**BEFORE THE**
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| **In the Matter of the Petition of Qwest Corporation for Arbitration with Eschelon Telecom, Inc. Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996** | **Docket No. UT-063061** |

# EXHIBIT DD-36

# TO THE

# SURREBUTTAL TESTIMONY OF DOUGLAS DENNEY

# ON BEHALF OF ESCHELON TELECOM, INC.

**APRIL 3, 2007**

ORDER NO. 07-109

ENTERED 03/20/07

# BEFORE THE PUBLIC UTILITY COMMISSION

# OF OREGON

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| In the Matter of | ) | |
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| COVAD COMMUNICATIONS COMPANY; ESCHELON TELECOM OF OREGON, INC.; INTEGRA TELECOM OF OREGON, INC.; MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.; and XO COMMUNICATIONS SERVICES, INC. | ) | ORDER |
| | ) | |
| Request for Commission Approval of Non-Impairment Wire Center List. | ) | |

DISPOSITION: GRANTED IN PART AND DENIED IN PART CONSISTENT WITH ORDER

**Introduction.** This case involves matters relating to future availability of certain Unbundled Network Elements (UNEs) in the provision of telecommunications services to the public and the interplay of federal and state regulation of telecommunications. For a number of years subsequent to the passage of the federal Telecommunications Act of 1996 (the Act), Incumbent Local Exchange Carriers (ILECs) were required to provide Competitive Local Exchange Carriers (CLECs) with access to certain of the ILECs' telecommunications facilities and services on an unbundled basis. The FCC deemed this necessary because alternative facilities from other providers were not sufficiently available within the service areas of wire centers where the CLECs operated to permit adequate competition to flourish. The FCC's expectation was that CLECs could use these UNEs in various combinations either in conjunction with their own facilities or on a resale basis, to offer telecommunications services to the public.

The common expression used to characterize these wire centers was that they constituted markets that were competitively "impaired." The following question then was raised: "when will there be a sufficient number of alternative providers of telecommunications facilities within the serving area of particular wire centers so that CLECs are not impaired in their ability to compete without access to those ILEC facilities as UNEs and thus, the ILECs' offering of ILEC facilities on an unbundled basis will no longer be mandated?"

On February 4, 2005, the Federal Communications Commission (FCC) released its Triennial Review Remand Order (*TRRO*),[1] which answered that question, at least in part. In that Order, the FCC established a default date of March 11, 2006, terminating ILECs' obligations to offer unbundled high-capacity (DS1/DS3/dark fiber) loops and unbundled high-capacity (DS1/DS3/dark fiber) interoffice transport in those wire centers certified by the ILECs to satisfy the *TRRO* impairment analysis criteria. The criteria were the number of business lines and the number of fiber-based collocators in each wire center.[2]

At the same time, CLECs were given the opportunity to challenge the designation of the wire centers. In so doing, a CLEC was required to "undertake a reasonably diligent inquiry into whether the wire centers in question meet the criteria and then self-certify to the ILEC that the CLEC was entitled to access to the aforementioned UNEs." Upon making that showing, the *TRRO* required that the ILEC must "immediately process" the UNE order and then may subsequently bring a dispute before a state commission or other authority if it contests the CLEC's access to the UNE. If the ILEC prevails, the CLEC may be back-billed for the time period when it should have paid the higher rate.[3]

This proceeding arises out of Qwest's submission of its list of non-impaired wire centers in Oregon and the objections to that list and to the procedures Qwest proposes to follow under the *TRRO*.

On February 15, 2006, Covad Communications Company; Eschelon Telecom of Oregon, Inc.; Integra Telecom of Oregon, Inc.; McLEODUSA Telecommunications Services, Inc.; and XO Communications Services, Inc. (Joint CLECs), filed a letter requesting that the Commission act to investigate the data being provided by ILECs Qwest Corporation (Qwest) and Verizon Corporation (Verizon) to the Commission in developing the Commission-approved list of non-impaired wire centers and to implement a process for reviewing and updating the lists. Verizon was subsequently dismissed from the case. The Commission issued Protective Orders 06-110 and 06-141. On April 7, 2006, Qwest submitted an issues list matrix prepared jointly by Qwest and the Joint CLECs.

On June 9, 2006, Joint CLECs filed a Motion to Compel Qwest to Respond to Data Requests (Motion). Joint CLECs asserted that the data sought "is reasonably calculated to lead to the discovery of admissible evidence."[4] The data in question was the subject matter of data request Nos. 33 and 34 of 49, seeking wire center data from Qwest's December 2004 ARMIS Report submitted to the FCC in April 2005.

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[1] *In re Unbundled Access to Network Elements,* WC Docket No. 04-313, CC Docket No. 01-338, FCC No. 04-290, Order on Remand.
[2] *Id.*, ¶¶ 146, 155, 166, 174, 178, 182 and 195.
[3] *Id.*, ¶ 234.
[4] Motion, p. 1.

According to the Joint CLECs, on April 28, 2006, Joint CLECs propounded 49 data requests to Qwest, including Request Nos. 33 and 34. Request 33 sought information previously provided by Qwest in Highly Confidential Attachment C and Confidential Attachment D, except updated through March, 2005, or if that data was not available, updated through December 31, 2004. Highly Confidential Attachment C provided UNE-L/EEL loop counts for each CLEC, and Confidential Attachment D provided UNE-P loops by wire center. Request 34 sought information previously provided by Qwest in Confidential Attachments B, C and D, except updated through March 2005, or if that data was not available, updated through December 31, 2004. Confidential Attachment B contained all business line counts in non-impaired wire centers; Attachment C provided UNE-L loop counts for each CLEC and Attachment D provided the number of DS1 and DS3 circuits.[5]

Qwest declined to provide the data, citing paragraph 105 of the *TRRO* for the principle of using only data from the December 2003 ARMIS Report. Qwest also objected to Request 34 as "vague, ambiguous and unclear."[6]

On June 26, 2006, Qwest Corporation filed its Response to the Joint CLEC's Motion to Compel Qwest to Respond to Data Requests (Response). Qwest asserted that the requests sought data that was not relevant to the case because the data that the FCC intended to be utilized in this proceeding is the December 2003 ARMIS 43-08 data "that Qwest submitted to the FCC in February 2005 in support of its initial wire center list and is consistent with the data upon which the FCC relied in making its wire center non-impairment criteria determinations in its *TRRO* order."[7]

The ALJ issued a Ruling on July 26, 2006, granting the Joint CLECs' Motion, stating, in part: "While the Commission has yet to determine which (2003 or 2004 ARMIS) data shall be used as the basis for its findings and conclusions, by making the information available, the Commission will be better able to evaluate its impact and relevance to the proceedings."[8]

By letter of June 30, 2006, Qwest Corporation, on behalf of all of the parties to the proceeding, filed a Joint Motion for Adoption of Proposed Procedural Schedule. The letter affirmed that the parties waived their right to a hearing and that they had agreed to dates for brief supplemental testimony in lieu of the evidentiary hearing. Supplemental testimony was filed on August 30, 2006.

[5] *Id.*, p. 2.
[6] *Id.*, p 3.
[7] Response, p. 1.
[8] Ruling, p. 3.

Opening briefs were filed on September 21, 2006, and Reply Briefs were filed on October 17, 2006. On December 19, 2006, Qwest filed a Request for Official Notice and Submission of Supplemental Authority requesting that official notice be taken of the Washington Utilities and Transportation Commission's December 15, 2006, *TRRO* Order, Docket UT-053025, Order 06 and the accompanying Modified Interpretative Statement.

By the time the record was closed in the proceeding, the parties had reduced or consolidated the issues in the Joint Issues List and needed to brief the following six issues:

1. What time period is the proper data vintage for determining wire center non-impairment for the initial list of Oregon wire centers?

2. What is the proper means to calculate business line counts as proxies for the existence of competition when creating the initial list of non-impaired wire centers, and consequently do Qwest's business line counts in designated wire centers meet the *TRRO* non-impairment thresholds?

3. What is the proper means to calculate the number of fiber-based collocators as proxies for the existence of competition when creating the initial list of non-impaired wire centers, and consequently does Qwest's fiber-based collocator evidence in designated wire centers meet the *TRRO* non-impairment thresholds?

4. What procedures should be adopted for evaluation and implementation of future wire center classifications?

5. How should Qwest process orders submitted by CLECs for UNEs in non-impaired wire centers?

6. Should the Commission authorize Qwest to impose a charge for converting UNEs to tariffed services, and what should the appropriate charge be for conversions of tariffed services to UNEs?

**Issue 1: What time period is the proper data vintage for determining wire center non-impairment for the initial list of Oregon wire centers?**

**Background.** As noted in the ALJ's Ruling cited above, the FCC adopted fiber-based collocation and business line counts as the triggers for determining whether impairment exists in a particular wire center. In paragraph 105 of the *TRRO*, the FCC defines business lines as ILEC "ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops." The Commission must decide in the absence of an unambiguously categorical FCC statement what may reasonably be interpreted as the FCC's intentions with respect to which ARMIS data is to be utilized in state proceedings such as these; *i.e.*, should the Commission base its decision on the December 2003 ARMIS data or the more current ARMIS data available to Qwest at the time the wire center designations were

made, consistent with public interest in the promotion of full and fair competition for telecommunications services in Oregon? The *TRRO* became effective March 11, 2005.

**Positions of the Parties.** The Joint CLECs contend that determinations made pursuant to that order should therefore be based on data that is contemporaneous with that date.[9] Joint CLECs also cite a Michigan PSC case in which the ILEC, SBC, was found to be non-compliant with the 47 C.F.R. 51.319(a)(4) standards test because the data was not recent enough.

> The age of the data must be close enough in time to reflect conditions at the time that SBC claims that the wire center is no longer impaired. In this case, the Commission finds that SBC should have used the 2004 ARMIS data, which was available, even if not fully edited and incorporated in a report to the FCC. The analysis requires using data gathered for ARMIS calculations, not the calculations themselves.[10]

Joint Parties also note that BellSouth has interpreted the FCC requirements the same way and relies on 2004 ARMIS data for the line count information.[11]

Qwest argues that the use of December 2003 data is consistent with the FCC's language and contends that the reference to ARMIS 43-08 data in paragraph 105 meant the data on file at the effective date of the order.[12]

Qwest asserts that the CLECs' arguments are without merit: the FCC would not have intended that the RBOCs use incomplete and unofficial data on which to make their non-impairment studies. The intervention of time does not mean that the earlier data was inappropriate for the preparation of the list. Furthermore, only two of at least nine state commissions have used data other than the December 2003 ARMIS data.[13]

In reply, the Joint CLECs note that case law is moving toward Joint CLECs' view and that the Washington Utilities and Transportation Commission (WUTC) reversed its Administrative Law Judge and ordered the use of the most recent data available. "Because these designations are permanent and materially affect the development of competition in Washington, we determine that our designation decision should be based on the most recent data available."[14]

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[9] Joint CLEC Opening Brief, p. 8.
[10] *Id.*, p. 8, citing *In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC MICHIGAN and VERIZON,* Case No. U-14447, p. 5, Order issued September 20, 2005.
[11] *Id.,* citation omitted.
[12] Qwest Opening Brief, pp. 14-15.
[13] *Id.*, p. 15, ftn. 19, and cases cited therein.
[14] Joint CLEC Reply Brief, pp. 4-5, and cases cited therein.

Qwest notes that the 2003 data set was called by the FCC "an objective set of data that incumbent LECs have already created for other regulatory purposes." Therefore, the FCC intended that the parties use data that had already been collected. [15] In its Request to Consider Supplemental Authority (Request), filed December 19, 2006, Qwest notes that the WUTC had recently reversed its decision to use 2005 data and reverted to 2003 data because it felt that it was constrained to do so by the FCC's decision.[16]

**Discussion.** In determining which data should be used, the Commission must look not only to what a reasonable interpretation of the FCC's intent would be, but also one that is most consistent with the public interest in the promotion of robust competition in the marketplace for telecommunications services. In this instance, the FCC did not make unequivocally clear its intentions by specifying that the 2003 data were to be used; neither has it seen fit to issue a subsequent order clarifying the ambiguity surrounding the interpretation of its order. Rulings by state commissions around the country that venture an opinion as to the FCC's intent have reached no clear consensus.

The WUTC Order upon which Qwest relies contains the following statements relevant to our analysis:

> We continue to find that the FCC did not mandate or require the use of data from a particular year when applying the criteria to particular wire centers.
>
> We are persuaded, however, that our decision to use 2005 data may run afoul of the FCC's requirement that wire center designations are permanent. If a wire center meets the FCC's criteria at the time an ILEC designates the wire center, but does not meet the criteria when applying data from a later period of time, the wire center designation would change, contrary to the FCC's rules. Thus, we find that state commissions must evaluate the most current data available when the ILECs designated the wire center as non-impaired . . . .
>
> Given this clarification, we strike paragraphs 20-21 of Order 04. While we continue to believe those paragraphs describe the preferable public policy, we are constrained by the FCC's decision.

[15] Qwest Reply Brief, p. 12, citing *TRRO* ¶ 105.
[16] Request, p. 2, citing Docket UT-053025, Order 06, December 15, 2006, ¶¶ 33-34.

> While we recognize that the ILECs had presumably collected 2004 ARMIS data and were preparing the data for filing with the FCC by April 1, we find the ILECs reasonably relied on 2003 data given the circumstances at the time.[17]

Unlike the Washington Commission, we are not facing the choice of 2003 versus 2005 data. We note that Qwest had the 2004 data readily available and could have used it in its wire center designations (as BellSouth had), but chose not to. WUTC notes that the FCC did not mandate the use of 2003 data and that using more recent data was "the preferable public policy." Although the use of 2005 ARMIS data might run afoul of the *TRRO*, as WUTC suggests, we find that the use of 2004 data does not.

The availability to CLECs of alternative sources for telecommunications facilities has a real world impact on the state of competition in Oregon. We have had a consistent policy to encourage competition in the telecommunications marketplace, and it is therefore in the public interest to use the data that most closely reflects *current, real world* circumstances. The fact that Qwest's choice of 2003 rather than 2004 ARMIS data might be considered one of two reasonable choices does not trump these important public policy concerns. The 2004 ARMIS data shall be used in this proceeding.

**Issue 2: What is the proper means to calculate business line counts as proxies for the existence of competition when creating the initial list of non-impaired wire centers, and consequently do Qwest's business line counts in designated wire centers meet the *TRRO* non-impairment thresholds?**

The *TRRO* defines Tier 1 wire centers as those with four or more fiber-based collocations or with 38,000 or more business lines.[18] Tier 2 wire centers are defined as those with three or more fiber-based collocations or with 24, 000 or greater business lines.[19] Tier 3 wire centers are all those that are not Tier 1 or Tier 2 wire centers.[20] For the purposes of the *TRRO*, "business lines" include (1) UNE-loop counts (including EELs), (2) business UNE-P counts and (3) Qwest business line counts.[21]

The FCC found that for Tier 2 and Tier 3 wire centers CLECs are impaired with respect to DS1 transport and, as a consequence, incumbent LECs are obligated to provide unbundled DS1 transport that originates or terminates in any Tier 2 or Tier 3 wire center.[22] The FCC concluded that CLECs were not impaired without access to unbundled DS3 transport on routes connecting wire centers where both are classified as either Tier 1 or Tier 2.[23] Similarly, CLEC access to unbundled dark fiber

[17] WUTC Order, ¶¶ 33-36.
[18] *TRRO*, ¶ 112.
[19] *Id.*, ¶ 118.
[20] *Id.*, ¶ 123.
[21] *Id.*, ¶ 105.
[22] *Id.*, ¶ 126.
[23] *Id.*, ¶ 129.

was found not to be impaired in Tier 1 and Tier 2 wire centers.[24] Thus, access to unbundled DS3 and dark fiber must be available to CLECs only in Tier 3 wire centers.

CLECs dispute Qwest's classification of three wire centers that Qwest has classified as non-impaired. Qwest designated Bend and Portland Alpine as Tier 2, based on the number of business lines.[25] Qwest designated Medford as Tier 1, based on the number of fiber-based collocators.[26] Joint CLECs dispute the methodology that Qwest has used to calculate both elements.

**Data Review.** Qwest provided confidential and highly confidential data in conjunction with Bench Requests BCH 01-002 and 01-003. BCH 01-002, Exhibits B and C, provided highly confidential information regarding the UNE-Ls and EELs of each CLEC by wire center, as well as the number of collocators in each wire center and the asserted tier classification of that wire center. BCH 01-002, Exhibit D, provided confidential information on the number of UNE-P Voice Grade Equivalent lines in each wire center. BCH 01-003, Exhibits C, D and E, provided a summary of 12/2003 TRRO Total Business Switched Access Lines by wire center, 12/2003 TRRO Business Switched Access Lines vs. ARMIS 43-08, Table III, and 12/2003 TRRO Quantities Summary-Total Switched Access Lines, including and excluding voice channels on DS1 pipes. BCH 01-003 highly confidential Exhibits A and B contained correspondence regarding the status of several fiber collocators in various wire centers.

**Positions of the Parties.** With respect to the calculation of line counts, Joint CLECs object to Qwest's inclusion of line equivalents for the spare capacity on digital circuits. "The FCC has never authorized such an adjustment, which is inconsistent with both the letter and the spirit of the TRRO." Joint CLECs contend the language of the TRRO demonstrates that the count should include only those lines actually "used to serve" the customer, rather than spare capacity. Joint CLECs contend that the only other Commissions in Qwest's territory to address the issue, Washington and Utah, reached that same conclusion. The North Carolina Commission stated specifically that "the FCC did not intend for the ILECs' ARMIS business line count to be altered in any way. Therefore . . . BellSouth has inappropriately adjusted the high capacity business lines represented in the ARMIS report to reflect the maximum potential use." Joint CLECs also argue that Qwest's proposed adjustment of its ARMIS 43-08 business line counts to account for lines that are served out of one wire center but terminated in another is an unauthorized adjustment and is followed by neither AT&T nor Verizon.[27]

Qwest notes the FCC TRRO definition of business lines and the rules embodied in 47 C.F.R. §51.5, stating "The FCC's directives are very clear: *all* ILEC lines that are used to serve business customers . . . should be included in the business line count."

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[24] *Id.*, ¶ 133.

[25] Qwest Response to Bench Request BCH 01-002, Attachment A. Joint CLECs assert they are Tier 3. *See* Surrebuttal Testimony of Douglas Denney dated July 12, 2006, Joint CLECs/13, Denney/2.

[26] Qwest designated the Medford wire center as Tier 1. *See* BCH 01-002, Attachment A. Joint CLECs contend that the Medford wire center is Tier 3. Joint CLECs/13, Denney/2.

[27] Joint CLEC Opening Brief, pp. 3-6, and cases cited therein.

(Emphasis in text.)[28] Qwest contends that the FCC intended that the full capacity of high capacity digital business lines should be used in the calculation because the TRRO requires that an ILEC should count "each 64-kbps equivalent as one line." Qwest also asserts that the Joint CLECs undercount lines because Qwest does not track lines by originating wire center. Similar principles apply with respect to Business UNE-P line counts, DS1 and DS3 loop counts.[29] The counting of full capacity for all digital channels satisfies the plain language of 47 C.F.R. §51.5. Qwest argues that Joint CLECs have parsed the language to mean that individual channels have to be in use in order to serve a business customer. "Indeed, the mere fact the FCC mandated this full 24-VGE channel requirement (for a DS1 line) can only lead to the conclusion that it did not 'intend' to count only actual channels 'in use.'"[30] Qwest notes that the ARMIS Report includes only channels "in use," but if the FCC intended only those lines to be counted, Subsection 3 of Rule 51.5 would have been unnecessary; the FCC intended that each 64-kbps channel equivalent "*shall* be counted as *one line*."[31] Qwest also notes that a number of jurisdictions have accepted its interpretation of the FCC language and permitted counting of unused capacity equivalents.[32]

**Discussion.** With respect to whether lines "used to serve" should include spare capacity, including DS1 equivalents for the purpose of calculating line counts and consequent wire center eligibility, the Commission is again asked to divine the FCC's intentions. The relevant language could reasonably be interpreted as either Qwest or the Joint CLECs propose. Although there is a lack of general consensus among the various state commissions, we agree with the comments of the North Carolina commission that a simple reading of the phrase "used to serve" precludes counting spare—i.e., unused—capacity either in individual lines or equivalents. This interpretation is not only reasonable; it most closely reflects current, real world circumstances and is most consistent with our policy of promoting robust competition in the offering of telecommunications services to the public.

Joint CLECs also have asked that, if Qwest is authorized to modify its ARMIS 43-08 line counts (i.e., include unused capacity as described by Qwest above), the Commission make certain additional adjustments, including using the most contemporaneous data for UNE-P and UNE-loops.[33] In light of our findings above, Joint CLECs' request is moot.

We direct the parties to jointly submit new business line data for the Bend and Portland Alpine wire centers. The submission shall utilize business line counts, as defined in paragraph 105 of the *TRRO,* taken from the 2004 ARMIS 43-08 report. The line counts for each wire center shall include only lines actually used to serve customers and shall exclude spare capacity, as measured in voice grade equivalents.

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[28] Qwest Opening Brief, p. 13.
[29] *Id.*, p. 20.
[30] Qwest Reply Brief, pp. 5-6.
[31] *Id.*, p. 6, emphasis in text.
[32] *Id.*, pp. 7-8.
[33] Joint CLEC Opening Brief, pp. 7-8.

**Issue 3: What is the proper means to calculate the number of fiber-based collocators as proxies for the existence of competition when creating the initial list of non-impaired wire centers, and consequently does Qwest's fiber-based collocator evidence in designated wire centers meet the *TRRO* non-impairment thresholds?**

The Joint Issues List submitted by the parties originally identified the question as follows: Has Qwest justified that Portland Capitol and Medford wire centers have at least four fiber-based collocators as defined by the FCC in the *TRRO* and should thus be classified as Tier 1 by the Commission?[34]

**Positions of the Parties.** Only the Tier 1 classification of the Medford wire center, as determined by the number of fiber-based collocators, remains at issue. Joint CLECs contend that Qwest incorrectly counted one company (Company A) despite having been informed that Company A did not own or operate fiber in the Medford wire center. Joint CLECs assert Qwest misinterprets the *TRRO* by relying on the fact that Company A obtains transport from both Qwest and non-Qwest affiliated carriers.[35] Joint CLECs assert that merely obtaining transport does not mean that a company operates or has the right to use the fiber itself and does not meet the "indefeasible right of use" standard for the purpose of the *TRRO* analysis.[36] Joint CLECs also claim that a second company (Company B) should not have been counted because Company B: (1) had declared bankruptcy and was in the process of going out of business on the effective date of the *TRRO*, (2) served only a handful of customers and (3) was completely out of business six months later. Such a company would not demonstrate that, as the *TRRO* would have it, "significant revenue opportunities exist for competitive LECs."[37]

Qwest asserts that Medford is one of five wire centers that meet the FCC's threshold for Tier 1 non-impairment status for interoffice transport.[38] After describing its information gathering and analysis methods,[39] Qwest states that it properly designated Company A as a fiber-based collocator, because of its admitted use of both Qwest and non-affiliated CLEC fiber.[40] Although Company B may be out of business, Qwest claims that it, too, is rightly included in the determination calculation because it was operational on March 11, 2005, even though Qwest confirmed that the collocation was decommissioned in November 2005.[41]

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[34] Qwest claimed four fiber-based collocators in Portland Capitol and Medford.
[35] Joint CLEC Opening Brief, p. 10, citing exhibit ref. in ftn. 13.
[36] *Id.*, p. 11.
[37] *Id.*, pp. 11-13.
[38] Qwest Opening Brief, pp. 20-21.
[39] *Id.*, pp. 21-23.
[40] *Id.*, p. 24.
[41] *Id.*, p. 25.

**Discussion.** Here again we find it to be in the public interest to use data that most closely reflects current, real world circumstances. Wire center non-impaired status classification is a permanent, i.e., irreversible, act and should therefore be firmly based in fact. Company A was not shown to have either ownership or an indefeasible right of use of facilities from another carrier, the standard enunciated in paragraph 102, Note 292, of the TRRO.[42] Thus, Company A's leasing of fiber circuits without any ownership or operation of a fiber optic network does not fulfill the language of the *TRRO* for "fiber-based collocators." Company B is no longer a factor in the marketplace, and including it in this permanent calculation fails to reflect the true state of competition in the Medford wire center for the purposes of a non-impairment determination. However, we are constrained by the fact that, as of the effective date of the *TRRO,* Company B was providing service to customers, and Qwest's claim for its inclusion in the list of fiber-based collocators is supported by the record. We therefore conclude that, based on the number of fiber-based collocators, the Medford wire center should be classified as Tier 2.

**Issue 4. What procedures should be adopted for evaluation and implementation of future wire center classifications?**

The parties disagree with respect to four distinct areas: (1) whether Qwest should be required to provide advance warning that a wire center is approaching classification in a higher tier; (2) the amount of information Qwest should file and whether Qwest should provide prior notice of filing for Commission approval of a new wire center classification; (3) the effective date of a new classification; and (4) the length of the transition period for the affected UNEs.

**(1) Should Qwest be required to provide advance warning that a wire center is approaching classification in a higher tier?**

**Positions of the Parties.** Joint CLECs ask the Commission to require Qwest to notify affected CLECs when the number of business lines in a wire center is within 5,000 lines of meeting the *TRRO* threshold or the number of fiber-based collocators is within one fiber-based collocator of meeting the *TRRO* threshold. Such notification would enable CLECs to better prepare to find alternatives to UNEs and any impact or burden on Qwest would, in Joint CLECs' view, be minimal.[43]

[42] "We find that when a company has collocation facilities connected to fiber transmission facilities obtained on an indefeasible right of use (IRU) basis from another carrier, including the incumbent LEC, these facilities shall be counted for purposes of this analysis and shall be treated as non-incumbent LEC fiber facilities."

[43] Joint CLEC Opening Brief, pp. 14-15.

Qwest strongly objects to the Joint CLEC proposal, asserting that it would be an additional administrative burden for which Qwest has no administrative process in place. Furthermore, neither the *TRRO* nor any state Commission has imposed such a requirement.[44] Qwest also claims that 5,000 lines or one fiber collocator "does not mean that a change in the impairment classification for that wire center is imminent," and that fluctuations in line counts "could actually cause CLECs to take costly action to prepare for a wire center non-impairment reclassification that would not occur." Qwest also voices a concern that advance notice might encourage CLECs to "game the system."[45] Finally, Qwest notes that no such requirements exist in the *TRRO* and that no state commission anywhere has imposed such requirements; the Utah Commission also rejected the proposal.[46]

**Discussion.** While we appreciate the uncertainty that the *TRRO* imposes upon CLECs, despite Joint CLECs' contention that the more information they have, the better able they will be to make sound decisions,[47] we are not convinced that the proposed notification program will assist the CLECs in any meaningful way. Furthermore, we acknowledge the uniform rejection of the CLECs' proposal throughout the Qwest region as an indication of other Commissions' concurrence in our view.

Qwest has testified that the proposed notification mechanisms would be burdensome and could provide false signals, and Joint CLECs have not provided evidence to the contrary. We therefore accept that putting notification procedures in place (and raising the possibility of sanctions for their violation) may well be a significant burden, especially in light of the fact that such systems would be unique to Oregon. However, we find Qwest's conjectures regarding CLECs' "gaming the system" too remote and speculative to be worthy of consideration.

By adopting the Qwest position on this issue, we also ensure uniformity of treatment of CLECs throughout the Qwest region. Qwest shall not be required to provide notification of approaching wire center non-impairment threshold levels.

**(2) What information should Qwest file, including prior notice of filing for Commission approval of a new wire center?**

**Positions of the Parties.** Joint CLECs propose that Qwest be required to include all of its supporting documentation with its initial filing for Commission approval of a new wire center classification as a means of facilitating a 30-day review process. Joint CLECs also propose that Qwest provide five days' advance notice to alert CLECs that Qwest will be providing confidential data on the number of UNEs those CLECs

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[44] Qwest Opening Brief, pp. 26-27, citing, e.g., *In the Matter of the Investigation into Qwest Wire Center Data*, Public Service Commission of Utah, Docket No. 06-049-40, issued September 11, 2006 (Utah Order), pp. 24-26.
[45] *Id.*, p. 27, and Qwest Reply Brief, pp. 23-24.
[46] Qwest Reply Brief, pp. 24-25.
[47] Joint CLEC Reply Brief, pp. 6-7.

have in the wire center. This would give CLECs time to object to the disclosure of confidential information.[48]

Qwest responds by saying that Joint CLECs' concerns regarding disclosure of confidential information are overstated. Mechanisms for confidential treatment of CLEC data are readily available via standing non-disclosure agreements or protective orders such as those in this docket.[49] Furthermore, Qwest argues, neither the TRRO nor any other state commission has imposed such a requirement.[50] With respect to supporting documentation, Qwest contends that it is already committed to provide "substantive supporting documentation under a protective order similar to the data that Qwest has provided in this docket . . . . Qwest is certainly well aware that without support for such a filing, reclassification of a wire center could be delayed and that Qwest cannot take advantage of the new competitive environment until reclassification is effective."[51]

CLECs contend that the data Qwest proposes to provide "simply is not sufficient . . . . CLECs need the type of data that they requested in discovery in this case, including Qwest's supplemental [wire center-specific] responses to that discovery."[52]

**Discussion.** The Commission Staff has gone to great lengths in this and other dockets[53] to protect competitively sensitive CLEC information and has readily adapted protective orders to particular circumstances. Furthermore, it is in Qwest's own interests to be as thorough and forthcoming as possible with respect to the submission of supporting documentation. We are not persuaded that adopting the five-day advance notice which Joint CLECs propose will in any way improve upon the procedures already in place. However, we shall require Qwest to include detailed wire center-specific information in its initial filing for Commission approval of a new wire center classification equivalent in scope and particularity to that which was provided in this proceeding pursuant to CLEC data requests.

**(3) How should the effective date of a new classification be determined?**

**Positions of the Parties.** Joint CLECs propose that the Commission should have flexibility in setting the effective date of a new wire center classification. In Joint CLECs' view, this would provide Qwest with the incentive to submit data as quickly as possible so that parties can confirm or raise issues with Qwest's conclusions. This flexibility would also discourage CLECs from using procedural mechanisms to delay the effective dates because the Commission could move up the effective date if it concludes that a CLEC may have raised issues solely for the purposes of delay. The Utah

[48] Joint CLEC Opening Brief, pp. 15-16.
[49] Qwest Reply Brief, p. 25.
[50] *Id.*, p. 26.
[51] Qwest Reply Brief, pp. 26-27.
[52] Joint CLEC Reply Brief, pp. 7-8.
[53] *See, e.g.*, Docket UX 29, Commission Request for Production of Information, March 16, 2005.

Commission reserved itself the authority to delay proceedings in the event of a CLEC objection.[54]

Qwest contends that the 30-day period should be adopted. CLECs would be provided with the same type of data that they received for the initial list of non-impaired wire centers at the time of the Qwest filing. If no objections were raised, the changes would go into effect by operation of law. In the event of CLEC objections, Qwest contends that if it ultimately prevailed on the merits, Qwest should be entitled to back-bill CLECs to the original effective date. The *TRRO,* Qwest notes, has provided for such a true-up procedure.[55] According to Qwest, it is the CLECs, not Qwest who are motivated to delay the process and prevent Qwest from taking advantage of the benefits of the *TRRO.*[56]

**Discussion.** The Utah Commission concluded that a 30-day period between the filing and the effective date struck a reasonable balance: it gave CLECs sufficient time to object while reserving Commission authority to change the effective date for all non-impairment filings if such a change was warranted by the facts and actions of the parties specific to that filing. The Utah Commission also concluded that if the CLECs' claims were without merit, Qwest would be entitled to back-bill to the effective date for the CLECs' use of Qwest's facilities.[57]

We believe that this is a reasonable compromise. We reject the CLEC five-day advance notice as unnecessary and adopt a 30-day effective date in the event that no CLEC interposes any objection to the Qwest filing. In the event that the designation is opposed, we reserve our authority to set another effective date either on our own or upon CLEC motion.

We also require that the initial filing seeking non-impaired status for a wire center contain more granular detail than Qwest has proposed, including Qwest and CLEC-specific business line count and facilities data by wire center, calculating the number of lines served as provided in the discussion of Issues 2 and 3, above. Such data shall be identified as "highly confidential" and subject to the standing special protective order used in this proceeding.

Finally, rather than allowing Qwest to automatically back-bill CLECs to the original effective date if it prevails on the designation generally, we shall only allow Qwest to back-bill to a date designated by the Commission in the event that we specifically find the CLECs' objections to have been without merit or primarily for the purpose of delaying implementation. To do otherwise would have an undue chilling effect on the exercise of the CLECs' rights to scrutinize Qwest's proposed wire center designation.

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[54] Joint CLEC Opening Brief, pp. 17-18, citing Utah Order at 30.
[55] Qwest Opening Brief, pp. 28-29, citing *TRRO* ftns. 408, 524 and 630.
[56] *Id.*, p. 29.
[57] Utah Order, pp. 30-31.

**(4) What is the appropriate transition period for the affected UNEs?**

**Positions of the Parties.** Joint CLECs note that the FCC provided for a one-year transition period for unbundled DS1 and DS3 transport and loops in affected wire centers and 18 months to transition off dark fiber. Joint CLECs believe these time frames should be applied to newly classified wire centers as well.[58] In Joint CLECs' view, the 90-day transition period proposed by Qwest is inadequate because it does not apply to the rates charged for use of its facilities but is limited to network operations required to change the circuit identifications. CLECs would be billed from the effective date, even if they changed facilities during the transition period. CLECs therefore have only 30 days from the date of notification to act to avoid the new charges for UNEs.[59]

Qwest notes that the 12- and 18-month transition periods in the *TRRO* applied only to the initial lists, and there will be fewer newly classified wire centers than the initial list. The Joint CLEC proposal provides incentives to delay implementation of the transition of services "thereby denying Qwest the benefits of wire center reclassification that the FCC intended."[60] Citing the Utah Order at page 33, Qwest proposes that it should be allowed to charge CLECs 115 percent of the UNE rate for non-impaired UNE services and facilities during the transition.[61] If CLECs receive the UNE rate during the transition period, they will have an incentive to delay their transition of services until the end of the transition period.[62]

Joint CLECs may have accepted Qwest's Opening Brief proposal to adopt the Utah Order formula; their Reply Brief does not mention the issue in its discussion captioned Filing for Future Wire Center Classification at page 7, *et seq.*

**Discussion.** The 12- and 18-month transition periods reflected the need to address the large number of wire centers that would be part of the original non-impairment filings. Additions to the non-impaired wire center lists would arrive at far larger intervals and require smaller scale CLEC responses. The 90-day transition period in the Utah Order provides a reasonable balance. The interim compensation plan—115 percent of the current UNE rates for non-impaired UNE services and facilities—is also a reasonable one; CLECs can plan for the future by knowing how to quantify their incremental costs to continue to use UNEs during the transition period, and Qwest will obtain at least some of the benefit the *TRRO* conferred. We adopt the directives set forth on page 33 of the Utah Order.

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[58] Joint CLEC Opening Brief, p. 18.
[59] *Id.*, pp. 18-19.
[60] Qwest Opening Brief, p. 30.
[61] *Id.*, p. 31.
[62] Qwest Reply Brief, p. 20.

**Issue 5. How should Qwest process orders submitted by CLECs for UNEs in non-impaired wire centers?**

**Positions of the Parties.** Joint CLECs acknowledge that CLECs are not entitled to order UNEs that have been classified as non-impaired in a particular wire center, but request that the Commission establish a policy regarding "how Qwest handles UNE orders in a new environment in which certain UNEs are unavailable in certain wire centers."[63] Joint CLECs assert that the parties should:

> be required to work together to develop an order process that will ensure that CLECs are able to obtain the facilities they need from Qwest at the applicable rates, terms, and conditions. Pending development of such a process, the default should be the process outlined in the TRRO—a CLEC may place a UNE order in any wire center as long as the CLEC self-certifies that it is entitled to order that UNE, and Qwest must provision that UNE, subject to a later conversion to a tariffed service if the CLEC was not entitled to order the facility as a UNE in that wire center.[64]

In reply, Qwest asserts that it has already committed not to reject or block orders "unless and until the Commission has approved a wire center as non-impaired . . . . [T]he Joint CLECs apparently want to be able to force Qwest to accept orders at wire centers that have *already been declared,* by *this Commission,* to be *non-impaired*, and thus for Qwest and the Joint CLECs to 'work together to develop a process.'"[65] In Qwest's view, the proposal would have Qwest be a guarantor for CLECs mistakes in placing orders in non-impaired wire centers, and neither the *TRRO* nor any state commission has required such a process.[66]

Joint CLECs contend that "Qwest's disagreement is with the FCC, not the Joint CLECs. . . . The Utah Public Service Commission agreed with the Joint CLECs and concluded that Qwest is required to comply with the FCC process."[67] Contrary to Qwest's assertions in its Opening Brief, Joint CLECs claim that they do not seek separate proceedings before the Commission when a CLEC wishes to place a UNE order in a particular wire center that Qwest believes is non-impaired. They wish to establish procedures in lieu of unilaterally implemented order processing adjustments subsequent to a wire center reclassification because of a concern that Qwest may erroneously reject legitimate orders. Any error by a CLEC would give rise to back-billing for the difference between the UNE charges and the applicable tariff charges, and Qwest would be kept

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[63] Joint CLEC Opening Brief, p. 20.
[64] *Id.*, citing the concurrence of the Utah Commission at p. 39 of the Utah Order.
[65] Qwest Reply Brief, p. 29, emphasis in text.
[66] *Id.*, pp. 29-30. Qwest also contends that the Utah Order is ambiguous and has filed a Motion for Clarification; it intends to seek reconsideration if it is dissatisfied with the outcome of its Motion, ftn. 24.
[67] Joint CLEC Reply Brief, p. 9, citing *TRRO* ¶ 234 and Utah Order, pp. 37-38.

economically whole. The process would ensure timely provisioning of UNEs to enable CLECs to serve their customers.[68]

**Discussion.** Paragraph 234 of the *TRRO* reads as follows:

> Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.

The Utah Commission concluded that the process described in the above paragraph "remains applicable to CLEC requests for UNEs and order Qwest and CLECs to follow that process in the procurement of UNEs in the future."[69] Although Qwest claims that "Joint CLECs cannot point to any *TRRO* requirement, or state commission order, requiring such a process,"[70] Qwest does not address the *TRRO* language directly and asserts that the Utah Commission may have meant for procedures to apply only in wire centers that had not yet been designated as non-impaired.

The Joint CLEC proposal seeks the development of a process wherein a CLEC request for a UNE in a non-impaired wire center, either made in error or in dispute, is dealt with by Qwest and the CLEC in such a way so that facilities are provided in a timely manner. This process should also ensure that the services are ultimately charged at the proper rate—UNE or tariffed service—and the CLEC back-billed for the difference, if the CLEC has erroneously placed a UNE order that Qwest was not required to provide. We find such an approach, which provides facilities to CLECs on a timely basis and keeps Qwest financially whole, to be a reasonable one and fully consistent with the *TRRO*. We therefore direct Qwest and Joint CLECs to develop such procedures reasonably consistent with the intentions we have set forth here.

[68] *Id.*, pp. 9-10.
[69] Utah Order, pp. 37-38.
[70] Qwest Reply Brief, p. 30.

**Issue 6. Should the Commission authorize Qwest to impose a charge for converting UNEs to tariffed services, and what should the appropriate charge be for conversions of tariffed services to UNEs?**

**Conversion of UNEs to Tariffed Services.** Qwest proposes a $50 "Design Change Charge" on each UNE that it converts to a special access circuit after a wire center has been properly classified as non-impaired with respect to that particular UNE.

**Positions of the Parties.** Joint CLECs argue that the cost is inappropriate: Qwest was the party that sought the wire center designation change and the attendant administrative costs. Furthermore, Qwest benefits by being able to charge rates that are more than double the exiting UNE rates for the same facilities. Joint CLECs also note Qwest does not charge its own retail customers under comparable circumstances. Joint CLECs reference an opinion of the California commission that concluded Qwest should not be authorized to impose such charges on CLECs.[71] Other state commissions have established much lower non-recurring charges for conversions of UNEs to special access and vice versa. If the Commission believes such charges are appropriate, they should be similarly cost-based.[72]

Qwest argues that a CLEC who chooses to convert a UNE to an alternative Qwest circuit does so voluntarily and in the face of other business alternatives; Qwest performs work activities in converting UNEs to private line circuits and is entitled to recover the Design Change Charge as a non-recurring cost. The cost is incurred at a CLEC's request, and it is therefore unfair to shift the cost to Qwest and its customers.[73] The conversion work involves three functional areas and a number of necessary tasks and must, at the same time, avoid interruptions of service to the CLEC's customers. Qwest has already gone to great expense to provide UNEs and should not be required to spend millions more to further modify its systems.[74]

In reply, Joint CLECs claim they do not benefit from what is essentially a billing record change "in conjunction with Qwest doubling or tripling the rate Qwest charges the CLEC for providing a particular circuit. Once the conversion takes place, moreover, the CLEC becomes one of Qwest's customers that pays retail rates and thus is already bearing the burden of whatever costs Qwest incurs to undertake this activity for its own benefit."[75] Joint CLECs also note that the staffs of the Arizona and Colorado Commissions share Joint CLECs' view that either no charge or a nominal charge (one dollar) would be appropriate.[76]

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[71] Joint CLEC Opening Brief, p. 21.
[72] *Id.*, p. 22.
[73] Qwest Opening Brief, pp. 31-32, and ftn. 35.
[74] *Id.*, pp. 32-33.
[75] Joint CLEC Reply Brief, p. 11.
[76] *Id.*, pp. 12-13.

Qwest responds that the conversion of a UNE circuit to a special access or private line circuit is a very involved and detailed process. Although transparent to the CLEC's end-user customer, it avoids placing the customer's service at risk and thus benefits the CLEC. Qwest contends that, because it has already had to spend millions of dollars to modify its systems to provide UNEs, it would not be fair to again require Qwest to bear the cost for further system modifications.[77] But for the conversion, Qwest would not have to bear the costs of performing the tasks; Qwest is thus disadvantaged in a market the FCC has determined to be competitive. Furthermore, the Utah Commission has agreed that Qwest may levy a non-recurring charge, if it is supported by appropriate cost information.[78]

In this case, Qwest argues that the use of Qwest's existing tariffed Design Change Charge is more appropriate than a cost study-developed unique charge for UNE-to-private line conversions or a charge to convert a special access circuit to a UNE. First, requiring a TELRIC rate for an NRC for a tariffed interstate private line service would be an inappropriate application of TELRIC beyond the Commission's jurisdiction; TELRIC should only apply to UNEs, not to tariffed private line services. Secondly, Qwest argues, the Design Change Charge involves functional areas and tasks similar to those associated with the conversion of a UNE to a private line service or facility. The proposed $50 charge is a conservative estimate of the costs, because TELRIC-priced conversion rates from private line to UNE run between $22 and $42, and the added complexity for a billing system change of a UNE to private line should make the cost much higher.[79]

**Discussion.** The *TRRO requires* the Commission to make findings and take action with respect to certain wire center classification benchmarks. It is not appropriate for the Commission to look at the initiating cause of those classifications, i.e., the filing of a petition by an ILEC, to determine whether or not the costs associated with the outcome of those findings should be assessed. Simply put, once a wire center has been declared to be non-impaired, a CLEC utilizing UNEs is faced with a business decision as to whether to find another source for transport and loops or to purchase private line services from the ILEC. If it chooses to convert existing UNEs to private line services and notifies the ILEC of its intentions, the ILEC is required to perform at least *some* functions or actions that will cause it to incur costs on a one-time basis. Regardless of the benefit to be derived by the ILEC from the recurring charges that will follow, it has been our consistent policy to permit charges to recover these non-recurring costs.

We reject Qwest's assertion that we lack jurisdiction to apply TELRIC pricing to non-recurring charges for UNE to private line conversion. Qwest cites no jurisdiction that has mandated the Qwest-tariffed Design Change Charge for UNE conversions or denied that it has authority to examine the costs and set prices for the non-recurring charges associated with UNE conversions to private line.

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[77] Qwest Reply Brief, p. 30.
[78] *Id.*, p. 31.
[79] *Id.*, pp. 32-33.

Furthermore, we are not convinced that Qwest's Design Change Charge is a reasonable proxy for the actual non-recurring costs involved in the conversion of UNEs to private line services; the differences between the two processes is too great. Like other state commissions, we will utilize cost-based evidence to set the rates charged for these non-recurring costs.

We therefore require that the non-recurring UNE-to-private-line service conversion charge shall be based on costs. We direct Qwest to propose a specific non-recurring rate for the UNE-to-private line conversions, and to submit a cost study in support of its proposed charge. Qwest's cost study must include calculations of TELRIC costs and justification for any variation of its proposed non-recurring rate from TELRIC costs.

## ORDER

IT IS ORDERED that:

1. The request for an investigation contained in the February 15, 2006, letter filed by Covad Communications Company; Eschelon Telecom of Oregon, Inc.; Integra Telecom of Oregon, Inc.; McLEODUSA Telecommunications Services, Inc.; and XO Communications Services, Inc., regarding the data filed by Qwest Corporation to the Commission in developing the Commission-approved list of non-impaired wire centers and to implement a process for reviewing and updating the lists is GRANTED IN PART AND DENIED IN PART, consistent with this Order.

2. Within 30 (thirty) days of the effective date of this Order, Qwest shall submit a revised list of wire centers, indicating their classification and the bases therefor, supported by appropriate data, consistent with the findings and conclusions of this Order.

3. Within 30 (thirty) days of the effective date of this Order, Qwest shall submit a document setting forth the procedures for the evaluation and implementation of future wire center classifications consistent with the findings and conclusions of this Order.

4. Within 60 (sixty) days of the effective date of this Order, Qwest shall submit a cost study consistent with this Order to establish a non-recurring charge for the conversion of Unbundled Network Elements to tariffed special access services.

5. This docket shall remain open to review and assess compliance with this Order and to resolve any matters arising therefrom.

Made, entered and effective MAR 2 0 2007.

**Lee Beyer**
Chairman

**Ray Baum**
Commissioner

**John Savage**
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.