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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| **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. 04-2277-02<br><br>DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY'S RESPONSE TO QWEST'S CORPORATION'S MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT RELATING TO PORTIONS OF ISSUES SUBMITTED BY COVAD COMMUNICATIONS COMPANY FOR ARBITRATION |

DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"), through its undersigned counsel, hereby responds to Qwest Corporation's ("Qwest's") Motion to Dismiss Portions of Covad's Petition for Arbitration filed on September 17, 2004 (the "Qwest Motion" or "Motion").

## INTRODUCTION

The Qwest Motion primarily challenges the authority of the Utah Public Service Commission (the "Commission") to require unbundling of network elements under Section 271 of the Telecommunications Act of 1996[1] and Utah law.[2] Covad maintains that the FCC's explicit direction was to continue the obligations of Regional Bell Operating Companies ("RBOCs") to provide all network elements listed in the provisions of Section 271 of the Act outlining specific RBOC obligations to maintain authority to provide in-region interLATA service (the "Section 271 Checklist" or "Checklist"). Qwest believes its obligations under Section 271, if any, are outside the jurisdiction of this Commission.

The Qwest Motion is flawed for two key reasons. First, unambiguous federal law, interpreted by federal courts, provides that: (1) state commissions can arbitrate issues outside of Section 251 if the parties negotiated those issues and, (2) state commissions have authority to apply state law in Section 252 arbitrations.

Second, Qwest presents an internally inconsistent argument for preemption. The unbundling obligations in Section 251 that Qwest claims are precluded by recent interpretations of that provision are nonetheless still contained in Section 271 of the Act. An unbundling obligation clearly set forth in Section 271 cannot be construed to preempt consistent state law unbundling requirements. This Commission can – and should – arbitrate the issue of unbundling under both Section 271 and Utah law.

## ARGUMENT

### A. THE COMMISSION HAS JURISDICTION TO ARBITRATE QWEST'S UNBUNDLING OBLIGATIONS UNDER SECTION 271 AND UTAH LAW BECAUSE THOSE OBLIGATIONS ARE "OPEN ISSUES"

#### *1. Section 252(b) grants the Commission broad authority to arbitrate any "open issues" regarding the Interconnection Agreement between Covad and Qwest.*

[1] Pub. Law No. 104-104, 110 Stat. 56 (the "1996 Act" or "Act").
[2] Utah Code Ann. §§54-4-1, 54-8b, Utah Admin. Rule R746-348. Interconnection and Commission orders in Docket Nos. 94-999-01, 00-049-106, 01-049-85.

Covad has submitted its Interconnection Agreement ("ICA") with Qwest pursuant to Section 252(b) of the Act, which provides that a competitive local exchange carrier ("CLEC") negotiating an interconnection agreement with an incumbent local exchange carrier ("ILEC") "may petition a State Commission to arbitrate *any open issues*." 47 U.S.C. § 252(b) (emphasis added).

In *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482 (5th Cir. 2003), the Fifth Circuit construed Section 252(b) to grant state commissions authority to arbitrate a broad range of disputes. The court emphasized that Congress intended that "*any issue* left open after unsuccessful negotiation would be subject to arbitration," even issues that an ILEC was not required to negotiate under the Act. *Id*. at 487 (emphasis in original). The only limitation is that the party petitioning for arbitration "may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations." *Id.*

### *2. Qwest's unbundling obligations under Section 271 and Utah law were negotiated and, therefore, are "open issues."*

During multi-state negotiations, Covad and Qwest discussed the issues of unbundling under both Section 271 and state law and, therefore, those issues are both "open" and subject to mandatory arbitration. Qwest denies that it negotiated any issues outside of its mandatory obligations under Section 251. *See Qwest Motion at 19 n. 49*. Generally, for the purpose of this Motion, however, the Commission is to assume that the facts Covad has asserted in the petition to arbitrate are true and all inferences are to be drawn in Covad's favor. See *Stokes v. Van Wagoner*, 987 P.2d 602, 603 (Utah 1999); *St. Benedict's Dev. v. St. Benedict's Hosp*., 811 P.2d 194, 196 (Utah 1991). Accordingly, dismissal of the issues identified by Qwest in its Motion is inappropriate under Utah law.

Moreover, in parallel administrative proceedings in Colorado and Minnesota, Administrative Law Judges rejected Qwest's denials that the parties negotiated unbundling obligations under Section 271 and state law and concluded that these obligations were "open issues." *See Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Company Pursuant to 47 U.S.C. § 252(b)*, Colo. Commission Docket No. 04B-160T, Decision No. R04-0649-I (June 16, 2004); *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) (a copy of the Colorado and Minnesota decisions are attached hereto as Exhibits A and B).

## B. QWEST CONTINUES TO HAVE UNBUNDLING OBLIGATIONS UNDER SECTION 271 THAT THE COMMISSION HAS THE POWER TO ENFORCE

In its Motion to Dismiss, Qwest argues that the Commission does not have authority to enforce or set pricing for unbundling obligations under Section 271. *Qwest Motion at 17-20*. As explained below, however, Section 271 obligations are independent from Section 251 obligations and the Commission has the power to enforce and set pricing for them in a Section 252 proceeding.

### *1. Section 271 unbundling obligations are independent from Section 251 obligations.*

The FCC made clear in the *Triennial Review Order*[3] that Section 271 creates access obligations for the RBOCs that are independent of obligations under Section 251:

[3] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and

> [W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

*Triennial Review Order*, ¶ 653.

> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.

*Triennial Review Order*, ¶ 655.

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under Section 251 for ILECs, Qwest retains an independent statutory obligation under Section 271 of the Act, as an RBOC, to provide competitors with unbundled access to the network elements listed in Section 271.[4]

Moreover, there is no question that these obligations include the provision of unbundled access to loops and dedicated transport under Checklist item #4:

> Checklist items 4, 5, 6, and 10 separately impose access requirements regarding *loop, transport*, switching, and signaling, without mentioning section 251.

*Triennial Review Order*, ¶ 654 (emphasis added).

### *2. The Commission has authority to enforce Section 271 unbundling obligations in the context of a 252 arbitration.*

The Commission has authority to enforce Section 271 Checklist obligations in the context of a Section 252 arbitration proceeding. This authority is derived from two sources. First, Section 252(b) provides the Commission with arbitration authority to enforce unbundling obligations under Section 271, because enforcement is an "open issue" between the parties that

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Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147, (rel. September 17, 2003) ("*Triennial Review Order*").

[4] *See* 47 U.S.C. § 271(c)(2)(B).

requires resolution; there is no need for parallel or supplemental arbitration authority within Section 271 itself. In fact, the case law that Qwest relies upon in its Motion supports this interpretation of Section 252. *See Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission ("Indiana Bell")*, 2003 WL 1903363, at * 9 (S.D. Ind. 2003) (courts have found that Section 252 gives state commissions the authority to implement performance standards and penalties); *see also In the Matter of Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Company pursuant to 47 U.S.C. § 252(b)*, Colo. Comm. Docket No. 04B-160T, Decision No. C04-1037, ¶ 179 fn. 77 (Aug. 19, 2004) (rejecting Qwest's reliance on *Indiana Bell*: "Since the matter at hand is in the context of a § 252 proceeding, and in any case this Commission is imposing its interpretation of Federal, not state law, *Indiana Bell* is inapposite.")

Second, Utah law independently vests the Commission with the authority to "supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction." Utah Code Ann. §54-4-1. This enforcement authority encompasses the authority to ensure that Qwest fulfills its statutory duties under Section 271. It is not possible that the Commission's enforcement of Qwest's Section 271 Checklist obligations would substantially prevent the implementation of any provision of the Act. Where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized. *Florida Avocado Growers v. Paul*, 373 U.S. 132 (1963).

Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons—either that the nature

of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *De Canas v. Bica,* 424 U.S. 351, 356 (1976) (quoting *Florida Avocado Growers,* 373 U.S. at 142). The Act hardly evinces an "unmistakable" indication of Congressional intent to preclude state enforcement of federal Section 271 obligations. Far from doing so, the Act expressly preserves a state role in the review of a RBOC's compliance with its Section 271 Checklist obligations and requires the FCC to consult with state commissions in reviewing a RBOC's Section 271 compliance.[5] Thus, the Commission clearly has the authority to enforce Qwest's obligations to provide unbundled access to loops (including high capacity loops, line splitting arrangements, and subloop elements) and dedicated transport under Section 271 Checklist item #4.

Other state commissions have enforced Section 271 unbundling obligations and have denied the RBOCs' attempts to discontinue unbundled offerings as a result of the *Triennial Review Order*.[6] For example, the Maine Public Utilities Commission recently concluded that the FCC had explicitly endorsed the authority of state commissions to enforce Section 271 matters:

> [W]hile noting that Congress had authorized the FCC to enforce section 271 to ensure continued compliance, the *New York 271 Order*[7] specifically endorsed state commission authority to enforce commitments made by Verizon (then Bell Atlantic) to the New York Public Service Commission. The FCC stated:

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[5] *See* 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing RBOC compliance with the Section 271 Checklist).

[6] *See Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market,* Pennsylvania Public Utility Commission Docket No. I-00030100, Reconsideration Order (May 27, 2004) at 4 (upholding a prior order determining that the *Triennial Review Order* relieved Verizon of its Section 251 obligation to provide certain elements, but upholding its determination that access to those elements remained as a result of Verizon's Section 271 long distance entry and state law) (a copy of this decision was submitted with Covad's petition); *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* Me. Comm. Docket No. 2002-682, Order – Part II (Sep. 3, 2004) (*Verizon-Maine Order*).

[7] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, 15 FCC Rcd 3953 (*New York Order*).

> Complaints involving a BOC's [Bell Operating Company] alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, *should be directed to that state commission rather than the FCC*.

(emphasis added). Thus, *the FCC explicitly recognized the authority of state commissions to enforce 271-related commitments* including, but not limited to, performance assurance plans (PAPs).

*Verizon-Maine Order at 6-7* (emphasis added). A copy of the *Verizon-Maine Order* is attached as Exhibit C.

### *3. The Commission may arbitrate Section 271 pricing in the context of a Section 252 arbitration.*

The Commission is not prohibited from arbitrating Section 271 pricing issues in the context of this arbitration. It simply must use the appropriate standard. The FCC made clear in the *Triennial Review Order* that a different pricing standard applies to network elements required to be unbundled under Section 271 as opposed to network elements unbundled under Section 251 of the Act. Specifically, the FCC stated that "the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable, and not unreasonably discriminatory basis—the standards set forth in sections 201 and 202." *Triennial Review Order*, ¶ 656. In other words, according to the FCC, the *legal standard* under which pricing for Section 271 Checklist items should be determined is a different *legal standard* than that applied to price Section 251 UNEs. Thus, "Section 271 requires RBOCs to provide unbundled access to elements not required to be unbundled under Section 251, but does not *require* TELRIC pricing." *Triennial Review Order*, ¶ 659 (emphasis added).

Notably, in the *Triennial Review Order*, the FCC does not forbid the application of such pricing of network elements required to be unbundled under Section 271. Rather, the FCC

merely states that unbundled access to Section 271 Checklist items is not *required* to be priced pursuant to the particular forward-looking cost methodology specified in the FCC's rules implementing Section 252(d)(1) of the Act—namely TELRIC. The FCC states that the appropriate legal standard to determine the correct price of Section 271 Checklist items is found in Sections 201 and 202. However, nowhere does the FCC state that these two different legal standards may not result in the same, or similar, rate-setting methodology. In fact, the FCC itself has allowed the use of forward-looking economic costs to establish the rates for tariffed interstate telecommunications services regulated under Sections 201 and 202 of the Act—services that are *not* subject to the pricing standards in Section 252(d)(1) of the Act. *See, e.g.*, *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962, 12984, ¶ 57 (2000).

Furthermore, the FCC does not preclude the use of forward-looking, long-run incremental cost methodologies *other* than TELRIC to establish the prices for access to Section 271 Checklist items. As the FCC made clear when it adopted the TELRIC pricing methodology in its *Local Competition Order* (as defined below), there are various methodologies for the determination of forward-looking, long-run incremental cost. *In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, ¶ 631 ("*Local Competition Order*"). TELRIC describes only one variant, established by the FCC for setting UNE prices under Section 252(d)(1) of the Act, derived from a family of cost methodologies consistent with forward-looking, long-run incremental cost principles. *See Local Competition Order*, ¶¶ 683-685 (defining "three general approaches" to setting forward-looking costs). Thus, the FCC's *Triennial Review Order* does not

preclude the use of a forward-looking, long-run incremental cost standard *other* than TELRIC in establishing prices consistent with Sections 201 and 202 of the Act.[8]

Since the *USTA II* decision was released, several state commissions have addressed the issue of state authority to review pricing for 271 elements. The Massachusetts Department of Telecommunications and Electricity recently found that it could approve or deny, on the basis of market-based pricing, the prices included in Verizon's wholesale tariff for its Section 271 obligations because those services are jurisdictionally intrastate.[9] On June 21, 2004, the Tennessee Regulatory Authority issued an order which sets a 271 switching rate in the context of a Section 252 arbitration proceeding.[10] And finally, the Maine Public Utilities Commission concluded that it had the authority to require Verizon to file prices for its Section 271 UNEs in its wholesale tariff and that it had the authority to review those prices for compliance with the FCC's "just and reasonable" standard.[11] The Maine Commission stated that "[i]t is also possible that we may order Verizon to unbundle certain elements *pursuant to state law*, in which case we will use state law pricing standards to evaluate Verizon's proposed rates."[12] It is significant to note that the Maine Commission observed:

> [S]tate commissions have authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct. Section 271(c)(2)(A)(ii) requires that ILECs provide access and interconnection which meet the

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[8] For example, where the 271 Checklist item for which rates are being established is not legacy loop plant but next-generation loop plant, incumbents might argue for the use of a forward-looking, long-run incremental cost methodology based on their *current network technologies*—in other words, a non-TELRIC but nonetheless forward-looking, long-run incremental cost methodology. *See, e.g., Local Competition Order,* ¶ 684.

[9] *Proceeding by the DTE on its own Motion to Implement the Requirements of the FCC's TRO Regarding Switching for Large Business Customers Serviced by High-Capacity Loops*, DTE 03-59-A (Jan. 23, 2004), fn. 9.

[10] *In the Matter of Bellsouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04- __ (July 1, 2004) at 1.

[11] *Maine-Verizon Order at 18.*

[12] *Id*. at fn. 31.

> requirements of the 271 competitive checklist, *i.e*., includes the ILEC's 271 unbundling obligations. *Thus, state commissions have the authority to arbitrate section 271 pricing in the context of section 252 arbitrations.*[13]

Qwest argues that "the FCC rejected the argument that the pricing authority granted to state commissions by section 252(c) to set rates for UNEs provided under section 251 gives commissions the authority to set rates for section 271 elements." *Qwest Motion at 21* (citing Brief for the Federal Respondents in Opposition to Petitions for a Writ of Certiorari, *Nat'l Assoc. of Regulatory Utility Commissioners v. United States Telecom Assoc.*, Supreme Court Nos. 04-12, 04-15, and 04-18, at 23). This argument is contrary to the recent conclusions of various state commissions, as set out above, and is solely based on a statement by the FCC in a legal brief that has no precedential or persuasive value. As such, this Commission should ignore it.

### C. QWEST CONTINUES TO HAVE UNBUNDLING OBLIGATIONS UNDER UTAH LAW THAT THE COMMISSION CAN ENFORCE

#### *1. The Commission has independent authority to impose unbundling obligations.*

This Commission has the requisite authority to require access to loops, including high capacity loops, line splitting arrangements, and subloop arrangements, as well as dedicated transport, under independent state law authority. In 1995 the Utah legislature passed H.B. 364, the Telecommunications Reform Act, which was enacted as part of Utah Code Ann. §54-8b. Utah Code Ann. §54-8b-2.2 empowered the Commission to require telecommunications corporations to interconnect their essential facilities in order to enable and promote competition. This state authority predates and is independent of the Federal Act.

In Utah Admin. Rules R746-348-7, the Commission, pursuant to its independent intrastate authority established a list of what it considered to be the minimum essential facilities and services and left open the possibility that more could be added. Three of the fourteen

[13] *Id*. at 19 (emphasis added).

essential facilities and services enumerated in the Rule are: (1) Unbundled local loops including 2-wire, 4-wire, and digital subscriber line ("DSL") facilities; (2) Loop concentration, loop distribution, and loop feeder facilities, and (3) Switching capability including line-side facilities, trunk-side facilities, and tandem facilities.

The Commission also pursued the difficult task of determining prices for unbundled network elements in Docket Nos. 94-999-01 and all of its phases, 00-049-106, and 01-049-85. Not surprisingly, the Commission cited principles from the Federal Act in each of these cases because by 1996 Congress had passed the Act. In that Docket the Commission referred to the Act and used its own state authority to unbundle network elements and set prices. In the June 2, 1999 Phase III C Order in Docket No. 94-999-01, the Commission stated:

> No party disputes and we conclude that under the 1995 State Act and the 1996 Federal Act, we have the authority to decide what costs are relevant, how cost estimates should be calculated, what methods and models are appropriate, and the weight to be accorded to evidence and the factors advocated by the parties.

Covad maintains that the Commission's conclusion is true today and applies to the Commission's independent power to impose unbundling requirements and set prices.

Qwest needlessly argues that the Commission does not have the ability to make the impairment determinations required by Section 251(d)(2) of the Act to impose unbundling requirements because the "the FCC has not sufficiently defined the impairment standard to allow such determinations." *Qwest Motion at 14-16*. Whether that is true or not, Covad is not presently asking the Commission to make impairment determinations; rather, Covad simply is asking the Commission to include language in the parties' interconnection agreement that will require Qwest to comply with Commission impairment determinations, should those determinations occur in the future. As such, Qwest's argument is irrelevant.

### *2. The Commission's authority to impose unbundling obligations is not preempted by federal law.*

The Commission's independent state law authority to impose unbundling obligations is not preempted by the FCC's *Triennial Review Order*. Nowhere does Section 251 of the Act evince a general Congressional intent to preempt state laws or regulations providing for competitor access to unbundled network elements or interconnection with the ILEC. In fact, as recognized by the FCC in its *Triennial Review Order*, several provisions of the Act expressly indicate Congress' intent *not* to preempt such state regulation and forbid the FCC from engaging in such preemption:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.

*Triennial Review Order,* ¶ 191.

As the FCC further acknowledges in the *Triennial Review Order*, Congress expressly declined to preempt states in the field of telecommunications regulation:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.

*Triennial Review Order,* ¶ 192.

In fact, the FCC only identified a narrow set of circumstances under which federal law would act to preempt state laws and rules providing for competitor access to ILEC facilities:

> 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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> * * *
>
> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.

*Triennial Review Order*, ¶¶ 192, 194.

Notably, in reaching these conclusions, the FCC was simply restating existing, well-known precedents governing the law of preemption. Specifically, the long-standing doctrine of federal conflict preemption provides for exactly the limited sort of federal preemption acknowledged by the FCC's *Triennial Review Order*. Courts have long held that state laws are preempted to the extent that they actually conflict with federal law. As noted by the FCC's *Triennial Review Order*, such conflict exists where compliance with state law "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Triennial Review Order*, ¶ 192 n. 613 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Even more notably, in its *Triennial Review Order*, the FCC did not act to preempt any existing state law or regulation inconsistent with the FCC's rules, nor did it act to preclude the adoption of future state laws or regulations governing the access of competitors to ILEC facilities which are inconsistent with the FCC's rules. In fact, following the governing law set out in the Eighth Circuit's *Iowa Utilities Board I* decision, the FCC specifically recognized that state laws or regulations which are inconsistent with the FCC's unbundling rules are not, *ipso facto*, preempted:

> That portion of the Eighth Circuit's opinion reinforces the language of [Section 251(d)(3)], *i.e.*, that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).

*Triennial Review Order*, ¶ 192 n. 611 (citing *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 806 (1997)).

In so doing, the FCC made clear that it was acting in conformance with the governing law set out in the *Iowa Utilities Board I* decision:

> We believe our decision properly balances the broad authority granted to the Commission by the 1996 Act with the role preserved for the states in section 251(d)(3) and is fully consistent with the Eighth Circuit's interpretation of that provision.

*Id.*

Thus, far from taking any specific action to preempt any state law or regulation governing competitor access to incumbent facilities, the FCC merely acted in the *Triennial Review Order* to restate the already-existing bounds on state action recognized under existing doctrines of conflict preemption. Furthermore, the FCC's *Triennial Review Order* recognized that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules would be insufficient to create such a conflict. Instead, consistent with existing doctrines of conflict preemption, the FCC recognized that the state laws would have to "substantially prevent implementation" of Section 251 in order to create conflict preemption.

Of course, the FCC's *Triennial Review Order* could not have concluded that all state rules unbundling network elements not required to be unbundled nationally by the FCC create conflict preemption. Had the FCC reached such a conclusion, the FCC would have rendered Section 251(d)(3)'s savings provisions a nullity, never operating to preserve any meaningful state law authority in any circumstance. Rather than reaching such a conclusion, the FCC

created a process for parties to determine whether a "particular state unbundling obligation" requiring the unbundling of network elements not unbundled nationally by FCC rules creates a conflict with federal law. The *Triennial Review Order* invited parties to seek declaratory rulings from the FCC regarding individual state obligations. An invitation to seek declaratory ruling, however, hardly amounts to preemption in itself—it merely creates a process for interested parties to establish *in future proceedings before the FCC* whether or not a particular state rule conflicts with federal law.

The FCC did give interested parties some indication of how it might rule on such petitions. Specifically, the FCC stated that it was "*unlikely*" that the FCC would refrain from finding conflict preemption where *future* state rules required "unbundling of network elements for which the Commission has either found no impairment … or otherwise declined to require unbundling on a national basis." *Triennial Review Order*, ¶ 195. The FCC's statement, however, that such future rules were merely "*unlikely*" – as opposed to simply unable – to withstand conflict preemption leads to the inevitable conclusion that there are some circumstances in which the FCC would find that such future rules were not preempted. Moreover, with respect to state rules in existence at the time of the *Triennial Review Order*, the FCC's indications that it might find conflict preemption are even more muted. Specifically, the FCC merely stated that "in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation." *Triennial Review Order*, ¶ 195 (emphasis added).

Thus, while the FCC's *Triennial Review Order* indicates that under some circumstances the FCC would find conflict preemption for state rules requiring the unbundling of network elements not unbundled nationally under federal law, the decision also indicates that in some

circumstances the FCC would decline to find that such state rules substantially prevent implementation of Section 251.[14] In fact, the FCC's decision gives some direction on the circumstances that would lead the FCC to decline a finding of conflict preemption for state rules unbundling network elements the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that "the availability of certain network elements may vary between geographic regions." *Triennial Review Order*, ¶ 196. Indeed, according to the FCC, such a granular "approach is required under *USTA*." *Triennial Review Order*, ¶ 196 (citing *United States Telecom Association v. FCC*, 290 F.3d 415, 427 (2002)). Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements not required to be unbundled nationally are permissible in that state and would not substantially prevent the implementation of Section 251.

In addition, state determinations requiring the unbundling of elements also subject to the unbundling requirements of Section 271 of the Act, such as switching, dedicated transport, and loops, could not, as a matter of law, be subject to preemption analysis. The inclusion of these requirements in the Act clearly indicates that, far from frustrating the implementation of the Act, these unbundling requirements are critical components of the Act.

While Covad believes preemption of Utah law empowering the Commission to unbundle network elements is unlikely, it is also irrelevant. This Commission should exercise its authority as it is delineated by Utah statute, irrespective of preemption analysis, as the adjudication of the constitutionality of legislative enactments is generally beyond the jurisdiction of administrative

[14] Notably, the FCC's statements indicating when it is “likely” to find preemption for particular state rules appear to conflict with a recent Sixth Circuit decision. The Sixth Circuit has stated that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." The court further noted that a state commission is permitted to "enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement" entered into pursuant to Section 252 of the Act, "as long as the regulations do not interfere with the ability of new entrants to obtain services." *See Michigan Bell v. MCIMetro*, 2003 WL 909978, at 9 (6th Cir. 2003).

agencies. *Johnson, Administrator of Veterans' Affairs, et. al. v. Robison,* 415 U.S. 361, 368 (1974).

Consistent with the discussion above, Covad has proposed language maintaining access to network elements that may, in the future, no longer be available pursuant to Section 251 of the Act, but must nevertheless remain available pursuant to Section 271 of the Act and Utah law.

### *3. The Commission's authority to impose unbundling obligations is not prohibited by the* **Interim Rules.**

Qwest claims that the FCC's *Interim Rules* prohibit the Commission from adopting Covad's unbundling language in the parties' ICA, because those rules require Qwest "to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under [Qwest's] interconnection agreements as of June 15, 2004." *Qwest Motion at 23-24* (quoting *Interim Rules and Unbundling NPRM* at ¶ 1).

Qwest also urges that the Commission reject "Covad's aggressive unbundling demands while the FCC formulates final unbundling rules"[15] and that the likelihood of impermissible conflicts between Covad's unbundling proposals and FCC's impairment determinations have risen substantially as a result of the Interim Rules, therefore making any Commission finding on Covad's proposed language regarding unbundled elements contrary to federal law. *Qwest Motion at 12*.

Qwest also argues that the Interim Rules create an increased likelihood of impermissible conflicts between Covad's unbundling proposals and FCC's impairment determinations and,

[15] The FCC has expressed its intent to draft permanent unbundling rules "on an expedited basis," perhaps by the end of the year. *Interim Rules* at ¶2.

therefore, any Commission finding on Covad's proposed language regarding unbundled elements will be contrary to federal law. *Qwest Motion at 13*.

Covad emphatically disagrees. In short, it is Covad's position that the Interim Rules do not affect Covad's Petition for Arbitration whatsoever for the following three reasons: (1) the Interim Rules pertain only to those Section 251 UNEs that are not in dispute between Qwest and Covad in this Docket (switching, enterprise market loops, and dedicated transport); (2) even if those elements were in dispute in this Docket, Covad argues that it would not be necessary to provide a list of products no longer available under Section 251 because many of them are nevertheless available under Section 271 or state law[16]; and (3) it is premature to decide any matter based on the Interim Rules, as they are, by definition, interim in nature.[17] Moreover, as explained in detail above, the Commission has authority to require unbundling of UNEs pursuant to Section 271 and Utah law, and that authority is not affected by the Interim Rules.

### D. QWEST SHOULD BE REQUIRED TO FOLLOW THE FCC's DIRECTIVES REGARDING THE COMMINGLING OF FACILITIES ESTABLISHED IN THE TRIENNIAL REVIEW ORDER

As it has in proceedings before other state commissions, Qwest argues that this Commission should dismiss that part of Issue [3 (mistakenly referred to as Issue 4)] which would 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 271."

[16] To the extent any elements are truly no longer available (such as E-UDIT), their absence from the Proposed ICA should be sufficient to demonstrate that Qwest is not obligated to provide them. In addition, Covad maintains that Qwest continues to have obligations to provide network elements on an unbundled basis pursuant to Section 271 and Utah law. To label these elements as something other than "unbundled network elements" creates confusion and is semantically illogical. Further, there is no justification for excluding non-251 UNEs from negotiations. To do otherwise would require the Commission to create an entirely new regime to review agreements reached with respect to state unbundling obligations, if not Section 271.

[17] As Qwest notes in its Motion, Qwest, along with Verizon and the United States Telecom Association, considers the Interim Rules to be unlawful and has filed a writ of mandamus on that basis with the D.C. Circuit.

*Qwest Motion at 1-2*. This argument was addressed and rejected by the Public Utilities Commission of the State of Colorado. *See In the Matter of Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Company pursuant to 47 U.S.C. § 252(b),* Colo. Comm. Docket No. 04B-160T, Decision No. C04-1037 (Aug. 19, 2004). The reasoning of that commission is instructive:

> 177. Qwest's primary contention here is that the TRO prohibits commingling of § 251(c)(3) UNEs with § 271 network elements. We observe, however, that little in the TRO itself supports this position . . . .
>
> 178. Qwest cites the language in the TRO where the FCC stated: "We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251."[] This statement means that Qwest, under the TRO, need not combine (or commingle) the network elements which are no longer subject to unbundling under § 251(c)(3); the parties referred to these as "delisted UNEs." In fact, Covad recognizes this limitation. As noted above, the parties agree that commingling must involve UNEs that *continue to be available under § 251(c)(3).* That is, Covad is not requesting commingling of delisted UNEs with § 271 network elements. Qwest argues here for the expansive proposition that it need not commingle any § 251(c)(3) UNE with any § 271 network elements. However, the cited language (from the TRO), that the BOCs need not combine delisted UNEs, is a substantially narrower principle. As noted above, Covad's advocacy here recognizes the TRO's narrow ruling regarding those network elements (*i.e.* delisted UNEs) that need not be combined (or commingled) with § 271 elements.[]
>
> 179. Qwest's other arguments regarding its § 271 obligations are misplaced. Qwest contends that (1) neither § 271, nor FCC rules, establish an obligation to combine or commingle UNEs, and (2) state commissions are not empowered to impose new obligations on the BOCs under § 271, inasmuch as only the FCC is authorized to establish binding obligations under the statute. In response, we note that our decision here is based upon the FCC's ruling in the TRO which, as stated above, require ILECs to commingle § 251(c)(3) UNEs with wholesale services. Our ruling does not establish new, independent obligations for Qwest in reliance upon § 271, but merely implements the FCC's directives in the TRO.[]

(Footnotes omitted.)

Covad's proposed language is premised on a few simple concepts embodied in the *Triennial Review Order*. First, UNEs are available for the provision of a qualifying service. *See*

*Triennial Review Order,* ¶ 135. Second, CLECs may only order combinations of two or more UNEs available under Section 251(c)(3), and ILECs, even RBOCs such as Qwest, have no obligation to combine other services, even elements provided under Section 271. *See Triennial Review Order,* ¶ 655, fn. 1990. Third, CLECs may *commingle* UNEs obtained pursuant to Section 251(c)(3) of the Act and combinations of such UNEs with services obtained at wholesale pursuant to any method of access other than Section 251(c)(3) of the Act, and ILECs must perform the functions necessary to commingle these services upon request. *See Triennial Review Order*, ¶ 579. Fourth, ILECs are not required to bill for circuits aggregating UNE and non-UNE circuits at blended rates ("ratcheting"). Fifth, additional service eligibility criteria apply to the availability of UNE combinations of high-capacity loops and transport ("Enhanced Extended Loops," or "EELs"). Covad's proposals embody these five simple concepts, and nothing more.

Qwest has proposed alternate language that does not differentiate between UNEs available pursuant to Section 251(c)(3) and UNEs available pursuant to other statutory unbundling methods, such as Section 271. The premise of Qwest's position is that the only UNEs available under the Parties' Agreement are those made available pursuant to Section 251(c)(3), and no differentiation between classes of UNEs is required.

Covad believes its proposed language represents a faithful implementation of the FCC's new commingling and ratcheting rules, as well as the FCC's clarifications of the limits to an ILECs' obligations to combine services obtained by some method other than Section 251(c)(3) of the Act.

## CONCLUSION

For the foregoing reasons, the Commission should deny Qwest’s Motion to Dismiss Issue 2 of Covad’s petition and the portion of Issue 4 relating to commingling.

Respectfully submitted this 4th day of October, 2004.

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Stephen F. Mecham
Karen Shoresman Frame

For DIECA Communications, Inc., dba Covad Communications Company

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of 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 was mailed by U.S. Mail, postage prepaid, and electronically mailed this 4th day of October, 2004 to the following:

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