

Mary S. Hobson (ISB No. 2142)  
STOEL RIVES LLP  
101 South Capitol Blvd., Suite 1900  
Boise, Idaho 83702  
Telephone: (208) 389-9000  
Facsimile: (208) 389-9040  
[mshobson@stoel.com](mailto:mshobson@stoel.com)

RECEIVED  
FILED  
2005 MAY 18 PM 3:50  
IDAHO PUBLIC  
UTILITIES COMMISSION

Adam L. Sherr  
QWEST CORPORATION  
1600 Seventh Avenue, Room 3206  
Seattle, Washington 98191  
Telephone: (206) 398-2507  
Facsimile: (206) 343-4040

John M. Devaney  
PERKINS COIE LLP  
607 Fourteenth St., N.W., Suite 800  
Washington, D.C. 20005  
Telephone: (202) 628-6600  
Facsimile: (202) 434-1690  
[jdevaney@perkinscoie.com](mailto:jdevaney@perkinscoie.com)

*Attorneys for Qwest Corporation*

**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 REPLY  
BRIEF ON THE MERITS**

Qwest Corporation ("Qwest") submits this reply brief in support of its positions in this interconnection arbitration under the Telecommunications Act of 1996 ("the Act") between Qwest and Covad Communications Company ("Covad").

**INTRODUCTION**

Qwest and Covad have been able to resolve most of their disputes through cooperative, good faith negotiations, leaving only one disputed issues that the Commission must decide in this

arbitration. As Qwest stated in its initial brief, the parties' inability to resolve this remaining issue is largely attributable to Covad's adherence to overly aggressive demands that are without legal support. Covad continues this approach in its opening brief.

The absence of legal support for Covad's arguments is demonstrated by Covad's willingness to voluntarily accept Qwest's language in the Colorado Covad/Qwest arbitration and the recent decisions in the Covad/Qwest arbitrations in Minnesota, Washington and Utah.<sup>1</sup> The commissions and administrative law judges in those states have uniformly ruled for Qwest on the single issue in this arbitration, finding that Covad's position lacks legal and evidentiary support. There is thus now a substantial body of determinations and recommendations by neutral decision-makers relating to the disputed issue that the Commission must decide in this proceeding. These decisions and recommendations demonstrate forcefully the significant flaws in Covad's proposal. In the discussion that follows, Qwest further demonstrates these flaws and explains why the Commission should adopt Qwest's proposal.

Before turning to the merits of Qwest's response to Covad's opening brief, it is important to emphasize that Qwest provides competitive local exchange carriers ("CLECs"), including Covad, with access to network elements through means other than Section 251 interconnection

---

<sup>1</sup> 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 ¶¶ 46-50 (Minn. PUC Dec. 16, 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), Minnesota Commission Docket No. P-5692, 421/IC-04-549, Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement at 5 (Minn. PUC 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 ¶ 37 (Wash. UTC 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 at 19-21 (Utah Commission Feb. 8, 2005) ("Utah Arbitration Order").

agreements ("ICAs"). For example, under commercial agreements that Qwest and Covad have entered into throughout Qwest's region, Covad continues to have access to line sharing despite the FCC's ruling that "de-listed" line sharing as a Section 251 unbundled network element ("UNE"). Similarly, pursuant to multi-state commercial agreements between the parties involving a product known as "Qwest Platform Plus," Covad still has access to switching and shared transport, neither of which incumbent local exchange carriers ("ILECs") are required to provide as UNEs under Section 251.<sup>2</sup> Under these agreements, Qwest provides access to network elements and services based on commercially negotiated terms and rates, not based on the pricing and other terms that the Act mandates for UNEs.

In addition, Qwest provides CLECs with access to many of its network elements, including loops and dedicated transport, through Qwest's FCC1 Access Service Tariff. For example, Section 6 of Qwest's tariff provides CLECs with general Switched Access Service, which includes loops and is defined as "a two-point electrical communications path between a customer's premises and an end user's premises . . . ." Section 6.1.2.A specifically addresses Switched Transport and allows CLECs to obtain "transmission facilities between the customer's premises and the end office switch(es) where the customer's traffic is switched to originate or terminate its communications." Under Switched Transport, CLECs also may purchase Direct Trunk Transport, which is a transmission path on circuits dedicated to the use of a single customer. FCC1 Access Service Tariff § 6.1.2.A.1(b). Thus, network elements Covad seeks are available through Qwest's tariffs in addition to commercial agreements.

---

<sup>2</sup> As Qwest has entered into these commercial agreements with CLECs in Idaho, it has submitted the agreements to this Commission for informational purposes.

Accordingly, a ruling by this Commission that the ICA between Qwest and Covad should only include access to UNEs that Qwest is required to provide under Section 251 – as the Minnesota, Utah, and Washington commission have ruled – does not mean that Covad will be without access to any non-251 network elements and services. Consistent with the Act's fundamental objective of transitioning the telecommunications industry away from a regime of extensive regulation and toward a more market-driven, deregulatory structure,<sup>3</sup> Covad will still have access to multiple non-251 elements through commercially negotiated agreements and tariffs.

### 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.**

As Qwest demonstrated in its opening brief, the Act's "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*<sup>4</sup> and the D.C. Circuit's decisions in *USTA I*<sup>5</sup> and *USTA II*<sup>6</sup> invalidating three of the FCC's attempts at establishing lawful unbundling rules. In this case, the unbundling obligations that Covad would have the Commission impose on Qwest ignore entirely these critical limitations and are based on the legally flawed assumption that a state commission may require unbundling under state law that the FCC has expressly rejected. As shown by its opening brief, Covad does not recognize the

---

<sup>3</sup> 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*, 18 FCC Rcd 16978, ¶ 62, n.198 (2003) ("Triennial Review Order" or "TRO")

<sup>4</sup> 525 U.S. 366 (1998) ("*Iowa Utilities Board*").

<sup>5</sup> *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

Act's important limits on state law authority – namely, that such authority must be exercised consistently with Section 251 and the federal unbundling regime established by the FCC. Moreover, Covad is asking this Commission to order broad unbundling of network elements without having provided any evidence that it will be impaired in the absence of access to those elements. Covad's broad unbundling requests cannot be permitted without evidence of impairment, and there is no such evidence before the Commission.

Covad also improperly asks this Commission to require unbundling and set rates under Section 271, ignoring that states have no decision-making authority under that section. As discussed below, the FCC has exclusive jurisdiction to determine the network elements that BOCs are required to provide under Section 271 and to determine the rates that apply to those elements. The FCC cannot – and has not – delegated that authority to state commissions. Covad offers several strained readings of the Act to support its claim that states have unbundling authority under Section 271, but its interpretations are wrong and certainly do not come close to establishing that Congress has expressly conferred Section 271 decision-making authority on state commissions.

The Washington Commission ruled correctly when it recently 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.<sup>7</sup>

The Commission should rule likewise and find that Covad's requests are improper and without legal support.

---

<sup>6</sup> *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

**A. It Is Improper To Include Terms Relating To Network Elements Provided Under Section 271 In An Interconnection Agreement.**

As Qwest discussed in its initial brief, there is no statutory or other legal basis for including terms and conditions relating to network elements provided under Section 271 in a Section 252 interconnection agreement.<sup>8</sup> Indeed, the FCC has defined the "interconnection agreements" that must be submitted to state commissions for approval as "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) . . ."<sup>9</sup> Thus, the term "interconnection agreement" encompasses only terms and conditions relating to network elements and other services provided under Section 251 and does not include terms and conditions relating to elements provided under Section 271. As the Minnesota ALJ stated in a ruling recently upheld by the Minnesota Commission, "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 objection."<sup>10</sup>

Accordingly, for these reasons and those set forth in Qwest's initial brief, Covad's attempt to include Section 271 network elements in the ICA is improper and should be rejected. The terms and conditions relating to offerings under Section 271 are properly addressed in commercial agreements and tariffs, not ICAs. The Commission should reject Covad's proposals for the following ICA sections: Section 4.0 definition of "UNE," Sections 9.1.1; 9.1.5; 9.2.1.4; 9.3.1.1; 9.3.1.2; 9.3.2.2; 9.3.2.2.1; and 9.6. For each of these sections, the Commission should adopt Qwest's proposed language.

---

<sup>7</sup> Washington Arbitration Order ¶ 37.

<sup>8</sup> Qwest Corporation's Initial Brief ("Qwest Br.") at 15-17.

<sup>9</sup> Memorandum Opinion and Order, Qwest Communications Int'l 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), FCC 02-276, WC Docket No. 02-89 ¶ 8 n.26 (FCC Oct. 4, 2002) ("Declaratory Order").

**B. Covad Has Provided No Legal Support For Its Claim That State Commissions Have Decision-Making Authority Under Section 271 And Can Impose Unbundling Obligations Under That Provision Of The Act.**

The Act does not give state commissions any substantive decision-making role in the administration and implementation of Section 271. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine if BOCs have complied with the substantive provisions of Section 271, including the 271 checklist provisions upon which Covad bases its arbitration demands for 271 unbundling. State commissions have only a non-substantive, consulting role in that determination. Accordingly, even if it were proper to address Section 271 issues in the context of a Section 252 arbitration, the Commission still would not have authority to impose affirmative obligations under that section.<sup>11</sup>

Significantly, in its discussion of this issue, Covad fails to cite any provision or language in the Act giving a state commission decision-making authority under Section 271. While Section 271 requires the FCC to "consult" with a state commission in reviewing a BOC's compliance with that section in connection with applications for authority to provide long distance service, there is an obvious difference between Congress's decision to give states *consulting authority* relating to BOCs' Section 271 applications and the complete absence of any Congressional delegation of *decision-making authority* under that provision.

As the D.C. Circuit made emphatically clear in *USTA II*, the only authority that state commissions have under the Act is that which Congress has clearly and expressly delegated to them.<sup>12</sup> Under the Act, Congress and the FCC took over the regulation of local telephone

---

<sup>10</sup> Minnesota ALJ Order ¶ 46.

<sup>11</sup> See Qwest Br. at 15-17.

<sup>12</sup> *USTA II*, 359 F.3d at 565-68.

service, leaving the states only with authority that Congress expressly granted. The Seventh Circuit recently described this regulatory regime:

In the Act, Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission (FCC). While the state utility commissions were given a role in carrying out the Act, Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act;" it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations.<sup>13</sup>

Under this regime, states are not permitted to regulate local telecommunications competition "except by the express leave of Congress."<sup>14</sup> As described by the Third Circuit, "[b]ecause Congress validly terminated the states' role in regulating local telephone competition and, having done so, then permitted the states to resume a role in that process, the resumption of that role by a state is a congressionally bestowed gratuity."<sup>15</sup> Thus, the court explained, a "state commission's authority to regulate comes from Section 252(b) and (e), not from its own sovereign authority."<sup>16</sup> Here, there has been no delegation of 271 decision-making authority to state commissions, and this Commission therefore has no authority to impose the Section 271 unbundling obligations that Covad seeks to impose through its proposed ICA unbundling language.

---

<sup>13</sup> *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Comm'n*, 359 F.3d 493, 494 (7<sup>th</sup> Cir. 2004) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999)).

<sup>14</sup> *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3<sup>rd</sup> Cir. 2001) (internal citations omitted).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

As Qwest discussed in its initial brief, in *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*,<sup>17</sup> a federal district court held that the consulting role given to states under Section 271 does not give a state commission substantive decision-making authority. *Indiana Bell* confirms the absence of a decision-making role for states under Section 271. The decision contrasts the substantive role that states have in administering Sections 251 and 252 with the "investigatory" and "consulting" role they have under Section 271.<sup>18</sup> In recognizing the different roles that Congress assigned states under these distinct provisions of the Act, the court noted that the Act does not include a "savings clause" that preserves the application of state law in the administration of Section 271.<sup>19</sup> By contrast, the court observed, Congress included a savings clause – Section 261(b) – that preserves the application of "consistent" state regulations in the administration of Sections 251 and 252.<sup>20</sup> As the court found, this contrast confirms further that Congress did not intend a substantive role for states in the administration of Section 271.<sup>21</sup>

Further, Covad's suggestion that a state legislature may grant to its agencies the authority to administer federal law that Congress has withheld is frivolous.<sup>22</sup> A state legislature may plainly confer authority to adopt and enforce state law if Congress has not preempted the law's subject. It may also permit the state's administrative agencies to exercise any authority conferred upon them by Congress. However, state legislatures may not confer authority to administer

---

<sup>17</sup> 2003 WL 1903363 (S.D. Ind. March 11, 2003).

<sup>18</sup> *Id.* at \*11.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Covad Br. at 10-11.

federal law that has been withheld by Congress. Covad cites no decision from any court or agency, federal or state, holding otherwise.

In addition, the provision of Idaho law that Covad cites does not even remotely purport to give the Commission authority to engage in substantive decision-making under Section 271 or to require unbundling of network elements that the FCC has declined to require ILECs to unbundle.<sup>23</sup> Specifically, Covad cites Section 62-614 of the Idaho Telecommunications Act of 1988, the limited purpose of which is to establish that this Commission has authority to resolve disputes involving certain incumbent local exchange telephone companies. The statute does not address network unbundling and, since it pre-dates the 1996 Act by eight years, does not mention Section 271.

The order issued by the Maine Commissions in a tariff proceeding involving Verizon, which Covad relies upon in its brief,<sup>24</sup> is also plainly distinguishable and does not support Covad's unbundling demands under Section 271. As the Minnesota ALJ found in the Qwest/Covad arbitration in that state, the *Verizon-Maine* decision "is distinguishable on its facts as it appears to be premised on enforcement of a specific commitment that Verizon made to the Maine Commission during 271 proceedings to include certain elements in its state wholesale tariff."<sup>25</sup>

Indeed, *Verizon-Maine* did not involve an interconnection arbitration under Section 252 and thus did not present the issue presented here – whether a state commission serving as an arbitrator in a Section 252 arbitration has authority to impose Section 271 unbundling in an ICA. Instead, the issue in that proceeding was whether the Maine Commission could require Verizon

---

<sup>23</sup> See Covad Br. at 8.

<sup>24</sup> Covad Br. at 4. This order is attached to Covad's Initial Brief.

to honor unbundling commitments it made during the Section 271 approval process by ordering it to amend a wholesale tariff to include network elements that the FCC had de-listed from Section 251 in the *TRO*. The Commission ruled that it had the authority to require Verizon to amend the tariff because, as a condition to receiving approval for entry into the Maine long distance market, Verizon had specifically agreed to include its unbundling obligations under both Section 251 and 271 in the tariff: "We find, upon consideration of each of these factors, that we do have authority to enforce Verizon's commitment to file a wholesale tariff with us that includes both its section 251 and 271 obligations."<sup>26</sup> Significantly, the Commission also recognized that it does not have authority independent of the FCC to determine the scope of Section 271 obligations: "This is not to suggest that the Commission has the independent authority to define the scope of [Section 271] obligations where the FCC has clearly spoken; merely that, in light of Verizon's commitment, the Commission has an independent role in determining whether those obligations have been met."<sup>27</sup>

Here, unlike in the Maine proceeding, Covad is specifically asking this Commission to exercise independent unbundling authority under Section 271, not to enforce a commitment made during the Section 271 approval process. The Commission does not have that authority, and the Maine orders does not suggest otherwise.

---

<sup>25</sup> Minnesota ALJ Order ¶ 46.

<sup>26</sup> Maine Order at 12.

<sup>27</sup> *Id.* at 14.

**C. The Commission Does Not Have Authority To Establish Prices For Section 271 Elements.**

Covad asserts that the Act and the FCC's *Triennial Review Order* ("TRO")<sup>28</sup> establish the authority of state commissions to set prices for Section 271 elements.<sup>29</sup> For several reasons, this argument is seriously flawed, as Qwest discusses in its initial brief.<sup>30</sup>

First, the FCC was quite clear in the *TRO* that it has responsibility for setting prices for elements that BOCs provide under Section 271: "[w]hether a particular [Section 271] checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)."<sup>31</sup>

Second, Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271,<sup>32</sup> provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.<sup>33</sup> The FCC has not delegated that authority, and Congress has not permitted it to do so.

Third, the pricing authority that state commissions have under Section 252(d)(1) does not empower states to set rates for Section 271 elements. The authority granted by that provision is

---

<sup>28</sup> 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).

<sup>29</sup> Covad Br. at 6-8.

<sup>30</sup> Qwest Br. at 17-19.

<sup>31</sup> *TRO* ¶ 664.

<sup>32</sup> *Id.* ¶¶ 656, 662.

<sup>33</sup> *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).

expressly limited to determining "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection [251(c)(2)] . . . [and] for network elements for purposes of subsection [251(c)(3)]."<sup>34</sup> Thus, the only network elements over which states have pricing authority are those that an ILEC provides pursuant to Section 251(c)(3). Nothing in the Act extends that authority to Section 271 elements, as evidenced by Covad's inability to cite any statutory provision that even remotely suggests state commissions have such authority.

Significantly, as Qwest discussed in its initial brief, the FCC recently rejected substantially the same pricing argument in its opposition to the petitions for a *writ of certiorari* filed with the Supreme Court by NARUC, state commissions, and certain CLECs in connection with *USTA II*.<sup>35</sup> Addressing NARUC's contention that Section 252 gives state commissions exclusive authority to set rates for network elements, the FCC stated that the contention "rests on a flawed legal premise."<sup>36</sup> It explained that Section 252 limits the pricing authority of state commissions to network elements provided under section 251(c)(3).<sup>37</sup>

Fourth, Covad's claim that the Commission has authority to set TELRIC rates for Section 271 elements – which of course incorrectly assumes that state commissions have pricing authority over Section 271 elements – is directly refuted by the *TRO* and *USTA II*. In the *TRO*, the FCC ruled very clearly that any elements a BOC provides pursuant to Section 271 are to be priced based on the Section 201-02 standard that rates must not be unjust, unreasonable, or

---

<sup>34</sup> 47 U.S.C. § 252(d)(1).

<sup>35</sup> Qwest Br. at 18-19.

<sup>36</sup> Brief for the Federal Respondents in Opposition to Petitions for Writ of Certiorari, *National Association of Regulatory Utility Commissioners v. United States Telecom Ass'n*, Supreme Court Nos. 04-12, 04-15, and 04-18 at 23 (filed Sept. 2004).

<sup>37</sup> *Id.*

unreasonably discriminatory.<sup>38</sup> Consistent with its prior rulings in Section 271 orders, the FCC confirmed that TELRIC pricing does not apply to these network elements.<sup>39</sup> 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."<sup>40</sup>

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

As Qwest demonstrated in its initial brief, under Section 251 of the Act, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]."<sup>41</sup> 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."<sup>42</sup>

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

---

<sup>38</sup> *TRO* ¶¶ 656-64.

<sup>39</sup> *Id.*

<sup>40</sup> *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

<sup>41</sup> 47 U.S.C. § 251(c)(3).

<sup>42</sup> 47 U.S.C. § 251(d)(2).

[251](c)(3)” to the FCC.<sup>43</sup> 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.”<sup>44</sup> And *USTA II* establishes that Congress did not allow the FCC to have state commissions perform this work on its behalf.<sup>45</sup> Consistent with these rulings, as Qwest discussed in its opening brief, the FCC recently ruled in the *BellSouth Declaratory Order* that state commissions are generally without authority to require ILECs to unbundle network elements that the FCC has declined to require ILECs to unbundle.<sup>46</sup>

Covad responds to the legal framework established by these authorities and those described in Qwest's opening brief as if it were not there, arguing that the Act, the *TRO*, and *USTA II* do not impose any meaningful limits on the authority of state commissions to require unbundling under state law. Thus, Covad asserts that the Commission is free to require Qwest to provide network elements that the FCC declined to require ILECs unbundle based on specific findings that CLECs are not impaired without them.<sup>47</sup> Covad's argument fails to recognize that the Act's savings clauses preserve independent state authority only to the extent that authority is exercised in a manner consistent with the Act.<sup>48</sup> This point was forcefully confirmed in the

---

<sup>43</sup> 47 U.S.C. § 251(d)(2).

<sup>44</sup> *Iowa Utilities Board*, 525 U.S. at 391-92.

<sup>45</sup> See *USTA II*, 359 F.3d at 568.

<sup>46</sup> Qwest Br. at 11-12.

<sup>47</sup> For example, Covad asserts that the Board has authority to require access to "subloop elements" (Covad Br. at 2) even though the FCC expressly ruled in the *TRO* that CLECs are not impaired without access to feeder subloops and that ILECS are therefore not required to provide them. *TRO* ¶ 253.

<sup>48</sup> Qwest Br. at 12-13.

recent decision from the United States District Court for the District of Michigan discussed in Qwest's initial brief.<sup>49</sup>

The fundamental problem with Covad's position, as confirmed by its brief, is that it requires unbundling regardless of consistency with the Act. As Qwest described in its opening brief, the inevitable conflicts with federal law that would result from adoption of Covad's position are demonstrated by the application of Covad's proposed unbundling language to feeder subloops.<sup>50</sup> Covad fails to respond to this striking example of how the virtually limitless unbundling obligations that would result from its language directly conflict with federal law and the "federal regime" that the FCC alone has authority to implement. And this example would not be an isolated occurrence under Covad's unbundling language, as the language is broad enough for Covad to contend that Qwest is required to provide unbundled access to OCn loops, feeder subloops, DS3 loops (in excess of two per customer location), extended unbundled dedicated interoffice transport and extended unbundled dark fiber, and other elements despite the FCC's fact-based findings in the *TRO* that CLECs are not impaired without access to these elements.<sup>51</sup>

As the FCC stated quite clearly in the *TRO*, the type of state law unbundling regime that Covad is proposing – one that ignores altogether FCC findings of non-impairment with respect to individual elements – "overlook[s] the specific restraints on state action taken pursuant to state law embodied in section 251(d)(3), and the general restraints on state actions found in sections

---

<sup>49</sup> Qwest Br. at 10-11.

<sup>50</sup> Qwest Br. at 13 and n. 39.

<sup>51</sup> In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundled 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).

261(b) and (c) of the Act."<sup>52</sup> This approach to state law unbundling "ignore[s] long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy."<sup>53</sup> As the United States Court of Appeals for the Seventh Circuit stated, "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.<sup>54</sup>

Equally significant, any unbundling obligations imposed under state law would have to be supported by an express finding that Covad would be impaired without access to specific network elements. A finding of impairment is essential under Section 251, and any unbundling requirement that does not rest on such a finding is plainly unlawful. Covad's failure to provide any evidence of impairment is thus fatal to its unbundling demands, as the Commission has no evidentiary record upon which to base findings of impairment or requirements to unbundle.

Relying on an inaccurate interpretation of a ruling by the Illinois Commerce Commission that is expressly based on Illinois law, Covad asserts that this Commission must apply Idaho law relating to network unbundling without concern for whether the results conflict with the 1996 Act and FCC orders and rules implementing the Act.<sup>55</sup> This argument is meritless. First, no provision of Idaho law empowers the Commission to order network unbundling, and, accordingly, the premise of Covad's argument – that the Commission must order unbundling under Idaho law without regard to federal law – is fundamentally flawed.<sup>56</sup> Second, the Illinois

---

<sup>52</sup> TRO ¶ 192 (footnote omitted).

<sup>53</sup> *Id.*

<sup>54</sup> *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d at 395.

<sup>55</sup> Covad Br. at 10.

<sup>56</sup> *See Qwest Br.* at 13-14.

Commission ruled only that as a creation of the Illinois legislature, that Commission's powers are limited to those that the legislature expressly conferred.<sup>57</sup> Applied to this case, this ruling directly undermines Covad's request for unbundling under state law, since the Idaho Legislature has not empowered this Commission to order network unbundling. Third, contrary to Covad's incomplete description of the ruling, the Illinois Commission concluded that it does have authority to construe and apply Illinois law relating to network unbundling to avoid inconsistency with the 1996 Act and FCC orders.<sup>58</sup> Fourth, the 1996 Act establishes that any exercise of state authority must be consistent with the federal law, and any unbundling requirements imposed under state law that conflict with FCC rulings are, therefore, unlawful.<sup>59</sup>

Finally, Covad incorrectly implies that Qwest's position is that state commissions are entirely without authority to regulate unbundled network elements under the Act. However, Qwest is not arguing that state commissions are without authority to regulate under the Act. Instead, as described here and in Qwest's opening brief, states are permitted to regulate but only with respect to the specific areas identified by Congress in the Act and only to the extent their regulations are consistent with federal law, including FCC orders and rules. Here, Covad is asking the Commission to regulate in a manner that is inconsistent with federal law by requiring network unbundling that the FCC has specifically rejected. The Commission does not have that authority and, accordingly, Covad's request is unlawful.

---

<sup>57</sup> Illinois Bell Telephone Co.; Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act, Docket No. 01-0614, Order on Remand (Phase I) at 61 (Ill. Commission Apr. 20, 2005).

<sup>58</sup> *Id.* at 62 ("[W]e have some latitude to a make appropriate changes [to state law] to achieve consistency with federal law.").

<sup>59</sup> *See* Qwest Br. at 12-13.

**E. The ICA Should List Specific Non-251 Network Elements That Qwest Is Not Required to Provide Under The Agreement.**

In its proposed ICA, Qwest includes several provisions listing the network elements that the FCC has ruled ILECs are not required to provide under Section 251. Qwest's proposed Section 9.1.1.6 lists 18 different elements and services that pursuant to rulings in the *TRO*, ILECs are not required to unbundle under Section 251. There is no dispute that Qwest's listing of these elements and services accurately reflects the FCC's *TRO* rulings. However, Covad clearly believes that Qwest's unbundling obligations are unlimited and include even the network elements for which the FCC has made findings of non-impairment and declined to impose an unbundling requirement. Given Covad's overreaching position, Qwest is very concerned that Covad will demand unbundling of these de-listed elements if the ICA does not state clearly that the elements are unavailable. To protect against this distinct possibility and the dispute that would result, the ICA should include the list of de-listed UNEs in Qwest's section 9.1.1.6, which all parties agree is accurate.<sup>60</sup>

The Commission should also approve Qwest's language and not require Qwest to continue providing network elements that the FCC has de-listed as UNEs until the Commission approves an ICA amendment removing the UNEs from the ICA. The use of the amendment process for de-listed UNEs is improper because it would require Qwest to continue providing network elements at TELRIC rates potentially long after the FCC has ruled that ILECs are not required to provide the elements under Section 251. Accordingly, the Commission should adopt Qwest's proposed sections that would eliminate unbundling obligations upon non-impairment findings by the FCC.

---

<sup>60</sup> For the same reason, the Commission should adopt Qwest's proposed language for Sections 9.2.1.3; 9.6.1.5; 9.6.1.5.1; 9.6.1.6; 9.6.1.6.1; and 9.21.2. These sections establish that certain network elements will no longer be

## CONCLUSION

For the reasons stated here and in its initial brief, Qwest respectfully requests that the Commission adopt Qwest's proposed language for each of the ICA provisions in dispute.

DATED: May 18, 2005

Respectfully submitted,

  
Mary S. Hobson (ISB No. 2142)  
STOEL RIVES LLP  
101 South Capitol Blvd., Suite 1900  
Boise, Idaho 83702  
Telephone: (208) 389-9000  
Facsimile: (208) 389-9040  
[mshobson@stoel.com](mailto:mshobson@stoel.com)

Adam L. Sherr  
QWEST CORPORATION  
1600 Seventh Avenue, Room 3206  
Seattle, Washington 98191  
Telephone: (206) 398-2507  
Facsimile: (206) 343-4040

John M. Devaney  
PERKINS COIE LLP  
607 Fourteenth St., N.W., Suite 800  
Washington, D.C. 20005  
Telephone: (202) 628-6600  
Facsimile: (202) 434-1690  
[jdevaney@perkinscoie.com](mailto:jdevaney@perkinscoie.com)

*Attorneys for Qwest Corporation*

---

available under the ICA if the FCC rules that ILECs are not required to provide them under Section 251.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 18<sup>th</sup> day of May, 2005, I served the foregoing **QWEST CORPORATION'S REPLY BRIEF ON THE MERITS** upon all parties of record in this matter as follows:

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
P.O. Box 83720  
Boise, Idaho 83720-0074  
[jjewell@puc.state.id.us](mailto:jjewell@puc.state.id.us)

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

John Devaney  
Mary Rose Hughes  
Perkins Coie LLP  
607 Fourteenth Street NW – Suite 800  
Washington, DC 20005-2011  
Telephone: (202) 434-1624  
Facsimile: (202) 434-1690  
*Co-Counsel for Qwest*

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

Gregory Diamond  
Covad Communications Company  
7901 Lowry Boulevard  
Denver, CO 80230  
Telephone: (720) 670-1069  
Facsimile: (720) 670-3350  
*Counsel for Covad*

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

Dean J. (Joe) Miller  
McDevitt & Miller LLP  
420 West Bannock Street  
Boise, ID 83702  
Telephone: (208) 343-7500  
Facsimile: (208) 336-6912  
[joe@mcdevitt-miller.com](mailto:joe@mcdevitt-miller.com)  
*Counsel for Covad*

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email

Andrew R. Newell (CSB #31121)  
Krys Boyle P.C.  
600 Seventeenth Street – Suite 2700 South  
Denver, CO 80202  
Telephone: (303) 889-2237  
Facsimile: (303) 893-2882  
[anewell@krysboyle.com](mailto:anewell@krysboyle.com)

Hand Delivery  
 U. S. Mail  
 Overnight Delivery  
 Facsimile  
 Email



Brandi L. Gearhart, PLS  
Legal Secretary to Mary S. Hobson  
Stoel Rives LLP