CenturyLink™

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By ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **EX PARTE** -- *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 7, Tim Goodwin and Jeb Benedict from CenturyLink and John Devaney from Perkins Coie met, on behalf of CenturyLink, with FCC General Counsel Austin Schlick, together with Laurel Bergold, Peter Karanjia, Jacob Lewis, and Richard Welch from the Office of General Counsel and Lisa Gelb, Melissa Kirkel (by telephone), Deena Shetler, and Tim Stelzig from the Wireline Competition Bureau.

At the meeting, CenturyLink addressed *Qwest Corp. v. Colorado PUC*, Nos. 10-1187 & 10-1212 (10th Cir.). The appeal involves the proper application of the non-impairment criteria the Commission adopted in the *Triennial Review Remand Order*, 20 FCC Rcd 2533 (2005), *aff'd, Covad Commc'ns v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). Specifically, we discussed the court's May 19, 2011 request that the Commission address the method for counting "business lines" that are used in 47 U.S.C. § 51.5 and the *TRRO* as a proxy for determining whether individual wire centers will be deemed non-impaired under section 251(d)(2)(B) of the Act.

The dispute before the court centers on the meaning of "all UNE loops" in Rule 51.5 and whether counts of business lines should include "all" loops -- as the rule states -- or only loops that CLECs use to provide switched services to business customers, as the Colorado Public Utilities Commission and CLEC Cbeyond contend. CenturyLink encouraged the FCC to explain in its amicus brief to the Tenth Circuit that "all UNE loops" means what it says, and does not mean only "some" UNE loops. CenturyLink added that (1) the *TRRO* and Rule 51.5 require including all UNE loops, (2) counting only loops that CLECs use to provide switched services to business customers conflicts with the Commission's prior determination that line counts must be based on verifiable data that ILECs already file for other regulatory purposes; (3) the Commission counted all UNE loops when it set the numeric threshold for business lines in the *TRRO*, and (4) that the Colorado commission's line-counting method would wrongly compel continued unbundling in wire centers where there is no impairment. CenturyLink distributed a summary of its position, a copy of which is attached to this letter.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this notice is being filed in the above-referenced dockets.

Sincerely,

John E. Benedict

attachment

cc: Austin Schlick
Laurel Bergold
Lisa Gelb
Peter Karanjia
Melissa Kirkel
Jacob Lewis
Deena Shetler
Tim Stelzig
Richard Welch

SUBMISSION OF QWEST CORPORATION RELATING TO
***QWEST CORPORATION V. COLORADO PUBLIC UTILITIES COMMISSION*, Case NOS. 10-1187, 10-1212 (10th Circuit)**

The appeal in *Qwest Corporation v. Colorado Public Utilities Commission* involves determining the proper application of the non-impairment criteria the FCC adopted in the *Triennial Review Remand Order* ("*TRRO*")[1] and, in particular, the method for counting the "business lines" the *TRRO* establishes as a proxy for deciding whether individual wire centers are non-impaired under Section 251(d)(2)(B) of the Telecommunications Act of 1996. The *TRRO* establishes that there is no competitive impairment in a wire center and no obligation for an incumbent local exchange carrier ("ILEC") to provide high-capacity loops or high-capacity transport as Section 251 unbundled network elements ("UNEs") if there are sufficient numbers of "business lines" in the wire center.[2] Based on years of highly contentious, costly litigation, the FCC made it clear in the *TRRO* that it was establishing a method for counting business lines that would be easy to implement and not subject to dispute.[3] The *TRRO* thus establishes that line counts would be determined based upon data that ILECs already file for other regulatory purposes.[4] The *TRRO* establishes that line counts will *not* be based on data controlled by CLECs and will *not* be based on anything other than data ILECs already file with the FCC.[5]

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

[2] There is no impairment for DS1 loops if a wire center is served by at least 60,000 business lines and four or more fiber-based collocators. 47 C.F.R. § 51.319(a)(4)(i). For DS3 loops, there is no impairment if a wire center contains at least 38,000 business lines and four or more fiber-based collocators. 47 C.F.R. § 51.319(a)(5)(i). For DS1 transport, there must be either at least four fiber-based collocators or at least 38,000 business lines in a wire center. 47 C.F.R. 51.319(e)(2)(ii)(A); (e)(3)(i). For DS3 and dark fiber transport, both wire centers in the transport route must have at least three fiber-based collocators or at least 24,000 business lines. 47 C.F.R. 51.319(e)(3)(i)-(ii).

[3] *TRRO*, at ¶ 99.

[4] *Id.* at ¶¶ 93, 99, 105, 108.

[5] *Id.* at ¶ 105.

The FCC's definition of a business line and its required method for counting business lines in individual wire centers are set forth on 47 U.S.C. § 51.5:

> 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.[6]

The dispute before the Tenth Circuit centers on the meaning of "all UNE loops" in this rule and whether counts of business lines should include "all" loops – as the rule states – or only loops that CLECs use to provide switched services to business customers, as the Colorado Commission and Cbeyond claim. For the multiple reasons summarized below, Qwest urges the FCC to explain in its *amicus* brief to the Tenth Circuit that "all UNE loops" means just that and does not mean only "some" UNE loops.

1. The *TRRO* and Rule 51.5 both require including all UNE loops.

Rule 51.5 could not be clearer in mandating that the counts of business lines "shall" include "all UNE loops." Simply put, "all" does not mean "some," and "shall" does not mean "may." But, those are the meanings that the Colorado Commission improperly ascribed to these terms by ruling that non-switched loops and loops serving residential customers are to be excluded from business line counts, thus inflating the number of "impaired" wire centers in Colorado. In the *TRRO*, just as in Rule 51.5, the FCC did not place any limits on the UNE loops to include in the line counts, stating that business line counts should be based on "ARMIS 43-08 *business* lines, plus *business* UNE-P, plus UNE-loops." (emphasis added.)

[6] 47 C.F.R. § 51.5 (emphasis added).

Thus, the FCC used "business" as a qualifying limitation for some line count data, but *not* for UNE loops.

The FCC's omission of any qualifier before "UNE loops" has led the vast majority of federal courts and state utility commission to hold that the FCC's rule requires counting all UNE loops. For example, in *Logix Communs L.P. v. P.U.C. of Texas*,[7] the Fifth Circuit upheld the Texas Commission's decision to count all UNE loops, ruling that the FCC's rule unambiguously requires that result. The Court found that this conclusion was supported not only by a plain reading of the regulation, but also by the FCC's analysis in the *TRRO*.[8] The federal district court for the Eastern District of Michigan reached the same conclusion in *Michigan Bell Telephone Co. v. Lark*, finding that any contrary reading of Rule 51.5 "ignores the plain language of the regulation, and transforms an otherwise unambiguous phrase, 'all UNE loops,' to mean only some UNE loops."[9] At least 13 state commissions have reached the same result.[10]

2. Counting only loops that CLECs use to provide switched services to business customers violates the FCC's determination that line counts must be based on verifiable data that ILECs already file.

It is logical that the FCC required state commissions to count "all UNE loops," as that approach is consistent with the FCC's goal of establishing impairment criteria that are objective and not difficult to implement. Toward that goal, the FCC based its impairment analysis on "an objective set of data that [ILECs] already have created for other regulatory purposes."[11] The FCC explained that it is "acutely aware of the need to base any test we

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[7] 521 F.3d 361 (5th Cir. 2008), *cert. denied,* 129 S.Ct. 223 (U.S. 2008).
[8] *Id.*
[9] No. 06-11982, 2007 WL 2868633, at *9 (E.D. Mich. Sept. 26, 2007).
[10] Qwest can provide a list of these decisions.
[11] *TRRO* at ¶ 105.

adopt here *on the most objective criteria possible* in order to avoid complex and lengthy proceedings that are administratively wasteful but add only marginal value to our unbundling analysis."[12]

The ruling of the Colorado Commission would directly conflict with this goal because Qwest does not have "already created" data tracking whether a CLEC is using a loop to provide a switched service to a business customer. Only the CLECs have that data, and as described above, the FCC specifically decided not to make impairment determinations dependent upon information in the sole possession of CLECs. Under the Colorado Commission's ruling, Qwest would be required to conduct a loop-by-loop analysis of every leased loop to determine if the CLEC is using the loop for to provide a switched service to a business customer. That would lead to precisely the type of "complex and lengthy proceedings" that the FCC was determined to avoid.

3. The FCC counted all UNE loops when it established the numeric threshold for business lines.

The requirement that state commissions count "all UNE loops" is consistent with the data and analysis the FCC relied upon to set the numeric business line thresholds in the *TRRO*. Explaining its methodology, the FCC stated that the "wire center data that we analyze in the Order," which was provided by ILECs in response to FCC requests, includes the total UNE loops in individual ILEC wire centers.[13] Because the FCC set the thresholds using data that included all UNE loops, it would be inconsistent for a state commission to count only a portion of UNE loops in deciding whether individual wire centers meet the

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[12] *Id.* (emphasis added).
[13] *Id.* at ¶¶ 105, 114 n. 322.

thresholds. Indeed, if the data the FCC used to set the business line thresholds had not included non-switched loops, the FCC likely would have adopted lower thresholds.

Thus, courts and state commissions have recognized that the nature of the data the FCC relied upon compels counting "all UNE loops," as Rule 51.5 requires.[14] The Indiana Commission explained the need for consistency between the FCC's data and methodology and the line counting method used by a state commission:

> [W]hen the FCC conducted a sample run of how to compute "business lines" in a wire center in paragraph 105 of the TRRO, it used all UNE loops in a wire center, with no exclusions . . . . We will not ignore the FCC's use of all UNE loops in its dry run nor will we redefine business lines in a manner that conflicts with the FCC approach.[15]

4. The Colorado Commission's line-counting method will improperly result in continued network unbundling requirements in wire centers where there is no impairment.

Limiting the UNE loops included in business line counts to those CLECs use to provide switched services to business customers will perpetuate network unbundling in wire centers where there is no impairment. First, because ILECs do not know how CLECs use the loops they lease, they would lack the information needed to know whether to petition a state commission for a declaration that a wire center is no longer impaired. Specifically, Qwest does not know if a CLEC is using Qwest-leased loops to provide business customers with switched services. Without that information, Qwest cannot know whether the business line

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[14] *See, e.g.*, *Logix Comms.*, 521 F.3d at 366 ("the FCC chose to base its line count data established by objective [ILEC] filings"); *Illinois TRO/TRRO Order*, 2005 WL 3359097 (I.C.C., Nov. 2, 2005) (the ILEC's "position on this issue is fully consistent with the data the FCC relied upon to set the impairment thresholds and this is why we find [the ILEC's] proposed language more preferable.").

[15] *Indiana TRO/TRRO Order*, 2006 WL 618004, at *12 (Indiana I.R.C., Jan. 11, 2006).

thresholds have been reached in a wire center and whether there is a basis for requesting a non-impairment determination from a state commission. Nor will a state commission have the information it needs to make a non-impairment determination since, as recognized in the *TRRO*, CLECs do not willingly provide data that could eliminate access to UNEs. The end result is that network unbundling obligations will continue in wire centers that meet the *TRRO* non-impairment criteria, in direct conflict with the FCC's intent.

Second, even if Qwest had access to CLEC data showing which loops that are being used to provide business customers with switched services, including only those loops in line counts would perpetuate network unbundling in wire centers that are no longer impaired. Examples of this result are Qwest's wire centers in Denver, Colorado Springs, and Northglenn. Each of these wire centers would be declared non-impaired if all loops were included in the counts of business lines. But the Colorado Commission's exclusion of loops that serve business customers and do not support switched services has resulted in continued network unbundling in these wire centers. The continuation of network unbundling in these geographic areas conflicts with the Act's and the FCC's goal of promoting facilities-based competition, as that result fosters continued reliance on ILEC networks and creates a disincentive for CLECs to invest in their own networks.