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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 OPENING BRIEF

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 Opening Brief.

INTRODUCTION

The Federal Communications Commission's ("FCC's") Triennial Review Remand Order ("TRRO")[1] has fundamentally changed the availability of high capacity unbundled network elements ("UNEs"). Using business line counts and the number of fiber-based collocators as proxies for the existence of competition, the FCC has authorized Qwest Corporation ("Qwest") and other incumbent local exchange carriers ("ILECs") to refuse to

[1] *In re Unbundled Access to Network Elements*, WC Docket No. 04-313 & CC Docket No. 01-338, FCC No. 04-290, Order on Remand (rel. Feb. 4, 2005).

offer DS1, DS3, and dark fiber transport and loops as UNEs in wire centers that meet thresholds that the FCC has determined mean that competitive local exchange carriers ("CLECs") are not impaired without access to these facilities as UNEs. Once a wire center achieves a particular non-impairment level, it retains that classification and the associated UNEs are no longer available, regardless of any change in the number of business lines or fiber-based collocators. Thus wire center non-impairment classifications, like extinction, are forever, which emphasizes the importance of the accuracy of those classifications.

Qwest has classified several wire centers in Utah as non-impaired, and the parties have carefully examined the data on which Qwest relied to make those classifications. As a result, only the classification for the Salt Lake Main wire center is at issue, and that issue is limited to whether that wire center should be classified as impaired with respect to DS1 loops. The Joint CLECs and the Division agree that the record evidence demonstrates that it should not. The other wire center-specific issue in dispute is the timing of Qwest's classification of the Salt Lake West and Salt Lake South wire centers. Again, the Joint CLECs and the Division agree that the classification of those wire centers as Tier 1 should be effective July 8, 2005 – the date Qwest provided notice of that classification – rather than March 11, 2005, the effective date of the TRRO.

This proceeding, however, raises other issues. The Commission needs to establish appropriate procedures for review of future Qwest wire center classifications. The parties agree that such procedures should facilitate prompt review, but as is so often the case, the devil is in the details. The parties also dispute how Qwest should process high capacity UNE orders in a post-TRRO environment, as well as whether Qwest should be permitted to impose a non-recurring charge for converting affected UNEs in non-impaired wire centers to other

Qwest services and if so, at what rate.

The Joint CLECs propose reasonable procedures for future wire center review proceedings that will encourage Qwest to produce all data supporting its classifications in a timely manner that will enable all interested parties to promptly evaluate that data and provide their recommendations to the Commission. The Joint CLECs also propose that Qwest be required to work with them to establish ordering procedures that will minimize errors in the availability of UNEs that affect end user customers' ability to obtain prompt service from their provider of choice. Finally, the Joint CLECs reasonably recommend that Qwest either not be permitted to assess a nonrecurring charge for converting affected UNEs to special access services or that any such charge be limited to the amount the Commission previously authorized Qwest to charge for conversions of special access services to UNEs. The Commission should adopt the Joint CLECs' recommended resolution of all disputed issues.

ARGUMENT

A. The Salt Lake Main Wire Center Should Not Be Classified as Non-Impaired with Respect to DS1 Loops.

Qwest has classified the Salt Lake Main Wire Center as a Tier 1 Wire Center and as non-impaired with respect to DS3 and DS1 loops. The Joint CLECs, along with the Division, dispute only the classification of non-impairment for DS1 loops. DS1 loops are not available in a wire center that has at least four fiber-based collocators and serves at least 60,000 business lines. The Joint CLECs and the Division agree that, properly calculated, the number of business lines served in the Salt Lake Main wire center does not meet or exceed 60,000. Notwithstanding Qwest's proposals to inflate its ARMIS data, the record evidence supports the Joint CLECs' and the Division's position.

1. The FCC Did Not Authorize Qwest to Increase Its Business Line Count to Include Spare Capacity on Digital Circuits.

The primary issue with respect to the classification of the Salt Lake Main wire center is the proper calculation of Qwest's own business lines as reflected in the ARMIS 43-08 data it files with the FCC on an annual basis. The Joint CLECs and the Division propose that these business lines be calculated to include only the business lines that Qwest actually has in service as reported to the FCC. Qwest, however, proposes to increase that business line count to include excess capacity on digital circuits that is not being used to provide service to business customers. Neither the TRRO nor the FCC's rules support Qwest's proposal.

Paragraph 105 of the TRRO provides that "business line" counts for determining non-impairment include the ILEC's "ARMIS 43-08 business lines" without any reference to increasing those lines to reflect spare capacity. Qwest ignores this paragraph and points to FCC Rule 51.5, which defines "business line" 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 relies on the last part of this rule to justify its proposal, but Qwest cannot reasonably pick selected portions of the definition without considering the rule as a whole or the provisions of the TRRO that gave rise to that definition.

The first sentence of the definition provides, "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." (Emphasis added.) Spare capacity on a digital circuit that Qwest has deployed to provide service to business customers is not being "used to serve" that customer. Similarly, the second sentence states, "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." (Emphasis added.) Qwest reports the number of all of its business switched access lines to the FCC in its ARMIS 43-08 report without enhancement to include spare capacity. Neither the definition of "business line" in Rule 51.5 nor the TRRO contemplate, much less require, any adjustment to the ARMIS 43-08 business line counts to account for spare capacity.

The North Carolina commission recently agreed. In rejecting BellSouth's proposal to expand its count of its switched access business lines to count full system capacity, that commission concluded that the FCC did not authorize any adjustment to the ARMIS 43-08 business line counts:

> The Commission believes after reading and analyzing the FCC's directives in both the *TRRO* and Rule 51.5 that the FCC did not intend for the ILECs' ARMIS business line count to be altered in any way. Therefore, the Commission agrees with CompSouth and the Public Staff that BellSouth has inappropriately adjusted the high capacity business lines represented in the ARMIS report to reflect the maximum potential use. The Commission is further convinced by the first sentence of the business line rule, Rule 51.5, which specifically states that a business line is an incumbent LEC-owned switched access line <u>used to serve a business customer</u>. The Commission agrees with CompSouth witness Gillan that this

first sentence is the core of the FCC's definition of business line.[2]

The Administrative Law Judge in Washington – the only state in the Qwest region to have addressed this issue to date – reached the same conclusion.[3] Indeed, AT&T (formerly SBC) and Verizon do not make any adjustment to their ARMIS 43-08 business line counts.[4] The Joint CLECs and the Division agree that the Commission should refuse to permit Qwest to do so.

Qwest nevertheless proposes an alternative modification to its ARMIS 43-08 business line counts if the Commission disallows Qwest's original adjustment. Qwest proposes to increase those line counts ostensibly to account for lines that are served out of the Salt Lake Main wire center but are terminated in the service area of a different wire center. Qwest misses the point. The FCC did not authorize Qwest to make *any* adjustments to its ARMIS 43-08 business line counts for *any* purpose. Qwest's alternative proposal thus is equally impermissible under the TRRO and associated rules. Indeed, Qwest does not even offer any provision in the FCC decision that even arguably could support its alternative adjustment to Qwest's ARMIS 43-08 data.

To the contrary, Qwest's alternative modification even more egregiously violates the intent of the FCC in requiring the use of ARMIS data – simplicity and use of data maintained for other purposes – than Qwest's original proposal. Qwest produced no evidence whatsoever to support its calculations – or even the alleged need to make such calculations.[5]

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[2] *In re Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunication, 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 67-68 (emphasis in original).

[3] Ex. Eschelon 1R (Denney Rebuttal) at 25; Ex. Eschelon 1R.3 (Washington Comm'n Initial Order) at 12-13.

[4] Ex. Eschelon 1SR (Denney Rebuttal) at 5, Table 8.

[5] Tr. at 126-27 (Joint CLEC Denney).

Even as Qwest represented its figures, they are fundamentally flawed by being based not on the actual number of lines that allegedly originate in the Salt Lake Main wire center and terminate elsewhere but on a statewide average of the number of such lines (which Qwest does not even provide, much less support).[6]

The Commission should refuse to permit Qwest to make any adjustment to its ARMIS 43-08 business line counts when determining the number of business lines served out of the Salt Lake Main wire center.

2. The FCC Requires Qwest to Rely on 2004 ARMIS Data for the Initial Classification of Non-Impaired Wire Centers.

The FCC in paragraph 105 of the TRRO defines business lines as 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 accordingly should be based on data that is contemporaneous with that date – or as close as possible in light of the fact that the ILECs make their ARMIS filings on April 1 for the previous calendar year. The Joint CLECs, therefore, propose that the Commission require Qwest to support its Salt Lake Main wire center designation (the only one to which business line counts are relevant) using ARMIS, UNE loop, and UNE-P data as of December 31, 2004.

Qwest disagrees and has proposed to rely on 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

[6] *Id.*; Tr. at 44-46 & 54-58 (Qwest Teitzel).

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.[7]

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.[8]

[7] 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.

[8] *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).

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.[9]

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.[10] The Commission, therefore, should require Qwest to base its Salt Lake Main wire center designation on 2004 data.[11]

3. The Commission Should Make Additional Adjustments to Qwest's Business Line Counts if Qwest is Authorized to Increase Its ARMIS 43-08 Lines.

The Commission should not permit Qwest to adjust its ARMIS 43-08 business line count, but if it does, the Commission should also make other adjustments based on the language in FCC Rule 51.5. The first sentence of that rule provides, "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." (Emphasis added.) Qwest's ARMIS 43-08 lines exclude non-switched lines and lines used to serve residential customers. The UNE-P line counts also do not include non-

[9] *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."); Ex. Eschelon 1R (Denney Rebuttal) at 18.

[10] TRRO ¶ 105, n.303.

[11] Ex. Eschelon 1R (Denney Rebuttal) at 17-18; Ex. Eschelon 1SR (Denney Surrebuttal) at 14-18.

switched or residential lines. UNE loop counts should have the same exclusion and Qwest's data should be adjusted accordingly.[12]

Qwest disagrees, contending that paragraph 105 of the TRRO does not authorize any adjustment to UNE loop counts in favor of a "simplified ability to obtain the necessary information" and that the vast majority of state commissions have disallowed such adjustments. Qwest, of course, ignores that the very same arguments are equally applicable to Qwest's proposed adjustment to its ARMIS 43-08 line count. Qwest cannot reasonably ask the Commission to apply TRRO paragraph 105 only to the Joint CLECs' proposals or selectively view Rule 51.5 only to support Qwest's interpretation. If the FCC meant what it said in paragraph 105, as Qwest contends, the Commission should not permit *any* adjustments to Qwest's ARMIS 43-08 lines, UNE loops, or business UNE-P line counts. If Rule 51.5 is subject to interpretation separate from the TRRO, as Qwest also contends, the Commission should make the UNE loop adjustments that the Joint CLECs have proposed, which are much closer to the spirit of the FCC order than Qwest's proposed adjustment to its ARMIS 43-08 data.

The bottom line is that under either scenario, the Salt Lake Main wire center does not serve 60,000 or more business lines.[13] That wire center thus is not properly classified as non-impaired for DS1 loops, and the Commission should so find.

B. The Salt Lake West and Salt Lake South Wire Centers Should Be Designated as Tier 1 Wire Centers Only as of July 8, 2005.

All parties agree that the Salt Lake West and Salt Lake South wire centers are properly classified as Tier 1 wire centers. The parties simply disagree as to the date on which

[12] Ex. Eschelon 1R (Denney Rebuttal) at 25-31.

[13] Ex. Eschelon 1SR (Denney Surrebuttal) at 18 (Highly Confidential Table 9); Ex. Eschelon 1R (Denney Rebuttal) at 29-31.

that classification should be effective for purposes of calculating when the transition period and applicable rates began. The Joint CLECs and the Division propose July 8, 2005 because that was the date that Qwest listed and provided notice of those wire centers' classification. Qwest, however, proposes that the classification be deemed effective as of March 11, 2005, the effective date of the TRRO. Qwest's proposal is unreasonable and unsupportable.

The sole basis for Qwest's position is that those wire centers met the applicable Tier 1 qualifications as of March 11, 2005, even though Qwest did not notify CLECs, the FCC, or this Commission of that fact until almost four months later. The initial transition periods established by the FCC have expired or will expire on March 11, 2006, and September 11, 2006, along with the transition rates for affected UNEs of 115% of the UNE rate. Effectively, Qwest seeks to deprive CLECs of the full 12 and 18 month transition periods established in the TRRO and to impose the higher transition rates for DS1 and DS3 transport UNEs for four months *before* CLECs had notice of any rate increase. Qwest apparently believes that contemporaneous notice to CLECs of its wire center classifications is unnecessary, as are the lengths of the FCC's transition periods.[14]

Nothing in the TRRO authorizes Qwest to unilaterally abbreviate the transition periods prescribed in the TRRO or to engage in retroactive ratemaking. Nor is such a position remotely reasonable. Taken to its logical extreme, Qwest's position would allow Qwest to classify a wire center today based on data that existed as of March 11, 2005, and make that classification effective on that date – even though the first transition period has expired and CLECs were unaware that they were obligated to pay higher rates for affected UNEs in that wire center for the past 16 months. Nor is this a mere theoretical concern.

[14] Tr. at 102-04 (Qwest Torrence).

Qwest has not classified its Midvale wire center as a Tier 2 wire center as part of this proceeding, but Qwest believes that Midvale qualified as a Tier 2 wire center on March 11, 2005, and may very well classify that wire center as Tier 2 effective March 11, 2005.[15]

The Commission should forestall any such gamesmanship with respect to the effective date of wire center classifications. Qwest did not classify the Salt Lake West and Salt Lake South wire centers as Tier 1 until July 8, 2005. That is the date when Qwest notified the FCC and CLECs of that classification, and that is the date on which the transition period and rates prescribed by the FCC should begin to run. The Commission should reject Qwest's proposal to retroactively classify these wire centers.

C. The Commission Should Adopt Reasonable Procedures for Evaluation and Implementation of Future Wire Center Classifications.

The parties generally agree that once the Commission has resolved the threshold issues raised in this proceeding, Commission review of future wire center classifications should be far less complicated and time-consuming. The parties, however, do not agree on some of the specifics for the applicable approval and implementation process. The primary areas of disagreement concern (1) whether Qwest should be required to provide advance warning that a wire center is approaching classification in a higher tier; (2) the amount of information Qwest should file and whether Qwest should provide prior notice of filing for Commission approval of a new wire center classification; (3) the effective date of a new classification; and (4) the length of the transition period for the affected UNEs. The Commission should adopt the Joint CLECs' proposals on all of these issues.

Notice of Wire Center Approaching Non-Impairment Threshold

The Joint CLECs and the Division propose that Qwest be required to notify the

[15] *See* Tr. at 99-101 (Qwest Torrence).

Commission and interested parties when a wire center is close to meeting a non-impairment threshold.[16] More specifically, Qwest should provide notice when the number of business lines served in a particular wire center is within 5,000 lines of meeting the business line counts specified in the TRRO or the number of fiber-based collocators is within one fiber-based collocator of meeting a particular FCC threshold. For example, a wire center is eligible for classification as a Tier 2 wire center if it serves 24,000 or more business lines or contains three or more fiber-based collocators. Under the Joint CLECs' and Division's proposal, Qwest would notify the Commission when a wire center has at least 19,000 business lines or two fiber-based collocators.

Qwest objects to providing such notification on the grounds that the TRRO includes no such obligation. The TRRO, however, does not preclude the Commission from establishing such a requirement. Notice to CLECs that a wire center is approaching a non-impairment threshold will enable CLECs to better prepare to find alternatives to UNEs in order to continue to serve existing customers and obtain new customers, which is consistent with concerns the FCC expressed in the TRRO.[17] Qwest has expressed the concern that this will somehow enable CLECs to game the process and adjust their UNE ordering to keep a wire center from reaching the threshold. Such concerns ignore reality. To engage in such "gaming," a CLEC could avoid ordering UNEs only by (1) denying serve to new customers – which is bad business and would only benefit Qwest; (2) ordering a special access circuit at a much higher rate from Qwest – which would benefit Qwest; or (3) building its own facilities or obtaining a comparable facility from another carrier, which would encourage the development of facilities-based local competition. Any attempt by CLECs to keep a Qwest

[16] *E.g.*, Ex. Eschelon 1SR (Denney Surrebuttal) at 23-25.

wire center from meeting a non-impairment threshold, therefore, would only benefit Qwest or the public policy of fostering effective local exchange competition.[18] Qwest's "gaming" concerns thus are unwarranted.

Qwest also complains that providing such notice would be an administrative burden, but Qwest has failed to support that contention. Qwest will calculate the number of business lines in its wholly or partially impaired wire centers on an annual basis as Qwest prepares to file its ARMIS report with the FCC. Providing notice to the Commission of the results of that analysis for wire centers close to the threshold is a *de minimus* administrative burden.[19] Similarly, when Qwest is reviewing the number of fiber-based collocators in such wire centers to determine for its own purposes whether the impairment status has changed, there is no significant additional burden to inform the Commission of the results of that review if they demonstrate that a wire center is approaching a relevant threshold. Qwest thus has identified no legitimate basis on which the Commission should not adopt the Joint CLECs' and Division's proposal.

Prior Notice of Filing for Future Wire Center Classification

The Joint CLECs and the Division recommend that Qwest be required to include all of its supporting documentation with its initial filing for Commission approval of a new wire center classification as a means of facilitating a 30-day review process.[20] As part of that process, the Joint CLECs propose that Qwest provide notice to affected CLECs five days

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[17] *See, e.g.*, TRRO ¶¶ 143-44.

[18] *See* Ex. Eschelon 1SR (Denney Surrebuttal) at 24-25; Tr. at 22-23 (Qwest Albersheim).

[19] *See* Tr. at 43 (Qwest Teitzel).

[20] Ex. Eschelon 1R (Denney Rebuttal) at 36; Eschelon 1SR (Denney Surrebuttal) at 27-28. It remains unclear whether Qwest proposes to include something less than this full documentation as part of its initial filing, but such a position would be untenable if Qwest reasonably expects interested parties and the Commission to conduct the necessary thorough review of Qwest's proposed classification of

prior to making that filing. The purpose of this notice is to alert CLECs that Qwest will be providing confidential data on the number of UNEs those CLECs have in place in the wire center to give them an opportunity to object to having its confidential information disclosed as part of that filing. Such a proposal is fully consistent with Qwest's prior practice and its obligations under interconnection agreements to provide notice prior to disclosing a CLEC's confidential information.[21]

Qwest counters that such a period is unnecessary because Qwest will be filing the data as confidential and that the Commission can establish a standing protective order to ensure nondisclosure.[22] Qwest misses the point. The Commission has not issued such an order, and even if it did, a CLEC nevertheless may have an objection to disclosure of its confidential information for a purpose other than administration of its interconnection agreement with Qwest. Accordingly, Qwest should be required to give CLECs on whose customer proprietary network information Qwest intends to rely are given the opportunity to object to disclosure of that information.

Effective Date of New Classification

The Joint CLECs propose that the Commission establish the date on which Qwest's reclassification of a wire center will be effective as part of the evaluation process. Knowing that the Commission can set that date provides Qwest with the incentive to provide all information needed to review the classification as early in the process as possible so that interested parties can promptly confirm or raise legitimate issues with Qwest's conclusions. If Qwest fails to do so, the Commission can delay the effective date accordingly. Such

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a specific wire center.

[21] Ex. Eschelon 1R (Denney Rebuttal) at 35; Ex. Eschelon 1SR (Denney Surrebuttal) at 26-27.

[22] Tr. at 12 (Qwest Albersheim).

Commission flexibility also discourages CLECs from using procedural mechanisms in an attempt to delay the effectiveness of the new classification because the Commission can establish an earlier effective date if it concludes that one or more CLECs have raised issues solely for purposes of delay.[23]

Qwest, on the other hand, proposes that a new wire center classification be effective 30 days after Qwest files for Commission approval, regardless of the length of time that it takes for the Commission and interested parties to review that classification. Qwest's proposal provides Qwest with no incentive to ensure that its initial filing is sufficiently comprehensive. Indeed, Qwest's failure to timely provide all information supporting its wire center designations in this proceeding resulted in needless delay in the classification of two wire centers and unnecessary expenditure of party resources to continue to litigate issues that could have been resolved two months earlier.[24]

The Commission, therefore, should retain the authority to determine when the new wire center classification will become effective based on the circumstances of each proceeding.

Length of Transition Period

The FCC established a one-year transition period for unbundled DS1 and DS3 transport and loops in affected wire centers "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 where to deploy, purchase, or lease facilities."[25] The FCC gave carriers 18 months to transition off of dark fiber

[23] Ex. Eschelon 1R (Denney Rebuttal) at 35-37; Ex. Eschelon 1SR (Denney Surrebuttal) at 28-29.

[24] Ex. Eschelon 1SSR (Denney Supp. Surrebuttal).

[25] TRRO ¶¶ 143 & 196.

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."[26] The Joint CLECs believe that the concerns the FCC expressed are equally applicable to new classifications of Qwest wire centers.[27]

Qwest, however, proposes a 90-day transition period. As an initial matter, Qwest's transition proposal does not apply to the rates Qwest charges for its facilities but is limited to the network operations required to physically change the circuit identifications. In sharp contrast to the TRRO's adoption of interim rates during the transition period, Qwest proposes to backbill CLECs the tariffed rate as of the effective date of the new wire center classification. Such billing would apply even if a CLEC transitions to its own facilities or the facilities of another carrier during that transition period. Under Qwest's "transition" proposal, therefore, a CLEC effectively has only 30 days from the date that Qwest notifies the Commission and CLECs of the new non-impairment classification to obtain facilities from a source other than Qwest if the CLEC wants to avoid paying tariff rates for affected UNEs in that wire center.[28]

Qwest provides virtually no support for its proposal, much less a justification for its radical departure from the transition process the FCC established in the TRRO. To the contrary, Qwest's own engineering witness testified "from a network perspective" that the amount of transition time required "would be situational depending on the number of

[26] TRRO ¶ 144; *accord id*. ¶ 197.

[27] Ex. Eschelon 1R (Denney Rebuttal) at 37-38.

[28] *E.g.*, Tr. at 24-25 (Qwest Albersheim).

collocators and the number of circuits and services involved with any given wire center." No Qwest witness addressed the issues presented to a CLEC who must determine how it will obtain or build substitute facilities once UNEs are no longer available. Qwest's one-size-fits-all proposal for a limited 90-day transition period thus is inconsistent with its own testimony, as well as the TRRO. The Commission should reject that proposal and adopt the same transition periods and rate structure the FCC established.

D. The Commission Should Not Permit Qwest to Unilaterally Reject Orders for UNEs in Non-Impaired Wire Centers.

The parties agree that CLECs are not entitled to order UNEs in wire centers that have been classified as non-impaired with respect to those UNEs. The disputed issue is how Qwest handles UNE orders in a new environment in which certain UNEs are unavailable in certain wire centers. The Joint CLECs propose that Qwest and CLECs be required to work together to develop an order process that will ensure that CLECs are able to obtain the facilities they need from Qwest at the applicable rates, terms, and conditions. Pending development of such a process, the default should be the process outlined in the TRRO – a CLEC may place a UNE order in any wire center as long as the CLEC self-certifies that it is entitled to order that UNE, and Qwest must provision that UNE, subject to later conversion to a tariffed service if the CLEC was not entitled to order the facility as a UNE in that wire center.[29]

Qwest contends that once the Commission approves Qwest's certification of a wire center as non-impaired, Qwest should be permitted to reject orders for any affected UNEs in that wire center. Qwest misses the point. CLECs need to respond promptly to customer

[29] Ex. Eschelon 1R (Denney Rebuttal) at 38-42; Ex. Eschelon 1SR (Denney Surrebuttal) at 30-31; Tr. at 124-25 (Joint CLEC Denney).

requests for service. Both Qwest and CLECs need to adjust their ordering systems on a wire center-specific basis to accommodate evolving UNE availability in light of the TRRO and Qwest's wire center classifications based on the TRRO. In the absence of a coordinated effort to do so, errors are inevitable. A CLEC may place a UNE order in a wire center where that UNE is no longer available or Qwest may reject a UNE order in the mistaken belief that the UNE is not available in that wire center. Customers are the ultimate losers under either scenario as their ability to obtain service is delayed while the carriers sort out the mistake.

The Joint CLECs' recommendation minimizes the opportunities for such end user customer service-affecting errors to occur. The parties will work together to modify their systems and order processes to comply with applicable legal requirements, but until they do, Qwest will process all UNE orders, subject to a true-up to tariffed nonrecurring and recurring charges if the CLEC erroneously placed the order in a non-impaired wire center. Qwest is made whole, and customers promptly obtain their requested service. The Commission, therefore, should adopt the Joint CLECs' proposal.

E. The Commission Should Not Authorize Qwest to Impose a Charge for Converting UNEs to Tariffed Services or Should Not Authorize a Charge in Excess of the Charge the Commission Previously Established for Conversions of Tariffed Services to UNEs.

Qwest proposes to impose a $50 Design Change Charge on each UNE that it converts to a special access circuit after a wire center has been properly classified as non-impaired with respect to that particular UNE. No such charge is appropriate. Qwest is the party seeking to make the change to its own records when no such change is necessary and, as such, is the cost-causer that should be financially responsible for the administrative costs. Qwest's tariffed rates, moreover, are more than double the UNE rates for the exact same facilities, and whatever minimal costs Qwest incurs to change its records are far more than

offset by the recurring price increase in the first month alone. Qwest does not charge its own retail customers under comparable circumstances, and as the California commission recently concluded, Qwest should not be authorized to impose such charges on CLECs.[30]

Even if a charge were appropriate – which it is not – Qwest's proposed application of a Design Change Charge is unreasonable. Qwest devotes substantial testimony to attempting to justify this charge, but that testimony demonstrates only that Qwest seeks to charge CLECs for little more than repeatedly checking to make sure that Qwest did not make any errors when changing its own records.[31] More to the point, none of the activities involved in changing Qwest's billing records when converting from UNEs to special access services are any different than the activities involved in converting special access services to UNEs, and the Commission has already established a much lower nonrecurring rate ($8.48) for such conversions.[32] The Washington commission authorized the same conversion charge regardless of whether the conversion is from special access to UNEs or UNEs to special access, and so should this Commission if it finds that any charge is appropriate.[33]

CONCLUSION

For the foregoing reasons, the Commission should not approve Qwest's classification of the Salt Lake Main wire center as non-impaired with respect to DS1 loops, should not approve the classification of the Salt Lake West and Salt Lake South wire centers as Tier 1 prior to July 8, 2005, and should adopt the Joint CLECs' proposals on the other disputed issues.

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[30] Ex. Eschelon 1R (Denney Rebuttal) at 52-54.

[31] *Id.* at 55-57.

[32] *Id.* at 57-58.

[33] *Id.* at 57.

Dated this 14th day of July, 2006.

DAVIS WRIGHT TREMAINE LLP

By: /s/ Gregory J. Kopta
Gregory J. Kopta

APPENDIX

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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 CERTIFICATE OF SERVICE

I hereby certify that on the date given below, true and complete copies of the *JOINT CLEC OPENING BRIEF* and the within *CERTIFICATE OF SERVICE* were served by Federal Express, overnight delivery, and by electronic mail on the following day, July 14, 2006, on the following:

Ms. Melissa Thompson Qwest Corporation 1801 California, 10th Floor Denver, CO 80202 Email: melissa.thompson@qwest.com	Alex M. Duarte Corporate Counsel QWEST 421 SW Oak Street, Room 810 Portland, Oregon 97204 Phone: (503) 242-5623 Fax: (503) 242-8589 Email: Alex.Duarte@qwest.com
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Dated June 11, 2018.

Colleen Johnson