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Alex M. Duarte
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VIA EMAIL AND U. S. MAIL

July 27, 2005

Honorable Allan Arlow
Administrative Law Judge
Oregon Public Utility Commission
P. O. Box 2148
Salem, OR 97308-2148

Re: ARB 584- Submission of South Dakota Commission Covad/Qwest arbitration order

Dear Judge Arlow:

As I mentioned last week on July 18, 2005, the South Dakota Commission in the Covad arbitration ruled last week in Qwest's favor on the network unbundling issue (Arbitration Issue No. 2) that is before you in this arbitration. Enclosed with this letter is a copy of the South Dakota Commission's written order that it issued yesterday.

As Your Honor can see, the South Dakota Commission ruled that it does not have authority to enforce section 271 requirements in a section 252 arbitration, and that the language in sections 252(a) and 252 (c)(1) clearly anticipates that section 252 arbitrations will concern section 251 requirements, and not section 271 requirements. The Commission also ruled that the language in section 271 places enforcement authority of that section with the FCC, and that even if the Commission were to find any enforcement authority under section 271, it does not follow that it could use that authority to impose section 271 requirements in a section 252 arbitration. Finally, the Commission declined to use state law to impose unbundling obligations in a section 252 arbitration.

Qwest asserts that the South Dakota Commission arbitration order is consistent with federal law, and thus respectfully requests that this Commission rule in a similar manner on this issue.

If you have any questions regarding this matter, please feel free to call me at your convenience. Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Alex M. Duarte". The signature is fluid and cursive, with a large initial "A" and "D".

Alex M. Duarte

Encl.

cc: Service List

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION OF DIECA)	ARBITRATION ORDER
COMMUNICATIONS, INC. D/B/A COVAD)	
COMMUNICATIONS COMPANY FOR)	TC05-056
ARBITRATION OF AN INTERCONNECTION)	
AGREEMENT WITH QWEST CORPORATION)	

PROCEDURAL HISTORY

On March 28, 2005, the Public Utilities Commission ("Commission") received a Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended ("Petition for Arbitration" or "Petition") from DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"). Covad requested that the Commission arbitrate certain terms and conditions of a proposed Interconnection Agreement between Covad and Qwest Corporation ("Qwest"). Covad summarized the unresolved issues as whether the Interconnection Agreement should provide for access to network elements pursuant to Section 271 of the Telecommunications Act of 1996 and South Dakota law, as well as Section 251 of the Telecommunications Act of 1996. Pursuant to ARSD 20:10:32:30, Qwest was allowed to respond to this "petition for arbitration and provide additional information within 25 days after the commission receives the petition." On April 25, 2005, Qwest filed a response.

By order dated May 17, 2005, the Commission set a procedural schedule for this matter. The parties agreed to brief the issues raised by the arbitration petition and stated that no hearing was needed because the issues were purely legal. Briefs were filed in accordance with the procedural schedule. At its June 28, 2005, meeting, the Commission heard oral argument from the parties.

At its July 12, 2005, meeting, the Commission unanimously voted to adopt Qwest's proposed language on the disputed issues that are the subject of this petition for arbitration.

POSITION OF THE PARTIES

Covad summarized the unresolved issues as whether the Interconnection Agreement should provide for access to network elements pursuant to section 271 of the Telecommunications Act of 1996 and South Dakota law, as well as section 251 of the Telecommunications Act of 1996. Specifically, Covad listed the following sections as relating to the unresolved issues: Section 4, Definition of "Unbundled Network Element," Sections 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.1.8,¹ 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 Section 9.6.1.6], and 9.21.2.² According to the Petition, "[t]he Parties disagree with respect to Qwest's continuing obligations to provide certain network elements, including certain unbundled

¹ The Commission points out that at the oral argument the parties agreed that section 9.1.1.8 was referenced in the petition and briefs by mistake and that section is not in dispute. TR. at 20.

² Petition for Arbitration at 5.

loops (including high capacity loops, line splitting arrangements, and subloop elements) and dedicated transport, after the FCC's recent analysis in the Triennial Review Order."³

Covad states that the first issue of law is whether the Commission has authority under section 271 to order Qwest to unbundle certain network elements and the second issue is whether pursuant to South Dakota law the Commission can order Qwest to unbundle certain network elements in this arbitration.⁴

The essence of the disputed issues is illustrated by the parties' proposed definitions of "unbundled network element." Covad proposes the following definition:

"Unbundled Network Element" (UNE) is 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, *for which unbundled access is required under section 271 of the Act or applicable state law*, or for which unbundled access is provided under this Agreement.⁵

By contrast, Qwest's proposed definition of an unbundled network element is as follows:

"Unbundled Network Element" (UNE) is 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.*⁶

Covad states it is seeking "to require Qwest to unbundle those elements set forth in section 271 and any elements it is required to unbundle under state law."⁷ Covad further states that it is not asking the Commission to *add* to the section 251 list but to *enforce* the section 271 list.⁸

Qwest claims 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

³ *Id.*; see also *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 Wireless Services Offering Advanced Telecommunications Capability*, CC Dockets Nos. 01-338, 96-98, 98-147, FCC 03-36, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (*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*).

⁴ Covad's Initial Brief at 1.

⁵ Interconnection Agreement, Section 4, Definitions, at 27 (emphasis added).

⁶ *Id.* (emphasis added).

⁷ Covad's Reply Brief at 9.

⁸ TR. at 25.

longer required as a result of the D.C. Circuit vacatur of unbundling requirements in USTA II.⁹ Qwest further notes that it is offering access to non-251 elements through commercial agreements and tariffs.¹⁰

Qwest argues that "[u]nder Section 251, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding."¹¹ Qwest cites to language in the FCC's Triennial Review Order in support of its position:

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 [FCC] has either found no impairment -- and thus has found that unbundling that element would conflict with the limits of section 251(d)(2) -- or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(c).¹²

Qwest further states that "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."¹³

Covad counters that the Commission does not need to perform an impairment analysis under section 251 because Covad is asking the Commission to order unbundling consistent with the section 271 checklist and South Dakota law, neither of which imposes a requirement to conduct an impairment analysis.¹⁴

1. Section 271 Argument

a. Covad's Position

With respect to its section 271 argument, Covad argues that the Commission has the authority to enforce the unbundling requirements of section 271.¹⁵ Covad notes that the Federal

⁹ Qwest's Initial Brief at 8.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 9.

¹² *Id.* at 10-11 (*citing Triennial Review Order* at ¶¶ 193, 195).

¹³ Qwest's Initial Brief at 14.

¹⁴ Covad's Reply Brief at 6.

¹⁵ Covad's Initial Brief at 2.

Communications Commission ("FCC") has found that section 271 creates Bell Operating Company obligations that are independent of section 251 unbundling requirements.¹⁶ Covad states that the Commission's enforcement of section 271 checklist obligations would not impair federal regulatory interests.¹⁷ Covad concedes that it does not expect that Qwest would remove any section 271 elements from its access tariff and that the "linchpin" of the dispute is the rates for those elements.¹⁸ Covad states that the rates under the access tariffs are too high and that the Commission should impose TELRIC rates for section 271 elements under the "just and reasonable" standard.¹⁹

b. Qwest's Position

Qwest states that the Commission does not have the authority to require unbundling under section 271.²⁰ Qwest's position is that only the FCC has the authority to determine whether Qwest has "complied with the substantive provisions of Section 271, including the 'checklist' provisions upon which Covad purports to base its requests."²¹

With respect to the pricing issues, Qwest notes that under Covad's proposed section 9.1.1.7, the "existing TELRIC rates would apply to network elements that Qwest provides pursuant to Section 271 until new rates are established in accordance with Sections 201 and 202 of the Act or applicable state law."²² Qwest asserts that states are not given any decision making authority under sections 201, 202, or 271 and thus are unable to determine prices for network elements provided pursuant to section 271.²³ Qwest further states that the FCC has found that TELRIC pricing does not apply to elements provided pursuant to section 271 but must be based on sections 201 and 202.²⁴ Qwest states that the pricing authority that a state commission has under section 252(d)(1) does not give a state commission the authority to set rates for section 271 elements; instead, that authority is limited to network elements that an incumbent LEC provides pursuant to section 251(c)(3).²⁵

¹⁶ *Id.* at 2-3 (citing *Triennial Review Order* at ¶ 653).

¹⁷ *Id.* at 5.

¹⁸ TR. at 19, 21-22.

¹⁹ TR. at 10, 22.

²⁰ Qwest's Initial Brief at 15.

²¹ *Id.*

²² *Id.* at 18.

²³ *Id.*

²⁴ *Id.* at 19.

²⁵ Qwest's Reply Brief at 15.

2. State Law Argument

a. Covad's Position

Covad's second issue is whether pursuant to South Dakota law the Commission can order Qwest to unbundle certain network elements in this arbitration.²⁶ Covad cites to SDCL 49-31-15 which provides as follows:

The commission may compel access to any telecommunications facilities in this state. Any telecommunications company desiring access to any other company's facilities shall, if access is refused, make an application to the commission. Upon receipt of the application, the commission shall ascertain the facts in the case. If in its judgment the public service demands the access and the facilities of the applicant are in proper condition, the commission may order the access upon such terms and conditions that are found to be in the public interest and apportion the expense of the access.

b. Qwest's Position

Qwest responds that "states are permitted to regulate unbundled network elements 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."²⁷

COMMISSION'S DECISION

The Commission has jurisdiction over this matter pursuant to 47 U.S.C. sections 251 and 252 and SDCL Chapter 49-31, specifically 49-31-81 and ARSD 20:10:32:30 through 20:10:32:36.

Pursuant to section 252(c), the Commission is required to apply the following standards for arbitrations:

- In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
- (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title;
 - (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
 - (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

The unresolved issues presented to the Commission center on whether the Commission has authority under section 271 to order Qwest to unbundle certain network elements and whether pursuant to South Dakota law the Commission can order Qwest to unbundle certain network elements.

²⁶ Covad's Initial Brief at 1.

²⁷ Qwest's Reply Brief at 21.

With respect to the section 271 issue, the Commission finds that it does not have the authority to enforce section 271 requirements within this section 252 arbitration. Section 252(a) provides that interconnection negotiations are limited to requests "for interconnection, services, or network elements pursuant to section 251. . . ." In addition, as stated above, section 252(c)(1) requires the Commission to ensure that the Commission's resolution of open issues "meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title. . . ." The language in these sections clearly anticipates that section 252 arbitrations will concern section 251 requirements, not section 271 requirements.

In addition, the language of section 271 places enforcement authority of that section with the FCC.²⁸ Section 271(d)(6) provides as follows:

(A) [FCC] authority. If at any time after the approval of an application under paragraph (3), the [FCC] determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the [FCC] may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to subchapter V of this chapter; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints. The [FCC] shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the [FCC] shall act on such complaint within 90 days.

Even if the Commission were to find that it had some sort of enforcement authority under section 271, it does not follow that the Commission could use that authority to impose section 271 requirements in a section 252 arbitration. The Commission finds Covad's argument regarding this issue to be less than persuasive. First, Covad states that the FCC decisions approving RBOC 271 applications "firmly support the enforcement authority of state utilities commissions with respect to the competitive checklist."²⁹ Covad argues that this enforcement authority allows the Commission to interpret the requirements of section 271.³⁰ Covad then claims that interpreting section 271 requirements within a section 252 arbitration would allow the *Commission to establish its own authority, separate from 271 to enforce* the requirements imposed. *Id.* Covad asserts that if "Qwest were to refuse to comply with the Commission's order in this case, citing this Commission's lack of authority to interpret section 271, the Commission could enforce its order as it enforces any Commission order, as well as advise the FCC of Qwest's non-compliance with section 271 of the Act."³¹ The Commission does not believe that interpreting section 271 requirements within a section 252 arbitration would result in some sort of separate authority, apart from section 271, to enforce

²⁸ The Commission notes that it has the authority to enforce Qwest's performance obligations but that is pursuant to the Qwest Performance Assurance Plan.

²⁹ Covad's Reply Brief at 11-12.

³⁰ *Id.* at 12.

³¹ *Id.*

section 271 requirements. In fact, Covad agrees that only the FCC can enforce noncompliance with section 271.³²

With respect to the state law issue, the Commission declines to use state law to impose unbundling obligations within this section 252 arbitration. If a party requests arbitration under section 252, it is doing so with respect to section 251 requirements. See 47 U.S.C. § 252(a) and (c). In order for this Commission to impose any state unbundling requirements, it would need to do so based on an evidentiary record, not in a docket in which both parties requested that no hearing be held. Pursuant to SDCL 49-31-15, if a party requests access to facilities, the party must make an application and the Commission is required to "ascertain the facts in the case." A party cannot request that the Commission approve access to unbundled network elements under state law without making a factual showing as to the need for such access.

The Commission further notes that under the savings clause of section 251(d)(3)(B), a state commission's order regarding access must be consistent with the requirements of section 251. Thus, even if Covad were to request access to unbundled elements pursuant to state law, the Commission's decision would need to be consistent with section 251.

Therefore, the Commission finds that it will approve Qwest's proposed language in the disputed sections of the proposed Interconnection Agreement. Pursuant to ARSD 20:10:32:33, the parties shall file their final Interconnection Agreement with the Commission for approval within 60 days after the issuance of this order.

It is therefore

ORDERED, that the Commission approves Qwest's proposed language in the disputed sections of the proposed Interconnection Agreement; and it is

FURTHER ORDERED, that the parties shall file their final Interconnection Agreement with the Commission for approval within 60 days after the issuance of this order.

Dated at Pierre, South Dakota, this 26th day of July, 2005.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>Helaine Kolbo</u>
Date:	<u>7/26/05</u>
(OFFICIAL SEAL.)	

BY ORDER OF THE COMMISSION:

Gary Hanson
GARY HANSON, Chairman

Robert K. Sahr
ROBERT K. SAHR, Commissioner

Dustin M. Johnson
DUSTIN M. JOHNSON, Commissioner

³² *Id.*

CERTIFICATE OF SERVICE

ARB 584

I hereby certify that on the 27th day of July, 2005, I served the foregoing **QWEST'S LETTER TO THE HONORABLE ALLAN ARLOW** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 27th day of July, 2005.

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