IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOS. 10-1187 & 10-1212

QWEST CORPORATION, A COLORADO CORPORATION,

PLAINTIFF-APPELLANT/CROSS-APPELLEE,

V.

THE COLORADO PUBLIC UTILITIES COMMISSION, ET AL.,

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

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ACTING ASSOCIATE GENERAL COUNSEL

LAUREL R. BERGOLD
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

AMICUS BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF PLAINTIFF-APPELLANT/CROSS-APPELLEE URGING AFFIRMANCE IN PART AND REVERSAL IN PART.

In response to the Order of this Court dated May 19, 2011, the Federal Communications Commission ("FCC") respectfully files this brief as *amicus curiae*.

STATEMENT OF INTEREST

The FCC has primary responsibility for implementing and enforcing the Communications Act of 1934, 47 U.S.C. §151, *et seq*., as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The present dispute turns on the proper interpretation of an FCC regulation, 47 C.F.R. § 51.5, that implements provisions of the Communications Act, 47 U.S.C. §§ 251(c)(3) and 251(d)(2). The FCC has an interest in ensuring that its regulation, which defines and prescribes a method for counting "business lines," is correctly interpreted.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

In its Order dated May 19, 2011, the Court invited the FCC to file an *amicus* brief addressing the following questions:

1. "Does the business line count in 47 C.F.R. § 51.5 include only UNE [*i.e*., unbundled network element] loops that serve business customers?"

2. "Does the business line count in 47 C.F.R. § 51.5 include only UNE loops that are connected to switches?"

As we explain below, the FCC interprets section 51.5 to require the inclusion in the business line counts of all UNE loops, including UNE loops that serve residential customers and those that are not connected to switches.

STATEMENT OF THE CASE

1. Statutory Background

For most of the last century, American consumers could purchase local telephone service from only one source: their incumbent local exchange carrier ("LEC"). Until the 1990s, regulators treated local telephone service as if it were a natural monopoly. As a result, states typically granted an exclusive franchise in each local service area to the incumbent LEC that owned and operated the local telephone network.[1]

In the Telecommunications Act of 1996,[2] Congress fundamentally altered this regulatory framework "to achieve the entirely new objective of uprooting the monopolies."[3] The 1996 Act creates "a new telecommunications regime designed to foster competition in local telephone markets"[4] by imposing "a host of duties" upon incumbent LECs.[5] Foremost

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[1] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

[2] Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

[3] *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 488 (2002). *See Qwest Corp. v. Pub. Util. Comm'n of Colo.*, 479 F.3d 1184, 1186-87 (10th Cir. 2007).

[4] *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 638 (2002).

[5] *AT&T*, 525 U.S. at 371.

among these duties is the incumbent LEC's obligation "to share its network with competitors."[6]

Section 251(c)(3) of the Communications Act, as amended by the 1996 Act, requires an incumbent LEC to lease to its competitors on an "unbundled" – *i.e.*, à la carte – basis those elements of its network specified by the FCC. 47 U.S.C. § 251(c)(3).[7] This requirement "makes it easier for a competitor to create its own network without having to build every element from scratch."[8] When determining which non-proprietary network elements incumbent LECs must offer to their competitors on an unbundled basis, the FCC must consider, "at a minimum," whether the incumbent LEC's failure to provide access to such elements would "impair" a competitor's ability to provide service. 47 U.S.C. § 251(d)(2).[9] Unbundled network elements ("UNEs") that are offered

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[6] *Id*. (*citing* 47 U.S.C. § 251(c)(3)).

[7] A "network element" is defined as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(35).

[8] *Talk America v. Mich. Bell Tel. Co.*, No. 10-313, slip op. at 2 (U.S., Jun. 9, 2011), 2011 WL 222429.

[9] The 1996 Act also directs the FCC to consider whether unbundled access to proprietary network elements is "necessary." 47 U.S.C. § 251(d)(2). This case, however, does not concern the standard for unbundled access to proprietary network elements.

pursuant to section 251(c)(3) must be made available at regulated, cost-based rates. *See* 47 U.S.C. § 252(d)(1).[10]

2. The FCC's Unbundling Rules

In its *Triennial Review Remand Order* ("*TRRO*"), the FCC adopted rules to implement the unbundling provisions of the Communications Act, including section 251(d)(2)'s test for "impairment."[11] The rules set out in the *TRRO* impose unbundling obligations only in situations where competitive LECs "genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition."[12] The rules also "remove unbundling obligations over time as carriers deploy their own networks and downstream local exchange markets exhibit . . . robust competition."[13]

As relevant here, the FCC in the *TRRO* found a "correlation" between a large number of "business lines" in an incumbent LEC's "wire center" (*i.e.*,

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[10] The Supreme Court has upheld the FCC's methodology for calculating these cost-based rates as lawful and consistent with the statute. *Verizon*, 535 U.S. 467; *see also* 47 C.F.R. § 51.505(b) (specifying methodology).

[11] *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533 (2004) ("*TRRO*"), *aff'd, Covad Commc'ns Co. v. FCC*, 450 F.3d 528, (D.C. Cir. 2006).

[12] *Id*. at 2535 (¶ 2).

[13] *Id*. at 2536 (¶ 3).

the place in the incumbent LEC's network where "loops" and "transport facilities" attach to the switch)[14] and the existence of a "revenue opportunity" sufficient to encourage competitive LECs to create their own facilities in the areas served by that wire center.[15] Simply stated, more total lines provide greater opportunities for new entrants profitably to provide competitive services over their own facilities. Based on that finding, the FCC used business lines in the LEC's wire center as a proxy for impairment. When the number of business lines reaches a specified threshold, competitive LECs that operate in the area served by the wire center are deemed to be economically capable of deploying their own high-capacity loops and transport facilities (*i.e.*, they are no longer "impaired" without access to those UNEs at cost-

[14] "[L]oops are the transmission facilities between [an incumbent LEC's] central office and the customer's premises." *TRRO*, 20 FCC Rcd at 2614-15. (¶ 147). Transport facilities are "facilities dedicated to a particular competitive carrier that the carrier uses for transmission between or among incumbent LEC central offices and tandem offices, and to connect its local network to the incumbent LEC's network." *Id.* at 2576 (¶ 67).

[15] *Id.* at 2559 (¶ 43). The FCC also found a correlation between such revenue opportunities and the number of "fiber collocators" (*i.e.*, arrangements that allow a competitive LEC to interconnect its facilities with those owned by an incumbent LEC). *Id.*

based rates).[16] Thus, when the threshold number of business lines is reached, the incumbent LEC (such as incumbent Qwest Corporation in this case) is no longer required to offer high-capacity loops and transport to the competitive LECs on an unbundled, cost-based basis.

The FCC's unbundling rules also prescribe a method for calculating whether the number of business lines in a wire center satisfies the numeric threshold for non-impairment. Under the relevant FCC rule, 47 C.F.R. § 51.5, the number of business lines in a wire center is deemed to "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."

The FCC chose this computational method for two reasons. First, the method "fairly represents the business opportunities in a wire center, including business opportunities already being captured by competing

[16] *Id.* at 2588-95 (¶¶ 93, 105); *see Logix Comm'ns v. PUC of Texas*, 521 F.3d 361, 363-64 (5th Cir.), *cert. denied*, 129 S.Ct. 223 (2008). The FCC similarly adopted specific thresholds for the number of fiber collocators, which it also used as a proxy for impairment. For some UNEs, a LEC is required to reach the numeric thresholds for both business lines and fiber collocators in order to establish non-impairment. *See TRRO*, 20 FCC Rcd at 2536 (¶ 5).

carriers through the use of UNEs," and thus provides an appropriate approximation of the number of business lines in a particular wire center.[17]

Second, the counting method is simple to administer and produces easily verifiable results. The FCC explained that its approach uses "an objective set of data that incumbent LECs already have created for other regulatory purposes," *i.e.*, "an ARMIS filing required of incumbent LECs" plus "UNE figures, which must also be reported."[18] By allowing LECs to base their computations upon these "objective and readily available" data, the FCC sought to avoid uncertainty and prevent disputes between the incumbent LECs and their competitors that could result in "complex and lengthy proceedings that are administratively wasteful."[19]

The FCC understood that basing a business line count solely upon objective and readily available data would not always result in a precisely accurate count of the actual number of business lines. For example, the agency decided not to include in its line count methodology the number of

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[17] *TRRO*, 20 FCC Rcd at 2595 (¶ 105).

[18] *Id.* The Automated Reporting Management Information System ("ARMIS") was initiated in 1987 to collect financial and operational data from telecommunications carriers. *See In the Matter of Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules)*, Report and Order, 2 FCC Rcd 5770 (1987), *recon. granted in part*, 3 FCC Rcd 6375 (1988).

[19] *TRRO*, 20 FCC Rcd at 2592, 2623 (¶¶ 99, 161).

business lines that competitive LECs serve using their own loops. Even though that approach would have resulted in "more complete business lines counts," the FCC rejected it because such data are "extremely difficult to obtain and verify."[20]

Concerns about administrability also guided the FCC's decision to evaluate impairment at the wire center level, rather than for smaller geographic areas or even particular customer locations. The FCC recognized that a wire center-based "test may in some cases be under-inclusive (denying unbundling in specific buildings where competitive entry is not in fact economic) or over-inclusive (requiring unbundling in specific buildings where competitive entry is in fact economic)."[21] But the alternative proposed by appellee Cbeyond and other competitive LECs – a building-by building evaluation – would be "impracticable and unadministrable."[22] As the agency explained, that approach would require the "collection and analysis of information that is not easily verifiable."[23] In short, the benefits of

[20] *Id.* at 2595 (¶ 105).

[21] *Id.* at 2619-20 (¶ 155).

[22] *Id.* at 2619-20 (¶¶ 157, 158).

[23] *Id.*

administrability and ease of verification outweighed any loss of precision when calculating business lines as a proxy for economic impairment.

3. This Proceeding

In February 2006, at the request of several competitive LECs, the Colorado Public Utilities Commission ("Colorado PUC") initiated an evidentiary hearing before an Administrative Law Judge ("ALJ"). The stated purpose of the hearing was to "provid[e] insight into the development of a list of non-impaired wire centers in Qwest Corporation's serving territory and the underlying data used to develop and update that list."[24] As relevant here, the hearing addressed whether the business line count in 47 C.F.R. § 51.5 includes residential and/or non-switched UNE loops.[25]

Qwest argued that the business line count includes both (1) all residential UNE loops, except for residential UNE-Platform ("UNE-P")

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[24] *In the Matter of the Joint Competitive Local Exchange Carriers' Request Regarding the Status of Impairment in Qwest Corporation's Wire Centers and the Applicability of the Federal Communications Commission's Triennial Review Remand Orders*, Commission Order Opening a Docket and Allowing Response, 2006 WL 1211152 at Order, ¶ 1 (Colo. PUC, Feb. 22, 2006). *See* Aplt. App. at 9 (¶¶ 1-3) (*Recommended Decision*).

[25] *See* Aplt. App. at 17-18 (¶¶ 66-80) (*Recommended Decision*).

loops[26] and (2) non-switched lines. The competitive LECs maintained that the business line count should exclude UNE loops that service residential customers and UNE loops that are not connected to switches.[27]

On February 19, 2008, the ALJ ruled in favor of the competitive LECs.[28] The ALJ construed 47 C.F.R. § 51.5 as excluding from the business line calculation UNE loops that serve residential customers and UNE loops not used to provide switched services.[29] Qwest filed exceptions to the ALJ's rulings. On September 18, 2008, the Colorado PUC issued an order denying those exceptions.[30]

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[26] *See id.* at 15-16, 18 (¶¶ 54, 59, 66, 78) (*Recommended Decision*). UNE-P loops are incumbent LEC loops that are provided with incumbent LEC switching. *Local Telephone Competition: Status As Of June 30, 2010*, 2011 WL 972603, at Table 4 n.4 (Ind. Anal. & Tech. Div, WCB, FCC) (Mar. 2011). Qwest included UNE-P business lines (but not residential UNE-P lines) in its wire center business line counts. *See* Aplt. App. at 15 (¶ 54) (*Recommended Decision*). Because Qwest did not have readily available data to disaggregate UNE-P loops into business and residential subcategories, Qwest provided estimates of those subcategories by comparing the numbers associated with UNE-P lines with the White Pages database. *See id.* at 16 (¶ 59) (*Recommended Decision*).

[27] *See id.* at 18 (¶ 80) (*Recommended Decision*).

[28] *Id*. at 17-18 (¶¶ 68-70) (*Recommended Decision*).

[29] *Id.*

[30] *See id*. at 76-77 (¶¶ 44-53) (*Order on Exceptions*).

On December 5, 2008, after the Colorado PUC denied a request for rehearing,[31] Qwest challenged the state agency's order in federal district court under 47 U.S.C. § 252(e)(6). Qwest argued that the Colorado PUC erred in ruling that UNE loops used to serve residential customers and UNE loops that are not used to provide switched services are excluded from the business line count under 47 C.F.R. § 51.5. On January 28, 2010, the district court issued an order granting partial relief to Qwest.[32] Relying upon the phrase "all UNE loops" in section 51.5, and the FCC's explanation in the *TRRO* that the business line count must be based upon readily available data, the district court agreed with Qwest that the Colorado PUC erred in interpreting section 51.5 to exclude residential UNE loops from the business line count.[33] The district court, however, held that the Colorado PUC was correct in excluding non-switched UNE loops from that count.[34]

The parties filed cross-appeals from the district court's judgment.

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[31] *See id.* at 81-83 (¶¶ 3-15) (*Order on Application for Rehearing, Reargument or Reconsideration*).

[32] *Id*. at 102 *(District Court Order*).

[33] *Id*. at 105-06 (*District Court Order* at 4-5).

[34] *Id.* at 105 (*District Court Order* at 4).

ARGUMENT

I. STANDARD OF REVIEW

As the Supreme Court has recently confirmed, the courts owe substantial deference to the FCC's construction of its own regulations. *Talk America, supra*, slip op. at 7-8; *see Chase Bank, N.A. v. McCoy*, 131 S. Ct. 871, 878-81 (2011). Indeed, the FCC's construction of one of its own regulations is controlling unless "'plainly erroneous or inconsistent with the regulation'" itself. *Talk America*, slip op. at 8 (*quoting Chase Bank*, 131 S. Ct. at 881); *see PLIVA, Inc. v. Mensing*, No. 09-993, slip op. at 6 (U.S., Jun. 23, 2011), 2011 WL 2472790; *Auer v. Robbins*, 519 U.S. 452, 461 (1999); *Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 794 (10th Cir. 2010). The Supreme Court also has made clear that this deference applies fully to an agency interpretation set forth in an *amicus curiae* brief, unless there is "'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" *Talk America*, slip op. at 8 (*quoting Auer*, 519 U.S. at 462).

These principles call for deference here. The FCC's interpretation of its rule 51.5 at the Court's request reflects the agency's "fair and considered judgment on the matter in question," *Id. Cf. Talk America*, slip op. at 12-13 (noting that the FCC's interpretation of its rules was not a "*post hoc*

rationalization" advanced to support its own litigation position). It also "reflect[s] the considerable experience and expertise the [agency] ha[s] acquired over time with respect to the complexities" of the Communications Act, *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006), and the agency's own implementing regulations. As the Supreme Court has explained, the FCC "stands in a better position" than the courts "to make the technical and policy judgments necessary to administer the complex regulatory program at issue." *Talk America*, slip op. at 15 n.7; *see also AT&T Commc'ns of Calif., Inc. v. Pac-West Telecomm. Inc.*, No. 08-17030, 2011 WL 2450986, *16 (9th Cir., June 21, 2011) (deferring to interpretation of FCC rules set forth in FCC *amicus* brief, and noting that "the FCC is best positioned to describe the reach of its own orders."). Moreover, Congress specifically entrusted the FCC with the responsibility to administer section 251(c)(3). *See AT&T*, 525 U.S. 366. Adherence to the FCC's rule interpretation in this case thus will ensure that the standard applied in deciding which network elements incumbent LECs must make available to their competitors on an unbundled, cost-based basis is the one established by the expert agency charged by Congress with making that determination.

II. THE BUSINESS LINE COUNT UNDER SECTION 51.5 INCLUDES UNE LOOPS THAT SERVE RESIDENTIAL, WELL AS BUSINESS, CUSTOMERS.

By its terms, FCC rule 51.5 specifies that "[t]he number of business lines in a wire center shall equal [1] the sum of all incumbent LEC business switched access lines, plus [2] the sum of *all* UNE loops connected to that wire center." 47 C.F.R. § 51.5 (emphasis added). As the courts have recognized, "the word 'all' is 'one of the least ambiguous [words] in the English language.'" *Lockheed Martin Corp. v. Retail Holdings, N.V.,* 639 F.3d 63, 70 (2d Cir. 2011) (*quoting GEICO v. Fetisoff*, 958 F.2d 1137, 1142 (D.C. Cir. 1992)) (brackets in original). The FCC's use of "all" in section 51.5 to modify the phrase "UNE loops" signifies that the business line count includes "the whole number of"[35] UNE loops in the wire center "without exception."[36] The FCC is well aware that UNE loops can be used to serve

[35] *See Webster New Universal Unabridged Dictionary* 54 (1996 Barnes & Noble Books) (defining "all" to mean "the whole number of").

[36] *Cohens v. State of Va.,* 19 U.S. 264, 348 (1821) ("The term '*all* cases,' means *all*, without exception.") (emphasis in original).

residential customers as well as business customers.[37] If the FCC had intended to exclude the subset of UNE loops serving residential customers from the business line count, it would not have specified the addition of "all UNE loops" to that count.

This understanding of section 51.5 is further bolstered by the FCC's inclusion of the limiting term "business" to modify "switched access lines" in the first part of the line count equation, while omitting that term in the next part of the equation, which instead refers to "all UNE loops." *See* 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 . . . .") (emphasis added). Where, as here, "an agency includes a specific term or exception in one provision of a regulation, but excludes it in another," it is "presume[d] that the exclusion [is] intentional." *Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1265 (10th Cir. 2005); *see also Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2000). The FCC's presumptively intentional omission of the term "business" to modify "all UNE loops" thus confirms the FCC's intent to

[37] *See, e.g.*, *In re Qwest Communications International, Inc. for Authorization to Provide In-region, InterLATA Services in Minnesota*, Memorandum Opinion and Order, 18 FCC Rcd 13323, 13356 (¶ 61) (2003) (describing a carrier's provision of "telephone exchange service to residential subscribers over its own facilities, UNE-Loops, and the UNE-Platform.").

include "all" UNE loops in the business line count, including UNE loops used to serve residential customers.

This interpretation also comports with the FCC's description of its counting method in the *TRRO*, the rulemaking order that adopted section 51.5. In that order, the FCC explained that the business line count uses "an objective set of data that incumbent LECs already have created for other regulatory purposes."[38] The FCC identified those data as "an ARMIS filing required of incumbent LECs" plus "UNE figures, which must also be reported."[39] Significantly, the FCC requires incumbent LECs to report on FCC Form 477 – the FCC's only source of complete data about incumbent LECs' provision of UNEs – the aggregate number of UNEs provided to other carriers, including UNEs used to serve either residential or business

[38] *TRRO*, 20 FCC Rcd at 2595 (¶ 105). *See also id*. at 2623 (¶ 161) (the business line counts "rely on data . . . which are objective and readily available").

[39] *Id.* at 2595 (¶ 105).

customers.[40] Thus, the readily available data underlying the FCC's line count methodology cover both UNE loops that serve business customers and UNE loops that serve residential customers.

Notwithstanding section 51.5's express directive that the business line count includes "all UNE loops," the Colorado PUC and Cbeyond maintain that UNE loops used to serve residential customers must be excluded because section 51.5 generally defines a business line as "an incumbent LEC-owned switched access line used to serve a business customer." 47 C.F.R. § 51.5. They are mistaken.

The relevant portion of section 51.5 consists of two discrete parts. The first sentence under the heading "Business line" supplies a *definition* of that term: "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." 47 C.F.R.

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[40] In the past, the FCC also had required incumbent LECs on Form 477 to "estimate the types of customers unaffiliated carriers serve," but it eliminated that reporting requirement from Form 477 before the *TRRO* was adopted. *See Local Telephone Competition and Broadband Reporting*, Report and Order, 19 FCC Rcd 22340, 22351 (¶ 22) (2004) ("*Local Telephone Order*"). Thus, by the time section 51.5 took effect, the incumbent LECs did not report estimates of the number of UNE loops that serve only business customers. *Id.* The version of Form 477 that was in effect at the time section 51.5 was enacted can be found in Appendix D of the *Local Telephone Order*, 19 FCC Rcd at 22376.

§ 51.5. By contrast, because the FCC's rules use business line density as a proxy for economic impairment (see pp 5-7, *supra*), the second and third sentences of the rule prescribe a specific *computational method* for determining the number of business lines in a wire center for purposes of identifying wire centers where competitors are or are not impaired (and thus do or do not have access to UNEs at cost-based rates.). The problem with the rule construction advanced by Cbeyond and the Colorado PUC is that it "confuses the definition of a business line with the procedure that is used for counting it."[41]

The Colorado PUC and Cbeyond (Principal Br. at 29-30) further contend that the business line count in section 51.5 cannot include UNE loops serving residential customers because the FCC intended business line density to identify wire centers in which there are large concentrations of businesses, and not residential lines. But this argument again conflates the basic concept of what is to be measured – business lines – with the specified computational method.

Although the FCC's proxy for economic impairment speaks in terms of business lines, the FCC did not expect that its prescribed counting method

[41] *Michigan Bell Tel. Co. v. Lark*, No. 06-11982, 2007 WL 2868633, at *9 (E.D. Mich. 2007) (subsequent history omitted).

would achieve a mathematically perfect count of the business lines in a wire center. Instead, the FCC created a method of counting business lines that uses readily available and objective data so as to minimize regulatory burdens, avoid uncertainty, and prevent computational disputes between the incumbent LECs and their competitors that could result in "complex and lengthy" litigation.[42]

As explained in the *TRRO*, the prescribed method *undercounts* some business lines insofar as it excludes business lines served by competitive LECs over their own loop facilities.[43] On the other side of the ledger, the counting method *overcounts* some business lines by allowing incumbent LECs to use their readily available calculation "all UNE loops," including those used to serve residential customers. Nevertheless, in adopting section 51.5, the FCC made a deliberate policy choice to forgo absolute mathematical precision in order to achieve an administratively workable counting system that minimizes regulatory burdens and produces reasonably accurate, certain, and verifiable results. Consistent with the "proverb [that] cautions that the best should not be the enemy of the good," the FCC, in prescribing a method of counting business lines, "did not intend the infeasible perfect to oust the

[42] *TRRO*, 20 FCC Rcd at 2592 2623 (¶¶ 99, 161).

[43] *Id.* at 2595 (¶ 105).

feasible good." *Commonwealth of Pa. v. ICC*, 535 F.2d 91, 96 (D.C. Cir. 1976).

III. THE BUSINESS LINE COUNT UNDER SECTION 51.5 INCLUDES UNE LOOPS THAT ARE NOT CONNECTED TO A SWITCH.

For many of the same reasons that the unqualified phrase "all UNE loops" in section 51.5 is properly understood as requiring the inclusion of loops that serve residential customers in the business line count, that phrase also encompasses UNE loops that are not connected to a switch. As demonstrated above, the use of the word "all" directly before the words "UNE loops" signifies that the business line counts include the whole number of UNE loops in the wire center "without exception." *Cohens*, 19 U.S. at 348. Because UNE loops not connected to a switch are a species of the generic category "all UNE loops," such loops must be included in the business line count.

A comparison of the language used to define the element of the business line count – "all incumbent LEC business *switched* access lines" – and the following phrase, "all UNE loops," – confirms the foregoing interpretation. As noted above, when particular language is included in one part of a rule and omitted in another part, the omission is presumed to be intentional. *Barnhart*, 534 U.S. at 452; *Atlas*, 400 F.3d at 1265. The FCC's

use of the limiting term "switched" in conjunction with "access lines", coupled with its omission of that term to modify "all UNE loops" in the very same sentence, evidences the agency's intent to include within the business line count UNE loops that are not connected to switches, as well as those that are connected to switches.

Moreover, the FCC explained in the *TRRO* that the business line count uses reported UNE loop data. *TRRO*, 20 FCC Rcd at 2595 (¶ 105). As stated in FCC Form 477, those data cover the aggregate UNE loop figures – not just the subset of UNE loops that are connected to switches. *See* pp. 17-18, *supra*. Given the FCC's emphasis on administrability and ease of verification when crafting its business line rule, this match between the explicit language of the line-count rule, *i.e.*, "all UNE loops" and the Form 477 reporting requirements confirms that the line count rule was intended to cover both switched and non-switched UNE loops.

Contrary to the conclusion of the district court and the appellees here, the third sentence of the business line rule[44] does not override the explicit directive in the second sentence that the business line count shall include "all UNE loops." As indicated by its introductory clause ("[a]mong these requirements"), the third sentence clarifies and elaborates on, and does not supersede or replace the counting method specified in the second sentence.

In order to prevent an inconsistency with the requirement that "all UNE loops" be included in the line count, the first and second subsections of the third sentence are best read to relate solely to the first element of the business line count – "all incumbent LEC business switched access lines."[45] Those subsections make clear that the incumbent LEC's business switched access lines "(1) [s]hall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, [and]

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[44] That sentence provides: "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, [and] (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.

[45] *See* 47 C.F.R. § 51.5 ("The number of business lines in a wire center shall equal [1] the sum of all *incumbent LEC business switched access lines*, plus [2] the sum of fall UNE loops connected to that wire center . . . .") (emphasis added).

(2) [s]hall not include non-switched special access lines."[46] The two subsections thus clarify that an incumbent LEC's retail business switched access lines – but not its retail business "special access lines"[47] – are included under the first part of the business line count methodology. The two subsections do not override or alter the second part of the counting methodology at issue in this case, which requires the inclusion of "the sum of *all UNE loops* connected to [the relevant] wire center," 47 C.F.R. § 51.5 (emphasis added).

CONCLUSION

The Court should affirm the district court's order insofar as it construed section 51.5 to include all UNE loops in the business line count, including those used to serve residential customers. The Court should reverse the

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[46] *Id.* Subsection (1) of section 51.5 closely tracks the instructions for ARMIS 43-08 for the reporting by incumbent LECs of "switched access lines in service": "Report in Table 11 *only those lines connecting end-user customers with their end-offices for switched services*." FCC Report 43-08, Instructions (Dec. 2004) at 17 (emphasis added), http://transition.fcc.gov/wcb/armis/documents/2004PDFs/4308c04.pdf (last visited on June 29, 2010). *See TRRO*, 20 FCC Rcd at 2595 (¶ 105) ("[B]y 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.")

[47] "[A] 'special access' line . . . provides a direct connection from a home or business to a long distance network through a dedicated line, rather than through the switched public telephone network." *Qwest Corp. v. Scott*, 380 F.3d 367, 369 (8th Cir. 2004).

district court's order insofar as it interpreted section 51.5 to exclude UNE loops providing non-switched services from the business line count.

Respectfully submitted,

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ACTING ASSOCIATE GENERAL COUNSEL

/s/ Laurel R. Bergold
LAUREL R. BERGOLD
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

June 30, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QWEST CORPORATION, A COLORADO CORPORATION, PLAINTIFF-APPELLANT/CROSS-APPELLEE, v. THE COLORADO PUBLIC UTILITIES COMMISSION, ET AL., DEFENDANTS-APPELLEES/CROSS-APPELLANTS, AND CBEYOND COMMUNICATIONS, LLC DEFENDANT-INTERVENOR-APPELLEE/CROSS-APPELLANT.	NOS. 10-1187 & 10-1212

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Amicus Brief For The Federal Communications Commission" in the captioned case contains 5,021 words.

/s/ Laurel R. Bergold
Laurel R. Bergold
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1747 (Telephone)
(202) 418-2819 (Fax)

June 30, 2011

10-1187

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Qwest Corporation, Appellant

v.

Colorado Public Utilities Commission, et al., Appellees.

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, hereby certify that on June 30, 2011, I electronically filed the foregoing Amicus Brief for the Federal Communications Commission in Support of Plaintiff-Appellant/Cross-Appellee Urging Affirmance in Part and Reversal in Part with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Charles E. Watkins, III
Cbeyond Communications LLC
320 Interstate North Parkway
Suite 300
Atlanta, GA 30339
Counsel for Cbeyond Communications LLC

Mark A. Davidson
Holland & Hart LLP
555 17th Street
Suite 3200
Denver, CO 80202
Counsel for Cbeyond Communications LLC

David A. Beckett
Office of the Attorney General for the State of Colorado
1525 Sherman Street
7th Floor
Denver, CO 80203

John M. Devaney, Esq.
Perkins Coie LLP
700 13th Street, N.W.
Suite 600
Washington, D.C. 20005
Counsel for Qwest Corporation

Michael A. Sink
Perkins Coie
1900 16th Street
Suite 1400
Denver, CO 80202
Counsel for Qwest Corporation

/s/ Laurel R. Bergold