

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Investigation into Qwest
Wire Center Data

Docket No. 06-049-40

QWEST'S RESPONSE TO THE JOINT
CLECs' MOTION TO COMPEL QWEST
TO RESPOND TO DATA REQUESTS

Qwest Corporation ("Qwest") hereby responds to the motion to compel that various CLEC parties ("the Joint CLECs") filed on May 2, 2006 with respect to two data requests, nos. 31 and 33 (of 47), seeking wire center data as of December 2004 in contravention of the Federal Communications Commission's (FCC's) Triennial Review Remand Order (*TRRO*) to which Qwest has properly objected. For the reasons set forth below, these data requests do 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. Accordingly, Qwest respectfully submits that the Commission should deny the Joint CLECs' motion to compel.

INTRODUCTION AND SUMMARY

In response to the Joint CLECs' March 31, 2006 set of 47 data requests, Qwest provided the Joint CLECs the comprehensive set of data it used to determine which wire centers in Utah satisfied the FCC's *TRRO* wire center "non-impairment" criteria. However, Qwest properly objected to the two requests at issue in this motion to compel (request nos. 31 and 33) which seek to expand the relevant data beyond Qwest's April 2004 filing of December 2003 data in Qwest's ARMIS 43-08 annual report to the FCC. This December 2003 ARMIS data is the data that Qwest had provided to the FCC in its initial wire center list and upon which the FCC relied in making its wire center non-impairment criteria determinations in its *TRRO* order, as well as the data that Qwest submitted to the FCC in February 2006 pursuant to the FCC's request for such data in the *TRRO*. Qwest respectfully submits that it should not be required to respond to

either of these data requests seeking information that is not relevant to this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence.

Specifically, in their motion to compel, the Joint CLECs have requested that Qwest produce new, additional data different from that which the FCC used to make its fundamental determinations in its *TRRO*, with no factual or legal basis for such a request. Indeed, changing or modifying the thorough, detailed data that Qwest has already provided is both unnecessary and contrary to the FCC's stated intent regarding the data on which non-impairment decisions are to be made. The CLECs' attempt to impose upon Qwest an ongoing, open-ended obligation to produce additional data would result in precisely the type of complex and lengthy proceeding that the FCC intended to avoid. As the FCC stated in the *TRRO*, "[w]e are acutely aware of the need to base any test we adopt here on the most objective criteria possible in order to avoid complex and lengthy proceedings that are administratively wasteful but add only marginal value to our unbundling analysis." *TRRO*, ¶ 99.

Accordingly, for the reasons set forth below, the data the Joint CLECs seek is irrelevant, adds nothing to the probative value of determining the accuracy of the original "non-impaired" wire center list, and is not reasonably calculated to lead to the discovery of admissible evidence. Even a broad and liberally-construed policy favoring discovery in most instances does not apply in situations where there the data requests at issue at issue have no relevance to the issues or scope of the docket. Thus, the Commission should deny the CLECs' motion to compel.

ARGUMENT

I. 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 the available data when the FCC directed RBOCs to submit their non-impaired list of wire centers

Preliminarily, Qwest's use of December 2003 ARMIS data is consistent with the data the FCC analyzed in making its non-impairment decisions in the *TRRO*. This December 2003

ARMIS data 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, which Qwest did in February 2005. Specifically, the FCC stated: “The 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.” *TRRO*, ¶ 105. The data which formed the basis for the FCC’s analysis was ARMIS data from December 2003, which Qwest filed in April 2004. This same data was also what was available on February 4, 2005 when the FCC in its *TRRO* order directed Qwest and the other RBOCs to submit the list of wire centers that meet the FCC’s non-impairment criteria. Consequently, the use of December 2003 data is both appropriate and consistent with the FCC’s intent to base determinations on “an objective set of data that incumbent LECs already have created for other regulatory purposes.” *TRRO*, ¶ 105.

In their motion to compel, the Joint CLECs argue that Qwest’s December 2004 ARMIS data was available at the time that Qwest made its wire center filing with the FCC in February 2005. That assertion is mistaken, however, as ARMIS data is not filed until the April of the following calendar year.¹ More importantly, however, even if such data had been available as of February 2005 (or even as of the March 11, 2005 effective date of the *TRRO*), the data would still not be relevant to an inquiry of the wire center list and data that Qwest submitted to the FCC at the FCC’s direction in February 2005. Qwest’s February 2005 filing at the FCC used *December 2003* data. If the FCC had wanted the wire center lists to be based on subsequent data, it most certainly would have requested such data. However, the FCC did not request any subsequent data. Rather, it requested the wire center lists based on the most current data available *at the time* those lists were filed in February 2005.²

¹ There was also no FCC filing of ARMIS data as of March 2005. Thus, the Joint CLECs’ request for that data (see data requests nos. 31 and 33) also cannot be satisfied.

² The Joint CLECs’ data requests also beg the question why they did not act promptly in response to the

The Joint CLECs claim in their motion that the *TRRO* did not specify the date on which these counts were to be made. They claim, however, that because the order “became effective on March 11, 2005,” “[t]he determinations made pursuant to that order . . . should be based on data that is contemporaneous with that date.” (Joint CLECs’ Motion, p. 2.) However, Qwest *did* in fact provide the data that was readily available, and that the FCC requested, at that point in time. The FCC had requested that RBOCs compile the list of non-impaired wire centers prior to the March 11, 2005 effective date, and thus the “most current data available” at that time was the December 2003 ARMIS data. The CLECs’ attempts to deny that the FCC clearly contemplated the application of “readily available” data completely disregard the plain language of the *TRRO*.³

II. Other state commissions agree with Qwest about the use of December 2003 data

The Joint CLECs quote from a Michigan Commission decision last September which evidently agreed with their argument regarding use of December 2004 data. However, that decision is not persuasive for the reasons set forth above. Moreover, the Joint CLECs neglected to note that just a couple of weeks ago, in the first (and thus far only) commission ruling in the Qwest 14-state region, the Washington Utilities and Transportation Commission rejected the Joint CLECs’ position, and thus agreed with Qwest that the *December 2003* data was the

wire center data that Qwest provided in February 2005 shortly after the FCC issued the *TRRO*. Even if the December 2004 data were relevant to these issues, which it is not, it would not be reasonable for the Joint CLECs’ one-year delay in disputing Qwest’s wire center list to serve as the basis for requiring Qwest to undertake an entirely new, time-consuming data-gathering effort.

³ The Joint CLECs’ argument that “the 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” (Joint CLECs’ Motion, p. 3), does not make sense. Qwest certainly agrees that the *TRRO* expressly contemplates future non-impairment designations. Those future designations (i.e., subsequent updates to the list), of course, will be made based on the “most current data available” *at that time* (the ARMIS data filed and available *at the date of future filings*). For example, as the Washington Commission correctly ruled, “[o]n a going-forward basis, however, Qwest and Verizon must submit the most recent ARMIS 43-08 data when seeking to add any new wire centers to the list of non-impaired wire centers the Commission resolves in this proceeding.” *Washington Initial Order*, p. 10, ¶ 24. That certainly does not mean, however, that the *initial* wire center designation, which is what this Commission is considering in this docket, should be anything other than the “most current available data” *at the time that Qwest submitted its list to the FCC* in February 2005.

appropriate data for the wire center lists.⁴ The Washington Commission ruled as follows: “This order finds *December 2003* data appropriate for evaluating Qwest’s and Verizon’s initial designation of non-impaired wire centers.” (Emphasis added.)⁵

The Washington Commission elaborated as follows:

Discussion and decision. It is reasonable for Verizon and Qwest to submit to the Commission *December 2003 ARMIS data* to support the designation of their initial list of “non-impaired” wire centers. It was the *most recent data* on file with the FCC at the time it entered the TRRO. The FCC used this data in establishing the wire center tiers. Qwest and Verizon used this data in filing their initial lists of non-impaired wire centers with the FCC. (Emphasis added.)⁶

Other commissions have ruled similarly. For example, the Texas Commission affirmed AT&T Texas’ utilizing of December 2003 ARMIS 43-08 access line data in its non-impairment analysis. The Texas Commission found in its investigation that “the method used by AT&T Texas for determining business line counts is consistent with the FCC’s instructions for reporting business line counts for ILEC wire centers.”⁷ Similarly, in their state *TRRO* wire center non-impairment review proceedings, the California, Illinois and Indiana commissions each approved SBC’s wire center non-impairment lists -- which were each based upon of December 2003 access line data.⁸ Although the commission orders did not specifically include language

⁴ The “Joint CLECs” (Covad, Eschelon, Integra, McLeod and XO) in Washington are the same carriers as the “Joint CLECs” here, and are represented by the same counsel.

⁵ *In the Matter of the Investigation Concerning the Status of Competition and Impact of the FCC’s Triennial Review Remand Order on the Competitive Telecommunications Environment in Washington State*, Docket UT-053025, Order 3 (“*Washington Initial Order*”), p. 2, ¶ 4.

⁶ *Washington Initial Order*, p. 9, ¶ 23. The Washington Commission also rejected the Joint CLECs’ argument that Qwest should provide “updated data” so that the Joint CLECs could “verify[] the status of other wire centers.” The Commission ruled:

It would be inconsistent to determine the initial list of non-impaired wire centers based on data from different time periods. *Qwest and Verizon’s use of December 2003 data for the purpose of determining the initial list of wire centers is appropriate.* Therefore, the Joint CLECs’ request for Qwest and Verizon to provide updated ARMIS 43-08 data is rejected. *Washington Initial Order*, p. 10, ¶ 24.

⁷ *Post-Interconnection Dispute Resolution Proceeding Regarding Wire Center UNE Declassification*, PUC Docket No. 31303, Order Approving Methodology to Determine AT&T Texas Wire Centers which are Non-impaired, Texas PUC (issued April 7, 2006), at p. 29.

⁸ *Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to*

explicitly endorsing the December 2003 data vintage, obviously, had these commissions believed a more current data vintage was required, they would have ordered SBC to provide updated access line counts.

Finally, in Verizon states, in which the procedural mechanism for establishing wire center non-impairment was through tariff filings (as opposed to fully contested dockets), the original list of non-impaired wire centers was based on December 2003 business line data. For example, in its filing to expand its original non-impaired wire center list in Rhode Island, Verizon stated:

The original wire center list, which is being updated here, was based principally on 2003 data, as amended in late 2004 to reflect terminated collocation arrangements.⁹

Accordingly, the vast majority of state commissions that have addressed this issue, including the only commission in the Qwest region, have agreed with Qwest and other RBOCs, and have disagreed with the Joint CLECs. Thus, the state commissions have ruled that the December 2003 data submitted to the FCC is the appropriate data in these types of cases.¹⁰

Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996., Application 05-07-024, Decision 06-01-143, Cal. PUC (adopted January 26, 2006), at pp. 10-11 (discussing the appropriate business line counts, without specifically accepting 2003 data, but without ordering additional data beyond what SBC already provided); Arbitration Decision, *Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order*, Ill. Commerce Com'n., ICC Docket No. 05- 0442 (Nov. 2, 2005), at p. 30 (in which the Commission found that SBC's business line count methodology was consistent with the FCC methodology and data used by the FCC, without making a determination specifically on the vintage of the data); see also Direct Testimony of Carol A. Chapman in *Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order*, p. 38, lines 889 through 898 (where SBC clearly states that 2003 ARMIS data was the data provided to the FCC). Ms. Chapman's direct testimony can be found on the Illinois Commerce Commission e-docket website link: <http://eweb.icc.state.il.us/e%2Ddocket/> [browse docket function with docket 05-0442, SBC Testimony filed 9/6/05 at 11:22 a.m.]; *In the Matter of the Indiana Utility Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communication Commission's Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order*, Cause No. 42857, Issue 3, Ind. Utility Reg'y. Com'n (approved January 11, 2006), at pp. 15-16.

⁹ Docket No. 3662, Verizon Rhode Island's Proposed Revision to PUC Tariff 18, RI PUC (1/13/06), fn. 4.

¹⁰ The Joint CLECs also argue that another RBOC (BellSouth) used 2004 ARMIS data for its business line count information to initially designate wire centers as non-impaired, and they cite to a decision in North Carolina. However, the fact that one RBOC out of four may have voluntarily agreed in North Carolina to use December 2004 data (presumably with concurrence or without objection from the CLECs in that state) is completely irrelevant and not probative of the issue regarding the most current and readily available data that the FCC requested, and that Qwest and other RBOCs provided. Clearly, the most current and readily available data that the FCC requested, and

III. The Joint CLECs' other arguments are not well taken

Finally, the Joint CLECs intimate that Qwest's objection to providing updated data is linked to the determination of DS1 loop impairment in the Salt Lake Main wire center. (Joint CLECs' Motion, pp. 4-5.) Qwest's objection to providing updated data, however, is not tied to the result of any wire center on the current list. Rather, the data the Joint CLECs seek is simply not relevant. As Qwest has mentioned, 2004 ARMIS data was *not available* to the FCC at the time the wire center list was produced. If the FCC had desired updated data, it could have (and most certainly would have) requested that RBOCs update their wire center lists after April 2005. The FCC made no such request, however.

Conversely, the Joint CLECs claim that updating the data to at least December 2004 might in some way simplify and narrow the issues in this docket. (Joint CLECs' Motion, p. 5.) This argument is not persuasive, however. To the contrary, updating the data would actually add an additional level of complexity to the matter. This is especially so because if December 2004 ARMIS data were to be used, the process for adding wire centers to the list would need to be determined *before* the initial list could be finalized. Qwest believes that the Commission should validate the original wire center list before it begins to update that validated list.

CONCLUSION

Accordingly, Qwest respectfully submits that the Joint CLECs' motion to compel is not well taken. The two data requests at issue (of 47 total requests) to which Qwest has objected are neither relevant to the issues in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Qwest is, of course, mindful that the discovery rules in Utah and this Commission's discovery processes are broadly and liberally construed. Qwest is also aware that the Commission generally encourages disclosure of information through the discovery process

that Qwest and other RBOCs provided, was the December 2003 data from their April 2004 ARMIS filings.

and usually defers a determination as to relevancy at the hearing after material has been disclosed. However, there are some requests, like the two requests at issue, that are simply too far afield and remote to the issues of the case, and/or that would serve to expand, complicate or confuse the proceeding so significantly, that Qwest must object to them.¹¹ Despite a policy of broad discovery, the Commission should not allow discovery that goes beyond the issues of the case simply for the sake of discovery. As such, Qwest submits that the Commission should deny the Joint CLECs' motion to compel in its entirety.

Dated: May 12, 2006

Respectfully submitted,
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¹¹ Qwest notes that although the substantive issues were different from this case, the Commission very recently denied a motion to compel responses to two data requests on grounds that the information sought was not relevant to the issues of the case or reasonably calculated to lead to the discovery of admissible evidence. See Order Denying Motion to Compel Discovery, *In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc. against Qwest Corporation for Enforcement of Commission-Approved Interconnection Agreement*, Docket No. 06-2249-01 (issued May 5, 2006).

CERTIFICATE OF SERVICE

I certify that the original and five copies of the foregoing were delivered on May 12, 2006 to:

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