

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of:	)	
	)	Docket No. UT-033044
QWEST CORPORATION	)	
	)	COVAD COMMUNICATIONS
To Initiate a Mass-Market Switching and	)	COMPANY'S COMMENTS TO
Dedicated Transport Case Pursuant to the	)	THE COMMISSION'S NOTICE
Triennial Review Order	)	TO SUBMIT COMMENTS
_____	)	

Covad Communications Company ("Covad") hereby submits its Comments in response to the questions posed in the Commission's Notice of Opportunity to Submit Comments dated May 6, 2004:

**1) What FCC unbundling rules will be in effect in light of the USTA decision?**

Response: Covad believes that, at a minimum, access to the unbundled network elements described in Section 271(c)(2)(B) of the Act remains after the USTA decision, at least with respect to Bell Operating Companies (BOCs) such as Qwest. Unless and until the FCC seeks to clarify any changes necessary to its prior rules, which were primarily based on the unbundling requirements of Section 251 of the Act, the existing terms of unbundling should be considered in effect for all elements that have been, or may be, subject to a finding of non-impairment, at least with respect to the BOCs. It is not immediately clear that any changes will need to be made to the substance of the FCC's unbundling rules other than revisiting the statutory basis for those rules, and perhaps limiting the applicability of some of the rules to the BOCs rather than to all Incumbent LECs.

**2) What unbundling obligations, if any, will remain in effect for Qwest Corporation for mass market switching and high-capacity (DS1, DS3, and dark fiber) transport, either under §§ 251 or 271 of the Telecommunications Act, when the USTA decision becomes effective?**

Response: Covad believes no changes to these obligations will occur, but the legal authority supporting these unbundling obligations may shift from Section 251 to Section 271 if findings of non-impairment are ultimately made (or already have been made) with respect to certain network elements. The ultimate answer to this question, however, depends heavily on the Commission's willingness to provide access to network elements pursuant to Section 271 of the Act and state law notwithstanding the FCC's impairment analysis of those network elements pursuant to Section 251 of the Act. If the Commission leaves any uncertainty with respect to access to these elements, the availability of specific elements, such as unbundled switching and line splitting, will be unknown, and it is likely that Qwest will unilaterally increase prices and/or eliminate offerings in an effort to eliminate competition.

Of course, a tremendous amount of uncertainty will surround the availability of UNE-P, and the just, reasonable and non-discriminatory rates for UNE-P, as well as line splitting arrangements. This uncertainty will likely lead to significant litigation, either regarding CLECs' continued access to UNE-P and/or with respect to the filing obligations of incumbent LECs who reach commercial agreements with CLECs to make UNE-P available.

**3) In the event USTA becomes effective, will Qwest have any legal obligation to provide network elements and services at prices based on Total Element Long Run Incremental Cost (TELRIC)?**

Response: Qwest should be required to offer its current list of wholesale services at current prices until such time as the Commission conducts a proceeding to determine new pricing, if any, for these services. Prior to the elimination of any obligation to provide a network element, the Commission should establish pricing for that element, if it is determined the network element is still available pursuant to Section 271 or state law. Nothing prohibits this Commission from establishing TELRIC rates for elements unbundled pursuant to Section 271 or state law, and this existing pricing may very well be the most appropriate pricing in many circumstances. It is certainly the most reasonable interim alternative, until fair, just and reasonable pricing, or pricing compliant with any applicable state law standards, is established by this Commission or the FCC.

- 4) Will Qwest's current Statement of Generally Available Terms and Conditions (SGAT) as it relates to unbundled switching and dedicated transport remain in full force and effect in the event USTA becomes effective?**

Response: The existing SGAT terms will remain effective unless and until the Commission approves changes pursuant to established procedures.

- 5) What state unbundling rules remain in effect after USTA becomes effective?**

Response: USTA does not, by its terms, have any impact on state unbundling obligations. To the extent it is necessary to enforce those obligations in the event federal unbundling requirements recede, this Commission should do so.

- 6) Which state tariffs remain in effect after USTA becomes effective?**

Response: See above.

**7) What should the Commission do to facilitate negotiations between parties on prices, terms, and conditions of unbundled network elements affected by USTA?**

Response: It is unlikely that each and every issue can be resolved through commercial negotiations. ILECs have an inordinate amount of bargaining power in commercial negotiations, which is the reason why the obligations established by Sections 251 and 252 are so critical. For any element that lies outside these obligations, it is likely that the threat of state utilities commissions' confirmation of continuing ILEC/RBOC obligations, either pursuant to Section 271 or state law, is the primary, if not only, factor allowing negotiations to succeed. If and when these issues are settled, it is unlikely, in Covad's view, that ILECs will be willing to negotiate additional matters beyond established statutory obligations.

Covad plans to seek arbitration of any disputed issues related to interconnection and access to facilities that are available pursuant to any applicable law. Whether the obligation of the ILEC is derived from state or federal law, this Commission is authorized to arbitrate open issues related to these obligations.

In addition, this Commission should explicitly prohibit any changes to carriers' relationships that are enacted unilaterally by Qwest. The Commission should clarify that, for instance, UNE-P and line splitting remain available pursuant to Section 271, if not Section 251, and until such time as new prices, if any, are established by this Commission for UNE-P, these products will remain available at current TELRIC rates.

**8) Should the Commission set a procedural schedule and/or hear oral argument on these issues?**

Covad believes it would be helpful and appropriate for the Commission to convene a status conference in the docket to hear from parties on these and other relevant issues, and to consider the need for further proceedings.

Respectfully submitted, this 21st day of May, 2004.

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Karen S. Frame, WSB #33859  
Senior Counsel  
Covad Communications Company  
7901 Lowry Boulevard  
Denver, Colorado 80230