BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, Termination, and Resale	)))))	Docket No. UT-003013 JOINT CLEC BRIEF IN OPPOSITION TO QWEST PETITION FOR RECONSIDERATION

XO Washington, Inc., f/k/a NEXTLINK Washington, Inc. ("XO"), Electric Lightwave, Inc. ("ELI"), Advanced TelCom Group, Inc. ("ATG"), McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), and AT&T Communications of the Pacific Northwest, Inc. ("AT&T") (collectively "Joint CLECs") provide the following brief in opposition to the Petition of Qwest Corporation ("Qwest') for Reconsideration of the Commission's 13th Supplemental Order. The Commission did not err in reducing the level of Qwest's proposed operations support system ("OSS") modification cost recovery or in requiring that Qwest's collocation rates not exceed the rates proposed by Verizon Northwest Inc. ("Verizon"). Accordingly, the Commission should deny Qwest's Petition.

DISCUSSION

A. The Commission Should Not Reconsider the Amount of, or Charges for, Qwest's OSS Modification Expenditures.

The Commission concluded that Qwest sought to recover an excessive amount to modify its OSS to function in a multiple provider environment, and that the charges Qwest proposed to recover that amount were unreasonable. The record adequately supports the Commission's decision to reduce the amount Qwest may recover and to restructure Qwest's proposed charges to coincide with the amounts and charges Verizon proposed.

Qwest disagrees, contending that the record does not support the Commission's conclusion that Qwest's arrangement with Telcordia unreasonably inflated Qwest's proposed OSS modification costs. Qwest, however, purports to support its position with evidence that Qwest concedes is not part of the record. Qwest Petition at 4-5. The Commission reasonably inferred that Telcordia costs contributed to the excess in Qwest's proposal based on evidence developed during the hearings. Qwest had every opportunity to present sufficient evidence through pre-filed testimony and during the hearings with respect to the nature of the costs for which it sought recovery, but it failed to do so. Indeed, Joint CLECs proposed an audit of Qwest's expenditures precisely because Qwest had refused to provide sufficient documentation to verify the legitimacy and accuracy of its expenditures. Qwest cannot credibly claim that it would have produced additional evidence to further support its proposal if the issue of Telcordia's involvement had been raised earlier. The Commission is constrained by the record before it, and cannot and should not accept evidence or offers of proof that should have been made long before Qwest filed its Petition for Reconsideration.

Qwest also claims that the Commission erred in comparing Qwest's OSS costs with Verizon's proposal. Qwest, however, has consistently maintained in this and the prior cost proceeding that cost estimates need to be validated using "real world" experience, and Verizon's expenditures provide such a validation. Qwest cannot credibly claim that costs to modify its OSS are several multiples of the expenditures another similarly situated incumbent local exchange company ("ILEC") has incurred to undertake the same work. The Commission properly refused to take Qwest's word for the level of its expenditures and used Verizon's

expenditures as a measure of a reasonable amount needed to update monopoly OSS.

In addition, Qwest disputes the Commission's use of the ILECs' relative number of access lines to calculate a comparable amount of OSS expenditures that Qwest should be permitted to recover. Both Qwest and Verizon stated that their OSS cost expenditures were not state-specific and that they had roughly allocated a portion of those expenditures to Washington. Particularly in the absence of any more precise allocation method, the Commission's use of the ILECs' access lines to approximate the relative sizes of their operations in Washington and to calculate relative OSS expenditures is no more erroneous than the methodology the ILECs themselves proposed. Qwest's objection to the Commission's methodology is particularly disingenuous in light of Qwest's proposal to use access lines to allocate its OSS modification costs for number pooling. Docket No. UT-991627, Qwest Petition for Waiver at 9 n.28 (Jan. 19, 2001). If Verizon simply divided its total OSS modification expenditures of $56 million evenly among the 28 states in which it operates, as Qwest theorizes, the same calculation would entitle Qwest to only $4 million in Washington ($56 million divided by 14) – significantly less than the $5.5 million the Commission authorized. The Commission, therefore, was overly generous in using relative access lines to calculate the amount of Qwest's OSS cost recovery in this state.

Finally, Qwest complains that a charge of $3.27 per local service request ("LSR") is insufficient, unfair, and unreasonable. Again, Qwest relies on evidence that is not in the record to support this claim. In prefiled testimony, the Joint CLECs proposed that if the Commission authorized the ILECs to charge competitors for OSS modification expenditures, that those charges be calculated on a per LSR basis and not exceed Verizon's proposed rate. Ex. T-151

(XO Knowles Response) at 7-8. Qwest had every opportunity to address this argument in responsive testimony and during the hearing, but Qwest refused and insisted on its own unreasonable proposal. Accordingly, the record supports the Commission's decision and is devoid of evidence to support Qwest's unreasonable request to double or triple the rate Verizon proposed and the Commission established based on record evidence. The Commission, therefore, should reject Qwest's Petition with respect to cost recovery the Commission authorized for Qwest's OSS modification expenditures.

B. The Commission Should Not Reconsider the Rates Established for Physical Collocation in Qwest Central Offices.

Qwest challenges the rates the Commission established for two physical collocation rate elements – entrance facilities (the facilities necessary to bring fiber from the CLEC network into the Qwest central office and to the CLEC's collocated equipment) and terminations (the connections between Qwest UNE access points and the CLEC's collocated equipment). Qwest contends that the Commission's decision to cap Qwest's rates for these elements at the prices proposed by Verizon does not comply with the pricing requirements of the Act as interpreted by the Eighth Circuit Court of Appeals. The Eighth Circuit, however, affirmed the FCC's requirement that prices must be based on forward-looking (rather than embedded) costs. The Commission found that Verizon's costs were significantly lower than Qwest's cost estimates to provide the same functionality, and Qwest produced no evidence that it uses significantly different facilities than Verizon to provide that functionality. The Commission's determination that Qwest should incur no greater costs in Washington than a similarly situated ILEC to provide the same facilities and functionality is fully consistent with forward-looking cost requirements.

Even if the Eighth Circuit's decision somehow could be construed to impact any Commission determinations in this case, that decision has been stayed pending disposition by the Supreme Court. Qwest acknowledges the stay but claims that the Eighth Circuit subsequently required the Missouri Public Service Commission to comply with the court's earlier decision. Qwest Petition at 9. That later decision, however, is applicable only to the parties in that case, which do not include any parties in this proceeding. The Eighth Circuit, moreover, interprets the law in Missouri and other midwestern states, but that court's decisions are not binding in Washington, at least as long as the decision in the consolidated appeals of the FCC's rules remains stayed. Until the Supreme Court or the Ninth Circuit rules otherwise, FCC Rule 51.505(b)(1) remains in effect in Washington, and the Commission's determinations with respect to the challenged physical collocation elements are consistent with that rule.

Qwest also claims that "it is not at all clear that the CLECs, or the Commission, were correct in their conclusions with regard to whether Qwest's costs were indeed higher than Verizon's for various rate elements." Qwest Petition at 9. As discussed in more detail below, it could not be more clear based on the record evidence that the Joint CLECs and the Commission correctly concluded that Qwest's cost estimates for entrance facilities and terminations are excessive and that Verizon's proposed prices for comparable functionality represent the maximum amount Qwest should be entitled to charge for those elements.

1. Entrance Facilities

The Commission properly concluded that the record evidence demonstrates that Qwest should not charge more for entrance facilities than Verizon charges for the same functionality.

Qwest disagrees, contending that "the rates are very close, and that Qwest's rates may actually be lower than Verizon's." Qwest Petition at 10. Qwest's statement, however, is misleading and does not withstand scrutiny.

The Joint CLECs agree that Qwest's latest proposed rate of $1,201.16 for Express Fiber Entrance Facilities is comparable to Verizon's rates for the same facilities. The five other rates Qwest has proposed for Entrance Facilities, however, are grossly excessive. Qwest proposed a different price for Express Fiber Entrance Facilities when using a manhole dedicated to CLECs of $7,589.47 – over *six times higher* than the rate Qwest proposed when using a manhole shared with Qwest. Verizon proposed no such higher rate, nor is such an additional rate appropriate. Qwest also proposed rates for Entrance Facilities when Qwest, rather than the CLEC, provides the fiber. Using Qwest's standard minimum of 12 fibers, Qwest proposed prices for these Entrance Facilities between $14,901 and $21,582.12 – as much as *18 times higher* than the Express Fiber Entrance Facilities charge. Verizon proposed no such rates, although Verizon does not offer to provide the fiber. To account for the fact that Qwest offers to provide the fiber rather than require the CLEC to provide it, the Joint CLECs proposed that Qwest be entitled to charge a slightly higher price for Entrance Facility types other than Express Fiber to account for the costs of the fiber. Fiber costs, however, are minimal and would not justify a substantial increase in the charges when Qwest provides the fiber. *See* Ex. C-15 (Qwest Collocation Model Results) at 82-83 (identifying fiber costs in line 1 under "cable" categories).[1]

[1] Qwest will no doubt contend that it provides additional facilities such as a fiber distribution panel and jumpers when Qwest provides the fiber and that Qwest should also be able to recover these costs. Qwest, however, failed to produce any evidence to justify the use of such additional facilities when they

Qwest further complains that it would be difficult to calculate the portion of the rate Verizon charges for "Overhead Superstructure," *i.e.*, dedicated cable racking, that is attributable to Qwest's Entrance Facilities element. Qwest Petition at 11. In light of these difficulties and the revisions Qwest made during the hearings to its rate for Express Fiber Entrance Facilities, the Joint CLECs would not object if the Commission were to permit Qwest to charge its proposed $1,201.16 nonrecurring charge for Entrance Facilities when the CLEC provides the fiber. As discussed above, Qwest should also be permitted to charge a slightly higher rate for Entrance Facilities when Qwest provides the fiber, but the difference should be based solely on the additional costs for the fiber.

2. Terminations

The record evidence fully supports the Commission's conclusion that Qwest and Verizon use the same facilities to provide the same functionality with respect to DS-0, DS-1 and DS-3 terminations. None of Qwest's contentions to the contrary have any merit.

Qwest first claims that it proposed a different rate structure than Verizon. Petition at 12-13. The difference Qwest describes, however, is that Qwest has divided the element of "terminations" into four "subelements." When added together, however, those subelements represent the same functionality as the Verizon elements used to provide the connection of ILEC UNEs to CLEC collocated equipment. Ex. T-151 (XO Knowles Response) at 20-21. Accordingly, the sum of Qwest's subelement charges should be the same as the sum of the

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are not necessary when the CLEC provides its own fiber. Accordingly, Qwest should be entitled to recover no more than the cost of the fiber when Qwest provides that facility.

element charges Verizon proposed. *Id*. The "different" rate structure thus does not account for the disparity between the prices Qwest and Verizon propose to charge for terminations. The Joint CLECs nevertheless would not object to Qwest continuing to divide terminations into four subelements as long as the total of the rates for all subelements does not exceed the total of the corresponding Verizon element rates.

Qwest also takes issue with the comparison of Qwest's and Verizon's terminations rates, contending that Qwest's higher rates are justified in light of the ILECs' different views with respect to whether the underlying costs are recurring or nonrecurring and differences in the type of facilities each ILEC uses. Qwest Petition at 13-14. Qwest cites no record evidence to support any of these arguments, and the record is devoid of any factual basis for the Commission to consider them. In pre-filed testimony, the Joint CLECs proposed using Verizon's rates for terminations as the maximum Qwest should be authorized to charge for the same elements. Ex. T-151 (XO Knowles Response) at 21-22. Qwest had every opportunity to address this argument in reply testimony and during the hearing, but Qwest refused and insisted on its own unreasonable and unsupported rates. Now that the Commission, if not Qwest, has taken the Joint CLEC concerns seriously, Qwest attempts to justify its proposal with factual assertions that should have been presented at the hearing, not in a petition for reconsideration. The existing record does not support Qwest's arguments, and accordingly Qwest has identified no basis on which the Commission should, or even could, reconsider its decision on this issue.

C. Qwest's Attempts to Introduce New Evidence on Reconsideration Should Be Held to the Same Standards Qwest Proposed.

Qwest consistently relies on unsupported factual assertions in conjunction with its request that the Commission reconsider its decisions on Qwest's OSS cost recovery and certain physical collocation charges. Qwest, however, bitterly complained that the Joint CLECs should not be permitted to address issues in their post-hearing brief that were not presented during the hearings because Qwest would be denied the opportunity to present evidence to address those issues. The Commission agreed that "parties may not raise factual disputes for the first time in their post-hearing briefs." Order para. 387. Qwest now disregards its prior objections and attempts not just to raise new issues in its petition for reconsideration but to present new evidence to address issues that were contested in the record.

The Commission should hold Qwest to the same standard of fairness it proposed and the Commission adopted. The Joint CLECs specifically raised the issues on which Qwest now seeks reconsideration in testimony prefiled in July 2000. Ex. T-151 (XO Knowles Response). Qwest could have included in its prefiled reply testimony the evidence Qwest now seeks to have the Commission consider, but Qwest did not. Qwest could have cross-examined the Joint CLEC witness on these issues during the hearing, but Qwest did not. Qwest should not be permitted to introduce additional evidence long after the parties have filed testimony and the Commission has conducted evidentiary hearings and rendered a decision. Other parties would be denied any opportunity to rebut, conduct discovery, or cross-examine a witness on this evidence, and Qwest would be encouraged in future proceedings to ignore other parties' issues and evidence until the Commission has rendered a decision on those issues. The Commission, therefore, should

expressly reject Qwest's request that the Commission consider unsupported factual allegations that Qwest failed to introduce into the record as evidence in testimony or during the hearings.

CONCLUSION

Qwest's Petition for Reconsideration with respect to OSS cost recovery and collocation rates is unsupported by law and record evidence. Accordingly, the Commission should deny the Petition with respect to these issues.

DATED this 28th day of February, 2001.

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