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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Investigation into Qwest Wire Center Data	Docket No. 06-049-40 JOINT CLEC RESPONSE TO QWEST MOTION FOR REVIEW, REHEARING AND/OR RECONSIDERATION

Pursuant to Utah Code Annotated §§ 63-46b-12 and 54-7-15, Covad Communications Company, Eschelon Telecom of Utah, Inc., Integra Telecom of Utah, Inc., McLeodUSA Telecommunications Services, Inc., and XO Communications Services, Inc. (collectively "Joint CLECs") provide this response to the motion of Qwest Corporation ("Qwest") for Review, Rehearing and/or Reconsideration and/or clarification ("Motion") of the Commission's Report and Order ("Order"). The Joint CLECs oppose the Motion and recommend that the Commission adhere to the provisions of the Order that Qwest seeks to change.

ARGUMENT

The Order concludes that for purposes of calculating the number of business line served out of a Qwest wire center, Qwest must use the number of business lines in service that it files in its annual ARMIS to the FCC, not the total capacity of the circuits used to provide those lines. The Order also interprets paragraph 234 in the Triennial Review Remand Order ("TRRO") to mean what it says and requires Qwest to provision orders for unbundled network elements ("UNEs") if a CLEC certifies a good faith belief that it is entitled to those UNEs. Qwest challenges both of those determinations, claiming that they are inconsistent with FCC requirements. Qwest's challenges have no legal or factual basis, and the Commission should refuse to review or alter these aspects of its Order.

A. The Commission Correctly Concluded that Qwest May Not Alter Its ARMIS 43-08 Line Count Data.

The Order correctly interprets the FCC's rules and TRRO to require Qwest to use the number of business lines in its ARMIS reports to the FCC, without alteration, when calculating the number of business lines in a wire center. Qwest seeks reconsideration of this decision, claiming that the plain language of FCC Rule 51.5 defining "business line" requires Qwest to count not just the actual lines in service but the line equivalent capacity of the circuits used to provide that service. Qwest misconstrues the Order and the FCC's requirements in making this baseless claim.

Qwest misconstrues the Order by contending that the Commission relied on a recommendation by the Division that was based on policy considerations, not the FCC rule. Neither the Commission nor the Division did any such thing. The Division quite appropriately expressed its concern with the impact of implementation of the TRRO on the development of local exchange competition in Utah, but the Division's analysis of this issue

was based on its interpretation of the language in the FCC rule without any reference to Utah public policy.[1] As even Qwest acknowledges, the Order similarly states, "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*."[2] The Commission did just that and concluded that "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 the wire center."[3] As the Joint CLECs explained in their submissions (and will not repeat here),[4] the Commission properly and correctly interpreted the FCC's language and based its conclusion on the law, not policy.

Not surprisingly, the Washington Commission reached the same conclusion, on the same basis, in its final order issued October 5, 2006. That commission upheld the Administrative Law Judge's initial order on this issue and concluded that the FCC's rule defining "business line," viewed in the context of the TRRO, requires using unaltered ARMIS 43-08 data – i.e., the actual circuits in use Qwest reports to the FCC – to determine the number of Qwest's own business lines:

> The FCC's rule is internally inconsistent and must be reconciled with the FCC's discussion in the TRRO. The first sentence of the rule provides: "A business line is an incumbent LEC-owned switched access line *used to serve a business customer*, whether by the incumbent itself or by a competitive LEC that leases the line from the incumbent LEC." While the first requirement in the last sentence of the definition provides that carriers should only count business lines connecting end-user customers, i.e., actual circuits in use, the third requirement provides that carriers should include the

[1] DPU Ex. 1 (Coleman Testimony) at 2-6; Tr. at 208-10 (DPU Coleman).

[2] Order at 20.

[3] *Id.*

[4] *E.g.*, Joint CLEC Opening Brief at 4-6.

> capacity of the circuit when counting business lines. By relying solely on the last requirement in the definition, Qwest ignores the other conditions in the definition and the FCC's explanation in the TRRO.
>
> We uphold the initial order's finding that the FCC's requirements for calculating, or tallying, the total number of business lines serving a wire center are most reasonably applied in part to ILEC-owned switched access lines, and in part to UNE loops. The first two listed requirements (i.e., that the access lines connect only actual customers and the number not include non-switched special access lines) are already applied in the switched access lines ILECs report to the FCC in ARMIS 43-08 data. The third requirement, that digital access lines be counted by voice-grade equivalents, should apply when ILECs count the number of business UNE-P lines and UNE loops served by a wire center. . . . Thus, Qwest should include the total capacity, not actual circuits in use, when calculating UNE-P business line and UNE loops, but not when calculating ILEC-owned switched access business lines.[5]

While other state commissions in the Qwest region have not yet resolved this issue, commission staffs in Arizona and Colorado agree with this Commission and the Washington Commission that Qwest should be required to use its ARMIS business line count data without Qwest's proposed alteration. As the testimony of Arizona Commission staff explains, nothing in the TRRO authorizes Qwest to adjust the line counts in the ARMIS data Qwest files with the FCC:

> Staff's review of the ARMIS 43-08 instructions and the TRRO leads it to believe that the use of ARMIS 43-08 data exactly as reported is consistent with TRRO requirements. The FCC appeared to support ". . . a simplified ability to obtain the necessary information . . ." and the simplest approach is to use data exactly as reported in ARMIS 43-08. Nothing in the ARMIS 43-08 and the TRRO speaks directly to the adjustment of ARMIS

[5] *In re Investigation Concerning the Status of Competition and Impact of the TRRO*, WUTC Docket No. UT-053025, Order 04, Order Adopting Interpretive Statement; Granting Joint CLECs' Petition for Review; Granting in Part and Denying in Part Qwest's Petition for Review, ¶¶ 30-31 (Oct. 5, 2006) (footnotes omitted) (emphasis added by WUTC) (a copy of which was attached to the Joint CLECs' Petition for Review of the Order). Qwest, moreover, did not seek reconsideration of the Washington Commission's decision on this issue.

> data. Had the FCC intended to adjust the ARMIS data, explicit instructions could easily have been included in the TRRO.[6]

Colorado Commission staff similarly found that "[t]o rely on a voice grade equivalent line count that applies to unused capacity, as Qwest does via its adjustment, contradicts the FCC's desire to rely on readily available data. Therefore line counts supported by only working voice grade equivalent lines should be required."[7]

Qwest cannot plausibly claim that its interpretation of FCC Rule 51.5 is "the only possible conclusion" when every commission and commission staff in the Qwest region to have considered the issue has *rejected* Qwest's interpretation. The rule does not mean what Qwest wants it to mean, and all of Qwest's bluster to the contrary cannot change that. The Commission did not err.

Qwest also reconsiders its own advocacy in asking the Commission to permit Qwest to make a different adjustment to its ARMIS data if the Commission will not permit Qwest to count circuit capacity. Qwest now claims that the Commission should accept Qwest's figures on the number of circuits that allegedly originate from a particular wire center, rather than the number of circuits assigned to a wire center based on Qwest's ARMIS report. Qwest, however, stated repeatedly that it "is not sponsoring this methodology."[8] Qwest's briefing further states that "Qwest did not propose an 'alternative modification,'" but that "the Joint CLECs exaggerate the point" and that "it was the Joint CLECs who raised the

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[6] *In re the Application of [Joint CLECs] and Qwest Request for Commission Process to Address Key UNE Issues Arising from TRRO*, Ariz. Corp. Comm'n Docket Nos. T-03632A-06-0091, *et al.*, Responsive Testimony of Armando Fimbres at 6-7 (Sept. 22, 2006) (footnote omitted) (a copy of which was attached to the Joint CLECs' Petition for Review).

[7] *In re Joint CLECs' Request Regarding the Status of Impairment in Qwest's Wire Centers*, Colo. PUC Docket No. 06M-080T, Answer Testimony and Exhibits of Lynn M. V. Notarianni at 19 (July 24, 2006) (a copy of which was attached to the Joint CLECs' Petition for Review).

[8] Tr. at 45, lines 5-6 (Qwest Teitzel); *accord id*., lines 13-14.

issue, to which Qwest simply responded."[9] It is far too late in the process for Qwest now to change its mind and make a recommendation for an alternative modification to its ARMIS data that it previously has expressly disavowed.

Even if Qwest could properly make such a claim now – which it cannot – neither the law nor the record supports such an adjustment. Again, nothing in the FCC's rule or TRRO authorizes Qwest to alter the ARMIS data that Qwest reports to the FCC. Qwest's newly proposed alterations, moreover, are based not on the actual number of circuits that originate in the Salt Lake Main wire center but on the application of "statewide average ARMIS data and ratios developed from that basis" to that wire center – ratios that Qwest did not provide, much less explain how Qwest calculates.[10] Such line counts are the antithesis of the FCC's requirement that business line counts be determined according to "an objective set of data that incumbent LECs already have created for other regulatory purposes" and be based on "a simplified ability to obtain the necessary information."[11] The Commission properly rejected Qwest's manipulation of its ARMIS data and should continue to do so.

B. The Commission Correctly Interpreted Paragraph 234 of the TRRO.

The Joint CLECs raised the issue of Qwest unilaterally rejecting UNE orders, and the Commission resolved that issue by determining that "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."[12] Qwest seeks "clarification" that this applies only to wire centers that the Commission has not included on

[9] Qwest Reply Brief at 7.

[10] Tr. at 44-46 (Qwest Teitzel).

[11] TRRO ¶ 105.

[12] Order at 38.

the list of non-impaired wire centers. Qwest, however, continues to miss the point.

The Joint CLECs remain concerned that without a joint process for properly rejecting UNE orders that are mistakenly placed for affected UNEs in nonimpaired wire centers, customers will be negatively impacted in the event that Qwest erroneously rejects legitimate orders. For example, if Qwest mistakenly rejects a CLEC order for DS1 transport out of a wire center that is nonimpaired only for DS3 transport, the customer for whom the CLEC has agreed to provide service over that circuit must wait until the companies sort out the error – or take its business elsewhere. By requiring Qwest to provision the circuit and dispute the CLEC's entitlement to it as a UNE, the customer obtains service while the carriers resolve the dispute. The customer, not Qwest, was – and should be – the Commission's and the FCC's primary concern in adopting this requirement.

Qwest nevertheless raises the specter of CLECs self-certifying in bad faith and requiring Qwest to undertake multiple individual proceedings before the Commission. Qwest, however, points to no history of such CLEC conduct in Utah or in any other state – which is not surprising because such behavior is not in CLECs' economic self-interest. If a CLEC orders but is not entitled to a UNE, it will be required to pay not only Qwest's special access recurring and nonrecurring charges for the ordered circuit retroactively to the date the circuit was installed but whatever costs it incurs to go through the dispute resolution procedure with Qwest. No CLEC is going to expend such additional time and resources unless it has a good faith belief that it is entitled to the UNE (or is mistaken). Qwest's parade of horribles thus is simply unrealistic.

It is within Qwest's control, moreover, to eliminate the need for CLEC self-certification and to ensure that both CLEC and Qwest errors in the UNE ordering process are

promptly corrected to minimize disruption in customer service provisioning. The Joint CLECs have offered to work with Qwest to make the necessary modifications to Qwest's processes to implement Commission-approved wire center nonimpairment designations, including the ability of Qwest to reject orders that a CLEC mistakenly places for UNEs that are no longer available in such wire centers.[13] To date, Qwest has refused to take the Joint CLECs up on that offer. Qwest thus has provided no basis on which the Commission should change its determination and permit Qwest unilaterally to reject any CLEC UNE orders without having first developed and implemented the appropriate order processes with CLEC input.

CONCLUSION

For the foregoing reasons and the reasons discussed in the Joint CLECs' Opening and Reply Briefs, the Commission should adhere to the determinations that Qwest has challenged in the Order and deny Qwest's Motion.

Dated this 25th day of October, 2006.

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[13] Ex. Eschelon 1R (Denney Rebuttal) at 41-42.