Proposed Rulemaking in *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC 05-150 ("*Broadband Order*"). Thereafter, on November 7, 2005, the arbitrator issued an order requesting the parties to submit comments on the impact, if any, of the *Broadband Order* on the issues in this docket. At a high level, the FCC adopted the following regulatory changes in the *Broadband Order*:

- Consistent with the Supreme Court's opinion in *NCTA v. Brand X*, the FCC determined that facilities-based wireline broadband Internet access service is an information service.
- Determined that facilities-based wireline broadband Internet service providers (ISPs) are no longer required to offer the wireline broadband transmission component of wireline broadband Internet access services as a stand-alone telecommunications service under Title II, subject to the transition explained below.
- Determined that facilities-based wireline carriers are permitted to offer broadband Internet access transmission arrangements for wireline broadband Internet access services on a common carrier basis or a non-common carrier basis.
- Determined that facilities-based wireline Internet access service providers must continue to provide existing wireline broadband Internet access transmission offerings, on a grandfathered basis, to unaffiliated ISPs for a one-year transition period.

In plain language what these changes mean is that the RBOCs no longer have to provide a wholesale broadband product to non-facilities based ISPs such as Earthlink or AOL.

These regulatory changes are wholly unrelated to any of the issues in this docket as will be made clear below. Here, the arbitrator has been asked to consider the following issues:

**Issue 1 (Copper retirement)** involves Qwest's commitments to maintain wholesale service to Covad in the event that copper plant serving Covad and its customers is retired by Qwest and replaced with fiber optic facilities. Covad's proposal that Qwest provide an alternative service to Covad in the event that it retires copper feeder is applicable only to situations in which Qwest retires copper feeder subloops, creating mixed-media or "hybrid" copper/fiber loops. Covad has also proposed improvements to Qwest's notice procedures for copper retirement activity, which are required by FCC rules. These improvements are required to lend meaning to Qwest's notices, and to comply with existing FCC standards.

**Issue 2 (Section 271 unbundling)** encompasses the Parties' disagreement regarding the availability of network elements that may, in the future, no longer be available under the FCC's application of the "necessary" and "impair" standard applicable to Section 251 of the Telecommunications Act of 1996 ("Act"), but must nevertheless be unbundled by Regional Bell Operating Companies ("RBOCs" or "BOCs") pursuant to Section 271 of the Act. This Commission has clear authority to apply both state law and all provisions of the Act as it decides interconnection arbitration disputes.

**Issue 3 (Commingling)** involves the language in the Agreement describing permissible commingling arrangements. Covad has proposed language that is consistent with the FCC's statements regarding the commingling of unbundled network elements purchased under Section 271 of the Act: while Section 271 elements are not afforded status as Section 251 elements under the FCC's commingling rules, they are eligible for commingling with Section 251 elements just like any other telecommunications service. Covad also proposes a definition of "251(c)(3) UNE." Covad believes that this definition is helpful in describing the precise group of unbundled network elements (those obtained pursuant to Section 251(c)(3) of the Act) that must be present in any commingling arrangement. This definition, rather than the general definition of "unbundled network element," is necessary because "unbundled network element" is used (and Covad believes will continue to be used) to describe not only UNEs purchased pursuant to Section 251 but also elements provided under other "Applicable Law," such as Arizona law.

**Issue 5 (Regeneration)** involves the Parties' disagreement over Qwest's obligation to provide regeneration between CLEC-to-CLEC cross connections ordered by FCC rule. Covad believes Qwest should maintain a consistent regeneration policy as to both its ILEC-to-CLEC and CLEC-to-CLEC arrangements, and is certainly not permitted to

refuse to provide a CLEC-to-CLEC connection solely because that connection requires regeneration.

**Issue 9 (Payment)** involves the length of the period within which Covad may review Qwest's wholesale invoices prior to payment, and the timing of Qwest's remedies for non-payment. Covad has established a substantial record in this proceeding regarding the deficiencies of Qwest's bills, which slows down Covad's review and analysis of those bills. As a result of the current deficiencies of Qwest's bills, Covad requires additional time to adequately review certain portions of the UNE, collocation, and transport invoices it receives. With respect to Qwest's remedies for non-payment, Covad has no objections to the remedies themselves, but believes there are legitimate reasons to extend the timing of those remedies. Because the remedies have a potential to irreversibly damage Covad's business, the modest extensions of time Covad has proposed will allow Qwest to maintain the remedies to which it is entitled, while affording Covad sufficient time to either resolve payment issues with Qwest or seek appropriate relief from this Commission if necessary.

None of these issues fall within the range of any of the regulatory changes or other issues the FCC considered in the *Broadband Order*. Further, the FCC explicitly states in the *Broadband Order* that nothing in that order changes the rights of a CLEC to obtain UNEs:

As noted, the *Wireline Broadband NPRM* sought comment on the relationship between a competitive LEC's rights under section 251 and the Commission's tentative conclusion that wireline broadband Internet access service is an information service with a telecommunications input. Several competitive LECs, and one BOC, argue that regardless of how the Commission classifies wireline broadband Internet access service, including its transmission component, competitive LECs should still be able to purchase UNEs, including UNE loops to provide stand-alone DSL telecommunications service, pursuant to section 251(c)(3) of the Act. We agree. Section 251(c)(3) and the Commission's rules look at what use a competitive LEC will make of a particular network element when obtaining that element pursuant to section 251(c)(3); the use to which the

incumbent LEC puts the facility is not dispositive. In this manner, even if an incumbent LEC is only providing an information service over a facility, we look to see whether the requesting carrier intends to provide a telecommunications service over that facility. Thus, competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled under our rules, regardless of the statutory classification of service the incumbent LECs provide over those facilities. So long as a competitive LEC is offering an "eligible" telecommunications service – *i.e.*, not exclusively long distance or mobile wireless services – it may obtain that element as a UNE. Accordingly, nothing in this Order changes a requesting telecommunications carriers' UNE rights under section 251 and our implementing rules.

*Broadband Order*, ¶¶126-127 (emphasis added).

Accordingly, nothing in the *Broadband Order* affects Covad's right to access UNEs, and the order, therefore, cannot have any impact on the arbitration of an interconnection agreement pursuant to section 251 and 252 of the Act. In light of these comments as well as Covad's other submissions to date, should the arbitrator decide to discuss the *Broadband Order* as part of this docket, he should find that the *Broadband Order* has no impact on any of the issues in this docket.

RESPECTFULLY SUBMITTED,

Dated: November 21, 2005

DIECA COMMUNICATIONS, INC.

By: \_\_\_\_\_

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## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of **COVAD'S COMMENTS REGARDING THE FCC'S BROADBAND ORDER** was electronically mailed and mailed first class, postage prepaid this 21st day of November, 2005 to the following:

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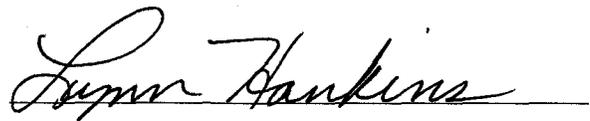
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