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October 17, 2006

Frances Nichols Anglin
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Re: UM 1251

Dear Ms. Nichols Anglin:

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Post-Hearing Reply Brief, along with a certificate of service.

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

Sincerely,

Carla

Carla M. Butler

CMB:
Enclosures
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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1251

In the Matter of TRRO/Request for Commission Approval of Wire Center Lists submitted on behalf of the Joint CLECs	QWEST'S POST-HEARING REPLY BRIEF

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Pursuant to Administrative Law Judge Allan Arlow's October 6, 2006 ruling, Qwest Corporation ("Qwest") respectfully submits its post-hearing reply brief.

INTRODUCTION AND SUMMARY

As the Joint CLECs acknowledge, the Federal Communications Commission ("FCC") fundamentally changed the environment regarding the availability of high-capacity unbundled network elements ("UNEs") in its Triennial Review Remand Order ("*TRRO*"). However, they largely ignore the fact that the FCC intended the unbundling rules established in the *TRRO* to be largely self-effectuating and implemented through negotiations between ILECs and CLECs. They also largely ignore, or attempt to turn around, the *TRRO*'s mandates and the FCC's associated implementation rules by attempting to complicate what should be a relatively simple and straightforward counting exercise. As Qwest has shown, the Joint CLECs rely on flawed analysis and flawed data, including inappropriate adjustments to Qwest's business line counts and the wrong vintage of data, contrary to the *TRRO*'s guidelines and to the conclusions of the vast majority of state commissions that have addressed these various issues.

Based on the FCC's *TRRO* mandates and the FCC's associated implementation rules, and despite objections, roadblocks and obstacles that the Joint CLECs attempt to throw at Qwest, and this Commission, Qwest has shown that one Oregon wire center (Portland Capitol) meets the FCC's non-impairment criteria for non-impairment for DS1 and DS3 unbundled loops. The Joint CLECs *do not dispute* the non-impairment status at this wire center. Qwest has also shown that four Oregon wire centers (Eugene 10th Avenue, Medford, Portland Capitol and Salem Main) meet the FCC's interoffice transport threshold for "Tier 1" non-impairment status, and that three Oregon wire centers (Bend, Portland Belmont and Portland Alpine) meet the FCC's interoffice transport threshold for "Tier 2" non-impairment status. Although the CLECs manipulate the *TRRO*'s business line counting methodology to dispute the non-impairment status at three wire

centers (Medford, Bend and Portland Alpine (the "disputed wire centers"), the evidence shows that these disputed wire centers are non-impaired at the tiers Qwest has presented in this docket.

Further still, although Qwest has proposed a simple, straightforward, expeditious, and largely self-effectuating process for the updating of non-impaired wire centers in the future, the Joint CLECs propose four burdensome and unnecessary requirements that neither the FCC nor any state commission have required any RBOC to follow. For example, Qwest has shown why the Commission should reject the Joint CLECs' unprecedented and administratively burdensome proposals to require "advance notice" of wire centers approaching a non-impairment threshold (when a wire center is within 5,000 business lines or one fiber-based collocator of a threshold) or a five-day "prior notice" of Qwest's filing for future wire center classifications. Qwest has also shown that the Joint CLECs' proposals regarding the effective date of a wire center update and the length of a "transition period" are without merit and thus should be rejected.

Finally, Qwest showed that it is entitled to recover its reasonable costs, in the form of its existing tariffed Design Change nonrecurring charge ("NRC"), for the work it must perform for the conversion of a UNE circuit to an alternative Qwest service or facility (such as private line or special access circuits) at those wire centers declared to be non-impaired. This reasonable tariffed charge provides a fair approximation of the cost that Qwest will incur when it performs the necessary work activities to convert the former UNEs to a new service as a direct result of a CLEC choosing to remain on Qwest's network instead of seeking a non-Qwest alternative.

Accordingly, the Commission should adopt all of Qwest's positions in this docket. Specifically, Qwest respectfully submits that the Commission should declare the wire centers that Qwest presents here (including the "disputed wire centers") to be non-impaired, at the tiers that Qwest shows them to be, pursuant to the guidelines and standards in the *TRRO* and the FCC's associated implementation rules. Qwest further submits the Commission should also adopt Qwest's wire center update process, and should reject the Joint CLECs' proposals, and that

it should permit Qwest to charge its reasonable tariffed Design Change charge for the UNE-to-alternative Qwest service conversions that CLECs request at non-impaired wire centers.

ARGUMENT

I. QWEST'S BUSINESS LINE COUNTS MEET THE *TRRO* THRESHOLDS, AND THUS QWEST HAS JUSTIFIED ITS CLASSIFICATION OF NON-IMPAIRMENT AT THE DISPUTED WIRE CENTERS

Preliminarily, the Joint CLECs argue that Qwest has not justified its classification of non-impairment at two wire centers (Bend and Portland Alpine), which it calls "the disputed wire centers"), based on business line counts.[1] They do so for a variety of reasons, including their arguments about how Qwest has counted its business lines pursuant to the *TRRO*, and the vintage of data (December 2003 ARMIS 43-08 report data). Indeed, they even propose that the Commission make certain "additional adjustments" to Qwest's business line counts. For the reasons set forth below, Qwest's interpretation of the FCC's business line count methodology is appropriate, its business line counts meet the *TRRO* thresholds, and thus, Qwest has met its non-impairment designations for all of the wire centers that it has listed, including the disputed Bend and Portland Alpine wire centers, based on business line counts.

A. Qwest's counting of full capacity for all digital lines is appropriate

In their post-hearing brief, the Joint CLECs argue that the FCC did not authorize Qwest to include "spare capacity" for digital lines. (Joint CLEC Brief, pp. 4-7.) Specifically, the Joint CLECs parse the plain language of paragraph 105 of the *TRRO* and the FCC's associated

[1] According to the Joint CLECs, there is a third "disputed wire center," Medford, *based on business lines*, and they further claim that "Qwest has *also* classified the Medford wire center [as non-impaired] based on the number of fiber-based collocators." (Joint CLEC Brief, p. 3, and fn. 2 (emphasis added).) However, Qwest did not have the Medford wire center on its original non-impaired wire center list for business lines. (See e.g., Confidential Ex. Qwest/6 (Qwest's list of business lines in service, which shows the Medford wire center with 23,517 lines [less than 24,000].) Rather, Qwest included the Medford wire center on the non-impairment list as a "Tier 1" wire center based solely on the four fiber-based collocators there. (See Highly-Confidential Ex. Qwest/10.) It appears that the Joint CLECs "dispute" the Medford wire center based on business lines because, if the Commission were to adopt the Joint CLECs' advocated 2004 vintage data, the Medford wire center business line count would exceed 24,000 business lines, even using the Joint CLECs' "ARMIS (as is)" methodology. (See e.g., Highly-Confidential Ex. Joint CLECs/19 ("ARMIS (as is)" number of business lines is 24,243 in 2004).)

implementation rule, 47 CFR § 51.5, to argue that paragraph 105 and Rule 51.5 require Qwest to count only the digital channels within a DS1 facility that are "actually used" to provide service to an end-user customer. (*Id*., pp. 4-5.) For the reasons set forth below, the CLECs are wrong.

1. **The plain language of the *TRRO* and Rule 51.5 mandate the use of total voice-grade equivalent channels for all digital lines, regardless whether such voice-grade equivalent channels are actually "in use" or "in service"**

a. **The plain language of the *TRRO* and Rule 51.5**

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

> The BOC [Bell Operating Company] wire center data that we analyze in this Order is *based on* ARMIS 43-08 business lines, *plus* business UNE-P, *plus* UNE-loops." *TRRO*, ¶ 105. (See Exhibit ("Ex.") Qwest/5, Brigham/3.) (Emphasis added.)

Thus, it is important to break down the definition to its three components: (1) BOC wire center data "based on" ARMIS 43-08 business lines, **plus** (2) business UNE-P, **plus** (3) UNE-loops."[2]

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

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:
> (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
> (2) shall not include non-switched *special access* lines,
> (3) *shall account* for ISDN and other digital access lines by *counting **each** 64 kbps-equivalent as one line*. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to ***24*** "*business lines*." (Qwest/5, Brigham/3-4 (emphasis added).)

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

b. Qwest's counting of full capacity for all digital channels

Accordingly, it was necessary for Qwest to adjust the ARMIS 43-08 data for its retail digital loops in order to satisfy the FCC's directives. Thus, since there are 24 voice-grade equivalent ("VGE") channels in each DS1 line, Qwest multiplied each retail DS1 from its December 2003 ARMIS retail report by 24 to comply with that rule. (Qwest/5, Brigham/8-9; Qwest/14, Brigham/16-19.) This adjustment is consistent with the plain language directives in the *TRRO*. (Qwest/14, Brigham/16-19; Transcript ("Tr."), pp. 35, 37-39, 47-48, 57.)[3]

In addition, as for wholesale digital lines, Qwest multiplied all DS1 unbundled loops in Qwest's December 2003 wholesale database -- the same vintage of data upon which Qwest's retail business line count for its ARMIS 43-08 report was based -- by a VGE factor of 24. Again, Qwest did so because there are 24 VGE channels in each DS1 line, consistent with the plain language of the FCC's rule (47 CFR § 51.5) that *all* 64 kbps channels in a digital line should be counted as separate business lines. (Qwest/5, Brigham/16-18; Qwest/14, Brigham/19-21.)[4] This adjustment is also completely consistent with the FCC's plain language directives in the *TRRO*. (Qwest/5, Brigham/16-17; Qwest/14, Brigham/19-24; Tr., pp. 35, 47-48.)

c. The Joint CLECs' parsing of the plain language

The Joint CLECs, however, parse the language in the first sentence of Rule 51.5 that provides that a business line is an ILEC-owned line "used to serve" a business customer (whether provided by an ILEC or a CLEC). There is no dispute, however, regarding what the

[3] As the parties have mentioned, they have agreed to use the transcript from the Utah *TRRO* hearing. The Qwest business line methodology witness in the Utah proceeding was David Teitzel, and the witness in Oregon was Robert Brigham. However, their testimony about the FCC's business line methodology, and how Qwest complied with it, is similar. Accordingly, Qwest adopts the oral testimony of Mr. Teitzel in the Utah proceeding as Mr. Brigham's testimony in this proceeding.

[4] Qwest also included enhanced extended loops ("EELs") in its unbundled loop counts, as well as high-capacity UNE-P circuits. (Qwest/5, Brigham/18, 23; Tr., pp. 35, 37-39.) However, Qwest conservatively did not include High-Speed Digital Service Lines ("HDSL") lines in its *TRRO* business line counts, even though other state commissions have allowed RBOCs to include other services in their business line counts. (Qwest/5, Brigham/19.)

FCC rule specifically says, and no dispute that the digital (DS1 and DS3) lines at issue are in fact being used to serve "business customers."[5] Rather, the dispute here revolves around the fact that the Joint CLECs have parsed the plain language of the phrase "used to serve" to somehow mean that *each individual voice-grade equivalent* ***channel*** in a digital line must be "in use" to serve a business customer.

As Qwest's witness Robert Brigham noted, however, ARMIS 43-08 access line data already counts "actual" digital channels in service for Qwest retail lines. Thus, if an ISDN-Primary Rate (PRI) customer were to use 16 of the 24 available DS0 channels in a DS1, Qwest would report only 16 "business lines" to the FCC in its ARMIS report. Therefore, if the FCC had really "intended" that only "active channels" (or channels "in use") should be counted (as the CLECs contended), subsection 3 of Rule 51.5 would not have been necessary. (Qwest/14, Brigham/17-18.) Indeed, the mere fact the FCC mandated this full 24-VGE channel requirement (for a DS1 line) can only lead to the conclusion that it did not "intend" to count only actual channels "in use." Otherwise, the FCC certainly would have said that only the actual digital channels that the BOC had previously reported on its ARMIS 43-08 report (i.e. those actually in use to serve a customer) could be counted. Instead, the FCC specifically states that *each* 64-kbps channel equivalent in a DS1 facility *shall* be counted as *one line* (and then gave the example of 24 lines in a DS1). (*Id.*) Likewise, this full capacity counting applies to wholesale lines (UNE loops). (Qwest/14, Brigham/29.)

d. The Joint CLECs' parsing of the plain language is without merit

Accordingly, the Joint CLECs' parsing of the plain language of paragraph 105 of the *TRRO* and Rule 51.5 is without merit. As is clear from the plain meaning and *strict textual reading* of Rule 51.5, the FCC ruled that the *full capacity* of *each* digital line (whether retail or

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

wholesale) should be counted. Significantly, nowhere in the FCC does it say that the rule is limited only to "actual" 64-kbps-equivalent channels "in use" or "in service." Indeed, if that were the case, there would not have been any need for the FCC to have said that business line tallies "shall" account for digital lines by counting "each" VGE (64 kbps-equivalent) channel "as one line." (See e.g., Qwest/14, Brigham/16-18.)

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

In short, the mere fact that the FCC rule specifically says "*each* 64-kbps-equivalent," and that the example instructs about counting *each* of *24* VGE channels in a DS1 line as *one line,* makes it clear and unambiguous that the plain language of the *TRRO* and the FCC's rule mandate this Commission to include full capacity (*all VGE channels*) when counting each (retail *and* wholesale) digital business line. That rule specifically states that so long as a digital line is being used to serve a "business customer" (not in dispute here), *all 24 VGE channels* (in a DS1 digital line) must be counted. This is so even if not all 24 *channels* are being used to service a customer, and regardless whether the customer is served by a CLEC or by the ILEC.

2. <u>Other state commissions have agreed with Qwest on this issue</u>

The Joint CLECs rely on a state commission order in North Carolina, as well as an initial ALJ order in Washington and a recent order in Utah that have agreed with their position, and thus which have rejected ILEC proposals to count the full digital capacity of digital lines. (See e.g., Joint CLEC Brief, pp. 5-6.)[6] However, these state commission orders are inconsistent with

[6] Actually, neither the ALJ Initial Order in Washington nor the Utah *TRRO* Order agreed completely with the CLECs' position, as both orders ruled that Qwest could count the full capacity of *wholesale* lines (UNE loops)

the plain language of the *TRRO* and the FCC's associated implementation rule (47 CFR § 51.5), and are contrary to many other state commission decisions that have addressed the issue. (Qwest/5, Brigham/18-19; Qwest/14, Brigham/18.)[7]

More importantly, and as stated, most state commission decisions that have addressed the issue have permitted the counting of the full capacity of both digital retail ARMIS lines and UNE loops by applying the plain language of the *TRRO* and Rule 51.5. For example, commissions in Washington, Utah, California, Texas, Florida, Georgia and South Carolina have permitted ILECs to count the full capacity of CLEC (UNE loop) lines. (See e.g., Joint CLECs/1, Denney/31, Table 5; see also Tr., pp. 133-134.)[8] Further still, at least three state commissions (Florida, Georgia and South Carolina) have concluded that adjusting ARMIS data to reflect the full

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that it sells to CLECs, but *not* for the retail digital lines that it reports in ARMIS. In other words, the Washington Commission ruled that "ILECs should include total capacity, not actual circuits in use, when calculating UNE loops, but not when calculating ILEC-owned or UNE-P business lines" (i.e., "Qwest need not modify its calculations of UNE [wholesale] loops"). See *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,* WUTC, Docket UT-053025, Order 3 (April 20, 2006) ("*Washington Initial Order*") (Ex. Joint CLECs/7, ¶¶ 34-35), *affirmed* Order No. 4 (October 5, 2006). The Utah Commission ruled similarly, based on a policy-driven compromise proposal by the Department of Public Utilities (DPU). See *In the Matter of the Investigation into Qwest Wire Center Data*, Utah PSC, Docket No. 06-049-40, Report and Order (September 11, 2006) ("*Utah TRRO Order"*), pp. 19-21 (finding that using ARMIS 43-08 data, Qwest is to use its "known retail DS1 and DS3 line counts" for its business line counts, and that "adjusting wholesale DS1 and DS3 numbers to account for their total VGE capacity and counting all UNE loops accords with the FCC's view that the number of business lines fairly represents the business opportunities available in a given wire center"). However, Qwest has recently filed a motion for reconsideration regarding the Utah Commission's exclusion of total capacity for retail business lines.

[7] As stated, because the Utah Commission did not apply the plain language of the *TRRO* and Rule 51.5, but instead adopted the DPU's policy-driven compromise position of counting full capacity of *wholesale* digital business lines, but *not* of retail digital business lines (*Utah TRRO Order*, pp. 19-21), Qwest has recently filed a motion for reconsideration on this issue.

[8] See e.g., *Washington Initial Order*, p. 13, ¶ 34-35 (Ex. Joint CLECs/7); *Utah TRRO Order*, pp. 19-21; *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,* California PUC, Decision 06-01-043 (January 26, 2006) ("*California TRRO Order*"), at p. 10-11; *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) ("*Texas TRRO Order*"), at p. 29; *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, by BellSouth Telecommunications, Inc.,* Fla. PUC, Docket No. 041269-TP, Order No. PSC-06-0172-FOF-TP (March 2, 2006) ("*Florida TRO/TRRO Order*"), at p. 37; *Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc's. Obligations to Provide Unbundled Network Elements,* Ga. PSC, Docket No. 19341-U (February 7, 2006) ("*Georgia TRRO Order*"), at pp. 19-20. (See e.g., Qwest/5, Brigham/11-19; Qwest/14, Brigham/19-24; Joint CLECs/1, Denney/31, Table 5.)

capacity of *ILEC retail* digital facilities fully complies with the *TRRO*. (Qwest/5, Brigham/18; Joint CLECs/1, Denney/31, Table 5.)

B. The Joint CLECs' "additional adjustments" are without merit

Further still, the Joint CLECs argue that the Commission should not permit Qwest's to adjust its ARMIS 43-08 business line data, but that if the Commission does so, it should make other adjustments as well. For example, they argue that Qwest's business line count should exclude "non-switched" lines and "residential lines" (simply because ARMIS 43-08 data does not include such lines). (Joint CLEC Brief, pp. 9-10.) They also argue that because UNE-P line counts do not include non-switched or residential lines, *UNE loop* counts also should not include such lines. (*Id*., p. 9.) Because Qwest opposes such adjustments, the Joint CLECs accuse Qwest of "selectively viewing FCC Rule 51.5 only to support Qwest's interpretation." (*Id.*) In essence, they accuse Qwest of seeking to "have its cake and eat it too," when, in fact, the CLECs themselves argue that the Commission should "adjust" Qwest's business lines in ways favorable to them, but should not adjust the lines in ways unfavorable to them. Thus, the CLECs resort to talking about their proposal being "much closer to the spirit of the FCC order than Qwest's proposed adjustment." (*Id*. (emphasis added).)

However, for the reasons set forth in Qwest's testimony and opening post-hearing brief, the adjustments that Qwest has made are appropriate and specifically mandated by the *TRRO*. This is apparently why the Joint CLECs do not cite to *any specific language* or *provisio*n, but speak merely about the "spirit of the FCC order." As Qwest demonstrated, the Joint CLECs' "adjustments" to Qwest's data are in conflict with the *TRRO*, especially because the *TRRO* requires Qwest to count all UNE loops, and because the vast majority of state commission orders

have ruled that "residential" UNE loops should not be excluded, and no state commission has ruled that "non-switched" should be excluded.[9]

For example, only the North Carolina and Michigan commissions have excluded "residential" UNE loops from the business line count, whereas commissions in Washington, California, Texas, Florida, Illinois, Indiana, Ohio, Georgia and South Carolina have all agreed with Qwest and other RBOCs that the UNE loop counts that are used to determine wire center non-impairment should *not* be reduced to account for UNE loops that may be used to serve "residential" customers. (See Qwest/5, Brigham/11-19; Qwest/14, Brigham/19-24; Joint CLECs/1, Denney/31, Table 5.) Similarly, no state commission (not even the North Carolina or Michigan commissions) has found that "non-switched" UNE loops should be excluded from the count of business lines to determine wire center non-impairment, whereas the same nine state commissions mentioned above have included such non-switched UNE loops. (See Qwest/5, Brigham/11-19; Qwest/14, Brigham/21; Joint CLECs/1, Denney/31, Table 5.) Therefore, there is simply no basis for the Joint CLECs' recommendation (Joint CLECs/1, Denney/29) that Qwest should "work together" with the Joint CLECs to establish a process to remove UNE loops serving residential customers and non-switched UNE loops from the business line total for the Oregon wire centers at issue.

In short, and as Qwest demonstrated, the inclusion of *all* UNE loops in a wire center in its business line counts is exactly what the FCC had directed. *TRRO*, ¶ 105. That is, consistent with the FCC's "business line" definition, Qwest did not "remove" UNE loops that may be used to serve residential customers, or that may be used to provide "non-switched" services. Rather, the clear language in the *TRRO* and associated rules specifies that there is no basis to distinguish

[9] Indeed, the Joint CLECs' "adjustments" can only be described as arbitrary, especially since they were largely based on their own assumptions and determinations of the types of facilities that certain CLECs may or may not purchase and the types of services these CLECs may or may not offer. (See e.g., Joint CLECs/1, Denney/29-30 (removing Covad and Eschelon data and thereafter developing "ratios," "factors" and "estimates" based on their assumptions); Joint CLECs/17, Denney/5-6.) Significantly, however, the Joint CLECs provided no information as to how they derived their specific counts or factors. (See Qwest/14, Brigham/28-30.)

between "business" UNE loops and "residential" UNE loops (or "switched" or "non-switched" UNE loops) in counting *all* UNE loops for determining the total number of business lines in a wire center. In other words, wire center-level access line counts used to determine whether the non-impairment thresholds are satisfied must be "based on ARMIS 43-08 business lines, plus business UNE-p, *plus UNE-loops*." *TRRO*, ¶ 105. (Emphasis added.) (Qwest/5, Brigham/11; Qwest/14, Brigham/19; Tr., p. 35.) Notably, the FCC did not include the adjective "business," or any other qualifier, for UNE loops in its definition of "business lines," either in the *TRRO* itself or in the FCC's implementation rules, 47 CFR § 51.5. (Qwest/5, Brigham/11-12; Qwest/5, Brigham/11-12; Qwest/14, Brigham/22-23; Tr., p. 35.)[10]

C. The FCC requires Qwest to use 2003 ARMIS data, not 2004 data

Finally, the Joint CLECs argue that the FCC requires Qwest to rely on 2004 ARMIS data for the initial classification of non-impaired wire centers. (Joint CLEC Brief, pp. 7-9.) They admit that the FCC did not rule that 2004 data was required to be used, but they simply extrapolate that since the FCC's order became effective March 11, 2005 (although issued February 4, 2005, and obviously drafted by the FCC in late 2004 and January 2005), "the determinations made pursuant to that order should be based on data that is contemporaneous with that date- or as close as possible in light of the fact that the ILECs make their ARMIS filings on April 1 for the previous year." (*Id*., pp. 7-8.) Thus, they apparently take issue with Qwest and other RBOC/ILEC use of December 2003 data, simply because it was "over one year before the

[10] The Joint CLECs apparently do not take issue with Qwest's business UNE-P line counts, which necessarily included its use of white page directories to remove residential lines (since Qwest's wholesale UNE-P tracking systems are unable to distinguish between residential and business UNE-P lines). (Qwest Opening Brief, pp. 18-19; Ex. Qwest/5, Brigham/20-22.) Having not addressed this issue in their testimony, or their opening brief, the Commission should consider such Joint CLEC silence to be their agreement that such adjustments are appropriate under the circumstances, and thus should not consider any argument on that issue in their reply brief.

The Joint CLECs also apparently abandon their arguments (Joint CLECs/1, Denney/17-20) about counting business lines using Qwest's publicly-available "ICONN" database, which Qwest effectively rebutted. (See Qwest/14, Brigham/10-16.) Accordingly, Qwest will not address the ICONN argument here, but notes that the Joint CLECs therefore should be precluded from further raising this argument because Qwest would not have had an opportunity to rebut it in its reply brief.

TRRO was issued and became effective." (*Id*., p. 8.) They even deem irrelevant the fact that this December 2003 data was what was on file with the FCC when it issued the *TRRO*. Instead, the Joint CLECs resort to surmising about what they believe "[the] FCC obviously contemplated" about the date, although they cannot point to any proof that this is what "the FCC obviously contemplated." (*Id*., p. 8.)

1. **The 2003 data was already created for other regulatory purposes**

First, the FCC clearly ruled 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*." *TRRO*, ¶ 105. (Emphasis added.)[11] Thus, the FCC's intent is that ILECs should utilize data "already created for other regulatory purposes," and that they follow the FCC's simple and unambiguous definition to count business lines in determining which wire centers meet the *TRR*O's non-impairment thresholds. (Qwest/5, Brigham/5-6.)

This FCC directive clearly means that ILECs should use data that was "already created" for other regulatory purposes (ARMIS), and not data that was *in the process* of being created (or "may have been close to being completed," or for which Qwest was analyzing based on some preliminarily raw data).

As Qwest further demonstrated, the FCC clearly meant for 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 criteria. The only ARMIS data that was on file with the FCC on February 4, 2005 was

[11] Thus, Qwest's use of Qwest's December 2003 ARMIS data is not only appropriate, but it is also fully consistent with the FCC's intent, as expressed at paragraph 105 of its *TRRO*, to base determinations on "an objective set of data that incumbent LECs already have created for other regulatory purposes." (Qwest/5, Brigham/5-6, 9, fn. 7; Qwest/14, Brigham/2-5; Tr., pp. 32-37.)

December 2003 data. Qwest files its access line data to the FCC in April of each year for incorporation into its ARMIS report, and as such, it filed data for full year 2004 to the FCC in April 2005, nearly two full months after the FCC's February 4th order. It is not reasonable to argue that the FCC's clear directions meant that it intended for RBOCs to use incomplete and unofficial data to determine wire center non-impairment. Simply stated, and contrary to the CLECs' assertion, full year 2004 access line data was not finalized, verified and available in ARMIS when the FCC required Qwest to complete its wire center non-impairment analysis. (Qwest/14, Brigham/2-3.) The mere fact time may have come between the initial filing in February 2005 and now does not mean December 2003 data is not the appropriate basis for Qwest's initial list. (Qwest/5, Brigham/, p. 4; Qwest/5, Brigham/3; Tr., pp. 32-37.)[12]

Accordingly, there is no basis to review "December 2004" (or "2005") data for any wire center. The FCC's rules mandate that even if the number of business lines in a particular wire center eventually or subsequently declines below non-impairment thresholds for DS1 or DS3 loops, the non-impairment designation for that particular wire center *remains unchanged*. (Qwest/14, Brigham/8-9; Tr., p. 28.)[13]

2. Most state commissions agree with Qwest's vintage of data position

Further still, the Joint CLECs rely on a lone Michigan order reaching the same conclusion as them (Joint CLEC Brief, p. 8), although they will undoubtedly rely on the

[12] The FCC rules also do not require that fiber collocation data and business line data be of the same vintage in determining wire center non-impairment (especially since only business line data is based on ARMIS data, while fiber collocation data is not). In fact, the Joint CLECs agree that that both types of non-impairment need not be based on the same vintage of data, since the once-a-year updating of wire centers would apply only to business lines, and not to the updating of wire centers based on the presence of fiber-based collocators (as updating wire centers based on fiber-based collocators is not based on ARMIS data). (See Qwest/14, Brigham/9-10; see also Tr., p. 163.)

[13] The Joint CLECs had previously argued (Joint CLECs/1, Denney/15-16) that footnote 303 of the *TRRO* supported their argument about December 2004 data. However, although the Joint CLECs did raise this argument in their post-hearing brief in Utah, they do not raise it here, and thus Qwest assumes that the Joint CLECs have now abandoned it for the reasons that Qwest showed in Qwest/14, Brigham/3-4. Having not raised this argument in their opening post-hearing brief here in Oregon (and thus having not given Qwest an opportunity to rebut it in this reply brief), the Commission should consider such Joint CLEC silence to indicate that they no longer argue about footnote 303. Thus, the Commission should not consider any CLEC argument on that issue in their reply brief.

Washington Commission's recent *partial* reversal of the ALJ's Initial order on this issue.[14] However, not surprisingly, only four state commissions (of at least 12) have required RBOCs to use business line data other than December 2003 ARMIS data. (See e.g., Qwest/14, Brigham/5-8; see also Joint CLECs/1, Denney/31, Table 5.)[15] The vast majority of states have agreed with Qwest's position. (*Id*., pp. 6-8; see also Joint CLECs/1, Denney/31, Table 5.) Moreover, given that all RBOCs other than BellSouth have relied on December 2003 data, it can be reasonably assumed that all of the other state commission decisions allowed December 2003 data, even if the Joint CLEC table of decisions (Joint CLECs/1, Denney/31, Table 5) reflected an "N/A" (not applicable) designation. Indeed, the Joint CLECs agree, as they admitted that where the table indicates an "N/A" on this issue, "it is correct to assume that the RBOC's position was used as a default." (Eschelon/1, Denney/31.)

Finally, the only state commission in the Qwest region that has addressed this issue after a full contested case proceeding, which included extensive prefiled testimony and a full evidentiary hearing, was the Utah Commission.[16] In that proceeding, the Utah Commission found Qwest's use of December 2003 ARMIS data to be in full compliance with the *TRRO*. See *Utah TRRO Order*, pp. 14-15.

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[14] The Joint CLECs also argue that one other RBOC, BellSouth, apparently relied on December 2004 data. (Joint CLEC Brief, p. 8.) However, the mere fact that BellSouth may have agreed, for whatever reasons it deemed appropriate or prudent, to use December 2004 data, without apparent objection from the CLECs, is irrelevant and immaterial here.

[15] The only other state commissions that have relied on December 2004 data are North Carolina (see Joint CLECs/1, Denney/31, Table 5) and the recent reversal on this issue by the Washington Commission with respect to the three disputed wire centers. As to North Carolina, Qwest notes there was apparently *no dispute* there because both the CLECs and the ILEC (BellSouth) had evidently *agreed* to a December 2004 vintage of data. As Qwest mentioned, the mere fact that BellSouth may have agreed to use December 2004 data, without CLEC objection, is irrelevant here. Further, in Washington, where the Commission partially reversed the ALJ's Initial Order on this issue, the Commission determined that Qwest must resubmit its business line data with its most recent (2005) ARMIS data for the three wire centers still in dispute only. Qwest believes that the Commission's partial reversal of the ALJ's Initial Order on this issue is simply an error of law, and thus Qwest has recently filed a motion for reconsideration. Notably, the Joint CLECs themselves also have filed a motion for reconsideration as well.

[16] The Washington Commission did not have a full contested case proceeding with testimony, but decided the issues based on legal briefs and bench request responses. However, as mentioned in the previous footnote, Qwest has recently filed a motion for reconsideration on the Washington Commission's reversal of the Administrative Law Judge's Initial Order on this vintage of data issue, as have the Joint CLECs.

D. The wire centers on Qwest's list meet their non-impairment thresholds

Accordingly, based on Qwest's appropriate business line counts and the necessary adjustments that were required by the FCC's *TRRO*, it is clear that Qwest meets the *TRRO* non-impairment thresholds at all of the Oregon wire centers it has listed, including the "disputed wire centers." (See e.g., Confidential Ex. Qwest/6 (Qwest business lines in service in Oregon wire centers); Tr., pp. 32, 35-36.)[17] Thus, the Commission should find that Qwest meets the non-impairment threshold for all of the wire centers on its initial non-impaired wire center list, including at the two disputed wire centers (Bend and Portland Alpine) based on business lines. Specifically, the Commission should rule that Qwest's business line data, along with its fiber collocation data, support the non-impairment determinations for the following wire centers: (1) the Portland Capitol wire center meets the non-impairment standard for DS1 and DS3 unbundled loops; (2) five Oregon wire centers (Eugene 10th Avenue, Medford, Portland Belmont, Portland Capitol and Salem State (Main)) meet the transport threshold for "Tier 1" non-impairment status and (3) two Oregon wire centers (Bend and Portland Alpine) meet the transport threshold for "Tier 2" non-impairment status.

II. THE MEDFORD WIRE CENTER IS TIER 1 BASED ON COLLOCATION

The Joint CLECs claim that the Medford wire center should be classified as a "Tier 3" wire center because two companies are allegedly not "fiber-based collocators" as that term is

[17] In their brief, the Joint CLECs argue that they may *possibly* dispute Qwest's classification of the Salem State (Main) wire center. (See Joint CLEC Brief, p. 3, fn. 3 and p. 10, fn. 12.) However, this is contrary to their final testimony (supplemental surrebuttal testimony) in which they said that '[t]here remains *three* wire centers in Oregon where the 'non-impairment' status is in dispute: Medford, Bend and Portland Alpine." (Joint CLECs/17, Denney/8 (emphasis added).) Indeed, whether the Commission accepts 2003 data or 2004 data, or whether the Commission accepts Qwest's business line count or *the Joint CLECs' "ARMIS (as is)*" business line count, there is no question that the Salem Main wire center meets the Tier 1 non-impairment status for transport. (See e.g., Highly-Confidential Ex. Joint CLECs/19 (showing that under any of these scenarios, the Salem Main wire center meets and exceeds the 38,000 Tier 1 business line non-impairment threshold).) Apparently, the Joint CLECs now argue that if the Commission accepts their "adjustments" based on "estimates," "ratios" and "factors" (which in turn are based on their *assumptions* about the types of facilities certain CLECs purchase and the types of services certain CLECs offer (Joint CLECs/1, Denney/29-30; Joint CLECs/17, Denney/5-6)), then the Commission should find that this wire center does not meet non-impairment status. However, this argument is without merit, especially since the CLECs provided no information as to how they derived their specific counts or factors. (See Qwest/14, Brigham/28-30.)

used in the *TRRO*. The Joint CLECs are wrong, however, as they misread the plain meaning of the *TRRO* in their attempts to avoid non-impairment status at that wire center. Both of these companies operated as fiber-based collocators on the effective date of the *TRRO*, and thus both of them should be counted toward the correct Tier 1 non-impairment status at that wire center.

A. Company A is a fiber-based collocator even if it does not own its own fiber or have an IRU

First, the Joint CLECs claim that one company ("Company A") is not a fiber-based collocator because it wrote to Qwest in April 2005 and claimed that it was not a fiber-based collocator on grounds that it "does not own or operate fiber-optic cable in the Medford Exchange." (See Qwest/1, Torrence/9-10; Highly-Confidential Ex. Qwest/17.) Rather, Company A claims that it "*purchases fiber* from Qwest *as well as alternative providers* and does not have an active dark fiber agreement with Qwest." (Highly-Confidential Ex. Qwest/17 (emphasis added).) The Joint CLECs thus claim that because this company does not "own" its own fiber "or "have a right to such fiber" (such as through an indefeasible right of use ("IRU") agreement), it does not "operate" as a fiber-based collocator as that term is used in the *TRRO*. (Joint CLEC Brief, pp. 10-11.) The Joint CLECs then take a diversionary turn by focusing on what the FCC has determined to be *included* within the definition of a "fiber-based collocator" (a company obtaining fiber through an IRU, either with an *ILEC* or *another party*). Thus, they argue that "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." (Joint CLEC Brief, p. 11.) They further continue their diversionary sleight of hand by putting words in Company A's mouth by saying that "[t]o the contrary, Company A expressly denies owning or having a right to such fiber." (*Id*. (emphasis added).) The Joint CLECs protest too much.

First, it is important to see exactly what the FCC said about what a "fiber-based collocator" is. The FCC stated that it "define[s] fiber-based collocation simply." Specifically, it

said: "we define fiber-based collocation as a competitive collocation arrangement, with active power supply, that has a non-incumbent LEC fiber-optic cable [fn.] that both terminates at the collocation facility and leaves the wire center." *TRRO*, ¶ 102. The footnote within this definition that the CLECs reference comes immediately after the reference to "non-incumbent LEC fiber optic cable" and merely explains that "*when* a company has collocation facilities connected to fiber transmission facilities obtained on an [IRU] basis from *another carrier* [*including the ILEC*], these facilities shall be counted for purposes of this analysis and shall be treated as *non-incumbent LEC fiber facilities*." *TRRO*, fn. 292. (Emphasis added.) Thus, this footnote simply explains that fiber obtained from an IRU (*even if the fiber is owned by an "ILEC"*) is considered "non-incumbent" fiber.

The Commission, however, will notice that nowhere does the FCC say that an ILEC must "produce evidence to demonstrate" that there is an IRU agreement between a fiber-based collocator and another party. (Indeed, while an ILEC would obviously know of an IRU agreement between a collocator and itself (i.e., an IRU with the ILEC), the ILEC typically would not have access to such information between a collocator and a third party (absent an admission by the collocator) because such arrangements would not include the ILEC and are typically highly-confidential.) Nor does the FCC say that an IRU is even required if a collocator does not "own" any such fiber. Again, all the FCC said in its footnote was that *when* a company has collocation facilities obtained through an IRU (even IRUs between *the ILEC* and the collocator), the collocation counts as "non-incumbent LEC fiber-optic cable," and thus counts as a fiber-based collocation within its definition. In other words, even *ILEC-owned* fiber is considered "non-incumbent LEC fiber-optic cable" *if* there is an IRU between the ILEC and the collocator.[18]

[18] In fact, the applicable FCC rule (47 CFR 51.5), which Qwest noted to Company A in its response (Highly-Confidential Ex. 17), states that the fiber must be "owned by a party *other than* the incumbent LEC or an affiliate of the incumbent LEC ….***or*** is obtained from an incumbent LEC on an [IRU] basis." Here the fiber at issue fits within the rule because it is "owned by a party other than the incumbent LEC" (the "alternative providers").

Second, there is no "ownership" requirement (or even a "right to use" requirement) in the *TRRO*'s definition of a "fiber-based collocator." Breaking down the applicable definition, there is no dispute that all of the elements regarding Company A apply. That is, there is no dispute that Company A's collocation is a "competitive carrier collocation" (Company A is indeed a CLEC), or that the collocation has no "active power supply." There is also no dispute that there is a "non-incumbent LEC fiber-optic cable." Indeed, Company A admitted that it purchases fiber from "alternative providers." Obviously, someone has to own the fiber, and that someone is not Qwest, but "alternative providers." Finally, there is no dispute that the fiber "both terminates at the collocation facility and leaves the wire center."

Third, even if "ownership" or "right to use" (or an "IRU") were required in the *TRRO* definition of a fiber-based collocation (which they are not), Company A did not deny "having a right to such fiber," as the CLECs argue. (See Joint CLEC Brief, p. 11.) Indeed, all that Company A claimed was that it did no "own" or "operate" the fiber because it *purchased fiber* from Qwest and "alternative providers," and that it did not have "an active dark fiber agreement with Qwest." Clearly, since Company A admits it has a collocation, and further admits that it purchases fiber from alternative providers, it necessarily has to be using and *operating* such fiber in its Medford collocation.

Fourth, Qwest provided the string of emails between Qwest and Company A on this issue. (See Highly-Confidential Ex. Qwest/17; Qwest/1, Torrence/8-9.) What is further noteworthy is that after Qwest explained to Company A why Company A was still considered a fiber-based collocator within the terms of the *TRRO*, Company A *did not respond or otherwise challenge* that conclusion, despite that Qwest made it clear that "[i]f [Company A] ha[d] any questions regarding this [issue}," Company A should let Qwest know. (*Id.*) Nevertheless, there

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Thus, the Commission need not even consider whether there is an IRU agreement between Qwest and Company A. Obviously, someone has to own the fiber, and since there is no evidence that the fiber is owned by Qwest on a non-IRU basis, there is no merit to the CLEC position.

was no such response or challenge. (*Id.*) Thus, it can only be reasonably presumed that Company A was satisfied with Qwest's explanation why its collocation is a fiber-based collocation as the *TRRO* defines it. This is especially so because Company A clearly has a financial interest in whether the Medford wire center is deemed impaired or non-impaired (or even whether it is deemed a Tier 1 or a Tier 2 wire center), and yet it did not respond further, or even intervene in this docket. Obviously, Qwest can only do so much to confirm the existence of a fiber-based collocation, and it cannot be responsible if a carrier fails to challenge the facts that Qwest possesses, or fails to provide any additional evidence that the carrier believes is pertinent to any dispute it might have with Qwest on an issue.

Accordingly, the Commission should reject the Joint CLECs' arguments about Company A having to own (or to have an ownership or lease (IRU) interest in) fiber in order for its collocation in the Medford wire center to be considered to be a fiber-based collocation under the *TRRO*. The undisputed facts are that this company has a fiber-based collocation at the Medford wire center, and thus it should be counted as such.

B. Company B is a fiber-based collocator as of the *TRRO* effective date even if it was in bankruptcy

The Joint CLECs also argue that a second collocator in the Medford wire center should not be a fiber-based collocator because it was in bankruptcy proceedings as of the March 11, 2005 effective date of the *TRRO*, and had only "a handful of customers on that date and was completely out of business six months later." (Joint CLEC Brief, p. 12.) The Joint CLECs resort to arguments about why the FCC finds fiber-based collocation to be an indicator of competition, and thus argue that the situation with Company B means that the Commission should not count its collocation as a fiber-based collocation on the *TRRO* effective date.

First, as Qwest showed, Company B *admitted* that it *still* carried traffic after the March 11, 2005 *TRRO* effective date. (See Qwest/25, Torrence/3.) Moreover, Company B did not

request that the collocation be decommissioned during the time frame of its bankruptcy proceedings, and as of June 2005, there were still more than *300 active circuits*. In fact, it was not until September 2005 that Qwest confirmed the collocation was no longer serving customers and thus decommissioned the collocation in November 2005. (*Id*., pp. 3-4.) Finally, there was additional evidence from the bankruptcy proceedings for Company B and its affiliate (both owned by the same sole shareholder) that indicated that Company B was still operational throughout most of 2005. (*Id*., pp. 4-5.)

Further, there is no *de minimis* exception to the *TRRO*. Obviously, the *TRRO* looks at competition at a certain point in time, and conditions can change (either greater or fewer collocations) as time goes on. Thus, the FCC must essentially take a *snapshot in time* (here, March 11, 2005). Therefore, just as a fiber-based collocation that met all requirements and thus became operational on March *10*, 2005 would count as a fiber-based collocation under the *TRRO*, a similar collocation that met all requirements but did not become operational until March *12*, 2005 would *not* count as a fiber-based collocation. Likewise, just as a fiber-based collocation that was *terminated* by March *10*, 2005 would *not* count as a fiber-based collocation under the *TRRO*, a fiber-based collocation that was not terminated until March *12*, 2005 *would* count as a fiber-based collocation.[19] Thus, Qwest could not count a fiber-based collocation as being effective as of March 11, 2005 if all of the requirements were not met for that collocation on that particular date, even if all of those requirements were later met (and even if it was simply weeks or days later). Similarly, the Joint CLECs cannot pick-and-choose collocations simply because one collocation might be decommissioned six months (or even six days) later, or because a particular company was "winding down" its affairs on the effective date. In other

[19] The parties agree that, for purposes of the initial non-impaired wire center list based on collocations, the *TRRO* effective date of March 11, 2005 is the applicable date. Obviously, wire centers on future updated non-impaired wire center lists based on collocations would be based on the date that the wire center met the *TRRO* collocation non-impairment requirements, and the Joint CLECs agree. (See Tr., pp. 163-164.)

words, there obviously needs to be a bright-line standard, or cut-off, when the FCC determines the state of the world on a specific date; otherwise, there would be no purpose in having an effective date of the *TRRO*.

Finally, the Joint CLECs argue that "[a] company cannot be held to 'operate' fiber if the company is only doing so provisionally pending dissolution of its business." (Joint CLEC Brief, p. 12.) However, they cite to no authority for that proposition. More importantly, the CLECs' citing to the FCC's policy discussion about why fiber-based collocation is a reasonable proxy for competition is a red herring. This is especially so because the fact remains the *collocation* itself was in place and *in operation* (handling traffic) on the effective date. Counting this collocation is really the flip side of the coin of other later collocations that could show competition at a wire center, but that would *not count* on the effective date because they *did not become operational* until *after* the effective date. Again, the FCC can only look at a "snapshot in time," which will necessarily include some collocations that have just begun and some that are "winding down," but which would not include collocations (even long-term collocations) that had *already* "wound down" *before* the effective date, or that did *not become operational* until *after* the effective date. Obviously, if Qwest had tried to include these latter collocations on its initial list, the CLECs would have certainly argued that Qwest would need to focus only on what was operational *on the specific effective date* (March 11, 2005) and not on dates before or after that date.

Accordingly, as with Company A, the undisputed facts are that Company B was indeed a fiber-based collocator at the Medford wire center as of the March 11, 2005 *TRRO* effective date, and thus was properly designated as such. Thus, Qwest has shown that based on these two fiber-based collocators, in addition to the two other fiber-based collocators at the Medford wire center that the Joint CLECs do not challenge, the Medford wire center has *four* fiber-based collocators and thus should be designated a *Tier 1* wire center as Qwest has set forth in its testimony.

III. THE COMMISSION SHOULD REJECT THE JOINT CLECs' PROPOSED PROCEDURES FOR FUTURE WIRE CENTER CLASSIFICATIONS

As Qwest mentioned, Qwest and the Joint CLECs largely agree on most issues regarding the process for the updating of the wire center non-impairment list in the future. However, there is still a dispute regarding certain recommendations that the Joint CLECs make regarding the timing and notice of future wire centers on the non-impairment list. For example, as set forth below, Qwest vehemently disagrees with the Joint CLEC position (Joint CLEC Brief, pp. 13-15; Joint CLECs/1, Denney/33-34) that Qwest should provide *advance notice* when a wire center is "within 5,000 business lines" or "within one fiber-based collocator" of changing tier designation. Qwest also disagrees with the Joint CLECs' recommendation (Joint CLEC Brief, pp. 15-16; Joint CLECs/1, Denney/39-40) that Qwest should provide *advance notice* five days before Qwest actually files a request with the Commission to update the wire center list. Further still, Qwest believes a time period of *30 days* is sufficient time for CLECs to determine if they have any objection to Qwest's non-impaired wire center designation, and thus, absent an objection and subsequent Commission action finding that the objection was warranted, or that Qwest has not provided adequate documentation supporting such reclassification, the effective date of a wire center update should be 30 days after notice from Qwest. Finally, the *TRRO*'s 12- and 18-month "transition period" applied only to the *initial* wire center list, starting with the *TRRO* effective date of March 11, 2005. This "transition period" does not apply to the updating of wire centers, and thus Qwest's proposed 90-day transition period is reasonable and sufficient.

A. The Commission should not require "advance notice" of tier thresholds

The Joint CLECs' first "proposal" is a requirement that Qwest provide "advance notice" or advance warning that a wire center is approaching classification in a higher tier. Specifically, they request the Commission require Qwest to notify the Commission and interested parties whenever the number of business lines served in a particular wire center is *within 5,000 lines* of

meeting the non-impairment thresholds in the *TRRO*, or whenever a wire center is *within one fiber-based collocator* of meeting a particular *TRRO* threshold. (Joint CLEC Brief, pp. 13-15.)

However, there is absolutely no reason to place upon Qwest the administrative burden of providing advance notice of a wire center being "within 5,000 business lines" or "one fiber-based collocator" of a threshold. This is especially so because Qwest does not have a process in place for such notice. (Qwest/13, Albersheim/11-12; Tr., pp. 20-21, 24, 27, 39-43, 51-54, 59-61, 69.) Although the Joint CLECs simply dismiss the administrative burden as a "*de minimus* [sic] administrative burden" (Joint CLEC Brief, p. 15), they provide absolutely no proof for such contention.[20] The same holds true regarding the Joint CLECs' argument that there is similarly "no significant additional burden" to inform the Commission of any wire centers that are within one fiber-based collocator of a *TRRO* threshold. (Joint CLEC Brief, p. 15.) Indeed, the CLECs cite to nothing in the record for their position, and they fail to show that Qwest has any process to determine when a wire center is within a certain *TRRO* fiber-based collocation threshold.

Further, the thresholds that the Joint CLECs advocate are not even meaningful, especially since 5,000 lines or one fiber collocator does not necessarily mean a change in the impairment classification for that wire center is imminent. (Qwest/13, Albersheim/11.) For example, since Qwest must rely on ARMIS 43-08 data that is filed once per year (in April for the previous year's data), Qwest can only propose updates to the wire center non-impairment list based on ARMIS data once per year. If the number of business lines in a wire center increased to within 5,000 of a non-impairment threshold in June, but subsequently declined to a number below 5,000 of a non-impairment threshold by December, advance notice could actually cause CLECs to take

[20] The Joint CLECs cite to page 43 of the Utah hearing transcript (Joint CLEC Brief, p. 15, fn. 24) in which Qwest's business line witness in Utah, David Teitzel, made clear that Qwest does not have any such process. Mr. Teitzel also testified that Qwest would only be in a position to determine when a wire center was within the 5,000 business line count "warning sign" once a year, when it has finalized its annual FCC ARMIS 43-08 report (April of each year). (Tr., pp. 42-43.) The Joint CLECs' attorney then asked Mr. Teitzel whether such a process (i.e., a once-a-year notice) "could be done," and Mr. Teitzel simply responded that "theoretically it could be done." (*Id.*, p. 43.) This is hardly an admission that such a process is "a *de minimis* administrative burden."

costly action to prepare for a wire center non-impairment reclassification that would not occur. As such, the Joint CLECs are simply wrong that "[n]otice to CLECs that a wire center is approaching a non-impairment threshold will enable the CLEC to better prepare to find alternatives to UNEs in order to continue to serve existing customers and obtain new customers." (Joint CLEC Brief, p. 14.) The CLECs do not need such advance notice, and such advance notice would hurt Qwest more than it could help the CLECs. Such advance notice could also cause more harm than good to the CLECs themselves, assuming the CLECs actually were to take action based on such advance notice.

Further still, advance notification could allow a CLEC to attempt to "game" the system by changing its business plans so that the wire center would be unlikely to meet the threshold. (Qwest/13, Albersheim/11.) The Joint CLECs dismiss this concern by arguing that a CLEC avoiding ordering of UNEs would "benefit Qwest" (because it would deny serving new customers, "which is bad business," or because it would order special access circuits at higher rates), or that the CLEC would build its own facilities, which would encourage competition. However, there are many other scenarios that the Joint CLECs ignore. For example, the Joint CLECs ignore that two CLECs could share one collocation (a CLEC-to-CLEC connection), rather than establishing a fiber-based collocations, all for the purposes of denying Qwest the ability to include the wire center on the non-impaired wire center list and/or hoping to potentially avoid an increase to the CLECs' transport or loop costs (i.e., the CLECs would still be allowed to purchase UNEs when they otherwise would not be able to). (See e.g., Tr., pp. 22-23.)

Finally, as even the Joint CLECs' witness admitted, there is no such "advance notice" requirement in the *TRRO*, and *no state commission*, *anywhere*, has imposed such a requirement. (Qwest 13, Albersheim/11; Tr., pp. 139-140.) In fact, the Joint CLECs made this same argument in Utah, and the Utah Commission soundly rejected it. *Utah TRRO Order*, pp. 23-26. The Commission ruled:

> On this issue we agree with Qwest. The *TRRO* provides for *no additional threshold reporting or notification* and the Joint CLECs have *failed to provide sufficient evidence* to convince us that such a process is *reasonable, necessary, or would enhance competition*. The wire center non-impairment list updating process announced herein provides sufficient notice and transition protection to CLECs. We therefore *decline* to order the additional threshold notification threshold requested by the Joint CLECs. *Utah TRRO Order*, p. 26. (Emphasis added.)

Likewise, this Commission should not impose a separate Oregon threshold, in addition to the FCC threshold. (Qwest 13, Albersheim/11-12.)

In short, the Commission should not take the unprecedented step of imposing a separate Oregon threshold, in addition to the FCC threshold. (Qwest 13, Albersheim/11-12.) It is simply no wonder that neither the FCC (either in a 185-page order or in very detailed rules) nor any state commission (despite CLEC advocacy urging such advance notice) have required any RBOC to provide such notice. This is simply a bad idea, with very real potentially adverse (and potentially unintended) consequences, masquerading as a way to "help" CLECs. The Commission should see through this dangerous and unprecedented proposal and thus reject it in its entirety.

B. <u>There should be no "prior notice" for future wire center classifications</u>

The Joint CLECs also argue that the Commission should require Qwest to provide five days prior notice before making any filing to add a wire center to the non-impairment list. (Joint CLEC Brief, pp. 15-16.) The Joint CLECs argue that the purpose would be to allow affected CLECs to object to having confidential information disclosed as part of that filing. However, these concerns are overstated. This is especially so because having the data released to the public is simply not an issue.

As Qwest demonstrated, Qwest intends to protect any such confidential CLEC data as it has in this case, such as through a standing non-disclosure agreement or protective order that can protect sensitive CLEC-specific data. (Tr., p. 12.) In response, the Joint CLECs argue (without citation to any evidence) that even with a standing protective order, a "CLEC nevertheless may have an objection to disclosure of its confidential information for a purpose other than

administrative of its interconnection agreement with Qwest." (Joint CLEC Brief, p. 16.) However, not only is this unsupported assertion vague, and irrelevant in any event, without any specificity about what such objections may be, or why, the point is that Qwest would not be providing this confidential information to anyone other than the Commission and those persons who have already *signed the protective order*. This is, of course, standard practice before this Commission. Indeed, once a protective order is in place, Qwest is not required to "pre-file" its confidential information; this wire center update process should be no different.

In short, the Joint CLECs do not adequately explain why they need more than the 30 days (to which they have already agreed for this update process) in order to advise the Commission that they have an objection to Qwest's filing. Not surprisingly, and as with the "advance notice" proposal, the Joint CLECs do not point to any "prior notice" requirement in the *TRRO* itself or in any state commission order.[21]

C. **The Commission should reject the Joint CLECs' "effective date" proposal**

The Joint CLECs also 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. (Joint CLEC Brief, pp. 17-18.) However, not only does Qwest disagree, but the Joint CLECs' argument that Qwest does not have the "incentive to provide all information needed to review the classification as early in the process as possible" (*id*., p. 17) is particularly without merit.

As Qwest demonstrated, Qwest has every incentive to provide all pertinent information to support its filing for a change in the classification of a wire center. Indeed, Qwest has affirmed it will provide substantive supporting documentation under a protective order similar to the data that Qwest has provided in this docket. (Tr., pp. 11-12, 14-15, 25-27.) Qwest is certainly well aware that without support for such a filing, reclassification of a wire center could be delayed,

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[21] The Utah Commission did require Qwest "to file a request for a protective order at least five days prior to its filing for approval of an updated wire center non-impairment list." *Utah TRRO Order*, p. 28. The Commission further provided that Qwest shall identify those wire centers that it seeks to reclassify as non-impaired. *Id*.

and that Qwest cannot take advantage of the new competitive environment until reclassification is effective. On the other hand, it is CLECs who have every incentive to delay the effective date of reclassification, especially because once reclassification is effective, they are no longer legally entitled to UNE pricing.

Further, Qwest does *not* argue that the Commission lacks authority to determine the effective date of wire center reclassifications. Rather, Qwest simply argues that this Commission should make it clear that the standard for the effective date of reclassification of a wire center will be 30 days after notice from Qwest, unless there is substantive evidence that Qwest has not provided adequate documentation supporting such reclassification. (Tr., pp. 11-12, 14-16; see also Tr., pp. 25-27.) Finally, similar to the previous Joint CLEC proposals of an "advance warning" or a five-day "prior notice," the Joint CLECs cannot point to anything in the *TRRO* itself supporting its position.[22]

D. The Commission should reject the Joint CLECs' proposed transition period

Finally, the Joint CLECs argue that the transition period for future changes to the list of non-impaired wire centers should be the same as the initial transition period the FCC ordered in the *TRRO* (i.e., 12 and 18 months). (Joint CLEC Brief, pp. 18-19.) They conveniently ignore the fact, however, that this transition applies only to the initial wire center designations, especially because the FCC understood the initial transition would have a more significant impact on CLECs, especially given the large number of wire centers, and thus the large number of embedded services requiring conversion, that would be involved. (Tr., pp. 13-14; 102-103.)[23]

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[22] The Utah Commission agreed with Qwest that "Qwest's proposed thirty-day waiting period *reasonably balances* a desire to expedite the process with the necessary of ensuring CLECs adequate time to object." *Utah TRRO Order*, p. 30. (Emphasis added.) However, the Commission did say that it reserves its authority to establish an appropriate effective date for all such [future] filings "based on the facts and actions of the parties specific to that filing." The Commission also ruled that the effective date may be determined to be 30 days from filing, and that if CLECs object to Qwest's filing, the such "objections are found to be *without merit*, Qwest will be entitled to *back bill* to the effective date for [the] CLEC[s'] use of facilities." *Utah TRRO Order*, p. 30. (Emphasis added.)

[23] The Joint CLECs fail to point to anything in the *TRRO* that indicates that the 12- and 18-month transition periods apply to wire center updates (as opposed to the initial wire center designations at issue here). Nor do they

It is patently clear, however, that subsequent additions to the list of non-impaired wire centers would involve a much smaller subset of services, as they are likely to involve only one or two wire centers at a time. (*Id.*) It follows, therefore, that it would not take nearly as long to convert impacted services, and thus, that the "transition period" should be much shorter. Accordingly, Qwest's proposed 90-day transition period is reasonable and sufficient. (Qwest/1, Albersheim/, p. 15; Qwest/13, Albersheim/13-14; Tr., pp. 17-18.)

The Joint CLECs also argue that they should not have to pay the tariffed rate upon the effective date of wire center reclassification. (Joint CLEC Brief, p. 19.) However, if CLECs were to be permitted to continue paying UNE rates during any transition, they would essentially be improperly incented to delay the transition of services until the end of that transition period, which is apparently why they seek a longer transition period here. However, once a wire center is reclassified, Qwest should be permitted to receive the benefits of reclassification that the FCC intended. (Tr., pp. 13, 16-17; see also p. 24.)

The Joint CLECs also argue that Qwest presented no testimony regarding how a CLEC must determine whether to obtain or build substitute facilities. (Joint CLEC Brief, p. 19.) That is not for Qwest to decide, however. Each CLEC is in the best position to evaluate its own business alternative; Qwest is simply not in a position to do so on a CLEC's behalf. (Tr., p. 22.)

Further still, the Joint CLECs also argue that Qwest's proposed transition period is inconsistent with its own testimony. (Joint CLEC Brief, p. 19.) To the contrary, however, Qwest has been quite consistent in its advocacy regarding the transition period. (Qwest/1, Albersheim/15; Qwest/13, Albersheim/13-14; Tr., pp. 13-14, 17-18.) In fact, the Joint CLECs provide no support for their contention that the transition period for subsequent wire centers

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cite to any state commission order that has agreed with its proposal.

requires the same amount of time as the initial transition period. Indeed, the Utah Commission agreed with Qwest on this issue. Specifically, the Commission ruled as follows:

> … we agree with Qwest that the transition periods ordered by the FCC are rooted in the FCC's recognition that the initial list of non-impaired wire centers could be so large and constitute such a major change in the way CLECs procure necessary services and facilities that a lengthy transition was appropriate. Because future updates should impact fewer wire centers, we conclude that the *90-day transition period* proposed by Qwest will provide CLECs *adequate opportunity to make business decisions* regarding alternative facilities and services. Therefore, 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 [a]ffected CLECs 115% of the UNE rate for non-impaired UNE services and facilities. *Utah TRRO Order*, p. 33. (Emphasis added.)

Accordingly, given the obvious motivation that CLECs might have to delay the update process, the Commission should reject the Joint CLECs' proposal regarding the effective date. Thus, the Commission should instead adopt Qwest's proposed transition period.

IV. THE ARGUMENTS ABOUT REJECTING ORDERS ARE WITHOUT MERIT

Further, the Joint CLECs argue that the Commission should not permit Qwest to "unilaterally reject orders for UNEs in non-impaired wire centers." (Joint CLEC Brief, pp. 20-21.) However, this is much ado about nothing because Qwest has confirmed that it will *not* reject or block orders unless and until the Commission has approved a wire center as non-impaired. (Tr., pp. 12-13.)

Nevertheless, the Joint CLECs apparently want to be able to force Qwest to accept orders at wire centers that have *already been declared*, by *this Commission*, to be *non-impaired*, and thus for Qwest and the Joint CLECs to "work together to develop a process." (Joint CLEC Brief, p. 20.) But again, the Joint CLECs are talking about wire centers which this Commission has found to be *non-impaired*, and thus where they *should not be placing orders in the first place*. Their proposal simply makes no sense. In other words, the Joint CLECs apparently want Qwest to be responsible for CLEC "mistakes" about orders in non-impaired wire centers. Qwest, however, should not be the "guarantor" of a CLEC's "mistake." Not surprisingly, and as with

their proposed "procedures" discussed in section IV, the Joint CLECs cannot point to any *TRRO* requirement, or state commission order, requiring such a process.[24]

V. THE JOINT CLEC ARGUMENTS ABOUT QWEST'S NRC FOR CONVERTING UNEs TO ALTERNATIVE SERVICES ARE NOT WELL-TAKEN

Finally, Qwest showed that it is entitled to assess nonrecurring charges ("NRCs") when converting a UNE to an alternative Qwest circuit, such as a private line or special access circuit. This is especially so because a CLEC which converts a UNE to an alternative Qwest circuit has *other business alternatives*, and thus *voluntarily* requests such a conversion. Moreover, Qwest's Design Change charge is reasonable.

A. An NRC is appropriate to compensate Qwest for the work it performs

First, there can be no real dispute that Qwest performs work activities to convert UNEs to private line or special access circuits in wire centers that meet the FCC's non-impairment thresholds. As such, Qwest is entitled to recover its Design Change charge as an NRC for conducting such work at the CLEC's request. (Ex. Qwest/12, Million/2-3, 7-8.)

Specifically, Qwest demonstrated that the conversion of a UNE circuit to a special access or private line circuit is a *very involved and detailed process*. (Qwest/12, Million/, pp. 4-8.) This process, transparent to a CLEC's end-user customer, is used to *avoid placing the end-user customer's service at risk,* and thus benefits the *CLEC*. (Ex. Qwest/22, Million/3-4.) Moreover, Qwest has literally spent hundreds of millions of dollars to enhance and modify its ordering, provisioning and inventory systems to appropriately track facilities it has been required to provide as UNEs; it should not be required to spend millions more to further modify its systems to track these same facilities yet another way. Such costs would place an unfair burden on

[24] Because the Utah Commission's order on this issue was unclear about whether it applied only to wire centers that the Commission has not yet declared to be non-impaired, or applied even to wire centers that the Commission has already declared to be non-impaired, Qwest recently filed a motion for clarification on this issue. Qwest also seeks reconsideration if the Commission's order is not as understood by Qwest (i.e., that this process applies only to wire centers that have not yet been declared to be non-impaired, and not to wire centers that the Commission has already declared to be non-impaired)..

Qwest, especially when it already has systems and identifiers in place to track private line services and avoid service interruptions. (*Id.*, pp. 6-7.)

The Joint CLECs' argument (Joint CLEC Brief, p. 21) that "Qwest is the party seeking a change to its own records when no such change is necessary and, as such, is the cost-causer" is utterly without merit and without evidentiary support. First, *but for* the conversion, Qwest would not have to incur the costs of performing the associated tasks. (Qwest/12, Million/2-3.) Obviously, if Qwest were to perform the activities associated with a conversion, but were not allowed to charge the CLEC for such activities, the cost burden would be unfairly shifted to Qwest and its customers, thereby disadvantaging Qwest in a market the FCC has determined to be competitive. Thus, to the extent Qwest incurs costs to facilitate a CLEC's conversion from a UNE to a private line service, Qwest should be entitled to assess an appropriate charge. (Qwest/22, Million/4-5.)

The Joint CLECs' further argument (Joint CLEC Brief, p. 21) that "Qwest does not charge its own retail customers under comparable circumstances" is a red herring and a *non sequitur*. First, although the CLECs do not define what they mean by "under comparable circumstances," Qwest notes that retail end-user customers do not purchase UNEs, at TELRIC rates, so there are not alternative services for them to convert or switch their services to. Qwest notes, however, that Qwest does charge its own retail end-user customers NRCs when such customers order a variety of services that require Qwest to perform work activities. In other words, the Joint CLECs' example is not an apt comparison.

Finally, the Utah Commission agreed with Qwest that Qwest may levy a nonrecurring charge on CLECs to recoup its costs when a CLEC requests conversion of a UNE to a private line. *Utah TRRO Order*, p. 36. However, the Commission required Qwest to file any "cost information it deems appropriate on this issue" within 30 days of the order, which Qwest recently did by filing a cost study.

B. <u>The Design Change charge is reasonable</u>

Finally, the CLECs argue that Qwest's proposed application of its $50 Design Change charge is unreasonable. (Joint CLEC Brief, p. 22.) Specifically, they argue that the activities are similar to the activities involved in converting from special access services to UNEs, and that other commissions have established lower nonrecurring charges for such conversions. (*Id.*)

However, the use of Qwest's tariffed Design Change charge is more appropriate than a unique charge for UNE-to-private line conversions, or a charge to convert a special access circuit to a UNE. As Qwest showed, requiring a TELRIC rate for an NRC for a *tariffed inte<u>r</u>*state private line service would be an inappropriate application of TELRIC rates and be outside the scope of the Commission's jurisdiction. Nonrecurring TELRIC charges should only apply to *UNEs*, *not* to tariffed private line services. (Qwest/22, Million/9-10; Tr. pp. 114-117.)

Moreover, as Qwest showed, the Design Change charge involves functional areas and work tasks that are similar to those associated with the conversion of a UNE to a private line service or facility. This charge is a conservative estimate of the costs that Qwest will incur when converting CLEC loop and transport UNEs to their private line counterparts (since Qwest performs similar activities when it processes orders to convert a UNE to a private line circuit). In fact, UNE-to-private line conversion orders are typically more costly to process than a typical Design Change due to the systems involved in the separate tracking of UNE and private line services, as well as the additional manual efforts that Qwest undertakes to ensure there are no service disruptions for CLEC customers.[25] The existing Design Change charge also avoids the

[25] The Joint CLECs had previously raised in their testimony, but not in their opening post-hearing brief, a comparison between the conversion of DS1 and DS3 UNEs to private line circuits and the conversion of UNE-P to Qwest Platform Plus™ ("QPP"). However, since the Joint CLECs did not raise that argument in their opening brief, fairness dictates that they should be precluded from doing so in their reply brief. Nevertheless, even if the Joint CLECs attempt to unfairly raise it in their reply brief, Qwest notes that the *loop portion* (which is identified by a circuit ID) for QPP *is still a UNE*, and is still identified by its telephone number (which does not change) for purposes of billing, maintenance and repair. In contrast, in converting UNE-P to QPP, Qwest did not convert a UNE product to an existing tariffed equivalent because QPP did not previously exist. (Qwest/22, Million/7-8.) Thus, any such comparison is nothing more than an apples-to-oranges comparison.

complexity of adding a new charge to Qwest's billing systems, and gives CLECs the benefit of a very conservative charge when compared with the actual activities that Qwest undertakes during this conversion process. (Qwest/12, Million/7-8.)[26]

In short, Qwest is not asking this Commission to determine the reasonableness of its tariffed Design Change charge, which is a preexisting charge that has already undergone regulatory scrutiny. Rather, Qwest has demonstrated the nature of the work activities it will perform in processing the conversions from UNEs to private line circuits at non-impaired wire centers. Qwest believes that its existing tariffed Design Change charge represents an appropriate charge to CLECs for Qwest's processing of these conversions. In short, Qwest should have a right to assess a reasonable charge for the work that it performs. (Qwest/12, Million/8.)

CONCLUSION

For all of the reasons set forth above, Qwest respectfully submits that the Commission should adopt Qwest's positions in this docket. Accordingly, Qwest respectfully submits that the Commission should declare the wire centers Qwest presents here to be non-impaired pursuant to the guidelines and standards in the *TRRO* and the FCC's associated implementation rules.

Dated: October 17, 2006

Respectfully submitted,

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[26] As Qwest showed, that the TELRIC rates for private line-to-UNE conversions in 12 of its states range between $22 and $42, with the most prevalent rate being about $37. (Qwest/22, Million/9-11.)

CERTIFICATE OF SERVICE

UM 1251

I hereby certify that on the 17th day of October, 2006, I served the foregoing QWEST CORPORATION'S POST-HEARING REPLY BRIEF 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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