

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition for Arbitration  
of an Interconnection Agreement Between  
DIECA COMMUNICATIONS, INC.,  
d/b/a COVAD COMMUNICATIONS  
COMPANY with QWEST  
CORPORATION Pursuant to 47 U.S.C.  
Section 252(b), and the *Triennial Review  
Order*

DOCKET NO. UT-043045

QWEST CORPORATION'S RESPONSE  
TO COVAD COMMUNICATION  
COMPANY'S PETITION FOR  
RECONSIDERATION

**I. INTRODUCTION**

- 1 Pursuant to the Commission's Notice issued February 24, 2005, Qwest Corporation ("Qwest") submits this response in opposition to Covad Communication Company's ("Covad") petition for reconsideration. For the reasons set forth below, the Commission should deny Covad's petition.
  
- 2 Covad's petition is procedurally improper and substantively flawed. Procedurally, it is improper and prejudicial for Covad to be addressing line splitting for the first time in this arbitration through a petition for reconsideration filed many months after the close of the evidentiary record and long after the briefing in this case concluded. Covad should have presented its factual assertions and legal arguments relating to line splitting through

evidence and briefing in the underlying arbitration, which would have permitted Qwest to respond with evidence and arguments of its own. By waiting until the reconsideration stage to raise this issue and to present factual information relating to it, Covad has prejudiced Qwest and deprived the Commission of a proper record. For this reason alone, the Commission should deny Covad's petition.

3 Additionally, a central issue in this interconnection arbitration conducted under the Telecommunications Act of 1996 ("the Act") was Covad's demand that the interconnection agreement ("ICA") between the parties obligate Qwest to provide unbundled access to virtually all of the network elements that comprise Qwest's Washington network. Covad attempted to achieve this impermissible result through two proposals. First, it presented ICA language that would have required Qwest to provide access to network elements under section 271 of the Act even though the obligations imposed by section 271 are not a proper subject for an ICA entered into under section 251, as other state commissions have ruled. Second, it proposed provisions for the ICA that would have required Qwest to provide under Washington law access to network elements that the Federal Communications Commission ("FCC") has conclusively determined competitive local exchange carriers ("CLECs") like Covad are not entitled to under section 251 of the Act because they are not competitively impaired without them.

4 Following extensive briefing and oral argument, this Commission rejected Covad's unbundling proposals in their entirety, reaching the same result as the two other state commissions that have considered this issue -- the commissions of Minnesota and Utah.<sup>1</sup> In

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<sup>1</sup> See Arbitration Report and 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, Docket No. 04-2277-02 at 19-20 (Utah PSC Feb. 8, 2005); Arbitrator's Report, 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, MPUC Docket No. P-5692,421/IC-04-549, OAH

finding that Covad's proposals are unlawful, the Commission issued two rulings that bear directly on Covad's petition for reconsideration. First, it held that state commissions do not have any authority to impose network unbundling or other obligations under section 271. Second, the Commission ruled that a state commission is without authority to require an incumbent local exchange carrier ("ILEC") like Qwest to provide access to network elements under state law that the FCC has ruled CLECs are not entitled to under section 251. Specifically, the Commission held that imposing such a requirement under state law would "be in direct conflict with federal law."<sup>2</sup>

5 In requesting in its petition that the Commission require Qwest to provide line splitting under the ICA, Covad is asking the Commission to ignore these two critical rulings in the Arbitration Order. As Covad itself acknowledges in its petition in the *Triennial Review Order*, the FCC ruled that the line splitting arrangement Covad seeks is no longer an unbundled network element ("UNE") that ILECs are required to provide under section 251.<sup>3</sup> As a result, Covad is necessarily invoking either section 271 or state law in its attempt to include line splitting in the ICA. Its request therefore conflicts directly with the Commission's rulings -- neither of which Covad challenges -- that state commissions are without authority to impose section 271 obligations in an ICA or to require an ILEC to unbundle under state law a network element that the FCC has determined ILECs are not required to unbundle under section 251. Covad's statement that its petition "does not raise these broader issues"<sup>4</sup> is simply wrong; indeed, Covad accepts the Commission's unbundling

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Docket No. 3-2500-15908-4 ¶ 46 (Minn. PUC Dec. 15, 2004). The Minnesota Commission has voted to adopt this ruling and is expected to soon issue a written order reflecting its adoption.

<sup>2</sup> 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 ("Arbitration Order") at ¶52.

<sup>3</sup> Covad Petition at ¶11. *See also TRO* at ¶ 251 (limiting ILEC unbundling obligations to situations where a CLEC leases a "stand-alone loop").

<sup>4</sup> Covad Petition at ¶ 2.

rulings but then asks the Commission to ignore them by including line splitting the ICA. That result is plainly foreclosed by the Arbitration Order and the provisions of law that underlie the Order.

6 For these reasons and those discussed below, the Commission should deny Covad's petition.

## II. ARGUMENT

### A. Having failed to raise its concerns about line splitting in the arbitration, Covad cannot now raise these concerns in a petition for reconsideration.

7 It is fundamental that petitions for reconsideration should not present new facts or raise legal arguments that could have been raised during the initial proceeding. At no time during the arbitration proceeding did Covad present any evidence or offer any legal arguments relating to line splitting. Indeed, Covad had repeated opportunities to raise the issue, but it never even mentioned line splitting in its arbitration petition, testimony, post-hearing brief, or petition for review challenging the Arbitrator's Report. Its petition for reconsideration is the first time that Covad has addressed this network element.

8 Covad's attempt to raise this issue now is procedurally improper and prejudicial. For example, Covad's request for access to line splitting relies in substantial part on its interpretation of a service agreement for a Qwest commercial product known as Qwest Platform Plus ("QPP"). Covad attaches a copy of a QPP agreement to its petition and, based on its interpretation, argues that the agreement "suggests that Qwest believes line splitting is a loop-based product that should be purchased not pursuant to a commercial agreement, but through ICAs."<sup>5</sup> This broad characterization of Qwest's position relating to line splitting is incomplete and wrong, which Qwest could have demonstrated through testimony relating to

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<sup>5</sup> *Id.* at ¶ 6.

QPP during the arbitration. To raise this issue now when the time for presenting evidence has passed is highly prejudicial to Qwest.

9 Equally important, by raising this issue now and thereby denying Qwest the opportunity to respond with evidence, Covad is depriving the Commission of the complete record it must have to decide this or any other issue properly. Covad should not be asking the Commission to render a ruling on a record that is incomplete because of Covad's dilatory conduct.

10 Accordingly, the Commission should deny Covad's petition on procedural grounds alone.

**B. The line splitting network element is not an appropriate subject for an interconnection agreement.**

11 On the merits, Covad's request for the Commission to include line splitting in the ICA is without legal support. Most significantly, Covad is asking the Commission to exercise authority that the Commission ruled in the Arbitration Order it does not have. Covad's request for ICA language that would have required Qwest to provide network elements under section 271 and Washington law was probably the most extensively briefed and thoroughly argued issue in the arbitration. In detailed, thoroughly reasoned rulings in the Arbitration Order, the Commission rejected Covad's unbundling demands with findings that bear directly on Covad's belated request for line splitting.

12 First, in response to Covad's demand for ICA language that would have required Qwest to provide access to network elements under section 271, the Commission ruled unequivocally that "state commissions do not have authority under either Section 271 or Section 252 to enforce the requirements of Section 271."<sup>6</sup> The Commission explained further that the Act "provides no decision-making authority to state commissions" under section 271 and that

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<sup>6</sup> Arbitration Order at ¶ 39.

"the FCC has sole authority under Section 271 to enforce BOC compliance with Section 271, without any shared decision-making role for state commissions."<sup>7</sup>

13 Second, in rejecting Covad's demands for unbundling under Washington law, the Commission was equally clear that it does not have authority to require access to network elements under Washington law that the FCC has refused to require under section 251. As the Commission stated, a state-imposed requirement for Qwest to unbundle elements "de-listed" by the FCC from section 251 would "be in direct conflict with federal law."<sup>8</sup>

14 The line splitting that Covad seeks in its petition is among the network elements that the FCC has "de-listed" from section 251. As Covad itself described it, "the switching portion of line splitting arrangements is clearly no longer a section 251 UNE. . . ."<sup>9</sup> Because Qwest no longer has an obligation to provide this type of line splitting under section 251, the only conceivable basis for Covad's request is section 271 or state law. And, as discussed above, the Commission has already determined that it is without authority under either to require access to this type of "de-listed" element. In other words, the Commission would have to violate its own rulings, which Covad does not challenge in its petition, to give Covad the relief it seeks.

15 Accordingly, the Commission is without authority to require line splitting, and Covad's petition must be denied on that basis.

16 Finally, the factual premise of Covad's petition is also flawed. Specifically, the petition relies on Covad's representations that it must have line splitting to take advantage of a QPP agreement. What Covad fails to disclose, however, is that it has *not* entered into a QPP

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<sup>7</sup> *Id.* at ¶ 42.

<sup>8</sup> *Id.* at ¶ 52.

<sup>9</sup> Covad Petition at ¶ 11. *See also* TRO at ¶ 251.

agreement with Qwest. Thus, the factual claims in the petition about the need for access to line splitting in connection QPP – claims that should have made presented during the arbitration – do not apply to Covad.

**C. Qwest deliberately included a line splitting exclusion in its ICA and did not do so because of a "glitch."**

17 The ICA language that Covad is challenging in its petition provides: "On the effective date of a Commission determination that Qwest is no longer required to provide UNE-P Combination services in a market area, Line Splitting is also not available in that market area."<sup>10</sup> Covad characterizes Qwest's inclusion of this language as a "glitch" and an "oversight." That is hardly the case. Instead, Qwest proposed this ICA language specifically because it has no obligation to provide line splitting in connection with UNE-Platform services or, for that matter, in connection with its commercial QPP product. The language accurately reflects the state of the law and the parties' legal rights.

18 Notwithstanding the absence of any legal obligation to provide the line splitting Covad seeks, Qwest will consider a request for line splitting from Covad *if* Covad eventually enters into a QPP agreement or a similar agreement with Qwest. When that occurs, the parties can determine if a line splitting agreement is feasible and, if it is, can negotiate its terms. Because Covad does not have a QPP type agreement now, there is no reason for the parties to enter into a negotiation over line splitting. And, because line splitting is not a section 251 UNE, there is no legal basis for Covad to ask this Commission to require Qwest to provide it.

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<sup>10</sup> Section 9.21.2 of the ICA.

### III. CONCLUSION

19 For these reasons, Qwest respectfully requests that the Commission deny Covad's petition.

DATED this 9th day of March, 2005.

Respectfully submitted,

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