

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC. DBA  
COVAD COMMUNICATIONS COMPANY FOR ARBITRATION OF AN  
INTERCONNECTION AGREEMENT WITH QWEST CORPORATION

CASE NO. CVD-T-05-1; ORDER NO. 29825

Idaho Public Utilities Commission

2005 *Ida. PUC LEXIS 139*

July 18, 2005

**PANEL:** [\*1] PAUL KJELLANDER, PRESIDENT; MARSHA H. SMITH, COMMISSIONER; DENNIS S. HANSEN, COMMISSIONER

**OPINION:** On February 28, 2005, Dieca Communications, Inc. dba Covad Communications Company (Covad) filed a Petition asking the Commission to arbitrate terms of its interconnection agreement with Qwest Corporation. Covad's Petition states that the parties worked in good faith "to resolve the vast majority of issues raised during the negotiations." Covad and Qwest were unable, however, to agree on terms "relating to Qwest's continuing obligations to provide unbundled access to certain elements pursuant to Section 271 of the [1996 Telecommunications] Act and Idaho law." Covad Petition, p. 4. The parties notified the Commission that the remaining unresolved issues could be processed by written briefs followed by oral argument. Accordingly, on April 1, 2005, the Commission issued a Procedural Order adopting the parties' briefing schedule, and on June 13, 2005, issued a Notice of Hearing for Oral Argument, set for July 12, 2005.

Covad's Petition for Arbitration was filed pursuant to Section 252 of the 1996 federal Telecommunications Act (Act), codified in Title 47 of the United States Code as an amendment to [\*2] the Communications Act of 1934. A petition for arbitration of an interconnection agreement must state the unresolved issues, the position of each of the parties with respect to those issues, and any other issue discussed and resolved by the parties. 47 U.S.C. § 242(b)(2). The State Commission is required to limit its consideration to the issues set forth in the petition and in the response, if any. 47 U.S.C. § 252(b)(4)(A). In resolving the issues submitted for arbitration, a State Commission is required to "ensure that such resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251, establish any rates for interconnection, services or network elements according to Subsection (d), and provide a schedule for implementation of the terms and conditions by the parties to the agreement." 47 U.S.C. § 252(c).

Covad's Petition made clear that the difference between the parties involves an overarching legal issue for the Commission's determination. The Petition states that the parties "disagree with respect [\*3] to Qwest's continuing obligations to provide certain network elements, including certain unbundled loops . . . and dedicated transport." Covad Petition p. 5. Covad maintains that an order issued by the Federal Communications Commission, in which the FCC reduced the number of network elements an incumbent carrier must make available in interconnection agreements, does not affect a state commission's ability to order that additional elements be provided pursuant to a separate section of the Act. Specifically, Covad argues the FCC intended network elements required from a Bell operating company (BOC) under Section 271 of the Act can be ordered as part of an interconnection agreement arbitrated by a state commission pursuant to Section 251 and 252. Covad also states its belief that Qwest has an obligation under Idaho law to provide unbundled access to network elements pursuant to *Idaho Code* § § 61-503, 61-513, 61-514 and 62-602. Covad asserts that the Commission "can, and should, use its authority to enforce the unbundling requirements of Section 271 of the Act." Qwest filed a response to Covad's Petition on March 24, 2005, making clear that the [\*4] legal issue identified by Covad is the sole determination for the Commission.

Covad's argument concerning Qwest's obligation to provide access to certain unbundled network elements arises from two different sections of the Act, each containing unbundling obligations for an incumbent local exchange carrier (ILEC). Section 251(c)(3) requires an ILEC to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251 (c)(3). The FCC created a lengthy and detailed list of unbundled network elements an ILEC must make available to a carrier requesting interconnection under Section 251.

The second unbundling requirement is contained in Section 271 of the Act. Section 271 provides the means for an ILEC that is also a bell operating company to obtain authority to enter the interLATA services market. A BOC, which includes Qwest, could begin providing interLATA services only when approved by the FCC, upon determination that the BOC met the specific requirements of Section 271. Section 271(c)(B) contains a competitive [\*5] checklist the FCC must determine a BOC is satisfying, which includes network unbundling requirements. For example, checklist item number four requires a BOC to provide "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." 47 U.S.C. § 242(c)(2)(B)(iv). State commissions provide a consulting role in determining whether a BOC meets the Section 271 requirements, but the determination is solely for the FCC.

Until recently, the FCC had interpreted the unbundling requirements in Sections 251 and 271 to be identical. When the FCC issued its *Triennial Review Order (TRO)*, n1 and later its *Triennial Review Remand Order (TRRO)*, n2 it removed some key network elements from the list required for unbundling under Section 251. Because the unbundling requirements of Section 271 have not changed, Covad asks the Commission to require Qwest to provide the Section 271 UNEs in the interconnection agreement submitted for arbitration.

n1 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 Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (FCC rel. Aug. 21, 2003) ("*Triennial Review Order*"), vacated in part, remanded in part, *U.S. Telecom Assn' v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). [\*6]

n2 Order on Remand, *In the Matter of Review of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, WC Docket No. 04-313 (FCC rel. Feb. 4, 2005) ("*Triennial Review Remand Order*").

Covad relies primarily on a decision from the Maine Public Utilities Commission to support its position. The Maine PUC docket, however, was related to Verizon's Section 271 application for interLATA services authority. The Maine Commission had explicitly conditioned support of Verizon's 271 application on Verizon's agreement to fulfill a number of additional requirements, including the filing of a wholesale tariff, and "Verizon committed to meeting the Commission's conditions." The Maine docket to produce the wholesale tariff, including a list and prices for UNEs, was underway when the FCC issued the *TRO*. The Maine Commission noted that, "at the time we conditioned our support of Verizon's 271 Application on Verizon filing a wholesale tariff, Verizon's unbundling obligations under sections 251/252 of the TelAct were [\*7] synonymous with its section 271 unbundling obligations," but since the *TRO* was issued, "an ILEC's 251/252 obligations are narrower (in most respects) than its 271 obligations." *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*; Maine Public Utilities Commission, Docket No. 2082-682, Order -- Part II (September 3, 2004), p. 4. Verizon argued that the FCC "has exclusive jurisdiction over matters relating to its 271 obligations and that [the Maine] Commission has no authority to require Verizon to amend its wholesale tariff to include its 271 obligations." *Id.* The Maine Commission concluded that "a reasonable interpretation of the condition we placed upon Verizon during our 271 proceeding, and the condition it committed to fulfill, requires Verizon to include both its section 251 and 271 unbundling obligations in its wholesale tariff filed in Maine." *Id.*, p. 12. Thus, the Maine decision is based on Verizon's commitment to file a wholesale tariff, not on a conclusion that Section 271 unbundling requirements can be made part of an arbitrated interconnection agreement under [\*8] Section 251 and 252.

The Act is clear that a state commission arbitrating an interconnection agreement is required to ensure the ILEC is providing the network elements identified by the FCC under Section 251, not the elements identified in Section 271.

When a state commission arbitrates an interconnection agreement between an ILEC and a competitor, the state commission must "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). At the same time, enforcement authority for Section 271 obligations is granted exclusively to the FCC. Section 271(d)(6) states "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 Title V; or (iii) suspend or revoke such approval." 47 U.S.C. § 271(d)(6)(A). [\*9] Paragraph B of the section requires the FCC to establish procedures for reviewing complaints concerning failures by a BOC to meet the conditions of Section 271.

Covad quotes from the *TRO* where the FCC made clear "that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under Section 251." Covad Petition, p. 6, quoting paragraph 653 of the *TRO*. The FCC did not say, however, that the independent unbundling requirements of Section 271 must be made part of an interconnection agreement. Qwest asserted in this case, and Covad did not contest, that Qwest continues to make the Section 271 network elements available to Covad apart from any interconnection agreement.

We conclude that the Commission does not have authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement. Covad also argues the Commission has authority under state law to expand the FCC's Section 251 unbundling requirements, but the statutes identified by Covad do not authorize what it requests. Section [\*10] 61-503 authorizes the Commission to set retail rates for utilities regulated under Title 61. Section 61-513 authorizes the Commission to order physical connection of two regulated telephone companies so as to form a continuous line of communication. Section 61-514 enables the Commission to require a utility to share its conduits, subways, tracks, wires, poles, pipes or other equipment with other utility companies. Section 62-602 states the Legislature's intent in promulgating the Idaho Telecommunications Act of 1988, including a desire to encourage the development of competition, but that is not enough to empower the Commission to expand Qwest's Section 251 unbundling requirements. Section 62-614 gives the Commission authority to resolve telephone company disputes, and Section 62-615 authorizes the Commission to implement the 1996 Act. In short, none of the statutes identified by Covad provide the specific grant of authority necessary to support a Commission Order for Qwest to provide specific UNEs, apart from what the FCC has directed, in an arbitration agreement.

Having concluded the Commission has no legal authority to require Qwest to include its Section 271 unbundling obligations [\*11] in an interconnection agreement, we approve the relevant language proposed by Qwest, or similar language, for the parties' interconnection agreement. The parties should complete their negotiations and submit their interconnection agreement for approval as soon as practicable.

#### ORDER

IT IS HEREBY ORDERED that Qwest is not obligated to include its Section 271 unbundling obligations in an interconnection agreement with Covad. The parties should conclude their negotiations for an interconnection agreement consistent with this Order and submit it for approval as soon as practicable.

THIS IS A FINAL ORDER ON ARBITRATION. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 18th day of July 2005.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER