

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of CLECS' Request for  
Commission Approval of ILEC Wire Center  
Impairment Analysis

**RULING ON JOINT CLECS'  
MOTION TO COMPEL**

In the Matter of a Commission Investigation  
Identifying Wire Centers in which Qwest  
Corporation Must Offer High-Capacity Loop or  
Transport UNEs at Cost-Based Rates

The Joint CLECs filed a Motion to Compel in the above matter on August 28, 2006. Qwest Corporation filed a Response in Opposition to the Motion on September 11, 2006. Qwest also requested that the prehearing conference currently scheduled for September 25, 2006, be continued.

Dan Lipschultz, Attorney at Law, Moss & Barnett, 90 South Seventh Street, Suite 4800, Minneapolis, MN 55402, appeared on behalf of the Joint CLECs. Joan C. Peterson, Attorney at Law, Qwest Corporation, 200 South Fifth Street, Room 2200, Minneapolis, MN 55402, appeared on behalf of Qwest Corporation.

Based upon the record in this matter, and for the reasons discussed in the Memorandum below, IT IS HEREBY ORDERED as follows:

1. The Motion to Compel filed by the Joint CLECs is **GRANTED**. As explained more fully in the Memorandum below, Qwest shall provide a response to Information Request No. 01-042 as soon as possible, but no later than **September 27, 2006**.
2. The prehearing conference previously scheduled in this matter for Monday, September 25, 2006, is hereby **CONTINUED** to **Thursday, September 28, 2006, at 12:30 p.m.** by telephone conference call. Participants should call **1-888-390-8568** at 12:30 p.m. and enter code **17274**.

Dated: September 21, 2006

/s/ Barbara L. Neilson  
BARBARA L. NEILSON  
Administrative Law Judge

## MEMORANDUM

The present contested case proceeding was initiated by the Minnesota Public Utilities Commission on May 11, 2006. One of the purposes of this proceeding is to identify Qwest's wire centers in which a competitive local exchange carrier (CLEC) would suffer impairment under the criteria established by the Federal Communications Commission ("FCC") in its Triennial Review Remand Order ("TRRO") if the CLEC lacked the opportunity to purchase high-capacity loops and transport UNEs at cost-based rates.<sup>1</sup> The TRRO specified that business line density in a wire center and the presence of fiber-based collocators in a wire center were the best indicia for determining whether impairment exists in a particular wire center.<sup>2</sup> The TRRO defined the business line data to be used in this test as being based upon "ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops" of the incumbent local exchange carrier ("ILEC").<sup>3</sup> The TRRO became effective on March 11, 2005.<sup>4</sup>

In their Motion to Compel, the Joint CLECs seek to compel Qwest Corporation to provide a full and complete response to Information Request 01-042, which was served on Qwest on July 7, 2006. This Information Request asked that Qwest "provide data similar to what was provided in MPUC 01-003 Attachments A, B and D representative of March 2005. If March 2005 data is not available, please provide this data for end of year 2004."<sup>5</sup> The Joint CLECs thereby seek discovery of wire center data as of March 2005 or, in the alternative, as of December 2004. Qwest objected to the Request on the grounds that it is irrelevant and does not bear upon or reasonably lead to matters that bear upon any issue in this proceeding and contended that production of 2003 wire center data is sufficient, for the following reasons:

First, Qwest's use of December 2003 data is consistent with the data the FCC analyzed in making its non-impairment decisions in the TRRO. The data which formed the basis of the FCC's analysis was ARMIS data from December 2003, which was filed in April 2004. See e.g., TRRO, ¶ 105 ("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"). Second, on February 4, 2005, the FCC directed Qwest and the other RBOCs to submit the list of wire centers that meets the FCC's non-impairment criteria. The December 2003 data represents the most recent ARMIS business line data that was available in February, 2005. Consequently, the use of December 2003 ARMIS business line data is not only appropriate, it is consistent with the FCC's intent to base

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<sup>1</sup> Order Initiating Investigation and Notice and Order for Hearing at 5, 6, and 8.

<sup>2</sup> TRRO, ¶ 93.

<sup>3</sup> *Id.*, ¶ 105.

<sup>4</sup> *Id.* ¶ 235.

<sup>5</sup> Ex. A attached to Memorandum in Support of Motion.

determinations on “an objective set of data that incumbent LECs already have created for other regulatory purposes.” TRRO, ¶ 105. Further, for consistency, the UNE-L quantities and UNE-P quantities must be provided for the same December, 2003 time frame.<sup>6</sup>

## Discovery Standard

The rules of the Office of Administrative Hearings specify that any means of discovery available under the Rules of Civil Procedure for the District Court of Minnesota is allowed and authorize the filing of motions to compel. The rules further state that a party bringing a motion to compel must show the discovery is needed for the proper presentation of its case, is not for delay, and the issues or amounts in controversy are significant enough to warrant the discovery. The party resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.<sup>7</sup>

Rule 26.02 of the Minnesota Rules of Civil Procedure permits discovery regarding any unprivileged matter that is “relevant to the subject matter involved in the pending action,” including information relating to the “claim or defense of the party seeking discovery or to the claim or defense of any other party.” Materials that may be used in impeachment of witnesses may also be discovered as relevant information.<sup>8</sup> It is well accepted that the discovery rules are given “broad and liberal treatment” in order to ensure that litigants have complete access to the facts prior to trial and thereby avoid surprises at the ultimate hearing or trial.<sup>9</sup> Administrative Law Judges at the OAH “have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts.”<sup>10</sup>

The definition of relevancy in the discovery context has been broadly construed to include any matter “that bears on” an issue in the case or any matter “that reasonably could lead to other matter that could bear on any issue that is or may be in the case.”<sup>11</sup> As a general matter, evidence is deemed to be relevant if it would logically tend to prove or disprove a material fact in issue.<sup>12</sup> In summary, “matters sought to be discovered in administrative law settings will be considered relevant if the information requested has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated

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<sup>6</sup> Ex. B attached to Memorandum in Support of Motion.

<sup>7</sup> Minn. R. 1400.6700, subp. 2.

<sup>8</sup> See, e.g., *Boldt v. Sanders*, 261 Minn. 160, 111 N.W.2d 225 (1961).

<sup>9</sup> See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), quoted with approval in *Jeppesen v. Swanson*, 243 Minn. 547, 551, 68 N.W.2d 649, 651 (1955); *Baskerville v. Baskerville*, 75 N.W.2d 762, 769 (1956).

<sup>10</sup> G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure*, § 8.5.2 at 135 (1998).

<sup>11</sup> *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

<sup>12</sup> *Boland v. Morrill*, 270 Minn. 86, 132 N.W.2d 711, 719 (1965).

to lead to such information, or is sought for purposes of impeachment.”<sup>13</sup> The definition of “relevancy” for discovery purposes is not limited by the definition of “relevancy” for evidentiary purposes. Thus, information that is deemed relevant at the discovery stage may not necessarily be admissible evidence at the hearing.<sup>14</sup>

## Discussion

The Joint CLECs contend that it is not appropriate for Qwest to provide only line count data as of December 2003. They assert that the TRRO did not specify any date on which these counts were to be made and argue that determinations made pursuant to the TRRO should be based on data that is contemporaneous with the date the TRRO became effective, which was March 11, 2005. Although they acknowledge that the December 2003 data was the data that was on file with the FCC when it issued the TRRO and when the Wireline Competition Bureau subsequently requested a listing of the wire centers that satisfied the TRRO’s non-impairment thresholds, they contend that those facts are irrelevant here. The Joint CLECs argue that the FCC contemplated that the wire center designations would be based on the most current data available because the TRRO expressly contemplates future non-impairment designations, and point out that that aspect of the TRRO would be meaningless if only 2003 data could be considered. The Joint CLECs also allege that Qwest files its ARMIS reports annually on April 1, and thus would have filed a report on April 1, 2005, just three weeks after the date the TRRO became effective. Thus, more current ARMIS data was accessible to Qwest and was filed with the FCC at virtually the same time as the TRRO took effect. Thus, at a minimum, the Joint CLECs assert that Qwest should be required to provide business line count data from their April 2005 ARMIS filing reflecting data through December 2004.

The Joint CLECs point out that the Utah, Arizona, Colorado, and Oregon Commissions have ordered Qwest to provide responses to the same data request in their respective state proceedings.<sup>15</sup> They also emphasize that the Michigan Public Service Commission has similarly ordered SBC to use 2004 ARMIS data, which was available, even if not fully edited and incorporated in a report to the FCC, on the grounds that the “age of the data must be close enough in time to reflect conditions at the time that SBC claims that the wire center is no longer impaired.”<sup>16</sup> The Joint CLECs also contend that BellSouth has relied upon 2004 ARMIS data for the business line count information it used to initially designate wire centers as non-impaired. The Joint CLECs argue that the fact that the FCC referred to a report dated December 2004 in describing the wire center data to be used to calculate business lines for determining non-

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<sup>13</sup> G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure*, § 9.2 at 146 (1998).

<sup>14</sup> 2 D. Herr & R. Haydock, *Minnesota Practice* 9 (2d Ed. 1985), citing *Detweiler Brothers v. John Graham & Co.*, 412 F. Supp. 416, 422 (E.D. Wash. 1976), and *County of Ramsey v. S.M.F.*, 298 N.W.2d 40 (Minn. 1980).

<sup>15</sup> These decisions are attached to the Memorandum in Support of the Motion as Exs. C-F.

<sup>16</sup> *Id.*, Ex. G.

impairment supports the view that the FCC requires that determinations under the Act be based on the most current data available.

In response, Qwest argues that the data relevant to this proceeding is the December 2003 data included in its April 2004 ARMIS 43-08 annual report to the FCC. It points out that this is the data Qwest submitted to the FCC in February 2005 in support of its initial wire center list and contends that it is consistent with the data upon which the FCC relied to make its wire center non-impairment criteria determinations in the TRRO.<sup>17</sup> Qwest asserts that the new and additional data sought by the Joint CLECs are irrelevant in determining the accuracy of the original “non-impaired” wire center list and contends that expansion to include this type of data will complicate this proceeding.<sup>18</sup> Qwest also asserts that it cannot satisfy the request of the Joint CLECs for March 2005 data because there is no FCC filing of ARMIS data for a particular calendar year until April of the following calendar year.<sup>19</sup> Qwest argues that the Washington, Texas, and Ohio Commissions have approved the use of December 2003 ARMIS data;<sup>20</sup> the Illinois and Indiana Commissions have approved wire center non-impairment lists that were based upon December 2003 access line data in their state TRRO wire center non-impairment review proceedings;<sup>21</sup> and Verizon expanded its original list of non-impaired wire centers in Rhode Island based upon December 2003 business line data.<sup>22</sup>

After careful consideration of these competing arguments, and in light of the applicable discovery standards, the Administrative Law Judge has concluded that it is appropriate to grant the Joint CLECs’ Motion to Compel. Although it is not necessary to decide at this time whether Qwest should be required to use 2003 or 2004 ARMIS data, the data sought in the Information Request propounded by the Joint CLECs appears reasonably calculated to lead to the discovery of admissible evidence, and this data may be of assistance to the Administrative Law Judge and ultimately the Commission in addressing this issue. Therefore, the Motion to Compel is granted. Assuming (as asserted in Qwest’s memorandum in opposition to the motion) that Qwest has no ARMIS filing reflecting data as of March 2005, Qwest is ordered to provide business line count data from their April 2005 ARMIS filing reflecting data through December 2004.

**B. L. N.**

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<sup>17</sup> Memorandum in Opposition at 3, 4.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.* at 3 & n.1.

<sup>20</sup> *Id.* at 5-6 & n.4-7.

<sup>21</sup> *Id.* at 7 & n.8.

<sup>22</sup> *Id.* at 7-8 & n.9.