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June 26, 2006

Annette Taylor  
Oregon Public Utility Commission  
550 Capitol St., NE  
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Salem, OR 97301

Re: UM 1251

Dear Ms. Taylor:

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Response to the Joint CLECs' Motion to Compel Qwest to Respond to Data Requests.

If you have any question, please do not hesitate to give me a call.

Sincerely,

A handwritten signature in blue ink that reads "Carla".

Carla M. Butler

CMB:

Enclosures

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**BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

**UM 1251**

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In the Matter of TRRO/Request for Commission Approval of Wire Center Lists submitted on behalf of the Joint CLECs	QWEST’S RESPONSE TO THE JOINT CLECs’ MOTION TO COMPEL QWEST TO RESPOND TO DATA REQUESTS
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Qwest Corporation (“Qwest”) hereby responds to the motion to compel that various CLEC parties (“the Joint CLECs”) filed on June 9, 2006 with respect to two data requests, nos. 33 and 34 (of 49), seeking wire center data as of December 2004 in contravention of the Federal Communications Commission’s (“FCC’s”) Triennial Review Remand Order (“*TRRO*”) to which Qwest has properly objected. For the reasons set forth below, these data requests do not seek data that is relevant to the issues in this case or that is reasonably calculated to lead to the discovery of admissible evidence. Accordingly, Qwest respectfully submits that the Commission should deny the Joint CLECs’ motion to compel.

**INTRODUCTION AND SUMMARY**

In response to the Joint CLECs’ April 28, 2006 set of 49 data requests, Qwest provided the Joint CLECs the comprehensive set of data it used to determine which wire centers in Oregon satisfied the FCC’s *TRRO* wire center “non-impairment” criteria. However, Qwest properly objected to the two requests at issue in this motion to compel (request nos. 33 and 34), which seek to expand the relevant data beyond Qwest’s April 2004 filing of December 2003 data in Qwest’s ARMIS 43-08 annual report to the FCC. This December 2003 ARMIS data is the data that Qwest submitted to the FCC in February 2005 in support of its initial wire center list and is consistent with the data upon which the FCC relied in making its wire center non-impairment criteria determinations in its *TRRO* order. Qwest respectfully submits that it should not be

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

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

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

### **ARGUMENT**

#### **I. Qwest's use of December 2003 data is consistent with the data the FCC analyzed in making its non-impairment decisions in the *TRRO* and is the available data when the FCC directed RBOCs to submit their non-impaired list of wire centers**

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

ARMIS data is also the data that was available when the FCC directed Qwest and the other RBOCs to submit the list of wire centers that meet the non-impairment criteria, which Qwest did in February 2005. Specifically, the FCC in its *TRRO* stated: “The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE loops.” *TRRO*, ¶ 105. The data which formed the basis for the FCC’s analysis was ARMIS data from December 2003, which Qwest filed in April 2004. This same data was also what was available on February 4, 2005 when the FCC directed Qwest and the other RBOCs to submit the list of wire centers that meet the FCC’s non-impairment criteria. Consequently, the use of December 2003 data is both appropriate and consistent with the FCC’s intent to base determinations on “an objective set of data that incumbent LECs already have created for other regulatory purposes.” *TRRO*, ¶ 105.

In their motion to compel, the Joint CLECs argue that Qwest’s December 2004 ARMIS data was available at the time that Qwest made its wire center filing with the FCC in February 2005. That assertion is mistaken, however, as ARMIS data is not filed until the April of the following calendar year.<sup>1</sup> More importantly, however, even if such data had been available as of February 2005 (or even as of the March 11, 2005 effective date of the *TRRO*), the data would still not be relevant to an inquiry of the wire center list and data that Qwest submitted to the FCC at the FCC’s direction in February 2005. Qwest’s February 2005 filing at the FCC used *December 2003* data. If the FCC had wanted the wire center lists to be based on subsequent data, it most certainly would have requested such data. However, the FCC did not request any subsequent data. Rather, it requested the wire center lists based on the most current data available *at the time* those lists were filed in February 2005.<sup>2</sup>

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<sup>1</sup> There was also no FCC filing of ARMIS data as of March 2005. Thus, the Joint CLECs’ request for that data (see data request nos. 33 and 34) also cannot be satisfied.

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

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

Indeed, the Joint CLECs’ argument that Qwest should have used 2004 business line data in its February 2005 submission, under the apparent belief that such data must have been “readily ascertainable” to Qwest (even though 2004 ARMIS data was not yet available), is inconsistent with its advocacy in this case. Specifically, the Joint CLECs’ witness Douglas Denney has testified that there is “no reason to use stale data collected many months earlier for such a critical determination.” (Joint CLECs/1, Denney/16.). However, later in his testimony, in discussing the process for adding wire centers to the non-impairment list, he states that “due to the FCC’s

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

<sup>3</sup> The Joint CLECs’ argument that “the FCC obviously contemplated that the wire center designations are to be based on the most current data available because the *TRRO* expressly contemplates future non-impairment designations, which would be meaningless if only 2003 data could be considered” (Joint CLECs’ Motion, p. 4), does not make sense. Qwest certainly agrees that the *TRRO* expressly contemplates future non-impairment designations. Those future designations (i.e., subsequent updates to the list), of course, will be made based on the “most current data available” *at that time* (the ARMIS data filed and available *at the date of future filings*). For example, as the Washington Commission correctly ruled, “[o]n a going-forward basis, however, Qwest and Verizon must submit the *most recent ARMIS 43-08 data when seeking to add any new wire centers* to the list of non-impaired wire centers the Commission resolves in this proceeding.” *Washington Initial Order*, p. 10, ¶ 24. For example, if Qwest were to seek to designate an additional Oregon wire center as non-impaired for DS1/DS3 loops or transport at any point during the remainder of 2006, Qwest would be required to utilize 2005 ARMIS data (the most current ARMIS data available today). In other words, if in July 2006, Qwest were to seek to add a particular wire center to the non-impaired wire center list based on business line counts, it would need to rely on the most current available ARMIS report, which was its 2005 ARMIS 43-08 report. That certainly does not mean, however, that the *initial* wire center designation, which is what this Commission is considering in this docket, should be anything other than the “most current available data” *at the time that Qwest submitted its list to the FCC* in February 2005.

reliance on ARMIS data, updates based on line counts are appropriate only when new ARMIS data is available, i.e., *once a year*.” (Joint CLECs/1, Denney/33 (emphasis added).) Thus, the appears to acknowledge that switched business lines should be identified based on the *latest available* ARMIS data, and that updated ARMIS data is only released once a year. Yet, in their critique of Qwest’s business line identification methods, they claim that in February 2005, Qwest should have somehow used 2004 line data, even though 2004 ARMIS data was not yet available. It is entirely inconsistent for the Joint CLECs to acknowledge that the latest ARMIS data should be used for Qwest’s non-impairment analysis, while at the same time arguing that the 2003 ARMIS data - the most recent available as of February 2005 - should not be utilized (because it is somehow “stale”). In fact, Qwest’s use of 2003 ARMIS data is completely consistent with the Joint CLECs’ recommended procedure for *updating* wire centers.

Accordingly, the Joint CLECs’ attempts to deny that the FCC clearly contemplated the application of “readily available” data completely disregard the plain language of the *TRRO*. Qwest respectfully submits the Commission should thus deny the Joint CLEC motion to compel.

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

The Joint CLECs quote from a Michigan Commission decision last September which evidently agreed with their argument regarding use of December 2004 data. However, that decision is not persuasive for the reasons set forth above. Moreover, the Joint CLECs neglected to note that just a couple of months ago, in the first (and thus far only) commission ruling in the Qwest 14-state region on the substantive issue regarding the appropriate date for determining business line counts, the Washington Utilities and Transportation Commission rejected the Joint CLECs’ position, and thus agreed with Qwest that the *December 2003* data was the appropriate data for the wire center lists.<sup>4</sup> The Washington Commission ruled as follows: “This order finds

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<sup>4</sup> The “Joint CLECs” (Covad, Eschelon, Integra, McLeod and XO) in Washington are the same carriers as

December 2003 data appropriate for evaluating Qwest's and Verizon's initial designation of non-impaired wire centers." (Emphasis added.)<sup>5</sup>

The Washington Commission further elaborated as follows:

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

Other commissions have ruled similarly. For example, the Texas Commission affirmed AT&T Texas' utilizing December 2003 ARMIS 43-08 access line data in its non-impairment analysis. The Texas Commission found in its investigation that "the method used by AT&T Texas for determining business line counts is consistent with the FCC's instructions for reporting business line counts for ILEC wire centers."<sup>7</sup> Just a few weeks ago, in the most recent *TRRO* decision, the Ohio Commission specifically approved the use of 2003 ARMIS data, finding:

The Commission finds that, for the initial list of wire centers, the use of the most recent ARMIS data available at the time of designation, which in this case was the December 2003 ARMIS business line counts, is appropriate. . . . While the 2004 ARMIS data is now available, using it for the initial wire center impairment determinations for high capacity loops and transport would be at odds with the way future wire center impairment determinations will be made (i.e., using the most recent data available at the time of the designation).<sup>8</sup>

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the "Joint CLECs" here, and are represented by the same law firm.

<sup>5</sup> *In the Matter of the Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Remand Order on the Competitive Telecommunications Environment in Washington State*, Docket UT-053025, Order 3 (April 20, 2006) ("*Washington Initial Order*"), p. 2, ¶ 4.

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

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

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

<sup>8</sup> *In the Matter of the Petition of XO Communications, Inc. Requesting a Commission Investigation of Those Wire Centers that AT&T Ohio Asserts are Non-impaired*, Ohio PUC, Case No. 05-1393-TP-UNC, Finding and Order (June 6, 2006) ("*Ohio TRRO Order*"), at p. 20.

Similarly, in their state *TRRO* wire center non-impairment review proceedings, the California, Illinois and Indiana commissions each approved SBC's wire center non-impairment lists -- which were each based upon of December 2003 access line data.<sup>9</sup> Although the commission orders did not specifically include language explicitly endorsing the December 2003 data vintage, obviously, had these commissions believed a more current data vintage was required, they would have ordered SBC to provide updated access line counts.

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

The original wire center list, which is being updated here, was based principally on 2003 data, as amended in late 2004 to reflect terminated collocation arrangements.<sup>10</sup>

Finally, the CLECs note that the Utah Commission recently granted the CLECs' motion to compel in that proceeding. (Joint CLEC Motion, p. 4.) However, although the Commission

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

<sup>10</sup> Docket No. 3662, Verizon Rhode Island Proposed Revision to PUC Tariff 18, RI PUC (Jan. 13, 2006), fn. 4.



in Utah granted the CLEC motion, it expressly ruled that it was “not decid[ing] at this point whether Qwest should be required to use 2003 or 2004 data” (unlike the Washington Commission, which did make clear that December 2003 data was the appropriate data). The Utah Commission may still yet agree with the Washington Commission on the appropriate data vintage now that the hearing in that state has been completed and after the post-hearing briefs have been filed. Accordingly, the Utah ruling should not be persuasive here.

Accordingly, the vast majority of state commissions that have addressed this issue, including the only commission in the Qwest region, have agreed with Qwest and other RBOCs, and have disagreed with the Joint CLECs, on the substantive issue regarding the appropriate vintage of data for business line counts. That is, the state commissions have ruled that the December 2003 data submitted to the FCC is the appropriate data in these types of cases.<sup>11</sup>

### **III. The Joint CLECs’ other arguments are not well taken**

Finally, the CLECs allege that “[w]hen 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,” which the CLECs aver means that the FCC “obviously contemplated that 2004 (or later) ARMIS data compiled consistent with this report would be used.” (Joint CLEC Motion, p. 5 (emphasis in original).) However, the CLECs strain much too hard to make this argument. The fact of the matter is that the Joint CLECs misrepresents the meaning of the FCC’s footnote. Footnote 303 refers to the *FCC Report 43-08 Report Definitions* that were to be used in the preparation of December 2004 ARMIS data. (The

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<sup>11</sup> The Joint CLECs also argue that another RBOC (BellSouth) used 2004 ARMIS data for its business line count information to initially designate wire centers as non-impaired, and they cite to a decision in North Carolina. However, the fact that one RBOC out of four may have voluntarily agreed in North Carolina to use December 2004 data (presumably with concurrence or without objection from the CLECs in that state) is completely irrelevant and not probative of the issue regarding the most current and readily available data that the FCC requested, and that Qwest and other RBOCs provided. Clearly, the most current and readily available data that the FCC requested, and that Qwest and other RBOCs provided, was the December 2003 data from their April 2004 ARMIS filings.

full document is available at <http://www.fcc.gov/web/armis/documents/2004PDFs/4308c04.pdf> , as shown in fn. 303.) These definitions do not contain actual 2004 ARMIS *data* as the CLECs imply, but simply provide *instructions* for the preparation of year-end 2004 data that would be available in April 2005. Obviously, 2004 ARMIS *data* was not available in December 2004, and therefore “the BOC wire center data that we [the FCC] analyze in this order” could not possibly be based on 2004 ARMIS data—as the Joint CLECs imply.

The Joint CLECs further claim that updating the data to at least December 2004 might in some way simplify and narrow the issues in this docket. (Joint CLECs’ Motion, p. 6.) This argument is not persuasive, however. To the contrary, updating the data would actually add an additional level of complexity to the matter. This is especially so because if December 2004 ARMIS data were to be used, the process for adding wire centers to the list would need to be determined *before* the initial list could be finalized. Qwest believes that the Commission should validate the original wire center list before it begins to update that validated list.

### **CONCLUSION**

Accordingly, Qwest respectfully submits that the Joint CLECs’ motion to compel is not well taken. The two data requests at issue (of 49 total requests) to which Qwest has objected are neither relevant to the issues in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Qwest is, of course, mindful that the discovery rules in Oregon and this Commission’s discovery processes are broadly and liberally construed. Qwest is also aware that the Commission generally encourages disclosure of information through the discovery process and usually defers a determination as to relevancy at the hearing after material has been disclosed. However, there are some requests, like the two requests at issue, that are simply too far afield and remote to the issues of the case, and/or that would serve to expand, complicate or

confuse the proceeding so significantly, that Qwest must object to them.<sup>12</sup> Despite a policy of broad discovery, the Commission should not allow discovery that goes beyond the issues of the case simply for the sake of discovery. As such, Qwest submits that the Commission should deny the Joint CLECs' motion to compel in its entirety.

Dated: June 26, 2006

Respectfully submitted,

QWEST CORPORATION



By \_\_\_\_\_

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<sup>12</sup> Qwest notes Commission very often denies motions to compel responses to data requests on grounds that the information sought was neither relevant to the issues of the case nor reasonably calculated to lead to the discovery of admissible evidence. In fact, the Commission has recently done so in the context of several motions to compel in the ARB 665 docket between Qwest and Level 3 because some of those data requests were simply not pertinent to the issues of that case. (For example, there were at least two motions to compel that Administrative Law Judge Sam Petrillo denied on such basis, although he did so orally instead of in a written ruling.)

## CERTIFICATE OF SERVICE

UM 1251

I hereby certify that on the 26<sup>th</sup> day of June 2006, I served the foregoing QWEST CORPORATION'S RESPONSE TO THE JOINT CLECS' MOTION TO COMPEL QWEST TO RESPOND TO DATA REQUESTS in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 26<sup>th</sup> day of June, 2006.

**QWEST CORPORATION**



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