Qwest
1600 7th Avenue, Room 3206
Seattle, Washington 98191
Phone: (206) 345-1574
Facsimile (206) 343-4040

Lisa A. Anderl
Associate General Counsel
Regulatory Law Department

August 23, 2006

Via E-mail and
Overnight Mail

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: Docket No. UT-053025 – TRRO
Response to Joint CLECs August 9, 2006 Letter to the Commission Regarding Qwest's Petition for Competitive Classification

Dear Ms. Washburn:

This letter is in response to the Joint CLECs' August 9, 2006 Letter in Docket No. UT-053025 asking the Commission to conduct an adjudicative proceeding to establish cost-based rates for high capacity loops and transport, either as unbundled network elements ("UNEs") pursuant to Section 271 of the Telecommunications Act of 1996 ("Act") or as intrastate private line services.

Qwest disagrees that the issues raised by Joint CLECs warrant an adjudicative proceeding or investigation. The Section 271 issues are identical to issues already raised and decided by the Commission in at least two other recent Commission proceedings, and the intrastate private line issues raised by the Joint CLECs simply do not present even probable cause for the Commission to conduct an investigation. Indeed, if the Joint CLECs wish to file a complaint against the rates for Qwest's competitively classified intrastate private line services, the Joint CLECs may do that, but they would then assume the burden of proof in that action. By requesting Commission action in the way that they have, they seek to avoid that burden and to have Qwest and the Commission take the laboring oar in a matter that is really a CLEC complaint against rates.

<u>Need for Commission Action</u>

Joint CLECs state that they will be severely limited in their ability to offer competitive service if they do not have reasonable access to Qwest's facilities, and therefore ask the Commission to take action to set prices for high capacity loops and transport in this case. CLECs go on to contend that implementation of the TRRO will severely limit CLECs' access to high capacity facilities in the non-impaired wire centers, and that CLECs' *only* potentially viable alternative is Qwest's special access services.

With all due respect, Qwest believes that the CLECs are living the Peter Pan dream – they simply do not want to grow up and enter the real world. They do that by ignoring the reality of the FCC's orders, the reality of the limitations on the Commission's jurisdiction, the reality of alternative sources of supply, the reality of the existing rate levels that are available to them – rates that have already been determined to be fair, just and reasonable, and the reality of the relatively small impact the TRRO changes will have on them overall.

The actions taken by the FCC in the TRRO recognize that as a market becomes competitive, the ILECs' regulatory unbundling obligations should correspondingly be reduced. In the TRRO, the FCC accomplishes this transition in a relatively slow and methodical fashion where, based on a certain level of facilities concentration (i.e., the number of access lines in a wire center) and the existence of a certain number of competitive facility-based providers, an ILEC is relieved of its obligation to provide the relevant unbundled network elements to CLECs. In essence, the TRRO reflects the long-standing bias of the FCC for facilities-based competition and provides a framework for slowly transitioning from the unbundled network element environment to an environment of facility-based competition. The criteria used by the FCC in determining the structure is whether access to the facilities in question is necessary for a CLEC to compete and whether the CLEC would be impaired in its ability to compete if it is denied such access. In other words, the FCC has already determined that CLECs are not severely limited in their ability to compete if they do not have access to certain UNEs in certain wire centers.

Qwest does not know how carriers will elect to replace exempted UNE circuits, but they have numerous options – self-provisioning, leasing facilities from other CLECs, and purchasing ILEC interstate and intrastate tariffed private line services. The information in the Joint CLECs' letter does not even amount to a prima facie showing that these alternatives are not viable.

Section 271 Elements and Pricing

Joint CLECs first ask the Commission to establish UNEs under Section 271. Joint CLECs correctly assert that the Section 271 obligations are separate and independent from Section 251 obligations, and that de-listing under Section 251 does not necessarily impact the obligation to provide certain elements under Section 271. Then, however, Joint CLECs take the position, without citation to authority for it, that this Commission has the authority to enforce Section 271 obligations and to price Section 271 elements. That position is completely at odds with this Commission's recent rulings. In its February 9, 2005 Final Order in *Covad v. Qwest*, Docket No. UT-043045, the Commission stated very clearly that it has "no authority under Section 271 to require Qwest to include Section 271 elements, or pricing for such elements, in its interconnection agreement." *Order No. 06 at ¶ 45.*

The Commission noted that the FCC does not directly address in the Triennial Review Order how the independent Section 271 obligations are to be implemented. The Commission went on to state that the FCC has implied that it has sole authority over such elements and that BOCs should make Section 271 elements available through interstate tariffs or commercial agreements, quoting the following section of the TRO Order:

> Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that *the [FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)*. We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers *under its interstate access tariff*, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into *arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate*.[1]

The Commission concluded that "[b]ased on our analysis above, we find that we have no authority under Section 271 to require Qwest to include Section 271 elements, or pricing for such elements, in its interconnection agreement. Section 271 elements, are, however, appropriately included in commercial agreements entered into between an ILEC and CLEC." *Order No. 06 at ¶¶ 44-45.*

Qwest agrees with the Commission on this point. Indeed, the only pricing authority the Act confers upon state commissions is that set forth in Section 252(c)(2), which directs states to set prices *in the exercise of their Section 252 arbitration authority* for interconnection services and unbundled network elements ("UNEs") that ILECs provide under Sections 251(c)(2) and (c)(3). Section 252(c)(2) provides specifically that in exercising their arbitration authority states shall determine "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection [251(c)(2)] . . . [and] for network elements for purposes of subsection [251(c)(3)]."[2] As shown by this language, nothing in this section gives states pricing authority

1 *Triennial Review Order*, ¶ 664 *(emphasis added)*.
2 47 U.S.C. § 252(d)(1).

over Section 271 services and elements; instead, the authority Congress granted in that section is plainly limited to elements and services provided under Section 251(c).

The Joint CLECs' reliance on the recent decision of the federal district court in Maine is similarly unavailing. The Commission has already reviewed the underlying decision of the Maine Commission and has rejected the analysis and rationale contained therein. "The *Maine Order*, however, ignores the fact that states have no authority under Section 271 to enforce Section 271 unbundling obligations, as well as the FCC's apparent intent that Section 271 elements be made available through tariff or commercial agreements. *** Section 271 of the Act provides authority only to the FCC and not to state commissions." *Order No. 06 at ¶ 49* (internal footnote omitted).

The Maine court decided the issue as a preemption question, finding that the state was not preempted from setting rates. Qwest respectfully submits that this analysis asks the wrong question, and that this Commission got it right when it asked whether the Act conferred any authority on the state commissions in this regard, and then concluded that it had not. There is nothing in the language of the recent decision from Maine that ought to change that conclusion.

In fact, the Joint CLECs themselves virtually concede this point in note 11 – there, they discuss the fact that the FCC has established the pricing standard for these elements, meaning that this Commission need not act, and that the FCC has further stated that pricing will be evaluated to ensure that they are set on a "just, reasonable, and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202." Joint CLECs point to no state commission authority whatsoever to enforce those provisions of the federal law.

Interstate and Intrastate Private Line Service

In their letter, Joint CLECs complain that the rate levels for at least special access are too high for them to compete. They give an example comparing the month-to-month rate for a DS1 channel termination, at $150, to a DS1 unbundled loop at $68.86. They also complain that if the best price they can obtain from Qwest for such facilities is the intrastate private line retail rate, they will not be able to compete against the services Qwest sells its end user customers at the same rates. Both of these claims fall short.

First, with regard to interstate special access pricing, it is beyond reasonable dispute that the Commission does not have jurisdiction to affect the pricing of federally tariffed circuits. That said, most, if not all of the UNEs that would be converted to private line would most likely convert to federally tariffed services. The basis for this contention is three-fold. First, there is the language in the FCC order that specifically contemplates that the services would be purchased from the interstate tariff. Second, there is the current mix of DS1/DS3 circuits in Washington, most of which are purchased as interstate.[3] It seems unlikely that the overall mix would change. Third, unless the CLECs establish otherwise, it is also likely that there is currently interstate traffic carried on the UNEs that will be converted – there is no prohibition against it – and, under the 10% rule, it seems unlikely in the extreme that most of the UNEs would even be eligible for purchase as intrastate private line. Nevertheless, if the Commission were to reduce private line rates in such a way as to present a lucrative arbitrage opportunity, it is difficult to say that some might not exploit that opportunity.

Unlike interstate special access, intrastate special access can be purchased as a resold service with the applicable 14.74% resale discount. Following are the rates for various term options for an intrastate DS1 channel termination:

Intrastate

	Month-to-Month	36 Month	60 Month
Standard Rates	$150.00	$126.90	$109.28
w/Resale Discount	$127.89	$108.19	$93.17

Obviously, there are numerous options available to CLECs and certainly more than referenced by Joint CLECs in their letter.

It is also important to understand that a DS1 or DS3 private line is not the same service as a DS1 or DS3 UNE. Thus, the table attached to the Joint CLECs' letter, comparing the pricing of UNEs with private line, does little to inform the debate. For example, when purchased as UNEs, these circuits are purchased simply as single elements of a service, not the combination of elements or what is termed a "finished service." When a service is offered as a UNE, the CLEC is responsible for most aspects of service delivery and uses its expertise and employees to combine the unbundled elements to make the "finished" service.

When a DS1 is sold as a finished retail service, Qwest is responsible for assuring the service delivery. The cost of providing a finished service is always higher than the cost of providing only an element of service. Thus, the fact that the price of the finished service is higher than the price of the element is not evidence that the price of the finished service is unreasonable. In part, the price comparisons that the CLECs presented to the Commission gave the appearance of a dramatic increase in price because the CLECs attempted to compare the price of an unbundled

[3] If 10% or more of the traffic on a circuit is interstate, the circuit is purchased as an interstate circuit, in accordance with FCC requirements and as set forth in Qwest's tariffs.

element, a mere component of the service, with the price of the finished service – two different things.

That these are two different services is demonstrated by the fact that many CLECs today purchase ***both*** retail DS1 private line and DS1 UNEs in the same wire centers. If these two services were identical, no logical CLEC would purchase the higher-priced retail private line circuit. And yet they do so in significant quantities. The services themselves are different and the methods of setting their prices are different. Thus, the mere fact of a difference in price between the UNE rate and a retail rate does not justify a conclusion that the retail rate is not just and reasonable.

With regard to intrastate private line, Joint CLECs correctly observe that those services are competitively classified. As such, the Commission does not regulate rates for those services, and under recent legislation, does not even accept price list filings for them. As such, the Commission may investigate those rates only on complaint. RCW 80.36.330(4). Thus, Joint CLECs' recommendation that the Commission undertake an adjudicative proceeding, absent formal complaint, recommends that the Commission take action outside the scope of its statutory authority. Further, Joint CLECs present not one iota of evidence that the market for these services is no longer competitive.

Finally, probably the most common alternative to UNEs for CLECs is the facilities that CLECs own themselves. In its most recent petition for competitive classification of certain business services (Docket No. UT-050258, the docket in which Joint CLECs first raised this issue), Qwest described the significant growth in CLEC fiber networks in the past 5 years. Qwest has no independent way to translate this growth into CLEC access lines. One point of reference, however, is the survey that Staff conducted during Qwest's analog business services competitive classification proceeding (Docket No, UT-030614). In that case, Qwest presented competitive evidence based on wholesale services purchased by CLECs in the amount 104,019 lines. In its survey, Staff asked CLECs to provide the total number of analog business lines sold to their customers. The total number of CLEC analog business lines documented by Staff in response to its survey was 230,049 lines or more than twice the lines that Qwest had documented based on its wholesale service volumes. This reduced Qwest's analog business line market share percentage from 83% to 69%. In Docket No. UT-050258, Qwest's market share numbers were only 60% for DS1/3 services, without any reductions for CLEC owned facilities.

It has been suggested that Qwest should welcome a rate reduction for these services, in order to retain the CLECs as customers. However, Qwest believes that the CLECs will not necessarily take their business elsewhere, even without a rate reduction. If the response to that is that perhaps there is insufficient competition for those services, Qwest responds that in fact there is vigorous competition, but that Qwest's rates remain among the best deal in town. Qwest's proposed rate for a DS1 in non-impaired wire centers is $112, with no term commitment. As can be seen from the attached price list comparison[4], this rate compares very favorably to the rates offered by CLECs.

Forcing Qwest to price at an artificially low rate for competitive services would harm both Qwest and the competitive market by requiring Qwest to forego margin that the market would otherwise allow and by making it more difficult for others to compete with Qwest in the same market.

Thus, Qwest recommends that no additional action is necessary or appropriate in this docket, and recommends that the Commission deny Joint CLECs' request for an adjudicative proceeding.

Sincerely,

Lisa A. Anderl

LAA/llw
cc: All parties of record (*via e-mail and U.S. Mail*)

[4] Data provided in Docket No. UT-050258.