STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE ARBITRATION OF: DIECA COMMUNICATIONS, INC., d/b/a COVAD COMMUNICATIONS COMPANY, Petitioning Party, vs. QWEST CORPORATION, Responding Party.	DOCKET NO. ARB-05-1

ARBITRATION ORDER

(Issued May 24, 2005)

PROCEDURAL BACKGROUND

On January 31, 2005, Dieca Communications, Inc., d/b/a Covad Communications Company (Covad), filed a petition with the Utilities Board (Board) requesting the Board arbitrate certain terms and conditions of a proposed interconnection agreement between Covad and Qwest Corporation (Qwest). The petition was filed pursuant to the provisions of 199 IAC 38.4(3) and 38.7(3) and § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 101-104, 110 Stat. 56 (1996) (hereinafter referred to as the "Act"). The petition was identified as Docket No. ARB-05-1.

On February 11, 2005, the Board issued an order directing a telephone conference to be held to determine a procedural schedule, clarify the issues to be resolved, identify additional information needed to reach a decision on the issues, schedule production of documents and other information, and to consider any other matters that would expedite the arbitration process as required by 199 IAC 38.7(3)"f."

The telephone conference was held on February 21, 2005. The parties agreed that the only issue for arbitration is a legal issue that does not require presentation of factual evidence and that no hearing was necessary. The parties agreed to a briefing schedule that was adopted by the Board. Initial briefs were filed on March 23, 2005. Reply briefs were filed on April 15, 2005.

OVERVIEW

In its initial brief, Covad describes the issues in this arbitration as follows:

A. Does the Board have authority pursuant to § 271 of the Telecommunications Act of 1996 (1996 Act) to order Qwest to unbundle certain network elements as part of the arbitration of an interconnection agreement?[1]

B. Can the Board, pursuant to Iowa law, order Qwest to unbundle certain network elements in this arbitration?

Both of these issues can be summarized into one question for the Board's determination: Is Qwest required to provide access to unbundled network elements

[1] Section 271 of the Act generally prohibits Bell operating companies from providing interLATA long distance service in their "in-region" states. This prohibition can be lifted if a Bell operating company can show, among other things, that it offers access or other interconnection to other telecommunications carriers in a manner that satisfies a statutory checklist, set out at § 271(c)(2)(B). In Iowa, the Bell operating company is Qwest, which has made the necessary showing for lifting the § 271 prohibition.

under either § 271 or state law, even if it is not required to provide that access pursuant to § 251?

Covad's argument starts with the contention that when the Federal Communications Commission (FCC) lifted Qwest's § 271 prohibition, it explicitly directed that Qwest must continue to provide all network elements listed in § 271 of the Act, which outlines specific Regional Bell Operating Company (RBOC) obligations (the 271 checklist) in order to maintain its authority to provide in-region interLATA service. Further, Covad asserts that Qwest continues to be obligated under Iowa law to provide unbundled access to network elements (essential facilities) pursuant to Iowa Code § 476.100(2) (2005) and that the pricing methodology for such access has been established by 199 IAC 38.5(2).

Qwest maintains that Covad is attempting to impose obligations on Qwest that conflict with rulings by the FCC and that are inconsistent with the 1996 Act. According to Qwest, adopting Covad's proposed interconnection agreement language regarding the definition of unbundled network elements (UNEs) would require it to provide almost unlimited access to the elements in Qwest's Iowa telecommunications network. This would be contrary to the FCC's findings in the *Triennial Review Order (TRO)*[2] that competitive local exchange carriers (CLECs) are

[2] *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 Docket Nos. 01-338, 96-98, 98-147, "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*).

not impaired without access to many network elements and that incumbent local exchange carriers (ILECs) are therefore not required to unbundle them.

SUMMARY OF COVAD ARGUMENTS

Covad cites the FCCs *Triennial Review Order* and argues that the FCC held that § 271 creates an independent access obligation for the RBOCs, including Qwest. In that order, the FCC stated:

> [W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for Bell Operating Companies (BOCs) to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.[3]

Further, the FCC noted that items 4, 5, 6, and 10 on the § 271 checklist separately impose access requirements regarding loop, transport, switching, and signaling on RBOCs that are not imposed on all ILECs. The FCC stated:

> Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs. In fact, section 271 places specific requirements on BOCs that were not listed in section 251.[4]

Covad asserts that Qwest does not directly disagree with the premise. Covad points out, however, that Qwest has instead argued that the Board does not have the authority to order the adoption of terms in an interconnection agreement that address compliance with § 271.

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[3] *Id*. at ¶ 653.
[4] *Id*. at ¶ 655.

Covad also argues that the question of unbundling under state law is clear, pursuant to 199 IAC 38.4(1)"b," which was promulgated in accordance with Iowa legislation passed in 1995, prior to the enactment of the 1996 Act. That rule provides:

> 199 IAC 38.4(1)"b" *Initial list of unbundled essential facilities.* Each local exchange carrier's initial tariff filing shall, at a minimum, unbundle the following essential facilities, services, features, functions, and capabilities: loops, ports, signaling links, signal transfer points, facilities to interconnect unbundled links at the central office, interoffice transmission facilities, directory listings in white pages, directory listings in yellow pages, listings in the directory assistance database, inbound operator services including busy line verification and call interrupt, interconnection to the 911 system, and interconnection to the tandem switch for routing to other carriers.

SUMMARY OF QWEST'S ARGUMENTS

Pursuant to § 251(c) of the Act, ILECs, like Qwest, are required to provide other telecommunications carriers with access to the ILEC's "unbundled network elements," but only when the FCC concludes that failure to provide that access "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." § 251(c)(2). Qwest argues that Covad's arguments ignore FCC findings that this impairment test is no longer satisfied for some network elements, such that the ILECs no longer have to offer access to them. In other words, according to Qwest, Covad is trying to obtain access to elements

pursuant to § 271 or state law when the FCC has said that access is no longer required by § 251.

Qwest points out that the dispute arises because of Covad's insistence upon language in the interconnection agreement that would require Qwest to provide almost unlimited access to network elements in violation of the unbundling limitations established by court decisions, the 1996 Act, and the *TRO*. Qwest asserts that Covad's objective is to obtain access to all elements of Qwest's network that Covad may desire at the lowest rates possible.

This issue has been litigated and decisions have been rendered by the public utility regulatory commissions in Minnesota,[5] Utah,[6] and Washington.[7] In each of those states, Covad's proposed unbundling language has been rejected. In the Washington, Utah, and Minnesota orders, the Commissions determined that it would be improper to include terms and conditions relating to network elements that Qwest provides under § 271 in a § 251/252 interconnection agreement, as proposed by

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[5] *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 Docket No. 3-2500-15908-4, Arbitrator's Report (Minn. PUC Dec. 15, 2004).

[6] *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, Arbitration Report and Order (Utah PSC Feb. 8, 2005).

[7] *In the Matter of the Petition for Arbitration of Covad Communications Company With Qwest Corporation Pursuant to 47 U.S.C. Section 252(b) and the Triennial Review Order*, Docket No. UT-043045, Final Order Affirming, In Part, Arbitrator's Report and Decision (Wash. UTC Feb. 9, 2005).

Covad, according to Qwest. Qwest further notes that in Colorado, Covad accepted Qwest's proposed language related to unbundled network elements and did not raise this issue in that state.

BOARD ANALYSIS

The first question is whether the Board has the authority, when arbitrating an interconnection agreement pursuant to § 252, to impose unbundling obligations pursuant to § 271. Section 271(d)(3) of the Act gives the FCC the authority to determine whether an RBOC has complied with the substantive provisions of § 271, including the "checklist" provisions that are cited by Covad. The 1996 Act gave state commissions only a consulting role in that determination.

The arbitration process that is mandated by § 252 is concerned only with the implementation of an ILEC's obligations under § 252. In arbitrations, then, a state commission only has the authority to impose terms and conditions related to those § 252 obligations. Section 252(a) specifically states that the negotiations it requires are limited to "request[s] for interconnection, service or <u>network elements pursuant to section 251</u>." (Emphasis added.)

Clearly, the provisions that are at issue in this arbitration are unbundling obligations pursuant to § 271, rather than § 251 obligations. Therefore, the Board lacks jurisdiction or authority to require that Qwest include these elements in an interconnection agreement arbitration brought pursuant to § 252.

The U.S. Supreme Court has stated that the 1996 Act does not authorize "blanket access to incumbents' networks."[8] Rather, that § 251(c)(3) authorizes unbundling only as required by § 251.[9] Following that, § 251(d)(2) provides that unbundling may be required only if the FCC determines that access to such network elements is necessary and that the failure to provide access to network elements would impair the ability of a telecommunications carrier seeking access to provide the services that it seeks to offer.

The second question is whether the Board has the authority to impose these unbundling requirements under state law.

An examination of § 476.100 provides a listing of prohibited acts, and states, in part, that a local exchange carrier may not:

> 2. Discriminate against another provider of communications services by refusing or delaying access to **essential facilities** on terms and conditions no less favorable than those the local exchange carrier provides to itself and it's affiliates. A local telecommunications facility, feature, function, or capability of the local exchange carrier's network is an essential facility if all of the following apply:
>
> a. Competitors cannot practically or economically duplicate the facility, feature, function, or capability, or obtain the facility, feature, function, or capability from another source.
>
> b. The use of the facility, feature, function, or capability by potential competitors is technically and economically feasible.
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> c. Denial of the use of the facility, feature, function, or capability by competitors is unreasonable.
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> d. The facility, feature, function, or capability will enable competition. (Emphasis added).

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[8] *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366 at 390 (1998).
[9] *Id.*

A finding that the facility is not capable of being duplicated or obtained elsewhere is required by § 476.100(2) for the Board to find that an element is an "essential service" and require Qwest to provide the element. Such a finding may not be appropriate where the FCC has found that access to the element is not impaired; at least, there is no evidence here that would support such a finding. Thus, in this case, state law does not provide a separate basis for requiring that Qwest provide access to unbundled network elements.

IT IS THEREFORE ORDERED:

The petition for arbitration filed January 31, 2005, by Dieca Communications, Inc., d/b/a Covad Communications Company, is granted. The Board rules that Qwest is not required, as a part of a 47 U.S.C. § 252 interconnection agreement, to provide access to unbundled network elements pursuant to § 271 or state law.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 24th day of May, 2005.