

Gregory J. Kopta (WSBA No. 20519)
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
Telephone: (206) 628-7692
Facsimile: (206) 628-7699
E-mail: gregkopta@dwt.com

Attorneys for Covad Communications Company,
Eschelon Telecom of Utah, Inc., Integra Telecom of
Utah, Inc., McLeodUSA Telecommunications
Services, Inc., and XO Communications Services, Inc.

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 MOTION TO COMPEL QWEST TO RESPOND TO DATA REQUESTS
---	---

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”) hereby move the Commission for an order compelling Qwest Corporation (“Qwest”) to respond to data requests seeking Qwest wire center data as of the end of 2004. Those requests seek data that is reasonably calculated to lead to the discovery of admissible evidence, and Qwest should be required to produce that information.

ARGUMENT

The Commission initiated this proceeding on March 2, 2006, in response to a letter from the Joint CLECs and a Petition from Qwest. On March 9, 2006, the parties participated in a procedural conference to establish a schedule for this docket, and pursuant to that

schedule, Qwest filed its direct testimony on March 24, 2006.

On March 31, 2006, the Joint CLECs propounded their first set of data requests to Qwest. Request Nos. 31 and 33 in that set request data on the number of Qwest business lines Qwest has calculated in its Salt Lake Main central office, specifically asking for data on the number of business lines as of March 2005 or the closest date to March 2005 for which Qwest has such data. Qwest objected and refused to provide the requested data:

Qwest objects to this data request on the grounds that it is irrelevant and does not bear upon, or reasonably could lead to matters that bear upon, any issue in this proceeding, especially because Qwest's use of December 2003 data is consistent with the data the FCC analyzed in making its non-impairment decisions in the TRRO, and is also the data that was available when the FCC directed Qwest and the other RBOCs to submit the list of wire centers that meet the non-impairment criteria. . . .

A copy of the requests and Qwest's responses is attached as Exhibit A.

Qwest has improperly refused to provide the information requested in these Joint CLECs' data requests. The FCC adopted fiber-based collocation and business line counts as the triggers for determining whether impairment exists in a particular wire center. In paragraph 105 of the Triennial Review Remand Order ("TRRO"), the FCC defines business lines as incumbent local exchange carrier ("ILEC") "ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops." The TRRO did not specify the date on which these counts were to be made, but that order became effective on March 11, 2005. The determinations made pursuant to that order, therefore, should be based on data that is contemporaneous with that date.

Qwest disagrees and refuses to provide data on the number of business lines that is contemporaneous with the TRRO and has limited the line count information it provides to data as of December 2003 – over one year before the TRRO was issued and became

effective. Qwest claims that this is the data that was on file with the FCC when it issued the TRRO and when the Wireline Competition Bureau subsequently requested a listing of the wire centers that satisfied the TRRO's non-impairment thresholds. That observation, while accurate, is irrelevant. The FCC did not state that its non-impairment test was to be applied to the data that was on file as of the date of the TRRO. Indeed, FCC obviously contemplated that the wire center designations are to be based on the most current data available because the TRRO expressly contemplates future non-impairment designations, which would be meaningless if only 2003 data could be considered.

Qwest's position is particularly disingenuous given that Qwest files its ARMIS reports annually on April 1 – *three weeks* after March 11, the date in 2005 when the TRRO became effective. More current ARMIS data thus was on file with the FCC at virtually the same time as the TRRO became effective, and Qwest unquestionably had the data in an accessible form three weeks before making its FCC filing. At a bare minimum, the Commission should require Qwest to provide business line count data from their April 2005 ARMIS filing reflecting data through December 2004.

The Michigan Public Service Commission came to the same conclusion. SBC Michigan ("SBC"), like Qwest, contended that the commission should use 2003 ARMIS data in applying the FCC's non-impairment criteria because that was the data that was publicly available when SBC listed the wire centers as non-impaired and use of later vintage data would be inconsistent with the TRRO. The Michigan Commission rejected those arguments, finding that SBC is required to use data that is as close as possible to the time at which SBC listed the wire center as non-impaired, even if SBC had not yet filed its FCC report:

The age of the data must be close enough in time to reflect conditions at the time that SBC claims that the wire center is no

longer impaired. In this case, the Commission finds that SBC should have used the 2004 ARMIS data, which was available, even if not fully edited and incorporated in a report to the FCC. The analysis requires using data gathered for ARMIS calculations, not the calculations themselves.¹

Indeed, BellSouth, another regional Bell operating company, has interpreted the FCC requirements the same way and relies on 2004 ARMIS data for the business line count information it used to initially designate wire centers as non-impaired.²

The FCC and this Commission have consistently required that determinations under the Act be based on the most current data available. Indeed, when describing the wire center data to be used to calculate business lines for determining non-impairment, the FCC expressly referenced its *FCC Report 43-08 – Report Definition* dated December 2004, obviously contemplating that 2004 (or later) ARMIS data compiled consistent with this report would be used.³ Qwest has business line count data available at least as of December 2004, if not March 11, 2005. Qwest's refusal even to provide such data in response to a discovery request is a strong indication that such contemporaneous data does not support Qwest's designation of its Salt Lake Main central office based on business line counts.

The Commission need not decide at this point whether Qwest should be required to use 2003 data or 2004 data. Indeed, there may be no issue at all. The 2004 data might support Qwest's designation of the Salt Lake Main wire center as non-impaired for DS1 and

¹ *In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC MICHIGAN and VERIZON*, Case No. U-14447, Order at 5 (Sept. 20, 2005) (A copy of the order is attached as Exhibit B).

² See, e.g., *In re Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes of Law*, NC Utils. Comm'n Docket No. P-55, SUB 1549, Order Concerning Changes of Law at 38 (March 1, 2006) ("BellSouth has updated its wire center results to include December 2004 ARMIS data and the December UNE loop and UNE-P data so that the most current information is used to establish the wire centers that satisfy the FCC's tests.").

³ TRRO para. 105, n.303.

DS3 loops, and the issue of which vintage data to use would only be academic. Or the 2004 data may support designation for DS3 loops but not DS1 loops, which would at least narrow the issue to whether Salt Lake Main can be designated as non-impaired for DS1 loops. Consistent with the broad scope of discovery, therefore, the Commission should require Qwest to provide that data in response to the Joint CLECs' requests.

PRAYER FOR RELIEF

WHEREFORE, the Joint CLECs pray for the following relief:

- A. An order from the Commission compelling Qwest to provide the information that the Joint CLECs have requested in Data Request Nos. 31 and 33; and
- B. Such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

Dated this 2nd day of May, 2006.

DAVIS WRIGHT TREMAINE LLP

By: _____
Gregory J. Kopta