BEFORE THE PUBLIC UTILITIES COMMISSION OF OREGON

UM 1251

In the Matter of COVAD COMMUNICATIONS COMPANY, ESCHELON TELECOM OF OREGON, INC., INTEGRA TELECOM OF OREGON, INC., MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., and XO COMMUNICATIONS SERVICES, INC. Request for Commission Approval of Non-Impairment Wire Center List.	JOINT CLEC OPENING BRIEF

Covad Communications Company, Eschelon Telecom of Oregon, Inc., Integra Telecom of Oregon, 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 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

[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).

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 Oregon as non-impaired, and the Joint CLECs have carefully examined the data on which Qwest relied to make those classifications. As a result, only the classifications for the Medford, Bend, Portland Alpine, and possibly Salem State (Main) wire centers are at issue. The data that Qwest provided for each of these wire centers fails to support Qwest's classification. The Commission, therefore, should classify those wire centers as the Joint CLECs have proposed.

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 a reasonable amount, specifically the Commission authorizes 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. Qwest's Line Count Data Fails to Support Qwest's Classifications of the Disputed Wire Centers.

The Joint CLECs dispute Qwest's classification of three wire centers that Qwest has classified based on the number of business lines: Medford,[2] Bend, and Portland Alpine (collectively "disputed wire centers").[3] Qwest has improperly inflated the number of business lines served in those wire centers by including not just the line counts that Qwest reports to the FCC but Qwest's calculation of line equivalents for the spare capacity on digital circuits Qwest uses to serve its business customers. The FCC has never authorized such an adjustment, which is inconsistent with both the letter and the spirit of the TRRO. If the Commission nevertheless permits Qwest to make such an adjustment, the Commission should also require Qwest to use updated ARMIS and UNE data and make additional adjustments to the line counts. Under either scenario, the disputed wire centers should be classified as the Joint CLECs propose.

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[2] Qwest has also classified the Medford wire center based on the number of fiber-based collocators. As discussed in Section B, *infra*, however, the evidence does not support Qwest's classification of this wire center based on this alternative threshold requirement either.

[3] The Joint CLECs also dispute Qwest's classification of the Salem State (Main) wire center if, as discussed below, the Commission accepts Qwest's adjustment to its ARMIS 43-08 data over the Joint CLECs' objection.

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 disputed wire centers 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 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.[4]

The Utah Public Service Commission, in a decision issued last week, and the Administrative Law Judge in Washington – the only states in the Qwest region to have addressed this issue to date – reached the same conclusion.[5] Indeed, AT&T (formerly SBC) and Verizon do not make any adjustment to their ARMIS 43-08 business line counts.[6] 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 one 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

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[4] *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).

[5] *In re Investigation into Qwest Wire Center Data*, Utah PSC Docket No. 06-049-40, Report and Order at 20-21 (Sept. 11, 2006) ("Utah Order"); Ex. Joint CLECs/1 (Denney Rebuttal) at 24; Ex. Joint CLECs/7 (Washington Comm'n Initial Order) at 12-13.

[6] Ex. Joint CLECs/1 (Denney Rebuttal) at 31, Table 5.

whatsoever to support its calculations – or even the alleged need to make such calculations.[7] Even as Qwest represented its figures, they are fundamentally flawed by being based not on the actual number of lines that allegedly originate in one of the disputed wire centers and terminate elsewhere but on a statewide average of the number of such lines (which Qwest does not even provide, much less support).[8]

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 disputed wire centers. Without those adjustments, the information that Qwest provided does not support Qwest's tier designations for the Medford, Bend, and Portland Alpine wire centers.

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

Qwest bears the burden to prove that its wire center classifications comply with the criteria the FCC established in the TRRO. The data that Qwest provided does not satisfy that burden with respect to the disputed wire centers. If the Commission permits Qwest to adjust its ARMIS 43-08 business line count, however, the Commission should also require Qwest to update its data and to make other adjustments as well.

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

[7] Utah Tr. at 126-27 (Joint CLEC Denney) (the parties have agreed to rely on the transcript from the parallel proceedings before the Utah Commission in lieu of a hearing in this docket and will submit copy of that transcript for inclusion in the record).

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

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. In this case, the most contemporaneous ARMIS, UNE loop, and UNE-P data is as of December 31, 2004.

Qwest disagrees and has proposed to rely on data as of December 2003, claiming 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. The Michigan Public Service Commission, however, rejected those arguments, finding that SBC Michigan ("SBC") was required to use data that was 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.[9]

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.[10] The Commission should interpret the TRRO the same way.

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[9] *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).

[10] *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. Joint CLECs/1 (Denney Rebuttal) at 16. The Utah Public Service Commission and the Washington Administrative Law Judge, however, concluded that

The Commission should also make other adjustments based on the language in FCC Rule 51.5 if the Commission accepts Qwest's adjustments to its ARMIS data. 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-switched or residential lines. UNE loop counts should have the same exclusion and Qwest's data should be adjusted accordingly.[11]

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.

Qwest appropriately relied on 2003 data.

[11] Ex. Joint CLECs/1 (Denney Rebuttal) at 24-31.

Whether the Commission relies on 2003 data without Qwest's adjustments or 2004 (or 2003) data with all parties' adjustments, the disputed wire centers do not serve the number of business lines required to achieve the tier status that Qwest has assigned.[12] Qwest thus has not properly classified those wire centers, and the Commission should adopt the Joint CLECs' proposed classifications.

B. The Medford Wire Center Should Be Classified as a Tier 3 Wire Center.

The Medford wire center, as discussed above, serves insufficient business lines to be classified above Tier 3. Qwest nevertheless has classified that wire center as Tier 1 based on Qwest's count of the number of fiber-based collocators in that wire center. Qwest, however, has counted at least two companies who are not "fiber-based collocators" as that term is defined and used in the TRRO.

The first such company ("Company A") actually informed Qwest that the company is not a fiber-based collocator because it does not own or operate fiber in the Medford wire center.[13] Qwest disregards that position and continues to count Company A as a fiber-based collocator, claiming that it satisfies the FCC's definition because the company "concedes" that it obtains transport both from Qwest and from carriers unaffiliated with Qwest. Qwest misinterprets the TRRO in making such a claim.

FCC Rule 51.5 defines "fiber-based collocator," in relevant part, as a carrier that maintains a collocation arrangement and "operates a fiber-optic cable or comparable

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[12] Ex. Joint CLECs/17 (Denney Supp. Surrebuttal) at 4-8; Highly Confidential Ex. Joint CLECs/19 (Joint CLEC corrections to Qwest 2003 and 2004 data); Ex. Joint CLECs/1 (Denney Rebuttal) at 27-30. The Salem State (Main) wire center would be properly classified as a Tier 1 wire center using 2003 or 2004 data without any of the adjustments proposed by Qwest or the Joint CLECs but should be designated as a Tier 2 wire center if the Commission uses 2003 or 2004 data and makes both Qwest's and the Joint CLECs' proposed adjustments.

[13] Highly Confidential Ex. Qwest/17 (email exchange with Company A).

transmission facility." Company A does not "operate" a fiber-optic cable or comparable facility because Company A does not own or otherwise have a right to use the fiber itself, as opposed to simply obtaining transport service provided by another carrier. The FCC explained, "when a company has collocation facilities connected to fiber transmission facilities **obtained on an indefeasible right of use (IRU) basis from another carrier,** including the incumbent LEC, these facilities shall be counted for purposes of this analysis and shall be treated as non-incumbent LEC fiber facilities."[14] The FCC expressly cross-referenced paragraph 408 the *Triennial Review Order,* which states the requirement even more clearly:

> This requires that separate facilities are counted and avoids counting as a true alternative a provider that uses the transport facilities of the incumbent LEC or another alternative provider to provide service on that route. We find, however, that when a company has obtained dark fiber from another carrier on a long-term IRU basis and activated that fiber with its own optronics, that facility should be counted as a separate, unaffiliated facility.[15]

Qwest has produced no evidence to demonstrate that Company A owns its own fiber or has obtained dark fiber from another company on a long-term IRU basis to its Medford collocation. To the contrary, Company A expressly denies owning or having a right to such fiber.[16] Company A, therefore, is not a "fiber-based collocator" in the Medford wire center.

The other company that Qwest has improperly counted as a fiber-based collocator ("Company B") had declared bankruptcy and was in the process of going out of business on

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[14] TRRO ¶ 102, n.292 (emphasis added).

[15] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *et al.*, FCC 03-36 (Report and Order and Order on Remand and Further Notice of Proposed Rulemaking ¶ 408 (rel. Aug. 21, 2003) (footnote omitted); *accord id.* n. 1263 ("we find, for the limited purposes described herein, that when a company acquires dark fiber, **but not lit fiber**, from another company on a long-term IRU or comparable basis, that facility should be counted as a separate, unaffiliated facility") (emphasis added).

[16] Highly Confidential Ex. Qwest/17 (email exchange between Qwest and Company A).

March 11, 2005, the effective date of the TRRO. Indeed, Company B served only a handful of customers on that date and was completely out of business six months later.[17] Qwest largely does not dispute these facts but contends that they are irrelevant.[18] According to Qwest, Company B facilities carried some level of traffic on March 11, 2005, and thus the company satisfies the FCC's definition of "fiber-based collocator." Qwest's position flies in the face of the meaning and very rationale of the TRRO requirements.

Again, the operative word in the FCC's definition of "fiber-based collocator" is "operate." A company cannot be held to "operate" fiber if the company is only doing so provisionally pending dissolution of its business. The FCC established non-impairment thresholds that are based on the number of fiber-based collocators as one measure of the extent to which sufficient revenue opportunities exist in a particular wire center to make competitive entry financially viable:

> [W]e find that fiber-based collocation provides a reasonable proxy for where significant revenue opportunities exist for competitive LECs, regardless of the size, density, or geographic attributes of the wire center, because it identifies competition in both large and small incumbent LEC wire centers. The record indicates that there are smaller wire centers to which competitors have deployed significant transport facilities. Because our thresholds are disjunctive, our test will capture these relatively smaller offices that, through fiber-based collocation, display signs of significant potential revenues.[19]

The Commission should not permit Qwest to count Company B as a fiber-based collocator in the Medford wire center. A company that is in bankruptcy and is only temporarily serving a few customers as part of the process of winding down its business does

[17] Exs. Joint CLECs/13-16 (Denny Surrebuttal and exhibits).

[18] Ex. Qwest/25 (Torrence Supp. Response).

[19] TRRO ¶ 101.

not demonstrate that "significant revenue opportunities exist for competitive LECs." It demonstrates the opposite – that sufficient revenue opportunities do **not** exist in that wire center because a company has tried and failed to serve customers using its own facilities in that wire center. Such a wire center unquestionably should consider to be impaired with respect to high capacity transport UNEs.

Two of the four collocators that Qwest has identified in the Medford wire center do not satisfy the FCC's definition of "fiber-based collocators" and accordingly should not be counted toward the TRRO threshold requirements. The Medford wire center, therefore, should be designated as a Tier 3 wire center.

C. The Commission Should Adopt Reasonable Procedures for Evaluating and Implementing 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.

<u>Notice of Wire Center Approaching Non-Impairment Threshold</u>

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

interested parties when a wire center is close to meeting a non-impairment threshold.[20] 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' 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.[21] 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.[22] 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

[20] Ex. Joint CLECs/1 (Denney Rebuttal) at 34.

[21] The Utah Commission agreed with Qwest on this point and declined to order the notifications the Joint CLECs proposed. Utah Order at 26.

[22] *See, e.g.*, TRRO ¶¶ 143-44.

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 wire center from meeting a non-impairment threshold, therefore, would only benefit Qwest or the public policy of fostering effective local exchange competition.[23] 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.[24] 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' proposal.

Prior Notice of Filing for Future Wire Center Classification

The Joint CLECs 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.[25] As part of that process,

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[23] *See* Utah Tr. at 22-23 (Qwest Albersheim).

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

[25] Ex. Joint CLECs/1 (Denney Rebuttal) at 40. 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

the Joint CLECs propose that Qwest provide notice to affected CLECs five days 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.[26]

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.[27] 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. The Utah Commission addressed these concerns by requiring "Qwest to file a request for protective order at least five days prior to its filing for approval of an updated wire center non-impairment list" specifying "those wire centers that Qwest seeks to reclassify as non-impaired."[28] This Commission should adopt the same requirement.

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necessary thorough review of Qwest's proposed classification of a specific wire center.

[26] Ex. Joint CLECs/1 (Denney Rebuttal) at 39-40.

[27] Utah Tr. at 12 (Qwest Albersheim).

[28] Utah Order at 28.

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 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.[29]

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 has resulted in needless delay in the classification of some wire centers in other states and unnecessary expenditure of party resources to continue to litigate issues that could have been resolved much earlier.[30]

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

[29] *See* Ex. Joint CLECs/1 (Denney Rebuttal) at 38-40.

[30] *See* Utah Tr. at 230-39.

proceeding. The Utah Commission concluded that "while updated non-impairment lists may, without objection, become effective thirty days after filing, we reserve the Commission's authority to establish an appropriate effective date for all such filings based on the facts and actions of the parties specific to that filing."[31] This Commission, at a minimum, should reserve the same authority.

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."[32] The FCC gave carriers 18 months to transition off of dark fiber transport (and loops): "Because incumbent LECs offer no tariffed service comparable to dark fiber, we find that, if no impairment is found for a particular route on which a competitive LEC utilizes unbundled dark fiber, the risk of service disruption is significantly higher than for DS3 and DS1 unbundled transport, for which comparable service offerings are available under tariff."[33] The Joint CLECs believe that the concerns the FCC expressed are equally applicable to new classifications of Qwest wire centers.[34]

Qwest, however, proposes virtually no transition period. Qwest claims that it is proposing a 90-day transition period, but the 90 days is a transition in name only – it does not apply to the rates Qwest charges for its facilities but is limited to the network operations

[31] Utah Order at 30.

[32] TRRO ¶¶ 143 & 196.

[33] TRRO ¶ 144; *accord id.* ¶ 197.

[34] Ex. Joint CLECs/1 (Denney Rebuttal) at 37.

required to change the circuit identifications. Because no physical change is actually taking place to the circuit, the fact that Qwest proposes to change rates immediately upon approval of its updated wire center list renders Qwest's 90-day transition meaningless. 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.[35]

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 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.[36]

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

[36] The Utah Commission concluded that "future updates to Qwest's non-impaired wire center list shall trigger a 90-day transition period commencing on the effective date of the updated list during which Qwest may charge effected [*sic*] CLECs 115% of the UNE rate for non-impaired UNE services

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.[37] The Utah Commission agreed, concluding that "so long as a CLEC abides by the self-certification process specified in the TRRO, Qwest must provide the requested UNEs."[38]

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 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

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and facilities." Utah Order at 33.

[37] Ex. Joint CLECs/1 (Denney Rebuttal) at 41-44; Utah Tr. at 124-25 (Joint CLEC Denney).

[38] Utah Order at 39.

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 a Reasonable Charge 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.[39]

[39] Ex. Joint CLECs/1 (Denney Rebuttal) at 55-58.

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.[40] 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 other state commissions have established much lower nonrecurring rates for such conversions.[41] 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.[42]

CONCLUSION

For the foregoing reasons, the Commission should not approve Qwest's classification of the Medford, Bend, and Portland Alpine wire centers but should classify them as Tier 3 wire centers, should classify the Salem State (Main) wire center as Tier 2 if the Commission finds that any adjustments to the ARMIS and UNE line count data is appropriate, and should adopt the Joint CLECs' proposals on the other disputed issues.

Dated this 21st day of September, 2006.

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[40] *Id.* at 58-60.

[41] *Id.* at 61-62.

[42] *Id.* at 61.

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CERTIFICATE OF SERVICE
UM 1251

I hereby certify that on September 21, 2006, I submitted for filing the **Joint CLEC Opening Brief,** both electronically and via overnight delivery to the Oregon Public Utility Commission. Copies were also served electronically and via U.S. postage prepaid mail to the parties listed below.

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