



**EXCEPTION**  
BEFORE THE ARIZONA CORPORATION 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  
EXCEPTIONS TO THE  
RECOMMENDED OPINION AND  
ORDER**

Qwest Corporation ("Qwest") respectfully submits these exceptions to the Recommended Opinion and Order ("ROO") issued by the Administrative Law Judge in this arbitration proceeding on December 9, 2005. Qwest's exceptions are limited to the ROO's recommended resolution of Arbitration Issue No. 2, which involves Covad Communication Company's ("Covad") request to include in the parties' interconnection agreement ("ICA") a requirement that Qwest: (1) provide network elements under Section 271 of the Telecommunications Act of 1996 ("the Act") at TELRIC ("total element long run incremental cost") rates, and (2) unbundle network elements under Arizona law that the Federal Communications Commission ("FCC") has ruled are not subject to unbundling under Section 251 of the Act and are not governed by TELRIC rates. For the reasons set forth below, the Commission should reject the rulings in the ROO that adopt these unbundling requests from Covad.

Arizona Corporation Commission  
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1 I. INTRODUCTION AND SUMMARY

2 This interconnection arbitration conducted under Section 252 of the Act is the tenth  
3 arbitration between Qwest and Covad in which state commissions have addressed Covad's  
4 request that the ICA impose on Qwest network unbundling obligations under Section 271  
5 and state law. The nine prior arbitrations have resulted in 12 separate decisions  
6 addressing these issues, eight from other state commissions and four from administrative  
7 law judges ("ALJs"). In each of these 12 decisions, the state commissions and ALJs have  
8 ruled that Covad's unbundling demands are unlawful and must be rejected. The finding in  
9 the ROO that the ICA should include these unbundling obligations is thus contradicted by  
10 the legal conclusions reached by 12 other independent decision-makers applying the same  
11 provisions of the Act. These 12 decisions, not the ROO, are correct.

12 The ROO's analysis of these network unbundling issues is flawed on multiple  
13 levels. First, the ROO fails to recognize that Section 252, the provision of the Act that  
14 gives state commissions the power to conduct interconnection arbitrations, only authorizes  
15 commissions to arbitrate issues relating to the duties imposed by Section 251(b) and (c).  
16 States do not have any authority in a Section 252 arbitration to impose duties relating to  
17 Section 271 and, accordingly, are not permitted in an arbitration to impose terms and  
18 conditions relating to the network elements that Regional Bell Operating Companies  
19 ("RBOCs") must provide under that section. As explained by one commission, "[t]he Act  
20 is clear that a state commission arbitrating an interconnection agreement is required to  
21 ensure the ILEC is providing the network elements identified by the FCC under Section  
22 251, not the elements identified in Section 271."<sup>1</sup>

23 Second, the Act does not empower state commissions to impose any terms and  
24 conditions under Section 271. There is no language in that section that gives states  
25 decision-making authority and, indeed, the ROO cites none. For this reason, courts

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27 <sup>1</sup> *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad*  
28 *Communications Company, for Arbitration of an Interconnection Agreement with Qwest*  
*Corporation*, Case No. CVD-T-05-1, Order No. 29825 at 4 (Idaho Public Utility  
Commission July 18, 2005) ("Idaho Arbitration Order").

1 applying the Act have determined that while state commissions have authority to take  
2 affirmative action under Sections 251 and 252, "Section 271 does not contemplate  
3 substantive conduct on the part of state commissions."<sup>2</sup>

4 Third, the ROO's finding that TELRIC prices set by this Commission for Section  
5 251 UNEs should also apply to Section 271 network elements conflicts directly with the  
6 FCC's ruling in the *Triennial Review Order* ("TRO")<sup>3</sup> and the D.C. Circuit's ruling in  
7 *United States Telecom Association v. FCC*.<sup>4</sup> Both rulings establish that TELRIC does not  
8 apply to these elements. TELRIC applies only to UNEs for which the FCC has made a  
9 finding of "impairment" under Section 251. By applying TELRIC to Section 271  
10 elements in violation of the FCC's and D.C. Circuit's rulings, the ROO improperly  
11 eliminates the Act's important regulatory distinctions between network elements for which  
12 there is competitive impairment and those for which there is not.

13 Fourth, the ROO erroneously concludes that state commissions can require ILECs  
14 to unbundle network elements under state law that the FCC has expressly refused to  
15 require ILECs to unbundle under Section 251. State commissions are only authorized  
16 under the Act to regulate under state law in a manner consistent with federal policy and  
17 FCC rules and orders. A state commission cannot, therefore, "act in a manner inconsistent  
18 with federal law and then claim its conduct is authorized under state law."<sup>5</sup> That is  
19 precisely what the ROO does. Moreover, even if a state could order unbundling under  
20 state law that the FCC has rejected, as discussed below, Arizona law does not permit the  
21 unbundling that the ROO imposes.

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23 <sup>2</sup> *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL  
24 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by section 271 to impose  
binding obligations), *aff'd*, 359 F.3d 493 (7<sup>th</sup> Cir. 2004).

25 <sup>3</sup> Report and Order and Order on Remand and Further Notice of Proposed  
26 Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of*  
*Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003) ("TRO").

27 <sup>4</sup> 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

28 <sup>5</sup> *Michigan Bell Tel. Co. v. Lark*, Case no. 04-60128, slip op. at 13 (E.D. Mich.  
Jan. 6, 2005).

1 Finally, the ROO does not properly address the effects of the FCC's recent ruling in  
2 the *Wireline Broadband Order* establishing that DSL transmission service bundled with  
3 Internet access is no longer a telecommunications service.<sup>6</sup> Covad has failed to  
4 demonstrate it provides any services in Arizona other than this combined transmission and  
5 access service, and, therefore, it has not established that it still qualifies as a  
6 "telecommunications carrier" entitled to enter into an interconnection agreement. Before  
7 issuing a final order in this matter, the Commission should require Covad to demonstrate  
8 that it provides telecommunications services in Arizona and is a telecommunications  
9 carrier.

## 10 II. ARGUMENT

### 11 A. Summary Of The Issue And Rulings By Other State Commissions

12 The Act requires ILECs to provide UNEs to other telecommunications carriers and  
13 gives the FCC the authority to determine which elements the ILECs must provide. In  
14 making these network unbundling determinations, the FCC must consider whether the  
15 failure to provide access to an element "would impair the ability of the  
16 telecommunications carrier seeking access to provide the services that it seeks to offer."<sup>7</sup>  
17 This "impairment" standard imposes important limitations on ILECs' unbundling  
18 obligations, as has been forcefully demonstrated by the Supreme Court's decision in  
19 *AT&T Corp. v. Iowa Utilities Board*<sup>8</sup> and the D.C. Circuit's decisions in *USTA I* and *USTA*  
20 *II* invalidating each of the FCC's three attempts to establish lawful unbundling rules.<sup>9</sup>

21 Arbitration Issue No. 2 arises because of Covad's demand for ICA language that  
22 would require Qwest to provide almost unlimited access to network elements in violation  
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24 <sup>6</sup> *In the Matter of Appropriate Framework for Broadband Access to Internet Order*  
25 *Wireless Facilities, et al.*, CC Docket No. 02-33, et al., FCC 05-150, Report and Order  
and Notice of Proposed Rulemaking (Sept. 25, 2005) ("Wireline Broadband Order").

26 <sup>7</sup> 47 U.S.C. § 251(d)(2).

27 <sup>8</sup> 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

28 <sup>9</sup> *USTA II, supra*; *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427-28 (D.C.  
Cir. 2002) ("*USTA I*").

1 of the unbundling limitations established by these decisions, the Act, the *TRO*, and the  
2 *Triennial Review Remand Order* ("*TRRO*"). It is not surprising, therefore, that all state  
3 commissions and ALJs that have previously considered this issue -- the state commissions  
4 and ALJs in Idaho, Iowa, Minnesota, New Mexico, Oregon, South Dakota, Utah,  
5 Washington, and Wyoming -- have rejected Covad's unbundling language, finding that it  
6 is plainly unlawful. Attached to these exceptions as Exhibit A are the relevant quoted  
7 excerpts from these decisions.<sup>10</sup>

8 The rulings of these other state commissions, which are virtually uniform in their  
9 conclusions, demonstrate the legal errors in the ROO. For example, the Minnesota ALJ,  
10 in a ruling adopted by the Minnesota Commission, concluded that "both the Act and the  
11 *TRO* make it clear that state commissions are charged with the arbitration of section 251  
12 obligations, whereas the FCC has retained authority to determine the scope of access  
13 obligations pursuant to section 271."<sup>11</sup> Addressing the limited authority that state  
14 commissions have as arbitrators -- a threshold jurisdictional issue that the ROO fails to  
15 address -- the South Dakota Commission analyzed the language of the relevant  
16 subsections of Section 252 and, like the Minnesota Commission, found that "[t]he  
17 language in these sections clearly anticipates that section 252 arbitrations will concern  
18 section 251 requirements, not section 271 requirements."<sup>12</sup> Similarly, in rejecting Covad's  
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20 <sup>10</sup> The Wyoming Commission has issued an oral ruling rejecting Covad's proposals,  
21 with a written decision forthcoming. The commissions in Minnesota and Utah adopted  
22 the ALJ decisions in those states without further written discussion and, accordingly,  
23 Exhibit A includes only the excerpts from the ALJ decisions in those states. The New  
24 Mexico Commission has not yet ruled on the hearing examiner's recommended decision;  
25 Covad did not file any exceptions or objections to that decision.

26 <sup>11</sup> *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad*  
27 *Communications Company for Arbitration to Resolve Issues Relating to an*  
28 *Interconnection Agreement with Qwest Corporation*, Minnesota Commission Docket No.  
P-5692, 421/IC-04-549, Arbitrator's Report at ¶ 46 (Minn. Commission Dec. 15, 2004).

<sup>12</sup> *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad*  
*Communications Company, for Arbitration of an Interconnection Agreement with Qwest*  
*Corporation*, TC056, Arbitration Order at 6 (S.D. Commission July 26, 2005) ("*South*  
*Dakota Arbitration Order*").

1 argument that state commissions have authority to impose unbundling obligations under  
2 Section 271, the Utah Commission ruled that "Section 271 on its face makes quite clear  
3 that the FCC retains authority over the access obligations contained therein."<sup>13</sup>

4 The orders from these other state commissions are equally clear that TELRIC  
5 pricing does not apply to Section 271 elements and states are not permitted to require  
6 unbundling under the auspices of state law that the FCC has rejected under Section 251.  
7 The hearing examiner in the New Mexico arbitration concluded, for example, that the  
8 FCC has been "explicit about TELRIC pricing not being applicable to Section 271  
9 elements" and that "while Qwest must provide access to 271 elements it is not required to  
10 do so as part of a Section 251 ICA or at TELRIC rates."<sup>14</sup> Addressing the issue of  
11 unbundling under state law, the Washington Commission emphasized that "any  
12 unbundling requirement based on state law would likely be preempted as inconsistent with  
13 federal law, regardless of the method the state used to require the element."<sup>15</sup>

14 These rulings, which address the same Covad unbundling language at issue here,  
15 confirm the unlawfulness of the ROO's rulings. It is not a coincidence that 12 decision-  
16 makers have concluded independently that Covad's proposals – and by extension, the  
17 rulings in the ROO – are unlawful.

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21 <sup>13</sup> *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad*  
22 *Communications Company, for Arbitration to Resolve Issues Relating to an*  
23 *Interconnection Agreement with Qwest Corporation, Utah Commission Docket*  
24 *No. 04-2277-02, Arbitration Report and Order at 20 (Utah Commission Feb. 8, 2005).*

25 <sup>14</sup> *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad*  
26 *Communications Company, for Arbitration of an Interconnection Agreement with Qwest*  
27 *Corporation, Case No. 04-00208-UT, Recommended Decision of Hearing Examiner at 38*  
28 *(New Mexico Commission Oct. 14, 2005).*

<sup>15</sup> *In the Matter of the Petition for Arbitration of Covad Communications Company*  
*with Qwest Corporation, Washington Commission Docket No. UT-043045, Order No. 06,*  
*Final Order Affirming in Part, Arbitrator's Report and Decision; Granting, In Part,*  
*Covad's Petition for Review; Requiring Filing of Conforming Interconnection Agreement*  
*at ¶ 37 (Wash. Commission Feb. 9, 2005).*

1 **B. Summary Of Qwest's And Covad's Conflicting Unbundling Proposals.**

2 Covad's sweeping unbundling proposals are built around its definition of  
3 "Unbundled Network Element," which Covad defines as "a Network Element to which  
4 Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access, *for*  
5 *which unbundled access is required under section 271 of the Act or applicable state law,*  
6 *or for which unbundled access is provided under the Agreement.*" (Emphasis added.)  
7 Consistent with this definition, Covad's language for Section 9.1.1 would require Qwest to  
8 provide "any and all UNEs required by the Telecommunications Act of 1996 (including,  
9 but not limited to Sections 251(b), (c), 252(a) and 271), FCC Rules, FCC Orders, and/or  
10 applicable state rules or orders . . . ."

11 Its proposal leaves no question that Covad would require Qwest to provide access  
12 to network elements for which the FCC has specifically refused to require unbundling and  
13 for which unbundling is no longer required as a result of the D.C. Circuit vacatur of  
14 unbundling requirements in *USTA II*. In Section 9.1.1.6, for example, Covad proposes  
15 language that would render irrelevant the FCC's non-impairment findings in the *TRO* and  
16 the D.C. Circuit's vacatur of certain unbundling rules:

17 On the Effective Date of this Agreement, Qwest is no longer  
18 obligated to provide to CLEC certain Network Elements  
19 pursuant to Section 251 of the Act. Qwest will continue  
20 providing access to certain network elements as required by  
21 Section 271 or state law, regardless of whether access to such  
22 UNEs is required by Section 251 of the Act. This Agreement  
23 sets forth the terms and conditions by which network  
24 elements not subject to Section 251 unbundling obligations  
25 are offered to CLEC.

26 Under this proposal, Covad would contend, for example, that it can obtain unbundled  
27 access to OCn loops, feeder subloops, and other elements despite the FCC's fact-based  
28 findings in the *TRO* that CLECs are not impaired without access to these elements.<sup>16</sup> In

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26 <sup>16</sup> In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not  
27 required to unbundle these and other elements under section 251: ¶ 315 (OCn loops);  
28 ¶ 253 (feeder subloops); ¶ 324 (DS3 loops); ¶ 365 (extended dedicated interoffice  
transport and extended dark fiber); ¶¶ 388-89 (OCn and DS3 dedicated interoffice  
transport); ¶¶ 344-45 (signaling); ¶ 551 (call-related databases); ¶ 537 (packet switching);

1 addition to these demands, in its proposed Section 9.1.1.7, Covad is seeking – and the  
2 ROO would permit -- TELRIC pricing for network elements that the FCC and the courts  
3 have de-listed from Section 251(c)(3).

4 In contrast to Covad's unbundling demands, Qwest's ICA language ensures that  
5 Covad will have access to the network elements that ILECs must unbundle under Section  
6 251 while also establishing that Qwest is not required to provide elements for which there  
7 is no Section 251 obligation. Thus, in Section 4.0 of the ICA, Qwest defines the UNES  
8 available under the agreement as:

9 [A] Network Element that has been defined by the FCC or the  
10 Commission as a Network Element to which Qwest is  
11 obligated under Section 251(c)(3) of the Act to provide  
12 unbundled access or for which unbundled access is provided  
under this Agreement. Unbundled Network Elements do not  
include those Network Elements Qwest is obligated to  
provide only pursuant to Section 271 of the Act.

13 Qwest's language also incorporates the unbundling limitations established by the Act, the  
14 courts, and the FCC by listing specific network elements that, per court and FCC rulings,  
15 ILECs are not required to unbundle under Section 251.

16 Although Qwest's ICA language properly recognizes the limitations on unbundling,  
17 its exclusion of certain network elements does not mean that those elements are  
18 unavailable to Covad and other CLECs. As the Commission is aware, Qwest is offering  
19 access to non-251 elements through commercial agreements and tariffs, including, for  
20 example, its line sharing and Qwest Platform Plus agreements with Covad.

21 **C. State Commissions Do Not Have Authority In An Arbitration Conducted**  
22 **Under Section 252 To Impose Section 271 Unbundling Requirements.**

23 The threshold jurisdictional issue that Arbitration Issue No. 2 presents is the scope  
24 of this Commission's authority as an arbitrator under Section 252 and, in particular,  
25 whether the Commission's arbitration authority permits it to render decisions relating to  
26 obligations arising under Section 271. The ROO responds to this jurisdictional question  
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28 ¶ 273 (fiber to the home loops); ¶ 560 (operator service and directory assistance), and  
¶ 451 (unbundled switching at a DS1 capacity).

1 not with an analysis of the arbitration authority Congress granted in Section 252, but  
2 instead with a discussion of the types of agreements that carriers must file with state  
3 commissions for approval. ROO at 17-20. This analysis does not answer the relevant  
4 question.

5 To answer the relevant question, it is necessary to focus on Section 252(b)(4)(C),  
6 the provision that defines a state commission's duties and powers as an arbitrator:

7 The State commission shall resolve each issue set forth in the  
8 petition and the response, if any, by imposing appropriate  
9 conditions as required to implement subsection (c) upon the  
10 parties to the agreement, and shall conclude the resolution of  
any unresolved issues not later than 9 months after the date on  
which the local exchange carrier received the request under  
this section.

11 Importantly, this subsection *mandates* through the term "shall" that state commissions are  
12 to resolve arbitration issues by imposing conditions "*required to implement subsection*  
13 *[252](c).*" In turn, subsection 252(c), which sets forth "standards for arbitration,"  
14 expressly directs state commissions to resolve "open issues" by imposing "conditions  
15 [that] *meet the requirements of section 251.*" This plain linkage between the "open  
16 issues" that state commissions are permitted to arbitrate and the "requirements of section  
17 251" demonstrates that the open issues state commissions are authorized to resolve are  
18 only those relating to the duties imposed by Section 251. Significantly, Congress neither  
19 directed nor authorized state commissions to resolve open issues relating to duties  
20 imposed by Section 271.

21 In its decision rejecting Covad's Section 271 unbundling demands, the South  
22 Dakota Commission provided a succinct statutory analysis of why state commissions do  
23 not have authority to impose Section 271 unbundling obligations in a Section 252  
24 arbitration. The commission explained that Section 252(a), which describes the  
25 negotiations that are a prerequisite to a Section 252 arbitration, establishes that  
26 negotiations "are limited to requests 'for interconnection, services, or network elements  
27 *pursuant to section 251 . . .*'"<sup>17</sup> Relatedly, the South Dakota Commission explained,

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<sup>17</sup> South Dakota Arbitration Order at 6 (emphasis added).

1 "section 252(c)(1) requires the Commission to ensure that the Commission's resolution of  
2 open issues 'meet the requirements of section 251 of this title, including the regulations  
3 prescribed by the [FCC] pursuant to section 251 of this title . . . .'"<sup>18</sup> The commission  
4 concluded that the language in these provisions "clearly anticipates that section 252  
5 arbitrations will concern section 251 requirements, not section 271 requirements."<sup>19</sup>

6 The ROO fails to analyze or recognize these clear limitations on the arbitration  
7 authority of state commissions.

8 **D. Section 271 Does Not Grant States Any Arbitration Authority Or Any**  
9 **Authority To Require Unbundling Of Section 271 Elements.**

10 The ROO concludes incorrectly that the Commission has an ongoing role in  
11 ensuring Qwest's compliance with Section 271, and that this enforcement authority  
12 permits the Commission to impose Section 271 unbundling requirements in an arbitration.  
13 ROO at 20-21. This reasoning is flawed.

14 First, nothing in Section 271 grants arbitration authority to state commissions.  
15 Only Section 252 gives states the authority to conduct arbitrations and, as discussed  
16 above, that authority is limited to imposing obligations that implement the duties in  
17 Section 251, not Section 271.

18 Equally significant, there is no statutory support for the ROO's conclusion that state  
19 commissions have Section 271 enforcement authority that permits imposing unbundling  
20 obligations under that section. The ROO does not cite any statutory language to support  
21 this proposition and, indeed, there is none. The only authority that Section 271 gives to  
22 state commissions relates to the requirement in Section 271(d)(2)(B) that the FCC consult  
23 with state commissions *before* making a determination relating to a BOC's application to  
24 provide in-region interLATA services. Section 271 does not grant state commissions any  
25 authority to enforce requirements *after* a BOC has received approval to provide  
26 interLATA services and does not even provide state commissions with a consulting role

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27 <sup>18</sup> *Id.* (emphasis added).

28 <sup>19</sup> *Id.*

1 relating to post-approval enforcement.

2 State commissions that have considered this issue in Qwest-Covad arbitrations  
3 have determined that Section 271 does not give states enforcement authority under which  
4 unbundling obligations can be imposed. Quoting Section 271(d)(6), which speaks only of  
5 the FCC having enforcement authority, the South Dakota Commission concluded that "the  
6 language of section 271 places enforcement authority of that section with the FCC."<sup>20</sup> The  
7 commission stated further that even if it "were to find that it had some sort of enforcement  
8 authority under section 271, it does not follow that the Commission could use that  
9 authority to impose section 271 requirements in a section 252 arbitration."<sup>21</sup> The Idaho  
10 Commission reached the same conclusion based on a plain reading of Section 271(d)(6),  
11 stating that "enforcement authority for Section 271 obligations is granted exclusively to  
12 the FCC."<sup>22</sup>

13 These rulings are consistent with the fact that Section 271 does not grant state  
14 commissions any decision-making authority and, hence, does not authorize state  
15 commissions to impose unbundling requirements. As explained by one federal court, a  
16 state commission has a fundamentally different role in implementing Section 271 than it  
17 does in implementing Sections 251 and 252:

18 Sections 251 and 252 contemplate state commissions may  
19 take affirmative action towards the goals of those Sections,  
20 while Section 271 does not contemplate substantive conduct  
21 on the part of state commissions. Thus, a "savings clause" is  
not necessary for Section 271 because the state commissions'  
role is investigatory and consulting, not substantive, in  
nature.<sup>23</sup>

22 The absence of any state commission decision-making authority under Section 271  
23 also is confirmed by the fundamental principle that a state administrative agency has no

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24 <sup>20</sup> *Id.*

25 <sup>21</sup> *Id.*

26 <sup>22</sup> Idaho Arbitration Order at 4.

27 <sup>23</sup> *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL  
28 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by section 271 to impose  
binding obligations), *aff'd*, 359 F.3d 493 (7<sup>th</sup> Cir. 2004) (emphasis added).

1 role in the administration of federal law, absent express authorization by Congress. That  
2 is so even if the federal agency charged by Congress with the law's administration  
3 attempts to delegate its responsibility to the state agency.<sup>24</sup> *A fortiori*, where (as here)  
4 there has been no delegation by the federal agency, a state agency has no authority to  
5 issue binding orders pursuant to federal law.<sup>25</sup>

6 Accordingly, the ROO's conclusion that Section 271 authorizes this Commission to  
7 impose Covad's proposed Section 271 unbundling requirements is legal error.

8 **E. The ROO Improperly Applies TELRIC Prices To Section 271 Elements.**

9 The absence of any authority of state commissions over Section 271 elements, as  
10 established above, renders unlawful the ROO's recommendation that TELRIC prices this  
11 Commission has established for Section 251 UNEs should apply to Section 271 elements.  
12 ROO at 23. In addition, as discussed below, this recommendation directly violates the  
13 FCC's and the D.C. Circuit's rulings that these elements are not governed by TELRIC.

14 The ROO attempts to support the application of TELRIC to Section 271 elements  
15 by asserting that the *TRO* requires Qwest to continue using the TELRIC prices for UNEs  
16 that were in effect when the FCC approved Qwest's application to provide interLATA  
17 services in Arizona. ROO at 23. The ROO cites paragraph 665 of the *TRO* for this  
18 proposition, asserting implicitly that the FCC intended that prices for network elements  
19 would not change after the FCC's approval of a Section 271 application even if a network  
20 element has been de-listed as a Section 251 UNE. However, that is not what paragraph  
21 665 says; indeed, the paragraph makes clear that a BOC's post-approval obligations under  
22 Section 271 will change as the law changes:

23 665. *Post Entry Requirements.* In the event a BOC has  
24 already received section 271 authorization, section 271(d)(6)  
25 grants the Commission enforcement authority to ensure that

26 <sup>24</sup> *USTA II*, 359 F.3d at 565-68.

27 <sup>25</sup> See *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL  
28 1903363 at 13 (state commission not authorized by section 271 to impose binding  
obligations). See also *TRO* at ¶¶ 186-87 ("states do not have plenary authority under  
federal law to create, modify or eliminate unbundling obligations").

1 the BOC continues to comply with market opening  
2 requirements of section 271. In particular, this section  
3 provides the Commission with enforcement authority where a  
4 BOC 'has ceased to meet any of the conditions required for  
5 such approval.' We conclude that for purposes of section  
6 271(d)(6), BOCs must continue to comply with any  
7 conditions required for approval, *consistent with changes in*  
8 *the law*. While we believe that section 271(d)(6) established  
9 an ongoing duty for BOCs to remain in compliance, *we do*  
10 *not believe that Congress intended that the 'conditions*  
11 *required for such approval' would not change with time.*  
12 Absent such a reading, the Commission would be in a  
13 position where it was imposing different backsliding  
14 requirements on BOCs solely based on date of section 271  
15 entry, rather than based on the law as it currently exists. *We*  
16 *reject this approach as antithetical to public policy because it*  
17 *would require the enforcement of out-of-date or even vacated*  
18 *rules.*<sup>26</sup>

11 As shown by the full text of paragraph 665, while stating that "BOCs must  
12 continue to comply with any conditions required for approval," the FCC qualified the  
13 statement with the important condition that such continued compliance should be  
14 "*consistent with changes in the law.*"<sup>27</sup> This condition, as the FCC emphasized, is  
15 consistent with the fact that Congress could not have intended that a BOC's compliance  
16 obligations would remain unchanged despite changes in the law. If the law were  
17 otherwise, as the FCC aptly described it, that would be "antithetical to public policy  
18 because it would require the enforcement of out-of-date or even vacated rules."<sup>28</sup>

19 The ROO's recommended application of TELRIC to Section 271 elements that  
20 were de-listed as Section 251 elements in either the *TRO* or the *TRRO* would lead to  
21 precisely the type of result that paragraph 665 of the *TRO* is intended to avoid.  
22 Specifically, under the ruling, the Commission would apply a pricing structure reserved  
23 exclusively for Section 251 UNEs to network elements that the FCC has determined are  
24 no longer UNEs under that section.

25 Although the ROO is silent on the subject, there can be no dispute that TELRIC

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27 <sup>26</sup> *TRO* at ¶ 665 (emphasis added, footnotes omitted).

28 <sup>27</sup> *TRO* at ¶ 665 (emphasis added).

<sup>28</sup> *Id.*

1 pricing does not apply to network elements that the FCC has removed from Section 251  
2 and that BOCs are now providing only pursuant to Section 271. In the *TRO*, the FCC  
3 ruled unequivocally that any elements a BOC provides pursuant to Section 271 are to be  
4 priced based on the Section 201-02 standard that rates must not be unjust, unreasonable,  
5 or unreasonably discriminatory.<sup>29</sup> In so ruling, the FCC confirmed, consistent with its  
6 prior rulings in Section 271 orders, that TELRIC pricing does not apply to these network  
7 elements.<sup>30</sup> In *USTA II*, the D.C. Circuit reached the same conclusion, rejecting the  
8 CLECs' claim that it was "unreasonable for the Commission to apply a different pricing  
9 standard under Section 271" and instead stating that "we see nothing unreasonable in the  
10 Commission's decision to confine TELRIC pricing to instances where it has found  
11 impairment."<sup>31</sup> The ROO fails to give effect to these binding rulings.

12 **F. The Commission Does Not Have Authority To Require Unbundling Under**  
13 **Arizona Law That The FCC Has Rejected Under Section 251.**

14 The ROO erroneously concludes that the Commission has authority to require  
15 network unbundling under Arizona law that the FCC has already rejected under Section  
16 251. ROO at 21. This ruling violates the Act and misinterprets the unbundling authority  
17 that the Commission has under Arizona law.

18 **1. The Act Does Not Permit State Commissions To Order Network**  
19 **Unbundling That The FCC Has Rejected.**

20 Congress explicitly assigned the task of applying the Section 251(d)(2) impairment  
21 test and "determining what network elements should be made available for purposes of  
22 subsection [251](c)(3)" to the FCC.<sup>32</sup> The Supreme Court confirmed that as a  
23 precondition to unbundling, Section 251(d)(2) "requires the [Federal Communications]  
24 Commission to determine on a rational basis which network elements must be made

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25  
26 <sup>29</sup> *Id.* at ¶¶ 656-64.

27 <sup>30</sup> *Id.*

28 <sup>31</sup> *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

<sup>32</sup> 47 U.S.C. § 251(d)(2).

1 available, taking into account the objectives of the Act and giving some substance to the  
2 'necessary' and 'impair' requirements."<sup>33</sup> And the D.C. Circuit confirmed in *USTA II* that  
3 Congress did not allow the FCC to have state commissions perform this work on its  
4 behalf.<sup>34</sup> *USTA II*'s clear holding is that the FCC, not state commissions, must make the  
5 impairment determination called for by Section 251(d)(3)(B) of the Act.

6 *Iowa Utilities Board* makes clear that the essential prerequisite for unbundling any  
7 given element under Section 251 is a formal finding by the FCC that the Section 251(d)(2)  
8 "impairment" test is satisfied for that element. Simply put, if there has been no such FCC  
9 finding, the Act does not permit any regulator, federal or state, to require unbundling  
10 under Section 251. In the *TRO*, the FCC reaffirmed this:

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

16 \*\*\*

17 If a decision pursuant to state law were to require unbundling  
18 of a network element for which the Commission has either  
19 found no impairment—and thus has found that unbundling  
20 that element would conflict with the limits of section  
21 251(d)(2)—or otherwise declined to require unbundling on a  
22 national basis, we believe it unlikely that such a decision  
23 would fail to conflict with and "substantially prevent"  
24 implementation of the federal regime, in violation of section  
25 251(d)(3)(c).<sup>35</sup>

26 Federal courts interpreting the Act have reached the same conclusion.<sup>36</sup> For  
27 example, the United States District Court of Michigan observed that in *USTA II*, the D.C.  
28 Circuit "rejected the argument that the 1996 Act does not give the FCC the exclusive

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24 <sup>33</sup> *Iowa Utilities Board*, 525 U.S. at 391-92.

25 <sup>34</sup> See *USTA II*, 359 F.3d at 568.

26 <sup>35</sup> *TRO* at ¶¶ 193, 195.

27 <sup>36</sup> See *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (citing  
28 the above-quoted discussion in the *TRO* and stating that "we cannot now imagine" how a  
state could require unbundling of an element consistently with the Act where the FCC has  
not found the statutory impairment test to be satisfied).

1 authority to make unbundling determinations."<sup>37</sup> The court emphasized that while the Act  
2 permits states to adopt some "procompetition requirements," they cannot adopt any  
3 requirements that are inconsistent with the statute and FCC regulations. Specifically, the  
4 court held, a state commission "cannot act in a manner inconsistent with federal law and  
5 then claim its conduct is authorized under state law."<sup>38</sup>

6 Section 251(d)(3), the provision the ROO relies upon to support the Commission's  
7 alleged unbundling authority, expressly protects only those state enactments that are  
8 "consistent with the requirements of this section" — which a state law unbundling order  
9 ignoring the Act's and the FCC's limits would clearly not be. The savings clause in this  
10 section does not preserve the authority of state commissions to adopt or enforce under  
11 state law unbundling requirements that have been rejected by the FCC or vacated in  
12 *USTA II*.

13 **2. Arizona Law Does Not Authorize The Unbundling Required by The**  
14 **ROO.**

15 The discussion immediately above establishes that any Arizona law purporting to  
16 give the Commission authority to order unbundling inconsistent with the unbundling  
17 required by the FCC would be unenforceable. But, in any case, the ROO does not include  
18 any citation to the Arizona Constitution, an Arizona statute or Arizona case law purports  
19 to give the Commission such authority. Instead, the ROO reasons that "[a]bsent some  
20 evidence that this Commission's Rules related to interconnection and access conflict with  
21 federal law, we do not believe that the Rules are preempted." ROO at 21. The plain error  
22 in this statement is that, as discussed above, the unbundling ICA language Covad is  
23 proposing and the ROO apparently endorses clearly requires unbundling that the FCC has  
24 not required. There is therefore clear evidence that application of the Commission's rules  
25 in the manner recommended in the ROO would conflict with federal law.

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27 <sup>37</sup> *Michigan Bell Tel. Co. v. Lark*, Case no. 04-60128, slip op. at 13 (E.D. Mich.  
28 Jan. 6, 2005).

<sup>38</sup> *Id.*

1 The ROO does reference Articles 13 and 15 of the Arizona Administrative Code  
2 (“A.A.C.”), Title 14, Chapter 2, and specifically A.A.C. R14-2-1302, -1502 and -1506(A).  
3 A close examination of the adoption and content of these rules, however, does not support  
4 the result reached by the ROO.

5 First, Articles 13 and 15 were adopted to comply with certain federal mandates  
6 established in the 1996 Act. Article 15 expressly provides that its rules govern only the  
7 procedural mechanisms for reviewing and approving interconnection agreements and  
8 makes clear that those rules are intended to be consistent with the requirements of the  
9 Act.<sup>39</sup> In fact, Article 15 is replete with direct references to the Act making it clear that  
10 federal, not state law, serves as the legal basis for the imposition of any regulatory  
11 requirements and standards prescribed therein.<sup>40</sup>

12 Second, the ROO ignores the specific rule in Article 13 that expressly enumerates  
13 the essential facilities or services an ILEC must unbundle. A.A.C. R14-2-1307 (C)  
14 expressly provides that “the following local exchange carrier network capabilities are  
15 classified as essential facilities or services” and then lists six such facilities and services.<sup>41</sup>  
16 If a carrier “makes a bona fide request of an incumbent local exchange carrier to unbundle  
17 any network facility or service capability not identified in subsection (C),” A.A.C.  
18 R14-2-1307 establishes an initial timeline and process through which the carriers  
19 exchange explanations concerning whether they consider a particular network facility to  
20 be essential. After these exchanges, however, A.A.C. R14-2-1307(E)(2) permits a carrier  
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22 <sup>39</sup> See, e.g., A.A.C. R-14-2-1501 (“These rules govern *procedures* mandated by the  
23 Telecommunications Act of 1996, 47 U.S.C. 252, regarding the mediation, arbitration,  
24 review, and approval of interconnection agreements.”) (emphasis added).

25 <sup>40</sup> See A.A.C. R14-2-1503, R14-2-1504(A); R14-2-1505(A)(1);  
26 R14-2-1505(B)(2)(a); R14-2-1505(B)(2)(e); R14-2-1505(D); R14-2-1505(E)(3);  
27 R14-2-1505(F)(3); R14-2-1506(A); R14-2-1506(C)(2)(b); R14-2-1506(C)(2)(c);  
28 R14-2-1506(E); R14-2-1508(2).

<sup>41</sup> It is well established that any specific statute or rule controls over general  
provisions on the same subject. See *Ruth Fisher Elementary Sch. Dist. V. Buckeye Union  
High Sch. Dist.*, 202 Ariz. 107, 112, ¶ 12, 41 P.3d 645, 650 (App. 20002).

1 to refuse to provide the requested network facility or service. Under these circumstances,  
2 the rule does not authorize the Commission to add additional services to Subsection (C)  
3 on an *ad hoc* basis. In fact, Article 13 does not provide for Commission resolution of  
4 such disputes.<sup>42</sup>

5 In effect, the ROO permits the Commission to add on an *ad hoc* basis to the list of  
6 essential facilities and services set forth in A.A.C. R14-2-1307 (C). Such *ad hoc*  
7 determinations by a state agency are discouraged under Arizona law as poor public policy.  
8 In *Arizona Corporation Commission v. Palm Springs Utility Co., Inc.*, 24 Ariz. App. 124,  
9 536 P.2d 245 (1975), the Court of Appeals endorsed the general principle that Arizona  
10 public policy should be implemented by promulgating rules and regulations, not through  
11 individual adjudicatory orders issued in a piecemeal fashion. Consistent with this  
12 decision, *ad hoc* determinations are scrutinized to ensure that any such decision-making  
13 applies ascertainable standards of which parties have adequate notice, and that any  
14 departure from established precedent is supported by an explanation for the change of  
15 policy.<sup>43</sup>

16 Although the Commission is addressing a specific interconnection dispute between  
17 Covad and Qwest in an arbitration proceeding, the ROO's resolution of Issue No. 2 is  
18 based on the application of federal law (Section 251(d)(3) of the Act) and state rules  
19 (A.A.C. R14-2-1502, R14-2-1506 and R14-2-1302) on an industry-wide basis. In  
20 *Carondelet Health Services, Inc. v. Arizona Health Care Cost Containment System*  
21 *Administration*, 182 Ariz. 221, 229, 895 P.2d 133, 141 (1995), the Court of Appeals  
22 declined to apply the narrow exception carved out in *Palm Springs* (*i.e.*, *ad hoc*  
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24 <sup>42</sup> To the extent that Articles 13 and 15 are inconsistent with the *TRO*, that Order is  
25 clear that "states must amend their rules and . . . alter their decisions to conform to our  
26 rules." *TRO*, ¶ 195. The FCC further found that "state authority preserved by section  
27 251(d)(3) is limited to state unbundling actions that are consistent with the requirements  
of Section 251 and do not 'substantially prevent' the implementation of the federal  
regulatory regime." *TRO* at ¶ 193. *See also, id.*, ¶¶ 194-96.

28 <sup>43</sup> 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.9 at 386-87 (4<sup>th</sup>ed.  
2002).

1 determinations may be necessary in specific cases concerning complex and specialized  
2 problems). The Court rejected the approach of substituting individual rulings for  
3 standards that apply to all regulated entities.

4 Similarly, the ROO's proposed resolution of Issue No. 2 will affect the entire  
5 telecommunications industry – not just Qwest or Covad. Issue No. 2 is not so specialized  
6 or unique to the interconnection agreement between Qwest and Covad as to overcome the  
7 general principle that the promulgation of rules is favored over the generation of policy in  
8 a piecemeal fashion through individual adjudicatory orders. If the Commission decides to  
9 expand the number of "essential facilities or services" already enumerated in  
10 A.A.C. R14-2-1307(C) in a manner consistent with the FCC's orders, the proper  
11 procedure for doing so is a rulemaking that complies with the Arizona Administrative  
12 Procedure Act. Moreover, as discussed above, the Commission cannot choose to expand  
13 the number of "essential facilities or services" in its rule in a manner that conflicts with  
14 the express mandates of the Act, the FCC, and the courts.

15 **G. Covad Has Not Demonstrated That It Is A Telecommunications Carrier**  
16 **With A Right To Enter Into An Interconnection Agreement.**

17 The FCC's recently issued *Wireline Broadband Order* raises significant questions  
18 concerning whether Covad is still a "telecommunications carrier" with a right to enter into  
19 an interconnection agreement. Without providing any analysis of the FCC's order, the  
20 ROO concludes summarily that the order has no effect on whether the issues raised in this  
21 proceeding are properly before the Commission. ROO at 39. The Commission should  
22 reject this conclusory finding and, before issuing a final order, should require Covad to  
23 provide information demonstrating whether it is a telecommunications carrier.

24 Under the 1996 Act, only "telecommunications carriers" are entitled to enter into  
25 interconnection agreements with ILECs. Section 252(a)(1), which addresses negotiated  
26 interconnection agreements, provides that upon receiving a request pursuant to Section  
27 251, an ILEC "may negotiate and enter into a binding agreement with the requesting  
28 *telecommunications carrier* or carriers . . . ." (emphasis added). Section 252(b)(1), which

1 addresses arbitrated interconnection agreements, provides similarly that a "carrier" --  
2 which is the same "telecommunications carrier" referred to in Section 252(a)(1) -- may  
3 petition a state commission for arbitration of an interconnection agreement.

4 The Act defines a "telecommunications carrier" as "any provider of  
5 telecommunications services."<sup>44</sup> Under this definition, a carrier that provides only  
6 information services and no telecommunications services is not a telecommunications  
7 carrier. Such a carrier is not permitted to avail itself of the negotiation and arbitration  
8 provisions in Sections 252(a) and (b), since the rights those provisions confer are limited  
9 to telecommunications carriers.

10 In the *Wireline Broadband Order*, the FCC ruled in clear terms that wireline  
11 broadband Internet access service is an information service: "[W]e conclude that wireline  
12 broadband Internet access service provided over a provider's own facilities is  
13 appropriately classified as an information service because its providers offer a single,  
14 integrated service (*i.e.*, Internet access) to end users."<sup>45</sup> The FCC explained further that  
15 the classification of wireline broadband Internet access as an information service applies  
16 regardless whether the provider of the service uses its own transmission or those of  
17 another carrier.<sup>46</sup>

18 While classifying wireline broadband Internet access service as an information  
19 service, the FCC also stated that "nothing in this Order changes a requesting  
20 telecommunications carriers' UNE rights under Section 251 and our implementing  
21 rules."<sup>47</sup> This statement clarifies that carriers are permitted to purchase UNEs to provide  
22 *as a telecommunications service* only the transmission service that underlies Internet  
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26 <sup>44</sup> 47 U.S.C. § 153(44).

27 <sup>45</sup> *Wireline Broadband Order* at ¶ 14.

28 <sup>46</sup> *Id.* at ¶ 16.

<sup>47</sup> *Id.* at ¶ 127.

1 access -- not the transmission service bundled with Internet access.<sup>48</sup> Carriers also can  
2 choose to provide this unbundled transmission service *as an information service*. Covad  
3 is not a telecommunications carrier entitled to an interconnection agreement if its Arizona  
4 service offerings only include Internet transmission service provided as an information  
5 service or the transmission service bundled with Internet access.

6 In its briefs addressing the FCC's order, Covad is conspicuously silent about  
7 whether it is offering a telecommunications service in Arizona. Covad emphasizes that it  
8 purchases UNEs and interconnection services from Qwest, but that does not answer  
9 whether Covad is a telecommunications carrier.<sup>49</sup> The relevant question is whether Covad  
10 is using the elements and services it obtains from Qwest to provide a telecommunications  
11 service. Covad's failure to answer this question casts doubt on whether it still qualifies as  
12 a telecommunications carrier.

13 To eliminate the doubt surrounding this issue, Covad should be required to state  
14 affirmatively whether it is offering telecommunications services in Arizona. To that end,  
15 Qwest has prepared the data requests attached to this brief (Exhibit B) that seek to obtain  
16 this information, and it respectfully requests that the Commission order Covad to respond  
17 to these requests. The Commission should defer a final ruling in this matter until Covad  
18 has responded to the data requests with information demonstrating whether it is providing  
19 telecommunications services in Arizona.

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20  
21 <sup>48</sup> In this regard, the FCC stated at paragraph 127 of the *Wireline Broadband Order*  
22 that "[s]o long as a competitive LEC is offering an "eligible" telecommunications service -  
23 *i.e.*, not exclusively long distance or mobile wireless services - - it may obtain that  
24 element as a UNE."

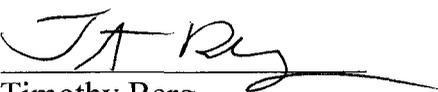
25 <sup>49</sup> Covad also argues incorrectly that if a CLEC seeks to obtain UNEs, it is  
26 necessarily entitled to an interconnection agreement because those agreements are the  
27 means by which a CLEC obtains UNEs. This argument ignores that under the Act, a  
28 CLEC is permitted to obtain a UNE from an ILEC only if the CLEC will use the UNE to  
provide a telecommunications service. Thus, Section 153(29) defines "network element"  
as "a facility or equipment used in the provision of a telecommunications service." If a  
CLEC does not intend to use a network element to provide a telecommunications service,  
it has no right to obtain the element as a UNE under an interconnection agreement.

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### III. CONCLUSION

For the reasons stated, the Commission should: (1) reject the ROO's recommendation relating to Arbitration Issue No. 2 and adopt Qwest's proposed ICA language for this issue; and (2) require Covad to demonstrate whether it is a telecommunications carrier or an information service provider in Arizona by directing it to respond to the data requests set forth in Exhibit B.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of December, 2005.

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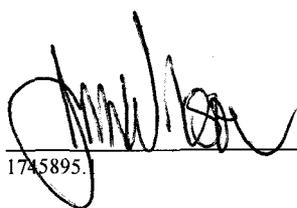
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## EXHIBIT A

### EXCERPTS FROM COVAD-QWEST ARBITRATION RULINGS RELATING TO NETWORK UNBUNDLING

#### Idaho Commission Arbitration Decision

"The Act is clear that a state commission arbitrating an interconnection agreement is required to ensure the ILEC is providing the network elements identified by the FCC under Section 251, not the elements identified in Section 271. When a state commission arbitrates an interconnection agreement between an ILEC and a competitor, the state commission must "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). At the same time, enforcement authority for Section 271 obligations is granted exclusively to the FCC." at page 4.

"Covad quotes from the *TRO* where the FCC made clear 'that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under Section 251.' Covad Petition, p. 6, quoting paragraph 653 of the *TRO*. The FCC did not say, however, that the independent unbundling requirements of Section 271 must be made part of an interconnection agreement. Qwest asserted in this case, and Covad did not contest, that Qwest continues to make the Section 271 network elements available to Covad apart from any interconnection agreement.

We conclude that the Commission does not have authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement. Covad also argues the Commission has authority under state law to expand the FCC's Section 251 unbundling requirements, but the statutes identified by Covad do not authorize what it requests." at page 4.

"Having concluded the Commission has no legal authority to require Qwest to include its Section 271 unbundling obligations in an interconnection agreement, we approve the relevant language proposed by Qwest, or similar language, for the parties' interconnection agreement. The parties should complete their negotiations and submit their interconnection agreement for approval as soon as practicable." at page 5.

#### Iowa Utilities Board Arbitration Decision

"The first question is whether the Board has the authority, when arbitrating an interconnection agreement pursuant to § 252, to impose unbundling obligations pursuant to § 271. Section 271(d)(3) of the Act gives the FCC the authority to determine whether an RBOC has complied with the substantive provisions of § 271, including the 'checklist' provisions that are cited by Covad. The 1996 Act gave state commissions only a consulting role in that determination.

The arbitration process that is mandated by § 252 is concerned only with the implementation of an ILEC's obligations under § 252. In arbitrations, then, a state commission only has the authority to impose terms and conditions related to those § 252 obligations. Section 252(a) specifically states that the negotiations it requires are limited to 'request[s] for interconnection, service or network elements pursuant to section 251.' (Emphasis in original.)

Clearly, the provisions that are at issue in this arbitration are unbundling obligations pursuant to § 271, rather than § 251 obligations. Therefore, the Board lacks jurisdiction or authority to require that Qwest include these elements in an interconnection agreement arbitration brought pursuant to § 252." at page 7.

"The U.S. Supreme Court has stated that the 1996 Act does not authorize 'blanket access to incumbents' networks.' Rather, that § 251(c)(3) authorizes unbundling only as required by § 251. Following that, § 251(d)(2) provides that unbundling may be required only if the FCC determines that access to such network elements is necessary and that the failure to provide access to network elements would impair the ability of a telecommunications carrier seeking access to provide the services that it seeks to offer." At page 8 (footnotes omitted).

"A finding that the facility is not capable of being duplicated or obtained elsewhere is required by § 476.100(2) for the Board to find that an element is an 'essential service' and require Qwest to provide the element. Such a finding may not be appropriate where the FCC has found that access to the element is not impaired; at least, there is no evidence here that would support such a finding. Thus, in this case, state law does not provide a separate basis for requiring that Qwest provide access to unbundled network elements." at page 9.

### **Minnesota ALJ Arbitration Decision**

"The Administrative Law Judge agrees with the Department that there is no legal authority in the Act, the *TRO*, or in state law that would require the inclusion of section 271 terms in the interconnection agreement, over Qwest's objection. The authority of a state commission must be exercised consistently with the Act; both the

Act and the *TRO* make it clear that state commissions are charged with the arbitration of section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to section 271." at page 15.

"The Administrative Law Judge also agrees with the Department that there should be no language in the agreement concerning the availability or pricing of elements no longer required under section 251. The *TRO* contemplates that the parties would negotiate alternative long-term arrangements, other than interconnection agreements, to address provision of these elements." at page 15.

### **New Mexico Hearing Examiner Arbitration Decision**

"State unbundling is permitted so long as it is consistent with the goals of the Act. Consistent with Qwest's argument however, the Act places limits on state law authority – namely, that such authority must be exercised consistently with Section 251 and the federal unbundling regime established by the FCC. Thus, in order to justify state commission unbundling of network elements there must be evidence that Covad will be impaired in the absence of access to those elements. Since the parties agreed that this issue was a matter of law and no impairment related arguments were made or evidence proffered, this Commission cannot find that Covad is impaired.

Furthermore, consistent with Qwest's arguments, the FCC and courts have made it clear that a state commission's jurisdiction is limited to the network elements required through Section 251 of the Act because 'that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1).'" at page 37. (footnote omitted).

"Similarly, at ¶ 659 of the *TRO* the FCC was explicit about TELRIC pricing not being applicable to Section 271 elements:

659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271(c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but

does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

Thus, while Qwest must provide access to 271 elements it is not required to do so as part of a Section 251 ICA or at TELRIC rates. This issue is resolved in favor of Qwest's proposed language." at page 38.

### **Oregon Commission Arbitration Decision**

"Every state within the Qwest operating region that has examined this issue has done so in a thoughtful, thorough and well-reasoned manner. In each case, the agency with the authority to review the Covad/Qwest ICA dispute has found that there is no legal authority requiring the inclusion of Section 271 UNEs in an interconnection agreement subject to arbitration under Section 251 of the Act, and I adopt the legal conclusions that they all hold in common and, specifically, the findings and conclusions of the Minnesota Arbitrator recited above." at page 12.

"I also note that in the vast majority of decisions by other state commissions, Qwest's proffered language has been adopted without modification. I find the language proposed by Qwest to be that which is most reasonably reflective of the intent of the Act and of the *TRO*, and direct that it be included in the ICA." at page 12.

### **South Dakota Commission Arbitration Decision**

"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 requests 'for interconnection, services, or network elements pursuant to section 251 . . . .' In addition, 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 27 requirements.

In addition, the language of section 271 places enforcement authority of that section with the FCC." at page 6 (footnote omitted).

"Even if the Commission were to find that it had some sort of enforcement authority under section 271, it does not follow that the Commission could use that

authority to impose section 271 requirements in section 252 arbitration. The Commission finds Covad's argument regarding this issue to be less than persuasive.... The Commission does not believe that interpreting section 271 requirements within a section 252 arbitration would result in some sort of separate authority, apart from section 271, to enforce section 271 requirements. In fact, Covad agrees that only the FCC can enforce noncompliance with section 271." at page 6 (footnote omitted).

"With respect to the state law issue, the Commission declines to use state law to impose unbundling obligations within this section 252 arbitration. If a party requests arbitration under section 252, it is doing so with respect to section 251 requirements. See 47 U.S.C. § 252(a) and (c). In order for this Commission to impose any state unbundling requirements, it would need to do so based on an evidentiary record, not in a docket in which both parties requested that no hearing be held. Pursuant to SDCL 49-31-15, if a party requests access to facilities, the party must make an application and the Commission is required to 'ascertain the facts in the case.' A party cannot request that the Commission approve access to unbundled network elements under state law without making a factual showing as to the need for such access.

The Commission further notes that under the savings clause of section 251(d)(3)(B), a state commission's order regarding access must be consistent with the requirements of section 251. Thus, even if Covad were to request access to unbundled elements pursuant to state law, the Commission's decision would need to be consistent with section 251.

Therefore, the Commission finds that it will approve Qwest's proposed language in the disputed sections of the proposed interconnection Agreement. Pursuant to ARSD 20:10:32:33, the parties shall file their final Interconnection Agreement with the Commission for approval within 60 days after the issuance of this order." at page 7.

### **Utah ALJ Arbitration Decision**

"While we see a continuing role for Commission regulation of access to UNEs under state law, we 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." at page 19.

"Nor has Covad offered any legal authority that would require this Commission to consider Section 271 or state law obligations in a Section 252 arbitration proceeding. Indeed, Section 271 on its face makes quite clear that the FCC retains authority over the access obligations contained therein. Furthermore, Section 251 elements are distinguishable from Section 271 elements precisely because the access obligations regarding these elements arise from separate statutory bases. The fact that under a careful reading of the law the Commission may under certain circumstances impose Section 271 or state law obligations in a Section 252 arbitration does not lead us to conclude that it would be reasonable in this case for us to do so.

We therefore decline in this proceeding to require the inclusion in the proposed ICA of language referencing Qwest's Section 271 and state law unbundling obligations. Qwest's Section 271 and state law unbundling obligations remain in effect and we expect Qwest to continue to abide by them. However, given the current uncertainty of the federal regulatory regime and the fact that this docket is the product of a Section 252 action intended to arbitrate Section 251 obligations, we conclude it is reasonable to limit the parties' obligations under the resultant ICA to those mandated by Section 251 and the FCC's implementing regulations. We therefore adopt Qwest's proposed language for ICA Section 4.0." at page 20 (footnote omitted).

"Because we determine not to require provision of Section 271 or state law network elements in this interconnection agreement, we reject all Covad language referencing Section 271 and state law requirements and specifically adopt Qwest's proposed language for ICA Sections 9.1.1, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, and 9.21.2.

We agree with the Division that the best way to avoid conflicts with the FCC's rules and any future FCC or judicial pronouncements is to stick to the plain language of the ICA which limits access to only Section 251 elements. We therefore conclude that the list of 'former Network Elements' included in Qwest's proposed ICA Section 9.1.1.6 may ultimately prove confusing and is in any event redundant since only those elements required under Section 251 will be available under the ICA. We therefore adopt Qwest's proposed language for this section, but order the deletion of subsections (a) through (r)." at page 21.

### **Washington ALJ Arbitration Decision**

"As Qwest asserts above, and Covad appears to agree, network elements unbundled pursuant to Section 251 should be distinguished from those network elements that are available on an unbundled basis pursuant to Section 271 of the Act, other provisions of the Act, or state law. The network elements may be the same, i.e., certain types of loops or transport, but the foundation for their availability on an unbundled basis is different. For purposes of defining terms in the proposed agreement, unbundled network element should refer to those elements unbundled pursuant to Section 251. Other types of unbundled network elements, such as Section 271 unbundled elements, should be individually labeled or defined in the agreement. The dispute over the definition of Unbundled Network Element is resolved in Qwest's favor, in part, but also in Covad's favor, in part, in that the parties should include definitions of Section 271 and other types of unbundled network elements in the agreement.

The FCC has determined that there is an independent unbundling obligation under Section 271, aside from its determinations of impairment under Section 251(c)(3). Triennial Review Order, ¶¶ 653-655. It appears reasonable for states to rely on the current law, i.e., the FCC's determination concerning access to unbundled network elements under Section 271. By doing so, states are not making an independent determination on impairment or seeking to enforce Section 271 of the Act. As Qwest argues, however, state commission arbitration of interconnection agreements under Section 252 is limited to those matters identified in Section 252(c), specifically 'ensuring that such resolution and condition meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251.' See 47 U.S.C. § 252(c)(1). Unless the parties have mutually agreed to discuss matters other than requirements under Section 251, the state cannot impose conditions other than those required by Section 252(c). The issue of whether network elements are available under the independent unbundling obligations of Section 271 can be imposed in this arbitration is resolved in Qwest's favor." at page 19.

"As Covad asserts, the Commission has independent statutory authority. The Commission was justified in relying on that authority in its Interconnection Order prior to 1996 Act. Since the Act, however, states must also take into consideration the FCC's findings and rules, and may only act in a way that is not inconsistent with federal law. In addition, this Commission cannot find independent unbundling obligations pursuant to state law without engaging in the necessary impairment analysis, and determining whether any findings are inconsistent with FCC's findings.

Covad has not filed a petition requesting that the Commission conduct such a specific independent unbundling analysis, nor submitted the kind of evidence necessary for the Commission to make such determinations for the state of

Washington. The dispute over language in the proposed agreement requiring unbundling pursuant to state law is resolved in favor of Qwest on the basis that the Commission has not engaged in the necessary impairment analysis, not on the basis that the Commission lacks authority to require that certain network elements be made available on an unbundled basis. The Commission's statutes certainly allow the Commission to make those determinations." at page 21.

### **Washington Decision**

"Having determined that Issue No. Two is an open issue for arbitration, we must answer the remaining question concerning whether state commissions have authority under Section 271 or Section 252 to require an ILEC to include independent Section 271 network elements in an interconnection agreement in the context of Section 252 arbitration. We conclude that state commissions do not have authority under either Section 271 or Section 252 to enforce the requirements of Section 271." at page 16 (footnote omitted).

"The first issue we must address concerning state commission authority is whether state commissions have authority under Section 271 to enforce the independent unbundling requirements of Section 271. The statutory scheme in Section 271 provides that the FCC is solely responsible for determining whether a BOC should be allowed to provide in-region interLATA, or long-distance, service in a particular state. The Act requires the FCC to consult with state commissions as to whether the BOC has met the statutory requirements for providing long distance service, but provides no decision-making authority to state commissions." at page 17 (footnote omitted)..

"Similarly, the FCC has the sole authority under Section 271 to enforce BOC compliance with Section 271, without any shared decision-making role for state commissions. Covad asserts that the FCC has recognized a role for state enforcement of Section 271 compliance in its Section 271 orders. In the FCC's Section 271 Order governing Washington State, the FCC stated '[w]e are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into these nine states.' The FCC's statement in its Section 271 orders does not mean that states may enforce the provisions of Section 271. To the extent a BOC has included its plan to prevent against backsliding—in Washington, the Qwest Performance Assurance Plan—as a part of its Statement of Generally Available Terms and Conditions, and the state has approved such a statement under Section 252(f), the state will have authority to enforce the BOC's performance obligations. As Covad concedes, the FCC retains sole authority under

Section 271 to determine compliance with Section 271." at page 18 (footnotes omitted).

"Based on our analysis above, we find that we have no authority under Section 271 to require Qwest to include Section 271 elements, or pricing for such elements, in its interconnection agreement. Section 271 elements, are, however, appropriately included in commercial agreements entered into between an ILEC and CLEC." at page 19.

"The *Maine Order*, however, ignores the fact that states have no authority under Section 271 to enforce Section 271 unbundling obligations, as well as the FCC's apparent intent that Section 271 elements be made available through tariff or commercial agreements. While the parties may have agreed to negotiate the issue of including Section 271 elements in this Section 252 arbitration, the parties cannot require the Commission arbitrate an issue over which it has no authority. In addition, we find that requiring Qwest to include Section 271 elements in the context of arbitration under Section 252 would conflict with the federal regulatory scheme in the Act, as Section 271 of the Act provides authority only to the FCC and not to state commissions." at page 21 (footnote omitted).

"We find Covad's request—that we require in the agreement inclusion of elements that have been 'delisted' as Section 251(c)(3) network elements—to be in direct conflict with federal law. The FCC has stated as much:

If a decision pursuant to state law were to require the unbundling of a network element for which the [FCC] has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision would fail to conflict with and “substantially prevent” implementation of the federal regime, in violation of section 251(d)(3)(C).

This position is supported by a recent decision concerning Michigan's authority to implement a batch hot-cut process pursuant to vacated portions of the Triennial Review Order, as well as a recent decision by the Seventh Circuit Court of Appeals. The Lark decision finds that a state order is contrary to federal law where the order requires what a federal court has deemed to be contrary to federal law. The McCarty court addressed a decision of the Indiana Utility Regulatory Commission to include unbundled packet switching in an interconnection agreement during Section 252 arbitration. After noting that the FCC found in the Triennial Review Order that

ILECs are not required to unbundle packet switching, the court observed that 'only in very limited circumstances, which we cannot now imagine, will a state be able to craft a packet switching unbundling requirement that will comply with the Act.'" at page 22 (footnotes omitted).

"In this proceeding, Covad clearly requests access to elements under state law that the FCC and the D.C. Circuit Court have determined are no longer unbundled network elements under Section 251(c)(3). We uphold the Arbitrator's decision to include Qwest's language on this issue in the agreement, on the basis of conflict with federal law. Further, whether or not state commissions must conduct an impairment analysis before ordering unbundled access to network elements, a decision would conflict with federal law if the ordered elements were the same as those 'delisted' as Section 251(c)(3) UNEs." at page 23.

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**EXHIBIT B**

**BEFORE THE ARIZONA CORPORATION COMMISSION**

JEFF HATCH-MILLER

Chairman

MARC SPITZER

Commissioner

WILLIAM A. MUNDELL

Commissioner

MIKE GLEASON

Commissioner

KRISTIN K. MAYES

Commissioner

**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**

**DATA REQUESTS TO COVAD COMMUNICATIONS COMPANY**

DIECA Communications, Inc., dba Covad Communications Company ("Covad"), is directed to provide responses to the following data requests in the above-captioned proceeding.

**DATA REQUESTS**

1. Please list and describe all of the products and services that Covad is currently offering or providing in Arizona.
2. Does Covad claim that any product or service listed in response to request no. 1 is a "telecommunications service," as that term is defined in 47 U.S.C. §§ 153(43) and (46)? If so, please identify all such products and services and explain the basis for Covad's belief that they are "telecommunications services."

3. At page 4 of "Covad's Reply to Qwest's Comments Regarding the FCC's Broadband Order" ("Covad's Reply"), Covad states that it is a "telecommunications carrier." Please describe all facts upon which Covad relies for its claim that it is a "telecommunications carrier" in Arizona.

4. At page 4 of Covad's Reply, Covad states in support of the assertion that it is a telecommunications carrier that it "purchases UNEs and interconnection services from Qwest for a variety of products completely unaffected by the *Broadband Order*, including, for example, TI services." (footnote omitted). Please explain the basis for the conclusion that the purchase of UNEs and interconnection services from Qwest, including TI services, establishes that Covad is a telecommunications carrier.

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