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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

I. Introduction and Summary

Qwest Corporation ("Qwest") respectfully submits this reply in support of its motion to dismiss certain issues for which petitioner Dieca Communications, Inc. D/B/A Covad

Communications Company ("Covad") has sought arbitration under section 252 of the Telecommunications Act of 1996 ("the Act"). This reply, which is supported by the accompanying Supplemental Affidavit of Linda C. Miles, responds to Covad's arguments in response to Qwest's motion ("Covad Response").¹

Qwest's motion to dismiss the portions of Covad's Petition for Arbitration that seek to impose section 271 unbundling obligations and state law unbundling obligations that conflict with FCC rulings is directly supported by a small number of basic principles established by the Act's negotiation and arbitration provisions and the recent decisions by the Fifth Circuit in *Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Corp.*² These principles are:

- (1) The Act requires an incumbent local exchange carrier ("ILEC") to negotiate with a competitive local exchange carrier ("CLEC") concerning the ILEC's obligations listed in sections 251(b) and (c);
- (2) An ILEC is free not to negotiate issues that go beyond the obligations listed in sections 251(b) and (c);
- (3) A state commission has authority to arbitrate only "open issues" that remain after an ILEC and CLEC conclude their negotiations;
- (4) The open issues over which state commissions have arbitration authority are those relating to the ILEC obligations listed in sections 251(b) and (c) and, per *Coserv*, any non-251(b) or (c) issues that were the subject of the ILEC and CLEC negotiations; and
- (5) State commissions do not have authority to arbitrate non-251(b) or (c) issues that the ILEC and CLEC did not negotiate.

Application of these principles to this arbitration establishes that the Commission does not have authority to arbitrate Covad's claims for access to network elements under section 271 or for unbundling of network elements under state law that is not permitted under federal law.

¹ Dieca Communications, Inc., d/b/a Covad Communications Company's Response to Qwest Corporation's Motion to Dismiss or, Alternatively, for Summary Judgment Relating to Portions of Issues Submitted by Covad Communications Company for Arbitration (filed with Utah Commission on June 3, 2004) ("Covad Response").

² *Coserve Limited Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003).

First, sections 251(b) and (c) do not impose any obligation on ILECs to provide unbundled access under section 271, as the unbundling obligations in section 251(c)(3) are expressly limited to unbundling "in accordance with the . . . the requirements of this section [§ 251] and section 252."³ Similarly, where the FCC has determined that ILECs are not required to unbundle specific network elements under section 251, a CLEC request for unbundling of those same elements under state law necessarily exceeds the obligations that sections 251(b) and (c) impose. Second, since Covad's requests for unbundled access under section 271 and access under state law go beyond the section 251 duties, Qwest had the right not to negotiate those requests. Third, as established by the affidavit of Linda Miles filed with Qwest's motion and Ms. Miles' supplemental affidavit submitted with this reply, Qwest and Covad did not mutually agree to negotiate Covad's non-251 unbundling requests and, indeed did not negotiate them. Fourth, because Qwest and Covad did not negotiate these non-251 issues, under the ruling in *Coserv*, they are not "open issues" over which the Commission has authority to decide in this arbitration.

In its Response, Covad relies primarily on three arguments, none of which has merit. It argues first that the Commission has authority to arbitrate the section 271 unbundling issues regardless whether they were negotiated because those issues relate broadly to "obligations pursuant to federal law."⁴ However, as *Coserv* and related cases confirm, the Act is clear that the only "federal obligations" that are subject to arbitration by state commissions are those listed in sections 251(b) and (c) that remain open after the parties complete their negotiations.⁵ States do

³ Qwest recognizes that Regional Bell Operating Companies ("RBOCs") have certain unbundling obligations under section 271 that are independent of the unbundling duties imposed by section 251. *See U.S. Telecom Association v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) ("*USTA II*"). However, the FCC has exclusive jurisdiction to determine the scope and terms and conditions of unbundling under section 271, as states do not have any decision-making authority under that section. *See Qwest's Motion to Dismiss ("Qwest Motion")* at 8 & n.16.

⁴ Covad Response at 5-6.

⁵ As discussed here and in Qwest's motion, *Coserv* also holds that non-251 issues are arbitrable if the parties mutually agreed to address them in voluntary negotiations. *Qwest Motion* at 4.

not have broad authority to arbitrate all "federal obligations" and, specifically, do not have authority to arbitrate or otherwise determine RBOCs' obligations under section 271.⁶

Covad next argues that states have authority to order, and hence arbitrate, access to network elements under state law. Qwest agrees that under section 251(d)(3), states may require access to certain network elements under state law and that requests for such access that meet the requirements of section 251(d)(3) are an appropriate subject for negotiation and arbitration. What Covad ignores, however, is that section 251(d)(3) and the other savings clauses it cites 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.⁷ Section 251(d)(3) protects only those state enactments that are "consistent with the requirements of this section" — which a state law unbundling order or rule ignoring the Act's limits, as interpreted by the FCC in the *TRO*, would clearly not be. Indeed, given the courts' unambiguous holdings that the FCC's various iterations of blanket unbundling rules violated *the Act itself*, an attempt to reimpose or maintain those same obligations on state law grounds would similarly violate the Act and be unlawful.⁸

Here, as shown below, Covad is seeking to require Qwest to unbundle network elements that the FCC has specifically ruled ILECs are not required to provide under section 251. These FCC rulings establish that Covad's request for state law unbundling conflicts with the requirements of section 251 and, accordingly, does not relate to a section 251 obligation that

⁶ See Qwest Motion at 8 & n.16.

⁷ These limitations are the "necessary" and "impair" requirements set forth in sections 251(d)(2)(A) and (B).

⁸ The Sixth Circuit's decision in *Michigan Bell v. MCIMetro*, 323 F.3d 348 (6th Cir. 2003), which Covad discusses in its response (at p. 7), does not hold to the contrary. Indeed, the Sixth Circuit recognized that any requirements imposed under state law must be consistent with the Act, including section 251. *Id.* at 358-61.

Qwest is required to negotiate or that, in turn, is the proper subject of an arbitration under section 252.

Covad's final argument is that regardless whether the Commission has original authority to arbitrate these issues, the parties addressed Covad's unbundling proposals in their negotiations and thereby conferred authority on the Commission to arbitrate the unbundling issues. As described below, however, a careful reading of the affidavits Covad submitted to support this claim shows that the parties did not mutually agree to negotiate Covad's unbundling proposals and that even the Covad negotiators do not claim that Qwest and Covad ever discussed Covad's proposed unbundling language. Ms. Miles' affidavits confirm that Qwest consistently refused to negotiate these non-251 issues, as was its right, and that the parties never discussed Covad's proposed unbundling language. Thus, these issues were not negotiated.

Accordingly, for the reasons stated here and in its motion to dismiss, Qwest respectfully requests that the Commission dismiss the portions of Covad's Petition for Arbitration that ask the Commission to impose the section 271 and state law unbundling obligations described herein.⁹

II. Argument

A. Because Covad's Claims Relating To Unbundling Under Section 271 And State Law Do Not Involve Qwest's Obligations Under Sections 251(b) And (c) And Were Not Negotiated, Those Claims Are Not A Proper Subject Of This Arbitration.

1. Covad's Unbundling Claims Do Not Relate To Qwest's Obligations Under Sections 251(b) and (c).

a) Section 271 Unbundling

Coserv and related cases establish that the scope of an arbitration under Section 252 is determined by (1) the obligations imposed on ILECs and CLECs under section 251(b), (2) the

⁹ Covad's proposed language that would impose these obligations is included in the following sections of its proposed interconnection agreement: Section 4 definitions of "unbundled network element" and "commingling,"

obligations imposed on ILECs under section 251(c), and (3) any non-251 issues that the parties addressed but did not resolve in their negotiations.¹⁰ Stated another way, under *Coserv* and related cases, the scope of a section 252 arbitration is limited to issues the parties did not resolve in their negotiations ("open issues") relating to sections 251(b) and (c) and any other non-251 issues the parties negotiated but did not resolve. To decide whether Covad's claims for unbundling under section 271 and state law are within the permissible scope of the arbitration, therefore, it is necessary to determine whether the claims involve a section 251(b) or (c) obligation or were negotiated by Qwest and Covad.

It is clear from the plain language of sections 251(b) and (c) that those sections do not impose any section 271 unbundling obligations on ILECs. The only provision within those sections that relates to unbundling is section 251(c)(3), and it does not include any reference to section 271. The only unbundling obligations imposed by that section are those that are "in accordance . . . with the requirements of this section [section 251] and section 252."

Accordingly, under the framework established by *Coserv* and related cases, the only possible argument for arbitration of Covad's request for section 271 unbundling would be the claim that Qwest and Covad mutually agreed to negotiate the request.¹¹ As discussed below, they did not.

§ 9.1.1, § 9.1.1.1, § 9.1.1.6, § 9.1.1.7, § 9.1.5, § 9.6(g), § 9.6.1.5, § 9.6.1.5.1, § 9.6.1.6, § 9.6.1.6.1, § 9.2.1.2, § 9.2.1.3, § 9.2.1.4, and § 9.3.1.1.

¹⁰ *Coserv*, 350 F.3d 482 at 487-88. See also *U S WEST Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp.2d 968, 985 (D. Minn. 1999); *In the Matter of the Request for Arbitration of Interconnection Agreements by Certain Independent Telephone Companies with Qwest Wireless LLC and TW Wireless LLC*, 15-2500-15667-4, P-401, et al./IC-03-1893 at 7 (Feb. 17, 2004).

¹¹ As discussed below, based on the ruling in *USTA II* that the FCC cannot sub-delegate its unbundling authority under section 251 to the states, it follows that the FCC also cannot sub-delegate such authority under section 271. Thus, state commissions have no authority to require section 271 unbundling in a section 252 arbitration or in any other proceeding. Negotiation of this issue by parties to an interconnection agreement should not be sufficient to confer upon state commissions unbundling authority that Congress did not intend for them to have.

Covad's effort to distinguish the rulings in *Coserv* is fundamentally inaccurate. Covad asserts that in *Coserv*, the Texas Commission and the Fifth Circuit refused to require arbitration of Coserv's claim relating to "compensated access" because there was no state or federal law that supported the obligation it was seeking to impose.¹² Covad argues that in this case, in contrast to *Coserv*, there is both state and federal law authority for the unbundling it seeks, and that that authority permits the Commission to address Covad's claims.

Contrary to Covad's description, the Texas Commission ruled that it lacked jurisdiction over Coserv's claim because the claim did not relate to any of the duties imposed by sections 251(b) and (c). The Commission ruled that only issues relating to those duties are within a state commission's arbitration authority, and, accordingly, it dismissed Coserv's claim for lack of jurisdiction. In doing so, contrary to Covad's description, the Texas Commission ruled that even if federal or state regulations governed the compensated access issues, dismissal would still be required because the issues did not relate to any of the duties imposed by sections 251(b) and (c).¹³

In affirming the Texas Commission, the Fifth Circuit also based its jurisdictional inquiry on whether Coserv's claim implicated an ILEC's duties under sections 251(b) and (c), recognizing that those duties are the starting point for determining whether a state commission has authority to arbitrate an issue.¹⁴ The court then went a step further than the Texas Commission in defining a state commission's arbitration jurisdiction by ruling that even if an issue is not among the section 251(b) and (c) duties, a state commission may nevertheless have

¹² Covad Response at 4-5.

¹³ See *Joint Petition of Coserv, L.L.C., et al. for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Southwestern Bell Tel. Co.*, Texas Public Utility Commission, Docket No. 23396, Arbitration Award at 23-25 (April 17, 2001).

¹⁴ 350 F.3d at 487.

arbitration jurisdiction if the parties *mutually* agreed to include the issue in their negotiations.¹⁵ In applying this jurisdictional framework, the court ruled that the Texas Commission lacked jurisdiction to arbitrate the compensated access issues because the issues were not among the duties imposed by section 251(b) and (c), and Southwestern Bell had properly refused to negotiate them.¹⁶ In reaching this result, contrary to Covad's description, the court did not consider whether provisions of law other than sections 251(b) and (c) gave the Texas Commission authority to grant the relief Coserv was seeking.

The rulings in *Coserv* and related cases therefore render irrelevant Covad's incorrect claim that state commissions have authority to require unbundling under section 271. The only relevant inquiries for jurisdictional purposes are whether section 271 unbundling is among the section 251(b) and (c) duties and, if not, whether the parties mutually agreed to include that issue in their negotiations. As Qwest discussed in its motion, state commissions do not have any unbundling or other decision-making authority under section 271.¹⁷ There is no language in that section of the Act that gives state commissions authority to impose binding obligations.¹⁸ Likewise, sections 201 and 202 of the Communications Act of 1934, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by section 271,¹⁹ also provide no role for state commissions. Accordingly, the FCC has stated that "[w]hether a particular [section 271] checklist element's rate satisfies the just and reasonable pricing standard

¹⁵ *Id.* at 487-88.

¹⁶ *Id.* at 488. The court's conclusion that the compensated access issues are not within sections 251(b) and (c) can be inferred by its finding that Southwestern Bell had no obligation to negotiate the issues.

¹⁷ Qwest Motion at 8 & n.16.

¹⁸ See *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).

¹⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 at ¶¶ 656, 662 (2003) ("*TRO*").

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)."²⁰

Further evidence of the absence of state commission authority over section 271 issues is found in the FCC's order outlining the types of agreements that carriers must file with state commissions. The FCC ruled that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)."²¹ Notably, the FCC did not rule that agreements relating to RBOC section 271 obligations must be filed with state commissions, further demonstrating that state commissions do not have authority over those issues.

Covad's assumption that the Commission can require unbundling of network elements under section 271 also directly conflicts with the D.C. Circuit's decision in *USTA II*. In its decision, the D.C. Circuit ruled that the FCC could not delegate its unbundling decision-making authority under section 251 to the states because there was "no affirmative evidence" that Congress had given it "authority to do so."²² Here, not only is there an absence of any evidence that Congress intended to give states unbundling authority under section 271, but there is compelling evidence that the states have no such authority.²³

²⁰ *TRO* at ¶ 664.

²¹ Memorandum Opinion and Order, *Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337, FCC 02-26 (2002).

²² *USTA II*, 359 F.3d at 566.

²³ To be clear, as stated earlier, Qwest does not dispute that RBOCs have unbundling obligations under section 271 independent of those that exist under section 251. But the scope of those obligations and the terms and conditions that apply to elements provided under section 271 are within the FCC's exclusive jurisdiction and cannot be addressed by state commissions in section 252 arbitrations or other proceedings.

b) State Law Unbundling

Contrary to Covad's characterization, Qwest does not dispute that state commissions have authority to impose obligations under state law in section 252 arbitrations. However, per section 251(d)(3)(B), unbundling imposed under state law is permissible only if it is "consistent with the requirements of [section 251]." Here, Covad is seeking to require Qwest to unbundle network elements under state law that the FCC has specifically ruled ILECs are not required to provide under section 251. Because this request for state law unbundling conflicts with the requirements of section 251, it does not relate to a section 251 obligation that Qwest is required to negotiate or that, in turn, is the proper subject of an arbitration under section 252.

That Covad is seeking network elements under state law that the FCC has not required ILECs to provide under section 251 is established by Covad's rejection of unbundling language that Qwest proposed for the interconnection agreement. In section 9.1.1.6, Qwest's language makes it clear that Qwest is not obligated to provide network elements that, per the *TRO*, the FCC has ruled ILECs are not required to unbundle under section 251:

On the Effective Date of this Agreement, Qwest is no longer obligated to provide to CLEC certain Network Elements that had formerly been required to be offered pursuant to Section 251 of the Act. These former Network Elements were determined by the FCC to not satisfy the FCC's impairment test. As a result, these former Network Elements are not available pursuant to this Agreement.

Following this general language, Qwest's lists the specific network elements that the FCC has established, per the *TRO*, ILECs are no longer required to unbundle pursuant to section 251. These network elements that the FCC has ruled ILECs do not have to unbundle include, but are not limited to, OCn loops, feeder subloops, DS3 loops (in excess of two per customer location), extended unbundled dedicated interoffice transport and extended unbundled dark fiber, OCn unbundled dedicated interoffice transport, DS3 unbundled dedicated interoffice transport (in

excess of 12 per route), unbundled signaling (in limited circumstances), call related databases, packet switching, fiber to the home loops, operator service and directory assistance (in limited circumstances), and unbundled switching at a DS1 capacity.²⁴ Covad has rejected this language, claiming that it is entitled to access to these elements under state law.

Consistent with the framework established by *Coserv* and related cases, Covad's request for this unbundling under state law is arbitrable only if it relates to an obligation established by sections 251(b) and (c) or if the parties mutually agreed to address it in their negotiations. As noted earlier, an ILEC's unbundling obligations under those sections are limited to providing unbundled access "in accordance with the . . . requirements of this section [section 251] and section 252."²⁵ Because the unbundling that Covad seeks indisputably involves access to network elements that the FCC has ruled ILECs do not have to unbundle under section 251, Covad's request is not "in accordance with the requirements" of that section. Accordingly, Covad's request for unbundling that the FCC has denied under section 251 is not among the section 251(b) and (c) duties that are subject to arbitration. And, as discussed below, the parties did not mutually agree to negotiate Covad's request and, indeed, did not negotiate it.

Covad's discussion of the Commission's general unbundling authority under state law ignores the express limitation in section 251(d)(3)(B) on state unbundling authority. That provision of the Act requires that state law obligations be "consistent with the requirements of [section 251]." As one court has stated,

²⁴ In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundle these 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).

²⁵ See section 251(c)(3).

The prerequisite for preserving state commission regulations, policies and orders is that these decisions must be consistent with Section 251, and not substantially prevent implementation of the purposes of the Act.²⁶

Here, this principle precludes the Commission from ordering unbundling under state law that is inconsistent with the FCC's implementation of the purposes of the Act, as reflected in its section 251 unbundling determinations. In the *TRO*, the FCC was clear that such state-ordered unbundling would likely violate the limits of the state authority granted in section 251(d)(3)(C):

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.

If a decision pursuant to state law were to require the 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 in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, *we believe it unlikely that such a decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C).*²⁷

Accordingly, Covad's request for unbundling under state law that the FCC has rejected under section 251 exceeds the authority granted to states under section 251(d)(3)(C) and is not part of the section 251(b) and (c) duties that must be negotiated in interconnection negotiations.

2. Covad's Unbundling Claims Were Not A Mutually Agreed Upon Subject Of The Negotiations.

Because Covad's section 271 and state law unbundling requests do not relate to Qwest's duties under sections 251(b) and (c), under *Coserv* and related cases, the Commission can arbitrate the requests only if Qwest and Covad mutually agreed to address them in their

²⁶ *Michigan Bell Telephone Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d at 353.

²⁷ *TRO* at ¶¶ 193, 195 (emphasis added). *See also USTA II*, 359 F.3d at 594.

negotiations. Thus, in *Coserv*, the Fifth Circuit ruled that the Texas Commission properly found it did not have jurisdiction over Coserv's compensated access issues "because compensated access was not a *mutually agreed upon subject of voluntary negotiation* between SWBT and Coserv."²⁸ In so ruling, the Fifth Circuit also established that an ILEC is "clearly free to refuse to negotiate issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252."²⁹

Here, the initial and supplemental affidavits of Linda Miles establish that Covad's requests for unbundling under section 271 and state law were not a "mutually agreed upon subject of voluntary negotiation." As Ms. Miles describes, on December 1, 2003, Qwest provided Covad with contract language that implemented the FCC's rulings in the *TRO* relating to ILECs' obligations under section 251. Qwest's proposal focused only on the unbundling required under section 251 and did not include any provisions that would have permitted unbundled access under section 271 or state law. On January 22, 2004, for the first time, Covad provided its own language that included the section 271 and state law unbundling language.³⁰

When the parties eventually focused on Covad's proposed language in the negotiations, Qwest's representatives told the Covad negotiators that Qwest would not discuss the requests for section 271 and state law unbundling because they were not appropriate to include in negotiations toward an interconnection agreement under sections 251 and 252. Covad did not contest this position. Qwest consistently refused to discuss these issues and, to ensure that there was no ambiguity about its refusal, Ms. Miles and Qwest's counsel sent Covad two separate e-

²⁸ *Coserv*, 350 F.3d at 488 (emphasis added).

²⁹ *Id.*

³⁰ Supplemental Affidavit of Linda Miles ("Miles Supp. Aff.") at ¶ 3.

mails stating Qwest's objection to discussing the issues and confirming that the parties had not negotiated them.³¹

The affidavits of Michael Zulevic and Charles Watkins do not contest these central facts established by Ms. Miles' affidavits. Significantly, Messrs. Zulevic and Watkins do not assert that Qwest and Covad ever engaged in discussions about Covad's proposed section 271 and state law unbundling language. The closest Covad comes to such a claim is the accurate assertion by Mr. Zulevic that the issue lists Qwest provided to Covad during the negotiations on December 22, 2003, January 12, 2004, and January 21, 2004 include references to sections of the agreement for which Covad eventually proposed its section 271 and state law unbundling language. That assertion is apparently intended to imply that because Qwest identified those sections of the agreement as being at issue, Covad and Qwest necessarily had to have negotiated Covad's proposal. However, all three of the issues lists were prepared prior to Covad submitting its proposed unbundling language on January 22, 2004. The lists thus could not possibly have addressed Covad's proposed unbundling language.³²

Mr. Watkins' references to his discussions relating to Covad's view of Qwest's obligations under section 271 also do not support any claim by Covad that its unbundling proposals were negotiated. Mr. Watkins states that on two separate occasions, he told Qwest of Covad's position relating to Qwest's section 271 unbundling obligations. However, his recitation of Covad's legal position does not constitute "negotiation" of Covad's proposed unbundling language. Indeed, as Ms. Miles shows in her affidavit, Mr. Watkins provided these statements of Covad's legal position *before* Covad had submitted its proposed unbundling language to Qwest. Thus, the

³¹ Affidavit of Linda Miles ("Miles Aff.") at ¶¶ 6, 8, 9 and Attachment A.

³² Miles Supp. Aff. at ¶¶ 4, 5.

"discussions" that Mr. Watkins refers to did not include any negotiation of Covad's proposed unbundling language.³³

In its brief, Covad asserts disingenuously that Qwest "itself raised" the issues it seeks to dismiss.³⁴ According to Covad, by proposing language to implement the section 251 obligations established in the *TRO*, Qwest implicitly raised issues relating to its section 271 and state law unbundling obligations. Covad's proposal in response that raised those issues, according to Covad, was essentially invited by Qwest's proposal relating to its section 251 obligations. This claim is nonsense. As even Covad acknowledges, Qwest's proposal was limited to its section 251 obligations, which are a proper subject for section 251 negotiations. Only Covad, not Qwest, proposed language relating to section 271 and state law unbundling, and, after it did, Qwest told Covad that the proposal was improper.

A recent decision of a Minnesota administrative law judge in the Qwest/Covad arbitration in that state incorrectly concludes that because Qwest proposed language relating to section 9 of the interconnection agreement – the section that defines unbundled network elements – it implicitly agreed to negotiate network unbundling under section 271.³⁵ The ALJ concludes that because of this implicit agreement, Covad's request for section 271 unbundling is an "open issue" that is subject to arbitration. However, Ms. Miles' affidavits establish that there was no agreement, implicit or otherwise, to negotiate Covad's request. The language that Qwest proposed for section 9 related exclusively to implementing the modifications to its section 251

³³ *Id.* at ¶ 8.

³⁴ Covad Response. at 8.

³⁵ *In the Matter of the Petition of Covad Communications Co. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Minnesota OAH Docket No. 3-2500-15908-4, MPUC Docket No. P-5692, 421/CI-04-549, Order on Motion to Dismiss (June 4, 2004).

unbundling obligations established by the *TRO*; Qwest never proposed nor discussed with Covad including section 271 unbundling obligations in the interconnection agreement.

The ALJ's ruling is thus based on the illogical factual leap that by proposing language to implement section 251 unbundling obligations, Qwest necessarily agreed to address section 271 unbundling in the negotiations. The ruling assumes incorrectly that a CLEC can require the arbitration of non-251 issues simply by submitting counter-proposals that seek to impose duties under statutory provisions other than section 251. Nothing in the Act's negotiation and arbitration provisions supports that interpretation. Indeed, if CLECs could confer jurisdiction on state commissions over non-251 issues through their ICA proposals, the limitations on arbitrations established by sections 251(b) and (c) would be rendered meaningless and the scope of section 252 proceedings would be virtually boundless.

In sum, the circumstances described in the affidavits establish that Covad's section 271 and state law unbundling proposals were not, in the words of the Fifth Circuit, a "mutually agreed upon subject of voluntary negotiation."³⁶ Like Southwestern Bell in *Coserv*, Qwest consistently refused to include Covad's proposals in the negotiations, and the proposals therefore were not negotiated.

³⁶ *Coserv*, 350 F.3d at 488.

III. Conclusion

For the reasons stated, Qwest respectfully requests that the Commission grant Qwest's motion to dismiss.

DATED: June 17, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **QWEST CORPORATION'S REPLY IN SUPPORT OF 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 June, 2004:

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