

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<p>In the Matter of</p> <p>QWEST CORPORATION dba CENTURYLINK QC</p> <p>Petition for Commission Approval of Non- impaired Wire Center Lists pursuant to the Triennial Review Remand Order</p>	<p>Docket No. _____</p> <p>QWEST CORPORATION DBA CENTURYLINK QC'S PETITION FOR COMMISSION APPROVAL OF NON- IMPAIRED WIRE CENTER LISTS PURSUANT TO THE TRIENNIAL REVIEW REMAND ORDER, AND MOTION FOR EXPEDITED ISSUANCE OF PROTECTIVE ORDER</p>
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**INTRODUCTION AND SUMMARY**

Qwest Corporation dba CenturyLink QC ("CenturyLink") hereby petitions the Commission to open an investigation to develop a Commission-approved initial list of non-impaired wire centers pursuant to the FCC's *Triennial Review Remand Order* ("TRRO")<sup>1</sup> and SDCL § 49-31-81. CenturyLink attaches a proposed protective agreement to this petition that it will offer to CLECs wishing to see the supporting information it files. CenturyLink further requests that the Commission (1) implement a process for updating and approving the initial list and (2) conduct this and any future proceedings on an expedited basis in order to ensure that the regulations impacting particular South Dakota wire centers reflect the specific competitive situation relevant to them.

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<sup>1</sup> 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 (FCC rel. February 4, 2005) (hereafter "TRRO").

While this issue has not arisen in South Dakota, CenturyLink's predecessor Qwest and numerous major CLECs ("Joint CLECs")<sup>2</sup> have engaged in similar proceedings in other states in its 14-state ILEC region and have reached a settlement agreement that sets forth the process for establishing the list, the criteria by which the list is evaluated and the timeframes for Commission approval of revisions to the list (see Attachment A). Many states have approved this settlement agreement. Various commissions have used these procedures in numerous *TRRO* non-impaired wire center list dockets (both the original *TRRO* non-impaired wire center list dockets filed in 2006 and the wire center list "update" dockets in 2007).

CenturyLink believes that most if not all CLECs choosing to intervene in this proceeding will agree with CenturyLink to recommend to the Commission that the Commission adopt the multi-state settlement agreement that Qwest and certain CLECs ("Joint CLECs") entered into in 2007 to resolve certain line count methodology and related process issues to implement the *TRRO* in those states. CenturyLink's request that the Commission take action on the issues described in this petition is supported by the FCC's endorsement in the *TRRO* of an ongoing role for state commissions in these matters that relate to the change of law provisions in interconnection agreements between Qwest and CLECs and to Sections 251 and 252 of the Telecommunications Act of 1996 ("the Act"). *See, e.g., TRRO*, ¶¶ 233, 234.

### **BACKGROUND**

On February 15, 2006, a coalition of CLECs ("the Joint CLECs") submitted a letter to various state commissions in Qwest's 14-state ILEC region (primarily the larger states, and not including South Dakota) requesting proceedings for the purpose of establishing a list of non-

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<sup>2</sup> The Joint CLECs were Covad Communications Company and DIECA Communications, Inc. (collectively "Covad"), Eschelon Telecom, Inc. ("Eschelon"), Integra Telecom Holdings, Inc. ("Integra"), McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), Onvoy, POPP.Com ("POPP"), US Link, Inc. d/b/a TDS Metrocom, Inc. ("TDSM"), and XO Communications Services, Inc. ("XO")

impaired wire centers by determining the business line counts and numbers of collocators in wire centers in those states, explaining that these determinations were necessary to implement the FCC's rulings in the *TRRO* relating to unbundled dedicated transport and high-capacity loops. The commissions docketed these requests.<sup>3</sup>

**I. The FCC's Impairment Criteria for Dedicated Interoffice Transport and High-Capacity Loops**

In the *TRRO*, the FCC established criteria for determining whether high-capacity dedicated transport and high-capacity loops meet the "impairment" requirement for unbundled network elements ("UNEs") set forth in Section 251(d)(2) of the Act. The primary significance of these impairment determinations is that they dictate whether high-capacity transport and loops qualify as Section 251(c)(3) UNEs that Qwest must provide to CLECs at rates based on the FCC's TELRIC ("total element long-run incremental cost") pricing methodology or whether they are no longer within Section 251(c)(3) and are governed by the non-TELRIC pricing standard in Sections 201 and 202 of the Communications Act of 1934.<sup>4</sup>

Under the *TRRO* framework, CLECs are deemed not to be impaired without access to DS1 transport on routes connecting a pair of wire centers where both wire centers contain at least

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<sup>3</sup> Some or all of the Joint CLECs were parties to similar Joint CLEC filings at the state utility regulatory commissions in Arizona (Docket Nos. T-03632A-06-0091, T-03406A-06-0091, 03267A-06-0091, T-03432A-06-0091, T-04302A-06-0091 and T-01051B-06-0091), Colorado (Docket No. 06M-080T), Minnesota (Docket Nos. P-5692, 5340, 5643, 5323, 465, 6422/M-06-211), and Oregon (docket UM 1251). The Washington Utilities and Transportation Commission (WUTC) investigated Qwest's initial non-impairment list in an existing docket (number UT-053025) established to review the impacts of the *TRRO* on local competition.

<sup>4</sup> Under this standard, rates must not be unjust, unreasonable, or unreasonably discriminatory. Responsibility for administering the Section 201-02 pricing standard rests with the FCC. *See, e.g.,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt. Nos. 01-338, 96-98, 98-147, FCC 03-36 at 664 (FCC rel. Aug. 21, 2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part, remanded in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

four fiber-based collocators or at least 38,000 business access lines. *TRRO*, ¶ 126.<sup>5</sup> For DS3 transport and dark fiber transport, there is no impairment on routes connecting a pair of wire centers where both wire centers contain at least three fiber-based collocators or at least 24,000 business lines. *TRRO*, ¶¶ 118, 129, 133.<sup>6</sup>

The impairment criteria for high-capacity loops also are based on a capacity-specific approach that distinguishes between DS1 and DS3 capacity. For DS1 loops, CLECs are not impaired in any building within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators. *TRRO*, ¶ 178. CLECs are not impaired without access to DS3 loops in any building within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators. *TRRO*, ¶ 174.

## **II. Qwest's Initial Identification of Non-Impaired Wire Centers**

To implement the FCC's impairment framework, Qwest undertook a detailed, multi-step process designed to generate accurate wire center data and to permit CLECs to verify these data. On February 18, 2005, Qwest responded to a request from the FCC's Wireline Competition Bureau with a submission designating the wire centers in Qwest's operating areas as Tier 1, Tier 2, or Tier 3 based on the criteria in the *TRRO*.<sup>7</sup> This submission also identified the wire

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<sup>5</sup> The wire centers meeting these criteria are referred to as "Tier 1 wire centers." They are the wire centers "with the highest likelihood for actual and potential competitive deployment, including wholesale opportunities." *TRRO*, ¶ 111.

<sup>6</sup> The FCC defines wire centers with three or more fiber-based collocators or 24,000 or more business lines as "Tier 2 wire centers." *TRRO*, ¶ 118. According to the FCC, the presence of three or more fiber-based collocators "establishes that multiple carriers have overcome the costs of deployment in a wire center, signifying that substantial revenues exist in the wire center to justify deployment." *Id.*

<sup>7</sup> A copy of this February 18, 2005 letter to the FCC is attached as Attachment C. Because the list of wire centers that was attached to the original letter is quite voluminous and is not necessary to this petition, Qwest is not including that list with Attachment C.

centers in Qwest's operating areas that meet the non-impairment thresholds for DS1 and DS3 loops.<sup>8</sup>

After providing this information to the FCC, Qwest attempted to develop a cooperative process with the CLECs and state commissions to ensure the accuracy of its wire center data. Under the protection of a nondisclosure agreement, Qwest provided CLECs and state commission staffs access to the confidential data underlying its February 18 submission. These data included, on a wire center-specific basis, numbers of switched business lines, UNE-P lines, UNE loops, and fiber collocators. Qwest also provided to each carrier upon whose data it relied in the February 18, 2005 submission a list of the wire centers where, according to Qwest's records and investigation, the carrier has fiber-based collocation. These carriers were given the opportunity to review and, if appropriate, contest the accuracy of Qwest's data.

As a further step toward verification, Qwest conducted an additional internal review of the collocation and line count data used for its February 18, 2005 submission. Based on this additional review, which included another comprehensive evaluation of collocation arrangements in Qwest's wire centers, Qwest refined its list of wire centers. In another submission to the FCC on July 8, 2005 Qwest provided a revised list of wire centers.<sup>9</sup> Qwest continued reviewing its wire center data after this submission, leading to a third submission on August 18, 2005 that made minor corrections to the wire center data.<sup>10</sup>

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<sup>8</sup> Qwest based the counts of switched business access lines on its most recent ARMIS Report 43-08 data, which were current as of December 2003. To develop an estimate of the business UNE-P lines in each wire center, Qwest relied on the percentage of white page listings for each wire center that are business, not residential. Qwest determined the number of collocation arrangements that meet the *TRRO*'s definition of "fiber-based collocator" based on billing data that were current as of February 2005 and physical inspections of wire centers.

<sup>9</sup> A copy of this July 8, 2005 letter to the FCC is attached hereto as Attachment D. Qwest is not including the list of wire centers that was provided with the original submission because that list also is voluminous and is not necessary to this petition.

<sup>10</sup> This third submission to the FCC, on August 18, 2005, is attached as Attachment E.

### **III. State Commission Proceedings in Other States**

Thereafter, in February 2006, the Joint CLECs requested various state commissions to open proceedings to investigate these issues and to determine and establish line counts and numbers of collocators in Qwest wire centers, and Qwest agreed to such requests. Neither Qwest nor the Joint CLECs filed any petition in South Dakota. These commissions opened dockets to investigate these issues, which included evidentiary hearings, post-hearing briefs and commission orders regarding these issues.

### **IV. Settlement Agreements Approved By The Commissions**

In 2007, Qwest and the Joint CLECs negotiated and executed a multi-state settlement agreement in the *TRRO* wire center dockets addressed all issues in those *TRRO* wire center dockets in Qwest's region.<sup>11</sup> Qwest filed the multi-state settlement agreement in all of those states, along with its petitions for approval of its 2007 additions to the non-impaired wire center list in those states, and all but one of these commissions later approved the agreement in 2007 and 2008. A copy of the parties' multi-state settlement agreement that the Commission approved is attached as Attachment A.

As set forth in the multi-state settlement agreement that the commissions approved in the original *TRRO* wire center dockets, the parties to the settlement agreement have agreed that Qwest may request the addition of non-impaired wire centers based in whole or in part upon line counts at any time up to *July 1st* of each year, based on prior year line count data, and using an

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<sup>11</sup> Some or all of the Joint CLECs were parties to similar Joint CLEC filings at the state utility regulatory commissions in Arizona (Docket Nos. T-03632A-06-0091, T-03406A-06-0091, 03267A-06-0091, T-03432A-06-0091, T-04302A-06-0091 and T-01051B-06-0091), Colorado (Docket No. 06M-080T), Minnesota (Docket Nos. P-5692, 5340, 5643, 5323, 465, 6422/M-06-211), Oregon (docket UM 1251) and Utah (Docket No 06-049-40). The Washington Utilities and Transportation Commission (WUTC) investigated Qwest's initial non-impairment list in an existing docket (number UT-053025) established to review the impacts of the *TRRO* on local competition.

agreed-upon methodology.<sup>12</sup> The parties to the multi-state settlement agreement also agreed that at least *five (5) business days prior to filing* new non-impairment or tier designations for Commission review, Qwest will request a *protective order* from the Commission to govern the handling of confidential information during this new non-impairment proceeding. The parties also agreed to seek from the Commission approval of a standing protective order, which is a new protective order, based on an agreed-upon model protective order. Although CenturyLink is not bound by the multi-state settlement agreement in South Dakota, it is willing to recommend the Commission follow it and thus CenturyLink is attaching the model protective order as a proposed protective agreement as Attachment B.

**V. CenturyLink's Request for Approval of Non-impaired Wire Center List in South Dakota**

Qwest did not file a petition for approval of its non-impaired wire center list before this Commission in 2006, when it was involved in the wire center proceedings in the other states. However, CenturyLink is now filing its petition for such approval of the wire centers identified in this petition. Consistent with this process and the requirements of the initial *TRRO* Order and the multi-state settlement agreement that numerous state commissions approved in 2007 and 2008, CenturyLink intends to file with this Commission, on September 9, 2013, the data supporting its list of non-impaired wire centers in South Dakota, along with a request for Commission approval of the list.

Alternatively, if this Commission does not approve CenturyLink's non-impaired wire center list based on the process that the parties agreed to in the multi-state settlement agreement,

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<sup>12</sup> With respect to fiber-based collocators, Qwest may request the addition of non-impaired wire centers to the Commission-approved wire center list at any time based on the number of fiber-based collocators.

then CenturyLink requests that the Commission fully investigate these wire center data issues, and any related issues that the Commission may deem appropriate.

Regardless of the approach the Commission takes, and assuming that CLECs sign the proposed protective agreement described above beforehand, CenturyLink will also provide the data supporting the updated list to all CLECs that have signed the protective agreement.

The wire centers that CenturyLink is seeking approval for its list of non-impaired wire centers in South Dakota based on the confidential data that it will file on September 9, 2013 are as follows:

STATE	WIRE CENTER	CLLI	TIER	NON-IMPAIRMENT FOR
South Dakota	Sioux Falls	SXFLSDCO	Tier 1	DS1, DS3 Transport & DF
South Dakota	Rapid City	RPCYSDCO	Tier 2	DS3 Transport & DF

**VI. Reasons for Opening an Investigation if the Commission Does Not Accept the Multi-State Settlement Agreement**

In the event the Commission determines not to accept the multi-state settlement agreement reached between Qwest and the Joint CLECs in those numerous other states as the manner in which wire centers will be determined to be non-impaired, then CenturyLink respectfully requests that the Commission open an investigation to fully explore these issues. If the Commission does so, CenturyLink respectfully requests the Commission address the following issues.

**A. The Commission Should Conduct an Expedited Adjudicatory Proceeding**

If the Commission does not decide to adopt the processes agreed to by Qwest and the Joint CLECs in the multi-state settlement agreement, and thus opens a full investigation of these issues, CenturyLink respectfully submits the Commission should conduct an expedited

proceeding to review and establish wire center line counts and numbers of fiber collocators per wire center. In the discussion that follows, CenturyLink describes the framework the Commission should adopt for the proceeding to ensure that all necessary issues are resolved expeditiously and with the certainty required for CenturyLink and CLECs to implement the *TRRO* as the FCC intended.

1. *The proceeding must be binding on CenturyLink and all CLECs in the state.*

CenturyLink believes that the proceeding should be binding on every registered local exchange carrier in the state, including those that receive notice of the proceeding but choose not to participate. Unless the Commission resolves the wire center counts and related issues through binding rulings, implementation of the *TRRO* will be delayed and time-consuming, costly disputes will be inevitable. Moreover, it would be a highly inefficient use of the Commission's and the parties' resources to conduct a non-binding proceeding with rulings that any dissatisfied party could elect to ignore.

Thus, for example, in submitting orders for high-capacity transport and loops, all carriers will be required to review and adhere to the list of non-impaired wire centers that results from the Commission's determination of the business line counts and numbers of collocators in individual wire centers. Further, if a CLEC submits an order for UNE transport or a high-capacity loop in a wire center that is on the list of non-impaired wire centers resulting from this proceeding, the Commission should confirm that CenturyLink is permitted to reject that order.

In addition, to maximize the efficiency of the proceeding and to eliminate future disputes, the Commission should provide notice of the proceeding to all local exchange carriers registered in the state, not just the carriers with which CenturyLink has interconnection agreements. The

notice should state expressly that the proceeding is binding on all registered local exchange carriers.

2. *The proceeding should be expedited.* To avoid any further delays in implementing the *TRRO* and to minimize or eliminate the possibility of disputes upon expiration of the FCC's transitional pricing scheme for high capacity transport and loops, the Commission should invoke any available procedures for expedited resolution of the issues described in this petition. As part of this expedited approach, the Commission at its initial prehearing conference should schedule an adjudicatory hearing as soon as possible.

3. *The Commission should conduct an adjudicatory proceeding.* Because the issues involving line counts and fiber collocators are factual in nature, the Commission should conduct an adjudicatory proceeding. CenturyLink proposes a proceeding under which it would present an opening round of testimony containing wire center data for line counts and fiber collocators, the CLECs would present response testimony indicating if they have a good faith basis for contesting CenturyLink's data. If the CLECs have such a good faith basis, they would offer data of their own or other evidence responding to CenturyLink's data. CenturyLink would submit reply testimony addressing any CLECs challenges to CenturyLink's data. Through this process, CenturyLink expects that the parties could significantly limit any disagreements concerning the wire center data. More important, an adjudicatory proceeding will result in a definitive determination by the Commission concerning the business line counts and numbers of fiber collocators in wire centers and will thereby give CenturyLink and the CLECs alike the certainty they need going forward.

4. *The Commission should adopt an appropriate protective order.* As stated, because this proceeding will involve large amounts of confidential information, the Commission

should adopt an appropriate protective order. In particular, confidentiality protection is needed for the types of CLEC-specific data described below. CenturyLink suggests that prior to or during the initial procedural conference, all interested parties should discuss and attempt to agree upon an appropriate protective order. Qwest and the Joint CLECs have already agreed to a certain form of a protective order as part of the settlement agreement in other states, and thus, if a full investigation is required before this Commission, CenturyLink believes that the parties will be able to agree to a form of a protective order in relatively short order.

5. *The Commission Should Issue an Order Compelling CenturyLink to Produce CLEC-Specific Data to Interested Parties.* To facilitate review of the relevant wire center data, it will be necessary for CenturyLink to provide wire center data, including data specific to individual CLECs, to all interested parties. Because this information may be protected under Section 222 of the Telecommunications Act and is deemed confidential by CLECs, CenturyLink is unable to produce the information without an order from the Commission compelling production with appropriate confidentiality protection. It is particularly important that the order the Commission issues authorizes CenturyLink to produce wire center data that is disaggregated so that individual pieces of data can be identified and associated with particular carriers. For example, a carrier reviewing data to determine the number of fiber collocators in a wire center very likely will want to know not just the total number of collocators, but the specific CLECs that are collocated.

Accordingly, following adoption of an appropriate protective order, the Commission should issue an order compelling CenturyLink to produce CLEC-specific wire center data to all intervenors. CenturyLink includes with this petition a motion requesting issuance of such an order.

**B. In Addition to Determinations Relating to Wire Center Data, the Commission Should Resolve Other Issues that Will be Affected by Those Determinations**

The Commission's resolution of the wire center data issues is essentially a counting exercise, with the Commission being asked to review data and determine the number of business lines and fiber collocators in wire centers. CenturyLink is not asking the Commission to make any impairment determinations relating to high-capacity transport and loops, as the D.C. Circuit's decision in *USTA II* establishes that the FCC alone has authority to make those determinations. *See USTA II*, 359 F.3d at 568. However, application of the FCC's *TRRO* criteria to the line counts and collocator counts the Commission adopts will permit CenturyLink and the CLECs to make their own wire center-specific impairment determinations, consistent with the FCC's expectation that the *TRRO* would be largely self-effectuating. *See, e.g., TRRO*, ¶¶ 233, 234. In addition to changing the rates that will govern CLEC purchases of high-capacity transport and loops, a determination that there is no impairment in a particular wire center where a CLEC is purchasing one of these network elements will trigger at least two other issues relating to the conversion of the element from a Section 251 UNE to a non-251 element. The Commission should address these issues as part of this proceeding.

First, if the Commission ultimately does not adopt the multi-state settlement agreement between Qwest and the Joint CLECs in other states, the Commission should confirm CenturyLink's right to assess a nonrecurring charge (NRC) at applicable tariffed rates if CenturyLink performs a conversion after a CLEC fails to perform that work. CenturyLink incurs costs in converting UNE transport or high-capacity loops to alternative facilities or arrangements, and, accordingly, it should be permitted to assess an appropriate tariffed charge. Multiple CLECs have implicitly recognized CenturyLink's right to assess this charge, as evidenced by their decisions to enter into amendments to their interconnection agreements

containing the charge. CenturyLink also notes that Qwest and the Joint CLECs agreed to an NRC for conversion activity in their settlement agreement in other states.

Second, if the Commission does not ultimately adopt the multi-state settlement agreement between Qwest and the Joint CLECs in other states, the Commission should address the process for future updates of CenturyLink's list of non-impaired wire centers. This process should be streamlined and efficient. Again, the settlement agreement between Qwest and the Joint CLECs in other states has a description of a process that CenturyLink and those CLECs believe is streamlined and efficient, and which is consistent with the FCC's directive that carriers implement that framework expeditiously and in a self-executing manner.

Thus, if the Commission does not ultimately adopt the multi-state settlement agreement between Qwest and the Joint CLECs in other states, the Commission should require CenturyLink to provide notice to the CLECs of additions to the list of non-impaired wire centers and, if the CLECs seek additional information, should direct CenturyLink to provide the CLECs with the methodology by which CenturyLink determined that a wire center meets the *TRRO*'s non-impairment criteria relating to numbers of business lines and fiber collocators. The CLECs should thereafter be given 90 days to transition DS1 and DS3 UNEs to an alternative service.

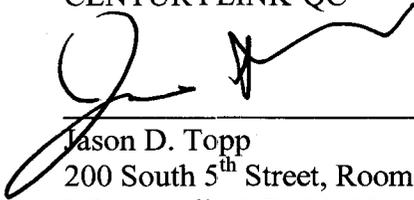
At the prehearing conference, the Commission should direct the parties to propose a streamlined process in their testimony – similar to that described here - that will govern changes to the list of non-impaired wire centers.

**CONCLUSION**

For the reasons stated, CenturyLink respectfully requests that the Commission conduct an investigation to address the issues described herein on an expedited basis.

Dated: August 30, 2013

QWEST CORPORATION DBA  
CENTURYLINK-QC



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Jason D. Topp  
200 South 5<sup>th</sup> Street, Room 2200  
Minneapolis, MN 55402  
(651) 312-5364  
[Jason.topp@centurylink.com](mailto:Jason.topp@centurylink.com)