

1                   BEFORE THE WASHINGTON UTILITIES AND  
2                   TRANSPORTATION COMMISSION

3 In the Matter of the Petition )  
of QWEST CORPORATION to        ) DOCKET NO. UT-033044  
4 Initiate a Mass-Market         )  
Switching and Dedicated         ) Volume VII  
5 Transport Case Pursuant to     ) Pages 297 to 492  
the Triennial Review Order.     )  
6 \_\_\_\_\_)

7                   A hearing in the above matter was held on  
8 March 1, 2004, from 10:05 a.m to 5:00 p.m., at 1300  
9 South Evergreen Park Drive Southwest, Room 206, Olympia,  
10 Washington, before Administrative Law Judge ANN RENDAHL  
11 and Chairwoman MARILYN SHOWALTER and Commissioner  
12 RICHARD HEMSTAD and Commissioner PATRICK J. OSHIE.

13  
14                   The parties were present as follows:  
15                   THE COMMISSION, by JONATHAN THOMPSON,  
16 Assistant Attorney General, 1400 South Evergreen Park  
Drive Southwest, Olympia, Washington 98504-0128,  
17 Telephone (360) 664-1225, Fax (360) 586-5522, E-mail  
jthompso@wutc.wa.gov.

18                   THE PUBLIC, by SIMON FFITCH, Assistant  
19 Attorney General, 900 Fourth Avenue, Suite 2000,  
Seattle, Washington, 98164-1012, Telephone (206)  
389-2055, Fax (206) 389-2058, E-Mail simonf@atg.wa.gov.

20                   QWEST CORPORATION, by LISA ANDERL and ADAM  
21 SHERR, Attorneys at Law, 1600 Seventh Avenue, Suite  
3206, Seattle, Washington 98191, Telephone (206)  
345-1574, Fax (206) 343-4040, E-Mail  
22 lisa.anderl@qwest.com; and by TED SMITH, Attorney at  
Law, Stoel Rives LLP, 201 South Main Street, Suite 1100,  
23 Salt Lake City, Utah 84111, Telephone (801) 578-6961,  
Fax (801) 578-6999, E-mail tsmith@stoel.com.

24 Joan E. Kinn, CCR, RPR  
25 Court Reporter

1                   AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST,  
2 by REBECCA DECOOK and STEVEN WEIGLER, Attorneys at Law,  
3 1875 Lawrence Street, Suite 1575, Denver, Colorado  
4 80228, Telephone (303) 298-6357, Fax (303) 298-6301,  
5 E-mail decook@att.com; and by ROBERT M. POMEROY, JR.,  
6 Attorney at Law, Holland & Hart, 8390 East Crescent  
7 Parkway, Greenwood Village, Colorado 80111, Telephone  
8 (303) 290-1622, Fax (303) 290-1606, E-mail  
9 rpomeroy@hollandhart.com.

10                   ADVANCED TELCOM, INC., ESCHELON TELECOM OF  
11 WASHINGTON, INC., INTEGRA TELECOM OF WASHINGTON, INC.,  
12 GLOBAL CROSSING LOCAL SERVICES, INC., MCLEODUSA  
13 TELECOMMUNICATIONS SERVICES, INC., PAC-WEST TELECOMM,  
14 INC., TIME WARNER TELECOM OF WASHINGTON, LLC, and XO  
15 WASHINGTON, INC., by GREGORY J. KOPTA, Attorney at Law,  
16 Davis Wright Tremaine, LLP, 1501 Fourth Avenue, Suite  
17 2600, Seattle, Washington 98101, Telephone (206)  
18 628-7692, Fax (206) 628-7699, E-mail gregkopta@dwt.com.

19                   MCI, by MICHEL SINGER NELSON, Attorney at  
20 Law, 707 - 17th Street, Suite 4200, Denver, Colorado  
21 80202, Telephone (303) 390-6106, Fax (303) 390-6333,  
22 E-mail michel.singer\_nelson@mci.com; and by LISA F.  
23 RACKNER, Attorney at Law, Ater Wynne LLP, 222 Southwest  
24 Columbia, Suite 1800, Portland, Oregon 97201, Telephone  
25 (503) 226-8693, Fax (503) 226-0079, E-Mail  
lfr@aterwynne.com.

1                   COVAD COMMUNICATIONS COMPANY, by KAREN S.  
2 FRAME, Attorney at Law, 7901 Lowry Boulevard, Denver,  
3 Colorado 80504, Telephone (720) 208-1069, Fax (720)  
4 208-3350, E-mail kframe@covad.com.

5                   WEBTEC, by ARTHUR A. BUTLER, Attorney at Law,  
6 Ater Wynne LLP, 601 Union Street, Suite 5450, Seattle,  
7 Washington 98101, Telephone (206) 623-4711, Facsimile  
8 (206) 467-8406, E-Mail aab@aterwynne.com.

9                   FEDERAL EXECUTIVE AGENCIES, DEPARTMENT OF  
10 DEFENSE, by STEPHEN S. MELNIKOFF, Attorney at Law,  
11 Regulatory Law Office, U.S. Army Litigation Center, 901  
12 North Stuart Street, Suite 700, Arlington, Virginia  
13 22203-1837, Telephone (703) 696-1643, Facsimile (703)  
14 696-2960, E-Mail stephen.melnikoff@hqda.army.mil.

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1 P R O C E E D I N G S

2 JUDGE RENDAHL: Good morning, we're back on  
3 the record again in Docket UT-033044 in the Matter of  
4 the Petition of Qwest Corporation to Initiate a Mass  
5 Market Switching and Direct Transport Case Pursuant to  
6 the Triennial Review Order. I'm Ann Rendahl, the  
7 Administrative Law Judge presiding over this hearing  
8 with Chairwoman Marilyn Showalter and Commissioners  
9 Richard Hemstad and Patrick Oshie.

10 The focus of our hearings are Qwest's  
11 petition challenging the Federal Communications  
12 Commission's National findings of impairment concerning  
13 mass market switching and dedicated transport.

14 We will take brief appearances of the  
15 parties, and then we'll begin with the parties' opening  
16 statements beginning with Qwest for five minutes, and  
17 any other party that wishes to make an opening statement  
18 for five minutes, and then Qwest has five minutes of  
19 rebuttal.

20 So let's begin appearances with Qwest.

21 MS. ANDERL: Thank you, Your Honor, Lisa  
22 Anderl and Adam Sherr, in-house attorneys representing  
23 Qwest.

24 MR. SMITH: My name is Ted Smith with the law  
25 firm of Stoel Rives, also appearing for Qwest.

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1 JUDGE RENDAHL: Thank you, Mr. Smith.

2 For MCI.

3 MS. RACKNER: Lisa Rackner with the law firm  
4 of Ater Wynne appearing for MCI.

5 MS. SINGER NELSON: Michel Singer Nelson  
6 appearing on behalf of MCI.

7 JUDGE RENDAHL: For AT&T.

8 MS. DECOOK: Rebecca DeCook, and also today  
9 Mr. Steve Weigler will be appearing for AT&T. His  
10 address is the same as mine, his telephone number is  
11 (303) 298-6957, his E-mail address is weigler@att.com.

12 JUDGE RENDAHL: Thank you.

13 For the joint CLECs.

14 MR. KOPTA: Gregory Kopta of the law firm  
15 Davis Wright Tremaine, LLP on behalf of Advanced Telcom,  
16 Eschelon, Integra, Global Crossing, McLeod USA,  
17 Pac-West, Time Warner Telecom, and XO.

18 JUDGE RENDAHL: Thank you.

19 For Covad.

20 MS. FRAME: Karen Frame, in-house counsel for  
21 Covad.

22 JUDGE RENDAHL: And for Staff.

23 MR. THOMPSON: Jonathan Thompson, Assistant  
24 Attorney General for Commission Staff.

25 JUDGE RENDAHL: Thank you. And at our new

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1 back table for the Department of Defense and other  
2 Federal Executive Agencies.

3 MR. MELNIKOFF: Steve Melnikoff, Your Honor.

4 JUDGE RENDAHL: For Public Counsel.

5 MR. FFITCH: Simon ffitch, Assistant AG for  
6 Public Counsel, Your Honor.

7 JUDGE RENDAHL: And for WeBTEC.

8 MR. BUTLER: Arthur A. Butler of the law firm  
9 Ater Wynne for WeBTEC.

10 JUDGE RENDAHL: Thank you.

11 Okay, now I think we're going to start with  
12 opening statements beginning with Qwest.

13 (Discussion on the Bench.)

14 JUDGE RENDAHL: I distributed during the  
15 pre-hearing conference a flow chart which describes the  
16 decision making process for mass market circuit  
17 switching and for the dedicated transport portion. It  
18 indicates by letter each element that this Commission  
19 needs to determine, and it would help the Commissioners  
20 greatly if you could refer in your opening statements to  
21 those portions of the flow chart so we know where you're  
22 headed. This is where we're -- this is sort of a road  
23 map of where we're going.

24 A modification this morning for the benefit  
25 of the Commissioners, we are going to move the transport

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1 issues to April, so actually these two weeks in March we  
2 will be primarily addressing the mass market switching  
3 issue less the batch hot cut, so you don't need to  
4 really refer to the second page, and the batch hot cut  
5 issues are N, O, and P, so if you can -- I don't think  
6 we will be addressing batch hot cut and transport this  
7 morning. We'll probably do that separately in April,  
8 and so for your purposes this morning, just please  
9 address where you are on the main part of the mass  
10 market circuit switching chart.

11                   Okay, and with that I think we're ready to  
12 begin with Mr. Smith for Qwest. Please go ahead.

13                   MR. SMITH: Thank you very much. Members of  
14 the Commission, Judge Rendahl, my name is Ted Smith, and  
15 I'm here on behalf of Qwest. We appreciate the  
16 opportunity to briefly frame the critical issues in this  
17 case.

18                   The TRO is a lengthy order. It's very easy  
19 to get lost in its details. I think the challenge we  
20 all face with the many witnesses and thousands of pages  
21 of testimony is to not lose sight of the core principles  
22 that are inherent in that order. The core principles I  
23 believe can be boiled down into two statements.

24                   The first of these, which refers to area D on  
25 the mass market switching flow chart, is that if there



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1 is a sufficient level of competition, there is no  
2 competitive or legal reason for ILECs to be required to  
3 unbundle switching or transport. This principle relates  
4 to -- is typically referred to as the track 1 or the  
5 trigger test, and it's area D as I indicated.

6           Secondly, in the case of switching, even if  
7 existing competition is not widespread in some markets,  
8 there is no competitive or legal reason for ILECs to be  
9 required to unbundle switching if it is possible for a  
10 competitive carrier to operate economically without  
11 access to those unbundled elements. This is typically  
12 referred to as track 2, it's area F on the flow chart.

13           I think you will find that the vast majority  
14 of the discussion in these hearings refers to those two  
15 significant areas. I would ask the Commission as it  
16 weighs the evidence to evaluate the evidence that will  
17 be presented in the light of those two core principles.  
18 While reading the TRO is a laborious process, a careful  
19 reading of its 800 plus paragraphs discloses that the  
20 FCC has provided a well defined road map for applying  
21 these core principles in the making of the required  
22 decision.

23           As to the first of those principles, that  
24 unbundling is not required where there is a sufficient  
25 level of existing competition, the FCC standard is

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1 clear. For unbundled switching, there is a sufficient  
2 level of competition if there are three competitive  
3 carriers in a market that are serving mass market  
4 customers with their own switches. The FCC in the order  
5 has characterized this test as an objective bright line  
6 test that was intended to be easy to apply. Indeed FCC  
7 Commissioner Martin, one of the architects of the  
8 Triennial Review Order, recently stated that this three  
9 carrier trigger test is a pretty clear, easy test to  
10 apply. The single most important point I would like to  
11 make in this brief opening statement is that, is to  
12 reaffirm that point. The three carrier self  
13 provisioning trigger in the TRO is intended by the FCC  
14 to be a bright line and objective test and should be  
15 applied precisely in that manner.

16 I think the most significant area of  
17 disagreement in this case, certainly in this week, is  
18 how this bright line trigger test should be applied.  
19 AT&T and MCI want to turn it into a subjective,  
20 complicated exercise. They add numerous requirements  
21 that are neither discussed in nor contemplated by the  
22 Triennial Review Order. We will address these issues in  
23 great detail, but just a few examples. They would  
24 impose market share tests. They would impose a test of  
25 ubiquity. They simply ignore the market definition for

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1 mass market customers in the triennial review order and  
2 attempt to create submarkets. They even want you to  
3 look behind the motives of the carriers. These  
4 subjective factors are not relevant to the self  
5 provisioning trigger, they're not listed anywhere in the  
6 TRO, and by proposing them the CLECs are attempting to  
7 convert a straightforward test into a morass of  
8 subjective and imprecise measures.

9           The reason they do so I think is clear.  
10 After applying the test proposed by AT&T, not a single  
11 CLEC qualifies as a trigger candidate in a single wire  
12 center in the state of Washington, not even one. Yet  
13 Western Washington is one of the most competitive areas  
14 in the United States. So my key point to you today is  
15 if you take anything from this opening statement I ask  
16 that it be this point, please apply the self  
17 provisioning trigger test in the objective  
18 straightforward way it was intended.

19           Let me just quickly address the second core  
20 principle, which relates to the area F on the flow  
21 chart, which is the second principle that unbundling is  
22 not required where there are fewer than three self  
23 provisioning switches if it is nevertheless feasible for  
24 CLECs to operate economically with their own switching.  
25 The FCC view on this area is also clear. We're

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1 instructed to look at three factors. The extent to  
2 which carriers have deployed switching. In other words,  
3 even if it's less than three, actual deployment should  
4 weigh heavily. Mr. Teitzel addresses this issue.  
5 Second issue is whether business case models demonstrate  
6 that a hypothetical efficient CLEC could operate  
7 economically by serving mass market customers with its  
8 own switching. Mr. Copeland and Mr. Buckley address  
9 these issues. And then finally whether there are any  
10 operational barriers that would prevent a CLEC from self  
11 provisioning switching. Mr. Hubbard demonstrates that  
12 there are no such operational impediments.

13 I would stop at this point, thank you.

14 JUDGE RENDAHL: Thank you, Mr. Smith.

15 We'll proceed next with AT&T, Ms. DeCook.

16 MS. DECOOK: Thank you, Your Honor, good  
17 morning Chairwoman Showalter, other members of the  
18 Commission. I too would like to address what you have  
19 labeled in the chart as section D, the trigger analysis.  
20 And I think there are some core principles that you need  
21 to keep in mind. Mine are slightly different than those  
22 mentioned by Qwest. And I think these are principles  
23 that the FCC kept in mind as it drafted and decided its  
24 TRO decision. And that they are two.

25 First, the principle goal of the Act. The

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1 objective here is to assess the level of competition,  
2 keeping in mind that the principle goal of the Act was  
3 to ensure the development of competition in the local  
4 services market. With that in mind, I think the second  
5 question you should ask yourself as you assess the  
6 evidence in this case is if there is no UNE-P, will  
7 there be alternatives available in the marketplace to  
8 serve mass market customers. Because that is surely the  
9 focus of this proceeding, the mass market customer, both  
10 the small business customer and the residential  
11 customer.

12 Focusing on the trigger analysis, I agree  
13 that the test here is, is there a sufficient level of  
14 competition to ensure that the mass market customers  
15 will be served if you eliminate UNE-P. Where Qwest and  
16 AT&T differ is the scope of the trigger analysis. Qwest  
17 would have you believe that the switching analysis is  
18 simply a counting exercise, if there are three switches,  
19 CLEC switches, in a particular geographic area that  
20 serves one or two customers, that's sufficient to  
21 demonstrate that the impairments have been overcome. We  
22 disagree. We think that the impairment analysis is an  
23 analysis. It's more than just counting switches.

24 The FCC directs the states to conduct a  
25 granular analysis and that whatever analysis you do must

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1 be based on economic rationality. The FCC expects  
2 states to analyze the facts of switched deployment end  
3 usage, not just count to three. In doing your analysis,  
4 we believe that the Commission must review and evaluate  
5 the actual evidence of competition in the marketplace to  
6 ensure that there is sufficient competition to  
7 demonstrate that the barriers to entry have been  
8 overcome. And in doing so, you must apply reason and  
9 common sense in assessing whether a carrier does, in  
10 fact, qualify as a trigger.

11           The FCC has said to qualify as a trigger, the  
12 CLEC must be actively providing service using UNE-L and  
13 they're likely to continue to do so. We believe that  
14 these two factors underscore the FCC's intent that  
15 states apply reason and judgment to assessing the  
16 granular facts that are presented to you. In Washington  
17 we believe the facts will show that no matter what  
18 geographic definition you adopt that UNE-L mass market  
19 competition is so small that it barely registers on the  
20 radar screen. Nowhere does the UNE-L mass market market  
21 share for all of the CLECs that represent the combined  
22 triggers in this case exceed 1.6% of the total market.

23           Now if the objective here is to determine  
24 whether there is sufficient level of competition, the  
25 FCC has provided us some indicia as what it thinks is

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1 the appropriate level of market share that isn't enough.  
2 For example, in its order it stated that the level of  
3 competition, the 3% market share of cable competitors  
4 was not sufficient to have overcome the impairment. It  
5 also said that the 3% to 5% market share of wireless  
6 service providers was not sufficient. Also instructed  
7 in this consideration are the models that have been  
8 presented to you in this case. The models all assume  
9 that a 5% market penetration is required by a CLEC using  
10 UNE-L in order to demonstrate that it can be  
11 economically viable and have a sustainable market. The  
12 actual level of penetration for UNE-L in the state of  
13 Washington is a mere 1.6% at best. That's well below  
14 the 3% to 5% range that the FCC considered was not  
15 sufficient to show that impairment had been overcome on  
16 a national level.

17 In short, the evidence will show that Qwest  
18 has failed to overcome the national finding of  
19 impairment as it relates to mass market switching.

20 Thank you.

21 JUDGE RENDAHL: Thank you, Ms. DeCook.

22 For MCI.

23 MS. SINGER NELSON: Yes, thank you, Your  
24 Honor. Good morning Chairwoman Showalter,  
25 Commissioners. Ultimately this case is about consumer

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1 choice. You must ask yourselves at the end of this  
2 case, will mass market consumers continue to have the  
3 ability to choose local service providers. There are  
4 three broad areas of issues before you in the next  
5 couple weeks. The first is market definition, and  
6 that's in item A on the mass market circuit switching  
7 decision chart. The second is switching triggers, which  
8 both Qwest and AT&T have focused on this morning so far.  
9 Those are items D and E in the decision chart. And then  
10 the third broad areas, economic and operational  
11 impairment issues, which really is part of item F in  
12 your mass market circuit switching chart, the potential  
13 for self provisioning.

14           Each decision that you make in these broad  
15 areas must pass through the customer choice filter. For  
16 example, on the issue of switching triggers, the trigger  
17 test is not about potential deployment. Rather triggers  
18 evaluate evidence of actual CLECs that actually overcame  
19 the operational and economic barriers to serve mass  
20 market residential and small business customers using  
21 their own switch. So switching for a geographic area  
22 can not be triggered out so to speak unless and until  
23 every customer in that area has either three self  
24 provisioning or two wholesale carriers actually  
25 providing local service using their own switches.



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1 Therefore, triggering out UNE-P for all residential  
2 consumers in a broad geographic area on the basis of a  
3 more limited geographic entry by CLECs providing only  
4 business service not only violates the FCC's trigger  
5 test, it also will result in denial of consumer choice.

6           The FCC also asks you to evaluate potential  
7 deployment. Qwest's model makes incorrect assumptions  
8 concerning the length of time a CLEC can maintain a  
9 steady revenue stream. Revenues are too unpredictable  
10 and costs are too variable for the Commission to  
11 determine that any particular market is definitely  
12 economic. Until the economic and operational  
13 impairments are removed, mass market switching should  
14 remain available so that consumers can continue to have  
15 the choices that they have today. In sum, you want to  
16 prevent the situation where the Commission receives a  
17 phone call from a residential UNE-P consumer complaining  
18 that she lost her UNE-P local provider and has to switch  
19 back to Qwest, and all the Commission can say in return  
20 is, well, we found that three UNE-L providers provide  
21 local service in the market, but unfortunately none of  
22 them provide it to you.

23           That's all I have this morning.

24           JUDGE RENDAHL: Thank you.

25           For the joint CLECs, Mr. Kopta.

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1                   MR. KOPTA: Thank you, Your Honor, in the  
2 interest of conserving time, I believe we will simply  
3 concur in the opening statements of AT&T and MCI, thank  
4 you.

5                   JUDGE RENDAHL: Thank you.

6                   For Covad, Ms. Frame.

7                   MS. FRAME: Thank you, Your Honor. Members  
8 of the Commission, Chairwoman Showalter. In this case  
9 Covad requests that the Commission consider how it will  
10 also ensure nondiscriminatory access to combined voice  
11 and data services. That is our interest here. Because  
12 Qwest is challenging the FCC's finding of impairment in  
13 access to local circuit switching for mass market  
14 consumers, this Commission also must consider whether  
15 competitive local exchange carriers are impaired in  
16 their ability to operationally transition from the  
17 unbundled network element platform, UNE-P, to the  
18 unbundled network element loops and whether the CLECs  
19 are economically impaired in their ability to use UNE-L  
20 based on line splitting processes, rates, and OSS  
21 currently available from ILECs. And this directly  
22 relates to item F on your mass market circuit switching  
23 chart.

24                   The Triennial Review Order vested this  
25 Commission with a responsibility for determining the

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1 future of competition in Washington state in the  
2 residential voice market. Specifically the FCC  
3 delegated to the states the authority to determine  
4 whether competitors are entitled to UNE access to the  
5 incumbent's switching facilities in the residential or  
6 mass market. The competitors' ability to access the  
7 incumbent's switching facilities, however, is  
8 operationally and economically intertwined with their  
9 ability to provide their customers with data services.  
10 It's a key component in the future of competition in the  
11 residential voice market in Washington state, and with  
12 the ability of the competitors to provide the bundled  
13 voice and data product via line splitting. And that's  
14 basically what Covad would like the Commission to  
15 consider is whether or not the other competitors, namely  
16 even the data competitors, would be impaired if Qwest  
17 does meet the test in this case.

18 Thank you.

19 JUDGE RENDAHL: Thank you.

20 Mr. Thompson.

21 MR. THOMPSON: Thank you, good morning. The  
22 key issue for Staff in this case, like many parties, is  
23 the future of unbundled switching for the mass market.  
24 Without unbundled switching, of course there's no UNE-P.  
25 And you have become familiar with the importance of

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1 UNE-P as a result of the recent Qwest competitive  
2 classification case. Specifically Mr. Spinks' testimony  
3 provides a critique of Qwest's mass market switching  
4 case as it pertains to market definition, which is parts  
5 A and B on the chart. And he provides you with a sort  
6 of a high level road map for preserving the opportunity  
7 for UNE-P based competition to develop for the  
8 residential market and to continue to develop outside of  
9 the urban cores.

10 Staff's main concern is that you not adopt  
11 market definitions that are overinclusive, in other  
12 words, that sweep in market segments and geographic  
13 areas wherein which a finding of impairment is warranted  
14 with those in which it is not. And we propose that you  
15 do this in two ways. The first is we propose  
16 eliminating certain wire centers from the metropolitan  
17 statistical areas that Qwest has proposed as its  
18 markets. Even Qwest concedes that in many cases these  
19 wire centers do not meet the test for profitability for  
20 CLECs using their own switches. And secondly, we  
21 propose that you separate the mass market into  
22 residential and small business segments for your  
23 impairment analysis and keep open the opportunity for  
24 separate findings for both of those segments.  
25 Mr. Spinks uses Qwest's own financial model, the CPRO

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1 model, to show that if CLECs are required to use their  
2 own switches, that is if UNE-P is not available to them,  
3 it will not be economic for them to serve the average  
4 revenue residential customer in the market areas that  
5 they propose.

6 In a nutshell, Staff will be arguing in this  
7 case that you're not occluded in your discretion so much  
8 that you have to eliminate UNE-P for the broad mass  
9 market residential and very small business customers  
10 high and low revenue groups simply because you find that  
11 CLECs may have made inroads in the high revenue end of  
12 that broad mass market. Thank you.

13 JUDGE RENDAHL: Thank you.

14 Mr. Melnikoff.

15 MR. MELNIKOFF: Thank you, Your Honor. Good  
16 morning Chairwoman and Commissioners. I am appearing on  
17 behalf of the customer interests of the Federal  
18 Executive Agencies. Collectively the agencies are among  
19 the largest, if not the largest, users of  
20 telecommunications in the state of Washington. The  
21 agencies do not have access to unbundled network  
22 elements. However, the Commission's decisions as to the  
23 availability of UNEs, especially the mass market  
24 switching UNEs, will affect the ability of the agencies  
25 to obtain local telecommunications services from

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1 carriers other than incumbents.

2           It is the agencies' policy to solicit  
3 competitive bids for services whenever possible. Our  
4 interest is not limited to services provided to large  
5 facilities or facilities in urban areas. Rather the  
6 agencies vary widely in size and needs and include many  
7 in small rural offices. Whether small or large systems,  
8 However, the absence of effective competition means few,  
9 if any, choices, which translates to higher prices.  
10 Moreover, a strong competitive presence in the mass  
11 market local services enables competitors to have a  
12 viable presence to serve both large and small customers.  
13 We strongly advocate for a strong, vibrant, but fair  
14 competitive environment.

15           However, we do not seek here a  
16 reconsideration of the FCC's TRO determinations. We are  
17 participating in this proceeding to assess the Qwest  
18 proposal seeking elimination of the mass market  
19 switching UNE in the major population centers, areas so  
20 large that many rural areas will likewise be unserved by  
21 the now prevalent UNE platform, UNE-P. UNE-P has been,  
22 as the Commission emphasized in its 2003  
23 reclassification proceeding, the driver of competitive  
24 alternatives for customers throughout the state. The  
25 Commission should be sensitive that the results of a

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1 grant of Qwest's request in its entirety could seriously  
2 impact what the Commission did in the reclassification  
3 proceeding.

4           Our position on market definition trigger,  
5 track 2, is evolving and we'll await the completion of  
6 the hearings, but this much we know from the evidence  
7 which is sought to be introduced. The market, which is  
8 area A, should not be defined at either extreme the  
9 parties are advocating, but rather should start with an  
10 area such as the MSA, start. An analysis of the Qwest  
11 data, however, shows that there are many wire centers  
12 with no presence of self provisioning CLECs. It is  
13 questionable whether those wire centers should be  
14 included in the market, especially if they're small and  
15 far from major population center of the MSA. That  
16 action would implement the FCC's guideline that in  
17 defining the market the Commission should take into  
18 account in part the presence of competitors. Qwest did  
19 not do so.

20           As far as area D, the track, the trigger  
21 mechanism, Qwest moreover has taken we believe a more  
22 simplistic view of the task of identifying self  
23 provisioning carriers that qualify for inclusion in the  
24 trigger analysis. Some of their triggers should not be  
25 counted. Qwest appears to believe that the literal

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1 reading of the FCC's TRO rules only mandates inclusion.  
2 But one doesn't need to read much to see that the FCC  
3 directions in its underlying order and its rules in this  
4 regard are inconsistent and require the Commission to  
5 exercise some objective, not subjective, discretion to  
6 ensure that the spirit of the TRO in addition to the  
7 letter of the applicable rule are considered together.

8           Finally, we will assess whether there is as  
9 claimed no impairment under the TRO track 2, which is  
10 area F approach, recognizing that this is a complex  
11 analysis, while we reserve -- we will reserve our  
12 evolving conclusion in that regard until the brief.

13 Thank you.

14           JUDGE RENDAHL: Thank you.

15           Mr. ffitch.

16           MR. FFITCH: Thank you, Your Honor. Good  
17 morning Chairwoman Showalter and Commissioners. This  
18 case clearly has significance for Washington residential  
19 and business customers, and while due to resource  
20 constraints Public Counsel has not presented expert  
21 testimony, we are following the case closely and do  
22 intend to file post hearing briefs commenting on the  
23 evidence and the policy issues. We appreciate the  
24 opportunity to be heard in opening statements, and I  
25 want to emphasize concisely four key issues, and given



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1 where I am in the lineup, I'm going to be echoing a  
2 couple of things that you have heard already.

3           First, unbundling is a key mode of entry.  
4 The Telecom Act provides for three modes of entry to  
5 foster competition in the local market, and unbundling  
6 is one of those modes, and it has been critical to the  
7 emergence of competition in Washington. Phasing out  
8 unbundled switching and thereby eliminating UNE-P has  
9 the effect of severely curtailing a key mode of entry.  
10 And this should only occur if the Commission is very  
11 strongly persuaded by the evidence that competition for  
12 the mass market in Washington will not suffer.

13           Second point is consistency. The Commission  
14 should keep in mind, as others have noted, its recent  
15 decision in Qwest's competitive classification petition  
16 for business service. That decision placed significant  
17 weight on the availability and the use of UNE-P by  
18 competitors. The Commission should require consistency  
19 in Qwest's position between the two dockets and should  
20 achieve consistency in its own final decision.

21           Third point, the market definition is  
22 critical, and this is part A on the diagram. If the  
23 Commission selects a geographic market that's too large,  
24 there is a much greater risk of an erroneous  
25 determination as to impairment. The larger the market,

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1 the more heterogenous it is, and the more likely it is  
2 that a finding of nonimpairment will improperly gather  
3 up areas where no competition exists at all or where  
4 competition is heavily reliant on UNE-P and impairment  
5 would result from its removal. The larger the market,  
6 the further the definition strays from the FCC's  
7 direction to employ a granular analysis, to focus on the  
8 location of customers actually being served, and to  
9 define a geographic market which excludes areas where  
10 there's likely to be impairment.

11 We question whether the use of an MSA or a  
12 company wide service territory meets this test as  
13 opposed to a more granular bottom-up type of approach.  
14 The risk of an erroneous determination arising from an  
15 overbroad market definition can be significantly  
16 diminished in two additional ways. Echoing Staff here,  
17 we would urge the Commission to treat the residential  
18 and small business markets as separate markets based on  
19 their different characteristics. Secondly, and this is  
20 item C on the chart, the Commission should be cautious  
21 about increasing the number of lines used for the  
22 crossover from DSO to DS1 to a number much above the FCC  
23 default number.

24 My fourth and final point is that I would  
25 emphasize that the risks of a wrong decision are

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1 asymmetric. If the Commission makes a finding of  
2 impairment that is in fact in error, the impact on  
3 competition is neutral or even positive. Competitors  
4 can continue to serve consumers through use of  
5 unbundling via UNE-P, and the only real consequence is  
6 that Qwest would have to continue offering unbundled  
7 switching at wholesale rates. On the other hand, if the  
8 Commission determines that UNE-P need no longer be  
9 available to enable competition for large areas of the  
10 state and the Commission is, in fact, wrong, the  
11 emergence of competition in those areas will likely be  
12 reversed, and it's the residential and small business  
13 customers who will be the most affected, because they  
14 are the least economical to serve. So getting the  
15 market definition right can go a long way to minimizing  
16 the risk of an erroneous finding of nonimpairment.

17 Thank you for my time.

18 JUDGE RENDAHL: Thank you, Mr. ffitich.

19 Mr. Butler.

20 MR. BUTLER: Yes, from the standpoint of  
21 WebTEC, we are in a position I guess most similar to  
22 that of the Department of Defense in that our members  
23 are large businesses, most of their facilities would  
24 clearly qualify as enterprise customer locations and  
25 therefore are unaffected by, unaffected directly by the

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1 decisions to be made in this proceeding, because as  
2 enterprise customers, unbundled switching is not  
3 available to them or to the carriers that would provide  
4 service to them. We do have an overarching interest in  
5 a sound competitive marketplace, because we think that  
6 does affect the development of competition for our  
7 members. That being said, our members do have a number  
8 of locations where there are very small facilities, many  
9 of which are located outside the urban cores, and it  
10 would qualify as mass market customer locations. And so  
11 we have a direct interest in the results of this  
12 proceeding specifically with respect to those  
13 facilities.

14           From our standpoint, the key issues are what  
15 you have characterized as category A, which is the  
16 determination of the appropriate geographic market.  
17 From our perspective, that market definition should be  
18 sufficiently granular to capture differences in economic  
19 -- in operational conditions. We have not reached a  
20 final conclusion on what that ultimate definition ought  
21 to be. That will await the result of cross-examination  
22 in this docket. But the general principle is we think  
23 you need to look at it on as granular a level as  
24 practically possible in order to make a meaningful  
25 determination.

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1           The second key issue from our standpoint is  
2 area number C, which is the crossover point between mass  
3 market and enterprise market customers. The FCC's basic  
4 intent was that the Commission make a determination of  
5 when it became economically justifiable to serve  
6 customers on a DS1 or higher capacity circuit. We think  
7 that is an important inquiry in this proceeding. It's  
8 important not just from the availability of unbundled  
9 switching for this docket, but given the Commission's  
10 recent decision in the competitive classification  
11 proceeding for Qwest business services where the primary  
12 justification for finding that there was a constraint on  
13 Qwest's market power was the availability of UNE-P, that  
14 UNE-P is not available for a mass market customer. So  
15 again, from our perspective, the determination of that  
16 demark is important.

17           Next with respect to the self provisioning  
18 triggers, it's important to keep in mind that the  
19 rationale behind using an objective test for the self  
20 provisioning triggers is the assumption that actual  
21 entry into the market serving customers was the best  
22 evidence of whether there was impairment, but we believe  
23 that that does not justify the sort of naked counting  
24 exercise that was described by AT&T, that you need to  
25 apply common sense and keep in mind the purpose of the

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1 Telecommunications Act and make a meaningful  
2 determination about whether the candidates for trigger  
3 really do, their presence in the market really does  
4 indicate the absence of impairment.

5           Finally with respect to the analysis of the  
6 potential for self provisioning, in area number F, in  
7 our view the key issue there is whether the analysis of  
8 economic factors regarding self provisioning should use  
9 revenues of an average customer or revenues of just a  
10 high revenue customer. We think that is a critical  
11 issue for the Commission to make a determination of, and  
12 it will I think have a significant effect on whether you  
13 find that there would be a potential impairment or not.

14           JUDGE RENDAHL: Thank you, Mr. Butler.

15           Back to you, Mr. Smith.

16           MR. SMITH: Thank you very much. Let me just  
17 address two or three issues that have arisen in the time  
18 I have left. First is perhaps a couple of comments on  
19 what this case is not and what the CLECs are trying to  
20 make it. This case is not a referendum on whether CLECs  
21 or at least some CLECs like UNE-P. They do, they love  
22 it, and they want to keep it very badly, and that's why  
23 they're here opposing Qwest's position in this case.  
24 The FCC in the Triennial Review Order has made it very  
25 clear that this case is about impairment. When the

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1 federal Act allowed three modes of entry, and unbundled  
2 elements being one of them, they did so clearly in the  
3 context that you get those elements only where  
4 impairment exists. In the Triennial Review Order, the  
5 FCC has laid out a clear road map as to when impairment  
6 exists and when it does not. And while some of the  
7 CLECs here are going to continue to tell you this is all  
8 about why UNE-P is the entry strategy they want to  
9 maintain henceforth and forever more, the question that  
10 I believe the Commission needs to remain focused on is  
11 whether under the Triennial Review Order and the  
12 standards set forth therein impairment exists. That is  
13 the legal question that you are being asked to  
14 determine.

15           Second issue, common sense has come up  
16 several times in the course of the discussions today.  
17 Qwest believes that the order must be viewed from the  
18 perspective of reality and common sense. AT&T says, for  
19 example, that all Qwest wants to do is engage in a  
20 counting exercise. The irony of that statement is that  
21 when you apply the standards that they believe should  
22 apply for the self provisioning trigger, it's not a  
23 question of counting to three, it's the fact that under  
24 their analysis you never get to one anywhere. Those  
25 standards are clearly unreasonable and clearly were not

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1 what the FCC intended.

2 Another issue I think that is important, they  
3 talked about the fact that, well, we don't know that  
4 UNE-L is a viable entry strategy because the volumes  
5 aren't very high. I would ask you as you consider the  
6 evidence on this issue as to whether the volumes of  
7 UNE-L out there, and some carriers are using UNE-L to  
8 serve mass market customers, whether that might be  
9 impacted by the fact that UNE-P remains available and  
10 from a financial perspective is a far preferable entry  
11 strategy for some CLECs, yet others have moved beyond it  
12 and are moving beyond UNE-P.

13 A final point I would like to make refers to  
14 Ms. DeCook talked about the track 2 and the cost models  
15 that are utilized for determining whether potential  
16 deployment is available. AT&T's model, alternative  
17 model, is something I would ask the Commission to look  
18 at very carefully. The CLEC witnesses or the CLEC  
19 attorneys have told you this morning how important UNE-P  
20 is to them. Yet if you will analyze the BCAT model, the  
21 AT&T model, and instead of using UNE-L prices imported  
22 into that model you import UNE-P prices into the model,  
23 this entry strategy that is being utilized broadly by  
24 numerous CLECs under their model is showed not only to  
25 be mildly unprofitable, but hugely unprofitable. And I



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1 believe you -- I would recommend and ask you to look at  
2 that model very carefully in light of that. If UNE-P is  
3 all that they say it is, it is ironic that their very  
4 own model shows that it is -- has a -- produces a  
5 negative net present value.

6 In the end, the last point I would like to  
7 make is to reaffirm really the main point that I made in  
8 my opening comments, and that is apply the Triennial  
9 Review Order in the way it is written. Do not encrust  
10 it with barnacles of additional requirements that were  
11 neither contemplated by nor required by the Triennial  
12 Review Order.

13 Thank you.

14 JUDGE RENDAHL: Thank you, Mr. Smith.

15 I think what we're going to do now is take a  
16 five minute break so that we can bring Mr. Shooshan up  
17 to the stand, so we will be off the record until about  
18 just before 11:00, and then we will go through his  
19 cross-examination until a quarter to 12:00.

20 Thank you, we will be off the record.

21 (Recess taken.)

22 JUDGE RENDAHL: Before we proceed with  
23 Mr. Shooshan, we have a minor administrative detail,  
24 which is our exhibit list. In various prehearings we  
25 have marked a number of exhibits for identification, at

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1 this point it's Exhibit 1 beginning with Mr. Shooshan's  
2 direct testimony all the way through to Exhibit 628.  
3 Instead of reading all of those into the record, I will  
4 be providing a copy to the court reporter who can insert  
5 it into the record. And as we go through, the parties  
6 will offer and we will determine whether to admit  
7 various exhibits.

8 So with that, Mr. Shooshan, you're here.

9 THE WITNESS: I am.

10 JUDGE RENDAHL: And Ms. Anderl has alerted me  
11 that you have a few corrections to make to your  
12 testimony once we get started; is that correct?

13 THE WITNESS: Yes.

14 JUDGE RENDAHL: Okay. So please rise, state  
15 your full name and address, spelling any names and words  
16 that may not be common, could you state your name for  
17 the record, please.

18 THE WITNESS: Yes, I am Harry M. Shooshan,  
19 S-H-O-O-S-H-A-N. I am a principal in and co-founder of  
20 the consulting firm Strategic Policy Research,  
21 headquartered at 7979 Old Georgetown Road, Bethesda,  
22 Maryland.

23 JUDGE RENDAHL: Thank you, would you raise  
24 your right hand, please.

25 (Witness Harry M. Shooshan was sworn in.)

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1 JUDGE RENDAHL: Okay, please sit down.

2 THE WITNESS: Thank you.

3 JUDGE RENDAHL: And, Mr. Smith, please  
4 proceed.

5

6 Whereupon,

7 HARRY M. SHOOSHAN,

8 having been first duly sworn, was called as a witness

9 herein and was examined and testified as follows:

10

11 D I R E C T E X A M I N A T I O N

12 BY MR. SMITH:

13 Q. Mr. Shooshan, do you have your mike on there?

14 A. Yes, I do.

15 Q. All right.

16 JUDGE RENDAHL: Yes, if the button is up, the  
17 mike is on.

18 THE WITNESS: I'm active.

19 BY MR. SMITH:

20 Q. Mr. Shooshan, you have filed testimony in the  
21 three rounds that were available in this case, did you  
22 not?

23 A. Yes, I did.

24 Q. And that testimony very quickly is Exhibit  
25 1-T, which is your direct testimony redacted?

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1 A. Yes.

2 Q. 2-T, which is the confidential version of  
3 your direct testimony; 3-T, which is your response  
4 testimony; and attached to 3-T were three additional  
5 exhibits which are designated 4, 5, and 6; and then  
6 finally 7-T, which is your rebuttal testimony.

7 A. Yes.

8 Q. Does that constitute all of the testimony and  
9 exhibits that you have pre-filed in this case?

10 A. It does.

11 Q. Do you have any corrections that you need to  
12 make to that?

13 A. Yes, I do. All of those corrections, there  
14 are four corrections that are to be made to Exhibit 2-C,  
15 which is my direct testimony. First on page 25, line 3,  
16 the phrase above cost should read artificially low.

17 JUDGE RENDAHL: Mr. Shooshan, is that it  
18 reads, i.e., where facilities based competition exists  
19 or where retail rates are held above cost?

20 THE WITNESS: Correct.

21 JUDGE RENDAHL: And you're stating replace  
22 above cost with --

23 THE WITNESS: With artificially low, yes.

24 JUDGE RENDAHL: This is exhibit --

25 THE WITNESS: Exhibit 2-T.

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1 MR. SMITH: 2-TC.

2 THE WITNESS: 2-TC, page 25, line 3.

3 CHAIRWOMAN SHOWALTER: Oh, it's line 2 on  
4 ours.

5 JUDGE RENDAHL: It's line 2 on our version.

6 That's the problem sometimes with different versions.

7 Replace above cost with artificially low.

8 A. And that should be in quotes for the term  
9 artificially low.

10 Next, and these are minor references, page  
11 73, again these are all in 2-TC, Footnote 101, the  
12 testimony cite in that footnote should cite Paragraph 65  
13 instead of Paragraph 102.

14 Two pages further on on page 75, Footnote  
15 105, the citation there should be Paragraph 102 instead  
16 of 120.

17 And finally on page 81, again this is still  
18 in the same exhibit, Footnote 119, the cite there should  
19 be to the TRO, not to ID paragraph 511. So strike the  
20 ID and insert TRO.

21 BY MR. SMITH:

22 Q. Is that all your corrections?

23 A. It is.

24 JUDGE RENDAHL: Thank you.

25 Q. Mr. Shooshan, as corrected, if I were to ask

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1 you the questions that are set forth in the three sets  
2 of testimony that you filed, would your responses today  
3 be the same?

4 A. Yes, they would.

5 MR. SMITH: Judge Rendahl, we would move the  
6 admission of Exhibits 1-T, 2-TC, 3-T, Exhibits 4, 5, and  
7 6, and then finally 7-T subject to cross-examination.

8 JUDGE RENDAHL: Are there any objections to  
9 the admission of these exhibits?

10 MR. WEIGLER: No objection from AT&T.

11 JUDGE RENDAHL: Hearing no objection, they  
12 will be admitted.

13 MR. SMITH: And we would tender Mr. Shooshan  
14 for cross-examination at this point.

15 JUDGE RENDAHL: Thank you.

16 And I believe AT&T is going first, and that's  
17 by you, Mr. Weigler?

18 MR. WEIGLER: Correct. Thank you, Your  
19 Honor.

20

21 C R O S S - E X A M I N A T I O N

22 BY MR. WEIGLER:

23 Q. Good morning, Mr. Shooshan.

24 A. Good morning, Mr. Weigler.

25 Q. You're an attorney by training, correct?

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1 A. Yes.

2 Q. Okay. And have you ever tried cases before  
3 or done anything along those lines?

4 A. Have I tried cases before?

5 Q. Right.

6 A. No, I have done -- I did oral argument at one  
7 point, but I have not been a trial lawyer.

8 Q. Okay. So you're familiar with court rules  
9 through doing your appellate argument, and you taught  
10 law school, correct?

11 A. Correct.

12 Q. Now you have recently appeared in front of  
13 this Commission in the competitive cost classification  
14 case, haven't you?

15 A. Yes, I did.

16 Q. And that case involved Quest's petition for  
17 competitive classification of basic business services in  
18 the state of Washington, correct?

19 A. Yes.

20 Q. Okay. And Qwest's basic argument in that  
21 case, at least gathering from your testimony, was that  
22 the market for basic business services using analog loop  
23 was competitive in Washington, correct?

24 JUDGE RENDAHL: Mr. Weigler, you will need to  
25 slow down just a bit.





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1           A.     I think I heard a double negative in there.  
2 I hope I didn't say it that way. But yes, I believe I  
3 made a statement like that.

4           Q.     Now in this case, meaning the Triennial  
5 Review Order, you have testified that your  
6 interpretation of the trigger test is that a CLEC  
7 serving one customer with its own switch would count as  
8 a trigger candidate. Is that not true?

9           A.     Could you repeat that, please.

10          Q.     Sure. In this case, meaning the TRO.

11          A.     Mm-hm.

12          Q.     Triennial Review Order, you have testified  
13 that your interpretation of the trigger test in the  
14 Triennial Review Order is that a CLEC serving one  
15 customer with its own switch would count, in the  
16 relevant market, would count as a trigger candidate; is  
17 that true?

18          A.     That's what the TRO requires. The evidence  
19 that's been presented by Qwest in this proceeding goes  
20 far beyond that hypothetical.

21          Q.     Okay.

22          A.     But that is what the TRO requires.

23          Q.     And I asked you if that's your interpretation  
24 of the trigger test. If that was my question, your  
25 answer is yes?

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1 A. Is yes.

2 Q. Okay.

3 A. That's what a TRO requires.

4 Q. As long as there are three trigger candidates  
5 that meet that definition in the entire market, your  
6 interpretation of the TRO is that UNE-P would become  
7 available in that entire market area, correct?

8 A. Yes, that's what the TRO requires. That's  
9 not -- the evidence Qwest has presented goes far beyond  
10 that in this case.

11 Q. Okay, and please, I just asked you if that's  
12 your interpretation, and you will have a chance, your  
13 attorney, you know, you will have a chance on redirect  
14 to answer any questions that your attorney may have.

15 A. I just wonder whether we're going to be  
16 dealing with facts or hypotheticals, that's all.

17 JUDGE RENDAHL: Please direct your answers to  
18 the Bench, and let's keep the colloquy between to a  
19 minimum.

20 MR. WEIGLER: Sure.

21 BY MR. WEIGLER:

22 Q. Now you relied, in your competitive cost  
23 classification testimony, you relied on a Bear Sterns  
24 study which indicates that -- which said that AT&T would  
25 not exit the local services market if switching is

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1 removed. Did you not rely on that study in the --

2 A. I cited that in my testimony I believe, yes.

3 Q. Okay. Are you aware that AT&T has stopped  
4 offering service in states such as Indiana when UNE  
5 rates were raised, even when UNE rates were raised?

6 A. I understand that AT&T has its own particular  
7 approaches to entering the markets and that it has  
8 responded to certain decisions by certain states in  
9 certain ways. Specifically in Indiana I don't recall.

10 Q. Okay. In the competitive cost classification  
11 docket, meaning the one in this state, you testified  
12 that there's a direct relationship between a CLEC's  
13 ability to provide service offerings and the CLEC's  
14 ability to utilize Qwest's network. Is that not  
15 correct?

16 A. I very well could have said that. I think  
17 that's true.

18 Q. But in this docket you indicate that the  
19 purposes of determining a trigger candidate, it does not  
20 matter that a CLEC is either active or continuing market  
21 participation, correct?

22 A. No, must be actually serving customers,  
23 that's what the TRO requires.

24 JUDGE RENDAHL: Mr. Weigler, do you have a  
25 reference to the testimony that you're referring to?

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1                   MR. WEIGLER: Sure, it's on page 1-T, Exhibit  
2 1-T, page 23. And, Your Honor, I'm using 1-T as opposed  
3 to 2-T because I wanted to stay away from any  
4 confidential issues.

5                   JUDGE RENDAHL: That's fine.

6                   (Discussion on the Bench.)

7                   CHAIRWOMAN SHOWALTER: We don't even have  
8 1-T.

9                   JUDGE RENDAHL: Well, 1-T is the same as 2-T.  
10 It will have yellow pages that refer to the confidential  
11 information, so the bulk of 2-T is 1-T.

12                   CHAIRWOMAN SHOWALTER: Are the line numbers  
13 the same?

14                   JUDGE RENDAHL: My understanding is they are.

15                   THE WITNESS: Judge Rendahl, if I could,  
16 actually in my testimony there aren't even page -- there  
17 are only a handful -- there's one footnote, and then  
18 there are a couple of references to specific CLECS  
19 that --

20                   JUDGE RENDAHL: Let's be off the record for a  
21 moment.

22                   (Discussion off the record.)

23                   JUDGE RENDAHL: So we're --

24                   MR. WEIGLER: I'm sorry, I meant Exhibit 3-T,  
25 which is the responsive testimony, page 23.

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1 THE WITNESS: So it's 23 of 3-T.

2 MR. WEIGLER: Right.

3 JUDGE RENDAHL: And why don't you restate  
4 your question to the witness.

5 BY MR. WEIGLER:

6 Q. But in this docket, Mr. Shooshan, you  
7 indicate that:

8 For purposes of determining a trigger  
9 candidate, it does not matter that a  
10 CLEC is either active and continuing  
11 market participation; is that correct?

12 MR. SMITH: I'm going to object, is there --  
13 he indicated a page, I don't find that on this page.

14 JUDGE RENDAHL: Why don't you refer to a line  
15 reference, Mr. Weigler, if you can point the witness to  
16 a particular --

17 MR. WEIGLER: Sure, it's line 9 through 13.  
18 Dr. Cabe also asserts that:

19 To be counted as triggers, the CLEC must  
20 have active and continuing market  
21 participation. Is this a relevant  
22 criterion for the WUTC to consider?

23 And the answer is no.

24 JUDGE RENDAHL: Okay, and so please restate  
25 the question to the witness based on that.

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1 MR. WEIGLER: Sure, I could ask him --

2 BY MR. WEIGLER:

3 Q. Did you -- were you asked that question, and  
4 did you answer it no?

5 A. Yes, and I went on to clarify what I meant by  
6 no.

7 Q. And did you -- and you also were asked, must  
8 a CLEC reach a particular scale of operation to be  
9 considered a trigger candidate, and you answered that  
10 question no too, correct?

11 A. Yes, that's correct, it's Paragraph 114 of  
12 the TRO provides the FCC specifically rejected that  
13 approach.

14 Q. In the competitive cost classification  
15 docket, and this is Exhibit 10, page 8, you testified:

16 Competition should not be viewed in  
17 terms of --

18 A. Excuse me, could I get that open, please?

19 Q. Sure.

20 JUDGE RENDAHL: Exhibit 10, page 8,

21 Mr. Weigler?

22 MR. WEIGLER: Yes.

23 CHAIRWOMAN SHOWALTER: Mr. Weigler, I'm just  
24 going to ask you again to slow down, especially if  
25 you're reading a question. Even if you're reading it

0343

1 slowly, it's hard when one is reading for the listener  
2 to understand. It's just one of those things.

3 MR. WEIGLER: Sure.

4 CHAIRWOMAN SHOWALTER: It's just that talking  
5 conversationally to someone you can understand it better  
6 than if you're reading. I don't mean to say don't read,  
7 but if you do read, slow down.

8 MR. WEIGLER: Sure, and I'm just trying to  
9 stay within the hour time frame, but I will slow down.

10 THE WITNESS: So it's page 8 of Exhibit 10,  
11 my direct testimony on the competitive reclassification  
12 case, I'm there.

13 BY MR. WEIGLER:

14 Q. You testified:

15 Competition should not be viewed in  
16 terms of which provider actually owns  
17 the facilities.

18 A. Excuse me, could you point me to where on  
19 page 8, I just want to make sure I'm in the same --

20 Q. I will withdraw that question for now.

21 It's Exhibit 11, I'm sorry, Exhibit 11, page  
22 8.

23 A. Okay.

24 Q. And starting in the middle of the page,  
25 starting at line 9.

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1 A. Okay, just a minute, please.

2 Okay, I'm there.

3 Q. In the competitive cost classification docket  
4 you testified:

5 Competition should not be viewed in  
6 terms of which provider actually owns a  
7 facilities. A CLEC that chooses to use  
8 resale UNE loops or UNE-P owns that  
9 customer just as it would if it chose to  
10 serve the customer with its own  
11 facilities.

12 Did you not state that?

13 A. Yes, I did.

14 Q. Okay. In fact, in the competitive cost  
15 classification docket you testified, and it continues  
16 on:

17 The fact that Qwest owns the underlying  
18 wholesale facilities is not relevant to  
19 the consideration of whether or not  
20 effective competition exists in the  
21 retail market.

22 Did you not state that?

23 A. Yes.

24 Q. Okay. But in this docket, meaning the TRO,  
25 you argue, and I'm referring to Exhibit 3-T, page 28,



0345

1 are you there?

2 A. Yes.

3 Q. Okay, you argue that UNE-P is --

4 CHAIRWOMAN SHOWALTER: Mr. Weigler, give us a  
5 line number.

6 MR. WEIGLER: Oh, sure, I'm sorry, lines 12  
7 through 14.

8 BY MR. WEIGLER:

9 Q. You argue that:  
10 UNE-P is inferior competition because  
11 the supposed benefits of UNE-P are  
12 vastly overstated because under UNE-P  
13 the ILEC continues to provide the lion's  
14 share of the value added.

15 JUDGE RENDAHL: Is this page 28, line 12 of  
16 Exhibit 3-T?

17 Let's be off the record for a moment.

18 (Discussion off the record.)

19 JUDGE RENDAHL: We're at page 29, line 11.

20 BY MR. WEIGLER:

21 Q. You testified that:  
22 The supposed benefits of UNE-P are  
23 vastly overstated because under UNE-P  
24 the ILEC continues to provide the lion's  
25 share of value added while the CLEC's

0346

1 contribution is limited to retail  
2 functions.

3 Did you not state that?

4 A. Yes.

5 Q. Okay. And you also stated that UNE-P, on  
6 page 28, line 14, that UNE-P is completely "synthetic  
7 competition"; did you not state that?

8 A. No, that's what the D.C. Circuit  
9 characterized UNE-P competition as.

10 Q. Okay.

11 A. I'm simply quoting the D.C. Circuit in that  
12 case.

13 Q. But the --

14 A. And the statement that I made on page 29 is  
15 perfectly consistent with what I testified to in the  
16 business reclassification case.

17 Q. You adopted the finding that UNE-P  
18 competition is completely synthetic, correct?

19 A. I have cited what the court of appeals  
20 referred to UNE-P competition as.

21 Q. The sentence before it, you say that you find  
22 that the CLECs greatly exaggerate the benefits of UNE-P.  
23 Reading that with the next sentence it leads me to  
24 believe that you agree with the statement that UNE-P is  
25 completely synthetic.

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1           A.     I understand fully why the D.C. Circuit would  
2 take that view, but I think the point -- the fact of the  
3 matter was that in analyzing the market as it existed in  
4 Washington when we did the business reclassification  
5 case and I was privileged to testify here, at that point  
6 much of the competition one observed in the marketplace  
7 was from UNE-P. So I don't think the two are in  
8 conflict at all, and UNE-P competition is a real way of  
9 winning away the retail customer. That was the point  
10 that I made here.

11                     The point about value added is that since  
12 they are reprovisioning Qwest's underlying network, they  
13 are providing a limited value added in terms of their  
14 contribution to the total gross domestic product, much  
15 as the way a long distance carrier that's providing long  
16 distance service but is buying local access as an input  
17 provides only part of the value added of long distance  
18 service. That was the point. The two are not in  
19 conflict, they're very much I think logically connected.

20           Q.     Now in the TRO in this proceeding on Exhibit  
21 3-T, page 30, your view of -- you indicate your view of  
22 UNE-P, and you said:

23                     I regard UNE-P as primarily an arbitrage  
24 opportunity that enriches the CLECs but  
25 tends to depress more beneficial forms

0348

1 of competition.

2 Did you not state that?

3 A. Yes.

4 JUDGE RENDAHL: Mr. Weigler, I just note  
5 you're reading from line 9 through 11 of page 30 of  
6 Exhibit 3-T; is that correct?

7 MR. WEIGLER: Correct.

8 CHAIRWOMAN SHOWALTER: Also, Mr. Weigler,  
9 it's going to help all of us if you're going to refer to  
10 anything, give us the exhibit number, pause, give us the  
11 page number, pause, and then give us the line number,  
12 pause, then proceed to ask your question. Otherwise  
13 what's happening is while you're going on with your  
14 question, we're riffling through our books trying to  
15 remember what page number you said to what exhibit.

16 BY MR. WEIGLER:

17 Q. On Exhibit 11, page 11, lines 1 through 2.

18 A. Yes.

19 Q. You testified that:

20 The FCC's long awaited Triennial Review  
21 Order does not consider competition  
22 differently based on a means of  
23 providing service.

24 Correct?

25 A. Yes.

0349

1 Q. However, in this docket, Exhibit 1-T, page  
2 19, lines 10 through 12.

3 A. Sorry, could you slow down, give me that  
4 again, please.

5 Q. Sure, Exhibit 1-T, page 19, line 10 through  
6 12.

7 A. I'm sorry, the line numbers again on 19?

8 Q. 10 through 12.

9 A. 10 through 12, yes.

10 Q. You indicated that:

11 The TRO shows a preference for  
12 facilities based competition.

13 Correct?

14 A. I think the question there says:

15 Has the FCC and the courts articulated a  
16 preference?

17 And I answered that question yes.

18 Q. Okay, so the FCC's preference isn't found in  
19 the TRO, correct?

20 A. The FCC's preference is found in a variety of  
21 documents, only one of which is the TRO.

22 Q. Okay.

23 A. I think that the long-term objective of local  
24 competition, much as it was with terminal equipment and  
25 long distance, is that there be facilities based

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1 competition where it is economic to have it. So I think  
2 that's pretty clear, the FCC has made that clear, the  
3 courts have made that clear. That's all I'm saying  
4 here.

5 Q. Okay. Do you agree with me that UNE-P and  
6 resale are significantly similar because both involve  
7 the use of Qwest's network?

8 A. I think UNE-P is largely resale at a further  
9 discount, so yes.

10 Q. Now Exhibit 11, page 10,

11 A. Yes, I'm there.

12 Q. You testified that --

13 CHAIRWOMAN SHOWALTER: What line?

14 Q. I'm starting with line 12, you testified  
15 that:

16 The FCC found that the presence of  
17 resalers positively affects the growth  
18 of the market for telecommunications  
19 services.

20 Correct?

21 A. Yes.

22 Q. And you -- and starting -- following on with  
23 line 13 through line 17 that:

24 Resalers themselves have emphasized that  
25 resaler resells the quickest method of

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1           developing ubiquitous competition and  
2           that resale will be a particularly  
3           important market entry strategy for  
4           small businesses that can not afford the  
5           investments necessary to construct their  
6           own facilities or purchase unbundled  
7           networks.

8           Correct?

9           A.    I'm citing the FCC there, yes.

10          Q.    And that starting with line 9, that the FCC  
11 found that allowing resale -- or strike that.

12          A.    Just to clarify, I said I was quoting the  
13 FCC, I was quoting statements that were made by resalers  
14 themselves to the FCC as found in the docket footnoted  
15 there below.

16                   And again, the point I'm making here is --

17           JUDGE RENDAHL:  Mr. Shooshan, you will have  
18 an opportunity on redirect to explain anything you may  
19 need to through your attorney.

20          Q.    Now on Exhibit 11, page 9,

21          A.    Yes.

22          Q.    The first paragraph starting on line 6 and  
23 ending on line 12, and the question starts at line 3 and  
24 ends at line 5, you talk about the differences between  
25 UNE based competition and resale, at least in theory,

0352

1 and you state, the theory -- I will start with:

2 In the first place, I think it's  
3 misleading to accept Mr. Gates'  
4 generalization that UNE based  
5 competition is in effect resale. The  
6 theory behind unbundling was in part  
7 that it would permit competitors to  
8 create value added by developing  
9 innovative offerings if the ILECs were  
10 unwilling or unable to provide.  
11 Especially by combining Qwest network  
12 elements with their own facilities and  
13 software, CLECs claim that they are able  
14 to differentiate their offerings from  
15 Qwest.

16 Is that the -- that's your characterization  
17 of UNE-P, correct?

18 A. No, no, once again I think it's important to  
19 read what is said here and what I'm referring to. I am  
20 saying that, for example, CLECs, that last sentence you  
21 read, I say CLECs claim. I was simply saying that  
22 Mr. Gates' view that resale somehow wasn't an effective  
23 form of retail competition was belied by the fact that  
24 the CLECs themselves have suggested in many instances  
25 that it was. That's all I'm saying there.



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1 Q. Okay, but this is your characterization of  
2 what CLECs consider the benefit of UNE-P to be, correct?

3 A. I cite in that last sentence, Z-Tel's own  
4 representation, so it's my observation of what CLECs  
5 claim.

6 Q. Okay. Have you done any analysis to  
7 determine if Qwest offers every telecommunications  
8 offering as its competitors does, you personally,  
9 Mr. Shooshan?

10 A. No.

11 Q. Okay. And by combining Qwest network  
12 elements with a CLEC's own facilities and software, it  
13 could be possible for that CLEC to differentiate its own  
14 offerings from Qwest, correct?

15 A. It could, and I think the -- I think the  
16 matter that's relevant to this proceeding is whether  
17 there is anything special about UNE-P that provides the  
18 ability to do that. Indeed in some instances that I  
19 have examined, the asserted value added is just as much  
20 possible technically with UNE-L as with UNE-P or with  
21 even full service resale as opposed to UNE-P. So I  
22 think you have to specifically analyze each claim of  
23 what the CLECs say they're going to do and analyze for  
24 purposes of this proceeding whether somehow UNE-P is the  
25 without which not for that service.

0354

1                   Having said that, again, as I say elsewhere  
2 in my testimony, in the application of the TRO, there's  
3 a fairly defined set of decisions this Commission has to  
4 make and --

5                   JUDGE RENDAHL: Mr. Shooshan, I think you're  
6 going beyond the scope of the question.

7                   MR. WEIGLER: Thank you, Your Honor.

8 BY MR. WEIGLER:

9           Q.       Currently the TRO is what we're working off  
10 of, correct?

11          A.       Yes, that's what we're working off of.

12          Q.       And you testified in Connecticut, correct?

13          A.       I did.

14          Q.       Okay. For the Commission's reference I'm  
15 going to be referring to Connecticut testimony, which is  
16 Exhibit 9. I'm not there yet, so I won't give a page  
17 number, but I'm just getting you to the right reference.

18                   And I don't think we need to turn to the  
19 page, but you indicated in Connecticut and you will  
20 probably indicate here you're not here to offer your  
21 opinion, but to tell us what you think the TRO says,  
22 correct?

23          A.       Let me put it this way. I believe the TRO in  
24 most respects for purposes of this proceeding is very  
25 clear, and I have simply grounded my observations of

0355

1 what the TRO requires by specific references to the  
2 sections in the TRO. Where I have provided opinion I  
3 have labeled it as opinion, and where I have provided  
4 opinion that I feel is not relevant to this proceeding I  
5 have said that as well, in many instances saying I don't  
6 think it's relevant, but since the other side has raised  
7 it, I will give you my view. And that's the best way I  
8 can answer that question. So I have provided some  
9 opinions, but I have labeled them as such.

10 Q. Now although there are appeals pending, the  
11 Triennial Review Order is currently ordered, correct?

12 A. Yes.

13 Q. And you have indicated in your testimony that  
14 you don't necessarily agree with the TRO?

15 A. I think that's irrelevant for this  
16 proceeding, what any party feels or witness feels about  
17 the TRO. There are elements of it I obviously disagree  
18 with.

19 Q. Okay. You indicate and would you agree with  
20 me that the Washington Utilities and Transportation  
21 Commission should follow what the TRO actually says?

22 A. Yes, I do. And along those lines, I might  
23 say that, you know, the position that AT&T's counsel  
24 talked in arguing before the D.C. Circuit Court of  
25 Appeals on the TRO criticized the triggers test because

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1 he said it was objective. And yet what they're urging  
2 -- what AT&T and others are urging this Commission to do  
3 is to --

4 JUDGE RENDAHL: Mr. Shooshan --

5 Please go ahead. Go ahead, continue.

6 A. Not much more to add. I mean I think that it  
7 is pending, parties have objections to it, and I think  
8 it's interesting to observe the nature of some of the  
9 arguments that have been made before the D.C. Circuit to  
10 the extent that they conflict with positions that  
11 parties are urging this Commission to take, and the  
12 treatment of the triggers is a primary example.

13 Mr. Carpenter on behalf of AT&T argued that  
14 he thought the triggers were faulty in arguing to the  
15 Court of Appeals because they were objective and that he  
16 felt more needed to be considered, just as the  
17 intervenors have argued this Commission should do. What  
18 I have said is, particularly with regard to the  
19 triggers, it's pretty clear what the FCC intended, and  
20 that was the objective bright line test that was set  
21 forth in the TRO. So on the trigger side, I just -- I  
22 make that -- I make that point.

23 Q. Do you agree with the statement that:

24 Where the Commission's unbundling  
25 determination should be based on the

0357

1           TRO, the multiple ambiguities in the  
2           FCC's 485 page order creates some  
3           uncertainty concerning how the order  
4           should be applied.

5           A.     There are definitely ambiguities in the TRO,  
6     yes.

7           Q.     And a 485 page order can be rather -- any 485  
8     page order can be rather Talmudic; is that not correct?

9           A.     Yes, and I think if I could just elaborate  
10    briefly, it's very important when you're looking at that  
11    500 plus page order what sections you're referring to  
12    because the FCC, much as this Commission does when it  
13    renders an opinion, goes through many pages where it  
14    says on the one hand, on the other hand, this party  
15    argued, that party argued.  What's relevant it seems to  
16    me is to look through those pages and find where the FCC  
17    actually provides direction to the states.  There are  
18    far fewer than 500 hundred pages where that takes place,  
19    and more often than not I have tried to limit my  
20    observations and my references to the TRO to those  
21    sections, that is where the Commission has directed the  
22    state to do something and where the Commission has  
23    specifically rejected an argument made to it that  
24    parties here are saying this Commission should somehow  
25    reconsider.  And I have said, you don't relitigate it

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1 here, you relitigate it in the Court of Appeals.

2 Q. Okay, but this Commission needs to look at  
3 the entire order; is that not correct?

4 A. It certainly should, yes.

5 Q. Okay. And, in fact, that's, as I asked you  
6 before, you're an attorney, and that's relevant case  
7 law, you look at the rules, and you look at the order to  
8 determine the FCC's intent; is that not correct?

9 A. I would say yes qualified with the  
10 qualification I gave in my previous answer, that you  
11 have to separate the, if you will, the wheat from the  
12 chaff, there's muscle and there's fat there so to speak.

13 Q. Okay, and that's up for this Commission to  
14 determine, correct?

15 A. And it can start by looking at the rules  
16 themselves and then work back from there to the TRO,  
17 which is an elaboration on the rules.

18 Q. Okay. And the TRO has made a pretty bright  
19 line finding that on a national basis the competing  
20 competitors are impaired without access to local circuit  
21 switching for mass market customers; is that correct?

22 A. Yes, based on the FCC's concern about the hot  
23 cut issue.

24 Q. Okay. Now I noticed in your testimony, and  
25 I'm referring to Exhibit 1-T, that you utilized a lot of

0359

1 paragraphs of the TRO to make your points. For example,  
2 you utilized Paragraph 141 on page 15 of your direct  
3 testimony, you utilized --

4 A. Excuse me, can I just get there, please?

5 Q. Sure.

6 JUDGE RENDAHL: Could you repeat the page  
7 reference.

8 MR. WEIGLER: Sure, page 15.

9 JUDGE RENDAHL: And the reference is to  
10 paragraph 141, Mr. Weigler?

11 MR. WEIGLER: Right.

12 THE WITNESS: Yes.

13 BY MR. WEIGLER:

14 Q. You utilized Paragraph 141 of the FCC order?

15 A. Yes.

16 Q. And on Exhibit 1-T, page 18, you utilized  
17 Paragraph 64 of the FCC order?

18 A. Sorry, where is that again?

19 Q. On page 18.

20 A. Page 18.

21 Q. 1-T.

22 A. Yes, I cite the FCC's having cited Justice  
23 Breyer there, yes, that's correct.

24 Q. All right. So what you are basically doing  
25 is, for lack of a better term, pulling various

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1 paragraphs to review the intent of the FCC, correct?

2 A. I'm giving you certainly in this section of  
3 my testimony my opinion as to how the courts and the FCC  
4 are seeking to interpret these issues, that's correct.

5 Q. Okay.

6 A. When I go to the application of the tests  
7 that are laid out for the Commission, I believe the  
8 references in my testimony are to applicable provisions  
9 in the relevant sections of the TRO and of the rules.

10 Q. Now, in fact, you spell out on Exhibit 1-T,  
11 page 26, lines 6 through 10, you kind of put together a  
12 road map on what you believe this Commission should do  
13 based on your reading of the TRO. And you say, the  
14 first thing you say, is you indicate that this  
15 Commission should begin following steps outlined in the  
16 TRO.

17 A. Yes.

18 Q. Now the next line, you state:

19 Keeping in mind the admonition by the  
20 courts that the FCC must apply a  
21 limiting standard on the scope of  
22 unbundled elements that is rationally  
23 related to the goals of the Act.

24 A. Yes.

25 Q. Okay. And so under your -- we talked about



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1 that the Commission needs to look at the order and the  
2 rules, and you said you absolutely believe that that's  
3 the truth?

4 A. Yes.

5 Q. Okay. And now under your interpretation,  
6 this Commission should not only look at the rule, the  
7 order, but also the appropriate case law precedent,  
8 correct?

9 A. Yes, absolutely.

10 Q. Now, in fact, there's case law on deference  
11 to administrative agencies, is there not?

12 A. Yes.

13 Q. Okay. And the Commission should be free to  
14 look at that case law also, correct?

15 MR. SMITH: Your Honor, I am going to object  
16 here.

17 THE WITNESS: Beyond the scope.

18 MR. SMITH: There's a lot of discussion of  
19 the TRO and a lot of legal opinions being expressed  
20 here, but this question goes far beyond into a more  
21 general question of what deference courts give  
22 administrative agencies, and I don't believe that's  
23 addressed in Mr. Shooshan's testimony, so it not only  
24 calls for a legal conclusion, but it's beyond the scope  
25 of his testimony.

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1 JUDGE RENDAHL: Mr. Weigler.

2 MR. WEIGLER: Judge, first, he has been  
3 designated -- he's an attorney, and he's testifying to  
4 what the -- what court cases this Commission should look  
5 at. And how, number two, how to interpret how this  
6 Commission should interpret the Triennial Review Order  
7 and what discretion this Commission has, which he argues  
8 this Commission has very little. The fact is there is a  
9 line of cases, and I can present the cases to the  
10 Commission but I was saving it for briefing, that the  
11 Commission has a substantial amount of leeway as an  
12 administrative agency to impose the TRO as it deems  
13 appropriate. Because of that, not only is it relevant,  
14 but it's in his line of examination, and he's qualified  
15 as an attorney to answer that question.

16 JUDGE RENDAHL: Thank you, we will be off the  
17 record for a moment.

18 (Discussion on the Bench.)

19 JUDGE RENDAHL: We will allow the question,  
20 but it does seem that if you're going to go much further  
21 in this vein of legal analysis that it may make more  
22 sense on brief. I understand that Mr. Shooshan is a  
23 lawyer and is stating some legal opinion, but I think it  
24 depends on how far you wish to go in this vein.

25 MR. WEIGLER: I'm pretty much done, basically

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1 that vein has been tapped.

2 JUDGE RENDAHL: Okay, why don't you restate  
3 the question to the witness, and we'll get an answer.

4 BY MR. WEIGLER:

5 Q. This Commission should be free to look at  
6 case law in deference to administrative agencies also,  
7 correct?

8 A. No, I think that here unlike when this  
9 Commission is interpreting its own enabling statute or  
10 law of this state, the Commission's authority comes from  
11 the statute and through -- from the statute through the  
12 FCC. Obviously as you're well aware, there are some  
13 parties that are arguing that the FCC delegated too much  
14 decision making authority to the states. So all I'm  
15 saying here is that in making its decision, the states  
16 should consider first the specific requirements and  
17 language of the TRO, but then also keep in mind what the  
18 courts have said. This is not a case of first  
19 impression for the federal courts. This is the third  
20 time the FCC has tried to come up with an impairment  
21 standard and a UNE policy. And as far as deference to  
22 the administrative agency, I would point out that the  
23 court decision I am referencing here is one of many or  
24 several instances where the courts rejected the FCC's  
25 interpretation of the statute, said they had gotten it

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1 wrong, and that the unnecessary unbundling that the FCC  
2 had allowed to take place was contrary to the statute.  
3 So I think there's a fairly defined set of decisions  
4 that the Commission has to make in this case because it  
5 is dealing with delegated authority from the FCC under  
6 the TRO. That's my opinion anyway.

7 Q. And you have opened, with your answer you  
8 have opened just a very brief legal vein if I could  
9 explore it. You quote that the courts have interpreted  
10 the FCC's impairment standard twice, correct?

11 A. Yes.

12 Q. Okay. Now the first time is the Iowa  
13 Utilities Board U.S. Supreme Court case, correct?

14 A. Yes.

15 Q. And that dealt with the FCC's first order,  
16 correct?

17 A. Correct.

18 Q. Which does not deal -- which is not the same  
19 impairment test that the FCC articulates in the  
20 Triennial Review Order, is it?

21 A. No, this is the third time, as I said, the  
22 FCC has attempted to articulate an impairment standard,  
23 and none of them today have been found, you know, upheld  
24 by the courts.

25 Q. Okay. And now the second case you cite is

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1 the USTA case, which is a D.C. Circuit court case,  
2 correct?

3 A. Yes.

4 Q. And that dealt with the UNE Remand Order?

5 A. Correct.

6 Q. For lack of a better term. And the UNE  
7 Remand Order was a different definition of impairment  
8 that's found in the TRO; is that correct?

9 A. That's correct.

10 Q. Okay.

11 A. Also rejected by the courts.

12 Q. Okay. Now the next sentence in going back to  
13 page 26, line 9 through 10, the next sentence of your  
14 interpretation on how the Commission should interpret  
15 the TRO is that you state:

16 Mandatory unbundling when there is no  
17 impairment undermines lasting  
18 competition.

19 Are those your words?

20 A. Those are my words, and that I think is a  
21 fair characterization of the way the courts have handled  
22 this issue. But the USTA court for example said that  
23 the only unbundling, the only time unbundling is  
24 warranted is when the UNE is unsuitable for competitive  
25 supply. That doesn't mean any time a competitor wants

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1 it and particularly in this case where you observe that  
2 there are competitors using other forms of unbundled  
3 elements, UNE loop for example, using their own  
4 switching, that's a good example of exactly what the  
5 court had in mind when it said that unnecessary  
6 unbundling is contrary to the Act.

7 Q. Now your -- when you -- so you're saying this  
8 is within your own words but based on what courts have  
9 interpreted, correct?

10 A. This particular statement here is my  
11 observation, but I believe it's grounded in what the  
12 court -- how the courts have handled this issue.

13 Q. And the citations would be the USTA case and  
14 the Iowa Utilities Board case?

15 A. Yes.

16 Q. Okay. And in the Iowa Utilities Board Case  
17 you cite Justice Breyer, correct, his concurring  
18 opinion?

19 A. I have at places, yes.

20 Q. Okay. And do you -- your observation or your  
21 opinion, do you agree with Justice Breyer's finding?

22 A. In what respect?

23 Q. Okay, for example --

24 A. He's a smart man. I used to work with him on  
25 The Hill when I was there. He was on the Senate side, I

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1 was on the House side.

2 Q. I have heard he is a bright guy.

3 A. He is.

4 Q. Paragraph 64 of the TRO summarizes Justice  
5 Breyer's opinion.

6 A. I'm sorry?

7 Q. Paragraph 64 of the --

8 A. Of the Triennial Review Order?

9 Q. -- of the Triennial Review Order.

10 JUDGE RENDAHL: Let's be off the record for a  
11 moment.

12 (Discussion off the record.)

13 JUDGE RENDAHL: Okay, so we will begin with  
14 the TRO Exhibit 115 after the lunch break, so we're off  
15 the record, and we'll be back at 1:30, thank you.

16 (Luncheon recess taken at 11:45 a.m.)

17

18 A F T E R N O O N S E S S I O N

19 (1:20 p.m.)

20

21 JUDGE RENDAHL: We're continuing  
22 Mr. Weigler's cross-examination of Mr. Shooshan. Go  
23 ahead, Mr. Weigler.

24 MR. WEIGLER: Thank you, Your Honor.

25

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1 C R O S S - E X A M I N A T I O N

2 BY MR. WEIGLER:

3 Q. Good afternoon, Mr. Shooshan.

4 A. Good afternoon.

5 Q. We were in the middle of talking about  
6 needing to look at the various courts' interpretations  
7 of the order and the rule, correct?

8 A. Yes.

9 Q. Okay. And we were talking about your  
10 statement, mandatory unbundling when there's no  
11 impairment undermines lasting competition, correct?

12 A. Yes.

13 Q. Now that seems close to -- and we were  
14 referring to Paragraph 64 of the Triennial Review Order.

15 JUDGE RENDAHL: And that is Exhibit 115 for  
16 the record.

17 MR. WEIGLER: I apologize, Exhibit 115.

18 BY MR. WEIGLER:

19 Q. And that seems rather close to, starting on  
20 the 7th line:

21 On the other hand, Justice Breyer  
22 expressed his view that unbundling can  
23 have significant administrative and  
24 social cost inconsistent with the Act's  
25 purposes.



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1                   Is that somewhat where you pulled the concept  
2 that mandatory unbundling when there's no impairment  
3 undermines lasting competition?

4           A.       Well, I wasn't relying just on Justice  
5 Breyer, it was relying on the observations one would  
6 make in looking as we went through this morning at the  
7 fact that the FCC has tried now for the third time to  
8 find impairment, and in each case the court has told the  
9 commission that, so far anyway, that they got it wrong.  
10 And part of the rationale for the court's decision in  
11 each case was the fact that the FCC had in effect  
12 allowed for unnecessary unbundling, that is unbundling  
13 of UNEs that were otherwise could be competitively  
14 supplied. Or in the first instance, the initial set of  
15 rules, in effect it was an unbounded or unlimited  
16 unbundling requirement as the court read it.

17                   So all I'm saying is that each step of the  
18 way the court has told the commission that it has to  
19 pare back if you will or redefine what is impairment and  
20 therefore what UNEs are subject to that standard.  
21 That's all I'm saying here. And, you know, I'm -- to  
22 the extent Justice Breyer has addressed that, as other  
23 opinions have, I would be referring to that, yes.

24           Q.       So I really need to understand what you said.  
25 You just told -- I asked you if mandatory unbundling

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1 when there's no impairment underlies lasting  
2 competition, where you got that concept from, and you  
3 said, to paraphrase your lengthy answer into a couple  
4 words, you said that it's from the various court  
5 opinions striking the impairment analysis?

6 A. Yes.

7 Q. Okay. But part of it is from what Justice  
8 Breyer said about unbundling having significant  
9 administrative and social costs?

10 A. What Justice Breyer is talking about here and  
11 what the commission, this is the FCC characterizing his  
12 views, are that what Justice Breyer is saying, you know,  
13 there are certainly pluses and minuses that must be  
14 considered. That's, boiling it down to a -- to its  
15 synthesis, that's what -- that's what Breyer's view is.  
16 What he's saying is, and this is what the court ended up  
17 saying in the Iowa Utilities Board cases, the FCC never  
18 considered those trade offs, i.e., that there were  
19 substantial societal and administrative costs in having  
20 unnecessary unbundling.

21 Q. Okay, and you --

22 A. And the court is telling the FCC it must  
23 subsequently do that, that that's the thrust of this,  
24 and this is the FCC's recognition that, in its latest  
25 attempt to define impairment, that it has tried to

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1 address those kinds of concerns.

2 Q. Now you would acknowledge that Justice Breyer  
3 as you indicated said that there were pluses and minuses  
4 to unbundling?

5 A. Absolutely, as indeed there are.

6 Q. Okay, and you agree with that?

7 A. I do.

8 Q. Okay.

9 A. I don't dispute the fact that there -- that  
10 if a -- an element is unsuitable for competitive supply,  
11 which was the standard in the USTA decision, that that  
12 UNE should continue to remain available.

13 Q. Now you indicated that Mr., and I went up to  
14 the court reporter before and I took your exact words,  
15 that Mr. Carpenter argued that the triggers were faulty  
16 in arguing to the Court of Appeals because they were  
17 objective. Did you not state that?

18 A. What I -- what I -- let me state what my  
19 understanding is of what Mr. Carpenter argued.

20 Q. I'm asking, did you say that exact statement,  
21 because that's what I got directly off the court  
22 reporter.

23 A. May I put his -- may I put his statement in  
24 context? Mr. Carpenter was responding to arguments that  
25 were made by the incumbent local exchange carriers that

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1 there was an impermissible delegation of authority to  
2 the states and that one of the arguments the ILECs made  
3 to the court of appeals has been that it was this sort  
4 of unbounded discretion that were given -- that was  
5 given to the states. There were too many decisions, the  
6 FCC had abdicated its responsibilities. And Carpenter  
7 said, well, you can't be objecting to the triggers,  
8 because the triggers are objective. In fact, that was a  
9 problem that AT&T found with them. That's what I was  
10 saying, and I'm saying so it's a little bit unnerving to  
11 me to see AT&T saying in the Court of Appeals that these  
12 are objective and coming here and saying, well, they're  
13 really not objective, you should read into them what you  
14 want. That's all I'm saying.

15 Q. Was that in the D.C. Circuit Court?

16 A. That was in the oral argument appeal of the  
17 TRO.

18 Q. Okay.

19 A. In January, yes.

20 MR. WEIGLER: And I pulled the oral argument  
21 that you referred to, if I could pass these exhibits out  
22 to the witness.

23 JUDGE RENDAHL: Let's be off the record.

24 (Discussion off the record.)

25 JUDGE RENDAHL: While we were off the record,

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1 Mr. Weigler distributed what's now been marked as  
2 Exhibit 22. It is a transcript of Mr. Carpenter's  
3 argument before the D.C. Circuit Court of Appeals in  
4 USTA versus FCC on January 28th, 2004.

5 Please go ahead, Mr. Weigler.

6 BY MR. WEIGLER:

7 Q. Mr. Shooshan, first, is this the argument  
8 that you were referring to?

9 A. Yes, it appears to be.

10 Q. And where does Mr. Carpenter at all criticize  
11 the FCC's Triennial Review Order?

12 A. Well, you're misstating what I said. The  
13 passage that I'm referring to is on page 47 of this,  
14 sorry, what did we label this exhibit?

15 JUDGE RENDAHL: What's been marked as Exhibit  
16 22.

17 A. 22, Exhibit 22. Again, I have two pieces of  
18 it, but it's on page 47, which is in the second  
19 compilation here, and if I could read you the sentences  
20 that I have reference to starting at line 4.

21 I'm not sure what the scope of the  
22 court's objection to the delegation is.

23 And this is after there's been oral argument  
24 where it's been very clear right out of the box that the  
25 Court of Appeals is I believe sympathetic to the

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1 arguments about delegation of authority. He said:

2 I take it there can be no objection to  
3 the delegation of pure fact finding.

4 For example, the FCC's determination of  
5 whether there are, in fact, three  
6 providers on a particular route, because  
7 that's --

8 JUDGE RENDAHL: Slow down.

9 THE WITNESS: I'm sorry.

10 A. (Reading.)

11 For example, the FCC's determination of  
12 whether there are, in fact, three  
13 providers on a particular route, because  
14 that's what the whole scheme is. The  
15 FCC adopts the regulations and under 252  
16 of the Act the states apply the  
17 regulations.

18 It's pure -- I mean I think his -- what says  
19 it all is on line 6, to the delegation of pure fact  
20 finding. That's really what in the context of the  
21 triggers is what the states in my view have been asked  
22 to do, pure fact finding, not interpretive fact finding,  
23 not to relitigate issues that were resolved in the TRO,  
24 but to apply the facts, to count the numbers.

25 Q. Mr. Shooshan, that's really outside the scope

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1 of what I asked you. You indicated before and I read it  
2 from the court reporter that you -- AT&T but through  
3 Mr. Carpenter was critical of the trigger analysis and  
4 saying it was faulty because the triggers were  
5 objective, and where in this transcript do you see that?

6 A. If I stated it in that context, then I would  
7 like to correct what I said to simply say that --

8 Q. No, you can do that through redirect.

9 MR. SMITH: Your Honor, I do object with  
10 counsel arguing with the witness. He was legitimately  
11 trying to explain the comment he made earlier.

12 JUDGE RENDAHL: Could you please explain what  
13 you interpreted, but let's keep moving.

14 A. If I said, and I will take it subject to  
15 check that I said it was critical of the triggers, I  
16 would correct that. I would say his characterization of  
17 the triggers before the Court of Appeals was that they  
18 were pure fact finding, a delegation of pure fact  
19 finding, and that's very different in my view from  
20 what's being argued to this Commission by AT&T in this  
21 case, which is that the Commission should go beyond --  
22 behind the triggers and do a variety of what I would  
23 call subjective determinations as to whether the  
24 triggers should apply, and if so, how. That's all the  
25 point I was making, and there's no discrepancy there in

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1 my view.

2 CHAIRWOMAN SHOWALTER: Are you going to be  
3 offering this?

4 JUDGE RENDAHL: Yes, it's been marked, I  
5 assume you're going to offer --

6 MR. WEIGLER: Oh, yes, I will.

7 CHAIRWOMAN SHOWALTER: Well, if it is, it  
8 seems to me that we need what comes before it, because  
9 on page 46, line 24, Mr. Carpenter is saying, with your  
10 indulgence, I would like to say a word about delegation,  
11 and I don't know, but it appears that he's picking up on  
12 some kind of theme that occurred before, which also may  
13 put his comments and maybe Mr. Shooshan's  
14 characterization, I don't know, in context. But when we  
15 get something like this, I think we need the whole  
16 context, so I think I'm asking, I don't know how, well,  
17 46, I guess it must begin with page 1 at least through  
18 this.

19 MR. WEIGLER: Absolutely, Your Honor. At  
20 first I didn't think that was necessary because  
21 Mr. Shooshan had made one statement, now he's changed  
22 his statement, so to the extent that he has changed his  
23 statement, to the extent that the court or the  
24 Commission think that the entire record becomes  
25 necessary, I can supplement.



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1 JUDGE RENDAHL: Well, I don't think we need  
2 the entire transcript, but I think that to the extent  
3 that there are pages prior to 46 that speak to the issue  
4 of the delegation and --

5 CHAIRWOMAN SHOWALTER: Well, let's just have  
6 pages 1 through 46, I don't want a selection of pages.

7 JUDGE RENDAHL: Okay, so if you could provide  
8 pages 1 through 45, then it will complete the exhibit.

9 MR. WEIGLER: And that will be no problem.  
10 And do you want -- I don't know exactly when -- right  
11 now I'm sitting here, but I will --

12 JUDGE RENDAHL: I'm not asking --

13 MR. WEIGLER: -- try and do it.

14 JUDGE RENDAHL: If you can do it in the next  
15 day or two, that would be great.

16 MR. WEIGLER: Sure.

17 JUDGE RENDAHL: Thank you.

18 MR. WEIGLER: May I continue?

19 JUDGE RENDAHL: Please go ahead.

20 MR. WEIGLER: Thank you.

21 BY MR. WEIGLER:

22 Q. And so what you basically advocate for is an  
23 objective reading of the Triennial Review Order,  
24 correct?

25 A. A literal reading of the TRO, yes.

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1 Q. Okay.

2 A. Which I believe is an objective test when it  
3 comes to the triggers. That's what I'm saying.

4 Q. Okay. Now we are going to move on the  
5 Commission's diagram to C, which deals with the  
6 crossover point. On page 56 and 57 of your direct  
7 testimony --

8 A. Yes.

9 Q. -- you indicate, and we're talking about line  
10 19 and starting to 57, line 4, you indicate:

11 The FCC also stated we expect in those  
12 areas where the switching carveout was  
13 applicable, the appropriate cutoff will  
14 be four lines absent significant  
15 evidence to the contrary. We are not  
16 persuaded based on this record that we  
17 should alter the Commission's previous  
18 determination on this point.

19 Did you -- that's part of your direct  
20 testimony, correct?

21 A. Yes, it's largely a quote from the TRO.

22 Q. Okay. I refer you to Exhibit 115, which is  
23 the Triennial Review Order, paragraph, oh, Footnote  
24 1545.

25 JUDGE RENDAHL: That would be on page 317.

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1 Q. Have you had the opportunity to review that  
2 footnote?

3 A. Yes.

4 Q. Okay. And I will read it into the record:  
5 Because the previous carveout only  
6 applies where new EELs were made  
7 available and because this commission  
8 allowed state commissions to require  
9 switching to be unbundled even in areas  
10 where the carveout test was met, it  
11 appears that the four line carveout was  
12 adhered to in very few areas in the  
13 country.

14 And it gives a site.

15 As part of their analysis, we expect  
16 states to make a finding of whether or  
17 not the carveout was in effect.

18 Do you know if Qwest has implemented the  
19 carveout in actual practice in Washington?

20 A. I do not.

21 Q. Now this is going to -- we're going to talk a  
22 little -- I don't know where it fits exactly into this  
23 graph, but you talked about, it's probably D, but you  
24 talked about, or it's actually A talking about  
25 geographic markets, you talk about intermodal

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1 competition and how it should affect the market  
2 definition, correct?

3 A. Yes.

4 Q. Okay. And in Exhibit 1-T at page 69, lines 1  
5 through 3.

6 JUDGE RENDAHL: Page 69, 1 through 3?

7 MR. WEIGLER: Yes.

8 BY MR. WEIGLER:

9 Q. You indicate that:  
10 There is sufficient intermodal  
11 competition, especially from wireless  
12 carriers, to lead the Commission to a  
13 finding of no impairment.

14 Correct?

15 A. No, you have misread my statement. Maybe you  
16 should read the whole sentence.

17 Q. Okay, and I will read the whole sentence into  
18 the record.

19 However --

20 A. Actually, maybe going back -- actually, to  
21 put it in context, the entire answer which starts with,  
22 except to the extent.

23 Q. Okay.

24 Except to the extent that cable  
25 companies are operating as CLECs, Qwest

0381

1           does not rely on intermodal competition  
2           for its mass market switching trigger.

3           A.     So I'm not saying that they should beyond  
4 what Qwest has.

5           Q.     And I apologize, I will rephrase that. We  
6 both acknowledge that Qwest isn't using wireless  
7 competition in its analysis.

8           A.     Its triggers analysis.

9           Q.     In its triggers analysis, correct.

10          A.     Yes.

11          Q.     Okay. But indicate if the Commission gets to  
12 a close call that there's sufficient enough intermodal  
13 competition, especially from wireless carriers, to kind  
14 of tip the scales, correct?

15          A.     Yes, and what I had in mind there was more  
16 track 2 where the Commission is able to make much more  
17 subjective judgments about the extent of potential  
18 competition, that in doing the analysis there where the  
19 FCC gives them a variety of different things to look at,  
20 that there they could certainly consider and should  
21 intermodal competition other than that that's been  
22 included in the triggers case. That would be, for  
23 example, wireless or voice over Internet protocol. So  
24 yes, I do think it -- in fact, the FCC has mandated and  
25 the courts have mandated the FCC to mandate that

0382

1 intermodal competition be examined. So Qwest is only  
2 including it in the triggers to the extent that the  
3 cable company involved is a certificated CLEC.

4 Q. Okay. Now you also indicate on page 70,  
5 lines 15 through 17, where significant, and we're  
6 talking about Exhibit 1-T:

7 Where significant numbers of customers  
8 view intermodal services as substitutes  
9 for wireline services, competition  
10 exists that is not impaired without  
11 unbundled local switching.

12 Did you not state that?

13 A. Yes.

14 Q. Now I refer you to Exhibit 8. Do you have  
15 that in front of you, Mr. Shooshan?

16 A. I will shortly, yes.

17 Yes, I do.

18 Q. Okay. Now this article discusses -- have you  
19 had the opportunity to review it? Did I ask that  
20 already?

21 A. I have.

22 Q. Okay. This article discusses possible  
23 impediments to the merger of AT&T Wireless and Cingular?

24 A. Yes.

25 Q. Regulatory impediments.

0383

1 A. Dow Jones Business News Wire Service, yes.

2 Q. Okay. One impediment that is discussed is  
3 that:

4 Wireless is advanced enough or  
5 competitive enough that any merger may  
6 monopolize the industry. At least  
7 that's what consumer groups have argued.  
8 Correct?

9 A. Yes.

10 Q. Now the article says, and I'm quoting, and  
11 it's the third paragraph down:

12 But an antitrust attorney and analyst  
13 both say that the concept isn't likely  
14 to create serious issues for the merger.  
15 One reason is that few households have  
16 cut the cord to their wireline phone and  
17 gone wireless.

18 So there's another view to your position on  
19 wireless services; is that not correct? That was stated  
20 on page 70, lines 15 through 17.

21 A. I mean I don't think what's -- what you read  
22 from this wire service story is in conflict with what I  
23 said in my testimony.

24 Q. Okay, fair enough.

25 My last question for you is if I could just

0384

1 go back to a statement you made on Exhibit 3-T, page 28.

2 A. Page 28?

3 Q. Mm-hm.

4 A. Okay.

5 Q. I'm sorry, it's page 29, lines 11 through 13.

6 I made the same mistake before.

7 A. Yes, we talked about this this morning I

8 think.

9 Q. Right. And you stated -- my question to you  
10 is, is it your view that retail functions in the economy  
11 generally provide very little value added?

12 A. No.

13 MR. WEIGLER: No further questions.

14 JUDGE RENDAHL: Thank you, Mr. Weigler.

15 MCI has requested 20 to 30 minutes of cross.

16 Ms. Rackner, are you ready to go?

17 MS. RACKNER: Thank you, Your Honor,

18 Commissioners, Mr. Shooshan.

19

20 C R O S S - E X A M I N A T I O N

21 BY MS. RACKNER:

22 Q. Mr. Shooshan, you stated earlier that you are  
23 here testifying as an attorney; is that correct?

24 A. No, I'm here testifying as a policy analyst.

25 Q. Thank you. But by training you are not an



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1 economist, you don't have a degree in economics?

2 A. I don't have a degree in economics. I don't  
3 think the economics that the Commission is called upon  
4 to examine in this case need somebody with a Ph.D. to  
5 examine, but no, I'm not an economist.

6 Q. I understand, thanks.

7 There was quite a bit of conversation earlier  
8 this morning about the relative merits of UNE-P  
9 specifically as it relates to the incentives on CLECs or  
10 possibly ILECs as well to deploy their own facilities.  
11 Am I properly characterizing the discussion this  
12 morning?

13 A. I recall we did get into that, yes.

14 Q. Would you agree though that the Commission  
15 here today does not need to resolve whether or not UNE-P  
16 positively or negatively incents deployment of  
17 infrastructure?

18 A. Certainly in applying the triggers part of  
19 the case I would argue they may not consider that.

20 Q. Okay, thank you. And I believe you so stated  
21 in your rebuttal testimony.

22 A. I tried to make it clear, as I said this  
23 morning, where I'm citing what I believe the TRO  
24 requires and then what my own opinion is on some of the  
25 what I will call peripheral issues that have been raised

0386

1 by some of the parties, yes.

2 Q. Thank you. I would like to direct you to  
3 page 46 of your direct testimony, lines 6 through 9.

4 JUDGE RENDAHL: And that's Exhibit 1-T or 2-T  
5 depending on what you're looking at.

6 A. I'm sorry, page number again?

7 Q. 46.

8 A. Okay.

9 Q. Are you there?

10 A. Yes, page 46.

11 Q. Right. And at line 6 you make a statement:

12 There is no preordained method for  
13 determining the scope of geographic  
14 markets, and the FCC offers very little  
15 guidance for divining one other than  
16 declaring that a market can not include  
17 an entire state, while stating that it  
18 must be large enough to allow the CLEC  
19 to take advantage of economies of scale.

20 Am I correctly quoting your testimony?

21 A. Yes.

22 Q. And so it appears to me in your testimony  
23 that you are referring to two factors that the FCC has  
24 asked the Commissions to take into account when they're  
25 defining the market; is that correct?

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1                   The first one being that the market can not  
2 include an entire state while stating that it must be  
3 large enough to take economies of scale; is that  
4 correct?

5           A.       Those are the bounds in effect that one gets  
6 from reading the TRO, yes.

7           Q.       Okay. And referring to the TRO, I take it  
8 you're referring to page 495?

9                   CHAIRWOMAN SHOWALTER: Paragraph?

10          Q.       Excuse me, Paragraph 495.

11          A.       That's where the discussion of defining the  
12 market begins, yes.

13          Q.       Okay. And indeed the FCC does refer to each  
14 of those factors. Do you have your TRO out?

15          A.       Yes, I do.

16          Q.       Okay. At the top of page 315 there's a  
17 statement that corresponds with your statement that:

18                   State commissions have discretion to  
19                   determine the contours of each market,  
20                   but they may not define the market as  
21                   encompassing the entire state.

22                   Am I quoting that correctly from the TRO?

23          A.       I believe I have read that before. I'm  
24 trying now to locate that on page 315.

25          Q.       Yeah, at the very top of the page in mine.

0388

1 JUDGE RENDAHL: It would be the third  
2 sentence in the Paragraph --

3 THE WITNESS: Oh, yeah --

4 JUDGE RENDAHL: -- 495.

5 THE WITNESS: -- Paragraph 499.

6 JUDGE RENDAHL: No, 495.

7 THE WITNESS: 495.

8 JUDGE RENDAHL: Paragraph 495, I believe  
9 you're referring to the third sentence in that  
10 paragraph; is that correct, Ms. Rackner?

11 MS. RACKNER: Yes, I am.

12 THE WITNESS: So it's page 311, okay.

13 MS. RACKNER: Yeah, we must have different  
14 versions.

15 THE WITNESS: Maybe we do.

16 MS. RACKNER: Okay, well, I'll make sure we  
17 go slowly.

18 THE WITNESS: All right.

19 MS. RACKNER: Okay, but you have me there?

20 THE WITNESS: You're in Paragraph 495?

21 MS. RACKNER: Yes.

22 THE WITNESS: Yes.

23 BY MS. RACKNER:

24 Q. And that is the first factor that you refer  
25 to in your testimony. But if you drop down several

0389

1 lines there's a statement as well that corresponds with  
2 your second statement that:

3 States should not define the market so  
4 narrowly that a competitor serving that  
5 market alone would not be able to take  
6 advantage of available scale and scope  
7 economies from serving a wider market.

8 Am I quoting that correctly?

9 A. Yes.

10 Q. Okay. So in between those two factors that  
11 are contained in Paragraph 495 under defining the  
12 market, there's squeezed in a little bit more guidance  
13 from the FCC. I'm wondering if you would read to me the  
14 sentence starting with the word, rather.

15 A. I thought you were going to ask me the one  
16 starting with, while, but --

17 Q. Oh, yes --

18 A. (Reading.)

19 Rather state commissions must define  
20 each market --

21 I'm not -- is that the right sentence?

22 Q. Yes.

23 A. (Reading.)

24 On a granular level, and in so doing  
25 they must take into consideration the

0390

1 locations of customers --

2 JUDGE RENDAHL: Please read more slowly for  
3 the court reporter and us too.

4 THE WITNESS: I apologize.

5 JUDGE RENDAHL: Thank you.

6 A. (Reading.)

7 And in so doing they must take into  
8 consideration the locations of customers  
9 actually being served, if any, by  
10 competitors, the variation in factors  
11 affecting competitors' ability to serve  
12 each group of customers, and  
13 competitors' ability to target and serve  
14 specific markets economically and  
15 efficiently using currently available  
16 technologies.

17 Q. Thank you. So do you agree that those are  
18 some additional factors that the FCC does provide to  
19 give guidance to the Commission?

20 A. Yes.

21 Q. And also there is could you please read  
22 Footnote 1537, which is also referred to in those lines.

23 A. It says:

24 For example, if competitors with their  
25 own switches are only serving certain

0391

1           geographic areas, the state commission  
2           should consider establishing those areas  
3           to constitute separate markets.

4        Q.     And is that also guidance that the Commission  
5     should take into account in this case?

6        A.     Yes.

7        Q.     Thank you.  You have stated in your testimony  
8     that you support Qwest's proposal that the Commission  
9     use MSAs as the geographic market in this case?

10       A.     Yes, I think that's a reasonable  
11     specification.

12       Q.     Thank you.

13       A.     For the relevant geographic market.

14       Q.     And you have also stated that you support  
15     Qwest's proposal that the finding of impairment in the  
16     six MSAs that they have indicated ought to be  
17     overturned; is that correct?

18       A.     Yes, I believe there's adequate evidence to  
19     overturn them, yes.

20       Q.     Okay.  Would you also agree with me that  
21     there are a number of wire centers in those six MSAs for  
22     which Qwest's own analysis concludes that neither the  
23     trigger test nor the potential deployment test is  
24     satisfied?

25       A.     Yes.

0392

1 Q. And I want to refer you to your I believe  
2 it's in your rebuttal testimony, you have provided some  
3 revised figures which show just that subject that we  
4 were talking about.

5 A. Yes.

6 Q. I will direct you to page 19, it's pages 19  
7 through 21.

8 JUDGE RENDAHL: Of which exhibit, please?

9 THE WITNESS: 7-T.

10 JUDGE RENDAHL: Thank you. And it's pages?

11 MR. SMITH: 19 through 21.

12 JUDGE RENDAHL: Thank you.

13 BY MS. RACKNER:

14 Q. Okay, could you please indicate whether there  
15 are wire centers in revised figure 1 which would  
16 indicate that Qwest has neither found the trigger  
17 satisfied or made a finding of, a positive finding for  
18 potential deployment?

19 A. Yes, but may I explain?

20 Q. Well, first, tell you what, first let's go  
21 through these, and if you need to make a further  
22 explanation when we're done, we'll come back to that.

23 A. Fine.

24 Q. Thanks. But you do agree, I mean I just want  
25 to make sure that you don't disagree, that there are



0393

1 wire centers in figure 1 showing the Seattle MSA for  
2 which there is not either a positive business case or a  
3 positive finding on the trigger analysis; is that  
4 correct?

5 A. Yes.

6 Q. And could you just read off those wire  
7 centers for which neither of the tests are satisfied?

8 A. In Seattle MSA that would be Maple Valley,  
9 Enumclaw, and Black Diamond. Numclaw, I'm sorry.

10 Enumclaw, am I right the first time, I  
11 apologize.

12 Q. And I want to refer you to page 20, the same  
13 exhibit, and could you give me the same information for  
14 the Tacoma MSA, could you read the names of the wire  
15 centers for which neither the trigger analysis or the  
16 positive business case analysis has been satisfied?

17 A. Yes, those -- there are three in Tacoma as  
18 well, that would be Buckley, Roy, and Crystal Mountain.

19 Q. Okay. And I'm dropping to the bottom of the  
20 page, revised figure 3, are there any wire centers  
21 falling into the same category in the Portland-Vancouver  
22 MSA, the Washington portion?

23 A. Yes.

24 Q. And could you name that wire center?

25 A. Battleground.

0394

1 Q. I'm moving to page 21.

2 A. Yes.

3 Q. And we're looking at figure 4, which shows  
4 the Olympia MSA, are there any wire centers for which  
5 there's neither a positive business case or a positive  
6 or satisfaction of the triggers?

7 A. Yes.

8 Q. And could you read those wire centers?

9 A. Olympia, Evergreen, and Rochester.

10 Q. I'm moving down to the Bremerton MSA, are  
11 there any wire centers that fall into that category?

12 A. Yes.

13 Q. Could you read them for me, please.

14 A. Port Orchard, Bainbridge Island, Colby,  
15 Crosby, and Sunny Slope.

16 Q. Okay. And for each of those wire centers,  
17 there's neither a positive business case or satisfaction  
18 of the triggers?

19 A. That's correct.

20 Q. And then finally we're moving to the  
21 Bellingham MSA, are there any wire centers that fall  
22 into that category?

23 A. Yes, the Bellingham Loomie wire center.

24 Q. Thank you.

25 A. Now can I explain?

0395

1 Q. Well, do you think anything that -- any of  
2 your answers have been misleading that you need to  
3 explain?

4 A. I think that they need to be -- we need to  
5 make sure for the record and for the Commission that  
6 we're interpreting those empty boxes correctly, yes.

7 Q. Well, I think we'll leave that then to  
8 redirect. Unless you think that you have answered any  
9 of my questions in a misleading manner, I think we ought  
10 to leave that to redirect.

11 A. Fine.

12 Q. Thank you.

13 I believe that you may have missed the Tacoma  
14 Graham wire center in your reading of the wire centers  
15 for which there is not --

16 A. Oh.

17 Q. -- either the satisfaction of the triggers or  
18 a positive business case.

19 A. That's correct, because you have not -- you  
20 haven't -- we have not been focusing up to now on those  
21 wire centers where that didn't meet the triggers or the  
22 positive business case but where there are actual CLECs  
23 with deployed switches.

24 Q. Yeah, I didn't ask you about that.

25 A. You didn't, okay.

0396

1 Q. Okay.

2 A. Then Graham should be included.

3 Q. Thank you.

4 A. And that was one of the clarifications I  
5 wanted to make at one point, but.

6 Q. Okay. I want to have you turn to page 46 of  
7 your direct testimony, which I believe is 1-T or 2-T in  
8 the highly confidential.

9 JUDGE RENDAHL: Could you repeat the page  
10 number.

11 MS. RACKNER: 46.

12 JUDGE RENDAHL: Thank you.

13 BY MS. RACKNER:

14 Q. We were earlier -- are you there?

15 A. Yes.

16 Q. We were earlier looking at the top of that  
17 first Q&A, but I want to now direct your attention to a  
18 line towards the bottom of that Q&A is a statement that  
19 you make:

20 Firms usually refrain from entering --

21 JUDGE RENDAHL: Excuse me, is this on line  
22 12?

23 MS. RACKNER: It is, thank you.

24 JUDGE RENDAHL: Thank you.

25 BY MS. RACKNER:

0397

1 Q. (Reading.)  
2 Firms usually refrain from entering at  
3 the same time all geographic areas where  
4 entry is economically feasible. Initial  
5 entry typically occurs where the  
6 expected benefits are greatest, and  
7 expansion occurs over time to areas that  
8 are expected to add value.

9 Is that part of your testimony?

10 A. Yes.

11 Q. Thank you. I want to turn you now to an  
12 exhibit that was marked as a cross-exhibit for you, it's  
13 Exhibit 15, and specifically it's the first page on  
14 Exhibit 15, 264, and if you will just indicate for me  
15 when you get there.

16 JUDGE RENDAHL: And when you say 264, that's  
17 the bate stamped number that appears on the bottom of  
18 the page?

19 MS. RACKNER: That is.

20 A. Yes.

21 BY MS. RACKNER:

22 Q. Are you there?

23 A. Yes, I am.

24 Q. And 264 is a data request that was served  
25 upon you by my client, MCI, and the request states as

0398

1 follows. Well, first of all, refers you to the line we  
2 just looked at:

3           And firms usually refrain from entering  
4           at the same time all geographic areas  
5           where entry is economically feasible.

6           And the question that was put was:  
7           Please describe the basis for this  
8           statement and provide complete copies of  
9           any documents supporting this statement.

10          And the response, the first sentence is:  
11          The basis of this statement is logic and  
12          common observation.

13          And I just want to make sure that I  
14 understand that by not providing any documents, you  
15 didn't have any documents supporting that statement; is  
16 that correct?

17          A.     I think the statement is common sense, that's  
18 what I tried to say there, yes.

19          Q.     That is what you said, okay. But there were  
20 also no documents supporting the statement; is that  
21 correct?

22          A.     Well, I took the supporting the statement  
23 being that I relied upon, I relied upon common sense. I  
24 could probably find you many chapters of many books in  
25 business texts that would support what I said here, but.

0399

1 Q. But you didn't provide them, did you?

2 A. No, I didn't provide them.

3 Q. Okay.

4 A. I didn't think that was what I was being  
5 asked to provide.

6 Q. Okay. And then your statement that:  
7 Firms can not grow at an arbitrarily  
8 rapid rate. The growth rate must be  
9 limited in order to avoid failures in  
10 delivery of satisfactory product or  
11 service. Given that the growth rate is  
12 limited, it takes times to expand  
13 operations into all geographic areas  
14 where entry is economically feasible.  
15 Is that correct?

16 A. Yes.

17 Q. Okay. And I just wanted to ask you about an  
18 assumption that I believe might have underlay your  
19 statement or your response. Does your analysis rely on  
20 the assumption that over some period of time carriers  
21 who have entered a market where the benefits are the  
22 greatest will, in fact, expand their services or  
23 operations to those areas where in other places in the  
24 market where the benefits may not be as great?

25 A. Often that's what we observe in many markets,

0400

1 not just in telecommunications.

2 Q. I want to turn you to Qwest's supplemental  
3 response to Staff Bench Request Number 1. That's the  
4 document that I handed to you earlier this afternoon.

5 JUDGE RENDAHL: And that's, I'm sorry, that's  
6 the supplemental response to Bench Request 11?

7 MS. RACKNER: And I believe the exhibit  
8 number --

9 JUDGE RENDAHL: It should be Exhibit 535 and  
10 536HC.

11 MS. RACKNER: Thank you. And I apologize to  
12 counsel, because this was a new, a revised exhibit that  
13 we just got today, I didn't mark it correctly, so there  
14 may be some confusion in the way I have marked it.

15 JUDGE RENDAHL: Let's be off the record for a  
16 moment so I can clarify. We will be off the record.

17 (Discussion off the record.)

18 JUDGE RENDAHL: While we were off the record,  
19 we have marked another exhibit, it is Exhibit 546HC. It  
20 is Qwest's second supplemental response to Bench Request  
21 Number 11 including highly confidential attachment D.

22 Please proceed, Ms. Rackner.

23 MS. RACKNER: Thank you.

24 BY MS. RACKNER:

25 Q. Mr. Shooshan, the document that you have



0401

1 before you is the document that the Judge just referred  
2 to. It contains a listing of all of the wire centers in  
3 the state of Washington, and what I have done just for  
4 our convenience is I have highlighted those wire centers  
5 that are contained in the six MSAs for which Qwest is  
6 seeking a finding of nonimpairment. And would you  
7 accept subject to check that the wire centers that I  
8 have highlighted indeed are those wire centers in the  
9 six MSAs?

10 A. Yes, subject to check. I just saw this  
11 document a few minutes ago too.

12 Q. I understand, and perhaps on a break you can  
13 double check.

14 A. Sure.

15 Q. Thank you. And I want to make sure that we  
16 are both understanding together what this document  
17 actually shows. The document as I read it shows the  
18 number of DSO level UNE loops in each wire center in  
19 Washington over a period from January to February 2003,  
20 and there's a calculation of the number of UNE loops for  
21 each successive month as the year goes on. Does that  
22 accord with your reading of that document?

23 A. January to September 2003?

24 Q. Yes.

25 MR. SMITH: I think counsel said February.

0402

1 Q. Oh, I'm sorry, I meant January to September.

2 A. Yes, that appears to be what this is, yes.

3 Q. Okay. And the first thing I would like you  
4 to do if you would is count for me the number of wire  
5 centers in the highlighted areas for which there are  
6 zero UNE loops in January of 2003.

7 A. Okay.

8 One, all right, allow me a minute to do it  
9 and I will do it.

10 CHAIRWOMAN SHOWALTER: Can I suggest that if  
11 you already know the number, ask him if he thinks it is  
12 that number --

13 THE WITNESS: Subject to check.

14 CHAIRWOMAN SHOWALTER: -- subject to check,  
15 it would save time.

16 MS. RACKNER: Your Honor, I wish that I did,  
17 but perhaps I will do the work for the witness and count  
18 them and then ask him if it's correct subject to check.  
19 Again, I got the document this morning.

20 THE WITNESS: We can both count.

21 MS. RACKNER: Okay, let's see who gets done  
22 first.

23 BY MS. RACKNER:

24 Q. Did you get 13?

25 A. Do I go first?

0403

1 Q. Yeah, I got --

2 A. I got 14 actually.

3 Q. Okay, well, we'll go with your 14, I like  
4 that answer better.

5 A. Well, let's get it right.

6 Q. All right, to be conservative we'll say 13.  
7 Okay, for any of those 13 wire centers which begin in  
8 January of '03 with zero UNE loops, is the number any  
9 greater than zero in September of '03?

10 A. No, it appears the answer is no, no.

11 Q. And I would also like you, this is the last  
12 calculation I will ask you to perform on this document,  
13 and I will count as well, the number of wire centers for  
14 which there are 200 or fewer UNE loops in January of  
15 '03.

16 A. I count an additional 14.

17 Q. So did I this time.

18 A. Hey.

19 Q. All right, so for any of those, and I will  
20 check as well, I would like to ask you whether the  
21 number of loops in those wire centers nine months later  
22 in September of '03 is any greater than it was when we  
23 started out in January of '03?

24 A. Just for those, the arbitrary 200 cutoff that  
25 you were using?

0404

1 Q. Well, I won't accept the characterization  
2 arbitrary.

3 A. Okay.

4 Q. But yes, for the 200 cutoff.

5 A. And again, the question is how -- repeat  
6 again what we're looking for here, how many at the end  
7 of the period?

8 Q. Right, is the number any greater --

9 A. The number any greater --

10 Q. -- than where you started out?

11 A. -- than 200.

12 Q. No, is it any greater than where you started  
13 out?

14 A. Than where we started, okay.

15 Q. Yes.

16 A. This will take a few minutes. Well, shall we  
17 go -- maybe here it would be better to go -- I mean the  
18 answer is yes apparently.

19 Q. Okay. And for how many?

20 A. Well, I haven't gotten there yet.

21 Q. Okay.

22 A. But you asked me for any -- were there for  
23 any and there's a -- I noticed that --

24 Q. Okay.

25 A. -- right on the first page there's one that

0405

1 where there was 62 that's up to 65.

2 Q. Okay, so we added a few loops?

3 A. Yep. And again it was more than, is that --  
4 because I see one where it's the same at the end of the  
5 period, it's gone up and then down a little and back up  
6 again.

7 Q. But it was no greater at the end, no net  
8 addition?

9 A. (Nodding head.)

10 Q. Is that a yes?

11 A. Right, yes, that's a yes.

12 Q. Thanks. And that was the only one was that  
13 one?

14 A. Yes, that's again subject to check. I did  
15 this very quickly, but yes, it appears there was only  
16 one in which the number actually was higher at the end  
17 of the period, yes.

18 Q. Thank you. I want to direct you to your  
19 direct testimony on page 49, which is Exhibit 1-T or  
20 2-T.

21 A. Yes.

22 Q. This time you got there before I did.

23 MR. SMITH: What page?

24 Q. Page 49, lines 11 through 12. And I see a  
25 statement after the first full Q&A:

0406

1           The usual definition of the geographic  
2           market is the area wherein competitors  
3           actually do operate or efficient  
4           competitors could operate.

5           Am I correctly quoting your testimony?

6           A.     Yes.

7           Q.     And MCI served on Qwest a data request asking  
8           for some clarification. I would direct your attention  
9           to Exhibit 15, which was marked as a cross exhibit for  
10          you. It's the date stamp at the bottom of the page 265.

11          A.     Yes.

12          Q.     And the data request directs your attention  
13          to that particular statement and says:

14                 Please provide copies of any sources  
15                 that Mr. Shooshan relies on for the  
16                 concept the usual definition of the  
17                 geographic market.

18                 And in your response you refer to the  
19          Horizontal Merger Guidelines, page 12.

20          A.     Yes.

21          Q.     And what you say is that at page 12 the  
22          Horizontal Merger Guidelines define the geographic  
23          market as the "markets in which firms produce and sell".  
24          Do I correctly quote your --

25          A.     Yes.

0407

1 Q. -- response? I want to call your attention  
2 to the Horizontal Merger Guidelines, which have been  
3 marked as Exhibit 18 in the case. And I don't find that  
4 particular quote on page 12, but I did find it on page 8  
5 under I think you had meant to say 1.2, although maybe  
6 you have a different copy that has it on page 12, but  
7 the copy that I provided to you has that quotation on  
8 page 8.

9 A. Yeah, I know that the one version I have used  
10 in the past is a printout that you can download from the  
11 DOJ's Web site.

12 Q. I have seen that one too.

13 A. You have probably seen that one too, so.

14 Q. Yeah. But on the one that you've got in  
15 front of you --

16 A. Yes.

17 Q. -- what I have is Paragraph 1.2. It says  
18 geographic market definition.

19 A. Yes.

20 Q. And there's a statement right underneath that  
21 heading that says:

22 For each product market in which both  
23 merging firms participate, the agency  
24 will determine the geographic market or  
25 markets in which the firms produce or

0408

1 sell.

2 Is that the language that you meant to refer  
3 to in your response to the data request?

4 A. Yes, but it appears that -- it appears  
5 there's a --

6 Q. An or instead of an and?

7 A. -- an or instead of an and, yes.

8 Q. Okay.

9 A. You corrected me.

10 CHAIRWOMAN SHOWALTER: I'm just going to  
11 interrupt for a second. Each of you is speaking over  
12 the other quite frequently, which is natural in  
13 conversation, but it makes it very difficult for the  
14 court reporter to take it down and also makes it  
15 difficult for people to read the transcript later if  
16 they want to. So try as hard as you can to wait for the  
17 other to finish and also not to interject these small  
18 things like okay or that's right even though that is  
19 normal in conversation.

20 MS. RACKNER: Thank you, Chairwoman, I will  
21 endeavor to help you get a cleaner record at the end of  
22 this.

23 BY MS. RACKNER:

24 Q. I would like to direct your attention to the  
25 statement that you quote, and I guess I wanted to



0409

1 explore with you whether in your view the quoted  
2 language that you used in your response to the data  
3 request really constitutes the Horizontal Merger  
4 Guidelines' market definition. Have you taken a look at  
5 it?

6 A. Yes.

7 Q. Okay. And perhaps to help with this, I also  
8 want to call your attention to page 4 of Exhibit 18,  
9 which contains the overview on market definition,  
10 measurement and concentration.

11 A. Yes.

12 Q. And somewhere in the middle of the third  
13 paragraph, there's a statement:

14 A market is defined as a product or  
15 group of products in a geographic area  
16 in which it is produced or sold such  
17 that a hypothetical profit maximizing  
18 firm not subject to price regulation  
19 that was the only present and future  
20 producer or seller of those products in  
21 that area likely would impose at least a  
22 small but significant and non-transitory  
23 increase in price, assuming the terms of  
24 sale and all other products are held  
25 constant.

0410

1                   In your view, Mr. Shooshan, is the language  
2 that I just read the Horizontal Merger Guidelines'  
3 actual definition of a market?

4           A.     Yes.

5           Q.     Thank you. I would now like to direct you to  
6 Exhibit 1-T or 2-T, your direct, at page 56.

7           A.     Yes.

8           Q.     In the first full paragraph starting on page  
9 line, you make the following --

10                   JUDGE RENDAHL: Starting on line what?

11                   MS. RACKNER: Line 6.

12                   JUDGE RENDAHL: Thank you.

13 BY MS. RACKNER:

14           Q.     You make the following statement:

15                   To this point, if CLECs do not have  
16 positive value business cases in these  
17 wire centers even when they have a  
18 switch in place serving mass market  
19 customers in surrounding areas, it is  
20 likely that Qwest is not serving the  
21 customers in these areas profitably  
22 either.

23                   Am I correctly quoting your testimony?

24           A.     Yes.

25           Q.     Now MCI served another data request on Qwest

0411

1 that is also included in Exhibit 15 asking you some  
2 questions about that language, and I would direct you  
3 and the Commission to page 266. It's the bate stamp at  
4 the bottom of the page. And the data request quotes the  
5 language that I just quoted and then asks you:

6 Please describe the basis for this  
7 statement, and provide complete copies  
8 of any studies or documents supporting  
9 this statement.

10 And the first thing I would like to clarify  
11 is that Qwest and you did not produce any studies or  
12 documents supporting your statement along with this data  
13 response; is that correct?

14 A. Yes, again I interpret questions like this to  
15 be documents that you relied on in making the statement,  
16 and I -- that you're right, we did not provide any  
17 documents.

18 Q. I'm just reading back, you're saying that you  
19 interpreted to mean documents that you relied on.

20 Again, I'm going to read it out loud:

21 Please describe the basis for this  
22 statement, and provide complete copies  
23 of any studies or documents supporting  
24 the statement.

25 A. Right.

0412

1 Q. I guess what I gather you're saying is that  
2 there may be some studies or documents out there, but  
3 you didn't produce them in response to this --

4 A. Yes, that's --

5 Q. -- data request; is that correct?

6 A. That's correct, I was relying here on my  
7 expertise as a 30 year participant in this arena.

8 Q. Thank you.

9 JUDGE RENDAHL: And let's please try not to  
10 talk over one another. Mr. Shooshan, if you can wait  
11 until Ms. Rackner finishes, just pause, then it will be  
12 easier, thanks.

13 BY MS. RACKNER:

14 Q. And could you read the response into the  
15 record just so that we are all going to be on the same  
16 page.

17 A. This is from bate stamp 266 again?

18 Q. That's correct.

19 A. Response:

20 Two important factors that lead to  
21 nonpositive business cases for CLECs  
22 also lead to low profitability for  
23 Qwest. One, sparsely populated areas  
24 have relatively high UNE loop prices.  
25 Qwest also incurs relatively high costs

0413

1           in supplying loops to customers in such  
2           areas. Two, small wire centers are  
3           relatively costly for CLECs because of  
4           fixed collocation costs. Such wire  
5           centers are relatively costly for Qwest  
6           because the switch is not large enough  
7           to take advantage of the full economies  
8           of scale. In both these cases the  
9           higher costs translate into lower  
10          profitability because of rate averaging.

11          Q.     Thank you. And what I wanted to ask you  
12          about this response is that the question asked you about  
13          your testimony in which you originally stated that where  
14          there is a nonpositive business case for CLECs, there  
15          will also be a nonpositive business case for Qwest; is  
16          that --

17          A.     I said --

18          Q.     -- correct?

19          A.     I said it's likely, I didn't say there would  
20          be.

21          Q.     Okay.

22          A.     I said it's likely. In many cases that would  
23          be true.

24          Q.     And in your response what you appear to be  
25          focusing on is your belief that a nonpositive business

0414

1 case for CLECs would also lead to low profitability for  
2 Qwest; is that correct?

3 A. No, what I'm saying is that these -- that the  
4 same factors manifested slightly differently would cause  
5 that -- those wire centers, could cause that wire center  
6 to be unprofitable for a CLEC but also unprofitable on a  
7 stand-alone basis for Qwest.

8 Q. But you don't have any study to support that,  
9 do you?

10 A. I don't cite any study to support that, no.

11 Q. And you don't have a study to point us to  
12 today, do you?

13 A. No, I don't.

14 Q. Thank you.

15 JUDGE RENDAHL: Ms. Rackner, about how much  
16 more do you have?

17 MS. RACKNER: I'm just trying to see what's  
18 already been mooted, I think about three minutes.

19 JUDGE RENDAHL: Please go ahead.

20 BY MS. RACKNER:

21 Q. I want to direct your attention to your  
22 response testimony, page 14, and I believe that's  
23 Exhibit --

24 A. 3-T.

25 Q. -- 3-T, thank you.

0415

1 MR. SMITH: What page?

2 Q. Page 14.

3 A. Yes, I'm there.

4 Q. And the question is posed to you in your  
5 testimony:

6 How does Qwest propose that the relevant  
7 geographic markets be specified in the  
8 state of Washington?

9 And you lay out Qwest's recommendation, and  
10 then beginning on line 14 you state:

11 Qwest evidence demonstrates that  
12 competitors have viable opportunities to  
13 provide service over their switches to  
14 mass market customers throughout to  
15 these entire MSAs.

16 And the question I wanted to ask you about  
17 that testimony is your use of the words throughout and  
18 entire when you refer to throughout these entire MSAs.  
19 I take it you do not mean to say that competitors can  
20 serve all mass market customers in the MSAs profitably.  
21 I guess I'm posing you a double negative, but did you  
22 follow me?

23 A. I did follow you, nor does the TRO require  
24 that either.

25 Q. Okay, but that isn't what your --

0416

1 A. Yes.

2 Q. Okay. I mean we can -- the Commission can  
3 conclude what the TRO requires, but I guess I'm trying  
4 to discover what it is you think the evidence actually  
5 supports. And again, you are not saying that the  
6 evidence supports the idea that all mass market  
7 customers through the entire MSAs could be profitably  
8 served by CLECs?

9 A. Nor for Qwest if one was doing an analysis  
10 from Qwest's perspective.

11 Q. Have you done the analysis from Qwest's  
12 perspective?

13 A. I have not.

14 Q. Okay. And the analysis is supposed to be  
15 from the CLECs' perspective --

16 A. Oh, definitely.

17 Q. -- in this case?

18 A. Yes.

19 MS. RACKNER: Okay, I have no more questions.

20 JUDGE RENDAHL: Thank you, Ms. Rackner.

21 We're going to be off the record, we'll take  
22 maybe a ten minute break at this point, we'll be off the  
23 record.

24 (Recess taken.)

25 JUDGE RENDAHL: Mr. Weigler, had you wanted



0417

1 to offer certain exhibits into the record?

2 MR. WEIGLER: Yes, Your Honor, AT&T would  
3 like to offer Exhibit Numbers 8, 9, 10, 11, and 22.

4 JUDGE RENDAHL: Is there any objection to  
5 those Exhibits 8, 9, 10, 11, and 22?

6 MR. SMITH: I guess I would note that while  
7 there was a passing reference to Number 9, which is his  
8 transcript in Connecticut, there wasn't a single  
9 question directed to that exhibit. In light of that, I  
10 don't see that it should be admitted here.

11 JUDGE RENDAHL: Mr. Weigler.

12 MR. WEIGLER: Your Honor, I asked him  
13 specific quotes from the Connecticut record, and he  
14 agreed with them. I read it directly from the  
15 Connecticut record.

16 MR. SMITH: That's not my recollection, Your  
17 Honor.

18 MR. WEIGLER: I referred to Exhibit 9, page  
19 186, line 20 through --

20 JUDGE RENDAHL: Page 186?

21 MR. WEIGLER: Yes, on Exhibit 9.

22 JUDGE RENDAHL: Would that be bate stamp  
23 number 73? I don't recall that line of questioning  
24 myself, but I guess what was the purpose of offering the  
25 Connecticut testimony?

0418

1                   MR. WEIGLER: For certain things that he said  
2 in Connecticut such as, you are not here to offer your  
3 opinion but to tell us what you think the TRO says,  
4 which is a direct quote of what he said in Connecticut.

5                   MR. SMITH: Well, he --

6                   JUDGE RENDAHL: Is there any harm --

7                   MR. SMITH: Well, I don't know that there's  
8 any --

9                   JUDGE RENDAHL: -- in introducing the --

10                  MR. SMITH: I don't think there's any harm at  
11 all, but Mr. Weigler indicates he crossed him on these  
12 pages, I have no recollection whatsoever of that.

13                  MR. WEIGLER: Also he talks about the  
14 difference between the rules, the Order, and the Act and  
15 quotes precedent on the -- and I asked him this question  
16 on page 134, line 19, through 135, line 9, where he  
17 talks about you look at the rules first and then you  
18 look at the TRO.

19                  JUDGE RENDAHL: Well, I guess I recall that  
20 line of questioning but not in relation to the  
21 particular transcript. Is there any additional value in  
22 the transcript in addition to his testimony here in this  
23 proceeding?

24                  MR. WEIGLER: No, I guess not, I mean --

25                  JUDGE RENDAHL: Okay, with that is there any

0419

1 objection to 8, 10, 11, and 22 being admitted?

2 MR. SMITH: We have no objection to those.

3 JUDGE RENDAHL: Okay, they will be admitted.

4 And for MCI?

5 MS. RACKNER: Thank you, we would move

6 Exhibits 15, 18 -- we would move 16, 18, and Exhibit

7 546HC.

8 JUDGE RENDAHL: Okay, so 16, 18, and 546HC?

9 MS. RACKNER: Yes.

10 JUDGE RENDAHL: Is there any objection to 16,

11 18, and 546HC being entered into the record?

12 MS. RACKNER: Did you say 16 or 15?

13 JUDGE RENDAHL: I said 16 because I thought I

14 heard you say 16.

15 MS. RACKNER: 15, Your Honor.

16 JUDGE RENDAHL: So 15 and 18 and 546HC.

17 MS. RACKNER: Yes, that's correct, thank you.

18 JUDGE RENDAHL: Is there any objection?

19 MR. SMITH: No.

20 JUDGE RENDAHL: Okay, they will be so

21 admitted.

22 Okay, so let's go ahead, Ms. Frame, are you

23 prepared?

24 MS. FRAME: Yes, Your Honor.

25 JUDGE RENDAHL: Good, let's go ahead.

0420

1

2

C R O S S - E X A M I N A T I O N

3

BY MS. FRAME:

4

Q. Welcome back, Mr. Shooshan.

5

A. Thank you.

6

Q. I was wondering if you could clarify for me

7

what your specifically -- what your role is testifying

8

here today, are you stating in response to the MCI

9

question that you're a policy analyst and not an

10

economist; is that correct?

11

A. I am not a -- I am not a degreed economist.

12

I made that point clear. His suggestion was he said are

13

you appearing here as a lawyer, and I said, no, I'm

14

actually appearing here as a -- more as a policy

15

analyst. I'm not offering legal testimony.

16

Q. Okay, so you're not testifying as an expert

17

on legal issues and interpretation of the TRO; is that

18

correct?

19

A. I am providing my opinion as to the TRO, but

20

I am not appearing as a lawyer in this case. I'm

21

trained as a lawyer.

22

Q. Okay.

23

A. I have read and written statutes myself in

24

the past or helped in that process so -- but I -- if you

25

want to characterize me or put me in a box, it would be

0421

1 policy analyst, not economist, not lawyer.

2 Q. Okay, thank you very much.

3 I want to call your attention to your direct  
4 testimony, which is Exhibit 1-T and 2-TC, page 15, lines  
5 8 through 10, and I'm going to read you what you write  
6 there or what you testified to.

7 A. I'm sorry, we're at page 15?

8 Q. Page 15.

9 A. Yes.

10 Q. Lines 8 through 10.

11 Findings of impairment should be limited  
12 to situations --

13 JUDGE RENDAHL: I'm sorry, Ms. Frame.

14 CHAIRWOMAN SHOWALTER: We're not on the same  
15 page.

16 JUDGE RENDAHL: We're not on the same page.

17 MS. FRAME: Okay.

18 JUDGE RENDAHL: We have a different version.

19 MS. FRAME: Oh, my, okay.

20 JUDGE RENDAHL: It's --

21 MS. FRAME: 1-T.

22 JUDGE RENDAHL: 1-T.

23 MS. FRAME: Page 15, 8 through 10, lines 8  
24 through 10.

25 JUDGE RENDAHL: I'm sorry, we were on 3-T.

0422

1 MS. FRAME: Okay.

2 JUDGE RENDAHL: Go ahead.

3 MS. FRAME: Are you ready?

4 JUDGE RENDAHL: Yes.

5 BY MS. FRAME:

6 Q. Okay, and I will read slowly:

7 Findings of impairment should be limited  
8 to situations where it is clear that an  
9 efficient firm does not have a  
10 reasonable opportunity to succeed  
11 without an unbundling requirement.

12 So that's your definition of impairment; is  
13 that correct, Mr. Shooshan?

14 A. Well, it goes to findings of impairment, but  
15 yes, that's how I read the state of the policy.

16 Q. Okay.

17 A. That exists today, yes.

18 Q. Thank you. So that's your opinion on where  
19 findings of impairment should be made, not by a direct  
20 citation from a statute, not by through judicial  
21 opinion, not by a judicial opinion, and not from the FCC  
22 order; is that correct?

23 A. I have not put specific citations to the  
24 sentence. I believe that it is a reasonable  
25 interpretation of a variety of legal decisions and

0423

1 opinions. In fact, if one, as I said earlier today,  
2 tracks the history --

3 Q. That's all I wanted to hear.

4 A. Oh, okay.

5 Q. Thank you very much.

6 A. Okay.

7 MR. SMITH: Your Honor, can I interject, I  
8 mean it is my understanding that witnesses have at least  
9 some reasonable latitude to explain their answers, and  
10 he was part way through, and counsel apparently felt  
11 like that was enough, and she arbitrarily stopped him.  
12 I think he ought to be enabled to at least complete a  
13 short answer on these.

14 JUDGE RENDAHL: Let's go ahead and finish  
15 your answer.

16 A. Let me finish by saying that the directive of  
17 the court of appeals in the USTA decision says that only  
18 those UNEs should be -- only that unbundling that's  
19 needed where the UNE involved is unsuitable for  
20 competitive supply is what the impairment should focus  
21 on. And I believe, for example, although I don't cite  
22 it there, that would be one place I would look for  
23 support for that statement.

24 And I was just simply adding, if you look at  
25 the entire history of the FCC's efforts to interpret the

0424

1 statute here, what the courts, both the Supreme Court  
2 and the D.C. Circuit have said now repeatedly is you can  
3 not have this unfettered, unbounded, unlimited right to  
4 UNEs. The statute conceives of UNEs being made  
5 available when there are insurmountable barriers to  
6 entry.

7 BY MS. FRAME:

8 Q. Are you finished?

9 A. I am.

10 Q. Okay, thank you.

11 I'm going to direct your attention to again  
12 Exhibit 1-T and 2-TC, page 39, lines 8 through 16.  
13 Could you please just read that, review that silently to  
14 yourself.

15 A. Page 39?

16 Q. Yes.

17 A. And the line numbers again?

18 Q. 8 through 16.

19 A. (Reading.)

20 Q. Have you had a chance to review that?

21 A. No.

22 Q. Okay, just let me know when --

23 A. I will let you know.

24 Q. Thank you.

25 A. (Reading.)



0425

1                   I'm sorry, does it end at line 15 that you  
2 wanted me to read, or it continues?

3           Q.     Well, I --

4           A.     There's a sentence that starts at the end of  
5 15 and goes into 16.

6           Q.     It will end at 15 --

7           A.     Okay.

8           Q.     -- but then I'm going to ask you to continue  
9 on after that, so you can --

10          A.     All right.

11          Q.     -- go ahead and read the whole section.

12          A.     All right.

13          Q.     Thanks.

14          A.     (Reading.)

15                   Okay, I'm complete.

16          Q.     Thank you.  It's my understanding that when  
17 you discussed the product market and then the Act's  
18 vision of competition here, you tie it to whether  
19 consumers have access to a particular product or its  
20 substitute; is that correct?  Am I paraphrasing this  
21 section correctly?

22          A.     In general terms I would say yes.  I'm  
23 discussing here of what consists of a product market in  
24 generally accepted terms, yes.

25          Q.     Okay.  And from there impairment, and again

0426

1 I'm going to direct your attention back to this same  
2 exhibit and the same page but lines 17 through 19, and  
3 from there impairment can be determined by looking at  
4 whether consumers now and will be able to in the future  
5 get those products or their substitutes; is that  
6 correct?

7 A. Where did I say that?

8 Q. Lines 17 through 19.

9 A. Oh.

10 Q. Exhibit 1-T and 2-TC; is that correct?

11 A. Yes, yes.

12 Q. Thank you.

13 Mr. Shooshan, I put on your chair --

14 A. I wondered where that came from.

15 Q. Request to approach the witness, but I put on  
16 your chair Section 251(d)(2) of the Act, and I provided  
17 it to all of the commissioners and parties as well,  
18 which deals with impairment. Would you please read  
19 (d)(2), the pertinent part where it discusses  
20 impairment, 251(d)(2) where it discusses impairment.

21 A. It's under a section labeled implementation.

22 Q. That's correct.

23 A. And (d)(2) is access standards.

24 In determining what network elements  
25 should be made available for purposes of

0427

1 subsection (c)(3), the commission shall  
2 consider at a minimum whether (a) access  
3 to such network elements as are  
4 proprietary in nature is necessary, and  
5 (b) the failure to provide access to  
6 such network elements would impair the  
7 ability of the telecommunications  
8 carrier seeking access to provide the  
9 services that it seeks to offer.

10 Q. Thank you. So it's my understanding from  
11 your reading of 251(d)(2)(b) that the Act requires that  
12 impairment be determined by the services the carrier  
13 seeks to offer and not, as you put it, to services or  
14 substitutions consumers want to purchase; is that  
15 correct?

16 A. Well, I can't answer that question yes or no.  
17 I mean I think you're misconstruing two very different  
18 sets of observations. All I'm saying in, if I could go  
19 back to the cited section of my testimony, my direct  
20 testimony, I'm talking there about generally accepted I  
21 believe principles of defining a product market. And in  
22 that sense, because we are talking in this case from the  
23 perspective of the buyer of goods and services, that's  
24 how markets are typically defined, that is by how  
25 customers perceive the substitutes that are available.

0428

1 I take it and accept the fact that (d)(2) that you just  
2 had me read approaches the issue of what UNEs need to be  
3 made available or where impairment exists from the  
4 perspective of the requesting carriers, but they're two  
5 different -- there's no conflict in my mind with these  
6 observations.

7 Q. Okay. I'm going to now direct your attention  
8 to Exhibit 3-T, which is your response testimony, page  
9 35, lines 2 through 14.

10 MR. SMITH: Could you repeat the page.

11 Q. Page 35.

12 JUDGE RENDAHL: I believe it's page 35.

13 Q. Lines 2 through 14, which is a question and  
14 an answer, and if you could briefly review that  
15 silently, that would be great.

16 A. (Reading.)

17 Q. And please again let me know when you're  
18 finished.

19 A. (Reading.)

20 Okay.

21 Q. In your answer to the question on lines 2  
22 through 6, you discuss the ability of a data CLEC to  
23 also provide voice services; is that correct?

24 A. No, I talk about an efficient -- I'm talking  
25 here about an efficient CLEC. I don't specifically talk

0429

1 about data LECs or DLECs.

2 Q. Okay. But you do discuss data in this  
3 paragraph, correct?

4 A. Yes, I mention data services in several  
5 places in the paragraph, yes.

6 Q. You state that you discuss an efficient firm  
7 providing voice and data services in this paragraph?

8 A. Yes, if it's what I referred to in the last  
9 sentence. And indeed, that's the standard that the FCC  
10 requires this Commission to apply, that is the needs of  
11 an efficient CLEC, not the specific business plans of  
12 any one CLEC. That's been made clear if you look at the  
13 TRO, Paragraph 115 for example, where the commission  
14 goes through that at great length and says we're not  
15 talking about any carrier, we're talking about an  
16 efficient CLEC when we talk about an efficient  
17 competitor when we talk about impairment.

18 Q. Do you discuss anywhere in your rebuttal, or  
19 excuse me, your response testimony in the proceeding or  
20 subsequent paragraphs about the economic or operational  
21 costs associated with the acquisition by a CLEC of  
22 equipment or expertise to provide voice service?

23 A. I don't specifically address that, no.

24 Q. Do you address whether there are any economic  
25 costs associated with expansion of collocation space to

0430

1 house power and -- or to house and power CLEC voice  
2 service --

3 A. No, I --

4 Q. -- in this section?

5 A. No, I don't.

6 Q. Do you discuss the economic and operational  
7 costs associated with the ability to provide enhanced  
8 voice services like voice mail, conferencing, and the  
9 like?

10 A. I don't address that, no.

11 Q. Do you address any other additional costs  
12 associated with acquisition of expertise and resources  
13 to comply with regulatory requirements like E911 or  
14 CALEA?

15 A. No, I don't. I observe that a efficient CLEC  
16 could provide both, and if you look at the marketplace  
17 today you find that there are many CLECs that are  
18 providing all of these things.

19 Q. Do you have any substantiation regarding  
20 those CLECs that are providing both?

21 A. Oh, sure, your company included, or your  
22 client.

23 Q. Covad doesn't provide voice services.

24 A. Well, not according to your press release of  
25 a couple of weeks ago where you said you were rolling

0431

1 out voice over Internet protocol.

2 Q. We do not provide voice services.

3 A. Well, I would be happy to find you that press  
4 release. In fact, I think if I could go to my briefcase  
5 I could provide it, but.

6 JUDGE RENDAHL: Well, I think that's  
7 something counsel can handle on redirect if you so  
8 choose to do that.

9 A. But there are other examples, let me just if  
10 I could complete my answer, Allegiance, C-Beyond, there  
11 are other what I would call efficient CLECs out there  
12 providing both data and voice services in the  
13 marketplace today.

14 Q. I want to also make sure that I'm correct in  
15 that in your testimony it appears as though fundamental  
16 to your assumption that the barriers to entry are lower  
17 when a data CLEC also provides voice is the existence of  
18 a hot cut process; is that correct?

19 A. I would have to say in the case -- if you  
20 want me to answer that question yes or no, I would have  
21 to say no as you have asked it, and I could explain.

22 Q. Could you please explain?

23 A. Yes. The point that I'm trying to make here  
24 is that if you look at -- and again this is a proceeding  
25 about in part about transport. We're talking here about

0432

1 mass market switching. That's what -- that's the  
2 context in which I make these observations. There the  
3 very finding, the national finding of impairment the FCC  
4 made was based on concerns about the sufficiency of the  
5 hot cut process and specifically the batch hot cut  
6 process. The reason for that, and I'm getting directly  
7 to your question but you need to have this background,  
8 is that in the case of the provisioning of a UNE loop,  
9 which is what you would be relying on in the absence of  
10 unbundled switching and UNE-P, there is a different  
11 process that has to be undergone for a CLEC. There has  
12 to be a hard rewiring done at the central office to  
13 provision that line. Whereas for Qwest, that can all be  
14 done without the necessary -- without that rewiring.  
15 And it's the ability of the post impairment world in the  
16 post impairment world for those kinds of hot cuts to be  
17 handled that, and concern about that, that led the FCC  
18 to its national finding of impairment.

19           In the case of a data LEC, at least as I  
20 understand the way the process works, there is no  
21 comparable hot cut involved. There is a -- whether it  
22 is Qwest or Covad that's providing DSL, the provisioning  
23 of that line requires human intervention. Call it a hot  
24 cut, call it a cross connect, whatever, but it's the  
25 same for Qwest as it is for the data LEC.



0433

1                   And I was simply observing here that whatever  
2 it is that Covad is complaining of, and I frankly can't  
3 quite figure it out, it really it seems to me doesn't  
4 belong in a case about mass market switching. Because  
5 the whole issue of hot cut is not an issue at least for  
6 the provision of data services as part of the -- as part  
7 of this equation, and that's what all of that answer  
8 relates to. Very different predicate than exists for  
9 mass market switching.

10           Q.     Mr. Shooshan, are you aware that the FCC  
11 specifically identified operational impairment  
12 associated with hot cuts for its basis of finding of a  
13 national impairment, which is found in the Triennial  
14 Review Order Paragraphs 464 through 478?

15           A.     Yes, I just mentioned that, that's exactly  
16 right.

17           Q.     But it's associated with the mass market  
18 switching case, correct?

19           A.     Yes.

20           Q.     So fundamental to your assumption is that the  
21 barriers to entry are lower than when a data CLEC also  
22 provides voice is the fact that there is a hot cut  
23 process in place; is that correct?

24           A.     No, no, again I tried to explain that there  
25 is no incremental hot cut required. That's what I have

0434

1 said there. In other words, the -- in the case of a  
2 pure data LEC, as you assert Covad is, that you're not  
3 providing voice service, in that case the provisioning  
4 of the loop to you involves the same manual  
5 intervention, as I understand it, that the provisioning  
6 of that loop as a DSL loop to a Qwest customer provides,  
7 and therefore it is not the same kind of hot cut issue.

8 On the question of provisioning that circuit  
9 or loop to you, I mean I -- there will be other Qwest  
10 witnesses that can talk about the process that's going  
11 on to do that, but it is not the same kind of hot cut  
12 issue that gives rise to the FCC's concern in the case  
13 of mass market switching. That's the only point I'm  
14 trying to make.

15 Q. Okay. Well, then you know that Qwest is  
16 refusing to include data services in its hot cut  
17 process, correct?

18 A. You would have to ask other Qwest -- you  
19 would have to ask Qwest witnesses, Qwest employees,  
20 about that.

21 Q. Okay. And you are also then not aware that  
22 the lack of an available hot cut process is the same as  
23 basically no practical operational solution, is that --  
24 it sounds like you're not aware and I would have to ask  
25 another witness; is that correct?

0435

1           A.     I can -- I have tried to respond in general  
2 terms that if it's a provision of the loop for data  
3 only, DSL in the case of Qwest, that it would -- it  
4 would there -- the process that you undergo is the same  
5 whether it's a Qwest line and a Qwest customer or a  
6 Covad line and a Covad customer. I don't know that that  
7 is what's envisioned as being encompassed by the hot cut  
8 process. And as Covad's witnesses said, somehow reading  
9 from my statement about hot cuts, they immediately said  
10 batch hot cuts, that somehow I'm saying -- I don't think  
11 that's required by the TRO.

12                     But as to what's Qwest approach to dealing  
13 with that issue is and how sufficient that is, I would  
14 have -- think you would have to ask Qwest, other Qwest  
15 witnesses about that.

16           Q.     Okay, so --

17           A.     I don't have an opinion on that.

18           Q.     So you don't have an opinion on it, however  
19 you have written as part of your testimony several  
20 opinions about the hot cut process and that --

21           A.     No, there's a difference in what I have done.  
22 What I have tried to do has been to state, which I -- is  
23 my opinion but I believe to be the case, that the hot  
24 cut issue is no different for a company like Covad  
25 should it seek to provide analog voice services than it

0436

1 is for any other CLEC that is seeking to provide analog  
2 voice services. That's really what I'm saying here.  
3 There's no additional or incremental hot cut issue that  
4 as far as I see it brings you in to this part of the  
5 case. But if there's another -- but I leave aside the  
6 issue about whether there is some process that needs to  
7 be improved upon for provisioning of the facilities that  
8 Covad needs. It's not a basis it seems to me for this  
9 Commission, however, finding or refusing to find no  
10 impairment. That's the point I'm making here.

11 Q. So what you're basically stating is that the  
12 hot cut issue is not an operational issue that should be  
13 considered in this case?

14 A. It obviously is, it's one of the things the  
15 FCC has laid out for the states to look at. I don't see  
16 that there's an, want of a better word, an incremental  
17 hot cut issue raised by Covad's concerns, at least as I  
18 understand them.

19 MS. FRAME: I have no further questions.

20 JUDGE RENDAHL: Thank you, Ms. Frame.

21 Mr. Thompson.

22 I'm sorry, Mr. Kopta, I'm reading my list  
23 wrong here, Mr. Kopta.

24 MR. KOPTA: No, that's all right, thank you,  
25 Your Honor. I don't have any questions for this

0437

1 witness, thank you.

2 JUDGE RENDAHL: Okay, well, now you're on,  
3 Mr. Thompson.

4

5 C R O S S - E X A M I N A T I O N

6 BY MR. THOMPSON:

7 Q. Good afternoon, Mr. Shooshan, I'm Jonathan  
8 Thompson for Commission Staff. Actually, if you would  
9 just have out in front of you your Exhibit 7-T and then  
10 also a copy of the TRO, which has I guess been --

11 A. Yes, I have that.

12 Q. -- marked as Exhibit 115.

13 A. Okay.

14 Q. That's what I'm going to be referring to  
15 throughout these questions.

16 A. Okay, I'm there.

17 Q. Okay.

18 A. I've got it.

19 Q. In general, your testimony addresses in part  
20 at least how the Commission should define the markets  
21 for the mass market switching analysis, right?

22 A. Yes, sir.

23 Q. And I just want you to kind of help me walk  
24 through the portions of the TRO that address that. You  
25 were actually discussing them earlier with the counsel

0438

1 for MCI. I would like to ask you to turn to page 315 of  
2 the TRO itself.

3 MR. SMITH: Counsel, I think Mr. Shooshan's  
4 copy of the TRO doesn't necessarily paginate with  
5 everyone else's, at least with mine. Could you identify  
6 a paragraph number.

7 MR. THOMPSON: Yeah, it's Paragraph 495.

8 CHAIRWOMAN SHOWALTER: Just in general let's  
9 just use paragraph numbers for the TRO.

10 MR. THOMPSON: Okay.

11 A. All right, I'm there.

12 BY MR. THOMPSON:

13 Q. Well, it looks like about I guess the second  
14 sentence of Paragraph 495, it says:

15 State commissions have discretion to  
16 determine the contours of each market.

17 And that's just what I want to explore a  
18 little bit. Would you agree with me that the Footnote  
19 1536, which is quite a long footnote, provides some  
20 guidance on that analysis that the commissions are to  
21 engage in to define the contours of each market?

22 A. Yes.

23 Q. Okay. There's a -- what I want to direct  
24 your attention to in particular is a sentence in the --  
25 toward the end of that Footnote 1536, it's about eight

0439

1 lines up from the bottom in mine, and it says, starts,  
2 we require state commissions.

3 A. Yes.

4 Q. Are you there?

5 A. Yes.

6 Q. Okay. It says, well, it says:  
7 We require state commissions to define  
8 each geographic market on a granular  
9 level and direct them to take into  
10 consideration.

11 And then there's a number of things, and I  
12 just want to go through each of those things with you,  
13 and tell me what you think the FCC had in mind when it  
14 says that, first of all, how should the Commission take  
15 into consideration the locations of customers actually  
16 being served?

17 A. Well, I think this is a -- this anticipates a  
18 fact based analysis by the Commission. I mean they  
19 could look at the wire centers that customers are being  
20 served by today using UNE loops, and part of that is in  
21 the evidence that Qwest has provided here.

22 Q. What does locations mean, is that -- that's  
23 not limited to wire centers, is it?

24 A. Well, the term locations certainly could be  
25 read more broadly than that, but I mean wire centers is

0440

1 the way in which nearly every state that I'm aware of  
2 has chosen to analyze the data, so to speak.

3 Q. Could it mean the -- doesn't it elsewhere in  
4 the TRO, doesn't it -- don't they use the term to equate  
5 to buildings sometimes?

6 A. I see that in the transport part of the case.

7 Q. Or --

8 A. But I'm not sure --

9 Q. -- enterprise loops, is that a --

10 A. Yes.

11 Q. That's a building by building, location by  
12 location analysis, right?

13 A. Tends to be, yes.

14 Q. Okay. What about the next thing, how should  
15 the Commission take into consideration variations in  
16 factors affecting a CLEC's ability to serve each group  
17 of customers? Maybe you could start by saying what is  
18 -- what do you take each group of customers to mean?

19 A. I think that there the, you know, the issue  
20 could be, you know, the ability to serve mass market  
21 customers as well as enterprise customers, which is  
22 certainly -- which is certainly relevant in a track 2  
23 type analysis.

24 Q. Could it mean residential versus business  
25 within the mass market?



0441

1           A.     I thought we might be going there.  No, to,  
2     you know, in my view it would be inappropriate to take  
3     this very general language out of a footnote and try to  
4     overturn many paragraphs of discussions where the FCC I  
5     think very clearly, as I have stated in my testimony,  
6     forecloses states from subdividing the mass market into  
7     residence and very small business.  The commission if it  
8     wanted states to do that would have specifically allowed  
9     for the market to be segmented into more than two  
10    pieces, and it did not do that.

11          Q.     Well, let me ask you this.  It seems like  
12    you're saying that the Commission should blind itself to  
13    any differences that exist on the demand side in the  
14    mass market?

15          A.     I'm not saying that.  What I'm saying is that  
16    the FCC considered those issues.  There's a lengthy  
17    discussion in the TRO about ways in which very small  
18    business and residence customers have similar -- that  
19    look similar from the demand side in some areas, where  
20    they look different from the demand side.  It was an  
21    analysis, a weighing if you will, that the FCC went  
22    through in the TRO.  And its judgment in the end was to  
23    say there are only two relevant product markets,  
24    enterprise and mass market.  And I don't believe the TRO  
25    gives latitude to the states to change that.

0442

1 Q. But there's nowhere in the TRO, is there,  
2 where, you kind of insinuate that the FCC considered and  
3 explicitly rejected the idea of splitting residential  
4 and business markets, but there really is no explicit  
5 rejection of that, is there?

6 A. The fact that the Commission went through  
7 among other things the demand side analysis you just  
8 suggested and came out with saying there are really only  
9 two markets and only one line that has to be drawn, and  
10 that's the market that's the line between enterprise and  
11 mass market, and that mass market for purposes of this  
12 impairment analysis includes both residence and very  
13 small business.

14 Q. Well --

15 A. I don't think it could be much clearer than  
16 that.

17 Q. Well, what's to make then -- I mean I gather  
18 that where in this footnote where they're talking about  
19 each group of customers and then further on in the  
20 sentence a competitor's ability to target and serve  
21 specific markets, couldn't they have said the mass  
22 market? I mean it seems to me group and specific  
23 markets is asking the Commission to take a more granular  
24 look than simply to look at the mass market as a whole.  
25 I take it you disagree with that.

0443

1           A.     I disagree with that, and the FCC has  
2     asserted on a number of occasions in legal documents  
3     that it hasn't given the states that discretion.

4           Q.     What legal documents are those?

5           A.     Well, I think in its characterization of the  
6     TRO before the court it is suggested that the states are  
7     very circumscribed in the decisions that they are left  
8     to make, and one of them is not whether to subdivide the  
9     mass market into residence and small business.

10          Q.     They have specifically stated that in those  
11     court arguments that the possibility of subdividing into  
12     residence and small business is --

13          A.     No, what I --

14          Q.     -- circumscribed?

15          A.     What I have said is that in response to  
16     arguments being made by among other people the incumbent  
17     local exchange carriers that too much discretion and too  
18     much decision making has been left to the states, the  
19     FCC has on a number of occasions enumerated the fact  
20     that there are only a fairly small set of decisions that  
21     are left to the commission and that -- left to the  
22     states, and it has provided, and Commissioner Martin is  
23     a good example, guidelines that the states should apply.  
24     And all I'm saying is that they have not enumerated  
25     anyplace that I have seen that states have the ability

0444

1 to subdivide the mass market into residence and very  
2 small business.

3 Q. Would you, let's see, I hadn't planned on  
4 getting into this, but what -- in Paragraph 499 --

5 A. Oh, yes.

6 Q. -- of the TRO --

7 JUDGE RENDAHL: Let's be off the record for a  
8 moment.

9 (Discussion off the record.)

10 JUDGE RENDAHL: While we were off the record  
11 we discussed Paragraph 499 of the Triennial Review  
12 Order. I had in my handwriting made the changes  
13 required by the FCC in its errata, and the parties have  
14 agreed that this will work. I will type up a new  
15 version to put in the record tomorrow, but for now we're  
16 marking this as Exhibit 23.

17 And, Mr. Thompson, why don't you use this in  
18 your discussion with Mr. Shooshan.

19 MR. THOMPSON: Okay, I will do that.

20 Are we back on the record?

21 JUDGE RENDAHL: We are back on the record.

22 MR. THOMPSON: Okay.

23 BY MR. THOMPSON:

24 Q. Mr. Shooshan, this Paragraph 499 is  
25 discussing how state commissions should look at the

0445

1 triggers analysis, right?

2 A. Yes.

3 Q. And in the version of 499 prior to the  
4 errata, do you have a -- you have a copy of that in  
5 front of you?

6 A. Yes.

7 Q. Okay. If you go up about eight lines from  
8 the bottom there talking about trigger candidates, it  
9 says:

10 They must also be operationally ready  
11 and willing to provide service to all  
12 customers in the designated market.

13 A. Yes, that got struck in the errata.

14 Q. Right. And it said and I think it continues  
15 to say, no, I guess it doesn't, it said that:

16 They should be capable of economically  
17 serving the entire market as that market  
18 is defined by the state commission.

19 And then it says:

20 This prevents counting switch providers  
21 that provide services that are desirable  
22 only to a particular segment of the  
23 market.

24 Now in that instance, surely segment would  
25 refer to the distinction that I was talking about

0446

1 earlier between, for example, residential and business,  
2 wouldn't it?

3 A. I don't know what the commission meant there.  
4 And again, I have trouble sort of, as the Chairwoman  
5 said, trying to interpret what the commission once said  
6 as opposed to what it now says. That's what I think is  
7 relevant in this proceeding, so I don't --

8 Q. Okay, well, let me just pose a hypothetical  
9 to you or a hypothetical explanation of why there would  
10 not have been an explicit rejection of a residential  
11 business distinction in the market. And that is when  
12 the FCC was writing this order, they had in mind that  
13 the trigger analysis would require a finding that all  
14 segments of that market are being served in order to  
15 count that trigger candidate. Isn't that a reasonable  
16 interpretation?

17 A. Of what the commission intended?

18 Q. Of what the commission intended prior to the  
19 errata.

20 A. You know, I, you know, again, I don't mean to  
21 mince words with you, but I believe that in issuing the  
22 errata the commission was clarifying what its intent  
23 was, and that's the purpose of the errata. It was --  
24 there was no separate hearing or meeting where there was  
25 revoted. They simply said this is a -- I mean they

0447

1 looked at this very complex order, it had been written  
2 by committee as I think anybody knows in this hearing  
3 room, and I think the commission in reading it through  
4 made a number of changes or errata, but it was to  
5 conform it to what they believed they meant at the time  
6 they voted the item. That's what an errata is, so.

7 Q. In other words, you think the striking out of  
8 those sentences in 499 didn't work a substantive change  
9 in the text?

10 A. That's not what I said. It could easily have  
11 been that the FCC in voting on the item felt that it was  
12 voting for one thing and then in reading the item said,  
13 gee, there seems to be some language here that is at  
14 odds with what we intended, we better clean it up.  
15 Indeed that's what errata are designed to do.

16 Q. Well, isn't a possible explanation for  
17 adopting a broad mass market definition and not  
18 discussing differentiation of it that the test was to be  
19 that the carriers would have to be shown to be capable  
20 of economically serving the whole, that whole market,  
21 all segments of that market?

22 A. I think that what you have stated is the  
23 showing that needs to be made. Where we disagree is  
24 that the FCC allows -- that the TRO permits a separate  
25 analysis for very small business and residence, and

0448

1 that's where we disagree. I don't find that permission  
2 granted anywhere in the TRO. In fact, the Commission,  
3 it's not that they ignored it, they went through a lot  
4 of this analysis themselves and said, in our expertise,  
5 we deem that there is a single, for purposes of  
6 impairment, not for other purposes, but for purposes of  
7 determining impairment there's a single mass market.  
8 That's what the TRO provides.

9 Q. Well, okay, I guess we can -- I guess we can  
10 agree to disagree on that.

11 Can I just have you take a look, please, next  
12 at again Exhibit 7-T, page 5.

13 A. Yes.

14 Q. And down at lines 21 and 22, you're -- in  
15 that part of your testimony you're taking issue with  
16 Mr. Cabe and Mr. Spinks' proposal to specify separate  
17 markets for residence and small business. And you say:

18 Residence and small business are not  
19 geographic markets. The two groups are  
20 often comingled in the same geographic  
21 area.

22 A. Yes.

23 Q. Do you see that?

24 A. Yes.

25 Q. What if this Commission were to adopt a very



0449

1 granular geographic market definition that went  
2 neighborhood by neighborhood to determine the  
3 predominance of residential locations versus business or  
4 commercial locations and, you know, went about  
5 neighborhood by neighborhood specifying residential  
6 neighborhoods, would that be appropriate or permissible  
7 rather under the TRO in your view?

8 A. Absolutely not.

9 Q. Why not?

10 A. Because that is not -- that is not a relevant  
11 economic market for purposes of determining how CLECs  
12 would enter the market, and that's the analysis that  
13 needs to be done. The FCC it seems to me has rejected  
14 the use of, it's again my opinion shared by others, of  
15 the wire center. So the idea that you go somehow inside  
16 the wire -- below the wire center to neighborhoods or to  
17 specific locations, I think that would -- that would be  
18 directly contrary to the Commission saying that the  
19 relevant geographic market must be relevant in the sense  
20 that it reflects the way competitors enter the market  
21 and offer services. And to my knowledge, no competitor,  
22 at least the ones that are out there today, enter the  
23 market neighborhood by neighborhood or block by block as  
24 you seem to be suggesting.

25 Q. But don't they -- don't facilities based

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1 competitors overwhelmingly target business customers?

2 A. Some do, some don't. I mean again, remember  
3 what we're talking about here and I think what's  
4 important is not any particular CLEC's business plan,  
5 but what an efficient CLEC would do. An efficient CLEC  
6 in my view would not enter the market to serve a  
7 particular block or a particular location in the mass  
8 market. They would enter more broadly than that. Now  
9 we may disagree as to whether that market is MSA, which  
10 I think it is. AT&T seems to think it should be even  
11 larger than that. But I don't see any support in the  
12 record for going, you know, to neighborhood by  
13 neighborhood or, you know, building by building somehow.  
14 I just -- I think that would run afoul of the TRO in  
15 more ways than one.

16 Q. But doesn't the record show though that I  
17 think you would even see that CLECs do target high  
18 revenue customers certainly in the mass market?

19 A. Nothing wrong with that.

20 Q. And they don't target, in fact they don't  
21 even have offerings for the most part targeted at  
22 average revenue residential customers, do they?

23 A. Well, you know, that's a term that's been  
24 used today I think by you among others in your opening  
25 statements today, and I don't know what an average

0451

1 revenue customer is frankly. I think if you look out  
2 there, MCI has a plan that is MCI Neighborhood that's  
3 aimed at the residential market. It is a bundled  
4 offering, it is very attractive, and I assume that MCI  
5 can continue to make those offerings available based on  
6 the evidence that's been introduced here if it's using  
7 UNE-L and its own switching, you know, just as easily as  
8 it can today.

9 Q. How do you square that with the parts of your  
10 testimony where you're talking about, you're making an  
11 assertion that residential rates in this state are I  
12 think in your term artificially low? Isn't your point  
13 there that in order to compete, whether that's true or  
14 not, that your point is that in order to compete for  
15 those residential customers, CLECs have to -- would have  
16 to themselves offer a relatively low rate to compete on  
17 the basis of price?

18 A. Let me be clear. I have observed nothing  
19 about the actual residential prices in Washington, and  
20 the quote artificially low was a quote taken from the  
21 USTA decision. And the point of it was to say that in  
22 areas, this is in general terms, where prices, retail  
23 prices, have been held artificially low by regulation,  
24 one will observe, may well observe, there are no  
25 competitors serving those areas. And the commission

0452

1 goes on to say, and you would find impairment in that  
2 case based on the analysis here, but understand that  
3 even the finding of impairment and the continuing  
4 availability of unbundled switching may not mean that  
5 those wire centers get served.

6 Q. Well, let's go to where you're talking about  
7 that in your testimony. I think it's at page 7.

8 A. Of?

9 Q. Of your again Exhibit 7-T.

10 A. It's on page 7?

11 Q. Page 7.

12 A. Yes.

13 Q. And the part I was looking at was there's  
14 some discussion again of the USTA decision there on this  
15 where -- and as a matter of fact you quote a portion of  
16 it where it says rates -- makes reference to  
17 artificially low rates. Then later on page 18, or not  
18 page but line 18 and 19 of page 7 you say:

19 Any finding of impairment must be based  
20 on a finding that competitors do not or  
21 could not profitably serve customers  
22 where the rates are not artificially  
23 low.

24 Do you see that?

25 A. Yes.

0453

1 Q. Okay. In trying to interpret what you have  
2 in mind there, it looks like you're suggesting that  
3 artificially low rates, the existence of artificially  
4 low rates is another criteria for doing away with  
5 unbundled switching. Am I wrong?

6 A. No, I think again to be -- to clarify any  
7 misunderstanding, what I'm talking about here is an  
8 observation that the FCC makes in delineating its tests  
9 for impairment which the states are to apply. And  
10 there's track 1 and there's track 2. In saying that  
11 there may well be instances where, and maybe we'll get  
12 back later on to my charts that were discussed earlier,  
13 where there is no competitive presence, for example in a  
14 wire center, that would suggest that there's impairment  
15 there, or could. And what the commission goes on to  
16 suggest is that there's another explanation for why  
17 competition may not have -- competitors may not have  
18 located in that wire center, and that is because the  
19 rates are artificially low there. So in effect, you --

20 Q. But maybe you could just bring it back and  
21 explain why --

22 A. But they're not -- I'm not saying any -- I'm  
23 not relating that specifically to the situation in  
24 Washington.

25 Q. Okay, maybe you could just explain for me

0454

1 the, you know, the mechanism that's at work. What does  
2 the existence of artificially low rates have to do with  
3 a CLEC's decision whether to serve somewhere?

4 A. Because going back to your point earlier, I  
5 am going to try to initially enter a market by serving  
6 the high volume, lower cost customers, and one of the  
7 things I am going to look at when I enter that market is  
8 whether the retail prices the incumbent is charging --  
9 what are the prices being charged by the retail --  
10 retail prices being charged by the incumbent. And in  
11 areas where either, as I said earlier today, my costs  
12 are higher or the retail prices being charged by the  
13 incumbent are artificially low, not my word, the court's  
14 word, and I have not said anything about specifics here  
15 and analyzed things specifically here in Washington, it  
16 may look as if there's impairment in those areas, but I  
17 would point out that I, and this is me talking now, that  
18 a finding of impairment there, and that is or conversely  
19 a finding that you shouldn't roll back the national  
20 presumption of impairment in those areas, might not  
21 produce competition.

22 Q. Well, I guess I'm a bit confused then,  
23 because it seems to me in that sentence that we were  
24 talking about on page 7 at the very bottom that you're  
25 setting for the test and that where rates are

0455

1 artificially low, whatever that means, that that would  
2 negate the finding of impairment; am I wrong?

3 A. No, I'm saying that the commission, the FCC,  
4 whose TRO you're applying here, observes there's an  
5 anomaly, and I stated what that anomaly is. The courts  
6 have been pretty clear that the FCC and by inference the  
7 states can not find as a basis for impairment for  
8 purposes of the '96 Telecom Act for purposes of  
9 impairment a market where prices are held artificially  
10 low, because it's not for the lack of unbundled network  
11 elements that competitors haven't entered there, it's  
12 because the retail prices are held low by regulation.

13 Q. Well, not to argue with you about what the  
14 USTA case says, but doesn't it say that the FCC has just  
15 not -- failed to explain in its last order that was the  
16 subject of that case, it failed to explain its reasoning  
17 with regard to the cross subsidies?

18 A. It certainly did. But again, and I go back  
19 again to the series of decisions that have been made is  
20 that the court's big complaint, large, with the FCC's  
21 previous two efforts were that there was really no  
22 effective limit on unbundling and that the commission  
23 had not done the kind of analysis that needed to be done  
24 about whether impairment existed and whether it was the  
25 type of impairment that the Act was established to cure,

0456

1 and that's where the court has held the commission  
2 accountable. Now I don't know how the court is going to  
3 respond to some of those same issues in the current  
4 appeal. They may well find the current impairment  
5 standard inadequately deals with that issue.

6 Q. Didn't the --

7 A. That's the best I can do.

8 Q. Didn't the FCC in the TRO address this  
9 precise issue of the USTA court's discussion of --

10 A. Yes, they have addressed it.

11 Q. Okay.

12 A. Whether it's satisfactory to the court or  
13 not, I don't know. I said we'll have to wait and see is  
14 all I'm saying.

15 CHAIRWOMAN SHOWALTER: Would you like to give  
16 us a paragraph number.

17 Q. Yeah, let's look at Paragraph 168 and 169, in  
18 my copy page 108.

19 A. Yes, I'm there.

20 Q. Okay. Well, in particular I want to --  
21 there's a sentence in Paragraph 168 that says the  
22 following. It says:

23 We recognize that below cost local  
24 exchange rates will tend to discourage  
25 competitive facilities based entry and



0457

1           that the absence of such entry will be  
2           considered as evidence of impairment.

3           A.     Yes, that's what I have been trying to  
4 explain to you. That's what the commission is saying.  
5 The commission is saying when you apply our test, the  
6 test that's in the TRO, you will observe this, and it  
7 will lead you to determining that there is impairment in  
8 those areas.

9           Q.     But it doesn't say --

10          A.     But that --

11          Q.     But it doesn't say, sorry, it doesn't say you  
12 should, in the event that you find that there is below  
13 cost pricing that you should not find impairment.

14          A.     Oh, no, it goes -- I think it's important to  
15 read the rest of that paragraph. They're saying that,  
16 and this is very important given the changes we were  
17 looking at in the -- in section -- Paragraph 499 in the  
18 errata. What they're saying is that there -- it may be  
19 that there is still no impairment in those areas because  
20 of the broader economies of scale and scope in effect.

21          That is:

22                 Our impairment standard provides for the  
23                 consideration of evidence concerning the  
24                 full range of revenue opportunities  
25                 available to carriers providing service

0458

1 over --

2 JUDGE RENDAHL: You will have to read slowly.

3 A. I'm sorry.

4 Our impairment standard, however, also  
5 provides for consideration of evidence  
6 concerning the full range of revenue  
7 opportunities available to carriers  
8 providing service over relevant  
9 facilities. Thus retail local exchange  
10 rates that are "below cost" do not mean  
11 that competitive entry will necessarily  
12 be uneconomic since a competitor will  
13 base entry decisions on the comparisons  
14 of its costs and the full range of  
15 available revenue opportunities, not  
16 solely the local exchange rate.

17 And indeed, that's the very analysis that  
18 track 2 envisions this Commission undertaking.

19 Q. Okay, what about -- I want you to just look,  
20 however, at the next sentence, which is the first  
21 sentence of Paragraph 169, and it says:

22 Were our impairment standard to require  
23 unbundling for services in areas with  
24 below cost rates where actual  
25 competitive entry does not take place,

0459

1           little harm would result.

2           A.     That's correct, and that's because, as I said  
3 earlier, it is not impairment per se, but the low or  
4 below cost retail rates that is causing entry not to  
5 occur, that's all. The commission is simply explaining  
6 to the states how to interpret, if you will, some of  
7 what you might observe when you're applying the tests  
8 that are laid out in the TRO.

9           Q.     Is there any evidence in the record in this  
10 case that residential rates in the MSAs you identify are  
11 below cost by some measure?

12          A.     I have not provided any of that.

13          Q.     Isn't one of the cross subsidies that the  
14 USTA case was discussing in this context is the one that  
15 results from geographic averaging of rates, in other  
16 words the so-called subsidy from urban to rural?

17          A.     Yes.

18          Q.     And in that case, wouldn't it be possible to  
19 view rates within these MSAs as possibly being above  
20 cost?

21          A.     You know, we could go on like this, I don't  
22 know what relevance it is to the findings that the  
23 Commission has to make as to -- I have not offered any  
24 evidence about whether they're above cost or below cost.  
25 I'm simply saying the FCC has in responding to the

0460

1 court's criticisms of its previous decisions attempted  
2 to deal with this, and what it's saying is there may be  
3 apparent anomalies in the analysis you perform,  
4 understand that what they mean and what they don't mean.  
5 And then the point you were making that I responded to  
6 earlier, that's why they have the two tracks, so that in  
7 a track 2 analysis it may well be that there are wire  
8 centers, for example, that prove out profitable that  
9 don't meet the triggers, for example, and we have gone  
10 through that exercise earlier today.

11 Q. Okay, let's move on just a little bit here to  
12 page 9 of the same 7-T testimony, and there you're  
13 responding to Mr. Spinks of Staff's proposal of using  
14 the residence-business distinction as a proxy for low  
15 and high revenue customers, and you say it's a poor --  
16 the distinction is a poor proxy for low and high revenue  
17 customers. Do you see that? It's just the paragraph  
18 number 2 toward the top of that page.

19 A. Yes. This is page 9, line 4.

20 Q. Doesn't the TRO say in various parts that  
21 small businesses are likely to pay higher retail rates  
22 and to buy more features than residential customers?

23 A. In some respects, yes, they do.

24 Q. Do you have any or is there any empirical  
25 evidence in the record in the case that would

0461

1 demonstrate what the per customer revenue distribution  
2 curve would look like if you compared the residential  
3 customers to business customers, anything like that?

4 A. I haven't seen it.

5 Q. At lines 15 through 17 on that same page, you  
6 say:

7 The real consequence of dividing the  
8 market by residential and business will  
9 be to enable CLECs to continue using  
10 UNE-P to serve higher revenue  
11 residential customers even where they  
12 would be economically viable using self  
13 provided switching.

14 And again, this is just I gather you're just  
15 saying it's an imperfect division?

16 A. No, I'm saying it's more than imperfect, it  
17 doesn't have -- it would not have the effect that  
18 Mr. Spinks suggested it would have. If you read the  
19 full paragraph there, you know, the point is that today  
20 CLECs even with UNE-P are not serving low revenue  
21 customers. So if you separate the market, the mass  
22 market as I think you can't do, but if you were to try  
23 to do that into residence and small business or  
24 business, then it seems to me, and thereby preserving  
25 UNE-P, what you would really be doing is not

0462

1 facilitating the provision of service to the low revenue  
2 customers, but perpetuating it for the high revenue  
3 customers who can profitably be served using UNE-L and  
4 self provisioning switching, as the evidence I think  
5 provided by Qwest demonstrates.

6 Q. Well, turned around though, I mean if you're  
7 -- if you want to foreclose Z-Tel's ability to continue  
8 using UNE-P, which is the example you give, and the way  
9 you go about that is to throw residence and business all  
10 in one market, aren't you foreclosing the possibility of  
11 UNE-P based competition ever developing for low revenue  
12 residential customers, low to medium revenue residential  
13 customers?

14 A. Not to quibble, but I haven't thrown them all  
15 into one category, the TRO has thrown them into one  
16 category. And I think that it's very important, and  
17 this was stressed I think on a number of occasions  
18 today, this proceeding is not about the relative merits  
19 or demerits of UNE-P and what UNE-P might or might not  
20 allow hypothetical CLECs to do or even existing CLECs to  
21 do in the future. It's a question about whether an  
22 efficient CLEC serving the mass market could do so  
23 economically self providing their own switching and  
24 buying UNE-L from Qwest or leasing UNE-L from Qwest or  
25 providing some other form of distribution or loop plan.

0463

1 That's what this is about, not about what might or might  
2 not happen at some point in the future if you perpetuate  
3 UNE-P.

4 Q. Is there anything in the, anything in terms  
5 of model or empirical evidence, in the record that shows  
6 whether there's a potential for competitors to serve,  
7 well, for lack of a better term, average revenue retail,  
8 or residential customers rather, using UNE-P?

9 A. Using UNE-P?

10 Q. Yes.

11 A. No, that's not -- that's not -- there would  
12 be no -- as far as I -- well, the advocates of UNE-P  
13 have not provided that model. Indeed it's been  
14 suggested by Mr. Smith this morning, if you look at  
15 Mr. Baranowski's own model and you run it with UNE-P  
16 prices as opposed to UNE-L prices, it would suggest that  
17 it's unprofitable to serve anywhere with UNE-P. So I  
18 think what Qwest has done with the model that  
19 Mr. Copeland has presented and will defend is to present  
20 a model of an efficient CLEC serving the mass market.  
21 And that model it seems to me is a model that is set out  
22 -- that sets out to do what the TRO requires the  
23 incumbent to do to make the showing under track 2.

24 JUDGE RENDAHL: Mr. Thompson, how much more  
25 do you have?

0464

1                   MR. THOMPSON: Well, I'm just going to ask  
2 about three more minutes worth of questions.

3                   JUDGE RENDAHL: Thank you, go ahead.

4                   MR. THOMPSON: And I'm going to change the  
5 subject.

6 BY MR. THOMPSON:

7           Q.     I want to ask you just a couple of questions  
8 about the DSO versus the DS1 cutoff issue. And at page  
9 5 of Exhibit 7-T, actually I think it's page 4, nope,  
10 sorry, it is page 5 I want to refer to. You're  
11 discussing there, you're asserting that it's  
12 conservative of Qwest to go with the fewer than four  
13 lines cutoff, correct, because it makes it -- rather  
14 than picking a larger number of lines, because with a  
15 smaller number of lines it makes it more difficult to  
16 satisfy the triggers test. Is that a fair paraphrase?

17           A.     It's fair except I would just say it's not a  
18 question of Qwest having elected to do this. That's  
19 what the TRO permits, and Qwest hasn't challenged that.  
20 That is, by setting the cutover or crossover at a  
21 relatively low number, the effect of what the commission  
22 has done is to raise the bar for all the incumbents in  
23 terms of meeting the triggers. Had the cutover been set  
24 higher, then presumably there would be, could be, more  
25 trigger candidates.



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1 Q. But this cutover has a different aspect to  
2 it, doesn't it, in that the TRO has eliminated  
3 enterprise switching, right? Does this -- I want to get  
4 a sense of what you think the effect of this cutoff is  
5 in areas outside of the markets that you propose,  
6 assuming the Commission were to, the hypothetical that  
7 the Commission were to grant what Qwest seeks. What if,  
8 under that scenario, what if a CLEC were to request  
9 UNE-P to serve a business that requires four or five  
10 lines say in an area outside the MSAs, would Qwest be  
11 able to say, no, you only get -- you can only have UNE-P  
12 for a three line business?

13 A. As to what Qwest's position is on that, I  
14 think you're going to need to ask a Qwest witness, that  
15 is a Qwest employee. That's an interesting question. I  
16 mean I think that's an area where there may be some  
17 latitude for this Commission to decide.

18 Q. Well, okay, in that instance though, a lower  
19 number is certainly not more conservative for Qwest, it  
20 increases the effect of that, the FCC's elimination of  
21 unbundled switching for DS1 circuits, right?

22 A. That would be the effect of it. And, you  
23 know, again, my reading of the TRO on its face would  
24 seem to say it applies everywhere. The problem arises  
25 or the difficulty arises is that you're really asked

0466

1 then to apply it in the context of the geographic market  
2 that's been specified in the case, and at least by Qwest  
3 that's the MSA. So I think, you know, I really haven't  
4 thought that through, and I think that may involve a  
5 legal opinion that I'm not here, you know, to provide at  
6 this point right now. But you would have to ask Qwest  
7 about that.

8 MR. THOMPSON: Okay, thank you, Mr. Shooshan,  
9 that's all my questions.

10 JUDGE RENDAHL: Thank you, Mr. Thompson.

11 Mr. Melnikoff.

12 MR. MELNIKOFF: Thank you, Your Honor.

13

14 C R O S S - E X A M I N A T I O N

15 BY MR. MELNIKOFF:

16 Q. Good afternoon, Mr. Shooshan.

17 A. Good afternoon, Mr. Melnikoff.

18 JUDGE RENDAHL: Mr. Melnikoff, can you move  
19 the mike closer to your --

20 MR. MELNIKOFF: Is that better?

21 JUDGE RENDAHL: And is it on?

22 MR. MELNIKOFF: Yes, it is.

23 JUDGE RENDAHL: Yep, it's on, go ahead.

24 BY MR. MELNIKOFF:

25 Q. I'm going to be dealing in area A, the market

0467

1 definition, and I'm trying to get an understanding of  
2 what you're recommending in your testimony on market  
3 definition. Was it your responsibility to recommend to  
4 Qwest the definition of the geographic market that this  
5 Commission should use to determine nonimpairment for  
6 mass market switching?

7 A. No, I had discussions with Qwest about what  
8 it should be, but the decision in the end was their  
9 decision.

10 Q. So it's your responsibility to evaluate their  
11 decision and to defend it before this Commission?

12 A. My understanding of my role was to opine as  
13 to the acceptability of that decision, the MSA is what  
14 we're talking about in terms of geographic market, in  
15 connection with the requirements of the TRO, and within  
16 that context it's a reasonable specification of the  
17 market.

18 Q. I note that in Mr. Teitzel's discussion he  
19 also addresses relevant market in section 3 of his  
20 direct testimony. Are you testifying to that discussion  
21 as well?

22 A. I have read it. I don't have it in front of  
23 me right now. Is there something specific you wanted to  
24 point --

25 Q. No, I'm just saying are you responsible for

0468

1 that, for questions in that area?

2 A. About what Mr. Teitzel says?

3 Q. Correct.

4 A. No, I think questions about what Mr. Teitzel  
5 says should be directed to Mr. Teitzel.

6 Q. Thank you. Have you advised or evaluated  
7 market definition for Qwest in other proceedings, TRO  
8 proceedings in other jurisdictions?

9 A. Yes.

10 Q. Which ones?

11 A. I am witnessing for Qwest in a position  
12 similar to this in seven states. Some of those  
13 proceedings have been stayed at this point right now.

14 Q. Are you witnessing or advising other ILECs on  
15 the same --

16 A. I am --

17 Q. -- on the same subject?

18 A. I am witnessing for other ILECs, specifically  
19 an other ILEC, SBC, I think in seven states for them as  
20 well. The division of labor in those states is a bit  
21 different from here in the sense that Qwest is putting  
22 on an economist as well to testify as to the economic  
23 markets issues, geographic and product markets issues.

24 Q. In those approximate 14, 15 jurisdictions,  
25 have you recommended the use of the market definition,

0469

1 the product market, or I'm sorry, the geographic market  
2 definition in any of them other than the use of the  
3 entire MSA?

4 A. Let's be clear, there's a difference between  
5 recommending and saying that something that's done is  
6 reasonable. I have in my own testimony here in this  
7 proceeding suggested that a specification of the  
8 relevant market other than MSA would be reasonable too.  
9 For example, going to AT&T's approach, a collection of  
10 MSAs within a LATA would be reasonable. It may even be  
11 that there's a -- there's something, you know, just  
12 below an MSA that would make sense as well too.  
13 There's, you know, no right answer, but there are a lot  
14 of wrong answers under the TRO. But within the range of  
15 reasonability, I think there are other possibilities one  
16 could come to. So again, it's a -- my role is not to  
17 recommend it to them, but rather to say that I believe  
18 their using MSA to specify the market in this proceeding  
19 is acceptable and consistent with the TRO.

20 Q. Are they using the MSA in each of, this is  
21 Qwest now, each of those seven jurisdictions?

22 A. Yes, I believe that Qwest has decided to  
23 pursue all of its cases using the MSA as the relevant  
24 geographic market.

25 Q. The whole MSA?

0470

1           A.     Yes, or at least the whole MSA that's within  
2 a particular state. We have an example here of the  
3 Vancouver-Portland MSA, and we're only asking obviously  
4 for -- we're only using that portion of the MSA that's  
5 within Washington state, but with that caveat, yes.

6           Q.     There's actually another MSA in Washington  
7 that straddles the state, is there not?

8           A.     Yes, that's right.

9           Q.     And where is that?

10          A.     Gosh, I would have to look and see. I don't  
11 think it's any of the ones that we have pursued.

12          Q.     It might be helpful if I told you that it's  
13 in the eastern portion of the state; is that correct?  
14 It straddles --

15                   JUDGE RENDAHL: Let's be off the record for a  
16 moment.

17                   (Discussion off the record.)

18                   JUDGE RENDAHL: Mr. Melnikoff, maybe you can  
19 ask a question subject to check and we can move this  
20 along.

21 BY MR. MELNIKOFF:

22          Q.     Subject to check, would you agree that it's  
23 in the eastern part of the state?

24          A.     I would say subject to check that I believe  
25 the only MSA in which Qwest is seeking relief in this

0471

1 proceeding that is -- that straddles two states is the  
2 Portland-Vancouver MSA. That there's another MSA in the  
3 eastern part of the state that does, I would take that  
4 subject to check. I just don't know.

5 Q. Going to your Exhibit 1-T, page 50, line 1.

6 A. Just a minute, please.

7 Yes.

8 Q. You state:

9 Based on the circumstances in  
10 Washington, aggregating wire centers by  
11 MSA is logical from both an economic and  
12 practical perspective.

13 A. Yes, I say that.

14 Q. What are the circumstances in Washington to  
15 which you are referring?

16 A. Well, I think they're the ones that I  
17 enumerate in the next four points in that paragraph. I  
18 mean I don't -- in other words, I think that there's  
19 nothing in Washington that makes -- that suggests to me  
20 that the MSA would not be -- would not be appropriate.

21 Q. And the third one is reasonable areas for  
22 looking at actual and potential competition. Is that  
23 not correct?

24 A. Yes.

25 Q. Did you look at the actual and potential

0472

1 competition in each of those markets when you were  
2 trying to define them for Washington?

3 A. Well, I mean the decision in the end about  
4 what the relevant geographic market is is one that's  
5 informed by facts, and so therefore my statements here  
6 and elsewhere are informed by looking at the facts, yes.

7 Q. So you looked at the facts in Washington,  
8 what exact facts did you look at?

9 A. The facts that are represented in the various  
10 tables that are a part of my testimony which are drawn  
11 from the analysis done by Mr. Teitzel on the one hand  
12 where it's actual competition and the results of the  
13 CPRO model that Mr. Copeland presents.

14 Q. So, for instance, that would be figure 1 on  
15 page 53 as an example?

16 A. Yes. Although again, as we discussed  
17 earlier, it would probably be better in referring to  
18 these tables to refer to the ones that are at the back  
19 of 7-T, the revised tables, but yes, those are the  
20 tables that I'm referring to.

21 Q. And I want to just follow up on something the  
22 Staff raised with you. They addressed Footnote 1536 in  
23 the TRO.

24 A. Yes.

25 Q. Which required the state commissions to



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1 define each geographic market granularly and directs  
2 them to take into consideration a number of factors. Do  
3 you see where I'm speaking?

4 A. Yes.

5 Q. In your analysis, did you, or in your  
6 evaluation, did you look at those considerations for the  
7 state of Washington?

8 A. Are we talking now about the triggers  
9 evidence?

10 Q. No, I'm talking about market definition. It  
11 says, and I will just read it from --

12 A. Yeah, maybe --

13 Q. -- the footnote.

14 A. -- that would be helpful.

15 Q. (Reading.)

16 We require state commissions to define  
17 each geographic market on a granular  
18 level and direct them to take into  
19 consideration the location of customers  
20 actually being served by competitors.

21 Another factor they direct them to take a  
22 look at or to take into consideration:

23 The variation in factors affecting  
24 competitors' ability to serve each group  
25 of customers.

0474

1 And then it goes on to another one:

2 The competitor's ability to target and  
3 serve a specific market economically and  
4 efficiently.

5 Did you take a look at those factors in your  
6 evaluation --

7 A. Independent --

8 Q. -- for Washington?

9 A. Independent of the analysis done by  
10 Mr. Teitzel and by Mr. Copeland?

11 Q. I'm asking you, did you take a look at it in  
12 evaluating it and opining about its appropriateness  
13 here?

14 A. Yes.

15 Q. On each of those factors?

16 A. Yes.

17 Q. MSAs are defined as one or more counties in  
18 most states; is that correct?

19 A. Subject to check. I don't know what you're  
20 reading from.

21 Q. Well, does it include one or more counties in  
22 most states?

23 A. Typically, yes.

24 Q. In New England states, are they done by  
25 counties?

0475

1           A.     Typically there aren't counties in New  
2 England states. That's why I qualified my response to  
3 you.

4           Q.     So in New England, MSAs are done differently?

5           A.     No, MSAs are done the same everywhere in the  
6 country. I mean an MSA -- MSAs are established by the  
7 Department of Commerce for nationally. You asked me  
8 about whether they encompass counties or more than one  
9 county, and I said yes. And then you asked me what  
10 about areas of the country where they don't have  
11 counties, and I said obviously no. But an MSA is  
12 defined the same way in the analysis done by the  
13 Department of Commerce everywhere throughout the  
14 country.

15          Q.     In your analysis of Washington state, did you  
16 look at a map to examine the geographic boundaries of  
17 counties in MSAs and the presence of population centers  
18 in those areas?

19          A.     No, I looked at a map of the MSAs in the  
20 state.

21          Q.     But you didn't make any consideration of  
22 where in that within the boundaries of the presence of  
23 the population centers?

24          A.     No. Again, the advantage of MSAs, and I have  
25 already said that there could be other ways to specify

0476

1 the market, but the advantage of the MSA is that it's a  
2 known quantity, so to speak. I mean you can look at a  
3 map, and you can see where it is and of what it  
4 consists. It also is relevant in the sense that it is  
5 an effort by the Department of Commerce to define an  
6 area that has a community of interest, both economic and  
7 social. So it is a preexisting boundary, if you will,  
8 pretty objective, that people could reasonably use to  
9 specify the geographic market. Could there be others?  
10 Yes, I have admitted to the fact that there could be.  
11 Could be the LATA, a selection of wire centers in a  
12 LATA, I mean of MSAs in a LATA. It could be something  
13 slightly smaller than MSA. What it can't be is a wire  
14 center, and I don't think it can be a neighborhood or a  
15 specific building location.

16 Q. You state several times that you sought to  
17 aggregate wire centers into markets, and I will give you  
18 an example in the same document we're looking at, 1-T,  
19 Exhibit 1-T, page 52, line 4.

20 A. Yes.

21 Q. Does your testimony show or display such a  
22 building up approach?

23 A. Well, I wouldn't -- I mean I don't -- let's  
24 put it this way. I don't know that you have to -- it  
25 has to be a building up approach. That has other

0477

1 connotations, as you well know, in this proceeding. But  
2 I think the way in which Qwest has presented its data  
3 and the tables that I have presented in my testimony  
4 that represent that data supports the use of an MSA.

5           But again, I want to be very clear, I didn't  
6 elect to use the MSA, as you say did I do it, Qwest  
7 determined that that was the best way to go, and I  
8 believe that that's reasonable. And I think when you  
9 look at the way in which the evidence falls out in this  
10 state that it confirms that MSA is a reasonable choice  
11 of definition of relevant market.

12           Q.     But when you're evaluating and opining  
13 whether it's appropriate or not, did you have to go  
14 through an aggregation yourself of wire centers to  
15 determine what the -- enter markets for the analysis of  
16 impairment?

17           A.     Again, as I said earlier, I think that if you  
18 read the TRO in its entirety, what it envisions is that  
19 the specification of the relevant geographic market,  
20 while left to the states' discretion, is to be a fact  
21 based assessment. And if you're asking me in saying  
22 that the MSA is reasonable and the aggregation of wire  
23 centers within the MSA is reasonable, I looked at the  
24 evidence that Qwest has produced and which I have  
25 attempted to summarize in the tables in my testimony.

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1 That's what I looked at to reach those conclusions.

2 Q. Well, let's go to a couple of those tables.

3 We have already looked at some of them when MCI was

4 asking questions. For instance, 7-T, Exhibit 7-T, page

5 20, and I'm on figure 3, which is the Portland-Vancouver

6 MSA, the one that straddles two states.

7 A. Yes.

8 Q. In that you have or Qwest has aggregated

9 together, for example, two wire centers where there's no

10 self provisioning CLECs present with three wire centers

11 where there were purportedly three to five self

12 provisioning CLECs; is that correct?

13 A. Well, yes, with the additional point that in

14 Ridgefield there was a positive business case as well.

15 We have looked at both track 2 and track 1.

16 Q. Do you know how many of those CLECs that are

17 in Vancouver, Oxford, Orchard, and Vancouver North are

18 cable providers?

19 A. Cable providers, that's in Mr. Teitzel's

20 testimony.

21 Q. Well, but do you know whether or not or how

22 many of those are cable providers?

23 A. I do know. I can't tell you specifically. I

24 believe there are cable providers in there. I can't

25 tell you what that number is right now. But again,

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1 these numbers are simply numbers that add up the  
2 evidence that's presented by Mr. Teitzel. I do believe  
3 in a number of these areas, as I said this morning, a  
4 number of these markets, cable CLECs are included as  
5 trigger candidates and appropriately so.

6 Q. Well, I'm not trying to discuss whether it's  
7 a trigger candidate or not. I'm just wanting to look at  
8 how you evaluated the appropriateness of the market  
9 definition of this particular MSA.

10 A. And I tried to tell you that I have done so  
11 by examining the evidence that was developed by  
12 Mr. Teitzel of actual competition and the results of the  
13 CPRO model run by Mr. Copeland which he presented in  
14 this proceeding. And I have represented the results of  
15 that compilation of information in these tables, and it  
16 is upon those tables that I base my opinion. I have not  
17 gone behind those, that analysis, to determine whether  
18 it's correct or not. I have relied on it. That's the  
19 point I was making to you earlier.

20 Q. So in your mind, would it matter if one or  
21 all or some of the CLECs in those three wire centers  
22 were, in your evaluation of the appropriateness as a  
23 market definition, that they were cable providers?

24 A. I think we're making -- I think we're mixing  
25 apples and oranges here, Mr. Melnikoff. What I observe

0480

1 here and I think what the Commission needs to do is to  
2 look at the evidence of competition. That's really what  
3 the TRO sets out for it to do. And upon that evidence  
4 judge whether the market as specified, the geographic  
5 market as specified by Qwest is reasonable or not. I  
6 look at these numbers, and I say regardless of whether  
7 the triggering CLEC or the facilities based CLEC which  
8 would be in column 2 is a cable company or not doesn't  
9 matter to my analysis, because indeed under the TRO, if  
10 the intermodal competitor is providing service of  
11 comparable quality, it should be counted as a trigger  
12 candidate. So it is what it is.

13           So I think when I say apples and oranges, it  
14 is that the way this proceeding has to work is that to  
15 begin the analysis somebody, the incumbent in this  
16 state, has to start by saying here's the -- here's how  
17 we would specify the relevant market, and then produce  
18 evidence to support that. The Commission evaluates it  
19 and says based on that evidence you're either right or  
20 you're wrong. If you're wrong, we'll re-specify that  
21 geographic market. But it's based on the evidence  
22 that's actually presented in the state.

23           Q.     So --

24           A.     That's why, for example, just to finish up,  
25 if you look at my flow chart, which is a little bit



0481

1 different from the one we handed out, I have some arrows  
2 on the left-hand side flowing back into the box that  
3 says incumbent specifies the geographic market, because  
4 that's always a decision that can be informed by what  
5 the Commission finds as it goes through the triggers  
6 analysis and the track 2 analysis.

7 Q. So to summarize your response, in your mind  
8 in evaluating a market definition, a geographic market  
9 definition, it doesn't matter whether a CLEC -- you're  
10 combining CLECs that are cable providers in your  
11 traditional CLEC?

12 A. Two different questions. In specifying the  
13 relevant geographic market, it seems to me that the  
14 Commission looks at the totality of the evidence that's  
15 presented to see whether the market that's specified by  
16 Qwest is reasonable or not. And in so doing, can it  
17 look at evidence of cable CLEC deployment of facilities,  
18 yes, it can, the TRO permits it, indeed requires it.

19 Q. Thank you. In considering whether MSA market  
20 approach was a reasonable implementation of the FCC's  
21 TRO guidance and before you prepared your market  
22 definition testimony, did you look at all six MSAs that  
23 you referred to in your testimony or just those that  
24 were on a track 1 showing?

25 A. No. Again, what I'm telling you is I didn't

0482

1 do any initial look at MSAs. What I did was to take  
2 Qwest's decision to present this case in the context of  
3 MSAs and opine as to whether, given the wording of the  
4 TRO, whether that was a reasonable way to start this  
5 process. And I believe it -- I believe it is, but it  
6 was Qwest that determined which MSAs to seek relief in.  
7 And in some cases, as you note, it's based on triggers  
8 and track 2. In a couple of instances it's based simply  
9 on, for instance I think it's based on potential  
10 deployment only. That was their decision to make, not  
11 mine.

12 Q. And in the Bremerton MSA, it was in your mind  
13 appropriate to aggregate, I'm on page 21 of Exhibit 7-T,  
14 in your revised figure 5, in your mind it was  
15 appropriate to aggregate six wire centers that had no  
16 CLEC presence with another one that only had one CLEC  
17 presence?

18 A. Well, I think there are two -- the answer to  
19 the question is that's a judgment call. I mean I think  
20 that's a -- that's at the -- that's at sort of one end  
21 of the continuum. I would point out that in those two  
22 wire centers that either have a CLEC with its own  
23 switching or meet the positive business case, that  
24 accounts for 58% of Qwest's lines in the Bremerton MSA.  
25 But again, as I said this morning, this Commission looks

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1 at these facts and decides based on the facts that it  
2 wants to make an adjustment to the MSA either in  
3 Bremerton or across the board, I think it has the  
4 flexibility to do it within the parameters of what's  
5 allowed by and is reasonable under the TRO.

6 Q. So just to reiterate what you have beat me up  
7 on several times, you did not make the decision that it  
8 should be an MSA, correct?

9 A. Correct.

10 Q. That there are something different than an  
11 MSA that would be also appropriate under the TRO?

12 A. I have said as much in my testimony and today  
13 on the stand.

14 Q. Let me follow up on one additional area that  
15 has been troubling me that Mr. Thompson raised, and  
16 that's the appropriateness under the TRO of the  
17 splitting the geographic market into two customer  
18 components, residential and business. And he pointed to  
19 you, let's go back to the TRO, that same footnote,  
20 Footnote 1536, and it's the same area that we were in  
21 before, and he pointed to one of those factors, which  
22 was each group of customers. And if I got the tone of  
23 your voice and the words of your voice correct, you seem  
24 to discount that as a legitimate, and these are my  
25 words, as a legitimate rationale for the split because

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1 it was in a footnote. Is that correct?

2 A. No, I said that -- I said that the -- there's  
3 a much broader and extensive discussion about the mass  
4 market, the differences between mass market and  
5 enterprise market elsewhere in the TRO. I was simply  
6 saying to hang one's hat on a specific phrase within one  
7 footnote to try to suggest that this Commission could do  
8 something -- and by the way I would quibble right off  
9 the bat with what I think Mr. Thompson is suggesting. I  
10 think that, as I have said, this Commission has latitude  
11 in defining the geographic market. It does not in  
12 defining the product market. People may disagree with  
13 me on that. But what you can't do I think is to try to  
14 use your definition of the geographic market to  
15 accomplish a split that you're denied in the product  
16 market definition, which is what I took Mr. Thompson to  
17 be doing by saying let's suppose we can draw a line, as  
18 uneconomic as it might be, around geographic areas where  
19 there are only residence customers, no small businesses  
20 at all, and somehow consider those to be separate  
21 geographic markets. To which I would say, you probably  
22 could do it, but the question is, is that a market for  
23 purposes of impairment and entry analysis that's  
24 required under the TRO. Because remember the FCC says  
25 specifically it can't be so small as to be uneconomic,

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1 and that's my concern, and I don't think you should try  
2 to do in the geographic market what you're precluded  
3 from doing in the product market. And that's what I  
4 sensed, in fairness to me anyway, that I was hearing  
5 Mr. Thompson suggest, and that's what I responded to.

6 Q. There is another part, and I'm almost  
7 finished here, there's another part in the TRO, as you  
8 suggested there might be, to hang your hat on, and that  
9 is in the rules.

10 A. Sure.

11 Q. This exact language appears in the rules.  
12 It's in Appendix B, page 19, but it's actually I can  
13 give you the rule reference, it's Rule 51.319(d)(2)(i).

14 CHAIRWOMAN SHOWALTER: You have to wait up a  
15 minute.

16 MR. MELNIKOFF: I can repeat it if you --

17 THE WITNESS: What page was it on?

18 MR. MELNIKOFF: On Appendix B --

19 JUDGE RENDAHL: Let's be off the record.

20 (Discussion off the record.)

21 BY MR. MELNIKOFF:

22 Q. The fact that the admonition to the state  
23 commissions to take into consideration that particular  
24 factor, groups of customers, the fact that it exists in  
25 the rules, does that change at all your evaluation of

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1 the appropriateness under the TRO of a residential  
2 business segment breakout in the geographic market?

3 A. No, but may I explain? Clearly in this  
4 section of the rules some of the language that's recited  
5 in that footnote we were talking about appears as part  
6 of the rules, so it's also in the rules. There's other  
7 language in that footnote that we talked about that  
8 isn't in the rules and is not consistent necessarily  
9 with what's said in the body of the TRO. That's all I  
10 was pointing out. Here I think in terms of market  
11 definition that the suggestion that geographic market be  
12 defined in such a way as to accomplish what Mr. Thompson  
13 wanted you to accomplish or wants one to accomplish or  
14 the Commission to accomplish has the effect of tying  
15 one's self into a pretzel. I mean I just don't see how  
16 you could do what he's asking you to do and still have  
17 it be a relevant economic market. But the rules say  
18 what they say, and if the Commission chooses to do  
19 something that I may not recommend, you know, I can't --  
20 I can't argue with it.

21 Q. So --

22 A. But I just don't see how you get there from  
23 here is what I'm saying.

24 Q. But now I think I hear you saying it might be  
25 appropriate to make that split?

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1           A.     No, what I'm saying is that there's  
2     discretion this Commission has in defining the  
3     geographic market. I have also said that I find it  
4     personally to be violating the spirit if not the letter  
5     of the TRO to try to do through geographic market  
6     definition what the TRO precludes you from doing in  
7     defining the relevant product market. And I suggest  
8     further that if you try to do that, you will meet  
9     yourself coming and going, because you will define a  
10    market that is not relevant in any economic sense, i.e.,  
11    particular neighborhoods or blocks or locations that,  
12    you know, somehow are viewed to be different from other  
13    blocks, locations, or whatever. I just don't think that  
14    comports with the way in which competitors enter the  
15    mass market, which is to enter it broadly offering  
16    service throughout the mass market. Even if they're not  
17    capable or willing to serve everyone, they roll it out  
18    that way. You know, I just -- I don't know of  
19    competitors that literally target, you know, blocks,  
20    city blocks, I just don't know of it being done that  
21    way. But if the Commission finds evidence for that  
22    basis, it certainly has the flexibility to do it. I  
23    just don't know how it does it.

24           Q.     And I'm struggling with the same thing you're  
25    struggling with, and let me give you an example of what

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1 I think you're talking about in the relevant market and  
2 have you comment on it. If I'm a small business owner  
3 and I have a shop with two lines going into it and I  
4 happen to live in a house around the corner from my  
5 store, if we segment the market into or we think about  
6 segmenting the market into residential and business, the  
7 geographic market, are there different characteristics,  
8 economic characteristics and operational  
9 characteristics, to serve me in my house around the  
10 corner than from me as a small businessman in my  
11 business?

12 A. No, and that's why the TRO properly puts them  
13 in the same market as opposed to the enterprise market  
14 which is served by, for example, DSO's. And the reason  
15 they do it is again the whole basis for impairment that  
16 the Commission finds on a national basis is based on  
17 this issue we discussed earlier about hot cuts. So  
18 providing that service, provisioning that service in the  
19 hypothetical you suggested is operationally no different  
20 whether you're provisioning it to the two line business  
21 or the residence of that business owner around the  
22 block.

23 Q. Did I hear in your response something about a  
24 DSO and the enterprise customers, did you misspeak?

25 A. No, I was trying to delineate or I was trying



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1 to explain the difference that's relevant to the way the  
2 Commission draws the line here.

3 Q. Oh.

4 A. And that is it's a question of the  
5 provisioning of service using self provided switching,  
6 and that is they have said that even though the  
7 attributes of a residence and very small business  
8 customer might differ, i.e., the business customer might  
9 have more data use than the residence customer, that the  
10 way in which service is provisioned to them using UNE-L  
11 in a world after UNE-P is operationally and economically  
12 the same, and that's what the TRO is set up to provide.

13 Q. And one last question, I think you are  
14 helping me to organize this in my mind. In my example,  
15 is it in your mind, is it appropriate under the TRO to  
16 say there's impairment, if the trigger mechanism is met  
17 in the geographic market, that there is impairment  
18 serving the residential, me as in my house around the  
19 corner, from my business, whereas there is no impairment  
20 in serving me as a businessman?

21 A. That's right, and that is why for purposes of  
22 the analysis done here as opposed to some other case  
23 where you might be examining relevant market, the  
24 Commission has chosen to say there are only two relevant  
25 product markets here, and that's mass market and

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1 enterprise. Because the small business and residence  
2 customer of which the mass market consists are  
3 provisioned using UNE-L and self provided switching in  
4 the same way. That's why it's relevant for purposes of  
5 this analysis to put them in the same market.

6 Q. And when you say commission, you mean the FCC  
7 has chosen?

8 A. The FCC has chosen, and this Commission is  
9 here to apply those rules, yes.

10 MR. MELNIKOFF: Thank you, Mr. Shooshan, I  
11 have nothing further.

12 CHAIRWOMAN SHOWALTER: I just want to ask the  
13 witness to clarify what you thought the question was  
14 just because it was hard for me to follow the  
15 distinction. Can you restate what distinction you  
16 thought the question was trying to make, and you agreed  
17 with it, and then I want to make sure that that's --  
18 that you two were on the same wavelength.

19 THE WITNESS: I think that what he asked me  
20 was, was I saying that operationally and economically  
21 there was no difference in serving the small business  
22 location that he described in his hypothetical and the  
23 residence in the example, the owner that lived around  
24 the corner of the house. And I said that that was  
25 correct, that there was none, and that's why

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1 appropriately in this case given the way this Commission  
2 -- you need to proceed, that the FCC appropriately in my  
3 view said that they could be considered part of the same  
4 product market.

5 CHAIRWOMAN SHOWALTER: And therefore we would  
6 not find impairment in the one case and no impairment in  
7 the other?

8 THE WITNESS: I don't know how you --

9 CHAIRWOMAN SHOWALTER: Was that the question,  
10 I wasn't sure?

11 MR. MELNIKOFF: The question was, would it be  
12 appropriate under the TRO, his understanding of the TRO,  
13 I think we're on the same wavelength, but would it be  
14 appropriate under the TRO to say there's no impairment  
15 in one case and around the corner there is impairment.

16 CHAIRWOMAN SHOWALTER: And his answer must be  
17 no.

18 THE WITNESS: No, that's correct, no.

19 CHAIRWOMAN SHOWALTER: Okay, thank you.

20 MR. MELNIKOFF: We usually are on the same  
21 wavelengths, we sometimes disagree.

22 Again, I thank you, Mr. Shooshan, I have no  
23 further questions.

24 JUDGE RENDAHL: Okay, let's be off the record  
25 for a moment.

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1 (Discussion off the record.)

2 JUDGE RENDAHL: We're going to finish up now  
3 for today, and we'll come back tomorrow morning and  
4 begin with Mr. Butler's cross-examination, and hopefully  
5 we will be able to move a little faster tomorrow. I am  
6 going to revise the time schedule to omit Mr. Buckley at  
7 the end, but I still think we're going to need to move a  
8 little quickly to finish by Friday.

9 We will be off the record until tomorrow  
10 morning, thank you.

11 (Hearing adjourned at 5:00 p.m.)

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