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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 Joint CLECs[1] have requested 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 unbundled network elements ("UNEs") in the wake of the Federal Communications Commission's ("FCC's") Triennial Review Remand Order ("TRRO").[2] Not surprisingly, Qwest Corporation ("Qwest") and Verizon Northwest Inc. ("Verizon") vehemently oppose that request – indeed, Verizon filed a letter in opposition even while acknowledging that the Joint CLEC's request does not even apply to Verizon at this time. The Commission should reject the incumbent local exchange carriers' ("ILECs'") opposition if the Commission takes seriously its obligation to foster the development of local exchange competition in Washington.

Qwest and Verizon conveniently overlook the fact that the Commission established this proceeding well over a year ago to examine the level of local exchange competition in this state. At that time, the Commission recognized the concerns competing local exchange carriers ("CLECs") expressed in Qwest's last filing for competitive classification that the figures on

[1] Covad Communications Company, Eschelon Telecom of Washington, Inc., Integra Telecom of Washington, Inc, Time Warner Telecom of Washington, LLC, and XO Communications Services, Inc.

[2] *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).

which Qwest relied to show the existence and level of competition included services that CLECs provide using unbundled network elements ("UNEs") that would no longer be available once the TRRO was implemented. The Commission established this docket, rather than consider those concerns as part of its review of Qwest's competitive classification filing.[3] The Joint CLECs are asking nothing more than that the Commission undertake the inquiry for which this proceeding was initiated and that the Commission's investigation be conducted in an expeditious and appropriate procedural manner.

Having obtained its requested competitive classification, however, Qwest now would have the Commission abandon this docket and ignore the impact that the TRRO will have on the availability of UNEs that CLECs need to provide effectively competitive services. Qwest, allegedly "[w]ith all due respect," states that it "believes that the CLECs are living the Peter Pan dream – they simply do not want to grow up and enter the real world."[4] That world, according to Qwest (and Verizon), is a fully competitive one in which "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."[5] The Joint CLECs and the ILECs obviously live in different "real" worlds.

In the Joint CLEC's world, CLECs serve only 14% of the end user switched access lines in the state of Washington – a level that has not changed since December 2004.[6] CLECs in thirty-three other states have higher market shares, including states like Maine (20%), New Hampshire (25%), Kansas (21%), and Oklahoma (18%).[7] CLEC market share in Washington lags behind eight of the 14 states in the Qwest region, including Nebraska (26%), North Dakota (19%), and South Dakota (33%), and is only slightly higher than Wyoming (12%) – despite the fact that there are significantly more switched access lines in Washington than in any other Qwest state.[8]

The Commission should want to find out why one of the more populous and most progressive states in the country has one of the nation's lowest levels of local exchange competition. More immediately, the Commission should want to ensure that a bad situation does not become worse.

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[3] Docket No. UT-050258.

[4] Qwest August 23, 2006 Letter at 2.

[5] *Id*.; *see* Verizon August 21, 2006 Letter at 3 ("The Commission cannot launch a proceeding to reduce rates *by any degree* (to TELRIC or any level short of TELRIC) based on the Joint CLECs' unlawful premise that the Commission may second-guess the FCC's conclusion that CLECs can economically deploy their own high-capacity facilities where the FCC's non-impairment criteria are met.") (emphasis in original).

[6] *Local Telephone Competition: Status as of December 31, 2005*, FCC Industry Analysis and Technology Division, Wireline Competition Bureau, Table 8 (July 2006) (a copy of which can be downloaded from the Wireline Competition Bureau Statistical Reports Internet site at www.fcc.gov/wcb/stats).

[7] *Id*.

[8] *Id*.

Over 65% of CLEC switched access lines in Washington are resold lines or provisioned using UNEs obtained from the ILECs.[9] Those figures undoubtedly will change, as may the overall level of competition in Washington, once Qwest implements provisions of the TRRO to discontinue "certain UNEs in certain wire centers."

Qwest contends that although it "does not know how carriers will elect to replace exempted UNE circuits, [CLECs] have numerous options."[10] That is precisely what the Commission needs to determine. Qwest purports to demonstrate that CLECs can obtain such circuits from Qwest, specifically claiming that DS1 channel terminations are available from Qwest at lower rates than those reflected in the Joint CLECs' August 8, 2006 letter.[11] Of course, Qwest does not dispute the rates than the Joint CLECs identified for the DS3 channel terminations, dark fiber, or high capacity transport services that Qwest is offering in lieu of the corresponding high capacity UNEs – undoubtedly because no significantly lower rates exist.

With respect to the DS1 channel termination rates that Qwest identifies, Qwest fails to explain how a CLEC could obtain DS1 channel terminations from Qwest at a resale discount if the CLEC wants to use those facilities to provide other services to its customers (the most common CLEC use for such services) instead of reselling the same private line service to the CLEC's end user customer. Nor does Qwest discuss how a CLEC is supposed to benefit from a three- or five-year term discount from Qwest if the end user customer the CLEC serves is only willing to commit to obtain service for one or two years. Qwest also suggests that a DS1 private line "finished service" is more costly than a DS1 UNE, but according to Verizon, the total element long-run incremental cost ("TELRIC") of a DS1 UNE loop is *higher* than the total service long-run incremental cost ("TSLRIC") of the "finished" DS1 private line service.[12] The fact that CLECs purchase both UNEs and special access services, moreover, has far more to do with business plans and difficulties actually obtaining facilities as UNEs than any technical difference between an "element" and a "service" as Qwest contends.

By disputing the applicable rates for alternatives to UNEs and raising other factual issues, Qwest's letter actually supports the Joint CLECs' request for an appropriate proceeding in which such issues can be explored. The Joint CLECs were not attempting to comprehensively address every factual issue in their August 8 letter, and the purpose of this response is not to refute every inaccurate or incomplete allegation in Qwest's letter. These issues cannot be resolved through an exchange of letters. Rather, the Commission should resolve them in determining the state of competition in a litigated proceeding, including the issues of how CLECs will replace UNEs that

[9] *Id*. Table 11.

[10] Qwest Letter at 2.

[11] *Id*. at 5.

[12] *See* Docket No. UT-040788, Verizon Responses to TWTC/XO Data Request No. 1-003 (a copy of which is enclosed).

are no longer available and the extent to which viable alternatives to those UNEs exist or should be made available.

Finally, Qwest (and Verizon) contend that the Commission lacks jurisdiction to do anything about the pricing of high capacity circuits once those circuits are no longer available as UNEs under the TRRO. Again, the point of the Joint CLECs' comments was and is not to provide lengthy legal briefing. Some commissions (and a reviewing court) have determined that state commissions have jurisdiction to establish just and reasonable rates for high capacity facilities under Section 271. Others have not. Legal briefing on this issue should be part of a fully litigated proceeding. The Commission unquestionably has jurisdiction to examine pricing for intrastate private line services – including services that have been classified as competitive – but legal issues concerning the form of that examination and the extent to which CLECs can use such services as substitutes for UNEs similarly should be addressed through briefing in a litigated phase of this docket. The Joint CLECs have not attempted to further engage in substantive legal debate in this letter but continue to urge the Commission to open a proceeding in which both factual and legal issues can be fully made and considered.

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