

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation
Concerning the Status of Competition and
Impact of the FCC's Triennial Review
Remand Order on the Competitive
Telecommunications Environment in
Washington State.

DOCKET NO. UT-053025

QWEST'S PETITION FOR
RECONSIDERATION OF
ORDER NO. 04

- 1 Qwest Corporation ("Qwest") hereby files its petition for reconsideration of Order No. 04, ("Order") in this matter. Order No. 04 reversed the recommended finding of Order No. 03 and required Qwest to submit, no later than October 18, 2006, access line data from December 2005, as well as the most recent data for fiber-based collocators, regarding the three remaining disputed wire centers. Qwest respectfully suggests that the requirement to use 2005 data is in error, and that the Commission should, on reconsideration, hold that the proper analysis of whether a wire center is impaired does in fact involve the "the most recent available FCC data" as stated in the Order, but the determination of "most recent" can only mean "most recent as of the date that Qwest designated the wire center as non-impaired."
- 2 The Order currently requires Qwest to provide more recent data for three challenged wire centers, but affirms the non-impaired designation as to the remaining wire centers based on 2003 data. This result is inconsistent and simply unsustainable.

3 On the one hand, making a determination as to the identical issue, i.e., the issue of which wire centers are initially appropriately designated as non-impaired, based on two different vintages of data could put the Commission in the untenable position of acting arbitrarily – the TRRO requires that a determination as to a list of unimpaired wire centers be based on a set of data – there is simply no reasonable basis upon which to conclude that some wire centers may be determined based on 2003 data and some on 2005 data for an otherwise identical inquiry regarding wire centers on the same original non-impaired wire center list Qwest filed with the FCC. This is especially true where the data required to be used here, year-end 2005 data, did not even exist at the time the TRRO became effective and the original list was created.¹ On the other hand, making a determination based on 2005 data for all wire centers, as the CLECs may advocate, is equally unsustainable. Doing so would put the Commission in another untenable position – that of impermissibly delegating to the CLECs the authority to essentially decide what vintage data will be used for the analysis simply by timing their challenge to the designations.

4 For these two reasons, the Commission should reconsider Order No. 04 and reinstate the conclusion of the Initial Order that the data to be relied upon for designation of the initial non-impaired wire center list is the 2003 ARMIS data that was available at the time the TRRO became effective in March 2005. As noted above, such a conclusion is actually consistent with the Commission’s desire to use the “most recent” data available, as this data was in fact the most recent available at the time the designation was made.

5 Whether the wire center designations are correct can only be made based on data that is/was available at the time of designation – otherwise, what the Commission risks is exactly what the

¹ The most current access line data available at that time which conformed to the *TRRO* access line definitions was December 2003 ARMIS 43-08 data.

FCC prohibited – a result that in essence removes a wire center from the list. The Commission has recognized, and the CLECs agree, that designations are permanent. However, the result of Order No. 04 is that a designation that was indisputably correct at the time it was made, based on the most recent data available, could hypothetically be reversed in this proceeding based on later data. This is a clear violation of the mandates of the TRRO. That such a result may not occur, because the data did not change significantly, does not cure the legal infirmity of the decision.

6 The Commission should not make findings and conclusions that are subject to challenge on the basis that they are arbitrary, or not supported by substantial evidence in the record. Arbitrary agency action is action which is “willful, unreasoning, and taken without regard to the attending facts and circumstances.”² Qwest respectfully submits that the current Order is at risk of such a challenge. There is simply no rational basis upon which to justify making a determination as to the identical issue based on two different vintages of data. The TRRO requires that a determination as to the initial list of unimpaired wire centers be based on a set of data. The Commission’s duty here is not to make an independent determination as to impaired wire centers, but rather to evaluate the correctness of Qwest’s designations. Whether Qwest’s designations were correct of course can only be determined based on an assessment and evaluation of the *information that Qwest relied upon* in making those designations. There is simply no basis upon which to conclude that some wire centers may be determined based on 2003 data and some on 2005 data, for an otherwise identical inquiry, especially when Qwest did not rely upon the 2005 data in making the designations.

7 Nor is it supportable to make a determination based on 2005 data for all wire centers, as the

² *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (quoting *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997)); see *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 64 P.3d 606, 2003 WL 747662, at *9.

CLECs may advocate. Doing so would put the Commission in another untenable position – that of impermissible delegating to the CLECs the authority to essentially decide what vintage data will be used for the analysis simply by timing their challenge to the designations. Under the APA and its own enabling statutes, the Commission has limited ability to delegate its decision-making authority, and it may only do so to designated persons within the agency, not third parties.³

8 The non-impaired wire center list which is the subject of this proceeding is the original *and only* list Qwest has submitted to the FCC denoting those wire centers that meet the FCC’s non-impairment criteria to qualify for limited unbundling relief. Qwest’s use of December 2003 ARMIS data is consistent with the data the FCC analyzed in making its non-impairment decisions in the TRRO. This December 2003 ARMIS data is also the data that was available when the FCC directed Qwest and the other RBOCs to submit the list of wire centers that meet the non-impairment criteria, which Qwest did in February 2005. Consequently, the use of December 2003 data is both appropriate and consistent with the FCC’s intent to base determinations on “an objective set of data that incumbent LECs already have created for other regulatory purposes.” *TRRO Paragraph 105*.

9 However, under the Commission’s ruling, stating that the “most current data available” will be used, CLECs may be able to wait for a period of time after a designation is made and then bring a challenge, thereby wiping out the data on which the determination was made by claiming that “more recent” data is now available. Then, the Commission must still struggle with the question of “most recent” and what it means. It is unclear from the Order whether “most recent” means at the time the designation is challenged, at the time the Commission determines to hear the challenge, or at the very moment the Commission decides the challenge.

³ See RCW 80.01.030 regarding the scope of permissible delegation.

This puts Qwest in the impossible position of never being able to make a designation, because if challenged, there will potentially always be “more recent” data available to evaluate. And it puts the Commission in the position of essentially abdicating its decision-making authority with regard to evidence to be relied upon to the CLECs, who can time a challenge to dictate which vintage of data will be relied upon.

- 10 For the reasons noted above, Qwest respectfully requests that the Commission reconsider Order No. 04 and reinstate the findings in the Initial Order regarding the appropriateness of Qwest’s use of 2003 ARMIS data as a basis for its original non-impaired wire center list.

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QWEST

Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500