

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

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JEFF HATCH-MILLER
 Chairman
 WILLIAM A. MUNDELL
 Commissioner
 MARC SPITZER
 Commissioner
 MIKE GLEASON
 Commissioner
 KRISTIN K. MAYES
 Commissioner

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IN THE MATTER OF U S WEST)
 COMMUNICATIONS. INC'S)
 COMPLIANCE WITH SECTION 271)
 OF THE TELECOMMUNICATIONS)
 ACT OF 1996)
)
)

Docket No. T-00000A-97-0238

**COVAD'S RESPONSE TO QWEST'S
 REVISED APPLICATION FOR
 WAIVER FROM INDEPENDENT
 AUDIT**

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") files this response in opposition to Qwest Corporation's ("Qwest") revised application for waiver from an independent audit as required by the Commission's Decision No. 64836 ("Order"). In support of this response, Covad states as follows:

As a condition to obtaining a favorable recommendation from this Commission to allow Qwest to provide long distance service in Arizona, in 2002 Qwest agreed to submit its loop qualification systems to an independent audit 18 months after entry of the Order. Qwest willingly accepted this obligation. Now, Qwest attempts to evade its duty with untenable arguments in support of its waiver application. Since making its commitment, nothing has happened that would justify allowing Qwest to renege on this obligation. On the contrary, as Covad demonstrated in its initial response to Qwest's waiver petition

(attached hereto as Exhibit A), Covad has encountered serious difficulties in using Qwest's loop qualification data, calling into question whether the information is being made available to Covad on a non-discriminatory basis, and thus the need for a complete audit has become compelling.

Further, given Qwest's own admission that it has made a number of changes to its loop qualification tools (including presumably both the databases feeding those tools as well as the tools themselves) since May 21, 2002 (the date the Order was issued), the importance of a loop qualification tool audit is eminently appropriate.

In what can only be construed as recognition of Covad's difficulties, in its revised waiver application, Qwest has now proposed that its loop qualification systems be subjected to a partial audit. Qwest requests that the auditor assess the process for updating the Loop Qualification Database to verify that the bulk updates to the database and therefore the bulk updates available to Qwest personnel are no more frequent than the 20 business day refresh cycle experienced by Covad through its use of the Raw Loop Data Wire Center download. While Qwest's revised application is fine as far as it goes, it simply does not go far enough. In making this new proposal, Qwest continues to ignore the fundamental purpose of the audit, as outlined in the Order.

In the Order, the Commission stated as follows:

[A]n audit shall be conducted . . . of Qwest's company records, back office systems and databases to determine that Qwest is providing the same access to loop qualification information to CLECs to which any Qwest employee has access.

In short, the audit is designed to determine whether Qwest is providing CLECs (such as Covad) with non-discriminatory access to its loop qualification information and systems. But, Qwest's revised waiver application attempts to short circuit that goal. By limiting

the audit to an examination of a single loop qualification system, Qwest would render it impossible for an auditor to know whether in fact Qwest's other loop qualification information and systems are offered and available to CLECs on the same basis as Qwest employees. There is simply no way for an auditor to make this determination by examining a single system.

Moreover, what is especially pernicious about Qwest's original and revised application is that Qwest would have the Commission, on Qwest's word alone, accept that all its other loop qualification systems are available to CLECs on a non-discriminatory basis. There is no reason why the Commission should allow Qwest to act as the final arbiter. The whole point of an audit is to evaluate, on an independent basis, whether Qwest's loop qualification systems are available to CLECs on a non-discriminatory basis. The Order did not say that Qwest could perform the audit or otherwise seek a waiver of the audit if it came forward with information that would support a waiver. There is quite literally nothing Qwest could say that would constitute a sufficient basis to grant a waiver. The only way to determine whether Qwest's loop qualification information and systems are being provided on a non-discriminatory basis is to in fact conduct an audit. To accept Qwest's word on this point would gut the purpose of an audit: a process by which an independent person evaluates, separate and apart from Qwest's self-serving statements to the contrary, whether Qwest's loop qualification information and systems are available to CLECs on a non-discriminatory basis. Viewed from this perspective, the Commission may properly disregard Qwest's self-serving statements in its revised waiver application and re-order Qwest to submit to a comprehensive audit.

Covad responds below to the specific allegations Qwest makes in its revised waiver application.

First, Qwest contends that a partial audit should be limited to assessment of the process for updating the Loop Qualification Database. This simply does not go far enough and demonstrates a complete misunderstanding of Covad's position. Covad's argument that it does not receive timely and accurate loop qualification data is meant to underscore a serious weakness in Qwest's processes and to draw attention to the larger issue: that Qwest is not providing Covad with non-discriminatory access to its loop qualification information. Unlike Qwest, the three other regional bell operating companies (Verizon, SBC and BellSouth) offer Covad bulk raw loop data information on a much more timely basis. Covad notified Qwest and Commission staff of this glaring disparity. Thus, the question of discrimination lingers: Does Qwest provide to itself or others more accurate and up-to-date raw loop data than it does to Covad?

In an attempt to get an answer to this question, Covad served Qwest with a data request asking it to identify by name and type the loop qualification tool(s), method(s) or database(s) that Qwest, the Microsoft Network (MSN) or any other third party independent service provider uses to determine whether a Qwest loop is capable of supporting DSL service. Covad specifically sought information regarding MSN because it is one of Qwest's ISP partners and, presumably (because it is a large, mass market ISP), needs to qualify a significant number of loops for the provision of DSL service. In its response, Qwest stated that "MSN has no unique arrangement or access to loop qualification data." This opaque response simply begs the question regarding discrimination. Qwest did not specify which loop qualification tool MSN or any other

ISP in fact uses but simply identified which tools an ISP "can use" to qualify a loop for DSL service. The fact that MSN's access is not "unique" does not mean that CLEC access generally is non-discriminatory. The incentive for Qwest to favor an ISP partner such as MSN over non-affiliated CLECs is great. When given a direct opportunity from Covad to dispel the possibility of discrimination in favor of MSN, Qwest elected to ignore the issue. This response alone heightens Covad's suspicion of discrimination. The Commission should be equally suspicious and should not trust Qwest's self-serving statements to the contrary. In light of Qwest's unwillingness to answer a direct question regarding how other DSL providers actually use the loop qualification information available and the inability of Covad to lay to rest the question of discrimination on its own, the need for an audit is now overwhelming.

Second, Qwest contends that "actual operational experience" demonstrates that there is no need for the Loop Qual Audit. This is one of those unsubstantiated and self-serving statements that the Commission should reject. Moreover, there is no way Covad or any other CLEC can know what is Qwest's actual operational experience. Only an independent auditor can fully evaluate the veracity of that statement. In addition, Covad's own but limited "operational experience" demonstrates just the opposite -- an audit is essential.

Third, Qwest attempts to discount Covad's reliance upon raw loop data by arguing that it is not one of the primary tools available to CLECs and that Covad only uses it to serve its "apparently unique business preferences." This contention is inaccurate on a number of levels. The raw loop data is in fact Covad's primary tool to qualify loops for digital subscriber line (DSL) service in the Qwest service territory. In addition, there

is nothing unique about Covad's business preferences. Covad is the only nationwide provider of DSL service and, consequently, to argue that the raw loop data is not a primary loop qualification tool is contrary to reality. Moreover, Covad's use of the raw loop data is not driven by its unique business preferences but rather by the demands of its customers. Covad's needs are driven by the demand of DSL loops each month (especially provisioned on behalf of its ISP partners) and, consequently, Covad must rely upon accurate data provided in the bulk raw loop data files. The other loop qualification systems Qwest purportedly offers do not allow Covad to qualify a large number of loops at the same time. Rather, these other systems only allow Covad to qualify loops one at a time with the use of a cumbersome and very time consuming process. This disparity in the types of Qwest's systems once again highlights the possibility that Qwest may in fact be discriminating against Covad in favor of itself or other providers.

Fourth, Qwest argues a waiver is proper because no party has brought forward any reason supporting a larger audit than proposed and that no CLEC has filed a complaint regarding the availability of loop qualification information. However, the mere fact that no other party but Covad has argued for a larger audit or that no one has filed a complaint regarding the availability of loop qualification information cannot support a waiver. The burden rests on Qwest, not another party or CLEC, to demonstrate why a waiver should be granted. Mere silence alone does not mean a waiver is not necessary. It would be fundamentally impossible for Covad or any other CLEC to file a complaint regarding the availability of loop qualification information. Such information is in the exclusive control of Qwest and, absent a bona fide audit, it would be quite difficult for a CLEC to know whether a sufficient basis exists to support a stand alone complaint.

Even the limited negative experience Covad has had with regard to Qwest's loop qualification information and systems, by itself, might not support a complaint. Rather, this experience calls for an independent and exhaustive audit of all Qwest's loop qualification systems. Only then will Covad and this Commission have any comfort in knowing whether Qwest's systems are non-discriminatory.

Fifth, Qwest relies heavily upon the ROC OSS tests to excuse itself from an audit. Again, this argument misses the point altogether. However, this testing bears no relation to the present proceeding. This Commission performed its own 3rd Party 271 audit of Qwest's systems. Based upon that evaluation, the Commission ordered Qwest to undergo an audit 18 months after entry of the Order. When ordering the audit, the Commission did not say or provide that Qwest, on its own initiative, could rely upon the work product or activities of another person to perform the audit. Rather, the Commission specifically said that an independent auditor "selected by the Commission" would perform the audit. The ROC tests were not performed by a person under the control of or appointed by the Commission. In that regard alone the ROC tests deserve no credit. More importantly, there have been changes to Qwest's loop qualification systems since the ROC tests that have never been independently reviewed or audited. These changes obviously render the ROC tests meaningless.

WHEREFORE, for the reasons stated above and in Covad's response to Qwest's first waiver petition, Covad requests entry of an order (1) denying Qwest's petition for a waiver; (2) requiring Qwest to submit its loop qualification information and systems to a comprehensive independent third-party audit as required under the terms of the May 21,

2002 Commission Order; and (3) requiring Qwest to provide its raw loop data to Covad and other customers on a more timely basis.

RESPECTFULLY SUBMITTED this 4th day of October, 2005



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