BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE CONTINUED COSTING AND PRICING OF UNBUNDLED NETWORK ELEMENTS AND TRANSPORT AND TERMINATION	Docket No. UT-003013 PART A POST HEARING REPLY BRIEF OF COVAD COMMUNICATIONS COMPANY AND RHYTHMS LINKS INC.

I. INTRODUCTION

Covad Communications Company and Rhythms Links Inc. (collectively the "DLECs") provide this post hearing reply brief in response to line sharing pricing arguments made by Qwest, Verizon, and Public Counsel. The Commission should accept the DLECs' arguments and pricing proposals and reject the ILECs' attempts to thwart meaningful competition for xDSL service in Washington.

II. LEGAL AND POLICY ISSUES

A. THE ILECS' "TAKINGS" ARGUMENTS ARE NOT RIPE

Both Verizon and Qwest attempt to frighten the Commission with claims that certain pricing decisions could amount to unconstitutional takings of ILEC property.[1] Many courts have addressed and dismissed these claims before. In response to ILEC takings challenges to actions mandated by

[1] Verizon Brief, ¶¶ 7-8; Qwest Brief, ¶¶ 15-22.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

the Act, courts have confirmed that ILECs are protected only from "regulations that are 'so unjust as to be confiscatory.'"[2] To meet this standard the ILECs:

> must show that a regulation will "jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital."[3]

Courts have also concluded, however, that it is not possible to find an unconstitutional taking in a docket establishing prospective prices or subsidy levels. In the universal service funding context the Fifth Circuit Court of Appeals held:

> At the very least, therefore, petitioners must wait to experience the actual consequences of the Order before a court may even begin to consider whether the FCC has effected a constitutional taking. Until it is known what level of universal service funding each petitioner will receive under the Order, and under what circumstances the Commission will grant a waiver, we cannot seriously entertain a Takings Clause challenge.[4]

In the context of setting UNE prices, a federal district court in Minnesota similarly dismissed Qwest's claim that prospective UNE prices, examined in isolation, amounted to a taking:

> The purpose of the Telecommunications Act of 1996 is, in part, to foster competition in the local telephone market. Under the Act, U.S. West provides services to its competitors rather than the public. The end goal is not a fair rate of return as in the traditional rate-setting paradigm, but rather the equitable opening up of a market. Neither party to the Agreement is expected to profit in the interconnection or resale process. Because these transactions are not designed to be profitable, the analysis cannot be fair rate of return as to any individual provision concerning the sale or access or services to the CLECs. Rather, the query must be whether any provision or provisions of the Agreement negatively affect the overall operation of the incumbent LEC to such a degree that it can no longer receive a fair rate of return

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[2] Alenco Communications v. FCC, 201 F.3d 608, 624 (5th Cir. 2000) (quoting Duquesne Light Co. v. Bacasch, 488 U.S. 299, 307 (1989)).

[3] Alenco, 201 F.3d at 624 (quoting Duquesne, 488 U.S. at 307).

[4] Alenco, 201 F.3d at 624.

1 from its investment.[5]

2 The Minnesota Court noted that the real issue was whether US WEST would earn a prospective fair

3 rate of return in the future, and that US WEST 1) very well might earn a fair rate of return, and 2)

4 could seek a rate increase to allow it to earn a fair rate of return.[6] Only if both of these possibilities

5 failed to provide US WEST with a fair rate of return would its takings claim be ripe for review.[7]

6 The Ninth Circuit Court of Appeals has made a similar ruling applying Washington law on

7 appeal from this Commission's Order:

8 Moreover, because Washington law provides a remedy for takings, U.S. West must
9 pursue that remedy before bringing an action under the Fifth Amendment in federal
10 court.[8]

11 The bottom line is that ILEC takings claims arguments in UNE pricing dockets are misplaced, are

12 not ripe, and are meant to frighten commissions into ignoring the sound, fair, and competitively

13 neutral pricing standards adopted by the FCC. The Commission should disregard these arguments

14 in full in this docket.

15 **B. VERIZON IS NOT ENTITLED TO RECOVER WHAT IT**
16 **CHARACTERIZES AS ITS TOTAL ACTUAL COSTS**

17 Verizon proposes a pricing methodology that would allow it to recover what it characterizes

18 as its "total actual costs," and goes so far as to claim this pricing methodology is the "touchstone"

19 for establishing prices under the Act.[9] Verizon has no basis whatsoever for this statement. Neither

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1 5 US WEST Communications v. Minnesota Pub. Util. Comm'n, 55 F. Supp.2d 968, 989-90 (D. Minn. 1999).
1 6 Id.
1 7 Id.
1 8 US WEST Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1126 (9th Cir. 1999) (citations omitted).
1 9 Verizon Brief, ¶ 6.

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1 the FCC nor the Commission has ever said that an ILEC is entitled to recover the total actual costs
2 incurred in providing a UNE. Even the Iowa Utilities II case (if it ever becomes the law) could not
3 allow that result. In fact, Verizon's own proposed prices are based on cost models, not claimed
4 actual costs.

5 The touchstone of UNE pricing is that prices must require the ILEC to make efficient
6 decisions, as would be the case in a competitive market.[10] When "forward looking" costs are
7 measured, all parties agree those costs should assume the ILEC makes efficient decisions. Verizon,
8 however, in discussing costs currently or recently incurred wishes to avoid any analysis of whether
9 those costs were efficiently incurred.[11] This is a necessary step to price UNEs consistent with the
10 Act. The result argued for by Verizon would allow ILECs to pay technicians $1000 per hour to
11 install shared lines, for example, and pass those costs on to their competitors. Clearly, allowing
12 recovery of actual, inefficient costs incurred to provide line sharing will reward the ILECs, penalize
13 CLECs, and prevent meaningful competition. The Commission should reject Verizon's claim that
14 it is entitled to recover what it claims to be its actual costs regardless of whether they are necessary
15 or appropriate.

16 **C. THE PRICES SET IN THIS PROCEEDING SHOULD NOT BE SUBJECT TO**
17 **TRUE-UP**

18 Verizon suggests that due to the uncertainty surrounding the Iowa Utilities II decision, the
19 prices set in this proceeding should be "interim" prices subject to true up.[12] In no way is this an

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1 [10] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98,
2 First Report and Order, 11 FCC Rcd. 15, 499, ¶ 679 (1996) ("Local Competition Order").
1 [11] Verizon Brief, ¶¶ 7-9.
1 [12] Verizon Brief, ¶ 22.

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4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

interim proceeding. Each party has put on its case in accordance with applicable law, and the prices determined by the Commission will go into effect. If the law changes, and a party wishes to seek to establish new prices based on that change in the law, any such prices will apply on a going forward basis. To do otherwise would completely defeat the purpose of this proceeding, which would necessarily have to be redone in full. There is no policy reason or justification to require this proceeding to be done twice. The Commission should reject Verizon's suggestion to set only interim prices in this docket.

III. LINE SHARING

A. THE COMMISSION SHOULD SET THE HUNE PRICE AT $0

1. Verizon and Commission Staff Agree a $0 HUNE Price is Appropriate

As noted above, the DLECs strongly disagree with Verizon's proposed pricing methodology, which seeks recovery of all claimed actual costs. It is quite telling, then, that even under this methodology Verizon agrees the price of the HUNE should be $0.[13] In other words, Verizon agrees the actual cost of the HUNE is $0. Verizon is also not concerned with the myriad of evils that Qwest claims will come with a $0 HUNE, and consents to have the HUNE priced in accordance with the FCC's directives.[14] The Commission should not go out of its way to create a non-zero HUNE price that the FCC and one of the ILECs agree are contrary to sound pricing principles.

Commission Staff also proposes a $0 HUNE consistent with the FCC's directives and principles of competitive neutrality.[15] Staff recognizes that the HUNE must be priced at cost, and

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13 Verizon Brief, ¶ 44.
14 Verizon Brief, ¶ 44.
15 Staff Brief, ¶¶ 21-24.

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4400 TWO UNION SQUARE
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that the cost of the HUNE is $0.[16] Staff again points out that Qwest represented to Staff that its loop costs are recovered through voice rates, so that a positive HUNE would be discriminatory and provide Qwest with double recovery.[17] Finally, Staff argues correctly there is no principled basis for pricing the HUNE at 50% of the Commission-established loop price as requested by Qwest.[18] The Commission should follow Staff's recommendation and price the HUNE at $0.

2. A $0 HUNE Does Not Violate Section 254(k) of the Act

Public Counsel proposes a positive HUNE based on a concern that a $0 HUNE would violate 47 U.S.C. § 254(k), which requires that universal services bear a reasonable portion of joint and common costs to avoid ILECs subsidizing competitive services.[19] Public Counsel's concern over Section 254(k) is unfounded. First, when the FCC proposed its pricing methodology, it knew full well the result would be a $0 HUNE.[20] The FCC's methodology is nonetheless consistent with the Act because $0 is the undisputed cost of the HUNE, and because it is just and reasonable to charge CLECs the same price the ILECs themselves must pay. This Commission should not ignore the obligation to establish just and reasonable cost-base rates to mitigate on illusory Section 254(k) concern the FCC does not share.

Second, the purpose of Section 254(k) is to prevent the ILEC from raising its rates on non-competitive local service to give it a market advantage in competitive xDSL service. It is clear,

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[16] Staff Brief, ¶¶ 21, 24.
[17] Staff Brief, ¶ 24.
[18] Staff Brief, ¶ 30.
[19] Public Counsel Brief, p. 4.
[20] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, ¶¶ 140-41 (Rel. Dec. 9, 1999) ("FCC Line Sharing Agreement").

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1 however, that higher rates and a distorted market will result from a positive HUNE, and are avoided
2 by a $0 HUNE. Qwest has not raised voice rates to subsidize its MegaBit service, and has pledged
3 in the merger settlement not to raise its voice rates before 2004.[21] So Public Counsel is incorrect in
4 claiming a $0 HUNE would expose consumers to upward pricing pressure for basic services.[22] A
5 positive HUNE on the other hand, will increase direct costs for CLECs and transaction costs for both
6 ILECs and CLECs. This necessarily means consumers will pay higher xDSL rates than they would
7 with a $0 HUNE. Moreover, a $0 HUNE will allow CLECs to compete fairly with ILECs, while
8 ILEC recovery of a positive HUNE from competitors when the ILEC incurs no cost will facilitate
9 ILEC control over the xDSL market. Public Counsel's proposal, then, will actually create the exact
10 problems Section 254(k) seeks to prevent.

11 Third, the FCC recently addressed how loop costs are currently recovered through voice,
12 access, and xDSL service, and dismissed concerns over Section 254(k). In its May 31, 2000 Access
13 Charge Order, the FCC ordered a reduction of access charges, which required ILECs to recover more
14 charges from voice customers.[23] The FCC explained how it has managed and continues to manage
15 the requirements of Section 254(k):

> 16 The [FCC], however, has complied with the requirements of section 254(k) by
> 17 allocating joint and common costs to various interstate services, including those that
> 18 are supported by universal service, such as common line and switching, and those
> 19 that are not, such as special access services.[24]

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1 21 Qwest Merger Settlement Agreement, p. 10.
1 22 Public Counsel Brief, p. 4.
1 23 FCC 00-193, Sixth Report and Order in CC Docket Nos. 96-262 and 941, Report and Order in CC Docket No. 99-249,
2 Eleventh Report and Order in CC Docket No. 96-45, ¶¶ 90-91. (rel. May 31, 200) ("Access Charge Order").
1 24 Access Charge Order, ¶ 96.

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The FCC continued, specifically referencing its proposal for a $0 HUNE:

> We also reject the argument that elimination of the PICC is inconsistent with the Line Sharing Order. The Line Sharing Order concluded that states should not permit incumbent LECs to charge more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services. To date, we are not aware of any incumbent LECs that have allocated any loop costs to ADSL services.[25]

It is thus clear that the FCC fully expects that no loop costs will be recovered from xDSL service over shared lines, and believes this to be consistent with its access regulations and Section 254(k) of the Act. The Commission should take the FCC's lead and price the HUNE at $0 consistent with Section 254(k).

3. A Positive HUNE With a Tracking Account is Unlawful and Will Give Qwest an Unfair Market Advantage

Public Counsel proposes that a positive HUNE charge be collected by the ILECs, put into a tracking account, and used to lower voice rates.[26] The Commission should reject this suggestion for four reasons. First, this proposal violates FCC Rule 51.505(d)(4) by pricing a UNE in order to generate revenues for other services.[27] This also violates the FCC's prohibition on pricing UNEs to generate universal service subsidies:[28]

> Section 252(d)(1) requires that rates for . . . network elements reflect the costs of providing those network elements, not the cost of supporting universal service.[29]

This mechanism proposed by Public Counsel is simply not a legal option for the Commission.

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25 Access Charge Order, ¶ 98 (footnotes omitted).
26 Public Counsel Brief, p. 10.
27 47 C.F.R. § 51.505(b)(4).
28 Local Competition Order, ¶¶ 712-15.
29 Local Competition Order, ¶ 712.

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1 Second, Public Counsel's proposal would have CLECs pay a HUNE charge while Qwest
2 does not.[30] This direct cost to the CLEC will have to be recovered in the CLEC's xDSL rates, while
3 all of Qwest's loop costs will be recovered through its voice rates. This is discriminatory in violation
4 of 47 U.S.C. § 252(d)(1), and gives ILECs an inefficient market advantage. Nothing in Public
5 Counsel's proposal addresses this concern, which is recognized by Commission Staff.[31]
6 Third, it is not clear the Commission could track HUNE charges and use those amounts to
7 adjust voice rates. Although Public Counsel believes that would be allowed by the merger
8 settlement, Qwest takes the position that the settlement bars such action until after 2004.[32] This puts
9 in doubt the only arguable benefit of Public Counsel's proposal, and the Commission should not
10 adopt a proposal that will require further litigation to enforce.
11 Finally, the Commission should not, as a policy matter, require xDSL customers to subsidize
12 voice customers. Advanced services like xDSL should be widely available to consumers, and a
13 positive HUNE will make xDSL service more expensive and broaden the digital divide in
14 Washington. The Commission should take this opportunity to make xDSL service available and
15 affordable, not artificially increase that cost to the detriment of Washington consumers. For these
16 reasons, the Commission should reject Public Counsel's proposal for a positive HUNE and an ILEC
17 tracking mechanism.

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1 30 Public Counsel Brief, p. 10.
1 31 Staff Brief, ¶ 24.
1 32 Qwest Brief, ¶ 66.

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1 ### 4. A $0 HUNE Price is Fair and Reasonable

2 Qwest begins its argument on the price of the HUNE by claiming that a $0 price for the
3 HUNE is "inherently unfair and contrary to the spirit of free competition."[33] Qwest relies on the
4 assumption that the "man on the street" would be offended if asked whether "the government
5 [should] require a company to turn over an asset to its competitors for free."[34] The DLECs believe
6 the man on the street -- especially the man on the street who is shopping for xDSL service -- would
7 surely understand what is fair if asked the right questions. To that end, the Commission can (and
8 should) decide how the average consumer would answer the following questions:

9 Would you like to have two or more xDSL providers competing for your business on
10 equal terms?

11 Should you pay twice for one telephone line into your house?

12 If you prefer to take xDSL service from a CLEC, is it fair that Qwest receive $9 of profit
13 per month for doing nothing?

14 The Commission should have no doubt that the DLECs' proposal to price the HUNE at $0 is the
15 only price that is fair, reasonable and beneficial to Washington consumers.

16 ### 5. Qwest is Recovering its Loop Costs Through its Current Voice Rates

17 Qwest continues to claim it needs a positive HUNE to recover its loop costs. The facts are
18 undisputed, however, that 1) Qwest's voice rates were set prior to line sharing; 2) Qwest's rate of
19 return is regulated in Washington and so rates were set to recover historical costs, which are greater
20 than TELRIC loop costs; and 3) Qwest agreed in its merger docket not to raise retail rates knowing

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1 [33] Qwest Brief, ¶ 36.
1 [34] Qwest Brief, ¶ 36.

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1 full well the FCC had recommended a $0 HUNE.[35] This last point is significant. In May, 2000,

2 Qwest pledged not to increase tariffed voice rates, despite the probability of a $0 HUNE. Qwest has

3 in effect conceded that its current voice rates will fully recover its loop costs without even

4 considering HUNE payments. The Commission should reject Qwest's claim that it needs a positive

5 HUNE to recover its loop costs.

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8 **6. Qwest's Proposal is Not Supported by Economic Principles, and Will Not Further the Development of Competitive Markets for Advanced Services**

9 Qwest claims its theory of pricing the HUNE is based on sound economics and consistent

10 with FCC pricing principles.[36] Neither is true. Instead, Qwest has created a theory that is consistent

11 only with its desire to maintain a competitive advantage in the provision of xDSL service. The

12 Commission should reject Qwest's "economic" analysis in full.

13 As set forth in the DLECs' Post-Hearing Brief, the two FCC pricing principles that are most

14 significant in this docket are 1) the HUNE should be priced using an "incremental cost approach,"

15 and 2) CLECs should pay for only those costs that they cause to occur.[37] Here, all agree there is no

16 incremental loop cost associated with a CLEC's use of the HUNE.[38] As is mandated by FCC Rule

17 51.505(b) (which was not impacted by Iowa Utilities II), the HUNE should be priced based on costs

18 "reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent

19 LEC's provision of other elements."[39] Because line sharing can occur only when a customer is

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1 35 Qwest Merger Settlement Agreement, p. 10.
1 36 Qwest Brief, ¶ 42.
1 37 DLEC Brief, ¶¶ 34-38.
1 38 DLEC Brief, ¶ 36.
1 39 47 C.F.R. § 51.505(b).

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1 already taking voice service from an ILEC, it thus is undisputed there is no incremental cost of line

2 sharing. The FCC's direction on cost-causation leads to the same result:

3 Costs are causally-related to the network element being provided if the costs are
4 incurred as a direct result of providing the network elements, or can be avoided, in
5 the long run, when the company ceases to provide them.[40]

6 Because there must be local voice service before there can be line sharing, the cost of the loop is not

7 caused by line sharing.[41] Moreover, if Qwest "ceases to provide that service," the costs do not go

8 away. The Commission should find these FCC pricing principles should be applied in this docket,

9 and price the HUNE at $0.

10 Qwest's attempt to rely on the FCC's pricing guideline regarding the allocation of joint and

11 common costs should be rejected.[42] Qwest argues that when a line is shared, loop costs are magically

12 transformed from a direct cost to a common cost of two "dedicated connections."[43] In fact, the loop

13 has always provided the user with a set of services, including local and toll voice messages, caller

14 ID, alarm services, and so on. The addition of one more service provided over the loop (i.e., xDSL

15 service) does not change the character, or the cost of the existing loop. Qwest tries to overcome this

16 reality by placing importance in the idea of a "dedicated connection," which it claims shows the loop

17 cost is "caused" only by the two connections that are always available for the consumer's use ¯ voice

18 and xDSL. This idea of a "dedicated connection," a meaningless economic principle, is the only way

19 Qwest tries to distinguish its position in New Mexico from its position in this docket.[44] In New

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1 40 Local Competition Order, ¶ 691 (emphasis added).
1 41 Ex. 194 (Cabe Rebuttal), p. 6.
1 42 Qwest Brief, ¶ 48.
1 43 Qwest Brief, ¶ 41.
1 44 Hearing Transcript (Fitzsimmons), 245-46.

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1 Mexico, Qwest sponsored testimony that the local loop is not a shared facility with costs that should
2 be allocated to different services.[45] Qwest takes the opposite position here. As Dr. Gabel's cross
3 examination of Dr. Fitzsimmons made clear, these positions are tailored to reach a desired outcome,
4 leaving the economist the difficult task of drawing distinctions despite having no principled way of
5 doing so.[46] It is clear this theory of a reasonable allocation to dedication connections is not a
6 principle of economics, but an argument created for line sharing hearings.

7 Ironically, the "dedicated connection" theory falls apart even as applied in this case. As
8 Qwest admitted, one of its MegaBit offerings is "not an always-on service" (i.e., not a dedicated
9 connection).[47] Under Qwest's theory, the loop cost would not be "caused" by this kind of xDSL
10 offering, and no loop cost should be assessed to a similar CLEC offering that does not provide a
11 "dedicated connection." Qwest has not, however, proposed to price the HUNE differently for such
12 an offering, and has not explained how the Commission would implement such an odd pricing
13 proposal. Sound economic analysis does not lead to this kind of incongruity. The Commission
14 should thus find that Qwest's argument on allocation of common costs between dedicated
15 connections is not sound economics and is inconsistent with FCC pricing principles.

16 The Commission should also find that Qwest's proposal will not lead to efficient competition
17 that will benefit Washington consumers. Qwest argues the Commission should impose a positive
18 HUNE price to level the playing field between competitors who use the HUNE, and those using

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1 [45] Hearing Transcript (Fitzsimmons), 241-47.
1 [46] Hearing Transcript (Fitzsimmons), 245-46.
1 [47] Hearing Transcript (Thompson), 413:17-414:2.

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1 other technologies.[48] First, the FCC considered and rejected this exact ILEC claim when it ordered
2 TELRIC pricing for line sharing UNEs.[49] Second, the Commission should not encourage a bypass
3 of existing infrastructure (the loop) unless the alternatives really are less expensive. Building new
4 facilities will usually cost more than using existing ILEC facilities, which is one reason line sharing
5 is so promising for consumers. The FCC ordered line sharing so that competitors would not need
6 "additional required investment for voice band equipment and facilities" to offer xDSL service.[50]
7 The use of existing facilities at a lower cost allows consumers to obtain new services without having
8 to pay for new facilities. It also ensures that competitive facilities-based providers will succeed only
9 if they are more efficient providers.[51] The Commission should not price the HUNE in a way that
10 undermines consumers' ability to obtain inexpensive xDSL services.

11 Third, Qwest's proposal is not to place <u>all</u> providers on equal footing, but to give Qwest an
12 inefficient market advantage over all other providers, and to give the CLECs using the HUNE an
13 inefficient market disadvantage. For example, if Qwest, Covad and a wireless or cable broadband
14 provider each has actual costs of providing broadband service of $20, then the market will drive the
15 price of service to $20, and all three can compete equally. This is a good result because each has the
16 same costs. If the Commission prices the HUNE at $9, the broadband provider has costs of $20 and
17 can price at $20, Covad has costs of $29, and has to price at $29 to stay in business. Under this

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1 48 Qwest Brief, ¶¶ 52-53.
1 49 The FCC concluded: "There is no evidence in this record to cause us to alter the [FCC's] conclusion that pricing of
2 [UNEs] on the basis of TELRIC will not discourage efficient levels of investment and entry by competitive LECs." <u>FCC</u>
3 <u>Line Sharing Order</u>, ¶ 150.
1 50 <u>FCC Line Sharing Order</u>, ¶ 56.
1 51 Ex. 194 (Cabe Response), p. 8.

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4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

1 scenario, Covad cannot hope to price to recover its costs and stay in business. On the other hand,
2 Qwest can price below its costs by using HUNE revenue, if any, to undercut even the broadband
3 provider. The broadband provider and the CLEC are disadvantaged because each is just as efficient
4 as Qwest but cannot match Qwest's price, and neither provider has an incentive to invest in
5 Washington. Only Qwest is benefited by this result. The Commission should reject the unsupported
6 suggestion that Qwest's proposal is in any way intended to promote efficient competition in
7 Washington.

8 **7. The Loop Is Not a Joint Cost Under Proper Economic Principles**

9 Under a proper economic analysis, the loop is not a joint cost of voice and xDSL services.
10 Because the loop is not a joint cost, Qwest's proposal for a "reasonable allocation of joint costs"
11 cannot be applied. As Dr. Cabe explained, the use of the voice portion of the loop is not a joint
12 product with a HUNE because a HUNE is only available in the event the voice portion has been
13 sold.[52] This asymmetry between the two products violates fundamental assumptions underlying the
14 conventional model of joint product pricing.[53] In the chicken wing example, one can buy chickens
15 and wings independently, and need not buy wings only when the breast has already been sold. This
16 difference makes the traditional "joint product" analysis inapplicable.[54]

17 Qwest's own witness in a New Mexico proceeding agrees with the DLECs' witness Dr. Cabe
18 that the voice portion of the loop cannot be viewed as a joint product with other services provided
19 over the loop:

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1 [52] Ex. 194 (Cabe Response), pp. 8-9.
1 [53] Ex. 194 (Cabe Response), p. 9.
1 [54] Ex. 194 (Cabe Response), p. 9.

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601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

> Economists generally disagree with the view that the local loop is a shared facility because it conflicts with the fundamental principle of cost causation, which, in economics, attributes a cost to the source (an economic decision or activity) that gave rise to it. According to this principle, the costs associated with the loop are caused by a customer gaining access to the network.
>
> . . . .
>
> The contrary position that the loop's cost should depend on how it is used is based on a fallacy that confuses the cost causer (namely, the consumer or purchaser of the loop) with the entity that incurs and needs to recover the cost (namely, the supplier of the loop).
>
> . . . .
>
> Question: Do you accept the premise that the local loop is shared facility whose costs should be allocated to different services? Answer: No. This premise is contrary to sound economic principles and base on an incorrect approach to cost recovery processes.[55]

In this proceeding, then, the Commission should reject Qwest's strained, outcome-based attempts to characterize the same loop as a joint product for the purpose of imposing a HUNE charge to recover a cost that is never incurred.

B. COLLOCATION

1. Cable Lengths and Shelf Allocations

The ILECs' proposed cable lengths and Qwest's proposed shelf allocation are based on inefficient deployment of an efficient network architecture, and should be rejected as a basis for pricing collocation for line sharing. The bottom line is that the Commission should not give the ILECs the ability to unilaterally raise its competitors' costs.

With regard to cable lengths, Verizon's cost study assumes 175 feet between the MDF and

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55 Hearing Transcript (Fitzsimmons), 241-43.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

1 the splitter,[56] and Qwest proposes to use 100 feet as the average distance between the distribution
2 frame and the splitter.[57] This is contrary to the DLECs' evidence that splitters placed efficiently in
3 existing central offices would be within 25 feet of the distribution frame.[58] The ILECs have not
4 relied on evidence of existing splitter collocations in Washington to support their proposed
5 assumptions,[59] and as a result the Commission should not conclude that such inefficient placement
6 is necessary or appropriate.

7 Qwest also proposes to assume a splitter bay will hold only eight splitters, despite agreement
8 that a bay can hold 14 splitters.[60] This proposal is based substantially on a prediction that there will
9 be so few lines shared that splitter bays will be left underutilized.[61] The suggestion that current line
10 sharing deployment (just months after it was even possible) should be the basis for cost study inputs
11 is unsupported, contrary to Qwest's own estimates for OSS cost recovery, and designed solely to
12 overstate splitter bay engineering costs for CLECs.

13 Qwest's predictions for cable length and shelf allocation are also contrary to the Interim Line
14 Sharing Agreement between Qwest and CLECs. In developing the terms of the Interim Line Sharing
15 Agreement, the CLECs worked with Qwest to create an efficient way to deploy line sharing using
16 existing technologies. As the Interim Line Sharing Agreement itself evidences, and Qwest witness
17 Hubbard testified, the agreement (a) requires Qwest to place the splitters as close to the DS0

1 56 Verizon Brief, p. 27.
1 57 Qwest Brief, ¶ 70.
1 58 Ex. 172 (Zulevic Response), p. 3.
1 59 Hearing Transcript (Hubbard), 669:22-23.
1 60 Qwest Brief, ¶¶ 80-82.
1 61 Qwest Brief, ¶ 81.

MILLER NASH LLP
ATTORNEYS AND COUNSELORS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

terminations as possible; (b) permits Qwest to intermingle Qwest equipment with CLEC splitters in the same bay; and (c) did not require Qwest to build separate bays for the CLEC splitters.[62]

Instead of taking advantage of the efficiencies planned for in the Interim Line Sharing Agreement, Qwest made the business decision to deploy splitters inefficiently. Qwest, for example, unilaterally chose to construct two new bays for splitter deployment even though the Interim Line Sharing Agreement did not require that Qwest install any new bays at all.[63] While that may have increased the cost of deployment for Qwest, the CLECs should not be required to pay for the unilateral and unnecessary Qwest business decisions that increase costs. That fundamental truth remains true whether or not Iowa Utilities II becomes the law.

The application to this case of the basic premise that CLECs should not pay for unilateral business decisions made by the ILEC is simple:

Had Qwest deployed splitters efficiently, as the Interim Line Sharing Agreement permitted it to do, Qwest could and should have collocated splitters within 25 feet of the frame because (i) it lowers the cost of cabling, (ii) the splitter could be placed in any existing shelf space within 25 feet of the frame (up to seven rows of equipment away from the frame), and (iii) there is no requirement in the Interim Line Sharing Agreement that Qwest always construct new splitter bays;

The "fill rate" for bays containing splitters should always be 100% – that is, bays containing splitters should always be 100% filled over time – because Qwest can fill up new bays with its own equipment or fill up existing empty bay space with splitters; and

The engineering estimates proposed by Qwest are too high because less engineering work would be required if Qwest put the equipment in existing bays as the Interim Line Sharing Agreement permits.

Inefficient decisions raise the cost of a good or service so as to exceed the economic value

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62 DLEC Brief, ¶¶ 64, 71.

63 Hearing Transcript (Hubbard), 694:1-13.

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601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

1 of that good or service. These inefficient costs – even if actually incurred -- should not form the
2 basis for regulatory pricing decisions. Imposing this kind of inefficient decision on competitors
3 under the guise of "cost-based pricing" is bad economics, allows the ILEC to unilaterally raise the
4 costs of its competitors, and is inconsistent with binding authority.

5 Finally, Qwest's argument that the CLECs have somehow waived their right to efficient
6 placement of the splitters by agreeing that the splitters should be placed as close to the DS0
7 terminations as possible is wholly without merit.[64] In the first place, requiring the splitter to be
8 placed as close to the DS0 terminations as possible is, in fact, intended to create efficiencies and
9 reduce cost. Second, Qwest's argument is dependent on its claim that placing the splitter as close
10 as possible to DS0 terminations on an intermediate distribution frame ("IDF") means it cannot be
11 placed within 25 feet of the main distribution frame ("MDF"). It is undisputed, however, that the
12 only difference between an IDF and an MDF is functionality: ILECs like Qwest call any frame
13 where CLEC DS0s are terminated the "IDF".[65] Therefore, whether the splitter is placed 25 feet from
14 the IDF or 25 feet from the MDF, the key is that the splitter be placed 25 feet from the frame where
15 the terminations are located. With that understanding, placing the splitter within 25 feet of the IDF
16 is in reality, and for purposes of cabling, the functional equivalent of placing the splitter within 25
17 feet of the MDF. The evidence shows the splitter can and should be located within 25 feet of the
18 DSO terminations when the Interim Line Sharing Agreement is properly implemented. Neither the
19 Agreement nor the DLECs' cable length proposals relies on the IDF/MDF distinction. As a result,

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1 [64] Qwest Brief, ¶ 74.
1 [65] Hearing Transcript (Hubbard), 721-25.

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4400 TWO UNION SQUARE
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1 the DLECs are not contractually bound to pay for inefficient splitter placement.

2 **2. Engineering Time Assumptions**

3 The Commission should reject Qwest's proposed engineering time estimates because they
4 are not efficient. The Commission should reject Qwest's arguments regarding the engineering time
5 estimates proposed by Mr. Hubbard because those estimates are not efficient. While Qwest argues
6 that Mr. Hubbard's estimates are based on actual experience, Mr. Hubbard has never done central
7 office engineering work himself. To the contrary, his time estimates are based solely on his hearsay
8 recitations of conversations with unnamed Qwest engineers.[66] In addition, as explained more fully
9 in the DLECs' Post-Hearing Brief, Mr. Hubbard's testimony is not credible because (a) it is self-
10 contradictory; (b) it seeks to charge CLECs for Qwest errors by requiring engineering time for both
11 data input and subsequent validation of database plans; and (c) neither Mr. Hubbard nor Mr.
12 Thompson adjusted the engineering numbers based on either the type of splitter collocation or the
13 proper allocation of bay engineering across splitter shelves.[67]

14 Verizon's attempt to charge for engineering as a percentage of material cost[68] is not sound
15 pricing, and does not effectively capture the costs of engineering splitter collocation. The
16 Commission should reject this approach in full.

17 **3. Efficient Configuration**

18 a. The Commission should require Verizon to make available MDF-
19 mounted splitter collocation.

1 [66] DLEC Brief, ¶ 72.
1 [67] DLEC Brief, ¶¶ 72-73.
1 [68] Verizon Brief, ¶ 55.

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1 Verizon does not wish to allow CLECs to continue to implement the Verizon-owned splitter
2 option.[69] The Commission should not allow Verizon to withdraw this option after CLECs have
3 deployed their networks in reliance on that option. Such a result is inefficient and unfair to CLECs.

4 ___________________b. The Commission should reject Qwest's interconnection tie pair
5 charges.

6 Although Qwest does not address its interconnection tie pair charges in its brief, it continues
7 to claim a right to be compensated for the use of an IDF.[70] As described in the DLECs' Post-Hearing
8 Brief, this is inefficient and contrary to the FCC's Advanced Services Order.[71] The Commission
9 should not require CLECs to pay the cost of an IDF, and as a result should reject Qwest's proposed
10 interconnection tie pair charge.

11 **C. NON-RECURRING CHARGES**

12 Qwest's position on its proposed line-sharing installation and disconnection charges is
13 difficult to decipher. First, Qwest states these charges are the same charges imposed for installation
14 and disconnection of a loop.[72] As the DLECs have pointed out, Qwest admits these two functions
15 require different action to be taken.[73] Qwest then explains that it did not make any adjustments to
16 its NRC model because "those prices already reflect efficiencies in order processing that have yet
17 to be achieved."[74] Apparently, Qwest did not adjust that model to reflect line sharing because the
18 model underestimates the actual costs of the irrelevant function. This seems to be clear (if not

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1 69 Verizon Brief, ¶ 58.
1 70 Qwest Brief, ¶¶ 83-85.
1 71 DLEC Brief, ¶¶ 78-80.
1 72 Qwest Brief, ¶ 88.
1 73 DLEC Brief, ¶ 83 (citing Hearing Transcript (Thompson), 466:18-21).
1 74 Qwest Brief, ¶ 89.

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sound) until Qwest concludes that its "proposed rates for line sharing installation and disconnection properly reflect the actual costs Qwest will incur to perform these tasks."[75]

In other words, the NRC model does not consider line sharing, but because it understates loop NRCs, it necessarily predicts actual line sharing NRCs. This "logic" is flawed, and there is no evidence on the record to allow the Commission to establish proper non-recurring costs. The Commission should reject Qwest's proposed line sharing installation and disconnection prices in this docket.

IV. OSS COST RECOVERY

Qwest claims the Commission's 17th Supplemental Order authorizes Qwest to recover all of its OSS costs from CLECs.[76] The Commission's 17th Supplemental Order and the record on which it was based did not encompass line sharing, and cannot be regarded as resolving questions related to line sharing. In particular, the provision of xDSL service over a line also used for POTS is a new arrangement to which customers have only recently begun to subscribe. Recovery of the cost of OSS development for this new arrangement raises different issues than recovery of the cost of OSS development for the broad range of UNEs necessary to provide traditional telecommunications services. The Commission should find its 17th Supplemental Order does not require recovery of Qwest's inadequately-proven OSS expenses. Further, skepticism regarding the amount of cost to be recovered, as expressed in the FCC's Line Sharing Order and in the 17th Supplemental Order, is well

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[75] Qwest Brief, ¶ 89 (emphasis added).
[76] Qwest Brief, ¶¶ 95, 103.

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1 founded.[77] This skepticism is not assuaged by examination of the evidence presented by Qwest in
2 this proceeding. The amounts claimed are neither forward looking economic costs nor are they
3 known and measurable expenditures, and as a result should be rejected.

4 As described in the DLECs' Post-Hearing Brief, Qwest and its retail xDSL customers benefit
5 from the OSS improvements at issue, and so any recovery of these expenditures should be from all
6 customers receiving xDSL services over a line that is also used for POTS.[78] Contrary to Qwest's
7 claim,[79] this position holds true whether or not Qwest provides xDSL through a separate affiliate.[80]
8 The Commission should find at this time that any line sharing-specific OSS transition costs should
9 be recovered from all xDSL customers who receive xDSL service over the same line used for their
10 POTS service, and require additional filings to establish the proper amount of OSS costs to be
11 recovered.

12 Finally, Qwest's position is that its proposals for time for recovery and demand for shared
13 lines are not necessarily correct, but must be accepted because they are the only proposals in the
14 record.[81] Under FCC Rule 51.505(e), Qwest has the burden of proving its proposals are correct, and
15 until it has done so, it should be denied recovery.[82] The Commission should require any OSS
16 recovery to be based on accurate estimates of shared lines and the life of line sharing.

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1 [77] 17th Supplemental Order, General Cost Docket, Docket Nos. UT-960369, et. Al., ¶¶ 107 et seq.; FCC Line Sharing
2 Order, ¶¶ 94, 96.
1 [78] DLEC Brief, ¶ 98.
1 [79] Qwest Brief, ¶ 117.
1 [80] DLEC Brief, ¶ 98.
1 [81] Qwest Brief, ¶¶ 112-16.
1 [82] 47 C.F.R. § 51.505(e); Local Competition Order, ¶ 680.

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ATTORNEYS AND COUNSELORS AT LAW
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4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

V. CONCLUSION

Since the ILECs began providing xDSL over the high frequency portion of loops, they have sought to exploit the ability of that technology to create yet another monopoly market. Thanks to the FCC, consumers will not be to limited to monopoly provision of advanced services over the loop they pay for each month. Having lost the battle to prevent competition at the FCC, the ILECs now strive to avoid meaningful competition by proposing prices to this Commission that would give themselves a continued market advantage. The Commission should act in the interests of Washington consumers, and bring meaningful competition in the provision of xDSL service by accepting the DLECs' pricing proposals in this docket.

Respectfully submitted this 23rd day of October, 2000.

MILLER NASH llp

____
Brooks E. Harlow
WSB No. 11843

Attorneys for Intervenor
Covad Communications Company

RHYTHMS NETCONNECTIONS INC.

____
Douglas Hsiao
Assistant General Counsel
9100 E. Mineral Circle
Englewood, CO 80112
Phone: (303) 876-2704

1 Fax: (303) 476-2272
2
3
4 Of Counsel:
5
6 Laura Izon
7 Covad Communications Company
8 4250 Burton Drive
9 Santa Clara, CA 95054
10 Phone: (408) 987-1105
11 Fax: (408) 987-1111
12