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BEFORE THE ARIZONA CORPORATION COMMISSION

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2005 DEC -5 1 P 3: 56

AZ CORP COMMISSION  
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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**

**QWEST CORPORATION'S  
 RESPONSE TO COVAD  
 COMMUNICATION COMPANY'S  
 SECOND NOTICE OF  
 SUPPLEMENTAL AUTHORITY**

Qwest Corporation ("Qwest") hereby provides this response to Covad Communications Company's ("Covad") second notice of supplemental authority filed on November 21, 2005.

In its notice, Covad provides the Commission with a recent order ("TRA Order") from the Tennessee Regulatory Authority ("TRA") in an arbitration involving BellSouth Telecommunications, Inc. and Deltacom Communications, Inc. Covad presents the order in support of its position that the interconnection agreement ("ICA") between Qwest and Covad should include language requiring Qwest to provide network elements offered under Section 271 of the Telecommunications Act of 1996 ("the Act") at rates determined through the FCC's total element long run incremental cost ("TELRIC") pricing methodology. For the reasons discussed below, the TRA Order violates the Act and does not provide support for Covad's Section 271 unbundling and pricing demands. The unlawful rulings in the order conflict directly with the orders of the nine state commissions that have rejected Covad's unbundling demands in these

multi-state arbitrations between Qwest and Covad.<sup>1</sup> Those orders, not the TRA Order, correctly interpret and apply the governing provisions of the Telecommunications Act of 1996 ("the Act").

The first of the multiple flaws in the TRA Order is the starting premise that the scope of a state commission's authority to decide issues in a Section 252 interconnection arbitration is dictated by the issues that the petitioning party decides to include in its arbitration petition. According to the TRA, a state commission "has broad authority to arbitrate any open issue submitted in a Section 252 arbitration." TRA Order at 29. Under this reasoning, any demand that a petitioning party includes in a petition can be arbitrated and incorporated into the terms and conditions of an interconnection agreement. Thus, Covad contends that because it included Section 271 unbundling demands in its petition, the Arizona Commission is authorized to resolve those demands.

This premise in the TRA Order ignores the statutory language that defines the arbitration authority of state commissions. As Qwest described in its opening brief, the process mandated by Section 252, the provision pursuant to which Covad filed its petition for arbitration, is concerned with implementation of an ILEC's obligations under Section 251, not Section 271. In an arbitration conducted under section 252, therefore, state commissions only have authority to impose terms and conditions relating to Section 251 obligations. In its arbitration order that rejected Covad's Section 271 unbundling demands, the South Dakota Commission explained in clear terms why state commissions do not have authority to impose requirements under Section 271 in an arbitration conducted under Section 252:

With respect to the section 271 issue, the Commission finds that it does not have the authority to enforce section 271 requirements within this section 252 arbitration. Section 252(a) provides that interconnection negotiations are limited to requirements "for interconnection, services, or network elements pursuant to section 251 . . . ." In addition,

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<sup>1</sup> The Wyoming Commission voted last Friday, December 2, 2005, to adopt Qwest's positions and virtually all of Qwest's proposed language relating to this issue, becoming the ninth commission to rule this way. No state commission has adopted Covad's positions or language.

as stated above, section 252(c)(1) requires the Commission to ensure that the Commission's resolution of open issues "meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title . . . ." *The language in these sections clearly anticipates that section 252 arbitrations will concern section 251 requirements, not section 271 requirements.*<sup>2</sup>

Based on a similar analysis, the Utah Commission reached the same conclusion as the South Dakota Commission and other commissions that have rejected Covad's Section 271 unbundling demands. The Utah Commission explained:

[W]e differ with Covad in its belief that we should therefore impose Section 271 and state law requirements in the context of a Section 252 arbitration. Section 252 was clearly intended to provide mechanisms for the parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law.<sup>3</sup>

In an attempt to find authority where none exists, the TRA relies on Section 252(b)(4)(C), which provides in relevant part that in an interconnection arbitration, a state commission "shall resolve each issue set forth in the petition and response, if any, by imposing appropriate conditions as required to implement subsection [252](c) . . . ." *See* TRA Order at 29. The TRA concludes that this provision empowers a state commission to resolve any issue set forth in a petition regardless whether the issue relates to a duty imposed by Section 251. However, the TRA ignores the critical language in this subsection which directs state commissions to resolve arbitration issues by imposing conditions "*required to implement subsection [252](c).*" In turn, subsection 252(c), which sets forth "standards for arbitration," expressly directs state commissions to resolve "open issues" by imposing "conditions [that] *meet the requirements of*

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<sup>2</sup> *In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket TC05-056, Arbitration Order at 6 (July 26, 2005) (emphasis added).

<sup>3</sup> *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Utah Commission Docket No. 04-2277-02, Arbitration Report and Order at 19-20 (Utah Commission Feb. 8, 2005)

section 251." As the South Dakota Commission explained in the excerpt quoted above, this plain linkage between the "open issues" that state commissions are permitted to arbitrate and the "requirements of section 251" demonstrates clearly the open issues state commissions are authorized to resolve are only those relating to the duties imposed by Section 251. Significantly, Congress neither directed nor authorized state commissions to resolve open issues relating to duties imposed by Section 271.

In support of its flawed finding relating to the scope of a state commission's arbitration authority, the TRA cites the decision of the United States Court of Appeals for the Fifth Circuit in *Coserv Ltd. Liability Corp. v. Southwestern Bell*, 350 F.3d 482 (5<sup>th</sup> Cir. 2003). See TRA Order at 30. According to the TRA, *Coserv* supports the proposition that a state commission can decide any issue set forth in an arbitration petition regardless whether the issue relates to Section 251. In *Coserv*, however, the Fifth Circuit held that the Texas Commission was without jurisdiction to arbitrate a non-251 issue involving compensated access because the parties had not "mutually agreed" to negotiate the issue. As explained by the court, "[t]he PUC's ultimate refusal to arbitrate the compensated access issue was correct, because compensated access was not a *mutually agreed upon* subject of voluntary negotiations between SWBT and Coserv." *Id.* at 487-88 (emphasis added). In the TRA Order, the commission failed to address this important aspect of the *Coserv* holding. Given BellSouth's objection to the inclusion of Section 271 issues in the TRA arbitration, it is apparent that – just as in this case – there was not "mutual agreement" that those issues were a proper subject of negotiation and arbitration. Thus, instead of supporting the TRA Order, *Coserv* actually confirms that the order is unlawful.

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("Utah Arbitration Order").

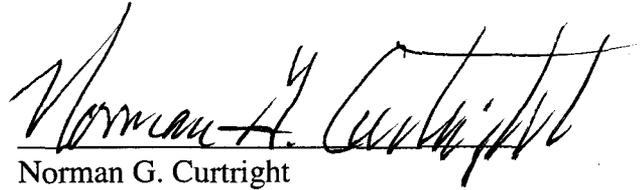
An additional material flaw in the TRA Order is the commission's conclusion that state commissions have authority to set rates for any network elements regardless whether the elements are provided under Section 251 or Section 271. This conclusion is contradicted by the language of Section 252(c)(2), the very provision that the TRA invokes for its alleged authority. That section provides that in an arbitration a state commission shall "establish rates for interconnection, services, or network elements according to subsection (d)." According to the TRA, this provision gives state commissions authority to set rates for Section 271 elements. TRA Order at 26. However, the TRA failed to analyze the meaning of the directive in this section to set rates "according to subsection (d)." That subsection – 252(d)(1) – sets forth the pricing standard unbundled network elements provided under Section 251(c)(3) and is expressly limited to those network elements. The section says nothing about Section 271 elements and does not grant state commissions any pricing authority over those elements.

Finally, the TRA Order improperly relies on Tennessee law for the proposition that state commissions have authority under the federal Act to arbitrate non-251 issues. TRA Order at 31. It is fundamental that a state legislature cannot confer authority to a state commission under a *federal* act, and the TRA cites no authority to support the alleged conferral of such authority. Only Congress can delegate authority to state commissions under the Act and, as discussed in Qwest's briefs, Congress has not conferred any authority to state commissions over Section 271 elements. That authority rests exclusively with the FCC.

For these reasons, the TRA Order is unlawful and does not provide any reason for the Commission to depart from the eight state commission orders in these Qwest-Covad arbitrations establishing that states are without authority to set rates or other terms and conditions for Section 271 elements.

DATED: December 5, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Norman G. Curtright". The signature is written in a cursive style with a horizontal line drawn across the middle of the letters.

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*Attorneys for Qwest Corporation*

I hereby certify that on this the 5th day of December 2005, I caused to be served a true and correct copy of **QWEST CORPORATION'S RESPONSE TO COVAD COMMUNICATION COMPANY'S SECOND NOTICE OF SUPPLEMENTAL AUTHORITY** by U.S. mail and electronic mail on the following individuals:

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