- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investigation into Qwest Wire Center Data	)	DOCKET NO. 06-049-40
	)	REPORT AND ORDER

ISSUED: September 11, 2006

SYNOPSIS

The Commission determines Qwest Corporation's ("Qwest") use of data from its 2004 ARMIS 43-08 report to develop its initial list of non-impaired wire centers in February 2005 was appropriate. Because Qwest's Salt Lake City South and West wire centers first appeared on Qwest's July 8, 2005, update to its initial wire center list, the Commission concludes the effective date of non-impairment for these wire centers is July 8, 2005. Furthermore, the Commission concludes it is reasonable for Qwest to charge a non-recurring charge to competitive local exchange carriers when those carriers choose to convert their unbundled network element ("UNE") services and facilities to alternative Qwest facilities at non-impaired wire centers. However, the Commission seeks further information from the parties regarding the reasonableness of the respective charges proposed by the parties. Finally, the Commission adopts a process to guide future updates to the Qwest non-impaired wire center list.

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By The Commission:

I. PROCEDURAL HISTORY

On February 16, 2006, Covad Communications Company; Eschelon Telecom of Utah, Inc.; Integra Telecom of Utah, Inc.; McLeodUSA Telecommunications Services, Inc.; and XO Communications Services, Inc. (hereinafter jointly referred to as "Joint CLECs") filed a memorandum seeking Commission order: (1) requiring Qwest Corporation ("Qwest") to provide the underlying data for its non-impaired wire center list submitted to the Federal Communications Commission ("FCC") pursuant to the FCC's Triennial Review Remand Order[1] ("*TRRO*"), (2) approving an initial list of non-impaired wire centers, and (3) implementing a process for updating and approving future lists.

On March 1, 2006, Qwest filed a Motion for an Order Compelling the Production of CLEC-Specific Wire Center Data ("Qwest Motion") seeking Commission order directing Qwest to provide certain business line count and fiber collocator data essential to this proceeding in a disaggregated form that would permit parties to match specific data with specific competitive local exchange carriers ("CLECs"). Also on March 1, 2006, Qwest filed a Petition to Open a Commission Investigation and Adjudicatory Proceeding to Verify Qwest Wire Center Data and Resolve Related Issues ("Qwest Petition") seeking not only a resolution of issues related to Qwest's wire center data but also Commission confirmation of Qwest's right to assess a nonrecurring charge at applicable tariffed rates when Qwest converts unbundled network

[1] *In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, CC Docket NO. 01-338, WC Docket No. 04-313, 20 FCC Rcd 2533 (rel. Feb. 4, 2005) ("*TRRO*").

element ("UNE") transport or high-capacity loops to alternative facilities or arrangements. Qwest also requested the Commission issue an appropriate protective order to govern the handling of confidential information in this docket. Attached to this filing were two lists, Qwest's Wire Center Classification for Dedicated Transport list and a Wire Centers That Satisfy the Nonimpairment Standards for DS1 and DS3 Loops list, identifying, respectively, six Qwest Utah wire centers as Tier 1facilities for dedicated transport and Qwest's Salt Lake City Main wire center as unimpaired for DS1 and DS3 loops, as defined in the *TRRO*.

On March 9, 2006, at a duly noticed Procedural Conference, the parties agreed to a procedural schedule for this docket, culminating in hearing convening on June 13, 2006. On March 14, 2006, the Commission issued a Protective Order to facilitate disclosure of, and provide adequate protection for, Confidential and Highly Confidential information in this docket.

On April 19, 2006, the Joint CLECs filed a memorandum requesting extension of the Commission-ordered deadlines for the filing of rebuttal, response, and surrebuttal testimony. On April 20, 2006, the Commission issued an Order Modifying Schedule approving said extensions.

On May 3, 2006, the Joint CLECs filed a Motion to Compel Qwest to Respond to Data Requests ("Motion to Compel Discovery") seeking Commission order compelling Qwest to respond to data requests for wire center data as of the end of 2004. On May 12, 2006, Qwest filed its Response to the Joint CLECs' Motion to Compel Qwest to Respond to Data Requests arguing the data requests to which Qwest objected did not seek data that is relevant to the issues in this case or that is reasonably calculated to lead to the discovery of admissible evidence and

asking the Commission to deny the Joint CLECs' Motion. On May 19, 2006, the Administrative Law Judge issued an Order Granting Motion to Compel Discovery requiring Qwest to respond to the subject Joint CLEC data requests.

On June 8, 2006, the Joint CLECs filed a Motion to Strike Portions of Qwest Surrebuttal Testimony and Exhibits ("Motion to Strike") seeking Commission order striking lines 158 through 177 of the June 5, 2006, Surrebuttal Testimony of David L. Teitzel filed by Qwest, as well as Highly Confidential Exhibit DLT-2 accompanying said testimony. On June 9, 2006, Qwest filed its Response to the Joint CLECs' Motion arguing the Motion to Strike is without merit and should be denied. On June 9, 2006, the Administrative Law Judge issued an Order Denying Motion to Strike.

Also on June 9, 2006, the Division of Public Utilities ("Division") filed an Issues List for Docket No. 06-049-40 listing the parties' respective positions on four issues, including eighteen sub-issues, for Commission resolution in this docket.

Hearing convened as scheduled on June 13-14, 2006, before the Administrative Law Judge. The Joint CLECs were represented by Gregory J. Kopta of Davis, Wright, Tremaine, LLP and William A. Haas, McLeod Vice President and Deputy General Counsel. Tami Spocogee, McLeod's Director of Network Cost and Access Billing; Sidney L. Morrison, Senior Consultant and Chief Engineer for QSI Consulting, Inc. ("QSI"); and Michael Starkey, President of QSI testified on behalf of McLeod. Qwest was represented by Gregory B. Monson of Stoel Rives; and Alex M. Duarte, in-house counsel for Qwest. William R. Easton, Qwest's Director–Wholesale Advocacy; Robert J. Hubbard, a Director of Technical Support in Qwest's

Network Public Policy Organization; and Curtis Ashton, Senior Staff Technical Support Power Maintenance Engineer in Qwest's Technical Support Group, Local Network Organization, testified on behalf of Qwest.[2]

At the conclusion of the hearing, the Administrative Law Judge ordered Qwest to provide additional information to the Joint CLECs that Qwest claimed to have used in evaluating the Provo and Ogden wire centers but had not been previously provided or offered into evidence. The Administrative Law Judge instructed parties that said information would be marked as Joint Hearing Exhibit 2 and, subject to objection, entered into evidence for consideration by the Commission. On June 16, 2006, Qwest provided this information and filed it with the Commission as Highly Confidential Joint Exhibit 2. No party having objected to this exhibit, the Commission hereby admits the same into evidence.

In addition, in response to additional rebuttal testimony provided by Qwest witness Rachel Torrence at hearing, as well as the post-hearing evidence to be provided by Qwest, the Joint CLECs requested their witness Douglas Denney have the opportunity to provide post-hearing supplemental surrebuttal testimony. The Administrative Law Judge granted this request, stating said testimony would be marked and admitted into evidence, subject to objection. On June 26, 2006, the Joint CLECs filed said testimony styled the Supplemental Surrebuttal Testimony of Douglas Denney. No objection having been raised, said testimony is hereby

[2]Portions of the hearing discussing Confidential and Highly Confidential information were closed to members of the public who had not previously signed the appropriate Protective Order exhibits. Portions of the transcript relating to closed hearing sessions have been sealed and stored separately. This Order may generally refer to Confidential and Highly Confidential information contained in witness testimony and exhibits, but does not disclose such information. The Commission has issued no separate Confidential or Highly Confidential order in this matter.

admitted into evidence as Exhibit Eschelon 1SSR for consideration by the Commission.

On July 14, 2006, the parties filed post-hearing briefs. Qwest and the Joint CLECs filed reply briefs on July 28, 2006.

II. BACKGROUND, DISCUSSION, FINDINGS, AND CONCLUSIONS

A. The *TRRO* and Applicable Regulatory Provisions

The FCC undertook the process leading to release of the *TRRO* in response to the decision of the D.C. Circuit Court of Appeals in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (2004)("*USTA II*"), vacating and remanding the FCC's findings of nationwide impairment for mass market switching and dedicated transport in the Triennial Review Order ("*TRO*").[3] The *TRRO* clarifies the obligations of incumbent local exchange carriers ("ILECs") to provide unbundled access to dedicated interoffice transport and high-capacity loops, as well as clarifying the FCC's "impairment" standard.

The *TRRO* establishes route-by-route unbundling requirements for dedicated interoffice transport depending on the number of "business lines" and "fiber-based collocators" in particular wire centers. The relevant *TRRO* language regarding business lines is as follows:

> [B]usiness line counts are an objective set of data that incumbent LECs already have created for other regulatory purposes. The [Bell Operating Company or "BOC"] wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops. We adopt this definition of business lines because it fairly represents the business opportunities in a wire

[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions fo the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16978, 17145 (2003).

> center, including business opportunities already being captured by competing carriers through the use of UNEs. Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify. Conversely, by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information.[4]

At *TRRO* paragraph 108, the FCC addresses the strengths and efficacy of this approach as follows:

> we adopt a proxy approach that, unlike the *Triennial Review Order* triggers, relies on objective criteria to which the incumbent LECs have full access, is readily confirmable by competitors, and makes appropriate inferences regarding potential deployment. This approach will significantly reduce the burdens of implementing the standard in comparison with the extensive and litigious proceedings that followed the issuance of the *Triennial Review Order*.

The FCC's *TRRO* implementation rule, 47 C.F.R. § 51.5 ("Rule 51.5"), further defines a business line as

> an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:
>
> (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
>
> (2) shall not include non-switched special access lines,

[4] *TRRO*, ¶ 105.

> (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

The FCC defines fiber-based collocation in the *TRRO* as "a competitive carrier collocation arrangement, with active power supply, that has a non-incumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center."[5]

The *TRRO* creates a three-tiered classification system for all ILEC wire centers "based on indicia of the potential revenues and suitability for competitive transport deployment."[6] Tier 1 wire centers are those with the highest likelihood for actual and potential competitive deployment, including wholesale opportunities. To qualify for Tier 1 status, a wire center must contain four or more fiber-based collocations or 38,000 or more business lines.[7] Tier 2 wire centers, those with three or more fiber-based collocations or with 24,000 or more business lines, also show a very significant but lesser likelihood of actual and potential competitive

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[5] *TRRO*,¶ *102*. Rule 51.5 provides the following definition:

> A fiber-based collocator is any carrier unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph.

[6] *TRRO*, ¶ 111.

[7] *Id.*, ¶ 112.

deployment.[8] Finally, Tier 3 wire centers are those that do not qualify for Tier 1 or Tier 2 status[9] and generally exhibit a low likelihood of supporting actual or potential competitive transport deployment.[10]

The FCC determined competing carriers are impaired without access to DS1-capacity transport on all routes except those connecting two Tier 1 wire centers. Thus, ILECs are obligated to provide unbundled DS1 transport that originates or terminates in any Tier 2 or Tier 3 wire center, but are not obligated to provide unbundled DS1 transport on routes connecting two Tier 1 wire centers.[11] With respect to DS3 interoffice transport, the FCC concluded requesting carriers are not impaired without access to unbundled DS3 transport on routes connecting wire centers where both of the wire centers are either Tier 1 or Tier 2 wire centers. Thus, ILECs are obligated to provide unbundled DS3 transport that originates or terminates in any Tier 3 wire center, but are not obligated to provide unbundled DS3 transport on routes connecting any combination of Tier 1 and Tier 2 wire centers.[12] The FCC's impairment determinations regarding dark fiber mirror those for DS3 transport.[13]

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[8] *Id.*, ¶ *118.*

[9] *Id.*, ¶ 123.

[10] *Id.*

[11] *Id.*, ¶ 126.

[12] *Id.*, ¶ 129.

[13] *Id.*, ¶ 133. "Dark fiber" is fiber optic cable that has been deployed by a carrier but has not yet been activated through connections to optronics that "light" it, and thereby render it capable of carrying communications. *Id*. (citations omitted).

Turning to high-capacity loops, the FCC determined there is no impairment in any location within the service area of a wire center that contains 60,000 or more business lines and four or more fiber-based collocators. Therefore, ILECs are not required to provide unbundled DS1 loops in these wire centers. Similarly, ILECs are not obligated to provide unbundled DS3 loops in wire centers containing 38,000 or more business lines and four or more fiber-based collocators. Finally, the FCC determined there is no impairment for dark fiber loops so ILECs are no longer obligated to provide unbundled dark fiber loops.[14]

Recognizing that the *TRRO* removed from ILECs significant dedicated transport and high-capacity loop unbundling obligations, the FCC established a 12-month deadline, from the effective date of the *TRRO,* for CLECs to transition to alternate DS1 and DS3 dedicated transport and high-capacity loops. The FCC set an 18-month transition for dark fiber transport and loops.[15] The FCC ordered that during the transition period any unbundled dedicated transport and high-capacity loops that a CLEC leases as of the effective date of the *TRRO,* but for which the FCC determines that no Section 251(c) unbundling requirement exists, shall be available for lease from the ILEC at a rate equal to the higher of 115% of the rate the CLEC paid for the UNE on June 15, 2004, or 115% of the rate the state commission has established, or establishes, if any, between June 16, 2004, and the effective date of the *TRRO,* for that UNE.[16]

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[14] *Id.*, ¶ 146. *See also* 47 C.F.R. § 51.391(a).

[15] *Id.*, ¶¶ 142, 195.

[16] *Id.*, ¶¶ 145, 198.

Regarding implementation procedures and future CLEC orders for UNEs, the FCC stated the following:

> We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market. We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements [of the *TRRO*] and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3). Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in [the *TRRO*], the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.[17]

Concurrent with release of the *TRRO*, the FCC's Wireline Competition Bureau requested Qwest use the unbundling standards and impairment standards outlined above to produce and file a list of "non-impaired" wire centers, listing by Common Language Location Identifier ("CLLI") those Qwest wire centers that satisfy the Tier 1, Tier 2, and Tier 3 criteria for dedicated transport, as well as those that satisfy the non-impairment thresholds for DS1 and DS3 loops.

In February 2005, Qwest filed its initial list of wire centers developed using the December 2003 ARMIS 43-08 data then on file with the FCC. On July 8, 2005, having

[17] *Id*., ¶ 234 (citations omitted).

conducted a more thorough count of fiber-based collocators than that originally conducted in February 2005, Qwest revised this list, resulting in a change of tier designation for the Salt Lake City South wire center from Tier 3 to Tier 1, the Salt Lake City West wire center from Tier 2 to Tier 1, and the Midvale wire center from Tier 2 to Tier 3. Qwest therefore claims six Utah wire centers (Murray, Ogden Main, Provo, Salt Lake City Main, Salt Lake City South, and Salt Lake City West) satisfy the FCC's Tier 1 criteria while its Salt Lake City Main center is non-impaired with respect to Qwest's obligation to provide unbundled DS1 and DS3 loops.

All parties agree it is important to get non-impairment classifications right because the FCC's rules mandate that even if the number of business lines in a particular non-impaired wire center declines below the non-impairment thresholds for DS1 or DS3 loops, the non-impairment designation for that wire center remains unchanged.[18] In other words, once a wire center is approved for the non-impairment list, it will not thereafter be removed from that list due to a reduction in its business line or fiber-based collocator count.

B. Issues Remaining for Commission Resolution

The Joint CLECs, having reviewed Qwest's data and testimony filed in this matter, now agree with Qwest's Tier 1 designation for each of the six listed wire centers. The only remaining dispute regarding Tier 1 designation concerns the effective date for the Salt Lake City West and Salt Lake City South reclassifications. Qwest believes Tier 1 designations for all

[18]The parties apparently base this view on 47 C.F.R. § 51.319(e)(3)(i) which states "Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center." Subsection (ii) of this rule likewise indicates that once a wire center is classified as Tier 2 it is not subject to later reclassification to Tier 3. While acknowledging the parties' agreement as to the effect of these provisions on non-impairment classifications, the Commission does not herein enter any conclusions regarding these provisions.

six wire centers are effective as of March 11, 2005, while the Joint CLECs, and the Division, assert Salt Lake City West and Salt Lake City South should be treated as Tier 2 and Tier 3 wire centers, respectively, from March 11 through July 7, 2005, and Tier 1 effective July 8, 2005, based on the date Qwest filed its revised non-impaired list with the FCC.

In addition, the Joint CLECs dispute Qwest's use of 2004 ARMIS 43-08 report data to develop its initial wire center list in February 2005. The Joint CLECs and the Division also challenge Qwest's classification of the Salt Lake City Main wire center as non-impaired with respect to DS1 loops.

In all, the parties agree six issues remain for Commission resolution: (1) the proper vintage of ARMIS data used to develop Qwest's initial non-impairment list; (2) the appropriate method of counting business lines; (3) the effective date of the Tier 1 designation for the Salt Lake City West and Salt Lake City South wire centers; (4) the process for future Qwest updates to its non-impairment list; (5) non-recurring charges to convert UNEs; and (6) rejection of UNE orders. Development of a process to govern future updates itself raises several sub-issues, each of which we address below.

1. The Appropriate Vintage of Data Used

In developing wire center-specific counts of Qwest retail switched business lines in service in February 2005, Qwest used December 2003 ARMIS 43-08 data that was the most current ARMIS data then on file with the FCC. Qwest argues this is the appropriate data to be used in business line count calculations because the FCC intended Regional Bell Operating Companies ("RBOCs") like Qwest to utilize access line data that was finalized and readily

available as of February 4, 2005, when the FCC directed the RBOCs to submit their lists of non-impaired wire centers. Qwest files its access line data with the FCC in April of each year so its calendar year 2004 ARMIS 43-08 report was not filed with the FCC until nearly two months after the FCC directed RBOCs to file their lists of non-impaired wire centers. Qwest argues the fact that time has intervened between Qwest's initial wire center non-impairment filing in February 2005 and proceedings in the current docket does not mean the December 2003 data is not the appropriate basis for Qwest's initial list.

Qwest also notes the FCC rules do not require that fiber-based collocation data and business line data be of the same vintage in determining wire center non-impairment.[19] In addition, Qwest points out only two of at least nine state commissions that have dealt with this issue have ordered the use of business line data other than December 2003 data. Furthermore, in Washington, the only state in the Qwest region which has addressed this issue to date, the Administrative Law Judge issued an order finding Qwest's use of the December 2003 data to be in full compliance with the *TRRO*.

The Joint CLECs counter that the *TRRO* became effective March 11, 2005, and determinations made pursuant to the *TRRO* should be based on data most close in time to its effective date. Since the RBOCs make their ARMIS filings on April 1 for the preceding calendar year, Qwest should be required to use the December 31, 2004, data it filed with the FCC in April 2005, a mere three weeks after the effective date of the *TRRO*, rather than the December 31, 2003, data that was already more than a year old when Qwest prepared its initial

[19] The Joint CLECs do not dispute this point.

list. According to the Joint CLECs, the FCC plainly intended wire center designations be based on the most current data available, noting the *TRRO* expressly contemplates future non-impairment designations but that such designations would be meaningless if only 2003 data could be considered.

The Joint CLECs also point out Qwest used fiber-based collocator data from March 2005 in developing its initial non-impairment list even though such data was created almost a month after the Wireline Competition Bureau's letter requesting the filing of a non-impairment list. In support of their position, the Joint CLECs cite the decision of the Michigan Public Service Commission requiring an RBOC to use data that is as close as possible to the time at which the RBOC listed the wire center as non-impaired, even if that data had not yet been filed with the FCC. The Michigan commission based its decision on its conclusion that the FCC requires RBOCs to use the data gathered for ARMIS reporting, but does not require them to use the actual figures provided in the ARMIS report.

The Division does not take a firm position on this issue, believing the particular vintage of the data used does not have a significant impact on the classification of the wire centers at issue.

Having considered the parties' arguments, we conclude it is appropriate for Qwest to have used the December 2003 data contained in its 2004 ARMIS 43-08 report to compile its initial wire center non-impairment list. The Wireline Competition Bureau requested this list in early February 2005 and Qwest provided the list to the FCC in March 2005. Qwest's 2005 ARMIS 43-08 report was not filed with the FCC until April 2005. We note the FCC decided to

require ILECs to base their business line counts on ARMIS information because that information has "already [been] created for other regulatory purposes"[20] and is "readily confirmable by competitors."[21] Based on this guidance, it is reasonable that Qwest used its 2004 ARMIS 43-08 data to create its initial non-impairment list, and we see no reason to require Qwest to change that list simply because newer data has become available over the past eighteen months. We therefore deny the Joint CLECs' request that we require Qwest to use data from its 2005 ARMIS 43-08 report as the basis for its initial wire center non-impairment list.[22]

2. The Appropriate Method of Counting Business Lines[23]

As provided above, the FCC intended that business line counts be "based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops." Qwest therefore used its December 2003 ARMIS 43-08 data as a starting point in calculating the number of business lines at each wire center. However, pointing to the apparent mandate of Rule 51.5(3), Qwest multiplied its high-capacity digital business line count by the appropriate voice-grade equivalent ("VGE") factor for each line to arrive at a total business line count for non-impairment

[20] *TRRO*, ¶ 105.

[21] *Id*., ¶ 108.

[22] As noted by the Division, it appears, especially in light of our decision below regarding the appropriate method of counting business lines, the particular vintage of the data used to produce Qwest's initial non-impairment list has little or no impact on the substance of that list. Finally, we note parties are in agreement that future updates to Qwest's non-impairment list will be based on the most current data available; indeed, updates based on new business line counts will be filed, if at all, only after the filing of Qwest's annual ARMIS 43-08 report, ensuring only the most current available business line count information will be used as a basis for such updates.

[23] The parties agree that, under Qwest's proposed counting method, the Salt Lake City Main wire center exceeds the FCC's 60,000 business line threshold for DS1 non-impairment, but, calculated using the Joint CLECs' and Division's proposals, the number of business lines at this wire center falls short of this threshold such that the Salt Lake Main wire center would be classified as non-impaired for DS3 loops but not for DS1 loops.

purposes.[24] Qwest argues the FCC's intended use of ARMIS data implicitly includes some adjustment of that data since ARMIS data must be disaggregated from the state-wide level in which it is reported to the wire center level necessary to produce a wire center non-impairment list. In making this adjustment to both retail and wholesale loops, Qwest notes the FCC's rule does not say that only those 64 kbps-equivalents that are actually "in use" or "in service" should be counted, or that adding the full capacity of these digital lines is limited to only wholesale UNE loops.[25]

Because Qwest's wholesale UNE-P tracking systems could not distinguish between the residential and business UNE-P lines included in the December 2003 data, Qwest determined the number of business UNE-P lines at each wire center by subtracting the number of directory listings associated with residential UNE-P access lines listed in its white pages directory from the total number of UNE-P lines in service in the relevant wire center. Qwest notes it previously used a similar procedure in the Commission's Section 271 process and so it believes this procedure provides a reasonable proxy for the actual number of UNE-P lines. Finally, Qwest used the same approach for high-capacity UNE-P circuits as it used for high-capacity retail and UNE loop circuits, that is, multiplying the quantity of UNE-P circuits by a "VGE-equivalence" factor of 24 to reflect the number of 64kpbs channels associated with its UNE-P DS1 lines.

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[24] For example, because there are 24 VGE channels in each DS1 circuit, Qwest multiplied the number of DS1 unbundled loops in Qwest's December 2003 wholesale database by 24.

[25] Qwest notes commissions in Washington, California, Texas, Florida, Georgia, and South Carolina have permitted ILECs to count the full capacity of CLEC (i.e., wholesale) high-capacity lines while three of these commissions have also permitted adjustments for the full capacity of ILEC (i.e., retail) digital facilities.

To its VGE-adjusted ARMIS data and business UNE-P count, Qwest added the number of all UNE loops in a wire center to calculate its final business line count for that wire center. Qwest did not attempt to remove from this count UNE loops that may be used to serve residential customers or to provide "non-switched" services. Qwest argues the clear language of the *TRRO* and associated rules mandating the counting of all UNE loops does not distinguish between business and residential UNE loops.

In contrast, the Joint CLECs argue business line calculations should only include the business lines that Qwest actually has in service, noting paragraph 105 of the *TRRO* speaks to business line counts including the ILEC's "ARMIS 43-08 business lines" without any reference to increasing those numbers to account for spare capacity. The Joint CLECs believe Qwest's reliance on the VGE adjustment outlined in Rule 51.5(3) is misplaced, pointing out the first line of this rule defines a business line as a line "used to serve a business customer." According to the Joint CLECs, this definition excludes the spare capacity on a digital circuit that Qwest has deployed to provide service to a business customer since that capacity is not being used to serve that customer. Furthermore, this rule includes in the number of business lines "all incumbent LEC business switched access lines", a number reported to the FCC in Qwest's ARMIS 43-08 report without any adjustment to account for spare capacity. The Joint CLECs do not dispute that Qwest must dissaggregate its state-wide ARMIS data to the individual wire center level, but they do not agree this basic activity opens the door to Qwest otherwise manipulating the ARMIS data using non-ARMIS records. The Joint CLECs also note the North Carolina commission recently reached the same conclusion, as did the ALJ in Washington. In

addition, the Joint CLECs point out that AT&T (formerly SBC) and Verizon do not make any adjustment to their ARMIS 43-08 business line counts in calculating the number of business lines at a particular wire center..

Should the Commission agree with the Joint CLECs and disallow Qwest's proposed VGE adjustments, Qwest proposes an alternative modification to its ARMIS 43-08 business line counts whereby it would increase those line counts to account for lines that are served out of the Salt Lake City Main wire center but are terminated in the service area of a different wire center. The Joint CLECs argue such an adjustment continues to miss the point that the FCC did not intend Qwest to make any adjustments to its ARMIS 43-08 business line counts for any reason. The Joint CLECs also point out that Qwest offered no evidence to support this alternate counting method.

While repeating their position that no adjustment to ARMIS 43-08 data should be permitted, the Joint CLECs offer their own alternative adjustments to be used if the Commission agrees with Qwest's augmentation of its ARMIS 43-08 business lines. Noting that Rule 51-5 defines business lines in terms of "switched" access lines serving "business" customers, the Joint CLECs testified Qwest's UNE loop count currently includes residential and non-switched lines and argue Qwest should be required to remove these lines in order to comply with the explicit terms of the rule. Qwest disagrees, arguing *TRRO* paragraph 105 prohibits any adjustment to UNE loop counts and notes the majority of state commissions that have dealt with this issue have disallowed such adjustments. The Joint CLECs conclude by testifying that under either of their

proposed counting methods, the Salt Lake City Main wire center does not serve 60,000 or more business lines and therefore is not properly classified as non-impaired for DS1 loops.

The Division begins its analysis by pointing out that *Utah Code Ann.* § 54-8b-1.1 encourages the development of competition as a means of providing wider customer choice, allows flexible and reduced regulation as competition develops, and encourages competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis. The Division believes the method adopted by the vast majority of states that have addressed this issue to date is the position most consistent with the *TRRO* and the Utah policy objectives noted above. Therefore, the Division argues Qwest's ARMIS data should not be adjusted to reflect the full capacity of Qwest's DS1 and DS3 circuits, but should instead reflect the actual circuits in use. However, CLECs' DS1 and DS3 line counts should be adjusted to represent those circuits' full capacity. The Division draws this distinction between wholesale and retail lines because Qwest knows precisely the number of retail 64 kbps channels in use at one of its wire centers while it does not know the number of channels actually being used by the CLECs.[26] In addition, all UNE loops, whether residential or business, switched or non-switched, should be added to the ARMIS business line data.

The Division believes this method is consistent with the FCC's desire that the non-impairment analysis be easily understood and based on readily available information. In the Division's view, neither Qwest's nor the Joint CLECs' proposed method satisfies these

[26] Qwest does not agree with this approach, arguing the Rule 51.5 definition of a "business line" explicitly applies to both wholesale and retail services. Qwest also points out the Division testified the FCC's rule does not state that it applies only to wholesale lines.

objectives. Qwest's proposal to count the full capacity of its retail DS1 and DS3 circuits rather than the known number of retail lines actually in use moves its process farther away from that envisioned by the FCC and opens the counting process to the potential for manipulation. However, accounting for the full capacity of the CLECs' DS1 and DS3 lines provides a transparent and reasonable measure of the competitive capacity available in a wire center since Qwest has no ability to readily determine the extent to which these lines are actually being used. Conducting this VGE adjustment for wholesale lines also satisfies the mandate of Rule 51.5(3) insofar as the actual number of wholesale lines in use can not be determined. Likewise, since Qwest has no way of determining whether a UNE is being used for residential or business purposes, it is reasonable that Qwest use the total number of UNE loops in its business line calculations.

In deciding this matter, we look first to the *TRRO* and then attempt to read the FCC's rules consistently with the FCC's guidance in the *TRRO*. All parties agree the basic intent of paragraph 105 of the *TRRO* is to provide an easily understood process for calculating business lines based on readily available information. We concur and conclude the Division's proposed method of determining the number of business lines at a given wire center best satisfies the FCC's intent by providing an easily calculated, reasonable representation of competition within that wire center. Using ARMIS 43-08 data, including Qwest's known retail DS1 and DS3 line counts, as a starting point for business line calculations provides "an objective set of data that incumbent LECs already have created." Likewise, adjusting wholesale DS1 and DS3 numbers to account for their total VGE capacity and counting all UNE loops accords with the

FCC's view that the number of business lines fairly represents the business opportunities available in a given wire center.

We therefore adopt the Division's business line counting method as set forth above and, based upon this method and the evidence of record, find Qwest's Salt Lake City Main wire center does not meet the *TRRO*'s 60,000 business line threshold and does not qualify for non-impairment status with respect to DS1 loops.[27] Given the evidence before us and the stated agreement of the parties, we further find and conclude that the Salt Lake City Main wire center is non-impaired with respect to DS3 loops and that the six Qwest wire centers listed above are properly classified as Tier 1 facilities meeting the FCC's non-impairment criteria for interoffice transport.

3. Effective Date of Salt Lake City West and South Tier 1 Designation

While the parties agree concerning the Tier 1 status of these wire centers, they do not agree on the effective date of Tier 1 status for the Salt Lake City West and Salt Lake City South wire centers. Qwest believes the effective date for all such designations on its initial list to the FCC should be March 11, 2005, the *TRRO* effective date. The Joint CLECs, on the other hand, argue that because Qwest first listed these two wire centers as Tier 1 facilities in its July 8, 2005, update to the FCC, the effective date of non-impairment for these two wire centers should be July 8, 2005, rather than March 11, 2005.

Qwest argues the Joint CLECs' position ignores the fact that the fiber-based collocations for these two wire centers were all operational as of the March 11, 2005, *TRRO*

[27] We note this decision does not preclude Qwest's reclassification of the Salt Lake City Main wire center as non-impaired in future lists prepared in accordance with the update process set forth below.

effective date, and that the FCC did not require that ILECs provide notice to CLECs or production of the non-impaired wire center list by this date. Qwest argues, given the short time period involved, it is reasonable that the notice of such non-impairment could follow at a later date, especially since RBOCs like Qwest were conducting thorough but cautious investigations to identify fiber-based collocators in their wire centers.

The Joint CLECs note that regardless of whether these two wire centers satisfied the Tier 1 criteria on March 11, 2005, Qwest did not notify CLECs, the FCC, or the Commission of this fact until almost four months later. The Joint CLECs point out that no where in the *TRRO* does the FCC establish any "grace period" for ILECs to update their initial non-impairment classifications after the *TRRO* effective date. According to the Joint CLECs, Qwest seeks to deprive CLECs of the full 12- and 18-month transition periods established by the FCC and to impose higher rates for DS1 and DS3 transport UNEs for the four months during which the CLECs had no notice of any rate increase. The Joint CLECs argue that, taken to its logical conclusion, Qwest's position would enable it to decide today that, based on data that existed on March 11, 2005, one of its wire centers should be reclassified effective March 11, 2005, such that CLECs would be obligated to pay higher rates for affected UNEs in that wire center for the past seventeen months.

The Division supports the Joint CLECs' position on this issue. We concur and conclude the effective date of non-impairment for the Salt Lake City West and Salt Lake City South wire centers is July 8, 2005. Qwest's updated non-impairment list changing the status of these two wire centers from Tier 2 to Tier 1 was not filed until July 8, 2005. This is the date on

which CLECs were effectively given notice that Qwest believed these two wire centers qualified for Tier 1 status. It makes no difference that Qwest now claims these wire centers actually qualified for Tier 1 status on March 11, 2005. The simple fact is on March 11, 2005, Qwest listed these wire centers as Tier 2 facilities, a designation that Qwest did not change until July 8, 2005. Our decision announced herein properly ensures that Qwest's charges for DS1 and DS3 transport and loops will be based on Qwest's non-impairment list as filed, not on Qwest's view of how that list might have been filed.

4. The Wire Center Non-Impairment List Update Process

Qwest and the Joint CLECs agree there should be a single, unified process going forward that includes Commission review and approval when CLECs contest Qwest's non-impairment designation of a wire center.[28] The Joint CLECs and Qwest also agree that a 30-day review period will provide the Joint CLECs sufficient time to review and object to, if appropriate, future updates to the Qwest non-impairment list.[29] However, the Joint CLECs and the Division seek to impose certain other filing requirements that Qwest challenges as unreasonable. The parties also disagree concerning the effective date of any reclassification of wire centers.

a. Additional Threshold Reporting by Qwest

[28]Qwest has testified that, when appropriate, Qwest intends to update the list of non-impaired wire centers using the same counting methods Qwest has used in this proceeding, or whatever alternate method is approved by the Commission in this proceeding.

[29]The Joint CLECs note that to make this 30-day review period workable Qwest must include with its initial filing for Commission approval of a new wire center classification "full" documentation similar to that produced via discovery and pre-filed testimony in this proceeding. Qwest has generally committed to providing such information with future filings of non-impairment list updates.

The Joint CLECs and the Division propose that Qwest be required to notify the Commission and interested parties when a particular wire center is within 5,000 lines of satisfying the business line counts specified in the *TRRO* or when the number of fiber-based collocators is within one fiber-based collocator of meeting a particular FCC threshold.[30] The Joint CLECs note that such notice will enable CLECs to better prepare to find alternatives to UNEs in order to continue to serve existing customers and obtain new customers

Qwest opposes such notice, arguing the Commission should not impose an additional reporting threshold not required by the *TRRO* that would simply add to Qwest's administrative burden. Qwest notes it does not have a process in place to provide such notice. Qwest also testified the "advance notice" thresholds proposed by the Joint CLECs are not meaningful because a wire center's coming within 5,000 business lines or one fiber-based collocator of the FCC's thresholds does not mean that a change in the impairment classification of that wire center is imminent. Qwest notes that it can only propose updates to its non-impairment list based on ARMIS business line counts once per year since it files its ARMIS 43-08 report only once per year. Therefore, if the number of business lines in a wire center increases to within 5,000 of a non-impairment threshold in, for example, June, but subsequently declines by December to a number below the 5,000 threshold, advance notice like that proposed by the Joint CLECs could actually cause CLECs to take costly action to prepare for a wire center non-impairment reclassification that will not occur. Qwest also testified that such advance

[30] For example, a wire is eligible for Tier 2 status if it serves 24,000 or more business lines or contains three or more fiber-based collocators. As proposed by the Joint CLECs, Qwest would be required to notify the Commission when a wire center reaches 19,000 business lines or two fiber-based collocators.

notification could allow CLECs to "game" the system by changing their business plans so that the wire center would be unlikely to meet the FCC threshold. Finally, Qwest points out that no state commission has imposed such an advance threshold reporting requirement.

In response, the Joint CLECs argue the *TRRO* does not preclude the Commission from establishing an additional reporting requirement. The Joint CLECs also dismiss Qwest's assertion that such a requirement might enable CLECs to adjust their UNE ordering to keep a wire center from reaching the threshold. To do so, the CLECs argue, they would either have to deny service to new customers, order special access circuits from Qwest at a much higher rate, or build their own facilities or obtain them from another carrier. The Joint CLECs find no merit in Qwest's argument that additional reporting would be an administrative burden. Likewise, when Qwest reviews the number of fiber-based collocators in its wire centers to determine for its own purposes whether the impairment status has changed, there would be no significant additional burden created by requiring Qwest to inform the Commission if any of those wire centers is approaching a relevant threshold.

The Division notes listing a wire center as non-impaired can have significant business impacts on CLECs. The Division believes all efforts should be made to assist CLECs in the transition from UNEs in order to maintain competition at a wire center once it has been determined to be non-impaired. For these reasons, the Division supports the 5,000 line threshold reporting proposed by the Joint CLECs. The Division notes no other state commission has yet addressed this issue and that the Commission should not be reluctant to add to the FCC's process when it sees a need and is not otherwise prohibited from doing so.

On this issue we agree with Qwest. The *TRRO* provides for no additional threshold reporting or notification and the Joint CLECs have failed to provide sufficient evidence to convince us that such a process is reasonable, necessary, or would enhance competition. The wire center non-impairment list updating process announced herein provides sufficient notice and transition protection to CLECs. We therefore decline to order the additional threshold notification requested by the Joint CLECs.

b. Prior Notice of Future Wire Center Classifications

The Joint CLECs propose Qwest provide notice to affected CLECs five days prior to making an initial filing with the Commission for approval of an updated wire center non-impairment list. Such notice would alert CLECs that Qwest will be providing confidential data on the number of UNEs those CLECs have in a given wire center so that they have the opportunity to object to disclosure of such data. The Joint CLECs testified such notice would be fully consistent with Qwest's prior practice regarding requests for CLEC-specific data, as well as its obligations under interconnection agreements to provide notice prior to disclosure of CLEC confidential information.

Qwest argues the Joint CLECs' concern about disclosure of confidential information is misplaced, rendering unnecessary the five days notice they seek. Qwest testified it intends to protect any confidential information just as it has in this proceeding via a standing non-disclosure agreement or protective order to protect sensitive CLEC-specific data. Qwest believes the Joint CLECs have not adequately explained why they need the additional time they

seek and points out the Joint CLECs have not cited any "prior notice" requirement in the *TRRO* or any other state commission order.

However, the Joint CLECs argue Qwest misses the point, noting the Commission has issued no such standing order and, even if it did, a CLEC may nonetheless have an objection to disclosure for purposes other than administration of its interconnection agreement with Qwest. Accordingly, Qwest should be required to give CLECs on whose proprietary network information Qwest intends to rely the opportunity to object to disclosure before disclosure occurs.

The Division supports the Joint CLECs' proposal.

We agree some form of advance notice would facilitate parties' handling of confidential information and should expedite the wire center non-impairment list approval process. It would also expedite proceedings seeking approval of the proposed non-impairment list. At hearings, parties generally agreed that future proceedings would require a protective order. Likewise, Qwest has promised to adequately protect confidential information in future proceedings, perhaps on the basis of a standing protective order issued by the Commission. While we decline to issue such a standing order, we conclude an advance filing by Qwest requesting issuance of a protective order in anticipation of filing an updated wire center non-impairment list with supporting data will facilitate expedited processing of the updated list.[31] In order to provide all interested parties adequate notice of the scope of the requested protective

[31]We note this procedure is largely identical to that followed in the instant docket wherein Qwest sought Commission approval of its non-impairment list and issuance of a protective order prior to Qwest's production of the CLEC-specific data used as the basis of its non-impairment list.

order, as well as the anticipated wire center update proceedings, the request for protective order should specify those wire centers to be proposed for re-classification. The five-day period proposed by the Joint CLECs and supported by the Division would provide the Commission sufficient time to issue said protective order prior to Qwest's filing of the updated list and would also provide CLECs and the Division ample notice that the 30-day review clock for a proposed wire center re-classification is about to begin ticking. Therefore, we will require Qwest to file a request for protective order at least five days prior to its filing for approval of an updated wire center non-impairment list. Said request shall identify those wire centers that Qwest seeks to reclassify as non-impaired.

c. Effective Date of Future Qwest Updates

Qwest proposes the designation of new non-impaired wire centers be effective thirty days following the initial notification to CLECs that the impairment status for that wire center has changed. Qwest would file the updated non-impairment list with the Commission and notify all CLECs via its Change Management Process notification system. Qwest would provide to CLECs the same kind of supporting data that it used to support its initial list of non-impaired wire centers.[32] CLECs would then have 30 days to raise objections to the Commission. If no objections were raised, the wire center list would be deemed approved through operation of law. In the event a CLEC disputes Qwest's revised wire center designation, Qwest should have the

[32] It is not clear from the testimony presented whether Qwest intends to provide only the data that it provided initially for the list of non-impaired wire centers at issue in this docket, or whether Qwest intends to provide data akin to all of the supporting documentation it has provided throughout this proceeding, such as data request responses.

right to back bill the CLEC to the above-specified effective date if the Commission subsequently approves the change in wire center status.

In support of this position, Qwest points to the true-up mechanism established by the FCC for applicable transition rates following amendment of interconnection agreements.[33] Qwest promises it would not block orders absent a final designation of non-impairment and notes that updates to the non-impaired list based on changed business line counts would only occur once a year in conjunction with the preparation of ARMIS data, but that updates to the list based on fiber-based collocators could occur throughout the year as the number of collocators changes since these numbers are not derived from the ARMIS process.

The Joint CLECs, on the other hand, propose the Commission, on a case-by-case basis, establish the date on which Qwest's reclassification of a wire center will be effective. According to the Joint CLECs, knowing the Commission can set the effective date will give Qwest an incentive to provide all information needed to review the classification as early in the process as possible so that interested parties can promptly confirm or raise issues with Qwest's reclassification. If Qwest fails to provide the necessary information, the Commission can delay the effective date of non-impairment accordingly. Likewise, if the Commission determines that CLECs have raised issues solely for the purposes of delay, the Commission could order an earlier effective date, such as thirty days after notice as proposed by Qwest. The Joint CLECs argue adoption of Qwest's proposed thirty-day effective period would provide Qwest no incentive to ensure its initial filing is sufficiently comprehensive. The Joint CLECs point to the

[33] Citing *TRRO*, fns. 408, 524, and 630.

current proceedings as an example of the delay that can result from deficient disclosure of supporting information.

Qwest counters that it is the CLECs, not Qwest, that have an incentive in delaying the effective date of future reclassifications since, once effective, the CLECs are no longer entitled to UNE pricing at the reclassified wire centers. Qwest, on the other hand, is motivated to provide all necessary information to support it classification decisions since without such information approval of the reclassifications could be delayed, depriving Qwest of the opportunity to take advantage of a new competitive environment.

The Division did not directly address this issue in its pre-filed testimony or at hearing.

Having considered the parties' positions, we conclude Qwest's proposed thirty-day waiting period reasonably balances a desire to expedite the process with the necessity of ensuring CLECs adequate time to object. However, while updated non-impairment lists may, without objection, become effective thirty days after filing, we reserve the Commission's authority to establish an appropriate effective date for all such filings based on the facts and actions of the parties specific to that filing. Upon CLEC objection, or upon its own motion, the Commission may schedule proceedings and will ultimately set an effective date based on all circumstances surrounding those proceedings. Said effective date may be determined to be thirty days from the filing date, or any date thereafter, as determined by the Commission. If CLEC's objections are found to be without merit, Qwest will be entitled to back bill to the effective date for CLEC's use of facilities. We intend this process to provide parties a reasonable level of

certainty regarding the effective date while ensuring against manipulation of the proceedings in an effort to influence that date.

d. Length of Transition Period

The Joint CLECs propose the Commission adopt the same 12- and 18-month transition periods and transition rates adopted by the FCC in the *TRRO* for wire centers reclassified as non-impaired. The Joint CLECs point out the FCC adopted these transition periods because it found they provide "adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, and or lease facilities."[34]

Qwest, on the other hand, proposes a 90-day period for CLECs to transition existing DS1 and DS3 UNEs to an alternative service and has memorialized this time frame in its *TRO/TRRO* Amendment to its interconnection agreements. Qwest argues the *TRRO*'s 12- and 18-month transition periods applied only to the initial wire center list, starting with the March 11, 2005, effective date of the *TRRO*. Qwest proposes a shorter transition period for future updates because there will be fewer newly classified wire centers to deal with in future updates than there were on the initial non-impairment list.

The Joint CLECs point out Qwest's proposed transition period would not apply to the rates Qwest charges for its facilities but only to the network operations required to physically change circuit identifications. In contrast to the transition process laid out in the *TRRO*, Qwest would back bill CLECs the tariffed rate as of the effective date of the new wire center

[34] Citing *TRRO* at ¶¶ 143, 196.

classification, even if a CLEC transitions to its own facilities or those of another carrier during the transition period. In reality, therefore, a CLEC would only have 30 days from the date that Qwest notifies the Commission of a wire center reclassification to obtain facilities from a source other than Qwest in order to avoid paying tariff rates for affected UNEs in that wire center. The Joint CLECs also point out that Qwest's own witness testified that from the network perspective the amount of time required to transition would depend on case-by-case factors.

Qwest counters that permitting CLECs to continue paying UNE rates during any transition period would improperly incentivize the CLECs to delay the transition of services until the end of the transition period while denying Qwest the benefits of reclassification intended by the FCC. Qwest claims the Joint CLECs have provided no support for their contention that the transition period for wire center list updates should be the same length as that for the initial list.

The Division did not take a position on this issue.

In establishing its 115% transition period rate cap, the FCC noted its conclusion such a rate would help to moderate the potential rate shock of an immediate elimination of TELRIC pricing while protecting the interests of ILECs where unbundling is no longer required.[35] The FCC also noted carriers remain free to negotiate alternative arrangements superseding its transition period and rates.[36] We concur and adopt these findings and conclusions as our own in deciding it is reasonable to impose the same rate for the transition period we announce herein for wire centers re-classified as non-impaired in the future.

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[35] *TRRO*, ¶¶ 145, 198.

[36] *Id.*

However, we agree with Qwest that the transition periods ordered by the FCC are rooted in the FCC's recognition that the initial list of non-impaired wire centers could be so large and constitute such a major change in the way CLECs procure necessary services and facilities that a lengthy transition was appropriate. Because future updates should impact fewer wire centers, we conclude the 90-day transition period proposed by Qwest will provide CLECs adequate opportunity to make business decisions regarding alternative facilities and services. Therefore, future updates to Qwest's non-impaired wire center list shall trigger a 90-day transition period commencing on the effective date of the updated list during which Qwest may charge effected CLECs 115% of the UNE rate for non-impaired UNE services and facilities.

5. Nonrecurring Charges to Convert UNEs

Qwest argues it is entitled to assess nonrecurring charges ("NRCs") when converting UNEs to alternative Qwest circuits, such as a private line or special access circuit, following classification of a particular wire center as non-impaired. Qwest notes the conversion process actually changes the fundamental nature of the CLEC-requested product from a wholesale UNE purchased only by CLECs in accordance with an interconnection agreement to a tariffed service purchased by CLECs, other interconnecting companies, and Qwest's retail customers through commercial contracts. These two different products are billed, inventoried, and maintained differently in Qwest's systems such that Qwest must process them as "order-out" and "order-in" requests and change circuit identifiers to move the service or facility from one product category to the other. Qwest notes conversion of a UNE circuit to a special private line circuit involves three different functional areas within its ordering and provisioning

organizations and requires a variety of steps that it must undertake to ensure that the data for the converted circuit is accurately recorded in the appropriate systems within each of these functional areas. Qwest points out its current process was developed at a cost of hundreds of millions of dollars to avoid placing end-user customers' service at risk and it should not be required to spend millions more to further modify its systems to track facilities in another way.

Qwest believes that since CLECs are not required to request conversion (i.e., because they have other business alternatives), such a request is a voluntary business decision for which Qwest should be able to recover its tariffed Design Change charge as an NRC for the work it performs to effectuate the conversion. Qwest proposes to use the Design Change charge rather than a unique charge for the UNE-to-private line conversion since the Design Change charge involves functional areas and tasks similar to those associated with the conversion of a UNE to a private line service. Qwest notes the Design Change charge would provide a conservative proxy for the costs Qwest actually incurs in such conversions which are typically more costly to process than the typical design change, but that its use would avoid the complexity of adding a new charge to Qwest's billing systems. Qwest argues that but for a CLEC's conversion request, Qwest would not incur the costs of performing conversion-related tasks. Requiring Qwest to bear this expense would therefore disadvantage Qwest in a market the FCC has determined to be competitive.

The Joint CLECs argue any conversion charge would be inappropriate since it is Qwest who is seeking to change its own records when no such change is necessary. As the cost-causer, Qwest should bear financial responsibility for the administrative costs it incurs in what

would amount to little more than checking to make sure that it did not make any mistakes when changing its own records. The Joint CLECs note Qwest does not charge its own retail customers a conversion charge and that imposing such a charge on CLECs would be discriminatory.[37] Furthermore, the Joint CLECs argue that, if the Commission determines some charge is appropriate to reimburse Qwest for the conversion costs it incurs, the Design Change charge is not the appropriate charge since Qwest's FCC Interstate Tariff #1 describes the design change for which the Design Change charge is billed as any change that requires engineering review. Since the UNE conversions at issue here require no physical change to the circuit, no engineering review is required and no Design Change charge should be imposed.

If the Commission wishes to permit a conversion charge, the Joint CLECs believe the appropriate charge would be the Total Element Long Run Incremental Cost ("TELRIC") UNE rate reflecting the record keeping nature of the conversion process. The Joint CLECs note the Commission-approved charge for converting Private Lines to UNEs is $8.48 and argue the Commission could reasonably decide this rate should apply to conversions from UNEs to Private Lines.

Qwest disputes this alternative charge, arguing that requiring a TELRIC rate for an NRC for a tariffed interstate private line service would constitute an inappropriate application of TELRIC rates and fall outside the scope of the Commission's jurisdiction since nonrecurring TELRIC charges should only apply to UNEs, not to tariffed private line services.

The Division took no position on this issue.

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[37] Citing, *TRO* at ¶ 587.

Having reviewed the evidence and arguments presented, we conclude Qwest may levy a non-recurring charge to recoup its costs when a CLEC requests conversion of a UNE to a private service. However, we are not convinced by the available evidence that the amount of the charge proposed by either party reasonably reflects the costs incurred by Qwest to perform the requested conversion. Therefore, we invite parties to file additional evidence and argument regarding the costs incurred when converting a UNE to a private service. Qwest shall have thirty days from the date of issuance of this Order to file whatever cost information it deems appropriate to this issue. The Joint CLECs and the Division shall then have fifteen days from the date of filing of said information to file rebuttal testimony. It is likely that persons already sworn in this docket would be competent to provide said testimony for each party. Therefore, the Commission requests said testimony and rebuttal be filed under the signature of such persons so that, subject to objection, it may be entered into evidence and considered by the Commission in resolving this matter. The Commission may, on its own motion or that of either party, order additional evidentiary hearing on this issue as necessary.

6. Rejection of UNE Orders

The Joint CLECs note the parties agree CLECs are not entitled to order UNEs in wire centers that have been classified as non-impaired with respect to those UNEs. However, they disagree with Qwest regarding how Qwest may process UNE orders in the future. The Joint CLECs propose Qwest and CLECs work together to develop an ordering process that will ensure CLECs are able to obtain the facilities they need from Qwest at the proper rates, terms, and conditions. Pending development of such a process, the Joint CLECs believe the default process

should be that outlined by the FCC in the *TRRO*; namely, that a CLEC may place a UNE order in any wire center as long as the CLEC self-certifies that it is entitled to order that UNE, and Qwest must provision the UNE, subject to later conversion to a tariffed service if the CLEC was not in fact entitled to order the subject facility as a UNE in that wire center.

In contrast, Qwest argues that once the Commission approves Qwest's certification of a wire center as non-impaired Qwest should be permitted to reject orders for any affected UNEs in that wire center. Qwest has committed to not block or reject orders unless and until the Commission has approved a wire center as non-impaired. Beyond that, Qwest argues it should not be the "guarantor" of any mistakes CLECs make in ordering services from a particular wire center.

The Joint CLECs argue Qwest's proposal to reject orders for prohibited UNEs would make the customers the ultimate loser since their ability to obtain desired services could be delayed while Qwest and the CLEC sort out the problem with the CLEC's order. However, under the Joint CLECs' proposal, the erroneous UNE order would be filled, the customer would be served, and Qwest would be made whole with a true-up to tariffed charges once the error has been corrected.

The Division did not take a firm position on this issue.

Having reviewed the parties' arguments and relevant portions of the *TRRO*, we conclude the process set forth by the FCC in paragraph 234 of the *TRRO* remains applicable to CLEC requests for UNEs and order Qwest and CLECs to follow that process in the procurement of UNEs in the future. Specifically, a CLEC must undertake a reasonable inquiry and self-

certify, based on that inquiry, that, to the best of its knowledge, it is entitled to unbundled access to particular network elements at a given wire center. Qwest must then immediately process the CLEC's request for those elements and may subsequently challenge the CLEC's claim of entitlement to those elements through the dispute resolution procedures provided in its interconnection agreements.

In summary, the process for future wire center non-impairment list updates that we order herein shall follow the same basic pattern, though hopefully in a considerably expedited manner, as have proceedings in this docket. At least five days prior to its anticipated filing for approval of an updated wire center non-impairment list, Qwest shall file a request for a protective order to govern the handling of confidential information during the anticipated proceedings. This request shall also specify those wire centers for which Qwest intends to seek re-classification. Qwest's updated wire center filing shall substantially include all information provided by Qwest in discovery and testimony in the current proceeding and, with respect to wire center reclassifications based upon a change in business line counts, shall be based on actually filed ARMIS 43-08 data. Failure to provide the necessary supporting data may delay Commission action and the ultimate effective date of any Commission approval. In addition to its filing with the Commission, Qwest shall notify CLECs of the filing via its Change Management Process notification system. Absent CLEC objection or Commission action on its own motion, Qwest's updated wire center list shall become effective 30 days from the date of filing with the Commission. A 90-day transition period shall commence with the effective date of the approved wire center list, during which time CLECs may continue to lease those UNE

dedicated transport and high-capacity loop facilities previously obtained at wire centers newly re-classified as non-impaired at a rate not to exceed 115% of the TELRIC rate paid for those elements prior to Commission approval of the updated wire center list. At the end of the transition period, Qwest will be no longer required to provide those elements at non-impaired wire centers, except as agreed between Qwest and individual CLECs. If a CLEC elects to obtain said elements from Qwest as tariffed facilities, Qwest may charge a non-recurring charge as noted above to complete the conversion of that facility. Once a wire center has been listed and approved as non-impaired, CLECs may not order affected UNEs at that wire center. However, so long as a CLEC abides by the self-certification process specified in the *TRRO*, Qwest must provide the requested UNEs. If Qwest subsequently desires to challenge these UNEs, it may do so as provided in the *TRRO*.

Wherefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters the following proposed:

III. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

- The wire center business line counting method proposed herein by the Division of Public Utilities shall be, and is, adopted as the appropriate method for counting business lines to determine the impairment status of Qwest Corporation wire centers in Utah.

- The Qwest Corporation Wire Center Classification for Dedicated Transport list filed March 1, 2006, is approved.

- The effective date of Tier 1 designation for Qwest Corporation's Salt Lake City West and Salt Lake City South wire centers is July 8, 2005.

- The Qwest Corporation Wire Centers That Satisfy the Nonimpairment Standards for DS1 and DS3 Loops list filed March 1, 2006, is approved only insofar as pertains to the classification of Qwest's Salt Lake City Main wire center as non-impaired for DS3 loops.

- The wire center non-impairment list update process specified above shall govern all future update filings initiated by Qwest Corporation in Utah.

- Qwest Corporation shall file within thirty days from the date of issuance of this Order, in the form of sworn written testimony and argument, additional information relating to the actual costs Qwest Corporation incurs, or will incur, when converting UNEs to private line services. Not later than fifteen days after said filing, the Joint CLECs and the Division of Public Utilities shall, if desired, file sworn rebuttal testimony and argument on this issue.

- This Order constitutes a final order of the Commission with respect to those issued decided herein. Pursuant to *Utah Code Annotated* §§ 63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply

with the requirements of *Utah Code Annotated* §§ 63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

Dated at Salt Lake City, Utah, this 11th day of September, 2006.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 11th day of September, 2006, as the Report and Order of the Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G# 50366