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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 REPLY 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 Reply Brief.

ARGUMENT

The Joint CLECs largely have already addressed in their Opening Brief the arguments that Qwest Corporation ("Qwest") makes in support of its positions on the disputed issues in this proceeding. The Joint CLECs will endeavor not to be repetitive, but Qwest raises a few points in its Opening Brief that merit additional discussion. The Joint CLECs do not specifically respond to the Memorandum of the Division of Public Utilities other than to support the Division's proposal to view the contested issues in the light of the Utah legislature's declarations, as well as the federal Telecommunications Act of 1996 ("Act").

The Joint CLECs also echo the Division's observation that "Not granting non impaired status to the Salt Lake Main wire center today does not in any way restrict Qwest from re submitting its business line count for that office in the future."[1] The Joint CLECs and Division agree that the "one way ratchet" of the Triennial Review Remand Order ("TRRO") – that wire centers can be classified in the future as non-impaired but not vice versa – highlights the importance of correctly determining the existence and correct level of non-impairment in a particular wire center before effectively authorizing Qwest to refuse to provide certain high capacity unbundled network elements ("UNEs") in that wire center.

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

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

Qwest prominently quotes from paragraph 105 of the TRRO "that 'business line counts are an objective set of data that incumbent LECs have already created for other regulatory purposes,' and that 'by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, *and a simplified ability to obtain the necessary information.*'"[2] Qwest then radically departs from this "simplified ability to obtain the necessary information" to "adjust" its ARMIS 43-08 data to include unused capacity on high capacity circuits that is not part of its ARMIS report.[3] Apparently, simplicity and reliance on data already created for other purposes is only desirable if it benefits Qwest.

Qwest's primary justification for altering its ARMIS 43-08 business line counts is

[1] Division Memo at 6.

[2] Qwest Opening Brief at 14 (quoting TRRO ¶ 105) (emphasis added by Qwest).

[3] E.g., Tr. at 48-50 (Qwest Teitzel).

Qwest's interpretation of the Federal Communications Commission's ("FCC's") definition of "business lines" in FCC Rule 51.5, which the Joint CLECs have discussed in their opening brief and will not repeat here. Qwest also contends, however, that "the FCC use of ARMIS data implicitly includes some adjustment to the data, especially in the use of the data at the wire center level since it is reported at the state level."[4] Qwest thus would have the Commission believe that because the ARMIS data must be adjusted to be wire-center specific, rather than statewide as reported to the FCC, other adjustments to that data are appropriate.

Making ARMIS data more granular by breaking the statewide number of business lines down by wire center is a far cry from using Qwest's non-ARMIS records to inflate the number of business lines that Qwest reports to the FCC. In one case, Qwest is assigning business lines reported to the FCC on a statewide basis to individual wire centers. Qwest's proposal, however, is to use its own proprietary data on the number and utilization of high capacity circuits in its network to create new data not included in its ARMIS report to the FCC. Such a proposal is fundamentally inconsistent with the FCC's stated goals in paragraph 105 of the TRRO of simplicity and "reliance on objective set of data that incumbent LECs have already created for other regulatory purposes." The Commission should reject Qwest's proposed adjustment.

2. The Commission Should Require Qwest to Use 2004 ARMIS Data for the Initial Classification 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 as such is the data that should be used for Qwest's initial wire center classifications. Qwest

[4] Qwest Opening Brief at 16-17.

offers three reasons why Qwest should be entitled to rely on calendar year 2003 ARMIS data, but none of those reasons support Qwest's position.

First, Qwest contends that "the FCC clearly meant for Regional Bell Operating Companies ('RBOCs') like Qwest to utilize access line data that was finalized and readily available on February 4, 2005, when the FCC directed the RBOCs to submit their lists of wire centers meeting the TRRO's non-impairment standards."[5] The *Wireline Competition Bureau*, not the FCC, *requested* a list of wire centers that Qwest and other ILECs believed satisfied the TRRO non-impairment thresholds to ensure timely implementation of the TRRO:

> The Bureau is mindful of the need for certainty with the industry regarding the scope of unbundling obligations. Such certainty depends on the timely incorporation of the *Triennial Review Remand Order*'s fact-dependent rules into revised interconnection agreements. To that end, we ask that you provide the Bureau a list identifying by Common Language Location Identifier (CLLI) code which wire centers in your company's operating areas satisfy the [non-impairment criteria]. We ask that you submit this information into the above-referenced dockets by February 18, 2005. [6]

Nothing in the Bureau's letter request or the TRRO states that 2003 is the correct vintage of the ARMIS data on which the initial wire center classifications were to be based, nor does the timing of that letter suggest that only the use of data in existence as of that request is permissible. Indeed, Qwest relies on fiber-based collocation data from March 2005 even though such data is from almost one month *after* the Bureau requested the list of non-impaired wire centers which included wire centers classified on the basis of such data.

Qwest's second argument is that even though Qwest relies on fiber-based collocation

[5] Qwest Opening Brief at 15, n.18.

[6] Ex. Qwest 1.1.

data from March 2005, the FCC rules do not require that business line data be of the same vintage. While true, that observation is irrelevant. Even Qwest agrees with the concept that non-impairment classifications should be based on data that is contemporaneous with the non-impairment classification.[7] Qwest seeks a one-time exception to this concept to use 2003 ARMIS data for the initial wire center classifications simply because the TRRO became effective less than one month before Qwest filed its 2004 ARMIS data with the FCC. Just as Qwest agrees that it should not classify wire centers in the future based on outdated data, Qwest should not be entitled to initially classify wire centers as non-impaired based on ARMIS data that was over one year old on March 11, 2005.

Finally, Qwest contends that "the vast majority of states have agreed with Qwest" that the use of 2003 ARMIS data is appropriate.[8] This statement is simply false. The "vast majority" of state commissions have not even addressed this issue, much less agreed with Qwest. More fundamentally, of the four commissions that have made a determination on that issue, half have agreed with the Joint CLECs that 2004 ARMIS data should be used.[9] These decisions are the better reasoned and should be adopted by this Commission.

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.

Qwest cannot plausibly justify its proposal to classify the Salt Lake West and Salt Lake South wire centers as Tier 1 wire centers effective March 11, 2005, when Qwest did not notify CLECs or the FCC of that classification until July 8, 2005. Qwest continues to rely primarily on "the fact that the fiber-based collocations for these particular wire centers were

[7] *E.g.*, Tr. at 40-41 & 69 (Qwest Teitzel) (new wire center classifications based on business line counts should be limited to once per year after ARMIS data from the previous year is available).

[8] Qwest Opening Brief at 15, n.18.

[9] Ex. Eschelon 1SR (Denney Surrebuttal) at 5, Table 8.

all operational as of the March 11, 2005 TRRO effective date."[10] As the Joint CLECs explained in their Opening Brief, Qwest misses the point. The transition period and rates established in the TRRO would be meaningless if Qwest and the other ILECs were permitted to classify wire centers retroactively to March 11, 2005, regardless of the fact that CLECs had no notice of that classification until several months later.

Qwest nevertheless argues that "given the short time period involved, it is reasonable that the notice of such non-impaired wire centers could follow later, especially since RBOCs like Qwest were conducting thorough but cautious investigations of the identify [*sic*] of fiber-based collocators in their wire centers."[11] Nowhere in the TRRO did the FCC establish any "grace" period for ILECs to make their wire center classifications after the TRRO became effective in order to have those classifications become effective on the same date. The Wireline Competition Bureau, moreover, requested that Qwest and other ILECs file a list of the wire centers they believed satisfied the non-impairment standards in February 2005 with the obvious intent to preclude the very retroactive classifications announced months after the TRRO became effective that Qwest is advocating here.[12]

The Commission should reject Qwest's proposal to retroactively classify the Salt Lake South and Salt Lake South wire centers and should classify those wire centers as Tier 1 wire centers effective no earlier than July 8, 2005, for purposes of calculating the one year transition period and associated rates.

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

The parties generally agree that Commission review of future wire center

[10] Qwest Opening Brief at 27.

[11] *Id*.

classifications should be handled on an expedited basis. The Joint CLECs have made proposals to allow for just such fast-track review, but Qwest objects to some of the very procedures that would be required for interested parties to have the information necessary to evaluate new wire center designations within the 30 days these parties recommend. Qwest also refuses without adequate justification to provide notice to affected CLECs that a wire center is approaching FCC non-impairment thresholds. The Commission should adopt the Joint CLECs' proposals on these issues.

Notice of Wire Center Approaching Non-Impairment Threshold

The Joint CLECs and the Division propose that Qwest be required to notify the Commission and interested parties when a wire center is close to meeting a non-impairment threshold.[13] 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. In addition to Qwest's "gaming" and "administrative burden" arguments that the Joint CLECs previously addressed in their Opening Brief, Qwest contends that these thresholds "are not meaningful, especially since 5,000 lines or one fiber collocator does not mean that a change in the impairment classification for that wire center is imminent."[14] Qwest is incorrect.

The Joint CLECs previously explained that notification of a wire center approaching one or more of the FCC's impairment thresholds enables CLECs to make better "informed

[12] *See* Ex. Qwest 1.1 (Wireline Competition Bureau letter to Qwest).

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

[14] Qwest Opening Brief at 29.

decisions regarding how they enter a market and the type of products they provide."[15] Qwest claims that because ARMIS data is updated only once per year and line counts may decline over the following year, notice based on the prior year's data "could actually cause CLECs to take costly action to prepare for a wire center non-impairment reclassification that will not occur."[16] The Joint CLECs appreciate Qwest's purported concern, but CLECs – like any other business – would rather make strategic and investment predictions and decisions based on more information, not less. The possibility that such notice may be a "false alarm" does not mean the CLECs should receive no notice whatsoever. The CLECs – not Qwest – should determine whether the proximity of the business line or fiber-based collocator counts in a particular wire center signals the need to develop alternatives to high capacity UNEs in that wire center. To the extent, moreover, that advance notification (in conjunction with other market analysis and business data) encourages CLECs to construct their own facilities – even though the wire center does not eventually meet an FCC impairment threshold and UNEs continue to be available – that notification fosters the development of more facilities-based competition, which even Qwest allegedly believes is in the best interests of Utah consumers. The Commission should require Qwest to provide such notice.

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.[17] Qwest states that it "intends to provide the same kind of supporting data that it used to support its initial list of

[15] Ex. Eschelon 1SR (Denney Surrebuttal) at 25, lines 17-19.

[16] Qwest Opening Brief at 29.

[17] Ex. Eschelon 1R (Denney Rebuttal) at 36; Eschelon 1SR (Denney Surrebuttal) at 27-28.

non-impaired wire centers."[18] That data simply is not sufficient to enable CLECs to conduct their review of Qwest's proposed classification and to undertake their own independent investigation within 30 days. CLECs need the type of data that they requested in discovery in this case, including Qwest's tardy supplemental responses to that discovery.[19] If Qwest does not provide that information as part of its initial filing, CLECs will need to obtain it through discovery in the new proceeding, which necessarily will result in a delay in interested parties' ability to respond to Qwest's filing. If Qwest, like the Joint CLECs, wants an expedited proceeding that contemplates any objection to Qwest's future wire center classifications within 30 days of Qwest's initial filing, Qwest needs to provide the same information it provided in this proceeding – including responses to the wire center-specific discovery propounded by the Joint CLECs – as part of that initial filing.

Qwest nevertheless raises the concern that while CLECs are entitled to "sufficient information," that should not include the level of detail it provided with respect to some fiber-based collocations "without the prior consent of the carriers whose data is being disclosed."[20] The Joint CLECs explained in their Opening Brief, however, that this is why the five day notice of any initial filing the Joint CLECs propose is necessary – to inform affected CLECs that their confidential data will be used in the proceeding and enable them to have time to lodge any objection before Qwest discloses that data. The data that Qwest eventually provided in response to the Joint CLECs' data requests was critical to the Joint CLECs' ability to review and confirm the accuracy of Qwest's fiber-based collocator determinations and the resulting wire center classifications. Until Qwest provides that data,

[18] Qwest Opening Brief at 12.

[19] Ex. Eschelon 1SSR (Denney Supplemental Surrebuttal).

[20] Qwest Opening Brief at 26, n.36.

neither Qwest nor the Commission should expect interested parties to be able to fully evaluate any filing for a new wire center classification.

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

"Qwest agrees that it would not 'block' orders absent a final designation of non-impairment" but disagrees with the Joint CLEC proposal to develop order processing modifications to ensure that Qwest does not block orders that CLECs are entitled to have processed.[21] Qwest's arguments against the Joint CLEC proposal fail to support Qwest's position.

Qwest "disagrees with the Joint CLECs' argument about Qwest being required to immediately process orders from a CLEC who 'self-certifies' that it is entitled to obtain the requested UNE."[22] Qwest's disagreement is with the FCC, not the Joint CLECs. Paragraph 234 of the TRRO requires Qwest to provision a UNE under just such circumstances:

> Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, **the incumbent LEC must immediately process the request**. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, **the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE** before a state commission or other appropriate authority. (Emphasis added and footnote omitted.)

Nor do the Joint CLECs advocate "separate proceedings before this Commission between Qwest and each CLEC that wishes to place a UNE order in a particular wire center

[21] Qwest Opening Brief at 12.

[22] *Id.*, n.12.

that Qwest believes is non-impaired,"[23] despite the FCC's clear establishment of just such a process. The Joint CLECs propose to work with Qwest to develop an order process that renders individualized Commission procedure unnecessary in wire centers that the Commission has agreed meet the FCC criteria for non-impairment. The Joint CLECs, however, are not willing to permit Qwest to unilaterally implement order processing adjustments in the wake of wire center reclassifications at the risk of having Qwest erroneously reject legitimate orders.

The Joint CLECs, of course, recognize that if a CLEC mistakenly submits an order for a UNE that is no longer available in such a wire center, the CLEC would be responsible for paying Qwest the difference between the UNE charges and the applicable tariff charges that should have applied retroactively to the date of the order. The Joint CLECs thus do not seek to have their cake and eat it too, as Qwest contends. Qwest remains economically whole under the Joint CLECs' proposal. The emphasis, however, should be on ensuring that the circuit is timely provisioned so that the CLEC can provide prompt service to its customers. The Joint CLECs' proposal does just that and should be adopted.

E. The Commission Either 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 inappropriately 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. Qwest maintains that it incurs costs to undertake such conversions for a CLEC's benefit and if Qwest "were not allowed to charge the CLEC for such activities, the cost burden would be unfairly shifted to Qwest and its end-

[23] *Id.*

user customers, thereby disadvantaging Qwest in a market the FCC has determined to be competitive."[24] Such contentions are unsupportable.

CLECs do not benefit from Qwest undertaking what amounts to nothing more than a billing record change in conjunction with Qwest doubling or tripling the rate charges the CLEC for providing a particular circuit. Once the conversion takes place, moreover, the CLEC becomes one of Qwest's customers that pays retail rates and thus is already bearing the burden of whatever costs Qwest incurs to undertake this activity for its own benefit. Nor did the FCC determine that *any* market is "competitive" – only that CLECs are not "impaired" without access to high capacity UNEs in wire centers that serve a certain number of business lines and/or have a specified number of fiber-based collocators. Qwest cannot argue with a straight face that these areas are "competitive" or that Qwest is suffering any "disadvantage" whatsoever if a CLEC agrees to pay recurring rates that are two or three times higher for a circuit as a special access service than the CLEC paid for the very same circuit as a UNE.

Qwest also fails to justify the need for any cost-generating activity. Qwest claims that the circuit identifier ("circuit ID") must be changed because FCC rules "require that telephone carriers accurately maintain records that track inventories of circuits, and that unique circuit ID is maintained as a means of measuring the different service performance requirements applying to UNEs and private line services."[25] Qwest, however, never explained why the existing circuit ID could not be used for these purposes. Indeed, at one time Qwest did just that with respect to the combination of transport and loops known as

[24] Qwest Opening Brief at 30, n.39.

[25] *Id*. at 30-31 (footnote omitted).

enhanced extended links ("EELs").[26]

Even if it were necessary for Qwest to undertake some cost-generating activity in connection with conversions of UNEs to private line circuits, Qwest failed to demonstrate that such activities are comprised of the same activities included in Qwest's Design Change Charge. Other than standard order processing activities – which are common to any Qwest nonrecurring charge – a *billing* system change for an *existing* circuit bears no similarity to the change in *design* of a *new* circuit.

Far more analogous to the activities required to convert UNEs to private line services are the activities included in the charge that the Commission already approved for conversions of private line circuits to UNEs. Qwest largely ignores this charge, however, except to claim that the charges are distinguishable on the grounds that the Commission allegedly assumed in setting the private line to UNE conversion rate that "the process would require little or no manual activity (unlike here, where there is a need to change circuit IDs)."[27] Qwest cites to no record evidence to support the assertion that the Commission approved rate does not include costs to change the circuit ID. Indeed, Qwest does not even attempt to explain why Qwest needs to change the circuit ID when converting a circuit from a UNE to a private line but not when converting that circuit from a private line to a UNE. To the extent that costs to change the circuit ID are not included in the private line to UNE conversion rate approved by the Commission, moreover, they should not be included in any charge to convert a UNE to a private line.

Finally, Qwest claims that the Commission lacks jurisdiction to establish a nonrecurring charge for an interstate tariffed service. That is true but irrelevant. Qwest

[26] Ex. Eschelon 1R (Denney Rebuttal) at 49-50.

obviously does not believe that a charge to convert a UNE to a private line is within the FCC's exclusive jurisdiction or Qwest would not have asked this Commission to authorize Qwest to impose that charge in this proceeding. Indeed, no such charge appears in Qwest's federal tariff. On its face, therefore, Qwest's tariff does not authorize Qwest to impose *any* charge for these conversions, and neither should the Commission. Even if the Commission were to decide that some charge for this activity is appropriate, however, the Commission has jurisdiction to establish that charge as among the rates for UNEs over which the Commission unquestionably has jurisdiction.[28]

CONCLUSION

For the foregoing reasons and the reasons discussed in the Joint CLECs' Opening Brief, 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.

Dated this 28th day of July, 2006.

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[27] Qwest Opening Brief at 32, n.44.

[28] 47 U.S.C. § 252(d)(1).