BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of	)	
	)	Docket No. UT-003013
	)	
The Continued Costing and Pricing	)	RESPONSE BRIEF OF
Of Unbundled Network Elements,	)	COMMISSION STAFF
Transport, Termination and Resale	)	
	)	*Part A*
________________________________	)	

The Commission Staff submits this brief in response to the arguments raised in the opening briefs filed by other parties to this docket.

I. LINE SHARING

A. Setting the Price for the High-Frequency Portion of the Loop at Zero Will Not Result In A Taking

1 Qwest argues that the Commission cannot set the price for the high-frequency portion of the loop at zero because that would result in a taking of Qwest's property without just compensation. However, Qwest's legal argument that a zero price is a taking ignores the fact that the Act requires Qwest to allow competitors access to its unbundled network elements and is based on the wrong legal standard of what constitutes a taking.

2 The Commission Staff agrees that a taking may occur when the government requires a property owner to accede the occupation or use of its property without just compensation. *See* Qwest's Opening Br. at 6. The issue in this case is not whether the Commission may order Qwest to accede the use of the high-frequency portion of the local loop – the FCC requires Qwest to do so. *See In the Matters of Deployment of Wireline Service Offering Advanced Telecommunications*

Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 14 FCC Rcd 20912, 20926, ¶ 25 (1999) ("*Line Sharing Order*").[1] The question before the Commission is what is the just compensation for Qwest when it provides the high-frequency portion of the loop to competitors.

3 The Supreme Court established the standard for determining whether an unconstitutional taking has occurred in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Under *Hope*, a utility company's rates, however they are determined, need only "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed . . ." *Id.* at 605. The Court stated:

> The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid . . . [W]hen the commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the [Natural Gas] Act. Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed, which is controlling.

Id. at 603 (citations omitted); *see also Bluefield Water Works Improvement Co. v. Public Serv. Comm'n of West Virginia*, 262 U.S. 679 (1923).

4 In *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), the Court reaffirmed the teachings of the *Hope* case and held that rate orders do not constitute a taking unless the *overall impact* of the rate orders "jeopardizes the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital." In *Duquesne*, the Court prescribed the standard by which Qwest's takings challenge would be measured: the total effect test. 488 U.S. at 310. There is no evidence that the total effect of a zero price for the high-frequency spectrum of the loop will

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[1]Qwest cannot challenge the constitutionality of the line sharing requirement in this forum. Any attack on the FCC's line sharing order must be brought under the provisions of the Hobbs Act, 28 U.S.C. §§ 2341 *et seq.*

jeopardize Qwest's financial integrity or leave it in a position where it cannot operate or raise capital.

5 Further, it is unlikely that Qwest can prevail on a takings claim because all parties agree, including Qwest, that the total element long-run incremental cost of the high-frequency portion of the loop is zero. *See, e.g.*, Tr. 181, ll. 3-11. Therefore, Qwest's takings argument should be rejected.

B. If the Commission Orders a Positive Price for the High-Frequency Portion of the UNE Loop, the Commission Has the Authority to Order a Corresponding Reduction of the Price for the UNE Loop.

6 In its brief, Qwest argues that the Commission is precluded by the merger settlement agreement from ordering a credit to retail rates if the Commission orders a positive price for the high-frequency portion of the loop. As set forth in Staff's opening brief, the Commission is not precluded by the merger agreement to order revenue-neutral rate rebalancing. *See In Re Application of US West, Inc. and Qwest Communications International, Inc. for an Order Disclaiming Jurisdiction, or in the Alternative, Approving the US West, Inc. - Qwest Communications International, Inc. Merger*, Docket No. UT-991358, Ninth Supp. Order Approving and Adopting Settlements and Granting Application, ¶ 34 (June 19, 2000).

7 The Commission Staff does not advocate that the Commission order a reduction in retail rates if the Commission orders a positive price for the high-frequency portion of the UNE loop.[2] Rather, if the Commission orders a positive price for the high-frequency spectrum of the UNE loop, a corresponding reduction should be made to the price of the UNE loop. As set forth above, this would not violate the terms of the merger agreement because the adjustment would be revenue-neutral.

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[2]In Staff's opening brief, we stated that if ILECs are allowed to charge a positive price for the high-frequency spectrum of the loop, the Commission should order a corresponding reduction to the *retail* price of the UNE loop. Staff's Opening Br. ¶ 32. Staff erroneously used the word "retail" in that statement. The UNE loop is not a retail product. Staff's position is that a reduction should be made to the wholesale UNE loop rate, not a retail service. *See id.* ¶ 31.

II. OSS COST RECOVERY

A. Sufficiency and Accuracy of Qwest's OSS Cost Estimates

8 In its brief, Qwest argued that it had presented sufficient evidence to establish the accuracy and validity of its OSS cost estimates. *See* Qwest's Opening Br. ¶¶ 98-101. Qwest states that it determined whether a particular project benefited Qwest's retail operations and, if so, the costs associated with that project were excluded from the company's cost recovery proposal. *Id.* ¶ 98; *see also* Ex. 122 ("If the project effort involved enhancements that were used by US West's retail systems users, the project was considered a benefit to US West and was not considered a candidate for cost recovery.").

9 Staff does not believe Qwest took appropriate affirmative steps to identify whether there were joint benefits from the projects. Qwest witness Brohl admitted on cross-examination that Qwest's retail personnel were not consulted on whether a project benefited the company's retail operations:

> **Q:** Were any of the people responsible for the retail provisioning consulted as to whether the various projects would provide any benefit to the retail OSS?
>
> **A:** No, but they didn't have to be. . . .

Tr. 868, ll. 20-23. From this exchange, it is clear that Qwest did not properly evaluate whether the OSS enhancements for which it seeks cost recovery provided a benefit to its provision of retail OSS.

10 Qwest argues that an independent audit of its OSS-related expenditures is not necessary because Qwest sufficiently justified its expenditures through its testimony and during the discovery phase of the proceeding. Qwest's Opening Br. ¶ 100. However, Qwest did not provide the information Staff requested in the discovery process in order for Staff to conduct a trend analysis. *See* Ex. T-350 at 4 (Spinks, Direct), Ex. C-352, and Ex. C-353. In sum, Qwest did not provide sufficient

information to support its OSS cost recovery proposal.

B. Qwest's Service Order Forecasts Are Unreliable.

11 As we stated in our opening brief, Staff is concerned about Qwest's service order forecasts. Staff's Opening Br. ¶ 41. Qwest's opening brief presents another concern with its forecasts. Qwest states that because a forecast that was submitted in 1997 overestimates the number of service orders for 1999, as evidenced by actual service orders for 1999, then the forecasts presented in this docket are therefore more accurate and reasonable. Qwest's Opening Br. ¶ 115.

12 The Commission should not be persuaded by this argument. The fact that Qwest underestimated service orders it would receive from competitors in 1999 based on a 1997 forecast does not mean that the current forecast is reasonable. Qwest's markets are not fully open to competition and presumably will not be until after the company's 271 process is complete. Because no one knows when Qwest's markets will be fully open to competition, forecasting service orders from competitors is an exercise in futility. For this reason, Staff recommended the flat charge for recovery of OSS start-up costs, which would not be based on any attempt to forecast CLEC service orders.

C. The ILECs Have Failed to Demonstrate That They Have Not Recovered OSS Start-up Costs in Their Retail Rates.

13 Qwest misunderstands Staff's argument that Qwest already is recovering its OSS start-up costs through its retail rates. Staff does not allege that the company specifically included OSS costs in certain retail rates. Rather, Staff's position is that Qwest has not demonstrated to the Commission that it already has not recovered those costs, which the Commission had directed the company to do. *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket Nos. UT-960369 et al., 17th Supp.

Order: Interim Order Determining Prices, ¶ 110 (Aug. 30, 1999). The Commission Staff's position is that Qwest is earning in excess of its authorized rate of return. Therefore, its overall revenues have grown faster than its overall expenses and the excess revenues are sufficient to permit recovery of the OSS start-up costs. If Qwest recovers OSS start-up costs from competitors, then the Commission must order a corresponding refund to retail rates. Otherwise, Qwest double-recovers those costs.

14 Qwest has not met its burden of showing that its OSS start-up costs have not been recovered through its retail rates. Qwest claims that the testimony of Teresa Million shows "that there is no possibility that wholesale OSS costs were included in or recovered by either Qwest's annual charge factors or its retail rates." Qwest's Opening Br. ¶ 103. However, the evidence Qwest cites in support of this claim does little to prove its point. *See id.* (citing Ex. T-90, ll. 11-14 (Million, Direct) ("As discussed above, the amount of information technology expense supported by the approved factors was based on pre-1996 data, for levels of expense incurred prior to the start of the development and enhancement activities related to OSS.")).

15 Likewise, Verizon has not demonstrated that it has not recovered OSS start-up costs through retail rates. Verizon's sole evidence on this point is the fact that the company has not had a rate case since 1985. Verizon's Br. ¶ 94. Staff's argument that the merger settlement shows Verizon is earning in excess of its authorized rate of return, and therefore has earned

revenues sufficient to recover its OSS start-up cost, is a valid argument in light of Verizon's scant evidence.

III. COLLOCATION

A. Qwest's Cost and Pricing Proposal

2. Space Construction

b. DC Power

16 In its brief, Qwest misstates Staff's position on power costs. Staff did not advocate that the Commission should base DC power costs on the two Washington central offices in the company's five central office study. *See* Qwest's Opening Br. ¶ 150. Rather, Staff argued that Qwest's power costs should be based on Washington-specific collocation jobs. Ex. 360 at 5 (Griffith, Direct). It is not Staff's position that the costs should be determined solely on the two Washington jobs in the five central office study. The Commission should order Qwest to produce a Washington-specific cost study.

17 Qwest argues that using the average distance for power cable from the 41 central office study would not produce significantly different results than using the costs from the two Washington collocation jobs, therefore, the average from the 41 offices should be used. Qwest's Opening Br. ¶ 150. However, the average distance from the 41 office study, which is 70.74 feet, is longer than the average power cable length in the Washington central offices that are in the 41 office study. Tr. 483-84. The confidential average cable length for collocation jobs in the *Washington* central offices that were included in Qwest's 41 central office study is contained in Ex. C-67. That confidential length is shorter than Qwest's proposed 70.74 feet.

18 Staff's concern with Qwest using a power cable length longer than the Washington average is

compounded by the fact that Qwest appears to overstate the average power cost per job from the 41 office study. Qwest states this cost as $5288. Qwest's Opening Br. ¶ 150. However, Qwest's actual average power costs per job from the 41 job study is considerably less than $5288. Ex. C-801 (Qwest's Response to Record Request No. 8). Qwest's power cable costs should be rejected because they are not Washington-specific and are overstated.

B. Verizon's Collocation Cost and Pricing Proposal

19 Like Qwest, the Commission should order Verizon to use Washington-specific costs in its collocation cost studies. Verizon suggests that because it produced the only collocation cost study in this docket, the Commission should approve its proposed costs. Verizon Opening Br. ¶ 103. Staff does not waive its concerns about Verizon's cost study by not filing its own cost model. Staff's concern is that Verizon's cost study is not Washington-specific and therefore does not accurately reflect the costs Verizon incurs for collocation in Washington.

4. DC Power Costs

20 Verizon argues that the Commission should reject Staff's recommendation that the time necessary to install DC power cable should be reduced to three to five minutes per foot, rather than Verizon's recommended fifteen minutes per foot. Verizon's Opening Br. ¶ 131. Verizon bases this argument on its assertion that Staff's reliance on RS Means is faulty because RS Means assumes that conduit already is installed in the central office. *Id.* However, Staff relied on RS Means because Verizon provided no verifiable data supporting its recommendation of fifteen minutes per foot. *See* Ex. T-360 at 10-11 (Griffith, Direct). Staff does not argue that RS Means is a perfect method for establishing costs, but it does produce verifiable results. Therefore, the Commission should reject Verizon's unsubstantiated fifteen minute proposal for

the time necessary to install DC power cable and adopt Staff's proposal of three to five minutes per foot.

IV. CONCLUSION

21 For the reasons set forth above and in Staff's Opening Brief, the Commission should adopt the recommendations of Commission Staff.

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CHRISTINE O. GREGOIRE
Attorney General

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SHANNON E. SMITH
Assistant Attorney General
Counsel for Commission Staff