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May 22, 2009

IDAHO PUBLIC
UTILITIES COMMISSION

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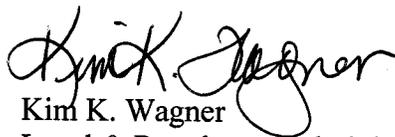
Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington
Boise, ID 83702-5983

RE: Docket No. QWE-T-08-07

Dear Ms. Jewell:

Enclosed for filing are nine copies of the Direct Testimony of Douglas Denney on Behalf of Intervenors Integra and 360networks, Joint CLECs in connection with the above-referenced matter. The highly confidential Exhibits 206 and 207 are included separately and will be provided directly to Qwest, consistent with the Protective Agreement.

Sincerely,



Kim K. Wagner
Legal & Regulatory Administrator
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Enclosures

cc: See Attached Certificate of Service

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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**IN THE MATTER OF QWEST)
CORPORATION'S PETITION FOR)
APPROVAL OF NON-IMPAIRED)
WIRE CENTER LISTS PURSUANT TO)
THE TRIENNIAL REVIEW REMAND)
ORDER)**

CASE NO. QWE-T-08-07 IDAHO PUBLIC UTILITIES COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that nine true and correct copies of the foregoing Direct Testimony of Douglas Denney on Behalf of Intervenors Integra and 360networks, Joint CLECs was filed on May 22, 2009, with:

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and served on May 22, 2009 upon the individuals listed below. Highly Confidential information is being served on any Qwest individual(s) that have signed the relevant protective agreement signature page.

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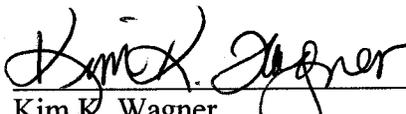
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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF QWEST)
CORPORATION'S PETITION FOR)
APPROVAL OF NON-IMPAIRED) CASE NO. QWE-T-08-07
WIRE CENTER LISTS PURSUANT TO)
THE TRIENNIAL REVIEW REMAND)
ORDER)**

INTERVENOR PROFILE TESTIMONY

DIRECT TESTIMONY

OF

DOUGLAS DENNEY

ON BEHALF OF

INTEGRA AND 360networks (USA) inc. ("JOINT CLECS")

May 22, 2009

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1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. My name is Douglas Denney. I work at 6160 Golden Hills Drive, Golden
4 Valley, Minnesota.

5 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

6 A. I am employed by Integra Telecom, Inc., as Integra's Director of Costs and
7 Policy. My job duties include negotiating interconnection agreements,
8 monitoring, reviewing and analyzing the wholesale costs Integra or its
9 subsidiaries pay to carriers such as Qwest, and representing Integra and its
10 affiliates on regulatory issues.

11 Integra Telecom, Inc. completed its purchase of Electric Lightwave, LLC
12 ("ELI"), the affiliate doing business in Idaho, on August 1, 2006. For
13 convenience, I will generally refer to Integra and its affiliates, including ELI,
14 as Integra. However, when describing certain dockets and actions of specific
15 Integra affiliates prior to their affiliation with Integra, I will refer to
16 specifically to the affiliate.¹

17 **Q. PLEASE DESCRIBE YOUR EDUCATION AND PROFESSIONAL
18 BACKGROUND.**

19 A. I received a B.S. degree in Business Management from Phillips University in
20 1988. I spent three years doing graduate work at the University of Arizona in

¹ For example, as discussed below, I was employed by Eschelon Telecom, Inc. when it was purchased by Integra on August 31, 2007. While with Eschelon I was involved in TRRO proceedings in many states.

1 Economics, and then I transferred to Oregon State University where I have
2 completed all the requirements for a Ph.D. except my dissertation. My field
3 of study was Industrial Organization, and I focused on cost models and the
4 measurement of market power. I taught a variety of economics courses at the
5 University of Arizona and Oregon State University. I was hired by AT&T in
6 December 1996 and spent most of my time with AT&T analyzing cost
7 models. In December 2004, I was hired by Eschelon Telecom, Inc., which
8 was subsequently purchased by Integra Telecom, where I am presently
9 employed.

10 I have participated in over 40 proceedings in the 14-state Qwest region. Much
11 of my prior testimony involved cost models — including the HAI Model,
12 BCPM, GTE's ICM, U S WEST's UNE cost models, and the FCC's Synthesis
13 Model. I have also testified about issues relating to the wholesale cost of local
14 service — including universal service funding, unbundled network element
15 pricing, geographic deaveraging, and competitive local exchange carrier
16 access rates. I have filed testimony regarding Qwest's "non-impaired" wire
17 center lists and related issues, including the *Five-State Settlement Agreement*,²
18 in dockets in Utah, Oregon, Colorado, Minnesota and Arizona.

19 **Q. HAVE YOU PREVIOUSLY TESTIFIED IN IDAHO?**

² The Multi-State Settlement Agreement Regarding Wire Center Designations and Related Issues ("Settlement Agreement"), is attached to Ms. Albersheim's testimony as Exhibit Qwest-4, and is heavily and improperly relied upon by Qwest witnesses as their direct evidence in this case. This agreement will be discussed in more detail in Section II, and referenced throughout this testimony.

1 A. Yes. While working for AT&T, I filed testimony and participated in
2 workshops in dockets GNR-T-97-22 / GNR-T-00-2 regarding universal
3 service. More recently, while working for Integra, I filed comments in QWE-
4 08-04 regarding Qwest's SGAT and performance assurance plan.

5 **Q. PLEASE DESCRIBE INTEGRA'S PRESENCE IN IDAHO.**

6 A. In Idaho, Integra serves almost 2,000 customers with nearly 40,000 access
7 lines using a combination of its own facilities and network elements leased
8 from Qwest. Integra's investment in facilities includes building collocations
9 in 4 Qwest central offices. Integra accesses its end user customers via "last
10 mile" facilities or Unbundled Network Element ("UNE") loops purchased
11 from Qwest and connects these customers to its DMS500 switch in Idaho.
12 Integra serves the Boise Metropolitan area including Boise, Meridian, Nampa,
13 Caldwell, Eagle, Kuna, Middleton and Star. In addition, Integra also supplies
14 services outside of the Treasure Valley, reaching to Mountain Home, Twin
15 Falls, Pocatello, Idaho Falls and north to Coeur d'Alene. Currently Integra
16 employs nearly 40 people in the state.

17 **ORGANIZATION OF TESTIMONY**

18 **Q. PLEASE DESCRIBE HOW YOUR TESTIMONY IS ORGANIZED.**

19 A. My testimony is organized into eight sections. Section I introduces the
20 testimony. Section II discusses the *Five-State Settlement Agreement* and
21 explains the history of the *Five-State Settlement Agreement*, how the
22 negotiated terms of the agreement prohibit its use as evidence with regard to
23 certain issues in this docket, and how the passage of time, including CLEC

1 experience in multiple TRRO³ dockets in multiple states has provided ideas
2 that will allow this Commission to improve upon the issues raised in the *Five-*
3 *State Settlement Agreement* for Idaho. Section III explains the flaws in
4 Qwest's switched business line counts, specifically how Qwest includes
5 residential and non-switched lines when counting Competitive Local
6 Exchange Carrier ("CLEC") switched business lines. In addition, this section
7 will discuss the difficulties in validating Qwest's switched business lines.
8 Section IV discusses fiber-based collocations and describes problems Qwest
9 has had in other states properly counting fiber-based collocators. This section
10 will also discuss the difficulties in validating Qwest's fiber-based collocation
11 data. Section V explains the appropriate transition period for moving away
12 from UNEs when UNEs are no longer available. This section will explain
13 why the transition period in the *TRRO Five-State Settlement Agreement* is too
14 short and why a transition period of one-year, as outlined in the TRRO, would
15 be more appropriate. Section VI discusses why this Commission has
16 jurisdiction over the transition from UNEs to Qwest alternative services. In
17 addition, this section explains why this conversion is simply a billing change
18 and thus there is no need to change circuit IDs or charge for these
19 conversions. Section VII explains improvements to Qwest's proposal
20 regarding the most efficient process going forward, for instances where Qwest

³ TRRO refers to the FCC's Triennial Review Remand Order. (i.e. *In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Order on Remand, FCC 04-290, February 4, 2005.*

1 seeks to expand the list of wire centers. Finally, section VIII concludes the
2 testimony and summarized my recommendations.

3 **SUMMARY OF TESTIMONY**

4 **Q. ARE THERE ANY EXHIBITS TO YOUR TESTIMONY?**

5 A. Yes. The exhibits to my testimony are described below:

6 **EXHIBIT 201:** Excerpts from the hearing transcript in Colorado regarding the *Five-State*
7 *Settlement Agreement*

8 **EXHIBIT 202:** Decisions of the Colorado Commission regarding TRRO Non-Impaired
9 Wire Center Issues and the *Five-State Settlement Agreement*

10 **EXHIBIT 203:** Qwest Data Responses to Joint CLECs in Arizona TRRO Wire Center
11 Docket regarding fiber-based collocations.

12 **EXHIBIT 204:** Washington Commission Order in Qwest/Eschelon Arbitration regarding
13 Commingling.

14 **EXHIBIT 205:** Minnesota Commission Order Regarding Jurisdiction over Conversions

15 **EXHIBIT 206:** Highly Confidential – Integra Estimate of Switched Business Lines as a
16 Percent of Loop Capacity

17 **EXHIBIT 207:** Highly Confidential -- 2007 and 2008 Qwest Line Counts with
18 Adjustments

19 **ISSUES TO BE ADDRESSED**

20 **Q. WHAT ISSUES DOES THIS COMMISSION NEED TO ADDRESS IN**
21 **THIS DOCKET?**

22 A. This Commission need only decide whether Qwest has properly supported the
23 classification of the Boise Main and Boise West wire centers. Qwest has
24 requested that Boise Main be classified as Tier 1⁴ and that Boise West be

⁴ Albersheim Direct, p. 33, lines 5-6.

1 classified is Tier 2.⁵ In addition, Qwest has requested that DS3 loops be
2 classified as non-impaired in the Boise Main wire center.⁶

3 A wire center is classified as Tier 1 if it has either 4 or more fiber-based
4 collocations or at least 38,000 switched business lines. DS1 UNE transport is
5 considered non-impaired between Tier 1 wire centers.⁷ In other words, Qwest
6 no longer has to offer DS1 transport at UNE rates when both offices at the end
7 of the transport route are classified as Tier 1.

8 A wire center is classified as Tier 2 when it has either 3 or more fiber-based
9 collocations or at least 24,000 switched business lines. DS3 UNE transport
10 and dark fiber transport is considered non-impaired between offices classified
11 as either Tier 1 or Tier 2.⁸ In addition, there is a limit of 10 DS1 UNE
12 transport routes in offices where DS3 transport is considered non-impaired.⁹
13 For example, if Qwest were to prevail on its request to classify Boise Main as
14 Tier 1 and Boise West as Tier 2, CLECs would no longer be able to purchase
15 DS3 UNE transport or dark fiber between these two wire centers and would
16 be limited to 10 DS1 UNE transport circuits.

⁵ Albersheim Direct, p. 33, lines 6-7.

⁶ Albersheim Direct, p. 31, lines 11-13.

⁷ *TRRO*, Executive Summary, ¶ 5, p. 4 and ¶ 126.

⁸ *TRRO*, Executive Summary, ¶ 5, p. 4 and ¶¶ 129 & 133.

⁹ *TRRO*, ¶ 128.

1 A wire center is considered non-impaired with respect to DS3 UNE loops if it
2 has 4 or more fiber-based collocations and at least 38,000 switched business
3 lines.¹⁰

4 **Q. PLEASE SUMMARIZE YOUR TESTIMONY.**

5 A. Based on review of the supporting information provided by Qwest, the Joint
6 CLECs currently do not dispute¹¹ that Boise Main and Boise West have the
7 minimum number of fiber-based collocators to be classified as Tier 1 and Tier
8 2 respectively. The only remaining non-impaired designation in dispute is
9 DS3 Loop non-impairment in Boise Main.

10 DS3 loop non-impairment designation is dependent upon switched business
11 line counts in that wire center. Qwest has improperly counted switched
12 business lines. First, because Qwest did not make its request for DS3 non-
13 impairment until its April 17, 2009 testimony, Qwest should have relied upon
14 end of year 2008 switched business line counts rather than end of year 2007.
15 Second, Qwest improperly counts CLEC loops by including residential loops
16 and non-switched capacity (both used and unused) in its CLEC switched
17 business line counts. Third, Integra is unable to verify Qwest's Integra
18 specific switched business line counts and as of the date this testimony is
19 filed, significant discrepancies exist between Integra's data and the data
20 Qwest provided.

¹⁰ *TRRO*, Executive Summary, ¶ 5, p. 5 and ¶ 174.

¹¹ The Joint CLECs may update their position based on the testimony of other parties in this docket.

1 The Commission should reject Qwest's request to classify the Boise Main
2 wire center as non-impaired for DS3 loops.

3 No further action is required in this docket at this time. If, however, the
4 Commission intends to address the issues improperly raised by Qwest through
5 the use of the *Five-State Settlement Agreement*, then the Commission should
6 determine that the transition period of converting from UNEs to alternative
7 services should be no less than six months. In addition, as UNE conversions
8 to Qwest alternative facilities is nothing more than a billing change, Qwest
9 should not change the circuit identification for the converted circuit and
10 Qwest should not bill CLECs a non-recurring charge for a change that is
11 performed for Qwest's benefit (i.e. higher recurring rates).

12 Because Qwest is reviewing its own data on at least an annual basis to
13 determine whether additional wire centers meet the FCC's non-impairment
14 thresholds, Qwest should provide information to CLECs regarding wire
15 centers that are near a non-impaired threshold. Qwest should notify CLECs
16 annually of all wire centers within 5,000 business lines of 24,000, 38,000 or
17 60,000 switched business lines. In addition, Qwest should notify CLECs of
18 wire centers when they are within one fiber-based collocation of reaching Tier
19 2 status. By providing this information, both Qwest and CLECs will have
20 access to similar market information regarding the potential for future non-
21 impairment determinations and CLECs will be able to take this information
22 into account when formulating their business plans, as Qwest can do today.

1 Qwest has historically provided CLECs with notice and the opportunity to
2 dispute, when Qwest plans to request a change to a wire center non-
3 impairment designation based upon a CLEC has a fiber-based collocation.¹²
4 The Joint CLECs propose steps to be included in Qwest's process to ensure
5 that the notice and opportunity to dispute serves its purpose. First, Qwest
6 should ensure that the proper individuals at a CLEC are informed of Qwest's
7 reliance on the CLEC's collocation. This can be done by sending the notice to
8 at least those persons identified by a CLEC to receive interconnection
9 agreement notices. Second, Qwest should not only inform CLECs of its
10 reliance upon their collocation but also when it intends to rely upon CLEC
11 switched business lines as part of a request for a change in non-impairment
12 designation. In so doing, Qwest should include the specific line counts on
13 which it relies. This will help ensure that CLECs are informed of Qwest's
14 reliance on their data and increase the likelihood that a CLEC will have the
15 opportunity to review and validate its own data upon which Qwest relies.

16 **II. THE FIVE-STATE SETTLEMENT AGREEMENT CANNOT BE USED**
17 **AS PRECEDENT IN THIS DOCKET**

18 ***FIVE-STATE SETTLEMENT AGREEMENT***

19 **Q. QWEST'S TESTIMONY MAKES NUMEROUS REFERENCES TO**
20 **THE FIVE-STATE TRRO NON-IMPAIRED WIRE CENTER**
21 **SETTLEMENT AGREEMENT ("FIVE-STATE SETTLEMENT**

¹² Though this is a term of the *Five-State Settlement Agreement*, Qwest provided this notice with its initial non-impaired wire center lists in 2005, before the agreement. In addition, Qwest provided notice as part of this case in Idaho (see Torrence Direct, p. 16, lines 6-11).

1 **AGREEMENT”¹³ PLEASE BRIEFLY DESCRIBE THIS**
2 **SETTLEMENT.**

3 A. This *Five-State Settlement Agreement* was reached between Qwest and a
4 group of CLECs¹⁴ for six states and was approved by the corresponding state
5 commissions in five of them (Arizona, Minnesota, Oregon, Utah and
6 Washington), with the Colorado Commission not approving the proposed
7 settlement agreement as filed. Qwest submits the *Five-State Settlement*
8 *Agreement* with its Petition as evidence (marked as Exhibit Qwest-4), even
9 though it expressly provides that it may not be used as evidence (as discussed
10 below).¹⁵ Without waiving any objections and to facilitate discussion of the
11 problems with Qwest’s testimony about the Five-State agreement, I describe
12 here that it is broken into seven sections as follows:

13 Section I. Introduction – This section establishes the context for the agreement. The
14 agreement stemmed from simultaneous TRRO cases in six states (Arizona,
15 Colorado, Oregon, Utah and Washington) that began in the beginning of 2006.

16 Section II. Definitions – This section provides definitions for the terms used throughout
17 the agreement.

18 Section III. Initial Commission-Approved Wire Center List – This section deals with
19 Qwest’s initial list of non-impaired wire centers and their effective dates. The
20 initial list was based upon Qwest’s February 4, 2005 filing at the FCC.¹⁶

21 Section IV. Non-recurring Charge for Conversions using the Initial Wire Center List and
22 for Future Commission-Approved Additions to that List – this section

¹³ See Albersheim Direct pp. 3, 13, 18 – 29, 31-38 and Exhibit Qwest-4 (a copy of the Agreement); Torrence Direct pp. 19, 20 and 27; and Hunnicutt Direct, pp. 9 and 21.

¹⁴ This group included Covad, Eschelon, Integra, McLeodUSA, Onvoy, POPP, TDS Metrocom and XO Communications.

¹⁵ *Settlement Agreement*, Exhibit Qwest-4, p. 16.

¹⁶ Ms. Albersheim references this filing and attaches the cover letter for the filing as Exhibit Qwest-4.

1 establishes a charge for converting from UNE to an alternative service or
2 product offered by Qwest.

3 Section V. Methodology – This section is broken into two parts and describes the
4 settlement methodology used for future additions to the non-impaired wire
5 centers. The first part deals with the settlement methodology for counting
6 switched business lines and the second part deals with the methodology for
7 counting fiber-based collocations.

8 Section VI. Future Qwest Filings to Request Commission Approval of Non-Impairment
9 Designations and Additions to the Commission-Approved Wire Center List –
10 This section of the agreement describes when Qwest can make future filings
11 for non-impaired wire centers, the methodology that Qwest should use,
12 process for requesting a protective order, advance notice to CLECs, the data
13 that should be provided, time frames for objecting to Qwest’s request,
14 proposed time frames to resolve disputes, length of the transition period to
15 move from UNEs to alternative products or services and the rate to apply
16 during the transition period.

17 Section VII. Other Provisions – This section describes how the agreement relates to
18 carriers’ interconnection agreements, and processes for the settling parties to
19 implement changes to their interconnection agreements. The section also
20 specifies that Qwest will make these provisions available to other CLECs,
21 though it does not provide that other CLECs are bound by these provisions.
22 This section also clarifies that the settlement is a settlement of controversy and
23 may not be used as evidence in future proceedings. Finally, this section
24 contains some conditions related to conversions of UNEs that occurred based
25 upon Qwest’s original proposed non-impaired wire center list, but that would
26 not have been necessary under the non-impaired wire center list contained as
27 part of the settlement agreement.

28 **Q. WHAT WAS YOUR INVOLVEMENT WITH THE *FIVE-STATE***
29 ***SETTLEMENT AGREEMENT?***

30 **A.** During the initial TRRO wire center dockets that commenced shortly after the
31 Triennial Review Remand Order (“TRRO”), I testified on behalf of a number
32 of CLECs¹⁷ regarding Qwest’s initial wire center list and issues pertaining to
33 “non-impairment” classifications. Qwest’s initial request involved 76 wire

¹⁷ 360networks was not a party to the *Settlement Agreement*.

1 centers.¹⁸ During the course of these initial proceedings, Qwest and the
2 CLECs actively involved in those proceedings began discussions in an attempt
3 to resolve disputed issues. I was the lead negotiator for the CLECs and was
4 involved in all aspects of the *Five-State Settlement Agreement*. Two of the
5 original six states, Arizona and Colorado, held hearings on the *Five-State*
6 *Settlement Agreement*. In those hearings, I was the witness for the CLECs
7 that signed the agreement.

8 **Q. CAN THE *FIVE-STATE SETTLEMENT AGREEMENT* BE USED AS**
9 **EVIDENCE REGARDING DISPUTED ISSUES IN THIS**
10 **PROCEEDING?**

11 **A.** No, while the *Five-State Settlement Agreement* is a publicly filed document,
12 section VI.B restricts its use.

13 This Settlement Agreement is a settlement of a controversy. No
14 precedent is established by this Settlement Agreement, whether or not
15 approved by Commissions. The Settlement Agreement is made only
16 for settlement purposes and does not represent the position that any
17 Party would take if this matter is not resolved by agreement. This
18 Settlement Agreement may not be used as evidence or for
19 impeachment in any future proceeding before a Commission or any
20 other administrative or judicial body, except for future enforcement of
21 the terms of this Settlement Agreement after approval.¹⁹

22 This section specifically acknowledges that parties²⁰ to the *Five-State*
23 *Settlement Agreement* agreed that no precedent is established by the

¹⁸ Note that, of the 76 wire centers identified by Qwest, only 66 of them were designated as non-impaired as a result of initial Commission decisions and the *Settlement Agreement*. Of those 66, a number of them had changes in non-impairment designations or the initial effective date.

¹⁹ *Settlement Agreement*, Exhibit Qwest-4, p. 16.

²⁰ Qwest was a party to the settlement agreement. See *Settlement Agreement*, Exhibit Qwest-4, p. 1.

1 agreement; parties may take other positions when a settlement is not reached;
2 and the agreement will not be used as evidence, except for enforcement of the
3 terms (which is not the case here).

4 **Q. IN STATES WHERE THE *FIVE-STATE SETTLEMENT AGREEMENT***
5 **WAS APPROVED, WAS IT THE PARTIES' INTENT THAT THE**
6 ***FIVE-STATE SETTLEMENT AGREEMENT* APPLY TO CARRIERS**
7 **THAT WERE NOT A PART OF THE AGREEMENT?**

8 A. No. All parties to the agreement recognized that the intent of the *Five-State*
9 *Settlement Agreement* was that it only apply in the states and to the parties that
10 negotiated the agreement. Qwest's attorney in the Colorado hearing on the
11 settlement summed it up nicely:

12 Are the moving parties simply asking for approval of this settlement
13 agreement only with respect to the signatory parties or are the moving
14 parties asking for approval of this settlement agreement so that it
15 would apply to all CLECs in the state of Colorado? And the answer to
16 the question is, we are only asking for approval of this settlement
17 agreement with respect to the parties that have executed the settlement
18 agreement.

19 Not only that, it has been made clear to me in my discussions with the
20 settling parties over the past couple of days that any effort by a settling
21 party to assert that the agreement should be applied to a CLEC that is
22 not a signing party would be viewed as a breach of the settlement
23 agreement. And I refer specifically to Section VII-B of the settlement
24 agreement. Furthermore, any effort by a settling party to use the
25 settlement agreement as evidence or as precedence in any Commission
26 proceeding would also be viewed as a breach of VII-B in the
27 settlement agreement.

28 Now, VII-B provides that the agreement is a settlement of controversy,
29 no precedent is established; the agreement is for settlement purposes
30 only. It shall not be used as evidence or for impeachment in any
31 proceeding before the Commission or any other administrative or
32 judicial body except for future enforcement.

1 So I think that's a critical piece of information to have, because I think
2 that answers one of staff's critical threshold questions with respect to
3 the settlement, which is, Who does it apply to? It only applies to the
4 signatory parties.²¹

5 **QWEST'S REQUEST IN THIS CASE IS PROHIBITED BY THE *FIVE-STATE***
6 ***SETTLEMENT AGREEMENT***

7 **Q. WHAT IS QWEST ASKING THIS COMMISSION TO DO WITH**
8 **RESPECT TO THE *FIVE-STATE SETTLEMENT AGREEMENT* IN**
9 **IDAHO?**

10 A. Qwest asks this Commission to approve the terms of the *Five-State Settlement*
11 *Agreement* as resolution to the disputed issues in this case, which can only be
12 done by using the agreement as a precedent in violation of its own terms.
13 Specifically, Ms. Albersheim states, "I will explain how this [settlement]
14 methodology can be used by this Commission to establish procedures for
15 future *TRRO* proceedings."²² In addition she states, "First, according to the
16 terms of the Settlement Agreement, which Qwest is asking this Commission
17 to adopt..."²³ Ms. Albersheim concludes her testimony explaining that,
18 "Qwest also asks the commission to adopt Qwest's proposed procedures as
19 outlined in the multi-state Settlement Agreement for designation of non-
20 impaired wire centers in the future."²⁴ Ms. Torrence requests the Commission
21 "adopt the provisions and methodology contained within the Settlement
22 Agreement attached to Qwest's Petition in this docket and presented in Ms.

21 CO Docket 06M-080T, Reporter's Transcript Volume I, opening statement of Qwest attorney David McGann, pp. 7, line 14 through p. 8 line 21. See Exhibit 201, pp. 7-8.

22 Albersheim Direct, p. 3, lines 18-19.

23 Albersheim Direct, p 31, lines 16-17.

24 Albersheim Direct, p. 38, lines 12-14.

1 Albersheim's testimony as Qwest Exhibit 4."²⁵ Ms. Hunnicutt claims to have
2 demonstrated that Qwest's proposed conversion charge is reasonable, "by
3 showing that it has been included in a Multi State Settlement Agreement
4 approved by various state commissions and interconnection agreements with
5 other, similarly-situated carriers."²⁶

6 **Q. SHOULD THE COMMISSION TAKE ACTION REGARDING**
7 **QWEST'S USE OF THE *FIVE-STATE SETTLEMENT AGREEMENT***
8 **IN THIS DOCKET?**

9 A. Yes. Qwest should not be relying on the *Five-State Settlement Agreement* as
10 evidence in this case, and Qwest's testimony related to the *Five-State*
11 *Settlement Agreement* should be stricken or given no weight. To the extent
12 Qwest seeks in its response testimony to provide evidence that should have
13 been provided in its direct case, that responsive testimony should also be
14 stricken from the record.

15 **Q. DOES QWEST MAKE ANY STATEMENTS THAT MISREPRESENT**
16 **THE *SETTLEMENT AGREEMENT*?**

17 A. Yes, Qwest does it on numerous occasions. For example, Ms. Albersheim
18 misrepresents the *Five-State Settlement Agreement* by claiming that "[t]he
19 parties have agreed that this methodology [the Settlement methodology of
20 counting business lines and fiber based collocators] complies with the rules

²⁵ Torrence Direct, p. 27, lines 7-9.

²⁶ Hunnicutt Direct, p. 21, lines 1-5.

1 established by the FCC in TRRO.”²⁷ In fact, the opposite is true – the *Five-*
2 *State Settlement Agreement* makes no such claims, and instead states that it
3 “does not represent the position that any Party would take if this matter is not
4 resolved by agreement.”²⁸ Further, in the Colorado wire center proceeding on the
5 settlement, I testified on behalf of the Joint CLECs that the business line count
6 methodology contained in the agreement was inconsistent with the FCC rules,
7 outlined in the TRRO, regarding how business lines should be counted.²⁹ (I will
8 further discuss the proper methodology for counting business line counts in Section
9 III of this testimony.)

10 Another example is Ms. Hunnicutt’s claim that Qwest’s proposed rate for
11 conversions of UNEs to non-UNEs – i.e. half of its federally tariffed design change
12 charge – “is reasonable, albeit conservative, by showing that it has been
13 included in a Multi State Settlement Agreement approved by various state
14 commissions and interconnection agreements with other, similarly-situated
15 carriers.”³⁰ Again, the *Five-State Settlement Agreement* makes no such claims,
16 and in fact, the term “Design Change Charge” is not even mentioned in the *Five-*
17 *State Settlement Agreement*. Instead, the *Five-State Settlement Agreement* talks
18 about a “non-recurring charge for conversions.”³¹ In addition, the \$25 conversion
19 charge outlined in the settlement was only mandatory for “three years from the

²⁷ Albersheim Direct p. 24, lines 5-8. A similar false statement is also made at p. 31, lines 5-6 of Albersheim Direct.

²⁸ *Settlement Agreement*, Exhibit Qwest-4, p. 16.

²⁹ *Colorado Settlement Hearing Transcript*, pp. 195-198. The relevant pages are attached as part of Exhibit 201.

³⁰ Hunnicutt Direct, p. 21, lines 1-5.

³¹ Section IV of the Settlement Agreement.

1 Effective Date of this Settlement Agreement.”³² The “Effective Date of this
2 Settlement Agreement” was defined as the date of a Commission order approving the
3 settlement.³³ Some of the states approving the agreement did so in 2007 and
4 therefore the \$25 rate could expire next year.

5 **Q. EVEN ASSUMING THE *FIVE-STATE SETTLEMENT AGREEMENT***
6 **COULD BE USED AS EVIDENCE, DID QWEST FOLLOW THE**
7 **TERMS OF THE AGREEMENT IN THIS DOCKET?**

8 **A.** No. In addition to the fact that Qwest acted contrary to the terms of the *Five-*
9 *State Settlement Agreement* by using it as advocacy in this docket, Qwest
10 failed to even follow the *Five-State Settlement Agreement* with regard to its
11 request for non-impaired status for DS3 loops in Boise Main.

12 Section VI.D of the *Five-State Settlement Agreement* states,

13 In order to provide all interested parties adequate notice of the scope of
14 the requested protective order and the anticipated Wire Center update
15 proceeding, Qwest will provide CLECs (Joint CLECs and other
16 potentially affected Competitive Local Exchange Carriers), including
17 at least the contacts identified by each such carrier for interconnection
18 agreement notices, via its email notification channels, with at least five
19 (5) business days notice prior to filing proposed non-impairment or tier
20 designations for Commission review.³⁴

21 Qwest did not notify CLECs of its proposal to classify DS3 loops in Boise
22 Main as non-impaired. The first time I became aware of this request was
23 when reading Qwest’s direct testimony in this docket. To the best of my

³² *TRRO Settlement Agreement*, Section IV.A, Qwest Exhibit-1, p. 5.

³³ *TRRO Settlement Agreement*, Section II, Qwest Exhibit-1, p. 3.

³⁴ *TRRO Settlement Agreement*, Section VI.D, Qwest Exhibit-1, pp. 9-10.

1 knowledge, Qwest still has not notified CLECs of its proposal to classify DS3
2 loops in Boise Main as non-impaired.

3 Remarkably, Ms. Albersheim's indicates in footnote 20 of her testimony that
4 CLECs should have been able to figure this out by virtue of Qwest's filing,
5 even though it took Qwest almost 10 months to figure it out for itself.³⁵ Ms.

6 Albersheim writes:

7 Please note that Qwest's Petition in this case inadvertently failed to
8 mention non-impairment for DS3 loops in the Boise Main wire center.
9 However, since Qwest's Petition indicated that it would demonstrate
10 that the Boise Main wire center met both standards for Tier 1 status in
11 that it had more than 38,000 business lines and four or more fiber-
12 based collocators, under the standards of the *TRRO*, a finding that
13 access to DS3 loops is non-impaired in Boise Main necessarily follows
14 from that evidence.³⁶
15

16 In addition, Qwest ignores the very *Five-State Settlement Agreement* provision
17 that it advocates should apply when it states, "Qwest may request addition of
18 Non-Impaired Wire Centers based in whole or part upon line counts at any
19 time up to July 1 of each year, based on prior year line count data."³⁷ Qwest
20 did not request non-impaired status for DS3 loops in Boise Main until April
21 17, 2009. However, Qwest relied upon line count data from December 2007
22 rather than December 2008.

³⁵ Qwest filed its initial petition on June 27, 2008 and its Direct Testimony on April 17, 2009.

³⁶ Albersheim Direct, p. 31, footnote 20.

³⁷ *Settlement Agreement*, Exhibit Qwest-4, Section VI.A.2.

1 **COMMISSION DOES NOT NEED TO DECIDE ISSUES RAISED IN THE *FIVE-***
2 ***STATE SETTLEMENT AGREEMENT***

3 **Q. DOES THIS COMMISSION NEED TO RULE ON USE OF THE *FIVE-***
4 ***STATE SETTLEMENT AGREEMENT* IN THIS DOCKET?**

5 A. No. The only issue the Commission needs to decide in this docket is the non-
6 impairment status of the Boise Main and Boise West wire centers. Other
7 issues, such as those Qwest raises through its filing of the *Five-State*
8 *Settlement Agreement*, can be negotiated by CLECs and Qwest as part of
9 provisions in their interconnection agreements or can be resolved in a future
10 proceeding regarding a request for a non-impaired wire center when the
11 specific issue actually is in dispute.

12 **Q. IF THIS COMMISSION WERE TO RULE ON THE ISSUES**
13 **OUTLINED IN THE *FIVE-STATE SETTLEMENT AGREEMENT*,**
14 **WOULD YOU ADVOCATE ANY POSITIONS DIFFERENTLY THAN**
15 **THOSE CONTAINED IN THE AGREEMENT?**

16 A. Yes. Parties completed negotiation of the *Five-State Settlement Agreement* in
17 June of 2007. Since that time, Qwest has made requests for further non-
18 impaired wire centers in multiple states in both 2007 and 2008. As a result,
19 many provisions of the agreement shifted from abstraction to reality. For
20 example, as will be discussed in more detail, the 90 day transition period is a
21 near physical impossibility. In addition, numerous CLECs have spoken out
22 against the agreement, the Commission staff in Arizona and Colorado
23 expressed concerns regarding the agreement, and the Commission in Colorado
24 rejected the agreement as filed. As a result, if this Commission intends to rule

1 on the merits of the issues contained in the *Five-State Settlement Agreement*
2 over CLEC objection, then the Joint CLECs would make at least the following
3 proposals:

- 4 • The methodology for counting switched business lines should be adjusted to
5 conform with 47 CFR § 51.5 defining business lines as was ordered by the
6 Colorado Commission.³⁸ Specifically, residential and non-switched business
7 lines should be excluded from the switched business line counts. This issue is
8 discussed in more detail in section III of this testimony.
- 9 • The methodology for identifying fiber-based collocators should be adjusted to
10 conform with 47 CFR § 51.5 defining fiber-based collocations. Specifically
11 the reference to Express Fiber should be removed, as it is not in the Federal
12 Rules and has led to confusion rather than clarification. This issue is
13 discussed in more detail in section IV of this testimony.
- 14 • The transition period outlined in the *Five-State Settlement Agreement* is too
15 short. It is difficult to make any significant network changes in the 90 day
16 transition period. The FCC adopted 1-year transition period in the *TRRO*³⁹
17 and a 6-month transition period in the Omaha UNE Forbearance.⁴⁰ The

³⁸ Colorado Public Utilities Commission, Docket No. 06M-080T. In *The Matter Of The Joint Competitive Local Exchange Carriers' Request Regarding The Status Of Impairment In Qwest Corporation's Wire Centers And The Applicability Of The Federal Communications Commission's Triennial Review Remand Order*, Decision No. C08-1164, Order On Application For Rehearing, Reargument Or Reconsideration, adopted date October 29, 2008 ("Colorado RRR Order"), pp. 2-6. The Arbitrator Recommended Decision, Decision No. R08-164, The Commission Decision on Exceptions, C08-0969, and the *Colorado RRR Order* are attached to this testimony as Exhibit 202.

³⁹ TRRO, ¶ 5. Note that the FCC set an 18-month transition period for Dark Fiber Transport.

⁴⁰ Omaha Forbearance Order (Memorandum Opinion and Order FCC 05-170, WC Docket No. 04-233, September 26, 2005), ¶ 74.

1 TRRO transition period is preferable, but either transition period would better
2 allow for parties to identify, plan and transition impacted circuits. This is
3 discussed in more detail in section V of this testimony.

4 • The conversion from a UNE to an alternative arrangement offered by Qwest is
5 simply a billing change that benefits Qwest. Nothing about the physical
6 facility changes. As determined by the Colorado Commission, Qwest should
7 not be able to charge CLECs for this conversion. Further, as determined by
8 the Washington Commission, Qwest should not be allowed to change a
9 CLEC's circuit ID when a facility is converted. This imposes unnecessary
10 cost upon the CLEC. This is discussed in more detail in section VI of this
11 testimony.

12 • Regarding the procedures for future requests for non-impaired wire center
13 designations (Section VI of the Agreement), this Commission should find, as
14 ordered by the Colorado Commission, that Qwest should provide notice to
15 CLECs of wire centers nearing the "non-impairment" thresholds. The
16 Colorado Commission ordered Qwest to provide a list of wire centers within
17 one fiber-based collocation or 5,000 business lines of reaching a non-impaired
18 designation. This list should be provided annually during the time frame that
19 Qwest files its TRRO wire center non-impairment petitions with the states
20 commissions. In addition, Qwest's process for providing notice to CLECs
21 when Qwest intends to count that CLEC as a fiber-based collocater should be
22 expanded to include advanced notice to CLECs whose line counts Qwest is
23 relying upon to meet line count thresholds. This will help CLECs understand

1 the extent to which Qwest relies upon their data and facilitate review of
2 Qwest's non-impaired wire center support. These recommendations will be
3 discussed in greater detail in section VII of this testimony.

4 **III. SWITCHED BUSINESS LINES**

5 **DEFINITION OF BUSINESS LINES**

6 **Q. HOW DOES THE FCC DEFINE A SWITCHED BUSINESS LINE FOR**
7 **THE PURPOSES OF DETERMINING NON-IMPAIRED WIRE**
8 **CENTERS?**

9 A. The FCC defines a Business Line as follows:⁴¹

10 A business line is an incumbent LEC-owned switched access line used
11 to serve a business customer, whether by the incumbent LEC itself or
12 by a competitive LEC that leases the line from the incumbent LEC.
13 The number of business lines in a wire center shall equal the sum of all
14 incumbent LEC business switched access lines, plus the sum of all
15 UNE loops connected to that wire center, including UNE loops
16 provisioned in combination with other unbundled elements. Among
17 these requirements, business line tallies (1) shall include only those
18 access lines connecting end-user customers with incumbent LEC end-
19 offices for switched services, (2) shall not include non-switched
20 special access lines, (3) shall account for ISDN and other digital access
21 lines by counting each 64 kbps-equivalent as one line. For example, a
22 DS1 line corresponds to 24 64-kbps-equivalents, and therefore to 24
23 business lines.

24 **Q. DOES QWEST PROPERLY RELY UPON SWITCHED BUSINESS**
25 **LINES TO DETERMINE "NON-IMPAIRMENT" FOR THE BOISE**
26 **MAIN AND BOISE WEST WIRE CENTERS IN IDAHO?**

27 A. No. There are a number of problems with Qwest's switched business line

⁴¹ 47 C.F.R. § 51.5, Terms and Definitions, Business Line.

1 counts used in this docket. First, Qwest makes two related errors that lead
2 Qwest to overstate CLEC switched business line counts and thus makes
3 Qwest's total switched business line counts unreliable. Second, I have been
4 unable to validate Qwest's Integra specific UNE loop counts and have arrived
5 at numbers significantly different than those provided by Qwest. Third,
6 Qwest should have used December 2008 line counts, rather than December
7 2007 line counts, to support non-impaired status for DS3 loops in the Boise
8 Main wire center.

9 **Q. DOES QWEST COUNT SWITCHED CLEC BUSINESS LINES**
10 **PROVISIONED OVER UNE LOOPS OR ALL UNE LOOPS IN ITS**
11 **BUSINESS LINE COUNTS IN IDAHO?**

12 A. Ms. Albersheim is clear that Qwest counted all UNE loops in its count of
13 business lines.⁴² By doing so, Qwest improperly inflates the count of business
14 lines in the following ways:

- 15 • Qwest improperly counts UNE-L lines that are used to serve residential and
16 not business customers.
- 17 • Qwest improperly counts unutilized capacity and capacity used to provide
18 data services in its UNE-L line counts.

19 These are some of the issues pointed out in the Colorado Decision.

20 **Q. BEFORE YOU PROCEED TO DISCUSS THESE ISSUES, PLEASE**
21 **EXPLAIN THE EXTENT TO WHICH BUSINESS LINE COUNT**

⁴² Albersheim Direct, p. 34, line 1.

1 **PROBLEMS AFFECT QWEST'S PROPOSED LIST OF NON-**
2 **IMPAIRED WIRE CENTERS.**

3 A. Though Qwest claimed to support its Tier designations with both business line
4 counts and fiber-based collocations,⁴³ the fact is one or the other is required,
5 not both. If Qwest meets the fiber-based collocation standards for Tier 1 and
6 Tier 2 designations, which it currently appears Qwest did, then business line
7 counts with respect to the tier designations are effectively irrelevant.
8 However, to classify a wire center as non-impaired for DS3 loops, both a
9 business line and fiber-based collocation threshold must be met. Therefore,
10 Qwest's business line counts are relevant with regard to Qwest's request to
11 classify Boise Main as non-impaired for DS3 loops. As discussed previously,
12 in order to meet this non-impairment threshold, Qwest must have at least
13 38,000 business lines and 4 or more fiber-based collocations.

14 **RESIDENTIAL LOOPS SHOULD NOT BE COUNTED IN THE SWITCHED**
15 **BUSINESS LINE COUNTS**

16 **Q. PLEASE EXPLAIN WHY IT IS IMPROPER TO COUNT UNE LOOPS**
17 **USED TO SERVE RESIDENTIAL CUSTOMERS.**

18 A. It is improper because the point of the TRRO's line count measure is to size
19 the business (not residential) market. This is evident from the first sentence of
20 the FCC's business line definition, which is as follows:

21 A business line is **an incumbent LEC-owned switched access line**
22 **used to serve a business customer, whether by the incumbent LEC**
23 **itself or by a competitive LEC that leases the line from the**
24 **incumbent LEC. The number of business lines in a wire center shall**
25 **equal the sum of all incumbent LEC business switched access lines,**

⁴³ Albersheim Direct, p. 33, lines 7-9.

1 plus the sum of all UNE loops connected to that wire center, including
2 UNE loops provisioned in combination with other unbundled
3 elements. Among these requirements, business line tallies (1) shall
4 include only those access lines connecting end-user customers with
5 incumbent LEC end-offices for switched services, (2) shall not include
6 non-switched special access lines, (3) shall account for ISDN and
7 other digital access lines by counting each 64 kbps-equivalent as one
8 line. For example, a DS1 line corresponds to 24 64 kbps-equivalents,
9 and therefore to 24 “business lines.”⁴⁴

10 Qwest reads the second sentence of the above rule in isolation from the rest of
11 the definition to prop up Qwest’s proposal to include CLEC *residential* and
12 *non-switched* lines (served via Qwest UNE loops) in the *switched business*
13 *line count*. As correctly observed by the ALJ in the Colorado Wire Center
14 Case, while on the surface the second sentence may suggest counting all UNE
15 loops, a complete reading of this rule indicates the exact opposite. Below I
16 reproduce the Colorado Commission’s explanation of why UNE loops serving
17 residential customers should be excluded:

18 According to the ALJ’s reasoning, to include residential loops in the
19 court of business lines in a wire center would impermissibly conflict
20 with the first sentence and would not give meaning to the entire rule.
21 Consequently, the ALJ determined that the term “business lines” in the
22 second sentence must restrict the subsequent phrase “such that all
23 UNE loops must be confined within the scope of business line as
24 defined in the first sentence of the paragraph.”... As such, the ALJ
25 concluded that given the plain language of 47 C.F.R. § 51.5, it is
26 illogical to conclude that a residential line is a business line. A non-
27 switched UNE loop providing service to a residential customer
28 conflicts with both the first sentence of the rule, as well as the third
29 sentence; therefore, the UNE loop component of the business line
30 calculation by wire center, is to be modified to exclude residential and
31 non-switched lines.⁴⁵

⁴⁴ 47 C.F.R. § 51.5 Terms and Definitions, Business Line. (emphasis added).

⁴⁵ Colorado RRR Decision, p. 3 (footnote referencing the specific paragraph of the ALJ Recommended Decision is omitted), attached to this testimony as part of Exhibit 202.

1 The FCC's rule requires that the business line counts include only lines used
2 to serve business customers that are switched. In contrast, Qwest's business
3 line count methodology includes lines used to service residential (not
4 business) customers as well as lines that are not switched. In addition to
5 violating the express language of the rule and being inconsistent with the
6 intent of the rule, Qwest's claim that a residential or non-switched line should
7 be counted as a switched business line simply does not make sense.

8 **Q. COULD QWEST HAVE EASILY REMOVED RESIDENTIAL LOOPS**
9 **FROM ITS SWITCHED BUSINESS LINE COUNTS?**

10 A. Yes. When a CLEC orders a loop from Qwest there is a mandatory field on
11 the Local Service Request ("LSR") where the CLEC indicates whether the
12 loop will be used to serve a business, residence or government customer.
13 Thus, Qwest has information in its possession to enable it to remove
14 residential loops from its calculation of switched business line counts.

15 **NON-SWITCHED CAPACITY OF LOOPS USED TO SERVE BUSINESSES**
16 **SHOULD NOT BE INCLUDED IN SWITCHED BUSINESS LINE COUNTS**

17 **Q. WHAT IS YOUR PRIMARY CONCERN ON THIS ISSUE?**

18 A. Qwest counts all UNE-L at their maximum potential capacity and assumes
19 that this full capacity is dedicated to serve voice switched demand, which
20 means that Qwest counts all high-capacity/digital DS1 UNE-L as 24
21 individual business switched lines. This approach inappropriately counts
22 channels on the high-capacity/digital UNEs that do not provide switched
23 business services – a prerequisite to a *line* being counted as a *business line*.

1 This method inappropriately assumes that every available channel on an
2 unbundled high-capacity loop (or its equivalent digital capacity) is being used
3 to support switched business services, when in fact, much of that capacity
4 might not be used at all (vacant), and some portion of that capacity in most
5 circumstance will almost certainly be used for data services.

6 **Q. WHAT METHOD OF COUNTING BUSINESS LINES SHOULD BE**
7 **USED INSTEAD OF QWEST'S METHOD?**

8 A. The lines that are included in the business line count must comply with the
9 *entire* definition of business line, which means that these lines must be: (1)
10 used to serve a business customer; *and* (2) used to provide switched services
11 (*i.e.*, voice); *and* to the extent consistent with these requirements, (3) each 64
12 kbps channel should be evaluated as one line. In addition, as discussed above,
13 whether a line is counted as a business line or not, should not depend upon
14 whether the customer is served by Qwest or the CLEC.⁴⁶ Qwest must use the
15 same methodology for counting CLEC lines as it does in counting its own
16 business lines.

17 **Q. IS THE FCC CLEAR THAT QWEST RETAIL LINES AND UNE-L**
18 **ARRANGEMENTS SHOULD BE TREATED THE SAME?**

19 A. Yes. Immediately after identifying the types of lines that are candidates to be
20 counted as business lines, the definition adopts limiting language with the
21 phrase "among these requirements," thereby making clear that the limiting

⁴⁶ This parity requirement is contained within the first sentence of the business line definition: "an incumbent LEC-owned switched access lines used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC."

1 criteria of the definition apply equally to UNE-L arrangements as well as
2 ILEC retail line counts.

3 **Q. HAS QWEST APPLIED THESE LIMITING CRITERIA**
4 **CORRECTLY?**

5 A. No. Just like the above discussed case of UNE loops that serve residential
6 customer, Qwest's application of the FCC definition is based on reading
7 isolated components of the definition of business line in a way that conflicts
8 with other provisions:

9 First, Qwest places great emphasis on the second sentence of the definition
10 which, when read in isolation, states:

11 The number of business lines in a wire center shall equal the sum of all
12 incumbent LEC business switched access lines, plus the sum of all
13 UNE loops connected to that wire center, including UNE loops
14 provisioned in combination with other unbundled elements.

15 As interpreted by Qwest, it claims that the sentence permits it to count all
16 UNE-L, without regard to whether the lines satisfy any of the requirements to
17 be considered a "business line."

18 Second, Qwest exploits an example in the definition as an unconditional
19 directive that the maximum potential capacity of high-speed digital services
20 *should* be counted, again without regard to whether any of the threshold
21 requirements to be counted as a business line are being satisfied.

22 Importantly, however, there are no absolute instructions in the definition that
23 require that all UNE loops – much less every 64 kbps channel – be counted as

1 a business line, whether or not they otherwise meet the requirements of the
2 definition. As I explained above, the definition applies additional
3 requirements to both UNE loop arrangements and Qwest's retail lines that
4 also must be satisfied before "a line" can be counted as a "business line."
5 This is true for individual analog lines, as well as each digital line to which
6 Qwest has counted at its maximum, theoretical capacity.

7 **Q. ARE YOU SAYING THAT QWEST IS INCORRECT BY COUNTING**
8 **EVERY DS1 LOOP BY ITS MAXIMUM POTENTIAL CAPACITY (i.e.,**
9 **AS 24 BUSINESS LINES IN ALL INSTANCES)?**

10 **A.** Yes. Qwest counts every high capacity/digital UNE loop assuming that the
11 maximum potential capacity is used to provide switched business line service,
12 when it understands fully, that such a circumstance is by far the exception, as
13 opposed to the rule, in today's marketplace. Qwest appears to base its view
14 on its selective reading of the final instruction, which indicates that the
15 business line count:

16 ...shall account for ISDN and other digital access lines by counting
17 each 64 kbps-equivalent as one line. For example, a DS1 line
18 corresponds to 24 64 kbps-equivalents, and therefore to 24 "business
19 lines."

20 Importantly, a proper reading of the above instruction does not direct Qwest to
21 count each channel in a high capacity circuit as a "business line." The critical
22 sentence in the quote cited above is that Qwest "shall account for ISDN and
23 other digital access lines by counting each 64 kbps-equivalent as one line"
24 (emphasis added). This requirement, however, does nothing more than what it

1 *plainly* states, *i.e.*, that each 64 kbps-equivalent should be considered “one
2 line.” Whether or not these lines should be counted as business lines,
3 however, depends upon whether the remaining requirements of the FCC
4 definition are satisfied.

5 The fact that the definition provides an example of how the analysis might
6 count a DS1 does not require that Qwest or the Commission, ignore situations
7 in which a similar DS1 might provide very little switched business service.
8 Indeed, had the FCC wanted to declare all high capacity services and circuits
9 as business lines, it could have easily simplified the definition to say so. But
10 the FCC did not. It directed that each 64-kbps equivalent be considered one
11 line, and then directed that other criteria – most specifically, that the line also
12 be used to provide switched access line service to a business customer (*i.e.*,
13 voice service) – be used to determine whether each “line” should be
14 considered a business line.

15 **Q. DOES ARMIS COUNT DIGITAL LINES AT THEIR MAXIMUM**
16 **POTENTIAL CAPACITY?**

17 **A.** No. The ARMIS instructions permit Qwest to count “only those access lines
18 connecting end-users with their end offices for switched services,”⁴⁷ which is
19 the same requirement as in the FCC’s definition of “business lines” for its
20 unbundling framework.⁴⁸ And as I explained earlier, the FCC’s business line

⁴⁷ <http://www.fcc.gov/wcb/armis/documents/2004PDFs/4308c04.pdf> at page 20.

⁴⁸ The first limiting factor in the FCC’s definition of a business line is that “business lines”: “shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services.” 47 C.F.R. § 51.5.

1 definition directs that lines be counted whether the line is served by the ILEC
2 or the CLEC. Thus, whether the line is a Qwest retail line, or a UNE loop
3 arrangement used by a CLEC to provide service, the same criteria apply.
4 Importantly, the term “business switched access lines” is a defined term in
5 ARMIS 43-08, which is the report that the FCC directed be used to measure
6 ILEC retail lines.⁴⁹ The ARMIS reporting instructions require that Qwest
7 report its lines in voice-equivalents,⁵⁰ but, importantly, does not permit Qwest
8 to count empty circuits or data circuits.⁵¹ Simply put, Qwest may not count
9 empty or data circuits on a DS1 used to provide service to one of its customers
10 (it may only count the activated circuit-paths) That is perfectly consistent
11 with the FCC’s rules with respect to counting business access lines relative to
12 impairment, unfortunately, that is not the process Qwest undertook.

13 **Q. ARE THERE ANY OTHER LOGICAL FLAWS IN ALLOWING**
14 **QWEST TO COUNT EMPTY CIRCUITS OR NON-SWITCHED**
15 **CIRCUITS IN ITS UNE-L COUNTS?**

16 **A.** Yes. Since empty (unused) and non-switched circuits would not be counted
17 under Qwest’s retail line counts, but would be counted under CLEC UNE-L
18 counts, Qwest would be allowed to count empty capacity and data circuits
19 simply because the customer switched to the CLEC.

⁴⁹ *TRRO*, ¶ 105, fn. 303.

⁵⁰ See <http://www.fcc.gov/wcb/armis/documents/2004PDFs/4308c04.pdf> (page 21) defining ARMIS 43-08 Business Switched Access Lines as “total voice-grade equivalent analog or digital switched access lines to business customers.” (emphasis added)

⁵¹ Page 20 of the instructions for ARMIS 43-08 – like the FCC’s business line definition – makes clear that Qwest may count “only those lines connecting end-user customers with their end offices for switched services.”

1 CLECs do not use high capacity UNE-L at their maximum potential capacity
2 for purposes of providing exclusively switched business services. CLECs
3 provide sophisticated data services (e.g., high speed internet access, web
4 hosting, IP address, DNS, email services) over these loops. These services,
5 while utilizing bandwidth (or 64 kbps channels) on the CLEC's DS1 loop, are
6 not switched business lines, and should therefore not be included in the count
7 of business lines.

8 **Q. IF QWEST DOES NOT KNOW WHETHER A CLEC IS USING THE**
9 **FULL BANDWIDTH OF THE UNE LOOPS, DOES THAT JUSTIFY**
10 **COUNTING THE FULL CAPACITY OF THE UNE LOOP?**

11 A. No. Complying with the FCC's full and complete definition of "business
12 line" is not simply a matter of convenience. The rule makes clear that *only*
13 switched business lines are to be counted – not the maximum potential
14 capacity which would include empty circuits and data circuits. Hence, even if
15 Qwest does not know the utilization rate of CLEC UNE-L for switched
16 business lines, Qwest cannot simply toss out part of the FCC's definition and
17 count all UNE-Ls at their maximum potential capacity regardless of whether
18 they meet the other applicable criteria.

19 **Q. HOW DO YOU PROPOSE THAT THE CLEC UNE LOOP COUNTS**
20 **BE ADJUSTED TO BETTER REFLECT THE FACT THAT UNE**
21 **LOOPS MAY BE USED TO PROVISION NON-SWITCHED DATA OR**
22 **SPECIAL ACCESS SERVICES?**

1 A. There are a number of options available to the Commission. First, this
2 Commission could require the CLECs that have lines Qwest included in its
3 line count totals provide voice access lines associated with loops it purchases
4 from Qwest. CLECs have to supply voice access lines for each state as part of
5 the FCCs 477 reporting requirements. This number can then be compared to
6 the loop capacity for the entire state to estimate the percentage of voice lines
7 to loop capacity. I have performed this calculation estimate for Integra as part
8 of Exhibit 206.

9 **Table 1: Highly Confidential – Integra Estimate of Switched Business Lines as a**
10 **Percent of Loop Capacity.**

11 *See Highly Confidential Exhibit 206.*

12 Alternatively, the Commission could rely on the experience of a large CLEC
13 in the state, such as Integra, to estimate results for all CLECs in the state.

14 **INTEGRA CAN NOT VERIFY QWEST'S LOOP COUNTS IN BOISE MAIN**
15 **AND BOISE WEST**

16 **Q. PLEASE EXPLAIN THE PROBLEMS YOU HAVE HAD**
17 **VALIDATING QWEST'S INTEGRA SPECIFIC UNE LOOP COUNTS**
18 **IN THE BOISE MAIN AND BOISE WEST WIRE CENTERS.**

19 A. Attempting to validate Qwest's CLEC specific loop counts is a time
20 consuming, labor intensive endeavor. Business data storage practices were
21 generally developed for different purposes and not with these non-impairment
22 designation proceedings in mind. Integra's internal data is typically stored by
23 customer, not by the Qwest loop facility upon which that customer's service
24 rides, and contains information regarding the collocation in which the

1 customer's service is connected, but not the Qwest wire center in which the
2 customer actually resides. For example, when a CLEC purchases from Qwest
3 an EEL circuit, i.e. a combination of an unbundled loop and transport, the
4 wire center where the customer is located is different from the wire center
5 where the circuit terminates. Integra purchases many EEL circuits from
6 Qwest that terminate at the Boise Main and Boise West wire centers, though
7 the customers being served by these EELs reside in wire centers other than
8 Boise Main or Boise West.

9 Thus, in order to validate Integra specific loop counts, I may attempt to check
10 Qwest billing data to determine whether it is consistent with Integra internal
11 data. Qwest billing data presents other challenges, as Qwest bills do not
12 clearly identify the wire centers to which a circuit belongs; there are often
13 multiple bills for each entity within a state; each bill has a unique bill date
14 which is not the December 31 time being investigated; and bills may have
15 missing data and/or components that make circuit validation difficult. Despite
16 these difficulties, in most non-impairment cases when I have used this
17 comparison method, I have been able to verify Qwest's Integra specific line
18 counts to such a degree that any discrepancies were minor and would not
19 impact the proposed non-impairment designation. An exception is the Eagan-
20 Lexington wire center in Minnesota where Integra along with another CLEC
21 found significant discrepancies with Qwest's data that Qwest was forced to

1 withdraw its non-impairment proposal for that wire center admitting that its
2 initial line count estimates were in error.⁵²

3 Qwest's loop count data for Integra in the Boise Main and Boise West wire
4 centers is proving difficult to validate, as was the case with Eagan-Lexington.
5 For example, Qwest shows a significant number of EEL circuits associated
6 with these two wire centers, while I cannot find a single EEL circuit
7 associated with a customer that resides in those wire centers.⁵³ In addition, I
8 have identified significantly more DS1 loop and 2-wire loop circuits than
9 Qwest has counted for Integra in these wire centers. The table below shows
10 the percent of Integra specific loop counts that I have been able to validate at
11 this time based both on Qwest's December 2007 filing provided as part of
12 Qwest's June 27, 2008 filing and Qwest's December 2008 data provided in
13 response to Staff data request STF 1-3.

14 **Table 2: Percent of Qwest's Integra Loop Counts Validated by Integra**

Percent of Integra Loop Capacity Validated		
Wire Center	December 2007	December 2008
Boise Main	43.2%	51.7%
Boise West	28.2%	71.2%

15

⁵² Minnesota Docket No. 07-865, Qwest Letter Withdrawing Wire Center, March 7, 2008. It is important to note that no signal CLEC had enough disputes to alter Qwest's line counts beyond the non-impairment threshold, but because two CLECs closely reviewed their data in combination the discrepancies were enough to challenge and force a withdrawal of Qwest's filing.

⁵³ Note that we have a number of EEL circuits terminating to the Boise Main and Boise West wire center serving customers that reside in other wire centers. However, these should not be included in the Boise Main and Boise West loop counts. This has not been a point of contention in the past and it is not clear that this is the cause of the discrepancy in this case.

1 **LINE COUNT DATA SHOULD BE REFLECTIVE OF TIME PERIOD OF THE**
2 **REQUEST FOR NON-IMPAIRED WIRE CENTER DESIGNATION**

3 **Q. DID QWEST USE LINE COUNT DATA FROM DECEMBER 2008 TO**
4 **SUPPORT ITS APRIL 2009 REQUEST FOR DS3 LOOP NON-**
5 **IMPAIRMENT IN BOISE MAIN?**

6 A. Surprisingly, no. Despite Qwest's stated desire to use the provisions of the
7 *Five-State Settlement Agreement* in Idaho, Qwest ignored the provision of the
8 agreement that would have required Qwest to use the most recent line count
9 data available when making a new non-impairment claim. That *Five-State*
10 *Settlement Agreement* provision states, "Qwest may request addition of Non-
11 Impaired Wire Centers based in whole or part upon line counts at any time up
12 to July 1 of each year, based on prior year line count data."⁵⁴ Qwest did not
13 request non-impaired status for DS3 loops in Boise Main until April 17, 2009.
14 However, Qwest relied upon line count data from December 2007 rather than
15 December 2008.

16 **Q. WHY IS THE TIMING OF THE COUNTS OF SWITCHED BUSINESS**
17 **LINE AND FIBER-BASED COLLOCATORS IMPORTANT AS**
18 **QWEST FILES TO CLASSIFY ADDITIONAL WIRE CENTERS AS**
19 **NON-IMPAIRED?**

20 A. The issue of the appropriate time period to review both the switched business
21 line count and the fiber-based collocation data is crucial as updates are made
22 to Qwest's Wire Center List. This Commission should make clear that, as
23 Qwest makes updates to its list, Qwest should use data that is

⁵⁴ *Settlement Agreement*, Exhibit Qwest-4, Section VI.A.2.

1 contemporaneous with Qwest's claim for "non-impaired" status. First, Qwest
2 should not be allowed to go fishing back through time in attempts to classify
3 wire centers as non-impaired that do not currently meet the non-impairment
4 status. As described above, it is difficult for CLECs to validate Qwest's line
5 count data. It becomes exponentially more difficult the older the data
6 becomes. Second, Qwest should not be allowed to select one set of data from
7 one time period and another set of data from a different time period and then
8 yet another time period to actually make its claim for non-impairment. For
9 example, suppose there exists a wire center today that has four fiber-based
10 collocators, but fewer than 60,000 lines. Suppose that the wire center
11 surpasses 60,000 lines in the future, but by this time there are only three fiber-
12 based collocators. Qwest should not be allowed to choose line counts from
13 the present and fiber-based collocators from the past. The determination of
14 "non-impaired" status should be made at the point in time that Qwest is
15 claiming an office is "non-impaired," not from a combination of counts from
16 different time periods that best advantages Qwest.

17 Allowing Qwest to selectively choose the time period and data upon which it
18 chooses to rely would put CLECs at a further substantial disadvantage
19 regarding validation of Qwest's data. It would also disadvantage CLEC
20 business planning as to when and how to expand its presence in Idaho since it
21 would have to take into account not only the current conditions of the market,
22 but also the conditions as they existed in the past.

1 **ADJUSTED QWEST LINE COUNTS**

2 **Q. HOW DO YOUR FINDINGS AFFECT QWEST'S NON-IMPAIRMENT**
3 **REQUEST FOR THE BOISE MAIN AND BOISE WEST WIRE**
4 **CENTERS IN IDAHO?**

5 A. By making the changes described below to the CLEC loop count data, Boise
6 Main does not meet the 38,000 line count threshold to be classified as non-
7 impaired for DS3 loops. In addition, the Boise West Tier 2 designation is not
8 supported by line counts and it is unclear whether the Boise Main Tier 1
9 designation is supported by line counts.

10 Change 1: Remove residential loops from the CLEC loop counts

11 Change 2: Remove disputed circuit counts from the CLEC loop counts. This
12 can be accomplished by applying the Integra disputed circuit percent (one
13 minus the validated percent) to all CLEC loop counts.⁵⁵

14 Change 3: Remove non-switched capacity from the loop capacity counts.
15 This can be accomplished by applying the Integra ALE to capacity percent to
16 the existing CLEC loop capacity counts.

17 Change 4: For DS3 loops in Boise Main, rely upon December 2008 line count
18 data consistent with the time period in which Qwest made its request for non-
19 impairment.

⁵⁵ Integra hopes to narrow this dispute throughout the course of this case. However, a subset of CLECs should not be punished by being forced to rely upon CLEC loop counts for CLECs that failed to undertake a review of their own data. Until such time that disputes can be resolved (and in all cases thus far they have been resolved), disputes should be applied to all CLECs not only the CLECs disputing their counts.

1 Exhibit 207 summarizes the impact of the changes described above.

2 **Table 3: Highly Confidential -- 2007 and 2008 Qwest Line Counts with**
3 **Adjustments**

4 *See Highly Confidential Exhibit 207.*

5 **A NON-IMPAIRMENT FINDING IS NOT REVERSIBLE**

6 **Q. THERE IS UNCERTAINTY REGARDING QWEST'S SWITCHED**
7 **BUSINESS LINE COUNTS AND THE PROPER MAGNITUDE OF**
8 **THE ADJUSTMENTS YOU RECOMMEND. HOW SHOULD THE**
9 **COMMISSION DEAL WITH THIS UNCERTAINTY?**

10 **A.** It is important to stress that once a wire center is classified as non-impaired,
11 this classification is irreversible.⁵⁶ Once a finding of non-impairment at a wire
12 center is approved by the Commission, CLECs would be forever (or until a
13 change in law) prohibited from purchasing certain UNEs for any "non-
14 impaired" wire centers.

15 The Commission should take extra care to ensure that that it does not make a
16 finding of non-impairment when impairment actually exists (or approve a
17 counting methodology that would lead to such a result).

18 **Q. WHY SHOULD THE COMMISSION BE MORE CONCERNED**
19 **ABOUT MAKING A FALSE FINDING OF NON-IMPAIRMENT?**

20 **A.** A finding of non-impairment is irreversible. As mentioned above, once wire
21 centers are classified as "non-impaired," the Commission cannot find

⁵⁶ CFR §51.319(a)(4)(i), §51.319(a)(5)(i), §51.319(e)(3)(i) and §51.319(e)(3)(ii). See also Albersheim Direct, p. 28, lines 12-15.

1 impairment for those transport routes in the future. On the other hand, if the
2 Commission erroneously finds impairment, the only risk is that requesting
3 carriers will be able to obtain unbundled access to high capacity loops and
4 transport at TELRIC rates longer than they should, *i.e.*, until the ILEC
5 petitions the Commission again to reclassify the wire center (which Qwest
6 indicates it plans to do periodically as conditions change).⁵⁷ In other words,
7 an erroneous finding of impairment where none exists is correctible, and the
8 potential risk of making such an error is less significant than potential
9 consequences arising from an erroneous finding of non-impairment that
10 cannot be corrected.

11
12 **IV. FIBER BASED COLLOCATIONS**

13 **IMPACT OF QWEST'S FIBER-BASED COLLOCATION SUPPORT DATA**

14 **Q. WHAT ROLE DOES THE NUMBER OF FIBER-BASED**
15 **COLLOCATORS PLAY IN THE DETERMINATION OF WIRE**
16 **CENTER "NON-IMPAIRMENT" STATUS?**

17 **A.** The number of fiber-based collocators in each Qwest wire center plays a
18 crucial role in determining a wire center's "non-impairment" status. If a wire
19 center has three fiber-based collocators, then that wire center is automatically
20 classified as Tier 2, and the presence of four fiber-based collocators

⁵⁷ Albersheim Direct p. 21, lines 3-5.

1 automatically classifies a wire center as Tier 1.⁵⁸ Wire centers with four fiber-
2 based collocators and the requisite number of switched business lines (60,000
3 for DS1 loops and 38,000 for DS3 loops) are classified as “non-impaired”
4 with respect to DS1 and/or DS3 UNE loops.⁵⁹ Both the Tier 1 status for Boise
5 Main and the Tier 2 status for Boise West currently appear to be supported by
6 the number of fiber-based collocations in those offices.

7 **Q. WHAT INFORMATION DID QWEST PROVIDE FOR REVIEWING**
8 **ITS COUNTS OF FIBER-BASED COLLOCATORS?**

9 A. Qwest Highly Confidential Exhibit 9 and 10 to Ms. Torrence’s direct
10 testimony contains a list of the names of the fiber-based collocators for each
11 office on the Qwest Wire Center List. This exhibit also contains the results of
12 Qwest’s field verification which includes the type of collocation, whether
13 there is express fiber, whether the fiber is terminated in the collocation,
14 whether the fiber exits the Qwest central office, whether power can be
15 visually verified at the cage, whether power can be verified at the BDFB as
16 well as other notes. In addition, Qwest Highly Confidential Exhibit 8

⁵⁸ *In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, CC Docket No. 01-338, WC Docket No. 04-313, 20 FCC Rcd 2533, (2004) (“TRRO”) ¶66.* The Tier status determines the availability of DS1, DS3 and Dark Fiber UNE transport. DS1 UNE transport is not available between Tier 1 wire centers. DS3 and Dark Fiber UNE transport is not available between wire centers designated as Tier 1 and/or Tier 2. Line counts can also play a role in determining the Tier status of a wire center and did so for most of the wire centers on Qwest’s list for Arizona. Offices with more than 38,000 switch business lines are classified as Tier 1 and offices with between 24,000 and 38,000 business lines are classified as Tier 2.

⁵⁹ *TRRO* ¶146.

1 includes the results of Qwest's letter to CLECs attempting to verify the fiber-
2 based status of the CLEC.⁶⁰

3 **Q. WHAT CONCLUSIONS CAN BE REACHED FROM A REVIEW OF**
4 **THE QWEST FIBER-BASED COLLOCATION DATA?**

5 A. Based upon a review of the fiber-based collocation data provided by Qwest, it
6 currently appears that Qwest has at least four fiber-based collocators in Boise
7 Main and at least three in Boise West, which would support Qwest's request
8 for Tier 1 and Tier 2 status respectively.

9 **CONCERNS REGARDING QWEST'S PROCESS FOR IDENTIFYING FIBER-**
10 **BASED COLLOCATIONS**

11 **Q. DO YOU HAVE ANY CONCERNS WITH QWEST'S PROCESS FOR**
12 **IDENTIFYING FIBER-BASED COLLOCATIONS AND THE**
13 **PROVISIONS RELATING TO FIBER-BASED COLLOCATIONS IN**
14 **THE *FIVE-STATE SETTLEMENT AGREEMENT*?**

15 A. I do have a few general concerns and corrections to Qwest's "non-impaired"
16 wire center list.

17 1) Qwest sent a letter to carriers that Qwest stated it believed were fiber-
18 based collocators and asked the carriers to verify whether or not the carrier is
19 a fiber-based collocator.⁶¹ Qwest counted a carrier as a fiber-based collocator

⁶⁰ It is important to note that if a CLEC did not respond to Qwest's request for verification of a fiber-based collocation, and most CLECs did not respond, Qwest interpreted this as CLEC agreement, rather than a CLEC dispute. As a result, Qwest counted these CLECs as fiber-based collocators.

⁶¹ *Torrence Direct*, p. 18, lines 6 - 11.

1 even if the carrier failed to confirm⁶² this status. In Qwest Highly
2 Confidential Exhibit 8, Qwest provides non-confidential information that only
3 one of the six carriers responded to Qwest's letter. Though Ms. Torrence
4 indicates Qwest regrets that "CLECs appear reluctant to respond," Qwest
5 Highly Confidential Exhibit 8 shows no indication of any action taken by
6 Qwest to obtain a response. It is also unclear how Qwest chooses the
7 company representative to whom to send its letter. For example, despite my
8 having worked with Qwest on numerous non-impairment cases across Qwest
9 region, Qwest failed to include me on the notice sent to Integra requesting
10 verification of fiber-based collocations in Idaho. Further, as far as I am aware,
11 Qwest made no attempt with anyone at Integra to follow up regarding
12 Integra's lack of response to Qwest's request for verification. The letter
13 serves little purpose if it is not reaching the intended individuals at the CLECs
14 who could provide a substantive response to Qwest's claims. I will discuss
15 what steps could be taken to improve this request for verification process in
16 Section VII regarding the most efficient process going forward.

17 2) Qwest attempted a field verification of the fiber-based collocations in
18 question. To do this, Qwest asked its Central Office Technicians and State
19 Interconnection Manager to verify the fiber-based collocations.⁶³ The letter
20 Qwest sent was written in a way that encouraged Qwest employees to err on

⁶² *Torrence Direct*, p. 18, lines 13 - 14.

⁶³ *Torrence Direct* p. 17, lines 10-16.

1 the side of finding fiber-based collocations.⁶⁴

2 This letter casts doubt on whether Qwest's verification process was performed
3 in an objective manner. In a wire center in Colorado, Qwest's field
4 verification confirmed there was fiber, confirmed the fiber left the Qwest
5 central office and confirmed the carrier had power. However, this carrier
6 disputed its status as a fiber-based collocater explaining that it had copper, not
7 fiber. Upon a further field verification, Qwest agreed that this carrier should
8 not be counted. Though Qwest eventually correctly designated this carrier in
9 Colorado, it does not change the fact that the initial field verification found
10 fiber where none existed.

11 Another example that casts doubt on Qwest's field verifications occurred in
12 Minnesota during the first round of requests for non-impaired status. At that
13 time Qwest claimed its initial list of fiber-based collocaters represented
14 carriers "operating from December 2003 through February 2005,"⁶⁵ but an
15 example involving Eschelon proves that this was not the case. For two wire
16 centers in Minnesota, Qwest counted Eschelon as a fiber-based collocater
17 even though Eschelon did not have power connected to its equipment on
18 March 11, 2005. Eschelon was in the process of establishing the collocations
19 as fiber-based collocations but the collocation sites were not fiber-based
20 collocations "from December 2003 through February 2005" nor was Eschelon

⁶⁴ Qwest has treated the actual letter as confidential and did not provide it as part of its filing in Idaho, though it has been provided in other states.

⁶⁵ Exhibit 203, Qwest Responses to Joint CLEC Data Requests in Arizona, JCDR 01-032.

1 a fiber-based collocator on March 11, 2005. Despite communicating this fact
2 to Qwest, Qwest continued to count Eschelon as a fiber-based collocator.

3 3) In some states, Qwest continues to count carriers as fiber-based collocators
4 even when the verification worksheets indicate otherwise. In Arizona, Qwest
5 counted carriers as fiber-based collocators even though Qwest was unable to
6 verify the carriers had power at the Battery Distribution Fuse Bay ("BDFB").
7 Qwest stated that the purpose of the spreadsheet was to verify various aspects
8 of the collocation including an inspection of the name, power, and fiber
9 facilities.

10 4) In some states, Qwest clarified that it did not count any CLEC-to-CLEC
11 connections as part of its fiber-based collocations.⁶⁶ However, contrary to the
12 *TRRO*, Qwest counted such an arrangement in a wire center in Colorado.
13 When one carrier simply relies upon the fiber of another fiber-based
14 collocator, it is inappropriate to count both carriers as fiber-based collocators.
15 Counting both carriers amounts to double counting. Based on my review of
16 the Idaho fiber-based collocation data, I currently do not believe Qwest
17 counted CLEC to CLEC cross connects for this request, but Qwest should
18 expressly confirm this fact and, in any event, this issue could play a role in the
19 future as Qwest updates the list.

20 47 C.F.R § 51.5 defines a fiber-based collocator as follows:

⁶⁶ Exhibit 203, Qwest Responses to Joint CLEC Data Requests in Arizona, JCDR 01-033.

1 A fiber-based collocator is any carrier, unaffiliated with the incumbent
2 LEC, that maintains a collocation arrangement in an incumbent LEC
3 wire center, with active electrical power supply, and operates a fiber-
4 optic cable or comparable transmission facility that (1) terminates at a
5 collocation arrangement within the wire center; (2) leaves the
6 incumbent LEC wire center premises; and (3) is owned by a party
7 other than the incumbent LEC or any affiliate of the incumbent LEC,
8 except as set forth in this paragraph. Dark fiber obtained from an
9 incumbent LEC on an indefeasible right of use basis shall be treated as
10 non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-
11 based collocators in a single wire center shall collectively be counted
12 as a single fiber-based collocator. For purposes of this paragraph, the
13 term affiliate is defined by 47 U.S.C. § 153(1) and any relevant
14 interpretation in this Title.

15 Paragraphs 93 through 102 of the *TRRO* explains the FCC's rationale for this
16 definition. Paragraph 95 states, "Our fiber-based collocation test captures
17 intermodal competitors' transport facilities..." Paragraph 101 states,
18 "Additionally, we find that fiber-based collocation provides a reasonable
19 proxy for where significant revenue opportunities exist for competitive
20 LECs..." In paragraph 102, the FCC first defines fiber-based collocators.
21 Footnote 292 to this paragraph clarifies the conditions that must exist in order
22 for a carrier to be considered a fiber-based collocator: "We find that when a
23 company has collocation facilities connected to fiber transmission facilities
24 obtained on an indefeasible right of use (IRU) basis from another carrier,
25 including the incumbent LEC, these facilities shall be counted for purposes of
26 this analysis and shall be treated as non-incumbent LEC fiber facilities."

27 A CLEC-to-CLEC connection does not fall within the FCC's definition of a
28 fiber-based collocator and should not be counted as separate fiber-based
29 collocations.

1 5) If the Commission reaches the issue of the *Five-State Settlement*
2 *Agreement* over CLEC objection, the *Five-State Settlement Agreement*
3 contains a provision regarding Express Fiber that is not in the FCC rules and
4 which should be removed. This provision reads, “Express fiber will be
5 counted as a functional fiber facility for purposes of identifying a fiber-based
6 collocator, if it meets the definition of fiber based collocator in 47 C.F.R.
7 §51.5 (as reflected in paragraph B(1) and subparts above). The Joint CLECs
8 agree not to raise the lack of Qwest provided power when there is traffic over
9 the express fiber as the sole basis to dispute whether express fiber can be
10 counted as a functional fiber facility for purposes of identifying a fiber-based
11 collocator. For the purposes of this Settlement Agreement, ‘express fiber’
12 means a CLEC-owned fiber placed to the collocation by Qwest that terminates
13 at CLEC-owned equipment in a collocation and draws power from a remote
14 location.”⁶⁷ It does not clarify the application of the fiber-based collocation
15 rule. Qwest’s testimony provides no support for this provision, other than the
16 fact that it is in the *Five-State Settlement Agreement* (i.e., an impermissible
17 use of the agreement as evidence and precedent). This provision should be
18 not be adopted here in Idaho.

19 **V. TRANSITION PERIOD**

20 **90 DAY TRANSITION PERIOD TO CONVERT FROM UNES TO AN**
21 **ALTERNATIVE FACILITY IS NOT SUFFICIENT**

22 **Q. IS THE NINETY DAY TRANSITION PERIOD FOR HIGH-**

⁶⁷ *Settlement Agreement*, Exhibit Qwest-4, Section V.B.3.

1 **CAPACITY LOOPS AND TRANSPORT⁶⁸ PROPOSED BY QWEST⁶⁹**
2 **SUFFICIENT TO PROPERLY TRANSITION IMPACTED CIRCUITS**
3 **FROM UNES TO ALTERNATIVE ARRANGEMENTS?**

4 A. No. Based on my experience in working to implement changes to wire center
5 non-impairment designations, the 90 day transition period is impracticable for
6 a number of reasons.

7 **Q. PLEASE DESCRIBE WHAT MUST HAPPEN IN ORDER TO**
8 **TRANSITION NON-IMPAIRED FACILITIES FROM UNES TO**
9 **ALTERNATIVE SERVICE ARRANGEMENTS.**

10 A. Until the Commission issues its order, the non-impairment designation of a
11 wire center and effective date can not be known with certainty. It would be
12 inefficient and potentially costly for CLECs to begin transition plans for wire
13 centers that may not end up being classified as non-impaired. Once a
14 designation has been ordered, then impacted circuits must be identified. The
15 task of identifying impacted circuits can be difficult and time consuming for
16 both Qwest and CLECs.⁷⁰ For example, in Arizona, on multiple occasions,
17 Qwest sent Integra a list of what it claimed were non-impaired circuits that
18 contained hundreds of errors.

19 Once circuits are identified, the CLEC needs to put together a plan for
20 transitioning away from UNEs that are no longer available. This may involve

⁶⁸ Qwest proposes a transition period of 180 days for dark fiber transport.

⁶⁹ Albersheim Direct, p. 27, lines 6-9.

⁷⁰ See the discussion above regarding difficulties in validating Qwest's non-impaired circuit list.

1 a transition of converting circuits to an alternative service or product offered
2 by Qwest. When placing a large number of orders involving Qwest circuits,
3 CLECs coordinate the project with Qwest. Given resource availability and the
4 type of conversion, there may be limits to the number of circuits that are
5 processed in a given day. Typically, in Integra's experience, no more than 20
6 circuits can be converted in a given day. Both CLEC and Qwest resource
7 limitations can delay the time that it takes to complete a conversion.

8 Conversions may also be more complex than switching to another Qwest
9 product. The CLEC may determine that adding equipment to an existing
10 collocation will allow the CLEC to serve existing customers in an alternative
11 manner. New equipment needs to be purchased, installed and tested before
12 orders can even be placed to convert circuits to use the new equipment.

13 The CLEC may determine that installation of a new collocation is warranted
14 to deal with impacted circuits. A new collocation can eliminate the need for
15 EEL transport. Qwest takes up to 125 days to install a new collocation for a
16 CLEC.⁷¹ Collocations do not come with working equipment. In addition to
17 waiting for Qwest to install the collocation, the CLEC needs to purchase,
18 install and test equipment that will be put into the collocation to serve
19 customers. Once the new collocation is working with CLEC installed
20 equipment, the CLEC can start placing orders to convert circuits to use the
21 new collocation space.

⁷¹ See Qwest's Service Interval Guide, p. 43
(http://www.qwest.com/wholesale/downloads/2009/090413/InterconnSIG_PV95.doc).

1 **MINIMUM SIX MONTH TRANSITION PERIOD IS RECOMMENDED**

2 **Q. WHAT TRANSITION PERIOD WOULD YOU RECOMMEND?**

3 A. For the reasons outlined above, for single wire centers, this Commission
4 should establish a transition period of a year, or at least six months as was
5 used by the FCC in the Omaha Forbearance Order.⁷² When multiple wire
6 centers are involved (impacting multiple high capacity transport routes or high
7 capacity loop circuits in multiple offices), a one year transition period, as was
8 used by the FCC in the *TRRO*⁷³ would be more practical.

9 **VI. UNE CONVERSIONS**

10 **UNE CONVERSION DEFINED**

11 **Q. WHAT IS A UNE CONVERSION, AND WHAT CONCERNS DO**
12 **CLECS HAVE REGARDING QWEST'S PROPOSED PROCESS?**

13 A. A conversion happens when a circuit that was formerly available as a UNE
14 must be converted to a non-UNE alternative arrangement, as the result of a
15 finding of "non-impairment." By definition, conversions will take place on
16 live circuits that are up and running and currently supporting service to End
17 User Customers. Therefore, a seamless and error free conversion is crucial
18 because, if problems arise during the conversion, the likelihood that a CLEC
19 customer will be placed "out of service" is high.

⁷² Omaha Forbearance Order (Memorandum Opinion and Order FCC 05-170, WC Docket No. 04-233, September 26, 2005), ¶ 74.

⁷³ TRRO, ¶ 5. Note that the FCC set an 18-month transition period for Dark Fiber Transport. In the Omaha Forbearance Order (Memorandum Opinion and Order FCC 05-170, WC Docket No. 04-233, September 26, 2005) the FCC established a six-month transition period for carriers to establish alternative arrangements.

1 Further, it is important to note the “conversions” discussed in this testimony
2 involve only changing the rate charged for the facility and, in the vast majority
3 of circumstances, the CLEC and its End User Customer should be using the
4 same facility that was used prior to the conversion. These conversions are
5 required solely for purposes of implementing a regulatory construct and have
6 nothing to do with improving or otherwise managing the customer’s service –
7 in essence, the conversion is intended to re-label as something different what
8 was before a UNE. These facts reinforce the need for conversions to be
9 transparent to the CLEC’s End User Customers, as any disruption in service
10 would be completely unexpected and difficult to explain. In other words,
11 even though these conversions are being undertaken to effectuate Qwest’s
12 reduced legal obligations relative to UNEs, it is the CLEC who bears all the
13 risk of failure. The Joint CLECs, therefore, are highly motivated to ensure
14 that conversions can be accomplished seamlessly, reliably, efficiently and
15 cost-effectively.

16 **UNE CONVERSION PROPOSALS**

17 **Q. WHAT ARE THE JOINT CLEC PROPOSALS FOR UNE**
18 **CONVERSIONS?**

19 **A.** The Joint CLECs propose that, for a conversion from a UNE to a non-UNE
20 product or service offered by Qwest, the circuit identification (“circuit ID”)
21 will not change. In addition, the Joint CLECs propose that, when Qwest
22 converts a facility to an analogous or alternative service arrangement as a
23 result of a non-impairment finding, the conversion will be in the manner of a

1 price change on the existing records and not a physical conversion. Finally,
2 the Joint CLECs propose that the rate Qwest charges the CLEC to convert a
3 UNE to a higher priced analogous or alternative service be set to zero.

4 **Q. IF THE COMMISSION CONSIDERS THE FIVE-STATE**
5 **SETTLEMENT AGREEMENT OVER CLEC OBJECTION, DOES THE**
6 **AGREEMENT ADDRESS THESE ISSUES?**

7 A. Not entirely. The *Five-State Settlement Agreement* only addresses the issue of
8 the rate to be charged for the conversion of a UNE to an analogous or
9 alternative service arrangement (i.e., regardless of how the conversion is
10 performed).⁷⁴ The *Five-State Settlement Agreement* does not address the issue
11 regarding maintaining the same circuit ID and limiting these types of
12 conversions to a price change. Regarding the rate, the *Five-State Settlement*
13 *Agreement* specifically recognizes that,

14 Parties may disagree as to the amount of the applicable non-recurring
15 charge after three years from the Effective Date of this Settlement
16 Agreement, and each Party reserves all of its rights with respect to the
17 amount of charges after that date. Nothing in this Settlement
18 Agreement precludes a Party from addressing the non-recurring charge
19 after three years from the Effective Date of this Settlement Agreement.
20 A different non-recurring charge will apply only to the extent
21 authorized by an applicable regulatory authority, or agreed upon by the
22 Parties.⁷⁵

23 **Q. WHAT IS QWEST'S PROPOSAL FOR CONVERSIONS?**

⁷⁴ See section IV.A of the *Settlement Agreement*, Exhibit Qwest-1. As discussed previously, the *Settlement Agreement* established a rate of \$25 for each converted circuit to be applied for a three year time period. As previously discussed, the *Settlement Agreement* was not intended to be used as evidence outside of the six states in which it was originally negotiated.

⁷⁵ *Settlement Agreement*, Section IV.C, Exhibit Qwest-4, p. 6.

1 A. On the one hand, Qwest argues that this docket is not the proper venue to
2 determine the appropriate amount to charge for the conversion process⁷⁶
3 while, on the other hand, Qwest asks the Commission to “acknowledge
4 Qwest’s right to assess an appropriate charge for the activities that it performs
5 in the requisite conversion process performed on behalf of the CLEC.”⁷⁷ In
6 addition, Qwest argues that the circuit ID must be changed during a
7 conversion.⁷⁸

8 **Q. PLEASE DESCRIBE THE TYPE OF CONVERSIONS ADDRESSED BY**
9 **THIS DISPUTE.**

10 A. This dispute applies to conversions from a UNE facility to an analogous or
11 alternative service arrangement. These conversions would occur when there
12 is agreement, or it is determined in dispute resolution, that the UNE is
13 impacted by a finding of non-impairment. Analogous or alternative service
14 arrangements include access products purchased from Qwest’s access tariff.
15 For instance, a UNE DS1 loop could be converted to a DS1 special access
16 circuit if it is determined that the applicable non-impairment thresholds are
17 met for a particular wire center (*see* 47 CFR § 51.319(a)(4)).

18 **UNE CONVERSIONS ARE WITHIN THIS COMMISSION’S JURISDICTION**

19 **Q. IS THIS TRANSITION AWAY FROM UNES WITHIN THE SCOPE**
20 **OF SECTIONS 251 AND 252 OF THE ACT?**

⁷⁶ Hunnicutt Direct, p. 4, lines 13-16.

⁷⁷ Hunnicutt Direct, p. 20, lines 10-12.

⁷⁸ Hunnicutt Direct, p. 16.

1 A. Yes. The FCC found that “as contemplated in the Act, individual carriers will
2 have the opportunity to negotiate specific terms and conditions necessary to
3 translate our rules into the commercial environment, and to resolve disputes
4 over any new contract language arising from differing interpretations of our
5 rules.”⁷⁹ Similarly, Qwest recently challenged the Washington Utilities and
6 Transportation Commission (“WUTC”) decision in the Eschelon/Qwest
7 arbitration⁸⁰ regarding this very issue, UNE Conversions. The WUTC found,

8 As in our Final Order, we reject Qwest’s contention that we exceeded
9 our authority under Section 252 to address these issues. In that Order,
10 we followed the FCC’s specific guidance to carriers and state
11 commissions to address, through the Section 252 process, the
12 transition from UNE services to non-UNE services and establish any
13 rates, terms, and conditions necessary to implement the changes
14 prescribed by the FCC. As envisioned by the FCC, we appropriately
15 exercised our jurisdiction to provide CLECs a reasonable transition
16 process away from UNEs and ensure a seamless effect on services
17 provided to their end-users.

18 We believe that Qwest continues to exaggerate the distinction between
19 UNE and non-UNE terms and conditions. We reiterate the FCC’s
20 conclusion, and our own, that the primary difference between the two
21 is the rate at which Qwest is entitled to bill for services; a rate which
22 was formerly limited by TELRIC pricing. By overstating the
23 distinction between UNE and non-UNE terms and conditions, Qwest
24 misinterprets the basis and scope of our authority.⁸¹

⁷⁹ TRO, ¶ 7.

⁸⁰ In the Matter of the Petition of: QWEST CORPORATION and ESCHELON TELECOM, INC.
Pursuant to 47 U.S.C. Section 252(b), Docket No. UT-063061.

⁸¹ WUTC Order No. 19, Order on Reconsideration in the Eschelon/Qwest Arbitration, January 30,
2009, ¶¶ 20 – 21. Pages from the WUTC Order No. 18 and Order No. 19 regarding UNE
Conversions are attached to this testimony as Exhibit 204.

1 Similarly, in a Minnesota docket regarding terms and conditions surrounding
2 UNE Conversions the Commission found,

3 After briefing by all parties, the Administrative Law Judge found that
4 this Commission had jurisdiction in both cases. On the conversion
5 issue, she found as follows:

6 The Administrative Law Judge has concluded, based on the provisions
7 of the TRO and the TRRO, that the FCC has expressly directed the
8 negotiation of rates, terms, and conditions relating to conversion
9 processes in interconnection agreements, and consequently the
10 Commission has legal authority under § 252 to address these issues in
11 this docket.

12 ...

13 The Commission has carefully examined the Administrative Law
14 Judge's recommended order and the record on which it is based. Her
15 recommended order is closely reasoned in its analysis and compelling
16 in its conclusions; the Commission will accept and adopt it.⁸²

17 **CONVERSIONS SHOULD NOT IMPACT END USER CUSTOMERS**

18 **Q. SHOULD ANY CHANGES BE MADE BY QWEST DURING A**
19 **CONVERSION THAT COULD RESULT IN SERVICE DISRUPTION**
20 **FOR CLEC END USERS?**

21 **A.** No. When it has been determined that a UNE facility needs to be converted to
22 an analogous or alternative service arrangement, CLEC and its End User
23 Customer should continue to use the same physical facility.⁸³ Therefore, the
24 change required to effectuate the FCC's regulatory requirements can be

⁸² In the Matter of Qwest Corporation's Conversion of UNEs to Non-UN Es and In the Matter of Qwest Corporation's Arrangements for Commingled Elements, ORDER ADOPTING ADMINISTRATIVE LAW JUDGE'S RECOMMENDED ORDER ON MOTION FOR SUMMARY DISPOSITION, Docket Nos. P-421/07-370 & P-421/07-371, March 23, 2009, pp. 2-3. The Commission's Order and the reference ALJ Order are attached to this testimony as Exhibit 205.

⁸³ Ms. Hunnicutt apparently agrees that the conversion process should be transparent to the customer. See Hunnicutt Direct, p. 17, lines 1-5.

1 accomplished with a record-only change (*i.e.*, changing the price of the UNE
2 facility being converted to a non-UNE).

3 **Q. PLEASE ELABORATE ON WHY CONVERSIONS SHOULD NOT**
4 **ENTAIL WORK THAT WOULD PUT CLECS' CUSTOMERS OUT OF**
5 **SERVICE?**

6 A. The conversions at issue are conversions from UNE to non-Section 251
7 alternative/analogous service (*e.g.*, access product). The "conversion" in this
8 instance is really a conversion from cost-based UNE prices (*i.e.*, TELRIC
9 based prices) to special access prices (*e.g.*, conversion from UNE rates for
10 DS1 loop to access rates for DS1 special access circuit). However, since the
11 physical facility otherwise remains unchanged – indeed, the end user should
12 not even know that it has been "converted" – no other changes should be
13 required for conversion. Given that this re-pricing should not affect the
14 operation of the facility itself, Qwest should not be allowed to change the
15 facility currently being provided.

16 **Q. DOES THE FCC AGREE THAT CONVERSIONS SHOULD INVOLVE**
17 **RECORD CHANGES AND AVOID NETWORK-RELATED CHANGES**
18 **THAT COULD PUT CLECS' END USER CUSTOMERS OUT OF**
19 **SERVICE?**

20 A. Yes. The FCC addressed the issue of conversions in the *TRO*⁸⁴ and found that
21 conversions should be seamless from the end user's perspective, and should

⁸⁴ The *TRO* addressed conversions from UNEs to wholesale services *and* from wholesale services to UNEs.

1 involve only billing changes from Qwest's perspective. At paragraph 586 of
2 the *TRO*, the FCC discussed the seamlessness of conversions:

3 Converting between wholesale services and UNEs or UNE
4 combinations should be a seamless process that does not affect the
5 customer's perception of service quality.

6 The FCC codified the requirement that conversions should be seamless from
7 the perspective of the CLEC's end user in 47 CFR §51.316(a) as follows:

8
9 (b) An incumbent LEC shall perform any conversion from a wholesale
10 service or group of wholesale services to an unbundled network
11 element or combination of unbundled network elements without
12 adversely affecting the service quality perceived by the requesting
13 telecommunications carrier's end-user customer.

14 And at paragraph 588 of the *TRO*, the FCC addressed the notion that
15 conversions are billing changes:

16 588. We conclude that conversions should be performed in an
17 expeditious manner **in order to minimize the risk of incorrect**
18 **payments**. We expect carriers to establish any necessary timeframes to
19 perform conversions in their interconnection agreements or other
20 contracts. We decline to adopt ALTS's suggestion to require the
21 completion of all necessary billing changes within ten days of a
22 request to perform a conversion because such time frames are better
23 established through negotiations between incumbent LECs and
24 requesting carriers. **We recognize, however, that converting**
25 **between wholesale services and UNEs (or UNE combinations) is**
26 **largely a billing function. We therefore expect carriers to establish**
27 **appropriate mechanisms to remit the correct payment after the**
28 **conversion request**, such as providing that any pricing changes start
29 the next billing cycle following the conversion request.

30 It is clear from the language above that the FCC's concern was directed at
31 ensuring proper payment for the facility, depending on whether it is a Section
32 251 UNE or a wholesale service (e.g., access product), and did not envision

1 work or physical changes on the ILEC's part leading to the potential for
2 customer disruption.⁸⁵

3 **IT IS UNNECESSARY TO CHANGE A CIRCUIT ID FOR PURPOSES OF A**
4 **UNE CONVERSION**

5 **Q. WHAT IS A CIRCUIT ID AND WHAT IS ITS PURPOSE?**

6 A. The term is somewhat self-explanatory. A circuit ID is just that, a number or
7 code that identifies a specific circuit, generally by defining its two end points
8 – referred to as the “A” and “Z” location. Both CLEC and Qwest use this
9 circuit ID throughout their operational support systems to identify that circuit
10 for numerous activities including billing and repair matters.

11 **Q. SHOULD A CIRCUIT ID CHANGE DURING A CONVERSION?**

12 A. No. As described above, in the vast majority of circumstances in which
13 CLECs will be required to convert an existing circuit from a UNE to an
14 alternative service arrangement, the physical facility need not (and should not)
15 change. As such, the circuit ID need not (and should not) change either. This
16 is important from Integra's perspective because Integra specifically tracks that
17 particular facility and the customer it serves via the circuit ID. Numerous
18 Integra systems rely on that circuit ID in providing ongoing billing and
19 customer service to the customer. To the extent Qwest is allowed to (a)

⁸⁵ The FCC did mention in paragraph 586 of the *TRO* that there may be an increase in the risk of customer disruption caused by CLECs grooming inter-exchange traffic in order to comply with the eligibility criteria. However, this potential for disruption stems from decisions made by the CLECs, not Qwest. The fact that the FCC mentioned the potential for End User Customer disruption caused by CLEC grooming, yet did not mention the possibility for disruption caused by Qwest (and indeed requires conversions to be seamless), indicates that the FCC never envisioned the potential for Qwest-caused customer disruption because from Qwest's perspective, the conversion involves simply changing the rate that applies to the facility.

1 unnecessarily change the underlying facility simply to effectuate what should
2 be accomplished by a billing change and then (b) assign a new circuit ID to
3 the same arrangement, Integra's systems will be substantially, adversely, and
4 unnecessarily affected. This will be accompanied by notable cost and
5 inconvenience. Likewise, unnecessarily re-arranging facilities puts the
6 customer at risk of losing service – a customer who never asked to be
7 converted and should not even realize that it happened.

8 **Q. PLEASE EXPLAIN HOW CHANGING CIRCUIT IDS DURING**
9 **CONVERSIONS COULD AFFECT CLECS' END USER CUSTOMERS.**

10 A. Changing the circuit ID for a circuit that is already in place and working well
11 for a customer in connection with “converting” the circuit from a UNE to an
12 alternative arrangement, significantly increases the risk of customer
13 disruption. For instance, Qwest processes circuit ID changes using
14 “disconnect” and “new” service orders. A simple typing error in an order
15 could send the order to Qwest facilities assignment with a “disconnect” on the
16 order, and the customer will be erroneously disconnected and put out of
17 service. In addition, if records are not correctly and timely updated to show
18 new circuit IDs in either Qwest or CLEC systems, problems are likely to arise
19 in the areas of maintenance and repair. For example, if six months after the
20 conversion, the end user notifies the CLEC that its circuit is in need of repair,
21 but the circuit ID is incorrectly stored in either the CLEC or Qwest systems as
22 a result of an unnecessary physical conversion, it is likely that the CLEC and
23 Qwest will be unable to effectively open a trouble-ticket. As a result, the

1 repair function will be delayed and is likely to require substantial additional
2 resources to resolve, as compared to a normal repair ticket. All of this can be
3 avoided by making sure that Qwest does not change circuit IDs for
4 conversions.

5 **Q. HAS QWEST ALREADY PROCESSED CONVERSIONS WITHOUT**
6 **CHANGING CIRCUIT IDS?**

7 A. Yes. When Qwest first converted special access circuits to UNEs, the original
8 circuit IDs did not change. To date Qwest has been unable to explain why the
9 circuit ID must be changed in the current situation when no such change was
10 required in previous conversions.

11 **Q. IS QWEST REQUIRED BY FCC RULES TO CHANGE THE CIRCUIT**
12 **IDS FOR CONVERTED CIRCUITS?**

13 A. No. Qwest contends that 47 C.F.R. § 32.12(b) and (c) requires Qwest to
14 change the circuit identifier.⁸⁶ Ms. Hunnicutt opines that “[i]n order to
15 sufficiently maintain its subsidiary records to support its accounting for UNE
16 services versus its Private Line services, Qwest must maintain accurate circuit
17 IDs that properly track circuits separately.”⁸⁷

18 However, the FCC provisions cited only require Qwest to maintain orderly
19 records with sufficient detail. The FCC does not prescribe how Qwest is to use
20 circuit identifiers to maintain orderly records. Hunnicutt’s conclusory
21 statement that accurate accounting and reporting requires changing circuit

⁸⁶ Hunnicutt Direct, p. 16, lines 3-5.

⁸⁷ Hunnicutt Direct, p. 16, lines 22-25.

1 identifiers begs the question of whether changing the circuit identifier is
2 necessary. Presumably Qwest is able to maintain orderly records for its QPP
3 products without changing the circuit identifier of the underlying line. As
4 previously stated, prior to April 2005, Qwest did not require a change to the
5 circuit IDs when a CLEC requested a conversion from Private Line/Special
6 Access to an EEL. When Qwest implemented its new process to change the
7 circuit ID, CLECs were given the opportunity to opt out of the changes to
8 their embedded base of circuits.⁸⁸ When given this opportunity all CLECs
9 chose to opt out of this change in circuit ID,⁸⁹ because no CLEC wants to put
10 its end user customers at risk, especially when there is no change in the
11 functionality of the circuit.

12 **Q. YOU DESCRIBED THE RISK OF DISRUPTION FACING CLECS'**
13 **CUSTOMERS IF QWEST CHANGES THE CIRCUIT IDS FOR**
14 **CONVERSIONS. WOULD QWEST'S RETAIL CUSTOMERS FACE**
15 **THIS SAME RISK?**

16 **A.** No, and this is a very important point. Conversions only apply to the facilities
17 used by CLECs, and not facilities used by Qwest, and therefore, Qwest's retail
18 customers would face none of the risks that are inherent in Qwest's proposal
19 to change circuit IDs during conversions. The FCC recognized this very point
20 when addressing conversion charges in paragraph 587 of the TRO:

⁸⁸ See Exhibit 203, Qwest Response to Joint CLEC Data Request 01-022 in Arizona Wire Center Proceeding.

⁸⁹ See Exhibit 203, Qwest Response to Joint CLEC Data Request 01-023 in Arizona Wire Center Proceeding.

1 Because incumbent LECs are never required to perform a conversion
2 in order to continue serving their own customers, we conclude that
3 such charges are inconsistent with an incumbent LEC's duty to
4 provide nondiscriminatory access to UNEs and UNE combinations on
5 just, reasonable, and nondiscriminatory rates, terms, and conditions.

6 The FCC was speaking to conversion charges that ILECs may attempt to
7 assess, but the same reasoning holds true with respect to circuit ID changes.

8 Qwest is never required to perform a conversion in order to continue serving
9 its own customers, and therefore, Qwest's proposal to change circuit IDs for
10 conversions to CLEC circuits: increases the risk for CLEC customer (not
11 Qwest customer) disruption; undermines the FCC's requirements for seamless
12 conversions; and fails to comply with Qwest's obligation to provide access to
13 UNEs on just, reasonable, and nondiscriminatory rates, terms and conditions.

14 **Q. WILL CHANGING CIRCUIT IDS FOR CONVERSIONS IMPOSE**
15 **COSTS ON THE JOINT CLECS?**

16 **A.** Yes. If Qwest changes circuit IDs for conversions, the Joint CLECs will be
17 forced to modify its systems and its records to account for the new circuit ID.
18 Qwest complains about purported costs that it would incur to leave the circuit
19 ID unchanged, but ignores the costs imposed on CLECs by changing the
20 circuit ID for the same facility.

21 **QWEST SHOULD NOT CHARGE CLECS TO CONVERT UNES TO HIGHER**
22 **PRICED ALTERNATIVE FACILITIES SOLD BY QWEST**

23 **Q. SHOULD CLECS BEAR THE COSTS ASSOCIATED WITH CIRCUIT**
24 **ID CHANGES?**

1 A. No. The physical circuit already exists and CLECs paid substantial non-
2 recurring charges to establish that circuit. There is no technical need to
3 change that circuit just to convert it from one service-type (UNE) to another
4 (special access). It is Qwest's decision to make a physical change (or change
5 unnecessarily the ID for that circuit), and it is Qwest who should bear the
6 costs. Otherwise, there will be no economic discipline associated with
7 Qwest's decision. In a circumstance in which Qwest can foist additional costs
8 on its competitors like 360networks or Integra, while at the same time
9 endangering the service provided by its competitors by requiring a physical
10 conversion, all the while garnering additional fees for unnecessary non-
11 recurring charges, why wouldn't Qwest require an unnecessary physical
12 change in every circumstance? Unfortunately, all of these additional fees and
13 expenses will have to ultimately be paid by Qwest's competitors and/or their
14 End User Customers and, therefore, the Commission should adopt the process
15 which is most efficient and least likely to disrupt customer services.

16 **Q. DID QWEST FILE COST SUPPORT TO SUBSTANTIATE ITS**
17 **PROPOSAL TO CHARGE CLECS FOR UNE CONVERSIONS?**

18 A. No. Ms. Hunnicutt explains, "Qwest is neither submitting a cost study nor is
19 it requesting approval of a particular rate."⁹⁰ Instead, as described above,
20 Qwest is "simply asking that this commission acknowledge that Qwest is
21 entitled to be compensated..."⁹¹

⁹⁰ Hunnicutt Direct, p. 11, lines 1-2.

⁹¹ Hunnicutt Direct, p. 11, lines 3-4.

1 Q. DOES QWEST CHARGE THE DESIGN CHANGE CHARGE TO ITS
2 SPECIAL ACCESS CUSTOMERS IN ORDER TO CHANGE A
3 CIRCUIT ID?

4 A. No. Qwest proposes to charge its Interstate Access Design Change Charge
5 times a factor of 50% for conversions from UNEs to Qwest alternative
6 services,⁹² however, Qwest's Interstate Special Access tariff clearly states
7 that there will be no charge for a change in circuit ID.

8 Administrative changes will be made without charge(s) to the customer.
9 Administrative changes are as follows:

10 • Change of customer name (i.e., the customer of record does not change
11 but rather the customer of record changes its name - e.g., XYZ Company
12 to XYZ Communications),

13 ...

14 • Change of customer circuit identification, ...⁹³

15 Thus, for Qwest's special access customers, including Qwest's retail
16 customers who purchase out of Qwest's special access tariff, not only does
17 Qwest not require the customer to change circuit identification numbers as a
18 result of the TRRO, if the customer were to change the circuit identification,
19 Qwest would not charge.

⁹² Hunnicutt Direct, p. 9, lines 1-13. It should also be noted that Ms. Hunnicutt's description of the derivation of the \$25 charge from the Settlement Agreement is factually incorrect. First, it should be noted that Ms. Hunnicutt was not a part of the Settlement Agreement negotiations. Second, at no time during the settlement agreement discussions did CLECs indicate that Qwest's design change charge was appropriate. In addition, at no time did the CLECs discuss a factor that should be applied to the Design Change charge. The CLECs did agree to a \$25 charge and allowed Qwest leeway as to how it implements that charge, which Qwest has chosen to do so through the Federal tariff and a factor.

⁹³ Qwest Tariff FCC #1, Section 7.1.1.A.2.C(3). Qwest's tariff is available on-line at (http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/fcc1_s007p021.pdf#Page=1&PageMode=bookmarks).

1 **QWEST'S DESIGN CHANGE CHARGE IS INAPPROPRIATE FOR UNE**
2 **CONVERSIONS**

3 **Q. IS QWEST'S DESIGN CHANGE CHARGE AN APPROPRIATE**
4 **CHARGE FOR CONVERSIONS FROM UNES TO AN**
5 **ALTERNATIVE PRODUCT OR SERVICE?**

6 **A.** No. Qwest's definition of a Design Change indicates that it is intended to
7 recover for engineering activity and no engineering activity is necessary to
8 record circuit information.

9 Qwest's FCC Interstate Tariff #1 defines this "Design Change Charge" as:

10 "[A]ny change to an Access Order which **requires engineering**
11 **review**. An engineering review is a review by Company personnel of
12 the service ordered and the requested changes to determine what
13 change in the design, if any, is necessary to meet the changes
14 requested by the customer. Design changes include such things as a
15 change of end user premises within the same serving wire center, the
16 addition or deletion of optional features, functions, BSEs or a change
17 in the type of Transport Termination (Switched Access only), type of
18 channel interface, type of Interface Group or technical specification
19 package."⁹⁴

20 Because the UNE circuits are converted "as is," no physical change to the
21 circuit is required. This change is a record change only in order to update the
22 Qwest systems. The circuit is up and working as a UNE. Since there is no
23 need to change the circuit ID, there is no need to "review" or "validate" the
24 circuit design or to ascertain whether "physical changes to the circuit are
25 needed."

⁹⁴ Qwest Tariff FCC No. 1, section 5.2.2C. (emphasis added).

1 Ms. Hunnicutt describes three positions involved in a conversion: a Service
2 Delivery Coordinator (SDC), a Designer, and a Service Delivery
3 Implementer,⁹⁵ but no activity that any of them do associated with a
4 conversion is “engineering design.”

5 First, Qwest requires CLECs to place an order. The SDC processes the order
6 to remove the circuit from the CRIS billing and put it into IABS billing and
7 changes the circuit identifier,⁹⁶ both of which are solely for Qwest’s
8 convenience or advantage rather than being technically necessary.

9 Ms. Hunnicutt describes the Designer as conducting a review of a working
10 circuit operating without trouble in order to determine whether any “physical
11 changes to the circuit are needed.”⁹⁷ A more unnecessary step could scarcely
12 be imagined. Ms. Hunnicutt also identifies two other tasks involving the
13 Designer. She states that the Designer “ensures that the design records for the
14 converted, non-UNE service match the original UNE service”⁹⁸ and that the
15 Designer “reviews the circuit inventory in the Trunk Integrated Record
16 Keeping System (“TIRKS”) database to ensure accuracy and database
17 integrity.”⁹⁹ It appears that what the Designer does is take the opportunity to
18 correct errors in Qwest’s database at CLEC expense. CLECs have already
19 paid installation charges when the UNE circuit was initially purchased.

⁹⁵ Hunnicutt Direct, pp. 13, line 22 – 14, line 2.

⁹⁶ Hunnicutt Direct, p. 14, lines 5-15.

⁹⁷ Hunnicutt Direct, p. 15, lines 4-10.

⁹⁸ Hunnicutt Direct, p. 15, lines 4-5.

⁹⁹ Hunnicutt Direct, p. 15, lines 7-8.

1 CLECs now are to be charged again to correct any errors in Qwest's systems
2 from earlier activity.

3 The Service Delivery Implementer has "overall control for order
4 provisioning."¹⁰⁰ Because no provisioning is required, there is nothing for the
5 Implementer to control. The Implementer also "verifies the Record-In and
6 Record-out orders and completes the update of the circuit orders in the WFA
7 system."¹⁰¹ In essence, the Implementer checks to see that the Coordinator's
8 work was correct. However, because the Coordinator principally processes
9 CLEC orders before they go into Qwest's systems, it would seem more
10 sensible to check the accuracy of the order before it is submitted. If an
11 accurate order does not flow through to update Qwest's systems properly, that
12 is a system issue and cost, not a conversion cost.

13 In other words, Qwest wants to impose an engineering charge on CLECs to
14 recover the costs of undertaking unnecessary work that does not actually
15 involve any engineering. The charge is inappropriate and the Commission
16 should not allow it.

17 **SEAMLESS CONVERSIONS CAN BE ACCOMPLISHED THROUGH A SIMPLE**
18 **BILLING CHANGE**

19 **Q. IS THE JOINT CLEC PROPOSAL THAT CONVERSIONS CAN BE**
20 **ACCOMPLISHED THROUGH A BILLING CHANGE, SUPPORTED**
21 **BY THE FCC'S FINDINGS ON CONVERSIONS?**

¹⁰⁰ Hunnicutt Direct, p. 15, lines 11-12.

¹⁰¹ Hunnicutt Direct, p. 15, lines 12-13.

1 A. Yes. As explained above, the FCC has found in paragraph 588 of the *TRO*
2 that conversions affect the billing of rates – not physical changes in the
3 facilities.

4 **Q. WHY IS IT CRITICAL TO ENSURE SEAMLESS CONVERSIONS?**

5 A. For starters, seamless conversions are required by the FCC (see, *TRO*, ¶ 586).
6 In addition, a conversion is a regulatory construct and not a change requested
7 by a CLEC or its customer, and because only the price of a facility is
8 changing, service to end users should not be put at risk. The Joint CLEC
9 proposal prohibits Qwest from putting CLECs' customers at risk by
10 performing unnecessary physical rearrangements. Furthermore, since Qwest's
11 customers will not face any of the same risks (because ILECs do not need to
12 perform conversions to continue to serve their customers), CLEC's End User
13 Customers will face a higher likelihood of service outage problems than will
14 Qwest's customers. These problems will be directly attributable to Qwest's
15 insistence on making physical facility changes when the FCC has already
16 found that record-only changes are required.

17 **Q. YOU HAVE EXPLAINED ABOVE THAT CONVERSIONS INVOLVE**
18 **A BILLING CHANGE AND NOT A CHANGE IN PHYSICAL**
19 **FACILITY. IS THERE A SIMPLE, TECHNICALLY FEASIBLE WAY**
20 **IN WHICH QWEST COULD EFFECTUATE THIS BILLING**
21 **CHANGE AND IMPLEMENT THE CONVERSION?**

22 A. Yes. Qwest can accomplish this conversion (or re-pricing) through the
23 application of an adder or surcharge to bill the difference between the old rate

1 and new rate (*i.e.*, pre and post conversion rates). For instance, if a DS1 UNE
2 loop was converted to a DS1 special access circuit, the adder or surcharge
3 would reflect the difference between the UNE rate and the special access rate.

4 **Q. HAS QWEST ALREADY USE SUCH AN ADDER/SURCHARGE**
5 **APPROACH TO REFLECT PRICE CHANGES?**

6 A. Yes. Qwest has already demonstrated this with its implementation of the
7 Qwest Platform Plus (“QPP”) agreements. Under those agreements, QPP
8 circuits are subject to annual rate increases. Qwest does not physically
9 convert the circuits to convert to the new rates. Instead, Qwest re-prices the
10 circuits by using an “adder” or “surcharge” for billing the difference between
11 the previous rate and the new rate.

12 **Q. IS THE USE OF ADDERS UNDER THE QPP AGREEMENTS**
13 **STRONG EVIDENCE THAT SUCH A RE-PRICING**
14 **METHODOLOGY COULD BE USED TO IMPLEMENT**
15 **CONVERSIONS?**

16 A. Yes. The rate changes involved with QPP are significantly more complex
17 than rate changes involved in converting UNE rates to analogous/alternative
18 service rates. That is, QPP rates differ depending on whether the End User
19 Customer is a residential or a business customer, and depend upon whether
20 the CLEC has met certain volume quotas. Implementing such a re-pricing
21 methodology should be easier to implement for conversion adders, which
22 would not vary based on these factors.

1 **OTHER STATES HAVE FOUND A CHARGE FOR UNE CONVERSIONS IS**
2 **INAPPROPRIATE**

3 **Q. HAVE OTHER STATES FOUND THAT ILECS SHOULD NOT**
4 **CHARGE A CONVERSION CHARGE FOR CONVERTING UNES TO**
5 **ALTERNATIVE FACILITIES OFFERED BY THE ILEC?**

6 **A.** Yes. The California Public Utilities Commission found many of the concerns
7 mentioned sufficient to prohibit the ILEC from assessing charges for
8 converting UNE circuits to special access. The California Commission
9 explained:

10 We concur with the FCC's finding in ¶ 587 of the *TRO* . . . that
11 because ILECs are never required to perform conversions in order to
12 continue serving their own customers, such charges are inconsistent
13 with Section 202 of the Act, which prohibits carriers from subjecting
14 any person or class of persons to any undue or unreasonable prejudice
15 or disadvantage. In the following paragraph, the FCC also reiterates
16 that the conversions between wholesale services and UNEs are
17 'largely a billing function.' Given the FCC's finding cited above, it is
18 inappropriate to charge a nonrecurring charge for record changes.
19 Therefore, **we conclude that no charges are warranted for**
20 **conversions and transitions that to not involve physical work**

21 ¹⁰²

22 The Colorado Commission also found, citing the ALJ's conclusions below,
23 that Qwest cannot charge for conversion of UNEs to private lines.¹⁰³

24 A well-recognized regulatory principle is that the cost causer should be
25 required to bear the resulting cost. If cost causation is impossible to
26 determine, then costs should be borne by the beneficiary. There has

¹⁰² *Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996*, Decision Adopting Amendment to Existing Interconnection Agreement (Jan. 26, 2006) (CA Arbitration Decision) at 35 (emphasis added).

¹⁰³ *Colorado Order on Exceptions*, ¶ 62, finding, "we agree with the ALJ's reasoning on this issue. A non-impairment determination will already significantly increase the recurring charges paid by CLECs to the benefit of Qwest. We find no reason to require an additional non-recurring charge." This decision is attached as part of Exhibit 202.

1 been no showing that CLECs caused any required change to continue
2 their existing service and that no direct benefit will be derived by any
3 change required. Rather, the conversion of services exposes only
4 CLEC customers to potential risk of service disruptions during
5 transition. The evidence is un rebutted that Qwest, at least initially, is
6 the beneficiary of lesser regulation from the FCC's determination that
7 a marketplace is non-impaired. It is also un rebutted that a non-
8 impairment determination will significantly increase Qwest
9 competitors' recurring charges. It has not been shown that Qwest's
10 initially increased revenue from this extraordinary event will not
11 recover transition costs.

12 Qwest has not demonstrated that the NRC should be recoverable from
13 CLECs or that costs must be recovered from a conversion charge.
14 Because UNE-P conversions are caused by Qwest, or the FCC to the
15 benefit of Qwest, to the detriment of CLECs, it is just and reasonable
16 that Qwest bear the cost of transitioning in the most efficient means.
17 In any event, Qwest has not justified imposition of the NRC as a direct
18 conversion cost.¹⁰⁴

19
20 **VII. PROCESS GOING FORWARD**

21 **Q. DOES THE COMMISSION NEED TO ESTABLISH A PROCESS IN**
22 **THIS PROCEEDING, AS SUGGESTED BY QWEST¹⁰⁵?**

23 A. No. The Commission need not establish a process for future filings in this
24 docket. Idaho already has procedures establish for Qwest to make filings
25 before the Commission, just as Qwest was able to do with the request that
26 established this docket.

27 **Q. DID QWEST PROVIDE ANY SUPPORT TO JUSTIFY THE USE OF**
28 **THE *FIVE-STATE SETTLEMENT AGREEMENT* PROCESS IN THIS**
29 **DOCKET?**

¹⁰⁴ Colorado ALJ Order in TRRO Docket 06M-080T, Decision No. R08-0164, ¶¶ 116-117. This decision is attached as part of Exhibit 202.

¹⁰⁵ Over CLEC objection, and in spite of the agreement's terms, Qwest is proposing that the process established in Section VI of the *Settlement Agreement* be used in Idaho. Albersheim Direct, p. 22, lines 5-6.

1 A. No, Qwest simple refers to the fact that it was agreed upon by CLECs in other
2 states and approved by some state Commissions,¹⁰⁶ without recognizing its
3 own agreement that it would not make this very argument.

4 **Q. BASED UPON YOUR EXPERIENCE IN OTHER STATES**
5 **REGARDING THE PROCESS FOR UPDATING QWEST'S NON-**
6 **IMPAIRED DESIGNATIONS, DO YOU RECOMMEND ANY**
7 **IMPROVEMENTS UPON THE PROCESS OUTLINED IN THE *FIVE-***
8 ***STATE SETTLEMENT AGREEMENT*, IF THE COMMISSION**
9 **CONSIDERS IT OVER CLEC OBJECTION?**

10 A. Yes. Section VI.A of the *Five-State Settlement Agreement* describes when
11 Qwest may request additions of Non-Impaired Wire Centers. This section
12 allows Qwest to make requested updates at any time based on fiber-based
13 collocations, but only once a year, up to July 1 based on prior year line count
14 data. I recommend that, in addition, Qwest be required to provide annually, to
15 CLECs doing business in Idaho, all wire centers that are within 5,000 lines of
16 reaching a new non-impaired designation¹⁰⁷ or within one wire center of
17 reaching Tier 1 or Tier 2 status.¹⁰⁸ This will enhance CLEC business planning

¹⁰⁶ Albersheim Direct, pp. 21, line 19 through 22, line 2. As discussed previously, this is a violation of the *Settlement Agreement*.

¹⁰⁷ The relevant line counts are 24,000 lines (Tier 2), 38,000 lines (Tier 1 or part of DS3 Loop Non-Impairment), and 60,000 lines (a part of DS1 Loop Non-Impairment).

¹⁰⁸ This would be a list of wire centers with 2 or 3 fiber-based collocators.

1 and provide CLECs with the same information as is possessed by Qwest
2 regarding potential future non-impairment.¹⁰⁹

3 Section VI.E.1 of the *Five-State Settlement Agreement* requires Qwest to
4 provide a copy of the letter sent by Qwest “to collocater(s) identified by
5 Qwest as fiber-based collocater(s) requesting validation of status,”¹¹⁰ and
6 “responses.”¹¹¹ As discussed previously, Qwest should make more of a
7 serious effort in order to obtain verifications from CLECs. This can be
8 accomplished by sending a notice to at least the contacts identified by each
9 carrier for interconnection agreement notices, via Qwest’s email notification
10 channels.¹¹² Qwest should also be required to follow up with carriers, if
11 Qwest receives no response from that carrier. In addition, Qwest should
12 notify any CLEC that Qwest intends to rely upon that CLEC’s business line
13 counts in its request for a new non-impairment designation.

14 Section VI.G describes the length of the transition period for new non-
15 impairment designations. As discussed in section V to this testimony, the
16 Joint CLECs recommend at least a six month transition period, or longer
17 depending on the number of new designations.

¹⁰⁹ Qwest would obtain this information annually through its determination whether it has met the FCC’s non-impairment thresholds as part of its determination whether to make a filing on or before July 1 each year.

¹¹⁰ Settlement Agreement, Section VI.E.1.d, Exhibit Qwest-4, p. 10.

¹¹¹ Settlement Agreement, Section VI.E.1.e, Exhibit Qwest-4, p. 10.

¹¹² This notification process is used in Section VI.D of the *Settlement Agreement*, p. 9-10, to alert carriers of a pending request for changes to non-impairment designations.

1 **QWEST SHOULD PROVIDE NOTICE OF WIRE CENTERS NEARING THE**
2 **FCC'S NON-IMPAIRMENT THRESHOLD**

3 **Q. WILL THE REQUIREMENT FOR QWEST TO PROVIDE NOTICE**
4 **TO CLECS OF WIRE CENTERS NEARING A NON-IMPAIRMENT**
5 **DESIGNATION REQUIRE EXTRA TIME CONSUMING WORK**
6 **FROM QWEST?**

7 A. No. Qwest has already admitted that it plans to make requests for new non-
8 impaired designations, assuming a wire center meets the non-impaired
9 criteria, based on line counts each year before July 1.¹¹³ In order to make a
10 determination as to whether any new wire centers meet the FCC's non-
11 impairment criteria, Qwest must determine the number of fiber-based
12 collocations and business line counts for each wire center. As a result, Qwest
13 already has in its possession the information that the Joint CLECs are
14 requesting. The effort to single out wire centers that are near the non-
15 impairment thresholds and provide notification to CLECs would be
16 minimal.¹¹⁴

17 **Q. WHY IS INFORMATION REGARDING WIRE CENTERS NEARING**
18 **THE FCC'S NON-IMPAIRMENT THRESHOLDS OF VALUE TO**
19 **CLECS?**

¹¹³ Albersheim Direct, pp. 31, line 16 through 32, line 6. Note that Qwest may make new requests based upon fiber-based collocations at any time. (Albersheim Direct, 25, lines 9-10.)

¹¹⁴ Qwest could use the same notification process it uses to inform CLECs that Qwest intends to file a new request for non-impaired wire center designation(s). See Section V.D of the *Settlement Agreement* (Exhibit Qwest-4, pp. 9-10). Note that Qwest has already used this process in Idaho even though there is no Settlement Agreement. If Qwest is opposed to the minimal work required to report only those wire centers within a certain threshold of the non-impairment criteria, Qwest could provide line count and fiber-based collocation information for all wire centers and CLECs could then determine whether any wire centers are close to being requested for a non-impaired designation.

1 A. The tariffed rates Qwest has proposed to charge for delisted UNEs are
2 significantly higher than the UNE rates. For example, the current DS1 UNE
3 transport rate is \$26.99 for ten miles of transport.¹¹⁵ The corresponding rate
4 from Qwest's interstate access tariff for ten miles of transport is \$252.00,¹¹⁶
5 more than nine times the UNE rate. Significant changes in costs will affect
6 CLECs' profitability and thus their business plans. Collocation builds are
7 expensive and time consuming. CLECs have limited capital dollars to deploy
8 to expanding their markets in Idaho and these dollars must be used wisely and
9 put to what is expected to be their most efficient use. Uncertainty as to future
10 UNE availability will deter CLEC investment in facilities. Providing CLECs
11 with information on the status of wire centers with respect to business access
12 lines and fiber-based numbers will allow them rationally to plan future
13 investment.

14 **Q. IS THE INFORMATION CLECS ARE REQUESTING**
15 **CONFIDENTIAL?**

16 A. No. For this notification process, specific line count totals by CLEC or
17 identification of fiber-based collocators is not required. The only requirement
18 is aggregate information for certain wire centers. In addition, Qwest already
19 makes available its switched business line counts by wire center on its

¹¹⁵ See Section 9.6.1 of Qwest's SGAT Exhibit A. The rates are \$24.69 fixed plus \$0.23 per mile. Note, the same rates are contained in the Exhibit A for Qwest's negotiations template. These rates were approved by the Commission in docket QWE-T-01-11.

¹¹⁶ See FCC Tariff #1, Section 17.2.11.C.1.a
(http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/fcc1_s017p081.pdf#Page=10&PageMode=bookmarks).

1 website.¹¹⁷ These lines are used in part to determine whether Qwest meets the
2 FCC's non-impairment thresholds.¹¹⁸ There is no reason that total switched
3 business lines would be proprietary while Qwest's switched business lines are
4 not. Further, CLECs are only requesting that Qwest indicate those wire
5 centers within 5,000 business lines of reaching a non-impairment designation.

6 **Q. COULD CLECS USE INFORMATION TO ALTER BUSINESS PLANS**
7 **TO ASSURE THAT A WIRE CENTER IS NOT DESIGNATED AS**
8 **NON-IMPAIRED IN THE FUTURE?**

9 A. No. This argument does not make sense. First, if a CLEC were to attempt to
10 do this, it would mean restraining from competing in a wire center. Qwest
11 would be the beneficiary of any reduction in competition. For CLECs
12 competition and winning customers is the key to success. CLECs can't game
13 the system by failing to compete – this is how CLECs lose. Second, CLECs
14 do not operate in the competitive environment as a single entity, but as
15 competitors.¹¹⁹ If one CLEC were to pull back, another CLEC would likely
16 step in. Finally, notification regarding wire centers near non-impairment
17 thresholds would likely spur investment and competition in that wire center.
18 A CLEC could invest in a collocation or become a fiber-based collocater in

¹¹⁷ http://www.qwest.com/cgi-bin/iconn/iconn_centraloffice.pl?function=3

¹¹⁸ Qwest's switched business lines are only part of the equation, and thus alone cannot be used reliably by CLECs to determine what wire centers have the greatest potential for becoming non-impaired.

¹¹⁹ Qwest identified a number of CLECs doing business in the Boise Main and Boise West wire centers. See Highly Confidential Exhibit Qwest-5 and Highly Confidential Exhibit Qwest-10.

1 order to provide itself some protection from the dramatic price increases it
2 would face if it remained wholly dependent upon Qwest's network.

3 **Q. HAVE ANY OTHER QWEST STATES REQUIRED QWEST TO**
4 **PROVIDE THIS TYPE OF INFORMATION TO CLECS?**

5 A. Yes. The Colorado Commission upheld its ALJ finding that Qwest should
6 provide notice to CLECs as wire centers near a non-impairment threshold.¹²⁰

7 The ALJ in Colorado found,

8 Changes in costs will affect CLECs' business plans. Collocation
9 builds are expensive and time consuming. The expected return from a
10 collocation will be dramatically lower if high-capacity loops, UNEs, or
11 UNE transport were suddenly to become unavailable. Uncertainty as
12 to future UNE availability will also affect CLEC investment in
13 facilities. Providing CLECs with information on the status of wire
14 centers with respect to business access lines and fiber-based numbers
15 will allow them the maximum opportunity to rationally plan future
16 investment.¹²¹

17

18 **BEFORE A REQUEST FOR A NON-IMPAIRMENT DESIGNATION, QWEST**
19 **SHOULD NOTIFY CLECS OF ITS INTENT TO RELY UPON BOTH THE**
20 **CLECS FIBER-BASED COLLOCATION AND THE CLECS BUSINESS LINE**
21 **COUNTS**

22 **Q. SEPARATE FROM THE NON-EVIDENTIARY FIVE-STATE**
23 **SETTLEMENT AGREEMENT, HAS QWEST AGREED TO PROVIDE**
24 **NOTICE TO CLECS IF IT INTENDS TO RELY UPON A CLEC'S**
25 **FIBER-BASED COLLOCATION IN ORDER TO REQUEST A WIRE**
26 **CENTER NON-IMPAIRMENT DESIGNATION?**

¹²⁰ *Colorado Wire Center Docket*, Colorado Order on Exceptions, ¶ 66. This order is attached to this testimony as part of Exhibit 202.

¹²¹ *Colorado Wire Center Docket*, Recommended Order of the ALJ, ¶ 121. This order is attached to this testimony as part of Exhibit 202.

1 A. Yes.¹²² Providing CLECs with an opportunity to review, and either confirm
2 or dispute their status as a fiber-based collocator is crucial in the process for
3 determining future non-impaired wire center designations. Based on
4 responses provided by CLECs in other states, Qwest has revised its fiber-
5 based collocation count.¹²³ Previously, in section IV of this testimony, I
6 discussed some of the problems with Qwest's current notification process.
7 These problems were that it was unclear as to who Qwest chooses to send its
8 notice and that Qwest undertook no effort to follow up with CLECs to receive
9 a response verifying or denying its status as a fiber-based collocator.

10 **Q. IF THERE ARE PROBLEMS WITH QWEST'S CURRENT**
11 **NOTIFICATION REGARDING THE USE OF FIBER-BASED**
12 **COLLOCATION INFORMATION, WHY DO YOU RECOMMEND**
13 **EXPANDING THIS NOTIFICATION TO BUSINESS LINE COUNTS?**

14 A. As discussed, providing CLEC with notice that its data is being relied upon is
15 important. This gives CLECs an incentive to participate in the case,
16 understand that their customers may be impacted by a change in a wire centers
17 non-impairment designation, and potentially provide information that can
18 narrow disputes regarding future designations. The Joint CLEC concerns
19 about the process had to do with Qwest's lack of effort in soliciting a
20 response, rather than with the concept of providing notification. In response
21 to the issues identified, the Joint CLECs recommend (1) that Qwest expand

¹²² Torrence Direct, p. 18, lines 6-11.

¹²³ The specific responses are confidential.

1 the list of individuals at a company to whom it provides notice that it intends
2 to rely upon a CLEC's fiber-based collocation by including at least the
3 contacts identified by each carrier for interconnection agreement notices and
4 those on the service list in wire center proceedings if a proceeding is pending;
5 and (2) Qwest send a follow up notice to the CLEC if it fails to receive a
6 response verifying or disputing that it is a fiber-based collocator.

7 As with the fiber-based collocation notice, notifying CLECs that Qwest
8 intends to rely upon their business line counts may encourage CLEC
9 participation and help narrow future disputes. For example, each CLEC only
10 has the ability to review Qwest's count of its own business line count data.
11 CLECs are not provided with the names of other carriers doing business in a
12 wire center. Allowing other CLECs to know that their information is being
13 relied upon and specifically what information is being relied upon (i.e. that
14 CLECs specific line counts) may facilitate review of Qwest's data and lead to
15 fewer disputes and quicker resolution of Qwest's future requests for non-
16 impairment designations.

17 **VII. CONCLUSION**

18 **Q. WHAT ARE YOUR RECOMMENDATIONS TO THE IDAHO**
19 **COMMISSION?**

20 **A.** This Commission should only decide on the non-impaired status of Boise
21 Main and Boise West. Based on review of the supporting information

1 provided by Qwest, the Joint CLECs currently do not dispute¹²⁴ that Boise
2 Main and Boise West have the minimum number of fiber-based collocators to
3 be classified as Tier 1 and Tier 2 respectively. The only remaining non-
4 impaired designation at dispute is DS3 Loop non-impairment in Boise Main.

5 DS3 loop non-impairment is dependent upon switched business line counts in
6 that wire center. Qwest has improperly counted switched business lines.
7 First, because Qwest did not make its request for DS3 non-impairment until
8 its April 17, 2009 testimony, Qwest should have relied upon end of year 2008
9 switched business line counts rather than end of year 2007. Second, Qwest
10 improperly counts CLEC loops by including residential loops and non-
11 switched capacity (both used and unused) in its CLEC switched business line
12 counts. Third, Integra was unable to verify Qwest's Integra specific switched
13 business line counts and as of the filing of this testimony has significant
14 discrepancies between its data and the data Qwest provided. One example is
15 that Qwest identifies a number of EEL circuits being purchased by Integra
16 serving customers in the Boise Main wire center, despite the fact that Integra
17 does not use EELs to serve these customers.

18 The Commission should reject Qwest's request to classify the Boise Main
19 wire center as non-impaired for DS3 loops.

20 Qwest's testimony largely improperly relies upon a *Five-State Settlement*
21 *Agreement* (not including Idaho) negotiated by CLECs in 2007, and Qwest

¹²⁴ Integra may update its position based on the testimony of other parties in this docket.

1 fails to provide independent testimony in support of its positions. Qwest's
2 reliance upon the *Five-State Settlement Agreement* as evidence is contrary to
3 the commitment that Qwest made in that agreement, which reduces
4 confidence in Qwest's future adherence to the agreement. That agreement
5 specifically provides that (1) it was a settlement of controversy; (2) does not
6 represent the positions a party may take in jurisdictions outside of the
7 agreement; and (3) that the agreement is not to be used as evidence.¹²⁵ This
8 Commission need not rule on the issues raised in the *Five-State Settlement*
9 *Agreement*, as CLECs and Qwest may negotiate and, if necessary arbitrate,
10 these issues as part of their interconnection agreements.

11 If the Commission nonetheless considers the *Five-State Settlement Agreement*
12 over CLEC objection, there are a number of issues, contained in the *Five-State*
13 *Settlement Agreement*, that can be improved upon. The transition period of
14 90 days is too short to actually transition impacted facilities. The Joint
15 CLECs recommend a transition period of six months or, if multiple non-
16 impairment designations are determined simultaneously, one year. The FCC
17 used a one-year transition period in the *TRRO* and a six-month transition in
18 the *Omaha Forbearance Order*.

19 Conversions from UNEs to Qwest alternative facilities are within this
20 Commission's jurisdiction. These conversions are done for the benefit of
21 Qwest.

¹²⁵ *Settlement Agreement*, Section VII.B.

1 Conversions should be seamless to the CLEC End User Customer. A
2 conversion involves re-pricing a facility – a facility that is operational and
3 serving an End User Customer – from UNE prices to the price of the
4 alternative/analogous service, and it should not involve any work that would
5 result in service disruption for the End User Customer. Qwest and its
6 customers do not bear any risk of disruption or costs from conversions
7 because Qwest does not convert its circuits. Qwest should not be allowed to
8 place the CLEC’s end-user customer at risk, for the convenience of Qwest, by
9 changing the circuit ID on UNE circuits impacted by the “non-impairment”
10 determination. In addition, Qwest should not be allowed to charge CLECs for
11 Qwest to perform tasks that Qwest is performing for its own benefit.

12 Because Qwest is reviewing its own data on at least an annual basis to
13 determine whether additional wire centers meet the FCC’s non-impairment
14 thresholds, Qwest should provide information to CLECs regarding wire
15 centers that are near a non-impaired threshold. Qwest should notify CLECs
16 annually of all wire centers within 5,000 business lines of 24,000, 38,000 or
17 60,000 switched business lines. In addition, Qwest should notify CLECs of
18 wire centers within one fiber-based collocation of reaching Tier 2 status. By
19 providing this information, both Qwest and CLECs will have access to similar
20 market information regarding the potential for future non-impairment and
21 CLECs will be able to take into account this information in formulating their
22 business plans, as Qwest can do today.

1 Qwest has agreed in testimony to provide notice to CLECs, and the
2 opportunity for CLECs to dispute, when Qwest relies upon its belief that a
3 CLEC has a fiber-based collocation in an office that Qwest plans to request a
4 change in its non-impaired designation. First, Qwest should improve this
5 process to ensure that the proper individuals at a CLEC are informed of
6 Qwest's reliance on its collocation. This can be done by sending the notice to
7 at least those persons identified by a carrier for receiving interconnection
8 agreement notices and persons on the service list in pending wire center
9 proceedings. Second, Qwest should also inform CLECs when it intends to
10 rely upon CLEC switched business lines, and the line counts it is relying
11 upon, as part of a request for a change in a non-impairment designation. This
12 will assure that CLECs are informed of Qwest's reliance upon their data and
13 increase the likelihood that a CLEC will review its own data upon which
14 Qwest relies.

15 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

16 **A. Yes.**

1 BEFORE THE PUBLIC UTILITIES COMMISSION

2 STATE OF COLORADO

3 DOCKET NO. 06M-080T

4 -----

5 REPORTER'S TRANSCRIPT VOLUME I

6 -----

7 IN THE MATTER OF THE JOINT COMPETITIVE LOCAL EXCHANGE

8 CARRIERS' REQUEST REGARDING THE STATUS OF IMPAIRMENT IN

9 QWEST CORPORATION'S WIRE CENTERS AND THE APPLICABILITY

10 OF THE FEDERAL COMMUNICATION COMMISSION'S TRIENNIAL

11 REVIEW REMAND ORDER.

12 -----

13 PURSUANT TO NOTICE to all parties in
14 interest, the above-entitled matter came on for hearing
15 before G. HARRIS ADAMS, Administrative Law Judge of the
16 Public Utilities Commission, on August 21, 2007, at
17 9:00 a.m., at 1560 Broadway, Suite 250, Denver,
18 Colorado; said proceedings having been reported in
19 shorthand by James L. Midyett, Certified Shorthand
20 Reporter.

21 WHEREUPON, the following proceedings were
22 had:

23

24

25

1 Greg Diamond, appearing on behalf of Covad.

2 MR. WATKINS: Good morning, Gene Watkins
3 and Mary Tribby and our expert, Doug Darnell, on behalf
4 of Cbeyond.

5 A.L.J. ADAMS: Okay. I don't know if the
6 parties have discussed any proposed order or anything
7 of the nature. The motion was filed by Covad,
8 Eschelon, McLeod, XO, and Qwest.

9 And I have that the only parties filing
10 opposition to the motion or response to the motion is
11 Cbeyond and staff. So --

12 MR. MCGANN: Your Honor, may I begin?

13 A.L.J. ADAMS: You may.

14 MR. MCGANN: Thank you.

15 I thought it might be --

16 A.L.J. ADAMS: I'm sorry, Mr. McGann, I
17 should mention -- that's another reminder.

18 First, the proceedings are being webcast.
19 If you should approach any confidential information
20 that's not appropriate to be webcast, please stop and
21 let me know so we can deal with that.

22 Also, in order for your -- you to be
23 heard on the PA system as well as the webcast, the
24 green light needs to be on on your microphone. And
25 there is a button that says, Push, to turn that on.

1 I have to apologize for my interruption.

2 Mr. McGann.

3 MR. MCGANN: No problem at all.

4 I thought it might be good for Qwest as
5 one of the moving parties to do a couple of things, at
6 least explain exactly the relief that the moving
7 parties are requesting and then perhaps place the
8 relief we are requesting in some context in terms of
9 the objections or the comments that have been filed in
10 response to our motion for approval of the settlement.

11 So if I can, let me just begin by saying,
12 staff raised a very good point in their comments, which
13 is, What exactly is the relief that the moving parties
14 are asking for? Are the moving parties simply asking
15 for approval of this settlement agreement only with
16 respect to the signatory parties or are the moving
17 parties asking for approval of this settlement
18 agreement so that it would apply to all CLECs in the
19 state of Colorado? And the answer to the question is,
20 we are only asking for approval of this settlement
21 agreement with respect to the parties that have
22 executed the settlement agreement.

23 Not only that, it has been made clear to
24 me in my discussions with the settling parties over the
25 past couple of days that any effort by a settling party

1 to assert that the agreement should be applied to a
2 CLEC that is not a signing party would be viewed as a
3 breach of the settlement agreement. And I refer
4 specifically to Section VII-B of the settlement
5 agreement. Furthermore, any effort by a settling party
6 to use the settlement agreement as evidence or as
7 precedence in any Commission proceeding would also be
8 viewed as a breach of VII-B in the settlement
9 agreement.

10 Now, VII-B provides that the agreement is
11 a settlement of controversy, no precedent is
12 established; the agreements is for settlement purposes
13 only. It shall not be used as evidence or for
14 impeachment in any proceeding before the Commission or
15 any other administrative or judicial body except for
16 future enforcement.

17 So I think that's a critical piece of
18 information to have, because I think that answers one
19 of staff's critical threshold questions with respect to
20 the settlement, which is, Who does it apply to? It
21 only applies to the signatory parties.

22 That then goes to one of the threshold
23 questions, in my mind, that's in staff's comments,
24 which is, If that's the case, has what, in staff's
25 view, is one of the central purposes of the docket --

1 has that been addressed by the settlement agreement?
2 And that is that the relief -- that the docket should
3 be used essentially to determine not only the wire
4 center impairment or non-impairment designations for
5 the current docket, but how we're going to treat future
6 wire-center-impairment decisions. And I think --
7 again, I think it's critical, for purposes of this
8 hearing, that we understand that the settling parties
9 are only seeking approval of the agreement as to them
10 and they are not seeking approval of the agreement or
11 the imposition of those terms on any other party.

12 I would like to stop there, just to make
13 sure that the other -- the attorneys for the other
14 settling parties agree with my statement up to this
15 point in time.

16 A.L.J. ADAMS: Okay.

17 MR. PEÑA: Your Honor, that is a fair
18 statement, I believe, of the joint CLECs. The
19 settlement specifically addresses only the joint CLECs
20 and Qwest. It does not bind any other CLEC. So I
21 would concur with the comments Mr. McGann just made.

22 MR. MCGANN: Thank you, Your Honor.
23 May I continue?

24 A.L.J. ADAMS: Are you going to leave
25 that topic?

1 A I believe it's notwithstanding what's
2 contained in Section 252, but I don't have the Act.

3 Q One way or the other, you are relying on
4 a provision within the Act that says the parties can
5 agree to other things, outside of whatever the other
6 provision is, 251 or 252?

7 A That's correct.

8 Q All right.

9 Is it your understanding that that also
10 allows the parties to agree to agree amongst themselves
11 to violate the FCC rules?

12 A I believe that's pretty -- the agreement
13 is pretty broad in terms of negotiating interconnection
14 agreements and would allow -- you know, would allow
15 parties -- I mean, gives parties leeway with that.

16 Q Is it your opinion that the settlement
17 provisions related to business line counts is
18 consistent with the FCC's rules on how that should be
19 done?

20 A I mean, you know, as Mr. Brigham
21 explained, there is different advocacy in the case.
22 The settlement was a settlement of controversy. We do
23 not agree that the settlement matches with our reading
24 of the FCC's rules, but we believe we have the right to
25 enter into a -- enter into a settlement under 252.

1 Q Is it your opinion that the settlement
2 methodology, with regards to counting non-switched
3 services related to UNEs, complies with the FCC's rule
4 on business line count methodologies?

5 A My testimony in the case is different
6 than what the settlement provides for. The settlement
7 is a settlement of controversy.

8 Q Is that a no?

9 A It's -- to say that it complies -- I
10 mean, I can't sit here and say that I agree that it
11 complies with the rules because I have a different
12 reading of what that rule is. I do think this
13 settlement is legitimate and the parties allowed to
14 enter into that under 252, and those types of actions
15 take place.

16 Q Do you believe that the settlement's
17 treatment, counting non-channelized loops as if they
18 are channelized, is consistent with the FCC rules on
19 how to count business lines?

20 A For loops, did you ask?

21 Q Loops that are non-channelized --
22 counting them as channelized; is that consistent with
23 the FCC rules on business line definitions?

24 A I would give the same answer that I gave
25 before. I mean, as we --

1 Q Is that a no?

2 A It's a no with a qualification.

3 Q Please --

4 A I personally didn't address the question
5 of channelization in testimony in this case. You know,
6 we talked about whether switched lines on loop
7 facilities should be counted or should not. Our
8 advocacy in the case is different than the terms that
9 we've offered up for settlement.

10 Q I believe you said you disagreed with the
11 way that the settlement treats the business line model,
12 as regards to the rule; but you were allowed to get
13 into that because the Act allows you to; do you agree,
14 outside of the FCC rules -- is that an accurate summary
15 of your position?

16 A I don't disagree with the settlement.
17 We're here to support the settlement and ask the
18 Commission to approve the settlement as between the
19 parties of the settlement. So that first part of your
20 question, I don't -- I don't agree with the setup of
21 that question. But I agree that the settlement is
22 different than my advocacy in the case. And if I were
23 to do the case again, my advocacy in the case wouldn't
24 change. And my advocacy in the case is based on my
25 reading of the FCC rules.

1 So if you are asking if there is an
2 inconsistency between my advocacy in the case and what
3 the joint CLECs set on with Qwest, yes, there are
4 differences.

5 Q Do you recall Demonstrative Exhibit C?

6 A Yes.

7 Q Do you believe, in your opinion, based on
8 the fiber-based -- based on the business-line
9 definition, that counting that channelized DS1 as 1 is
10 correct?

11 A.L.J. ADAMS: Let me interrupt, Exhibit
12 C is not in the record now.

13 MR. WATKINS: I apologize, Your Honor.

14 A.L.J. ADAMS: So let's not refer to the
15 exhibit. You can ask him questions --

16 BY MR. WATKINS:

17 Q Should a non-channelized DS1 be counted
18 as 24, 1, or 0, in your opinion?

19 A I mean, as advocacy in the case, we would
20 have advocated that would be counted as zero.

21 Q Why?

22 A There is no switched lines on that --

23 Q To the --

24 A -- on that DS1.

25 Q To the extent the Commission decides that

Decision No. C08-0969

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 06M-080T

IN THE MATTER OF THE JOINT COMPETITIVE LOCAL EXCHANGE CARRIERS'
REQUEST REGARDING THE STATUS OF IMPAIRMENT IN QWEST CORPORATION'S
WIRE CENTERS AND THE APPLICABILITY OF THE FEDERAL COMMUNICATIONS
COMMISSION'S TRIENNIAL REVIEW REMAND ORDER.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
DETERMINING INITIAL LIST OF NON-IMPAIRED WIRE
CENTERS AND APPROVING SETTLEMENT IN PART
[PUBLIC VERSION]**

Mailed Date: February 19, 2008

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 A. The Commission Orders That:76

I. STATEMENT

1. By Decision No. C06-0161, the Commission opened this docket for the purpose of providing insight into the development of a list of non-impaired wire centers in Qwest Corporation's (Qwest) serving territory and the underlying data used to develop and update that list.

2. Information derived from this docket is anticipated to be used to address issues arising from the Federal Communications Commission's (FCC) Triennial Review Remand Order¹ (TRRO) and the impairment analysis used to determine in which of Qwest's wire centers competitive local exchange carriers (CLECs) will continue to be able to purchase high-capacity unbundled loops and in which they will not. *See* Decision No. C06-0161.

3. The matter was referred to an administrative law judge (ALJ) for disposition during the Commission's Weekly Meeting held March 8, 2006.

4. By Decision No. R06-0279-I, additional notice of the proceeding was ordered and the time period for intervention was established. The Commission served notice of this proceeding, including the deadline to intervene, upon all active competitive local exchange providers and those on the Commission's mail list for telecommunications interested parties. *See* Decision No. R06-0279-I.

5. On April 10, 2006, timely notices of intervention were filed by Covad Communications Company (Covad); Eschelon Telecom of Colorado, Inc. (Eschelon); McLeodUSA Telecommunications Services, Inc. (McLeod); XO Communications Services, Inc. (XO) (Covad, Eschelon, McLeod, and XO will collectively be referred to as Joint CLECs); and Cbeyond Communications, LLC (Cbeyond).

6. On April 10, 2006, the Office of Consumer Counsel (OCC) filed its Notice of Intervention of Right and Entry of Appearance.

¹ *In re Unbundled Access to Network Elements*, FCC 04-290, WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, rel. Feb. 4, 2005.

7. On April 10, 2006, Staff of the Commission (Staff) filed its Notice of Intervention by Staff, Entry of Appearance, Notice Pursuant to Rule 1007(a) and Rule 1403(b) and Request for Hearing in this matter.

8. By Decision No. R06-0406-I, all parties were ordered to identify the fact and legal issues for hearing, including the ultimate issues of relief sought.

9. After modification, the procedural order governing the docket was suspended. *See* Decision No. R06-0890-I. By Decision No. R06-1113-I, the suspension was lifted, the procedural schedule was modified, and a new hearing was scheduled. After further modifications to the procedural schedule, a prehearing conference was conducted on January 17, 2007. Decision No. R06-1486-I. By Decision No. R07-0054-I, a new procedural schedule was established and a hearing was scheduled.

10. At the assigned time and place, the hearing was called to order.

11. During the course of the hearing, no oral testimony was offered. Exhibits 1 through 20 were admitted upon the joint unopposed stipulation of all parties appearing and cross-examination was waived. Exhibits 3, 5, 9, 11, 16, and 18 were admitted as confidential exhibits. Portions of Exhibits 3, 9, 16, and 18 are designated as Highly Confidential. Those Highly Confidential portions remain subject to the protections provided by Decision No. R06-0406-I. Exhibit 20 was admitted without objection as a late-filed exhibit filed on April 19, 2007.

12. On May 14, 2007, Statements of Position were filed by Qwest, Joint CLECs, and Staff. At the conclusion of the motions hearing (addressed below), a deadline was established for the filing of reply statements of position. Reply statements were filed by Qwest, Joint CLECs, Cbeyond, and Staff.

13. On May 14, 2007, Qwest filed a Motion for Leave to File Statement of Position in Excess of Thirty Pages. No response was filed. Good cause having been shown for the unopposed request, it will be granted.

14. Pursuant to § 40-6-109, C.R.S., the ALJ transmits to the Commission the record of this proceeding, this recommended decision containing findings of fact and conclusions thereon, and a recommended order.

II. FINDINGS AND CONCLUSIONS

A. Introduction of Witnesses

15. Ms. Renee Albersheim is employed by Qwest Services Corporation as a Staff Advocate.

16. Mr. Robert Brigham is a Staff Director in Qwest's Public Policy Department.

17. Mr. David L. Teitzel is a Staff Director in Qwest's Public Policy Department.

18. Ms. Theresa Million is a Staff Director in Qwest's Public Policy Department.

19. Mr. Douglas Denney is employed by Eschelon Telecom in its legal department as the Director of Costs and Policy.

20. Ms. Lynn Notarianni is employed by the State of Colorado, Public Utilities Commission, as a Rate/Financial Analyst, in the Fixed Utilities Division.

B. Impairment Definition

21. The source of the impairment determination at issue in this proceeding is 47 U.S.C. § 251(d)(2). The FCC adopted rules effective March 15, 2005, imposing unbundling obligations only in those situations where carriers are genuinely "impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition." TRRO at ¶ 2. In adopting impairment thresholds, the FCC stated the intention to

draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. TRRO at ¶ 5. It has been recognized that the selection of specific criteria is not an exact science. TRRO at ¶ 169.

22. The FCC found "a correlation between the number of business lines and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served via that wire center. In light of these correlations, we [FCC] draw inferences, based on competitive deployment in certain markets, regarding the likelihood of competitive entry in other markets exhibiting similar characteristics." TRRO at ¶ 43.

23. For providing unbundled access to dedicated interoffice transport and high-capacity loops, access obligations are based upon route-by-route unbundling requirements for dedicated interoffice transport depending on the total number of business lines² (*i.e.*, wholesale and retail) and the number of fiber-based collocators.³ For DS1⁴ and DS3 loops, the FCC establishes a wire center-by-wire center unbundling requirement based on the number of business lines and fiber-based collocators in that wire center.

24. The FCC defined tiers for dedicated interoffice transport:

(i) Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no

² 47 *Code of Federal Regulations* (C.F.R.) § 51.5 defines a "business line" as: "an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC."

³ 47 C.F.R. § 51.5 defines a "fiber-based collocator" as: "any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) Terminates at a collocation arrangement within the wire center; (2) Leaves the incumbent LEC wire center premises; and (3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph."

⁴ Illustratively, a DS1 loop might be used to serve a midsize business and a DS3 loop might be used to serve an enterprise customer. Hearing Exhibit 19 at 181-182. DS1 and DS3 loops are generally referred to as high capacity loops. A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services. A DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second.

line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs....

(ii) Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least 24,000 business lines, or both....

(iii) Tier 3 wire centers are those incumbent LEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers.

47 Code of Federal Regulations (C.F.R.) § 51.319(e)(3).

25. Mr. Denney nicely summarizes the hierarchy of impairment determinations:

If a wire center has three fiber-based collocators, then that wire center is automatically classified as Tier 2 for transport impairment, and if it has four fiber-based collocators automatically classifies a wire center as Tier 1 for transport impairment.⁵ Wire centers with four fiber-based collocators and the requisite number of switched business lines (60,000 for DS1 loops and 38,000 for DS3 loops) are classified as “non-impaired” with respect to DS1 and/or DS3 UNE loops.

Hearing Exhibit 15 at 8-9 (footnote omitted).

C. Unopposed Impairment Designations

26. Qwest requests the Commission approve a list of non-impaired wire centers in Colorado prepared under its methodology. While there are issues as to the methodology addressed below, no party opposes the following requested impairment designations:

wire center	CLLI(8)	UNE Transport Non-Impairment Tier	“non-impaired” with respect to DS1 and/or DS3 UNE loops

⁵ In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, CC Docket No. 01-338, WC Docket No. 04-313, 20 FCC Rcd 2533, (2004) (“TRRO”) ¶ 66. The Tier status determines the availability of DS1, DS3 and Dark Fiber UNE transport. DS1 UNE transport is not available between Tier 1 wire centers. DS3 and Dark Fiber UNE transport is not available between wire centers designated as Tier 1 and/or Tier 2. Line counts can also play a role in determining the Tier status of a wire center and did so for most of the wire centers on Qwest’s list for Colorado. Offices with more than 38,000 switch business lines are classified as Tier 1 and offices with between 24,000 and 38,000 business lines are classified as Tier 2.

Boulder	BLDRCOMA	T1	
Capitol Hill	DNVRCOCH	T1	
Colorado Springs	CLCPCOMA	T1	
Curtis Park	DNVRCOCP	T1	
Denver East	DNVRCOEA	T1	
Denver Main	DNVRCOMA	T1	DS3
Denver Southeast	DNVRCOSE	T2	
Dry Creek	DNVRCODC	T1	DS3
Pikeview	CLSPCOV	T1	
Sullivan	DNVRCOSL	T1	
Aberdeen	ENWDCOAB	T2	
Arvada	ARVDCOMA	T2	
Aurora	AURRCOMA	T2	
Denver South	DNVRCOSO	T2	
Lakewood	LKWDCOMA	T2	

27. Thus, aside from the applicability determination of particular issues and disputes, disputed issues will only determine in this proceeding whether the Northglenn wire center is Tier 2 (Joint CLECs and Staff position) or Tier 1 (Qwest's position) as well as Colorado Springs Main and Denver East DS3 impairment. The uncontested classifications set forth above are reasonable and will be adopted by the Commission.

D. Fiber-Based Collocators

28. A fiber-based collocator is:

any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that

(1) Terminates at a collocation arrangement within the wire center;

(2) Leaves the incumbent LEC wire center premises; and

(3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. 153(1) and any relevant interpretation in this Title.

47 C.F.R. § 51.5.

29. To identify the number of fiber-based collocators on March 15, 2005, Qwest used collocation tracking and inventory records and billing data coinciding with the December 2003 Automated Reporting Management Information System (ARMIS) data.⁶ In order to validate this information, Qwest incorporated CLEC responses to Qwest's requests for confirmation of data and actual field verifications of wire centers.⁷ Based upon the analysis detailed in Ms. Torrence's testimony, Qwest contends an accurate and verified list of non-impaired wire centers has been provided.

30. Mr. Denney challenges the accuracy of Qwest's determination of the number of fiber-based collocators and specifically notes one instance where Qwest's field inspection

⁶ ARMIS data contains the number of Qwest retail business lines. ARMIS data is not reported at a wire center level; rather, it is reported at a statewide level. Hearing Exhibit 19 at 135. Hearing Exhibit 19 at 79. ARMIS data would not include CLEC UNE-P lines or loops. Hearing Exhibit 19 at 137.

⁷ Ms. Torrence describes this process in more detail at pp. 11-15 of her Direct Testimony, Hearing Exhibit 2. Qwest's methodology excluded dark fiber and fixed wireless providers as fiber-based collocators. Torrence at 9-10.

verified a fiber collocator in Denver Main that was later acknowledged not to exist. In another instance, Mr. Denney maintains that application of the same methodology in Minnesota resulted in an error because Eschelon was included as a fiber-based collocator in two wire centers when no power was connected to its equipment. In another instance, a fiber-based collocator was counted where the Collocation Verification Worksheets did not verify the carrier's information. Finally, Mr. Denney maintains that Qwest improperly counted two fiber-based collocators where the service of one provider was dependent upon the fiber of the other properly classified collocator. He contends that the dependent provider does not meet the FCC's definition of a fiber-based collocator.

31. Mr. Denney questions the objectivity of Qwest's methodology because it initially counted two fiber-based collocators in the Denver Main wire center that should have only counted as one. He acknowledged that Qwest later corrected the matter after further field verification. He also raised some concerns that do not give rise to factual disputes applicable to future determinations, but to matters of timing.

32. While Staff generally agrees with Qwest's approach for counting fiber-based collocators, Staff has concerns regarding the validity of the results based upon the number of inaccuracies in Qwest's inventory system and the problems arising through transition in inventory systems. Staff remains concerned that Qwest does not validate the accuracy of data input into the "COMET" system relied upon for counting the number of fiber based collocators for determining wire center non-impairment. Based upon the number of differences between the two inventory systems, Staff recommends that Qwest be required to continue a detailed physical verification of all collocation sites it intends to rely on to seek designation of additional non-impaired wire centers.

a. Discussion

33. Through Ms. Torrence's rebuttal testimony, Qwest has shown that the disputed issues in Minnesota do not raise sufficient concerns about the investigation process applied in Colorado to negate the probative value of the evidence presented. Ms. Torrence also adequately addresses the concern raised by Mr. Denney regarding the Boulder Main wire center field verification.

34. The accuracy of Qwest's inventory records goes to the burden of persuasion. Considering the effect of an impairment determination, the risk of an incorrect determination, and Qwest's inventory records, it was reasonable for Qwest to attempt CLEC verifications of fiber-based collocations and conduct field verifications of inventory information to demonstrate the number of fiber-based collocators. Qwest's investigation was then subject to review and discovery in this proceeding. Because the accuracy of evidence relied upon by the Commission is paramount, Qwest's methodology indicates that the efforts taken present the best evidence to the Commission. The fact that there is some potential for human error that may go uncorrected through the litigation process does not overcome Qwest's showing.

35. Staff recommends that the Commission continue to require Qwest to conduct a detailed physical verification of all collocation sites to support an impairment finding. The crux of determining whether fiber-based collocation impairment thresholds are met is the ready availability of accurate, reliable, and verifiable information, rather than Qwest's historical inventory methods. The burden is unaffected by Qwest's current recordkeeping. Staff's recommendation is reasonable and supported by the evidence in this proceeding. The recommendation will be adopted.

36. Regarding whether a CLEC-to-CLEC fiber connection is within the scope of the FCC's definition of a fiber-based collocator, 47 C.F.R. § 51.5, Qwest provided a Highly Confidential discovery response explaining why both CLECs addressed by Mr. Denney were counted as fiber-based collocators. See Highly Confidential Exhibit DD-3 to Confidential Hearing Exhibit 16. [[*** Highly Confidential Information stricken***]] *Id.*

37. In rebuttal, Ms. Torrence states that Qwest believes some CLEC-to-CLEC connections meet the FCC's definition of a fiber-based collocator." Hearing Exhibit 8 at 16-17.

38. Qwest's characterization in Highly Confidential Exhibit DD-3 to Confidential Hearing Exhibit 16 at page 6 is contradicted by the Highly Confidential discovery response quoted above and the FCC's rule. [[*** Highly Confidential Information stricken***]] Highly Confidential Exhibit DD-3 to Confidential Hearing Exhibit 16. Thus, following the change, the collocation of this particular CLEC is dependent upon the fiber of the fiber-based collocator in such a manner that it does not meet the FCC's definition.

39. As recognized in the Report of the Arbitrator, to theoretically allow for a permanent non-impairment classification of a wire center based upon one other fiber connection leaving an incumbent local exchange carrier (ILEC) wire center would be would be absurd:

if that one true fiber-based code locator goes bankrupt (or is acquired by AT&T [the ILEC]), the only competitive source of fiber-based transport or loops disappears. It would be absurd to count collocators as Fiber-Based Collocators when they are themselves dependent on the legitimate Fiber-Based Collocator who actually operates and terminates the fiber for provision of alternate fiber capacity.

Report of the Arbitrator in re the Complaint of Southwestern Bell telephone, L.P., D/B/A AT&T Oklahoma Against Nuvox Communications of Oklahoma, Inc., Regarding Wire Center UNE Declassification, Cause No. PUD 200600034, Corporation Commission of the State of Oklahoma (A copy of this report is attached to the Notice of Supplemental Authority in

Objection to Qwest Corporation's Motion for Order Approving Settlement Agreement filed August 16, 2007).

40. Except for the CLEC-to-CLEC fiber connection in the Denver Main wire center, Qwest's methodology, including a detailed physical verification of all collocation sites, demonstrates that Qwest has objectively and accurately determined the number of fiber-based collocators in each of its wire centers. Qwest's methodology, as modified to be consistent with this decision regarding CLEC-to-CLEC connections, will be adopted as will Staff's recommendation that Qwest will be required to conduct and document physical verification to support future impairment determinations.

E. Number of Business Lines.

41. Qwest contends that the FCC's rules clearly provide that all ILEC lines used to serve business customers, via retail or wholesale, should be included within the line count for each wire center. Further, the FCC's rules provide that all unbundled network element (UNE) loops are included, because they are wholesale services and the ILEC has no way to determine the CLEC's use of the line. Hearing Exhibit 4 at 4. Applying FCC definitions, Qwest has determined that the Northglenn wire center should be categorized as Tier 1 for non-impairment.

42. Qwest contends that the FCC intended that ARMIS data provide the basis for the business line analysis by wire center contemplated in the TRRO. ARMIS data reports Qwest's retail high-capacity business lines in use. Qwest multiplied actual high-capacity digital facilities shown in its ARMIS report by the appropriate Voice-Grade Equivalent factor to comply with the FCC's rules. Each 64 kilobit voice-grade equivalent channel of capacity was calculated for all high-capacity digital lines (*i.e.*, DS1 and DS3 lines). All UNE loops were included without

regard to actual use of the loop. Qwest's methodology for counting business lines includes Qwest retail business lines, all UNE loops, and business UNE-Platform (UNE-P) lines.

43. Mr. Denney maintains that Qwest's switched business line counts should be counted in the same manner as they are counted for ARMIS 43-08. Citing paragraph 105 of the TRRO, Mr. Denney maintains that ARMIS data properly counts lines in use and that counting capacity not in use is inconsistent with the intent of the TRRO.

44. Staff generally agrees with counting the voice-grade equivalent of the high-capacity loop for Qwest business lines; however, Staff contends that the voice-grade equivalent multiplier should only be applied to the extent that it actually and accurately reflects the true count of working voice-grade equivalent lines rather than unused capacity of the high-capacity loop.

45. Staff's argument is premised upon the data included in the ARMIS 43-08 data. Because the readily available data available in the ARMIS 43-08 report reflects the voice-grade equivalent retail business working line count, Staff contends this data is most appropriate for use in counting working voice-grade equivalent lines. Applying Staff's argument to the data for Qwest's wire centers, Staff determined that the Northglenn wire center would drop to a Tier 2 designation.

46. In rebuttal, Mr. Brigham reiterates the business line definition, 47 C.F.R. § 51.5. He contends that business line tallies are to be adjusted to account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. Illustratively, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 business lines.

47. Mr. Brigham concludes that FCC rules define a "business line" as used by either local exchange carriers (LECs) or CLECs to serve a customer. Subsection three specifically

states that "business lines," defined to include both wholesale and retail high - capacity digital lines, are to be adjusted to reflect the corresponding 64 kbps-equivalent (DS0-channel) line capacity of these services. The rule specifically states that a DS1 corresponds to 24, 64 kbps-equivalents.

48. Mr. Brigham contends that his position is consistent with the FCC's intent because if the FCC only intended to include active lines it would have been unnecessary for the implementing rule to require a DS1 loop to be counted as 24 64 kbps-equivalent business lines. "Instead, the FCC would have ruled that the ILEC should only count 'active channels' or channels 'in use.' The FCC did not do so, however, and expressly ruled that a digital (DS1 and DS3) loop should be counted by its total capacity (24 business lines for a DS1 loop and 672 business lines (24 DS1s * 28) for a DS3 loop)." Hearing Exhibit 10 at 15.

1. Discussion of Business Line Calculation

49. The FCC defined:

A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:

- (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
- (2) Shall not include non-switched special access lines,
- (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

47 C.F.R. § 51.5.

50. Pending matters must be resolved based upon the plain language of the FCC's rule, in absence of ambiguity. Ambiguity must be found in the rule, not from extrinsic evidence. If the plain language does not resolve any matter, rules of construction must be applied to interpret the meaning of the rule. This does not mean that this Commission should attempt to draft a new rule consistent with expressions of intent in the TRRO. Specifically, every clause and word in the rule should be given effect and meaning;⁸ various terms should be read as a whole, and in their context;⁹ and a common-sense guide that the plain meaning of words should be given their literal meaning unless such meaning would defeat the purpose of the rule.¹⁰

51. The first sentence of the rule generally defines a business line as a switched access line used to serve a business customer. The second sentence defines how business lines will be tallied on a wire center level. The third sentence applies three tally modifications. Thus, business lines are identified and tallied by wire center prior to consideration of three enumerated modifications.

⁸ *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 2125 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute. . . . As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' . . . We are thus 'reluctan[t] to treat statutory terms as surplusage' in any setting.") (citing to *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (describing this rule as a "cardinal principle of statutory construction"); *Market Co. v. Hoffman*, 101 U.S. 112, 115, 25 L.Ed. 782 (1879); see also *Rafzlaf v. United States*, 510 U.S. 135, 140, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994)).

⁹ *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2534 (2007) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 and *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)); see also *Kunz v. United Security Bank*, 489 F.3d 1072, 1077 (10th Cir. 2007).

¹⁰ *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)).

52. Hypothetically, if a business customer uses ten channels of a DS1 circuit for switched access lines at one office, ten business lines will have been identified and included in the tally prior to consideration of the modifications of the third sentence. Because the excess capacity is not connecting the end-user customer with the ILEC's end offices for switched services, the excess capacity is not affected by the first modification. The second modification is not applicable to the hypothetical. Because the 10 business lines are provided over a digital access line (*i.e.*, the DS1 circuit), the third modification adjusts the tally so that the DS1 circuit is treated as 24 business lines, rather than 10. While the excess capacity of the circuit in the tally is clearly not used to provide business lines, the capacity is accounted for as lines, per the modification.

53. The rule makes no distinction as to the components of the tally modified by the third sentence (*i.e.*, all incumbent LEC business switched access lines versus the sum of all UNE loops connected to that wire center). The modification does not specify working lines; rather, it provides for contrary accounting. Therefore, the business line tallies will be adjusted by the voice-grade equivalent applied to capacity (*i.e.*, used and unused).

2. Proxy for Business UNE-P lines

54. Qwest included UNE-P business lines in its wire center business line counts. The number was estimated because Qwest did not separately track residential or business UNE-P lines (they were all tracked as generic wholesale services). The specific telephone number associated with each UNE-P line was checked against Qwest's white pages directory listings database, which includes all types of listings (*i.e.*, listed, non-listed, and non-published). If the number appeared in the database, it was subtracted from the total number of UNE-P lines, resulting in an estimate of business UNE-P lines.

55. Mr. Denney contends that two reports from Qwest's ICONN database call into question Qwest's count of business lines. One report identifies the total number of business and residential loops (working pairs) in service by wire center. A second report identifies the number of business and residence access lines. Similar to the rationale Qwest relied upon to use the white pages database, he contends a proxy for business lines is derived by subtracting residential lines from the total number of Qwest loops in service. *See* Table 3, Hearing Exhibit 15 at 23. While Mr. Denney does not contend that the Commission should adopt his methodology for impairment determinations, he contends that the data casts doubt as to the accuracy of Qwest's methodology.

56. Staff opposes Qwest's use of the white pages directory listings database to estimate the UNE-P business lines because it discovered that actual data is available for the determination. Qwest has published guidelines for CLECs to "regrade" an end user's service. Regrading service allows the end user's service to change between residential service and business service so long as the service stays within the same product classification. The Wholesale Interconnection/Ordering Overview Regrade Service guide (Exhibit LMVN-6) specifically provides for regrading of UNE-P services between residential and business service. While Staff is unsure when this data became available, Qwest has also required CLECs to indicate whether residential or business service is being provided by the UNE-P service as part of the Local Service Request. In any event, Staff contends that Qwest must demonstrate that accurate data is not available before being allowed to implement use of a proxy or estimation of the data.

57. Mr. Brigham states in rebuttal that Type of Service data is not required, utilized, or retained for billing purposes. Because Qwest's existing systems track line counts for all

services based upon billing records, current systems will not allow segregation of UNE-P lines between residential and business lines. While it is theoretically possible to extract such information, Mr. Brigham contends it would be by manual means that would be expensive and time consuming. Further, particularly because UNE-P is no longer being ordered, it would not make sense to invest in development of a mechanized system to retrieve the information. As to current products (*i.e.*, QPP), Qwest is already capable of segregating residential and business quantities.

58. Even if Qwest went through this manual exercise, Mr. Brigham contends the same data is already utilized to estimate UNE-P line counts based upon the listings database. He notes that this reasonable methodology was also utilized in the Colorado 271 proceeding.

a. Discussion

59. Qwest does not dispute that residential UNE-P lines should be excluded from the tally of business UNE-P lines. Because Qwest does not have a record of the actual use of the line, or it would be overly burdensome to manually retrieve such information, Qwest proposes to compare the numbers associated with UNE-P lines to the white pages database in order to estimate business UNE-P lines.

60. One must consider the context and use of the white pages database in other proceedings. Illustratively, Decision No. R02-0318-I addresses the use of the white pages database in order for the Commission to make the subjective determination of whether CLECs collectively served more than a *de minimis* number of residential and business customers within the state. Aside from the issue in that proceeding, the Commission noted that external information supported the conclusion and that the analysis conservatively met applicable thresholds as applied by other states.

61. Mr. Brigham explained that the field identified by Ms. Notarianni determined whether the associated number would be included among residential or business listings. Even if the specific field was manually reviewed and compiled, the result would reflect the same information for residential lines as is reflected in the white pages database.

62. In order to estimate the number of business UNE-P lines, Qwest contends that the white pages database provides a reasonable approximation of the number of residential lines to be removed from the total UNE-P lines connecting to a wire center. This methodology goes to the burden of persuasion. Comparable approaches have been utilized in the past (to a degree) for estimates because the database includes all types of listings (*i.e.*, listed, non-listed, and non-published). Mr. Denney questions the accuracy of the estimation based upon ICONN information. While Mr. Denney contends that the ICONN reporting indicates different information, he has not shown the ICONN information to be any more reliable than Qwest's methodology.

63. Because the data field identified by Staff determines inclusion in the white pages database, Qwest's methodology is indirectly based upon actual data. Mr. Brigham has adequately shown that a costly and time-consuming manual reconstruction would likely confirm Qwest's data and estimation. Upon this basis, the methodology will be adopted.

64. The ALJ finds that the adequacy and accuracy of the estimation of business lines must be considered based on the facts and circumstances. Staff appropriately prefers the use of actual data over estimates. However, it is reasonable to utilize estimates where actual information is theoretically obtainable but overly burdensome to obtain, or when the reliability of the estimate is demonstrated. The ALJ is convinced that more likely than not, a manual analysis

of historical records would not change the tier designation based upon the count of business UNE-P lines for the Northglenn wire center.

65. Qwest's methodology for identifying residential UNE-P lines through the white pages database will be adopted and approved for excluding residential lines from the tally of UNE-P business lines.

3. Inclusion of Residential Lines and Non-Switched Lines among UNE loops

66. The Joint CLECs maintain that Qwest has inflated the number of CLEC switched business lines by including loops used for residential and non-switched lines that were leased from Qwest apart from any UNE-P combination. Qwest's interpretation relies on the reference to "all UNE loops" in the second sentence of the business line definition in 47 C.F.R. § 51.5.

67. Qwest specifically challenges Mr. Denney's adjustment attempting to remove actual digital business channels in service associated with a wire center. *See* Hearing Exhibit 10 at 30. Without acknowledging the appropriateness of the adjustment, Qwest also proposes an alternative methodology. Qwest also contends that Mr. Denney has not properly counted non-switched UNE loops that he advocates must be removed from the business line counts for the high-capacity UNE Loops.

a. Discussion

68. The second sentence of 47 C.F.R. § 51.5 is ambiguous as to the meaning of the phrase "business line" based upon the first sentence's definition and inclusion of the phrase "all UNE loops" in the second sentence. Because "all UNE loops" could apply to those loops used for business and residential uses, it might appear that "business lines" in the second sentence is meant to include all UNE loops without regard to use of the line. Such an interpretation is

consistent with Qwest's argument that they are not able to determine a CLEC's use of some loops.

69. On the other hand, the first sentence is clear in its definition of the term "business line." Where the FCC's rule is clear and unambiguous, it is not for this Commission to interpret or apply an inconsistent alternative. Inclusion of residential loops in the count of business lines in a wire center would impermissibly conflict with the first sentence and would not give meaning to the entire rule. Therefore, business lines in the second sentence must restrict the following phrase such that all UNE loops must be confined within the scope of business line as defined in the first sentence of the paragraph.

70. This interpretation is consistent with the findings of the Michigan Public Service Commission: "The Commission finds that the first sentence of the FCC's rule defining business lines requires that, to be counted as a business line, the line must serve a business customer. The remaining portion of the definition presumes serving a business customer and clarifies that any loop, whether UNE-P, UNE-L, or leased line will be counted when it serves a business customer." 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, Order September 20, 2005 at 9 (footnotes omitted).

71. The FCC declared an intention to define business lines based upon an objective set of data that ILECs already have created for other regulatory purposes. TRRO at ¶ 105. However, despite the statement, it has been shown that the rule otherwise fails to meet this intent (*i.e.*, business UNE-P). Thus, particularly in absence of explicit adoption, it cannot be demonstrated that the FCC intended to include residential UNE loops in the impairment analysis.

72. By the TRRO language, it would appear that the FCC intended Qwest would have information available to make an impairment determination because it would be required to be reported for other regulatory purposes. First, reliance upon this language would impermissibly attempt to create ambiguity in the rule from the language of the TRRO. Further, neither the FCC nor any party has shown historical reporting for UNE loops to assist in applying defined terms in the rule.

73. While other commissions have considered the FCC's analysis of line data to construe the FCC rule, the record in this proceeding does not provide the foundation for the FCC's analysis. Thus, one cannot determine if or how the FCC applied the language of the rule in its own consideration. The FCC cites the Affidavit of Shelley W. Padgett for the calculation of business lines; however, a review of the affidavit does not clarify the matters at issue. *See* TRRO at ¶ 105 *citing* BellSouth Comments, Attach. 4, Affidavit of Shelley W. Padgett (BellSouth Padgett Aff.) at ¶ 5, FCC, WC Docket No. 04-313 (filed Nov. 1, 2004). Ms. Padgett stated that she derived the number of business lines "by adding the business and coin line counts from the December 2003 43-08 ARMIS Report to the UNE loop and UNE-P business line counts as of December 2003." *Id.* There is no evidence in this record as to the UNE loop data Ms. Padgett referenced. In any event, the usefulness of such foundational matter is not clear in light of the FCC's rejection of the specific details from tests applied by commentators. TRRO at ¶ 107.

74. While Qwest is not precluded from reliance upon other objectively available data to support impairment, the TRRO language cannot create ambiguity where it does not exist in the adopted rule. The FCC's stated rationale could even conflict with an unambiguous adopted rule. While the FCC states in the body of its Order that it expects the data underlying the business line

count to be "readily available"¹¹ and "created for other regulatory purposes,"¹² it also indicates that billing records¹³ and business UNE-P¹⁴ are "readily available." The record clearly shows all necessary information is not "readily available" nor "created for other regulatory purposes" (*i.e.*, business UNE-P lines).

75. These findings put Qwest in the position of having to prove a CLEC's use of UNE loops in order to rely upon such count to support a finding of non-impairment. While Qwest's current recordkeeping provides such information for future impairment proceedings as to some product offerings, Qwest has no currently identified means to record use of all UNE loops. The number of business lines in a wire center clearly includes business UNE loops and the ALJ cannot find any ambiguity along with expressed intent to ignore residential lines or to treat them as business lines.

76. Apart from Qwest's availability of data, there is no logical basis for the rule to exclude residential UNE-P lines, but include residential UNE loops. In absence of clear direction from the FCC to the contrary, availability of data alone does not provide such a basis.

77. Qwest argues that the CLEC's use of a UNE loop was properly ignored because there is no differentiation in the FCC's definition based thereupon. However, an adjustment was made for an Enhanced Extended Loop (EEL) so that the loop was counted against the customer's wire center.

¹¹ In the Matter of Unbundled Access to Network Elements; Review of the Section 2.51 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005) ("TRRO"), 1161.

¹² TRRO, ¶ 105.

¹³ TRRO, ¶ 100, fn 290 (Describing fiber-based collocation information as "readily identifiable" because such data is in the possession of the ILECs both in general data and in "billing records.").

¹⁴ TRRO, ¶ 105.

78. As concluded above, Qwest's argument that the FCC definition fails to differentiate business and personal lines conflicts with the definition of business line provided in the first sentence of the rule. While other commissions have determined that the "business" qualifier for "all UNE loops" was intentionally or decidedly omitted, the ALJ cannot support this conclusion because a residential UNE loop counted as business line conflicts with the first sentence of the rule. Further, it is illogical to conclude that a residential line is a business line. A non-switched UNE loop providing service to a residential customer conflicts with both the first sentence of the rule, as well as the third sentence.

79. Once the number of business lines are counted per wire center (*i.e.*, the second sentence of the rule), the third sentence restricts the tally at the wire-center level by three enumerated adjustments. *See* 47 C.F.R. § 51.5. The rule provides no further basis for modifications. The FCC could have explicitly defined components of the definition in terms of the ARMIS 43-08 components or specific ILEC records, but they did not. Further, to base calculations upon specific information does not necessarily require that it be based exclusively on such information. The FCC has found that the criteria provide the foundation for inferences drawn from information.

80. In summary, the UNE loop component of the business line calculation by wire center shall be modified to exclude residential and non-switched lines.

F. Inclusion of EELs Among UNE Loops

81. Qwest contends that EELs are properly includable among UNE loops because an EEL is essentially an unbundled loop plus interoffice transport. By use of an EEL, a CLEC can provide service to a customer in a given wire center when the CLEC is collocated in a different wire center. Hearing Exhibit 10 at 21-22.

82. While Qwest tallies EELs at the wire center level, the tally is equally subject to the three modifications in the FCC rule as a component of the UNE loop element. There is no distinction as to which component of the tally the three modifications apply.

83. An EEL is a combination of a loop and transport. The loop component of the EEL is not a business line under the FCC's definition unless the loop, provisioned in combination with other UNEs, is connecting the end-user customers with ILEC end-offices for switched services. Thus, the loop component of an EEL shall be treated the same as a UNE loop for purposes of impairment and to determine the wire center for which the loop is tallied.

G. Vintage of ARMIS Data

84. To determine business line counts on March 15, 2005, effective date of the TRRO, Qwest used the December 2003 ARMIS data.¹⁵ Qwest maintains that 2003 data is the proper vintage of data to be applied. Qwest argues that the FCC's statement that ARMIS data that had already been created and finalized for inclusion in ARMIS Report 43-08 could only refer to 2003 data. Even though available, Qwest contends that FCC did not intend at the time of the TRRO to rely upon data that was then incomplete and unofficial. The passage of time alone does not justify applying different data than Qwest was required to use for the initial designation of non-impaired wire centers in February 2005.

85. Qwest argues that applying data that later becomes available is inconsistent with the FCC's intent that a wire center, once determined to be non-impaired, cannot subsequently be found to be impaired. On a similar basis, Qwest rejects Mr. Denney's suggestion that both 2003 and 2004 data should be considered.

¹⁵ ARMIS data is not reported at a wire center level; rather, it is reported at a statewide level. Hearing Exhibit 19 at 135. ARMIS data contains the number of Qwest retail business lines. Hearing Exhibit 19 at 79. ARMIS data would not include CLEC UNE-P lines or loops. Hearing Exhibit 19 at 137.

86. Mr. Brigham contends that Ms. Notarianni made an error in calculations regarding the Boulder wire center, but he is unable to identify the basis because she did not provide her line count supporting the argument. As to the classification of the Colorado Springs Main and Denver East advocated by Staff, Qwest admits that impairment is determined by the vintage of data utilized.

87. Qwest utilized December 2003 ARMIS data as the only ARMIS data available to respond to the FCC's requirement that Qwest submit their lists of wire centers meeting the TRRO's non-impairment criteria on February 4, 2005.

88. The Joint CLECs oppose Qwest's reliance on 2003 ARMIS 43-08 data. Rather, Mr. Denney contends that the most recent line counts available on the effective date of the TRRO (*i.e.*, from December 2004) should be used. The FCC's rules regarding DS1 and DS3 UNE loop availability took effect as of the effective date of the TRRO. He sees no reasonable basis for relying upon data collected over a year prior to the effective date of the TRRO. To the contrary, he notes that the FCC relied upon analysis of December 2004 ARMIS data for analysis within the TRRO. In rebuttal, Mr. Brigham counters that Mr. Denney's cited reference refers only to definitions, rather than ARMIS data that would not yet have been available.

89. Mr. Denney testified that the December 2004 data is closest in time to the effective date of the TRRO (March 11, 2005) and that fiber-based co-locations were measured during that time period as well. Therefore, the line count most nearly matching the fiber-based measurement is the December 2004 data. He contends that the Commission should rely upon the timeliest information available in the future. Hearing Exhibit 19 at 190.

90. Staff opposes Qwest's reliance upon 2003 ARMIS 43-08 data. Because the TRRO was effective March 11, 2005 and 2004 ARMIS 43-08 data was available at that time,

2004 data should be utilized for analysis. ARMIS data is generated annually as of the end of the calendar year. The data is then filed with the FCC in April of the following year. Staff acknowledges the FCC's intent that readily available data provide the basis for analysis and contends that the most recent ARMIS data is consistent with that intent and is appropriate for impairment determinations.

1. Discussion

91. The ALJ views this issue as somewhat of a red herring. It is clear that the FCC rules implemented non-impairment because the commencement of the contemplated transition period began upon the effective date of the order. However, there is no clear expression of intent or ability to make an effective impairment finding prior to the effective date of the resulting rules. Rather, the FCC rules establish criteria upon which a determination would be made. Where an impairment determination is dependent upon business line counts, the determination must be made as of the time of the relevant data. The FCC has determined that the ARMIS 43-08 data is the appropriate data that is readily verifiable data. That report tabulates lines as of the end of the calendar year. However, the information is not compiled and reported to the FCC until the following April. Once filed, the reliable foundation accessible to ILECs becomes readily confirmable by competitors.

92. Because the rules became effective on March 15, 2005, that is the earliest date upon which this Commission could measure the impairment determination to designate an initial list of non-impaired wire centers. Further, while arguments have been presented as to impairment as of March 15, 2005, line counts have only been demonstrated as of the end of the preceding two calendar years. Because the FCC's action implies immediate use of ARMIS data

to measure impairment, the most recent and relevant data from the end of calendar year 2004 will be utilized to designate an initial list of non-impaired wire centers.

93. In order for wire centers to be designated as non-impaired in the future dependent upon business line counts contained in the ARMIS report, the proponent must show that applicable fiber thresholds are met within reasonable time proximity. While the evidence may not show precise calculations at the same point in time, a reasonable inference must be drawn based upon the evidence where an impairment determination is based upon business line counts contained in the ARMIS report. Thus, the Commission must consider the period of time for which the ARMIS data is probative and persuasive as to existing line counts.

94. Based upon the FCC's reliance and the demonstrated timing of the finalization of the ARMIS report, this Commission finds that, in absence of extraordinary unforeseen circumstances, the calendar year-end line count included in the ARMIS report is a reasonable estimation of current line counts from April 1st through December 31st of the calendar year during which the ARMIS 43-08 report is filed with the FCC. Due to the voluminous effort to capture and compile information for ARMIS reporting, information is not filed and available until April 1. A nine-month window (assuming timely filing) thereafter balances the FCC's reliance upon the ARMIS 43-08 report and the need for timely and relevant evidence with the availability of information to support a request to add to the list of wire centers found by this Commission to be non-impaired.

95. Illustratively, for January, February, and March, 2008, December 31, 2006 data is no longer the best evidence of business line counts. After April 1, 2008, the ARMIS 43-08 data is available to support a filing until the end of the calendar year. An evidentiary safe harbor is effectively created for the ARMIS 43-08 data. Outside the safe harbor, a company is free to

request a finding of non-impairment between January 1, 2008 and March 31, 2008. However, the proponent of such a request must show that all criteria partially dependent upon line counts were met under the rule within the applicable time frame of January 1, 2008 through March 31, 2008. The Commission will no longer consider ARMIS data compiled as of December 31, 2006 to be the best evidence as to line counts after December 31, 2007. Despite the wisdom of Staff's advocacy to the contrary, the ALJ does not believe that FCC rules allow this Commission to preclude a request for an impairment determination during a significant portion of a calendar year.

96. ARMIS 43-08 data reporting line counts for December 31, 2004 shall be used for purposes of this initial impairment classification of Qwest's wire centers as of March 15, 2005 because the 2003 data is no longer the best evidence of line counts at such time. Therefore the Colorado Springs Main and Denver East will be classified as non-impaired for DS3 loops.

97. Having made findings as to Qwest's obligations as of March 15, 2005, it must also be noted that the finding did not affect what Qwest actually offered or provided. This decision is not effective retroactively and does not retroactively change the classification of any wire center.

H. Transition of UNEs in Non-Impaired Wire Centers

1. Costs for UNE-P Conversion in Non-Impaired Wire Centers

98. If a wire center is found not to be impaired, affected UNEs will need to be converted to alternative Qwest services, to another carrier, or self provisioned by the CLEC.

99. Qwest contends entitlement to recovery of costs associated with the process of converting UNE transport or high-capacity loops to alternative facilities and arrangements. Qwest contends the costs would not be incurred but for the conversion. Million at 3.

100. Because the affected wire centers have been classified as non-impaired, Qwest presumes the CLEC has made an economic choice to continue with Qwest rather than self-provide or change to another provider. If Qwest's costs are ignored, that economic choice is distorted. Million at 3. If Qwest is forced to pay the associated costs, Qwest is put at a competitive disadvantage in a marketplace determined to be competitive by the FCC.

101. Qwest contends that UNE conversions are required by the TRRO. If Qwest were not allowed to convert the UNE circuits, Qwest contends that the FCC's non-impairment findings in the TRRO would be negated. Hearing Exhibit 6 at 8-9.

102. Ms. Million identified the processes necessary to convert a UNE to a special access/private line circuit. See Hearing Exhibit 6 at 4-6. In her rebuttal testimony, she explains:

For wire centers that the FCC has deemed to be 'non-impaired,' Qwest is no longer required to provide access to DS1 or DS3 UNE loops or inter-office transport. This FCC determination in the TRRO means that Qwest is no longer required to price these services at Total Element Long Run Incremental Cost (TELRIC) costs. UNEs are priced at TELRIC costs, and thus, in order for Qwest to be able to price these services at something other than TELRIC, as the TRRO entitles it to do, it is necessary for Qwest to convert them to private line services. What this means from an operational standpoint is that if a CLEC remains on Qwest's facilities at the affected wire centers (instead of disconnecting the UNEs and availing itself of alternative facilities), Qwest must convert those UNEs to private line services.

Hearing Exhibit 12 at 4.

103. Qwest's combination of manual and automated processes is intended to ensure the conversion process is transparent to the CLEC and its customers' service.

104. Qwest contends that 47 C.F.R. §§ 32.12(b) and (c) require that the circuit ID be changed for proper maintenance of subsidiary records. Million at 6. This is also necessary for Qwest to properly track UNEs and private line services and to properly apply applicable service

performance requirements. The circuit ID also identifies the type of existing parameters and determines which service and repair center is responsible for the circuit.

105. Qwest advocates use of the Design Change charge rather than a unique charge for the UNE-to-Private Line Conversion Process because the Design Change charge involves similar functional areas and work tasks. Qwest contends that the costs for a unique charge would only increase the rate to CLECs.

106. Qwest requests that the Commission acknowledge it may access an appropriate charge for work performed in the conversion process.

107. Qwest's product catalog contemplates transitioning circuits from UNE to Private Line/Special Access Services without any physical changes to the facility. The Joint CLECs contend that the circuit ID change is for the benefit and convenience of Qwest, the inconvenience of the CLEC, and risks the CLEC customer's service in the process. Because the facility and the service do not change, the Joint CLECs contend that the conversion is not a network facility issue; rather, it is within Qwest's internal systems. The conversion allows Qwest to charge higher monthly recurring charges while eliminating performance measurements. The voluntary choices of Qwest regarding conversion are stated not to be required by the TRRO.

108. The Joint CLECs contend that Qwest's proposed conversion process will expose customers' service during conversion and that the exposure will only impact CLEC customers. Manual intervention in the process exposes increased risk due to human error. All risks could be avoided if Qwest merely modified the rates for existing services rather than requiring a change to the circuit ID. The Joint CLECs also reject Qwest's assertion that a change in circuit ID is required. Hearing Exhibit 15 at 57.

109. Ms. Million counters that:

the circuit ID is Qwest's only means of tracking the difference between UNEs and private lines in systems such as the TIRKS database and the WFA system. These systems are used to inventory circuits and assign repair and maintenance of the circuits to the appropriate Qwest centers. This is important because the repair, testing and maintenance of circuits for UNEs and private lines are handled out of different work centers. In the long run, Qwest is able to maintain, track and service all of its customers, including CLECs and their end-user customers, better and more efficiently if it is able to identify accurately the types of services and facilities it is providing to these respective categories of customers. It would be grossly inefficient, expensive and wasteful for Qwest to make changes to its myriad of legacy systems, processes and tracking mechanisms, such as circuit IDs, in order to accommodate each new regulatory nuance regarding how it offers its services to its customers and its competitors.

Hearing Exhibit 12 at 7. She contends that it is not justified for Qwest to perform this system/process rework in a competitive environment, especially when Qwest's existing systems are in place to track private line services.

110. The Joint CLECs oppose imposition of the non-recurring charge (NRC). Primarily, they contend Qwest is the cost causer and should bear the burden. Secondly, the TRRO cautioned an incentive on the part of ILECs to impose various types of charges upon CLECs. Third, Qwest does not impose the same charge upon its own customers. Qwest did not impose a conversion charge when customers transitioned from UNE-P to QPP. To impose the NRC unjustly penalizes facilities-based providers. It is unreasonable to impose a conversion cost to continue the same service functionality at a substantially higher price.

111. If an NRC is allowed at all, the Joint CLECs contend it should be a Total Element Long Run Incremental Cost (TELRIC) UNE rate. They oppose some of the costs (specifically including engineering costs for a change that does not require engineering) Qwest included for cost recovery as well as the basis for applying the Design Change Charge. Finally, Joint CLECs oppose any inference that the NRC is beyond the Commission's jurisdiction.

112. Ms. Million contends that Mr. Denney's analogy to UNE-P to QPP conversions is not meaningful or helpful and she distinguishes the conversion at issue herein.

113. Staff contends that CLECs will have no practical alternative but to convert UNEs to different Qwest services. The process Qwest describes to implement such a change involves several manual processes. Staff points out that Qwest acknowledges that there is no change to the physical circuit, yet the proposed process contemplates a necessary circuit change to properly identify the circuits.

114. Staff opposes the proposed NRC because the CLEC is not directly the cost causer. Second, CLECs have no practical alternative but to convert UNEs to Qwest products. Third, Qwest ignores increased profit margins in private line service as a means to recover transition costs. Staff believes the proposed NRC is unreasonable in comparison to Qwest's existing charges to its own customers for changing the circuit ID for a private line service (\$20). Lastly, Qwest's process supporting the NRC does not reflect a total service long run incremental cost (TSLRIC). Staff contends that the Commission requires just and reasonable rates be based upon costs of forward looking efficient processes and systems, not embedded costs. Qwest's NRC is based on a current inefficient embedded process, rather than the more efficient process described in testimony. Based upon Staff's concerns, it is recommended that no NRC be assessed for the conversion of a UNE circuit to a private line circuit.

115. Ms. Million demonstrated that Qwest needs to track circuit IDs to allow it to continue to provide the existing functionality of services. It would take a significant investment to design and implement an automated process to effectuate the necessary conversion from UNE-P to private line services in a more efficient manner than through legacy systems, processes, and tracking mechanisms.

a. Discussion

116. A well-recognized regulatory principle is that the cost causer should be required to bear the resulting cost. If cost causation is impossible to determine, then costs should be borne by the beneficiary. There has been no showing that CLECs caused any required change to continue their existing service and that no direct benefit will be derived by any change required. Rather, the conversion of services exposes only CLEC customers to potential risk of service disruptions during transition. The evidence is unrebutted that Qwest, at least initially, is the beneficiary of lesser regulation from the FCC's determination that a marketplace is non-impaired. It is also unrebutted that a non-impairment determination will significantly increase Qwest competitors' recurring charges. It has not been shown that Qwest's initially increased revenue from this extraordinary event will not recover transition costs.

117. Qwest has not demonstrated that the NRC should be recoverable from CLECs or that costs must be recovered from a conversion charge. Because UNE-P conversions are caused by Qwest, or the FCC to the benefit of Qwest, to the detriment of CLECs, it is just and reasonable that Qwest bear the cost of transitioning in the most efficient means. In any event, Qwest has not justified imposition of the NRC as a direct conversion cost.

2. CLEC Notice

118. The Joint CLECs contend that Qwest should be required to notify CLECs and the Commission of changes to wire center designations and provide the factual evidence supporting changes. The Joint CLECs contend that CLEC review and Commission approval of future impairment determinations are crucial going forward for a number of reasons.

119. Because of the vital importance of the impairment determination to CLEC investment decision, the Joint CLECs contend that all CLECs should be informed when a wire center is within 5,000 lines, or within one fiber collocator, of changing designation.

120. Mr. Denney testified regarding a CLEC's need for timely information regarding reclassified wire centers:

I mean this is a big worry for our business units, especially the people doing planning, talking to our shareholders and to our investors. You know, you do business planning on what your expenses are going to be going forward, what are the risks you face. You need to reveal these risks to your shareholders. And they ask all the time, What's next, what wire centers are going to be next on the list? We need to have some idea so we can at least account to our shareholders and say or account internally and say here's some risk that we may be facing here, we better start looking. Are there other actual alternatives out there for us or not? What can we do to try to hedge our bet so that one day suddenly we're not just completely stuck. And these plans go out for a while.

I'm not personally involved in those plans, I just know I get the question all the time from these folks. I mean, they're worried about what is it that's coming up? Where are the next changes going to be? Where are my costs going to go up next? Where are my wholesale costs going to change? And so that's the type of -- it gives you some ability to at least kind of hedge in terms of accounting for these increased places where costs may increase going forward.

Hearing Exhibit 19 at 184-185.

121. The Joint CLECs note that Qwest's transition period pales in comparison to the one-year transition period the FCC established in the TRRO. The FCC also recognized the significant rate shock involved in a transition in addition to the practical problems of establishing alternative service arrangements and arranging for seamless migrations to avoid customer impacts. The Joint CLECs contend that the FCC's one-year transition should be the standard for all future transitions. Tariffed rates Qwest proposed to charge for delisted UNEs are significantly higher than the UNE rates (*i.e.*, the DS3 UNE rate is \$608.14, while the month-to-month interstate special access rate for DS3 Channel Terminations is \$2,200.00, more than three times

as much as the UNE rate). Changes in costs will affect CLECs' business plans. Collocation builds are expensive and time consuming. The expected return from a collocation will be dramatically lower if high-capacity loops, UNEs, or UNE transport were suddenly to become unavailable. Uncertainty as to future UNE availability will also affect CLEC investment in facilities. Providing CLECs with information on the status of wire centers with respect to business access lines and fiber-based numbers will allow them the maximum opportunity to rationally plan future investment.

122. Ms. Albersheim refutes Mr. Denney's argument for a lengthened transition period because she contends the support he references is only applicable to transitioning the initial set of wire centers and the one-year period contemplated in the TRRO was to begin upon its effective date. She contends that the FCC made no statement as to subsequent wire centers. She contends that it does not follow that the same transition should apply to subsequent wire centers and that a shorter transition is reasonable where future proceedings are likely to affect a smaller set of wire centers.

123. Ms. Albersheim sees no reason to add the administrative burden upon Qwest and that Mr. Denney's thresholds do not indicate that a change in classification is imminent. Qwest also contends that such notice would allow CLECs to "game" the system to ensure the wire center would not be likely to be non-impaired. She contends that the FCC has addressed the appropriate threshold and that additional notice requirements would create an undue burden that the FCC did not contemplate.

124. Mr. Brigham also points out the practical implication of the Joint CLEC proposal in this regard. Because line counts are based upon ARMIS data, Qwest would only become aware of this information on an annual basis. Thus, he believes any other notice is of

questionable value. Further, the fact that a wire center is within 5,000 lines of non-impaired status does not mean that the wire center will ever become non-impaired.

125. Mr. Teitzel acknowledged that it would be possible for Qwest to provide additional notice to CLECs about calendar-year-end ARMIS data when the data is input during the following April. However, he questions the benefit of the information in the current business environment. Hearing Exhibit 19 at 43. The year-end data is compiled during the first quarter of the following calendar year for reporting by April 1.

126. Mr. Teitzel also explained that Qwest tracks the number of lines in an exchange on a monthly basis, but that information will differ from ARMIS data. He details those differences in testimony. Hearing Exhibit 19 at 53. Current systems identify how many simple business lines are in the exchange or wire center, or the number of active channels that are tracked as being in a particular wire center if they are served by a DS1 or DS3 service. Hearing Exhibit 19 at 53.

a. Discussion

127. The FCC defined a transition period for the conversion of UNEs in the TRRO. No party has shown that the FCC contemplated modification of the transition period for converting UNEs in non-impaired wire centers. No party has shown a basis upon which unbundling obligations can be imposed for transition in non-impaired wire centers. The FCC explicitly adopted transition plans and tied those plans to the effective date of the TRRO (*see* 47 C.F.R. § 51.319).

128. However, it is reasonable that the Commission ensure that all competitors in the marketplace have the best aggregate information available to Qwest to anticipate and project the impairment of wire centers in the future.

129. The 1996 Act was intended to encourage competitive deployment of facilities. In part, the availability of UNE-P supported the FCC's revisiting unbundling requirement in the TRO. The process of eliminating UNE-P must be considered in how to maximize prospective competitive opportunities. The availability of competitive providers in a wire center is intended to infer feasibility of actual or potential competitive deployment. TRRO at ¶ 24. However, upon implementation of a finding of non-impairment, Qwest is no longer obligated to offer service at TELRIC rates and no existing competitor is required to resell its facilities.

130. Qwest established transition provisions in § 2.8.4 of the TRO/TRRO Amendment to its interconnection agreements (ICAs) for high-capacity UNEs. The provision generally provides notice to CLECs and the Commission "when wire centers are reclassified;" CLECs will no longer order high-capacity UNEs after 30 days' notice; and CLECs will have 90 days to transition DS1 and DS3 UNEs and 180 days to transition dark fiber. Albersheim at 14. However, existing ICA language is not controlling to terms and conditions approved by the Commission. Because such language may represent the negotiation and compromise of positions on multiple issues among specific parties, the Commission cannot be fully informed as to the basis for such a specific provision. Thus, the Commission must address each issue independently on its merits.

131. Qwest points to the availability of ARMIS data to competitors and the proposed process of notifying competitors of a request to change the impairment status of a wire center. While CLECs can easily monitor ARMIS data, it is reflective of only one component of the business line calculation. Further, Qwest's argument fails to fully consider the impact an impairment determination can have on CLEC operations as well as the ability to plan and operate a business. Qwest is the only company capable of compiling aggregate impairment data and such information directly impacts operations of all providers in the marketplace (including

Qwest and CLECs). Thus, it is reasonable to level the playing field so that all competitors have access to the same information.

132. It seems there are two ways that the playing field might be leveled: transition after an impairment determination or monitoring and notice in anticipation of requests to change an impairment determination.

133. The importance of timely information for CLECs is unmistakable. Pricing affects every aspect of CLEC operations. The availability of services also impacts their ability to continue providing services to existing and future customers.

134. As a given wire center approaches non-impairment thresholds, Mr. Denney described how timely information would be put to use in implementing business strategy. First, consideration could be given to the possibility of cost increases and the need to plan for them. Consideration could be given to building CLEC facilities or seeking alternative means to access affected end-use customers. Financial and regulatory risk could be more accurately reported. Hearing Exhibit 19 at 188-189. Giving an illustrative example, Qwest proposed increasing the estimated wholesale cost of a UNE-loop from \$65 to a special access rate of \$165 - - an increase of more than 250 percent. Hearing Exhibit 19 at 189. Such dramatic changes in cost structure have a direct and obvious impact upon any CLEC's overall business planning.

135. The Commission finds that sharing available aggregate impairment information among competitors provides the most reasonable allowable notice within the scope provided by the FCC. Thus, Qwest will be required to share aggregate data regarding impairment criteria with the Staff, OCC, and CLECs. Although Qwest appropriately notes that such information may not be determinative as to impairment, it will at least be equally available to CLECs for

business planning. The ultimate usefulness of the information is left to those receiving the information.

136. The need for accuracy triggering notifications is less critical than to support an impairment determination. Thus, as soon as Qwest's records reflect fiber-based collocations within one connection of changing impairment tier, or 5,000 business lines of changing impairment tier, a notification must be provided to all active competitive local exchange providers CLECs (*i.e.*, through Qwest's Change Management Process (CMP)), Staff, and the OCC. A copy of all such notices must be filed in support of any subsequent impairment proceeding for an affected wire center.

3. Blocking of Orders

137. The Joint CLECs raise concerns regarding Qwest's ability to block CLEC orders. Also, questions are raised as to how the ability to block an order is consistent with ¶ 234 of the TRRO. In any event, if a CLEC mistakenly self-certifies, it is suggested that Qwest has adequate redress through back billing. However, CLECs are willing to agree to procedures allowing Qwest to block orders where "1) the rejection of orders is limited to facilities designated as non-impaired after party review of the underlying data and consistent with the Commission-approved process established in this proceeding; and 2) the terms, procedures and details for the rejection of such orders are known in advance and mutually agreed upon." Hearing Exhibit 15 at 49. The Joint CLECs require that they be given due process before they will waive their right to self-certify.¹⁶ Additionally, the specific terms and procedures must be known and mutually agreed upon.

¹⁶ Notably, through this section, CLECs are not waiving their right to self certify under the TRRO. Rather, this proceeding is resulting in a finding that a CLEC cannot reasonably self certify an order in a wire center that the Commission classifies as non-impaired under FCC criteria.

138. In rebuttal, Ms. Albersheim contends that a filing by Qwest to change the status of a wire center would put CLECs on notice that an order submitted would be disputed, pending a Commission decision as to the status of the wire center. She also suggests that the Joint CLECs' interpretation of ¶ 234 of the TRRO might necessitate burdensome litigation that would not make sense, is impractical, and unworkable even though parties agree that one proceeding for all parties is more desirable for addressing disputed wire centers.

139. Ms. Albersheim's rebuttal testimony also clarifies that Qwest does not intend to block CLEC orders in absence of Commission approval (*i.e.*, before a Commission decision declares such wire center not to be impaired). Qwest agrees with Mr. Denney's testimony that "order rejection should be limited to wire centers on a Commission-approved list of non-impaired wire centers." Hearing Exhibit 8 at 6, *quoting* Hearing Exhibit 15 at 50. However, once the parties agree to when orders may be rejected, Qwest does not agree that the terms and procedures for rejecting orders must be predetermined and agreed to by all CLECs. Ms. Albersheim also references Staff's position as being consistent with Qwest's position regarding rejection of orders and ¶ 234 of the TRRO. She contends that the reality of Mr. Denney's interpretation would spawn numerous Commission proceedings that would potentially cause unintended customer service impacts.

a. Discussion

140. As to matters of general applicability, the effective date of a tariff on file with the Commission can unequivocally establish when Qwest would be authorized to reject CLEC orders based upon a finding of non-impairment. As to requirements of ICAs, obviously the individual terms may apply as to the effective date of changes in the impairment status of a particular wire center.

141. Qwest clarified in rebuttal that CLEC orders will not be blocked in absence of Commission approval. This position is reasonable and will be adopted. So long as a tariff is on file with the Commission identifying the classification of a particular wire center as impaired, Qwest shall accept orders for processing. However, once the effective tariff no longer identifies the classification of a particular wire center as impaired, Qwest is no longer obligated to accept CLEC orders.

142. The Commission finds that no CLEC can reasonably self-certify that it is entitled to unbundled access to particular network elements in wire centers found by this Commission to be non-impaired under the FCC criteria. Thus, Qwest will no longer be required to provision circuits to a CLEC from a non-impaired wire center pursuant to its wholesale tariff in effect despite a CLEC's self-certification in accordance with the TRRO.

143. In conclusion, the parties have not demonstrated that applicable tariff processes, including the rules of practice and procedure, are not best suited to define when CLEC orders may be rejected. The Commission is also best served by retaining the flexibility and discretion to accommodate foreseeable alternatives and unforeseen circumstances in the future.

I. Future Proceedings for Determination of Impairment

144. Qwest contemplates future proceedings for considerations of additional non-impairment findings as circumstances change over time. While Qwest contemplates CLECs having an opportunity to dispute Qwest's application of FCC rules, it does not believe CLECs should have the opportunity to re-litigate the FCC methodology as applied by Qwest. Albersheim at 15.

145. Qwest contends that a single docket governed by procedures similar to current tariff filing procedures would be most appropriate for the resolution of disputes. Qwest proposes

that notice to all CLECs be provided through the CMP notification. In absence of an objection raised within 30 days, the wire center list should be deemed approved by operation of law. Albersheim at 15.

146. If no objection is raised, the updated list would be in effect by operation of law and the tariff rate would apply. If a timely objection is raised, Qwest seeks an expedited resolution that would be effective 30 days following the initial notification to CLECs. If the resolution resulted in a change in wire center status, Qwest would then back bill CLECs to the effective date. Albersheim at 16.

147. The Joint CLECs contend that any request to reclassify a wire center based upon line count information should be restricted to when new ARMIS information is made available (*i.e.*, once a year).

148. The Joint CLECs support the position that Commission decisions regarding interpretation of the TRRO should not be re-litigated through the process of updating the wire center list. In addition, the Joint CLECs support an expedited process with regard to additions to the wire center list.

149. The Joint CLECs disagree that proposed changes by Qwest should become effective by "operation of law." They seek to avoid modifications by Qwest's unilateral action and support a Commission determination as to impairment of Qwest wire centers after affected parties have an opportunity to meaningfully review the evidence used to support changes to Qwest's wire center list.

150. The Joint CLECs contend that 30 days' notification to CLECs before changes are implemented is insufficient. A 30-day notification is inadequate for a CLEC to properly plan and react to changes in UNE availability. Qwest plans to provide notice and after 30 days the CLEC

will be billed alternative rates. The CLEC is put in the position of having to review Qwest's claims, initiate disputes if Qwest's data is unclear, and determine whether to transition facilities to an alternative service within 30 days. Though Qwest claims that it is offering a 90-day transition, this transition is meaningless to the Joint CLECs since the CLEC will be retroactively billed to day 31. In any event, 30 days is insufficient for CLECs to alter business planning in a particular wire center.

151. Mr. Denney testified that the Joint CLECs do not oppose, in absence of objections, 30 days as a reasonable time period for a wire center to go into effect as a non-impaired wire center. Hearing Exhibit 19 at 173. However, they believe the Commission should determine such matters on a case-by-case basis. Hearing Exhibit 19 at 173. The dispute comes in the terms of rates and transition and he contends such matters should be reviewed by the Commission on a case-by-case basis. Hearing Exhibit 19 at 173. Illustratively, Mr. Denney contends that the Commission could establish the effective date 30 days following notice if CLEC objections were found to be invalid or frivolous. Hearing Exhibit 19 at 174. Such an approach discourages Qwest from filing applications lacking merits while also discouraging CLECs from litigating objections lacking merits. Additionally, should any party pursue frivolous or improper claims, such as to cause unnecessary delay or needless increase in the cost of litigation, the Commission can award recovery of attorney fees and costs.

152. The Joint CLECs also oppose back billing to when Qwest added a wire center to the list of non-impaired centers when a CLEC unsuccessfully disputes updates to the list. While the Joint CLECs do not oppose the theory of Qwest's proposal, any disputes regarding the effective date should be settled by the Commission based on the circumstances that caused a delay in implementation. Illustratively, if Qwest's filing lacks proper supporting data, then an

ultimate determination of non-impairment should not be effective as of the original filing date. Qwest and the Joint CLECs raise appropriate concerns regarding the incentives surrounding the update process.

153. In rebuttal, Ms. Albersheim clarifies that Qwest's proposal is that the effective date of an update to the list of non-impaired wire centers should be 30 days following notice of an update to the list. Back billing should be permitted from the effective date. She disputes inferences regarding incentives in the update process.

154. Aside from Qwest's proposal, the Joint CLECs include an alternative proposal for updating the wire center list. The Joint CLECs propose that:

(1) Before Qwest files a request (along with supporting data) to this Commission to add a wire center to the wire center list, Qwest will issue a notice to CLECs informing them of the filing, notifying them that the filing (which will be filed as confidential pursuant to the protective order) may contain a CLEC's confidential data, advising each CLEC that it may obtain data in the docket by signing the protective order, and indicating that, if a CLEC objects, the CLEC should contact the Commission before a given date. These notices would be similar to the notices that ILECs currently send with respect to requests for CLEC-specific data (see example in Exhibit DD-8). The example of the Qwest notice in Exhibit DD-8 shows that Qwest already has a process in place for notifying CLECs (including non-party CLECs) of when Qwest intends to provide CLEC-specific data to the other parties or the Commission pursuant to a protective order.

(2) Qwest should make a filing with the Commission and provide sufficient supporting data to the Commission and CLECs so that the data can be reviewed. Once sufficient data is provided, the CLECs would request any necessary follow up information. This exchange of information should take no more than 20 days, assuming that Qwest provides sufficient data with its initial filing.

(3) Once the information exchange is complete and CLECs have reviewed the data, CLECs should file exceptions, challenge the sufficiency of the data, or object to inclusion of any wire center on the list. If there is no objection, the Commission should approve the wire center list, send a notice containing the updated approved wire center list, and post the approved list on the Commission's website. If there are any objections, the Commission should approve a list containing only any undisputed wire centers and resolve all disputes as to

disputed wire centers. Once the disputes are resolved, the Commission should, if necessary, update the list.

Hearing Exhibit 15 at 45-47.

155. In Rebuttal, Ms. Albersheim disputes that the notice advocated by the Joint CLECs is reasonable. She contends that 30 days, as proposed by Qwest, is more than reasonable to inform the Commission if they object to a requested update to the wire center list and there is no need for notice in advance of filing with the Commission.

156. Staff proposes an alternative approach to provide an efficient application process to update the list of wire centers. Specifically, Qwest would file an application to update the list of non-impaired wire centers based upon the order in this docket. The application could seek to update based upon the number of fiber-based collocators anytime the threshold is met. However, if the update is sought based upon business line counts, then the filing should only be allowed within a reasonable period of time following availability of annual ARMIS 43-08 data for the year in which Qwest meets the threshold. Testimony in support of the application must be filed with the application and provided to CLECs concurrent with the filing. Staff would be allowed to audit data and all supporting documentation to ensure completeness and demonstrated accuracy of the data, including any physical verification thereof. Upon the effective date of a Commission decision approving an update to the list of non-impaired wire centers, the updated list takes effect. Once the update is effective, a transition period would allow CLECs to convert existing circuits. Similarly, the transition pricing identified in the TRRO should apply. CLECs would be able to order UNEs in any impaired wire center until the effective date of an order finding the wire center is no longer impaired and correspondingly updating the list of non-impaired wire centers, with provision for billing effective as of the date of Qwest's application to update the list. The CMP would be utilized to implement procedures assuring that electronic

interfaces between the ILEC and CLEC are sufficiently tested following any changes to the Commission's list of non-impaired wire centers so as to minimize any possible disruption to the customer's service.

157. In rebuttal, Ms. Albersheim reiterates that the process to update the list of non-impaired wire centers should not be used as a means to delay the appropriate designation. Therefore, Qwest proposes an expedited procedure where the designation would be effective 30 days following initial notification to CLECs and the Commission that a wire center is non-impaired. If a dispute arises as to the change in status of a wire center, Qwest would agree not to implement a change in rates until the proceeding is complete; however, Qwest believes that it should be allowed to back bill CLECs to the effective date if the change in wire center status is approved. Qwest also contends that the results of this docket bind all parties.

158. Addressing Ms. Notarianni's testimony that a Commission order should be required to effectuate an update to the list of non-impaired wire centers, Qwest contends an order should not be necessary where the matter is not disputed. Qwest maintains that such a filing should be effective by operation of law 30 days following the filing of the update.

159. In rebuttal to Mr. Denney's testimony, Ms. Albersheim clarifies that Qwest will include supporting data to verify that a new wire center is non-impaired in accordance with the FCC methodology as ordered by this Commission. To expedite availability of anticipated highly-confidential CLEC-specific data, Qwest proposes that a standing non-disclosure agreement or protective order be imposed. Subject to confidentiality protections, Qwest will file sufficient detail to enable CLECs to validate access line counts and fiber-based collocator counts used in the future non-impairment analysis, as more specifically defined in Hearing Exhibit 8 at 5-6.

160. Ms. Albersheim acknowledges that Qwest is required to submit CLEC impacting systems changes to the CMP. Qwest agrees that the CMP process should be utilized; however, the internal design and implementation of these systems changes is determined by Qwest, and is not predetermined and agreed to by CLECs. While CLECs have an opportunity to provide input, and CLECs may test changes, systems changes are not implemented in the way that Mr. Denney demands and this is not the time or forum to change the CMP process.

1. Discussion of the Nature of Future Proceedings

161. The Commission must be particularly cautious of unilateral actions imposed by one competitor upon another in a competitive marketplace. Therefore, notification regarding requests for impairment determinations will not rely upon the CMP. The CMP does not provide adequate assurance that appropriate personnel will be informed in all matters and instances. Different persons may require notice on impairment issues and an ICA may require specific notice. As discussed subsequently, notice of an application to determine impairment will be required as in other applications filed with the Commission.

162. Colorado law ensures adequate notice is provided for changes in rates and allows the Commission discretion to make certain modifications as to required notice. Further, the Commission's Rules of Practice and Procedure were adopted to ensure all interested parties are treated fairly and that the rights of all interested parties are protected.

163. Parties advocate differing positions to define the effective date of future decisions regarding impairment. However, no specific determination will be adopted. As suggested by Mr. Denney, preservation of discretion may allow the Commission to act based upon anticipated as well as unforeseen future circumstances. In a future proceeding, the Commission may consider sufficiency of Qwest's disclosure of relevant information to support a filing or a

CLEC's motives in litigating a future impairment determination. The Commission should retain the discretion to manage implementation of impairment decisions based on the circumstances at the time.

164. The extent of Commission discretion will not be modified herein. Further, the ALJ has unanswered concerns as to whether positions advocated run afoul of the prohibition on retroactive ratemaking outside the scope of an ICA. The Supreme Court has recognized that "[r]etroactive ratemaking is prohibited. *Colorado Energy Advocacy Office v. Public Serv. Co.*, 704 P.2d 298, 305 (Colo. 1985). The reason for this prohibition is to prevent the unfairness entailed in altering the legal consequences of events or transactions after the fact. *Peoples Natural Gas Co. v. P.U.C.*, 197 Colo. 152, 154, 590 P.2d 960, 962 (1979)." *Silverado Communication Corp. v. Public Utils. Comm'n*, 893 P.2d 1316, 1321 (Colo. 1995).

165. The TRRO proscribes procedures for CLECs to order services. All parties support Commission adoption of procedures that ensure fairness in the implementation of the TRRO's prescribed process, in part. However, any attempt to bind the Commission in future proceedings or to dictate priority of future impairment proceedings over other Commission matters cannot be adopted. The Commission cannot foresee the reasonableness of such an approach on behalf of future Commissions and interested-party concerns.

166. An impairment determination controls Qwest's unbundling obligations under § 251. Qwest has filed its Statement of Generally Available Terms and Conditions (SGAT) pursuant to 47 U.S.C § 252(f) that it generally offers within Colorado to comply with the requirements of § 251. *See* 47 U.S.C. § 252(f)(1). Those terms and conditions concern price and non-price elements. In order for the findings of non-impairment to have general availability, they must be incorporated into Qwest's wholesale tariff and the SGAT.

167. Although following the completion of briefing, the Commission recently confirmed and clarified that Qwest is required to maintain wholesale tariffs on file with the Commission. Decision No. C07-1095. Qwest currently provides service in accordance with tariffs on file with the Commission as well as the SGAT. A finding of non-impairment eliminates Qwest's obligation to sell high-capacity unbundled loops in applicable wire centers. Because the classification of wire centers (*i.e.*, impaired and non-impaired) will now be necessary to determine the applicable rate, impaired wire centers must ultimately be included in the wholesale tariff so that pricing applicable to impaired wire center maybe determined.

168. The Commission stated: "Indeed, we agree with Staff that the language of § 40-3-103, C.R.S., which requires that all Colorado public utilities:

shall file with the commission ... schedules showing all rates, tolls, rentals, charges and classifications collected or enforced," along with the language of § 40-3-104, C.R.S., that requires that a Colorado public utility may only change rates in its schedules in accordance with the notice, suspension, and hearing requirements contained in that statute, provide a clear legislative intent that Commission approved tariffs, including Qwest's wholesale tariffs, must be on file with the Commission.

Decision No. C07-1095.

169. Anticipating a need for consideration of procedural modifications and confidential matters, including potential highly confidential protections, the tariff process alone does not provide the most expedient and efficient vehicle to consider such matters. However, as Staff suggests in part, the application process does. Qwest would be free to apply for approval of tariff modifications to change the impairment classification of a given wire center. In doing so, Qwest may choose how to prepare the application and the extent to which it supports the filing through testimony. If uncontested, approval could be expedited by the Commission. If the proposed tariff is part of such an application, the Commission could authorize a compliance filing of the

tariff modification on shortened notice. If the Commission construes an intervention to be filed for an improper purpose, intervention could simply be denied or alternative procedures could be adopted. In any event, interested parties could begin sharing information during the notice period. If disputes are resolved, interventions could be withdrawn leaving the application unopposed.¹⁷ Therefore, utilizing existing procedures can approximate the result contemplated by the parties.

170. It is important to note that the parties are free to negotiate ICAs. However, adoption of new Commission procedures for matters of general applicability must be in the public interest for the benefit of all concerned. The Commission cannot blindly prioritize this impairment filings over all other future matters. Rather, the application process provides an opportunity to act based upon circumstances present at the time and any party can request procedural modifications.

2. Discussion of Protective Order

171. The parties seek to impose a protective order regarding confidentiality to stand outside of the Commission's rules; however, the parties have not demonstrated adequate need for processes outside of the Commission's rules.

172. The Commission contemplated that appropriate extraordinary protections may be imposed based upon the facts and circumstances present in each case. *See* Decision No. C05-1093 in Docket No. 03R-528ALL (though not the final decision in this rulemaking docket, subsequent decisions did not affect *Rule 1100, 4 Code of Colorado Regulations 723-1*).

173. While there is understandable concern as to timeliness of access to information and the Commission's ability to act, it has not been shown that existing rules do not provide

¹⁷ This general process is regularly utilized in transportation matters before the Commission.

adequate flexibility. Qwest could seek to shorten notice of an application and request appropriate confidentiality protections, if necessary. Intervenors could access confidential information as soon as they become a party. Parties could access highly confidential information as ordered by the Commission. Finally, if an intervenor's investigation leads them not to oppose the granting of the application, a filing could be made to that affect or the intervention could be withdrawn.

174. If the parties seek to rely on the confidentiality protections afforded by the Commission, the Rules of Practice and Procedure provide sufficient flexibility to address matters on a case-by-case basis. Additionally, access to underlying data by Staff and the OCC cannot be questioned. Finally, it is noteworthy that the confidentiality rules do not prohibit variations through negotiated ICAs, should parties so desire.

J. Other Issues

175. In response to Decision No. R06-0406-I, the parties identified issues to be resolved in this matter. Staff suggested that the need be considered, if any, for a process for the Commission to periodically review the non-impaired wire center list for accuracy and whether a wire center, if it no longer meets the requirements for non-impaired status, can be designated as impaired. Qwest contends that a process for reviewing the list of non-impaired wire centers for accuracy or removal because a wire center found to be non-impaired is not subject to reclassification, citing 47 C.F.R. § 51.319(a)(4)(i); 47 C.F.R. § 51.319(a)(5)(i); TRRO at 94, footnote 466; and 47 C.F.R. § 51.319(e)(3)(i). Albersheim at 16.

176. The ALJ agrees with Qwest's interpretation of the TRRO that once a wire center is in fact non-impaired, it cannot later be classified as impaired even if applicable criteria are no

longer met. However, this prompts one clarification of implementing a Commission finding that a wire center is non-impaired.

177. If a Commission decision were to erroneously declare a wire center to be non-impaired, when in fact it was impaired, adoption of the foregoing procedures does not affect jurisdiction as to Commission decisions (*i.e.*, §§ 40-6-112 and 40-6-114, C.R.S.). Such relief is not a reclassification of a non-impaired wire center; rather it would void an erroneous finding that the standards established by the FCC were met.

III. STIPULATION FINDINGS AND CONCLUSIONS

A. Statement

178. Following conclusion of the hearing on the merits, but before completion of briefing, Qwest, with authorization for all parties, stated that the disputes at issue in the proceeding had been settled by Qwest; Covad; Eschelon; McLeod; and XO. (These CLECs will be referred to as the CLEC Settling Parties. The CLEC Settling Parties and Qwest will collectively be referred to as the Settling Parties) and efforts were underway to finalize a settlement agreement. Staff and the OCC anticipated supporting the settlement, but reserved any rights with regard thereto until the settlement was available for review. Based thereupon, the deadline to file Reply Statements of Position was vacated. Decision No. R07-0513-I

179. On June 22, 2007, the Settling Parties jointly filed their Notice of Joint Filing and Motion for Order Approving Settlement Agreement. The filing parties request approval of the settlement between Qwest and the Joint CLECs.

180. On June 27, 2007, Joint CLECs and Qwest jointly filed their Notice of Joint Filing and Amended Motion for Order Approving Settlement Agreement (Joint Motion). The Joint Motion supersedes the motion filed June 22, 2007 and requests approval of the amended

settlement among the Settling Parties filed therewith (Settlement). The Motion filed June 22, 2008 will be denied as moot.

181. By Decision No. 07A-0585-I, response time to the Joint Motion was extended. Any party was allowed up to and including July 20, 2007, to file a response to the Joint Motion.

182. On July 20, 2007, the Response of Cbeyond Communications, LLC (Cbeyond) to Qwest Corporation's Motion for Order Approving Settlement Agreement was filed. Cbeyond opposes approval of the Settlement in its current form.

183. On July 20, 2007, Staff's Response to Qwest/Joint CLEC Amended Motion for Order Approving Settlement Agreement was filed. Staff also opposes the Joint Motion.

184. By Decision No. R07-0585-I, an evidentiary hearing was scheduled to consider the Joint Motion. At the assigned time and place, the hearing was called to order. All parties appeared through counsel. Exhibits A, B, and D through G were identified, offered, and admitted into evidence. Exhibit C was identified, but not offered into evidence.

185. Robert Brigham, a Staff Director in Qwest's Public Policy Department testified in support of the stipulation.

186. Theresa Million, a Staff Director in Qwest's Public Policy Department testified in support of the nonrecurring charge that is in Section IV of the Settlement.

187. Douglas Denney, employed by Eschelon Telecom in its legal department as the Director of Costs and Policy, testified in support of the Settlement.

188. Greg Darnell, Director of ILEC relations for Cbeyond, testified in opposition to the Settlement.

189. Lynn Notarianni, a Rate/Financial Analyst with the Fixed Utilities Division of the Commission, testified in opposition to the Settlement.

190. This decision now turns to consideration of the Settlement. It is important to understand that consideration of the settlement is independent of the merits of the underlying proceeding. The Settling Parties expressly reserved the right to take inconsistent positions as to the underlying merits of the case. Therefore, the evidentiary record as to the Joint Motion will be bifurcated and decided based upon the motions hearing and the pleadings related thereto.

191. The evidence presented at the motions hearing makes clear that approval of the Settlement is not within the intended scope of this docket and resolves no issue identified by the Commission above. Prior testimony and positions of the Settling Parties as to the underlying proceedings are not affected or compromised by approval of the Joint Motion. Further, the Settling Parties do not intend to bind non-settling parties by the Settlement, if approved by the Commission. Thus, all parties remain free to take inconsistent positions as to the Settlement and the underlying proceedings.

192. At the conclusion of the motions hearing, a deadline was established for the filing of post-hearing statements of position regarding the Joint Motion. On September 24, 2007, Statements of Position were filed by Qwest, the CLEC Settling Parties, Cbeyond, OCC, and Staff.

193. On September 24, 2007, Qwest filed a Motion for Leave to File Statement of Position in Excess of Thirty Pages. No response was filed. Good cause having been shown for the unopposed request, it will be granted.

B. Settlement Agreement

194. The Settlement, Hearing Exhibit A, consists of seven sections and five attachments. The Introduction describes the FCC's TRO and TRRO orders, the various petitions filed with various state commissions, the dockets that were opened by various state commissions, and the parties' desire to effectuate a multi-state settlement to further their mutual interest.

195. Several agreed-upon definitions of key terms used in the Settlement are included.

196. The Settlement then sets out the Settling Parties' agreement for an Initial Commission-Approved Wire Center List. Without regard to the definitions or methodology of the Settlement, the parties agree to a list of which Qwest wire centers are the initial non-impaired wire centers, the associated non-impairment designations, and effective dates.

197. The parties' negotiated agreement to a NRC for conversions of UNEs to alternative services or products, including the agreed-upon NRC rate and length of term, as well as how credits for those CLECs which have already paid a higher NRC rate will apply, and the status of the rate after three years.

198. The parties agreed to a methodology to be applied for purposes of non-impaired facilities to determine non-impairment and/or tier designations, including how to count "business lines" and "fiber-based collocators."

199. The parties agreed to future Qwest filings requesting Commission approval of Non-Impairment Designations and Additions to the Commission Approved Wire Center List.

200. Finally, there are "other" provisions including ICA provisions and amendments, refunds related to Qwest identified non-impairment designations that are not identified as non-impaired in Attachment A to the Settlement Agreement, credits to CLECs that have been back-billed to March 11, 2005 for facilities with an effective non-impairment date of July 8, 2005

(instead of March 11, 2005), as well as general provisions about settlement, precedent and termination of the Settlement.

201. The Settlement incorporates five attachments: the initial List of Non-Impaired Wire Centers, alternative ICA amendment language, and a model protective order.

202. Mr. Brigham generally described the Settlement at the evidentiary hearing. Tr. pp. 45-49.

203. Notably, the Settlement has parties to it that are not a party to this docket. No basis has been shown for Commission jurisdiction over these entities in this docket. To be acceptable, the Settlement must be clear, understandable, and administratively enforceable. As to this Settlement, non-parties are no more than a signatory to an agreement -- effectively a contract. There is no basis upon which a Commission decision in this docket is administratively enforceable as to non-parties. Therefore, the Agreement will be considered only as to the parties in this docket. Any approved agreement must be enforced by or against any non-party by complaint.

204. At hearing, counsel for the Settling Parties clarified that they seek Commission approval of their negotiated agreement to resolve their differences without binding any carrier not a party to the Settlement.

205. The Settling Parties do not seek Commission approval of the terms of the Settlement as a substantive decision on the merits of this docket; rather, the Settling Parties seek approval of the Settlement as applied to them.

206. If other carriers desire to adopt the Settlement, they may do so by executing one of the ICA amendments appended as attachments to the Settlement. *See* Hearing Exhibit A, Attachments B, C, and D.

207. The Settlement is a six-state agreement: Arizona, Minnesota, Utah, Oregon, Washington, and Colorado. Qwest, Covad, Eschelon, Integra, McLeod, Onvoy, POPP.com, US Link, doing business as TDS Metrocom, and XO entered into the Settlement. The parties to the Settlement, that are also parties to this docket, include Qwest, Covad, Eschelon, McLeod, and XO.

208. The parties to the Settlement do not intend to create any precedent by the Settlement and have compromised various positions for settlement purposes.

209. Section IV of the Settlement provides for a non-recurring charge of \$25 in any instance where a CLEC, in a non-impaired wire center, chose to convert their UNE facilities to an alternative Qwest service. The amount is a negotiated rate. It is not based on a cost study.

210. The settling parties agreed to compromise on \$25 rate without reference to a TELRIC cost study, because the parties are free to negotiate those rates without reference to § 252 of the Act.

211. The NRC effectively amounts to a billing change. The physical circuit and the functionality of the service stay the same.

212. Qwest contends that the Settlement is compliant with FCC rules. On behalf of Qwest, Ms. Million believes the compromised rate is just and reasonable. She contends that the rate need not be TELRIC-based. In the underlying proceedings she has advocated for the rate to be \$50 and that such a rate is much lower than the costs to provide the service. She contends that \$25 is the reasonable result of a negotiated compromise.

213. Testifying on behalf of the CLEC Settling Parties, Mr. Denney contends that the Settlement is consistent with the Telecom Act because the parties are allowed to enter into agreements under § 252 of the Act without regard to whether the agreement precisely complies

with FCC rules. Thus, he does not assert that the Settlement necessarily complies with FCC rules. Rather, it is his opinion that the agreement need to comply with the rules. While Mr. Denney does not agree that the settlement is consistent with the FCC's rules, he believes the settling CLECs have the right to settle a controversy under § 252.

214. Staff is not able to substantiate a valid non-recurring charge. Staff contends that a TSLRIC rate should apply to the non-recurring charge and that such a charge is consistent with standards applied by the FCC and Colorado for determining whether the rate is just and reasonable in the retail environment.

215. Ms. Notarianni contends that there is an automated process involved in the service associated with the fee and that Qwest stops that automated process to validate and check that the automation worked as intended.

216. Section V of the Settlement defines the methodology for determining non-impaired facilities, non-impairment, or tier designations.

1. Line Counts

217. Mr. Brigham clarified how the Settlement accounts for types of lines.

218. The line count addressed in Section V.A.2 includes all UNE loops and all EELs -- all DS1 loops, DS3 loops, and basic loops. Aside from litigation positions, the Settlement reflects the compromise of the settling parties. Cbeyond demonstrated that the Settlement compromises Mr. Brigham's and Mr. Denny's statements on the issue in their prefiled testimony (Mr. Brigham maintains that all UNE loops should be included. Mr. Denney supported exclusion of the non-switched CLEC UNE-Ls). The Settlement adopted Qwest's position on this issue. Under the Settlement, Qwest is only including its retail portion of incumbent-owned switched retail access lines. Qwest's private line circuits are not included.

219. Mr. Brigham offered Qwest's interpretation of the business line definition: The first sentence addresses switched access lines and the second sentence adds the sum of all UNE loops connected to a given wire center. The number of business lines in a wire center shall equal the consumers of all ILEC switched access lines (*i.e.*, Qwest retail lines). Then the rule adds the sum of all UNE loops connected to that wire center, not some portion of the UNE loops. The third sentence adds that Qwest shall only include in ARMIS counts of Qwest retail lines, those access lines connecting end-user customers with incumbent LEC end offices for switched services; non-switched access lines; and ISDN and other digital access lines by counting each 64 kilobits equivalent as one line (for example, a DS1 line corresponds to 24 64 kilobit voice-grade equivalent channels in a larger data pipe, and therefore to 24 business lines).

220. The CLEC settling parties also contend that the Settlement's calculation of access lines under the ARMIS methodology is consistent with the FCC's rules.

221. Qwest acknowledges that Qwest private line service would not be for switched service. These appear in the private-line column of the ARMIS Report 43-08 and are not included in line counts under the Settlement.

222. ISDN is a switched service. For example, ISDN-PRIs are included as switched. The Settlement uses the voice channels that are actually utilized out of that 24, consistent with the data reporting to ARMIS.

223. DSL lines are not counted at all because they are not in ARMIS. If Qwest provides a CLEC a DSL compatible loop as a UNE, the count is based upon the loop provided. A DS0 is one loop, a DS1 loop is 24 loops, and a DS3 loop is 672 loops.

224. The Settlement attempts consistency with ARMIS Report 43-08. ARMIS only includes Qwest retail counts, not UNE loops. Qwest private lines are not included in the

switched line counts in the report. Therefore, they did not include any Qwest private lines in line counts. ARMIS Report 43-08 only includes Qwest retail services. For Qwest retail services, Qwest only included Qwest switched access lines.

225. QPP lines for business customers, and the loops associated with those customers, are considered QPP. They are not also included in the UNE-L counts. Qwest retail lines are included separately. Unbundled loops and EELs are a wholesale service that are included separately and will only count in the end-user serving wire center. UNE-P, to the extent they remain are included separately. ISDN-PRIs, Qwest's retail lines, are included as they are in ARMIS.

226. Under the Settlement, UNE-P business lines are included, but residence lines are not. UNE-P business lines are a switched service -- the equivalent of basic exchange service when sold to a CLEC.

227. Any residential UNE-P customer would not have been included in line counts because they were converted to a residential QPP product. If a carrier moves that QPP customer into UNE-L, the UNE-L would be included in the count as any other UNE-L line. UNE-L is included without regard to the use made by the CLEC. Qwest currently has no way of knowing where that line ultimately serves a residential or business customer.

228. Mr. Brigham attempted to clarify the reference to "other similar platform offerings" in Section V.A.4. First, this phrase did not impact the calculations in the most recent wire center calculations. This phrase is intended to reference only commercial agreements that are similar and have a loop associated with them, as opposed to other commercial agreements that would not be included.

229. The initial wire center list, at least in part, does not comply with the methodology proposed to be applied to future wire center proceedings. This list of wire centers is based on 2004 data. There were some instances where a negotiated agreement was reached to exclude a wire center. However, as far as lines are concerned, the list is based on the Settlement methodology defined in Section V.

230. All business line data provided to support future wire center designations will be disaggregated to the wire center level in addition to being disaggregated to the CLEC level already included in the settlement. In a new wire center proceeding, any intervening CLEC could access the methodology's underlying data in that proceeding, subject to a protective agreement.

231. The Settlement provides that when Qwest files future non-impairment proceedings, any proposed non-impairment designations will be made in accordance with the methodologies in the Settlement. The Settling Parties will jointly request that the Commission make its best efforts to resolve the issues within 60 days. Notably, the provision to request expedited treatment does not bind the Commission in any regard whatsoever.

2. Collocation

232. Section V.B, addressing collocation, practically recites the rule on fiber-based collocation, 47 C.F.R. § 51.5.

233. Section VI.C addresses a standing protective agreement applicable to future dockets where Qwest might request certain wire centers be declared no longer impaired. Qwest contends the provision, like the remainder of the Settlement, is not binding on non-signatories. However, Qwest will be willing to supply information to CLECs that are not a party to the

Settlement so long as they execute the protective agreement. Qwest is not going to argue that only signatories to the Settlement would get the information.

3. Subsequent Proceedings

234. Under the contemplated protective agreement, parties to the Settlement would be entitled to access supporting data upon filing, whereas non-signatories would have to intervene and execute the protective agreement before having access to the same data.

235. Intervenors would have 30 days within which to raise objections to Qwest's proposed designation of a non-impaired wire center. Without a standing order, parties would otherwise have less than 30 days to review information because they would have to obtain the underlying data after filing.

236. Section VI.F.3.A states the Settling Parties' agreement to take a joint litigation position in specific future proceedings. The parties agree to jointly request that the Commission use its best efforts to resolve any dispute within 60 days of the date of the objection. However, other intervenors in the future proceeding are not bound thereby and may oppose such a request. The provision binds the Settling Parties, not other intervenors or the Commission. Mr. Brigham clarified that the intention is to have the Commission conduct a hearing and issue a decision within the 60-day period.

237. Section VII.A.4 allows for non-signatories to opt into the Settlement.

238. While testimony was offered that data would be available to Staff, the Settlement does not clearly describe the circumstances pursuant to which Staff and OCC would access information other than as an intervenor in future proceedings. See Section VI.E.

239. Staff notes that the Settlement would allow Qwest to use data that is potentially a year or more stale in requesting a designation of non-impairment. Staff believes the Commission should rely upon the most recent ARMIS 43-08 data that is filed with the FCC.

240. Qwest files its ARMIS 43-08 data annually on April 1st. Under the provisions of the Settlement, Qwest could seek non-impairment a few weeks prior to a new filing using the data filed the prior year. Staff opposes the use of stale data.

241. Staff raises concern that Section VI.E.2.c of the Settlement makes a vague reference to a "similar platform product." Staff supports providing specificity around what Qwest is required to provide in future filings so there is transparency in the data for consideration of future wire center non-impairment designations.

242. Section VI.E.2.b references a non-exclusive list of minimum information that Qwest will provide in their filing. If any additional information is relied upon to support a wire center non-impairment designation, the Settlement does not specify that Qwest will provide all data that they relied upon. Staff believes it is important that Qwest, in each of its filings, provide all data relied upon.

243. Staff raised concerns about when the 30-day period for review would begin for the proceeding contemplated. Ms. Notarianni continues to support Staff's proposed procedure in the underlying proceeding that was generally referenced, but did point out that the procedure in the Settlement would cause that review cycle to potentially be less than 30 days.

244. The ability of Staff and the OCC to obtain information to support Qwest's filing is uncertain. Aside from the proposed confidentiality process, discovery would be governed by future proceedings. Further, Staff may utilize audit powers to obtain data. In any event, the time to obtain this information is uncertain.

245. Staff is not clear as to the nature of relief in subsequent proceedings. Reference is made both to a Commission order as well as a tariff-like filing that would go into effect by operation of law. Staff is also concerned that any finding of non-impairment should be effective as to all CLECs at the same time.

246. Staff raises concerns regarding the \$25.00 non-recurring charge in the Settlement Agreement. Understanding that the parties compromised for settlement, there is no cost study to support the settled rate. Staff submits there is not adequate information in the record to support any specific amount. Therefore, Staff would only support adoption of a nominal charge in absence of proper support.

247. The Settlement includes a non-recurring charge for the conversion from a UNE to a special access circuit or a private line. Ms. Notarianni understands that Qwest must change the circuit from a UNE circuit to a special access circuit for billing purposes, for maintenance and repair, to meet FCC guidelines, and for accounting purposes. While it is appropriate to determine just and reasonable rates, she does not believe it appropriate that the costs of this conversion be recovered from CLECs. However, she was aware of analogous rates that may justify imposition of a rate as high as \$20.

248. Even if specific concerns addressed by Staff were resolved, Staff still would not support approval of the Settlement because the Settlement would still only apply to the Settling Parties. Staff contends that this docket should be used as a docket to set out the rules or terms governing how the Commission will designate impaired wire centers for all of the CLECs in Colorado. To do otherwise would be inconsistent with the Commission's obligations tasked by the FCC and contrary to the public interest.

249. Comparing the Settlement with Qwest's Negotiations Template Agreement (Exhibit E), Ms. Notarianni confirmed disparate treatment. In Exhibit E, Denver Southeast is listed as a Tier 1 wire center. In the Settlement, that wire center is designated as a Tier 2 wire center. The Northglenn wire center in Exhibit E is listed as Tier 1 while it is a Tier 2 in the Settlement.

250. The Settlement binds the parties to specified procedures. However, it does not purport to bind the Commission or non settling parties to those procedures. Staff is concerned that the Settlement will practicably become the default procedure for all CLECs, in contravention of the Commission's intent in opening this docket, because CLECs will intervene in the existing proceeding rather than having had the decision made in advance.

4. Overall Considerations

251. The CLEC Settling Parties contend that approval of the Settlement is in the public interest because it resolves litigated issues and disputes. The parties pursued their settlement in the context of this proceeding due to practical considerations. Were individual CLECs to pursue ICA amendments consistent with the Settlement in their respective interconnection dockets, it would at least be challenging to manage the complexities of accessing confidential information of multiple providers that may not be a party to the subject docket. The Settlement results in a process that the Settling Parties believe to be workable and provides for a Commission determination and approval of non-impaired wire centers.

252. Staff contends that approval of the Settlement is not in the public's best interest because it only applies to the Settling Parties and will lead to additional controversy and litigation. Approval will result in different ICAs with varying terms.

253. Section VI.B addresses future proceedings. While the parties contemplate binding only the Settling Parties, Mr. Denney understands that the Settlement requires Qwest to use the Settlement methodology in future proceedings applicable to non-signators of the Settlement. However, approval of the Settlement does not affect the rights of non-signatories to the Settlement in such proceedings. Mr. Denney testified that Qwest has already filed an application that is currently pending before this Commission to find additional wire centers to be non-impaired.

254. Staff believes it is important for the Commission to establish a methodology applicable to all CLECs to determine impairment of wire centers, counting in the wire centers, and defining procedures for the filing of additional wire centers. Staff also addressed the appropriate non-recurring charge for transitioning from non-impaired circuits or UNEs to special access circuits. Staff supports adoption of one methodology applicable to all CLECs as contemplated in the scope of the docket and that such an outcome is consistent with the FCC's intent and the TRRO.

255. Staff is also concerned that if the non-impairment designation is the subject of negotiation, Qwest will be able to initiate *bona fide* requests with CLECs to modify their ICAs. Multiple proceedings of this nature would likely end up with more than one set of wire center non-impairment rules applying to different CLECs. Of course, including non-impairment in a negotiated agreement opens up the issue to future modification and debate.

256. In light of the stated purpose of the docket and prior statements in the docket, Staff does not believe that approval of the Settlement is appropriate. Therefore, Staff believes the Settlement should be rejected.

257. Staff joins in Qwest's earlier statement in this docket about the "need to expedite resolution of these issues" and description of "the type of binding adjudicatory proceeding the Commission should conduct to ensure that the regulatory framework established by the TRRO is implemented expeditiously and with clarity." Transcript II at 67:12-17.

258. In light of the express purpose of this proceeding, Ms. Notarianni points out that a compromise among the Settling Parties does not further the Commission's interest and purpose herein. Approval of the Settlement, without knowledge of the tradeoffs derived, results in a private list of non-impaired wire centers that will lead to confusion and potential duplication of the result as applied to different CLECs.

5. Cbeyond

259. Cbeyond purchases channelized DS1s with no subrate capability from Qwest to provide service to customers.

260. Cbeyond disputes that the Settlement is nonbinding upon non-signators. To the contrary, Cbeyond contends that approval of the Settlement imposes an immediate financial liability. Higher rates will be accrued as if Qwest was charging special access rates in any wire center that they claim to be unimpaired. Mr. Darnell contends this eventuality would occur without regard to any Commission findings that the Settlement's non-impairment decision and methodology contained in that decision is legal.

261. In further testimony, it was clear that Mr. Darnell was speculating as to future litigation over negotiated non-impaired wire centers where there has been no determination of non-impairment. He believes that Qwest will seek to charge Cbeyond for facilities outside of its ICA with Qwest. He anticipates that Qwest will claim a special access rate should apply to wire centers in the Settlement because it is an unimpaired wire center. Every order placed for service

at a disputed wire center would require burdensome litigation until Cbeyond's resources are exhausted or they leave the market. Upon presentation of such a claim, Cbeyond will accrue the special access charges without regard to whether Qwest is billing UNE rates. The result would be an increase in retail rates or denial of service to customers in the disputed wire center.

262. On cross examination, Mr. Darnell could not point to any language in the Settlement upon which his concerns were based nor could he identify language allowing Qwest to increase Cbeyond rates. Mr. Darnell could not identify any language in Exhibit D that would allow Qwest to avoid the ICA if the Settlement is approved. However, he reiterated his concern that Qwest will cite the language in § 2.8 of Exhibit D as authority to unilaterally change the list of non-impaired wire centers.

263. Mr. Darnell acknowledged that § 2.8 of its ICA, Exhibit D, addresses ordering of unbundled DS1 or DS3 loops. However, Mr. Darnell notes that the language of the agreement references a list that will be provided by Qwest. Because he is concerned that Qwest may unilaterally attempt to change that list of wire centers outside of the agreement, Qwest will try to impose the Settlement upon non-signatories to the Settlement. He notes that this would not be appropriate because the non-impairment thresholds in the agreement differ from those in the Settlement.

264. Ms. Notarianni noted inferences of dispute as to the list of non-impaired wire centers and properly points out that there are no wire centers in Colorado that the Commission has found to be non-impaired. Further, there is no basis upon which any carrier should believe themselves to make any unilateral finding on behalf of, or in place of, the Commission.

265. Mr. Darnell also acknowledged that § 2.8.3 of the agreement addresses how Qwest will declare additional non-impaired wire centers.

266. On cross examination, Mr. Darnell acknowledged that the Cbeyond ICA with Qwest does not prohibit Cbeyond from contesting non-impairment designations sought in accordance with the Settlement. Further, he acknowledged that Cbeyond has already agreed to the dispute resolution process that he described as being subjected to as a result of the Settlement. See § 2.8.1 of Cbeyond's ICA, Exhibit D. However, he maintains his belief that Qwest will breach Cbeyond's agreement.

267. Mr. Darnell is concerned that the language of the Settlement may infer that the stipulated wire center designations will not only be binding on the CLEC Settling Parties. If Qwest begins charging special access rates to Cbeyond for circuits, Cbeyond would be negatively affected in its ability to compete for small business customers in Colorado.

268. Mr. Darnell contends that the Settlement may result in discriminatory rates, terms, and conditions between the CLEC Settling Parties versus the non-settling CLECs, such as Cbeyond.

269. Cbeyond contends that various public policy statements have been made by the FCC, the Governor, and the Commission to encourage the deployment of advanced services. Cbeyond provides advanced services. Yet, Cbeyond contends that approval of the settlement is detrimental to future expansion of advanced services to customers.

270. Mr. Darnell acknowledges that the Settlement's definition of the fiber-based collocator is consistent with his understanding of the definition in the FCC rule. However, he contends that the FCC rule requires the counting of the fiber-based collocator as of the date a request for the change is made.

271. Mr. Darnell disputes that the Settlement methodology for counting business lines complies with the FCC rules. He also notes that, despite the agreed upon methodology, the

Settling Parties did not follow the methodology in developing the list of non-impaired wire centers. Thus, he contends that the written methodology will be applied to everyone going forward, even though it was not applied to implement the settlement list of non-impaired wire centers. Mr. Darnell contends the Settlement is discriminatory on that basis: CLECs that are not parties to the Settlement were discriminated against because they got no benefit of the bargain that resulted in adoption of a negotiated list of non-impaired wire centers.

272. Ms. Notarianni addressed her concerns in light of Qwest's negotiations template agreement from Qwest's wholesale website. An excerpt of a portion of the document was admitted as Exhibit E. On the second page, the agreement discusses Qwest's non-impaired wire center list for loops and dedicated transport and provides a list of Colorado wire centers that Qwest has deemed to be non-impaired. The document acts as a practical baseline agreement to start negotiations between Qwest and the CLECs when they enter into their negotiations agreement.

273. A comparison of the wire centers designated by Qwest as non-impaired differs from the Settlement.

274. Staff believes that Exhibit E illustrates the concerns raised by Cbeyond. Staff is concerned that Qwest will publish differing lists causing confusion to the CLEC community. CLECs entering the market rely on Qwest and start from the negotiations template. Although the intent may not be to bind parties, it may mislead new market entrants and effectively bind them to a Qwest-generated list. Staff believes they have a duty to eliminate uncertainty and confusion in the marketplace.

275. A key issue for determination is whether parties can negotiate impaired wire center classification. If the issue is capable of a negotiated resolution, Staff's argument becomes

somewhat the chicken or the egg. While Staff contends that one methodology should be adopted, multiple standards will surely follow if the issue is the subject of negotiation. Thus, if we must address multiple standards in the future, the benefit of rejecting the negotiated agreement comprised in the Settlement must be carefully considered.

276. The impairment analysis contemplated by the TRRO is an integral part of the market-opening provisions of § 251(c)(3) of the Act, which requires ILECs to make elements of their networks available on an unbundled basis to new entrants at cost-based rates pursuant to standards set out in § 251(d)(2). However, an ILEC and telecommunications carrier requesting an ICA can voluntarily enter into an agreement without regard to the standards set forth in subsections (b) and (c) of § 251. § 252(a)(1). FCC rules also provide: “[t]o the extent provided in section 252(e)(2)(A) of the Act, a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part.” 47 C.F.R. § 51.3.

277. While Staff questions the wisdom of entering into such a negotiated resolution in absence of understanding the Commission’s impairment determination, the Act’s encouragement and preference for negotiated agreements overcomes Staff’s interest in protecting the parties from themselves. Because the parties are free to negotiate an agreement that does not comply with the FCC’s implementation of unbundling obligations, the ALJ sees no reason that parties are prohibited from negotiating a private classification for purposes of their ICA, subject to § 252(e)(2)(A).

278. Section VI of the Settlement contemplates a partially negotiated agreement of the parties that attempts to bind this Commission into a new type of proceeding combining an adjudicated application filing within a negotiated ICA process. In such proceeding, the

Commission would be bound to apply the current extent of agreement among the parties to classify impairment of additional wire centers without regard to whether such agreement complies with Qwest's obligations under the Act.

279. As recognized above, the parties are free to negotiate impairment within the limits set forth in the Act. If the parties agree to amend their agreement over time, they submit the amendment to the Commission for approval under the Act. There is no need for the complex procedures contemplated by the parties.

280. If parties to an ICA do not agree to an amendment, the ICA or the Act may provide alternate remedies such as arbitration, adoption of a new ICA, or adoption of the SGAT. However, the Settlement attempts to bind the Commission into a process to approve impairment classification changes that may or may not be agreed to by the parties. The Settlement provides more than mere enforcement or dispute resolution. It proposes to expand the scope of the ICA.

281. One cannot consider how the Settlement will affect existing ICA provisions or future proceedings because no existing ICA is a part of the record. Therefore, those provisions regarding disputed requests to amend the impairment classification of wire centers will not be considered further herein. Such provisions within Section VI of the Settlement are not approved in this proceeding, but may be approved where the context of the agreement can be considered.

282. The attempt to impose future proceedings is unworkable and confusing because different standards and procedures apply to the types of proceedings for each ICA that is contemplated to be consolidated. The standard for Commission approval of a negotiated ICA is set forth in § 252(e)(2)(A) of the Act. The standard for Commission approval of an arbitrated agreement is set forth in § 252(e)(2)(B) of the Act. The Commission's rules also differ as to the type of proceeding.

283. Based upon the foregoing considerations, it is not consistent with the public interest, convenience, and necessity to privatize the Commission to play the contemplated role in developing negotiated ICA amendments. There is no demonstrated benefit to effectively implementing a private forum for the Commission to impose amendments to a negotiated agreement.

284. Those aspects of Section VI of the Settlement calling for a direct proceeding before the Commission to change the impairment classification of a Qwest wire center are rejected. Rather, those terms addressing such requests shall be limited among the parties in the context of the ICA. All references to a direct Commission proceeding to change the impairment classification of a Qwest wire center shall be construed within the context of the ICA. Illustratively, Qwest agrees not to request a CLEC Settling Party to amend their ICA to add additional Non-Impaired Wire Centers until after the 2007 ARMIS filing (using December 2006 line count data). *See* paragraph VI.A.3.

285. Attachments B, C, and D to the Settlement are rejected to the extent inconsistent with this Recommended Decision.

286. Attachment E to the Settlement, and all provisions in the Settlement related thereto, are rejected for those reasons addressed as to the merits in the underlying proceeding. This does not negate the parties' ability to negotiate confidentiality agreements as part of the ICA; however, the request for Commission issuance of a standing order is denied.

287. By approval of providing information to a CLEC Settling Party pursuant to the Stipulation, the Commission is making no finding as to the appropriateness of disclosure or the applicability of confidentiality protections.

288. No specific finding is made to interpret reference to “other similar platform offerings” in Section V.A.4. The term was understood and agreed among the Settling Parties. While the phrase is ambiguous, it does not cause sufficient concern to reject the provision in the context of this agreement. If adopted into ICA amendments, the phrase is subject to Commission interpretation as necessary in the future.

289. Based upon a review of the Settlement, the ALJ finds that the remaining terms of the Settlement reflect a just and reasonable resolution of the disputed issues among the Settling Parties. To the extent not otherwise inconsistent with this Recommended Decision regarding the Settlement, it should be, and will be, accepted.

IV. ORDER

A. The Commission Orders That:

1. The Motion for Leave to File Statement of Position in Excess of Thirty Pages filed by Qwest Corporation (Qwest) on May 14, 2007, is granted.

2. The impairment classifications for the following Qwest wire centers are as follows:

wire center	CLLI(8)	UNE Transport Non-Impairment Tier	“non-impaired” with respect to DS1 and/or DS3 UNE loops
Boulder	BLDRCOMA	T1	
Capitol Hill	DNVRCOCH	T1	
Colorado Springs	CLCPCOMA	T1	
Curtis Park	DNVRCOCP	T1	
Denver East	DNVRCOEA	T1	

Denver Main	DNVRCOMA	T1	DS3
Denver Southeast	DNVRCOSE	T2	
Dry Creek	DNVRCODC	T1	DS3
Pikeview	CLSPCOPV	T1	
Sullivan	DNVRCOSL	T1	
Aberdeen	ENWDCOAB	T2	
Arvada	ARVDCOMA	T2	
Aurora	AURRCOMA	T2	
Denver South	DNVRCOSO	T2	
Lakewood	LKWDCOMA	T2	
Northglenn	NGLNCOMA	T1	

3. Qwest's methodology applied in this proceeding to demonstrate the number of fiber-based collocators, modified to be consistent with this Recommended Decision regarding CLEC-to-CLEC connections, is accepted and approved. Qwest shall conduct and document physical verification to support future impairment determinations.

4. The Federal Communications Commission's (FCC) Automated Reporting Management Information System (ARMIS) 43-08 report shall be the best evidence as to included line counts from April 1st through December 31st of the calendar year during which the ARMIS 43-08 report is filed with the FCC.

5. For this initial impairment classification, the Colorado Springs Main and Denver East wire centers are found to have met the criteria as of March 15, 2005 for non-impairment for DS3 loops based upon 2004 ARMIS data.

6. Business lines tallied to determine impairment pursuant to 47 C.F.R. § 51.5 shall be calculated in accordance with this Recommended Decision. Business line tallies at the wire center level will be adjusted by the voice-grade equivalent applied to capacity (*i.e.*, used and unused). Qwest's methodology for identifying residential UNE-Platform (UNE-P) lines through the white pages database will be adopted to calculate the number of business UNE-P lines to determine impairment. The unbundled network element (UNE) loop component of the business line tally at the wire center level shall be modified to exclude residential and non-switched lines. The loop component of an Enhanced Extended Loop shall be treated the same as a UNE loop for purposes of impairment and to determine the wire center for which the loop is tallied.

7. The proposed non-recurring charge associated with product changes in response to changes in the impairment classification of wire centers will not be approved.

8. Within 30 days after Qwest's records reflect fiber-based collocations within one connection of meeting criteria to change impairment classification, or 5,000 business lines of meeting criteria to change impairment classification, a notification must be provided to all active competitive local exchange carriers (CLECs) (*i.e.*, through Qwest's Change Management Process), Staff of the Colorado Public Utilities Commission (Staff), and the Colorado Office of Consumer Counsel. A copy of all such notices must be filed in support of any subsequent impairment proceeding for an affected wire center.

9. No unique procedures will be adopted at this time for the processing of future requests for impairment determinations.

10. In accordance with § 40-3-104, C.R.S., Qwest shall amend its tariffs on file with this Commission within 30 days of the effective date of this Recommended Decision consistent with this Decision (*i.e.*, to show all changes in tariff rates, tolls, rentals, charges, and classifications collected or enforced).

11. In order to maintain compliance with 47 U.S.C. § 252(f)(1), Qwest shall amend its statement of the terms and conditions generally offered within Colorado to be consistent with this Recommended Decision within 30 days of the effective date of this Recommended Decision.

12. No CLEC can reasonably self-certify that it is entitled to unbundled access to particular network elements in wire centers found by this Commission to be non-impaired under the FCC criteria. Qwest will no longer be required to provision circuits to a CLEC from a non-impaired wire center pursuant to its wholesale tariff in effect despite a CLEC's self-certification in accordance with the Triennial Review Remand Order.

13. The Notice of Joint Filing and Motion for Order Approving Settlement Agreement filed June 22, 2007, is denied as moot.

14. The Motion for Leave to File Statement of Position in Excess of Thirty Pages filed by Qwest on September 24, 2007, is granted.

15. The record in this proceeding is bifurcated for consideration of the Notice of Joint Filing and Amended Motion for Order Approving Settlement Agreement filed June 27, 2007. Such motion is decided based upon the motion, the motion for enlargement of time (filed July 6, 2007); responses filed to the motion (filed July 20, 2007); Decision Nos. R07-0585-I and R07-0638-I; the evidentiary hearing held on August 21 and 22, 2008; statements of position regarding the joint motion (filed September 24, 2007); and filings regarding supplemental authority (filed August 2, 2008 and August 16, 2008). Eschelon Telecom of Colorado, Inc.'s Motion for

Reconsideration of, and Modification to, the Schedule, filed August 27, 2007, addresses procedural matters affecting the underlying proceedings as well as the joint motion. Accordingly, the motion and Decision No. R07-0725-I will be considered in both portions of the record.

16. The Notice of Joint Filing and Amended Motion for Order Approving Settlement Agreement filed June 27, 2007, is granted in part. The Multi-State Settlement Agreement Regarding Wire Center Designations and Related Issues, a copy of which is attached hereto as Appendix A, is incorporated by reference. Portions of Section VI of the agreement (beginning at page 8 of 18) are rejected consistent with this Recommended Decision. To the extent not otherwise inconsistent with this Recommended Decision regarding the Settlement, the remainder of the agreement is approved. However, to be effective, such agreement must be reflected in an amendment to the Interconnection Agreements of the parties thereto. To the extent not otherwise inconsistent with this Recommended Decision, Appendix A is made an Order of the Commission as if fully set forth herein.

17. Highly Confidential portions of this Recommended Decision remain subject to the protections provided by Decision No. R06-0406-I and shall be stricken from any publicly-available version of this Recommended Decision.

18. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

19. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own

motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

20. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 06M-080T

IN THE MATTER OF THE JOINT COMPETITIVE LOCAL EXCHANGE CARRIERS'
REQUEST REGARDING THE STATUS OF IMPAIRMENT IN QWEST CORPORATION'S
WIRE CENTERS AND THE APPLICABILITY OF THE FEDERAL COMMUNICATIONS
COMMISSION'S TRIENNIAL REVIEW REMAND ORDER.

ORDER ON EXCEPTIONS

Mailed Date: September 17, 2008

Adopted Date: July 30, 2008

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10. Qwest: Qwest should be allowed to charge the tariffed Design Change Charge when a CLEC converts a UNE to an alternative Qwest service in a wire center that has been declared to be non-impaired.19

11. Qwest: The Commission should reject the requirement that Qwest provide notice to the CLECs when its records reflect fiber-based collocations within one connection of changing impairment tier or 5,000 business lines of changing impairment tier.21

12. Qwest: The requirement in the Recommended Decision that Qwest maintain its list of non-impaired wire centers in a wholesale tariff or SGAT should be rejected.22

II. ORDER.....23

A. The Commission Orders That:23

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING July 30, 2008.25

V. BY THE COMMISSION

A. Statement

290. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R08-0164 filed by Qwest Corporation (Qwest);¹⁸ Staff of the Public Utilities Commission (Staff); Cbeyond Communications, LLC (Cbeyond); and DIECA Communications, Inc., doing business as Covad Communications Company, Eschelon Telecom of Colorado, Inc., McLeodUSA Telecommunications Services, Inc., doing business as PAETEC Business Services, and XO Communications Services, Inc. (collectively, the Joint CLECs). These same parties also filed Responses to Exceptions Pursuant to Decision No. C08-0458 and 4 Code of Colorado Regulations 723-1-1505(a).

¹⁸ Qwest filed an Errata to its Exceptions on May 21, 2008, correcting footnote 29.

B. Background

291. By Decision No. C06-0161, the Commission opened this docket for the purpose of providing insight into the development of a list of non-impaired wire centers in Qwest's service territory and the underlying data used to develop and update that list. By Decision No. R06-0279-I, additional notice of the proceeding was ordered and the time period for intervention was established. The Commission served notice of this proceeding, including the deadline to intervene, upon all active competitive local exchange providers and those on the Commission's mail list for telecommunications interested parties.

292. On April 10, 2006, timely Notices of Intervention were filed by the Joint CLECs and Cbeyond. Also on April 10, 2006, the Office of Consumer Counsel (OCC) and Staff filed Notices of Intervention of Right, Entries of Appearance and Requests for Hearing in this matter.

293. After the completion of the proceedings in this matter, on February 19, 2008 the Administrative Law Judge (ALJ) assigned, issued Recommended Decision No. R08-0164 that resolved all issues in this case.

C. Discussion of Issues on Exception**1. Cbeyond: The factual error at ¶ 259 of the Recommended Decision should be corrected.**

294. Cbeyond states in its exceptions, that there is a factual error in ¶ 259 of the Recommended Decision. Paragraph 259 states that "Cbeyond purchases channelized DS1s with no subrate capability from Qwest to provide service to its customers." Cbeyond asserts that the correct statement should be that Cbeyond purchases "unchannelized" loops. Cbeyond notes that the error is not of the ALJ's making. The transcript of Cbeyond witness, Greg Darnell, incorrectly included the statement that then made its way into the Recommended Decision.

295. Qwest, in its Response to Exceptions, did not object to this correction.

296. We accept Cbeyond's correction and make the change to the Decision.

2. Staff: The Motion for Approval of the Settlement Agreement should be denied.

297. Staff, in its exceptions, recommends denial of the amended Motion to approve the Settlement Agreement because the Movants are seeking approval of an agreement that contains terms and conditions that should be resolved by the Commission and not through a negotiated bilateral agreement. Staff is concerned that, by having an approved Settlement Agreement and a separate resolution of the issues in the docket, confusion will increase and future proceedings will be more complicated than necessary.

298. Staff is also concerned that, if we approve the Settlement Agreement, Qwest will take inconsistent starting and final positions in interconnection agreement negotiations. Staff reiterates its position that this result will lead to confusion and potentially to different outcomes for different competitive local exchange carriers (CLECs). Further, Staff asserts that the goal of this docket – to establish the initial list of non-impaired wire centers and the method to determine wire center status in the future – is simply not resolvable or advanced by the approval of a settlement that might result in multiple substantive and procedural standards.

299. Qwest in its Response states that the cornerstone of Staff's contention is that Qwest will violate the non-discriminatory provision of federal law by refusing to sell Unbundled Network Elements (UNEs) to CLECs that signed the Settlement Agreement while continuing to sell those same UNEs to CLECs that did not sign the Settlement Agreement. However, Qwest asserts that federal law prohibits it from engaging in this practice. The Settlement Agreement commits Qwest to file an application to seek future non-impairment designations and to file

specific data in support of that application. Qwest states that it will abide by the Commission's decision on its application and apply that decision on a non-discriminatory basis to all CLECs.

300. We deny Staff's exception on this issue. While the approval of the Settlement Agreement may produce an absurd result with different criteria for different CLECs, we agree with the ALJ's findings on this issue. Specifically, we agree that § 252 of the Telecommunications Act of 1996 (Telecom Act) allows parties to enter into negotiated arrangements for individual interconnection agreements (ICAs) and these negotiated ICAs need not comply with the Federal Communications Commission's (FCC) implementation of unbundling obligations. Therefore, Qwest and the Joint CLECs have rightfully entered into a Settlement Agreement that contains negotiated language for their individual ICA amendments.

301. However, Qwest is required to file the Commission-approved terms, conditions, and list of non-impaired wire centers in its wholesale tariff and its Statement of Generally Available Terms and Conditions (SGAT) and/or its ICA Negotiations Template. See Issue 12 below. This requirement will accomplish two things. First, it will ensure that all CLECs are informed as to the Commission approved default list. Second, it will protect against any potential discriminatory treatment of CLECs contrary to § 251(c)(3) of the Telecom Act.

3. Staff and the Joint CLECs: The Commission should order further proceedings to implement the ordered methodology for the Northglenn, Colorado Springs Main and Denver East wire centers.

302. Staff's second issue on Exceptions concerns the application of the ALJ's method for determining non-impairment status. Staff states that it does not take exception to any aspect of the method set forth by the ALJ in the Recommended Decision, Sections D through G. However, Staff maintains that the method ordered was a hybrid of the positions advocated by the

various parties and there is no evidence to support the classification of the three disputed wire centers: Northglenn, Colorado Springs Main, and Denver East.

303. Staff requests that we order Qwest to determine the Tier status of the Northglenn wire center and the DS3 loop non-impairment status for the Colorado Springs Main and Denver East wire centers in accordance with the method approved. Further, Staff requests that Qwest provide these findings to parties and the Commission within 30 days so that parties may then contest the findings and provide suggestions on further procedures within an additional 30 days.

304. The Joint CLECs also raise this issue in exceptions. The Joint CLECs request that Qwest work with parties to determine the proper status of the Northglenn wire center and the DS3 loop non-impairment status of the Colorado Springs Main and Denver East wire centers based on the business line count method in the Recommended Decision.

305. Qwest takes the position in its Response that we should reject the ALJ's decision on the counting of business lines, so that no recalculation is necessary.

306. We grant this exception in part. Staff is correct that Qwest shall apply the business line count method as ordered in this docket to the three contested wire centers to determine whether the wire centers are impaired with respect to any UNEs. However, we disagree with Staff's suggestion of further proceedings. Instead, we agree with the Joint CLECs that Qwest shall work off-line with parties to make this determination and then file the completed list for inclusion in its wholesale tariff. *See* Issue 12. If parties disagree with Qwest's results, then they may file a protest to that Advice Letter filing.

4. Joint CLECs: The effective date of non-impairment designations for some wire centers should be no earlier than July 8, 2008.

307. The Joint CLECs assert in their exceptions that, for a number of wire centers,¹⁹ the effective date be no earlier than July 8, 2005 because Qwest did not request the addition of these wire centers to the non-impaired wire center list prior to that date. That is the date when Qwest notified the FCC and CLECs of the classification of wire centers and that is the date on which the transition period and rates prescribed by the FCC should begin. The Joint CLECs assert that we should reject Qwest's proposal to retroactively classify these wire centers.

308. The Joint CLECs also contend that, if the Colorado Springs Main and Denver East wire centers ultimately are classified as non-impaired for DS3 loops, the effective date of those classifications should be the date of Commission approval. The Joint CLECs state that Qwest never formally asked for these classifications.

309. Qwest, in its Response, notes that the Triennial Review Remand Order (TRRO) requires that the effective date for these initial non-impairment designations be March 11, 2005, which is the effective date of the TRRO. The Joint CLECs' argument ignores the fact that the fiber-based collocations for these particular wire centers were all operational as of March 11, 2005. According to Qwest, the Joint CLECs' contention that some wire centers should have an effective date coinciding with the date that Qwest notified the FCC and CLECs of the classification ignores the fact that the FCC did not require that incumbent local exchange carriers (ILECs) provide notice to CLECs, or that ILECs produce a list of non-impaired wire centers by March 11, 2005.

¹⁹ The Joint CLECs state that the following wire centers should be classified as Tier 2 from March 11, 2005 to July 8, 2005 and Tier 1 after July 8, 2005: Capitol Hill, Colorado Springs Main, Pikeview, and Sullivan. The following wire centers should be classified as Tier 3 from March 11, 2005 to July 8, 2005 and Tier 2 after July 8, 2005: Denver Southeast and Lakewood.

310. Further, Qwest argues that, as for the Colorado Springs Main and Denver East wire centers, the Joint CLECs' reasoning on this point is ironic because Qwest originally filed 2003 business line data in support of its case and the CLECs argued that 2004 data should also be reviewed. It is because of this review that Colorado Springs Main and Denver East were added to the list of non-impaired wire centers for DS3 loops. According to Qwest, the Joint CLECs should not be allowed to have it both ways. Qwest states that it could not have given notice about these two wire centers since they were added during the investigation of this docket.

311. We deny this exception. Qwest gives an accurate interpretation of the TRRO and the effective date of the initial list of non-impaired wire centers. The Joint CLECs make an incongruous argument in advocating during the proceeding for 2004 data to be used which resulted in a change to Qwest's proposed list, but then also suggesting a later effective date for those contested wire centers. The TRRO effective date for the entire initial list is the most logical choice including the results of the impairment analysis for DS3s for the Colorado Springs Main and Denver East wire centers, as the findings for those wire centers were part of the same initial proceeding.

5. **Joint CLECs: The Commission should clarify whether the notice provisions apply to both high capacity loop non-impairment thresholds as well as to a wire center's tier status.**

The Commission should clarify the transition period as ordered by the ALJ.

312. The Joint CLECs request that the Commission clarify a portion of the Recommended Decision concerning notices to the CLECs. The ALJ ordered Qwest to provide notice to all CLECs, Staff, and the OCC when Qwest's records reflect fiber-based collocations within one connection of changing impairment tier or 5,000 business lines of changing impairment tier. The Joint CLECs seek clarification that this notice provision will apply both to

tier designations and non-impaired loop designations. Tier designations affect the availability of UNE transport, while non-impaired loop designations impact the availability of DS1 and DS3 loops.

313. The Joint CLECs also seek clarification with regard to the transition period after a wire center has been designated as non-impaired. The Joint CLECs recommended a one-year transition period with an interim rate of 115 percent of the UNE rate applied to facilities impacted by the non-impairment or tier designations. The Joint CLECs request that the Commission clarify whether the ALJ ordered some time period for transition of facilities.

314. Qwest stresses that because the Commission should reject the ALJ's decision concerning notice to CLECs as soon as Qwest's records reflect fiber-based collocations within one connection of changing impairment tier or 5,000 business lines of changing impairment tier, the Commission should also reject the Joint CLECs' assertion that the notice should apply to tier designations and non-impaired loop designations.

315. Further, Qwest asserts that the extended transition period proposed by the Joint CLECs is unwarranted. The initial transition under the TRRO was necessary because the FCC understood that the initial transition would have a more significant effect on CLECs. Qwest states that subsequent additions to the non-impaired list of wire centers will involve a much smaller subset of services and are likely to involve only one or two wire centers at a time. As a result, the transition period should be established at much shorter periods such as Qwest's recommendation of 90 days to transition existing DS1 and DS3 UNEs and 180 days to transition dark fiber.

316. We clarify, as requested by the Joint CLECs, that the notice provision ordered by the ALJ applies to both high capacity (DS1 and DS3) loop non-impairment, as well as a wire center's tiered status for UNE transport.

317. Further, we clarify for the parties that the ALJ did not order a specific transition period or an interim rate for wire centers added to the non-impairment list in the future. His decision on this issue was tied closely to his decision on the notification that Qwest is required to provide to CLECs, discussed above. The ALJ found that no party had shown a basis from the TRRO or any other source upon which a transition period for future additions should be imposed. See ¶ 127 of the Recommended Decision. Therefore, he left it to Qwest and the CLECs to negotiate a transition. However, by requiring notice of impending non-impairment, he gave the CLECs access to information for planning purposes.

6. Joint CLECs: The Commission should clarify that Qwest cannot implement a process for rejecting CLEC orders without either agreement from CLECs or approval from the Commission.

318. The Joint CLECs' final issue on exceptions concerns Qwest's ability to reject CLEC orders for UNEs once a wire center has been approved as non-impaired. The Joint CLECs seek clarification that Qwest cannot implement a process for rejecting CLEC orders without either agreement from CLECs or approval from this Commission. However, the Joint CLECs further assert that under 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 later conversion to a tariffed service.

319. The Joint CLECs argue that Qwest misses the point when it contends that, once the Commission approves Qwest's certification of a wire center as non-impaired, Qwest should be permitted to reject orders. The Joint CLECs assert that the better process is if a CLEC errs

and orders a non-impaired facility where the facility was not available, but Qwest processes the order, the CLEC will still be obligated to pay Qwest the rates for alternative services, but the provisioning of the service to the customer will not be impacted.

320. Qwest's position is that, if the Settlement Agreement is not approved, CLECs should not be permitted to place - and Qwest should not be required to fill - a UNE order in a wire center the Commission has declared to be non-impaired. The Joint CLECs want Qwest to be responsible for an order "mistakenly" placed in a non-impaired wire center, with Qwest being required to fill the order and challenge the order after that. However, Qwest maintains that it should not be the "guarantor" of a CLEC "mistake."

321. Further, Qwest quotes Staff witness Notarianni when she states in testimony that "it should no longer be necessary for CLECs to self-certify that they have undertaken a 'reasonably diligent inquiry' prior to submitting a request for a UNE and, in turn, Qwest would not need to process the CLEC request and dispute it after the fact" as the Commission orders an update to the list of non-impaired wire centers. Qwest agrees with this statement.

322. We deny the Joint CLECs' exceptions on this issue and clarify that Qwest can reject an order if it is made in a wire center for a UNE that the Commission has approved as non-impaired. This process is tied directly to our decision on Issue 12. The CLECs will have the ability to search the Qwest wholesale tariff and its SGAT and/or ICA Negotiations Template for the Commission approved list of non-impaired wire centers. With easy access to this information, Qwest should not have to take on the burden of policing and disputing UNE orders.

7. Qwest: The Commission should approve the parties' Settlement Agreement as a resolution of all issues in this docket.

323. Qwest asserts in its exceptions that the Commission should approved the parties' Settlement Agreement as it sets forth which wire centers are to be declared non-impaired today, and the methodology and process to be used to declare wire centers to be non-impaired in the future. Qwest states that the Settling Parties did not seek Commission approval of the terms of the Settlement Agreement as a substantive decision on the merits of the docket. The Settling Parties stated through the proceeding that they would view this as a breach of the Settlement if Qwest were to take that position. Qwest now states that it disagrees with that position and believes that the Commission should reject the Recommended Decision and find that the Settlement generally reflects a reasonable, legally sound resolution of the substantive issues in the docket.

324. Further, Qwest asserts that the ALJ's finding that Section VI of the Settlement will bind the Commission in future proceedings is not accurate. Qwest states that Section VI merely establishes the rights of the Settling Parties with each other and the Commission remains free to do whatever it deems appropriate.

325. The Joint CLECs state in their Response that this assertion by Qwest is the opposite of Qwest's previous commitments. The Settlement Agreement itself provides that the compromise does not represent the position that any settling party would take if this matter were not resolved by agreement. According to the Joint CLECs, it is not supposed to be used as evidence, but that is exactly how Qwest is attempting to use it here.

326. The Joint CLECs assert that the Commission should not permit Qwest to violate its commitments and the Colorado rule in this manner. If the Commission is going to determine a generally applicable methodology, it needs to be based on the evidence going to the merits and

not on a proposed compromise. If the Settlement Agreement were approved in its entirety as to the Settling Parties, a ruling would still be required on the merits for the non-settling parties.

327. Cbeyond states in its Response that the Commission may not adopt the Settlement as the substantive resolution in this case without conflicting with basic principles of due process, which this Commission has repeatedly recognized as being a fundamental requisite of the adversarial system. Qwest has purposefully misrepresented its claim and then deliberately ambushed Cbeyond with its proposal that the Settlement be used as a substantive resolution of the issues in this docket.

328. Further, Cbeyond states that the ALJ took voluminous testimony and evidence detailing the multitude of problems with the settlement. The doctrine of judicial estoppel also prevents Qwest from now taking its purported position because such position is in direct conflict with Qwest's representations throughout this case.

329. Cbeyond asserts that Qwest's own testimony, through its attorney in this case, stated that it "cannot use this settlement agreement as advocacy in this docket. I cannot say that the Commission should use this settlement agreement as a model to decide the disputed issues in this docket. I cannot use it as evidence. I cannot use it as precedent."²⁰

330. In addition to Staff's comments in its own Exceptions, Staff states in its Response that, because the Settlement has an opt-in provision, there is nothing to prevent Qwest from ensuring that the terms of the Settlement apply in this and all future wire center non-impairment designation requests. The Commission would also be sanctioning the ability of Qwest to use the position set forth in the settlement as a bargaining position for other ICA matters wholly

²⁰ Reporter's Transcript of Hearing held on August 21 and 22, 2007, Docket No. 06M-080T page 7.

unrelated to the issue of wire center impairment. If allowed, Staff anticipates that Qwest will use the settlement on its web-based template agreement.

331. We deny this exception. The Settlement Agreement was never offered in this docket as a resolution of the issues for all CLECs, parties, and non-parties to the docket. As the Joint CLECs state, this Settlement was a compromise between the Settling Parties who individually negotiated their positions. This was not a decision reached on the merits based on law.

332. Further, Section VI of the Settlement Agreement was properly rejected. The Settling Parties cannot bind the Commission to a type of future proceeding or specific timelines for that future proceeding. While Qwest states that only the Settling Parties are bound and not the Commission, by default the Settling Parties are improperly defining the proceeding, its timeline, and the information required.

8. Qwest: Residential and non-switched access lines should be included in the count of business lines.

333. The ALJ held that the UNE loop component of the business line calculation by wire center was to be modified to exclude residential and non-switched lines.²¹ In arriving at that determination, the ALJ analyzed the language of 47 *Code of Federal Regulations* (C.F.R.) § 51.5 which defines business lines as follows:

A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE

²¹ Recommended Decision at ¶ 80.

loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:

- (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
- (2) Shall not include non-switched special access lines,
- (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

47 C.F.R. § 51.5.

According to the ALJ's analysis, "[th]e first sentence of the rule generally defines a business line as a switched access line used to serve a business customer. The second sentence defines how business lines will be tallied on a wire center level. The third sentence applies three tally modifications."²² Consequently, the ALJ concluded that the proper method to read the regulation is that business lines are identified and tallied by wire center prior to consideration of the three enumerated modifications.

334. In the ALJ's analysis of 47 C.F.R. § 51.5, he found that the meaning of the phrase "business line" is ambiguous, based on the definition in the first sentence and the inclusion of the phrase "all UNE loops" in the second sentence. Because "all UNE loops" could apply to those loops used for business and residential uses, the ALJ concluded that it may appear that the phrase "business lines" in the second sentence is meant to include all UNE loops without regard to use of the line.

335. However, in weighing the meaning of the language of the regulation, the ALJ further reasoned that the first sentence is clear in its definition of the term "business line," and where the language of the regulation is clear and unambiguous, it is not for this Commission to

²² Recommended Decision at ¶ 51.

interpret or apply an inconsistent alternative. According to the ALJ's reasoning, to include residential loops in the count of business lines in a wire center would impermissibly conflict with the first sentence and would not give meaning to the entire rule. Consequently, the ALJ determined that the term "business lines" in the second sentence must restrict the subsequent phrase "such that all UNE loops must be confined within the scope of business line as defined in the first sentence of the paragraph."²³ The ALJ determined that in the absence of explicit adoption, it cannot be demonstrated that the FCC intended to include residential UNE loops in the impairment analysis. As such, the ALJ concluded that given the plain language of 47 C.F.R. § 51.5, it is illogical to conclude that a residential line is a business line. A non-switched UNE loop providing service to a residential customer conflicts with both the first sentence of the rule, as well as the third sentence; therefore, the UNE loop component of the business line calculation by wire center, is to be modified to exclude residential and non-switched lines.

336. Qwest takes exception with this finding. According to Qwest, the FCC's *TRRO* indicates that the count of business lines is to include all UNE loops. Qwest argues that the majority of public utilities commission and courts that have addressed the issue conclude that all UNE loops should be counted. Qwest further accuses the Commission as sitting as a federal appellate court with authority to conduct *de novo* reviews of FCC decisions by virtue of the ALJ's findings on this issue.

337. Qwest also argues that non-switched UNE loops should also be included in the count of business lines. According to Qwest, the FCC and the *TRRO* make clear that all UNE loops should be counted, including UNE loops provisioned in combination with other unbundled elements. Qwest concludes that the intent of the FCC's rules and the *TRRO* was to permit non-

²³ Recommended Decision at ¶ 69.

impairment designations to be made using objective data already created for other regulatory purposes. As such, Qwest urges the Commission to include all UNE loops in its count of business lines, including residential and non-switched UNE loops.

338. In response to Qwest's arguments to include non-switched and residence lines in business line counts, the Joint CLECs argues that Qwest focuses on the term "all UNE loops" in the definition of business lines to the exclusion of the rest of the definition. The Joint CLECs point out that the first sentence in the definition defines a business line as a "switched access line used to serve a business customer." Further, the definition indicates the business line shall include lines "for switched services" and "shall not include non-switched special access lines."

339. Cbeyond also takes issue with Qwest's arguments here. Cbeyond asserts that the business line definition was applied according to its plain meaning and the Commission should approve the Recommended Decision on that point. Any other reading, according to Cbeyond, would violate the basic rules of statutory construction.

340. Cbeyond argues that a plain reading of the third sentence of the business line rule, giving every word meaning in its context, compels the exclusion of non-switched data lines. Cbeyond takes the position that there is simply no way to read the third sentence of the business line definition to mean anything other than the listed requirements apply to the business line calculation described in the second sentence.

341. We agree with Cbeyond and the Joint CLECs on this issue. We find that the ALJ's analysis was well reasoned and followed the traditional canons of statutory construction. Regarding the inclusion of non-switched access lines in the line count for business lines, 47 C.F.R. § 51.5 is clear that business line counts are **not** to include non-switched access lines. As pointed out by Cbeyond, the first modifier of the regulation provides that business line

calculations "shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services." It is self-evident that this modifier excludes lines providing non-switched services.

342. Regarding the inclusion of residential lines in the business line calculation, we are persuaded that it is equally clear that the FCC's definition of a business line is "an incumbent LEC-owned switched access line used to serve a business customer ..." Further, we agree with the ALJ that the inclusion of residential loops in the count of business lines in a wire center fails to give meaning to the entire rule. The first sentence of 47 C.F.R. § 51.5 is unambiguous: "[a] business line is an incumbent LEC-owned switched access line used to serve a business customer ..." To then read the second sentence to mean that the line count should include all UNE loops regardless of whether they serve a business customer fails to give meaning to the entire regulation. Therefore, we deny Qwest's exceptions on this point and uphold the ALJ regarding this point.

9. Qwest: CLECs that use a CLEC-to-CLEC fiber connection should be counted as a fiber-based collocator.

343. Qwest argues that the Recommended Decision's resolution of this issue relies on an Oklahoma Arbitrator's recommendation that has not been reviewed or endorsed by the Oklahoma Commission. Qwest maintains that this reliance, therefore, cannot stand as legal precedent. Qwest takes the position that legitimate precedent indicates that courts and commissions are mixed in their review of whether a CLEC that leases fiber transport from another CLEC is to be counted as a fiber collocator pursuant to 47 C.F.R. § 51.5.

344. The CLEC that Qwest desires to count as a fiber collocator is collocated in a Qwest central office. Through the use of a CLEC-to-CLEC cross-connect, the CLEC obtains

from another carrier access to fiber that leaves the Qwest central office. According to Qwest, the issue is whether under this arrangement, the CLEC "operates a fiber-optic cable or comparable transmission facility" within the meaning of 47 C.F.R. § 51.5. Qwest asserts that this arrangement should be counted as a fiber based collocator.

345. The Joint CLECs, on the other hand, argue that Qwest's view that a single fiber alternative can be counted multiple times when used by multiple CLECs violates both the FCC's intent and the FCC's fiber-based collocation rule. The Joint CLECs assert that the ALJ's decision is reasonable and Qwest's request to count a single CLEC's fiber as potentially multiple fiber-based collocations should be rejected.

346. We deny this exception. Qwest's proposal would allow for the double counting of collocators – once for the CLEC actually collocating and once for the CLEC dependent on the fiber of the first CLEC. This dependent CLEC does not meet the definition of a fiber-based collocator.

10. Qwest: Qwest should be allowed to charge the tariffed Design Change Charge when a CLEC converts a UNE to an alternative Qwest service in a wire center that has been declared to be non-impaired.

347. Qwest disagrees with the ALJ's determination that the principles of cost causation should guide whether it should be allowed to charge a non-recurring charge for conversions.

348. Qwest asserts that the foundational concepts of the TRRO support the fact that Qwest is entitled to assess a non-recurring charge when a CLEC requests that Qwest convert a UNE to an alternative Qwest service. There are two transactions, according to Qwest, at issue when facilities are deemed to be non-impaired. First, the CLEC terminates its existing UNE service because it is no longer entitled to purchase the UNE from Qwest. Qwest states that it does not charge for this first transaction. Second, the CLEC may choose to purchase alternative

services from Qwest as opposed to choosing one of the other alternatives that are available to it in that wire center. Therefore, because purchasing from Qwest is at the CLEC's option, Qwest is entitled to assess a non-recurring charge for the conversion.

349. The Joint CLECs argue that Qwest is wrong in that the FCC made no specific findings of competition or business alternatives in non-impaired wire centers, but instead developed proxies that estimate where competition is likely to exist or able to exist. The FCC specifically noted that its methodology was imperfect and could over- or under-state competition. Further, the Joint CLECs note that no actual conversion of service takes place. Only the price and Qwest's name for the facility changes – the actual facility remains unchanged. Consequently, the Joint CLECs contend that Qwest's request should be rejected.

350. In its Response, Staff argues that a review of the evidence in this record demonstrates that Qwest never provided cost data to support its proposed non-recurring charge. Short of that, Staff asserts that Qwest's requested non-recurring charge should not be approved because it does not allocate the cost in accordance with cost causation principles, is unreasonable in comparison to other Qwest charges, and does not reflect the required forward-looking efficient processes and systems reflected in a Total Service Long Run Incremental Cost Study. Further, Staff argues that Qwest's exceptions do not account for the practical reality for Colorado CLECs, that purchasing a Qwest provided service is likely the only viable option to continue to provide seamless service to its customers during and beyond the 90-day transition period.

351. We deny this exception. We agree with the ALJ's reasoning on this issue. A non-impairment determination will already significantly increase the recurring charges paid by CLECs to the benefit of Qwest. We find no reason to require an additional non-recurring charge.

11. **Qwest: The Commission should reject the requirement that Qwest provide notice to the CLECs when its records reflect fiber-based collocations within one connection of changing impairment tier or 5,000 business lines of changing impairment tier.**

352. Qwest maintains that the Recommended Decision does not really address the substantive arguments against the prior notice requirement. Qwest asserts that providing such notice is not reasonable, practical, or useful. Further, Qwest states that even if it were to notify CLECs that a wire center was within 5,000 lines of non-impairment status, there is no guarantee that the wire center would ever reach that threshold. This notice may even have a detrimental effect on CLECs. According to Qwest, if a CLEC were to take action based on the advanced notice and the business lines in the wire center did not increase further to indicate non-impairment, the CLEC would have made a poor investment decision.

353. Qwest proposes that the filing of a notice with the Commission that it is seeking a change in wire center designation should be notification enough for the CLECs.

354. In the Joint CLECs' response, they contend that it is reasonable for all parties to have access to the same information regarding potential non-impairment classifications. There is no disagreement with Qwest's argument that a wire center within 5,000 lines or a single collocator of the threshold requirements could never meet that threshold. However, according to the Joint CLECs, this does not mean that the information is not useful to the CLECs. Any information will result in more informed decisions on investments. The Joint CLECs ask that Qwest's request be denied.

355. We deny this exception. While Qwest makes a valid point that the notification as required may not result in a non-impairment finding for some time, if at all, the CLECs can use the information for planning purposes and give it the weight they deem appropriate. This

notification requirement is a trade-off for a shorter transition period once non-impairment is found.

12. Qwest: The requirement in the Recommended Decision that Qwest maintain its list of non-impaired wire centers in a wholesale tariff or SGAT should be rejected.

356. Qwest asserts that the Recommended Decision's reliance on a state wholesale tariff and an SGAT is misplaced and wrong as a matter of law. Qwest insists that none of the documents establishing the scope of the docket notified Qwest that the obligation to maintain a wholesale tariff of an SGAT would be an issue in this docket. Qwest takes the position that such a requirement is contrary to the very terms of the *TRRO*, which makes clear that non-impairment determinations will be implemented through interconnection agreements, not state tariffs or an SGAT.

357. Rather than rely on the state wholesale tariff, Qwest asks the Commission to approve the Settlement Agreement.

358. The Joint CLECs note in their Response that this issue has already been litigated in Colorado with the CLECs opposing Qwest's position and pointing out the usefulness of the SGAT both as an available agreement and as a starting point for negotiations. Qwest has never approached the Commission seeking prior approval to cease offering the SGAT. Instead, Qwest sought approval to withdraw the tariff referring to the SGAT and that request was denied.

359. The Joint CLECs assert that the requirement to incorporate the Commission's findings from this docket in the tariff so that the SGAT and tariff are accurate is appropriate.

360. Staff, in its Response, argues that Qwest is making a collateral attack on Decision No. C07-1095. The scope of a wholesale tariff necessarily includes the list of impaired wire centers so that the list can be applied uniformly to all CLECs. Staff asserts that the ALJ's

decision does nothing more than applies the conclusions from Decision No. C07-1095 to the context of wire center non-impairment designations.

361. Staff asserts that Qwest's exceptions on this issue should be denied.

362. We deny this exception. Qwest is required to maintain an accurate wholesale tariff on file with this Commission. In order to provide CLECs with all information necessary to place informed orders for UNEs and other wholesale products, Qwest must include the list of non-impaired wire centers in this tariff. In addition, Qwest is required to maintain the same Commission-approved list in either its SGAT and/or its ICA Negotiations Template. This requirement is to ensure that all CLECs begin with the same approved starting point when negotiating individual ICAs with Qwest. In both instances, CLECs must be able to rely on the information supplied to know what wire centers have been approved for what non-impaired status. This decision is directly related to our decisions on Issues 6 and 11 above.

VI. ORDER

A. The Commission Orders That:

21. The exceptions filed by Cbeyond Communications, LLC are granted consistent with the discussion above.

22. The exceptions filed by Qwest Corporation; Staff of the Public Utilities Commission; and jointly by DIECA Communications, Inc., doing business as Covad Communications Company, Eschelon Telecom of Colorado, Inc., McLeodUSA Telecommunications Services, Inc., doing business as PAETEC Business Services, and XO Communications Services, Inc. are granted, denied, or clarified, consistent with the above discussion.

23. Qwest Corporation shall file an Advice Letter and tariff pages for inclusion in its wholesale tariff to implement the methodology, terms, conditions, zero pricing of non-recurring charge, and wire center list, as ordered. Qwest Corporation shall make this filing within 30 days of the Mailed Date of this Decision on not less than seven business days' notice.

24. Qwest Corporation shall update its Statement of Generally Available Terms and Conditions and/or its Interconnection Agreement Negotiations Template to incorporate the same changes to the methodology, terms, conditions, zero pricing of non-recurring charge, and wire center list, as Qwest Corporation files for inclusion in its wholesale tariff. These updates shall occur contemporaneously with the effective date of the wholesale tariff changes.

25. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

26. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
July 30, 2008.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

Decision No. C08-0969

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 06M-080T

IN THE MATTER OF THE JOINT COMPETITIVE LOCAL EXCHANGE CARRIERS'
REQUEST REGARDING THE STATUS OF IMPAIRMENT IN QWEST CORPORATION'S
WIRE CENTERS AND THE APPLICABILITY OF THE FEDERAL COMMUNICATIONS
COMMISSION'S TRIENNIAL REVIEW REMAND ORDER.

**ORDER ON APPLICATION FOR REHEARING,
REARGUMENT OR RECONSIDERATION**

Mailed Date: November 6, 2008

Adopted Date: October 29, 2008

VII. BY THE COMMISSION

A. Statement

363. This matter comes before the Commission for consideration of an Application for Rehearing, Reargument or Reconsideration (RRR) to Decision No. C08-0969 filed by Qwest Corporation (Qwest) on October 7, 2008. Qwest seeks rehearing on all issues raised in its exceptions to Decision No. R08-0164 and incorporates all arguments made therein. However, Qwest's Application for RRR focuses primarily on the Commission's decision on the method to be used in counting business lines.

364. Cbeyond Communications, LLC (Cbeyond) filed a Response to Qwest's Application for RRR on October 21, 2008. On October 23, 2008, Qwest filed a Motion to Strike this Response. Qwest states that 4 *Code of Colorado Regulations* 723-1-1308 disallows responses to Applications for RRR. Therefore, Qwest asks that the Commission strike the Response and not give it any consideration as it considers Qwest's Application for RRR. We agree with Qwest and strike the Response of Cbeyond.

B. Background

365. In Decision No. R08-0164, the Administrative Law Judge (ALJ) held that the unbundled network element (UNE) loop component of the business line calculation by wire center was to be modified to exclude residential and non-switched lines.²⁴ To arrive at that determination, the ALJ analyzed the language of 47 *Code of Federal Regulations* (C.F.R.) § 51.5 which defines business lines as follows:

A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:

- (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
- (2) Shall not include non-switched special access lines,
- (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

According to the ALJ's analysis, "[th]e first sentence of the rule generally defines a business line as a switched access line used to serve a business customer. The second sentence defines how business lines will be tallied on a wire center level. The third sentence applies three tally modifications."²⁵ Consequently, the ALJ concluded that the proper method to read the regulation is that business lines are identified and tallied by wire center prior to consideration of the three enumerated modifications.

²⁴ Recommended Decision at ¶ 80.

²⁵ Recommended Decision at ¶ 51.

366. In the ALJ's analysis of 47 C.F.R. § 51.5, he found that the meaning of the phrase "business line" is ambiguous, based on the definition in the first sentence and the inclusion of the phrase "all UNE loops" in the second sentence. Because "all UNE loops" could apply to those loops used for business and residential uses, the ALJ concluded that it may appear that the phrase "business lines" in the second sentence is meant to include all UNE loops without regard to use of the line.

367. However, in weighing the meaning of the language of the regulation, the ALJ further reasoned that the first sentence is clear in its definition of the term "business line," and where the language of the regulation is clear and unambiguous, it is not for this Commission to interpret or apply an inconsistent alternative. According to the ALJ's reasoning, to include residential loops in the court of business lines in a wire center would impermissibly conflict with the first sentence and would not give meaning to the entire rule. Consequently, the ALJ determined that the term "business lines" in the second sentence must restrict the subsequent phrase "such that all UNE loops must be confined within the scope of business line as defined in the first sentence of the paragraph."²⁶

368. The ALJ determined that in the absence of explicit adoption, it cannot be demonstrated that the Federal Communications Commission (FCC) intended to include residential UNE loops in the impairment analysis. As such, the ALJ concluded that given the plain language of 47 C.F.R. § 51.5, it is illogical to conclude that a residential line is a business line. A non-switched UNE loop providing service to a residential customer conflicts with both the first sentence of the rule, as well as the third sentence; therefore, the UNE loop component of

²⁶ Recommended Decision at ¶ 69.

the business line calculation by wire center, is to be modified to exclude residential and non-switched lines.

369. The Commission affirmed the ALJ's analysis and denied Qwest's exceptions on this issue. In Decision No. C08-0969, we found that the ALJ's decision was well reasoned and followed the traditional canons of statutory construction.²⁷

370. Qwest states in its Application for RRR, that it appears that the Commission is not aware of how fundamentally flawed its decision is, and how contrary the decision is to the overwhelming weight of authority on the issue of how the FCC desires business lines to be calculated for the purposes of determining whether a wire center is non-impaired. To support this argument, Qwest attaches a federal appellate court decision, a federal district court decision, and 12 state commission decisions that have ruled that business lines should be counted in a manner consistent with Qwest's proposal.

371. Qwest asserts that throughout the case, Qwest has recognized the apparent inconsistency in the FCC's rule on business lines and has argued that the proper way to resolve the inconsistency was to look to the FCC's Triennial Review Remand Order (TRRO) and the decisions that have interpreted the TRRO for guidance. Qwest states that both the ALJ and the Commission have refused to review these authorities.

372. Qwest also argues that the Commission's decision to exclude residential and non-switched access lines from the count of business lines simply cannot be done using any available objective set of information. Qwest states that no such information exists. Qwest does not know

²⁷ Commission Decision No. C08-0969 at ¶¶ 52-53.

whether a competitive carrier uses a UNE-loop to serve a residential or a business customer, nor are the competitive carriers under any obligation to provide that information to Qwest.

373. Qwest urges the Commission to grant its Application for RRR and modify that portion of its order on exceptions that requires residential and non-switched loops be removed from the count of business lines when determining whether a wire center is non-impaired.

374. We deny Qwest's Application for RRR and continue to affirm the ALJ's interpretation of the FCC's business line definition and rule. This is the most clear and all-encompassing interpretation of the FCC's definition and the interpretation that gives the most consistent reading of all segments of the definition.

375. Additionally, while the authorities Qwest cites may be persuasive, they are not binding for our decision in this case. It is well-settled that only decisions by the United States Supreme Court interpreting federal law are binding on state courts, or in this case, a state administrative agency. *See, e.g., Brotman v. Lake Creek Ranch, LLP*, 31 P.3d 886, 894 (Colo. 2001). Courts have also found that agencies are not bound by other agencies in its findings and decisions. *See also Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809 (1985); *Underwood v. Shalala*, 985 F.Supp. 970, 978 (D.Colo. 1997). Therefore, the Commission is not bound by agencies from other states or courts other than Colorado state courts.

376. In this instance, Qwest attached decisions of other state commissions and courts that have no jurisdiction over the Colorado Public Utilities Commission or the State of Colorado. We find that they are not applicable to the facts in this docket and we are not bound by the holdings in these cases.

377. Further, we point out a fundamental flaw with Qwest's argument. As the ALJ noted in the Recommended Decision, Qwest's own interpretation of the FCC definition is inconsistent. Qwest argues that 'all UNE loops' should be included in the business line count, but then reads the next part of the definition to exclude Unbundled Network Element Platform (UNE-P) residential lines. Apart from Qwest's availability of data, there is no logical reason to exclude UNE-P residential lines, but include UNE-P residential loops. Qwest states that 'all UNE loops' should be included because it does not have information readily available to it to exclude residential or non-switched loops. However, the same issue exists with historical UNE-P counts, and throughout the case, Qwest advocated using a proxy count based on white page listings until such time as it began recording residential Qwest Platform Plus (QPP) separate from business QPP. The Commission adopted this proxy count. There is nothing to prevent Qwest from using both a similar proxy for historical UNE-loops records and a separate order-tracking for residential and business loops in the future.

VIII. ORDER

A. The Commission Orders That:

27. Qwest Corporation's (Qwest) Application for Rehearing, Reargument or Reconsideration is denied.
28. Qwest's Motion to Strike the Response of Cbeyond Communications, LLC is granted.
29. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 29, 2008.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

COMMISSIONER JAMES K. TARPEY
ABSENT.

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Arizona
T-03632A-06-0091, et al.
Joint CLECs 01-022

INTERVENOR: Covad Communications Co., Eschelon Telecom of Arizona, Inc.,
McLeodUSA Telecomm. Services, Inc., and XO Communications Services, Inc.

REQUEST NO: 022

Joint CLEC Request 01-022: [Million Direct pages 7 - 9] Is there any time when Qwest changed the code used to maintain its inventory of circuits and did not change the embedded base of circuits to the new format?

RESPONSE:

Prior to April 2005, Qwest did not require a change to the circuit IDs when a CLEC requested conversions from Private Line/Special Access to EEL; these circuits retained the Private Line service code modifiers. However, because of the difficulty this practice caused with Qwest's ability to track these products correctly in its systems, effective April 8, 2005, Qwest began utilizing the industry standard service code modifiers specific to EEL, and also established service code modifiers specific to Loop Mux Combo (LMC). Circuit IDs were required to be changed to reflect the new service code modifiers on all new requests, as well as new conversion requests from Private Lines to EEL/LMC and change orders on existing EEL/LMC circuits. Qwest also implemented the changes to those EEL and LMC Loops in the embedded base.

There were some CLECs that requested to opt out of the changes to their embedded base, which Qwest allowed. Those circuits remaining in the EEL/LMC embedded base with a Private Line circuit ID represent less than 7% of the total circuits impacted by the UNE to Private Line conversions. These circuits will retain their Private Line circuit IDs when they are converted from EEL/LMC to Private Lines. The conversion cost study has been adjusted to reflect those circuits that do not require circuit ID changes as part of the conversion process.

Respondent: Terri Million, Staff Director

Arizona
T-03632A-06-0091, et al.
Joint CLECs 01-023

INTERVENOR: Covad Communications Co., Eschelon Telecom of Arizona, Inc.,
McLeodUSA Telecomm. Services, Inc., and XO Communications Services, Inc.

REQUEST NO: 023

[Million Direct pages 7 - 9] When Qwest implemented changes to the circuit ID in the embedded based of EEL / LMC circuits what portion of the impacted lines belonged to CLECs that opted out of changes to the circuit ID of their embedded based?

RESPONSE:

Please see the response to Joint CLECs 01-022; 100% of the less than 7% of UNE lines that have a Private Line circuit ID belong to CLECs that opted out of changes to the circuit ID of their embedded base.

Respondent: Terri Million, Staff Director

Arizona
T-03632A-06-0091, et al.
Joint CLECs 01-032

INTERVENOR: Covad Communications Co., Eschelon Telecom of Arizona, Inc.,
McLeodUSA Telecomm. Services, Inc., and XO Communications Services, Inc.

REQUEST NO: 032

[Torrence Direct, page 12] Qwest filed a fiber-based collocation list with the FCC in February 2005. Please clarify the time period represented by that fiber based collocation list.

RESPONSE:

The list of fiber-based collocators included in the FCC filing in February 2005 included collocators operational through the date of the filing.

Respondent: Ryan Gallagher, Qwest Manager

Arizona
T-03632A-06-0091, et al.
Joint CLECs 01-033

INTERVENOR: Covad Communications Co., Eschelon Telecom of Arizona, Inc.,
McLeodUSA Telecomm. Services, Inc., and XO Communications Services, Inc.

REQUEST NO: 033

[Torrence Direct] Did Qwest include in its count of fiber based collocations collocation-to-collocation arrangements, i.e. situations where a collocated carrier does not own or control (under an IRU) transmission facilities leaving the wire center but is utilizing the fiber facilities of another carrier through a cross-connect to the second carrier's collocation? If the answer is yes, please explain the rationale and support for counting such arrangements.

RESPONSE:

No.

Respondent: Ryan Gallagher, Qwest Manager

[Service Date October 16, 2008]

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

In the Matter of the Petition of:	)	DOCKET UT-063061
)	
	)	ORDER 18
QWEST CORPORATION)	
and	)	FINAL ORDER GRANTING, IN
	)	PART, ESCHELON'S PETITION FOR
	)	REVIEW; GRANTING, IN PART,
ESCHELON TELECOM, INC.	)	QWEST'S PETITION FOR REVIEW;
	)	AFFIRMING, IN PART, AND
Pursuant to 47 U.S.C. Section 252(b)	)	MODIFYING, IN PART,
	)	ARBITRATOR'S REPORT AND
	)	DECISION
.....)	

1 **SYNOPSIS.** *The Commission grants, in part, both Eschelon's and Qwest's petitions for review as follows:*

- *Affirms the Arbitrator's decision on "discontinuation of order processing and disconnection" with modifying language agreed to by both parties.*
- *Reverses the Arbitrator's decision on the definition of the term "repeatedly delinquent" and adopts Qwest's proposed language.*
- *Affirms the Arbitrator's decision on "transit record charges and bill validation" with the modifying language proposed by Eschelon.*
- *Modifies the Arbitrator's decision regarding the conditions under which Qwest will provide "expedites" without a fee and adopts Qwest's proposed language for these "expedites."*

The Commission affirms the remainder of the Arbitrator's Report and Decision and requires the parties to file an interconnection agreement consistent with this Order within 30 days of the service date of this Order.

51 Finally, Qwest argues that the Minnesota Commission eliminated the language in Section 7.6.4 because it imposed an additional burden on Qwest. We reviewed the Minnesota Commission order and confirm that Section 7.6.4 was completely eliminated from that ICA.¹⁰⁰ However, it does not appear that the Minnesota Commission did so, as Qwest argues, because the language imposed an additional burden on Qwest.¹⁰¹ The Minnesota Commission noted that Section 7.6.4 did not require anything more than that which was already required by the Commission-approved Section 7.6.3.1.¹⁰² Thus the Minnesota Commission concluded “[r]ather than approve superfluous language for Section 7.6.4, the Commission will simply decline to approve any language for that section at all.”¹⁰³ While the language may also be superfluous here, we conclude that sufficient confusion has been generated on this issue to warrant the use of explicit clarifying language in Section 7.6.4.

5. Conversions.

52 The parties dispute the process for converting circuits provided by Qwest to CLECs from an Unbundled Network Element (“UNE”) platform to another service arrangement, a process change which may be necessary as a result of unbundling relief granted by the FCC as a result of the *Triennial Review Remand Order* (“TRRO”) proceeding.¹⁰⁴ In that proceeding, the FCC took steps to eliminate ILEC unbundling obligations for high capacity transport and loops where certain competitive conditions are observed in particular ILEC wire centers. In those instances where sufficient competitive alternatives to ILEC UNEs in a wire center are available, the wire center is deemed “non-impaired” and CLEC access to UNEs is eliminated. As a consequence of the FCC’s TRRO decision, where wire centers are deemed non-impaired, CLECs must convert from UNEs to alternative wholesale services to maintain operation of existing circuits previously purchased as UNEs.

¹⁰⁰ Minnesota Commission Order at 7 (Feb. 4, 2008).

¹⁰¹ Qwest Petition for Review at 12.

¹⁰² Minnesota Commission Order at 6-7 (Feb. 4, 2008). We have already noted that the language in Section 7.6.3.1 in this proceeding is identical to that approved by the Minnesota Commission.

¹⁰³ *Id.* at 7.

¹⁰⁴ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) hereinafter referred to as the “*Triennial Review Remand Order*” or “*TRRO*.”

- 53 In this proceeding, the parties disagree about a number of jurisdictional, procedural, and billing issues regarding UNE circuit conversions. First, they disagree about the Commission's jurisdiction over the terms and conditions of converting circuits that were provided pursuant to Section 251(c)(3) of the Act to tariffed or contractual services to which this provision does not apply. Second, given their polarized views on conversions, the parties differ on the need for a separate or generic proceeding to address conversion-related issues. Third, the parties hold opposing views on how conversions should be managed administratively; that is, by changing or retaining a circuit's ID in Qwest's operational support systems after a circuit is converted to a non-UNE service. Finally, Qwest and Eschelon dispute how billing should be adjusted to new rates and displayed by Qwest on its bills after circuits are converted from a UNE platform to alternative service offerings.
- 54 The Arbitrator recommended adopting Eschelon's proposed contract language for conversions because it "ensures that the conversions from UNEs to non-UNEs do not cause disruption for [Eschelon's] business operations and potential harm to its end user customers."¹⁰⁵ The Arbitrator also concluded that a mechanism already exists under which Qwest is compensated for conversion-related activities. Finally, the Arbitrator noted that Qwest did not offer alternative contract language for conversion-related issues and had opposed efforts to have such matters considered in the Change Management Process (CMP) for these activities.¹⁰⁶
- 55 On review, Qwest states that the terms, conditions, and prices for UNE services are highly regulated under Sections 251 and 252 of the Act and are subject to different requirements than tariffed services.¹⁰⁷ Consequently, Qwest asserts that it uses separate and distinct computerized ordering, inventory, and billing systems for UNE-based services and different processes to provision these services.¹⁰⁸ Qwest contends that the disputes that give rise to this issue result from Eschelon's unreasonable demands that Qwest undertake very costly changes to its systems and provisioning

¹⁰⁵ Arbitrator's Report and Decision at ¶ 91.

¹⁰⁶ The Change Management Process was created as a vehicle for helping implement Section 271 of the Act and is the vehicle Qwest uses to announce changes related to terms that are not addressed in an ICA.

¹⁰⁷ Qwest Petition on Review at 13.

¹⁰⁸ *Id.*

procedures.¹⁰⁹ Qwest argues that Eschelon has not demonstrated that these changes are necessary, asserting that it has carried out more than 500 conversions in its region without complaint that a conversion caused a service problem for a CLEC's customer.¹¹⁰

- 56 Qwest argues that conversion of UNEs to non-UNE services require changes to each circuit ID and that it is or should be entitled to recover all of the costs it incurs to facilitate those conversions.¹¹¹ Qwest also asserts that the issue of these conversions is beyond the scope of an interconnection agreement arbitration and would be better addressed in a separate generic proceeding that would allow all affected CLECs the opportunity to participate.¹¹²
- 57 In support of its position that Eschelon's conversion-related language is unreasonable, Qwest asserts that arbitrators in three other jurisdictions have refused to adopt Eschelon's proposals.¹¹³ A decision by an arbitrator in Arizona concluded that Qwest had undertaken conversions without any disruption to CLEC end users and had demonstrated a legitimate and reasonable reason for its business practices.¹¹⁴ Oregon and Minnesota Commissions declined to adopt Eschelon's contract proposal, deciding instead to review conversion processes in a separate proceeding.¹¹⁵
- 58 Qwest argues that notwithstanding Eschelon's inability to demonstrate any need for the changes and the substantial costs they would impose on Qwest, the Arbitrator inappropriately and without foundation adopted Eschelon's proposed language in a single four-sentence paragraph that does not evaluate Qwest's objections or testimony.¹¹⁶ Qwest asserts that it did not provide alternative language because its position is that the *status quo* should not be altered.¹¹⁷ Qwest argues that we should reject the Arbitrator's ruling and permit Qwest to continue using separate systems and

¹⁰⁹ *Id.*

¹¹⁰ Million, Exh. No. 51 at 15.

¹¹¹ *Id.* at 9.

¹¹² *Id.*

¹¹³ Minnesota, Arizona, and Oregon.

¹¹⁴ Arizona Arbitrator's Decision at 45, affirmed by the Arizona Commission (May 16, 2008).

¹¹⁵ Oregon Arbitrator's Decision at 44; approved without review of this issue by the Oregon Commission Decision; Minnesota Arbitrators' Decision at 38; affirmed by the Minnesota Commission Order.

¹¹⁶ Qwest Petition for Review at 15.

¹¹⁷ *Id.* at 22.

processes for UNEs and tariffed services or alternatively we should resolve this issue in a separate generic docket.¹¹⁸

- 59 Qwest argues that Section 252(b)(4)(C) authorizes state commissions to serve as arbitrators but limits that authority to imposing terms and conditions necessary to implement the requirements of Section 251 of the Act.¹¹⁹ Qwest asserts that the UNE conversions at issue involve network elements that the FCC specifically removed from Section 251(c)(3), i.e., high capacity loops and transport, and the conversion of those elements to alternative tariffed services.¹²⁰ Accordingly, Qwest argues that the Commission lacks jurisdiction to impose terms and conditions relating to alternative services because Section 251 does not apply to tariffed non-UNE services.¹²¹
- 60 With respect to the process and billing-related aspects of UNE conversions, Qwest states that high capacity UNEs are different from services that CLECs purchase through tariffs and commercial agreements because these products are classified and priced under distinct regulatory schemes; UNEs are subject to cost-based pricing under the FCC's TELRIC pricing methodology and alternative services are provided through commercial contracts and tariffs at commission-approved or market-based pricing.¹²² Qwest states that UNEs are available only to CLECs whereas alternative service arrangements are available to CLECs, interexchange carriers, and large business customers and that it has developed separate ordering, maintenance, and repair processes for these services.¹²³ Qwest contends that conversions involve significant activity within three different functional areas of its ordering and provisioning organizations.¹²⁴ Conversions involve input from the Service Delivery Coordinator, the Designer, and the Service Delivery Implementer and Qwest must undertake a variety of steps within these job functions to assure itself that the data for the converted circuit is accurately recorded in the appropriate systems.¹²⁵ Qwest asserts that if we affirm the Arbitrator's recommendation to adopt Eschelon's contract language, then we should also rule that Qwest is entitled to recover the costs

¹¹⁸ *Id.* at 16.

¹¹⁹ Qwest Petition for Review at 17.

¹²⁰ *Id.* See n. 104.

¹²¹ Qwest Petition at 17.

¹²² *Id.* Million, Exh. No. 51 at 14-15.

¹²³ *Id.*

¹²⁴ *Id.* at 26.

¹²⁵ *Id.*

associated with changing the foregoing processes to implement Eschelon's demands.¹²⁶

- 61 Eschelon responds that the FCC has recognized that the conversion between wholesale services and UNEs is "... largely a billing function [for which the FCC therefore expects] carriers to establish appropriate mechanisms to remit the correct payment after the conversion request."¹²⁷ Eschelon also points out that this Commission also recognized that operational procedures should be in the ICA, finding "... it is reasonable to include in the amendment a provision addressing 'operational procedures' to ensure customer service quality is not affected by conversions."¹²⁸
- 62 Eschelon argues that conversion of UNE circuits should only involve changing the rate applied to each circuit, a procedure it argues could be accomplished without changing the circuit ID.¹²⁹ Eschelon's proposal for re-pricing the converted facilities would simply require Qwest to use an adder or surcharge and a Universal Service Ordering Code (USOC) in the manner Qwest previously used for the conversion of circuits from unbundled UNE-Platform (UNE-P) to Qwest's Platform Plus (QPP) service offering.¹³⁰ Eschelon opposes Qwest's proposal that these matters be addressed in a separate proceeding because Qwest had previously rejected the opportunity to address these issues through Qwest'sCMP; a forum in which all CLECs could have provided input.¹³¹
- 63 Eschelon notes that when Qwest first converted special access circuits to UNEs, circuit IDs did not change.¹³² Eschelon contends that this demonstrates that there is no legitimate need for the circuit ID to change when the reverse process occurs and Qwest converts from UNEs to non-UNEs.¹³³ Further, Eschelon asserts that while

¹²⁶ *Id.* at 27.

¹²⁷ Eschelon Response at 21 citing TRO at ¶ 588.

¹²⁸ Eschelon Response at 21; *In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest, Inc., with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Washington*, Order 17, Docket UT-043013, ¶ 416 (July 8, 2005), affirmed in relevant part in Order No. 18 (Sept. 22, 2005).

¹²⁹ Starkey, Exh. No. 62 at 142, 148 – 149.

¹³⁰ *Id.* at 149.

¹³¹ *Id.* at 69.

¹³² Starkey, Exh. No. 62 at 156.

¹³³ Eschelon Response at 22.

Qwest argues that the two products are subject to different regulatory schemes, are available to different customers, and are inventoried differently, the fact remains that after the conversion Eschelon's end-user customer is using exactly the same physical circuit or facility that was previously used on a UNE basis.¹³⁴ Eschelon contends that the end-user customer should be wholly unaware of a conversion because that process should simply be a pricing conversion and Qwest should be required to maintain existing circuit IDs to prevent the risk of end-user disconnections; a possibility it contends is inherent in Qwest's desire to process conversions through "disconnect" and "new service order" processes.¹³⁵

- 64 Eschelon asserts that past experience shows that Qwest has the ability to implement Eschelon's simpler-pricing approach for conversions; pointing to Qwest's implementation of QPP agreements. Under the QPP agreements, Qwest does not physically convert circuits, but simply re-prices the circuits using either an adder or surcharge for the billing difference between the old and new rates.¹³⁶ Eschelon proposes the same approach for the conversions at issue here.
- 65 Eschelon argues that Qwest ignores the substantial savings for both parties in not needing to physically convert circuits and simply modifying the billing to reflect the price differential. Eschelon also asserts that Qwest presented no data in the record to support its claims about the cost of conversions.¹³⁷ Eschelon states that the Arbitrator found that Qwest will be compensated for conversion-related activities by the non-recurring charge for the conversion. Eschelon argues that although the costs of re-pricing (through the use of a surcharge) are minimal, Qwest is being over-compensated for the conversion.¹³⁸ Eschelon states that to date, the only arbitrator to rule on the merits of the non-recurring conversion charges recommended a charge of \$0.00.¹³⁹ In Arizona, the Commission Staff also recommended a charge of \$0.00.¹⁴⁰

¹³⁴ *Id.*; Starkey, Exh. No. 62 at 151.

¹³⁵ Eschelon Response at 22.

¹³⁶ *Id.*

¹³⁷ Eschelon Response at 24.

¹³⁸ The surcharge of \$25.00 is part of the Settlement Agreement filed in Docket UT-073035, *In the Matter of the Petition of Qwest Corporation, For Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Remand Order on the Competitive Telecommunications Environment in Washington State*, and represents the rate the parties reached through compromise. The Settlement was approved by Order 05 entered March 21, 2008.

¹³⁹ Eschelon Response at 24.

Eschelon states that Qwest is the cost-causer and is the only party benefitting from the conversion.¹⁴¹

66 Eschelon argues that this arbitration, not a generic docket, is the proper forum to address these issues.¹⁴² Eschelon notes that while Qwest suggests a generic docket forum, it next argues that the Commission lacks jurisdiction over these issues. Eschelon contends that it would be unjust for it to have expended resources to exercise its Section 252 right to obtain a ruling from the Commission in this docket only to have to re-litigate these issues in a new docket, where Qwest may again argue the Commission lacks jurisdiction.¹⁴³ In any event, Eschelon argues that this Commission has already determined that it has jurisdiction, through the Section 252 process, to address the transition away from provisioning elements on an unbundled basis pursuant to the TRRO.¹⁴⁴

67 We concur with Qwest that the Arbitrator's ruling on conversions is, at best, sparse and that her summary disposition of these issues is inadequate. Although, we consider each argument raised by the parties and offer further analysis below, in the end we reach the same result as the Arbitrator.

68 *Commission Jurisdiction.* When the FCC considered how to implement changes in unbundling obligations, it determined that ILECs should not unilaterally change interconnection agreements, but that carriers should negotiate and arbitrate new agreements in accordance with Section 252.¹⁴⁵ The conversion from a UNE to a non-UNE service is one such change in the ILECs' unbundling obligations. In the TRRO proceeding, the FCC stated:

¹⁴⁰ AZ Docket Nos. T-03632A-06-0091, *et.al*, (Oct. 20, 2006).

¹⁴¹ Eschelon Response at 24. Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (*Triennial Review Order or TRO*). The TRO allows Qwest to stop offering UNEs, but does not require it to do so.

¹⁴² Eschelon Response at 25.

¹⁴³ Eschelon Response at 24-25.

¹⁴⁴ Docket UT-043013, Order 17 at ¶ 150, citing TRO, ¶¶ 700-701, TRRO, ¶ 142 n. 399, ¶ 198 n. 524, ¶ 228 n. 630, ¶ 233, affirmed, in relevant part, Order 18 (Sept. 22, 2005).

¹⁴⁵ TRO, ¶¶ 700, 701; TRRO, ¶ 233.

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act.¹⁴⁶ Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.¹⁴⁷ We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding *any* rates, terms, and conditions necessary to implement our rule changes.¹⁴⁸ We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

Thus, the FCC specifically anticipated that disputes about "*any*" rate, term or condition related to conversions would be addressed within the context of negotiating or arbitrating changes to existing interconnection agreements.

69 We have previously addressed this issue. In Docket UT-043013, the Arbitrator rejected Verizon Northwest Inc.'s argument that disconnect or conversion charges are outside the scope of Sections 251 and 252 and state commission review.¹⁴⁹ There the Arbitrator noted that "... the Commission specifically provided that the parties address through the Section 252 process the transition away from provisioning elements on an unbundled basis that the FCC has determined are no longer required to be unbundled."¹⁵⁰ We affirmed that ruling.¹⁵¹

70 Accordingly, it is clear from both the FCC's perspective and our own that we have jurisdiction to address conversion-related issues. We are not persuaded by Qwest's argument that we should refrain from exercising jurisdiction over conversions given the importance of providing CLECs a reasonable transition process away from UNEs and, more importantly, ensuring a seamless or uninterrupted effect on services provided to their end users.

¹⁴⁶ 47 U.S.C. § 252.

¹⁴⁷ *Id.*

¹⁴⁸ 47 U.S.C. § 251(c)(1); 47 U.S.C. § 252(b)(5). (Emphasis supplied).

¹⁴⁹ Docket UT-043013, Order 17 at ¶ 150.

¹⁵⁰ TRRO ¶ 142 n. 399, ¶ 198 n. 524, ¶ 228 n. 630. Docket UT-043013, Order 17, at ¶ 150. This issue was not presented for review in Docket UT-043013.

¹⁵¹ Docket UT-043013, Order 18, (Sept. 22, 2005).

- 71 *Separate or Generic Proceeding.* We next consider Qwest's argument that conversion issues should be addressed in a separate generic proceeding that would allow other CLECs to participate.
- 72 Qwest notes that in other Qwest/Eschelon arbitration proceedings, several state commissions have decided to address conversion issues in a separate proceeding. Qwest points to Oregon, where in a recent proceeding the Arbitrator rejected Eschelon's proposed contract language on conversions and recommended that the commission initiate a general investigation of Qwest's conversion process.¹⁵² The Oregon Arbitrator concluded that "[T]he evidence presented by Eschelon raises serious questions as to whether the conversion process implemented by Qwest, apparently without CLEC input, is consistent with the FCC's expectations [for a seamless transition of UNE products and services to alternative service arrangements.]¹⁵³ The Arizona Commission adopted the Arbitrator's recommendation to accept Qwest's proposal to change the circuit ID during conversions and concluded that there was an insufficient record to evaluate Eschelon's approach to employ an "adder" and that such a decision is best made in a separate rate docket.¹⁵⁴ The Arizona Commission concluded that, in the conversions undertaken to date, Qwest made the conversions without disruption to the CLEC end-user customers.¹⁵⁵ The Minnesota Arbitrators adopted the Department of Commerce's recommendation to explore these issues in a generic docket and to leave these sections of the ICA blank.¹⁵⁶
- 73 Eschelon opposes a separate proceeding arguing that, as the Arbitrator pointed out, Qwest did not seek to address this issue in its CMP) which is open to all CLECs, but now argues disingenuously that all CLECs should have input regarding this issue.

¹⁵² Oregon Arbitrator's Decision at 44. This issue was not raised on review and the Oregon Commission adopted the Arbitrator's recommendation.

¹⁵³ *Id.*

¹⁵⁴ Arizona Arbitrator's Decision at 45-46 and affirmed by the Arizona Commission May 16, 2008.

¹⁵⁵ *Id.*

¹⁵⁶ Minnesota Arbitrators' Decision at 38.

- 74 We find that regardless of whether other state commissions have chosen to consider conversion issues in a separate proceeding, we previously concluded that it was appropriate to use the Section 252 process to address the transition away from UNEs.¹⁵⁷ In arbitration proceedings, the parties present the issues they wish the Commission to resolve. Here, Qwest and Eschelon included these issues for Commission consideration on the joint disputed issue list. While the evidence on this topic is markedly diverse, both Qwest and Eschelon presented testimony and exhibits in support of their respective positions. It seems patently unfair to require Eschelon to undergo the time and expense of “re-litigating” these issues in a separate docket. We also conclude that it is an inefficient use of Commission resources to initiate a separate proceeding to consider, again, issues that were addressed extensively in this proceeding.
- 75 Moreover, while Qwest’s primary argument in support of a separate proceeding is to receive input from other CLECs on this topic, Qwest had that opportunity in the CMP, but chose not to do so.¹⁵⁸ Instead, apparently Qwest chose to unilaterally develop and issue notices of how its obligations regarding UNEs had changed since the issuance of the TRO/TRRO prompting Eschelon to raise the issue in this proceeding.¹⁵⁹
- 76 We do not approve a unilateral process for the transition from UNE’s to non-UNE tariffed products and services, but as noted above, believe the Section 252 process more appropriate.¹⁶⁰ While the CMP might have sufficed for that purpose, at this stage we will resolve the issue on the record before us for the previously stated reasons.
- 77 *Lack of Qwest Proposed Language.* Next, we address whether Qwest should have offered alternative ICA language in support of its position to maintain the *status quo*; a criticism leveled by the Arbitrator in ruling against Qwest on this matter.

¹⁵⁷ See n. 154.

¹⁵⁸ Eschelon Response at 27; Starkey, Exh. No. 67 at 36-37.

¹⁵⁹ *Id.*

¹⁶⁰ See n. 149.

- 78 In arbitration proceedings, each party is responsible for making its own decisions regarding the presentation of its position. Some of these decisions may be factual determinations while others are strategic, designed to present a party's position in the best light. We consider the decision of whether to offer alternative ICA language in the latter category. Qwest's decision to decline to offer alternative ICA language limits the Commission's options.
- 79 In arbitration proceedings the parties present disputed issues for our consideration, which represent only the "tip of the iceberg" with respect to the volume of issues parties ultimately resolve and include in an interconnection agreement. We never see the broad spectrum of issues until after the arbitration and review process have concluded and the parties submit an ICA for our approval. Only then, do we have the opportunity to view issues the parties resolved through the negotiation process.
- 80 During the course of an arbitration, if we reject a party's primary argument and that party has not offered any alternative ICA language, we are left in an untenable position. We can either attempt to craft some language from whole cloth (not knowing if it will conflict with unseen and agreed-upon portions of the ICA) or we can select from language offered by the prevailing party because generally, it presents the least risk of conflict with other provisions of the ICA to adopt language proposed by the parties. The parties are privy to the language in the negotiated sections of the ICA and are more likely to draft language that does not present conflict or controversy where none existed before. It is not unusual, and this arbitration is no exception, for parties to present alternative proposed language and clearly state the primary position for which they advocate.¹⁶¹ If the primary position is not adopted, we then have the option of selecting among the alternatives proposed by the parties.
- 81 In this proceeding, Qwest did not offer alternative language, relying instead on its position that conversion-related language did not belong in the ICA. Contrary to the Arbitrator's decision, however we agree that Qwest's decision to refrain from offering an alternative proposal is not dispositive. To do so would unfairly penalize a party for asserting, as Qwest does here, that matters are beyond the scope or jurisdiction of the proceeding. Nevertheless, for other reasons discussed above, we reject Qwest's

¹⁶¹ See, for example, the resolution of Issue 5-13, Review of Credit Standing, in the Arbitrator's Report and Decision at ¶ 6 (which is not raised on review).

argument that conversion-related issues are beyond our jurisdiction or the scope of Section 252 arbitration.

82 We turn now to the merits of the issues concerning conversions.

83 *Change in Circuit ID.* In considering whether Qwest may change the circuit ID for products converted from UNEs to alternative products and services, we are guided primarily by the FCC's conclusion that conversion is largely a billing function. For wire centers that are designated as non-impaired, Qwest is no longer obligated to provide UNEs under the FCC's TELRIC pricing methodology and is permitted to offer alternative services through commercial contracts and tariffs. Qwest notes that UNE and non-UNE facilities are subject to different regulatory schemes, available to different sets of customers, and are inventoried differently. Nonetheless, we cannot escape the fact that the actual underlying facilities being used at the time of conversion do not change; only the *classification* of those facilities changes. As Eschelon points out, customers are served over exactly the same facilities before and after the conversion. The only change is that Qwest is now entitled to bill Eschelon for these facilities in a manner differently than it billed UNEs.

84 Accordingly, the issue is whether the required billing change is a sufficient basis to warrant a change in circuit ID. We conclude it is not. We are persuaded by Eschelon's argument that Qwest has successfully converted facilities in the reverse direction; that is, from a non-UNE classification to a UNE classification without altering the circuit ID.¹⁶² When Qwest first converted special access circuits (which are non-UNEs) to UNEs, it did so without altering the circuit ID.¹⁶³ We agree with Eschelon that Qwest should be able to accomplish the reverse; a conversion from UNE to non-UNE, with the same degree of success without altering the circuit ID. Changing only the classification, and not the circuit ID, is consistent with the FCC's conclusion that these conversions should largely entail only billing functions; that is, the rate that is charged for the service or product is based on a different pricing mechanism.

¹⁶² Eschelon Response at 22; Starkey, Exh. No. 62 at 156.

¹⁶³ *Id.*

85 Further, we find that retaining the circuit ID appears to be the best method to ensure that the transition from UNE to non-UNE classification is a seamless transition. Although Qwest appears to have conducted a significant number of conversions without complaint that CLEC customers were disrupted, we are not persuaded that Qwest's use of the current process alone should govern the outcome of this issue. We share Eschelon's concern that Qwest's procedure to process circuit ID changes through "disconnecting" the UNE and "reconnecting" the non-UNE product increases the risk of problems with either the "disconnection or "reconnection" phase, or both.¹⁶⁴ That risk may increase as Qwest classifies more wire centers as non-impaired and the number of conversions increases.¹⁶⁵ We agree with Eschelon that the risk of end-user customer disconnection is inherent in this processing method. Therefore, we affirm the Arbitrator's ruling on this issue.

86 *Conversion charge.* The final issue is the method to be used to re-price a circuit to be converted from a UNE to a non-UNE product and the recovery by Qwest of the costs, if any, for revising its billing information. For re-pricing a circuit, Eschelon proposes the use of an adder or surcharge to address the difference between the previous rate and a new rate. Eschelon argues that Qwest has ample experience with this type of pricing change because it was the method used for the conversion of unbundled UNE-P to the corresponding non-UNE product, QPP.¹⁶⁶ Qwest opposes this approach and argues that it must take a variety of steps to ensure that the data for the converted circuit is accurately recorded in the appropriate systems. Qwest also asserts that its experience with converting UNE-P to QPP is not representative of the conversions it now faces.¹⁶⁷

87 Again, past practice is prologue because it appears that Qwest successfully used the adder or surcharge method to effect changes from UNE-P to QPP. This seems to be an efficient process for implementing the rate changes associated with the conversion of these products. While Qwest argues that its experience with the UNE-P to QPP conversions is not representative of these conversions, we agree with Eschelon that

¹⁶⁴ Qwest Petition for Review at 20.

¹⁶⁵ See, for example, Docket UT-073033, *In the Matter of the Petition of Qwest Corporation for Commission Approval of 2007 Additions to Non-impaired Wire Center List*, Order 10, entered July 30, 2008.

¹⁶⁶ Eschelon Response at 23; Starkey, Exh. No. 62 at 162-163.

¹⁶⁷ Qwest Petition for Review at 26; Million, Exh. No. 51 at 11.

UNE-P to QPP conversions were more complex than the current conversions. Accordingly, we affirm the Arbitrator's ruling to implement price changes through an adder or surcharge and Universal Service Ordering Codes.

- 88 Although Qwest argues that it must be compensated for the costs associated with these conversions,¹⁶⁸ Eschelon contends that Qwest did not provide any data to support its cost claims.¹⁶⁹ Eschelon also argues that Qwest ignores the significant savings that will inure to both parties by not changing circuit IDs and using a simplified manner of billing.¹⁷⁰ The Arbitrator concluded that Qwest is compensated for conversion-related activities through the \$25.00 conversion charge agreed upon in a separate proceeding.¹⁷¹
- 89 Qwest contests this finding and contends that the agreed-upon conversion charge relates solely to the costs Qwest incurs to receive and process orders from CLECs to convert from UNEs to alternative services.¹⁷² Eschelon asserts that Qwest is the "cost-causer" and the only party to benefit from the conversions. Eschelon claims that Qwest is *authorized* but not *required* to convert UNE products to non-UNE products so there must be a pecuniary benefit for doing so.¹⁷³ While these assertions are true, they do not address the fact that Qwest is entitled to recover the reasonable costs of conversion. The rub, however, lies in determining what those costs might be.
- 90 While Qwest claims it is entitled to recover its costs, it does not provide any data in this record to establish what those costs might be. Similarly, Eschelon claimed that it would incur some costs if required to record new circuit IDs for converted circuits, but provided no information to support its position. The Arbitrator ultimately concluded that, absent adequate costing evidence introduced in this proceeding, the agreed-upon conversion rate of \$25.00 determined in Docket UT-073035 should compensate Qwest for any costs it may incur to make the necessary billing adjustments necessitated by Eschelon's billing proposal.

¹⁶⁸ Qwest Petition for Review at 21.

¹⁶⁹ Eschelon Response at 24.

¹⁷⁰ *Id.*

¹⁷¹ Arbitrator's Report and Decision at ¶¶ 90 – 91; Docket UT-073035, Order 05, Order Approving Settlement (Mar. 21, 2008); *See also* Notice of Finality (Apr. 17, 2008).

¹⁷² Qwest Petition for Review at 21.

¹⁷³ Eschelon Response at 24.

91 We agree that the \$25.00 conversion rate adopted in Docket UT-073035 represents a reasonable compromise rate for the conversion process at this time. Because this rate was established during the negotiation process and was ultimately part of a settlement of all disputed issues in Docket UT-073035, we do not know the details surrounding the derivation of the rate. However, it is reasonable to assume that each party in that proceeding adequately represented its own interests in arriving at the rate. Consistent with our decision in Sections 1 and 8 of this Order, we adopt the \$25.00 rate as an interim rate, subject to revision in an appropriate costing proceeding.

6. Commingled Arrangements – Billing.

92 A commingled arrangement consists of a UNE connected to a tariffed service.¹⁷⁴ The parties dispute whether Qwest should include the UNE and non-UNE elements of a Commingled Enhanced Extended Link (EEL) on a single bill.¹⁷⁵

93 Qwest asserts that it has separate billing systems for UNEs and tariffed services and that it would be an extraordinary burden to include information on commingled arrangements on a single bill.¹⁷⁶ In the arbitration, Eschelon argued in favor of a single order, single circuit ID, single bill, and single billing account number (BAN),¹⁷⁷ but alternatively requested that commingled elements be listed separately on a single bill to ensure that it could manage repair and billing functions to its customers' satisfaction.¹⁷⁸

94 The Arbitrator rejected Eschelon's preferred proposal and adopted Qwest's language together with Eschelon's alternate language which would require separate commingled components to be identified and related.¹⁷⁹ Under the recommended language, Qwest may require separate ordering, circuit IDs, and billing for the UNE and non-UNE elements that comprise a commingled arrangement, but Qwest must then identify and relate the separate components on the bill and customer service

¹⁷⁴ Arbitrator's Report and Decision at ¶ 98.

¹⁷⁵ *Id.* at ¶ 115.

¹⁷⁶ Qwest currently assigns a single circuit ID to a UNE EEL and proposes to assign two circuit IDs for commingled EELs even where a UNE EEL is being converted to a commingled EEL. Stewart, Exh. No. 57 at 79. Denney, Exh. No. 130 at 149.

¹⁷⁷ This is how UNE EELs are provided today.

¹⁷⁸ Denney, Exh. No. 130 at 154.

¹⁷⁹ Arbitrator's Report and Decision at ¶ 118.

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

In the Matter of the Petition of:	)	DOCKET UT-063061
)	
QWEST CORPORATION	)	ORDER 19
)	
and)	
	)	ORDER DENYING QWEST'S
ESCHELON TELECOM, INC.	)	PETITION FOR
	)	RECONSIDERATION
Pursuant to 47 U.S.C. Section 252(b))	
)	
.....)	

1 **SYNOPSIS.** *The Commission denies Qwest's petition for reconsideration of three rulings in our Final Order, Order 18, regarding circuit identification numbers, UNE to non-UNE conversion charges, and informational requirements for bills and customer service records of commingled enhanced extended links.*

BACKGROUND

2 **NATURE OF PROCEEDING.** This proceeding involves a request by Qwest Corporation (Qwest) and Eschelon Telecom, Inc., (Eschelon) to arbitrate an interconnection agreement (ICA) under 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 (the Act).¹

3 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, and Adam L. Sherr, Seattle, Washington, represent Qwest. Gregory J. Kopta, Seattle, Washington, and Karen L. Clauson, and Gregory Merz, Minneapolis, Minnesota, represent Eschelon.

4 **PROCEDURAL HISTORY.** Following an evidentiary hearing and briefing by the parties, on January 18, 2008, the Arbitrator entered Order 16, the Arbitrator's Report and Decision, resolving all contested issues.² Eschelon and Qwest each filed a

¹ A glossary of acronyms and terms used in this Order is attached for the convenience of readers.

² The full procedural history in this matter is described more fully in Order 16 in this docket and

only if the petitioner demonstrates that our order is erroneous or incomplete.⁵ A petition for reconsideration must also cite to portions of the record and laws or rules for support of the request for reconsideration, and must present sufficient argument to warrant a finding that our order is erroneous or incomplete. Should we grant reconsideration, we may modify our prior order or take other appropriate action.⁶

Issues on Reconsideration.

1. Jurisdiction.

8 For each ruling under reconsideration, Qwest alleges that the Commission exceeded the scope of its jurisdiction when serving as an arbitrator pursuant to Section 252 under the Act. Qwest asserts that federal courts have ruled unanimously that state commissions are authorized only to set terms and conditions relating directly to the obligations imposed on incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs) under Sections 251(b) and (c) of the Act.⁷ Qwest argues that the Commission exceeded its limited arbitration authority by: (1) requiring it to use the same circuit identification number for a circuit converted from a UNE to a non-UNE service; (2) adopting a fee for conversions from UNE to non-UNE services; and (3) establishing the content of bills and customer service records for commingled UNE and non-UNE services (commonly referred to as commingled EELs).

9 Under Section 252(b)(4)(C), state commissions are authorized to serve as arbitrators but are required to resolve open issues by imposing conditions required to implement Section 252(c). The standards for arbitration set forth in Section 252(c) require commissions to impose conditions that meet the requirements of Section 251. Thus, Qwest argues, state commissions are limited to resolving only those issues relating to the duties imposed by Section 251 and that they are neither authorized nor required to resolve issues regarding other services or the company's obligations arising under Section 271. Qwest contends that we erred by not relying on the language in Section 252 to determine the scope of our arbitration authority.

⁵ WAC 480-07-850(2).

⁶ WAC 480-07-850(6).

⁷ See, for example, *Southwestern Bell Telephone v. Missouri Public Service Commission*, 530 F.3d 676 (8th Cir. 2008).

- 10 Qwest further argues that the Federal Communications Commission's (FCC's) *Triennial Review Remand Order* (TRRO) does not give state commissions authority over non-Section 251 services.⁸ Qwest contends that we misinterpret the TRRO's directives for transitioning certain UNE's from the Section 251 obligations as allowing states to regulate the terms and conditions of non-Section 251 services. Qwest asserts that the authority of state commissions is limited to that granted by the Act, not the FCC.
- 11 Finally, Qwest contends that the Commission has no authority over these issues because at least some of the non-Section 251 services Qwest offers for UNE conversions are provided pursuant to Section 271 and the authority to regulate network elements and services under Section 271 rests solely with the FCC.
- 12 In its answer, Eschelon argues that Qwest erred in framing the threshold question of jurisdiction. Eschelon contends that the proper threshold question is whether issues relating to conversions and commingled arrangements fall within the scope of a CLEC's arbitration rights given that they emanate directly from the diminution of ILEC unbundling obligations under the Act. Eschelon argues that the Commission properly concluded that conversions and commingled arrangements clearly fall within those rights and the Commission's jurisdiction.⁹
- 13 Eschelon contends that none of the federal court decisions cited by Qwest deal with whether UNE conversions and commingled arrangements fall within the scope of a CLEC's arbitration rights. Accordingly, Eschelon argues the cases are irrelevant to the Commission's determination that these issues are within the scope of this arbitration. Eschelon further argues that the issue of state authority to enforce Section 271 obligations was not raised by either party in the three rounds of testimony or the hearing regarding these issues. Eschelon concludes that while the Commission has not asserted authority over Section 271 network elements, the Commission properly

⁸ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) hereinafter referred to as the "*Triennial Review Remand Order*;" or "TRRO."

⁹ Order 18, ¶¶ 68-70; Docket UT-043013, Order 17, ¶¶ 150, 287, and 291.

determined that conversions and commingled EELs are within the scope of Sections 251 and 252 of the Act and the Commission clearly has authority over these sections.

- 14 Eschelon argues that Section 252(c) requires that state commissions, in resolving open issues, “shall ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251.”¹⁰ Thus, Eschelon contends, the Act mandates state commissions to ensure that their arbitration rulings comply with FCC regulations. Eschelon notes that the Final Order specifically references Sections 251 and 252 in its discussion of jurisdiction.¹¹
- 15 Finally, Eschelon notes that the FCC’s *Triennial Review Order (TRO)*¹² and TRRO clearly address the unbundling, interconnection, and nondiscrimination obligations of ILECs under Section 251 of the Act, including their obligations arising from the unbundling relief granted in those orders, which address both conversions and commingled EELs. Eschelon contends that while Qwest criticizes the Commission for relying on portions of the TRO and TRRO orders, Qwest refers to those same FCC orders to support its position on the scope of the Commission’s jurisdiction. Eschelon argues that the Commission’s interpretation is correct.
- 16 **Commission Decision.** Section 251 of the Act directs the FCC to determine the circumstances under which components of an ILEC’s network must be available on an unbundled basis. In the TRO and TRRO decisions, the FCC also determined the circumstances under which ILECs may be relieved of their unbundling obligations. The FCC specifically found that ILECs are not to unilaterally change interconnection agreements but are to negotiate and arbitrate new agreements in accordance with Section 252.¹³

¹⁰ Eschelon Answer at 8, quoting 47 U.S.C. § 252 (emphasis in Answer). In this citation, the reference to Commission means the FCC.

¹¹ Order 18, ¶¶ 68 – 69.

¹² Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 17 FCC Rcd 16978 (2003), vacated in part, remanded in part, *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). (hereinafter referred to as TRO).

¹³ TRO at ¶¶ 700, 701. TRRO at ¶ 233.

- 17 That is exactly the circumstance that gave rise to this proceeding. The initial ICA between Qwest and Eschelon expired July 24, 2000, but the parties continued to operate under that agreement while attempting to negotiate a new agreement. While those negotiations were underway, the FCC issued its TRO and TRRO decisions regarding ILECs' unbundling obligations. Thus, Qwest and Eschelon attempted to negotiate terms and conditions of a new ICA that complied with the FCC's intent under the TRO and TRRO orders, as well as all other provisions in the expired ICA. The parties reached agreement on many issues narrowing the scope of this arbitration from more than 250 pages of disputed issues to approximately 150 pages of disputed issues. Of the large number of issues originally teed up to be addressed in this arbitration, only three relating to conversion and commingling issues are raised in the petition for reconsideration.
- 18 These remaining issues merely address the operational processes attendant to converting existing circuits from a UNE basis to a non-UNE basis. The issues arise directly as a consequence of the unbundling relief the FCC afforded ILECs such as Qwest in the TRO and TRRO proceedings.
- 19 We reject Qwest's contention that a series of federal court decisions, including a recent decision by the United States Court of Appeals for the Eighth Circuit,¹⁴ implicate or place limits on our Section 252 authority with respect to conversions and commingling. Those decisions are not on point. The cases address efforts by other state commissions to rely upon state law or Section 271 to impose or address unbundling issues; a circumstance not present in this proceeding. Our Final Order did not attempt to establish rates or address operational conditions for Qwest's obligations under Section 271 nor to apply state law in some fashion to retain unbundling requirements where relief had been granted by the FCC. The issues under reconsideration merely addressed the operational processes attendant to converting existing circuits from a UNE basis to a non-UNE basis and fall well within our authority pursuant to Section 252 and the FCC's orders revising ILEC obligations under Section 251.

¹⁴ *Southwestern Bell Telephone v. Missouri Public Service Commission*, 530 F. 3d 676 (8th Cir. 2008).

- 20 As in our Final Order, we reject Qwest's contention that we exceeded our authority under Section 252 to address these issues. In that Order, we followed the FCC's specific guidance to carriers and state commissions to address, through the Section 252 process, the transition from UNE services to non-UNE services and establish any rates, terms, and conditions necessary to implement the changes prescribed by the FCC. As envisioned by the FCC, we appropriately exercised our jurisdiction to provide CLECs a reasonable transition process away from UNEs and ensure a seamless effect on services provided to their end-users.
- 21 We believe that Qwest continues to exaggerate the distinction between UNE and non-UNE terms and conditions. We reiterate the FCC's conclusion, and our own, that the primary difference between the two is the rate at which Qwest is entitled to bill for services; a rate which was formerly limited by TELRIC pricing. By overstating the distinction between UNE and non-UNE terms and conditions, Qwest misinterprets the basis and scope of our authority.

2. Conversions.

A. Change in Circuit ID.

- 22 Our Final Order concluded that we had jurisdiction to address this issue and that the conversion from UNEs to alternative products and services is largely a billing function.¹⁵ We required Qwest to retain the same circuit identification number, or ID, for conversions, finding that retaining a common circuit ID appeared to be the best method to ensure that the transition from UNE to non-UNE classification is a seamless transition for CLECs and their end-users.
- 23 Qwest requests that we reverse our ruling because we lack jurisdiction to impose a term or condition for a service that it does not provide under § 251.¹⁶ In addition, Qwest argues that using a single circuit ID number will adversely affect service, cause prejudice to other CLECs, and cause financial harm to Qwest.¹⁷ Qwest asserts that it explained in testimony and prior briefs that separate circuit ID numbers are required

¹⁵ Order 18, ¶¶ 67 – 70, 83 – 85.

¹⁶ For a more complete discussion of Commission jurisdiction *see* ¶¶ 16 - 20 above.

¹⁷ Qwest Petition for Reconsideration at 11.

for UNE and non-UNE products because they are subject to separate regulatory schemes and are available to different categories of customers.¹⁸ Therefore, Qwest asserts that it developed separate and distinct computerized ordering, inventory, and billing systems for these services.¹⁹ Qwest contends that the differences between these systems are embodied in the circuit ID numbers.²⁰

24 Qwest further argues that the Commission relies heavily on Qwest's past successful conversion from special access circuits to UNEs to require it to retain the same circuit ID number for conversions in this proceeding. Qwest contends that this conclusion is incorrect because Qwest found that process unworkable and created a risk of service degradation.²¹ Qwest argues that our decision is also erroneous because it finds that the use of different circuit ID numbers increases the risk of problems relating to disconnection and reconnection of circuits without recognizing that Qwest converted nearly 1,500 circuits in 2006 without experiencing any problems.²²

25 In the alternative, Qwest proposes to change the alphabetical prefix of circuit ID numbers while retaining the remainder of the number,²³ arguing that this balances the needs of both parties while protecting Eschelon and its customers from service problems related to retaining the same circuit ID number for both UNE and non-UNE products.

26 Eschelon responds that the FCC clearly contemplated that conversion issues would be addressed by state commissions under Section 252 of the Act.²⁴ Eschelon further contends that Qwest's petition fails to comply with WAC 480-07-850(2) because Qwest fails to provide citations to the record in support of its claims.²⁵

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 12.

²¹ *Id.* at 13.

²² *Id.* at 13 -14. While Qwest raises additional arguments, these arguments are not supported by citations to evidence in the record and are raised for the first time on reconsideration. Accordingly, these arguments do not meet the standards in WAC 480-07-850 and will not be addressed.

²³ *Id.* at 15.

²⁴ See also ¶¶ 12 – 15 above.

²⁵ Eschelon Answer at 17.

- 27 According to Eschelon, conversions typically only involve changing the rate charged for the facility and, in the vast majority of cases, the facility itself does not change.²⁶ Eschelon contends that a change in regulatory regime reinforces the need for conversions to be transparent and emphasizes that while the conversion reduces Qwest's legal obligations relative to UNEs, it is Eschelon who bears all the risk of failure.²⁷ Eschelon argues that logic dictates that not changing the circuit ID on a properly operating existing facility is less likely to cause service disruption than changing the circuit ID.²⁸ Moreover, Eschelon contends that the Commission properly evaluated the evidence regarding Qwest's process for converting circuits from UNEs to new private line service.²⁹
- 28 In response to Qwest's alternative proposal, Eschelon asserts that it is not new; Qwest raised the same proposal in an Oregon wire center docket in 2006.³⁰ Eschelon contends that the alternative proposal does not resolve any of the issues Eschelon raised in this case.
- 29 **Commission Decision.** Having already rejected Qwest's jurisdictional argument, we conclude that Qwest's other arguments do not comply with WAC 480-07-850.³¹ The rule is clear that Qwest must demonstrate that our order is erroneous or incomplete and provide citations to the record in support of its reconsideration claims. Qwest fails to do so and, save for its alternative circuit ID proposal which is raised for the first time on reconsideration, fails to raise any new arguments not already considered and rejected by the Commission. As previously stated, a petition for reconsideration requires more than a repetition of prior arguments on an issue.
- 30 Nor is it appropriate to raise for the first time in a petition for reconsideration new options or proposals that should have been addressed during the evidentiary phase of a docket, when they can be fully vetted through testimony, cross-examination, and rebuttal. At this juncture, our consideration is specifically limited to any errors or

²⁶ *Id.* at 22.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 23.

³⁰ The decision in the Oregon proceeding was admitted as an exhibit in this proceeding: Denney, Exh. No. 169.

³¹ See ¶¶ 16 – 20.

incomplete findings in our previous ruling. Having not previously considered Qwest's alternative circuit ID proposal, we cannot "reconsider" it here.

B. Conversion charge.

- 31 In Order 18, we agreed with the arbitrator that the \$25.00 conversion rate adopted in Docket UT-073035³² represents a reasonable compromise rate for the conversion process and accepted that rate as an interim rate, subject to revision in an appropriate costing proceeding.³³
- 32 Qwest reiterates its argument that we lack jurisdiction to address this issue and asserts that the \$25 conversion charge does not compensate Qwest for UNE conversion costs because those costs were not known at the time the charge was agreed upon.³⁴ Qwest asserts that an ILEC must be permitted to recover the costs it incurs to provide interconnection.³⁵
- 33 Eschelon again responds that we have jurisdiction to address this issue and that Qwest failed to provide appropriate citations to the record in support of its petition. Moreover, Eschelon asserts that Qwest did not provide cost studies in this case despite the requirement that it do so.³⁶ Eschelon contends that there is no evidence in this record to support a conversion charge other than the one adopted by the Commission.³⁷ Eschelon also contends that we already considered and rejected the arguments Qwest raises again here.³⁸

³² *In the Matter of the Petition of Qwest Corporation For Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Remand Order on the Competitive Telecommunications Market in Washington*, Docket UT-073035, Order 05 (March 21, 2008). Notice of Finality entered April 17, 2008.

³³ Order 18, ¶¶ 86 – 91.

³⁴ Qwest Petition for Reconsideration at 17.

³⁵ *Id.*

³⁶ Eschelon Answer at 32 – 33. Arbitrator's Report, Order 16, ¶ 173.

³⁷ Eschelon Answer at 33.

³⁸ *Id.*

34 Moreover, Eschelon argues that Qwest agreed to the conversion charge of \$25 when it executed the wire center settlement in June 2007.³⁹ Thus, Qwest voluntarily agreed to a conversion rate before the manner of conversion was determined in this case. Likewise, Eschelon agreed to the \$25 conversion rate at a time when other commissions concluded an appropriate rate should be \$0.00.⁴⁰

35 **Commission Decision.** Consistent with our previous analysis we reject Qwest's jurisdictional argument and find that it has failed to comply with WAC 480-07-850, failed to provide citations to the record, and failed to raise any argument regarding the conversion charge not already considered and rejected. Accordingly, we deny reconsideration of the conversion charge.

3. Commingled Arrangements – Billing.

36 In Order 18, we required Qwest to separately identify commingled components on bills and customer service records, concluding that this balanced Qwest's need to appropriately bill for the separate UNE and non-UNE elements of a commingled arrangement and Eschelon's need to ensure that it was being billed properly.⁴¹

37 Qwest requests reconsideration arguing that the Commission lacks jurisdiction to impose terms and conditions on these services.⁴² Alternatively, Qwest asserts that it is not technologically possible to comply with the ruling absent significant changes to Qwest's operating system and requests a delay in implementation to allow Qwest time to assess feasibility and perform the required changes.⁴³

38 Eschelon responds that it has already addressed Qwest's jurisdictional arguments.⁴⁴ Regarding Qwest's request for delay, Eschelon believes Qwest's claims to be exaggerated; unsupported by data or any citations to evidence in the record.⁴⁵ In

³⁹ *Id.*

⁴⁰ *Id.* at 35.

⁴¹ Order 18, ¶¶ 97 – 100.

⁴² Qwest Petition for Reconsideration at 18 – 19. For a more complete discussion of jurisdiction see ¶¶ 16 -20 above.

⁴³ Qwest Petition for Reconsideration at 19.

⁴⁴ Eschelon Answer at 36.

⁴⁵ *Id.* at 38.

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

David C. Boyd
J. Dennis O'Brien
Thomas Pugh
Phyllis A. Reha
Betsy Wergin

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Qwest Corporation's
Conversion of UNEs to Non-UNEs

ISSUE DATE: March 23, 2009

DOCKET NO. P-421/C-07-370

In the Matter of Qwest Corporation's
Arrangements for Commingled Elements

DOCKET NO. P-421/C-07-371

ORDER ADOPTING ADMINISTRATIVE
LAW JUDGE'S RECOMMENDED ORDER
ON MOTION FOR SUMMARY
DISPOSITION

AMENDED NOTICE AND ORDER FOR
HEARING

PROCEDURAL HISTORY

On June 26, 2007, the Commission referred the jurisdictional issues in these two related cases to the Office of Administrative Hearings under Minn. Stat. § 14.57 *et seq.* On December 9, 2008, the Administrative Law Judge filed her Recommended Order on Motion for Summary Disposition, finding that the Commission did have jurisdiction in both cases and explaining her reasons for reaching that conclusion.

On December 19, 2008, Qwest Corporation (Qwest) filed exceptions to the Administrative Law Judge's recommended order. The following parties filed replies supporting the conclusions of the Administrative Law Judge: the Minnesota Department of Commerce; Integra Telecom of Minnesota, Inc.; Eschelon Telecom of Minnesota, Inc.; and the CLEC Coalition, a group of competitive local exchange carriers.¹ On March 3, 2009, the Administrative Law Judge's Recommended Order on Motion for Summary Disposition came before the Commission.

¹ The members of the CLEC Coalition are McLeodUSA Telecommunications Services, Inc.; POPP.com, Inc.; TDS Metrocom; and XO Communications of Minnesota, Inc.

FINDINGS AND CONCLUSIONS

I. Threshold Jurisdictional Issues

The issues in both these cases stem from decisions of the Federal Communications Commission (FCC) releasing Qwest and other incumbent local exchange carriers from earlier obligations under 47 U.S.C. §§ 251 (c) (3) and 252 (d) (1) to provide certain services as unbundled network elements (UNEs) to competitive local exchange carriers at cost-based rates. As services are “de-listed” as UNEs, incumbent carriers become free to charge higher, market-based rates for them, even when these services are commingled with services that remain UNEs.

In these two cases, competitive local exchange carriers purchasing wholesale services from Qwest asked this commission to set rates and terms and conditions of service for the conversion of specific existing service arrangements from UNE-based facilities to non-UNE-based facilities and for the commingling of UNE and non-UNE service components on a going-forward basis. Qwest challenged the Commission’s jurisdiction over these issues, claiming that exclusive jurisdiction lay with the FCC.

The Administrative Law Judge to whom the Commission referred the jurisdictional issues in these cases framed them as follows:

- Does the Commission have authority with respect to issues arising over the rates, terms and conditions for conversions from UNE to non-UNE facilities? (Docket 07-370)
- Does the Commission have authority with respect to disputes arising over the terms and conditions for the UNE and non-UNE components and the interrelationship of them in commingled arrangements? (Docket 07-371)

After briefing by all parties, the Administrative Law Judge found that this Commission had jurisdiction in both cases. On the conversion issue, she found as follows:

The Administrative Law Judge has concluded, based on the provisions of the TRO² and the TRRO,³ that the FCC has expressly directed the negotiation of rates, terms, and conditions relating to conversion processes in interconnection agreements, and consequently the Commission has legal authority under § 252 to address these issues in this docket.⁴ (Footnotes added.)

² Report and Order, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd. 16978 (2003), vacated in part, remanded in part, U.S. Telecom Ass’n v. FCC, 359 F.3d 554 (D.C.Cir. 2004) (TRO).

³ Order on Remand, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 FCC Rcd. 2533 (2005), aff’d, Covad Communications Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006) (TRRO).

⁴ ALJ’s Recommended Order, p. 6.

On the issue of commingling, she found:

The FCC has clearly stated that these are the types of issues to be addressed in interconnection agreements, and the Administrative Law Judge accordingly concludes the Commission has the legal authority under § 252 to resolve issues in this docket relating to the terms and conditions under which Qwest provides commingled elements and services.⁵

The Commission has carefully examined the Administrative Law Judge's recommended order and the record on which it is based. Her recommended order is closely reasoned in its analysis and compelling in its conclusions; the Commission will accept and adopt it.

The Commission will also refer the remaining issues, which relate to rates and terms and conditions of service, for evidentiary development, as set forth below.

II. Jurisdiction and Referral for Contested Case Proceedings

The Commission has jurisdiction over the remaining substantive issues in this case as set forth in detail in the Recommended Order of the Administrative Law Judge, adopted herein.

The Commission finds that it cannot resolve the remaining issues of rates and terms and conditions of service on the basis of the record before it. These issues turn on numerous, specific facts that are best developed in formal evidentiary hearings. The Commission will therefore amend its original Notice and Order for Hearing to refer the remaining issues in this case for contested case proceedings.

III. Issues to be Addressed

The remaining issues in this case relate to appropriate rates and terms and conditions of service under 47 U.S.C. § 252 (d), Minn. Stat. §§ 237.09 and 237.12, and related statutes and regulations. The parties shall address these issues in the course of contested case proceedings. They may also raise and address other issues relevant to rates and terms and conditions of service.

IV. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Kathleen D. Sheehy. Her address and telephone number are as follows: Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101; (651) 361-7848. The mailing address of the Office of Administrative Hearings is P.O. Box 64620, St. Paul, Minnesota 55164-0620.

⁵ ALJ's Recommended Order, p. 8.

B. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 660 Olive Street, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Ganesh Krishnan, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 201-2215; or Jeanne Cochran, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 296-2106.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and the parties.

- *Notice of Appearance*

Any party intending to appear at the hearing who has not already done so must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are Qwest; the Minnesota Department of Commerce; Integra Telecom of Minnesota, Inc.; Eschelon Telecom of Minnesota, Inc.; and the CLEC Coalition. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference, which may be conducted by telephone, will be scheduled by the Administrative Law Judge. The Office of Administrative Hearings will inform the parties and the Commission of its time, date, and place.

Parties and persons intending to intervene in the matter should participate in the conference, prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, settlement prospects, and similar issues. Potential parties are invited to participate in the pre-hearing conference and to file their petitions to intervene as soon as possible.

V. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 *et seq.*, apply to rate setting cases. Persons appearing in this proceeding may be subject to registration, reporting,

and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

VI. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission hereby accepts, adopts, and incorporates herein the Administrative Law Judge's Recommended Order on Motion for Summary Disposition, which is attached as Attachment B.
2. The Commission hereby refers the remaining issues in this case to the Office of Administrative Hearings for contested case proceedings, as set forth above.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION


Burl W. Haar
Executive Secretary

(SEAL)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 201-2202 (voice). Persons with hearing or speech disabilities may call us through Minnesota Relay at 1-800-627-3529 or by dialing 711.

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of Qwest Corporation's
Conversion of UNEs to Non-UNEs

MPUC Docket No. P-421/C-07-370
P-421/C-07-371

In the Matter of Qwest Corporation's
Arrangements for Commingled Elements

OAH Docket No. 3-2500-19047-2

NOTICE OF APPEARANCE

Name, Address, Mailing Address, and Telephone Number of Administrative Law Judge:

Kathleen D. Sheehy, Office of Administrative Hearings, 600 North Robert Street, St. Paul,
Minnesota 55101; Mailing Address: P.O. Box 64620, St. Paul, Minnesota 55164-0620;
Telephone Number: (651) 361-7848.

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER AND E-MAIL ADDRESS:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER AND E-MAIL ADDRESS:

SIGNATURE OF PARTY OR ATTORNEY _____

DATE: _____
Exhibit No. 205
Case No. QWE-T-08-07
D. Denney, Joint CLECs

ATTACHMENT B

**OAH 3-2500-19047-2
MPUC P-421/C-07-370
& P-421/C-07-371**

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION**

**In the Matter of Qwest Corporation's
Conversion of UNEs to Non-UNEs**

**RECOMMENDED ORDER
ON MOTION FOR
SUMMARY DISPOSITION**

**In the Matter of Qwest Corporation's
Arrangements for Commingled
Elements**

This matter is before Administrative Law Judge Kathleen D. Sheehy on Qwest's Motion for Summary Disposition, filed September 15, 2008. The motion record closed October 31, 2008, upon receipt of Qwest's Reply Memorandum.

Jason D. Topp, Qwest Corporation, 200 South Fifth Street, Room 2200, Minneapolis, MN 55402, appeared on behalf of Qwest. Dennis D. Ahlers, Associate General Counsel, Integra Telecom, 730 Second Avenue South, Suite 900, Minneapolis, MN 55402, appeared for Integra. Dan Lipschultz, Moss & Barnett, 4800 Wells Fargo Center, 90 South Seventh St., Minneapolis, MN 55402-4129, appeared on behalf of the CLEC Coalition. Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, St. Paul, MN 55101-2131, appeared on behalf of the Department of Commerce (Department).

Based upon all of the files, records, and proceedings herein, and for the reasons explained in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION AND ORDER

1. **IT IS HEREBY RECOMMENDED** that Qwest's Motion for Summary Disposition be **DENIED**.
2. **IT IS HEREBY ORDERED** that this Recommendation is certified for final decision to the Minnesota Public Utilities Commission.

Dated: December 9, 2008

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

The Minnesota Public Utilities Commission opened these dockets to further investigate issues that arose during the arbitration of an interconnection agreement between Qwest and Eschelon (now Integra). In the arbitration proceeding, Eschelon and Qwest disagreed about the appropriate language in the interconnection agreement relating to Qwest's processes and prices for converting unbundled network elements (UNEs)—which Qwest is no longer obligated to offer at TELRIC prices under § 251 of the Telecommunications Act of 1996—into services available (at higher prices) through Qwest's tariff or through a commercial agreement. In addition, the parties disagreed about the appropriate language relating to Qwest's processes and prices for providing commingled enhanced extended loops (EELs), which are composed of both a § 251 UNE (the loop) and a non-UNE facility (the transport circuit).

Qwest objected to the Commission's assertion of authority over these issues, and in its order referring this matter to the Office of Administrative Hearings, the Commission requested that Qwest's jurisdictional objections be addressed before any further proceedings take place.¹ The parties jointly agreed to defer consideration of these issues for a time in order to focus on other pending dockets.² They have slightly reframed the wording of the legal issues referred by the Commission.³ And they have further agreed that Qwest's motion for summary disposition is the best procedural method for presenting these jurisdictional issues and that there are no genuine issues of material fact that would preclude resolution of these issues as a matter of law.⁴

Legal Issues

1. Does the Commission have authority with respect to issues arising over the rates, terms and conditions for conversions from UNE to non-UNE facilities? (Docket 07-370)

2. Does the Commission have authority with respect to disputes arising over the terms and conditions for the UNE and non-UNE components and the interrelationship of them in commingled arrangements? (Docket 07-371)

Arguments of the Parties

Qwest maintains that state commissions are limited to setting rates, terms, and conditions for UNEs and other services that incumbent local exchange carriers (ILECs) are required to provide pursuant to § 251. Because UNE conversions and commingled EELs involve non-251 services, state commissions lack authority to set rates, terms, and conditions for them. It maintains that a

¹ Notice and Order for Hearing (June 26, 2007).

² Joint Request for Continuance (September 21, 2007).

³ Joint Statement of Legal Issues (May 29, 2008).

⁴ First Prehearing Order ¶ 5 (September 12, 2007).

state commission's only authority with respect to these arrangements is to establish rates and terms for the UNE component of a commingled EEL, because that is the only component that is within a commission's § 251 authority. Qwest cites a variety of commission decisions and federal court decisions for the proposition that the arbitration authority of state commissions under § 252 only permits the imposition of terms and conditions for services and UNEs included within § 251. Accordingly, Qwest contends the commission "has no jurisdiction to determine how Qwest should provide the non-251 services used with UNE conversions or the non-251 services used with commingled EELs."⁵ Qwest also maintains that the UNE and non-UNE components of commingled EELs are subject to different regulatory schemes and that Qwest cannot be compelled to provide the non-UNE elements and services under the "ultra-regulatory framework" of § 251. Finally, Qwest maintains that a state commission lacks jurisdiction to establish terms and conditions for interstate access services, because that is within the exclusive regulatory authority of the FCC.

Integra maintains that the FCC has explicitly addressed conversion processes and has made it clear that carriers are to negotiate those processes through the § 252 arbitration process and that state commissions have the obligation to address and resolve these issues through that process. In addition, Integra argues that the FCC has provided guidance on the pricing and procedures to be employed, indicating that conversion should be a "seamless" process that does not affect a customer's perception of service quality. Consequently, Integra contends the Minnesota Commission has not only the authority but the obligation to oversee this process under § 252. With regard to commingling, Integra maintains that because Qwest is obligated under § 251 to provide commingled EELs, the Commission has the authority to prohibit Qwest from erecting operational barriers that would make the process of ordering, provisioning, and repairing commingled EELs difficult or impossible for competitive local exchange carriers (CLECs) to use. Both Integra and the CLEC Coalition urge the Commission to follow the approach taken by the Washington State Utilities and Transportation Board, which concluded that conversions and commingled arrangements fall within the arbitration authority of state commissions.⁶

The Department contends that Qwest has overstated the distinction between § 251 and non-251 elements, maintaining that conversion involves the process of moving a § 251 element to a different status and that all activities involved in the process therefore relate to the cost, provisioning, and pricing of § 251 UNEs, over which the Commission has exclusive authority. The Department also argues that the Commission has independent authority under state law to ensure that the wholesale pricing of converting and commingling non-251 elements is fair and reasonable.

⁵ Qwest Memorandum in Support of Motion for Summary Disposition at 9.

⁶ *In the Matter of the Petition of Qwest Corporation and Eschelon Telecom, Inc.*, Order No. 18, Commission's Final Order at ¶¶ 68-70, 92-108, Docket No. UT-063061 (WUTC Oct. 16, 2008).

Analysis

Under 47 U.S.C. § 251, ILECs are required to negotiate in good faith the terms and conditions of interconnection agreements with CLECs and to lease certain network facilities at TELRIC rates. If an agreement cannot be negotiated, the Act requires that unresolved § 251 disputes be submitted to arbitration, subject to oversight by state public service commissions. Initially, the FCC took the position that ILECs had to "unbundle" and provide most basic network elements at TELRIC prices. Since then, the FCC has changed its analysis of unbundling and interconnection obligations and has progressively limited the number of network elements ILECs must provide under § 251. Those changes were announced in 2003, in the Triennial Review Order (TRO),⁷ and in 2005, in the Triennial Review Remand Order (TRRO).⁸ The issues in this case arise as a result of the FCC's de-listing of certain § 251 elements in those orders, which have required ILECs and CLECs to address both the conversion of a product originally provided as a UNE to an alternative service arrangement and the commingling of a UNE with another product.

Conversions

In a section of the TRO addressed to the scope of unbundling obligations, the FCC addressed conversion issues as follows:

We decline the suggestions of several parties to adopt rules establishing specific procedures and processes that incumbent LECs and competitive LECs must follow to convert wholesale services (e.g., special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale services. Because both the incumbent LEC and requesting carriers have an incentive to ensure correct payment for services rendered, and *because both parties are bound by duties to negotiate in good faith, we conclude that these carriers can establish any necessary procedures to perform conversions with minimal guidance on our part.*⁹

. . . Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality. We recognize that conversions may increase the risk of service disruptions to

⁷ Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003), *vacated in part, remanded in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (TRO).

⁸ Order on Remand, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd. 2533 (2005), *aff'd, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (TRRO).

⁹ TRO ¶ 585 (emphasis added) (footnote omitted).

competitive LEC customers because they often require a competitive LEC to groom interexchange traffic off circuits and equipment that are already in use in order to comply with eligibility criteria. Thus, *requesting carriers should establish and abide by any necessary operational procedures to ensure customer service quality is not affected by conversions.*¹⁰

... We recognize ... that once a competitive LEC starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time. We agree that such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service. Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions. Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (e.g., competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or advantage.¹¹

We conclude that conversions should be performed in an expeditious manner in order to minimize the risk of incorrect payments. *We expect carriers to establish any necessary timeframes to perform conversions in their interconnection agreements or other contracts.*¹²

Qwest argues, creatively, that the TRO addressed only the reverse of the situation here—conversions from wholesale non-251 services to Section 251 UNEs—and that the absence of codified regulations governing conversions to non-251 services underscores the fact that state commissions lack authority over this process.¹³ On the contrary, the FCC could not have been more clear in its direction that conversion processes include both the procedures to convert wholesale services to UNEs “and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale services.”¹⁴ The FCC clearly envisioned that the availability of an element as a UNE might change, depending on other

¹⁰ TRO ¶ 586 (emphasis added) (footnotes omitted).

¹¹ TRO ¶ 587 (footnotes omitted).

¹² TRO ¶ 588 (emphasis added).

¹³ Qwest Reply Memorandum at 4-5.

¹⁴ TRO ¶ 585.

circumstances, and that ILECs and CLECs should be prepared to shift their billing for these elements between prices set in interconnection agreements and those contained in long-term commercial contracts.¹⁵ The FCC did not adopt rules for the conversion process because it determined the parties should negotiate these terms in good faith in their interconnection agreements.

Moreover, in the TRRO the FCC reaffirmed the validity of its existing rules governing conversions and commingling in the situation where one element used as part of an EEL (dedicated transport) is no longer subject to unbundling pursuant to section 251(c)(3).¹⁶ It also declined to prohibit conversions entirely, as requested by Bell Operating Companies (including Qwest), in part because of the difficulty CLECs have in purchasing circuits as UNEs:

For example, competitive LECs demonstrate that they often must purchase special access circuits because they encountered difficulties in purchasing the circuits as UNEs. In those cases, the competitive LECs accept special access pricing in order to provide prompt service to their customers, then convert those circuits to UNEs as soon as possible. Competitive LECs also explain that they may purchase special access services as part of a broader contract, which enables them to avoid having to coordinate connectivity through the access service request and local service request processes. But that option is available only because the availability of UNEs gives the competitive LECs leverage to negotiate lower prices for tariffed services.¹⁷

The Administrative Law Judge has concluded, based on the provisions of the TRO and the TRRO, that the FCC has expressly directed the negotiation of rates, terms, and conditions relating to conversion processes in interconnection agreements, and consequently the Commission has legal authority under § 252 to address these issues in this docket.

Commingling

At one point in time, the FCC had restricted the obligation of an ILEC to "commingle" UNEs and combinations of UNEs with tariffed services; in the TRO, the FCC eliminated this restriction. The TRO provides, in relevant part:

We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (e.g., switched and special access services offered pursuant to tariff), and to *require incumbent LECs to perform the necessary functions to effectuate such commingling upon request.*

¹⁵ TRO ¶ 587.

¹⁶ TRRO ¶ 142 n. 398 (citing TRO ¶¶ 585-89 (conversions) and ¶¶ 579-84 (commingling)).

¹⁷ TRRO ¶ 231.

By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services.¹⁸

We conclude that the Act does not prohibit the commingling of UNEs and wholesale services and that section 251(c)(3) of the Act grants authority for the Commission to adopt rules to permit the commingling of UNEs and combinations of UNEs with wholesale services, including interstate access services. An incumbent LEC's wholesale services constitute one technically feasible method to provide nondiscriminatory access to UNEs and UNE combinations. . . . For these reasons, we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.¹⁹

Finally, the FCC addressed arguments advanced by incumbent LECs that commingling should be prohibited because of the billing and operational issues involved in commingling a UNE with an interstate access service. It concluded that these issues could be addressed "through the same process that applies for other changes in our unbundling requirements adopted herein, i.e., through change of law provisions in interconnection agreements."²⁰ As noted above, the FCC reaffirmed the validity of these commingling rules in the TRRO.²¹

Qwest's argument that the Commission lacks authority is based more on semantics than on any substantive analysis of a state commission's legal authority to address the terms and conditions under which an ILEC is obligated to provide commingled facilities. It does not appear to the ALJ that Integra has advocated contract language that would impermissibly require Qwest to provide transport or any other non-251 facility as a UNE or at a TELRIC rate.²² What

¹⁸ TRO ¶ 579 (emphasis added).

¹⁹ TRO ¶ 581 (footnotes omitted).

²⁰ TRO ¶ 583.

²¹ TRRO ¶142 n. 398.

²² See Integra Memorandum at 6 (UNE component of a commingled EEL is priced at TELRIC; the non-UNE may be priced at a tariffed or other non-UNE rate). See also *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Arbitrator's Report at PP 46, 48 (Dec. 15, 2004), adopted by Minnesota Public Utilities Commission, Docket No. P-5692, 421/IC-04-549 (Mar. 14, 2005) (declining to characterize non-251 elements and services as UNEs or to require their provision at TELRIC rates); *Qwest Corp. v. Arizona Corporation Commission*, 496 F.Supp.2d 1069 (D. Ariz. 2007) (state commission cannot require unbundling of non-251 elements or require their provision at TELRIC rates as a matter of state law); *Bellsouth Telecommunications, Inc., v. Kentucky Public Service Commission*, 2007 WL 2736544 (E.D. Ky.) (state commission cannot arbitrate rates for switching, a non-251 element).

Integra has disputed are the duplicative operational processes involved in ordering, provisioning, billing, and repairing UNEs separately from interstate access services, maintaining these processes constitute an operational barrier to obtaining access to a UNE. The FCC has clearly stated that these are the types of issues to be addressed in interconnection agreements, and the Administrative Law Judge accordingly concludes the Commission has the legal authority under § 252 to resolve issues in this docket relating to the terms and conditions under which Qwest provides commingled elements and services.

Based on the agreement of the parties, the Administrative Law Judge hereby certifies this Recommended Order to the Commission for its consideration and final order pursuant to Minn. R. 1400.7600 A & B before any further proceedings take place in this docket.²³

K.D.S.

²³ Fourth Prehearing Order (June 27, 2008).

STATE OF MINNESOTA)
COUNTY OF RAMSEY)SS

AFFIDAVIT OF SERVICE

I, Margie DeLaHunt, being first duly sworn, deposes and says:

That on the 23rd day of March, 2009 she served the attached

ORDER ADOPTING ADMINISTRATIVE LAW JUDGE'S RECOMMENDED ORDER ON
MOTION FOR SUMMARY DISPOSITION - AMENDED NOTICE AND ORDER FOR
HEARING.

MNPUC Docket Number: P-421/C-07-370 & P-421/C-07-371

XX By depositing in the United States Mail at the City of St. Paul, a true and correct copy thereof, properly enveloped with postage prepaid

XX By personal service

XX By inter-office mail

to all persons at the addresses indicated below or on the attached list:

Commissioners
Carol Casebolt
Peter Brown
Eric Witte
Marcia Johnson
Kate Kahlert
Mark Oberlander
Kevin O'Grady
Ganesh Krishnen
Mary Swoboda
DOC Docketing
AG - PUC
Julia Anderson - OAG
John Lindell - OAG

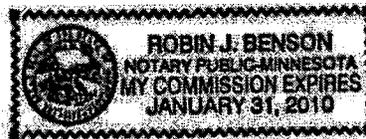
Margie DeLaHunt

Subscribed and sworn to before me,

a notary public, this 23 day of

March, 2009

Robin Benson
Notary Public



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