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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 PETITION FOR REVIEW, RECONSIDERATION, OR REHEARING OF REPORT AND ORDER
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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 Petition for Review, Reconsideration, or Rehearing (“Petition”) of the Commission’s Report and Order (“Order”).

ARGUMENT

The Order resolves most of the disputed issues in a manner that is consistent with the Federal Communications Commission’s (“FCC’s”) Triennial Review Remand Order (“TRRO”) and Utah law. There are three issues, however, that the Commission should review, reconsider, or rehear: (1) the vintage of the ARMIS data used; (2) the length of the transition period for newly designated wire centers; and (3) whether Qwest Corporation

("Qwest") should be authorized to charge for converting affected high capacity unbundled network elements ("UNEs") in the designated wire centers to Qwest special access services. On each of these issues, the Commission should modify the Order and adopt the Joint CLECs' proposed resolution.

A. The Commission Should Require Qwest to Use 2004 ARMIS Data for the Initial Designation of Non-Impaired Wire Centers.

ARMIS data for calendar year 2004 is the publicly available data for Qwest's business line counts that is closest to March 11, 2005, the effective date of the TRRO, and the Joint CLECs, therefore, advocate that this is the data that Qwest should be required to use the initial wire center classifications. The Order, however, concludes that Qwest appropriately used 2003 data because that was the only ARMIS data that was available when the FCC's Wireline Competition Bureau requested a list of wire center designations in February 2005. The Commission should revisit this decision.

The Washington Commission reached the opposite conclusion in its final order issued October 5, 2005. That commission concluded that reliance on the most recent data available is critically important when making any wire center designations because of the impact of those designations on the development of local exchange competition:

Because these designations are permanent and materially affect the development of competition in Washington, we determine that our designation decisions should be based on the most recent data available. In this instance, by applying the FCC's criteria to the most recent data, we ensure that our decisions are based on the best information available reflecting the most recent state of competition between competitive and incumbent carriers at the wire center level. For the same reasons, we shall require the use of the most recent data at the time we resolve future disputes over wire center designations.¹

¹ *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

While other state commissions in the Qwest region have not yet resolved this issue, commission staffs in Arizona and Colorado agree with the Washington Commission that Qwest should be required to use the more recent ARMIS data. Indeed, the testimony of Arizona Commission staff echoes the Washington Commission's concern for the impact of the TRRO on competition and the concurrent need for the most current data available:

Additionally, Staff believes the public interest is best served by assessing the most current information. By doing so, the initial list of Non-Impaired Wire Centers would reflect the most current competitive situation. Staff cannot conceive of any logical reason for using old data that has been superseded by more current data. Since wire centers, once designated as non-impaired, cannot be returned an impaired status per the TRRO rules, Staff believes use of the most current information is most reasonable for all parties – the Joint CLECs, Qwest and end-user customers. For those reasons, Staff supports the use of December 2004 ARMIS 43-08 data rather than December 2003.²

Colorado Commission staff recommends the use of 2004 data in reliance on decisions by the Michigan and North Carolina commissions that stress the importance of using the most current data available and observes that “as a practical matter, by the time parties were able to interpret and act on the TRRO, 2004 ARMIS 43-08 data was available (1 month after the TRRO).”³

A wire center that is designated as “non-impaired” for certain UNEs retains that

for Review; Granting in Part and Denying in Part Qwest's Petition for Review, ¶ 21 (Oct. 5, 2006) (footnote omitted) (a copy of which is attached to this Petition for the convenience of the Commission).

² *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 5 (Sept. 22, 2006) (“Arizona Staff Testimony”) (a copy of which is attached to this Petition for the Commission's reference).

³ *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 16-17 (July 24, 2006) (“Colorado Staff Testimony”) (a copy of which is attached to this Petition for the Commission's reference).

designation regardless of any subsequent change in the number of business lines or fiber-based collocators. The Commission has recognized the importance of using the most current data available when reviewing future wire center designations,⁴ and Qwest agrees.⁵ That principle is no less important for Qwest's initial wire center designations. The Commission, therefore, should modify the Order to require that those initial designations be supported by 2004 data, not the 2003 data that was reflected in Qwest's 2004 ARMIS report.⁶

B. The Commission Should Not Specify a 90-Day Transition Period for Future Wire Center Classifications.

The Joint CLECs proposed that the Commission adopt the same transition periods for future wire center designations as the FCC established for the initial designations. The Commission disagreed and “conclude[d] the 90-day transition period proposed by Qwest will provide CLECs adequate opportunity to make business decisions regarding alternative facilities and services.”⁷ The record, however, does not support this conclusion.⁸

The Joint CLECs proposed that the Commission adopt the same transition time frames established by the FCC for future wire center designations for the same reasons given by the FCC, *i.e.*, for unbundled DS1 and DS3 transport and loops “because we find that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, including decisions concerning

⁴ Order at 15, n.22.

⁵ *See, e.g.*, Ex. Qwest 2R (Teitzel Response) at 9 (“Qwest is required to utilize the most current data available when seeking to designate additional wire centers as non-impaired.”).

⁶ The Order notes that in light of its other determinations, “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.” *Id.* If the Commission does not adopt the Joint CLECs' position as a matter of principle, the Commission should modify the Order to not reach this issue as a matter of judicial restraint because a determination on the issue is not necessary to the ultimate resolution of this proceeding.

⁷ Report and Order at 33.

⁸ Indeed, even Qwest did not propose a 90-day transition period for all affected UNEs but allows for

where to deploy, purchase, or lease facilities”⁹; and the 8 months to transition off of dark fiber transport (and loops): “Because incumbent LECs offer no tariffed service comparable to dark fiber, we find that, if no impairment is found for a particular route on which a competitive LEC utilizes unbundled dark fiber, the risk of service disruption is significantly higher than for DS3 and DS1 unbundled transport, for which comparable service offerings are available under tariff.”¹⁰ Mr. Denney testified that the concerns the FCC expressed are equally applicable to new classifications of Qwest wire centers.¹¹

Qwest provided no evidence to support its proposal of a 90-day transition period for DS1 and DS3 transport and loops and 180 days for dark fiber.¹² The only substantive evidence that Qwest provided was the testimony of Ms. Albersheim during the hearing that the FCC did not address transition periods for future wire center designations and that the amount of time established by the FCC for the initial transitions “should not be necessary as such transitions will take place for a much smaller subset of services since it’s likely to be for one or two wire centers at a time.”¹³ Qwest provided no evidence – and nothing in Ms. Albersheim’s background qualifies her to give an expert opinion – on the amount of time a *CLEC* needs “to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, or lease facilities.”¹⁴ Indeed, Qwest’s network engineering witness testified that from a network perspective, a transition “would not

180 days for dark fiber. Ex. Qwest 1 (Albersheim Direct) at 15.

⁹ TRRO ¶¶ 143 & 196.

¹⁰ TRRO ¶ 144; *accord id.* ¶ 197.

¹¹ Ex. Eschelon 1R (Denney Rebuttal) at 37-38.

¹² *See* Ex. Qwest 1 (Albersheim Direct) at 15.

¹³ Tr. at 13-14 (Qwest Albersheim).

¹⁴ TRRO ¶¶ 143 & 196.

necessarily require the entire year” but that the specific amount of time required “would be situational depending on the number of collocators and the number of circuits and services involved with any given wire center.”¹⁵

The record evidence (and analogous findings in the TRRO) supports the Joint CLECs’ proposal, while no evidence or reasonable argument supports the Qwest proposal that the Order adopted. At most, there is evidence in the record that some time less than one year (or 18 months for dark fiber) may be required for a transition depending on the factual circumstances in a particular wire center. Accordingly, the Commission should modify the Order to adopt the Joint CLECs’ proposal or, alternatively, to establish the transition periods as being no longer than those established in the TRRO subject to an evidentiary demonstration by Qwest in the future proceeding that a shorter transition time is appropriate.¹⁶

C. The Commission Should Not Authorize Qwest to Impose a Charge for Converting UNEs to Tariffed Services.

The Order states, “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.”¹⁷ The Commission should reconsider this determination.

The Commission was the first to issue an order on whether Qwest may impose a non-recurring charge when converting TRRO-affected UNEs to Qwest private line or special

¹⁵ Tr. at 108-09 (Qwest Torrence).

¹⁶ If the Commission believes it should prescribe a transition period shorter than one year, it should at least provide CLECs with the six month transition period the FCC granted in its Omaha Forbearance Order that relieved Qwest of its obligation to provide UNEs in that city. *See* Ex. Eschelon 1R (Denney Rebuttal) at 38, n.67.

¹⁷ Order at 36.

access services, but other commission staffs are recommending that no (or only a nominal) charge is appropriate. Colorado Commission staff, for example, cites multiple reasons why no charge (or a nominal charge of \$1) should be imposed:

First, the CLEC is not directly the cost causer. The FCC mandated that in 'non-impaired' wire centers, a CLEC may not retain the UNE circuit. Second, it is not clear, as described above, that the CLEC currently has alternative facilities that can be obtained from other providers to which the customer can be converted. This second basis is further supported because the cost of building facilities, particularly in the 90-day window Qwest proposes to require transitioning existing circuits, likely makes the option not viable. Third, the cost will not be passed along to the Qwest end-user. Qwest will more than recover its costs in the margin of the recurring charge for the ongoing private line service which is considerably higher than the current UNE circuit rate.¹⁸

Arizona Commission staff similarly proposes that Qwest be required to waive any nonrecurring charge for converting TRRO-affected UNEs to private line circuits for many of the same reasons.¹⁹

CLECs derive no benefit from converting a circuit from a UNE to a special access service. Qwest, on the other hand, enjoys revenues from the same circuit as a private line service that are two or more times higher than the UNE rate and that will far more than cover whatever legitimate costs that Qwest incurs to change its billing records. The Commission, therefore, should modify the Order to conclude that Qwest may not impose any nonrecurring charge for converting TRRO-affected UNEs to special access services.

¹⁸ Colorado Staff Testimony at 33-36.

¹⁹ Arizona Staff Testimony at 16-20.

CONCLUSION

For the foregoing reasons and the reasons discussed in the Joint CLECs' Opening and Reply Briefs, the Commission should review, reconsider, or rehear the three issues discussed above and modify the Order to adopt the Joint CLECs' proposals.

Dated this 10th day of October, 2006.

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