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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER  
Chairman  
WILLIAM A. MUNDELL  
Commissioner  
MARC SPITZER  
Commissioner  
MIKE GLEASON  
Commissioner  
KRISTIN K. MAYES  
Commissioner

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AZ CORP COMMISSION  
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IN THE MATTER OF THE PETITION ) Docket No. T-03632A-04-0425  
OF DIECA COMMUNICATIONS, INC., ) Docket No. T-01051B-04-0425  
D/B/A COVAD COMMUNICATIONS )  
COMPANY, FOR ARBITRATION TO )  
RESOLVE ISSUES RELATING TO AN )  
INTER-CONNECTION AGREEMENT )  
WITH QWEST CORPORATION )

**COVAD'S REPLY TO QWEST'S COMMENTS REGARDING THE FCC'S  
BROADBAND ORDER**

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

As discussed below, the FCC has already resolved the very question raised by Qwest and found that the *Broadband Order* has no affect on Covad's rights under 47 U.S.C. § 251 and, by extension, 47 U.S.C. § 252. Ignoring the FCC's express language, however, Qwest inappropriately and incorrectly argues that Covad might not be entitled to enter into an interconnection agreement with Qwest because Covad may only be an information service provider in Arizona, not a telecommunications carrier. Qwest argues that the *Broadband Order* stands for the proposition that if a carrier provides digital subscriber line (DSL) service that includes internet access as a component of the service,

the service is an information service. Hence, Qwest argues, if Covad provides only information services in Arizona, then Covad would not be a telecommunications carrier (a provider of “telecommunications service”) and therefore would not be entitled under 47 U.S.C. § 252 to require Qwest to negotiate an interconnection agreement in good faith with Covad. Qwest further claims not to know whether Covad provides a telecommunications service in Arizona, and it demands that Covad come forward and demonstrate that it in fact does so.

The Commission should reject Qwest’s argument for three distinct and independently sufficient reasons. First, Qwest’s argument is procedurally improper and should be ignored. Second, Qwest’s argument is simply wrong, and it completely ignores the FCC’s express finding that the *Broadband Order* does not affect UNE and interconnection issues. Third, and finally, it is self-evident that Covad is a telecommunications carrier entitled as a matter of law to enter into interconnection agreements with Qwest.

Qwest’s argument is procedurally improper and should be ignored. Its comments violate the arbitrator’s last order, which said that “Staff, Covad and Qwest shall file comments regarding the impact of the FCC’s order in CC Docket No. 02-33 on the issues raised in this proceeding. . . .” (emphasis added). Five issues were arbitrated in this docket, none relating in any way to Covad’s right to negotiate, arbitrate and ultimately enter into an interconnection agreement with Qwest. The issues raised and arbitrated only relate to the terms and conditions of the interconnection agreement itself, not the threshold issue of Covad’s right to compel Qwest to negotiate an interconnection agreement. Qwest’s argument regarding this threshold issue, therefore, is an entirely

new and substantive issue that has never been raised before and was certainly never arbitrated. The parties conducted extensive pre-arbitration negotiations on select issues and engaged in a lengthy arbitration, including an evidentiary hearing. The parties also filed comprehensive post-hearing briefs. Qwest cannot restart the process at this late date to arbitrate an issue never raised before. The arbitrator did not grant Qwest the right to do so.

Qwest's argument, moreover, is simply wrong. The FCC expressly concluded that the *Broadband Order* has no impact at all on a CLEC's rights under section 251 of the Act (including Covad's right as a CLEC to an interconnection with Qwest).<sup>1</sup> Footnote 21 to Paragraph 9 of the *Broadband Order*, for example, says "Similarly, this Order does not disturb incumbent LECs' unbundled network element (UNE) obligations or competitive carriers' rights to obtain UNEs." Again, in Paragraph 127, the order says "[N]othing in this Order changes a requesting telecommunications carriers' UNE rights under section 251 and our implementing rules." Qwest completely ignored these definitive statements by the FCC in the comments it filed here.

The Telecommunications Act of 1996 expressly contemplates that the means to obtain UNEs and interconnection is through an interconnection agreement with an ILEC such as Qwest. See, 47 USC §251(c) and §252. Because the *Broadband Order* specifically preserved Covad's right to obtain UNEs and interconnection from Qwest, it necessarily follows that Covad's right to enter into an interconnection agreement with Qwest has also been preserved.

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<sup>1</sup> The FCC reaffirmed that the *Broadband Order* has no impact on a competing carrier's right to obtain interconnection from an ILEC. See, *Broadband Order*, n. 400.

Finally, the Commission should reject Qwest's argument out of hand because the Commission has already determined that Covad is authorized to provide telecommunications services in Arizona. *In the Matter of the Application of the Petition and Application of DIECA Communications, Inc. dba Covad Communications Company for a Certificate of Convenience and Necessity*, Arizona Corporation Commission, No. T-03632A-98-0542, Opinion and Order (9/17/99). Because Covad may offer telecommunications services in Arizona it is, by definition, a telecommunications carrier. *See* 47 U.S.C. §153(44); 47 C.F.R. § 51.5. It is difficult, in fact, to understand how Qwest could claim not to know that Covad is a telecommunications carrier since Covad purchases UNEs and interconnection services from Qwest for a variety of products completely unaffected by the *Broadband Order*, including, for example, T1 services.<sup>2</sup> Since even Qwest acknowledges that telecommunications carriers are entitled to enter into interconnection agreements under 47 U.S.C. § 252, there can be no dispute that Covad is legally entitled to enter into an interconnection agreement with Qwest.

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<sup>2</sup> The *Broadband Order* expressly finds that T1 and other "high-capacity special access services" are telecommunications services:

These characteristics distinguish wireline broadband Internet access service from other wireline broadband services, such as stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services, that carriers and end users have traditionally used for basic transmission purposes. That is, these services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information-processing capabilities. Because carriers and end users typically use these services for basic transmission purposes, these services are telecommunications services under the statutory definitions. *Broadband Order*, ¶ 9, footnotes omitted.

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 this 2<sup>nd</sup> day of December, 2005.

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