Alex M. Duarte
421 SW Oak Street, Room 810
Portland, OR 97204
(503) 242-5623
(503) 242-8589 (facsimile)
Alex.Duarte@qwest.com

Melissa Thompson
1801 California Street
Denver, CO 80202
(303) 383-6728
(303) 383-8512 (facsimile)
Melissa.Thompson@qwest.com

Attorneys for Qwest Corporation

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 MOTION FOR REVIEW, REHEARING AND/OR RECONSIDERATION, AND FOR CLARIFICATION, OF CERTAIN PORTIONS OF THE COMMISSION'S SEPTEMBER 11, 2006 REPORT AND ORDER

Pursuant to Utah Code Ann. §§ 54-7-15 and 63-46b-12 and Utah Admin. Code R746-100-11.F, Qwest Corporation ("Qwest") respectfully moves for review, rehearing and/or reconsideration of a certain portion of the Public Service Commission ("Commission") Report and Order ("Order") issued in this docket on September 11, 2006. In addition, Qwest seeks clarification of one aspect of the Order, and reconsideration with respect to that aspect of the Order if it is not as understood by Qwest.

INTRODUCTION AND SUMMARY

On September 11, 2006, the Commission issued its Report and Order ("Order") in this *TRRO* wire center non-impairment proceeding. In the Order, the Commission addressed all of

the issues in the case, including its interpretation of the FCC methodology for counting business lines under the *TRRO* and the process for updating the non-impaired wire center list in the future. However, in its ruling on the issue of counting the voice-grade equivalents of a digital (DS1/DS3) business line, the Commission erred by not applying the plain meaning of paragraph 105 of the *TRRO* and the FCC's implementation rule, 47 CFR § 51.5. As Qwest has shown, and as discussed in more detail below, the plain meaning of paragraph 105 of the *TRRO* and Rule 51.5 make clear that the Commission should have ruled that Qwest must count *all* voice-grade equivalents in all digital business lines, based on their total voice-grade equivalent *capacity* (24 lines for a DS1 and 672 for a DS3). Although the Commission agreed with Qwest regarding Qwest's wholesale lines (e.g., the UNE loops that it sells to CLECs), the Commission adopted an ill-founded compromise advocated by the Division of Public Utilities (DPU) that required the counting only of "active" channels (or channels "in use" or "in service") for Qwest's *retail* business lines. The Commission did so despite the clear mandate of the *TRRO* and Rule 51.5 to count *each* voice-grade equivalent in a digital business line (without regard to whether the line is a wholesale or retail line). If the Commission had done so, there would be no dispute that the Salt Lake City Main wire center meets (and exceeds) the 60,000 business line threshold for non-impairment for DS1 loops at that wire center.

Moreover, even if the Commission does not agree with Qwest that the plain meaning of the *TRRO* and Rule 51.5 requires the counting of each voice-grade equivalent in a digital business line (including retail business lines), the Commission should have, at a very minimum, followed the meaning of the rule and the FCC's intent by counting the actual Qwest retail digital business channels in service associated with the appropriate *originating* or home wire center. Again, if the Commission had done so, it would find that the Salt Lake City Main wire center

meets (and exceeds) the 60,000 business line threshold for non-impairment for DS1 loops at that wire center.

Finally, Qwest seeks clarification of the Commission's decision with respect to the right of a CLEC to "self-certify" its entitlement to a "UNE" at a given wire center under paragraph 234 of the *TRRO*. Qwest reads the Order as allowing a CLEC to self-certify its entitlement to a UNE at any wire center that the Commission has not yet *declared* to be non-impaired for such UNEs, but not for those wire centers where the Commission has declared to be non-impaired for that particular "UNE." Any other interpretation would not make sense, and thus Qwest seeks clarification on that point. Qwest seeks reconsideration with respect to that aspect of the Order if it is not as understood by Qwest.

ARGUMENT

I. THE PLAIN MEANING OF THE *TRRO* AND THE FCC'S RULES MANDATE THE USE OF TOTAL VGEs FOR ALL BUSINESS LINES, REGARDLESS WHETHER ALL VGEs ARE ACTUALLY "IN USE" OR "IN SERVICE"

A. Statutory construction principles

It is well-settled in Utah, as elsewhere, that where the plain meaning of a law (whether a statute or, as here, an FCC order or rule) is unambiguous, the plain meaning controls. That is, Utah courts (and this Commission) determine a law's meaning by first looking at the law's plain language, and give effect to the plain language unless the language is ambiguous. *See e.g.*, *American Fork City v. Pena-Flores*, 2002 UT 131, ¶ 9, 63 P.3d 675, 678. In other words, "only if there is ambiguity [in a statute or law] do we look beyond the plain language to legislative history or *policy considerations*." *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶ 13, 993 P.2d 207, 210 (citing *Olsen v. McIntyre Inv. Co.*, 956 P.2d 257, 259 (Utah 1998)). (Emphasis added.) However, a statute's unambiguous language "may not be interpreted to contradict its

plain meaning." *Zoll & Branch, P.C. v. Asay*, 932 P.2d 592, 594 (Utah 1997) (citing *Salt Lake Therapy Clinic v. Frederick*, 890 P.2d 1017, 1020 (1995)).

B. The plain meaning of the *TRRO* and Rule 51.5 on this issue

In order to address this point, it is important, indeed critical, to look at *exactly* what the FCC said (i.e., the plain meaning of the *TRRO* and the FCC's rules). First, there is no dispute that paragraph 105 of the *TRRO* defines "business lines" as follows:

> The BOC [Bell Operating Company] 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. (See Exhibit ("Ex.") Qwest 2 (Direct Testimony of David Teitzel) (hereafter "Qwest 2"), p. 3.) (Emphasis added.)

Thus, it is important to break down the definition to its three components: (1) BOC wire center data "based on" ARMIS 43-08 business lines, **plus** (2) business UNE-P, **plus** (3) UNE-loops."[1] As to the second component, there is no dispute by any party that only "business" UNE-P lines should be included, and thus that residential UNE-P lines should *not* be included (and therefore, Qwest did not include residential UNE-P lines). Further, as to the third component, the Commission correctly found that *all* UNE loops should be counted, regardless whether they are used for business customers or non-business customers, as the definition itself does not restrict the type of UNE loop customer, but includes *all UNE loops*. The Commission correctly did so because counting all UNE loops is in accord with the FCC's view that the number of business lines fairly represents the business opportunities available in a given wire center. Order, pp. 20-21. Accordingly, the focus for purposes of this motion is on the first

[1] It is important to note that these three components are *added together* (hence the references to "plus") because each component stands by itself. Thus, for example, it is clear that the first two components (BOC wire center data based on ARMIS 43-08 *business* lines and *business* UNE-P) must be based on lines provided to *business* customers. The third component (UNE loops), however, is not so limited (for obvious reasons), and thus this component is not limited to "business lines," but may include residential UNE loops, as the Commission correctly found. Order, pp. 20-21 (Commission agrees with Qwest that "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").

component of the definition, which is "BOC wire center data based on ARMIS 43-08 business lines," which, by definition, is limited to business lines.

Thereafter, one must look at the plain language of the FCC's associated implementation rule, 47 CFR § 51.5, which further defines "business lines" as follows:

> A business line is 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,
>
> (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*." (Qwest 2, pp. 3-4 (emphasis added).)

C. The Joint CLEC and DPU positions on this issue

The Joint CLECs parsed the language in the first sentence of Rule 51.5 that provides that a business line is an ILEC-owned line "used to serve" a business customer (whether provided by an ILEC or a CLEC). There is no dispute regarding what the FCC rule specifically says, and no dispute that the digital (DS1 and DS3) lines at issue are in fact being used to serve "business customers."[2] Rather, the dispute here revolves around the fact that the Joint CLECs had parsed the plain language of the phrase "used to serve" to somehow mean that *each individual voice-grade equivalent ("VGE")* ***channel*** in a digital line must be "in use" to serve a business customer. The Commission correctly rejected this CLEC interpretation, at least as to *wholesale* (CLEC) lines. Order, pp. 20-21.

The DPU, on the other hand, adopted a position that was essentially a middle-ground compromise based on *policy considerations* and perceived "FCC *intent*" grounds, and not on the

[2] It is particularly important, however, to note that the three specific sub-criteria in the FCC's *TRRO* implementation rules apply equally to retail *and* wholesale services.

plain language of the *TRRO* and Rule 51.5. The DPU's policy-driven (and speculative) compromise method of counting total VGE channels for digital *wholesale* lines (i.e., UNE loops), but not for Qwest digital retail business lines, was essentially a "split the baby" approach by siding with Qwest on this issue with respect to CLEC (wholesale) lines, while siding with the Joint CLECs with respect to Qwest retail business lines.[3] This speculative approach, however, attempts to read beyond the plain meaning of the *TRRO* and the FCC rule, and thus invites interpretations that muddy the plain meaning that is required of an unambiguous provision.

As Qwest's witness David L. Teitzel noted, ARMIS 43-08 access line data already counts "actual" digital channels in service. That is, if an ISDN-Primary Rate (PRI) customer were to use 16 of the 24 available DS0 channels in a DS1, Qwest would report only 16 "business lines" to the FCC in its ARMIS report. Thus, if the FCC had really "intended" that only "active channels" (or channels "in use") should be counted (as the CLECs contended), subsection 3 of Rule 51.5 would not have been necessary. (Qwest 2R, p. 13.) Indeed, the mere fact the FCC mandated this full 24-VGE channel requirement (for a DS1 line) can only lead to the conclusion that it did not "intend" to count only actual channels "in use." Otherwise, the FCC most certainly would have said that only the actual retail digital channels that the BOC had previously reported on its ARMIS 43-08 report (i.e. those that are actually in use to serve a customer) could be counted. Instead, the FCC specifically states in its rule that *each* 64-kbps channel equivalent

[3] The fact that the DPU's approach was guided by policy considerations and what it believed was the FCC's "intent" is clear from its advocacy. For example, the DPU began "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." Order, p. 19. (Emphasis added.) The DPU also believed that the method that most states had adopted on this issue was "most *consistent* with the *TRRO* and the *Utah policy objectives* noted above." *Id.* (Emphasis added.) The DPU further argued that its "method is consistent with the FCC's *desire* that the non-impairment analysis be easily understood and based on readily available information." *Id*., pp. 19-20. (Emphasis added.) Indeed, the DPU believed that "Qwest's proposal to count full capacity of its retail DS1 and DS3 circuits rather than the known number of retail lines actually in use moves this process farther away from that *envisioned by the FCC* and opens the counting process to the potential for manipulation." *Id*., p. 20. (Emphasis added.) In other words, the DPU's method was based on what it believed was "consistent" with the FCC's "intent" or "desire," or consistent with what the FCC "envisioned," as well as what it (the DPU) believed was most appropriate method to further the policy of competition in the state of Utah.

in a DS1 facility *shall* be counted as *one line* (and thereafter gave the example of 24 lines in a DS1). (*Id*.)

Similarly, if the FCC rule applied only to ILEC-owned wholesale (CLEC) lines (which, of course, are not reported by Qwest on its ARMIS report), the rule would have plainly said so. That is, the rule would have qualified that the ILEC's "business line" tally should only include each 64-kbps equivalent in an ILEC's wholesale lines (e.g., the UNE loops it provisions to CLECs), but should not include the actual 64-kbps equivalents that the ILEC reports to the FCC in its ARMIS report for its retail business lines. Obviously, the rule does not have any such qualifiers, as the plain language clearly provides that the ILEC should count **each** 64 kbps-equivalent as one line.

D. <u>The Commission's decision on this issue</u>

In any event, the Commission correctly prefaced its ruling on this issue by stating that "[i]n deciding this [issue], *we look first to the TRRO* and then attempt to read the FCC's rules *consistently with the FCC's guidance* in the *TRRO*." Order, p. 20. (Emphasis added.) However, looking at the plain meaning and strict, verbatim mandates of the *TRRO* and the FCC's associated implementation rule makes it clear that the only possible conclusion is that *all VGE channels*, regardless whether they are for retail lines or for wholesale lines, and regardless whether they are actually "in use" or "in service," must be counted. There is no need for anyone to divine what it believes the FCC meant (or "intended," "envisioned," or "desired") because the strict black letter (plain meaning) reading of the *TRRO* and the FCC rules makes it clear that all VGE channels must be counted, including all VGE channels in *retail* digital business lines. The Commission, however, did not apply the plain meaning of the *TRRO* and the FCC rule. Rather, it incorrectly adopted the DPU policy-driven compromise position as to Qwest "retail" lines. *Id*.

Specifically, the Commission ruled that "the DPU's proposed method for 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." Order, p. 20. (Emphasis added.) Thus, the Commission adopted the DPU's *policy-driven* and *speculative* compromise method of counting total VGE channels for digital wholesale lines (UNE loops), but not for digital Qwest retail business lines. As to these retail lines, the Commission ruled that Qwest could only include its "known retail DS1 and DS3 line counts" (i.e., only the VGE channels that are actually "in use" or "in service"). However, as shown, the DPU approach was clearly driven by policy considerations, including what it believed would further competition in Utah, as well as what it speculatively believed was "consistent" with the FCC's "intent," "desire" or "vision" in promoting "competition," and thus was not based on the plain language of the *TRRO* and FCC rule.

E. <u>The Commission's decision on this issue is an error of law</u>

With all due respect, the Commission's decision on this issue constitutes an error of law because it does not apply the plain meaning of the *TRRO* and the FCC rule. As is clear from the plain meaning and *strict textual reading* of Rule 51.5, the Commission must ("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*.'" (See Qwest 2, pp. 3-4 (emphasis added).) Thus, the FCC clearly ruled that the *full capacity* of *each* digital line (whether retail or wholesale) should be counted. Significantly, nowhere does the rule state that it is limited only to "wholesale" lines, but somehow does not apply to "ILEC retail lines." The rule applies, *by definition*, to *all* ISDN and other digital "business lines." In fact, Mr. Coleman of the DPU acknowledged that section 3 of FCC Rule 51.5 does not say that it is limited to wholesale lines only. (Transcript ("Tr."), pp. 208-209.)

Nor does the rule say it applies only to "actual" 64-kbps-equivalent channels "in use" or "in service." Indeed, if that were the case, there would not have been any need for the FCC to have said that business line tallies "shall" account for digital lines by counting "each" VGE (64 kbps-equivalent) channel "as one line." (See e.g., Qwest 2R, pp. 13-14; Qwest 2SR, p. 6.)

Moreover, if the FCC had "intended" to include only the actual retail channels in use or in service to an ILEC's "business line tallies," it certainly would not have used the example of "a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to *24* 'business lines.'" Instead, it most certainly would have said something to the effect that the counting of "each 64-kbps-equivalent" was limited to only wholesale lines (and not to retail lines), or that only those ILEC retail lines "actually in use" or "in service" could be counted for purposes of business line tallies.

In short, the mere fact that the FCC rule specifically says "*each* 64-kbps-equivalent," and that the example instructs about counting *each* of *24* VGE channels in a DS1 line as *one line*, makes it clear and unambiguous that the plain language of the *TRRO* and the FCC's rule mandate this Commission to include full capacity (*all VGE channels*) when counting each (retail *and* wholesale) digital business line. There is no need, as the DPU apparently believed was necessary, to divine the FCC's "intent" or "desire," or to invoke general "policy considerations" about competition, in order to interpret this rule; the plain language of the rule says it all. *See e.g., Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶ 13, 993 P.2d at 210 ("only if there is ambiguity [in a law] do we look beyond the plain language to legislative history or *policy considerations*"). (Emphasis added.) That rule specifically states that so long as a digital line is being used to serve a "business customer" (not in dispute here), *all 24 VGE channels* (in a DS1 digital line) must be counted, and this is so even if not all 24 *channels* are being used to service a customer, and regardless whether the customer is served by a CLEC or by the ILEC.

Accordingly, and with all due respect, the Commission erred, as a *matter of law*, in adopting the DPU's policy-driven and speculative compromise method for counting business lines by counting only those voice-grade equivalent channels in Qwest's retail digital lines that are actually in use or in service. The plain language of paragraph 105 and FCC Rule 51.5 make it absolutely clear that this Commission *shall* account for the *full capacity* (*all* VGE channels) of a digital business line, whether the VGE channels are in use or not, and regardless of whether it is a CLEC or an ILEC line. Therefore, Qwest respectfully submits that the Commission should reverse that portion of its September 11, 2006 Report and Order (pp. 20-21) on this issue, and thus allow Qwest to include the full capacity (all VGE channels) of all digital business lines, including its ILEC retail digital business lines, as required by 47 CFR § 51.5. Doing so would therefore mean that it is undisputed that the Salt Lake City Main wire center meets the *TRRO*'s DS1 loop non-impairment threshold.

II. IF THE COMMISSION DOES NOT APPLY THE PLAIN MEANING OF THE *TRRO* AND FCC RULE, IT SHOULD, AT A MINIMUM, COUNT INDIVIDUAL DS0 TERMINATIONS AT THE PROPER ORIGINATING WIRE CENTER

As stated, Qwest strongly believes that the plain meaning of the *TRRO* and the FCC rule makes it clear that ILEC retail digital business lines should also be counted using their full VGE channel capacity. Nevertheless, even if the Commission does not agree with Qwest on this issue, in order to properly count the "actual" VGE channels in use or in service for Qwest retail digital business lines at the appropriate wire center, the Commission should follow the meaning of the rule and the intent of the FCC by, at a very minimum, counting the actual Qwest retail digital business channels in service associated with the appropriate *originating* wire center.[4] In this

[4] Qwest wants to make clear that it strongly believes that the plain language of the *TRRO* and Rule 51.5 require that all VGE channels in a digital line should be counted, whether provided by a CLEC or by Qwest, for the reasons set forth above in section I of this motion. Thus, Qwest does not intend to imply that this alternative argument means that it does not believe in its main argument above. Nevertheless, on an abundance of caution, and recognizing that this Commission has previously ruled against Qwest on this issue by adopting the DPU's middle-ground compromise position, Qwest raises this alternative method because it believes that, if the Commission

instance, this count shows that when properly counting individual DS0 terminations at the appropriate originating or home wire center, Qwest's Salt Lake City Main wire center meets the *TRRO*'s DS1 loop non-impairment threshold of 60,000 lines.[5]

As Qwest made clear in its prefiled testimony and at the evidentiary hearing on June 13, 2006, the failure to account for digital facilities that originate in one wire center, but whose individual DS0 channels terminate in a different wire center, which is simply based on the way Qwest's systems track these terminations, substantially undercounts Qwest's "actual" ILEC retail digital lines at the originating, or "home," wire center. The upshot of this systems tracking issue is the substantial undercounting at the wire center level for certain wire centers like the Salt Lake City Main wire center. Here, the end result is that the Salt Lake City Main wire center is deemed not to meet the *TRRO's* DS1 loop non-impairment threshold, when, in fact, the wire center meets that threshold if the actual DS0 terminations in service that are associated with DS1 facilities purchased at that wire center are counted at that wire center.

Specifically, as Qwest's witness Mr. Teitzel explained, Internet Service Providers ("ISPs") often subscribe to ISDN-PRI service to serve their end-user customers. These ISPs can have the primary ISDN-PRI service originating in one wire center (i.e., purchase the DS1 facility at that wire center), but could have all individual DS0 terminating channels associated with that ISDN-PRI service counted in a different wire center (where the DS0s terminate), with the two wire centers linked by DS1 interoffice transport. The active individual (DS0) digital channels associated with the ISDN-PRI service, however, are "tracked" by Qwest's systems as being in the other (terminating) wire center, instead of the "home" wire center where the ISDN-PRI

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continues to require only actual in-service channels for Qwest retail digital business lines, the appropriate actual in-service channels must be counted at the Salt Lake City main wire center.

[5] As the Commission knows, a DS1 digital line has 24 voice-grade equivalent channels. Each such channel is a DS0 channel or termination, and 24 DS0s equals one DS1. Likewise, there are 28 DS1s in a DS3, and thus a DS3 has 672 (24 X 28) DS0 channels or terminations.

service originated (i.e. where the DS1 facility is purchased). Because ILECs like Qwest file their ARMIS 43-08 data with the FCC on an aggregate *statewide* basis, instead of at the "wire center level" that the *TRRO* necessarily requires, this tracking issue would not normally affect Qwest's actual "in service" digital business channel count at the statewide ARMIS reporting level.[6] Obviously, for purposes of the standard ARMIS 43-08 report, this tracking anomaly does not matter because the active channels will still be counted for the ARMIS *statewide* figures. However, at the *wire center* level that the *TRRO* necessarily requires for non-impairment purposes, Qwest's tracking systems would misleadingly show the ISDN-PRI DS0 level "in service" channels as belonging to the terminating wire center, even though the ISDN-PRI service is served by the originating wire center, and the DS1 facility is purchased there. (Qwest 2SR, pp. 7-9; see also Qwest 2R, pp. 19-20; Tr., pp. _.)

According, even if only "in- service" channels were to be counted for retail digital business lines (which Qwest disputes for the reasons set forth in section I), a more appropriate way to count such "in service" channels would be to apply the statewide ratio of in-service digital business (DS0) channels to the number of DS1 and DS3 facilities in the originating wire centers. (Qwest 2SR, pp. 8-9; see also Qwest 2R, p. 20; Tr., pp. 37, 38, 68, 69, 75, 83.)[7] Such ratio would ensure that actual "in-service" DS0 channels were properly counted at the "home" or originating wire center. (*Id*.) Indeed, Qwest applied this statewide ratio of active DS0 terminations in service to all of the DS1 and DS3 facilities at the Salt Lake City Main wire center. (Qwest 2SR, pp. 9-10; Highly-Confidential Ex. DLT-2; Tr., pp. __.) As Qwest Highly-

[6] Only the ISDN-PRI *facility* (which is not counted as an "access line" in Qwest's ARMIS 43-08 report) would be tracked to the originating wire center. The active channels, however, would be tracked to the terminating wire center.

[7] As Qwest witness Mr. Teitzel described, a statewide average of in-service DS0 channels to corresponding DS1 or DS3 digital facilities in service is calculated by simply dividing the total number of active DS0 channels for a particular service, such as ISDN-PRI, by the total number of active digital facilities for that same service. (See Tr., p. 75.)

Confidential Exhibit DLT-2 shows, the effect of using the statewide ratio of "actual DS0 channels in service" for all Qwest digital (DS1 and DS3) business lines served by the Salt Lake City Main wire center results in a business line count that would *still exceed* the 60,000 business line non-impairment threshold for DS1 loops. (Qwest 2SR, pp. 9-10; Highly-Confidential Ex. DLT-2; Tr., pp. __.)

As Qwest has made very clear, Qwest does not believe that the method described above is even necessary because the *TRRO* requires, by its plain language, that *each* voice-grade equivalent channel in a digital (DS1 or DS3) business line must be counted as one line (whether "in use" or not).[8] Accordingly, for the reasons set forth in section I above, Qwest has moved for reconsideration of the Commission's September 11, 2006 Report and Order on this issue. Nevertheless, if the Commission determines not to follow the plain meaning of the FCC rule and thus adopts the DPU's method of counting only actual in-service channels in a retail digital business line, instead of the full capacity of all such digital lines (all voice-grade equivalent channels), the Commission should, at a minimum, count the actual in-service DS0 terminations at the appropriate originating wire center where the digital service and facility are purchased. This appropriate counting at the originating wire center results in the Salt Lake City Main wire center meeting (and exceeding) the 60,000 business line threshold for non-impairment for DS1 loops at that wire center. The Commission should therefore reverse that portion of its September 11, 2006 order (pp. 20-21) and thus find that the Salt Lake City Main wire center is *non-impaired for DS1 loops*.

[8] Indeed, this counting of the DS0 terminations at the appropriate originating wire center are only required because the Commission adopted the DPU's method. The permutations of the DPU's position would not be necessary if the Commission were to adopt the plain meaning of the FCC rule as Qwest has proposed.

III. THE COMMISSION SHOULD CLARIFY THAT ITS ORDER REGARDING CLEC SELF-CERTIFICATION DOES NOT APPLY TO WIRE CENTERS THAT THIS COMMISSION HAS PREVIOUSLY DEEMED ARE NON-IMPAIRED

The Commission should also clarify that its order regarding CLEC "self-certification" does not apply to wire centers that this Commission has previously deemed are non-impaired. In its order, the Commission made clear that "[o]nce a wire center has been *listed and approved* as non-impaired, CLECs may *not* order affected UNEs at that wire center." Order, p. 39. (Emphasis added.) The Commission also explained that the parties are to abide by the process set forth in paragraph 234 of the *TRRO* for the procurement of UNEs in the future. Order, p. 37. The Commission specifically stated that the CLEC must undertake a *reasonable inquiry* and self-certify, based on that reasonable inquiry, that to the *best of its knowledge*, the CLEC is entitled to a particular UNE at a given wire center. *Id*., pp. 37-38. The Commission then stated that Qwest must immediately process the CLEC's request for these UNEs and may subsequently challenge the CLEC's claim of entitlement through the dispute resolution procedures in the parties' interconnection agreement. *Id*., p. 38.

Qwest does not quarrel with the process set forth in paragraph 234 of the *TRRO*, but merely wants to clarify that this Commission interprets this paragraph to apply only to UNEs at wire centers that the Commission has *not yet approved* as being non-impaired. For example, this process would apply at wire centers where Qwest may believe it has met a non-impaired threshold, or where it has already filed to have a declaration of non-impairment, *but where the Commission has not yet approved the wire center as being non-impaired*.

Nevertheless, with respect to those wire centers which the Commission has affirmatively declared to be non-impaired, Qwest assumes that the procedure of filling an order and then disputing it through dispute resolution procedures does not apply. Indeed, it would be non-sensical to have the Commission declare a wire center to be non-impaired for a certain (former)

UNE, only to have a CLEC, under the guise of "self-certification," or "reasonable inquiry," or "to the best of its knowledge," order the particular (former) UNE at a wire center that the Commission has already ruled is not impaired. There would be no need to have a Commission non-impairment declaration to begin with if that were the case.[9]

Similarly, it cannot be reasonably said that a CLEC can "self-certify" that it was entitled to a "UNE" at a given wire center if this Commission had already declared that wire center to be non-impaired for that particular UNE. It certainly cannot be reasonably said that a CLEC would have made a "reasonable" inquiry to order a "UNE" at a given wire center that this Commission has already declared to be non-impaired for that particular UNE. Nor can it be reasonable for a CLEC to state that "to the best of its knowledge," it is entitled to a "UNE" at a given wire center that the Commission has already declared is non-impaired for that particular UNE.

Indeed, paragraph 234 of the *TRRO* makes that abundantly clear when it notes that the reason for allowing "self-certification" is that "the requesting carrier [CLEC] seeking access to the UNE certifies only to the best of its knowledge, and is *unlikely to have in its possession all information necessary to evaluate whether the network element meets the factual criteria in our rules*." *TRRO*, ¶ 234, fn. 659. (Emphasis added.) Clearly, the caveat about a CLEC being "unlikely to have in its possession all information necessary to evaluate whether [a UNE] meets the factual criteria in [the FCC's] rules" would necessarily not apply to the Commission's current approved list of non-impaired wire centers for particular UNEs, especially since that information would be public knowledge that all CLECs could, and should, have.

The FCC also stated that although it declined to adopt specific record-keeping requirements, it "expects that [CLECs] will *maintain appropriate records* that they can rely upon

[9] In other words, the Commission should make clear that CLECs cannot *disregard* a Commission finding of non-impairment when a CLEC makes its "reasonable inquiry." Any reasonable inquiry would necessarily find the Commission's non-impairment determination in any given wire center, and thus foreclose any "self-certification."

to support their local usage certification." *TRRO*, ¶ 234, fn. 658. (Emphasis added.) Clearly, CLECs are charged with "maintain[ing] appropriate records" (the Commission's current approved list of non-impaired wire centers for particular UNEs). In essence, at the risk of sounding flippant, the question is really one of "what part of the Commission's non-impaired list of wire centers does a CLEC not understand."[10]

Further, Qwest notes that Rules 51.319(a)(4)(iii), (a)(5)(iii), (e)(2)(ii)(C) and (e)(2)(iii)(C) make very clear that requesting carriers may not obtain new DS1/DS3 loops or DS1/DS3 transport as UNEs where an ILEC like Qwest has no obligation to provide such loops or transport pursuant Rule 51.319. Thus, if those DS1/DS3 loops or DS1/DS3 transport were ordered from Qwest in a non-impaired wire center, they would not even be UNEs as contemplated by paragraph 234. Further, giving effect to any other interpretation of paragraph 234 would make meaningless Qwest's clear ability in the FCC's rules to reject orders for de-listed UNEs in those wire centers in which Qwest is no longer required to provide the facilities as UNEs. The language in the rules should take precedence over any inconsistent interpretation of paragraph 234.

Further still, the *TRRO* clearly (1) requires a CLEC to transition UNEs away from non-impaired wire centers before March 11, 2006 and (2) allows Qwest to charge an additional 15% above the UNE rate from March 11, 2005 to March 11, 2006 for the UNEs that must be transitioned from non-impaired wire centers. The clear purpose of the *TRRO* is to prohibit CLECs from continuing to receive facilities after March 11, 2006 at UNE pricing where they are not impaired without access to UNEs. Giving effect to any other interpretation of paragraph 234 would completely undermine that very purpose. Any other interpretation would permit CLECs

[10] If CLECs were able to use the self-certification right under paragraph 234, Qwest would be required to expend significant time, money and resources in dispute resolution procedures to transition CLECs away from de-listed UNEs to which they are no longer entitled. There also would be no closure on wire center non-impairment classifications if CLECs were to have self-certification rights to order UNEs in non-impaired wire centers.

to continue to receive facilities as UNEs after March 11, 2006 where they are not allowed to receive the facilities at UNE pricing. Thus, self-certification would simply prolong the time during which a CLEC is not paying the higher alternative service rates, and therefore has the time value of money benefit of receiving de-listed UNEs at TELRIC-based pricing.

Finally, there is recent case law that is instructive on this issue. For example, in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC.*, 2005 U.S. Dist. LEXIS 9394 (April 5, 2005), the court granted BellSouth's preliminary injunction against the Georgia Public Service Commission's March 9, 2005 order "to the extent that PSC Order requires BellSouth to continue to process new competitive LEC orders for switching as an unbundled network element ('UNE') *as well as new orders for loops and transport as UNEs (in instances where the [FCC] has found that unbundling of loops and transport is not required).*" See *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC.*, (U.S.D.C.,- N.D. Ga., April 5, 2005), 2005 U.S. Dist. LEXIS at 9394, *2. (Emphasis added). The Eleventh Circuit upheld that ruling in September 2005. *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC.*, Case No. 05-11880, D. C. Docket No. 05-00674-CV-CC-1 (11th Cir., Sept. 15, 2005). These rulings make clear that CLECs do *not* have a right under paragraph 234 of the *TRRO* to order facilities as UNEs in non-impaired wire centers (where the ILEC has the right to reject new order for loops and transport as UNEs) simply because such CLECs "self-certify" their entitlement to such facilities as UNEs.

Accordingly, for the reasons set forth above, and especially because the Commission has ruled that "[o]nce a wire center has been listed and approved as non-impaired, CLECs may not order affected UNEs at that wire center" (Order, p. 39), the Commission should clarify its ruling on this issue. Specifically, Qwest respectfully submits that the Commission should clarify that the procedure set forth in paragraph 234 of the *TRRO* does *not* apply to orders for UNEs at wire

centers that the Commission has *already determined to be non-impaired*. Finally, if the Order is not as understood by Qwest on this particular issue, then Qwest seeks reconsideration of this issue for the reasons set forth above.

CONCLUSION

For all of the reasons set forth above, Qwest respectfully submits that the Commission should grant reconsideration of its September 11, 2006 Report and Order on these issues, and thereafter rule consistent with the points that Qwest has raised above. Accordingly, Qwest respectfully submits the Commission should declare the Salt Lake City Main wire center to be non-impaired for DS1 loops, and that the *TRRO* paragraph 234 procedures do not apply to "UNEs" at any wire center that the Commission has already declared to be non-impaired.

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Respectfully submitted,

QWEST CORPORATION

Alex M. Duarte
421 SW Oak Street, Room 810
Portland, OR 97204
(503) 242-5623
(503) 242-8589 (facsimile)
Alex.Duarte@qwest.com

Melissa Thompson
1801 California Street
Denver, CO 80202
(303) 383-6728
(303) 383-8512 (facsimile)
Melissa.Thompason@qwest.com

Attorneys for Qwest Corporation