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VIA EMAIL & FEDERAL EXPRESS

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

Re: *In re Qwest Petition for Investigation*, Docket No. UT-073035

Dear Ms. Washburn:

Pursuant to the Notice of Bench Request Nos. 1 and 2 in the above-referenced proceeding, Covad Communications Company, Integra Telecom of Washington, Inc., Eschelon Telecom of Washington, Inc., McLeodUSA Telecommunications Services, Inc., and XO Communications Services, Inc. (collectively "Joint CLECs")[1] provide the following comments on the responses of Qwest Corporation ("Qwest") to the Commission's bench requests:

Bench Request No. 1

Bench request 001 asks Qwest to "describe the process used and notice provided to competitive local exchange carriers of their opportunity to participate in discussions and/or negotiations regarding modification of the process to designate wire centers as non-impaired."[2] Qwest

[1] "Joint CLECs" is a defined term in the proposed multi-state Settlement Agreement, which provides in the definitions (Section II) that "'Joint CLECs' refers collectively to Covad Communications Company ("Covad"), Eschelon Telecom, Inc. ("Eschelon"), Integra Telecom Holdings, Inc. ("Integra"), McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), Onvoy, POPP.Com ("POPP"), US Link, Inc. d/b/a TDS Metrocom ("TDSM"), and XO Communications Services, Inc. ("XO")." For purposes of these Responses, the term "Joint CLECs" includes the following CLECs in Washington from the Joint CLECs: Covad, Integra, Eschelon, McLeodUSA and XO.

[2] Bench Request 001

responds that it was "approached by the Joint CLECs to commence settlement negotiations"[3] and that "Qwest is not aware of the context or content of the contacts the Joint CLEs may have made with other CLECs who chose not to participate in the wire center examination phase of Docket UT-053025."[4]

First, settlement discussions began in the state of Minnesota and it is not clear to the Joint CLECs under what conditions the settlement discussions branched out to include Washington. Second, Qwest's response suggests erroneously that it was the Joint CLECs' obligation to contact other CLECs regarding the proposed settlement. Although both Qwest and the Joint CLECs are now asking the Commissions for approval of the proposed Settlement Agreement with respect to the Parties that have executed the proposed Settlement Agreement (as opposed to all carriers),[5] Qwest's litigation position was that it wanted an order that binds all CLECs.[6] To the extent that Qwest was seeking to bind other carriers, it was incumbent upon Qwest to contact the carriers it wanted to bind. Qwest has superior access to information regarding the identity of CLECs and proper contact information, as Qwest knows with which CLECs it currently has interconnection agreements in each state (and those ICAs likely have notice provisions with contact information). If Qwest contacted other CLECs who said that they wanted to be included

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[3] Qwest response to BCH-001.

[4] Qwest response to BCH-001.

[5] See Colorado Hearing Transcript, Docket No. 06M-080T, Aug. 21, 2007, Vol. 1, p. 7, line 12 – p. 9, line 11 (Counsel for Qwest, stating: ". . .staff raised a very good point in their comments, which is, What exactly is the relief that the moving parties are asking for? Are the moving parties simply asking for approval of this settlement agreement only with respect to the signatory parties or are the moving parties asking for approval of this settlement agreement so that it would apply to all CLECs in the state of Colorado? And the answer to the question is, we are only asking for approval of this settlement agreement with respect to the parties that have executed the settlement agreement. . . . Now, VII-B provides that the agreement is a settlement of controversy, no precedent is established; the agreements is for settlement purposes only. It shall not be used as evidence or for impeachment in any proceeding before the Commission or any other administrative or judicial body except for future enforcement. So I think that's a critical piece of information to have, because I think that answers one of staff's critical threshold questions with respect to the settlement, which is, Who does it apply to? It only applies to the signatory parties. That then goes to one of the threshold questions, in my mind, that's in staff's comments, which is, If that's the case, has what, in staff's view, is one of the central purposes of the docket -- has that been addressed by the settlement agreement? And that is that the relief -- that the docket should be used essentially to determine not only the wire center impairment or non-impairment designations for the current docket, but how we're going to treat future wire-center-impairment decisions. And I think -- again, I think it's critical, for purposes of this hearing, that we understand that the settling parties are only seeking approval of the agreement as to them and they are not seeking approval of the agreement or the imposition of those terms on any other party.").

[6] See proposed Settlement Agreement (fifth "Whereas" clause, stating Qwest's positions from its petition for a Commission investigation). There is no provision in the proposed Settlement Agreement stating that it binds all CLECs. Instead, it states (on page 1) that the proposed agreement is entered into between Qwest and a list of CLECs named in the proposed agreement. The named CLECs are then referred to as "Joint CLECs," which is a defined term that identifies them specifically. (See above FN, quoting definition of Joint CLECs.)

in the proposed settlement before execution, the Joint CLECs were willing to add those CLECs to the definition of "Joint CLECs" in the proposed agreement.[7]

Rather than contacting CLECs individually, the Joint CLECs proposed language relating to an opt-in to ensure that the terms of the proposed Settlement Agreement were available to other CLECs who desire those terms. *See* paragraph VII(A)(1)(4). Other CLECs have an opportunity to opt in to its terms under Paragraph VII(A)(4), without relinquishing their Section 252 rights to instead negotiate and arbitrate their own terms if they prefer to do so.

Bench Request No. 2

Bench request 002 concerns differences between the Commission's orders in Docket UT-053025 and the proposed settlement agreement.[8] Qwest's response indicates three areas of difference: (1) the methodology for counting business lines; (2) the vintage of the data used to establish the initial list; (3) and the effective date for additions to the wire center list. The Joint CLECs object to Qwest's characterization regarding the second and third items.

The proposed settlement agreement used the Commission's determinations in docket UT-053025 with respect to the initial wire center list in Washington. The Joint CLECs do not agree with Qwest that the initial vintage of the data is irrelevant to the determination of the initial list.

The Joint CLECs also disagree with Qwest's statement that the proposed settlement agreement establishes "an effective date for the non-impairment designation in the event there are no objections to the additions..."[9] Section VI of the proposed settlement agreement clearly provides that additions to the wire center list require Commission approval and that ***the Commission's order*** will establish the effective date of these additions. The Commission may review proposed non-impairment or tier designations either as a result of objections filed with the Commission by any party (whether or not a signatory to the proposed Settlement Agreement), including Staff,[10] or on its own motion.[11] In the event that there are no objections,

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[7] See, e.g., Joint CLEC note to Qwest (May 4, 2007): "Time Warner is a party to the Washington proceeding, but the term Joint CLECs is used herein to identify the CLECs that are parties to this Settlement Agreement and, to date, we have not heard any indication from Time Warner regarding whether it will join this settlement. If Time Warner indicates that it will be executing the settlement agreement, Joint CLECs have no objection to adding Time Warner to the definition at that time."

[8] FN to Bench Request 002.

[9] Qwest response to BCH-002.

[10] See, e.g, Paragraphs VI(F)(1) & VI(F)(5) (both: "a CLEC or any other party").

[11] See, e.g, Paragraph VI(F)(2) ("unless the Commission orders otherwise").

the proposed settlement agreement indicates that Parties[12] will request that the Commission not alter the proposed effective date of thirty days after the filing date, but the Commission is free to establish a different effective date. Specifically, Paragraph VI(F)(2) deals with situations in which no objections are filed with the Commission. Paragraph VI(F)(2) requires entry of a written Commission order in every scenario (*i.e.*, objection(s), no objection, objection(s) to some wire centers but not others). The first sentence of Paragraph VI(F)(2) provides: "If no objections are filed with the Commission, the Effective Date of the Non-Impairment Designation will be thirty (30) days after the Filing Date, ***unless the Commission orders otherwise*** ("Effective Date for Undisputed Designations")." Section II (Definitions) defines "Effective Date of Non-Impairment Designation" for additions to the list as "the date on which the non-impairment designation begins . . . as later determined pursuant to Section VI (F) for future non-impairment designations identified in a Commission-Approved Wire Center List." Reading these provisions together, if for example, a Commission order establishes non-impairment designations and states that it is "effective immediately," the Effective Date of Non-Impairment Designation for additions to the list made in that order would be the effective date of the order. Paragraph VI(F)(2) provides a default effective date only in situations of silence in the Commission order, and even then the effective date is not implemented until after the written order is issued. Any party to a proceeding regarding Qwest's request for additions, including Staff, may ask the Commission to set an effective date in its order, if that party seeks to avoid the default that occurs in the event the order is silent on this point.

Finally, Qwest indicates the transition period in the proposed settlement agreement is different than the transition period ordered by the Commission. The proposed Settlement Agreement does not alter the transition period for CLECs that do not execute the proposed agreement. Joint CLECs simply negotiated a different transition period, that would apply to the Joint CLECs (and opting-in CLECs) only, as part of the proposed settlement agreement.[13] Specifically, Paragraph VII(B) states: "No precedent is established by this Settlement Agreement, whether or not approved by Commissions."[14] Using a proposed settlement agreement among certain Parties to decide the merits of an underlying issue (such as transition period) as to all carriers, however, would be using the proposed agreement as evidence for a ruling that would set a precedent for other carriers. Under Paragraph VII(B), an order applicable to all CLECs, if any, has to be made without regard to the terms of the proposed Settlement Agreement (*i.e.*, on the merits). In

[12] The term "Parties" is defined on page 1 of the proposed Settlement Agreement as referring to the defined Joint CLECs and Qwest collectively.

[13] In general, for clarity, the term "CLECs" in Qwest's responses should be replaced with "Joint CLECs" (as that term is defined in the proposed Settlement Agreement), as the proposed agreement applies to those CLECs executing or opting-in to it.

[14] Paragraph VII(B) states in its entirety: "This Settlement Agreement is a settlement of a controversy. No precedent is established by this Settlement Agreement, whether or not approved by Commissions. The Settlement Agreement is made only for settlement purposes and does not represent the position that any Party would take if this matter is not resolved by agreement. This Settlement Agreement may not be used as evidence or for impeachment in any future proceeding before a Commission or any other administrative or judicial body, except for future enforcement of the terms of this Settlement Agreement after approval."

contrast, an order approving the proposed Settlement Agreement as to the executing Parties provides other CLECs with an opportunity to opt in to its terms under Paragraph VII(A)(4) without relinquishing their Section 252 rights to instead negotiate and arbitrate their own terms.

Please contact me if you have any questions about these comments.

Very truly yours,

Davis Wright Tremaine LLP

Gregory J. Kopta M. Scanlan

Gregory J. Kopta

cc: Service List