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**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of
QWEST CORPORATION
To Initiate a Mass-Market Switching and
Dedicated Transport Case Pursuant to the
Triennial Review Order

Docket No. UT-033044

MOTION FOR SUMMARY JUDGMENT
OF COVAD COMMUNICATIONS
COMPANY

Covad Communications Company (“Covad”) moves for summary judgment on Qwest’s dedicated transport case because Qwest has failed to support its case with evidence that CLECs are actually self-provisioning transport facilities and are actually offering these facilities on a wholesale basis as the Federal Communications Commission (“FCC”) requires. Instead, Qwest simply assumes that these conditions exist, as its transport witness Rachel Torrence admits. And, because the FCC has held that ILECs, like Qwest, cannot satisfy the FCC’s “trigger tests” based on assumptions, Qwest’s evidence is insufficient as a matter of law. Further, because Qwest has failed to raise an issue of material fact in this case, the Washington Utilities and Transportation Commission (“Commission”) must enter summary judgment denying Qwest’s Petition on transport issues.

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I. BACKGROUND

The FCC’s Triennial Review Order identified two trigger tests that states must use to determine whether there are alternatives to ILEC transport between wire centers: the “self-provisioning” and “wholesale alternatives” tests. Triennial Review Order, CC Docket No. 01-338, et al., FCC 03-36 (2003) (“TRO”). To meet the self-provisioning trigger for DS3 or dark-fiber transport, Qwest must prove that there are “three or more competing providers not affiliated with each other or with the incumbent LEC, including intermodal providers of service comparable in quality” that have self-deployed fiber transport facilities of these capacities along a particular route and that are operationally ready to use those facilities to provide transport along that route. 47 C.F.R. §§ 51.319(e)(2)(i)(A) and (e)(3)(i)(A).

To meet the competitive “wholesale alternatives” trigger for DS1, DS3, or dark-fiber transport, Qwest must prove that there are “two or more competing providers not affiliated with each other or with the incumbent LEC, including intermodal providers of service comparable in quality” that are operationally ready and willing to offer wholesale transport of these capacities along a particular route. 47 C.F.R. §§ 51.319(e)(1)(ii), (e)(2)(i)(B) and (e)(3)(i)(B).

Qwest filed a Petition on October 10, 2003, with the Commission contending that these triggers are met. On December 22, 2003, Qwest filed the Direct Testimony of Rachel Torrence in support of this claim. See RT-1T. Qwest submitted substantive revisions to Ms. Torrence’s testimony (Exhibit RT-9HC) on January 16, 2004, several weeks after the deadline for Qwest’s submittal of its primary case. Qwest presented no other evidence on dedicated transport other than Ms. Torrence’s testimony and exhibits.

II. STANDARD FOR SUMMARY DETERMINATION

This Commission should grant a request for summary determination where there is no issue of material fact:

1 A party may move for summary determination of one or more issues if the
2 pleadings filed in the proceeding, together with any properly admissible
3 evidentiary support (e.g., affidavits, fact stipulations, matters of which official
4 notice may be taken), show that there is no genuine issue as to any material fact
5 and that the moving party is entitled to judgment as a matter of law. In
6 considering a motion made under this subsection, the Commission will consider
7 the standards applicable to a motion made under CR 56 of the Washington
8 superior court's civil rules.

9 WAC 480-07-380(2)(a). To be material, the facts must be those on which the outcome of the
10 litigation depends. "Mere argumentative assertions, whether or not contained in the complaint or
11 affidavits, are insufficient." Blakely v. Housing Authority of King County, 8 Wn. App. 204, 210
12 (1973). Summary judgment is warranted in this case because Qwest has presented no material
13 facts in support of its case, only assumptions and arguments.

14 **III. THERE IS NO ISSUE OF MATERIAL FACT BECAUSE QWEST HAS FAILED
15 TO PRODUCE EVIDENCE OF ACTUAL, VERIFIABLE FACILITIES
16 NECESSARY TO SATISFY THE FCC'S TWO TRIGGER TESTS.**

17 Under the TRO, Qwest can only satisfy the self-provisioning trigger by providing
18 evidence of "the existence of actual competitive facilities" on a particular route. TRO at ¶ 410
19 (emphasis in original). Qwest cannot simply assume that these facilities exist. Similarly, Qwest
20 can only satisfy the wholesale alternatives trigger for DS1, DS3, and dark fiber by providing
21 actual, verifiable evidence that competing providers are ready and willing to offer wholesale
22 transport on a particular route. Qwest cannot rely on "alternative fiber providers that may offer
23 service, but ... are otherwise unable immediately to provision service along the route" or
24 "alternative transport facilities owned by competing carriers not willing to offer capacity to their
25 network on a wholesale basis." TRO at ¶ 414. Qwest must prove "that transport can readily be
26 obtained from a firm using facilities that are not provided by the incumbent LEC." TRO at
27 ¶ 412. As explained below, Qwest has not met this standard.

28 **1. Qwest assumes that CLECs are self-provisioning facilities but
29 provides no actual evidence of these facilities.**

30 Ms. Torrence, Qwest's expert on dedicated transport, argues that the "self-
31 provisioning" test is met for DS1 lines because the fiber transport routes deployed by competing

1 carriers are used not only for OCN and DS3 transport, but DS1 transport as well. First, the self-
2 provisioning test does not apply to DS1s. Second, this conclusion is not based on any hard
3 evidence. Rather, Ms. Torrence has “proceeded under the assumption” that carriers deploying
4 fiber facilities with attached OCN electronics have the ability channelize the OCN system into
5 lower transport levels, including DS1s. RT-1T at 12, ll. 8-12 (emphasis added). Her assumption
6 is further based on the fact that channelization is supposedly “consistent with standard industry
7 architectures and practices.” Id. at 12, ll. 11-13. This is conjecture, not evidence.
8 Ms. Torrence’s opinion about “standard industry practice” and the capabilities of OCN
9 electronics in general proves nothing about the conditions on a particular route.

10 Ms. Torrence also speculates that certain facilities meet the self-deployment
11 trigger for dark fiber because “the vast majority of self-provisioned fiber transport facilities will
12 have spare fibers.” RT-1T at 13, ll. 15-17. Again, the situation with the “vast majority” of
13 facilities proves nothing about any particular route. Ms. Torrence has not verified where these
14 spare fibers exist, only the possibility that they may exist.

15 Ms. Torrence theorizes that carriers have self-provisioned transport on certain
16 routes based on the fact that the carriers have “matching collocations.” RT-1T at 22, ll. 3-12.
17 Ms. Torrence claims to have verified these routes by reference to CLEC markings near
18 manholes. Id. at 23, ll. 4-8. But this research confirms nothing. Ms. Torrence has no idea
19 whether the facilities located between those manholes are part of a self-healing ring or a hub-
20 and-spoke arrangement requiring backhaul through the CLEC point of presence (and possibly
21 involving transport obtained from Qwest) to reach the facilities in the other manhole. They
22 could connect to a dedicated customer location and not go to another Qwest central office or
23 CLEC point of presence. The fiber could also be an entrance facility that connects from a CLEC
24 hub, node, or switch, which means it does not connect two ILEC wire centers. Ms. Torrence
25 even admits that Qwest “has no first-hand knowledge” about the location of the facilities in
26 question. RT-1T at 17, ll. 8-10.

1 Indeed, Ms. Torrence’s “matching collocations” methodology is essentially the
2 same as a Bell South and Verizon methodology the FCC expressly rejected in the TRO. Similar
3 to Qwest, Bell South and Verizon sought to assume the existence of dedicated transport based on
4 fiber-based collocations. The FCC rejected Bell South’s and Verizon’s assumption-based
5 methodology because it was not a reliable indicator of actual available dedicated transport
6 between two wire centers. TRO at ¶¶ 397, 401. The FCC instead demanded evidence that “true
7 alternatives to the incumbent LEC’s network have been deployed.” TRO at ¶ 408. The only
8 difference between Bell South’s and Verizon’s rejected approach and the one taken by
9 Ms. Torrence is that Ms. Torrence collected information regarding manholes to supplement her
10 findings. That distinction is irrelevant, because in the end Ms. Torrence’s conclusions are still
11 only assumptions and guesses as to the existence of CLEC facilities.

12 Ms. Torrence claims that she “personally conducted an on-site verification” of the
13 information that Qwest had collected regarding collocations and manholes (RT-1T at 20,
14 ll. 11-13), but she was simply verifying the bases for the assumptions that Qwest made, not
15 verifying the actual existence of any self-provisional facilities. The same deficiency exists with
16 Qwest’s Exhibit RT-8HC, which Ms. Torrence describes as a “compilation of the evidence used
17 in determining the routes meeting the FCC trigger criteria.” RT-1T at 27, ll. 4-7. As is clear
18 from the nonconfidential explanation in Ms. Torrence’s testimony, this exhibit just describes the
19 collocations Qwest uses to support its assumptions. It is not evidence of actual facilities.

20 **2. Qwest assumes that CLECs are offering facilities on a wholesale basis**
21 **but provides no actual evidence that they are doing so.**

22 The same gaping evidentiary hole exists with Ms. Torrence’s claims that certain
23 carriers are offering facilities on a wholesale basis as opposed to self-provisioning for their own
24 use. Here too Ms. Torrence has made “assumptions to help substantiate data regarding carriers
25 Qwest already verified as wholesale providers.” RT-1T at 21, ll. 10-15. She claims to have
26 conducted an “in-depth review of each company’s web site, (RT-1T at 21, ll. 6-10) but it is not

1 clear exactly what evidence she uncovered there. In the end, Ms. Torrence does not and cannot
2 verify whether any particular facilities are actually offered on a wholesale basis. The fact that a
3 CLEC may offer some facilities on a wholesale basis says nothing about the status of a particular
4 route. Even if there were excess capacity that a CLEC could theoretically provide on a
5 wholesale basis, many CLECs, like Qwest, reserve capacity on their lines for their own retail
6 services.

7 Ms. Torrence admits that Qwest could not perform the necessary “intensive
8 research” due to “the time constraints of this proceeding.” (RT-1T at 19, ll. 14-18), but that does
9 not excuse Qwest’s failure to produce actual, verifiable evidence proving that the FCC’s two
10 trigger tests are met. Qwest did not have to bring this case; it chose to do so. Qwest’s belated
11 acknowledgement that its case is hard to prove is too little, too late.

12 For competitive carriers like Covad who do not self-provision their own transport,
13 it is essential that the Commission not accept Qwest’s assumptions about the existence of
14 alternative dedicated transport facilities. If Qwest’s assumptions are not accurate, CLECs will be
15 left with no alternative facilities for particular routes, thereby severely harming competition.
16 Accepting “assumed evidence” is equally dangerous if it is applied to spare capacity, operational
17 readiness or a willingness to wholesale. As a result, Qwest’s practice of assuming facilities
18 without actually proving their existence improperly shifts the consequences of Qwest’s
19 evidentiary shortcomings onto CLECs. The more reasonable approach is to rule against Qwest
20 for failing to prove its own case with the proper evidence.

21 **IV. CONCLUSION**

22 Qwest’s entire case for dedicated transport is stitched together by assumptions in
23 an effort to distract the Commission from the fact that Qwest has not presented evidence of
24 facilities or conditions meeting the FCC’s triggers. The fact that Qwest has been unable to
25 gather sufficient evidence of actual facilities does not lower the bar that Qwest must overcome.
26

1 Consequently, the Commission must enter summary judgment as a matter of law holding that
2 Qwest has failed to prove its case on the issue of dedicated transport.

3 DATED this 30th day of January, 2004.

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