

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

2
3 In the Matter of the Investigation Into
4 U S WEST Communications, Inc.'s
5 Compliance With Section 271 of the
6 Telecommunications Act of 1996

Docket No. UT-003022

7
8 In the Matter of U S WEST Communications,
9 Inc.'s Statement of Generally Available Terms
10 Pursuant to Section 252(f) of the
11 Telecommunications Act of 1996

Docket No. UT-003040

12
13 **COVAD COMMUNICATIONS COMPANY'S BRIEF ON**
14 **THE NETWORK ELEMENTS, TRANSPORT**
15 **AND SWITCHING IMPASSE ISSUES**

16 Covad Communications Company ("Covad") respectfully submits this brief on
17 the network elements, transport and switching impasse issues:

18 **INTRODUCTION**

19 Throughout the workshops addressing Checklist Items 2 (network elements,
20 including UNE-C, UNE-P and EELs), Checklist Item 5 (transport), and Checklist Item 6
21 (switching), Qwest Corporation ("Qwest") assiduously refused to amend its SGAT to take pro-
22 competitive, pro-entry positions in several key areas. Indeed, even after a thorough development
23 of the record on these issues, Qwest continued unlawfully to: (1) impose unnecessary and
24 improper obligations and costs on CLECs when acquiring transport and access to network
25 elements; (2) refuse to adhere to the quality of service it guarantees to its retail customers; and
26 (3) deny access to its competitors to high speed line ports interfacing with DLC systems.

Qwest's SGAT, and the positions it took in the workshops, belie Qwest's supposed
"pro-competitive" commitments. Indeed, Qwest's SGAT, taken together with its refusal to alter
in any respect its current practices and policies, plainly reflects a desire to prevent the
development of a competitive local exchange market in Washington. Qwest thus has not met its

1 burden to show that its practices and proposed SGAT comply with state and federal law. This
2 Commission, therefore, should not approve Qwest's § 271 application.

3 ARGUMENT

4 **Qwest Bears The Burden Of Demonstrating That It** 5 **Has Met The Requirements For § 271 Approval.**

6 Section 271 of the Telecommunications Act of 1996 (the "Act") requires Qwest to
7 provide "access to network elements in accordance with the requirements of Section 251(c)(3)
8 and 252(d)(1)." Further, Qwest must provide "[l]ocal transport . . . unbundled from switching or
9 other services" and "[l]ocal switching unbundled from transport, local loop transmission or other
10 services."¹

11 To ensure that these statutorily-created rights and obligations translate into a
12 meaningful opportunity for CLECs to compete, Section 251(c)(3) requires incumbent LECs to
13 provide such access "at any technically feasible point on rates, terms, and conditions that are just,
14 reasonable, and nondiscriminatory."² Section 251(c)(3) is not mere recital; rather, it is the
15 method by which Congress sought to ensure that Washington consumers will reap the benefits of
16 viable competitive options for local exchange services:

17 [B]ecause section 251(c)(3) includes the terms "just" and "reasonable" this duty
18 encompasses more than the obligation to treat carriers equally. Interpreting these
19 terms in light of the 1996 Act's goal of promoting local exchange competition,
20 and the benefits inherent in such competition, we conclude that these terms
21 require incumbent LECs to provide unbundled elements under terms and
22 conditions that would provide an efficient competitor with a meaningful
23 opportunity to compete.³

24 Qwest bears "the burden of proving that all of the requirements for authorization
25 to provide in-region, interLATA services are satisfied."⁴ "[T]he ultimate burden of proof with
26

23 ¹ 47 U.S.C. § 271(c)(2)(B)(ii), (v) and (vi).

24 ² 47 U.S.C. § 251(c)(3).

25 ³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First
Report and Order, CC Docket No. 96-98, FCC 96-325 (1996), ¶ 315 (footnotes omitted).

26 ⁴ *In the Matter of Application of BellSouth Corporation*, Mem. Op. and Order, 13 FCC Rcd. 539 ¶ 37
(1997) ("BellSouth 271 Order").

1 respect to factual issues remains at all times with the BOC, even if no party opposes the BOC's
2 application."⁵ Qwest thus must prove that it complies with state and federal laws regarding
3 access to network elements, transport and switching before the Commission may grant its § 271
4 application.

5 **Qwest Has Failed To Meet Its Burden Of Proving That It**
6 **Has Satisfied The Requirements For § 271 Approval**

7 **A. Qwest May Not Assess Any Regeneration Costs, Regardless of Whether**
8 **Regeneration Arises in Connection with Access to a UNE or Regeneration Is**
9 **Incorporated into the Transport UNE Itself. (SGAT §§ 9.1.10 and 9.6.2; WA CL2-**
10 **11 and TR-6).**

11 The FCC has made clear that Qwest may not assess a channel regeneration charge
12 under any circumstance.⁶ Yet, the SGAT, directly and indirectly, charges CLECs for channel
13 regeneration in two different circumstances. First, a CLEC must pay a regeneration charge
14 where "the distance from the Qwest network to the leased physical space . . . is of sufficient
15 length to require regeneration." *See* SGAT § 9.1.10. Second, CLECs must supply their own
16 channel regeneration and associated equipment for transport transmission facilities. *See* SGAT
17 §§ 9.6.2.1 and 9.6.2.2. Regardless of the form in which the channel regeneration charge is
18 cloaked, it is an "additional cost" and therefore prohibited under controlling law.⁷

19 As this Commission recently confirmed, the FCC's 1997 *Second Report and*
20 *Order*⁸ undercuts any authority on which Qwest may ground its purported entitlement to the
21 recovery of channel regeneration costs. Indeed, the FCC made clear in the *Second Report and*
22 *Order* that it expects that cross-connection between incumbent LECs and CLECs be provided so
23 that regeneration is not required. Consistent with that conclusion, therefore, the FCC ordered

24 ⁵ *Id.*

25 ⁶ *In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection,*
26 *Second Report and Order, CC Docket No. 93-162, FCC 97-208 (1997), ¶ 110 ("Second Report and*
Order").

⁷ *Id.*

⁸ *Second Report and Order, ¶¶ 104-120.*

1 incumbent LECs, like Qwest, to file tariff revisions reflecting cross-connection rates that exclude
2 the cost of repeaters.⁹ Thus, the *Second Report and Order* conclusively requires that Qwest
3 furnish at its own cost any regeneration required by CLECs.¹⁰

4 Qwest seeks to disregard the clear import of the *Second Report and Order*,
5 arguing that regeneration is "necessary," as contemplated by the United States Court of Appeals
6 for the District of Columbia in *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423, 424 (D.C. Cir.
7 2000). Qwest therefore concludes that the cost of such regeneration should be born by CLECs.
8 Qwest's argument is fundamentally flawed, however, because channel regeneration may never be
9 deemed "necessary," as a matter of law, since regeneration should never be required in the first
10 place.¹¹ Qwest's "necessity" argument thus fails in the first instance.

11 As this Commission has done once before, it should require that the SGAT be
12 amended to eliminate the direct or indirect imposition of any channel regeneration charges. The
13 Commission also should order that the SGAT must be modified to include the requirement that
14 all transport delivered by Qwest to CLECs be accompanied by a sufficient and proper template
15 signal.

16 **B. Qwest Improperly Distinguishes Between UDIT and EUDIT. (SGAT § 9.6.1.1;
17 WA TR-2).**

18 By SGAT § 9.6.1.1, Qwest creates an unwarranted and artificial distinction
19 between (1) dedicated transport¹² from one Qwest wire center to another (unbundled dedicated
20 interoffice transport, or "UDIT"), and (2) dedicated transport from a Qwest wire center to a

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22 ⁹ *Id.*

23 ¹⁰ See *In the Matter of the Investigation into US West Communications, Inc.'s Compliance with Section*
24 *271 of the Telecommunications Act of 1996, WUTC Docket No. UT-003022 (Eleventh Supplemental*
Order; Initial Order Finding Noncompliance on Collocation Issues), ¶ 92.

25 ¹¹ *Second Report and Order*, ¶ 117; see also *id.*, ¶ 110.

26 ¹² The FCC identified dedicated transport as a network element in the *UNE Remand Order*.
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third
Report and Order, CC Docket No. 96-98, FCC 99-238 (1999) ("*UNE Remand Order*").

1 CLEC wire center (extended unbundled dedicated interoffice transport, or "EUDIT"). The
2 "distinction" between these two "forms" of transport, however, is grounded in neither a
3 principled basis upon which to differentiate the two transport scenarios, nor applicable law.

4 As an initial matter, it is imperative that this Commission understand that the
5 UDIT/EUDIT distinction is of Qwest's own making. More particularly, based on an
6 extraordinarily limited and skewed interpretation of the D.C. Circuit's *GTE* opinion, Qwest
7 informed CLECs, including Covad, that they were not permitted to collocate any alleged
8 "switching" equipment, including ATMs essential to the provision of DSL services and which
9 are not used for any type of switching purpose at all, in a Qwest CO. Instead, Qwest required
10 Covad to place its ATMs in nearby buildings.

11 When Covad sought to transport its data between the local serving office for
12 Covad's ATM and the non-Qwest collocation space, Qwest informed Covad that it could not
13 utilize Qwest's standardized UDIT transport product. Rather, Qwest created a "new" product –
14 EUDIT – to provide that leg of the transmission path. It is Qwest's own anti-competitive
15 interpretation of a particular judicial decision that lead to the EUDIT "scenario," to the
16 competitive detriment of Covad and other CLECs. Qwest should not be able to have its cake and
17 eat it too.

18 Equally fatal to the viability of EUDIT as a distinct transport product is the fact
19 that it falls afoul of controlling law in two significant ways. First, as the FCC reaffirmed just
20 last year, Qwest must provide nondiscriminatory access to transport across the spectrum of ILEC
21 and CLEC facilities:

22 A BOC has the following obligations with respect to dedicated transport:
23 (a) provide unbundled access to dedicated transmission facilities between BOC
24 central offices or between offices and serving wire centers (SWCs); between
25 SWCs and interexchange carriers' points of presence (POPs); between tandem
26 switches and SWCs, end offices or tandems of the BOC, and the wire centers of
BOCs and requesting carriers; (b) provide all technically feasible transmission
capabilities such as DS1, DS3 and Optical Carrier levels (e.g. OC-3/12/48/96) that
the competing carrier could use to provide telecommunications; (c) not limit the
facilities to which dedicated interoffice transport facilities are connected, provided

1 such interconnections are technically feasible, or restrict the use of unbundled
2 transport facilities; and (d) to the extent technically feasible, provide requesting
3 carriers with access to digital cross-connect system functionality in the same
manner that the BOC offers such capability to interexchange carriers that
purchase transport services.¹³

4 Because EUDIT does not comport with these FCC rules, Qwest must modify its SGAT to
5 eliminate the EUDIT product.

6 Second, and more importantly, Qwest has utilized EUDIT as an anti-competitive
7 device. Specifically, Qwest extorts from CLECs significantly greater amounts of money for the
8 purchase of EUDIT than UDIT. Although EUDIT plainly serves a transmission function and
9 thus constitutes transport, Qwest treats EUDIT as a loop and not transport. By characterizing
10 EUDIT as a loop, Qwest then claims justification to charge a higher, flat rate (like a loop), rather
11 than using the lesser, distance-sensitive rate element, as is the case for UDIT. Through the
12 creation of EUDIT, therefore, Qwest artificially inflates the price for transport and forces CLECs
13 to shoulder a greater financial burden when purchasing transport (which Qwest never has to
14 bear), thereby placing CLECs on an uneven competitive footing.

15 The discriminatory impact flowing from Qwest's requirement that CLECs
16 purchase EUDIT is not limited to the imposition of an undue financial burden. Rather, Qwest's
17 ordering requirements for, and provisioning of, EUDIT (*e.g.* the submission of two ASRs and the
18 assignment of two separate circuit identification numbers), interposes unnecessary delay and
19 administrative complication where none should exist – to the competitive detriment of CLECs.

20 As set forth more fully above and in AT&T's Brief on Impasse Issues Regarding
21 Checklist Items 2, 5 and 6 ("AT&T's Brief"), the lack of any factual or legal basis for the EUDIT
22 product, coupled with the demonstrable anti-competitive burden it places on CLECs, mandates
23 that the SGAT be revised to eliminate the EUDIT product and to make all necessary conforming

24 ¹³ *Application by SBC Communications, Inc., Southwestern Bell Telephone Company; and Southwestern*
25 *Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of*
26 *the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No.
00-65, Mem. Op. and Order, FCC 00-238 (2000), ¶ 331, n.920 ("*Texas 271 Order*").

1 SGAT changes, including but not limited to, ordering changes (one ASR), rate changes (the
2 UDIT rate) and interval changes (the standard UDIT interval in Exhibit C).¹⁴

3 **C. Qwest Improperly Prohibits CLECs and DLECs From Using EUDIT to Transport**
4 **Internet Traffic. (See SGAT 9.6.2.4; WA TR-15).**

5 Qwest made clear for the first time during the follow-up workshop in April 2001
6 on UNEs, transport and switching that it subjects EUDIT to the local use restriction permissibly
7 applicable to extended loop/transport combinations ("EELs").¹⁵ Stated more bluntly, Qwest
8 prohibits CLECs, like Covad, from using EUDIT to transport internet traffic. Qwest's local use
9 prohibition on the use of EUDIT to transport Covad's internet traffic¹⁶ is improper and unlawful
10 for five reasons.

11 First, the legal basis upon which Qwest relies is faulty. Qwest believes that the
12 *UNE Remand Order* permits it to implement a local use restriction on EUDIT.¹⁷ However, the
13 *UNE Remand Order* permits an incumbent LEC, such as Qwest, to impose a local use restriction
14 on the entrance facility segment of dedicated transport *if, and only if*, (1) the CLEC either self-
15 provisions transport or obtains it from a third party other than Qwest, *and* (2) purchases loops
16 from Qwest.¹⁸ In other words, Qwest may impose a local use restriction on CLECs when it
17 provides *only* the loop portion of an EEL, and not the transport segment. Consequently, unless
18 and until Qwest proves, for a particular CLEC purchasing loops from Qwest, that it obtained

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20 ¹⁴ Covad recognizes that Qwest has agreed that CLECs can order a UDIT/EUDIT combination on one
21 ASR, all of which will be provisioned according to the standard intervals for UDIT contained in Exhibit
22 C to the SGAT. *See* TR 3524, ll. 12–14 (Stewart). It also is Covad's understanding that Qwest has agreed
23 to assign one circuit identification number to the UDIT/EUDIT combinations ordered by a CLEC. *Id.*
24 While Covad believes that such changes eliminate some of the more egregious problems associated with
25 the creation of the EUDIT product, such changes in no way purport to address, much less resolve, the
26 impropriety of the creation of a EUDIT product in the first place. Accordingly, Covad asserts that Qwest
must delete all references to EUDIT and make the necessary conforming changes throughout its SGAT.

¹⁵ TR 3531, l. 15 to 3532, l. 17.

¹⁶ AZ Trans., Apr. 9, 2001, Vol. VIII, pp. 1364-65 (Zulevic).

¹⁷ TR 3531, l. 15 to 3532, l. 17; *See UNE Remand Order*, ¶¶ 487, 489.

¹⁸ *UNE Remand Order*, ¶ 487.

1 transport from a third party, Qwest cannot impose a local use restriction on the transport
2 segment. A necessary corollary, therefore, is the fact that Qwest may not impose prospectively a
3 blanket local use restriction on EUDIT, absent evidence supporting such restriction.

4 Here, Qwest failed to provide even a scintilla of evidence suggesting that the
5 preconditions to the local use restriction exist. Indeed, Qwest will never be able to demonstrate
6 with respect to Covad that such prerequisites have been satisfied. Accordingly, because Qwest
7 provided no evidentiary basis upon which to ground its local use restriction on EUDIT, it must
8 be eliminated from the SGAT.

9 Second, even assuming that Qwest may properly impose a local use restriction in
10 order to prevent CLECs from using an EEL as a functional substitute for special or switched
11 access services, imposing a local use restriction on EUDIT is akin to using a sledgehammer to
12 swat a fly. More particularly, the purpose underlying a local use restriction is to ensure that
13 universal service remains unharmed via a requirement that interexchange carriers pay their
14 portion of an incumbent LEC's costs which are recovered through access charges.¹⁹ Yet, Covad
15 neither requires nor purchases special access or switched services, regardless of the inter- or
16 intra-state nature of the traffic it transports. Regardless of the local use restrictions Qwest
17 imposes on EUDIT, therefore, such restriction does not, with respect to Covad, address, much
18 less eliminate, the concern addressed by the local use requirement. To the contrary, Qwest's
19 attempt to preserve and require the purchase of switched and special access services operates to
20 eliminate completely Covad's ability to transport data traffic within its network. Qwest's local
21 use restriction thus is nothing more than a thinly veiled attempt to drive DLECs out of business.

22 Third, the fundamental unfairness of Qwest's local use restriction on EUDIT is
23 self-evident. As set forth more fully above, EUDIT is Qwest's creation and the direct result of
24

25 ¹⁹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,*
26 *Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183 (2000) ("Supplemental Order Clarification").*

1 Qwest's refusal to permit Covad to collocate its ATM in its collocation space in Qwest COs. At
2 the same time Qwest necessarily creates a demand on the part of Covad for EUDIT²⁰, however, it
3 simultaneously prohibits Covad from using that product for the very purpose for which it was
4 ordered – to transport internet traffic to its network equipment. The fact that Qwest was and is
5 fully aware of Covad's intent in purchasing EUDIT – to transport internet traffic to its ATMs in
6 locations other than Qwest COs – simply underscores the fact that the EUDIT local use
7 restriction is one more vehicle by which Qwest attempts to throttle competition in Washington.

8 Fourth, the EUDIT restriction improperly discriminates between CLECs.
9 Specifically, depending on a CLEC's particular collocation arrangement, which arrangement is
10 solely dictated by Qwest, some, but not all, CLECs will be required to purchase EUDIT. As a
11 consequence, Qwest imposes on those CLECs who are required to purchase both UDIT and
12 EUDIT a local use restriction, whereas CLECs purchasing only UDIT are free from any such
13 obligation. Such potential for, and actual existence of, discrimination runs contrary to the plain
14 language of the Act, which mandates nondiscriminatory treatment of CLECs by Qwest.²¹

15 Finally, Qwest's positions on EUDIT are logically and legally inconsistent. As set
16 forth more fully above, Qwest treats EUDIT as a loop, imposing a flat rate for that product,
17 rather than the distance-sensitive rate Qwest applies to other transport products. Qwest's implicit
18 acknowledgement that EUDIT, as defined and implemented by it, is more closely related to
19 loops than to transport, is underscored by the fact that Qwest is fully aware that Covad uses
20 EUDIT to transport internet traffic throughout its network²² and has imposed no local use
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24 ²⁰ The local use restriction on EUDIT requires, as an absolute prerequisite, a finding on the part of this
25 Commission that Qwest may properly create, provision and charge for EUDIT. As set forth more fully
26 above, there is no basis, in fact or law, for the EUDIT product.

²¹ 47 U.S.C. § 251(c)(3).

²² AZ Trans., Apr. 9, 2001, Vol. VIII, pp. 1364-1365 (Zulevic).

1 restriction.²³ Yet, despite its treatment of EUDIT as a loop in other contexts, Qwest casts aside
2 that treatment where it can obtain an additional competitive advantage by conveniently
3 recharacterizing EUDIT as an entrance facility, subject to a local use restriction. Such
4 convenience is insufficient, however, to permit Qwest to impose a local use restriction on
5 CLECs.

6 The local use restriction on EUDIT is simply a backdoor attempt by which Qwest
7 seeks to eliminate DLEC competitors. Unless this Commission acts affirmatively and eliminates
8 the local use restriction on EUDIT, Washington residents will be deprived of competitive choice
9 among DSL providers. This Commission, therefore, must require that Qwest eliminate the local
10 use restriction on EUDIT. Qwest's proposal to temporarily "grandfather in" existing EUDITs is
11 not acceptable, as it potentially permits Qwest to assess the restriction improperly against all
12 existing EUDITs at some point in the future, as well as to impose a local use restriction on all
13 EUDITs ordered by Covad in the future.²⁴ Until such time, if any, as this Commission formerly
14 endorses the creation and implementation of an EUDIT product and any attendant local use
15 restriction, Covad will continue to use UDIT, and EUDIT, as necessary, to transport internet
16 traffic throughout its network.

17 **D. Qwest Improperly Refuses To Comply With Its Own Retail Service Quality**
18 **Standards for UNEs. (SGAT §§ 6.2.3, 9.1.2; WA CL2-5b).**

19 As set forth more fully in AT&T's Brief, Qwest should be obligated to comply
20 with its own retail service quality standards for UNEs. Covad therefore concurs in AT&T's
21 arguments and conclusions on this impasse issue. Accordingly, and consistent therewith, the
22 Commission should require Qwest to amend the SGAT to reflect its obligation to adhere to its
23

24 _____
25 ²³ Such treatment clearly implies that Qwest treats such traffic as local, which treatment determines, as a
26 matter of law, the interstate or intrastate nature of that traffic. *Supplemental Order Clarification*, n. 64.

²⁴ See TR 3533, ll. 12-14.

1 own retail service quality standards for UNEs. Until such time as Qwest includes such language,
2 the Commission should not approve Qwest's § 271 application.

3 **E. Qwest Must Be Required to Unbundle High Speed Line Ports (GR-303 and TR-008)**
4 **for DLC Systems. (SGAT § 9.11.1.4; WA SW-16).**

5 As set forth more fully in AT&T's Brief, Qwest is required to unbundle high
6 speed line ports (GR-303 and TR-008) for DLC systems. Covad therefore concurs in AT&T's
7 arguments and conclusions on this impasse issue. Accordingly, and consistent therewith, the
8 Commission should require Qwest to amend the SGAT to reflect this unbundling obligation.

9 **CONCLUSION**

10 Qwest's network element, transport, and switching provisions are insufficient to
11 spur competitive entry into Washington. Without competitive entry, Washington citizens will be
12 denied the key benefits of competitive choice—higher quality of service and lower prices.
13 Covad respectfully urges the Commission to take the appropriate and necessary steps in this
14 proceeding to provide Washington citizens with that option. Covad therefore encourages this
15 Commission to withhold § 271 approval until Qwest makes the appropriate modifications to its
16 SGAT.

17 Dated this _____ day of May, 2001.

18 MILLER NASH LLP

19
20 _____
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1 **DOCKET NO. UT-003022**

2 I hereby certify that I served the foregoing version of Covad Communication
3 Company's Brief On The Network Elements, Transport And Switching Impasse on:

4 *Please see attached Service List*

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Kim Taylor

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