

**BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

**In the Matter of the Petition of Qwest
Corporation to Initiate a Mass-Market
Switching and Dedicated Transport Case
Pursuant to the Triennial Review Order**

Docket No. UT-033044

**RESPONSE TESTIMONY OF
HARRY M. SHOOSHAN III
ON BEHALF OF
QWEST CORPORATION**

FEBRUARY 2, 2004

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1 **1. INTRODUCTION AND PURPOSE OF REBUTTAL**
2 **TESTIMONY**

3 **Q. ARE YOU THE SAME HARRY M. SHOOSHAN III WHO PROVIDED**
4 **DIRECT TESTIMONY ON BEHALF OF THE QWEST CORPORATION**
5 **(“QWEST”) IN THIS PROCEEDING?**

6 A. Yes. My curriculum vitae is Exhibit HMS-3 to this response testimony.

7 **Q. WHAT IS THE PURPOSE OF YOUR RESPONSE TESTIMONY?**

8 A. The purpose of my response testimony is to make a detailed response to the
9 December 22, 2003 direct testimony of AT&T witnesses John F. Finnegan (Exhibit
10 No. JFF-1T) and Drs. William Lehr/Lee Selwyn (“Lehr/Selwyn”) (Exhibit No.
11 WHL-1T) and MCI witness Dr. Richard Cabe (Exhibit No. not provided). I also
12 offer some general comments on the testimony of AT&T witnesses Michael R.
13 Baranowski (Exhibit No. MRB-1T), Douglas Denney/Arleen M. Starr (Exhibit No.
14 DD-1T), and Mark L. Stacy (Exhibit No. MLS-1T), and MCI witness Cedric Cox
15 (Exhibit No. not provided). I occasionally refer to all of the above as “the CLEC
16 witnesses.”

1 **2. ROAD MAP TO IMPLEMENTING THE *TRO*¹**

2 **Q. WHAT ARE THE TASKS OF THE WUTC IN THIS PROCEEDING?**

3 A. The tasks of the WUTC in this proceeding are to: 1) specify the relevant markets;
4 2) determine the DS0-DS1 cut-off between the mass market and the enterprise
5 market; 3) determine in which relevant geographic markets the trigger conditions
6 with regard to unbundled switching and shared transport are satisfied; and 4)
7 determine, in markets where the Commission believes that the trigger conditions
8 are *not* satisfied, whether an efficient CLEC would be viable without unbundled
9 switching.

10 I have attached two “decision-path” diagrams to this testimony that outline the
11 various steps in this proceeding. The two diagrams refer to mass market switching
12 (Exhibit HMS-4) and transport (Exhibit HMS-5), respectively. I would emphasize
13 two important points with respect to the mass market switching attachment: 1) The
14 TRO (at ¶¶ 498-500 and 47 C.F.R. § 51.319(d)(iii)) explicitly requires that the
15 triggers part of the case precede, and not be combined with, the potential-
16 deployment part of the case; and 2) The specification of the relevant market should
17 be consistent with all the evidence presented in the case. (*See* my direct testimony,

¹ Federal Communications Commission (“FCC”), *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 Service Offering Advance Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147 (August 21, 2003) (“*TRO*”).

1 Exhibit No. HMS-1T, at page 47 and AT&T witness John Finnegan's direct
2 testimony, Exhibit No. JFF-1T, at pages 59-61).

3 **Q. IN MAKING THESE DETERMINATIONS, SHOULD THE COMMISSION**
4 **ADHERE TO THE FCC'S GUIDELINES, AS EXPOUNDED IN THE *TRO*?**

5 A. Yes. The FCC has the statutory responsibility in this matter. In carrying out that
6 responsibility, it has delegated substantial authority to the states. Nevertheless, the
7 Act envisions a single national telecommunications policy with regard to ILEC
8 unbundling obligations. Under the *TRO*, state commissions are to implement that
9 policy, taking into account the conditions within their respective states. They are
10 not supposed to implement their own individual policies without regard to the
11 guidelines in the *TRO*.

12 Even apart from legal considerations, I believe that it is good public policy for state
13 commissions to follow the FCC's guidelines. The FCC has an extensive set of
14 rules that specify the details of ILEC unbundling obligations. To the extent that
15 state commissions have responsibility for implementing these rules, the FCC is
16 authorized under Section 252(e)(5) of the Telecommunications Act to pre-empt the
17 commissions if they do not adhere to its rules. This whole regime makes no sense
18 whatsoever if the most fundamental decision—whether to have unbundling at all—
19 is made by state commissions without regard to FCC guidelines. Such an unwieldy
20 regime—if not set right through FCC preemption—could not be expected to yield
21 good public policy outcomes.

1 This point is especially important because, as I explain later in this testimony,
2 several CLEC witnesses recommend that the Commission make determinations that
3 are contrary to the *TRO*. The Commission should reject those recommendations
4 and follow the *TRO* guidelines.

5 **Q. WHAT SECTIONS OF THE *TRO* ARE MOST RELEVANT FOR THIS**
6 **PROCEEDING?**

7 A. The most relevant sections are as follows

- 8 ■ ¶¶ 486–525; and
- 9 ■ Parts 51.319(d)(i) and 51.319(d)(iii) of the FCC’s rules.

10 These sections describe the actions that state commissions are expected to take.

11 While the FCC’s lengthy discussion of the rationale for its rulings relating to
12 unbundled switching at paragraphs 435 to 485 is important background, the
13 provisions of the *TRO* that define the steps state commissions must take should be
14 the primary focus of this proceeding.

15 In this regard, contrary to the theme in much of the CLEC testimony, the FCC did
16 not ask the states to replicate the FCC's analysis by developing their own
17 framework for determining whether unbundled switching should be eliminated. On
18 the contrary, the FCC attempted to fashion a framework that would yield
19 acceptably accurate determinations with regard to impairment, while not involving

1 unnecessary administrative burdens. It also attempted, by use of the objective
2 triggers analysis, to minimize arbitrary variations among states.

3 This point is important because, as I explain later in this testimony, several CLEC
4 witnesses base their points on cites from ¶¶ 435–485 of the TRO. Those
5 paragraphs do *not* specify what the states are directed to do. The CLEC witnesses
6 use those cites as their basis for requesting this Commission to make
7 determinations that are contrary to the FCC's directions. For example, the CLECs
8 continue to emphasize the alleged benefits of retaining the unbundled network
9 elements platform ("UNE-P"), essentially asserting that UNE-P should be retained
10 everywhere. However, the FCC has already decided in the TRO that unbundled
11 switching, a key component of UNE-P, should be eliminated in markets where the
12 conditions for elimination are met. The CLECs' proposal of a decision-making
13 framework that would effectively retain UNE-P everywhere is contrary to the
14 FCC's clear findings that state commissions must eliminate unbundled switching in
15 markets where CLECs are not impaired without access to this ILEC network
16 element.

17 **Q. SHOULD THE COMMISSION OBJECTIVELY EVALUATE THE**
18 **EVIDENCE IN THIS PROCEEDING?**

19 A. Yes. This answer would seem obvious. Nevertheless, MCI witness, Dr. Cabe
20 (Exhibit No. not provided at pages 25-26), urges the Commission to do precisely

1 the opposite. He claims that dangers from finding no impairment are so great that
2 this Commission should bias its findings in favor of a finding of impairment.

3 Of course, the Commission should do no such thing. This proceeding is not
4 intended to be a search for a rationale for perpetuating the UNE-P. Such decision-
5 making is certainly not what the courts had in mind when they established the
6 standards to be applied in determining under what conditions an ILEC is obligated
7 to offer unbundled elements. (*See* Exhibit HMS-1T at pages 6-8). To distort an
8 objective interpretation of the facts in order to reach a predetermined outcome
9 would be a sham. After trying and failing twice before to establish an unbundling
10 policy that is consistent with the statute, the FCC and state commissions
11 (implementing FCC policy) must avoid invitations to extend a flawed policy.
12 Indeed, the CLECs' position seems to be "when in doubt, require unbundling."
13 That, however, is little different from the FCC's "more unbundling is better"
14 approach that the D.C. Circuit has already rejected in *USTA*.²

15 To the extent that the Commission has to make judgment calls about the evidence
16 presented, it should not disregard the societal costs associated with the distortion of
17 incentives whenever a firm is required to provide products and services to its
18 competitors at regulated rates. The costs of distorted incentives are part of the
19 reason that the courts and the FCC have directed state commissions to discontinue

² *See United States Telecom Association v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002).

1 unbundled switching except where its absence would truly impair competition.

2 Furthermore, the problem of finding a satisfactory transition will become worse the
3 longer the unwarranted unbundling is perpetuated.

4 With respect to the evaluation of the triggers, if this Commission believes it has any
5 “close calls” to make, it should keep in mind the extensive intermodal competition
6 that is not included in the trigger evidence. Competition from wireless and from
7 emerging platforms, such as Voice over Internet Protocol (“VoIP”)—as with the
8 competition from those CLECs that are today providing their own circuit switching
9 and are included in the trigger evidence—demonstrates that there is competition
10 and “life without UNE-P.”

11 **3. DEFINITION OF THE RELEVANT GEOGRAPHIC**
12 **MARKET**

13 **Q. PLEASE DISTINGUISH BETWEEN THE DEFINITION OF THE**
14 **RELEVANT GEOGRAPHIC MARKET AND ITS SPECIFICATION.**

15 A. The definition of the relevant geographic market describes the general economic
16 concept. That concept is widely used in economic and antitrust analysis. The
17 specification of the relevant market describes the geographic area that corresponds
18 to the economic concept in a particular case.

1 **Q. HOW SHOULD THE RELEVANT GEOGRAPHIC MARKET BE DEFINED**
2 **(AS OPPOSED TO SPECIFIED) FOR PURPOSES OF THIS**
3 **PROCEEDING?**

4 A. As I discussed in my direct testimony (Exhibit HMS-1T at page 49), the usual
5 definition of the geographic market is “the area wherein competitors actually do
6 operate or efficient competitors *could* operate.” The geographic market that is
7 relevant to this proceeding (as I stated in my direct testimony at page 47) is the area
8 “where competitors have viable opportunities to provide service over their own
9 switches to mass-market customers.” That is, it is the geographic area wherein
10 efficient competitors could be expected to operate in the absence of unbundled
11 switching.

12 **Q. DO OTHER WITNESSES IN THIS PROCEEDING AGREE WITH THAT**
13 **DEFINITION OF THE RELEVANT GEOGRAPHIC MARKET?**

14 A. It appears that the AT&T witnesses largely agree with that definition, though their
15 *specification* of the relevant geographic market differs from mine. Mr. Finnegan
16 (Exhibit No. JFF-1T at page 55) puts forth the exact same definition. Messrs.
17 Lehr/Selwyn (Exhibit No. WHL-1T at page 33) also appear to put forth the same
18 definition of the relevant geographic market (though they grossly mischaracterize

1 the test for impairment).³ By contrast, MCI witness, Dr. Cabe (Exhibit No. not
2 provided, beginning at page 39), attempts to specify the relevant geographic market
3 without first defining the general economic concept that the specification is
4 supposed to reflect.

5 **Q. HOW DOES THE RELEVANT GEOGRAPHIC MARKET RELATE TO**
6 **THE ELIMINATION OF THE UNBUNDLING REQUIREMENT?**

7 A. However the Commission specifies the relevant geographic markets, Qwest should
8 not have to provide unbundled switching anywhere within those markets. This
9 conclusion follows directly from the definition of the relevant geographic market.
10 It is the geographic area where competitors have viable opportunities to provide
11 service over their own switches to mass-market customers. Put another way, it is
12 the geographic area wherein competition would not be impaired by the absence of
13 unbundled switching.

14 This point highlights the importance of the specification of the relevant geographic
15 market. In the next section of my testimony, I give my views on how the
16 Commission should go about specifying this market.

³ They state, "Thus, the definition of the relevant geographic market areas or 'impairment zones' that will be used to frame this analysis must be sized in a manner that will enable the state commission to be quite confident that consumers in the state would not be left worse off in the future if a finding of 'non-impairment' were made with respect to that specific area." (Lehr/Selwyn at page 33). In reality, state commissions are directed to make an objective determination whether the absence of unbundled switching in that specific area would impair competition.

1 **4. SPECIFICATION OF THE RELEVANT GEOGRAPHIC**
2 **MARKET**

3 **Q. HOW DO THE TRIGGER CONDITIONS RELATE TO THE RELEVANT**
4 **GEOGRAPHIC MARKET?**

5 A. The trigger condition stated in the *TRO*—in both ¶ 501 and 47 C.F. R.
6 § 319(d)(2)(iii)(A)(1)—is that three or more competing carriers are each serving
7 mass market customers in the particular market with the use of their own local
8 circuit switches.

9 **Q. WHAT IS THE FCC’S RATIONALE FOR APPLYING THE TRIGGERS IN**
10 **THIS MANNER?**

11 A. The relevant geographic market is the geographic area throughout which one would
12 expect to see competitors operating if unbundled switching were eliminated. Given
13 that a sufficient number of competing providers are already using their own
14 switches to serve mass market customers within a relevant market, it is reasonable
15 to conclude that they would operate throughout the entire relevant market if
16 unbundled switching were eliminated. That is, one can conclude that competition
17 is unimpaired throughout the entire relevant market.

18 **Q. WHAT GUIDANCE DOES THE *TRO* PROVIDE WITH REGARD TO THE**
19 **SPECIFICATION OF THE RELEVANT GEOGRAPHIC MARKET?**

20 A. Paragraph 495 provides:

1 Rather, state commissions must define each market on a granular
2 level and in doing so they must take into consideration the locations
3 of customers actually being served (if any) by competitors, the
4 variation in factors affecting competitors' ability to serve each group
5 of customers, and competitors' ability to target and serve specific
6 markets economically and efficiently using currently available
7 technologies. While a more granular analysis is generally
8 preferable, states should not define the market so narrowly that a
9 competitor serving that market alone would not be able to take
10 advantage of available scale and scope economies from serving a
11 wider market.

12 **Q. WHAT IS YOUR OPINION OF AT&T'S RECOMMENDED APPROACH**
13 **TO SPECIFYING THE RELEVANT MARKET (FINNEGAN, EXHIBIT NO.**
14 **JFF-1T AT PAGE 65)?**

15 A. AT&T proposes that a very large candidate-relevant geographic market be
16 specified; *e.g.*, an entire LATA or even the entire serving area of the ILEC.
17 (Exhibit No. JFF-1T at page 65). AT&T attempts to justify this proposal by
18 reasoning that competitors typically serve large areas and, indeed, must do so to
19 enjoy economies of scale. In discussing actual competitors, AT&T refers primarily
20 to UNE-P arbitrageurs rather than UNE-L competitors. Consequently, the
21 referenced economies of scale are presumably those of retail functions, including
22 mass advertising.

23 AT&T then proposes that one inquire into whether an efficient CLEC could be
24 expected to use its own switch to serve the entire area. If the area includes many
25 small wire centers in rural areas, the answer would probably be "no." Given a "no"
26 answer, AT&T proposes that Qwest be given no relief anywhere from its obligation

1 to provide unbundled switching. In other words, AT&T proposes a market so
2 broad that it is highly unlikely that any CLEC would serve throughout the entire
3 market. Then, because no CLEC does so, AT&T says that no relief can be granted
4 in the market as a whole or in any part thereof. In essence, the AT&T theory is
5 designed to ensure the universal availability of UNE-P forever. This proposal
6 understandably serves AT&T's business interests in preserving ubiquitous UNE-P.
7 It is, however, contrary to the *TRO* and does not make any economic sense. If the
8 answer to the above question is "no," the obvious next step is to specify a smaller
9 candidate relevant geographic market, not to deny Qwest relief anywhere in the
10 state. Simply because one particular candidate for the relevant geographic market
11 may be rejected, one cannot reasonably conclude, consistent with the *TRO*, that
12 competition would be impaired everywhere in the absence of unbundled switching.

13 **Q. WOULD SMALLER GEOGRAPHIC MARKETS ALLOW EFFICIENT**
14 **COMPETITORS TO ENJOY THE SCALE ECONOMIES TO WHICH**
15 **AT&T REFERS?**

16 A. Yes. Smaller relevant geographic markets (for purposes of this proceeding) do not
17 imply that a CLEC would not or could not serve much larger areas. Indeed, it
18 probably would. It would be able to obtain unbundled switching and the UNE-P in
19 geographic areas outside the relevant geographic markets. By doing so, the CLEC
20 would be able to enjoy economies of scale and scope in mass advertising and retail
21 operations.

1 **Q. WHAT IS YOUR OPINION OF MCI'S RECOMMENDED APPROACH TO**
2 **SPECIFYING THE RELEVANT GEOGRAPHIC MARKET (CABE,**
3 **EXHIBIT NO. NOT PROVIDED AT PAGES 34-35)?**

4 A. On behalf of MCI, Dr. Cabe recommends that the Commission designate individual
5 wire centers as separate, distinct geographic markets. This recommendation is
6 tantamount to urging the Commission to flout the FCC's *TRO*. The FCC could not
7 have been more specific: "...states should not define [specify] the market so
8 narrowly that a competitor serving that market alone would not be able to take
9 advantage of available scale and scope economies from serving a larger market."
10 Given that a single CLEC can reasonably expect to get only a relatively small
11 portion of the total market, no wire center is sufficiently large to allow the CLEC to
12 take advantage of available scale and scope economies.

13 Dr. Cabe (Exhibit No. not provided at pages 47-48) tries to get around this problem
14 by arguing that the CLEC may use the same equipment to serve multiple markets
15 (each consisting of an individual wire center). The proposition that the same
16 equipment may serve multiple markets is not, in itself, unreasonable. In particular,
17 CLECs' OSSs often serve customers nationwide. Nevertheless, analyzing wire
18 centers one at a time does not suffice to specify the relevant market. Additionally,
19 the analysis must demonstrate that the collection of wire centers that a CLEC is
20 assumed to serve, *considered together*, makes economic sense.

1 To be sure, Dr. Cabe (Exhibit No. not provided at page 34) is correct in saying,
2 “...the costs of providing service vary widely from one wire center to another.” For
3 that precise reason, not all wire centers will be in the relevant geographic market.
4 Nevertheless, no analysis of one wire center at a time can determine which wire
5 centers are in the relevant geographic market and which are out.

6 **Q. HOW DOES QWEST PROPOSE THAT THE RELEVANT GEOGRAPHIC**
7 **MARKETS BE SPECIFIED IN THE STATE OF WASHINGTON?**

8 A. As set forth in Qwest's direct case, the geographic markets relevant to this
9 proceeding are as follows:

- 10 ■ In LATA 672: The Portland-Vancouver MSA (of which the
11 Vancouver portion is in Washington); and
- 12 ■ In LATA 674: The Seattle, Tacoma, Olympia, Bremerton and
13 Bellingham MSAs.

14 Qwest's evidence demonstrates that competitors have viable opportunities to
15 provide service over their own switches to mass market customers throughout these
16 entire MSAs (but not necessarily throughout the entire LATAs). I explained in my
17 direct testimony (at page 50) why this specification of the relevant markets is
18 reasonable. MSAs are granular enough to include areas with similar cost and
19 revenue characteristics, but they are broad enough to allow competitors to capture
20 economies of scale.

1 **Q. IF UNBUNDLED SWITCHING WERE ELIMINATED IN THESE**
2 **MARKETS, IN WHAT GEOGRAPHIC AREAS WOULD EFFICIENT**
3 **COMPETITORS SERVE MASS MARKET CUSTOMERS USING A**
4 **SINGLE SWITCH?**

5 A. Efficient competitors would likely use the same switch to serve multiple MSAs.
6 Indeed, in the CPRO runs that I cited in my direct testimony, the CLEC was
7 reasonably posited to serve all the MSAs in each LATA.

8 **Q. ALTHOUGH YOUR VIEW IS THAT SPECIFYING THE MSA AS THE**
9 **RELEVANT MARKET AS QWEST HAS DONE IS REASONABLE,**
10 **WOULD IT ALSO BE REASONABLE TO SPECIFY THE GEOGRAPHIC**
11 **MARKET IN EACH LATA AS THE COLLECTION OF ALL THE MSAs IN**
12 **THAT LATA?**

13 A. Yes. That specification would be consistent with economic principles and with the
14 direction in the *TRO*.

15 **Q. WHAT WOULD BE THE CONSEQUENCES OF SPECIFYING THE**
16 **MARKET IN THAT WAY?**

17 A. The showing needed for relief under the *TRO* would be less stringent than under
18 Qwest's proposed specification. In particular, satisfaction of the trigger conditions
19 in portions of the MSAs in a LATA would justify relief from unbundling
20 obligations in *all* the MSAs in the LATA.

1 Qwest has, however, taken a more conservative approach. By specifying the
2 relevant markets as individual MSAs, Qwest is asking for relief under the triggers
3 only in MSAs where the trigger conditions are satisfied. It is not requesting that
4 evidence of non-impairment in one MSA be used to justify a finding of non-
5 impairment in another MSA. It has also undertaken to demonstrate that each
6 individual MSA is economically viable, on an incremental basis.

7 **Q. WHAT IS THE ECONOMIC BASIS FOR SPECIFYING THE RELEVANT**
8 **GEOGRAPHIC MARKETS AS INDIVIDUAL MSAs, RATHER THAN AS**
9 **THE COLLECTION OF ALL MSAs IN THE LATA?**

10 A. The primary justification for Qwest's approach is to be conservative. Qwest's
11 specification, like Dr. Cabe's, implies that the CLEC may serve multiple markets
12 with the same switch. Unlike Dr. Cabe's specification, however, the individual
13 markets in Qwest's specification are large enough to enable the CLEC to enjoy
14 substantial scale economies.

15 **Q. WHAT IS THE RANGE OF POSSIBILITIES THAT THE COMMISSION**
16 **COULD REASONABLY CONSIDER IN THIS PROCEEDING FOR THE**
17 **RELEVANT GEOGRAPHIC MARKET?**

18 A. I believe that it would be entirely reasonable for the Commission to adopt Qwest's
19 proposed specification of the relevant geographic markets. In that case, Qwest
20 would not be required to provide unbundled switching anywhere in the MSAs that

1 satisfy the trigger conditions or (failing that) for which a potential-deployment case
2 is successfully made.

3 Alternatively, the Commission might conclude that an efficient competitor could
4 not operate throughout these entire MSAs. It would then specify appropriately
5 smaller relevant geographic markets.

6 It would, however, be wholly unreasonable to specify the relevant geographic
7 market as smaller than (1) the set of wire centers that satisfy the trigger conditions,
8 and (2) the wire centers where it is demonstrated that a CLEC can operate
9 economically with self-provisioned switching. Given that competitors actually use,
10 or could economically use, their own switches to serve mass market customers in
11 these wire centers, this group of wire centers must be included in the relevant
12 geographic market. This set of wire centers is the absolute minimal candidate
13 market.

14 **Q. WHAT FACTORS SHOULD THE COMMISSION CONSIDER IN**
15 **DETERMINING THE SET OF WIRE CENTERS THAT ARE IN THE**
16 **RELEVANT GEOGRAPHIC MARKET—BETWEEN THE ENTIRE MSA,**
17 **AS PROPOSED BY QWEST, AND THE ABSOLUTE MINIMAL**
18 **CANDIDATE MARKET, WHICH YOU DESCRIBED IN YOUR PREVIOUS**
19 **ANSWER?**

20 A. The first point to consider is whether the absolute minimal candidate market is

1 sufficiently large (in the FCC's words that I previously quoted) "to take advantage
2 of available scale and scope economies from serving a wider market." If not, the
3 relevant geographic market *must* be larger.

4 Even if the absolute minimal candidate market does allow an efficient CLEC to
5 take advantage of scale economies, the relevant geographic market may
6 nevertheless be larger. In particular, if serving mass market customers in additional
7 wire centers would be incrementally profitable, an efficient CLEC would be
8 expected to do so. Those wire centers would therefore be part of the relevant
9 geographic market. The CPRO model, which indicates which wire centers are
10 incrementally profitable, provides important evidence in this regard.

11 Even if some wire centers are *not* incrementally profitable, an efficient CLEC may
12 choose to serve them in order to avoid the problems (*e.g.*, uncertainty among
13 potential customers) associated with redlining and refusing to provide service at
14 certain wire centers. Serving such wire centers would be reasonable if the
15 incremental losses would be only moderate, and overall profitability remains high.
16 In that case, those wire centers might also be in the relevant geographic market.
17 Again, the CPRO model provides important evidence in this regard.

1 **5. DS0-DS1 CUT-OFF**

2 **Q. IN YOUR DIRECT TESTIMONY (EXHIBIT NO. HMS-1T AT PAGE 56),**
3 **YOU SUGGESTED THAT THE COMMISSION ADOPT THE FCC’S**
4 **PRESUMPTIVE “DS0 CROSS-OVER” POINT OF 3 LINES OR FEWER**
5 **FOR PURPOSES OF DELINEATING THE MASS MARKET IN ABSENCE**
6 **OF AN ALTERNATIVE. DOES YOUR READING OF THE DIRECT**
7 **TESTIMONY OF THE CLEC WITNESSES CHANGE YOUR OPINION?**

8 A. No. The CLEC witnesses have failed to offer “significant evidence to the contrary”
9 as required by the *TRO*.⁴ AT&T witness, Mr. Finnegan (Exhibit JFF-1T at pages
10 72-98), provides an analysis of this cross-over point. He does not, however,
11 provide an *economic* analysis—only a cost analysis that disregards revenues. Mr.
12 Finnegan’s approach is completely contrary to the FCC rules, which at 47 C.F.R. §
13 51.319(d)(iii)(B)(4) state:

14 Specifically, in establishing this ‘cutoff,’ the state commission shall
15 take into account the point at which the increased revenue opportunity
16 at a single location is sufficient to overcome impairment and the point
17 at which multiline end users could be served in an economic fashion by
18 higher capacity loops and a carrier’s own switching and thus be
19 considered part of the DS1 enterprise market.

20 A study based on an approach that is completely contrary to the FCC’s explicit

⁴ *TRO* at ¶497.

1 directions cannot provide significant evidence of anything in this proceeding.

2 Moreover, even as a pure cost analysis, Mr. Finnegan's analysis is deeply flawed, as
3 explained in Mr. Copeland's testimony.

4 **6. APPLICATION OF THE TRIGGERS**

5 **Q. HOW DOES THE FCC SPECIFY THE SELF-PROVISIONING**
6 **SWITCHING CONDITIONS?**

7 A. In paragraph 501 of the TRO, the FCC states: "We determine that—subject only to
8 the limited exception set forth below—a state must find 'no impairment' when
9 three or more unaffiliated competing carriers each is serving mass market
10 customers in a particular market with the use of their own switches." The limited
11 exception is special circumstances - which the FCC defines by citing the example
12 of a lack of collocation space - which require a petition to the FCC for a waiver.

13 The FCC further elaborated this condition in its rules (Rule 51.319(d)(2)(iii)(B)(1):

14 To satisfy this trigger, a state commission must find that three or
15 more competing providers not affiliated with each other or the
16 incumbent LEC, including intermodal providers of service
17 comparable in quality to that of the incumbent LEC, each are [sic]
18 serving mass market customers in the particular market with the
19 use of their [sic] own local switches.

20 **Q. CLEC WITNESSES (MESSRS. LEHR/SELWYN, EXHIBIT WHL-1T AT**
21 **PAGE 44 AND CABE, EXHIBIT NO. NOT PROVIDED AT PAGE 64)**

1 **CLAIM THAT THE *TRO* REQUIRES QUALIFIED CLECS TO SERVE OR**
2 **BE READY, WILLING AND ABLE TO SERVE THE *ENTIRE* RELEVANT**
3 **MARKET. IS THIS A CORRECT INTERPRETATION OF THE *TRO*?**

4 A. No. The FCC issued an *errata* to the TRO that eliminated this requirement for self-
5 provisioning CLECs. (*TRO Errata* at 21 (September 16, 2003) (amending ¶ 499)).
6 Mr. Finnegan’s testimony on this point is plainly wrong. He is asked, “Did the
7 FCC’s Errata, which amended Paragraph 499 and related provisions, alter the
8 requirement that self-providers serve mass market consumers throughout the
9 designated geographic area?” There can be no doubt that the correct answer to this
10 question is “yes.” The FCC specifically removed the requirement. Nevertheless,
11 Mr. Finnegan answers the question, incredibly, with “no.” He then provides a page
12 of sophistry designed to prove that “yes” is “no.” Of course, the WUTC should
13 follow what the TRO actually says—not Mr. Finnegan’s distorted presentation of
14 the errata.

15 **Q. DR. CABE (EXHIBIT NO. NOT PROVIDED AT PAGES 67-68) ASSERTS**
16 **THAT THE CLEC MUST SERVE BOTH RESIDENTIAL AND SMALL**
17 **BUSINESS CUSTOMERS USING THEIR OWN SWITCHES TO BE**
18 **CONSIDERED IN THE TRIGGER ANALYSIS. IS THIS A REASONABLE**
19 **INTERPRETATION OF THE *TRO*?**

20 A. No. This argument also distorts the clear meaning of the *TRO*. The FCC did not
21 distinguish between residential and small business customers. On the contrary, it

1 deliberately included them in the same category that it calls the “mass market.”
2 (*TRO* ¶ 124). The FCC defines the mass market to include residential and small
3 business voice grade customers that “purchase only a limited number of POTS lines
4 and can economically be served via DSO loops.” (*TRO* at ¶ 497). This
5 Commission is directed to determine whether CLECs serve customers in *the mass*
6 *market*—not a subset of that market identified by CLECs. In its Order resolving
7 issues related to relevant market, the Public Utilities Commission of Ohio
8 (“PUCO”) recently stressed that “the purpose of the impairment analysis is to
9 assess whether or not CLECs are impaired in providing service to mass market
10 customers if unbundled local switching is no longer available to them at TELRIC
11 rates.”⁵ “Therefore,” the PUCO concluded, “it is the Commission’s opinion that
12 once an unaffiliated CLEC is determined by the Commission to be providing
13 service to mass market customers (customers with a limited number of POTS lines
14 *regardless of whether they are residential or small business*) in a particular
15 geographic market using its own switching equipment, the CLEC will be
16 considered as one of the “three self-provisioners of switching” for the purpose of
17 the trigger analysis.”⁶

⁵ Public Utilities Commission of Ohio, *In the Matter of the Implementation of the Federal Communications Commission’s Case No. 03-2040-TP-COI, Triennial Review Regarding Local Circuit Switching in the Mass Market* (January 14, 2004) at pages 33-34 (hereinafter “PUCO Order”).

⁶ *Ibid.* (emphasis added, footnote omitted)

1 **Q. MUST A CLEC REACH A PARTICULAR SCALE OF OPERATION TO BE**
2 **CONSIDERED IN THE TRIGGER ANALYSIS, AS DR. CABE (EXHIBIT**
3 **NO. NOT PROVIDED AT PAGES 64-65) AND MR. FINNEGAN (EXHIBIT**
4 **NO. JFF-1T AT PAGE 116) SUGGEST?**

5 A. No. There is no requirement in the *TRO* that competitors reach any particular scale
6 of operation. The CLEC witnesses support their wrong conclusion by referring to
7 the wrong part of the *TRO* (at ¶ 438), which describes the FCC’s own rebuttable
8 determination of impairment—not its directions to the state commissions.

9 **Q. DR. CABE (EXHIBIT NO. NOT PROVIDED AT 60-61) ALSO ASSERTS**
10 **THAT, TO BE COUNTED IN THE TRIGGERS, A CLEC MUST HAVE**
11 **“ACTIVE AND CONTINUING MARKET PARTICIPATION.” IS THIS A**
12 **RELEVANT CRITERION FOR THE WUTC TO CONSIDER?**

13 A. No. This approach is completely contrary to the FCC’s intention. The whole point
14 of the triggers is to obviate consideration of subjective factors, such as the
15 likelihood that the CLEC will continue to provide service. If interpreted properly
16 in this way, the triggers (in the FCC’s words) “can avoid the delays caused by
17 protracted proceedings and can minimize administrative burdens.” (*TRO* at ¶ 498).
18 The FCC stated further, “[o]ur selection of various thresholds is based on our
19 agency expertise, our interpretation of the record, and our desire to provide bright-
20 line rules to guide the state commissions in implementing section 251.” (*Id.*)

1 Bright-line rules are the opposite of the speculation in which the CLECs seek to
2 have the commissions engage.

3 The FCC specifically said that the financial condition of the CLECs that satisfy the
4 trigger conditions is not relevant. (*TRO* at ¶ 500). By contrast, the FCC cites a
5 CLEC that has actually requested to withdraw from providing local service. (*Id.* n.
6 1556). This example points to a clearly identifiable situation—not speculation on
7 the part of state commissions.

8 **Q. CLEC WITNESSES INTRODUCE MANY SUBJECTIVE FACTORS THAT**
9 **THEY BELIEVE SHOULD BE INCORPORATED INTO THE TRIGGERS**
10 **ANALYSIS PORTION OF THIS PROCEEDING. SOME OF THESE**
11 **INCLUDE OPERATIONAL BARRIERS ALLEGED BY WITNESSES COX**
12 **(EXHIBIT NO. NOT PROVIDED AT PAGES 4-5), FALCONE (EXHIBIT**
13 **NO. RVF-1T AT PAGES 17-18), AND STACY (EXHIBIT NO. NOT**
14 **PROVIDED AT PAGE 12) AND “ABSOLUTE COST DISADVANTAGES”**
15 **DISCUSSED BY DENNEY/STARR (EXHIBIT NO. DD-1T AT PAGE 8).**
16 **SHOULD THE WUTC CONSIDER THESE FACTORS IN DETERMINING**
17 **WHETHER THE TRIGGER CONDITIONS ARE SATISFIED?**

18 A. No. In fact, the FCC's rules preclude an examination of such issues in the context
19 of the trigger analysis. The FCC rule states that “[a] state commission *shall* find
20 that a requesting telecommunications carrier is not impaired without access to local
21 circuit switching on an unbundled basis in a particular market where...the self-

1 provisioning trigger...is satisfied.” (47 C.F.R. § 51.319(d)(2)(iii)(A) (*emphasis*
2 *added*)). This rule does not permit state commissions to import some free-form
3 operational or economic impairment analysis into their analysis of the trigger
4 evidence. Rather, the FCC’s rules direct state commissions to examine various
5 “operational barriers” and “economic barriers” to determine whether “self-
6 provisioning of local switching is economic” *only* where “neither of the triggers
7 described in paragraph (d)(2)(iii)(A) of this section has been satisfied.” (47 C.F.R.
8 § 51.319(d)(2)(iii)(B)). CLEC witnesses are attempting to morph the triggers case
9 into what amounts to a “potential deployment” analysis, which provides that *where*
10 *the trigger test is not satisfied*, “the state commission shall consider whether
11 switches actually deployed in the market at issue permit competitive entry in the
12 absence of unbundled local circuit switching.” (47 C.F.R.
13 § 51.319(d)(2)(iii)(B)(1)).

14 The FCC was careful throughout the *TRO* to *repeatedly* make clear that its trigger
15 test is wholly separate from any examination of operational or economic
16 impairment issues because its trigger rules are “mandatory and exhaustive.” (*TRO*
17 at n.1315).

- 18 ■ “For purposes of these [mass market switching] triggers, we find that
19 states *shall not evaluate any other factors...*” (*See id.* at ¶ 500)
20 (*emphasis added*).
-

- 1 ■ “[S]tates must first employ triggers that examine actual deployment;
2 only if the triggers are not met must the states apply criteria to assess
3 whether entry is economic.” (*Id.*, at n.1300).
- 4 ■ “The [impairment] factors...come into play only if our deployment
5 triggers are not met.” (*Id.* at n.1405).
- 6 ■ “[T]he Commission requires states to examine triggers based on actually
7 competitive deployment, *first*, and *when neither of these triggers is*
8 *satisfied*, the Commission sets forth factors the state commissions must
9 apply to determine whether a market allows self-provisioning of the
10 element” (*Id.* at n.1533) (*emphasis added*).
- 11 ■ “We require the states to apply triggers that look *only* at actual
12 deployment as the principal mechanism for evaluating impairment in a
13 particular market. If the deployment triggers are met, states *must* find
14 no impairment” (*Id.* at n.1561) (*emphasis added*).

15 The FCC, in justifying its use of the objective triggers, makes the following telling
16 point: “Finally, we believe that the existence of three self-provisioners of
17 switching demonstrates adequately the technical and economic feasibility of an
18 entrant serving the mass market with its own switch, and indicates that existing
19 barriers to entry are not insurmountable.” (*TRO* at ¶ 501).

20 **Q. MESSRS. LEHR/SELWYN (EXHIBIT NO. WHL-1T AT PAGES 55-56),**
21 **FINNEGAN (EXHIBIT NO. JFF-IT AT PAGES 132-133) AND CABE**
22 **(EXHIBIT NO. NOT PROVIDED AT PAGES 62-63) ARGUE THAT THE**
23 **TRO INDICATES THAT CABLE TELEPHONY PROVIDERS SHOULD**

1 **NOT BE CONSIDERED IN THE TRIGGER ANALYSIS. DR. CABE**
2 **FURTHER NOTES THAT CABLE TELEPHONY PROVIDERS DO NOT**
3 **PROVIDE EVIDENCE THAT COMPETITORS HAVE**
4 **“SUCCESSFULLY...OVERCOME...[THE] HOT CUT PROCESS”**
5 **(EXHIBIT NO. NOT PROVIDED AT PAGE 63). DO YOU AGREE WITH**
6 **THESE WITNESSES’ ASSESSMENTS?**

7 A. No. It is fully appropriate to include cable telephony providers in the trigger
8 analysis. Cable telephony operators provide services that are comparable in quality
9 to ILEC services, as specified in Rule 51.319(d)(2)(iii)(A)(1), which I quoted
10 above. The State of Washington applies the same quality standards to cable
11 companies as to other LECs. All the cable telephony providers used by Qwest in
12 its triggers analysis provide telephone service using circuit switches and are
13 certificated as CLECs by this Commission. Mr. Reynolds elaborates further on this
14 point in his response testimony (Exhibit MSR-14T). Qwest does not rely on cable
15 companies that provide only VoIP or that utilize packet or soft switches.

16 Again, CLEC witnesses support their wrong conclusion by referring to the wrong
17 part of the *TRO*—that describing the FCC’s own rebuttable determination of
18 impairment, not its directions to the states. In particular, Mr. Finnegan (Exhibit No.
19 JFF-1T at page 133) refers to ¶ 439 and Dr. Cabe (Exhibit No. not provided at page
20 62) refers to ¶¶ 439 and 440.

1 **7. THE ALLEGED BENEFITS OF THE UNE-P**

2 **Q. A NUMBER OF CLEC WITNESSES EXTOL THE ALLEGED BENEFITS**
3 **OF THE UNE-P (MESSRS. LEHR/SELWYN, EXHIBIT NO. WHL-1T AT**
4 **PAGES 12-13; MR. FINNEGAN, EXHIBIT NO. JFF-IT AT PAGES 22-29;**
5 **AND, DR. CABE, EXHIBIT NO. NOT PROVIDED AT PAGES 12-13). OF**
6 **WHAT RELEVANCE IS THAT DISCUSSION TO THIS PROCEEDING?**

7 **A.** That discussion is not relevant to this proceeding. The *TRO* does not direct the
8 Commission to evaluate the alleged benefits of the UNE-P. This point applies to
9 the potential deployment analysis, but it is even more applicable to the triggers
10 analysis, where the FCC has already established the specific circumstances under
11 which unbundled mass market switching, and thus the UNE-P, *must* be eliminated.

12 Having said that, I find that the CLECs greatly exaggerate the benefits of UNE-P.
13 Indeed, the D.C. Circuit drove this point home in *USTA*, characterizing the
14 “competition” created by the UNE-P as “completely synthetic.” (290 F.3d at 424).
15 FCC Chairman Michael Powell made similar observations in his dissent from the

1 TRO,⁷ as did FCC Commissioner Kathleen Abernathy.⁸ Moreover, the FCC was
2 well aware of the alleged benefits of UNE-P, as the CLECs made many of the same
3 arguments in the Triennial Review proceeding that they now make to this
4 Commission. Having considered those arguments fully, the FCC rejected them,
5 finding instead that where the triggers are met or where a potential-deployment
6 case can be successfully made, mass market switching does not have to be
7 unbundled. This proceeding is about determining where switch-based competitors
8 (not UNE-P-based competitors) are impaired. It is not the place of the Washington
9 Commission to refight the policy battle over the UNE-P. There is no time to do so,
10 and the FCC did not intend or authorize the states to do so.

11 In any event, the supposed benefits of the UNE-P are vastly overstated because
12 under UNE-P, the ILEC continues to supply the lion's share of the value-added,⁹
13 while the CLEC's contribution is limited to retail functions. In contrast, wireless
14 competition is challenging virtually all the value-added currently being provided by

⁷ Separate Statement of Chairman Michael K. Powell Approving in Part and Dissenting in Part. *Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338), Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98), and Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147)* at 17.

⁸ Separate Statement of Commissioner Kathleen Q. Abernathy Approving in Part and Dissenting in Part. *Re: Review of 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 Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Further Notice of Proposed Rulemaking (rel. August 21, 2003)* at page 4.

⁹ The term "value-added" is a common term in economics used to refer to the net contribution of a firm to the economy. It does not include what is acquired from other firms. For example, gross domestic product ("GDP") is the sum of the values-added of all firms in the domestic economy. What is acquired from other firms must be subtracted out to avoid double counting. Similarly, the value-added of the U.S. long-distance industry does not include the amounts paid for local access or international settlements.

1 ILECs. It provides far more competitive discipline to ILECs and much greater
2 benefits to consumers than UNE-P could ever be expected to provide. Similarly,
3 fiber-based CLEC competition is challenging the entire value-added of ILECs in
4 the areas where such CLECs operate. Cable provision of telephony has the same
5 consequences. Additionally, cable modem service can displace the entire value-
6 added of ILEC DSL offerings. In this last case, the real danger is that excessive
7 unbundling requirements will hobble ILECs to the point where they cannot
8 effectively compete with cable companies. All these forms of competition provide
9 far greater consumer benefits than UNE-P. More generally, I regard UNE-P as
10 primarily an arbitrage opportunity that enriches CLECs but tends to depress more
11 beneficial forms of competition.

12 **Q. DR. CABE (EXHIBIT NO. NOT PROVIDED AT PAGE 20) TESTIFIES**
13 **THAT MCI DEPENDS EXCLUSIVELY ON UNE-P TO PROVIDE ITS**
14 **“NEIGHBORHOOD” PRODUCT LINE. IS THAT STATEMENT**
15 **RELEVANT TO THIS PROCEEDING?**

16 A. No. Both the triggers and the potential deployment analyses are indifferent to the
17 preferences of individual CLECs. As the PUCO found in rejecting AT&T’s
18 position: “The market entry of competitors relying on UNE-P to serve customers,
19 and their business plans that are focused on using the highest profitability entry
20 method, are irrelevant to the determination of whether the competitive provider is

1 impaired without access to the unbundled local switching.” (*PUCO Order* at page
2 33).

3 If enough CLECs have been able to use self-provisioned switching in a given
4 market, then the FCC assumes that any efficient CLEC *can* do it, whether it has
5 *chosen to* or not. The FCC’s specification of the potential-deployment test is based
6 on what an efficient CLEC could do—not what particular CLECs have opted to do.

7 Interestingly, Mr. Cox (Exhibit No. not provided at pages 21-22) testifies that MCI
8 does seek to move its customers to the UNE-L, further indicating that MCI does not
9 ultimately view it as infeasible or unprofitable to provide mass market local
10 telecommunications services through the UNE-L.

11 **Q. MESSRS. CABE (EXHIBIT NO. NOT PROVIDED AT PAGES 27-28),**
12 **LEHR/SELWYN (EXHIBIT NO. WHL-1T AT PAGES 12-13) AND**
13 **FINNEGAN (EXHIBIT NO. JFF-1T AT PAGES 36-54) CLAIM THAT THE**
14 **AVAILABILITY OF UNE-P DOES NOT ADVERSELY AFFECT**
15 **INVESTMENT INCENTIVES AND MAY EVEN INCREASE THEM. DO**
16 **YOU AGREE?**

17 A. No, and neither do most commentators—including, as I noted in my direct
18 testimony, AT&T’s former Chairman, who said in an analogous context:

19 No company will invest billions of dollars to become a facilities-
20 based broadband services provider if competitors who have not
21 invested a penny of capital nor taken an ounce of risk can come
22 along and get a free ride on the investments and risks of

1 others... That would be a major disincentive to the kind of risk-
2 taking that goes with infrastructure investment. And discouraging
3 investment would have a chilling effect on competition.¹⁰

4 The effect of UNE-P on investment incentives has been hotly debated. I would
5 note, however, that many studies reach conclusions diametrically opposed to those
6 of the CLECs.¹¹ The Commission is not asked to resolve the issue of investment
7 incentives; it is asked to determine whether competition would be impaired in the
8 absence of unbundled switching.

9 **Q. DR. CABE (EXHIBIT NO. NOT PROVIDED AT PAGE 16) CLAIMS THAT**
10 **ILECS “CAN AND UNDOUBTEDLY WILL EXPLOIT THEIR**
11 **MONOPOLY LEVERAGE” IF UNE-P IS NO LONGER AVAILABLE. DO**
12 **YOU AGREE WITH THIS CLAIM?**

13 A. No, I do not. This claim is just a red herring. The Commission should not be
14 sidetracked by speculation about what might happen in a world without universally
15 available UNE-P. Indeed, the *TRO* expressly prohibits the Commission from
16 considering such factors. As the FCC explained to the D.C. Circuit Court of

¹⁰“Telecom and Cable TV: Shared Prospects for the Communications Future,” C. Michael Armstrong, Chairman & CEO, AT&T, as delivered to Washington Metropolitan Cable Club, Washington, DC, November 2, 1998, downloaded November 2, 2001, at www.att.com/speeches.

¹¹ See, e.g., the following discussions by the Eastern Management Group: “AT&T and other UNE-P model players, unlike overbuilders, view UNEs as the end game, not a transition, thereby threatening overbuilders that have built sustainable facilities-based business models” [Eastern Management Group, “Evaluating The Negative Impact of New FCC Rules for UNE-P on Cable Overbuilders” (June 2003) at page 3, downloaded from www.easternmanagement.com/pdfs/6_12_03_b.pdf]; and “Our discussions with the industry paints a disturbingly dark downward economic spiral, in which service providers wait for regulatory clarity on which to base investment, equipment providers wait for service providers to deploy new facilities, and investors move their money elsewhere while waiting on both...” [Eastern Management Group, “Qualitative Economic Impact of New FCC Rules for Network Unbundling” (June 2003), downloaded from www.easternmanagement.com/pdfs/6_12_03_a.pdf].

1 Appeals in its *Opposition to Mandamus Petitions* (at page 2), the *TRO* requires
2 “automatic elimination of unbundling” in any market where the triggers are met.
3 Similarly, unbundling must be eliminated if it is demonstrated that an efficient
4 CLEC would be viable, absent unbundled switching.

5 In any event, concerns about exercise of “monopoly power” by Qwest are mitigated
6 by the continued availability of UNE-L. An efficient competitor will be able to
7 utilize unbundled loops (rather than deploying its own loop plant) in combination
8 with its own (or a third-party’s) switching and compete effectively with Qwest,
9 albeit perhaps without the same margins as MCI and AT&T enjoy today.

10 **Q. MESSRS. CABE (EXHIBIT NO. NOT PROVIDED AT PAGES 15-16) AND**
11 **LEHR/SELWYN (EXHIBIT NO. WHL-1T AT PAGE 13) DISCUSS THE**
12 **ROLE OF RESALE IN THE DEVELOPMENT OF LONG-DISTANCE**
13 **COMPETITION. HOW DOES THE UNE-P POLICY COMPARE TO THE**
14 **COMPETITIVE POLICIES THAT THE FCC PURSUED WITH RESPECT**
15 **TO THE LONG-DISTANCE INDUSTRY?**

16 A. The long-distance market is a prime example of where the FCC got the competitive
17 policy right. The FCC mandated that AT&T allow resale, but *at retail rates* (with
18 whatever discounts AT&T offered to its largest customers). That policy was a
19 spectacular success. Resale allowed other common carriers (“OCCs”) to operate
20 where their networks did not yet reach. At the same time, the retail prices provided

1 a strong incentive for OCCs to expand their own networks to be able to undercut
2 AT&T's prices by being more efficient and innovative.¹²

3 If the FCC had instead unwisely required AT&T to offer UNEs and a long-distance
4 UNE-P to its competitors, quite possibly AT&T would still have the only
5 nationwide long-distance network. I believe that outcome would be far worse for
6 consumers than the robust facilities-based competition that currently exists in the
7 long-distance market.

8 Finally, the resale arrangements that the RBOCs have entered into to provide long-
9 distance services following removal of the line-of-business restrictions are
10 *voluntary* agreements at *negotiated* rates and terms. The terms of long-distance
11 resale are not compelled by regulation and long-distance resale is not primarily an
12 arbitrage opportunity.

¹² James C. Bonbright, Albert L. Danielsen, and David R. Kanerschen, *Principles of Public Utilities Rates* (Public Utilities Reports, Inc., Arlington, VA: 1988) at 600.

1 **8. UNBUNDLED SWITCHING AND DATA SERVICES**

2 **Q. COVAD WITNESSES MEGAN DOBERNECK AND MICHAEL ZULEVIC**
3 **(EXHIBIT NO. NOT PROVIDED) ARGUE THAT COMPETITION TO**
4 **PROVIDE BUNDLED VOICE AND DATA SERVICES WOULD BE**
5 **IMPAIRED IN THE ABSENCE OF UNBUNDLED SWITCHING. WHAT IS**
6 **YOUR OPINION OF THEIR ARGUMENT?**

7 A. Their argument is fundamentally incorrect. I believe that operational and economic
8 barriers to competition are not significant in the MSAs that I have identified as the
9 relevant geographic market. But any such barriers are even *less* significant for
10 CLECs that offered bundled voice and data services. Unbundled switching may be
11 a convenience, especially given the business plans of some particular CLECs.
12 Nevertheless, there is no reason whatever than an efficient CLEC that already
13 provides data services could not also provide voice services without unbundled
14 switching.

15 A CLEC that provides data services *must* collocate. This situation differs
16 substantially from that of UNE-P arbitrageurs, who need not collocate. Since
17 collocation is required in any event, there are no (incremental) economic or
18 operational barriers associated with collocation.

19 Alleged economic and operational impairments associated with hot cuts are also
20 not an issue with respect to data CLECs. Consider the following four cases:

- 1 1. The customer is currently served with unbundled switching. The FCC has
2 directed state commissions to develop a satisfactory transition plan for
3 existing customers where unbundled switching is to be phased out.
4 Transition plans are, however, being addressed in a separate proceeding and
5 are not relevant to this particular proceeding.
- 6 2. The customer currently gets DSL from Qwest or a CLEC. A hot cut is
7 required, irrespective of whether unbundled switching is available.
- 8 3. The customer currently gets only voice service from Qwest or a CLEC and
9 is switching to DSL. The equivalent of a hot cut is required in all cases,
10 even if the customer remains with Qwest. The loop must be connected to a
11 DSLAM. While that connection is being made, the customer has no
12 service.
- 13 4. The customer currently gets neither voice nor data service. No hot cut is
14 required.

15 The lack of any (incremental) impairment associated with hot cuts is especially
16 important. The FCC's rebuttable presumption that competition would be impaired
17 in the absence of unbundled switching is based on alleged problems associated with
18 hot cuts. Where hot cuts are not relevant – here, the same as in the DSL enterprise
19 market—the ILEC should not be required to provide unbundled switching.

20 **9. ABSOLUTE COST DISADVANTAGE**

21 **Q. AT&T WITNESSES DENNEY/STARR HAVE FILED A STUDY THAT**
22 **PURPORTS TO DEMONSTRATE THAT CLECS HAVE AN ABSOLUTE**

1 **COST DISADVANTAGE RELATIVE TO THE ILEC. WHAT**
2 **RELEVANCE DOES THAT STUDY HAVE TO THIS PROCEEDING?**

3 A. I previously explained that no study of economic impairment—including the
4 Denney/Starr study—has relevance to the triggers part of the case. The issue of
5 economic impairment arises only in the potential-deployment part of the case.

6 Other Qwest witnesses will comment on the Denney/Starr study. The only point I
7 want to make is that absolute cost disadvantage does not constitute impairment of
8 competition. The FCC (*TRO* at fn. 1579) could not have been clearer on this point:

9 State commissions should not focus on whether competitors
10 operate under a cost disadvantage. State commissions should
11 determine if entry is economic by conducting a business case
12 analysis for an efficient entrant. This involves estimating the
13 likely potential revenues from entry, and subtracting out the likely
14 costs.

15 **10. POTENTIAL DEPLOYMENT**

16 **Q. AT&T WITNESS MR. BARANOWSKI (EXHIBIT MRB-1T) PRESENTS A**
17 **POTENTIAL DEPLOYMENT ANALYSIS THAT ALLEGEDLY**
18 **DEMONSTRATES THAT COMPETITION WOULD BE UNIFORMLY**
19 **IMPAIRED IN THE ABSENCE OF UNBUNDLED SWITCHING. WHAT IS**
20 **YOUR OPINION OF THAT STUDY?**

21 A. The Baranowski model is seriously flawed. As Mr. Buckley shows in his
22 responsive testimony, the Baranowski model implies that UNE-P is unprofitable.

1 That implication is obviously incorrect. As the CLECs themselves point out, the
2 number of UNE-P lines has been growing quite rapidly. Given this real-world
3 result, UNE-P cannot possibly be unprofitable in the relevant economic sense. The
4 CLECs are contesting the elimination of unbundled switching so strongly in this
5 proceeding *precisely* because UNE-P is so profitable.

6 Mr. Baranowski's analysis is also belied by evidence of CLEC deployment.
7 Despite Mr. Baranowski's uniformly negative results regarding CLEC profitability,
8 Qwest has identified 41 wire centers where CLECs obtain a total of 11,554 mass
9 market UNE loops. These real-world results are completely inconsistent with Mr.
10 Baranowski's model.

11 The WUTC should reject Mr. Baranowski's analysis in favor of analysis that is
12 consistent with the real world.

13 **Q. DOES THE AT&T MODEL TREAT REVENUES PROPERLY, AS**
14 **PRESCRIBED BY THE TRO?**

15 A. No. AT&T's estimates of the efficient CLEC's revenues are based on ILEC
16 revenues. In sharp contrast to this approach, the *TRO* (at fn. 1588) specifically
17 states:

18 Chairman Powell claims that 'the Majority directs states to
19 consider whether price and revenue reductions that result from
20 additional competitive entrants can form the basis of impairment.'
21 *Chairman Powell Statement* at 13. This is simply false, as we do
22 not direct states to consider any such thing. While we recognize
23 that an academically pure interpretation of the impairment

1 standard proposed by Chairman Powell and adopted unanimously
2 in this item might take such reductions into account, we agree
3 with Chairman Powell that a more administratively practicable
4 approach would be to consider prevailing prices and revenues.
5 Accordingly, we expect states to consider prices and revenues
6 prevailing at the time of their analyses. We believe that these are
7 reasonable proxies for likely prices and revenues after
8 competitive entry and will result in a more administrable
9 standard.

10 It is plain that the *prevailing* prices and revenues referred to in the above paragraph
11 are those of CLECs.

12 This paragraph in the TRO applies an objective *standard* to the analysis of
13 revenues in potential-deployment analysis. States are not invited to speculate
14 regarding future declines (or increases) in revenues. To achieve objectivity and
15 minimize arbitrary variations among states, the FCC has resolved this
16 methodological issue. The WUTC should follow the TRO in this regard and reject
17 Mr. Baranowski's analysis of revenues.

18 11. CONCLUSIONS

19 **Q. PLEASE SUMMARIZE THE POINTS YOU ARE EMPHASIZING IN**
20 **RESPONSE TO THE TESTIMONY FILED IN THIS CASE BY THE CLEC**
21 **WITNESSES.**

22 A. Qwest has proposed that the relevant geographic markets be specified as the MSAs.
23 This specification is entirely reasonable. MSAs are large enough to allow CLECs

1 operating therein to achieve substantial scale economies but small enough to be
2 relatively homogenous.

3 AT&T recommends that a very large candidate relevant geographic market be
4 specified. Under that approach, if the Commission finds that efficient CLECs
5 would not operate in the entire geographic market, a smaller candidate relevant
6 market should be specified.

7 MCI recommends that the relevant geographic market be specified as the wire
8 center. This approach is contrary to the TRO, because individual wire centers are
9 not large enough to allow CLECs to enjoy economies of scale that are available in
10 larger serving areas.

11 Taken together, the testimony of the CLEC witnesses with regard to the triggers is
12 an effort to persuade the Commission to transform the reasonably objective,
13 straightforward test required under the *TRO*'s triggers into a much more subjective
14 process that brings into this triggers case a wide range of factors that do not belong
15 there. Fortunately, the FCC recognizes that evidence of actual competition is more
16 probative than theoretical arguments about impairment or the lack thereof.

17 To this end, the FCC structured its analytical framework in a manner that
18 recognizes the superiority of evidence of actual competition by making results from
19 the trigger test conclusive and not subject to further scrutiny under an economic
20 and operational impairment analysis. Many of the factors raised by CLEC

1 witnesses are ones the *TRO* has given the states the discretion to evaluate in the
2 context of a Track 2 or potential deployment case, but are not relevant to a Track 1
3 or triggers case.

4 In some instances, the CLEC witnesses are, in effect, asking the Commission to re-
5 litigate issues that have been resolved to their dissatisfaction in the *TRO*. The
6 forum for airing disagreements with the FCC and the *TRO* is the courts, not the
7 state commissions which are charged with implementing the *TRO*. This is not a
8 proceeding to determine whether UNE-P should be retained as “good public
9 policy” or to give a financial “shot in the arm” to certain CLECs. I urge the
10 Commission to follow carefully the “decision path” for mass market switching and
11 local transport that I have attached to this testimony (Exhibits HMS-4 and HMS-5)
12 and avoid the detours and dead ends mapped out by the CLEC witnesses.

13 Mr. Finnegan’s study of the DS0-DS1 cut-off disregards revenues and therefore
14 does not meet the standards of the *TRO*.

15 Covad witnesses allege impairment of competition with respect to data services in
16 the absence of unbundled switching. In reality, there is no significant operational
17 or economic impairment, on an incremental basis, for a data CLEC to provide voice
18 services without unbundled switching.

19 The Denney/Starr study of absolute cost disadvantage has no relevance under the
20 *TRO*.

1 Mr. Baranowski's study completely lacks credibility. Furthermore, his analysis of
2 revenues is inconsistent with the *TRO*.

3 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

4 A. Yes, it does.
