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June 7, 2011

VIA ECFS ***EX PARTE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: ***Unbundled Network Elements*****, WC Docket No. 04-313;** ***Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*****, CC Docket No. 01-338**

Dear Ms. Dortch:

On June 3, 2011, Gene Watkins of Cbeyond, Inc. ("Cbeyond") and the undersigned met with Austin Schlick, General Counsel of the FCC, Richard Welch, Laurel Bergold, Jacob Lewis, and Peter Karanjia of the Office of General Counsel, as well as Deena Shetler, Bill Dever, Tim Stelzig, Melissa Kirkel, and Lisa Gelb of the Wireline Competition Bureau. During the meeting, we discussed an order released by the United States Court of Appeals for the 10th Circuit in *Qwest Corp. v. Colorado Public Utils. Commn.*, Nos. 10-1187 & 10-1212 (10th Cir.) ("*Qwest v. CPUC*"), in which the 10th Circuit invited the FCC to file an amicus brief regarding whether the business line count in Section 51.5 of the Commission's rules includes unbundled network element ("UNE") loops that only (1) serve business customers and (2) are connected to switches.[1] During the meeting, we argued that the FCC should address these questions by releasing a petition for declaratory ruling or by ruling on pending petitions for reconsiderations in the above-referenced proceedings[2] rather than in an amicus brief. In this manner, the FCC could clarify the meaning the business line count throughout the country.

[1] *See Qwest Corp. v. Colorado Public Utils. Comm'n*, Nos. 10-1187 & 10-1212, Order (10th Cir. May 19, 2011).

[2] *See* Petition for Reconsideration of CTC Communications Corp. *et al.*, WC Docket No. 04-313, CC Docket No. 01-338, at 14-15 (Mar. 29, 2005) (arguing that the FCC should exclude UNE loops serving residential customers); Petition for Reconsideration of Birch Telecom, Inc. *et al.*, WC Docket No. 04-313, CC Docket No. 01-338, at 15 (Mar. 28, 2005) (arguing that inclusion of UNE loops serving

We argued that the Commission should clarify that the business line count in section 51.5 includes only UNE loops that serve business customers and that would be classified as switched under ARMIS reporting standards. Mr. Watkins summarized the arguments made by Cbeyond in its opening brief and reply brief in *Qwest v. CPUC*. Those briefs are attached hereto as Exhibits A and B respectively. In summarizing the arguments in those briefs, Mr. Watkins emphasized the following points. First, the phrase "an incumbent LEC-owned switched access line used to serve a business customer . . . by a competitive LEC that leases the line from the incumbent LEC" in the first sentence of the Section 51.5 refers to UNE loops since such facilities are regularly referred to as "leased" by the Commission. *See* 47 C.F.R. § 51.5. This means that the business line count only applies to UNE loops to the extent that they serve business customers connected to switches.

Second, while the second sentence of the business line count states that "all UNEs" should be counted, that phrase must be understood in the broader context of Section 51.5. As explained, the first sentence of the provision requires that all UNEs be read to mean UNEs used to provide switched services to business customers. The text of the *TRRO* is also replete with statements showing that the purpose of the impairment proxies, which utilize the business line count, is to identify wire centers in which there is a significant density of *business* customers.[3] In addition, counting residential non-switched lines only when the circuit is served via a leased UNE, and not when served by an incumbent LEC, makes no sense. It is contrary to the intent of the provision to measure competitors' opportunity to serve business customers. It also yields absurd and harmful outcomes. Under this approach, a residential customer subscribing to a 20 Mbps data line from an incumbent LEC would not be included in the business line count. But if that same customer were to switch from the incumbent LEC to a competitor, the residential customer not only would be treated as a "business," but the customer would be considered a business with *319 telephone lines*. This effect would dramatically inflate business line counts, overstate potential revenue by multiple factors, and create a perverse incentive for competitors to forgo serving residential customers.

Finally, the third sentence of the FCC rule deducts certain categories of lines from the business line count. Those deductions apply to both the tally of UNEs as well as the tally of incumbent LEC lines. This is evident from the use of the term "tallies" in the introduction of those deductions at the beginning of the third sentence. If the third sentence were intended only to modify "all business switched access lines," the provision would use the singular "tally." The application of the third sentence to "all UNEs" is confirmed by the fact that all concerned agree that the 64 kbps-equivalent rule in the third sentence applies to UNEs.

Third, it is relatively easy to identify the UNEs used to serve business lines connected to switches. As Mr. Watkins explained, competitors and incumbent LECs routinely undertake this kind of line identification process. Nor does the *TRRO* require use of only data that is already within the

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residential and non-switched customers artificially inflates business line counts used for the impairment thresholds).

[3] *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 103-105 (2005) ("*TRRO*").

possession of incumbent LECs. The Commission in the *TRRO* indicated that only business UNE-P lines should be counted. *See TRRO* ¶ 105. At the time of the *TRRO*, incumbent LECs did not report residential and business UNE-P lines separately with the FCC, and separating the two categories requires an identification process similar to the one required for identifying business, non-switched UNE lines. Nor is there merit to the argument that the business line count should include only those categories of lines (i.e., incumbent LEC switched business lines, residential UNE-P and all UNE loops) that the FCC used to establish the impairment proxy thresholds adopted in the *TRRO*. This argument is flatly contradicted by the FCC's use of the 64 kbps-equivalent rule in the Section 51.5, even though the line totals the FCC used to set the impairment proxy thresholds in the *TRRO* were not based on a 64 kbps-equivalent methodology.

Please do not hesitate to contact me at (202) 303-1111 if you have any questions or concerns regarding this submission.

Respectfully submitted,

/s/ Thomas Jones
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Counsel for Cbeyond, Inc.

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Bill Dever
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Lisa Gelb

Exhibit A

Case Nos. 10-1187 & 10-1212

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QWEST CORPORATION, a Colorado Corporation,

Plaintiff-Appellant/Cross-Appellee,

vs.

THE COLORADO PUBLIC UTILITIES COMMISSION; RON BINZ, in his official capacity as Chairman of the Colorado Public Utilities Commission; JAMES TARPEY, in his official capacity as a member of the Colorado Public Utilities Commission; MATT BAKER, in his official capacity as a member of the Colorado Public Utilities Commission;

Defendants-Appellees/Cross-Appellants,

and

CBEYOND COMMUNICATIONS, LLC.

Defendant-Intervenor-Appellee/Cross-Appellant.

On Appeal from the United States District Court
For the District of Colorado, Honorable Richard P. Matsch, Presiding
Civil Action No. 08-cv-02653-RPM-KLM

APPELLEES' PRINCIPAL AND RESPONSE BRIEF

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ORAL ARGUMENT IS REQUESTED

THIS BRIEF HAS AN ATTACHMENT
THAT IS INCLUDED ONLY IN SCANNED PDF FORMAT

CORPORATE DISCLOSURE STATEMENT

Defendant-Intervenor-Appellee/Cross-Appellant Cbeyond Communications, LLC is the direct and wholly-owned subsidiary of Cbeyond, Inc., which is a publicly traded corporation on the NASDAQ exchange (“CBEY”).

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Other Authorities

Appellees, the Colorado Public Utilities Commission and Cbeyond Communications, LLC, hereby submit this Principal and Response Brief.

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

While this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, which establishes United States Court of Appeal jurisdiction over final decisions of the district courts of the United States, the Court should consider invoking the doctrine of primary jurisdiction. Irrespective of the outcome of this case, the result will have the effect of determining impairment under 47 U.S.C. §251(d)(2). The business line count – set by the definition of a "business line" – will determine where impairment exists. The FCC has primary jurisdiction over impairment determinations pursuant to 47 U.S.C. §251(d)(2). The FCC's decisions regarding impairment are subject to appeal to the United States Courts of Appeal pursuant to 28 U.S.C. §2342(1) and 47 U.S.C. §402(a). That appeal has occurred and included a notation regarding the reviewing court's understanding of the business line definition.

The *Triennial Review Remand Order*[1] ("*TRRO*") (the FCC order from which the rule under review arose) was appealed to the U.S. Court of Appeals for the D.C. Circuit in the case of *Covad Communications Co. v. Federal Communications Commission*, 450 F.3d 528 (D.C. Cir. 2006). The *Covad* court affirmed the *TRRO* using a definition of a "business line" that assumed a "business line is a loop that runs from the wire center to a business customer."[2] If this Court arrives at a different interpretation – that a "business line" includes loops that run to residential customers – then *Covad* and the *TRRO* will essentially be subject to revision four to five years after the fact.

Because the *Covad* court did not rule on the business line definition – but only relied on it – Appellees do not suggest that it is a violation of the Hobbs Act, 28 U.S.C. §2341 *et seq*. per se. Although it could constitute a violation depending on the specific facts,[3] that is a question of first impression which this Court need not address. The Colorado Commission and Cbeyond only suggest that it is a fact supporting a primary jurisdiction referral.

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[1] Order on Remand, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC Order 04-290, WC Docket No. 04-313, CC Docket No. 01-338, 20 FCC Rcd. 2533 (FCC February 4, 2005) ("*TRRO"), aff'd, Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[2] *Covad*, 450 F.3d at 535, fn 2.

[3] *GTE South, Inc. v. Morrison*, 199 F.3d 733, 742-43 (4th Cir. 1999)

Additionally, the *TRO*[4], the *TRRO*'s predecessor order, was reversed by the D.C. Circuit because the FCC delegated its authority to make impairment determinations under 47 U.S.C. §251(d)(2) to state commissions.[5] The various interpretations of the business line definition under the *TRRO*, however, have had the same effect – albeit by poor draftsmanship rather than express fiat. Different state commissions arrived at different impairment criteria and implemented them differently. Wire centers which would not be impaired in North Carolina or Georgia are considered impaired in California (and vice versa). This Court has an opportunity to correct that creeping illegality in telecommunications law. In the interest of a uniform regulatory scheme across the country and adherence to the law, this Court should ask the FCC to clarify 47 C.F.R. §51.5. Any formal opinion from the FCC on the subject should receive a high degree of deference from this Court. [6]

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[4] Report and Order and Order On Remand And Further Notice Of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC Order 03-36, CC Docket No. 01-338, 18 FCC Rcd. 16978, (FCC August 21, 2003) ("TRO") *corrected by* Errata, 18 FCC Rcd. 19020 (2003), *vacated and remanded in part, aff'd in part, U.S. Telecom Assoc'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

[5] *USTA v. FCC, 359 F.3d 554, 565-68 (D.C. Cir. 2004), cert. denied*, 543 U.S. 925 (2004).

[6] *Chevron v. Natural Res. Defense Council*, 467 U.S. 837, 844 (1984).

If the Court chooses to proceed unguided by the FCC, it is jurisdictionally capable of doing so. There are three orders of the Colorado Public Utilities Commission (the "Colorado Commission") involved in this appeal, all of which arise from an arbitration conducted pursuant to 47 U.S.C. §252(b). The first Colorado Commission order, released February 19, 2008, was a "Recommended Decision" on all the issues in the arbitration, including the Colorado Commission's interpretation of 47 C.F.R. §51.5 at issue in this appeal.[7] The second order, released September 17, 2008, ruled on proposed exceptions to the first order.[8] Among the various exceptions proposed by the parties was a challenge by Qwest to the Colorado Commission's interpretation of 47 C.F.R. § 51.5.[9] The second order rejected Qwest's proposed exception. The third order, released on November 6, 2008, ruled on an Application for Rehearing, Reargument or Reconsideration by Qwest on the Colorado Commission's interpretation of 47 C.F.R. § 51.5.[10] Again, the Colorado Commission rejected Qwest's arguments. Having exhausted its administrative appeals, Qwest timely appealed to the United States District Court for the District of Colorado on December 8, 2008 pursuant to 28 U.S.C. § 1331,

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[7] Appellant Appendix ("Aplt. App.") at 0009-0071 (Recommended Decision).

[8] Aplt. App. at 0071-0080 (Order on Exceptions).

[9] Id. at 0076-0077 (¶¶44-53).

[10] Id. at 0081 – 0083 (Order on Application for Rehearing, Reargument or Reconsideration).

federal question, and 47 U.S.C. §252(e)(6), providing for district court review of arbitration decisions by state commissions.[11]

The District Court entered a final order, dated January 28, 2010, which affirmed the Colorado Commission's interpretation in part and reversed it in part.[12] Qwest filed a timely appeal to this Court on April 29, 2010[13] following the District Court's denial of its Motion to Amend the Judgment, dated March 31, 2010.[14] This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, which establishes United States Court of Appeal jurisdiction over final decisions of the district courts of the United States. Appellees filed a cross-appeal on May 13, 2010.

Cbeyond is a competitive local exchange carrier ("CLEC") providing telecommunications services to over 53,000 small businesses in fourteen markets across the United States, including small businesses in Colorado, under the jurisdiction of the Colorado Commission. As a CLEC, Cbeyond purchases certain Unbundled Network Elements ("UNEs") from Qwest in Colorado. Because the outcome of this case directly impacts the availability and price of critical inputs to Cbeyond's business, Cbeyond intervened to defend the Commission's correct

[11] Id. at 0084 – 0101 (Qwest Complaint).

[12] Aplt. App. at 0102 – 0108 (U.S. District Court Memorandum Decision).

[13] Id. at 0112 – 0114.

[14] Id. at 0109 – 0111.

interpretation of the FCC definition of a "business line." Cbeyond's intervention was approved on May 14, 2010.

ISSUES PRESENTED FOR REVIEW

1. Should the Court invoke primary jurisdiction and refer the issue to the FCC for clarification;
2. In interpreting 47 C.F.R. §51.5 to exclude residential lines, was the Colorado Commission correct in consistently applying the FCC's definition of the term "business line" to each use of that term within 47 C.F.R. §51.5; and
3. In interpreting 47 C.F.R. §51.5, did the Colorado Commission correctly apply the unambiguous limitations the FCC placed on "business line" tallies to exclude non-switched lines?

STATEMENT OF THE CASE

The Commission and Cbeyond are dissatisfied with the final sentences of the last two paragraphs of Qwest's Statement of the Case as well as the argumentative statements in Qwest's Statement of Facts. Pursuant to Federal Rule of Appellate Procedure 28.1(c)(2) Cbeyond and the Colorado Commission provide the following additional statements.

This case presents competing interpretations of the definition of a "business line" provided by the FCC in 47 C.F.R. §51.5. The FCC created the definition of a business line in order to count business lines in a particular wire center for the purpose of identifying wire centers located in dense business areas. After years of trying to find a way to identify where competitive carriers could economically deploy their own telephone lines, the FCC arrived at a test intended to identify dense business districts where there would be sufficient revenue to support such self-deployment. To implement that test the FCC defined a business line and described how such lines should be counted. In certain wire centers where the business line count is very high, the FCC relieved Qwest of its obligation to lease its facilities to competitive carriers at rates set by state public utility commissions using a Congressionally-designated pricing standard.

As a consequence, Qwest would like the business line count to include as many lines as possible. For instance, Qwest asserts that the FCC intended to include residential lines in the business line count. The Colorado Commission and Cbeyond disagree. Qwest is incorrect for two reasons: (1) the unambiguous definition of a business line requires that a business line serve a business customer (whether the line is provided by Qwest or by a CLEC as a UNE); and (2) because residential customers do not represent the higher revenues that business customers represent, including residential customers in a count of business lines would thwart the FCC's intention to identify dense business districts where high revenue customers exist such that deployment of non-Qwest facilities by competitive providers would be economically rational. Qwest also asserts that the FCC intended to include non-voice (referred to as non-switched) data lines. Again, the unambiguous terms of the business line definition exclude non-switched lines.

The Colorado Commission employed well-settled rules of statutory construction to exclude both residential and non-switched lines from the count of business lines. Most importantly, the Colorado Commission applied a rule that strongly presumes that a defined term is intended to be used in a consistent manner throughout a single rule. Because the FCC unambiguously defined a "business line" as a "switched access line used to serve a business customer, whether" it is a Qwest line or a UNE, the term "business line" thereafter must possess those two qualities – switched and used to serve a business customer. The District Court affirmed the Colorado Commission's reasoning for excluding non-switched lines, but ruled that residential lines should be counted. The District Court failed to apply the defined meaning of the term "business line" consistently to each use of the term in the same federal regulation, and this was a manifest error. For those reasons, the Court should affirm the Colorado Commission and reverse the District Court in part.

STATEMENT OF FACTS

Qwest accurately describes the purpose of the Act, its requirements and the TRRO impairment criteria. Qwest's argumentative representations, however, are inaccurate. Before addressing those facts, it is important to address the purpose of the effort to count business lines.

I. The Purpose Of The Business Line Definition Is To Identify Voice Lines Serving Businesses as Opposed to Residential or Data Lines

The FCC was very clear that the proxies it set for determining impairment were intended to identify urban centers with dense populations of businesses: "These proxies indicate when a particular building is likely to fall within the central business district . . .".[15] The FCC considered business line counts in particular as "indicative of [a wire center's] location in or near a large central business district . . .".[16] The FCC reasoned that a "high concentration of business lines generally indicates a likely concentration of large, multi-story commercial buildings, which in turn may justify the construction of fiber networks. Thus, high business line counts and the presence of fiber-based collocators, when evaluated in conjunction with one another, are likely to correspond with actual self-deployment of competitive LEC loops or to indicate where deployment would be economically rational and potential deployment likely."[17] Qwest does not dispute the purpose of counting business lines.[18]

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[15] *TRRO* at ¶167.

[16] *Id*.

[17] *Id*.

[18] Opening Brief of Appellant/Cross-Appellee Qwest Corporation, p. 12. ("Qwest's Opening Brief")

II. THE FCC REJECTED COUNTING ALL LINES IN FAVOR OF COUNTING JUST BUSINESS LINES

More importantly here, the FCC expressly rejected using a *total* count of all lines in a wire center in favor of a smaller subset of business lines. Apart from business lines, most of the remaining lines in a wire center are residential and data lines. Specifically, the FCC stated that "business lines are a more accurate predictor than total lines because transport deployment largely has been driven by the high bandwidth and service demands of businesses, particularly in areas where business locations are highly concentrated."[19] The residential customer lines that Qwest suggests the FCC included as "business lines" do not represent the "high bandwidth and service demands of businesses" which the count of business lines is intended to identify.[20]

In rejecting Incumbent LEC assertions that intermodal competition from cable companies should result in broad findings of non-impairment, the FCC pointed out that "cable providers are focusing their marketing strategies on residential users and 'small and medium businesses . . . that are near the residential network'" – and that such markets do not represent the high revenue or high-capacity loop (DS1) demands of dense business markets.[21] The FCC repeatedly

[19] *TRRO* at ¶103.

[20] *TRRO* at ¶193.

[21] *Id.*

states that it is using the business line count to identify actual dense businesses districts because those are the locations it identifies as representing sufficient potential revenue to make self-deployment by CLECs economically rational.[22]

When the FCC said "business lines" it clearly meant lines serving business customers. Adding residential lines and data lines to business line counts will misrepresent the revenue available in a wire center, deprive competitive carriers of access to facilities where they are impaired without them, and thwart the aims of the *TRRO*.

III. THE D.C. CIRCUIT AFFIRMED THE FCC'S USE OF A METHODOLOGY UNDER THE ASSUMPTION THAT A BUSINESS LINE SERVED A BUSINESS CUSTOMER

Not only was the FCC clear that it was endeavoring to identify wire centers with actual business lines, the D.C. Circuit affirmed the *TRRO* using a definition of a "business line" as a "line serving business customers" – not residential customers.[23] The FCC struggled for nearly ten years to identify a way to determine where competitive carriers are "impaired" without access to Incumbent LEC telephone lines.[24] In the *TRRO*, the FCC used business line counts and fiber-based collocation as proxies for identifying those dense business districts where

[22] *TRRO* at ¶¶ 70, 103, 105, 167, 168, 174, and 193.

[23] *Covad* at 535, fn 2.

[24] *Id.* at 286.

competitive carriers are not impaired.[25] Having repeatedly reversed the FCC's other efforts to identify a workable and legal method for identifying "impairment" under the Act, the D.C. Circuit finally approved the *TRRO* methodology at issue in this case.[26] In doing so, however, the D.C. Circuit noted a definition of a business line that did not include residential customers. The D.C. Circuit, citing 47 C.F.R. §51.5, noted that a "business line is a loop that runs from the wire center to a *business customer*."[27]

IV. THE PARTIES AGREE ABOUT MANY "BUSINESS LINES"

There is no dispute among the parties regarding the manner in which the Commission should calculate the "business line" tally for lines served by incumbent LECs. Specifically, the parties all agree that residential and non-switched lines are *not included* if they are served by Qwest.[28] Qwest argues, however, that these lines are *included* in the business line count when Qwest leases them to a CLEC as a UNE.[29]

The FCC picked a set of information "that incumbent LECs already have created for other regulatory purposes" – namely the ARMIS 43-08 reports and

[25] *Id.* at 290.

[26] *Id.* at 292-93, 298.

[27] *Id.* at 290, fn 2 (emphasis added).

[28] Aplt. App. at 0014 (¶ 42) (Recommended Decision).

[29] Qwest's Opening Brief at pp. 18-19.

"UNE figures, which also must be reported" as the basis for the business line count.[30] The ARMIS 43-08 report includes columns reporting single (column FC) and multiple (column FD) switched business lines, pay phones (column FE), residential switched (columns FF, FG and FH), special access non-switched (FJ and FK), and private lines (FM). All of those counts are aggregated counts by state – not specific to wire centers. Thus the FCC described them as "created for other regulatory purposes." [31]

The FCC's business line definition narrowed the access lines which would be considered "business lines" for impairment determinations by eliminating non-switched and residential lines. The ARMIS columns excluded (at the time of the *TRRO*) by the "business line" definition to reach the result of only having switched business lines remaining were 1) non-switched special access business lines (columns FJ and FK)); 2) residential (columns FF, FG and FH) and 3) private lines (column FM). The remaining lines were business switched access lines (ARMIS columns FC, FD and FE).

After the *TRRO*, the FCC relieved all Incumbent LECs, including Qwest, from most of their ARMIS reporting obligations except the reporting of business switched access lines (columns FC and FD) and payphones (FE) because those

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[30] *TRRO* ¶ 105.

[31] *Id.*

columns are "used in the non-impairment thresholds for the Commission's unbundling rules."[32] The FCC has also noted that Qwest uses ARMIS columns (FC, FD, and FE) in calculating its business line counts.[33] In short, there is no dispute between the parties over the fact that residential and non-switched lines are excluded from LEC "business lines" counts.

V. IN THE CASE BELOW, "ALL UNES" DID NOT MEAN ALL UNES

In the arbitration before the Colorado Commission it is notable that Qwest readily agreed that it should not include residential UNE-P – a subset of UNEs where unbundled loops are combined with unbundled switching – in the business line counts (despite the fact that they are among the larger set of "all UNE loops").[34] The Court should, consequently, take note that Qwest repeatedly uses the term "UNE loops" to designate the sub-set of UNEs it believes are selectively included in "all UNE loops" for which no limitations may apply, as opposed to the

[32] Memorandum Opinion and Order and Notice of Proposed Rulemaking, *In the Matter of Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, et al*., WC Docket No. 08-190, 07-139, 07-204, 07-273 and 07-21, 23 FCC Rcd. 13647, 13658, ¶ 19, (FCC Sept. 6, 2008).

[33] *Id.; see also*, Petition for Forbearance, *In the Matter of Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c), Corrected Version*, Federal Communications Commission, WC Docket No. 07-204, p. 8, fn 18 (filed October 1, 2007) ("The data in ARMIS Report 43-08, Table III, columns FC, FD and FE, provides business line counts associated with the Commission's establishment of non-impairment thresholds in the *Triennial Review Remand Order*.")

other UNE lines which are not – UNE-P.[35] UNE-P <u>does</u> include the loop – just as do UNE Loops facilities. The <u>only</u> difference is that UNE-P is a combination of unbundled loops and unbundled switching.

SUMMARY OF ARGUMENT

Neither this Court nor the Colorado Commission may ignore the unambiguous definition of a business line provided by the FCC. By its terms, a business line is a "switched access line used to serve a business customer, whether" it is a Qwest line or a UNE.[36] Once that term is defined, every instance of its use must be accorded the same meaning – including the limitations attendant to that meaning: that it is a switched access line and it serves a business customer.[37] This Circuit has repeatedly held that the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning" "applies with particular force where Congress has specifically defined the term."[38] When construing a single federal rule, it is

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[34] Aplt. App 0015 (¶ 54) (Recommended Decision).

[35] Qwest Opening Brief, passim.

[36] 47 C.F.R. §51.5.

[37] *United States v. Saenz-Mendoza*, 287 F.3d 1011, 1014 (10th Cir. 2002) ("When a statute includes an explicit definition, we must follow that definition . . .") (quoting from *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)).

[38] *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1175 (10th Cir. 2004) (*citing to Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986); *Gustafson v. Alloyd* Co., 513 U.S. 561, 576 (1995); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1381 (Fed. Cir. 2001)).

clear error to assign several meanings to different occurrences of a single, defined term where an equally logical reading can avoid that incongruous result.

A business line is exactly what the plain English words mean: a line used to serve a business customer. The FCC was not obtuse on that fact:

> § 51.5 Terms and Definitions.
>
> 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 lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."
>
> 47 C.F.R. §51.5

Thus, reading the first sentence of the definition, a business line is a "switched access line[s] used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from an incumbent LEC."[39] And this is where the dispute between the parties arises:

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[39] 47 C.F.R. §51.5.

Cbeyond and the Commission believe that the use of the term "business line" in the beginning second sentence of the rule must be consistent with the definition provided in the first sentence. Conversely, Qwest asserts that the term "business lines" as used in the second sentence stands alone as a kind of incongruous, unexplained second definition of the same term within a single rule.

One of two interpretations are available here: (1) the FCC provided a definition of a "business line" in one sentence (lines that do serve a business customer) and immediately defined "business line" in the opposite way in the succeeding sentence (to include lines that do not serve a business customer); or (2) the FCC was consistent in its definition of "business lines" in consecutive sentences within a single rule. The Colorado Commission chose an interpretation that maintained a consistence meaning.[40]

The critical point in understanding the meaning of the business line definition is the last part of the first sentence – "whether by the incumbent LEC itself or by a competitive LEC that leases the line from an incumbent LEC." The lease of such lines "by a competitive LEC" refers to a UNE. Accordingly, the definition states that the limiting elements of a business line – a "switched access line[s] used to serve a business customer" apply "whether" the line is served "by the incumbent LEC itself or" *as a UNE*.

[40] Aplt. App at 0018 (¶78) (Recommended Decision).

The Fifth Circuit in *Logix* misunderstood that fact when it dismissed the first sentence: "Only the first part of the business line count definition explicitly references serving business customers. The next clause, concerning UNE loops, makes no reference to businesses."[41] However, the "first part of the business line count" "explicitly referenc[ing] serving a business customer"[42] *does* reference UNEs – and states that the requirement that the line serve a business customer applies "whether" the line is served "by the incumbent LEC itself or" is lease to a CLEC *as a UNE.*[43]

Because the first sentence is clear that the limitations it describes applies to UNEs, the fact that the FCC chose not to repeat those limitations in the second sentence (twice) cannot serve to undo the unambiguous requirement from the first sentence. It is clear that even UNE business lines must serve a business customer. Otherwise the "count of business lines" is counting something at odds with the definition of a business line. The District Court's conclusion that "business lines" include lines that serve residential customers is counter to the definition provided by the FCC and is incorrect. The Court should affirm the Colorado Commission's interpretation of 47 C.F.R. §51.5 and reverse the District Court in part.

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[41] *Logix Comm. v. The Pub. Util. Comm'n. of Tex.*, 521 F.3d 361, 365 (5th Cir. 2008).

[42] *Id.*

[43] 47 C.F.R. §51.5.

The same reasoning also supports the exclusion of non-switched lines from the count of business lines. In addition to the first sentence describing a business line as a "switched access line," the definition also requires in the third sentence that the "business line tallies: Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services. . ."[44] Qwest asserts that this second requirement's use of "access lines" was a surreptitious reference to only Incumbent lines and not UNEs. That argument fails for two reasons: (1) "access lines" is a generic term that applies to UNEs; and (2) the "tallies" that introduce the three limitations in the third sentence include a tally of UNEs. The other tally is the Incumbent LEC lines. The FCC applied the third sentence limitations to the business line counts to both "tallies" not just the incumbent count. As a consequence, the Court should affirm the Colorado Commission's interpretation of 47 C.F.R. §51.5 and affirm the District Court in part.

ARGUMENT

I. STANDARD OF REVIEW

Qwest is correct that the Court's standard of review here is *de novo*.[45]

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[44] Id.

[45] Qwest's Opening Brief at p. 23.

II. BUSINESS LINES ARE LINES SERVING BUSINESSES

The Colorado Commission correctly interpreted the business line definition to exclude non-business access lines.

A. The Term "Business Line" Is A Defined Term Which Must Be Consistently Applied.

The manifest flaw in asserting that a "business line" includes lines serving residential customers is that such an interpretation results in the term "business line" meaning two different and opposite things in consecutive sentences in the same rule. The first of those two sentences actually defines a "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.[46]

This sentence imposes several qualities on a "business line." First, it must be "incumbent LEC-owned." Second, it must be a "switched access line." Third, it must be "used to serve a business customer." Finally, the FCC makes it clear that these qualities apply "whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC." The second portion of the last clarification – that those qualities apply when "a competitive LEC that leases the

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[46] Id.

line from the incumbent LEC" is particularly important here. That phrase describes a UNE.[47]

The FCC, the U.S. Supreme Court and Qwest all describe the provision of UNEs by the Incumbent LEC to CLECs as "leasing" such facilities. The FCC routinely describes the provision of UNEs as "leasing."[48] Indeed, the FCC has described a business model very similar to Cbeyond's as "leasing" facilities from the incumbent: "Some competitive LECs market integrated voice and data services to enterprise customers. The business plan of these competitive LECs involves

[47] *See e.g.* First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, CC Docket No. 96-98, 11 FCC Rcd. 15499, 15618, ¶ 232 (FCC August 8, 1996) ("Access to unbundled elements in these markets will promote efficient competition for local exchange services because, under the scheme set out in the 1996 Act, such access will allow new entrants to enter local markets by leasing the incumbent LECs' facilities at prices that reflect the incumbents' economies of scale and scope."); *see also, id* at ¶ 758 ("We noted that geographic averaging is simple to administer and prevents unreasonable or unlawful rate differences but, where averaging covers high and low cost areas, it could distort competitors' decisions whether to lease unbundled elements or build their own facilities."); see also, *TRO* at ¶¶ 36, 48, 48 fn 160, 50 fn 165; see also, *TRRO* ¶¶ 35, fn 102, 105, 64 fn 178.

[48] *Id*.; *see also id* at ¶ 36 ("Leasing some parts of the network as UNEs, such as unbundled loops, can be accomplished . . .")

leasing high-capacity loops as UNEs."[49] The United States Supreme Court has also used identical language to describe the provisioning of UNEs.[50]

Finally, Qwest, itself, uses the same language when communicating with the FCC: "Qwest requests 'restoration of TELRIC to its original purpose: the creation of economically appropriate price signals for competitive LECs as they choose between leasing facilities from incumbent LECs and procuring their own.'"[51] Qwest does not propose any alternative meaning for the reference "whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC." That phrase, therefore, applies the definition of a "business line" provided in the first half of the sentence to UNEs. As such, UNEs encompassed by the term "business line" must be "an incumbent LEC-owned switched access line used to serve a business customer."

There are two rules of construction governing the Court's consideration of the meaning of the first sentence of the business line definition: The first rule of construction requires that the court endeavor to give meaning to every word in the definition.[52] The second rule is the "normal rule of statutory construction" that

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[49] *TRO* at ¶ 48.

[50] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 393 (1999); *Verizon Commc'ns v. FCC,* 535 U.S. 467, 475, 476, 493, 496 fn 16 (2002).

[51] *TRO* ¶ 673.

[52] *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute. . . . As early as in Bacon's

"identical words used in different parts of the same act are intended to have the same meaning" and that rule "applies with particular force where Congress has specifically defined the term."[53] The application of those rules to this case compels the affirmation of the Colorado Commission's orders. Here, the application of those rules of construction mandate the exclusion of non-business access lines from the definition of a "business line."

In the first sentence of the definition, the term "business line" is expressly identified by the FCC as "an incumbent LEC-owned switched access line ***used to serve a business customer*** . . .". The second sentence of the rule 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.

Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' . . . We are thus 'reluctan[t] to treat statutory terms as surplusage" in any setting.'") (*citing to: United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also, *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction").

[53] *Sierra Club* at 1175; *see also*, *Dewsnup v. Timm*, 502 U.S. 410, 422 (1992)("We have often invoked the 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning. That rule must surely apply, *a fortiori*, to use of identical words *in the same section of the same enactment*.") (omitting internal quotation marks and citations; emphasis in original) (Scalia, Thomas and Souter in dissent) (Citing to *Sullivan v. Stroup*, 496 U.S. 478, 484 (1990) *et al.*).

This sentence takes the business line definition of the first sentence and indicates how such business lines should be counted for the purposes of the *TRRO*. In accordance with the standard rules of statuary construction, each instance of the term "business line" must be given the same meaning.

Three courts, including the District Court here, and several state commissions, have ruled that the term "business line" in the second sentence means something different than it does in the immediately preceding sentence. "Business line" in the first sentence <u>expressly</u> ***does not include*** residential lines, but the same words in the same definition one sentence later, according to the cases cited by Qwest, ***do include*** the very lines excluded only once sentence earlier. That absurdity violates the rule of construction requiring that the same words in the same provision be given the same meaning.[54] To address that conflict by ignoring or otherwise discounting the first sentence in the definition, as courts and other state commissions have done, violates the rule of statutory construction requiring that every word in the provision be given meaning. As such, the Court should interpret the first sentence of the "business line" definition as describing the parameters of a "business line" and affirm the Commission's Orders.

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[54] *Id.*

B. The FCC Does Not Introduce Its Definitions.

The FCC's intention that the first sentence of the business line definition be considered part of the whole definition is bolstered by the other definitions in the same section of the Code of Federal Regulations. 47 C.F.R. §51.5 contains fifty-four (54) definitions, including the definition of "business line" at issue here. Of those fifty-four (54) definitions, thirty-one (31) begin with the word being defined (e.g. "a business line") followed by the verb "is" or "are" followed by a substantive definition.[55] The business line definition precisely follows that pattern. It begins with "A business line is" followed by the substantive qualities defining that term: "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." Nothing about that definition – nor any of the fifty-three other definitions in §51.5 – indicates that the FCC was not providing the substantive meaning of "business line" in that first sentence.

A further sixteen (16) definitions follow the same pattern, but use the verbs "means," "refers to" or "involves" prior to providing the substantive definition. Given that it is the practice of the FCC in §51.5 (at least 47 out of 54 times) to provide the substantive definition of the word being defined in the first sentence of

[55] 47 C.F.R. §51.5.

that definition, the Court should give substantive meaning to the first sentence of the business line definition.

If the words of the first sentence of the definition are given meaning, then a "business line" means "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" – in other words a UNE. That definition excludes both non-switched and residential lines from the term "business line." As that term is then used in the remainder of the "business line" definition – including the wire line tallies – it necessarily excludes non-switched and residential services. Once "business line" is defined, every instance of the words "business line" must be given that defined meaning. The Court should affirm the Colorado Commission's Order which follows the requirements of the business line definition to exclude non-switched and residential services from "business lines."

C. The Courts Which Have Ruled that Residential Lines Are Included in the Business Line Definition Committed Manifest Errors.

The courts which have ruled otherwise on this subject were, respectfully, wrong. The District Court in *Michigan Bell v. Lark* dismissed the first sentence in the definition as separate from the "procedure" to count "business lines," alleging that the Michigan PSC "confuses the definition of a business line with the procedure used for counting a business line . . ."[56] As is demonstrated herein, the first sentence of the business line definition must necessarily dictate the remaining uses of that term unless the words "business line" in the definition and the procedure mean two opposite things. The Michigan PSC was not confused. The Michigan PSC was correct – residential lines are properly excluded from the term "business line" – including any effort to count them. As previously described in detail, once a term in a statute or rule is defined, courts cannot then ignore that definition when the defined words are used later in the same rule or statute,[57] yet that is precisely what the court in *Lark* did. *Lark* is neither binding nor correct. The Court should not follow it.

The Fifth Circuit in *Logix* similarly ignores the express requirement that a business line serve a business customer by noting that the FCC did not add the adjective "business" in front of "all UNE loops" to double-reinforce the fact that business lines serve business customers.[58] The *Logix* Court erred by relying less on what the FCC said and more on what the FCC *could have said* to make the

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[56] *Michigan Bell v. Lark*, 2007 WL 2868633,*9 (E.D. Mich 2007) (*Lark* is an unpublished opinion. It is, therefore, attached).

[57] *Sierra Club* at 1175.

[58] *Logix*, 521 F.3d 361, 365 (5th Cir. 2008) ("The first sentence goes to the definition of a business line. The second sentence repeats the definition of the business line from the first sentence and adds to that 'the sum of all UNE loops, including UNE loops provisioned in combination with other unbundled elements.").

definition clearer. This was manifest error; rewriting a rule to account for less-than-perfect drafting is not an appropriate role for the courts and is precisely the opposite of statutory *interpretation.*

The Fifth Circuit in *Logix* simply dismissed the first sentence: "Only the first part of the business line count definition explicitly references serving business customers. The next clause, concerning UNE loops, makes no reference to businesses." However the "first part of the business line count" "explicitly referenc[ing] serving a business customer" *does* reference UNEs – and states that the requirement that the line serve a business customer applies "whether" the line is served "by the incumbent LEC itself or" is leased to a CLEC as a UNE.

Because the first sentence is clear that the limitations it describes apply to UNEs, the fact that the FCC was not redundant in repeating those limitations in the second sentence (twice) cannot serve to undo the unambiguous requirement from the first sentence. Accordingly, even UNE business lines must serve a business customer. Otherwise the "count of business lines" is counting something at odds with the definition of a business line. The *Lark*, *Logix,* and District Court's conclusion that "business lines" include lines that serve residential customers is counter to the definition provided by the FCC and is incorrect. The Court should affirm the Colorado Commission's interpretation of 47 C.F.R. §51.5 and reverse the District Court in part.

The FCC's definition expressly states that a business line is used to serve a business. In affirming the *TRRO*, the D.C. Circuit assumed that the FCC's business line proxies represented lines that serve a business customer.[59] A court should not substitute its judgment for that of the FCC on the grounds that the FCC was insufficiently redundant. The court in *Logix* committed that error. This Court should not.

D. The Point of the Business Line Count is to Count Businesses.

It is the FCC's intention that the business line count identify actual businesses as opposed to, among other things, residential customers. The FCC explained its decision to use business line counts as a proxy for available revenues in the *TRRO*, at paragraph 103 as follows:

> 103. *Business Line Density*. Business line density also is an administrable proxy for determining where significant revenues are available sufficient for competitors to deploy transport facilities, despite the fixed and sunk costs of deployment. Wire centers that possess a high level of demand for telecommunications services are most likely to attract and support competing carrier transmission facilities that duplicate the incumbent LEC's network. For example, Alpheus asserts that "business access lines have some value as a proxy for when competitors have in the past deployed fiber transport" because "above a certain level of business access line density, carriers have been able to obtain revenue sufficient to overcome the enormous barriers to entry." Further, business lines are a more accurate predictor than total lines because <u>transport deployment</u>

[59] *Covad* at 535, fn 2.

> largely has been driven by the high bandwidth and service demands of businesses, particularly in areas where business locations are highly concentrated.[60]

It was only where there is a high concentration of businesses – with their attendant "high bandwidth and service demands" – that the FCC considered the available revenues to be high enough to support a CLEC deploying its own facilities. Where CLECs can deploy their own facilities, they are not impaired without access to the incumbent's facilities (UNEs). It is, therefore, critical that the Court affirm the Colorado Commission's correct interpretation excluding residential lines from the business line count.

Residential customers do not represent the "high bandwidth and service demands" that business customers represent. The FCC states that "business lines are a more accurate predictor than total lines" because of those higher business demands. The "total lines" the FCC is rejecting in favor of "business lines" are business lines AND residential lines. Qwest is attempting to re-impose the very "total line" count the FCC rejected in favor of a business line count. The FCC was relying on state commissions to identify actual business lines – not residential lines as well. The Court should effect what the FCC states it was trying to do and affirm the Colorado Commission's Orders.

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[60] *TRRO* ¶ 103 (footnotes omitted) (emphasis added).

III. NON-SWITCHED SERVICES ARE EXPRESSLY EXCLUDED FROM BUSINESS LINE ACCOUNTS

The Colorado Commission correctly interpreted the Federal Communications Commission business line definition to exclude non-switched services. The Court should, therefore, affirm the Colorado Commission's Orders.

A. The Court Should Apply the Business Line Definition According to its Plain Meaning.

The business line rule plainly means what it says: the business line tally "shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services."[61] Any other reading violates basic rules of statutory construction. Qwest's contorted reading was rejected by the Colorado Commission and the District Court.[62] This Court should affirm those rejections.

The first half of the business line definition reads:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by

[61] 47 C.F.R. § 51.5.

[62] One of the Commissions that Qwest relies on for its appeal followed the District Court's logic: While the Georgia PSC did order that all UNE Loops be counted, it did not order all non-switched lines be counted. In the page immediately after the page of the Georgia PSC Order Qwest provided, the Georgia PSC ruled that "if a DS1 line does not connect end-users for switched services, then it does not meet the first requirement set forth in the federal rule, and therefore must be excluded from the tally of business lines." Order on Remaining Issues, *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc's Obligations to Provide Unbundled Network Elements*, Ga. PSC Docket No. 19341-U, 2006 WL 758303 (Ga. P.S.C. February 7, 2006).

> 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: . . .

The second sentence of the business line rule provides the business line calculation. That calculation consists of two tallies – both involving the requirement that the "sum" include "all" of each set: "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."[63] The third sentence of the business line rule then identifies the limits the FCC applies to these two "tallies":

> 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."[64]

[63] Again, it cannot be overlooked that these tallies are "the number of business lines in a wire center" and thus are limited by the definition of the term "business line" from the first sentence.

[64] *Id.*

A plain reading of the third sentence of the business line rule giving every word meaning in its context compels the exclusion of non-switched data lines for both UNEs and Incumbent LEC lines.

The third sentence of the business line definition, providing three requirements, can be read in only one fashion: it applies to the business line calculation described in the second sentence. The third sentence begins with, “Among these requirements, business line tallies,” and provides a list of three “requirements” – each beginning with “shall.” The only tally which can be found in the business line definition is the wire center business line calculation from the second sentence: “the sum of all incumbent LEC business switched access lines” – “plus” – “the sum of all UNE loops.” The word “tally” is made plural in the introduction to these additional requirements because the requirements apply to both tallies constituting the business line calculation. Qwest fails to suggest any alternative meaning for the introduction to the three “requirements” applied to the business line tallies.

As such, both the UNE tally and the incumbent LEC business switched access tally are modified by the three “requirements” that are contained in the third sentence of the business line definition. The first of these requirements provides that business line calculations “shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services.” That limitation on the business line calculation could not be clearer – it excludes lines providing non-switched services. There is absolutely no indication in the third sentence that this requirement does not apply to the business line tally, including the UNEs within it – indeed, the sentence says expressly that it *does* apply to the business line tally. Again, Qwest fails to provide any explanation based on the language of the third sentence to support reading it in any other manner.

The use of the term "access line" in the requirement that business line calculations "shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services" does not exclude UNEs from that limitation. "Access line" is a generic industry term referring to "a telephone line reaching from the telephone company central office to a point usually on your premises."[65] "Access line" includes both lines provisioned as UNEs to CLECs and the same lines provisioned by the Incumbent LEC. Further, the FCC routinely uses "access line" generically throughout the *TRRO* to refer to both UNEs and Incumbent access lines.[66] For instance, the FCC describes the non-impairment standard for DS1 transport as being "where both wire centers contain at least four fiber-based collocators or at least 38,000 business <u>access lines</u>."[67] In

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[65] HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 85 (23d ed. 2007).

[66] *TRRO* ¶¶ 43, 51, 103 and 109.

[67] *Id.* at p. 4 (emphasis added).

that context (the same context debated here) the term "business access line" indisputably refers to both UNEs and Incumbent LEC lines.

Finally, the term "access line" is used in the third requirement for the business line calculation, and requires that the tallies "(3) shall account for ISDN and other digital <u>access lines</u> by counting each 64 kbps-equivalent as one line."[68] Qwest certainly does not dispute that the term "access line" in the third requirement applies to both UNEs and Incumbent LEC lines. As such, the first exception, that business line "tallies" "shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services" applies to both UNEs and Incumbent LEC access lines. The commonly accepted rule of statutory construction that a term of art in an industry should be given its normal meaning absent compelling evidence to the contrary should be applied here to apply all access line limitations to both UNEs and Incumbent LEC lines.[69]

While the FCC does state in the body of its Order that it expects the data underlying the business line count to be "readily available"[70] and "created for other

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[68] 47 C.F.R. § 51.5 (emphasis added).

[69] *McDermott Int'l v. Wilander*, 498 U.S. 337, 342 (1990) ("In the absence of contrary indication, we assume that when a statute uses such a term [of art], Congress intended it to have its established meaning."); *see also Morissette v. United States*, 342 U.S. 246, 263 (1952).

[70] *TRRO* ¶161.

regulatory purposes”[71], it also indicates that billing records[72] and business UNE-P[73] constitute “readily available” evidence. Said another way, the division of at least some business and residential UNEs using billing records are, in the opinion of the FCC, “readily available.”

Nevertheless, no party – including Qwest – asserts that the difficulties arising from the way Qwest keeps it own records allows the parties or the Commission to ignore the FCC’s directive to use only business UNE-P counts. The same is true for the requirement that business line counts “shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services.”[74] As such, the Colorado Commission correctly excluded non-switched services from the business line calculation. The Court should, respectfully, affirm it.

B. Qwest’s Assertions to the Contrary Are Without Merit.

Qwest asserts that because the second sentence modifies the word “UNE” with the adjective “all,” then the remainder of the business line definition must fall

[71] *Id.* ¶105.

[72] *Id.* ¶100, fn 290 (Describing fiber-based collocation information as “readily identifiable” because such data is in the possession of the Incumbent LECs both in general data and in “billing records.”).

[73] *Id.* ¶105.

[74] 47 C.F.R. § 51.5.

away and be ignored[75] for any wholesale business line count. Qwest notably does not suggest the same interpretation for the same language in the same sentence. The adjective "all" also modifies "incumbent LEC business switched access lines" in the same sentence.[76] In that instance, Qwest does not apply the same exclusionary meaning to the word "all" despite the fact that doing so would exclude portions of "all" business lines. For instance, Qwest does not assert that its "private line services" connecting end-users directly with each other should be included despite the fact that it is excluded by the first limitation set-forth in the third sentence of the definition requiring that "only" access lines connecting end-users to end offices be included. The use of "all" in front of "incumbent LEC business switched access lines" does not allow the "requirements" listed in the rule to be ignored.[77] Yet, that is precisely what Qwest asserts the word "all" allows with regard to UNEs. The Court should reject this selective application of the FCC's requirements and apply the plain language of the business line rule to exclude non-switched facilities, as prescribed.

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[75] Rendering terms within a statute meaningless violates a basic canon of statutory interpretation. *Duncan v. Walker,* 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.").

[76] 47 C.F.R. § 51.5 ("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.").

Qwest also points to one paragraph within the *TRRO*, paragraph 105, generally discussing the data the FCC used to analyze impairment, to assert that the business line rule does not mean what it plainly says. However, the general discussion at paragraph 105 does not undo the specific requirements laid-out in the business line rule. Qwest points to paragraph 105 of the *TRRO* in support of its assertion that "UNE loops" should render all limiting language in the business line rule moot.[78] Notably, paragraph 105 does not use the term "all" with regard to UNEs. Moreover, that paragraph does not mention any of the exclusions listed in the business line rule nor the 64 kbps channel treatment of high-capacity lines, much less state that those requirements may be ignored. Paragraph 105 (footnotes omitted) reads:

> Moreover, as we define them, business line counts are an objective set of data that incumbent LECs already have created for other regulatory purposes. The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops. We adopt this definition of business lines because it fairly represents the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs. Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is

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[77] It is worth noting that Qwest does not appear to have any objection to excluding its own non-switched retail data loops from the business line counts.

[78] Qwest Opening Brief at page 21-22, 28, 35.

> extremely difficult to obtain and verify. Conversely, by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information.

Paragraph 105 does not contradict any portion of the business line rule. The general reference to the fact that the FCC's analysis is "based on . . . UNE-loops" and results in "adding UNE figures" cannot support ignoring the specific rules provided in the business line rule. For instance, Qwest does not argue that the general reference to ARMIS 43-08 may trump the specific business line exclusions of some ARMIS 43-08 data.

Specifically, the ARMIS 43-08 report referenced in paragraph 105 includes private lines, and non-switched special access lines.[79] Yet none of those columns of data from ARMIS 43-08 are being counted in the business line definition despite the general reference in paragraph 105 to "ARMIS 43-08 business lines." It is the business line rule's exclusion of non-switched lines, non-switched special access

[79] *See TRRO* ¶ 105, fn 303 ("*See* Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, *FCC Report 43-08 – Report Definition* (Dec. 2004), *available at*: *http://www.fcc.gov/wcb/armis/documents/2004PDFs/4308c04.pdf*; *see also Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules)*, CC Docket No. 86-182, Report and Order, 2 FCC Rcd 5770 (1987), *modified on recon*., 3 FCC Rcd 6375 (1988) (*ARMIS Order*) (annual updates omitted). For further information regarding the Commission's ARMIS filing requirements, please refer to the

and lines not connecting end-users to end offices that exclude these lines from the business line counts. Qwest does not argue that any of these lines should be included in the business line count as a consequence of the FCC mentioning ARMIS 43-08 in paragraph 105 without any limitations. Yet, this is precisely the logic Qwest argues the Court should apply to the general mention of UNEs. In practice and in theory, the general terms of paragraph 105 cannot relieve the obligation to give effect to the specific plain language of the business line rule requiring that "business line tallies shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services."

Qwest also argues that residential, business and non-switched UNEs are "not created for other regulatory purposes."[80] The reference to "ILECs creating data for other regulatory purposes" at *TRRO* paragraph 105 is a simple reference to ARMIS data, not secret code for ignoring the business line definition. The FCC has previously identified both non-switched from switched UNEs[81] and residential-

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Commission's Internet *ARMIS Home Page*, available at: *http://www.fcc.gov/wcb/armis/*.")

[80] Qwest Opening Brief at pp. 27-30.

[81] For instance, at the time of the *TRRO*, the FCC Local Competition Data, December 2004 release (covering data as of June 30, 2004) reported CLEC switch access line separately from CLEC non-switched access lines.

serving from business-serving UNEs.[82] There is no indication the FCC considered that task difficult for incumbents.

More tellingly, Qwest readily concedes that it must divide business UNE-P from residential UNE-P despite the fact that, at least for Qwest, those records had not been "created for other regulatory purposes."[83] As a consequence, there is nothing about paragraph 105 which alters the requirement in the business line definition that "business line tallies shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services."[84] The Court should, therefore, enact the plain language requirements set-forth in the business line rule.

C. If "Access Lines" on the First Requirement Excludes UNEs, Then "Access Lines" in the Third Requirement also Excludes UNEs.

In the event the Court agrees that the FCC intended the phrase "access line" to exclude UNEs, then the Court must consistently apply that interpretation to the whole of 47 C.F.R. §51.5. Specifically, the third requirement, with emphasis, that the business line count "shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line."

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[82] Memorandum Opinion and Order, *Application of Ameritech Corp. and SBC Commc'ns, Inc.*, CC Docket No. 98-141, FCC 99-279, 14 FCC Rcd. 14712, 14874, ¶ 391 (FCC October 8, 1999) (Requiring the merging companies to provide discounts on UNE loops serving residential customers.).

[83] Aplt. App at 0015-16 (¶54, 59) (Recommended Decision).

If that requirement's reference to "access lines" does not include UNEs, then the accounting directed by that requirement should not include UNEs as well. It is worth noting that is actually how the UNEs were accounted (one per one) for when the FCC set its impairment thresholds. It was only with the issuance of Section 51.5 that the Incumbent LECs began multiplying UNE loops by 64 kbps equivalencies.[85] The Colorado Commission and Cbeyond respectfully request, therefore, that if the Court determines that "access lines" were intended in the context of this rule to only describe the treatment of Incumbent LEC access lines, then the Court also make it clear on remand that digital equivalency only apply to such Incumbent LEC "access lines" as well.

An outcome allowing both the inclusion of non-switched data lines <u>and</u> the multiplication of those data lines by their 64 kbps equivalency would result in inflated business line counts. Non-switched data lines invariably use very high data capacity to access internet services. It is not unusual to see xDSL services to both business and residential customers provided at very high bandwidth

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[84] 47 C.F.R. §51.5.

[85] Appellant Addendum of Relevant Authorities, Tab 19, is a partial copy of a pending Motion for Reconsideration filed by several CLECs in response to the *TRRO*. The pages attached by Qwest contain the complaint regarding the fact that the FCC used non-inflated line counts (and Incumbent LEC representations about them) to identify the thresholds for non-impairment. Following the release of the *TRRO*, Incumbent LEC figures ballooned using the business definition's third requirement regarding 64 kbps equivalency calculation.

capacities. If such non-switched capacities are converted to “business lines” the business line count would be overstated.

For example, publicly available Qwest offerings today for a 40 mbps xDSL service costs $49.99. Converted to 64 kbps equivalents, 40 mbps would be six hundred twenty-five (625) “business lines.” One of Qwest’s lowest prices for a standard business line is $30/month. Six hundred twenty-five such $30 business lines from Qwest would cost $18,750/month. The impact of counting such a non-switched data line AND inflating that data line by 64 kbps equivalency is to overstated potential revenues by 375,000%. Equating non-switched services with switched services and inflating that figure by voice-line equivalency seriously skews the business line count and overstates the revenues that actual business voice lines represent.

The FCC was very clear that the tallies of business lines should not include non-switched lines. The Colorado Commission and the District Court were correct to interpret 47 C.F.R. §51.5 to exclude non-switched lines and this Court should affirm those orders.

CONCLUSION

For the foregoing reasons, Cbeyond respectfully requests that the Court affirm the Colorado Commission’s treatment of non-switched data loops and residential lines and reverse the District Court in part.

ORAL ARGUMENT STATEMENT

The Colorado Commission and Cbeyond concur with Qwest that an oral argument will promote a better understanding of the issue raised in this appeal. As a consequence, the Colorado Commission and Cbeyond respectfully request oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 10,134 words. I relied on the Microsoft Word Count system to obtain that number. I certify that the information on this form is true and correct to the best of my knowledge and belief.

Dated: November 17, 2010.

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CERTIFICATE OF SERVICE

I certify that on November 17, 2010, a true and correct copy of the foregoing **PRINCIPAL AND RESPONSE OF APPELLEES** was served on the following persons by U.S. Mail, first class postage prepaid, and by digital submission via the CM/ECF System.

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UNPUBLISHED OPINION

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
MICHIGAN BELL TELEPHONE COMPANY, d/b/a AT & T Michigan, Plaintiff,
v.
J. Peter LARK, Laura Chappelle, and Monica Martinez, in their official capacities as commissioners of the Michigan Public Service Commissions and not as individuals, Defendants,
and
Covad Communications Company, McLeodusa Telecommunications Services, Inc., Talk America, Inc., TDS Metrocom, L.L.C., and XO Communications Services, Inc., Defendant-Intervenors.

No. 06-11982.
Sept. 26, 2007.

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Thomas M. Schehr, Dykema Gossett, Katherine A. Weed, Fraser, Trebilcock, Detroit, MI, Michael S. Ashton, Fraser, Trebilcock, Lansing, MI, for Intervenor Plaintiffs.Steven D. Hughey, Michigan Department of Attorney General, Lansing, MI, for Defendants.

ORDER

JULIAN ABELE COOK, JR., United States District Court Judge.

***1** This case is an appeal by the Plaintiff, Michigan Bell Telephone Company, doing business as AT & T Michigan, from an "Opinion and Order" that had been issued by the Michigan Public Service Commission ("MPSC") on September 20, 2005. These issues, about which the parties have differences of opinion, were addressed in their respective motions for summary judgment. For the reasons that have been set forth below, the Court will grant in part the parties' respective applications for relief.

I.

On April 28, 2006, AT & T Michigan filed this lawsuit, contending that the Defendants, in their official capacities as commissioners of the MPSC, had issued an "Opinion and Order" on September 20, 2005 [FN1] which is legally preempted by the Telecommunications Act of 1996. On May of the same year, five entities (namely, Covad Communications Company, McLeod USA Telecommunications Services, Inc., Talk America, Inc., TDS Metrocom, L.L.C., and XO Communications Services, Inc.) filed motions to intervene in the litigation, all of which were granted by the Court. Several months later (January 26, 2007), AT & T Michigan filed a motion for a summary judgment, seeking to obtain the entry of an order that would (1) permanently preclude the MPSC from enforcing the unbundling and cost-based pricing requirements that had been mandated by the MPSC in its September Order; (2) require a "true-up" of the transitional rates that had been issued by this state public service utility commission; and (3) direct the MPSC to establish appropriate rates for routine network modifications. On the same date, Covad Communications Company et al (called "Defendant-Intervenors" hereinafter) filed a cross-motion for summary judgment, in which they collectively asked the Court to uphold the validity of the now-challenged September Order.[FN2]

FN1. For purposes of simplicity, this MPSC "Opinion and Order" will be identified as the "September Order."

FN2. A brief in opposition to the AT & T Michigan motion was also filed by the MPSC.

II.

Initially, the Court determines that there are no genuine issues of a material fact which must be explored prior to its examination of the legal issues that have been raised by the parties in their respective motions. Fed.R.Civ.P. 56. Hence, the Court will now turn to other relevant matters that the parties have submitted for review.

Section 252 of the Telecommunications Act of 1996, 47 U.S.C. Sec. 252(e)(6), contains the following language:

> In any case in which a State commission makes a determination under this section [252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section [252].

In 2002, the Sixth Circuit Court of Appeals reaffirmed the authority of the federal courts to conduct a *de novo* review of an order from a state public utility commission to determine if it is in compliance with the requirements of the 1996 Act without giving deference to the commissioners' interpretation of this statute. *Michigan Bell Tel. Co. v. Strand,* 305 F.3d 580, 586 (6th Cir.2002). Moreover, a decision by a state public utility commission can be sustained only on those grounds that have been set forth within its orders. As such, a "reviewing court may not supply a reasoned basis for the agency's action that the agency itself has not given." *Bangura v. Hanson,* 434 F.3d 487, 502 (6th Cir.2006).

***2** On the other hand, the Sixth Circuit has declared that "[a]s for the MPSC's findings of fact made in the course of exercising its enforcement authority, we join our sister circuits in applying the 'arbitrary and capricious' standard." *Strand,* 305 F.d3d at 586. This arbitrary and capricious standard is the least demanding form of judicial review of an administrative action. Thus, the *Strand* court advised the district courts that when it is possible to offer a reasoned explanation for a particular outcome on the basis of the existing evidence, it is neither arbitrary nor capricious. *Id.* at 587.

III.

Historically, local telephone service was provided by state-regulated monopolies, each with its own distinct service territory. The rates and duties of such companies were regulated by the public utility commissions in each state. In the early 1990s, Michigan and other states undertook steps to introduce competition into the local market. However, these efforts were largely unsuccessful and competition in local markets remained practically nonexistent for an extended period of time. For this reason and to avoid patchwork regulation among the states, Congress passed the Telecommunications Act of 1996 ("1996 Act"), codified at 47 U.S.C. § 152 *et seq.*

The 1996 Act established a "pro-competitive, de-regulatory national policy framework" that was "designed to accelerate [the deployment of new technology and services and to] open ... all telecommunications markets to competition." H.R. Conf. Rep. No. 104-4568, at 1. Indeed, the Sixth Circuit Court in *Michigan Bell Telephone Co. v. MCIMetro Access Transition Services, Inc.,* 323 F.3d 348, 352 (6th Cir.2002), explained that:

[The 1996 Act] has been called one of the most ambitious regulating programs operating under "cooperative federalism," and creates a regulatory framework that gives authority to state and federal entities in fostering competition in local telephone markets. We have often reiterated the Act's purposes, which are ending local telephone monopolies and promoting competition in local telephone markets.

The objective of the 1996 Act was to ensure that "local service, which was previously operated as a monopoly overseen by the several states, be opened to competition according to standards established by federal law." *MCI Telecom. Corp. v. Bell Atl-Pa.,* 271 F.3d 491, 497 (3rd Cir.2001). This legislative enactment preempted all previously existing state laws that had restricted local competition, including the exclusive franchises which had been granted to incumbent local telephone service carriers by the various state public utility commissions.[FN3] However, Congress, in recognizing the existence of the practical hurdles to competition posed by requiring competitors to build duplicative stand-alone networks, concluded that the elimination of the historical legal barriers to competition was not enough to guarantee its development in the local markets. Thus, the 1996 Act represented a congressional effort to address this problem by requiring incumbent local telephone service carriers to open their networks to competing local carriers.[FN4]

FN3. The phrase, "incumbent local exchange carrier," refers to those telephone companies, such as AT & T Michigan, that had held monopolies in local markets prior to the passage of the 1996 Act.

FN4. The phrase, "competing local carrier,"is the identification of a new entrant into the deregulated market. Here, the DefendantIntervenors satisfy this definition for the purpose of this litigation.

***3** To this end, the 1996 Act imposed several duties upon every incumbent carrier. As an example, each incumbent carrier was directed to negotiate or arbitrate agreements with competing local carriers by offering one of three methods of competition; namely, (1) provide an interconnection to its network to a competing carrier that builds or has it own networks, 47 U.S.C. § 251(c)(2); (2) enable a competing carrier that desires to lease all or a part of the incumbent's network-as opposed to building its own-with access to its network elements on an "unbundled basis," 47 U.S.C. § 251(c)(3); or (3) sell its services at wholesale prices to a competing carrier that will resell them at retail prices, 47 U.S.C. § 251(c)(4).

This legislation also directed the Federal Communications Commission ("FCC") to create implementing regulations, while giving oversight responsibilities of the "interconnection agreements" to state public utility commissions. More importantly, the 1996 Act gave the task of determining which network elements must be shared or unbundled by incumbent carriers to the FCC. The language within 47 U.S.C. § 251(d)(2) provides that when determining "what network elements should be made available" for unbundling, the FCC "shall consider, at a minimum, whether-(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of" the competing carrier to offer its services. 47 U.S.C. § 251(d)(2).

The unbundling requirement, as well as the FCC's interpretation of the elements that incumbent carriers must share with every competing local carrier, has evolved and been the subject of continuing litigation over the years. In 1996, the FCC issued its *First Report and Order,*[FN5] which was immediately challenged by incumbent carriers. In 1999, the Supreme Court determined that some of the provisions within this *First Report and Order* were unlawful, and instructed the FCC to revise its regulations. *AT & T Michigan Corp. v. Iowa Utilities Bd.,* 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). As directed, new regulations were issued by the FCC in November 1999 in its *UNE Remand Order.*[FN6] However, the D.C. Circuit Court of Appeals rendered a decision on May 24, 2002 which held that some of these revised regulations were unlawful. *United States Telecom Ass'n v. FCC,* 290 F.3d 415 (2002).[FN7] Thereafter, the FCC responded by issuing its *Triennial Review Order* ("TRO") on August 21, 2003, which contained a new set of regulations. [FN8] An appeal followed. The D.C. Circuit Court of Appeals vacated several portions of the *TRO* regulations in *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (2004).[FN9] In February 2005, the FCC issued a new set of unbundling rules in the *Triennial Review Remand Order* ("TRRO") [FN10] which were subsequently affirmed on appeal. *Covad Comms. Co. v. FCC,* 450 F.3d 528 (D.C.Cir.2006).

FN5. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCCR 15499 (1996).

FN6. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 15 FCCR 3696 (1999).

FN7. This case is identified as *"USTA I."*

FN8. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCCR 19020 (2003).

FN9. This case is identified as *"USTA II."*

FN10. *Order on Remand, In re Unbundled Access to Network Elements,* 20 F.C.C. R. 2533 (2005).

***4** The Congress, in its passage of the 1996 Act, also assigned specific responsibilities to the state public utility commissions. Section 252 of this statute establishes the procedural framework by which competing carriers may enter into contracts, called "interconnection agreements," with incumbents to fulfill the obligations that are found in subsections 251(b) and 251(c), including the duty to provide unbundled access to certain network elements, as required by 251(c)(3). The 1996 Act also (1) requires incumbent carriers to negotiate these agreements upon request, and (2) provides for the assignment of a regulatory review of interconnection agreements to state public utility commissions. However, if these negotiations do not produce an agreement, either party to the process may petition the state public utility commission to arbitrate the unresolved issues. 47 U.S.C. § 252(b)(1). If either or both parties disagree with the terms within the interconnection agreement, as arbitrated by the state public utility commission, a review by a federal district court is available to the aggrieved party. 47 U.S.C. § 252(e)(6).

In addition, the 1996 Act has a special provision for those regional "Bell operating companies,"that split off from AT & T as the result of a 1982 antitrust settlement. Prior to the passage of the1996 Act, these companies had been precluded from providing long distance telephone service to their customers. However, Congress, in its enactment of the 1996 Act, provided these Bell operating companies with an opportunity to enter the long distance market in a state within its service area if certain steps were undertaken to open its local service market to competition. *Sprint Communications Co. L.P. v. F.C.C.,* 274 F.d3d 549, 551 (D.C.Cir.2001).

Section 271 of the Act specifically deals with the ability of the Bell operating companies to provide long distance services. 47 U. S .C. § 271(d). In order to gain permission to offer long distance services in a state in which a Bell operating company provides local service, the 1996 Act requires it to apply for approval with the FCC. 47 U.S.C. § 271(b)(1). Thereafter, the FCC has a period of ninety days from the date of the application in which to grant or deny the request for approval, based on whether the Bell operating company has satisfied the

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statutory prerequisites. In order to receive approval from the FCC, a petitioning Bell operating company must meet the fourteen identifiable requirements of a “competitive checklist” in Section 271(c)(2)(B).

IV.

In February 2005, AT & T Michigan notified competing carriers of its intention to modify some of the existing interconnection agreements which, arguably, were no longer in compliance with the FCC regulations. However, some of the competing carriers, including the Defendant-Intervenors, proffered their objections to this proposal with the MPSC, contending that AT & T Michigan should not be allowed to unilaterally modify the interconnection agreements. Thereafter, the MPSC initiated a proceeding (case no. U-14447), in which it initially directed the parties to engage in a collaborative process as a means of resolving their disagreements. Two of the DefendantIntervenors (i.e., Talk America, Inc., and XO Communications Services, Inc.), added an additional issue to the collaborative process, contending that the interconnection agreements had not adequately implemented some of the rulings by the FCC in the *TRO* that had not been adversely affected by *USTA II* or the *TRRO.* As a result, the MPSC expanded the collaborative process to include those issues that had been raised by these two competing carriers.

***5** On September 20, 2005, the MPSC rendered the “September Order”which included its decisions relating to twenty-nine of the issues that had been raised by the parties, five of which have been challenged by AT & T Michigan and are the subject of this appeal.

V.

There is a disagreement between the Plaintiff and the Defendant-Intervenors over whether AT & T Michigan's obligations under 47 U.S.C. § 271 should be included in their interconnection agreements and, if so, to what extent. In its September Order, the MPSC declined to adopt the suggested language by either party regarding their respective obligations under Section 271. However, the MPSC, in reasserting its authority to issue the now-challenged directive, ordered the parties to negotiate, stating:

> The Commission is still convinced that obligations under Section 271 should be included in the interconnection agreements approved pursuant to Section 252. However, the Joint CLEC's [FN11] must negotiate with SBC [FN12] concerning terms and conditions, seeking Commission arbitration if necessary. If the CLECs experience problems with obtaining items available pursuant to Section 271, they may take appropriate enforcement action.

FN11. Competing carriers are often referred to as CLECs in the telecommunications industry.

FN12. AT & T Michigan Michigan had previously conducted its business operations as “SBC.”

September Order at 16.

AT & T Michigan challenges the efficacy of this ruling, maintaining that the MPSC did not have the authority to issue such a directive. The Defendant-Intervenors argue that this challenge by AT & T Michigan is not ripe for a decision and should be dismissed. They point out that the September Order only outlined an appropriate method upon which to resolve any potential Section 271 disputes, claiming that AT & T Michigan had not presented the Court with a justiciable case or controversy.

Contrary to this argument by the Defendant-Intervenors, the September Order does impose a binding duty

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upon AT & T Michigan that it negotiate and include Section 271 obligations in its Section 252 agreements. Hence, the Court finds that this issue presents a justiciable case or controversy, and that a resolution of this matter by the Court is proper and necessary.

Next, AT & T Michigan argues that the directive in the September Order, which includes Section 271 obligations in its interconnection agreements, is without any justifiable legal basis. AT & T Michigan initially points to the structure of the 1996 Act that established two separate regulatory frameworks in which to govern two distinct markets. In one framework, it established competition for local telephone service. In the other framework, it discussed the entry by the Bell operating companies into long-distance markets. Section 251 is the linchpin of the framework on local telephone service. 47 U.S.C. § 251-261. Whereas, Section 271 appears in the framework of the 1996 Act which relates to Bell operating companies. 47 U.S.C. § 271-276.

Congress gave decision-making authority to the various state public utility commissions, such as the MPSC, in only one of these frameworks; namely, governance over those matters that pertained to competition in local telephone markets. In sharp contrast to the shared federal and state authority for local telephone markets, Congress established a separate framework for those Bell operating companies that are administered solely by the FCC. Approval for the Bell operating companies to provide long distance service under Section 271 is expressly granted by the FCC-not the state utility commission. If an aggrieved party believes that a Bell operating company-like AT & T Michigan-does not satisfy the requirements of Section 271, a complaint may be filed with the FCC. 47 U.S.C. § 271(d)(6).

***6** The MPSC and the Defendant-Intervenors have a different view of this issue. They point to Section 271 (c)(2)(A)(ii), which requires a Bell operating company-as a condition precedent to providing long distance services to its customers-to satisfy the requirements of Sections 251 and 252. By directly referencing these paragraphs within Section 271, the 1996 Act incorporates the obligation of a Bell operating company to comply with the requirements of Section 252. It is also undisputed that approval from the FCC for a Bell operating company to enter a long-distance market under Section 271 initially depends on a review and approval by the state public utility commission. This state approval process acts as a further binder of these two sections. The DefendantIntervenors also argue that a broadly implied authority exists under Section 252 for the state public utility commissions to undertake the necessary action to effectuate the Act, including Section 271.

Unfortunately, there is no direct case law on this issue within this Circuit. However, AT & T Michigan cites to *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n,* 359 F.3d 493, 497 (7th Cir.2004), in which the Seventh Circuit Court of Appeals opined that a state public utility commission may not "parlay its limited role in issuing a recommendation under section 271, involving long-distance service, into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service."

Following its review of the record, the Court concludes that the MPSC does not have the authority to direct the parties to negotiate those terms and conditions which pertain to Section 271 in the interconnection agreement process. Section 271 grants oversight authority to the FCC, but not to the state public utility commissions. Thus, the Court declares the directive by the MPSC, as found in the September Order relating to this matter, to have been unlawfully issued and must be set aside.

VI.

In the dispute resolution process that preceded the issuance of the September Order, the parties debated the issue as to whether AT & T Michigan, as an incumbent carrier, must continue to provide entrance facilities to competing carriers at TELRIC-rates.[FN13] The MPSC, in its September Order, determined that AT & T Michigan was obligated to provide "entrance facilities to the extent required for interconnection pursuant to Section 251(c) of the 1996 Act." September Order at 13.[FN14]

FN13. Unbundled network elements (UNEs) must be provided at cost-based rates, 47 U.S.C. 252(d)(1), and the FCC has defined the methodology to set such prices. This methodology is commonly known within the industry as "TELRIC," which stands for Total Element Long-run Incremental Cost. This technical term translates to "cost-based rates," as opposed to "retail rates."

FN14. The term "entrance facilities" was defined by the D.C. Circuit Court of Appeals as "dedicated transmission facilities that connect ILEC and CLEC locations." *United States Telecom Ass'n v. FCC,* 359 F.3d 554, 585 (2004). In a layman's term, entrance facilities can be defined as the mechanism that is used to transport traffic between networks. Under the 1996 Act, entrance facilities are defined as a "network element" to which incumbent carriers must provide competing carriers with unbundled access pursuant to 47 U.S.C. § 251(c)(3). *TRRO* at ¶¶ 136-137.

As a network element, entrance facilities are subject to an "impairment" analysis under Section 251(d)(2) of the Act to determine whether they must be unbundled (i.e., leased to requesting carriers at TELRIC-based rates) under Section 251(c)(3). *USTA II,* 359 F.3d at 586. In the *TRRO,* the FCC conducted an impairment analysis and concluded that entrance facilities can be procured by competing carriers at a low cost with no impairment to competing carriers. *TRRO* ¶ 138. The FCC declared that competing carriers can readily obtain these facilities from other sources or economically provide them for themselves. The FCC also rendered the following declaration in ¶ 140, which is the source of the dispute between the parties in this case, as well as the authority upon which the MPSC relied on in making its finding regarding entrance facilities:

> ***7** We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

TRRO, at ¶ 140. In the next paragraph, the FCC opined that "[t]he evidence described above convinces us that competitive LECs are not impaired without access to entrance facilities." *TRRO* at ¶ 141.

The Defendant-Intervenors and the MPSC have taken the position that ¶ 140 represents an acknowledgment by the FCC that entrance facilities can be used by CLECs for different purposes. They maintain that entrance facilities can be used in two ways; namely, (1) to provide a final link in the transmission path between a competing carrier's customer and the carrier's switch, and (2) to serve as interconnection facilities with which to exchange traffic between incumbent and competing carriers' switches. The Defendant-Intervenors claim that the first situation (known in the industry as "backhauling,") is where a competing carrier uses an incumbent's entrance facilities to carry traffic to and from its own end users. However, they acknowledge that a competing carrier in this situation is not entitled to use the entrance facilities at TELRIC-rates. On the other hand, the Defendant-Intervenors submit that, in dealing with the second situation, a competing carrier, which uses entrance facilities to interconnect with the incumbents network, is entitled to cost-based rates.

In a counter-argument, AT & T Michigan asserts that the MPSC's interpretation of ¶ 140 of the *TRRO,* if adopted, would have the practical effect of nullifying the earlier findings by the FCC. AT & T Michigan maintains that competing carriers have the right to obtain interconnection facilities pursuant to § 251(c)(2), without any corresponding right to lease such facilities at TELRIC-rates.

The Court agrees with AT & T Michigan and concludes that the September Order which pertains to this issue does not comply with the rules that were adopted by the FCC pursuant to Section 251. It is not reasonable to interpret an explanatory comment, such as the one found in ¶ 140 of the *TRRO,* in a manner that undermines the plain meaning of the rule. The meaning of ¶ 140 must be interpreted in light of the FCC rule, which provides that entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis. The *TRRO* conveys the finding by the FCC that entrance facilities should be offered competitively. A review of the ruling by the MPSC reveals that the September Order does not comply with this directive, and, accordingly, must be set aside.

VII.

AT & T Michigan also challenges the holding by the MPSC in its September Order as it relates to how to define the term "business lines." In its directive, the MPSC rejected AT & T Michigan's position on the definition of business lines serving a wire, and instead incorporated the following language that had been proposed by the competing carriers into its September Order:

> ***8** The Commission finds that the first sentence of the FCC's rule defining business lines requires that, to be counted as a business line, the line must serve a business customer. The remaining portion of the definition presumes serving a business customer and clarifies that any loop, whether UNE-P, UNE-L, or leased line will be counted when it serves a business customer. Therefore, the Commission concludes that the language proposed by the Joint CLECs should be adopted for purposes of the amendment to the interconnection agreements.

September Order at 9.

As explained above, the 1996 Act requires incumbent carriers to share, or unbundle, certain network elements with competing carriers. Section 251(d)(2) states that in determining which network element must be unbundled, the FCC must find that the network element satisfies the "necessary and impair" standard; i.e., that the element must be necessary for a competing carrier, and the competing carrier must be impaired without access to the incumbent's element at issue. Loops and transport circuits are network elements. In the *TRO* and the *TRRO,* the FCC grappled with trying to determine whether and where competing carriers were impaired if they could not obtain loops and transport circuits from incumbent carriers.

An impairment does not exist in those locations in which the economics of the market justify the construction of competitive facilities or where network elements can be obtained from providers other than incumbent carriers. In the *TRRO,* the FCC determined that, in those circumstances involving high-capacity loops and transport wherein it could not cite to conclusive evidence of non-impairment in particular markets or on particular transport routes between wire centers, the presence of multiple fiber-based collocators and a high concentration of business lines in incumbent wire centers provided a reasonable "proxy" for identifying those situations in which an impairment did not exist. *TRRO* at ¶¶ 78-103. Specifically, the FCC stated:

> We have weighed carefully a variety of actual competitive indicia for determining impairment and determine that the best and most readily administered indicator of the potential for competitive deployment is the presence of fiber-based collocators in a wire center. We also determine that business line density in a wire center is a useful tool to infer where carriers are likely to hve collocated with fiber, and thus, a measure of where

competitors are capable of duplicating the incumbent LEC's network. Both of these measures constitute proxies for where sufficient revenue opportunities exist to justify the high fixed and sunk costs of transport deployment.

TRRO at § 93.

In accordance with these findings, the FCC established specific numerical thresholds for the number of "business lines" and/or fiber-based collocators in a wire center. Once a wire center exceeds these thresholds, the incumbent is no longer required to unbundle high-capacity loops to transport wire from that center. For example, once a wire center is served by at least 60,000 business lines and at least four fiber-based collocators, no future DS1 loop [FN15] unbundling will be required in that wire center. For DS3 loops [FN16], the threshold is met by a wire center with at least 38,0000 business lines and at least four fiber based collocators. 47 C.F.R. § 51.319 (a)(5)(I).

FN15. A DS1 loop is a type of loop that carries that equivalent of 24 voice-grade telephone lines.

FN16. A DS3 loop carries the equivalent of 672 individual voice grade telephone lines.

***9** Thus, the issue between AT & T Michigan and the Defendant Intervenors is which lines are counted as business lines. The FCC's regulations defined business line in the following manner:

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 form 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.

47 C.F.R. § 51.5.[FN17]

FN17. "UNE" stands for "unbundled network element," and refers to those elements which must be unbundled, or shared, with competing carriers.

AT & T Michigan submits that the MPSC, when declaring in its September Order that "to be counted as a business line, the line must serve a business customer," rendered an interpretation which, in its judgment, was unlawful. Further, it maintains that the number of business lines counted should include all UNE loops, and claims that the MPSC's interpretation only counts "some" UNE loops.

In support of its argument on this issue, AT & T Michigan looks first to the regulatory language which it believes to be clear and unambiguous, noting that it uses the phrase, "all UNE loops." 47 C.F.R. § 51.5. Moreover, the directive to count "all UNE loops" is consistent with the FCC's underlying goal that impairment criteria be simple and easy to administer. Pursuing this issue, AT & T Michigan argues that while counting all loops is a relatively simple task, as this data has already been tracked, a compilation of pertinent data on loops connected to businesses is more complicated. Many states, including Michigan, do not have the ability to determine whether a stand-alone loop is being used to serve a business customer or a residential customer. AT & T Michigan points out that a loop belongs to an incumbent carrier, whereas the customer belongs to its competitor who possesses the knowledge about the use of the loop-not the incumbent.

The Defendant Intervenors defend the MPSC interpretation which, it believes, is correct and reflects the

FCC's intention to limit the number of business lines as a proxy for determining where revenue opportunities exist. They also point to ¶ 103 of the *TRRO,* which explains the FCC's decision to focus on business line density, stating:

> Business line density ... is an administrable proxy for determining where significant revenues are available sufficient for competitors to deploy transport facilities, despite the fixed and sunk costs of deployment.... Further, business lines are a more accurate predictor than total lines because transport deployment largely has been driven by the high bandwidth and service demands of businesses, particularly in areas where business locations are highly concentrated.

TRRO, ¶ 103.

The Court disagrees with the Defendant Intervenors, and concludes that the September Order improperly confuses the definition of a business line with the procedure that is used for counting it as specified in the governing regulation, 47 C.F.R. 51.5. Unfortunately, the September Order ignores the plain language of the regulation, and transforms an otherwise unambiguous phrase, "all UNE loops," to mean only some UNE loops. Moreover, the Court concludes that the MPSC, in misconstruing the regulation, has violated existing federal law. Accordingly, this part of the September Order must be voided.

VIII.

***10** Prior to the *TRRO,* which was issued in February 2005, local switching was often provided to competing carriers in a combination of unbundled network elements (or "UNEs") known as the "UNE Platform," or "UNE-P." The UNE Platform provided a competing carrier with unbundled access to a package of network elements that are composed of switching, a local loop, and a shared transport of calls between wire centers.FN18 The entire platform was provided to competing carriers at cost-based, or TELRIC, rates.

FN18. It is understood within the telecommunications industry that a local exchange network is comprised of three elements: (1) local loops, which are the wires connecting telephones to switches; (2) switches, which are the equipment that directs calls to their to their destinations; and (3) transport trunks, which are the wires carrying calls between switches. *AT & T Michigan Corp. v. Iowa Utilities Bd.,* 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

In the *TRRO,* the FCC determined that there was no longer any need for local switching to be unbundled by incumbent carriers to competing carriers. To put it simply, after the holding in the *TRRO,* local switching was no longer a UNE (unbundled network element). As a result, competing carriers are not entitled to use the local switching of the incumbent carriers at cost-based rates, and the original method of providing a group of network elements through the UNE Platform has been eliminated.

In the *TRRO,* the FCC also determined that rather than require competing carriers to immediately switch from paying cost-based rates to retail rates for local switching, it would allow the participants a period of transition in which to adjust. The purpose of the transition was to provide for an "adequate time for both competing LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loops cut overs or other conversions." *TRRO* at ¶ 227. To put it simply, the transition was designed to ensure an orderly migration of the UNE Platform and unbundled switching. To that end, the FCC required incumbents to continue to "provide access to local circuit switching on an unbundled basis" to a carrier's "embedded base" of end-user customers for a 12-month period. 47 C.F.R. Section 51.319(d)(2)(iii). It adopted a new rate applicable during the 12 month transition period of the existing UNE Platform rate plus a dollar. The *TRRO* stated that this would:

> help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated ... while at the same time, these price increase, and the limited duration of the transition, provide some protection of the interests of the incumbent LECs in those situations where unbundling is not required.

TRRO at ¶ 228.

In the negotiation and arbitration that led up to the September Order, the parties raised the issue of the appropriate rate for competing carrier customers who migrated to a functionally equivalent AT & T Michigan service arrangement (e.g., resale) before the transition period ended on March 11, 2006. The September Order adopted the language provided by the Defendant Intervenors, and held that, unless the competing carrier requests or agrees otherwise, the FCC-established transition rate (i.e., the UNE Platform rate plus one dollar) would apply.

***11** In order to phase out the UNE Platform, competing carriers were given a period of one year to transition their customers to a different commercial arrangement. AT & T Michigan contends that once the customer is switched to a new carrier, the transition rate should no longer apply, and a retail rate should apply in its place. AT & T Michigan argues that requiring it to provide local switching at the transition rate after the customer has been "resold" to another carrier constitutes an unlawful unbundling, in violation of the *TRRO.*

The Court disagrees with this argument by AT & T Michigan. On this issue, the September Order provision which calls for a designated transition period is clearly within the framework of ¶ 228 of the *TRRO,* which specifically gives state public utility commissions the discretion to implement these rates. The method within the September Order for dealing with the transition period is reasonable. Thus, the Court finds that it is in accordance with federal law.

IX.

FCC regulations require incumbent carriers "to make routine network modifications to unbundled transmission facilities such by requesting carriers where the requested transmission facility has already been constructed." *TRO* at ¶ 632; 47 C.F.R. Section 51.319(e)(4). For example, an incumbents' loops are not capable of functioning as digital high-capacity loops until the incumbent has modified them by removing certain equipment or adding other equipment. *TRO* at ¶¶ 633, 634. The same can be true of an incumbent's transport circuits. These technical modifications are commonly referred to in the industry as "routine network modifications." FN19

> FN19. The FCC gave the following examples of necessary loop modifications required: "rearrangement or splicing of cable; adding a double or repeater; adding an equipment case; adding a smart jack; installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer." *TRRO* at § 634.

Federal law requires that incumbents be compensated for the costs of making modifications. In the *TRO,* the FCC stated:

> The Commission's pricing rules provide incumbent LECs with the opportunity to recover the cost of the routine network modifications we require here. State commissions have discretion as to whether these costs should be recovered through non-recurring charges or recurring charges. We note that the costs associated

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with these modifications often are reflected in the recurring rates that competitive LECs pay for loops. Specifically, equipment costs associated with modifications may be reflected in the carrier's investment in the network element, and labor costs associated with modifications may be recovered as part of the expense associated with that investment (*e.g.*, through application of annual charge factors (ACFs)). The Commission's rules make clear that there may not be any double recovery of these costs (*i.e.*, if costs are recovered through recurring charges, the incumbent LEC may not also recover these costs through a NRC).

In the September Order, the MPSC rejected the suggested language by AT & T Michigan regarding the recovery of costs for network modifications, and instead, adopted language that had been proposed by the competing carriers. The MPSC stated that costs "for which [AT & T Michigan] seeks to impose additional charges should be recovered through the charges approved in Case. No. U-13531." AT & T Michigan claims that this directive is arbitrary, capricious and violates the cost-recovery mandates of the 1996 Act, in that (1) the September 2004 order in U-13531 (which established new TELRIC rates for UNEs) was issued five months before the *TRRO*, and (2) the MPSC precluded it from seeking an update from September 2004 until September 2006. Therefore, AT & T Michigan concludes, the MPSC's order violates the cost-recovery mandates of the Act, the FFC's implementing orders, and is arbitrary and capricious. The Defendant Intervenors respond by pointing out that the MPSC gave AT & T Michigan a full opportunity to present its costs and to seek rates that would recover its costs while performing routine network modifications. Finally, they conclude that the decision by the MPSC is neither unlawful nor arbitrary and capricious.

***12** On this issue, the Court finds that the September Order is within the discretion of the MPSC. More importantly, the Court determines that this provision neither violates the 1996 Act nor federal regulations. Hence, the arguments on this issue by AT & T Michigan are rejected.

VIII.

Accordingly, and for the reasons stated above, the Court will grant a summary judgment in favor of AT & T Michigan on the following issues: (1) The September Order ruling that obligations under Section 271 should be included in interconnection agreements under Section 252 is unlawful; (2) the declaration within the September Order ruling, which requires the unbundling of entrance facilities, is invalid; and (3) the definition of business lines in the September Order contravenes federal law. The Court will also grant a summary judgment in favor of the MPSC and the Defendant Intervenors on the following issues: (1) the authority in the September Order which provides for the recovery of transition period rates is within the discretion of the MPSC, and (2) the contested language in the September Order which pertains to AT & T Michigan's recovery of routine network modification costs is lawful.

E.D.Mich.,2007.
Michigan Bell Telephone Co. v. Lark
Not Reported in F.Supp.2d, 2007 WL 2868633 (E.D.Mich.)

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Exhibit B

Case Nos. 10-1187 & 10-1212

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QWEST CORPORATION, a Colorado Corporation,

Plaintiff-Appellant/Cross-Appellee,

vs.

THE COLORADO PUBLIC UTILITIES COMMISSION; RON BINZ, in his official capacity as Chairman of the Colorado Public Utilities Commission; JAMES TARPEY, in his official capacity as a member of the Colorado Public Utilities Commission; MATT BAKER, in his official capacity as a member of the Colorado Public Utilities Commission;

Defendants-Appellees/Cross-Appellants,

and

CBEYOND COMMUNICATIONS, LLC.

Defendant-Intervenor-Appellee/Cross-Appellant.

On Appeal from the United States District Court
For the District of Colorado, Honorable Richard P. Matsch, Presiding
Civil Action No. 08-cv-02653-RPM-KLM

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Under the doctrine of primary jurisdiction, the Court should refer the issues in this appeal to the Federal Communications Commission (FCC) because (1) this appeal involves the construction of technical terminology; (2) the FCC is the expert agency charged by Congress with the subject matter; and (3) uniformity in the national impairment standard is necessary but absent. If the Court chooses to construe the business line definition unguided by the FCC, it should affirm the Colorado Public Utilities Commission's interpretation of the business line definition because (1) the first sentence of the definition requires that business lines be switched and serve businesses "whether" the line is served by the Incumbent or the Competitive LEC; and (2) the assertion that "all" means "all" is unsupported by Qwest's own position.

I. PRIMARY JURISDICTION REFERRAL IS APPROPRIATE

This Court should stay this appeal and refer the meaning of the business line definition[1] to the FCC. Qwest asserts that referring the meaning of the business line definition under the doctrine of primary jurisdiction is inappropriate because (1) there is no "uniformity" problem involving various different interpretations of

[1] 47 C.F.R. §51.5.

the business line definition; and (2) primary jurisdiction referral is only appropriate where there is an issue of fact.[2] Both are incorrect.

Even if existing non-uniformity were the test (and it is not), there is no dispute that various state commissions issued conflicting orders ruling on the proper interpretation of "business lines," nor that the majority of state commissions have not ruled on the meaning of the business line definition at all. More importantly, the inquiry into the meaning of the business line definition requires an understanding of technical terms as well as the intent of the FCC. Under that circumstance, the appropriate response for courts is to ask the FCC to clarify its rule and/or its intent.

A. Uniformity Is Necessary and Not Present.

Of the *minority* of state commissions that have issued opinions regarding the proper interpretation of the business line rule, there is no uniformity. In the interest of national uniformity, Congress solely charged the FCC with setting the impairment standard.[3] In the *Triennial Remand Review Order* (*TRRO*) the FCC attempted (for at least the third time) to articulate a test for determining impairment

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[2] Response and Reply Brief of Appellant Qwest at pp. 1-4.

[3] 47 U.S.C. 251(d)(2).

using the count of business lines in a wire center and fiber based collocators.[4] Unfortunately, the FCC imprecisely drafted the definition for "business line."

The standard is not whether there is *existing* non-uniformity in the implementation of agency rules; the question is whether there is a need to have the agency rule on a matter within its sphere of authority in order to avoid *potential* non-uniformity.[5] Uniformity protected by the doctrine of primary jurisdiction is not an antecedent consideration. In no case found by Appellees was there any need to show *actual* non-uniformity. As such, the Court should ask whether national uniformity is served by referral and whether the subject of the referral is within the authority of the agency.[6]

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[4] Order on Remand, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC Order 04-290, WC Docket No. 04-313, CC Docket No. 01-338, 20 FCC Rcd. 2533 (FCC February 4, 2005) ¶¶ 2-4 ("*TRRO"), aff'd Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[5] *Marshall v. El Paso Natural Gas*, 874 F.2d 1373, 1379 (10th Cir. 1989); *Mical Commc'ns v. Sprint Telemedia*, 1 F.3d 1031, 1038 ("This court in *Marshall* specifically considered, *inter alia*, whether 'the potential for inconsistent orders [by the district court and the agency] was so likely that the district court abused its discretion in refusing to refer this case to the [agency] under primary jurisdiction." (citing *Marshall* at 1379).

[6] *TON Services v. Qwest Corporation*, 493 F.3d 1225, 1238-39 (10th Cir. 2007).

Nevertheless, the record is clear that state commissions and courts have interpreted the term "business line" to include *and* exclude certain sets of lines.[7] If the business line definition was clear, or there was uniformity in the meaning, the parties would not have the dispute before this Court. On the subject of counting residential customers as businesses, at least three out of the fifteen state commissions that have ruled on the matter have ruled against Qwest's position (Colorado, Michigan and North Carolina).[8] On the subject of counting non-switched (data) lines as business customers, Georgia also ruled against Qwest's position.[9] As a consequence, there is no ruling by this Court that could correct the undeniable variance in impairment standards across the country. At a minimum, if this Court reversed the Colorado PUC, North Carolina and Georgia are still contrary, and the majority of state commissions have not ruled on the matter. In the opinion of the Appellees, several courts and a dozen state commissions are wrong. Only a ruling by the FCC will correct that situation. Failure of courts to

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[7] Opening Brief of Appellant Qwest at pp. 37-41.

[8] *Id.*, Colorado was reversed in part by the District Court in this case, and Michigan was reversed in an unreported opinion (*Bell Telephone v. Lark*, No. 06-11982, 2007 WL 2868633 (E.D. Mich. Sept 26, 2007).

[9] Order on Remaining Issues, *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc's Obligations to Provide Unbundled Network Elements*, Ga. PSC Docket No. 19341-U, 2006 WL 758303 (Ga. P.S.C. February 7, 2006).

seek clarity from the FCC has created the non-uniformity that currently exists. This Court should correct that record.

B. The Court should not guess at the meaning of technical FCC rules.

Qwest is also incorrect that primary jurisdiction must rest upon a factual question.[10] The formula for courts to consider is not as fixed as Qwest represents. "There is no fixed formula for applying the doctrine. Courts should consider case-by-case whether the reasons for the existence of the doctrine are present and whether the purposes it serves [i.e., uniformity and resort to administrative expertise] will be aided by its application in the particular litigation."[11]

The construction of technical words within the business line definition is precisely the appropriate subject for referral to the expert agency. In addition to referring this matter to the FCC to protect national uniformity, referral to the FCC is appropriate where the issues turn on "technical words or phrases not commonly understood or employed."[12]

This case certainly turns on determining the construction of "technical words or phrases not commonly understood or employed." Indeed, it turns ***entirely***

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[10] Response and Reply Brief of Appellant Qwest at pp. 1-4.

[11] *TON Services v. Qwest Corporation*, 493 F.3d 1225, 1239 (10th Cir. 2007) (internal quotation marks and citations omitted).

[12] *Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285, 292 (1922).

upon the meaning of one technical phrase in the first sentence of the business line definition: "whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC."[13]

The first sentence reads, "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." If the phrase "a competitive LEC that leases the line from the incumbent LEC" *includes* UNE loops – and it does – then the qualities described in the first sentence – that a business line is a "switched access line" and is "used to serve a business customer" – apply to UNE loops. Those are the two issues in dispute – whether "business lines" include non-business lines and/or non-switched lines.

The meaning of the phrase "a competitive LEC that leases the line from the incumbent LEC" arises from an area of particular FCC expertise: the various state, federal and contractual obligations under which the Incumbent LECs operate – including the terms and conditions upon which they lease facilities to Competitive LECs (CLECs). What is and is not included in the facilities referenced by the phrase "a competitive LEC that leases the line from the incumbent LEC" should be requested from the expert agency – the FCC.

[13] 47 C.F.R. §51.5.

In the context of interpreting a tariff, the United States Supreme Court mandated that:

> [W]here the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the particular meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination *must* be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy.[14]

Though recognizing that the construction of tariffs is a "question of law,"[15] the Court in *Great Northern* directed that tariff disputes involving the construction of technical words should, in the interest of uniformity, be directed to the relevant commission for preliminary interpretation. In *Great Northern*, the Court ruled that the lower court was *not* obligated to invoke primary jurisdiction because "[t]he task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense . . .".[16] In *Great Northern*, the words at issue were not used in a technical sense (grain was held for inspection and forwarded to a new destination) and referral was not appropriate.

In an earlier case, distinguished by the Court in *Great Northern*, where primary jurisdiction was appropriate, the court was asked to ascertain whether

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[14] *Great Northern*, 259 U.S. at 292 (emphasis added).

[15] *Id* at. 290.

"lumber" in an interstate tariff should encompass "oak railway cross-ties."[17] In *Texas & Pacific*, there was disagreement among experts over this meaning of "lumber."[18] Resort to the agency for its technical opinion over the issue was, therefore, necessary to insure uniformity.[19]

Here, the dispute is whether a reference to leased facilities encompasses "UNEs," and, if Qwest's position has merit, whether the FCC chose a method to count business lines at odds with its definition of a business line. This case is more akin to *Texas & Pacific* than *Great Northern*. The terms here are certainly more complex than the meaning of "lumber" and the intent of the national rule – to count businesses – is in manifest conflict with the interpretation suggested by Qwest – which counts residential customers as if they were businesses. Nothing about the business line rule involves normal words used in their ordinary fashion, as was the case in *Great Northern*. This Court should, consequently, seek guidance from the FCC.

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[16] *Id.* at 295.

[17] *Id.; Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U.S. 138 (1914).

[18] *Id.* at 146.

[19] *Id.*

The fact that *Great Northern* and *Texas & Pacific* involved the interpretation of tariffs is not a basis to discount their precedential value. The need for uniformity and the highly technical considerations underlying the business line rule exceed the traditional tariff case. Tariffs impact the transactions between two companies, normally in a limited transaction in a single state. The business line rule impacts all related UNE transactions between all carriers in all states. The need for FCC guidance is, therefore, that much more warranted. This Court should invoke primary jurisdiction and refer the two issues in dispute to the FCC for its clarification.

II. UNES ARE INCLUDED IN THE SET OF ACCESS LINE CLECS LEASE FROM ILECS

The Colorado Attorney General and Cbeyond argued that the "critical" portion of the business line definition is the phrase "whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC."[20] Cbeyond and the Attorney General argued that because UNEs are among the access lines competitive carriers lease from Qwest, the qualities the FCC assigned to "business lines" – that they are "incumbent LEC-owned switched

[20] Appellees Response and Reply Brief at p. 17 ("The critical point in understanding the meaning of the business line definition is the last part of the first sentence.").

access lines used to serve a business customer" – apply "whether" the access line is used "by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC."[21]

In reply, Qwest does not dispute that UNEs are included in the set of loops that competitive LECs lease from incumbents. Rather, Qwest misleadingly argues that UNE loops are "not mentioned" in the first sentence.[22] Qwest also states that the second sentence "introduced a new category of lines."[23] The truth is that UNEs are the predominate facility that competitive LECs lease from Qwest.[24]

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[21] *Id.* at pp. 17-19.

[22] Response and Reply Brief of Appellant Qwest, p. 11 ("The problem with this argument, however, is that the FCC does not refer to UNE loops until the second sentence . . .")

[23] Id. at p. 15 ("At the same time, the FCC introduced a new category of lines in the second sentence – UNE loops . . . That new category of lines is not listed in the first sentence . . .").

[24] For instance, for retail switched access lines, the FCC recently reported: "At year-end 2009, CLECs reported using several methods to provide their 21 million retail switched access lines. They reported providing 33% of lines (or about 7.1 million lines) by reselling ILEC wholesale or retail services. They reported providing 38% of lines (or about 8.2 million lines) over ILEC facilities leased at regulated, cost-based rates (that is, as unbundled network elements, or UNEs). And they provided the remaining 28% of lines (or about 6.0 million lines) over local loops that they owned. However, the information about wholesale relationships differs as reported by CLECs and by ILECs, as discussed in Figure 8." FCC Local Competition Order as of December 31, 2009, released January 11, 2011, available at http://www.fcc.gov /Daily_Releases /Daily_Business/2011 /db0111/ DOC-304054A1.pdf. (emphasis added).

Special access, resale and state tariffs, as well as some private agreements, are the remaining ways competitive LECs lease facilities from Qwest. When the FCC used the phrase “whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC” it meant the qualities of the “business line” to apply to both the incumbent LEC as well as facilities leased by competitive LECs -- which includes UNEs.

The fact that, in the very next sentence, the FCC did not reiterate every quality of a business line in advance of the piece-part calculus for counting it cannot serve as a basis to ignore the qualities the FCC gives a “business line.” If instead of business lines, the rule asked to count “milking cows,” the absurdity of the interpretation proposed by Qwest becomes manifest.

In this analogy, the FCC is trying to determine whether CLECs have enough milking cows to get enough milk to make buying their own milking cows economic. In the first sentence, the FCC states that milking cows should be cows that provide milk whether they are owned or leased. In the next sentence, the FCC states that milking cows should be counted by adding all milking cows owned by famers and all bovines leased by those famers. Qwest is essentially arguing that the term “all bovines” includes bulls, so bulls should be counted as milking cows – despite the fact that they plainly are <u>not</u> milking cows AND the fact that the FCC stated that milking cows are cows that provide milk. As absurd as that sounds, that is exactly the case at hand (in less technical jargon).

No party can assert that residential customers are business customers any more than bulls are cows. Nor can anyone say that residential customers represent the "high bandwidth and service demands of businesses" any more than one can represent that famers can get milk from bulls.[25] The FCC was seeking to identify businesses – and expressly said so in the first sentence of the business line definition. Having expressly stated that a business line is a line used to serve a business, the FCC did not restate that requirement in the very next sentence in advance of the reference to UNEs.

Nevertheless, Qwest asserts that the FCC's reference to "all UNEs" was intentionally designed to count residential customers as individual businesses. That is more absurd than counting bulls as milking cows. Qwest's argument is entirely focused on the adjective "all" in front of "UNE Loops" in the second sentence – arguing that "all" means "all."[26] However, no party – including Qwest – believes that "all" means "all."

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[25] *TRRO* at ¶193

[26] Response and Reply Brief of Appellant Qwest, p. 2, 7-9, 12-13, 16-17.

III. NEITHER INSTANCE OF "ALL" MEANS "ALL"

Appellees pointed to two inconsistencies in Qwest's argument that "all UNE loops" should be read as an absolute bar to any consideration of the remainder of the business line definition: (1) that the first instance of the same adjective "all" in the same sentence in the phrase, "all incumbent LEC business switched access lines," does not mean "all incumbent LEC business switched access lines" are counted – and no party disputes that fact; and (2) Qwest agrees that residential UNE-P is not counted despite the fact that it is included in the phrase "all UNE loops." [27] Essentially neither instance of the "unambiguous" term "all" means "all" – they both mean "some" (the very thing Qwest asserts they cannot mean). Qwest responses to those criticisms prove Appellees' point.

Qwest erroneously argues that the "unambiguous"[28] requirement that "[t]he number of business lines in a wire center shall equal" "all UNE loops" prohibits any reading that would exclude a subset of "some UNE loops" from the business line count. In Qwest's words, "'[A]ll UNE loops' must be given its plain meaning and cannot permissibly be read to include just 'some' UNE loops." Qwest's

[27] Appellees' Principal and Response Brief at pp. 37 and 41.

[28] "Appellees attempt to transform the unambiguous reference to 'all UNE loops' into "UNE loops that serve business customers . . ." Response and Reply Brief of Appellant, p. 8

problem is that both instances of “all” – ILEC lines and UNE loops – indisputably mean “some” of each group.

A. “All UNE Loops” Indisputably Exclude Some “UNE Loops.”

The Colorado Attorney General and Cbeyond pointed out in Appellees’ Principle Brief that Qwest itself agreed in the case before the Colorado PUC that “all UNE loops” did not mean all UNE loops.[29] Specifically, that a subset of UNE loops, called UNE-P, was excluded from business line counts.[30] Even UNE-P facilities were further sub-divided into residential and business, with the residential UNE-P facilities being excluded from the count of “all UNE loops.”[31]

Qwest’s response is nonsensical. Qwest asserts that UNE-P is not a subset of “all UNE loops” at all. Specifically: “The flaw in this argument is Appellees’ premise that UNE-P lines are a subset of UNE loops. The FCC recognized in the *TRRO* that UNE-P and UNE loops are separate and distinct from each other.”[32] While Qwest’s argument would be a good basis to exclude ***all*** UNE-P facilities from the count of business lines, Qwest fails to explain how ***any*** UNE-P facilities are counted under the business line definition. The ***only*** reference to counting

[29] Aplt App. at 0015-16 (¶¶ 54, 59) (Recommended Decision).

[30] Appellees’ Principal and Response Brief at p. 41.

[31] Id.

[32] Appellant’s Response and Reply brief at p. 24.

UNEs in the business line definition at all is the very reference ("all UNE loops") which Qwest asserts does ***not*** include UNE-P. Yet business UNE-P is included in Qwest's business line count.[33]

Not only does Qwest agree that UNE-P is counted, it also agrees that only *business* UNE-P should be counted.[34] Qwest went to pains to exclude residential UNE-P in the case below.[35] Where does Qwest find a basis in the business line rule to exclude residential UNE-P if it is not the first sentence requirement that business lines are used to serve business customers? Qwest's argument fails to explain the inconsistency in Qwest's agreement that residential UNE-P should be excluded from the business line count while asserting that "all UNE loops" requires all UNE loops without exception, much less an exclusion of residential loops.

[33] Aplt App. at 0015-16 (¶¶ 54, 59) (Recommended Decision).

[34] Id.

[35] Id.

B. "All" ILEC Switch Access Does Not Mean "All" ILEC Switch Access.

The second error in Qwest's argument is that the same purported "unambiguous" requirement in the "number of business lines" requires "all incumbent LEC business switched access lines" be counted when the parties all agree they are not all counted. All the parties agree that Qwest private line services are not counted – despite the fact that they are a subset of "all incumbent LEC business switched access lines."[36]

The second and third sentences of the business line definition reads:

> 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.

[36] *Compare* Appellees' Principal and Response Brief at p. 37 *with* Response and Reply Brief of Appellant Qwest at pp. 33-34.

Rather than admit that excluding a subset of "all incumbent LEC business switched access lines" is inconsistent with the treatment Qwest proposes for "all UNE loops," Qwest makes the very point the Appellees were making: Qwest argues that "the flaw in this argument, however, is that private line services are excluded from line counts because they fall within the exception contained in Rule 51.5 (1)." [37] Qwest readily admits that the "unambiguous" reference to "all incumbent LEC business switched access lines" does NOT mean "all incumbent LEC business switched access lines" are counted. A later exclusion in the business line rule allows for the removal of a subset of "all incumbent LEC business switched access lines" despite the unambiguous adjective "all" being used.

Qwest is correct that Rule 51.5(1), requiring that business line tallies "shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services," excludes private line services. However, that is the very point the Attorney General and Cbeyond make for the exclusion of switched services and UNE loops.[38] If the exception in Rule 51.5(1) allows the exclusion of a subset of "all incumbent LEC business switched access lines," then it ***also*** allows the exclusion of a subset of "all UNE loops" – namely non-switched

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[37] Response and Reply Brief of Appellant Qwest at pp. 33-34.

[38] Appellees' Principal and Response Brief at p. 31-34.

UNE loops. It also demonstrates that the first instance of the adjective "all" in the business line definition does not mean "all" – it means "some."

Qwest is, of course, fully aware that this is a flaw in its reasoning. Qwest makes room for this inconsistency by asserting that all the exclusions from "business line tallies" (including 51.5(1)) only apply to the tally of "all incumbent LEC business switched access lines" but not the tally of "all UNE loops." Qwest attempts this mental contortion by alleging that the term "access line" in 51.5(1) surreptitiously only references Incumbent LEC facilities – not UNEs.[39] The District Court rejected this argument twice for good reason – it is manifestly incorrect.[40]

IV. ALL UNE LOOPS ARE ACCESS LINES, BUT NOT ALL ACCESS LINES ARE UNES.

Qwest asserts that the FCC's use of "access lines" excludes UNE loops.[41] Cbeyond and the Colorado Attorney General argued that the term "access line" is a generic industry term used to describe the lines that connect end users with wire centers.[42] That is precisely how the term is used in the first sentence of the

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[39] Opening Brief of Appellant at p. 32.

[40] Aplt. App. at 104-105 (Memorandum Decision at pp. 3-4).

[41] Opening Brief of Appellant at p. 32; *see also* Response and Reply Brief of Appellant at pp. 30-33.

[42] Appellees' Principal and Response Brief pp. 34-35.

business line definition as well as in numerous FCC Orders.[43] Qwest responded that some of Appellees' citations were incorrect and the use of "access line" in the second sentence of the business line definition is inconsistent with UNE loops being a subset of all "access lines." [44]

Qwest is correct that Appellees incorrectly cited to some paragraphs in the *TRRO* for examples of the use of the term "access lines."[45] Specifically, Appellee failed to note that those paragraphs were in the *TRRO Regulatory Flexibility Analysis (Appendix C)* rather than the body of the *TRRO* itself.[46] Nevertheless, there are literally thousands of examples in FCC documents, new and old, of the generic use of "access lines," to include UNEs.

In the *TRO* "access line" is used generically and in reference to UNEs at paragraphs 39, 41, 45, 49, 52, 53, 163, 169, 224, 300, 430, 440, 608, 660 and 740. In the FCC's most recent competition report, *Local Telephone Competition: Status as of December 31, 2009*, issued January 11, 2011, and available at http://www.fcc.gov/Daily_Releases/ Daily Business /2011/db0111 /DOC-304054A1.pdf, "access line" is used throughout to describe CLEC leased facilities.

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[43] Id.; *see also* 47 C.F.R. § 51.5.

[44] Response and Reply Brief of Appellant at pp. 30-33.

[45] Id. at 32.

[46] The citation to TRRO paragraph 109 appears to be entirely incorrect.

Qwest representation that access lines is not a generic industry term that includes UNE is just incorrect.

Qwest also points to the second sentence of the business line definition and alleges that a tally of all UNE loops would be unnecessary if the total of all incumbent switched access lines included UNEs.[47] A generic noun (e.g., “access lines”) modified by adjectives (e.g. “Incumbent LEC,” “business” and “switched”), is limited by those adjectives. “All Qwest business red cars” does not include “all cars leased by Qwest to Competitive LECs” any more than “all incumbent LEC business switched access lines” include “all UNE loops connected to that wire center.” To be clear: “Access lines” is a generic term meaning a wire (loop/access line) that runs from an end user to a wire center. All access lines are not UNEs loops – all UNE loops are access lines.

V. CONCLUSION

For the foregoing reasons, the Court should stay this appeal and refer the issues on appeal to the FCC pursuant to the doctrine of primary jurisdiction. If the Court does not refer this matter to the FCC, then the Court should affirm the Colorado Public Utilities Commission.

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[47] Response and Reply Brief of Appellant at p. 32.

Dated: January 18, 2011.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 3,670 words. I relied on the Microsoft Word word count system to obtain that number. I certify that the information on this form is true and correct to the best of my knowledge and belief.

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CERTIFICATE OF SERVICE

I certify that on January 18, 2011, a copy of the foregoing **APPELLEE'S REPLY BRIEF** was electronically filed with the Clerk of Court using the Court's CM/ECF system, which will then send a notification of such filing (NEF) to the following counsel for Plaintiff-Appellant/Cross-Appellee:

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