BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION
SUITE 350
121 SEVENTH PLACE EAST
ST. PAUL, MINNESOTA 55101-2147

Beverly Jones Heydinger	Chair
David C. Boyd	Commissioner
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
Betsy Wergin	Commissioner

In the Matter of Digital Telecommunications, Inc. Complaint against Qwest Corporation	MPUC Docket No. P-5681, 421/C-09-302
In the Matter of the Application of Qwest Corporation for Expedited Approval to Discontinue Physical Connection with Digital Telecommunications Inc.	MPUC Docket No. P-5681,412/M-08-1443

MINNESOTA DEPARTMENT OF COMMERCE
REQUEST FOR RECONSIDERATION

The Order Denying Relief dated September 10, 2014 (hereinafter the Order) issued by the Commission contains analyses that appear to differ significantly from the reasoning stated by the Commission during its deliberations. Some of these analyses contain legal errors, unjustified inferences, and plain factual mistakes in describing telecom terms and conventions. The Department recommends that the Commission reconsider its Order and amend the following.

1. QWEST'S OBLIGATION TO NEGOTIATE THE CONVERSION OF SECTION 251 UNES TO NON-251 ELEMENTS.

The Order Denying Relief dated September 10, 2014 (hereinafter the Order) concludes, at page 18, that, as a result of the TRO, "Qwest no longer had an obligation to offer enterprise switching to DTI."

The legal obligations of incumbent local exchange carriers (incumbent LECs) and competitive LECs under the 1996 Telecommunications Act are not symmetrical, reflecting the intent of the Act to rein in landline monopoly providers and facilitate development of competition

in local service. Thus, DTI, the competitive LEC was not obligated to purchase from the incumbent LEC, Qwest. Qwest, however, after issuance of the TRRO, was legally obligated to offer enterprise switching to DTI, because it offered the service to retail customers and under federal and state law, may not unfairly discriminate against competitive LECS. The Order should be corrected to remove or amend the inaccurate statement.[1]

2. THE ORDER'S DEFINITION OF THE "DUTY TO NEGOTIATE IN GOOD FAITH" IS NOT ACCURATE.

The Order at page 23, states an inaccurate definition of "the duty to negotiate in good faith," stating that "the duty to negotiate in good faith does not require Qwest to sacrifice its own interests to promote the interests of a competitor" and that the duty "requires all parties to engage in an act of creative entrepreneurship, seeking out opportunities for *mutual* gain relative to the status quo." (Emphasis in original).

The Order also fails to account for the modification to Qwest's duty toward DTI to account for its commitment in the TRRO Amendment, which required that Qwest not only act with "good faith" in negotiations, but also that "Qwest account representatives will work with CLEC on a plan to convert any existing Unbundled Local Switching at the DS1 or above capacity to other available Qwest products or services."[2]

The Department has found no telecommunications-related authority to support the Order's statements regarding an Incumbent LEC's duty, nor the Order's definition of good faith negotiations. The mischief of the Order's definition is illustrated on page 23, where the Order observes that DTI did not indicate what it "was willing to do to promote Qwest's interests," and concludes that Qwest therefore was relieved of any further obligation it may have "to make unilateral concessions." While the Order goes on correctly to observe that arbitration is available

[1] The Order could be modified to add, "at cost-based rates."
[2] Qwest Ex. 52 at RA-3, p. 24 (Albersheim Direct.)(TRRO Amendment).

when an LEC fails to negotiate in good faith, the availability of arbitration does not relieve the LEC of its duty to negotiate in good faith in the first instance.

First, the Order's definition an Incumbent LEC's duty to engage in good faith negotiation is erroneous because compliance with the regulatory scheme set out in the Telecommunications Act *does in fact compel ILECs to sacrifice their own interests* to promote the interests of a wholesale customer/competitor when that is what the law requires. Unlike the purpose of contract negotiations in unregulated markets, the very purpose of the "regulated negotiation" scheme in the Telecommunications Act was to break up the monopoly of ILECs over landline telephone service; the Telecommunications Act at its core is designed to compel ILECs to act contrary to their own interests as monopolists, and become the wholesale providers for their competitors; this indeed requires them to sacrifice their abiding interest in suppressing competition. This is a "one-sided" obligation; CLECs are not under the same compulsions; they are not monopolists and, under the Telecommunications Act, the public interest does not favor treating CLECs and ILECs alike in all circumstances. Language in the Order implying otherwise is inaccurate and undercuts the Commission's duty to protect the public interest as part of the "regulated negotiation" scheme laid out in the Telecommunications Act.

Second, 47 C.F.R. 51.301 (c) is a non-exclusive list of actions that demonstrate violation of a duty to negotiate in good faith. This rule states, in part: "[i]f proven to...an appropriate state commission...the following actions or practices, among others, violate the duty to negotiate in good faith...." and the rule gives examples of activities demonstrating a lack of good faith. There also are innumerable telecommunications cases discussing good faith. The Department recommends that the Commission remove from its Order the incorrect statements of regarding Qwest's duties in negotiation and definition of the "duty to negotiate in good faith" such that the Order is consistent with federal and state telecommunications law.

Finally, the Department recommends that the Order complete its analysis by addressing Qwest's additional contractual obligation set forth in the TRRO Amendment, under which it not only assumed in its ICA the duty to negotiate with its CLEC wholesale customer in good faith on the conversion of section 251 UNEs to non-251 elements, but also agreed that "Qwest account representatives will work with CLEC on a plan to convert any existing Unbundled Local Switching at the DS1 or above capacity to other available Qwest products or services.[3]

3. THE ORDER APPEARS TO MISAPPREHEND THE 14-STATE "CHANGE MANAGEMENT PROCESS" AND THE "DISCONNECTION PROCESS."

First, as to "change management process" (CMP) the Order at pages 24-25 assesses whether Qwest complied with the UNE Conversion Order.[4] The Order states that Qwest complied with the UNE Conversion Order because the TRRO Amendment was adopted through "negotiation as provided in their interconnection agreement's change management process."

The CMP is a 14-state process for making changes to technical aspects of the telecommunications networks that must be coordinated among carriers for the network to function with multiple operators. Affected changes typically concern Operations Support Systems (OSS) Interfaces, products and processes. It has nothing to do with negotiation of prices in interconnection agreements or amendments thereto. Unlike this 09-302 docket, the UNE Conversion Order happened to involve at least one "implementation" issue suitable to resolution in CMP, and Qwest there failed to address that issue in CMP; like this 09-302 docket, Qwest failed to seek Arbitration of the UNE conversion disputes.

The Order's reasoning, that Qwest complied with the UNE Conversion Order, is incorrect because Qwest neither pursued changes through the change management process nor did it seek

[3] Xcel Ex. 52 at RA-3 (Albersheim Direct) (TRRO Amendment).
[4] Order at 24, note 82.

formal Arbitration by the Commission. Any findings to that effect should be removed from the Order.

As to the Order's reference to the disconnection process, the Order infers at page 25 that Qwest's failure to commence the disconnection process demonstrates a lack of anti-competitive intent on the part of Qwest. This is an erroneous inference; and, from a policy perspective, it is harmful to the Commission's authority because "the disconnection process" merely means bringing a situation to the Commission's attention. One of the Commission's functions is to resolve interconnection and provisioning problems involving incumbent LECs and competitive LECs; hearing these disputes is part of the Commission's charge to encourage competition in Minnesota. It is antithetical to that function for the Commission to find that the failure to bring a dispute to the Commission evidences a company's lack of anti-competitive animus. The Department recommends removal of such findings from the Order.

4. THE ORDER'S REFERENCE TO "ELIGIBILITY CRITERIA" APPEARS TO BE BASED ON A COLLOQUIAL MEANING, RATHER THAN ITS SPECIFIC LEGAL MEANING IN TELECOMMUNICATIONS.

The Order, at pages 17-19 discusses the Department's position that the discriminatory billings by Qwest after August 2006 were not a reasonably equivalent arrangement to the arrangement before the UNE conversion. In this connection, the Order finds that Qwest's demand for "bulk purchase commitments" was sanctioned in paragraph 586 of the TRO:

> 586. We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, *so long as the competitive LEC meets the eligibility criteria that may be applicable.*

(Emphasis added by italics in Order.) The Order thus appears to adopt an argument that was in CenturyLink's Exceptions to ALJ Report[5], refuted by the DOC, and thereafter, prudently, abandoned by CenturyLink. CenturyLink there had argued, inaccurately, that the "eligibility

[5] CenturyLink Exceptions to ALJ Recommendations, p. 7.

criteria" to which the FCC referred in TRO ¶ 586 are the criteria (such as volume or duration) in Qwest's retail tariffs.[6] The argument was fundamentally wrong. The phrase "eligibility criteria," as used in FCC Orders, is not a colloquial term having a commonplace meaning. It refers instead to a set of legally-defined criteria (including safe harbors) developed by the FCC over the course of several of its early orders to determine what distinguishes a "bona fide" competitive LEC from other companies.[7] In the TRO, paragraphs 590-592,[8] the FCC discusses its historic development of the "eligibility criteria" used by it to determine whether a company was or was not a bona fide competitive LEC. Paragraph 586 does not concern tariffs nor the topic of price/quantity restrictions in Qwest tariffs.[9] Any discussion of paragraph 586 of the TRRO and eligibility criteria should be removed from the Order.

5. THE ORDER REACHES LEGAL CONCLUSIONS BASED ON THE INACCURATE STATEMENT THAT THE ESCHELON/QWEST BRIDGE AGREEMENT WAS FORMED IN THE CONTEXT OF A LEGALLY TIME-LIMITED ARBITRATION PROCEEDING.

The Order at page 24 incorrectly finds that "Qwest entered into a bridge agreement with Eschelon within the context of an arbitration proceeding." Based in part on this incorrect finding, the Order concludes that Qwest's treatment of Eschelon, in contrast to its treatment of DTI, did not demonstrate a lack of good faith negotiation or discrimination regarding DTI." This finding and conclusion drawn from it are plainly erroneous.

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[6] Exceptions, p. 7, 41,49. See also Exceptions, p. 7 (CenturyLink wrongly asserts that CenturyLink can simply force onto a CLEC any terms or conditions that CenturyLink chooses for a converted wholesale service and the Commission may not "require an ILEC to negotiate" the terms for a converted service) and pp. 41, 47-49.

[7] For example, a retail customer of the ILEC.

[8] For example, TRO ¶ 590 explains that a "requesting carrier" may obtain a UNE where it provides "qualifying services." TRO ¶ 140 states that "qualifying services," are telecommunications services offered by requesting CLECs in competition with those telecommunications services that have "been traditionally within the exclusive or primary domain of incumbent LECs." These services, include, for example, "local exchange services, such as POTS and local data service, and access services, such as xDSL and high-capacity circuits."

[9] The Department's Reply to Exceptions discusses other reasons why the term "eligibility criteria" is immaterial to tariff terms, conditions, or pricing.

The record in this 09-302 Docket and Commission orders in the eDocket System show that the Eschelon/Qwest Bridge Agreement was fully negotiated and filed for Commission approval Docket P5340, 421/IC-05-1976 during the calendar year 2005.[10] It was approved in January, 2006.[11] Half a year later, in May, 2006, Eschelon initiated a "time-limited" Arbitration proceeding, in P-5340, 421/IC-06-768.[12] The Department recommends that the Commission reconsider and correct the finding regarding the Bridge Agreement and related conclusions.

6. THE ORDER WRONGLY CHARACTERIZES TARIFFED PRICES AS NEGOTIATED PRICES.

The Order at page 6 discusses Qwest's admission, in its July 2009 Answer to DTI's Complaint, that Qwest believed, and told DTI, that Qwest had no duty to negotiate with DTI to convert the section 251 elements used in DSS/PRI to non-251 elements, because Qwest had retail tariffs for DSS/PRI.

The Order incorrectly refers to the retail tariff rates having prices to "renegotiate." The Order's characterization of the tariff prices being "renegotiated" both misquotes Qwest's

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[10] *ITMO the Bridge Agreement Until New Interconnection Agreements Are Approved,* Docket No. P5340, 421/IC-05-1976; "Bridge Agreement," filed Dec. 21, 2005, publ. at: *https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=viewDocument&documentId={D10D7832-6EFF-40BE-82D1-3FBEA99F308A}&documentTitle=2570965&userType=public;* Docket 09-302, DOC Ex. 72 at Exhibit BJJ-3 (Johnson Rebuttal) (Excerpts of Qwest/Eschelon Bridge Agreement approved by the Commission in Docket 05-1976; the "05" number in the docket signifies that the concluded Bridge Agreement was filed with the Commission in 2005.

[11] *ITMO the Bridge Agreement*, Docket 05-1976, Order, filed Jan. 12, 2006, publ. at *https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=viewDocument&documentId={CDC46CD8-42A5-4ABB-AC55-4D94EF494450}&documentTitle=2653547&userType=public*

[12] *ITMO Petition of Eschelon Telecom, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b),* Docket No. P-5340,421/IC-06-768, "Petition of Eschelon Telecom of Minnesota, Inc.," publ. at *https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=viewDocument&documentId={EEAD27A9-3C64-4E8E-A37D-75B4EF8391CF}&documentTitle=3104187&userType=public*; Docket 09-302, DOC Ex.72 at fn.3 (Johnson Rebuttal)(Ms. Johnson describes her participation in the 06-768 arbitration.)

admission that it told DTI it would not "negotiate" the conversion[13] and mischaracterizes the legal nature of tariff prices, which are unilaterally set by the tariffed company.

CONCLUSION

The Department recommends that the Commission reconsider and modify its Order.

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Respectfully submitted,

/s/ Linda S. Jensen

Linda S. Jensen
Atty. Reg. No. 0189030
445 Minnesota Street, Suite 1800
St. Paul, MN 55101-2134
Telephone: (651) 757-1472
Fax: (651) 297-1138
Linda.S.Jensen@ag.state.mn.us
Attorney for Minnesota Department of Commerce

[13] 09-302, Qwest Corporation's Answer and Counterclaim to Complaint by Digital Telecommunications, Inc., July 1, 2009, p. 4, ¶ 4 (Qwest admits it told DTI "it *would not negotiate* the retail DSS/PRI rates posted in the price catalog or the Resale Discount ordered by the Commission."); see also Tr. Ex. 58 (Qwest Corporation's Response to the Department's Information Request No. 68) unnumbered page 4, last paragraph.