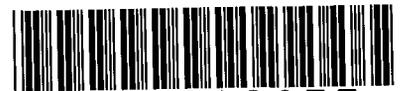


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**IN THE MATTER OF THE PETITION OF
DIECA COMMUNICATIONS, INC. dba
COVAD COMMUNICATIONS COMPANY
FOR ARBITRATION OF AN
INTERCONNECTION AGREEMENT WITH
QWEST CORPORATION**

DOCKET NO. T-03632A-04-0425
T-01051B-04-0425
**QWEST CORPORATION'S
APPLICATION FOR REHEARING**

Qwest Corporation ("Qwest") submits this application for rehearing relating to the Commission's Order of February 2, 2006 ("Commission Order" or "Order") that adopted the Administrative Law Judge's Recommended Opinion and Order, as amended, issued December 9, 2005. This application is limited to the Commission's ruling relating to Arbitration Issue No. 2 that directs the parties to include in their interconnection agreement ("ICA") requirements that Qwest: (1) provide network elements under Section 271 of the Telecommunications Act of 1996 ("the Act") pursuant to the ICA and, for at least an interim period, 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. For the reasons set forth below, the Commission should reconsider its ruling and, like the 12 other state commissions that have considered this issue, reject Covad's network unbundling requests and adopt Qwest's proposed ICA language.

1 I. INTRODUCTION AND SUMMARY

2
3 This interconnection arbitration conducted under Section 252 of the Act is the thirteenth
4 arbitration between Qwest and Covad in which state commissions have addressed Covad's
5 request that the ICA impose on Qwest network unbundling obligations under Section 271 and
6 state law. The 12 other arbitrations have resulted in 15 separate decisions addressing these
7 issues, 11 from other state commissions and four from administrative law judges ("ALJs") or
8 arbitrators. In each of these 15 decisions, the state commissions, ALJs, and arbitrators have
9 ruled that Covad's unbundling demands are unlawful and must be rejected. This Commission's
10 ruling that the ICA should include these unbundling obligations is thus contradicted by the legal
11 conclusions reached by 15 other independent decision-makers applying the same provisions of
12 the Act.

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

23 Second, the Act does not empower state commissions to impose any terms and conditions

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25 ¹ *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications*
26 *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 under Section 271. There is no language in that section that gives states decision-making
2 authority and, indeed, the Order cites none. For this reason, courts applying the Act have
3 determined that while state commissions have authority to take affirmative action under Sections
4 251 and 252, "Section 271 does not contemplate substantive conduct on the part of state
5 commissions."² Accordingly, there is no authority for the Commission's ruling in the Order that
6 it will conduct a pricing proceeding for Section 271 elements as part of a continuation of this
7 arbitration.

8 Third, the ruling that TELRIC prices set by this Commission for Section 251 UNEs
9 should also apply to Section 271 network elements until permanent rates are established conflicts
10 directly with the FCC's ruling in the *Triennial Review Order* ("TRO")³ and the D.C. Circuit's
11 ruling in *United States Telecom Association v. FCC*.⁴ Both rulings establish that TELRIC does
12 not apply to these elements. TELRIC applies only to UNEs for which the FCC has made a
13 finding of "impairment" under Section 251. By applying TELRIC to Section 271 elements, even
14 on an interim basis, the Order improperly eliminates the Act's important regulatory distinctions
15 between network elements for which there is competitive impairment and those for which there
16 is not. In addition, the Commission's ruling that the parties should revert back to TELRIC rates
17 for Section 271 elements until permanent rates are set improperly changes the status quo prior to
18 a final Commission order in this proceeding.

19 Fourth, the Order erroneously concludes that state commissions can require ILECs to
20 unbundle network elements under state law that the FCC has expressly refused to require ILECs

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

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

26 ⁴ 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

1 to unbundle under Section 251. State commissions are only authorized under the Act to regulate
2 under state law in a manner consistent with federal policy and FCC rules and orders. A state
3 commission cannot, therefore, "act in a manner inconsistent with federal law and then claim its
4 conduct is authorized under state law."⁵ That is precisely what the Order does. Moreover, even
5 if a state could order unbundling under state law that the FCC has rejected, as discussed below,
6 Arizona law does not permit the unbundling that the Order imposes. Arizona's "essential
7 facilities" unbundling standard does not permit the broad unbundling required under the Order,
8 and any attempt to apply this standard to require unbundling that the FCC has declined to require
9 under Section 251 would conflict impermissibly with federal law. Further, the Commission has
10 not conducted any proceeding, and hence has not developed any record, upon which to base a
11 conclusion that elements Covad is seeking are "essential" under the Arizona statute.

12 Finally, the Order does not properly address the effects of the FCC's recent ruling in the
13 *Wireline Broadband Order* establishing that DSL transmission service bundled with Internet
14 access is no longer a telecommunications service.⁶ Covad has failed to demonstrate it provides
15 any services in Arizona other than this combined transmission and access service, and, therefore,
16 it has not established that it still qualifies as a "telecommunications carrier" entitled to enter into
17 an interconnection agreement.

18 19 II. ARGUMENT

20 21 A. *Summary Of The Issue And Rulings By Other State Commissions*

22 The Act requires ILECs to provide UNEs to other telecommunications carriers and gives
23 the FCC the authority to determine which elements the ILECs must provide. In making these

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25 ⁵ *Michigan Bell Tel. Co. v. Lark*, Case no. 04-60128, slip op. at 13 (E.D. Mich. Jan. 6, 2005).
26 ⁶ *In the Matter of Appropriate Framework for Broadband Access to Internet Order 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").

1 network unbundling determinations, the FCC must consider whether the failure to provide access
2 to an element "would impair the ability of the telecommunications carrier seeking access to
3 provide the services that it seeks to offer."⁷ This "impairment" standard imposes important
4 limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by the
5 Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*⁸ and the D.C. Circuit's
6 decisions in *USTA I* and *USTA II* invalidating each of the FCC's three attempts to establish
7 lawful unbundling rules.⁹

8 Arbitration Issue No. 2 arises because of Covad's demand for ICA language that would
9 require Qwest to provide almost unlimited access to network elements in violation of the
10 unbundling limitations established by these decisions, the Act, the *TRO*, and the *Triennial*
11 *Review Remand Order* ("*TRRO*"). The state commissions and ALJs that have previously
12 considered this issue -- the state commissions and ALJs in Idaho, Iowa, Minnesota, Montana,
13 Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming
14 -- have rejected Covad's unbundling language, finding that it is plainly unlawful.¹⁰

15 The rulings of these other state commissions, which are virtually uniform in their
16 conclusions, demonstrate the legal errors in the Order. For example, the Minnesota ALJ, in a
17 ruling adopted by the Minnesota Commission, concluded that "both the Act and the *TRO* make it
18 clear that state commissions are charged with the arbitration of section 251 obligations, whereas
19 the FCC has retained authority to determine the scope of access obligations pursuant to section
20

21 _____
22 ⁷ 47 U.S.C. § 251(d)(2).

23 ⁸ 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

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

26 ¹⁰ The Wyoming Commission has issued an oral ruling rejecting Covad's proposals, with a
written decision forthcoming. The New Mexico Commission has not yet ruled on the hearing
examiner's recommended decision; Covad did not file any exceptions or objections to that
decision.

1 271."¹¹ Addressing the limited authority that state commissions have as arbitrators -- a threshold
2 jurisdictional issue that the Order fails to address -- the South Dakota Commission analyzed the
3 language of the relevant subsections of Section 252 and, like the Minnesota Commission, found
4 that "[t]he language in these sections clearly anticipates that section 252 arbitrations will concern
5 section 251 requirements, not section 271 requirements."¹² Similarly, in rejecting Covad's
6 argument that state commissions have authority to impose unbundling obligations under Section
7 271, the Utah Commission ruled that "Section 271 on its face makes quite clear that the FCC
8 retains authority over the access obligations contained therein."¹³

9 The orders from these other state commissions are equally clear that TELRIC pricing
10 does not apply to Section 271 elements and states are not permitted to require unbundling under
11 the auspices of state law that the FCC has rejected under Section 251. The hearing examiner in
12 the New Mexico arbitration concluded, for example, that the FCC has been "explicit about
13 TELRIC pricing not being applicable to Section 271 elements" and that "while Qwest must
14 provide access to 271 elements it is not required to do so as part of a Section 251 ICA or at
15 TELRIC rates."¹⁴ Addressing the issue of unbundling under state law, the Washington

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17 ¹¹ *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications*
18 *Company for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest*
19 *Corporation*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Arbitrator's Report at
20 ¶ 46 (Minn. Commission Dec. 15, 2004).

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

24 ¹³ *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications*
25 *Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with*
26 *Qwest Corporation*, Utah Commission Docket No. 04-2277-02, Arbitration Report and Order at
27 20 (Utah Commission Feb. 8, 2005).

28 ¹⁴ *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications*
29 *Company, for Arbitration of an Interconnection Agreement with Qwest Corporation*, Case No.
30 04-00208-UT, Recommended Decision of Hearing Examiner at 38 (New Mexico Commission
31 Oct. 14, 2005).

1 Commission emphasized that "any unbundling requirement based on state law would likely be
2 preempted as inconsistent with federal law, regardless of the method the state used to require the
3 element.¹⁵

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

7
8 ***B. State Commissions Do Not Have Authority In An Arbitration Conducted***
9 ***Under Section 252 To Impose Section 271 Unbundling Requirements.***

10 The threshold jurisdictional issue that Arbitration Issue No. 2 presents is the scope of this
11 Commission's authority as an arbitrator under Section 252 and, in particular, whether the
12 Commission's arbitration authority permits it to render decisions relating to obligations arising
13 under Section 271. The Order responds to this jurisdictional question not with an analysis of the
14 arbitration authority Congress granted in Section 252, but instead with a discussion of the types
15 of agreements that carriers must file with state commissions for approval. Order at 17-20. This
16 analysis does not answer the relevant question.

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

19
20 The State commission shall resolve each issue set forth in the
21 petition and the response, if any, by imposing appropriate
22 conditions as required to implement subsection (c) upon the parties
23 to the agreement, and shall conclude the resolution of any
24 unresolved issues not later than 9 months after the date on which

25
26 ¹⁵ *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 the local exchange carrier received the request under this section.

2 Importantly, this subsection *mandates* through the term "shall" that state commissions are
3 to resolve arbitration issues by imposing conditions "*required to implement subsection*
4 *[252](c)*." In turn, subsection 252(c), which sets forth "standards for arbitration," expressly
5 directs state commissions to resolve "open issues" by imposing "conditions [that] *meet the*
6 *requirements of section 251*." This plain linkage between the "open issues" that state
7 commissions are permitted to arbitrate and the "requirements of section 251" demonstrates that
8 the open issues state commissions are authorized to resolve are only those relating to the duties
9 imposed by Section 251. Significantly, Congress neither directed nor authorized state
10 commissions to resolve open issues relating to duties imposed by Section 271.

11 In its decision rejecting Covad's Section 271 unbundling demands, the South Dakota
12 Commission provided a succinct statutory analysis of why state commissions do not have
13 authority to impose Section 271 unbundling obligations in a Section 252 arbitration. The
14 commission explained that Section 252(a), which describes the negotiations that are a
15 prerequisite to a Section 252 arbitration, establishes that negotiations "are limited to requests 'for
16 interconnection, services, or network elements *pursuant to section 251 . . .*'"¹⁶ Relatedly, the
17 South Dakota Commission explained, "section 252(c)(1) requires the Commission to ensure that
18 the Commission's resolution of open issues '*meet the requirements of section 251 of this title,*
19 *including the regulations prescribed by the [FCC] pursuant to section 251 of this title . . .*'"¹⁷
20 The commission concluded that the language in these provisions "clearly anticipates that section
21 252 arbitrations will concern section 251 requirements, not section 271 requirements."¹⁸

22 As discussed in the section follows, an additional flaw in the Order is the conclusion that
23 states have authority to impose terms and conditions relating to Section 271 network elements.

24 _____
25 ¹⁶ South Dakota Arbitration Order at 6 (emphasis added).

26 ¹⁷ *Id.* (emphasis added).

¹⁸ *Id.*

1 States do not have that authority and, even if they did, the plain limitations on the issues states
2 are permitted to address in a Section 252 arbitration would prevent them from exercising it.
3 Specifically, the arbitration authority of states is not so broad as to permit them to conduct a
4 Section 252 arbitration regarding Section 271 elements, require those elements to be included in
5 an interconnection agreement, and direct that the elements be priced at TELRIC. The Order fails
6 to analyze or recognize this clear limitation on the arbitration authority of state commissions.
7

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

10 The Order concludes incorrectly that the Commission has an ongoing role in ensuring
11 Qwest's compliance with Section 271, and that this enforcement authority permits the
12 Commission to impose Section 271 unbundling requirements in an arbitration and to conduct a
13 follow-on proceeding in this arbitration to set prices for Section 271 elements. Order at 20-21.
14 This reasoning is flawed.

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

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

1 even provide state commissions with a consulting role relating to post-approval enforcement.

2 State commissions that have considered this issue in Qwest-Covad arbitrations have
3 determined that Section 271 does not give states enforcement authority under which unbundling
4 obligations can be imposed. Quoting Section 271(d)(6), which speaks only of the FCC having
5 enforcement authority, the South Dakota Commission concluded that "the language of section
6 271 places enforcement authority of that section with the FCC."¹⁹ The commission stated further
7 that even if it "were to find that it had some sort of enforcement authority under section 271, it
8 does not follow that the Commission could use that authority to impose section 271 requirements
9 in a section 252 arbitration."²⁰ The Idaho Commission reached the same conclusion based on a
10 plain reading of Section 271(d)(6), stating that "enforcement authority for Section 271
11 obligations is granted exclusively to the FCC."²¹

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

17 Sections 251 and 252 contemplate state commissions may take
18 affirmative action towards the goals of those Sections, *while*
19 *Section 271 does not contemplate substantive conduct on the part*
20 *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.²²

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

23 ¹⁹ *Id.*

24 ²⁰ *Id.*

25 ²¹ Idaho Arbitration Order at 4.

26 ²² *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by section 271 to impose binding obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004) (emphasis added).

1 administration of federal law, absent express authorization by Congress. That is so even if the
2 federal agency charged by Congress with the law's administration attempts to delegate its
3 responsibility to the state agency.²³ *A fortiori*, where (as here) there has been no delegation by
4 the federal agency, a state agency has no authority to issue binding orders pursuant to federal
5 law.²⁴

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

8

9 ***D. The Order Improperly Applies TELRIC Prices To Section 271 Elements.***

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

19 665. *Post Entry Requirements.* In the event a BOC has already
20 received section 271 authorization, section 271(d)(6) grants the
21 Commission enforcement authority to ensure that the BOC
22 continues to comply with market opening requirements of section
23 271. In particular, this section provides the Commission with
24 enforcement authority where a BOC 'has ceased to meet any of the
25 conditions required for such approval.' We conclude that for

24 ²³ *USTA II*, 359 F.3d at 565-68.

25 ²⁴ *See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13
26 (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 purposes of section 271(d)(6), BOCs must continue to comply with
2 any conditions required for approval, *consistent with changes in*
3 *the law*. While we believe that section 271(d)(6) established an
4 ongoing duty for BOCs to remain in compliance, *we do not believe*
5 *that Congress intended that the 'conditions required for such*
6 *approval' would not change with time*. Absent such a reading, the
7 Commission would be in a position where it was imposing
8 different backsliding requirements on BOCs solely based on date
9 of section 271 entry, rather than based on the law as it currently
10 exists. *We reject this approach as antithetical to public policy*
11 *because it would require the enforcement of out-of-date or even*
12 *vacated rules.*²⁵

13 As shown by the full text of paragraph 665, while stating that "BOCs must continue to
14 comply with any conditions required for approval," the FCC qualified the statement with the
15 important condition that such continued compliance should be "*consistent with changes in the*
16 *law.*"²⁶ This condition, as the FCC emphasized, is consistent with the fact that Congress could
17 not have intended that a BOC's compliance obligations would remain unchanged despite changes
18 in the law. If the law were otherwise, as the FCC aptly described it, that would be "antithetical
19 to public policy because it would require the enforcement of out-of-date or even vacated rules."²⁷

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

26 Although the Order is silent on the subject, there can be no dispute that TELRIC pricing
27 does not apply to network elements that the FCC has removed from Section 251 and that BOCs

28 ²⁵ *TRO* at ¶ 665 (emphasis added, footnotes omitted).

29 ²⁶ *TRO* at ¶ 665 (emphasis added).

30 ²⁷ *Id.*

1 are now providing only pursuant to Section 271. In the *TRO*, the FCC ruled unequivocally that
2 any elements a BOC provides pursuant to Section 271 are to be priced based on the Section 201-
3 02 standard that rates must not be unjust, unreasonable, or unreasonably discriminatory.²⁸ In so
4 ruling, the FCC confirmed, consistent with its prior rulings in Section 271 orders, that TELRIC
5 pricing does not apply to these network elements.²⁹ In *USTA II*, the D.C. Circuit reached the
6 same conclusion, rejecting the CLECs' claim that it was "unreasonable for the Commission to
7 apply a different pricing standard under Section 271" and instead stating that "we see nothing
8 unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has
9 found impairment."³⁰ The Order violates these binding rulings.

10

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

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

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

19 Congress explicitly assigned the task of applying the Section 251(d)(2) impairment test
20 and "determining what network elements should be made available for purposes of subsection
21 [251](c)(3)" to the FCC.³¹ The Supreme Court confirmed that as a precondition to unbundling,
22 Section 251(d)(2) "requires the [Federal Communications] Commission to determine on a
23 rational basis which network elements must be made available, taking into account the objectives

24

25 ²⁸ *Id.* at ¶¶ 656-64.

26 ²⁹ *Id.*

³⁰ *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

³¹ 47 U.S.C. § 251(d)(2).

1 of the Act and giving some substance to the ‘necessary’ and ‘impair’ requirements.”³² And the
2 D.C. Circuit confirmed in *USTA II* that Congress did not allow the FCC to have state
3 commissions perform this work on its behalf.³³ *USTA II*’s clear holding is that the FCC, not state
4 commissions, must make the impairment determination called for by Section 251(d)(3)(B) of the
5 Act.

6 *Iowa Utilities Board* makes clear that the essential prerequisite for unbundling any given
7 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 under
10 Section 251. In the *TRO*, the FCC reaffirmed this:

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

14 ***

16 If a decision pursuant to state law were to require unbundling of a
17 network element for which the Commission has either found no
18 impairment—and thus has found that unbundling that element
19 would conflict with the limits of section 251(d)(2)—or otherwise
20 declined to require unbundling on a national basis, we believe it
21 unlikely that such a decision would fail to conflict with and
22 “substantially prevent” implementation of the federal regime, in
23 violation of section 251(d)(3)(c).³⁴

21 Federal courts interpreting the Act have reached the same conclusion.³⁵ For example, the

23 ³² *Iowa Utilities Board*, 525 U.S. at 391-92.

24 ³³ See *USTA II*, 359 F.3d at 568.

25 ³⁴ *TRO* at ¶¶ 193, 195.

26 ³⁵ See *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (citing 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 United States District Court of Michigan observed that in *USTA II*, the D.C. Circuit "rejected the
2 argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling
3 determinations."³⁶ The court emphasized that while the Act permits states to adopt some
4 "procompetition requirements," they cannot adopt any requirements that are inconsistent with the
5 statute and FCC regulations. Specifically, the court held, a state commission "cannot act in a
6 manner inconsistent with federal law and then claim its conduct is authorized under state law."³⁷

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

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

15 The discussion immediately above establishes that any Arizona law purporting to give the
16 Commission authority to order unbundling inconsistent with the unbundling required by the FCC
17 would be unenforceable. But, in any case, the Order does not include any citation to the Arizona
18 Constitution, an Arizona statute or Arizona case law purports to give the Commission such
19 authority. Instead, the Order reasons that "[a]bsent some evidence that this Commission's Rules
20 related to interconnection and access conflict with federal law, we do not believe that the Rules
21 are preempted." Order at 21. The plain error in this statement is that, as discussed above, the
22 unbundling ICA language Covad is proposing and the Order apparently endorses clearly requires
23 unbundling that the FCC has not required. There is therefore clear evidence that application of
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25 ³⁶ *Michigan Bell Tel. Co. v. Lark*, Case no. 04-60128, slip op. at 13 (E.D. Mich. Jan. 6, 2005).

26 ³⁷ *Id.*

1 the Commission's rules in the manner recommended in the Order would conflict with federal
2 law.

3 The Order does reference Articles 13 and 15 of the Arizona Administrative Code
4 ("A.A.C."), Title 14, Chapter 2, and specifically A.A.C. R14-2-1302, -1502 and -1506(A). A
5 close examination of the adoption and content of these rules, however, does not support the
6 result the Commission reaches in the Order.

7 First, Articles 13 and 15 were adopted to comply with certain federal mandates
8 established in the 1996 Act. Article 15 expressly provides that its rules govern only the
9 procedural mechanisms for reviewing and approving interconnection agreements and makes
10 clear that those rules are intended to be consistent with the requirements of the Act.³⁸ In fact,
11 Article 15 is replete with direct references to the Act making it clear that federal, not state law,
12 serves as the legal basis for the imposition of any regulatory requirements and standards
13 prescribed therein.³⁹

14 Second, the Order ignores the specific rule in Article 13 that expressly enumerates the
15 essential facilities or services an ILEC must unbundle. A.A.C. R14-2-1307 (C) expressly
16 provides that "the following local exchange carrier network capabilities are classified as essential
17 facilities or services" and then lists six such facilities and services.⁴⁰ If a carrier "makes a bona
18 fide request of an incumbent local exchange carrier to unbundle any network facility or service
19 capability not identified in subsection (C)," A.A.C. R14-2-1307 establishes an initial timeline

20 _____
21 ³⁸ See, e.g., A.A.C. R-14-2-1501 ("These rules govern *procedures* mandated by the
22 Telecommunications Act of 1996, 47 U.S.C. 252, regarding the mediation, arbitration, review,
and approval of interconnection agreements.") (emphasis added).

23 ³⁹ See A.A.C. R14-2-1503, R14-2-1504(A); R14-2-1505(A)(1); R14-2-1505(B)(2)(a);
24 R14-2-1505(B)(2)(e); R14-2-1505(D); R14-2-1505(E)(3); R14-2-1505(F)(3); R14-2-1506(A);
R14-2-1506(C)(2)(b); R14-2-1506(C)(2)(c); R14-2-1506(E); R14-2-1508(2).

25 ⁴⁰ It is well established that any specific statute or rule controls over general provisions on the
26 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 and process through which the carriers exchange explanations concerning whether they consider
2 a particular network facility to be essential. After these exchanges, however, A.A.C. R14-2-
3 1307(E)(2) permits a carrier to refuse to provide the requested network facility or service. Under
4 these circumstances, the rule does not authorize the Commission to add additional services to
5 Subsection (C) on an *ad hoc* basis. In fact, Article 13 does not provide for Commission
6 resolution of such disputes.⁴¹ Moreover, any interpretation of the "essential facilities" standard
7 in this Arizona rule that would result in unbundling of network elements that the FCC has
8 declined to unbundle under Section 251 would impermissibly conflict with federal law.

9 In effect, the Order permits the Commission to add on an *ad hoc* basis to the list of
10 essential facilities and services set forth in A.A.C. R14-2-1307 (C). Such *ad hoc* determinations
11 by a state agency are discouraged under Arizona law as poor public policy. In *Arizona*
12 *Corporation Commission v. Palm Springs Utility Co., Inc.*, 24 Ariz. App. 124, 536 P.2d 245
13 (1975), the Court of Appeals endorsed the general principle that Arizona public policy should be
14 implemented by promulgating rules and regulations, not through individual adjudicatory orders
15 issued in a piecemeal fashion. Consistent with this decision, *ad hoc* determinations are
16 scrutinized to ensure that any such decision-making applies ascertainable standards of which
17 parties have adequate notice, and that any departure from established precedent is supported by
18 an explanation for the change of policy.⁴²

19 Although the Commission is addressing a specific interconnection dispute between
20 Covad and Qwest in an arbitration proceeding, the Order's resolution of Issue No. 2 is based on
21

22 ⁴¹ To the extent that Articles 13 and 15 are inconsistent with the *TRO*, that Order is clear that
23 "states must amend their rules and . . . alter their decisions to conform to our rules." *TRO*, ¶ 195.
24 The FCC further found that "state authority preserved by section 251(d)(3) is limited to state
25 unbundling actions that are consistent with the requirements of Section 251 and do not
26 'substantially prevent' the implementation of the federal regulatory regime." *TRO* at ¶ 193. *See*
also, id., ¶¶ 194-96.

⁴² 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.9 at 386-87 (4th ed. 2002).

1 the application of federal law (Section 251(d)(3) of the Act) and state rules (A.A.C. R14-2-1502,
2 R14-2-1506 and R14-2-1302) on an industry-wide basis. In *Carondelet Health Services, Inc. v.*
3 *Arizona Health Care Cost Containment System Administration*, 182 Ariz. 221, 229, 895 P.2d
4 133, 141 (1995), the Court of Appeals declined to apply the narrow exception carved out in *Palm*
5 *Springs* (i.e., *ad hoc* determinations may be necessary in specific cases concerning complex and
6 specialized problems). The Court rejected the approach of substituting individual rulings for
7 standards that apply to all regulated entities.

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

18 ***F. Covad Has Not Demonstrated That It Is A Telecommunications***
19 ***Carrier With A Right To Enter Into An Interconnection Agreement.***

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

1 Under the 1996 Act, only "telecommunications carriers" are entitled to enter into
2 interconnection agreements with ILECs. Section 252(a)(1), which addresses negotiated
3 interconnection agreements, provides that upon receiving a request pursuant to Section 251, an
4 ILEC "may negotiate and enter into a binding agreement with the requesting *telecommunications*
5 *carrier* or carriers" (emphasis added). Section 252(b)(1), which addresses arbitrated
6 interconnection agreements, provides similarly that a "carrier" -- which is the same
7 "telecommunications carrier" referred to in Section 252(a)(1) -- may petition a state commission
8 for arbitration of an interconnection agreement.

9 The Act defines a "telecommunications carrier" as "any provider of telecommunications
10 services."⁴³ Under this definition, a carrier that provides only information services and no
11 telecommunications services is not a telecommunications carrier. Such a carrier is not permitted
12 to avail itself of the negotiation and arbitration provisions in Sections 252(a) and (b), since the
13 rights those provisions confer are limited to telecommunications carriers.

14 In the *Wireline Broadband Order*, the FCC ruled in clear terms that wireline broadband
15 Internet access service is an information service: "[W]e conclude that wireline broadband
16 Internet access service provided over a provider's own facilities is appropriately classified as an
17 information service because its providers offer a single, integrated service (*i.e.*, Internet access)
18 to end users."⁴⁴ The FCC explained further that the classification of wireline broadband Internet
19 access as an information service applies regardless whether the provider of the service uses its
20 own transmission or those of another carrier.⁴⁵

21 While classifying wireline broadband Internet access service as an information service,
22 the FCC also stated that "nothing in this Order changes a requesting telecommunications carriers'

23 ⁴³ 47 U.S.C. § 153(44).

24 ⁴⁴ *Wireline Broadband Order* at ¶ 14.

25 ⁴⁵ *Id.* at ¶ 16.

26

1 UNE rights under Section 251 and our implementing rules."⁴⁶ This statement clarifies that
2 carriers are permitted to purchase UNEs to provide *as a telecommunications service* only the
3 transmission service that underlies Internet access -- not the transmission service bundled with
4 Internet access.⁴⁷ Carriers also can choose to provide this unbundled transmission service *as an*
5 *information service*. Covad is not a telecommunications carrier entitled to an interconnection
6 agreement if its Arizona service offerings only include Internet transmission service provided as
7 an information service or the transmission service bundled with Internet access.

8 In its briefs addressing the FCC's order, Covad is *conspicuously silent* about whether it is
9 offering a telecommunications service in Arizona. Covad emphasizes that it purchases UNEs
10 and interconnection services from Qwest, but that does not affirm with supporting facts that it is
11 a telecommunications carrier.⁴⁸ The relevant question is whether Covad is using the elements
12 and services it obtains from Qwest to provide a telecommunications service. Covad has overtly
13 refused to affirm or demonstrate that it is a telecommunications carrier, and Sections 251 and
14 252 do not allow an entity that is not a telecommunications carrier from requesting services
15 through an interconnection agreement under Sections 251 and 252 of the Act.

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17

18 ⁴⁶ *Id.* at ¶ 127.

19 ⁴⁷ In this regard, the FCC stated at paragraph 127 of the *Wireline Broadband Order* that "[s]o
20 long as a competitive LEC is offering an "eligible" telecommunications service - *i.e.*, not
21 exclusively long distance or mobile wireless services - - it may obtain that element as a UNE."

22 ⁴⁸ Covad also argues incorrectly that if a CLEC seeks to obtain UNEs, it is necessarily entitled to
23 an interconnection agreement because those agreements are the means by which a CLEC obtains
24 UNEs. This argument ignores that under the Act, a CLEC is permitted to obtain a UNE from an
25 ILEC only if the CLEC will use the UNE to provide a telecommunications service. Thus,
26 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.

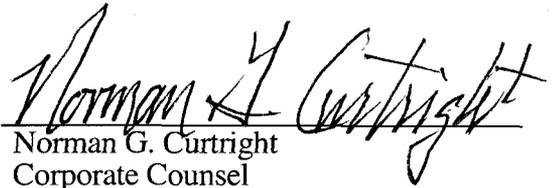
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III. CONCLUSION

For the reasons stated the Commission should grant this application for rehearing.

DATED: February 22, 2006

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1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify that I have served a copy of **QWEST CORPORATION'S**
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