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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

REPLY TO QWEST'S ANSWER TO
COVAD'S MOTION FOR SUMMARY
JUDGMENT

Qwest's Answer ("Answer") confirms that Qwest's dedicated transport case is based entirely on conjecture, not hard evidence. In the Answer, Qwest (1) admits that it has no evidence of actual facilities on specific routes that meet the FCC's trigger tests for the availability of wholesale and self-provisioned transport, (2) admits that its case is based on circumstantial, indirect and inferential evidence, which cannot satisfy the trigger tests, (3) admits that it does not yet even know what actual facilities it will rely on to prove its case, and (4) admits that its assumption-based approach has already caused Qwest to draw incorrect conclusions about the location of facilities. The parties and the Commission should not have to waste their resources while Qwest cobbles together its case based on speculation about facilities that Qwest itself concedes may not actually exist. The Commission should thus grant summary judgment denying Qwest's Petition on dedicated transport.

1 **I. THE ANSWER CONFIRMS THAT QWEST HAS NO EVIDENCE OF ACTUAL**
2 **FACILITIES ON SPECIFIC ROUTES THAT MEET THE FCC'S WHOLESALE**
3 **AND SELF-PROVISIONED TRANSPORT TRIGGER TESTS.**

4 The FCC's Triennial Review Order ("TRO") identified two trigger tests used to
5 determine whether there are alternatives to ILEC transport between wire centers: the "self-
6 provisioning" and "wholesale alternatives" tests. Triennial Review Order, CC Docket
7 No. 01-338, et al., FCC 03-36 (2003) ("TRO"). To meet the wholesale alternatives test for DS1,
8 DS3, and dark fiber, Qwest must produce evidence that two or more carriers are operationally
9 ready and willing to offer transport on specific facilities. 47 C.F.R. §§ 51.319(e)(1)(ii),
10 (e)(2)(i)(B) and (e)(3)(i)(B).¹ To meet the self-provisioning trigger for DS3 and
11 dark-fiber transport, Qwest must produce evidence that there are three or more unaffiliated
12 providers that have self-deployed fiber transport facilities along a particular route and that are
13 operationally ready to use those facilities to provide transport along that route. 47 C.F.R.
14 §§ 51.319(e)(2)(i)(A) and (e)(3)(i)(A). Because these tests do not state that Qwest may rely on
15 projected or theoretical facilities, Qwest must show that there are actual facilities in place on
16 particular routes that meet the tests' requirements, or this Commission must deny Qwest's
17 Petition.

18 Covad moved for summary judgment because Qwest produced no evidence of
19 actual facilities. Rather, Qwest assumed that CLECs are self-provisioning facilities and are
20 offering facilities on a wholesale basis based on guesswork, faulty assumptions, and flawed
21 generalizations. See Covad Motion at 3, 5. Qwest's Answer confirms that Covad's allegation is
22 correct. For example, the Answer claims that the wholesale alternatives test for DS1 and DS3 is
23 met because "one carrier" admitted in this proceeding that it has obtained dedicated transport
24 along "certain routes" on a wholesale basis from carriers who are parties to this proceeding,"
25 thereby proving that "some carriers lease transport to CLECs at least along some routes."

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¹ Covad is summarizing the tests because it already explained them fully in its Motion.

1 Answer at 3. Qwest cannot assume that the triggers are met for particular routes based on the
2 actions of “some carriers” along “some routes.”

3 Qwest also argues that the wholesale DS3 trigger is met because MCI is
4 provisioning transport in OC48 increments and these “can be provisioned in DS3 increments.”
5 Answer at 3-4 (emphasis added). Just because a carrier can theoretically do something does not
6 mean that it actually does it or is willing to do it. In fact, particular carriers have probably not
7 invested in equipment – and Qwest has provided no evidence at all as to whether such equipment
8 has been purchased – to channelize OC48 to DS3 unless their customers desire DS3. Qwest
9 further believes that “deploying OCn transport is adequate as a matter of law” to satisfy the
10 wholesale and self-provisioning trigger for DS3 because, “to the extent a carrier has deployed
11 OCn fiber, by definition it is economic to deploy DS3 transport.” Answer at 6-7. But the FCC
12 never stated that OCn availability satisfies the DS3 trigger, and Qwest provides no citations that
13 prove its claim.

14 Qwest believes that its dedicated transport witness, Rachel Torrence, does not
15 need to show that any actual facilities exist on any specific routes and can instead speculate
16 about the location of CLEC facilities based on manhole locations and scraps of other data.
17 Answer at 8. Ms. Torrence argues that CLECs “may” be using facilities in these locations to
18 bring fiber into certain offices, so this proves that such facilities exist. Answer at 8. Again, the
19 fact that a carrier “may” do something does not mean that it actually does it. A CLEC may be
20 using these facilities for one of many different purposes, almost all of which do not satisfy the
21 FCC’s trigger tests. See Covad Motion at 4.

22 Ms. Torrence claims in her rebuttal testimony filed February 20, 2004 that her
23 analysis is sound because she relied on “hard data, physical surveys, and inductive reasoning” to
24 identify facilities meeting the trigger tests. RT-11 THC at 15. The term “inductive reasoning”
25 however is just a fancy way of saying that Ms. Torrence “guessed” where the facilities were,
26 which is precisely the problem with her conclusions. The hard data Ms. Torrence describes in

1 her testimony involves collocation arrangements and manhole locations, not the location of
2 actual facilities at issue in this case.

3 Qwest complains that it “defies logic” for Covad to claim that “there is not a
4 single route in Seattle that meets this [sic] FCC’s triggers.” Answer at 9. That is not what
5 Covad’s Motion claims. Covad simply says that Qwest must produce enough evidence to show
6 that these routes identified by Qwest meet the FCC’s triggers. Covad Motion at 1. Importantly,
7 Qwest’s Answer underscores why it is perilous, to say the least, to rely upon “inductive
8 reasoning.” As discussed more fully below, Qwest admits that, in a number of cases, the actual,
9 hard evidence proved that assumptions made by Ms. Torrence were fully erroneous. Answer at
10 3. That admission, standing alone, necessitates the grant of Covad’s Motion.

11 **II. QWEST ADMITS THAT ITS CASE IS BASED ON CIRCUMSTANTIAL,
12 INDIRECT AND INFERENTIAL EVIDENCE, WHICH DOES NOT MEET THE
13 FCC’S REQUIREMENTS.**

14 Qwest tries to excuse its lack of evidence by arguing that it may present
15 circumstantial, indirect, and inferential evidence to support its case. Answer at 5. In fact, the
16 requirement of actual, verifiable evidence of facilities is the FCC’s requirement, not Covad’s, as
17 explained above. The FCC could have stated that theoretical facilities satisfy the trigger tests,
18 but it specifically and unequivocally chose not to do so.

19 Qwest believes that its burden is so low that it can defeat Covad’s motion for
20 summary judgment based solely on inference and conjecture without producing any factual
21 evidence at all. Answer at 5. In reality, “[a] party must provide affirmative factual evidence to
22 oppose a motion for summary judgment.” *Dunlap v. Wayne*, 105 Wn.2d 529 (1986). Qwest has
23 not provided affirmative factual support for its case. If unsupported theorizing could defeat a
24 motion for summary judgment, then the Commission would never grant summary judgment in
25 any case. This makes no sense and would effectively moot the Commission’s summary
26 judgment rule. WAC 480-07-380(2)(a).

1 **III. QWEST ADMITS THAT IT DOES NOT YET EVEN KNOW WHAT EVIDENCE**
2 **IT WILL USE TO PROVE ITS CASE.**

3 Qwest hopes to learn the location and use of transport facilities “through
4 deposition or on cross-examination at hearing.” Answer at 4. Qwest has had almost five months
5 to take discovery, depose witnesses and develop actual evidence, but chose not to do so.
6 Qwest’s refusal to do anything but assume, even while it had the opportunity to develop actual
7 evidence, plainly suggests that Qwest knows that it cannot do so. More importantly, Qwest
8 cannot overcome a motion for summary judgment based on the hope that a fishing expedition at
9 hearing will produce evidence supporting its claims. Qwest was required to file a prima facie
10 case on October 10, 2003, not save it for hearing. If Qwest is so certain that routes it identified
11 in this case meet the FCC triggers, then it should have been able to prove it in its direct case,
12 which it did not do.

13 **IV. QWEST ADMITS THAT ITS ASSUMPTION-BASED APPROACH HAS**
14 **ALREADY PRODUCED FLAWED CONCLUSIONS.**

15 The Answer concedes that Qwest has “uncovered evidence that suggests some of
16 the transport routes identified in Ms. Torrence’s testimony may not satisfy the triggers.” Answer
17 at 3. That is not surprising, because Ms. Torrence used guesswork and flawed assumptions to
18 identify routes that supposedly meet the triggers. Qwest’s admission proves that speculation is
19 not appropriate when identifying transport routes and facilities. Indeed, it is likely that other
20 routes that Qwest now claims meet the trigger tests actually do not do so. It is precisely this
21 scenario that lead the FCC to reject the inductive reasoning approach adopted by Qwest, which
22 the FCC did by prohibiting ILECs from “leverag[ing] the existence of competition in one
23 location to remove the unbundling obligation to perhaps several other locations without any
24 proof that a requesting carrier could self-provide or utilize alternative transport to reach those
25 other locations.” TRO at ¶ 401. The FCC wanted to “avoid falsely identifying as competitive a
26 route between two offices.” *Id.* For these reasons the Commission should not allow Qwest to
rely on conjecture rather than evidence.

1 **V. CONCLUSION**

2 Qwest's Answer confirms the basis of Covad's Motion. Qwest has no actual
3 evidence supporting its claims that the FCC's triggers are met, only circumstantial evidence that
4 proves nothing. Qwest plans to drag the parties and the Commission through a hearing in the
5 hope that it can adduce some evidence to support its claim. But the purpose of summary
6 judgment is to prevent parties from litigating their cases based on wishful thinking rather than
7 evidence. Accordingly, the Commission should grant Covad's motion for summary judgment
8 denying Qwest's Petition regarding dedicated transport.

9 DATED this 25th day of February, 2004.

10 COVAD COMMUNICATIONS COMPANY

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