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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC., D/B/A COVAD COMMUNICATIONS COMPANY, FOR ARBITRATION TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	:	Docket No. 04-049-68 **QWEST CORPORATION'S MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT RELATING TO PORTIONS OF ISSUES SUBMITTED BY COVAD COMMUNICATIONS COMPANY FOR ARBITRATION**

I. INTRODUCTION AND OVERVIEW

Qwest Corporation ("Qwest") respectfully submits this motion to dismiss certain requests that petitioner Dieca Communications, Inc. D/B/A Covad Communications Company ("Covad") has raised in this arbitration under the Telecommunications Act of 1996

("the Act"). Specifically, Qwest seeks an order from the Commission dismissing Issue 2 and Issue 4, as set forth in part G of Covad's petition ("Petition"), to the extent Covad seeks to have this Commission (1) require Qwest to provide unbundled access to network elements pursuant to section 271 of the Act; (2) set rates for any network elements that Qwest provides under section 271; (3) require Qwest to provide unbundled access to network elements under state law that conflicts with the access the Federal Communications Commission ("FCC") required in the *Triennial Review Order* ("*TRO*") and in its recently issued interim unbundling rules and Notice of Proposed Rulemaking ("*Interim Rules*" and "*Unbundling NPRM*");[1] and (4) require Qwest to commingle network elements provided under section 251 of the Act with other wholesale elements or services, including network elements provided pursuant to section 271.[2]

The Act requires incumbent local exchange carriers ("ILECs") like Qwest to provide unbundled network elements ("UNEs") to other telecommunications carriers and gives the FCC the authority to determine which elements the ILECs must provide. In making these network unbundling determinations, the FCC must consider whether the failure to provide access to an element "would impair the ability of the telecommunications carrier seeking

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[1] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003)("*TRO*"), *aff'd in part and rev'd and vacated in part, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"); Order and Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004). On August 23, 2004, Qwest, Verizon, and the United States Telecom Association challenged the lawfulness of the *Interim Rules* in a petition for a *writ of mandamus* filed with the D.C. Circuit. While Qwest strongly believes that the *Interim Rules* are unlawful and that a *writ of mandamus* should issue, the rules are of course still in effect Accordingly, this brief discusses the legal effects of the *Interim Rules* on Covad's unbundling demands, notwithstanding the pending petition.

[2] Qwest seeks to dismiss all portions of Issue 2 relating to Covad's demands for section 271 unbundling and pricing, unbundling under Utah law that conflicts with the *TRO, USTA II*, or the *Interim Rules*, and unbundling that conflicts with the *Interim Rules*. Qwest seeks to dismiss only that portion of Issue 4 relating to commingling.

access to provide the services that it seeks to offer."[3] This "impairment" standard imposes important limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*[4] and the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating each of the FCC's three attempts at establishing lawful unbundling rules.[5]

In this case, the unbundling obligations that Covad would have the Commission impose on Qwest ignore entirely these critical limitations and are based on the legally flawed assumption that a state commission may require unbundling that the FCC has expressly rejected. Moreover, Covad improperly asks this Commission to require unbundling and set rates under section 271, ignoring that states have no decision-making authority under section 271. As discussed below, the FCC has exclusive jurisdiction to determine the network elements that Regional Bell Operating Companies ("BOCs") are required to provide under section 271 and to determine the rates that apply to those elements. The FCC cannot – and has not – delegated that authority to state commissions.

The unlawfulness of Covad's unbundling demands is established by the *TRO*, *USTA II*, and the FCC's *Interim Rules* and *Unbundling NPRM* issued August 20, 2004. In the *TRO*, the FCC specifically declined to require ILECs to provide access to certain network elements under section 251, ruling that competitive local exchange carriers ("CLECs") are not "impaired" without access to them. Through the unbundling language it is requesting for its interconnection agreement ("ICA") with Qwest, Covad is asking this Commission to override these FCC determinations and to require unbundling despite the absence of any FCC findings of impairment. However, as the D.C. Circuit ruled quite emphatically in *USTA II*, the Act

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[3] 47 U.S.C. § 251(d)(2).

[4] 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

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

requires the FCC – not state commissions – to make the impairment determinations required by section 251. State commissions thus do not have authority to override FCC impairment determinations and to order unbundling that the FCC has rejected.

The FCC's *Interim Rules* and *Unbundling NPRM* establish additional legal and practical limitations on Covad's ability to obtain the broad unbundling it seeks. Under the *Interim Rules*, the extent of Covad's access to switching, enterprise market loops, and dedicated transport is governed by and limited to the terms and conditions that applied under the Qwest/Covad ICA that existed as of June 15, 2004.[6] As demonstrated below, Covad is asking the Commission to impose certain terms and conditions for access to these elements that did not exist in the parties' ICA as of June 15. The *Interim Rules* very clearly prohibit state commissions from imposing such terms and conditions.

Equally important, the FCC expressed its intent in the *Unbundling NPRM* to formulate permanent unbundling rules "on an expedited basis," perhaps by the end of the year.[7] The likelihood that the FCC will soon issue permanent unbundling rules provides another compelling reason for this Commission to reject the limitless unbundling language Covad proposes. Indeed, if the Commission permitted Covad's unbundling demands, there is a strong likelihood of conflicts between that ruling and the FCC's final rules, since Covad is seeking unbundling that the FCC rejected even before the D.C. Circuit imposed the limiting standards of *USTA II*. To avoid impermissible conflicts between the unbundling ordered in this proceeding and that ultimately required by the FCC, the Commission should reject Covad's proposals and only impose unbundling obligations on Qwest that are consistent with the current framework of federal law established by the *TRO, USTA II*, and the *Interim Rules.*

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[6] *Interim Rules* at ¶ 2.

[7] *Unbundling NPRM* at ¶ 18.

For these reasons and those set forth below, Qwest respectfully submits that the Commission should grant this motion now instead of deferring a ruling. The issues that the motion raises are purely legal and will not be altered by testimony or the arbitration hearing. Moreover, no legitimate purpose will be served by including in the arbitration issues that are beyond the Commission's jurisdiction or by considering proposed requirements under state law that are inconsistent with federal law. Granting Qwest's motion now will eliminate the waste of Commission and other resources that will otherwise occur and allow the Commission and the parties to focus on those issues that are properly before it.

II. BACKGROUND: COVAD'S UNBUNDLING DEMANDS

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

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

> On the Effective Date of this Agreement, Qwest is no longer obligated to provide to CLEC certain Network Elements pursuant to Section 251 of the Act. Qwest will continue providing access to certain network elements as required by Section 271 or state law, regardless of whether

> access to such UNEs is required by Section 251 of the Act. This Agreement sets forth the terms and conditions by which network elements not subject to Section 251 unbundling obligations are offered to CLEC.

Under this proposal, Covad could contend, for example, that it can obtain unbundled access to OCn loops, feeder subloops, signaling and other elements despite the FCC's fact-based findings in the *TRO* that CLECs are not impaired without access to these elements.[8]

Covad also seeks to require Qwest to continue to provide access to certain network elements under section 271 and state law despite possible rulings *in the future* that CLECs are not impaired without access to those elements.[9] In addition to these demands, Covad is proposing TELRIC pricing for the network elements it claims Qwest must provide under section 271:

> 9.1.1.7 If, on the Effective Date of this Agreement, Qwest is providing to CLEC, pursuant to orders placed in accordance with a Interconnection Agreement, any of the Network Elements for which an independent unbundling obligation exists under Section 271 of the Act, or applicable state law, then Qwest shall bill for such UNEs and services *using the Commission-approved TELRIC rates for such UNEs* until such time as new, just, reasonable and non-discriminatory rates (as required by Sections 201 and 202 of the Act or applicable state law) are approved for the Section 271 or state law required UNEs. (emphasis added).

While this language suggests that Covad is seeking TELRIC pricing only on a temporary basis, Covad's filings in this proceeding and in other states reveal that Covad is actually

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[8] In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundle these and other elements under section 251: ¶ 315 (OCn loops); ¶ 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); ¶ 273 (fiber to the home loops); ¶ 560 (operator service and directory assistance), and ¶ 451 (unbundled switching at a DS1 capacity).

requesting that the permanent prices to be set under sections 201 and 202 for section 271 elements be based on TELRIC.

As discussed below, this pricing proposal conflicts directly with the FCC's and the D.C. Circuit's unequivocal rulings that TELRIC does not apply to elements provided under section 271. Moreover, the proposal improperly assumes that state commissions have authority to establish prices for section 271 elements. The Act does not grant states any authority to set prices for section 271 elements; the pricing of these elements is within the exclusive jurisdiction of the FCC.[10]

Finally, in violation of the FCC's *Interim Rules*, Covad is seeking certain terms and conditions relating to access to switching, enterprise market loops, and dedicated transport that are not included in the parties' current ICA that was in effect on June 15, 2004. For example, under its proposal, Covad could obtain "commingling" – defined by Covad as "connecting, attaching, or otherwise linking" – of these elements with other elements and services. However, there is no commingling requirement in the current ICA and, therefore, the *Interim Rules* do not permit Covad to obtain commingling of switching, enterprise loops, and dedicated transport.[11] Issue 2 and Issue 4, as set forth in Covad's arbitration petition, encompasses the ICA provisions discussed above and several other provisions in Covad's

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[9] *See* Covad's proposed section 9.2.1.3.

[10] *See TRO* at ¶ 664.

[11] Both Covad and Qwest included commingling provisions in their proposed ICA language based on the FCC's ruling in the *TRO* that required ILECs to provide commingling. With the issuance of the *Interim Rules*, however, neither party's proposal is consistent with current law. To comply with the *Interim Rules*, both proposals must be modified to eliminate switching, enterprise market loops, and dedicated transport from any commingling obligations, since Qwest is not required to commingle those elements under its current ICA with Covad.

proposed ICA.[12] The dismissal of Issue 2 and the portion of Issue 4 relating to commingling will eliminate these improper proposals from this proceeding.

III. ARGUMENT

A. Standard For Determining Motion To Dismiss

Covad bears the burden of establishing that the Commission has jurisdiction to hear its unbundling claims encompassed by Issue 2.[13] "To ensure that the administrative powers of the PSC are not overextended, 'any reasonable doubt of the existence of any power must be resolved against the exercise thereof.'"[14] In meeting its burden, Covad cannot simply rest on a conclusory allegation that jurisdiction exists, and the Commission's first duty is to determine whether it has jurisdiction over the matter.[15] As shown below, Covad cannot meet its burden.

B. The Act Does Not Permit The Commission To Create Under State Law Unbundling Requirements That The FCC Rejected In The *TRO* Or That The D.C. Circuit Vacated In *USTA II*.

Under section 251 of the Act, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. As the Supreme Court made clear in the *Iowa Utilities Board* case, the Act does not authorize "blanket access to

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[12] The ICA provisions in Covad's proposed agreement that implicate this issue include the following sections: Section 4 definitions of "unbundled network element," "251(c)(3) UNE," and "commingling;" 9.1.1; 9.1.1.1, 9.1.1.6 (including sub-parts); 9.1.17; 9.1.5; 9.2.1.3; 9.2.1.4; 9.3.1.1; 9.3.1.2(b); 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; 9.21.2; and 9.1.1.7.

[13] *Furbreeders Agric. Corp. v. Wiesle*, 102 Utah 601, 604, 132 P.2d 384, 386 (Utah 1942) (". . . it is obvious that one who seeks the benefit of a statute must bring himself within its provisions.")

[14] *Williams v. Public Serv. Comm'n*., 754 P.2d 41, 50 (Utah 1988).

[15] *See, e.g., Blaine Hudson Printing v. Utah State Tax Comm'n*, 870 P.2d 291, 292 (Utah App. 1994) quoting *Varian-Eimac, Inc., v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989)("'[T]herefore, the initial inquiry of any [adjudicative body] should always be to determine whether the requested action is within its jurisdiction.'").

incumbents' networks."[16] Rather, Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]."[17] Section 251(d)(2), in turn, provides that unbundling may be required *only if the FCC determines* (A) that "access to such network elements as are proprietary in nature is necessary" and (B) that the failure to provide access to network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[18] The Supreme Court and D.C. Circuit have held that the Section 251(d)(2) requirements reflect Congress's decision to place a real upper bound on the level of unbundling regulators may order.[19]

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

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[16] *Iowa Utilities Board*, 525 U.S. at 390.

[17] 47 U.S.C. § 251(c)(3).

[18] 47 U.S.C. § 251(d)(2).

[19] *See Iowa Utilities Board*, 525 U.S. at 390 ("We cannot avoid the conclusion that if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] has come up with, it would not have included §251(d)(2) in the statute at all."); *USTA* I, 290 F.3d at 427-28 (quoting *Iowa Utilities Board*'s findings regarding congressional intent and section 251(d)(2) requirements, and holding that unbundling rules must be limited given their costs in terms of discouraging investment and innovation).

[20] 47 U.S.C. § 251(d)(2).

requirements."[21] And the D.C. Circuit confirmed rather dramatically in *USTA II* that Congress did not allow the FCC to have state commissions perform this work on its behalf.[22]

USTA II's clear holding is that the FCC, not state commissions, must make the impairment determination called for by Section 251(d)(3)(B) of the Act. As the Supreme Court held in *Iowa Utilities Board*, "the Federal Government has taken the regulation of local telephone competition away from the states," and it is clear that the FCC must "draw the lines to which [the states] must hew," lest the industry fall into the "surpassing strange" incoherence of "a federal program administered by 50 independent state agencies" without adequate federal oversight.[23]

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

> Based on the plain language of the statute, we conclude that the state authority preserved by section 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.
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> If a decision pursuant to state law were to require unbundling of a network element for which the Commission has either found no impairment—and thus has found that unbundling that element would conflict with the limits of section 251(d)(2))—or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision

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[21] *Iowa Utilities Board*, 525 U.S. at 391-92.

[22] *See USTA II*, 359 F.3d at 568.

[23] *Iowa Utilities Board*, 525 U.S. at 366, 378 n. 6.

> would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(c).[24]

Federal courts interpreting the Act have reached the same conclusion.[25]

Covad's broad proposals for unbundling under state law reflect its erroneous view that the Commission has plenary authority under state law to order whatever unbundling it chooses. To support this argument, Covad cites various state law savings clauses contained in the Act. What Covad ignores is that these savings clauses preserve independent state authority *only to the extent it is consistent with the Act*, including section 251(d)(2)'s substantive limitations on the level of unbundling that may be authorized. Section 251(d)(3), for example, protects only those state enactments that are "consistent with the requirements of this section" — which a state law unbundling order ignoring the Act's limits would clearly not be. Likewise, sections 261(b) and (c) both protect only those state regulations that "are not inconsistent with the provisions of this part" of the Act, which includes section 251(d)(2). Nor does section 252(e)(3) help Covad; that simply says that "nothing in *this section*" — that is, section *252* — prohibits a state from enforcing its own law, 47 U.S.C. § 252(e)(3) (emphasis added), but the relevant limitations on the scope of permissible unbundling that are at issue are found in section 251.[26]

Thus, these savings clauses do not preserve the authority of state commissions to adopt or enforce under state law unbundling requirements that have been rejected by the FCC or vacated in *USTA II*. Indeed, the Supreme Court has "decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by

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[24] *TRO* at ¶¶ 193, 195.

[25] *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).

[26] *See* 47 U.S.C. § 251(d)(2).

federal law."[27] The federal regulatory scheme that Congress has established for unbundling recognizes that "unbundling is not an unqualified good," because it "comes at a cost, including disincentives to research and development by both ILECs and CLECs, and the tangled management inherent in shared use of a common resource."[28] Therefore, as discussed above, Congress has mandated the application of limiting principles in the determination of unbundling requirements that would reflect a balance of "the competing values at stake."[29] That balance would plainly be upset if a state commission could impose under state law unbundling requirements that have been found by the FCC to be inconsistent with the Act and its objectives.

The clash between Covad's state law unbundling demands and the federal unbundling scheme is demonstrated sharply by Covad's approach to the unbundling of feeder subloops. In section 9.3.1.1 of its proposed ICA, Covad includes language that would require Qwest to provide feeder subloops, notwithstanding the FCC's ruling in the *TRO* that ILECs are not required to unbundle this network element.[30] The FCC determined that an unbundling requirement for this facility would undermine the objective of section 706 of the Act "to spur deployment of advanced telecommunications capability . . . ."[31] The "obligation" to ensure adequate infrastructure investment incentives pursuant to section 706," stated the FCC, "supports limitations on the unbundling of fiber-based loops."[32]

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[27] *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000).

[28] *USTA I*, 290 F.3d at 429. *See also AT&T Communs. Of Ill. v. Il. Bell Tel. Co.*, 2003 U.S. App. LEXIS 22961 (7th Cir 2003) (explaining that unbundling obligations may have negative effect on "investment and innovation").

[29] *Id*. *See also Iowa Utils. Bd.*, 535 U.S. at 388.

[30] *TRO* at ¶ 253.

[31] *Id.*

[32] *Id.* at ¶ 236.

A state-imposed requirement to unbundle feeder subloops would plainly conflict with this FCC determination and would seriously undermine the FCC's attempt to achieve a fundamental objective of the Act – promoting investment in advanced telecommunications facilities. This conflict with FCC rulings and policy determinations would of course not be limited to feeder subloops, since Covad would contend that its unbundling language reaches other network elements for which the FCC specifically declined to require unbundling based on element-specific fact and policy determinations.

The likelihood of impermissible conflicts between Covad's unbundling proposals and the FCC's impairment determinations has risen substantially with the FCC's issuance of the *Unbundling NPRM* and the FCC's expressed objective of expeditiously establishing final unbundling rules. Given the D.C. Circuit's vacatur of substantial portions of the FCC's unbundling rules and the court's findings in both *USTA I* and *USTA II* that the FCC has misapplied the impairment standard, there is at least a reasonable likelihood that the final unbundling rules will require less network unbundling than the *TRO* imposed. In contrast to this probable decrease in federally imposed unbundling requirements, Covad's language seeks to expand Qwest's unbundling obligations without any meaningful limits and far beyond what the FCC required in the *TRO*. In other words, Covad is headed in a direction precisely opposite to that the FCC is apparently taking, resulting in a high probability of impermissible conflicts with federal unbundling laws if the Commission were to adopt Covad's language.

In these circumstances, Qwest respectfully suggests that the prudent course for the Commission is to reject Covad's aggressive unbundling demands while the FCC formulates final unbundling rules. This path recognizes the deference that must be given to the FCC as the regulatory body with primary responsibility for administering the Act. As the Eighth Circuit has stated, "[t]he new regime for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for state commissions,

the scope of that role is measured by federal, not state law."[33] To avoid impermissible conflicts, the federal law relating to unbundling should be known and established before a state commission should even consider imposing the type of far-reaching unbundling obligations that Covad proposes.

In sum, the relevant question is not, as Covad presumes, whether sweeping unbundling obligations can be cobbled together out of state law, but rather whether any such obligations would be consistent with *Congress's* substantive limitations on the permissible level of unbundling, as authoritatively construed by the Supreme Court, the D.C. Circuit, and the FCC. Covad's proposals for broad unbundling under state law ignore these limitations and the permissible authority of state commissions to require unbundling. Accordingly, the Commission should dismiss the portions of Issue 2 in which Covad seeks to impose these impermissible state law unbundling requirements.

C. The Commission Does Not Have The Ability To Make The Impairment Determinations Required By The Act.

Even if the Commission wanted to step into the FCC's shoes and make the impairment determinations required by the Act, it could not as a practical matter do so. This is so because the FCC has not sufficiently defined the impairment standard to allow such determinations.

In *USTA II*, the D.C. Circuit decided not to review the Commission's impairment standard since the standard "finds concrete meaning only in its application, and only in that context is it readily justiciable."[34] However, the Court nonetheless noted significant deficiencies in the standard. First, the Court criticized the FCC's impairment standard for being so open-ended that it imposed no meaningful constraints on unbundling:

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[33] *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000) (emphasis added).

[34] *USTA II*, 359 F.3d at 572.

> [W]e do note that in at least one important respect the Commission's definition of impairment is *vague almost to the point of being empty***.** The touchstone of the Commission's impairment analysis is whether the enumerated operational and entry barriers "make entry into a market uneconomic." Order P 84. Uneconomic by whom? By any CLEC, no matter how inefficient? By an "average" or "representative" CLEC? By the most efficient existing CLEC? By a hypothetical CLEC that used "the most efficient telecommunications technology currently available," the standard that is built into TELRIC? Compare 47 CFR § 51.505(b)(1). We need not resolve the significance of this uncertainty, but we highlight it because we suspect that the issue of whether the standard is too open-ended is likely to arise again.[35]

Second, the Court noted that the impairment standard failed to address impairment in markets where state regulation holds rates below historic costs.

In making the impairment determination, the FCC is required to balance the advantages of unbundling against the costs, both in terms of spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.[36] *USTA II* makes clear that the FCC's impairment standard does not strike this balance. It is a "looser concept of impairment" in which the costs of unbundling are "brought into the analysis under §251(d)(2)'s 'at a minimum' language."[37] Thus, not only is the impairment definition open-ended, it is incomplete in that it fails to capture all of the considerations that must be taken into account under Section 251(d)(2) before unbundling can be required under federal or state law.

The Commission therefore has no legitimate way to determine which, if any, network elements Qwest would be required to provide under Covad's state law unbundling proposals. The FCC's impairment standard is too open-ended and does not contain guidance as to how to limit unbundling where the costs of unbundling outweigh any benefits there may be.

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[35] *Id.* (emphasis added).

[36] *Id.* at 563.

[37] *Id.* at 572.

Moreover, since the FCC's delegation of impairment decision-making was vacated in *USTA II*, the proper definition of the "market" for purposes of making the impairment determination also remains unresolved.

Adding to this uncertainty, with the limited exception noted above involving feeder subloops, Covad's proposed ICA language fails to identify the specific network elements that would be unbundled under state law. Even if there were a lawful impairment standard for the Commission to apply, therefore, there would be no meaningful way to apply the standard. In this sense, Covad's proposal lacks the "concrete meaning" that, in the words of the D.C. Circuit, is necessary to make an impairment standard "readily justiciable."[38]

Accordingly, since the FCC has not adequately defined impairment and Covad has not identified the network elements it is seeking, it is inappropriate for the Commission to attempt to make the impairment determinations that are required to be made by the FCC before unbundling may be lawfully required.

D. The Commission Does Not Have Authority To Require Unbundling Under Section 271.

Covad's Petition and ICA proposals assume incorrectly that state commissions have authority to impose binding unbundling obligations under section 271. Section 271 confers no such authority. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine whether BOCs have complied with the substantive provisions of section 271, including the "checklist" provisions upon which Covad purports to base its requests.[39] State commissions have only a non-substantive, "consulting" role in that

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[38] *Id.* While it is clear that Covad is seeking unbundling even where there is no impairment under section 251, its proposed ICA language does not (except for feeder subloops) identify the specific network elements it would demand from Qwest.

[39] 47 U.S.C. 271(d)(3).

determination.[40] As one court has explained, a state commission has a fundamentally different role in implementing section 271 than it does in implementing sections 251 and 252:

> Sections 251 and 252 contemplate state commissions may take affirmative action towards the goals of those Sections, *while Section 271 does not contemplate substantive conduct 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.[41]

Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by section 271,[42] likewise provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.[43] The FCC has thus confirmed that "[w]hether a particular [section 271] checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)."[44]

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[40] 47 U.S.C. 271(d)(2)(B).

[41] *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).

[42] *TRO* at ¶¶ 656, 662.

[43] *See id*; 47 U.S.C. 201(b) (authorizing the FCC to prescribe rules and regulations to carry out the Act's provisions); 205 (authorizing FCC investigation of rates for services, etc. required by the Act); 207 (authorizing FCC and federal courts to adjudicate complaints seeking damages for violations of the Act); 208(a) (authorizing FCC to adjudicate complaints alleging violations of the Act).

[44] *TRO* at ¶ 664.

The absence of any state commission decision-making authority under section 271 also is confirmed by the fundamental principle that a state administrative agency has no role in the administration of federal law, absent express authorization by Congress. That is so even if the federal agency charged by Congress with the law's administration attempts to delegate its responsibility to the state agency.[45] *A fortiori*, where (as here) there has been no delegation by the federal agency, a state agency has no authority to issue binding orders pursuant to federal law.[46]

Additionally, the process mandated by section 252, the provision pursuant to which Covad filed its petition for arbitration, is concerned with implementation of an ILEC's obligations under section 251, not section 271. In an arbitration conducted under section 252, therefore, state commissions only have authority to impose terms and conditions relating to section 251 obligations, as demonstrated by the following provisions of the Act.

(a) By its terms, the "duty" of an ILEC "to negotiate in good faith in accordance with section 252 the particular terms and conditions of [interconnection] agreements" is limited to implementation of "the duties described in paragraphs (1) through (5) of [section 251(b)] and [section 251(c)]."[47]

(b) Section 252(a) likewise makes clear that the negotiations it requires are limited to "request[s] for interconnection, services or network elements *pursuant to section 251*."[48]

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[45] *USTA II*, 359 F.3d at 565-68.

[46] *See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 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").

[47] 47 U.S.C. 251(c)(1).

[48] 47 U.S.C. 252(a)(emphasis added).

(c) Section 252(b), which provides for state commission arbitration of unresolved issues, incorporates those same limitations through its reference to the "negotiations under this section [252(a)]."[49]

(d) The grounds upon which a state commission may approve or reject an arbitrated interconnection agreement are limited to non-compliance with section 251 and section 252(d).[50]

(e) The final step of the section 252 process, federal judicial review of decisions by state commissions approving or rejecting interconnection agreements (including the arbitration decisions they incorporate), is likewise limited to "whether the agreement . . . meets the requirements of section 251 and this section [252]."[51]

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[49] *See* 47 U.S.C. 252(b)(1). The Fifth Circuit has ruled that state commissions may arbitrate disputes regarding matters other than the duties imposed by section 251 if *both* parties *mutually agree* to include those matters in their section 252(a) negotiations. *CoServ Limited Liability Corp. v. Southwestern Bell Tel. Co*., 350 F.3d 482 (5th Cir. 2003). Even if correct, that ruling is not relevant here, for Qwest has not included in its section 252(a) negotiations with Covad its duties under section 271. *See id*. at 488 ("an ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to sections 251 and 252"). In the Qwest/Covad Minnesota arbitration, the administrative law judge recently ruled that Qwest and Covad did negotiate Covad's request for unbundling under section 271. *Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Minn. Commission Docket No. P-5692, 421/C1-04-549, Minn. Office of Administrative Hearings Docket No. 3-2500-15908-4, Order on Motion to Dismiss (June 4, 2004). In that case, however, Qwest established that its negotiators consistently refused to negotiate those issues and expressly told Covad's representatives that the issues were not properly part of the section 251/252 process. The ruling incorrectly finds that Qwest opened the door to Covad's insertion of section 271 issues into the negotiations by proposing ICA language to implement the section 251 unbundling obligations established by the *TRO*. Qwest itself, however, never proposed any language relating to section 271 unbundling obligations, and Qwest and Covad never discussed Covad's proposed language. There was not, therefore, *mutual agreement* to address those issues in the negotiations, as is required under *Coserv*.

[50] *See* 47 U.S.C. 252(e)(2)(b).

[51] 47 U.S.C. 252(e)(6).

It is thus clear that state commission arbitration of disputes over the duties imposed by federal law is limited to those imposed by section 251 and excludes the conditions imposed by section 271. Accordingly, the Commission does not have the authority to require the section 271 unbundling that Covad seeks or to establish prices for those elements.

E. Covad's Proposal To Use TELRIC Rates For Section 271 Elements Is Unlawful.

Under Covad's proposed section 9.1.1.7 of the ICA, existing TELRIC rates would apply to network elements that Qwest provides pursuant to section 271 until new rates are established in accordance with "Sections 201 and 202 of the Act or applicable state law." In addition, it is clear from Covad's arbitration petition and its filings in other states that Covad is ultimately seeking permanent TELRIC-based prices for section 271 elements.[52] Covad's proposal assumes incorrectly that state commissions have authority to determine the rates that apply to section 271 elements and also violates the FCC's express ruling that TELRIC pricing does not apply to these elements.

The absence of state decision-making authority under sections 201, 202, and 271 establishes that state commissions are without authority to determine the prices that apply to network elements provided under section 271. Thus, as noted above, the FCC ruled in the *TRO* that it will determine the lawfulness of rates that BOCs charge for section 271 elements in connection with applications and enforcement proceedings brought under that section.

Significantly, the FCC recently rejected the argument that the pricing authority granted to state commissions by section 252(c)(2) to set rates for UNEs provided under section 251 gives commissions authority to set rates for section 271 elements. In its

opposition to the petitions for a *writ of certiorari* filed with the Supreme Court by NARUC, state commissions, and certain CLECs in connection with *USTA II*, the FCC addressed NARUC's contention that section 252 gives state commissions exclusive authority to set rates for network elements. It stated that the contention "rests on a flawed legal premise,"[53] explaining that section 252 limits the pricing authority of state commissions to network elements provided under section 251(c)(3):

> Section 252(c)(2) directs state commissions to "establish any rates for * * * network elements *according to subsection (d)*." 47 U.S.C. 252(c)(2) (emphasis added). Section 252(d) specifies that States set "the just and reasonable rate for network elements" *only* "for purposes of [47 U.S.C. 251(c)(3)]." 47 U.S.C. 252(d)(1).[54]

Accordingly, the FCC emphasized, "[t]he statute makes no mention of a state role in setting rates for facilities or services that are provided by Bell companies to comply with Section 271 and are *not* governed by Section 251(c)(3)."[55]

In requesting that the Commission adopt its rate proposal, Covad is therefore asking the Commission to exercise authority it does not have and that rests exclusively with the FCC. For this reason alone, Covad's pricing proposal is improper and should be dismissed from this arbitration. In addition, Covad's demand for even the temporary application of TELRIC pricing to section 271 elements violates the FCC's ruling in the *TRO* that TELRIC

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[52] *See* Covad's Petition for Arbitration at 10-12.

[53] Brief for the Federal Respondents in Opposition to Petitions for a Writ of Certiorari, *National Association of Regulatory Utility Commissioners v. United States Telecom Association*, Supreme Court Nos. 04-12, 04-15, and 04-18, at 23 (filed September 2004).

[54] *Id.* (emphasis in original).

[55] *Id.* (emphasis in original). In the same brief, the FCC commented that the *TRO* does not express an opinion as to the precise role of states in connection with section 271 pricing. *Id.*

pricing does not apply to these elements. The FCC ruled unequivocally that any elements an ILEC unbundles pursuant to section 271 are to be priced based on the section 201-02 standard that rates must not be unjust, unreasonable, or unreasonably discriminatory.[56] In so ruling, the FCC confirmed, consistent with its prior rulings in section 271 orders, that TELRIC pricing does not apply to these network elements.[57] In *USTA II*, the D.C. Circuit reached the same conclusion, rejecting the CLECs' claim that it was "unreasonable for the Commission to apply a different pricing standard under Section 271" and instead stating that "we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment."[58]

For these reasons, Covad's pricing proposal set forth in its proposed section 9.1.1.7 of the ICA is jurisdictionally improper and unlawful, and this claim should therefore be dismissed from the arbitration.

F. The *Interim Rules* Prohibit Adoption Of Covad's Unbundling Language.

The FCC's *Interim Rules* require ILECs "to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004."[59] The FCC ordered that these rates, terms, and conditions must remain in effect "until the earlier of the effective date of final unbundling rules promulgated by the [FCC] or six months after

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[56] *TRO* at ¶¶ 656-64.

[57] *Id.*

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

[59] *Interim Rules and Unbundling NPRM* at ¶ 1.

Federal Register publication of [the *Interim Rules*] . . . ."[60] Under this ruling, therefore, Qwest and Covad are bound by the rates, terms, and conditions in their existing ICA that was in effect on June 15, 2004, relating to access to switching, enterprise market loops, and dedicated transport. The ruling forbids the Commission from ordering any different terms or conditions.[61]

Covad's unbundling and other proposals clearly violate the *Interim Rules*, as they would impose terms and conditions relating to access to switching, enterprise market loops, and dedicated transport that are different from those in the current Qwest/Covad ICA that was in effect on June 15, 2004. For example, as discussed earlier, Covad's proposed terms and conditions of access would require Qwest to commingle these elements with other elements and services. Because the current ICA does not impose any commingling obligations, the commingling of switching, enterprise market loops, and transport that would be required under Covad's proposal is not permitted under the *Interim Rules*. In addition, the almost limitless unbundling obligations encompassed by Covad's proposed language very likely would result in other obligations that are not included in the current ICA and that are therefore impermissible.[62]

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[60] *Id.*

[61] The FCC established three exceptions under which rates, terms, and conditions may be different from those set forth in ICAs as of June 15, 2004: "(1) voluntarily negotiated agreements, (2) an intervening [FCC] order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements." *Id.* None of these exceptions apply in this case.

[62] Because of Covad's failure to identify the precise elements it would demand under its proposed language, it is not possible to conduct a full comparison of the elements required to be

In sum, because Covad's commingling and unbundling proposals would impose terms and conditions that are not in the current Qwest/Covad ICA, the proposals violate the *Interim Rules*. For this additional reason, the Commission is without authority to impose these proposed terms and conditions.

IV. CONCLUSION

For the reasons stated, the Commission should dismiss Issue 2 of Covad's petition and the portion of Issue 4 relating to commingling.

RESPECTFULLY SUBMITTED this 17th day of September, 2004.

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unbundled under the current ICA and those that Qwest would have to unbundle under Covad's proposal.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **QWEST CORPORATION'S MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT RELATING TO PORTIONS OF ISSUES SUBMITTED BY COVAD COMMUNICATIONS COMPANY FOR ARBITRATION** was mailed by U.S. Mail, postage prepaid, and electronically mailed to the following on this 17th day of September, 2004:

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