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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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

Case No. CVD-T-05-01

**QWEST CORPORATION'S INITIAL
BRIEF**

I. INTRODUCTION

Qwest Corporation ("Qwest") submits this initial brief on the merits in this interconnection arbitration between Qwest and Covad Communications Company ("Covad") under the Telecommunications Act of 1996 (the "Act").

This arbitration demonstrates that the negotiation/arbitration process set forth in Sections 251 and 252 can work fairly and efficiently. Through their good faith negotiations, Qwest and Covad were able to agree upon almost all of the contractual provisions in the multi-hundred page interconnection agreement (“ICA”) that is the subject of this arbitration. As a result, the parties have submitted only one disputed issue to the Idaho Public Utilities Commission (“Commission”) for resolution.

While Qwest appreciates Covad’s good faith conduct in the negotiations, the one unresolved issue is attributable to Covad’s attempt to impose network unbundling obligations on Qwest that conflict with rulings by the FCC and that are inconsistent with the Act. Covad’s proposed ICA language regarding the definition of unbundled network elements (“UNEs”) would require Qwest to provide almost unlimited access to the elements in Qwest’s Idaho telecommunications network. This proposal ignores the FCC’s findings in the *Triennial Review Order*¹ (“TRO”) and the *Triennial Review Remand Order*² (“TRRO”) that CLECs are not impaired without access to many network elements and that ILECs are therefore not required to unbundle them. As the FCC described in the *TRRO*, the FCC’s new, “more targeted” unbundling standard “imposes unbundling obligations only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *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*, CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36 (FCC rel. Aug. 21, 2003) (“*Triennial Review Order*” or “*TRO*”), *vacated in part, remanded in part, U.S. Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

² Order on Remand, *In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313 (FCC rel. February 4, 2005) (“*Triennial Review Remand Order*”).

not frustrate sustainable, facilities-based competition.”³ The almost limitless unbundling that Covad proposes ignores this standard entirely.

Covad’s broad unbundling demands also violate the rulings of the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit in which those courts struck down FCC unbundling requirements while confirming in the most forceful terms that the Act imposes real and substantial limitations on ILEC unbundling obligations. In addition, Covad’s proposed unbundling language assumes incorrectly that state commissions have authority to require Bell Operating Companies (“BOCs”) to provide network elements pursuant to Section 271, to determine pricing for those elements, and to include them in Section 252 ICAs.

The flawed nature of Covad’s arguments is confirmed by the recent decisions in the Covad/Qwest arbitrations in Minnesota, Washington, and Utah. Each of these commissions has rejected Covad’s position and proposed ICA language.⁴ The consistency among these decision-makers is not a coincidence – Covad’s proposal is without legal support. The infirmities of Covad’s arguments are further demonstrated by Covad’s willingness to voluntarily accept

³ *Id.* ¶ 2.

⁴ See *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*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Arbitrator’s Report (Minn. Commission Dec. 15, 2004) (“Minnesota ALJ Order”) *aff’d in part In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No P-5692, 421/IC-04-549, Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement (Minn. Commission March 14, 2005) (“Minnesota Arbitration Order”); *In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation*, Washington Commission Docket No. UT-043045, Order No. 06, Final Order Affirming in Part, Arbitrator’s Report and Decision; Granting, In Part, Covad’s Petition for Review; Requiring Filing of Conforming Interconnection Agreement (Wash. Commission Feb. 9, 2005) (“Washington Arbitration Order”); *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*, Utah Commission Docket No. 04-2277-02, Arbitration Report and Order (Utah Commission Feb. 8, 2005) (“Utah Arbitration Order”).

Qwest's language in the Colorado Covad/Qwest arbitration. In that proceeding, Covad elected to not raise the unbundling issue it now disputes here.

In contrast to Covad's demands, Qwest's ICA proposal is specifically based upon the FCC's rulings in the *TRO* and other governing law. To ensure that the ICA complies with governing law and the policies underlying the Act, the Commission should adopt Qwest's proposed ICA language for the disputed issue.

II. ARGUMENT

Issue 1: Section 4 Definition of "Unbundled Network Element" and Sections 9.1.1; 9.1.1.6; 9.1.1.7; 9.1.1.8; 9.1.5; 9.2.1.3; 9.2.1.4; 9.3.1.1; 9.3.1.2; 9.3.2.2; 9.3.2.2.1; 9.6; 9.6.1.5.1 (and related 9.6.1.5); 9.6.1.6.1 (and related 9.6.1.6); and 9.21.2.

The Act requires ILECs to provide 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 access to provide the services that it seeks to offer."⁵ 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*⁶ and the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating three of the FCC's attempts at establishing lawful unbundling rules.⁷

The disputed issue arises because of Covad's insistence upon ICA language that would require Qwest to provide almost unlimited access to network elements in violation of the

⁵ 47 U.S.C. § 251(d)(2).

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

⁷ *USTA II, supra*; *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427-28 (D.C. Cir. 2002) ("*USTA I*").

unbundling limitations established by these decisions, the Act, the *TRO*, and the *TRRO*. Covad's clear objective is to obtain access to all elements of Qwest's network that Covad may desire at the lowest rates possible. Not surprisingly, the commissions in Minnesota, Utah, and Washington have rejected Covad's unbundling language, finding that it is plainly unlawful.⁸

Each of these commissions determined correctly that it would be improper to include in a Section 251/252 ICA terms and conditions relating to network elements that Qwest provides under Section 271, as Covad proposes. As the Washington Commission stated:

[T]his Commission has no authority under Section 251 or Section 271 of the Act to require Qwest to include Section 271 elements in an interconnection agreement. . . [and] any unbundling requirement based on state law would likely be preempted as inconsistent with federal law, regardless of the method the state used to require the element.⁹

Likewise, the Utah Commission held:

[W]e differ with Covad in its belief that we should therefore impose Section 271 and state law requirements in the context of a Section 252 arbitration. Section 252 was clearly intended to provide mechanisms for the parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law.¹⁰

Consistent with this statement, in a decision adopted by the Minnesota Commission, the Minnesota ALJ ruled that "there is no legal authority in the Act, the *TRO*, or in state law that would require the inclusion of section 271 terms in the interconnection agreement, over Qwest's

⁸ Because Covad accepted Qwest's language relating to unbundled network elements in the Colorado arbitration, the Colorado Commission did not address Covad's proposed unbundling language.

⁹ Washington Arbitration Order ¶ 37.

¹⁰ Utah Arbitration Order at 19-20.

objection.”¹¹ She explained further that “both the Act and the *TRO* make it clear that state commissions are charged with the arbitration of Section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to Section 271.”¹²

These rulings, which address the same Covad unbundling language at issue here, confirm the unlawfulness of Covad’s proposals. As is discussed further below, neither the Act nor the *TRO* permits including Section 271 unbundling obligations in a Section 251/252 ICA. Further, just as it failed to do in the prior arbitrations, Covad is not providing any evidence of impairment in this case to support its demands for unbundling under state law. There is thus no factual foundation for the impairment analysis that is required under Section 251 and therefore no basis for imposing unbundling obligations under state law.

Accordingly, for the reasons articulated by the other commissions that have considered this same issue, the Commission should resolve this issue in Qwest’s favor and reject Covad’s unbundling language.

A. Summary of Qwest’s And Covad’s Conflicting Unbundling Proposals.

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

¹¹ Minnesota ALJ Order ¶ 46; Minnesota Arbitration Order at 5.

¹² Minnesota ALJ Order ¶ 46. In an arbitration pending in another state, Covad recently asserted that Qwest has mischaracterized the Minnesota ALJ decision, and that the Minnesota ALJ rejected both Covad’s and Qwest’s language relating to the issue of ICA language for network unbundling. However, it is Covad’s description of the decision, not Qwest that is inaccurate. While the Minnesota ALJ specifically rejected all of Covad’s proposed language relating to this issue, she accepted Qwest’s definition of “UNE” and eight other unbundling provisions that Qwest proposed. Minnesota ALJ Order at ¶ 47. Covad’s statement that the ALJ rejected all of Qwest’s language is thus entirely inaccurate.

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

Qwest's language also incorporates the unbundling limitations established by the Act, the courts, and the FCC by listing specific network elements that, per court and FCC rulings, ILECs are not required to unbundled under Section 251. For example, Qwest's proposed Section 9.1.1.6 lists 18 network elements that the FCC specifically found in the *TRO* do not meet the "impairment" standard and do not have to be unbundled under Section 251.

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

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.¹³

In addition to these demands, in its proposed Section 9.1.1.7, Covad is seeking TELRIC ("total element long run incremental cost") pricing for the network elements it claims Qwest must provide under Section 271.¹⁴ While its proposed language suggests that Covad is seeking TELRIC pricing only on a temporary basis, Covad's filings in this proceeding and in other states

¹³ 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).

¹⁴ In its Petition for Arbitration, Covad advocates the use of the TSLRIC methodology which, like TELRIC, is a forward-looking costing methodology. Covad's Petition for Arbitration at 8-9. For all practicable purposes, however, the TSLRIC methodology, as Covad apparently would apply it, would be almost indistinguishable from TELRIC. To be consistent with its advocacy in Covad arbitrations in other states, Qwest will continue to reference the TELRIC methodology.

reveal that Covad is actually requesting that the permanent prices to be set under Sections 201 and 202 for Section 271 elements be based on TELRIC.¹⁵

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

Under Section 251, 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 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

¹⁵ See Covad’s Petition for Arbitration at 8-9 (advocating the use of “forward-looking, long-run incremental cost methodologies” for Section 271 elements and arguing that the FCC does not “forbid” TELRIC pricing for these elements).

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*

[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’ requirements.”²¹ And the D.C. Circuit confirmed 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.

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, 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.

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

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).

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

²² *See USTA II*, 359 F.3d at 568.

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).²³

Federal courts interpreting the Act have reached the same conclusion.²⁴ Indeed, in a recent decision, the United States District Court of Michigan observed that in *USTA II*, the D.C. Circuit “rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations.”²⁵ The court emphasized that while the Act permits states to adopt some “procompetition requirements,” they cannot adopt any requirements that are inconsistent with the statute and FCC regulations. Specifically, the court held, a state commission “cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law.”²⁶

Consistent with these rulings, in an order issued just a few weeks ago, the FCC ruled that state commissions are generally without authority to require ILECs to unbundle network elements that the FCC has declined to require ILECs to unbundle.²⁷ In its *BellSouth Declaratory Order*, the FCC addressed orders from four different state commissions that required BellSouth to provide DSL service over unbundled loops that CLECs were using to provide voice service.²⁸ This requirement, the FCC determined, effectively obligated BellSouth to unbundle the low

²³ *TRO* ¶¶ 193, 195.

²⁴ *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).

²⁵ *Michigan Bell Tel. Co. v. Lark*, Case no. 04-60128, slip op. at 13 (E.D. Mich. Jan. 6, 2005).

²⁶ *Id.*

²⁷ Memorandum Opinion and Order and Notice of Inquiry, *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, FCC 05-78 ¶¶ 25-30 (FCC rel. March 25, 2005) (“*BellSouth Declaratory Order*”).

²⁸ *Id.* ¶¶ 9-15.

frequency portion of the loop (“LFPL”) which the FCC had specifically refused to require ILECs to unbundle in the *Triennial Review Order*.²⁹

In striking down the orders, the FCC emphasized the preeminence of its regulations under the Act over state laws and regulations: “except in limited cases, the [FCC’s] prerogatives with regard to local competition supersede state jurisdiction over these matters.”³⁰ State authority is preserved under the Act, the FCC stated, only to the extent state regulations are not inconsistent with the requirements of Section 251 and do not “substantially prevent implementation of the requirements of section 251 or the purposes of sections 251 through 261 of the Act.”³¹ Because it had refused to require ILECs to unbundle the LFPL in the *TRO*, the FCC held that the four state orders requiring such unbundling “directly conflict and are inconsistent with the Commission’s Rules and Policies implementing section 251.”³² It explained further that “[s]tate requirements that impose on BellSouth a requirement to unbundle the LFPL do exactly what the Commission expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B).”³³

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. What Covad ignores and what the FCC has reaffirmed in its *BellSouth Declaratory Order* is that the Act’s savings clauses preserve independent state authority *only to the extent that the exercise of that authority is consistent with the Act*, including Section 251(d)(2)’s substantive limitations

²⁹ *Id.* ¶¶ 25-26.

³⁰ *Id.* ¶ 22.

³¹ *Id.* ¶ 23.

³² *Id.* ¶ 26.

³³ *Id.* ¶ 27.

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 251.³⁴

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 federal law.”³⁵ Congress has mandated the application of limiting principles in the determination of unbundling requirements that reflect a balance of “the competing values at stake.”³⁶ 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.

The limitations on state unbundling authority were recently recognized by the Oregon Commission in response to substantially the same arguments that Covad is presenting here. As that commission correctly concluded, a state commission “may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been eliminated by the *TRO* or *USTA*

³⁴ See 47 U.S.C. § 251(d)(2).

³⁵ *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000).

³⁶ *Id.* See also *Iowa Utils. Bd.*, 535 U.S. at 388.

II.”³⁷ Yet, that is precisely what Covad is requesting this Commission to do through its proposed unbundling language. As the Oregon Commission concluded, any unbundling a state commission requires must be based upon a fact-specific impairment analysis required by Section 251(d). Here, Covad is requesting that the Commission require blanket unbundling without an impairment analysis and without providing any evidence that it would be impaired without the multitude of network elements it is seeking.³⁸

Moreover, contrary to Covad’s assertion, Idaho law does not provide the Commission with independent authority to order the unbundling of network elements. In its arbitration petition, Covad cites Idaho Code §§ 61-513, 61-514 and asserts that “the Idaho Code contains specific requirements that public utilities provide for the joint use of their plant and equipment, and allow physical connections with other telephone corporations.”³⁹ The sections cited by Covad, however, do not bestow on the Commission plenary power to order unbundling. Section 61-513 allows the Commission to order telephone companies to make physical connections between their lines. This provision only addresses the issue of “connection.” It does not authorize the Commission to order one telephone company to lease its network elements to another telephone company. Similarly, Section 61-514 requires telephone companies to allow

³⁷ *In the Matter of the Investigation to Determine Whether Impairment Exists in Particular Markets if Local Circuit Switching is no longer available*, Oregon Docket UM-1100, Order Denying CLEC Motion at 6 (Oregon P.U.C. June 11, 2004). The Oregon Commission adopted the order issued by an Oregon administrative law judge.

³⁸ The clash between Covad’s state law unbundling demands and the federal unbundling scheme is demonstrated sharply by Covad’s language in section 9.3.1.1 that would require Qwest to unbundle feeder subloops. In the *TRO*, the FCC refused to give CLECs unbundled access to this network element, finding that such access would undermine the objective of Section 706 of the Act “to spur deployment of advanced telecommunications capability” *TRO* ¶ 253. A state-imposed requirement to unbundle feeder subloops would plainly conflict with this FCC determination and would undermine the FCC’s attempt to achieve a fundamental objective of the Act – promoting investment in advanced telecommunications facilities. This conflict would of course not be limited to feeder subloops, since Covad contends that its unbundling language reaches other network elements for which the FCC specifically rejected CLEC unbundling requests.

³⁹ Petition at 10.

other public utilities to use their “conduits, subways, tracks, wires, poles, pipes or other equipment, or any part thereof, on, over or under any street or highway.” This provision certainly does not constitute broad authority to order the unbundling of network elements and is more limited than Covad implies. Furthermore, Covad’s reliance on Idaho Code Section 62-602, which expresses the Idaho legislature’s desire to encourage the development of open competition in the telecommunications industry, is misplaced. This provision is the legislature’s findings and does not constitute a statutory grant of power. Accordingly, Idaho law does authorize the Commission, independent of the federal Act, to order the unbundling of network elements.

Finally, 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. With no identification of these elements, it is of course impossible to conduct the element-specific impairment analysis required under Section 251. 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.”

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.

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

Covad's unbundling proposals also assume incorrectly that state commissions have authority to impose binding unbundling obligations under Section 271. 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.⁴⁰ State commissions have only a non-substantive, "consulting" role in that determination.⁴¹ 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.⁴²

Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271,⁴³ likewise provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.⁴⁴ The FCC has thus confirmed that "[w]hether a particular [Section 271] checklist element's rate

⁴⁰ 47 U.S.C. 271(d)(3).

⁴¹ 47 U.S.C. 271(d)(2)(B).

⁴² *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).

⁴³ TRO ¶¶ 656, 662.

⁴⁴ *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).

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)."⁴⁵

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.⁴⁶ *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.⁴⁷

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)]."⁴⁸

⁴⁵ TRO ¶ 664.

⁴⁶ *USTA II*, 359 F.3d at 565-68.

⁴⁷ 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 ¶¶ 186-87 ("states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations").

⁴⁸ 47 U.S.C. 251(c)(1).

(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*.”⁴⁹

(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)].”⁵⁰

(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).⁵¹

(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].”⁵²

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.

D. 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

⁴⁹ 47 U.S.C. 252(a)(emphasis added).

⁵⁰ See 47 U.S.C. 252(b)(1).

⁵¹ See 47 U.S.C. 252(e)(2)(b).

⁵² 47 U.S.C. 252(e)(6).

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.⁵³

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 in connection with *USTA II*, the FCC addressed the 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,”⁵⁴ 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).

⁵³ See Covad’s Petition for Arbitration at 8-9.

⁵⁴ 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).

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).⁵⁵

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).”⁵⁶

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. 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 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.⁵⁷ 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.⁵⁸ 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.”⁵⁹

⁵⁵ *Id.* (emphasis in original).

⁵⁶ *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.*

⁵⁷ *TRO* ¶¶ 656-64.

⁵⁸ *Id.*

⁵⁹ *USTA II*, 359 F.3d at 589; *see generally Id.* at 588-90.

III. CONCLUSION

For the reasons stated above, Qwest urges the Commission to enter an order adopting Qwest's proposed language for the interconnection agreement between Qwest and Covad.

Respectfully submitted this 27th day of April, 2005.



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2005, I served the foregoing **QWEST CORPORATION'S INITIAL BRIEF** upon all parties of record in this matter as follows:

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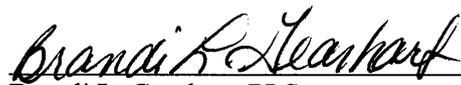
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