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BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

**Request for Competitive Classification of
High Capacity Circuits, Provisioned at
Capacities of DS-1 and Above, within the
Greater Seattle and Spokane Business District
Areas**)
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No. UT-990022
**Supplemental Reply Comments in
Support of U S WEST's Petition**

I. INTRODUCTION

U S WEST Communications ("U S WEST") hereby submits these supplemental reply comments in support of its Amended Petition requesting Competitive Classification of High Capacity Circuit Services, provisioned at capacities of DS1 and above, within the Greater Seattle (Seattle), Bellevue and Spokane Business District (Spokane) areas. These comments respond to new issues raised by the intervenors in this matter and also address the extent to which the Washington Utilities and Transportation Commission ("WUTC") should utilize the FCC's recent pricing flexibility order¹ in determining the outcome of this petition. Because a number of issues raised by the intervenors were addressed by U S WEST in its June 11, 1999

¹ See FCC 99-206, CC Dkts. 96-262, 94-1, 98-157 and File 98-63 Fifth Report and Order and FNPRM, adopted August 5, 1999.

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2 Reply Comments in Support of U S WEST's Petition, U S WEST will not repeat those
3 comments here. U S WEST's positions articulated in its reply comments remain unchanged.

4 **A. The FCC's Order Is Highly Relevant And Applicable Here.**

5 As discussed below, the FCC's recent order is very instructive as to how the
6 Commission should consider the evidence in the instant petition. Prior to issuing its order,
7 the FCC called upon interested parties to comment in several rounds of proceedings. Most
8 every commenter to the instant proceeding also commented in the FCC's proceeding. They
9 offered the same comments and raised the same issues as those raised here. Thus, the FCC's
10 analysis of these issues is useful as a guide to how this Commission might choose to weigh
11 the evidence in this case.

12 Further, the FCC relied on each of the underlying elements that this Commission must
13 consider in the context of a competitive classification proceeding in determining how best to
14 measure sufficient competition to warrant pricing flexibility. The FCC considered and
15 discussed at length: the number and size of alternative providers in the market, the extent to
16 which service is available from competitors, the ability of alternate providers to make
17 functionally equivalent and substitute services available on the same terms as ILECs, the
18 extent of the ILEC's market power and whether the ILEC has a captive customer base. These
19 are the same elements required by RCW 80.36.330 and WACs 480-120-022 and 023 on
20 which the Commission will rely in making its decision here. The fact that the FCC ultimately
21 develops a proxy, the extent of collocation, as a way of measuring whether each of these
22 elements have been satisfied, should not mask that it is these same elements which drive its
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2 test.

3 Because the FCC offers an analysis of each of the elements necessary for competitive
4 classification in Washington, and it's test for pricing flexibility, if satisfied, is a clear
5 indication that the elements themselves are satisfied, the FCC's order is instructive of
6 whether U S WEST satisfies the Washington test. U S WEST is not suggesting that the
7 Commission is no longer obligated to address directly the criteria outlined in RCW 80.36.330
8 and WAC 480-120-022 and 023. Rather, U S WEST is suggesting that this Commission
9 look to the FCC's test and U S WEST's satisfaction of it, as one factor it will review in
10 determining the outcome of this case.

11 **The Intervenors Continue To Deny The Clear Existence Of Competition For High**
12 **Capacity Services In These Select Market Areas.**

13 In its initial order in this case, the Commission requested three areas of supplemental
14 material before competitive classification could be granted: documentation addressing
15 competition in Vancouver and Spokane; a clearer definition of the term "high capacity
16 circuits;" and information on the balance between U S WEST's wholesale market and retail
17 market for high capacity services.² The Joint Supplemental Comments of AT&T and MCI
18 begin with the mistaken suggestion that U S WEST failed to address these three issues.³
19 AT&T and MCI are incorrect.

20 U S WEST has met each of the challenges raised by the Commission's initial order in

21 ² See Order Setting the Petition for Hearing and Requiring Notice to Affected Customers; and Notice of
Prehearing Conference, WUTC Docket No. 990022, February, 1999.

22 ³ See Supplemental comments of AT&T and MCI to U S WEST's Amended Petition (hereinafter AT&T),
September 9, 1999, p. 3.

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2 this case. First, U S WEST eliminated its request for competitive classification in Vancouver
3 and portions of the Spokane high capacity market, with the exception of the downtown
4 business corridor for which substantial competitive data has been made available. In
5 addition, U S WEST limited its request in Seattle to those exchanges with the most clear and
6 convincing evidence of competition within the Seattle MSA.⁴ Second, U S WEST, in direct
7 response to the Commission's request, clearly listed each of the services for which it seeks
8 competitive classification and further provided cites to the precise sections of its tariff where
9 these services are found.⁵ Third, U S WEST has produced all information available to it with
10 respect to that portion of the market served through wholesale U S WEST services, and that
11 portion served exclusively by competitors' separate facilities. U S WEST devoted an entire
12 section of its Additional Comments to this issue,⁶ and has continued to update that
13 information as more documentation has become available through the discovery process.
14 One can only presume that AT&T and MCI's failure to note U S WEST's comprehensive
15 response is due to their unwillingness to recognize the facts where those facts do not suit their
16 financial interests. Moreover, it is surprising that AT&T would now raise the Commission's
17 request for supplemental information regarding the differentiation between the wholesale and
18 resale aspects of the market given AT&T's previous statement that it found this information
19 irrelevant to this petition and given its staunch refusal to provide any information in this

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21 ⁴ See Motion to Amend Petition, U S WEST, WUTC Docket UT-990022, June 11, 1999. See also U S WEST's
letter correcting U S WEST's Motion to Amend Petition with respect to the included areas in Spokane, filed on
June 22, 1999.

22 ⁵ See U S WEST, Additional Comments in Support of U S WEST's Petition, (Hereinafter Add'l U S WEST),
February 24, 1999, pp. 5-6.

23 ⁶ See *Id.* at pp. 17-18.

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2 regard.⁷

3 AT&T and MCI's refusal to recognize the facts which clearly show a high degree of
4 competition in these markets is, unfortunately, telling of the approach taken by most of the
5 intervenors in this matter. In many instances, the intervenors have ignored the benefits that
6 competitive classification will bring to consumers, many of whom are their customers, in
7 order to maintain the competitive advantage they derive from the Commission's continued
8 regulation of U S WEST in this highly competitive market. Despite the stonewalling and
9 rhetoric of the intervenors in this case, U S WEST has met every request of the Commission
10 and its Staff, and has now provided a showing of effective competition in the seven wire
11 centers (or, in the case of Spokane, a portion of two wire centers) for which competitive
12 classification is requested. Based on the evidence already in the record before the
13 Commission and the additional support provided herein, U S WEST requests that the
14 Commission act swiftly to bring the benefits of competitive classification to customers.

15 **THE FCC'S PRICING FLEXIBILITY ORDER PROVIDES A VERY USEFUL**
16 **FRAMEWORK FOR MSA COMPETITION THAT THE COMMISSION CAN**
17 **ADAPT TO ITS COMPETITIVE CLASSIFICATION PROCESS AT THE WIRE**
CENTER LEVEL

18 In its order, the FCC sets forth new standards for determining when and to what
19 extent to grant LECs pricing flexibility based on competition in high capacity markets. The
20 FCC creates two phases of relief. Phase II closely parallels competitive classification in
21 Washington.⁸ Therefore, this discussion focuses mainly on its requirements. Under Phase II,

22 ⁷ See Prehearing Conference Transcript, May 11, 1999, p. 32.

23 ⁸ For a concise description of Phase I relief, see FCC 99-206 at para. 24. It is important to note, however, for purposes of discussion here, that Phase II simply requires LECs to meet higher threshold requirements for the exact same measurements as Phase I. Therefore, to the extent that a LEC such as U S WEST meets the

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2 a LEC must show that competitors have a significant presence in the MSA for which relief is
3 sought for purposes of providing the services at issue. The purpose of requiring a
4 “significant” presence is to ensure that the incumbent is precluded from exploiting “any
5 individual market power over a sustained period.”⁹

6 For purposes of gaining pricing flexibility for dedicated transport, special access
7 services and channel terminations between a LEC's end office and an IXC's POP, on an MSA
8 basis, Phase II requires competitors to have collocated in at least 50% of the LEC's wire
9 centers or in wire centers accounting for 65% of the LEC's revenues from these services
10 within the MSA. For pricing flexibility for channel terminations between a LEC's end office
11 and an end-user customers' premises, the threshold is higher: the FCC requires collocation in
12 65% of the wire centers or in wire centers accounting for 85% of a LEC's revenues from
13 these services within the MSA.¹⁰ The LEC must also show that in each wire center counted
14 toward satisfaction of these thresholds, at least one competitor is using the transport of a
15 provider other than the incumbent.¹¹ In exploring the comments of all of the parties to the
16 FCC's Docket, which comments focused on the same issues the comments of the parties have
17 here, the FCC determined that its test best captured the elements necessary to grant pricing
18 flexibility. Because those elements are the same as the elements the Commission must
19 consider here, this Commission should consider the FCC's analysis and conclusions in
20 determining the outcome of this case.

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22 requirements of Phase II, it necessarily meets the requirements of Phase I. Because U S WEST clearly satisfies
the requirements of Phase II, exploring the requirements of Phase I is unnecessary.

23 ⁹ See FCC 99-206 at para. 25.

¹⁰ See *Id.* at para. 25.

¹¹ See FCC Part 69, Subpart H, Section 69.711 (c) (1).

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2 **The FCC’s Test For Pricing Flexibility Is Different From Washington’s Competitive**
3 **Classification Process In That Competitive Classification Allows A LEC To**
4 **Request Pricing Flexibility On A Wire Center Basis As U S WEST Has**
5 **Requested Here.**

6 The FCC’s system for granting pricing flexibility is based solely on a test of
7 competition at the MSA level, an aggregation of all wire centers within a specific
8 metropolitan area. The FCC considered creating a test for competitive classification at the
9 individual wire center level but decided against it, finding that while such petitions might
10 provide a more “finely-tuned picture of competitive conditions,” the administrative cost to
11 LECs and to an agency with jurisdiction nationwide outweighed the benefit.¹² The FCC
12 found that competition does not have to exist everywhere in an MSA for there to be a
13 sufficient level of competition to warrant pricing flexibility.

14 U S WEST has limited its request for competitive classification of high capacity
15 services to four wire centers in Seattle, one in Bellevue and to a portion of two wire centers in
16 Spokane. Because of the differences between the scope of U S WEST’s wire center petition
17 and the FCC’s MSA-based test, the FCC’s framework for pricing flexibility cannot be
18 overlaid onto the state process in the exact form set out for determining pricing flexibility at
19 the federal level. Nor, if it could, would U S WEST suggest that this Commission’s inquiry
20 necessarily end there. Rather, the FCC’s test serves as a guide for what objective evidence
21 should satisfy the statutory requirements for pricing flexibility in Washington. The
22 Commission should therefore consider the FCC’s test and analysis in making its decision
23 here.

¹² FCC 99-206 at para. 74.

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2 **The FCC's Order Is Instructive As To When Pricing Flexibility Is Appropriate At**
3 **The State Level.**

4 Tracer, Nextlink, ELI and GST suggest that the FCC's pricing flexibility order is not
5 useful for purposes of this proceeding. Tracer contends that the FCC's standards are
6 "nonsensical" and that the thresholds are "literally picked from the air."¹³ Nextlink, ELI and
7 GST state that the FCC's order "has not required a showing of effective competition or
8 established any specific criteria an ILEC must satisfy prior to being eligible for regulatory
9 flexibility."¹⁴ These intervenors fail to recognize that the FCC's new test is based on the
10 same underlying criteria as those of the competitive classification statutes in Washington. By
11 focusing on the semantics and specific words of the tests (i.e., Washington's "effective
12 competition" versus the FCC's "permanent competitive presence"), the intervenors draw the
13 simplistic conclusion that the two are "in no way . . . equivalent."¹⁵ The intervenors' reliance
14 on sweeping statements and superficial analysis apparently blinds them to the evidence
15 clearly before this Commission. These two tests share virtually identical elements and reflect
16 common goals. The FCC's test is a relevant and useful tool for considering the introduction
17 of pricing flexibility in this case.

18 Under the FCC's MSA-based test, when the required thresholds are met (for Phase II
19 flexibility, 50% for dedicated or special access or 65% for channel terminations), the *entire*
20 *MSA* is granted pricing flexibility. This pricing flexibility is similar to that granted in

21 ¹³ Tracer's Comments on U S WEST's Amended Petition, (hereinafter "Tracer") September 10, 1999, pp. 21-
22 22.

¹⁴ See Nextlink, ELI and GST, Additional Comments, (hereinafter "Nextlink") September 10, 1999, p. 8.

¹⁵ See *Id.* at p. 9.

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2 Washington with competitive classification. At the FCC level, incumbents are allowed to
3 remove their services from price cap regulation and tariff them without meeting the
4 obligations of Part 61 or Part 69 of the FCC's rules.¹⁶ LECs will continue to file tariffs,
5 however, on only one day's notice, and without other structural requirements for fully
6 regulated, tariffed offerings. This is essentially the same as the price listing of services which
7 comes with competitive classification in Washington. In Washington, however, there is
8 slightly more restriction put on the LEC—10 day's notice for a price listed service to take
9 effect, for example, instead of one day's notice.

10 The underlying intent of the FCC's order is that in areas where a sufficient level of
11 collocation exists and a minimum threshold of collocators use the transport of a carrier other
12 than the incumbent, sufficient competition exists to relax restrictions on the LEC and to allow
13 the market more freedom to regulate itself. The FCC's test is based on the same elements as
14 the tests in the WAC and RCW governing Washington's competitive classification. The
15 FCC's test is based on a showing that service is widely available from large (some facilities-
16 based) competitors. The FCC's test accounts for whether or not the incumbent has a captive
17 customer base, the extent of its power over the market, and the ability of alternative providers
18 to make substitute services available at competitive rates, terms and conditions. As with any
19 measurement, a unit of measure must be chosen by which to determine if the elements are
20 satisfied. That the FCC has chosen collocation as its prime unit of measure should not mask
21 the fact that the FCC's test combines the elements of competitive classification before pricing

22 ¹⁶ See FCC 99-206 at para. 153.
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2 flexibility is granted.

3 The FCC’s new pricing flexibility test contemplates the same outcomes that
4 competitive classification in Washington is designed to engender. The FCC states that it
5 developed its order to grant LECs greater flexibility as competition develops while ensuring
6 that they do not use this flexibility to “deter efficient entry or engage in exclusionary pricing
7 behavior” or to “increase rates to unreasonable levels for customers that lack competitive
8 alternatives.”¹⁷ The same fundamental requirements underlie the statutory test for
9 competitive classification in Washington. The FCC found that its Phase I and Phase II
10 criteria satisfy these concerns.

11 Like the rules in Washington,¹⁸ the FCC’s test accounts for the existence of
12 alternative providers, the extent to which services are available to customers and the concern
13 that the customer base not be captive. The FCC writes, “by significant market presence, we
14 mean that IXC’s have a competitive alternative for dedicated transport services needed to
15 reach the majority, although not necessarily all of their long distance customers throughout
16 the MSA, and that almost all special access customers have a competitive alternative.”¹⁹
17 Washington requires service to be available from several non-incumbent sources.²⁰
18 Requiring some of the services to be available through non-LEC facilities ensures that
19 customers are not captive to the LEC. In addition, this requirement secures enough fixed
20 investment by alternative providers so as to deny the LEC the opportunity to exercise market

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¹⁷ *Id.* at para. 3.

22 ¹⁸ See WAC 480-120-022 (7) (a & b), RCW 80.36.330 (1) (a&b) and WAC 480-120-023 (4) (g).

23 ¹⁹ FCC 99-206 at para. 142.

²⁰ See *supra* fn. 18.

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2 power to drive competitors out of the market or keep new-comers from entering for any
3 meaningful period of time. These three concerns are to be considered within of the
4 competitive classification test. The FCC found that its tests ensure that the LEC meets its
5 burden of proving these elements.

6 The FCC's rules account for limiting market power, as do the Washington rules.²¹
7 The FCC notes that the significant market presence required by its test "ensures that the
8 incumbent will not be able to exploit any monopoly power for a sustained period."²² The
9 FCC further states that "as a condition for granting . . . pricing flexibility, [it] require[s] LECs
10 to show that markets are sufficiently competitive . . . to discourage incumbents from either
11 excluding new entrants or raising rates to unreasonable levels."²³ These elements of the
12 FCC's test address each of the factors of the competitive classification test for market power--
13 that market share is reasonably distributed among the providers in the market so as to
14 facilitate ease of entry, to regulate the pricing of LECs by market forces rather than by
15 Commission oversight and to ensure that the LEC is unable to leverage any of its former
16 monopoly status²⁴ to dominate the market. Again, the elements underlying the FCC's test are
17 virtually identical to those underlying competitive classification. The FCC merely provides
18 an objective vehicle for making such a showing by creating a bright-line test. The FCC
19 found that by employing its test, each of these elements are satisfied before pricing flexibility
20 is granted.

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22 ²¹ See WAC 480-120-022 (7) (d).

23 ²² FCC 99-206 at para. 153.

²³ *Id.* at para. 68.

²⁴ Or to the extent it still has monopoly power in other areas of the market, then its current monopoly power.

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2 The FCC's rules include, *de facto*, the Washington competitive classification statutes'
3 inquiry into the size of competitors in the market and the requirement that competitors offer
4 substitute services at competitive rates, terms and conditions. The FCC states in its pricing
5 flexibility order that "collocation by competitors in incumbent LEC wire centers is a reliable
6 indication of sunk investment by competitors."²⁵ The FCC goes on to state that "competitors
7 incur considerable expense to establish an operational collocation arrangement. The cost to a
8 competitor of a single collocation arrangement can exceed \$300,000."²⁶ Thus, the collocation
9 requirement, and the requirement of the use of some transport of another provider in the
10 FCC's test, is a proxy for ensuring that at least some of the competitors in the market have
11 extensive resources and ability to compete through the building and maintenance of their own
12 facilities. Similarly, the requirement that the market be able to create reasonable prices for
13 the LEC's services is, by logical inference, a requirement that the market will demand that
14 competitors have reasonable rates, terms and conditions or be forced to exit the market.

15 The intervenors seek to place unreasonable demands on U S WEST. Tracer contends
16 that U S WEST offers "no objective demonstration of the absence of market power."²⁷ At the
17 same time, Tracer, Nextlink, ELI and GST dismiss the FCC's bright line, entirely objective
18 test, as "simple,"²⁸ "not probative,"²⁹ and "non-sensical."³⁰ The intervenors seemingly
19 suggest that the criteria outlined in the FCC's order determining pricing flexibility are

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21 ²⁵ *Id.* at para. 81.

²⁶ *Id.*

²⁷ Tracer at p. 9.

²⁸ *Id.* at pp. 19, 21.

²⁹ Nextlink at p. 8.

³⁰ *See supra*, fn. 13.

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2 useless. Because the FCC reached its conclusion after reviewing the exact same criteria
3 required for competitive classification in Washington, one might conclude that the
4 intervenors also believe that the test in Washington is useless. The intervenors also criticize
5 the Commission Staff for relying on the FCC's decision in support of their recommendation
6 to approve U S WEST's petition.³¹ Perhaps the intervenors have not had the opportunity to
7 fully review the criteria considered by the FCC in reaching its conclusion. The competitors'
8 essential characterization of the law as not probative and non-sensical is unfortunate.

9 **Applying The FCC's Framework To The Instant Petition Would Lead To**
10 **Immediate Approval Of Phase II Type Pricing Flexibility For U S WEST's High**
11 **Capacity Services.**

12 U S WEST has requested pricing flexibility for its DS1 and above high capacity
13 services as set forth in its tariff. For special access, dedicated transport and channel
14 termination between the LEC's end office and an IXC's POP, U S WEST would satisfy the
15 FCC's pricing flexibility test for an entire MSA upon a showing that collocators are present in
16 at least 50% of the exchanges in the MSA and that in each of the exchanges included, at least
17 one competitor uses transport not provided by U S WEST.³² Thus, for example, if
18 U S WEST were requesting pricing flexibility in an MSA where only two exchanges are
19 present³³ the FCC would grant competitive classification for the entire MSA under a showing
20 that one of the two exchanges had collocators present and at least one of those collocators
21 relied on transport other than U S WEST's. That the FCC would grant pricing flexibility to

22 ³¹ See e.g. Nextlink at p. 8.

23 ³² See supra, fn. 10.

³³ Examples in Washington might include Yakima or Bellingham.

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2 an entire MSA based upon such a showing makes clear that a grant of competitive
3 classification for a single exchange or wire center is appropriate based upon the exact same
4 showing.

5 In the instant petition, U S WEST has requested competitive classification of five
6 wire centers and a portion of two wire centers consisting of the downtown Spokane business
7 district. The following is a showing of collocation in those wire centers and the number of
8 collocators who use non-USW transport:

<u>Wire Center</u>	<u># of Collocators</u>	<u># Using Non-USW Transport</u>
Seattle Duwamish	5	2
Seattle Elliot	7	5
Seattle Campus	6	3
Seattle Main	8	6
Bellevue Glencourt ³⁴	4	4
Spokane Riverside	3	3
Spokane Keystone	1	1

15 As the above evidence indicates, U S WEST far surpasses the requirements of the
16 FCC's strict Phase II test for pricing flexibility in every exchange for which competitive
17 classification is sought. There are no fewer than three collocators in each exchange and two
18 collocators using the transport of another provider in each exchange (except Spokane
19 Keystone where only a very small portion of the exchange is being considered).

20 U S WEST also satisfies the FCC's Phase II requirements for channel terminations

21 ³⁴ Nextlink, ELI and GST argue that only one provider is collocated in Bellevue Glencourt. They are incorrect.
22 Three providers are virtually collocated in this wire center in addition to the one physically collocated there and
23 U S WEST expects to have at least six providers cagelessly collocated here by the end of 1999. See *infra.* at p.
39, fn. 94.

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2 between a LEC's end office and an end-user's premises. The FCC requires a showing of
3 collocation in 65% of the exchanges in an MSA where at least one collocator per exchange
4 considered uses non-ILEC transport. If the FCC required that a group of exchanges in a
5 given MSA be treated as a mini-MSA (and looked at together rather than individually) for
6 purposes of applying this test, U S WEST would still meet the FCC criteria with 100% of the
7 exchanges meeting the FCC's requirements, well beyond the 50% or 65% required.

8 U S WEST should be granted pricing flexibility under any reasonable method chosen
9 for extending the MSA test to a wire center test. The level of competition in these exchanges
10 for which competitive classification is requested is clearly far beyond the thresholds set out in
11 the FCC's order. U S WEST's comprehensive satisfaction of the FCC's test, and of even
12 more difficult applications of the FCC's test at the wire center level, should be a clear sign to
13 this Commission that competitive classification is warranted in this case. The FCC's test is
14 based on the very same elements on which competitive classification in Washington is based.
15 That U S WEST overwhelmingly satisfies the FCC's strenuous Phase II test is dispositive of
16 the question whether U S WEST satisfies the elements of competitive classification of its
17 high capacity services.

18 **U S WEST'S AMENDED PETITION EXCEEDS EACH OF THE REQUIREMENTS**
19 **FOR COMPETITIVE CLASSIFICATION SET FORTH IN THE REVISED CODE**
20 **OF WASHINGTON AND THE WASHINGTON ADMINISTRATIVE CODE.**

21 Even in the absence of the FCC's pricing flexibility order, U S WEST meets the
22 requirements set forth by Washington law for competitive classification of its high capacity
23 services in the seven exchanges for which such classification is requested. It is not necessary

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2 to restate here all of the facts demonstrating that U S WEST has met its burden. Rather,
3 U S WEST takes this opportunity to respond to the issues raised by the intervenors with
4 respect to each element of competitive classification that U S WEST must prove.

5 **A. High Capacity Services Are Widely Available From Several Alternate Providers**
6 **Unaffiliated With U S WEST In Each Of The Seven Geographic Areas Included**
7 **In This Petition.**

8 Nextlink, ELI and GST argue that "competitors do not maintain sufficient facilities to
9 customer locations to provide wholly facilities-based alternatives even to a *majority* of end
10 users."³⁵ None of the requirements for competitive classification require U S WEST to prove
11 that competitors provide service to a *majority* of end users, let alone that a competitor does so
12 exclusively through its own facilities. WAC 480-120-022 (7) (b) clearly states that in
13 determining whether U S WEST has met its showing of effective competition, one factor the
14 Commission must consider is "the extent to which services are available from alternative
15 providers in the relevant market." There are at least 12 different providers offering high
16 capacity services in Washington.³⁶ At least three or more providers are available in each
17 exchange for which competitive classification is sought (except Keystone – only a small
18 fraction of which is included in this petition). U S WEST has shown that competitors serve

19 ³⁵ Nextlink at p. 5, *emphasis added*. U S WEST is surprised at Nextlink, ELI and GST's acknowledgment that
20 they do not comply with the specific mandates of RCW 80.36.090 which clearly requires that "[e]very
21 *telecommunications company* shall provide and maintain suitable and adequate buildings and facilities therein,
22 or connected therewith, for the accommodation, comfort and convenience of its patrons and employees."
23 (*emphasis added*). The statute further requires that "[e]very *telecommunications company* shall, upon
reasonable notice furnish to all persons and corporation who may apply therefor and be reasonably entitled
thereto suitable and proper facilities and connections for telephonic communication and furnish telephone
service as demanded." (*emphasis added*). This is a matter for the Commission's further inquiry in a separate
docket. However, the competitors' failure to satisfy their statutory obligations should have no bearing on
whether U S WEST has met its obligations with respect to competitive classification. U S WEST clearly has
done so.

³⁶ See Attachment B.

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2 at least 35% of the market for high capacity services in Seattle, the main focus of this
3 petition. In addition, based on the limited evidence provided to them,³⁷ the Commission
4 Staff has shown that U S WEST has lost at least 30% of the DS1 market and 12% of the DS3
5 market in Spokane.³⁸ This evidence reveals that alternative providers and their services are
6 very available.

7 Tracer makes the unfounded argument that "if CLECs are not in a particular building,
8 the customers in that building do not have a choice of providers."³⁹ As noted above,
9 Nextlink, ELI and GST similarly assert that if a competitor does not have facilities in a
10 building, the customers in that building are necessarily captives of U S WEST.⁴⁰ These
11 commenters miss two critical distinctions. First, competitors do not already have to be in a
12 building for customers to have a choice. Competitors can put facilities in any building drawn
13 from their expansive fiber networks throughout these exchanges. Second, a competitor can
14 choose to lease the facilities of another provider to serve customers in certain buildings. A
15 showing of the availability of alternatives does not mean that every building or every
16 customer uses those alternatives today. Customers in buildings with little or no competitive
17 fiber, but with such fiber running right past their door, clearly do have alternatives. CLECs

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19 ³⁷ Staff's estimates are based only on the limited information provided by those competitors who are intervenors
20 here. As demonstrated, other providers also offer high capacity services in these exchanges. Thus, Staff's
21 market share estimates clearly demonstrate less than the actual competition present in the market. *See e.g.*
22 *Avista Fiber, Inc.'s Petition for Competitive Classification, July 1, 1999* stating in para. 2, p. 2 that it "has
23 conduit and cable facilities in metropolitan Spokane . . ." and that their "services connect local exchange and
interexchange carriers' points of presence [sic] to each other, connect end users to POPs, and provide discrete
networks."

³⁸ *See U S WEST, Reply Comments in Support of U S WEST's Petition, (hereinafter "U S WEST"), June 11, 1999, pp. 13-15.*

³⁹ Tracer at p. 12.

⁴⁰ *See Nextlink at p. 5.*

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2 would not spend the enormous sums of money involved in extending their networks in these
3 exchanges if they were not currently using them and did not plan to continue doing so. As
4 more and more customers and more and more building managers request service from
5 CLECs, CLECs can and do provide that service. That CLEC's may initially lease lines from
6 a competitor, U S WEST included, in addition to using their own network to serve their end-
7 user customers does not make their service any less available. In fact, these options make
8 service much more available. The combined effect of the shift of customers away from
9 U S WEST's network and onto the networks of U S WEST's competitors, the use of CLEC's
10 networks by new customers entering the market, the general presence of CLEC's fiber
11 throughout these markets and CLEC's ability to reach those customers through leased
12 networks constitutes unambiguous availability.

13 Nextlink, ELI and GST contend that U S WEST only argues that CLECs *could* extend
14 their networks to serve customers rather than that the CLEC's already have done so.

15 Nextlink, ELI and GST state that there *could* be effective competition when this happens, but
16 that today there is not.⁴¹ AT&T and MCI make the same point, quoting Nextlink's
17 argument.⁴² These statements again reflect a willingness to ignore the evidence presented and
18 make sweeping, untrue statements. The fiber maps provided in support of U S WEST's
19 petition for each exchange in which competitive classification is sought are themselves
20 overwhelming evidence of the extent to which the networks of competitors already exist. As
21 discussed above, the availability of these alternatives in the market today is what constitutes

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23 ⁴¹ See *Id.* at p.5, fn. 3.

⁴² See AT&T at p. 7.

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2 U S WEST's showing of effective competition. There are other alternatives still which
3 demonstrate that the market is even more competitive than the available data show.
4 Unfortunately, because of the stonewalling of competitors, it is difficult to measure to what
5 extent these alternatives have taken hold. It is difficult to measure the extent of CLEC's use,
6 for example, of wireless local loops. This is true because competitors like Nextlink, who
7 have invested hundreds of millions of dollars in such systems, do not provide information
8 detailing the extent of their use.⁴³ However, the offering of these services through companies
9 like Advanced Radio Telecom, and their reported success in providing these services in
10 Washington,⁴⁴ is convincing proof that these sorts of services are readily available to CLECs
11 and to customers today. The presence of these providers and their statewide offerings are
12 evidence that: 1) The presence of lines running to each customer location from a CLEC's
13 facilities is not a necessary prerequisite to facilities-based service from CLECs and 2) that
14 services are widely available to end-users through the competitors own networks, the
15 interconnection of the networks of competitors and through leasing of U S WEST's network.

16 Nextlink, ELI and GST's contention that all competitors must have their own wire-
17 lines running to every customer location is unrealistic and unreasonable. Operational
18 presence, not omni-presence, is the appropriate standard here. As customers request service,
19 there are many options available to them to obtain service from the provider of their choice.
20 Many customers have already exercised this option.

21 _____
22 ⁴³ See Attachment D showing Nextlink's refusal to provide any data on the extent to which it relies on radio
spectrum to wirelessly link end-user customers to high speed networks.

23 ⁴⁴ See U S WEST at p. 31.

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2 Several providers currently offer service in each of the seven areas included in this
3 petition. Much of that service is provided through each individual competitors' facilities,
4 while some of the service is also provided through leasing of facilities from a competitor in
5 conjunction with the use of their own networks. In both cases, the competitors have the
6 ability to price and market their services at their discretion to their own end-user customers.
7 The number of competitors in the market, the extent of their networks in these markets and
8 the availability of interconnection with the networks of competitors satisfy the availability of
9 alternatives element of the test for competitive classification.

10 It is worth noting that AT&T and MCI believe that "the mere existence of alternative
11 sources of supply does not equate with effective competition."⁴⁵ AT&T and MCI thereby
12 acknowledge that a significant number of alternative sources of supply exist. U S WEST
13 agrees on both counts. U S WEST has shown that competitive alternatives are available to
14 customers in the markets for which competitive classification is sought. U S WEST also
15 agrees that the presence of alternatives, though a significant step toward a showing of
16 effective competition, is not alone enough to ensure effective competition. It is for that
17 reason that these comments and those previously filed explore the other factors that
18 demonstrate that effective competition is more than satisfied here.

19 _____
20 ⁴⁵ See AT&T at p. 5.

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2 **Each Of The Other Providers, In Each Of The Areas Included In This Petition,**
3 **Offer Functionally Equivalent Services At Competitive Rates And With**
4 **Competitive Terms And Conditions.**

5 Tracer asserts that "there is a complete lack of evidence, analysis or discussion of the
6 availability of substitutes for specific services covered by the amended petition."⁴⁶ Once
7 again Tracer relies on rhetoric and sweeping statements without regard to the actual facts
8 submitted in this case.⁴⁷ As a part of U S WEST's comments on its amended petition, it
9 provided an attachment showing the DS1 / DS3 offerings of each of the competitors in
10 Washington.⁴⁸ Further, U S WEST detailed each of its tariffs for high capacity services,⁴⁹ as
11 well as citing the tariffs and the price lists of competitors on which it relied in developing its
12 list of competitive alternatives.⁵⁰

13 Nextlink, ELI and GST claim that U S WEST has not provided evidence of effective
14 competition for services other than DS1 and DS3.⁵¹ The Washington Association of Internet
15 Service Providers in its comments requests that services provided over DS1 and DS3 lines
16 not be competitively classified as part of this proceeding.⁵² U S WEST has not requested that
17 ISDN, UAS and ADSS be competitively classified as part of this proceeding, only DS1, DS3,

18 ⁴⁶ Tracer at p. 15.

19 ⁴⁷ It is important to note that in Tracer's own response to Staff's data request 1, Tracer states: "Tracer members
purchase [sic] 10Mb circuits; all are provided by CLECs." See AT&T at Confidential Exhibit B.

20 ⁴⁸ See Attachment B, (A reproduction of Attachment F in U S WEST's Comments in Support of Amended
Petition.)

21 ⁴⁹ See *supra* fn. 5.

22 ⁵⁰ See Attachment B.

23 ⁵¹ See Nextlink at p. 3, fn. 1.

⁵² Supplemental Comments of Washington Association of Internet Service Providers (hereinafter "WAISP"),
September 9, 1999, p. 2. WAISP also asks as part of its petition that U S WEST be required to separate its
Mega Central Service from its DS1/DS3 service offering. U S WEST has already done so, just as it committed
in its Additional Comments in February. A copy of the tariff filing making the change requested is attached here
as Attachment C.

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2 SONET, SHARP and SHNS. U S WEST has provided cites to allow any intervenor,
3 customer or observer to review the specific sections of U S WEST's tariff as well as the
4 tariffs and price lists of competitors detailing DS1 and DS3 services.

5 It is clear from these sources that each competitor provides a full range of services
6 associated with its DS1 / DS3 service. Every competitor does not offer the exact same
7 services, under the exact same names, or in the exact same packages. However this is one of
8 the hallmarks of a competitive market—that it is by its nature diversified. Competitors alter
9 their offerings or package them differently as a means to attract customers. The fact that a
10 very large percentage of the market in the seven exchanges in question have gone to
11 competitors of U S WEST for these services is prima facie evidence that the competitors are
12 able to make functionally equivalent or substitute services available at competitive rates,
13 terms and conditions. That the underlying DS1/DS3 services being offered are so highly
14 competitive necessarily indicates that its "features" are also competitive. The tariffs of the
15 alternative providers compared with those of U S WEST indicate as much.

16 Tracer specifically references self-healing alternative route protection services, self-
17 healing network and SONET⁵³ services as lacking discussion in the petition.⁵⁴ The extensive
18 networks of the alternate providers, the ability of providers to interconnect with the facilities
19 of U S WEST and the facilities of other competitors and the fact that so many customers are
20 successfully using these networks is evidence that the competitors provide alternate route

21 _____
22 ⁵³ See *supra*, fn. 47 for a discussion of Tracer's own evidence provided with respect to the competitive presence
of these services in the market.

23 ⁵⁴ See Tracer at p. 15.

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2 protection sufficient to meet the needs of their customers. As long as competitors innovate
3 and integrate new technologies into their systems, there will be some distinctions between the
4 services offered to customers through any underlying technology. The best evidence that the
5 services of one provider are substitutes for those of another and that the terms and conditions
6 of a competitor's offering are competitive is the number of customers buying those services
7 from the competitor instead of buying them from U S WEST. This showing makes it
8 obvious that competitors are providing their services, "features" included, with competitive
9 terms and conditions and would satisfy even the FCC's strict bright-line test for granting
10 pricing flexibility.

11 **There Are Several Other Providers In The Market, Each Of Which Is A Large**
12 **Telecommunications Company, And Several Of Which Are Larger Than**
13 **U S WEST.**

14 U S WEST has presented extensive and compelling evidence of the size and number
15 of providers in the market throughout this docket.⁵⁵ With competitors such as AT&T,
16 MCIWorldcom, Nextlink and ELI in the market, it is virtually indisputable that U S WEST's
17 competitors are very large--some much larger than U S WEST--and have significant access to
18 capital and resources to allow them to compete effectively. Moreover, with the large number
19 of collocators for each exchange shown in Attachment A, it is beyond contention that there
20 are several competitors in these markets. The intervenors do not contest U S WEST's
21 satisfaction of this element of competitive classification in their most recent comments.

22 Thus, U S WEST makes no further comment on this issue beyond the substantial evidence

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⁵⁵ See e.g. U S WEST at pp. 21-24 and Attachment F thereto.

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2 provided in previous comments.

3 **U S WEST Does Not Have Market Power In The High Capacity Market In The**
4 **Seven Exchanges Considered In This Filing.**

5 Most of the issues raised in the comments of competitors center around market power
6 and the various elements of market power. The FCC's Phase II test is substantially focused
7 on these same issues. U S WEST satisfies that test by showing the presence of several
8 competitors in each relevant exchange and several using the transport of non-U S WEST
9 providers in each exchange. U S WEST does not have market power in the high capacity
10 services market. Nonetheless, U S WEST will address the comments of the intervenors with
11 respect to market power. Their comments fall generally into the following categories:

12 U S WEST has provided extensive objective evidence to show that it does not possess
13 market power in the high capacity market in the seven relevant exchanges.

14 WAC 480-120-022 states that in determining whether a service is competitive, "the
15 commission shall consider . . . indicators of market power."⁵⁶ U S WEST has provided
16 substantial objective evidence with respect to market share, in addition to evidence on the
17 other factors considered with respect to market power. AT&T and MCI argue that
18 "U S WEST hides behind a set of meaningless labels such as 'transport market,' 'provider
19 market,' 'wholesale market,' and 'retail market' so that competition will seem more
20 robust."⁵⁷ They further argue that U S WEST ignores the fact that CLEC's have to rely on
21 U S WEST to reach beyond their current facilities-based locations.⁵⁸ AT&T and MCI are

22 ⁵⁶ WAC 480-120-022 (7) (d).

⁵⁷ AT&T at p. 6.

⁵⁸ *Id.*

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2 wrong on both counts.

3 The terms "transport market," "provider market," "retail market," and "wholesale
4 market are hardly misleading terms. In fact, U S WEST uses these terms as a means to
5 explain the extent to which competition is available. AT&T and MCI accuse U S WEST of
6 ignoring the alleged fact that competitors have to rely on U S WEST's wholesale facilities to
7 serve their end-users and at the same time suggest that U S WEST's discussion of the extent
8 to which its market is based on "wholesale" versus "retail" sales is "meaningless."

9 Unfortunately for AT&T and MCI, they cannot have it both ways. Either there is a
10 meaningful distinction between the various markets for services for purposes of measuring
11 competition, or there is not. Ultimately, it is useful for the Commission to understand the
12 extent to which competitors are using their own facilities in the market. If competitors were
13 only using facilities leased from U S WEST to serve their customers, then the Commission
14 might give more weight to other factors in the test for competitive classification to ensure
15 that U S WEST did not possess power over the market.

16 U S WEST's description of the various portions of the market and the extent to which
17 its customers and the customers of competitors use U S WEST's network shows that it does
18 not have market power. Neither U S WEST's retail customers, nor its wholesale customers
19 are captive. The extensive facilities of competitors, their obvious ability to build additional
20 facilities upon the request of customers wishing to purchase their service and their access to
21 non-U S WEST facilities such as wireless local loops and the facilities of other CLECs is
22 clear evidence to demonstrate a lack of market power on the part of U S WEST.
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2 Tracer, AT&T and MCI all argue that U S WEST fails to provide objective evidence
3 that it lacks market power. They suggest that appropriate measures for determining
4 U S WEST's market power or lack thereof are the Herfindahl-Hirschman Index (HHI), the
5 Lerner Index and other measures of elasticity of supply and demand for high capacity
6 services.⁵⁹ Tracer states that U S WEST in the past "has *routinely* provided elasticity
7 estimates for its services" for rate-making purposes.⁶⁰ As evidence of this generalization it
8 provides one cite to a 1988 docket in which U S WEST allegedly offered elasticity
9 measurements apparently prepared by Pacific Northwest Bell, when it was still in existence
10 more than 10 years ago.

11 These arguments are nothing more than a repeated attempt to create competitive
12 classification requirements where they do not exist and to hold U S WEST to impossible
13 standards. U S WEST has stated that elasticity measurements are not available and would
14 require years of study at a significant costs to ratepayers. The FCC's recent pricing flexibility
15 order confirms this. The FCC concludes that it would be "administratively burdensome to
16 require incumbent LECs to perform and the Commission to evaluate . . . supply elasticity
17 analyses before the LECs may obtain any regulatory relief."⁶¹ They explain that while they
18 previously required such detailed analyses to remove some of AT&T's services from price
19 cap regulation, there is a significant difference between AT&T's filings and a request for
20 pricing flexibility such as this one. The FCC states "[w]e conclude that this detailed

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⁵⁹ See Tracer at pp. 6-7; AT&T at p. 5.

22 ⁶⁰ Tracer at p. 7.

23 ⁶¹ FCC 99-206 at para. 91.

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2 substantial competition test is not warranted for special access and dedicated transport
3 services because we grant incumbent LECs pricing flexibility only on a MSA-by-MSA basis,
4 while the Commission granted AT&T pricing flexibility on a nationwide basis.”⁶² Surely the
5 FCC's logic applies here where U S WEST has requested competitive classification on a wire
6 center-by-wire center basis, an area even smaller than an MSA. Any contrary finding would
7 require an unreasonable showing and indefinitely delay regulatory relief where it is otherwise
8 clearly warranted. This is clearly the outcome desired by Tracer.

9 U S WEST suggests that this Commission instead look to a *reasonable* objective
10 standard such as the collocation standard laid out in the FCC's order. This standard is an
11 excellent means by which to measure the extent to which customers are captive to a particular
12 provider. Such a measure is readily available, is easily quantifiable and is based on
13 significant investment of the CLECs involved. U S WEST has provided sufficient data to
14 satisfy this objective test. When this evidence is coupled with the extensive presence of
15 competitive fiber throughout these exchanges and the market share data provided by
16 U S WEST and Commission Staff, it is plain that alternatives are widely available to
17 customers.

18 Finally, the competitors allegations that U S WEST has not provided sufficient
19 objective data are hypocritical. To the extent objective evidence is lacking or has been
20 difficult to provide in this proceeding, such evidence is largely held by the competitors (many
21 of whom are intervenors herein) who refuse to provide it. U S WEST has, in its previous

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23 ⁶² *Id.* at para. 152.

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2 comments, thoroughly demonstrated the limitations that the stonewalling of the
3 competitor/intervenors has created. Once again, the FCC confirms the extent to which this is
4 true in general and the reasons why Commissions must act with the best information
5 available. They write:

6 "Our effort to select triggers that precisely measure competition for particular
7 services also is hampered by the lack of verifiable data concerning competitors'
8 revenues and facilities. Unlike incumbent LECs, competitors are not subject to
9 Commission reporting requirements and they often are unwilling to provide this
information voluntarily. Given these constraints we adopt triggers that, in our
reasoned judgment, balance both the desires for precision and simplicity and the
costs to carriers and customers alike of delaying the grant of pricing flexibility.⁶³

10 The Washington Commission should be guided by the same "reasoned judgment" and adopt
11 measures which will reasonably allow an evaluation of the market.

12 U S WEST does not have a captive customer base for its high capacity services.

13 The intervenors in this proceeding apparently believe that every single customer in an
14 exchange must have competitive choice for U S WEST to establish that it does not have a
15 captive customer base. Tracer argues that "USWC's approach to satisfying the statutory test
16 of showing that effective competition exists fails to provide any meaningful demonstration
17 that the company lacks market power."⁶⁴ In support of this statement it offers a heretofore
18 unheard-of standard by stating, "the Amended Petition demonstrates little more than the fact
19 that alternative sources of supply exist for some high capacity service customers."⁶⁵ Tracer
20 implies that U S WEST is required to show that *all* customers have choice in order for the

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⁶³ *Id.* at para 96.

22 ⁶⁴ Tracer at p. 4.

23 ⁶⁵ *Id.* at pp. 4-5.

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2 Commission to grant competitive classification. The intervenors once again resort to extreme
3 positions that are not only unreasonable and excessive, but that are inconsistent with the state
4 competitive classification requirements. The Washington Administrative Code does not
5 inquire into whether U S WEST has any captive customers, but rather whether it has a
6 captive *customer base*. The FCC explains why any requirement that every customer have
7 choice is both harmful and unrealistic. They write: "regulation is not an exact science, we
8 cannot time the grant of regulatory relief to coincide precisely with the advent of competitive
9 alternatives for access to each individual end-user. We conclude that the costs of delaying
10 regulatory relief outweigh the potential costs of granting it before IXC's [CLECs] have an
11 alternative for each and every end user."⁶⁶

12 Whether U S WEST has a captive customer base is not based upon whether *every*
13 customer has choice. It is a clear that CLECs simply refuse to serve some customers. Until
14 the Commission addresses the CLECs' obligation to serve in Washington, to distribute more
15 equitably the obligation to serve requirement among all providers in the market, the
16 customers that CLECs choose to leave behind will continue to be served by U S WEST.
17 Moreover, if every customer had choice, there would be no need for continued regulation of
18 this market at all. The Commission would simply de-regulate the entire market.

19 The appropriate measure to employ when considering the question of a captive
20 customer base is whether customers in an exchange have alternative providers who can offer
21 them service on par with, and under similar conditions to, the service of the incumbent. The

22 ⁶⁶ FCC 99-206 at para 144.
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2 competitors here have an extensive presence in each of these exchanges.⁶⁷ U S WEST has
3 demonstrated, and the data provided by the Commission Staff's comments validate that the
4 competitors already serve a significant portion of the market.⁶⁸ The tariffs of the competitors
5 also show that they offer their service on competitive terms with U S WEST.⁶⁹ High capacity
6 telecommunications customers in the seven exchanges considered here are simply not
7 captive.

8 Nextlink, ELI and GST's arguments on the question of a captive customer base are
9 equally specious. They attempt to twist U S WEST's argument that 35% market loss is a
10 significant loss into an argument that the alleged 72% of the market being served by
11 U S WEST facilities must then represent a "significant" captive customer base.⁷⁰ This is
12 clever, but the argument does not hold up. A 35% loss is highly significant in that it shows
13 that customers clearly have alternatives and are not captive to U S WEST. Simply because
14 72% of customers in some way allegedly use U S WEST's network does not establish that
15 they are captive to U S WEST, especially if many are also being served through a competitor
16 of U S WEST. Further, the fact that 72% of customers may be using U S WEST's lines to
17 some extent does not signify, as Nextlink, ELI and GST contend, that they do not have
18 choice. Rather, what it says is that several customers have chosen to purchase service from
19 U S WEST. As for customers who purchase services from other providers where U S WEST
20 is the underlying wholesale provider, they are probably not even aware that their service

21 _____
⁶⁷ See U S WEST's Amended Petition which includes a fiber map for each exchange considered.

22 ⁶⁸ See *supra*, fn. 38.

23 ⁶⁹ See Attachment B.

⁷⁰ See Nextlink at p. 3.

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2 comes from U S WEST. It is the CLECs, not U S WEST, who market and sell the service
3 and the CLECs who expand their market presence and expand their reputation in the market
4 under these arrangements. With other technologies available today, such as wireless local
5 loops, and with competitors offering transport to other competitors as each continues to build
6 their networks even further, competitors and their end-user customers through them have
7 much choice.

8 AT&T and MCI are concerned that U S WEST holds CLECs themselves captive as
9 customers of its wholesale DS1/DS3 service. U S WEST does not hold CLECs captive. In
10 every exchange included herein (but Keystone), two or more of the competitive providers use
11 the transport of another competitive provider as opposed to that of U S WEST.⁷¹ With at
12 least two (and often several more) collocators in each exchange using non-U S WEST
13 transport it is clear that competitors have a choice of other providers. This choice, coupled
14 with the non-U S WEST wireless access to end-users, available to all CLECs, ensures that
15 CLECs are not captive U S WEST customers.

16 AT&T and MCI further argue that competition is threatened because Qwest has
17 announced an intention to enter the high capacity services market in Washington.⁷² Qwest
18 currently provides network capacity to other carriers. Qwest's presence or absence has
19 nothing to do with whether the overwhelming investment of competitors in facilities and
20 service in these markets constitutes effective competition. As the FCC points out in its order,
21 sunk investment in the market means that an incumbent will be unable to undercut

22 _____
23 ⁷¹ See Attachment A.

⁷² See AT&T at p. 8.

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2 competitors and force them out of the market.⁷³ Qwest's potential entry in the retail market at
3 some point in the future cannot change that. AT&T and MCI's argument is like arguing that
4 if U S WEST plans to build more facilities in these areas, competition somehow does not
5 exist. The fact that another, non-U S WEST provider, Qwest, is even considering entering
6 these markets is another demonstration that competition is thriving here and the opportunities
7 for CLECs in these exchanges are boundless. AT&T and MCI's suggestions here are nothing
8 more than scare tactics rooted in fiction.

9 As for Nextlink, ELI and TCG, they incorrectly contend that Staff relies on nothing
10 more than the presence of fiber for its recommendation in favor of competitive classification.
11 The record on which Staff relies details the extent to which that fiber is being used, the extent
12 to which that fiber can and is being brought to customer locations, the way in which it is
13 being carried to those locations, the extent to which competitors are using their own facilities
14 to serve customers, and the availability of alternate services that are substitutable for each of
15 U S WEST's high capacity services in the market.

16 The market will constrain U S WEST's prices just as it does the prices of other
17 competitors in the high capacity services market.

18 Nextlink, ELI and GST suggest that U S WEST could use alleged power in the
19 market to drive out competitors through predatory pricing. They write "[i]f U S WEST's
20 high capacity services were competitively classified, U S WEST could dramatically increase
21 its retail market share by simply lowering its retail rate to its wholesale rate level (or vice

22 ⁷³ See FCC 99-206 at para. 24-25.

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2 versa), thus eliminating competition that relies in whole or part on U S WEST facilities.”⁷⁴

3 As U S WEST has stated in its prior comments on this issue, there are several underlying
4 services which it offers to competitors for their use in providing retail service to end-users.

5 For most of those products, U S WEST cannot change the Commission-set rates without
6 Commission approval. Thus for these services, there is no opportunity for U S WEST to use
7 its incumbent position to harm CLECs or their end-users. As for facilities which would be
8 competitively classified through this petition and for which U S WEST would therefore have
9 pricing flexibility, the FCC in its pricing flexibility order explains why it is neither realistic
10 nor in the interests of the incumbent to price predatorily in a market which meets the FCC’s
11 pricing flexibility test, as U S WEST does here. The FCC explains:

12 An incumbent monopolist will engage in exclusionary pricing behavior
13 only if it believes that it will succeed in driving rivals from the market or deterring
14 their entry altogether. Otherwise, the reduced profits caused by exclusionary
15 pricing behavior will not be recouped by other sales under the resulting conditions
16 of reduced competition and the incumbent will be worse off than if it had not
engaged in exclusionary pricing behavior. Once multiple rivals have entered the
market and cannot be driven out, rules to prevent exclusionary pricing behavior
are no longer necessary.⁷⁵

17 The FCC further points out that:

18 If a competitive LEC has made a substantial sunk
19 investment in equipment, that equipment remains
20 available and capable of providing service in
21 competition with the incumbent, even if the incumbent
succeeds in driving that competitor from the market.
Another firm can buy the facilities at a price that
reflects expected future earnings and, as long as it
can charge a price that covers average variable cost,
will be able to compete with the LEC. *In*

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⁷⁴ Nextlink at p. 3.

23 ⁷⁵ FCC 99-206 at para. 80.

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*telecommunications, where variable costs are a small fraction of total costs, the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed.*⁷⁶

In each of the markets for which the WUTC grants competitive classification, there are multiple competitors, several of whom use their own transport or that of a provider other than U S WEST. As the FCC explains, under such circumstances, the opportunity for U S WEST to price in an exclusionary manner is essentially non-existent.

Nextlink, ELI and GST further argue that the Commission should not waive RCW 80.36.170 and 80.36.180 for U S WEST, though RCW 80.36.330 “permits” them to do so upon a request for competitive classification.⁷⁷ First, for reasons mentioned above, the market will constrain U S WEST without Commission-imposed regulation. In a competitive market, these restrictions simply act to distort the market and create needless inefficiencies.⁷⁸ Secondly, the Commission should note that while the competitors seek to portray U S WEST as being able to harm them and competition in any number of ways under competitive classification, there are ample incentives for U S WEST to meet its obligations. The Commission clearly has the authority to reclassify a service if the public interest is at risk and to require a company to prove that its rates are “fair, just and reasonable” upon complaint that they are not.⁷⁹ Any potential for mischief under competitive classification is clearly mitigated through these provisions.

⁷⁶ *Id.* (emphasis added).
⁷⁷ Nextlink at p. 9, fn. 5.
⁷⁸ See *infra* the FCC’s discussion of these market distortions at p. 35, fn. 82.
⁷⁹ RCW 80.36.330 (4 & 6).

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2 Tracer argues that because some of the competitors charge more for service than does
3 U S WEST, U S WEST is not constrained from raising its rates to unreasonable levels. It
4 argues that the relatively higher prices for channel terminations of competitors such as
5 Teligent will not constrain U S WEST's "ability to charge supra-competitive prices."⁸⁰ There
6 are several other providers in the market for these service other than Teligent. Tracer chose
7 Teligent, the most extreme case as its example. U S WEST is clearly constrained as to its
8 pricing in this market by the vast majority of competitors, most of whom charge rates lower
9 than those of U S WEST.⁸¹ Allowing U S WEST to respond efficiently to market demand
10 without the delay associated with filing a tariff should make for a more robust competitive
11 market in which the prices of all providers move closer to cost.

12 Tracer proposes that if the Commission does grant pricing flexibility to U S WEST in
13 this case, that they should place a price cap on U S WEST's services to act as an upper-end
14 constraint on U S WEST's pricing. This suggestion is unwarranted. The FCC again offers a
15 straightforward and accurate view of the correct approach for a regulatory body to take in a
16 competitive environment. The FCC holds "[o]nce competitors have established a significant
17 market presence in an MSA . . . we believe it is no longer necessary to impose efficient rate
18 structures on incumbent LECs. . . Retaining our price cap and rate structure rules until LECs
19 are non-dominant is unwarranted because *doing so would delay the action of competition in*
20 *setting efficient rate levels and rate structures.*"⁸² U S WEST far surpasses the FCC's

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⁸⁰ Tracer at p. 10.

22 ⁸¹ See Attachment B.

23 ⁸² FCC 99-206 at para. 154 (*emphasis added*).

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2 thresholds for showing that competitors have a significant presence in the markets in
3 question. Tracer's statement that a "price cap also would protect against USWC's abuse of
4 its market power, thereby protecting consumers"⁸³ is nothing more than a mischaracterization
5 of U S WEST's presence in these seven markets. This Commission ought to base its decision
6 on reason, not groundless fear.

7 Even Tracer agrees that no price cap is necessary if "effective, price constraining
8 competition" really exists.⁸⁴ As the FCC's rules clearly demonstrate, such competition does
9 exist. No price cap is necessary here.

10 The competitors have a significant share of the market and U S WEST's market share
11 is declining.

12 AT&T, MCI and Tracer mischaracterize the data provided in Commission Staff's
13 Confidential Attachment B to claim that the competitors have 0-11% of the markets for
14 which U S WEST has requested competitive classification.⁸⁵ The data provided by Staff
15 clearly shows that competitors serve at the very least from 12-35% of the markets in question
16 here.⁸⁶ This is using data which is clearly incomplete and therefore underestimates the
17 competitive presence in these markets. As has been well-documented throughout these
18 proceedings, the competitors have simply refused to provide detailed information showing
19 the extent to which they serve these markets. U S WEST and Staff have therefore had to rely
20 on publicly available information and external market share studies to make minimum

21 ⁸³ Tracer at p. 18.

22 ⁸⁴ *Id.*

23 ⁸⁵ Tracer at pp. 11-12; AT&T at p. 4 & fn. 4.

⁸⁶ See U S WEST at p. 13 for a summary of the data provided by Staff.

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estimates of the share of competitors. However, the data available are a more than
satisfactory showing that competitors have a significant share of the high capacity market.
Further, this share continues to grow as former customers of U S WEST turn to the growing
competitors for service.

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In today's highly competitive telecommunications market, building owners are highly motivated to provide non-discriminatory access to all telecommunications service providers.

Nextlink, ELI and GST argue that building owners treat telecommunications companies other than U S WEST discriminatorily.⁸⁷ Though they provide absolutely no evidence that this is true, they argue that such alleged discrimination hinders competition in these markets. U S WEST once again feels compelled to point out the obvious. Competitors would *not* be spending the enormous sums of money involved in laying fiber, purchasing technology and collocating to the degree they have if they were not able to use their networks to provide service to end-users. There would simply be no incentive to do so. The evidence of the number of customers they serve in the relevant markets alone is proof that these carriers are not hindered from accessing end-users. The FCC agrees. They state that:

. . . establishing an operational collocation arrangement requires considerable time and expense. This evidence suggests that collocation in 50 percent of an incumbent LEC's wire centers corresponds to considerable investment by competitors in transmission facilities and the ability of competitors to serve customers in a large number of buildings.⁸⁸

Even Tracer acknowledges that the problem here is often one of CLECs simply deciding not to serve a particular building. In the one building example they discuss, the PACCAR building in downtown Bellevue, Tracer notes that "CLECs have simply been unwilling to extend facilities to the building . . ."⁸⁹ The limitations some competitors claim exist for building access are nothing more than an attempt to keep U S WEST regulated to provide

⁸⁷ See Nextlink at p. 7, fn. 4.

⁸⁸ FCC 99-206 at para. 148 (*emphasis added*).

⁸⁹ Tracer at p.13.

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2 them an advantage in this competitive market. The logic of the FCC's ruling and the facts
3 provided in this petition should guide this Commission with respect to this issue.

4 Tracer is not without error in its discussion of building access however. Tracer states
5 that "[i]t makes no difference why a CLEC does not extend its facilities" to a building.⁹⁰ It
6 states that whatever the reason, this means that facilities are unavailable to customers. This is
7 simply not true. The competitors in these markets can, and every day do, extend facilities to
8 buildings where customers wish them to serve. If buildings are open to competitors, which
9 they clearly are in these exchanges, and if competitors are capable of bringing in facilities to
10 compete with U S WEST at the request of customers, then customers options are not limited.
11 U S WEST does not have power over building owners and nor does it have power over
12 customers. In this competitive market customers and building owners can choose from an
13 array of telecommunications providers and they often do.

14 The existence of other inquiries before this Commission is irrelevant to determining
15 whether under today's market conditions effective competition exists.

16 Several of the intervenors suggest that this Commission must decide every issue from
17 271 relief to provisioning disputes before they can determine whether the market for high
18 capacity services in the relevant exchanges is competitive.⁹¹ These suggestions are nothing
19 more than an unsubtle attempt to use the Commission as a tool for achieving their financial
20 goals through legal and regulatory wrangling at the expense of customers who seek the most
21 robust competitive market. The FCC's retort to these same arguments made by the

22 ⁹⁰ *Id.*

23 ⁹¹ *See* Tracer at pp. 14-15; AT&T at pp.10-12; Nextlink at pp. 5-7.

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2 competitors in their pricing flexibility docket was to simply point out that it would not allow
3 competitors to abuse this process to satisfy their ends, but rather they would make their
4 decision based on the best interests of consumers of telecommunications services. The FCC
5 writes in its pricing flexibility order, “[d]elaying pricing flexibility under these circumstances
6 denies access customers the benefits of increased efficiency in the interstate access market.”⁹²
7 This Commission should not allow the intervenors to hijack this process for their own ends.
8 This Commission should instead review the evidence before it and make a finding based on
9 whether the significant level of competition demonstrated (despite all of the claimed
10 hardships by the competitors) merits competitive classification.

11 Because the claims of Nextlink are particularly egregious in this regard, U S WEST
12 takes this opportunity to briefly address them. Nextlink makes several statements that do not
13 provide a complete picture of the wholesale opportunities available to CLECs. They claim
14 that “. . . U S WEST can also impose provisioning delays and barriers other than recurring
15 rates to undermine competitors’ ability to use U S WEST facilities in the provisioning of high
16 capacity services.”⁹³ Nextlink knows that any such actions by U S WEST would be counter
17 to both federal and state statutes and that there is ample recourse available to address alleged
18 infractions by incumbent carriers. In fact, Nextlink recently availed itself (to its benefit) of
19 the Commission’s Interconnection Agreement Enforcement rule.

20 Further, Nextlink asserts that “. . . only one of the many requesting carriers has been
21 able to obtain physical collocation in the Bellevue Glencourt central office – one of the seven

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23 ⁹² FCC 99-206 at para. 89.

⁹³ Nextlink at p. 2, fn. 2.

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2 central offices specified in U S WEST's Amended Petition . . ."⁹⁴ Unfortunately, Nextlink
3 fails to tell the whole story. As Nextlink knows from its involvement in its Glencourt
4 collocation request, U S WEST declared in 1997 that there was not space for caged physical
5 collocation in the Glencourt central office. Since the Commission's collocation order was
6 issued in September of 1998, however, U S WEST has been working cooperatively with all
7 CLECs that have requested space in the Glencourt office to provide cageless collocation.
8 Cageless space has been made available primarily through the movement of U S WEST
9 circuits to other locations in the central office. As a result of the grooming efforts,
10 U S WEST plans to locate at least 6 CLECs in cageless installations in 1999. Nextlink also
11 conveniently fails to note that at least 3 CLECs have been virtually collocated in this office
12 for over a year, in addition to the one CLEC who is already cagelessly collocated there.

13 Finally, Nextlink laments that it has no assurances that wholesale services will be
14 provided at competitive prices and in a timely manner. This is simply not true. Nextlink has
15 an Interconnection Agreement with U S WEST, that it executed of its own accord, which
16 contains prices and terms associated with interconnection and UNEs. Additionally, there
17 have been literally thousands of pages of FCC orders and federal court decisions that provide
18 CLECs a wide array of both price and product assurances. The Commission and the industry
19 spent the last three years developing costs and prices for interconnection, UNEs and resale.
20 In fact, it might be said that there has never in history been so much time, effort and money
21 devoted to one market segment (CLECs) by so many different organizations (state

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23 ⁹⁴ *Id.* at pp. 5-6.

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2 commissions, FCC, courts, the press, legislators and the state and federal executive
3 branches). If all of these assurances are not enough to ensure Nextlink that it will be able to
4 compete in this openly competitive market, then it is clear that there will never be an
5 occasion on which enough assurances will be present.

6 Simply put, competition exists in this market, the CLECs have sufficient protection to
7 ensure that U S WEST cannot exercise market power and the Commission should not be
8 sidetracked by the array of issues that will continue to be examined as we move quickly to a
9 fully competitive telecommunications market.

10 The Commission should competitively classify all high capacity services being
11 provided in the relevant markets.

12 WAISP argues in its comments that “cross-territory circuits” which cross the
13 boundary from one exchange to another, should not be competitively classified. They claim
14 that these circuits are not subject to competitive pressure from the surrounding exchanges.
15 U S WEST has already stated that terminations outside the competitively classified area will
16 be treated as non-competitively classified. However, even without this concession, the
17 evidence suggests that there is a significant amount of competition in the exchanges
18 surrounding those for which competitive classification is sought. Further, the presence of
19 competition within the boundaries of the these exchanges is all that need exist in order to
20 ensure that U S WEST cannot exert market power. The customers in these exchanges can
21 choose the services of any of the providers available for their needs both within these
22 exchanges and going from these exchanges out. The competitors serving in the relevant
23 markets have extensive facilities that they use to serve customers in cities across the nation.

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2 The need of some customers to go beyond the boundaries of their local wire center should not
3 limit their ability to reap the benefits of market based pricing and expanded competition.

4 As to WAISP's assertion that U S WEST failed to meet its agreement to alter the
5 tariff of its MegaCentral services to decouple it from DS1/DS3 service, WAISP is mistaken.
6 U S WEST filed a tariff on March 23, 1999 that resolved this WAISP concern.⁹⁵

7 U S WEST should be granted competitive classification for all of its high capacity
8 services given the expansive competition present and its complete lack of market power in
9 these exchanges.

10 **THE PUBLIC INTEREST IS BEST SERVED BY GRANTING U S WEST'S**
11 **PETITION FOR COMPETITIVE CLASSIFICATION OF HIGH CAPACITY**
12 **SERVICES**

13 Granting U S WEST's Petition Would Allow Competition To Flourish And Customers
14 To Reap Its Benefits.

15 The FCC held in its recent pricing flexibility order that "[a] significant market
16 presence [by competitors] . . . ensures that the incumbent will not be able to exploit *any*
17 monopoly power for a sustained period of time."⁹⁶ By the FCC's measure and by the measure
18 of the Competitive Classification statutes in Washington, a significant market presence exists
19 in each of the seven exchanges in which U S WEST has requested competitive classification.

20 The FCC further states that where significant competition exists in the market "delaying
21 regulatory relief imposes costs on carriers and the public, the latter of which is deprived of
22 the benefits of *more vigorous competition*."⁹⁷ These benefits include among other things,

22 ⁹⁵ See Attachment C.

23 ⁹⁶ FCC 99-206 at para. 153 (*emphasis added*).

⁹⁷ *Id.* at para. 92 (*emphasis added*).

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2 reduced regulatory costs, enhanced ability to react quickly to market demands, prices set by
3 market demands and more innovation in the market. This is the reason why organizations
4 such as WAISP support competitive classification of U S WEST's high capacity services.
5 The ISP members of WAISP depend on high capacity telecommunications services as a
6 lifeline for their businesses. Despite disagreement with WAISP over certain points, WAISP's
7 overall support of this petition is a prime example of customers seeking to gain the benefits
8 that competitive classification promises.

9 It could not be clearer that competition for high capacity services exists in the seven
10 exchanges included in this filing. The competitors are numerous. Their fiber in these regions
11 is voluminous. Their customer base is expansive and its growth is continuous. U S WEST
12 has no market power because of the extent of competition present. U S WEST, having
13 satisfied these criteria as set forth in WAC 480-120-022 and RCW 80.36.330 and having far
14 exceeded the FCC's new requirements for pricing flexibility, it is in the best interests of
15 consumers to allow the above benefits of competitive classification to take hold. U S WEST
16 strongly urges the Commission to grant competitive classification of all of U S WEST's high
17 capacity services in the Bellevue Glencourt, Seattle Campus, Seattle Duwamish, Seattle
18 Elliot, and Seattle Main exchanges and in the Spokane Riverside and Spokane Keystone
19 business districts as defined in U S WEST's amended petition.

20 **V. CONCLUSION**

21 Where effective competition exists in the market, customers are best served by
22 competitive classification of the competitive services. For the reasons set forth throughout
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the record in this case, and for those included herein, U S WEST respectfully requests that the Commission competitively classify U S WEST's high capacity services in the areas requested.

Dated this 24th day of September, 1999

U S WEST Communications, Inc.

Lisa A. Anderl, WSBA #13236