BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the CONTINUED COSTING AND PRICING OF UNBUNDLED NETWORK ELEMENTS, TRANSPORT, TERMINATION, AND RESALE	Docket No. UT-003013 (*Part B*) QWEST'S CONSOLIDATED RESPONSE TO PETITIONS FOR RECONSIDERATION AND REHEARING OF THE 32ND SUPPLEMENTAL ORDER

I. INTRODUCTION

Qwest files this Answer in response to the Petitions for Reconsideration and Rehearing filed by AT&T and XO, TRACER, and Covad. Qwest urges the Commission to deny the requests for both reconsideration and rehearing because these parties have presented no basis for the Commission to either reconsider its decisions or rehear the issues. The challenges to the Commission's decisions on reciprocal compensation, TIFs, fill factors, and consistency of loop cost estimates merely restate the parties' hearing positions, and rehash arguments that have already been considered and rejected. Qwest also responds to one issue raised in Verizon's Petition, and supports Verizon's request that the Commission reconsider or clarify its decision with regard to the requirement to file time and motion studies in Part E.

II. DISCUSSION

A. Reciprocal Compensation

AT&T/XO request reconsideration of two Commission rulings relating to reciprocal compensation. First, they contend that the Commission erred in not allowing CLECs to recover both the

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end office and tandem switching rates in all circumstances, even where a CLEC only performs end office switching. Second, they argue that the Commission improperly excluded Internet traffic from the relative use calculations that all parties agree should be used to determine responsibility for paying for interconnection facilities.

The Commission's rulings on these issues are correct. In challenging the rulings, AT&T/XO offer the same arguments that the Commission has already considered and rejected. There is no evidentiary or legal justification for AT&T's/XO's challenges, and the Commission should affirm its rulings on both issues.

1. The Commission Properly Established a Two-Tiered Rate Scheme Relating to Tandem Switching.

AT&T's/XO's challenge to the Commission's ruling establishing a two-tiered rate scheme for tandem switching is premised on the position that a CLEC is entitled to the tandem switch compensation rate for *all* ILEC traffic that the CLEC terminates on its network. The Commission correctly rejected this position by relying on FCC Rule 711 and the fundamental principle that rates for transport and termination of local telecommunications traffic must be symmetrical.[1]

As the Commission correctly observed, by requesting the tandem rate for all ILEC traffic, AT&T/XO are seeking asymmetrical termination rates.[2] If an ILEC has large volumes of traffic terminating at a single end office, it would use direct end office trunking and would not route the traffic through a tandem switch. Based on the principle of rate symmetry, when a CLEC has the analogous situation – where there are direct trunks between a Qwest end office and a CLEC switch, for example – the CLEC likewise should be permitted to charge only the end office rate. If a CLEC were permitted to charge the tandem rate in this circumstance, the rate would not be symmetrical with the ILEC's rate and, moreover, the CLEC would receive compensation in excess of its costs.

Allowing a CLEC to recover more termination costs than it incurs also would violate the

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[1] *See* 32nd Supplemental Order ("Order") at ¶¶ 102-105.

[2] *See id*. at ¶¶ 103, 105.

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requirement in FCC Rule 709(a) that state commissions "shall establish rates for transport and termination of local telecommunications traffic that are structured consistently *with the manner that carriers incur those costs* . . . ."[3] This provision requires that a CLEC's termination rates reflect the cost efficiencies associated with the use of direct trunking, since the use of such trunking relates directly to the "manner" in which costs are incurred.

AT&T/XO contend that the two-tiered rate scheme the Commission ordered violates the "geographic comparability" criterion in FCC Rule 711(a)(3), but in advancing that argument they ignore altogether the rate symmetry requirements of that very Rule that undermine their position. In particular, Rule 711(a)(1) provides:

> [S]ymmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of telecommunications traffic *equal* to those that the incumbent LEC assesses upon the other carrier for the same services. (Emphasis added).

AT&T/XO are demanding that this Commission, in violation of this Rule, impose upon the ILECs *unequal* termination rates by charging the tandem rate in circumstances where the ILECs could not charge that rate.

There also is no merit to AT&T's/XO's suggestion that the Commission relied improperly on the FCC's *Local Competition Order*[4] in ordering the two-tiered rate scheme. To the contrary, the Commission properly relied on paragraph 1090 of the *Local Competition Order* as evidence that not all calls terminating on a CLEC's network must be priced at the tandem rate.[5] The FCC instructs in that paragraph that state commissions must determine

> whether *some or all calls* terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. (Emphasis added).

This provision implicitly validates the Commissions ruling that not all calls terminated by CLECs would be

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[3] 47 C.F.R. § 51.709(a) (emphasis added).

[4] First Report and Order, *In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Dkt. Nos. 96-98 & 95-185, FCC 96-325 (rel. Aug. 6, 1996) ("*Local Competition Order*").

[5] *See* Order at ¶ 103.

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subject to the tandem rate, as does paragraph 1086 of the *Local Competition Order,* also cited by the Commission.[6]

Accordingly, there is a sound legal and evidentiary basis for the two-tiered rate structure the Commission adopted. AT&T's/XO's claim that the Commission's ruling is without support is plainly wrong.

2. The Commission Correctly Concluded that Payment for Local Interconnection Facilities Should Be Determined Based Upon the Local Traffic Flow Over Those Facilities.

The Commission correctly ordered that cost sharing for interconnection facilities should "be determined according to the relative *local* traffic flow over that facility."[7] Because the FCC has ruled that Internet traffic is interstate, not local, the Commission properly excluded that traffic from the calculation of relative use.[8]

In arguing that the Commission should reverse itself, AT&T/XO rely on the flawed contention that the FCC's reciprocal compensation rules apply not only to local traffic but also to interstate Internet traffic. The FCC rules that implement the reciprocal compensation obligations set forth in section 251(b)(5) of the Act expressly exclude interstate access traffic from the "telecommunications traffic" that is subject to reciprocal compensation.

FCC Rule 701(a) establishes that reciprocal compensation applies to the "transport and termination of telecommunications traffic," and Rule 701(b)(1), in turn, defines "telecommunications traffic" as *not* including interstate access traffic:

> (b) *Telecommunications traffic*. For purposes of this subpart, telecommunications traffic means:

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[6] *See id.* at ¶ 104.

[7] *Id*. at ¶ 113 (emphasis in original).

[8] *See id.; see also* Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic,* CC Dkt. Nos. 96-98 & 99-68, FCC 01-131, at ¶¶ 52, 57, 65 (rel. Apr. 27, 2001)("*ISP Order II*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The United States Court of Appeals for the District of Columbia recent remand of the *ISP Order II* does not affect the FCC's determination that traffic bound for ISPs is interstate in nature. Rather, the court's remand turns on its determination that section 251(g) of the Act cannot provide the basis for the FCC's conclusion that reciprocal compensation is not owed for ISP-bound traffic. *See WorldCom, Inc.*, 288 F.3d at 434.

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> (1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, *except for telecommunications traffic that is interstate* or intrastate exchange access, information access, or exchange services for such access.[9]

Consistent with this definition, the concept of each carrier paying for its relative use of transmission facilities, which is set forth in FCC Rule 51.709(b), does not apply to interstate traffic. Because the FCC has established unequivocally that Internet traffic is interstate access,[10] the Commission correctly concluded that this traffic should not be part of the relative use calculations.

The Commission's ruling is supported further by the FCC's conclusion that Internet traffic is within the FCC's exclusive jurisdiction.[11] That ruling precludes state commissions from including this traffic in compensation calculations for interconnection facilities. Compensation for the facilities associated with this interstate traffic is within the sole province of the FCC.

The correctness of the Commission's ruling on this issue is confirmed by decisions from the Colorado and Oregon commissions that discuss the legal principles and policy reasons for excluding Internet traffic from relative use. The Oregon Commission adopted the following ruling of the arbitrator in an arbitration between Qwest and Level 3 Communications:

> The same arbitrage opportunities that the FCC cites with respect to the termination of ISP-bound traffic, apply in the allocation of ILEC facilities' costs on the basis of relative use by the traffic originator, because an ILEC customer who calls an ISP generates an identical number of minutes-of-use over facilities on the ILEC side of the POI as over the CLEC's terminating facilities. The overall thrust of the language of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic. Since the allocation of costs of transport and entrance facilities is based upon relative use of those facilities, ISP-bound traffic is properly excluded, when calculating relative use by the originating carrier.[12]

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[9] 47 C.F.R. § 51.701(c) (emphasis added).

[10] *ISP Order II* at ¶ 57.

[11] *Id*. at ¶ 82.

[12] Arbitrator's Decision, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, with Qwest Corporation Regarding Rates, Terms, And Conditions for Interconnection*, ARB 332 (Or. P.U.C. Aug. 15, 2001) at *quoted in* Commission Decision, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996,*

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In reaching the same conclusion in a separate arbitration between Qwest and Level 3, the Colorado Commission relied on principles of cost causation:

> When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for the costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of the entrance facilities and direct trunked transport.[13]

Consistent with these decisions and the applicable FCC rules, the Commission properly required the exclusion of Internet traffic from relative use. AT&T's/XO's exception to that ruling should be denied.

B. Qwest's Cost Studies

1. Probability of Manual Orders

AT&T/XO ask the Commission to require Qwest to separate all of its nonrecurring charges to reflect whether the CLEC ordered the element electronically or via facsimile. They claim that such an outcome is consistent with the 17th Supplemental Order in UT-960369 (AT&T/XO Petition at ¶ 8). Qwest opposes this request, and believes that the Commission has correctly allowed Qwest to assess a single nonrecurring charge that is calculated using appropriate assumptions regarding the relative probabilities of manual versus mechanized orders.

On this issue it is important to remember that Qwest is seeking recovery of properly calculated TELRIC costs – it is not seeking recovery of its actual, or historic costs of order processing – indeed, if Qwest were, the CLECs could be counted on to protest. Yet, when it appears as though the CLECs might gain some cost advantage by advocating "actual" costs, they can also apparently be counted on to do so. The CLECs are asking that they only be charged for electronic ordering when they submit an order via IMA, and that those carriers who submit via facsimile be charged a different rate. Qwest's

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with Qwest Corporation Regarding Rates, Terms, And Conditions for Interconnection, ARB 332, Order No. 01-809 (Or. P.U.C. Sept. 13, 2001) at 4 n.3.

[13] Initial Commission Decision, *In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation*, Dkt. No. 00B-601T, Decision No. C01-312 (Colo. P.U.C. March 30, 2001) at 36.

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testimony in this and other phases of the proceeding has consistently emphasized the fact that Qwest employs forward-looking assumptions regarding the ordering process. This is true with regard to the probabilities of mechanized orders as well, where Qwest has generally used assumptions regarding mechanized ordering and flow through that are higher than Qwest has actually experienced, thus producing a lower cost.[14] If Qwest were now to be required to produce actual costs, its cost studies would look much different. One of the main points of conducting a nonrecurring cost study is to produce a cost and price for an activity based on averages and somewhat simplified or generalized assumptions about the actual process. To the extent that the CLECs are now advocating a more granular approach, the whole process would change.

Qwest notes that it has submitted many nonrecurring costs and prices since the 17th Supplemental Order, and all of them, with the exception of UNE-P, have been structured in the way that the CLECs now oppose. Qwest asks that the Commission affirm its holding in paragraph 129 of the Order.

2. TIFs

AT&T/XO and TRACER all challenge the Commission's conclusions regarding Qwest's TIFs. At paragraphs 10-15 of their Petition, AT&T/XO discuss Qwest's TIFs and argue that since they are based on actual experience, they are not TELRIC. Qwest provided information in response to a bench request illustrating the trend in TIFs that showed that there was very little fluctuation in them year over year. [15] Therefore, the TIFs used in Qwest's studies are forward-looking, since they are not reasonably anticipated to change significantly in the future.

These parties also claim that the Commission inappropriately disregarded Mr. Weiss's testimony, and incorrectly characterized Mr. Weiss's experience as being with a "small" company as opposed to a "mid-sized" company (AT&T/XO Petition at ¶ 14). First of all, it is largely irrelevant whether Mr. Weiss's experience is with a small company or a mid-sized one, since neither would be comparable to

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[14] S*ee, e.g.*, Tr. 4314-16, Part D

[15] Response to Bench Request #25.

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Qwest. Second, although Mr. Weiss may have characterized the company as mid-sized, he gave more detailed information with regard to the size of the company during cross examination, describing the approximate number of lines the company had as 20,000, served from one central office (Tr. 3568-70). The Commission is certainly free to consider this testimony and reach a conclusion that the company is properly described as "small" in comparison to Qwest, which has approximately 25 million lines in 14 states.

The other arguments raised in paragraph 14 are logically flawed and should be rejected. For example, AT&T/XO argue that if a small company has less buying power with regard to equipment, it must also have less buying power with regard to engineering and installation. Leaving aside the fact that there is no record to support this assumption, common knowledge allows one to conclude that it is simply not true. A large company may have significant buying power because of its purchase of large volumes of material or equipment and attendant volume discounts. However, in a side-by-side installation, there is no basis to assume that each company would not incur the same $40-$50/hour for installation of the discrete pieces of equipment.

At bottom, AT&T/XO are simply unhappy with the Commission's decision not to rely on the opinion of their witness. However, given the multiple opportunities these parties had to support that opinion with data, but never did so, it is hardly surprising that the Commission would look elsewhere for reliable information. The parties here do nothing more than to ask the Commission, again without supporting data, to rely on their witness's opinion. The Commission should again decline to do so.

3. Fill Factors

TRACER, at paragraphs 3-4 of its Petition, challenges the Commission's conclusions regarding proper fill factor, and argues that the Commission did not properly consider the issue of aggregating demand from multiple end users at a single location. However, as is clear from the record, the Commission did consider that issue, and Qwest has properly accounted for it in its cost studies. The data Qwest used for end-user demand was on a per-location basis and so already reflects the aggregation occurring at each location. As Ms. Million described in her testimony and on the stand, the average

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number of DS1s per location in the state of Washington is less than 3 (Tr. 2028). This is why Qwest weighted the architectures into the model that provide for 4 channels per location instead of the OC3 system that provides 84 channels per location. It should be noted that end-users will determine aggregation, not Qwest or the CLEC, when DS1s are purchased. So if sales can be made to building owners who wish to provide service to tenants, then there may be greater opportunity for aggregation. However, there is nothing in the record to indicate that Qwest's consideration of the ability to aggregate demand is incorrect or unrealistic.

TRACER also argues, at paragraphs 5-7 of its Petition, that the Commission should reconsider TRACER's argument about using 100% fill for fiber. TRACER cites the same FCC orders that it cited in its closing briefs. Those orders address universal service issues, not pricing for UNEs. TRACER gives no reason why the Commission should reach a different conclusion now than it did in the Order. TRACER cites the testimony given by Mr. Buckley and claims that Qwest "mechanically applied" a 65% fill. This mischaracterizes Mr. Buckley's testimony – a review of the transcript at 2057-2059 shows that Mr. Buckley describes in detail the various fills used in the cost studies, and describes the difference between fiber sheath fill and electronics fill. He also notes that Qwest used an ordered fill for fiber sheath, and there is nothing in TRACER's petition to show that the fill was incorrectly applied or that using the Commission-ordered value was improper.

AT&T/XO argue, at paragraphs 17-19 of their Petition, that Qwest only used one architecture in the cost study to develop costs for DS3s. However, the model that was submitted also calculates the cost for entrance facilities. AT&T/XO's argument has been made before, and simply does not apply here. Entrance facilities are designed to carry traffic to the central office and so require larger pipes and designs that include a lot of capacity, whereas DS3 capable loops only go to end-user customers with low demand per location. The design used to calculate DS3s is for low demand situations and is the least cost methodology under those circumstances. It would not be appropriate to use the high-demand designs for entrance facilities because the costs would be higher if the fills for DS3 capable loop demand were used.

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4. Consistency of Loop Cost Estimates

This issue, raised by AT&T/XO, is again a repeat of arguments already addressed in the Order. AT&T/XO do not seek clarification of any point, they do not raise any mistakes of fact or law, and they do not make any new arguments. One important point that they do not address, however, is that the high capacity loops that were the subject of Part B were indeed not the same loops that were the subject of the first cost proceeding. In fact, their own witness readily agreed that the first cost proceeding did not include any costs for fiber based loops. Tr. 3782. Furthermore, since these parties did not introduce their own cost models, and primarily addressed the TIF and fill assumptions in Qwest's study, it is difficult to see their arguments now as anything more than a request for another bite at the apple. Indeed, for all of their claims that loop cost estimates must be consistent, they have not presented any information that would lead to the conclusion that the costs produced in Part B are not consistent with the costs in the first docket.

5. Time and Motion Studies

Verizon asks the Commission to clarify that it may use actual data instead of time and motion studies in future dockets. Qwest supports this request. As more fully developed in the Part D record, time and motion studies do not provide forward-looking information and are not suited to the types of activities that Qwest performs in the ordering and provisioning processes. Additionally, it is unclear how they would be compared against Qwest's current nonrecurring cost studies in any meaningful way since Qwest's nonrecurring cost studies exclude items that are out of the ordinary, while a time and motion study would measure actual activity. Furthermore, they are expensive and time consuming to prepare, and Qwest does not have either the staffing or any plans to conduct such studies. It would be especially inappropriate to condition OSS cost recovery on the presentation of time and motion studies. The OSS expenditures for which recovery is sought are mandated by the Act to provide CLECs access to Qwest's OSS. These OSS modifications may or may not reduce nonrecurring work times in the ordering process – they may simply enable access to new UNEs, or otherwise improve the CLECs ability to access Qwest's systems. Thus, Qwest asks that the Commission not require time and motion studies, but that

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the Commission continue to evaluate its nonrecurring costs by review of current and past estimates from subject matter experts.

6. Covad's Petition

With regard to Covad's Petition, Qwest simply responds that it may be premature to open a new docket to consider line sharing over digital loop carrier and unbundled packet switching. As Verizon points out, the determinations that these elements are UNEs subject to the unbundling requirements of the Act have been remanded to the FCC, with the line sharing requirements vacated as well as remanded.[16] To the extent that Qwest is still obligated to provide those elements as UNEs, Qwest believes they are fully and adequately addressed in Part D. The Commission should proceed to a decision in Part D, and otherwise await the outcome of the proceeding at the Court of Appeals and the FCC before expending additional resources on determining costs and prices for line sharing and packet switching, when it is uncertain whether either element will be ordered to be unbundled when that question is finally decided.

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III. CONCLUSION

For the reasons stated, the Commission should deny the petitions for reconsideration filed by AT&T/XO, TRACER, and Covad, and should clarify its requirements with regard to time and motions studies as addressed herein.

DATED this 18th day of July, 2002.

QWEST

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[16] *United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002).

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