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IDAHO PUBLIC
UTILITIES COMMISSION



June 15, 2009

Jean D. Jewell
Idaho Public Utilities Commission
472 West Washington Street
Boise, ID 83702

Re: Prehearing Brief in Case No. QWE-T-08-07

Attention Ms. Jewell:

360networks (USA) inc. and Integra Telecom, Inc. hereby submit an original and seven copies of their Prehearing Brief in Case No. QWE-T-08-07.

If you have any questions regarding this submittal, you may contact Michel Singer Nelson at 303-854-5513.

Respectfully,

A handwritten signature in black ink, appearing to read 'C Forst'.

Charles Forst
360networks (USA) inc.

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

RECEIVED

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

2009 JUN 16 AM 9:16
IDAHO PUBLIC
UTILITIES COMMISSION

PREHEARING BRIEF OF 360NETWORKS (USA) INC. AND INTEGRA
TELECOM, INC.

360 Networks (USA) inc. ("360") and Integra Telecom, Inc. ("Integra")
(collectively, the "CLECs"), hereby submit their Prehearing Brief in this proceeding.

I. INTRODUCTION

This case pertains to, whether, and to what extent, unbundled access to dedicated interoffice transport and unbundled loops "UNEs" will be available in specific Idaho wire centers going forward. This case, then, identifies the non-impaired wire centers that will impact all competitive local exchange carriers ("CLECs") and the development of competition, as well as the policy decisions as to how to interpret the *TRO/TRRO* impairment policies and rules on a going forward basis.¹ While the TRRO established the methodology and criteria for determining whether a wire center is non-impaired, its implementation – and the establishment of the list of non-impaired wire centers – has been implemented in state regulatory proceedings, with incumbent local exchange

¹ *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"); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services offering Advanced Telecommunjctions Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16978, 17145 (2003) ("TRO").

carriers (“ILECs”) and requesting carriers oftentimes disagreeing on how the TRRO directed business lines and fiber-based collocators are to be counted.

Once a finding of non-impairment at a wire center is approved by the Commission, CLECs would be forever (or until a change in law) prohibited from purchasing certain UNEs for any “non-impaired” wire centers. It is important to stress that once a wire center is classified as non-impaired, this classification is irreversible.² As such, the Commission, the requesting carriers, and Idaho consumers would be bound by that decision based on the Commission’s designation and review process going forward. Therefore, given the immediate and substantial impact on competition that will result from the Commission’s decisions in this docket, the Commission should take special care to ensure that Qwest’s data, and its assertions related to business line counts and fiber-based collocators are accurate, reasonable and substantiated.

Finally, while the immediate question in this case is whether the two wire centers named in Qwest’s filing are non-impaired with respect to unbundled transport and the one wire center is impaired with regard to unbundled loops, the decisions that the Commission will make in this case will also affect *future* potential designations of wire centers with respect to both unbundled interoffice transport and high-capacity unbundled loops. This consequence follows from the fact that the Federal Communications Commission’s (“FCC”) framework for determining non-impairment for both unbundled interoffice transport and high-capacity unbundled loops is based on the same criteria – i.e., counts of fiber-based collocators and switched business lines.

² CFR §51.319(a)(4)(i), §51.319(a)(5)(i), §51.319(e)(3)(i) and §51.319(e)(3)(ii).

This Commission need only decide whether Qwest has properly supported the classification of the Boise Main and Boise West wire centers. Qwest has requested that with regard to DS1 and DS3 Transport and Dark Fiber Boise Main be classified as Tier 1³ and with regard to DS3 Transport and Dark Fiber, that Boise West be classified is Tier 2.⁴ In addition, Qwest has requested that DS3 loops be classified as non-impaired in the Boise Main wire center.⁵ Qwest is also asking the Commission to adopt certain procedures for determining wire center non-impaired designation – procedures that were contained in a settlement between Qwest and a group of CLECs in several other states.⁶

II. ARGUMENT

Although the unbundling framework is a relatively straightforward process involving counting business lines and fiber-based collocators, disagreements between ILECs and CLECs have often arose related to the ILEC's interpretation of the FCC's framework used to count business lines and fiber-based collocators, and the resulting ILEC proposed classification of the wire centers. Hence, understanding the intent of the FCC's rules and framework will assist the Commission in determining which party's interpretation (and proposed counts of business lines and fiber-based collocators) is correct.

The FCC explained that its intent was to identify geographic markets with sufficient actual or potential competition in high-capacity transport services, or markets

³ See Qwest's Filing for Commission Approval of Non Impaired Wire Center Designations with Supporting Data, dated 6/27/08.

⁴ Id.

⁵ Albersheim Direct, p. 31, lines 11-13.

⁶ "Five State Settlement Agreement," Qwest Exhibit 4.

where competition is sufficient to make facilities-based entry economical. This intent is stated in the following passages from the TRRO:

By using our section 251 unbundling authority in a more targeted manner, this Order imposes unbundling obligations only in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition. This approach satisfies the guidance of courts to weigh the costs of unbundling, and ensures that our rules provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition.⁷

Third, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets.⁸

As described below, the record shows 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 draw inferences, based on competitive deployment in certain markets, regarding the likelihood of competitive entry in other markets exhibiting similar characteristics. We believe it is reasonable to expect that competitive LECs can most economically deploy dedicated transport facilities and high-capacity loops in those geographic markets where revenue opportunities are highest, which is confirmed by the evidence of actual deployment found in the record.⁹

Thus, the purpose of the FCC unbundling framework was to use the data on business lines and fiber-based collocators as evidence about revenue opportunities and the state of competition in a particular wire center. The FCC reasoned that if revenue opportunities are sufficiently high, as evidenced by a large number of business lines and the presence of a certain number of fiber-based collocators, requesting carriers should not

⁷ TRRO, ¶ 2 (emphasis added).

⁸ *Id.*, ¶ 5 (emphasis added).

⁹ *Id.*, ¶ 43 (emphasis added)(footnotes omitted).

be impaired without unbundled access to high capacity transport because competitive facilities-based deployment is likely to be economically feasible.

The FCC's unbundling framework for dedicated transport involves counting two criteria meant to serve as a proxy for measuring the potential level of competition (or availability of non-UNE alternatives) in the particular market in question (in this case, a wire center): (1) business lines, and (2) fiber-based collocators. Relative to determining high capacity unbundled dedicated *transport* (DS1, DS3 and dark fiber dedicated transport), the impairment analysis for each wire center is based on a three (3) tier classification system, which classifies each wire center by Tier based on the number of business lines served by the wire center *or* the number of fiber-based collocators in the wire center, and then determines impairment for dedicated transport based on the tier classification of the wire centers at the endpoints of the transport circuit. With regard to unbundled DS3 loops, a wire center is considered non-impaired if it has 4 or more fiber-based collocators *and* at least 38,000 switched business lines.¹⁰ The actual number of business line counts and fiber-based collocators that must be present in each circumstance is not at issue in this proceeding. Rather, the issue is Qwest's interpretation of the FCC's impairment criteria with respect to business lines¹¹ and fiber-based collocators.¹²

¹⁰ TRRO, Executive Summary, para. 5 and para. 174.

¹¹ "Business line" is defined in 47 CFR §51.5 as follows:

Business line. 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

The FCC's unbundling framework for dedicated transport relies on a wire center tier structure that groups wire centers into Tier 1, Tier 2, and Tier 3 wire centers, according to business line counts or fiber-based collocator counts. Once wire centers are given a tier designation, impairment for dedicated transport will depend on the tier designation of the wire centers on the endpoints of the requested circuit. 47 C.F.R. §51.319(e)(3) defines the wire center tier structure as follows:

Wire center tier structure. For purposes of this section, incumbent LEC wire centers shall be classified into three tiers, defined as follows:

(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 line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.

(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. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.

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."

¹² "Fiber-based collocator" is defined in 47 CFR §51.5 as follows:

Fiber-based collocator. 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.

(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.

The tier classifications for the wire centers on the endpoints of the dedicated transport route¹³ will determine whether the dedicated transport circuit must be unbundled by the ILEC. The specific thresholds for DS1, DS3 and dark fiber transport are summarized as follows:

- DS1 Transport:¹⁴ ILECs must unbundle DS1 transport where the wire centers at either end of the route are non-Tier 1 wire centers.¹⁵ Or, in other words, if either wire center at the end of a requested route is a Tier 2 or Tier 3 wire center, then the ILEC must unbundle DS1 transport.
- DS3 Transport:¹⁶ ILECs must unbundle DS3 transport where a wire center on either end of the requested route is a Tier 3 wire center.¹⁷
- Dark Fiber Transport: As in the case of DS3 Transport, ILECs must unbundle dark fiber dedicated transport where a wire center on either end of the requested route is a Tier 3 wire center.¹⁸

The specific threshold for DS3 Unbundled Loop is summarized as follows:

- DS3 UNE Loop. ILECs must unbundle DS3 Loops unless the wire center has 4 or more fiber based collocators *and* at least 38,000 switched business lines.

¹³ "Route" is defined in 47 CFR 51.319(e) as "a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (e.g., wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (e.g., wire center or switch "X"). Transmission paths between identical end points (e.g., wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any."

¹⁴ 47 C.F.R. §51.319(e)(2)(ii)(B) caps the number of unbundled DS1 dedicated transport circuits on each route at 10.

¹⁵ 47 C.F.R. §51.319(e)(2)(ii)(A).

¹⁶ 47 C.F.R. §51.319(e)(2)(iii)(B) caps the number of unbundled DS3 dedicated transport circuits on each route at 12.

¹⁷ 47 C.F.R. §51.319(e)(2)(iii)(A).

¹⁸ 47 C.F.R. § 51.319(e)(2)(iv)(A).

A. QWEST'S BUSINESS LINE COUNT IMPROPERLY INCLUDES RESIDENTIAL LINES, NON-SWITCHED LINES, AND UNUSED CAPACITY.

The interpretation of the business line rules has played out before various state public utility commissions. While Qwest will be able to cite to several such proceedings that interpreted the business line rules consistent with its position, other proceedings such as in Colorado and North Carolina favored the CLECs' interpretation. It is important to note, however, that while those authorities may be persuasive, they are not binding on the Commission's decision in this case. Rather, only decisions by the United States Supreme Court interpreting federal law are binding on state courts, or in this case, a state administrative agency.¹⁹ Likewise, agencies are not bound by other agencies in their findings and decisions.²⁰ Thus, this Commission has the authority to interpret the federal rules underlying the impairment of wire centers.

As argued below, and consistent with a proper interpretation of the federal impairment rules, the Commission should adjust the business line count to remove residential customers, spare capacity, and non-switched lines.

1. Qwest improperly includes lines used to serve residential customers in its business line counts.

Qwest improperly inflates the line count by ignoring the plain meaning of the FCC definition. Including residential lines within the business line count is improper

¹⁹ *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*, Colorado Public Utilities Commission, 2008 Colo. PUC LEXIS 999 ("Colorado Wire Center Decision") (citing *Brotman v. Lake Creek Ranch, LLP*, 31 P.3d 886, 894 (Colo. 2001)).

²⁰ *Colorado Wire Center Decision*, 2008 PUC LEXIS at *7-8 (citing *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)).

because the purpose of the TRRO's line count measure is to size the business (not residential) market. The concept is clear from the first sentence of the FCC's business line definition, which is 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."²¹

Qwest's methodology isolates the second sentence of the above rule from the rest of the definition to include CLEC *residential* and *non-switched* lines (served via Qwest UNE loops) in the *switched business* line count. As correctly observed by the ALJ in the Colorado Wire Center Case (and ultimately the Colorado Commission), while on the surface the second sentence may suggest counting all UNE loops, a complete reading of this rule indicates the exact opposite. The Colorado Commission explained:

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."... 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

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

of the business line calculation by wire center, is to be modified to exclude residential and non-switched lines.²²

The FCC's rule requires that the business line counts include only lines used to serve business customers that are switched. In contrast, Qwest's business line count methodology includes lines used to service residential customers as well as lines that are not switched. Qwest's claim that a residential or non-switched line should be counted as a switched business line simply does not comport to the FCC's definition. Moreover, Qwest cannot claim that it is unable to differentiate between residential and business lines. The evidence will show that when a CLEC orders a loop from Qwest there is a mandatory field on the Local Service Request ("LSR") where the CLEC indicates whether the loop will be used to serve a business, residence or government customer. Thus, Qwest has the necessary information in its possession to remove residential loops from the switched business line counts.

2. Qwest improperly includes spare capacity and non-switched lines in its business line counts.

Qwest improperly counts all UNE-L at their maximum potential capacity and assumes that the full capacity is dedicated to serve voice switched demand. Therefore, Qwest counts all high-capacity/digital DS1 UNE-L as 24 individual business switched lines. That approach, however, inappropriately counts channels on the high-capacity/digital UNEs that do not provide switched business services – a prerequisite to a *line* being counted as a *business line*. This method inappropriately assumes that every

²² Exhibit 202 to Joint CLEC Testimony, Colorado Decision, p. 3 (footnote referencing the specific paragraph of the ALJ Recommended Decision is omitted). The North Carolina Commission made a similar finding distinguishing residential and business customers. See *In the Matter of Proceedings to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes in Law*, 2006 N.C. PUC LEXIS 732.

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

The lines that go into the business line count must comply with the *entire* definition of business line, which means that these lines must be: (1) used to serve a business customer; *and* (2) used to provide switched services (*i.e.*, voice); *and* to the extent consistent with these requirements, (3) each 64 kbps channel should be evaluated as one line. In addition, as discussed above, whether a line would be counted as a business line should not depend upon whether the customer is served by Qwest or the CLEC.²³ Qwest must use the same methodology for counting CLEC lines as it does in counting its own business lines.

Qwest's application of the FCC definition is based on reading isolated components of the definition of business line in a way that conflicts with other provisions: First, Qwest places great emphasis on the second sentence of the definition which, when read in isolation, states:

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.

²³ 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."

Qwest claims that the sentence permits it to count all UNE-L, without regard to whether the lines satisfy any of the requirements to be considered a “business line.”

Second, Qwest exploits an example in the definition as an unconditional directive that the maximum potential capacity of high-speed digital services *should* be counted, again without regard to whether any of the threshold requirements to be counted as a business line are being satisfied. Importantly, however, there are no absolute instructions in the definition that require that all UNE loops – much less every 64 kbps channel – be counted as a business line, whether or not they otherwise meet the requirements of the definition. As explained above, the definition applies additional requirements to both UNE loop arrangements and Qwest’s retail lines that also must be satisfied before “a line” can be counted as a “business line.” This is true for individual analog lines, as well as each digital line to which Qwest has counted at its maximum, theoretical capacity.

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

...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.”

Importantly, a proper reading of the above instruction does not direct Qwest to count each channel in a high capacity circuit as a “business line.” The critical sentence in the quote cited above is that Qwest “shall account for ISDN and other digital access lines by

counting each 64 kbps-equivalent as one line” (emphasis added). This requirement, however, does nothing more than what it *plainly* states, *i.e.*, that each 64 kbps-equivalent should be considered “one line.” Whether or not these lines should be counted as business lines, however, depends upon whether the remaining requirements of the FCC definition are satisfied.

The fact that the definition provides an example of how the analysis might count a DS1, does not require that Qwest, or the Commission, ignore situations in which a similar DS1 might provide very little switched business service. The FCC was perfectly capable of declaring all high capacity services and circuits as business lines and it could have easily simplified the definition for such a mandate. However, the FCC directed that each 64-kbps equivalent be considered one line, and then directed that other criteria – most specifically, that the line also be used to provide switched access line service to a business customer (*i.e.*, voice service) – be used to determine whether each “line” should be considered a business line.

The *TRO* originally instituted an unbundling regime wherein different unbundling obligations were imposed on the ILEC depending on whether the UNE (*i.e.*, unbundled local switching) was used by the requesting carrier to serve the mass market versus the enterprise market. In doing so, the FCC entrusted the state commissions with establishing a “DS0 crossover” – or a certain number of DS0 lines that serves as distinguishing mass market customers (*i.e.*, below this crossover is the mass market) from enterprise customers (*i.e.*, above the crossover is the enterprise market). As the FCC explained

At some point, [mass market] customers taking a sufficient number of multiple DS0 loops could be served in a manner similar to that described above for enterprise customers—that is, voice services provided over one or several DS1s, including the same variety and quality of services and customer care that enterprise customers receive. Therefore, as part of the economic and operational analysis discussed below, a state must determine the appropriate cut-off for multi-line DS0 customers as part of its more granular review. This cross over point may be the point where it makes economic sense for a multi-line customer to be served via a DS1 loop.²⁴

Not surprisingly, ILECs argued for relatively low cross over points when this issue was addressed in state regulatory cases designed to implement the FCC's (now defunct) rules. For example, in the California PUC's case implementing the *TRO* rules, R.95-04-043/I.95-04-044, AT&T argued for a low crossover point to distinguish the mass market from the enterprise market. AT&T's witness stated:

SBC California proposes a DS0 cut-off of 4 DS0s, meaning that a customer with 4 or more DS0s at a location would be in the enterprise market, while a customer with 3 or fewer DS0s would be in the mass-market."²⁵

AT&T also criticized the higher crossover points proposed by CLECs. AT&T based its proposed crossover point largely on evidence showing the revenue opportunities available to CLECs providing voice and data services over a high capacity DS1 line through integrated access products. AT&T testified that under the CLECs' DS1-based integrated access products "bandwidth can then be divided in 64 Kbps segments to provide up to 24 voice lines, or, if the end user only needs a few voice lines, the remaining bandwidth can be used for data services."²⁶ AT&T further provided numerous

²⁴ *TRO* ¶ 497 (emphasis added).

²⁵ Reply Testimony of Curtis L. Hopfinger on behalf of SBC California Regarding Mass Market Switching, CPUC R.95-04-043/I.95-04-044 at 8 (January 16, 2004) ("Hopfinger Reply").

²⁶ *Id.* (citing Hopfinger Direct at 29-30).

examples of the integrated access retail products CLECs were providing over DS1 UNE-L.

Thus, ILECs understand that CLECs do not use high capacity UNE-L at their maximum potential capacity for purposes of providing exclusively switched business services. First, without exception, the examples of CLECs providing service over DS1 loops shows that they provide sophisticated data services (*e.g.*, high speed internet access, web hosting, IP address, DNS, email services) over these loops. These services, while utilizing bandwidth (or 64 kbps channels) on the CLEC's DS1 loop, are not business services, and should therefore not be included in the count of business lines.

Complying with the FCC's full and complete definition of "business line" is not optional, and that definition makes clear that *only* switched business lines are to be counted – not the maximum potential capacity which would include empty circuits and data circuits. Hence, even if Qwest does not know the utilization rate of CLEC UNE-L for switched business lines, Qwest cannot simply toss out part of the FCC's definition and count all UNE-Ls at their maximum potential capacity regardless of whether they meet the other applicable criteria.

The Commission should adopt a good faith estimate, or proxy, to remove UNE loop capacity that is empty capacity or capacity used for data services. In other words, for each DS1 UNE-L loop or EEL, Qwest should be required to count no more than 12 business access lines (50% of its total 64 kbps equivalency). This proposal strikes a fair balance between the FCC's goal to accurately count multiple business lines provided over digital/high capacity loops and Qwest's attempt to inappropriately count each UNE-L to their maximum potential capacity.

3. Integra cannot verify Qwest's loop counts in Boise Main and Boise West.

The evidence will show that Integra, which attempted to validate Qwest's CLEC specific loop counts, was ultimately unable to do so.²⁷ Attempting to validate this information is a time consuming, labor intensive endeavor. Business data storage practices were generally developed for different purposes and not with the non-impairment designations in mind. Integra's internal data is typically stored by customer, not by the Qwest loop facility upon which that customer's service rides and contains information regarding the collocation in which the customer's service is connected, but not the Qwest wire center in which the customer actually resides.

Qwest's loop count data for Integra in the Boise Main and Boise West wire centers was difficult to validate. For example, Qwest shows a significant number of EEL circuits associated with these wire centers. However, Integra was unable to find a single EEL circuit associated with a customer that resides in those wire centers. In addition, Integra identified significantly more DS1 loop and 2-wire loop circuits than what Qwest counted for Integra in these wire centers. The Joint CLEC testimony contains a Table showing the percentage of Qwest's Integra Loop counts validated by Integra for both 2007 and 2008. For Boise Main, Integra was only able to verify 43.2% (2007) and 51.7% (2008) of the line counts that Qwest has used to support its petition. For Boise West, Integra was only able to verify 28.2% (2007) and 71.2% (2008). The Commission should not presume that Qwest's numbers are correct when the CLEC data on which it relies cannot be validated by the CLEC.

²⁷ See Joint CLEC Testimony of D. Denney at pages 33-35.

4. Qwest should use the most recent data available when making a new non-impairment claim.

Despite Qwest's stated desire to use the provisions of the *Five-State Settlement Agreement* in Idaho, Qwest ignored the provision of the Agreement that would have required Qwest to use the most recent line count data available when making a new non-impairment claim. That *Five-State Settlement Agreement* provision states, "Qwest may request addition of Non-Impaired Wire Centers based in whole or part upon line counts at any time up to July 1 of each year, based on prior year line count data."²⁸ Qwest did not request non-impaired status for DS3 loops in Boise Main until April 17, 2009. However, Qwest relied upon line count data from December 2007 rather than December 2008.

The issue of the appropriate time period to review both the switched business line count and the fiber-based collocation data is crucial as updates are made to Qwest's Wire Center List. This Commission should make clear that, as Qwest makes updates to its list, Qwest should use data that is contemporaneous with Qwest's claim for "non-impaired" status. First, Qwest should not be allowed to go fishing back through time in attempts to classify wire centers as non-impaired that do not currently meet the non-impairment status. As described above, it is difficult for CLECs to validate Qwest's line count data. It becomes exponentially more difficult the older the data becomes. Second, Qwest should not be allowed to select one set of data from one time period and another set of data from a different time period and then yet another time period to actually make its claim for non-impairment. For example, suppose there exists a wire center today that has four fiber-based collocators, but fewer than 60,000 lines. Suppose that the wire center surpasses 60,000 lines in the future, but by this time there are only three fiber-based

²⁸ *Five State Settlement Agreement*, Qwest Exhibit 4, Section VI.A.2.

collocators. Qwest should not be allowed to choose line counts from the present and fiber-based collocators from the past. The determination of “non-impaired” status should be made at the point in time that Qwest is claiming an office is “non-impaired,” not from a combination of counts from different time periods that best advantages Qwest.

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

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

Change 1: Remove residential loops from the CLEC loop counts

Change 2: Remove disputed circuit counts from the CLEC loop counts. This can be accomplished by applying the Integra disputed circuit percent (one minus the validated percent) to all CLEC loop counts.²⁹

²⁹ 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.

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

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

B. QWEST IMPROPERLY COUNTS THE NUMBER OF FIBER-BASED COLLOCATORS.

The number of fiber-based collocators in each Qwest wire center plays a crucial role in determining a wire center's "non-impairment" status. If a wire center has three fiber-based collocators, then that wire center is automatically classified as Tier 2, and the presence of four fiber-based collocators automatically classifies a wire center as Tier 1.³⁰ 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.³¹ Both the Tier 1 status for Boise Main and the Tier 2 status for Boise West currently appear to be supported by the number of fiber-based collocations in those offices.

Based upon a review of the fiber-based collocation data provided by Qwest, it currently appears that Qwest has at least four fiber-based collocators in Boise Main and at

³⁰ TRRO at ¶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. 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.

³¹ TRRO at ¶146.

least three in Boise West, which would support Qwest's request for Tier 1 and Tier 2 status transport respectively.

1. Qwest inadequately verifies the status of fiber-based collocators.

Nonetheless, the Joint CLECs have a number of concerns relating to Qwest's process for designating wire centers as non-impaired under the TRO/TRRO criteria. First, the evidence will show that Qwest sent a letter to carriers that Qwest stated it believed were fiber-based collocators and asked the carriers to verify whether or not the carrier is a fiber-based collocator.³² Qwest counted a carrier as a fiber-based collocator even if the carrier failed to confirm³³ this status. Qwest provides non-confidential information that only one of the six carriers responded to Qwest's letter. Though Ms. Torrence indicates that Qwest regrets that "CLECs appear reluctant to respond," it shows no indication of any action taken by Qwest to obtain a response. It is also unclear how Qwest chooses the company representative to whom to send its letter. The letter serves little purpose if it is not reaching the intended individuals at the CLECs who could provide a substantive response to Qwest's claims.

Second, the evidence will show that Qwest attempted a field verification of the fiber-based collocations in question. To do this, Qwest asked its Central Office Technicians and State Interconnection Manager to verify the fiber-based collocations.³⁴

³² *Torrence Direct*, p. 18, lines 6 - 11.

³³ *Torrence Direct*, p. 18, lines 13 - 14.

³⁴ *Torrence Direct* p. 17, lines 10-16.

The letter Qwest sent was written in a way that encouraged Qwest employees to err on the side of finding fiber-based collocations.³⁵

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

Another example that casts doubt on Qwest's field verifications occurred in Minnesota during the first round of requests for non-impaired status. The evidence will show that at the time Qwest claimed its initial list of fiber-based collocators represented carriers "operating from December 2003 through February 2005,"³⁶ but an example involving Eschelon proves that this was not the case. For two wire centers in Minnesota, Qwest counted Eschelon as a fiber-based collocator even though Eschelon did not have power connected to its equipment on March 11, 2005. Eschelon was in the process of establishing the collocations as fiber-based collocations but the collocation sites were not fiber-based collocations "from December 2003 through February 2005" nor was Eschelon a fiber-based collocator on March 11, 2005. Despite communicating this fact to Qwest, Qwest continued to count Eschelon as a fiber-based collocator.

³⁵ 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.

³⁶ Exhibit 203, Qwest Responses to Joint CLEC Data Requests in Arizona, JCDR 01-032.

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

In some states, Qwest clarified that it did not count any CLEC-to-CLEC connections as part of its fiber-based collocations.³⁷ However, contrary to the *TRRO*, Qwest counted such an arrangement in a wire center in Colorado. When one carrier simply relies upon the fiber of another fiber-based collocator, it is inappropriate to count both carriers as fiber-based collocators. Counting both carriers amounts to double counting. Qwest should expressly confirm that it did not count carriers involved in a CLEC-to-CLEC connection and, in any event, this issue could play a role in the future as Qwest updates the list.

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

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

³⁷ Exhibit 203, Qwest Responses to Joint CLEC Data Requests in Arizona, JCDR 01-033.

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.

Paragraphs 93 through 102 of the *TRRO* explain the FCC's rationale for this definition. Paragraph 95 states, "Our fiber-based collocation test captures intermodal competitors' transport facilities..." Paragraph 101 states, "Additionally, we find that fiber-based collocation provides a reasonable proxy for where significant revenue opportunities exist for competitive LECs..." In paragraph 102, the FCC first defines fiber-based collocators. Footnote 292 to this paragraph clarifies the conditions that must exist in order for a carrier to be considered a fiber-based collocator: "We find that when a company has collocation facilities connected to fiber transmission facilities obtained on an infeasible right of use (IRU) basis from another carrier, including the incumbent LEC, these facilities shall be counted for purposes of this analysis and shall be treated as non-incumbent LEC fiber facilities." A CLEC-to-CLEC connection is not an IRU and thus does not fall within the FCC's definition of a fiber-based collocator, and should not be counted as separate fiber-based collocations.

2. The Five-State Settlement Agreement's provision for "express fiber" does not support a finding that power is not required to establish the presence of a fiber-based collocator for purposes of the FCC's impairment analysis.

In Section C of this brief, the Joint CLECs request that the Commission reject Qwest's use of the Five-State Settlement Agreement as evidence to support the resolution of any issue in this docket. If, however, the Commission reaches the issue of the *Five-State Settlement Agreement* over CLEC objection, the *Five-State Settlement Agreement* contains a provision regarding Express Fiber that is not in the FCC rules and which should be removed. This provision reads, "Express fiber will be counted as a functional

fiber facility for purposes of identifying a fiber-based collocator, if it meets the definition of fiber-based collocator in 47 C.F.R. §51.5 (as reflected in paragraph B(1) and subparts above). The Joint CLECs agree not to raise the lack of Qwest provided power when there is traffic over the express fiber as the sole basis to dispute whether express fiber can be counted as a functional fiber facility for purposes of identifying a fiber-based collocator. For the purposes of this Settlement Agreement, ‘express fiber’ means a CLEC-owned fiber placed to the collocation by Qwest that terminates at CLEC-owned equipment in a collocation and draws power from a remote location.”³⁸ These statements in the Settlement Agreement do not clarify the application of the fiber-based collocation rule. Nor does Qwest’s testimony provide any support for this provision, other than the fact that it is in the *Five-State Settlement Agreement* (i.e., an impermissible use of the agreement as evidence and precedent). This provision should be not be adopted here in Idaho.

C. THE SETTLEMENT REACHED BY QWEST IN OTHER STATES IS OF NO RELEVANCE IN THIS PROCEEDING.

With respect to several issues in this proceeding, Qwest suggests that rather than look at the evidence specific to this case, or to the unique facts in Idaho, that the Commission should instead simply use the settlement attached as to its testimony as a “template.” It is clear, however, from the language of the settlement itself, from the law, and from the facts surrounding the settlement that it not only should not be considered a “template,” it should be ignored in this proceeding.

Under Rule 408 of the Idaho Rules of Evidence, evidence of settlement negotiations or results is typically inadmissible. The rule flatly prohibits the use of

³⁸ *Five State Settlement Agreement*, Qwest Exhibit 4, Section V.B.3.

settlement negotiations to prove, “liability for, invalidity of, or amount of” a claim.³⁹ This limitation has long existed in Idaho law.⁴⁰ It is intended to promote settlements, a public policy endorsed by the Idaho Supreme Court.⁴¹ Here, in the unique situation where the settlement has been made public in several other states a true evidentiary exclusion may make little sense. The policy behind Rule 408 nonetheless remains quite valid: the settlement terms involve unique trade-offs for the purpose of ending the dispute. It is not an adjudication of what represents the right outcome, either for the parties or under the law, and it is not applicable without the entire package of compromises that were involved. Rather than settle, the CLECs in Idaho have chosen to contest Qwest’s request for non-impairment findings and conversion charges as improper and harmful to competition. A settlement – that did not occur in Idaho, and did not include all of the CLECs in the present case – cannot be relevant to the right outcome in a fully litigated case. The text of the settlement itself could not be clearer on this point.

Section VII.B. expressly provides that

No precedent is established by this Settlement Agreement, whether or not approved by Commissions. This Settlement Agreement is made only for settlement purposes and does not represent that any Party would take if this matter is not resolved by agreement. This Settlement Agreement may not be used as evidence or for impeachment in any future proceeding before a Commission or any other administrative or judicial body. . .

Qwest is, in fact, in violation of its own agreement by Qwest’s use of it in this docket. It is also clear from the Settlement Agreement that it is a compromise that may not even comport with the law – that is, the result may not be lawful without a mutual agreement among the parties. The initial sentence of Section III states that the ultimate results

³⁹ Rule 408, Idaho Rules of Evidence.

⁴⁰ See *Whitney v. Cleveland*, 13 Idaho 558, 91 P. 176 (1907).

⁴¹ See *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986).

agreed to are “notwithstanding anything that may be to the contrary in the Definitions set forth in Section I and the Methodology set forth in Section V” – sections that both incorporate many of the concepts from the FCC rules. A good example is the design change charge, which is purely a negotiated figure in the settlement agreement. No witness has claimed that is a cost-based rate, or that it has any rational basis at all. Yet, Qwest suggests the Commission should simply adopt the “settlement rate” for no other reason than that it is in the settlement. Because the settlement cannot, by its own terms, be substantial evidence, if that is all the support Qwest has for its proposed charge, adopting Qwest’s proposal would violate Rule 408.

Not only does Qwest inappropriately present the settlement as evidence, Qwest compounds the error by misrepresenting the Settlement Agreement. Moreover, it is not as though the settlement has found universal support: even with the parties in agreement, the Colorado Commission rejected the settlement. The settlement itself proves nothing except that in some other states certain parties decided that a compromise to avoid litigation made more sense than the costs of litigation. CLECs in Idaho made different choices and those choices should be respected. This case will generate its own record and its own evidence. If Qwest fails to meet its evidentiary burden without improper reliance on the Settlement Agreement, then Qwest should not prevail. The settlement -- by its own terms, by Idaho law, and by a common sense observation of the fact that the circumstances and trade-offs were different than they are in this contested case – should be disregarded as irrelevant to this proceeding.

D. THE COMMISSION SHOULD REJECT QWEST’S PROCESSES FOR UNE CONVERSIONS.

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

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

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

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

1. The Commission should adopt processes that allow conversions to occur seamlessly, reliably, efficiently and cost effectively.

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

The FCC found that "as contemplated in the Act, individual carriers will have the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new contract language arising from differing interpretations of our rules."⁴² Similarly, Qwest recently challenged the Washington Utilities and Transportation Commission ("WUTC") decision in the Eschelon/Qwest arbitration⁴³ regarding this very issue, UNE Conversions. The WUTC found,

⁴² *TRO*, ¶ 7.

⁴³ 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, see Exhibit 204.

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.

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.⁴⁴

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

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 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.

...

The Commission has carefully examined the Administrative Law Judge's recommended order and the record on which it is based. Her recommended order is

⁴⁴ Exhibit 204, WUTC Order No. 19, Order on Reconsideration in the Eschelon/Qwest Arbitration, January 30, 2009, ¶¶ 20 – 21.

closely reasoned in its analysis and compelling in its conclusions; the Commission will accept and adopt it.⁴⁵

When it has been determined that a UNE facility needs to be converted to an analogous or alternative service arrangement, CLEC and its End User Customer should continue to use the same physical facility.⁴⁶ Therefore, the change required to effectuate the FCC's regulatory requirements can be accomplished with a record-only change (*i.e.*, changing the price of the UNE facility being converted to a non-UNE).

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

⁴⁵ 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. See Exhibit 205.

⁴⁶ Ms. Hunnicutt apparently agrees that the conversion process should be transparent to the customer. See Hunnicutt Direct, p. 17, lines 1-5.

The FCC addressed the issue of conversions in the *TRO*⁴⁷ and found that conversions should be seamless from the end user's perspective, and should involve only billing changes from Qwest's perspective. At paragraph 586 of the *TRO*, the FCC discussed the seamlessness of conversions:

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.

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

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

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

588. 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. We decline to adopt ALTS's suggestion to require the completion of all necessary billing changes within ten days of a request to perform a conversion because such time frames are better established through negotiations between incumbent LECs and requesting carriers. **We recognize, however, that converting between wholesale services and UNEs (or UNE combinations) is largely a billing function. We therefore expect carriers to establish appropriate mechanisms to remit the correct payment after the conversion request**, such as providing that any pricing changes start the next billing cycle following the conversion request.

⁴⁷ The *TRO* addressed conversions from UNEs to wholesale services and from wholesale services to UNEs.

It is clear from the language above that the FCC's concern was directed at ensuring proper payment for the facility, depending on whether it is a Section 251 UNE or a wholesale service (e.g., access product), and did not envision work or physical changes on the ILEC's part leading to the potential for customer disruption.⁴⁸

A circuit ID is just that, a number or code that identifies a specific circuit, generally by defining its two end points – referred to as the “A” and “Z” location. Both CLEC and Qwest use this circuit ID throughout their operational support systems to identify that circuit for numerous activities including billing and repair matters. In the vast majority of circumstances in which CLECs will be required to convert an existing circuit from a UNE to an alternative service arrangement, the physical facility need not (and should not) change. As such, the circuit ID need not (and should not) change either. This is important from Integra's perspective because Integra specifically tracks that particular facility and the customer it serves via the circuit ID. Numerous Integra systems rely on that circuit ID in providing ongoing billing and customer service to the customer. To the extent Qwest is allowed to (a) unnecessarily change the underlying facility simply to effectuate what should be accomplished by a billing change and then (b) assign a new circuit ID to the same arrangement, Integra's systems will be substantially, adversely, and unnecessarily affected. This will be accompanied by notable cost and inconvenience. Likewise, unnecessarily re-arranging facilities puts the customer

⁴⁸ 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.

at risk of losing service – a customer who never asked to be converted and should not even realize that it happened.

Changing the circuit ID for a circuit that is already in place and working well for a customer in connection with “converting” the circuit from a UNE to an alternative arrangement, significantly increases the risk of customer disruption. For instance, Qwest processes circuit ID changes using “disconnect” and “new” service orders. A simple typing error in an order could send the order to Qwest facilities assignment with a “disconnect” on the order, and the customer will be erroneously disconnected and put out of service. In addition, if records are not correctly and timely updated to show new circuit IDs in either Qwest or CLEC systems, problems are likely to arise in the areas of maintenance and repair. For example, if six months after the conversion, the end user notifies the CLEC that its circuit is in need of repair, but the circuit ID is incorrectly stored in either the CLEC or Qwest systems as a result of an unnecessary physical conversion, it is likely that the CLEC and Qwest will be unable to effectively open a trouble-ticket. As a result, the repair function will be delayed and is likely to require substantial additional resources to resolve, as compared to a normal repair ticket. All of this can be avoided by making sure that Qwest does not change circuit IDs for conversions. When Qwest first converted special access circuits to UNEs, the original circuit IDs did not change. To date Qwest has been unable to explain why the circuit ID must be changed in the current situation when no such change was required in previous conversions.

Qwest contends that 47 C.F.R. § 32.12(b) and (c) requires Qwest to change the circuit identifier.⁴⁹ Ms. Hunnicutt opines that “[i]n order to sufficiently maintain its subsidiary records to support its accounting for UNE services versus its Private Line services, Qwest must maintain accurate circuit IDs that properly track circuits separately.”⁵⁰

However, the FCC provisions cited only require Qwest to maintain orderly records with sufficient detail. The FCC does not prescribe how Qwest is to use circuit identifiers to maintain orderly records. Hunnicutt’s conclusory statement that accurate accounting and reporting requires changing circuit identifiers begs the question of whether changing the circuit identifier is necessary. Presumably Qwest is able to maintain orderly records for its QPP products without changing the circuit identifier of the underlying line. As previously stated, prior to April 2005, Qwest did not require a change to the circuit IDs when a CLEC requested a conversion from Private Line/Special Access to an EEL. When Qwest implemented its new process to change the circuit ID, CLECs were given the opportunity to opt out of the changes to their embedded base of circuits.⁵¹ When given this opportunity all CLECs chose to opt out of this change in circuit ID,⁵² because no CLEC wants to put its end user customers at risk, especially when there is no change in the functionality of the circuit.

⁴⁹ Hunnicutt Direct, p. 16, lines 3-5.

⁵⁰ Hunnicutt Direct, p. 16, lines 22-25.

⁵¹ See Exhibit 203, Qwest Response to Joint CLEC Data Request 01-022 in Arizona Wire Center Proceeding.

⁵² See Exhibit 203, Qwest Response to Joint CLEC Data Request 01-023 in Arizona Wire Center Proceeding.

Conversions only apply to the facilities used by CLECs, and not facilities used by Qwest, and therefore, Qwest's retail customers would face none of the risks that are inherent in Qwest's proposal to change circuit IDs during conversions. The FCC recognized this very point when addressing conversion charges in paragraph 587 of the TRO:

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.

The FCC was speaking to conversion charges that ILECs may attempt to assess, but the same reasoning holds true with respect to circuit ID changes. Qwest is never required to perform a conversion in order to continue serving its own customers, and therefore, Qwest's proposal to change circuit IDs for conversions to CLEC circuits: increases the risk for CLEC customer (not Qwest customer) disruption; undermines the FCC's requirements for seamless conversions; and fails to comply with Qwest's obligation to provide access to UNEs on just, reasonable, and nondiscriminatory rates, terms and conditions.

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

- 2. The 90-day transition period to convert from UNEs to an alternative facility is not sufficient.**

Until the Commission issues its order, the non-impairment designation of a wire center and effective date can not be known with certainty. It would be inefficient and potentially costly for CLECs to begin transition plans for wire centers that may not end up being classified as non-impaired. Once a designation has been ordered, then impacted circuits must be identified. The task of identifying impacted circuits can be difficult and time consuming for both Qwest and CLECs.⁵³ For example, in Arizona, on multiple occasions, Qwest sent Integra a list of what it claimed were non-impaired circuits that contained hundreds of errors.

Once circuits are identified, the CLEC needs to put together a plan for transitioning away from UNEs that are no longer available. This may involve a transition of converting circuits to an alternative service or product offered by Qwest. When placing a large number of orders involving Qwest circuits, CLECs coordinate the project with Qwest. Given resource availability and the type of conversion, there may be limits to the number of circuits that are processed in a given day. Typically, in Integra's experience, no more than 20 circuits can be converted in a given day. Both CLEC and Qwest resource limitations can delay the time that it takes to complete a conversion.

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

⁵³ See the discussion above regarding difficulties in validating Qwest's non-impaired circuit list.

The CLEC may determine that installation of a new collocation is warranted to deal with impacted circuits. A new collocation can eliminate the need for EEL transport. Qwest takes up to 125 days to install a new collocation for a CLEC.⁵⁴ Collocations do not come with working equipment. In addition to waiting for Qwest to install the collocation, the CLEC needs to purchase, install and test equipment that will be put into the collocation to serve customers. Once the new collocation is working with CLEC installed equipment, the CLEC can start placing orders to convert circuits to use the new collocation space.

For the reasons outlined above, for single wire centers, this Commission should establish a transition period of a year, or at least six months as was used by the FCC in the Omaha Forbearance Order.⁵⁵ When multiple wire centers are involved (impacting multiple high capacity transport routes or high capacity loop circuits in multiple offices), a one year transition period, as was used by the FCC in the *TRRO*⁵⁶ would be more practical.

3. Qwest should not charge CLECs to convert UNEs to higher priced alternative facilities sold by Qwest.

Qwest's petition in this case seeks to invoke a significant benefit for Qwest: further deregulation of two wire centers in Idaho. Such a deregulation removes certain

⁵⁴ See Qwest's Service Interval Guide, p. 43

(http://www.qwest.com/wholesale/downloads/2009/090413/InterconnSIG_PV95.doc).

⁵⁵ Omaha Forbearance Order (Memorandum Opinion and Order FCC 05-170, WC Docket No. 04-233, September 26, 2005), ¶ 74.

⁵⁶ *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.

protections and rights afforded to CLECs under the Act. Qwest now seeks to add insult to that injury by charging CLECs a fee for losing those protections.

Qwest has failed, however, to provide any substantial evidence in support of its fee. Nowhere does a single Qwest witness provide any support for the \$25 per circuit charge other than to point to a tariffed rate for a different product, the design change charge. Any rates established before the Commission must be just and reasonable and clearly there has not been such a demonstration of service costs. There cannot be an assumption that Qwest has met, or even proffered, cost analyses it alleges competitors must pay. Further, this Commission should not be expected to guess about such a significant impact effecting customers, simply because Qwest asserts there is was a settlement in some other jurisdiction. This Commission should not accept Qwest unsupported assertions which are not tied to the facts and circumstances in Idaho.

Qwest is clearly the cost-causer for the conversion of Qwest's circuits. Qwest has asked for a finding that certain wire-centers are non-impaired. Such a ruling would permit Qwest to stop offering certain facilities as UNEs, but it would not require Qwest to do so or to make any other changes to pricing or availability to CLECs. The "conversion" is entirely internal to Qwest – it is a change from one billing system to another. The FCC has already warned against "wasteful and unnecessary charges" assessed by the ILECs as competition develops. Similarly, the Colorado Commission found that Qwest was the cost-causer of any such charges and that they should not be assessed on CLECs.⁵⁷

Particularly in light of Qwest's failure to provide substantial evidence for any particular rate (much less \$25 per conversion), and because the charge is optional for

⁵⁷ See Exhibit 202.

Qwest, this charge – a pure windfall for Qwest, on top of the benefits it would already derive from the deregulation -- falls squarely within the admonition of the Eighth Circuit Court of Appeals when it provided guidance on how utility commissions should interpret the Act:

It is undisputed that Congress passed the Act with the intention of eliminating monopolies and fostering competition. . . . this general intent should guide our consideration of competing interpretations of the Act. *Such guidance suggests that we should be wary of interpretations that simultaneously expand costs for competitors (such as a requirement for direct connections) and limit burdens on incumbents (such as a limitation of dialing parity to local exchange boundaries). If a cost is imposed on a competitor, it becomes a barrier to entry and rewards the company who previously benefited from monopoly protection.*⁵⁸

The conversion charge Qwest is proposing is expressly precluded by this guidance: it expands costs for competitors to the benefit of the incumbent. The Commission should adopt this guidance, and as Qwest has presented no compelling case to the contrary, should find that no conversion charge is appropriate on this record.

The California Public Utilities Commission found many of the concerns mentioned sufficient to prohibit the ILEC from assessing charges for converting UNE circuits to special access. The California Commission explained:

We concur with the FCC's finding in ¶ 587 of the *TRO* . . . that because ILECs are never required to perform conversions in order to continue serving their own customers, such charges are inconsistent with Section 202 of the Act, which prohibits carriers from subjecting any person or class of persons to any undue or unreasonable prejudice or disadvantage. In the following paragraph, the FCC also reiterates that the conversions between wholesale services and UNEs are 'largely a billing function.' Given the FCC's finding cited above, it is inappropriate to charge a nonrecurring charge for record changes. Therefore, **we conclude**

⁵⁸ *WWC License v Boyle*, 459 F. 3d 880, 891 (8th Cir. 2006) (emphasis added).

that no charges are warranted for conversions and transitions that to not involve physical work⁵⁹

The Colorado Commission also found, citing the ALJ's conclusions below, that Qwest cannot charge for conversion of UNEs to private lines.⁶⁰

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.

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.⁶¹

D. MISCELLANEOUS ISSUES RELATING TO PROCESSES FOR FUTURE NON-IMPAIRMENT DESIGNATIONS.

⁵⁹ *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).

⁶⁰ *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." Exhibit 202.

⁶¹ Colorado ALJ Order in TRRO Docket 06M-080T, Decision No. R08-0164, ¶¶ 116-117 Exhibit 202.

1. Qwest should provide information to CLECs about wire centers that are near non-impairment status.

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

Qwest has historically provided CLECs with notice and the opportunity to dispute, when Qwest plans to request a change to a wire center non-impairment designation based upon a CLEC has a fiber-based collocation.⁶² The Joint CLECs propose steps to be included in Qwest's process to ensure that the notice and opportunity to dispute serves its purpose. First, Qwest should ensure that the proper individuals at a CLEC are informed of Qwest's reliance on the CLEC's collocation. This can be done by sending the notice to at least those persons identified by a CLEC to receive interconnection agreement notices. Second, Qwest should not only inform CLECs of its reliance upon their collocation but also when it intends to rely upon CLEC switched business lines as part of a request for a change in non-impairment designation. In so

⁶² 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).

doing, Qwest should include the specific line counts on which it relies. This will help ensure that CLECs are informed of Qwest's reliance on their data and increase the likelihood that a CLEC will have the opportunity to review and validate its own data upon which Qwest relies.

The Colorado Commission upheld its ALJ finding that Qwest should provide notice to CLECs as wire centers near a non-impairment threshold.⁶³ The ALJ in Colorado found,

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.⁶⁴

2. Qwest should provide notice to CLECs that it plans to rely on that CLEC's data.

Providing CLECs with an opportunity to review, and either confirm or dispute their status as a fiber-based collocater is crucial in the process for determining future non-impaired wire center designations. Based on responses provided by CLECs in other states, Qwest has revised its fiber-based collocation count.⁶⁵ Providing a CLEC with notice that its data is being relied upon is important. This gives CLECs an incentive to participate in the case, understand that their customers may be impacted by a change in a

⁶³ Exhibit 202, *Colorado Wire Center Docket*, Colorado Order on Exceptions, ¶ 66.

⁶⁴ *Id.*, *Colorado Wire Center Docket*, Recommended Order of the ALJ, ¶ 121.

⁶⁵ The specific responses are confidential.

wire centers non-impairment designation, and potentially provide information that can narrow disputes regarding future designations. The Joint CLEC concerns about the process had to do with Qwest's lack of effort in soliciting a response, rather than with the concept of providing notification. In response to the issues identified, the Joint CLECs recommend (1) that Qwest expand the list of individuals at a company to whom it provides notice that it intends to rely upon a CLEC's fiber-based collocation by including at least the contacts identified by each carrier for interconnection agreement notices and those on the service list in wire center proceedings if a proceeding is pending; and (2) Qwest send a follow up notice to the CLEC if it fails to receive a response verifying or disputing that it is a fiber-based collocater.

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

III. CONCLUSION

The Joint CLECs intend to present testimony consistent with the views expressed herein and will request that the Commission issue an Order:

1. Rejecting Qwest's request to change the impairment status of Boise Main with regard to DS3 Loops;
2. Reject Qwest's request to adopt the terms of the Five-State Settlement Agreement with regard to the resolution of issues and ongoing processes for implementing the TRO and TRRO decisions with regard to impairment findings;
3. Reject Qwest's proposal to change the circuit ID from a UNE to an alternative Qwest service;
4. Reject Qwest's proposal for a 90-day transition period for conversions from UNEs to alternative Qwest services;
5. Reject Qwest's proposal for a \$25 per circuit non recurring conversion charge;
6. Require Qwest to provide information to CLECs going forward about wire centers that are nearing non-impairment status and effectively to inform CLECs that the CLECs information will be relied on by Qwest for a non-impairment petition; and
7. Such additional relief that it appropriate based on the law and the evidence presented at the hearing in this matter.

Dated this 15th day of June 2009.

Respectfully Submitted,
360networks (USA) inc.

By _____

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By _____

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing brief was served on the 15th day of June, 2009 on the following individuals:

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