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By E-Mail and Federal Express

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504

Re: Commission Investigation into Competition, Docket No. UT-053025

Dear Ms. Washburn:

The Commission will be issuing a final decision in its review of the wire center classifications made by Qwest Corporation ("Qwest") and Verizon Northwest Inc. ("Verizon") pursuant to the Federal Communications Commission's ("FCC's") Triennial Review Remand Order ("TRRO").[1] Regardless of how the Commission resolves the remaining disputed issues, DS1, DS3, and/or dark fiber interoffice transport will not be available as an unbundled network element ("UNE") at the cost-based rates established by the Commission between 11 Qwest wire centers covering most of Seattle, Bellevue, Tacoma, Olympia, and Spokane.[2] If the Commission accepts Qwest's position, DS1 and DS3 loops will not be available as UNEs out of the Seattle Main Qwest wire center once Qwest implements its TRRO wire center classifications. Even where high capacity loops remain available, CLECs will not be able to order more than 10 DS1 loops and 1 DS3 loop

[1] *In re Unbundled Access to Network Elements*, FCC 04-290, WC Docket No. 04-313 & CC Docket No. 01-338, Order on Remand (rel. Feb. 4, 2005).

[2] As the Joint CLECs explained in their Final Exceptions and Objections, subject to the reservation of certain rights, the Joint CLECs do not dispute Qwest's non-impairment designations, in whole or in part, in the following wire centers: Seattle East (Tier 1), Seattle Elliott (Tier 1), Spokane Riverside (Tier 1), Bellevue Glencourt (Tier 2), Tacoma Fawcett (Tier 2), Seattle Atwater (Tier 1 as of July 8, 2005), Seattle Campus (Tier 1 as of July 8, 2005), Seattle Duwamish (Tier 2 as of July 8, 2005), Seattle Main/Mutual (Tier 1, awaiting accurate line count data for loops), Bellevue Sherwood (Tier 2, awaiting accurate collocation data for Tier 1), and Olympia Whitehall (Tier 2, awaiting accurate collocation data for Tier 1).

to any customer location. Dark fiber loops will not be available as UNEs anywhere after September 11, 2006.

Covad Communications Company, Eschelon Telecom of Washington, Inc., Integra Telecom of Washington, Inc, Time Warner Telecom of Washington, LLC, and XO Communications Services, Inc. (collectively "Joint CLECs") provide the following comments and recommendations on the procedures and scope of the above-referenced docket in the wake of a Commission decision on TRRO wire center classifications. The Joint CLECs recommend that the Commission conduct an adjudicative proceeding to establish cost-based rates for high capacity transport and "last mile" facilities either as unbundled network elements ("UNEs") required pursuant to Section 271 of the Telecommunications Act of 1996 ("Act") or as intrastate private line services pursuant to Washington law.

Need for Commission Action

The Joint CLECs are facilities-based providers of telecommunications services in Washington. They each have constructed their own networks, but they also must obtain high capacity facilities from Qwest Corporation ("Qwest") to be able to provide service to many of the Joint CLECs' customers. No competitive local exchange carrier ("CLEC") could hope to duplicate the network that Qwest has built over decades as a monopoly provider with virtually guaranteed rates of return. Nor do CLECs enjoy Qwest's unfettered access to virtually every building, if not every building, within its service territories. There are, and likely always will be, a very large number of customer locations to which Qwest alone has constructed facilities. CLECs would be severely limited in their ability to offer competitive service if they could not have reasonable access to such facilities.

Implementation of the TRRO will severely limit CLECs access to high capacity facilities in wire centers that have been classified as non-impaired. CLECs' only potentially viable alternative to high capacity UNEs that no longer will be available in such wire centers is Qwest special access services, but the rates for those services are far in excess of the cost-based UNE rates that the Commission has established. The UNE rate for 10 miles of DS1 transport, for example, is $39.62. The month-to-month rate for the equivalent DS1 transport out of Qwest's interstate tariff is $252.00, more than **five times** the UNE rate. Qwest's interstate tariff rate for DS3 transport is over **300% higher** than the UNE rate, and Qwest offers dark fiber transport and loops at "commercial" rates that are over **600% and 700% higher**, respectively, than the comparable UNE rates. Qwest's intrastate private line rates for DS1 and DS3 transport and loop facilities (Qwest does not have an intrastate dark fiber offering) generally are not as bad, but nevertheless exceed UNE rates by over 200 to 300%. Enclosed are two charts that compare Qwest's UNE and special access rates in Washington, illustrating the vast disparity between the rates CLECs have been paying and the rates CLECs will be paying in "non-impaired" wire centers and for UNEs that exceed the FCC's caps.

Qwest's position is that the FCC in the TRRO has determined that non-impaired wire centers are competitive and that CLECs have multiple alternatives to Qwest facilities. The FCC, however, made no such determination. Rather, the FCC concluded only that the number of business lines served and/or the number of fiber-based collocators in a particular wire center created "reasonable inferences" about the extent to which sufficient "revenue opportunity" exists for CLECs to deploy their own facilities.[3] Indeed, the FCC expressly stated that it was "avoiding individualized review of each discrete geographic market."[4] The FCC's assumptions, however, have no basis in fact, at least in Washington. Qwest increased its interstate rates three times in less than four years since it obtained pricing flexibility from the FCC and maintains interstate and intrastate pricing levels that vastly exceed the costs of those facilities as determined by this Commission. As Chairman Beyer of the Public Utility Commission of Oregon recently remarked to TR Daily in connection with that commission's denial of most of the deregulation for business services that Qwest sought in that state,

> Most telling to me is the fact that Qwest has never reduced its prices to stem the loss of market share despite the fact that it can do so without prior approval of the PUC. With few exceptions, its business services are being offered at their maximum allowable prices. Is that competitive market behavior -- I don't think so.

The FCC may be indifferent to the competitive impact of implementing its "non-impairment" criteria in Washington, but this Commission should not be. CLECs face enormous rate increases in the wire centers where high capacity UNEs will no longer be available and can only serve to further constrain, if not reduce, the extent to which customers have an effective alternative to Qwest business services. The Commission, therefore, should ensure that CLECs continue to have access to high capacity transport and loops at just and reasonable rates after implementation of the TRRO wire center classifications in this proceeding.

Section 271 UNEs

The first alternative for ensuring such access is to establish rates for UNEs under Section 271. The FCC has established that Bell Operating Companies ("BOCs") such as Qwest have an obligation to provide access to certain elements under Section 271, and that that obligation remains in effect independent of an FCC determination to eliminate their unbundling under Section 251. The FCC first made this finding in the *UNE Remand Order* [5] and confirmed it unambiguously in the *Triennial Review Order* ("TRO"):

[3] TRRO ¶ 43.

[4] *Id*. ¶ 44.

[5] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd at 22814, ¶ 72 (1999) ("*UNE Remand Order").*

> ***Independent Access Obligation***…[W]e continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251. First, ***the plain language and the structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271***. Checklist item 2 requires compliance with the general unbundling obligations of section 251…[while] Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2.… Second, it is reasonable to interpret section 251 and 271 as operating independently. Section 251, by its own terms, applies to ***all*** incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs. In fact, section 271 places specific requirements on BOCs that were not listed in section 251. These additional requirements reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market.… As such, ***BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.*** [6]

Thus, the FCC specifically found that BOCs such as Qwest have the continuing obligation to provide access to "the specific interconnection requirements" of Section 271(c)(2) that are independent of Section 251 unbundling obligations: loop, transport, switching, and signaling.[7] The FCC's finding was upheld by the D.C. Circuit Court of Appeals in *USTA II*.[8]

The Commission has the authority to enforce that obligation, including establishing appropriate rates. Section 271(c)(2)(A) requires that the "competitive checklist" in Section 271(c)(2)(B) be incorporated into interconnection agreements under Section 252, and the competitive checklist includes high capacity loops and transport. The Commission, therefore, has the authority to oversee the rates, terms, and conditions for high capacity loops and transport – whether provided

[6] *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *et al*., FCC 03-36, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking ¶¶ 653-655 (rel. Aug. 21, 2003) (first and third emphasis in original; second and fourth emphasis added).

[7] Section 271(c)(2), under which the "competitive checklist" is found at (B), is entitled "Specific interconnection requirements."

[8] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 589-90 (D.C. Cir. 2004).

under Section 251(c)(3) or Section 271(c)(2)(B). Several other state commissions have used or are using that authority to establish rates for these Section 271 UNEs, including Arizona and Minnesota in the Qwest region, as well as Georgia, Maine, New Hampshire, Tennessee, and Vermont.

Qwest has taken the position in other states that the FCC has preempted state commissions from establishing rates for Section 271 UNEs. The only federal court to have addressed this issue to date disagrees. The Maine District Court denied a motion for preliminary injunction seeking to preclude the Maine commission from implementing Section 271 rates it had established, concluding that nothing in the language of the statute or any FCC order indicates any intent to preempt state commissions from fixing rates under Section 271:

> It is clear that the statute is not intended to have any such effect. While § 271 states that the approval of an application submitted by a BOC to provide InterLATA services shall be by the FCC, neither that provision nor any other provision in the Act confers exclusive jurisdiction on the FCC with respect to rate-making for § 271 UNEs. . . . Thus, the authority of state commissions over rate-making and its applicable standards is not pre-empted by the express or implied content of § 271.
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> . . . . Verizon has failed to present, and this Court has been unable to find, any FCC order specifically interpreting the Act as providing the FCC with exclusive authority to set rates under § 271.[9]

Indeed, the FCC has refused to make any ruling on whether states have jurisdiction to set rates under Section 271.[10] The Commission thus has, and should exercise, authority to establish just and reasonable rates for high capacity transport and loop UNEs that Qwest must provide to CLECs pursuant to Section 271.[11]

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[9] *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 403 F. Supp. 2d 96, 102 (D. Me. 2005). The Court recently reaffirmed its interpretation in granting summary judgment in favor of the Maine commission. The slip opinion is enclosed.

[10] *See Momentum Telecom, Inc. v. BellSouth Telecommunications, Inc.*, File No. EB-05-MD-029, DA-06-520, Order of Dismissal (March 3, 2006) (granting motion for voluntary dismissal of complaint alleging that the rates, terms, and conditions under which BellSouth is offering local switching violate Section 271 without addressing "assertion that state commissions have concurrent jurisdiction over the issues in dispute").

[11] Having unequivocally found the continuing obligation for BOCs to provide access to these elements, regardless of the FCC's analysis of competitor impairment and unbundling obligations for ILECs under Section 251, the FCC further determined the appropriate pricing standard for them:

Intrastate Private Line

The second alternative for ensuring that CLECs continue to have reasonable access to high capacity facilities is for the Commission to establish appropriate wholesale rates for Qwest's intrastate private line services. The Commission unquestionably has jurisdiction to establish appropriate rates for such services.[12] Indeed, Commission Staff recommended that the Commission establish just such rates for Verizon Northwest Inc. in its recent rate case, Docket No. UT-040788, although the case settled without resolving that issue. The Commission should use that authority to require Qwest to provide such services to CLECs at fair, just, reasonable, and sufficient rates.

Qwest will likely point out that its high capacity private line services have been classified as competitive and are thus subject to reduced regulation. Such reduced regulation, however, does not preclude the Commission from capping rates for those services. CLECs, for example, are classified as competitive companies, yet the Commission has set cost-based limits on the rates that they can charge other telecommunications companies for certain services.[13] To the extent necessary, moreover, the Commission could revisit the competitive classification of these services, at least as they are provided to competitors, in light of the unavailability of UNEs in non-impaired wire centers. Such an inquiry would be fully consistent with the purpose of this docket to determine the status of competition and assess the impact of the TRRO.

Request for Commission Action

The Joint CLECs, therefore, request that the Commission initiate an adjudicated phase of this docket to establish just and reasonable rates for high capacity loop and transport facilities that are no longer available as UNEs in the wake of the TRRO – either as Section 271 UNEs or as wholesale intrastate private line circuits. Cost issues would not be at issue in such a proceeding. The Commission has already established the costs of these high capacity facilities, and the Joint CLECs are not requesting that the Commission re-examine those costs. Rather, the purpose would be to determine how far above the costs the Commission previously established Qwest

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> Here … we are discussing the appropriate pricing standard for these network elements where there is no impairment. Under the no impairment scenario, section 271 requires these elements to be unbundled, but not using the statutorily mandated rate under section 252. As set forth below, we find that the appropriate inquiry, for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis—the standards set forth in sections 201 and 202.

TRO ¶ 656. The FCC therefore determined that the pricing standard for delisted 271 UNEs is not TELRIC, as required under the independent analysis of § 251, but is instead just and reasonable.

[12] *E.g.*, RCW 80.36.140.

[13] *See* WAC 480-120-540 (establishing cost-based caps on terminating access charges).

should be permitted to price those facilities as 271 UNEs or wholesale intrastate private line circuits.

The Joint CLECs appreciate the Commission's consideration of these comments. Please contact me if you have any questions about them.

Very truly yours,

Davis Wright Tremaine LLP

Gregory J. Kopta

Enclosures
cc: Interested Parties