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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

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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

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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.<sup>1</sup> 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

<sup>1</sup> *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.<sup>2</sup> 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.

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<sup>2</sup> 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 1<sup>3</sup> and with regard to DS3 Transport and Dark Fiber, that Boise West be classified is Tier 2.<sup>4</sup> In addition, Qwest has requested that DS3 loops be classified as non-impaired in the Boise Main wire center.<sup>5</sup> 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.<sup>6</sup>

## **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

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

<sup>4</sup> Id.

<sup>5</sup> Albersheim Direct, p. 31, lines 11-13.

<sup>6</sup> "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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

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

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<sup>7</sup> TRRO, ¶ 2 (emphasis added).

<sup>8</sup> *Id.*, ¶ 5 (emphasis added).

<sup>9</sup> *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.<sup>10</sup> 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 lines<sup>11</sup> and fiber-based collocators.<sup>12</sup>

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<sup>10</sup> TRRO, Executive Summary, para. 5 and para. 174.

<sup>11</sup> "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.

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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."

<sup>12</sup> "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 route<sup>13</sup> 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:<sup>14</sup> ILECs must unbundle DS1 transport where the wire centers at either end of the route are non-Tier 1 wire centers.<sup>15</sup> 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:<sup>16</sup> ILECs must unbundle DS3 transport where a wire center on either end of the requested route is a Tier 3 wire center.<sup>17</sup>
- 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.<sup>18</sup>

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.

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<sup>13</sup> "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."

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

<sup>15</sup> 47 C.F.R. §51.319(e)(2)(ii)(A).

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

<sup>17</sup> 47 C.F.R. §51.319(e)(2)(iii)(A).

<sup>18</sup> 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.<sup>19</sup> Likewise, agencies are not bound by other agencies in their findings and decisions.<sup>20</sup> 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

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<sup>19</sup> *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)).

<sup>20</sup> *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)).

