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1 JUDGE CAILLE: We're ready to resume the
2 evidentiary hearings after a brief -- well, a long
3 recess, which covered our public meeting, and we are
4 continuing with the cross-examination of Dr.
5 Goodfriend. Mr. Owens.

6 MR. OWENS: Thank you, Your Honor. As a
7 preliminary matter, I'd like to offer Exhibit 183
8 into evidence.

9 JUDGE CAILLE: Is there any objection?

10 MS. RACKNER: No objection.

11 JUDGE CAILLE: Then 183 is admitted into
12 evidence.

13 Q. Dr. Goodfriend, it's true, isn't it, that
14 those very large customers who are Tracer members who
15 purchase Qwest services do not purchase all of those
16 services out of the tariff?

17 A. I believe that's correct. Some of that is
18 ICB-type service. I think, on occasion, it's also
19 the members either engage in a more or less formal
20 process to try and solicit bids for business.

21 Q. Those bids would result in a contract?

22 A. It would be my assumption.

23 Q. So do you even know what proportion of the
24 very large customer services that are purchased by
25 Tracer members are not under contract?

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1 A. When I've spoken with the members, I've
2 talked to them about their individual services, so
3 the answer is no. I would suspect it varies by the
4 nature of the demands for telecommunications
5 services, based on a member's specific business.

6 Q. Directing your attention back to Exhibit
7 168-T, page 10, and referring also to Exhibit 169,
8 page -- I'm having a hard time finding a page number
9 on this. It's -- I have to count pages in. Fourth
10 page. And at those references --

11 JUDGE CAILLE: Excuse me, Mr. Owens, could
12 you just identify for the record maybe the first two
13 words at the top of this page?

14 MR. OWENS: Oh, sure. In the left-hand
15 column, it's "The switches and the equipment" in bold
16 type.

17 JUDGE CAILLE: Thank you.

18 MR. OWENS: You're welcome.

19 Q. With those two references in mind, you
20 apparently -- well, let me ask you this. Did you
21 obtain the facts that you recite at page 10 of
22 Exhibit 168-T, lines seven through 10, from the
23 fourth page of Exhibit 169, a statement attributed to
24 Mr. Spiridellis at the bottom of the left-hand
25 column, where he answers, By virtue of employing an

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1 experienced sales force, et cetera?

2 A. Yes, I did.

3 Q. And in your testimony, you talk about that
4 number increasing recently. He ties it to an
5 increase from 290 in the first quarter to 300 at the
6 end of the second quarter; correct?

7 A. Yes.

8 Q. And that is a number that, according to
9 him, describes the average number of lines per
10 customer; correct?

11 A. Yes.

12 Q. And then, further on, there's a statement
13 which you've also recounted in your testimony, that
14 the corporate customers subscribed at the same point,
15 that is, the end of the second quarter, to an average
16 of about 66 access lines?

17 A. Yes.

18 Q. So would we correctly understand, then,
19 that the customers other than corporate, which would
20 be individuals and partnerships, would subscribe to
21 some average significantly greater than 300?

22 A. I don't think that's correct. I admit I
23 found his numbers a bit confusing. I can go to the
24 CLEC Report 2000 and attempt to reconcile those. My
25 sense was that they were talking -- why don't I just

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1 do that. I'm afraid I can't reconcile that for you
2 at this point.

3 Q. Okay. At page 31 of Exhibit 166-T, you
4 discuss services provided by CLECs to the
5 newly-minted datacentric small businesses. Are there
6 services on Qwest's Attachment A to its petition that
7 are not provided to these datacentric small
8 businesses because of their nature?

9 A. No, those voice services are also provided
10 to datacentric businesses.

11 Q. You discuss in your testimony the
12 Department of Justice Horizontal Merger Guidelines;
13 correct?

14 A. Yes, I do.

15 Q. This case isn't about a merger; would you
16 agree with that?

17 A. The Merger Guidelines --

18 Q. Can you answer it yes or no, whether you
19 agree with what?

20 A. Yes, and I'd like to explain. The Merger
21 Guidelines were recognized by many authorities as an
22 appropriate model, FERC, the FCC, and state
23 commissions, for providing a framework for analysis.
24 Qwest witnesses, in the 990022 case, explicitly
25 employed the Merger Guidelines framework in their

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1 analysis. That was not a merger, either.

2 Q. And it's true, isn't it, that at some time
3 in the past, with regard to the business services in
4 Attachment A to Qwest's petition, you would agree
5 that Qwest had, if not actually, at least approaching
6 a 100 percent market share?

7 A. Within its certificated franchise service
8 territory, yes.

9 Q. Yes. Have you done any survey on the
10 extent to which consumers perceive CLEC services as
11 being different from those provided by Qwest? That
12 is, a 1FB provided by a CLEC or a PBX digital trunk
13 provided by a CLEC or a Centrex system provided by a
14 CLEC is different from the corresponding service
15 provided by Qwest?

16 A. I've not done an independent analysis.

17 Q. On page 37 of Exhibit 166-T, you discuss
18 the issue about excess capacity, and you caution
19 against double, triple, or quadruple-counting that
20 capacity. It's true, isn't it, that at least with
21 regard to some kinds of telecommunications capacity,
22 more than one service is enabled by investment in
23 that capacity?

24 A. That doesn't relate to --

25 Q. Well, can you --

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1 A. -- excess capacity at all.

2 Q. Can you answer yes or no?

3 A. If you're asking me if a switch could
4 deliver multiple services, the answer is yes.

5 Q. You discuss reasons, at page 39 of Exhibit
6 166-T, why you consider financial opportunity costs
7 to be a barrier to entry into nontargeted markets.
8 And would you agree with me that the hypothetical
9 significant nontransitory price increase by Qwest
10 would represent a CLEC profit opportunity that did
11 not exist before that price increase?

12 A. No, I wouldn't, exactly because of the
13 analysis I've provided here in the testimony.

14 Q. Part of that analysis is what appears at
15 page 41 of Exhibit 166-T; is that correct?

16 MS. RACKNER: Mr. Owens, could you please
17 give line numbers along with pages?

18 MR. OWENS: Beginning at line one.

19 MS. RACKNER: Thank you.

20 THE WITNESS: No, this doesn't discuss
21 financial opportunity cost, per se; it focuses on the
22 effect of competitive classification allowing Qwest
23 to have new flexibilities to managing entry, because
24 it can more fully discriminate in pricing and the
25 effect of that. Using the fact that there are

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1 financial opportunity costs for CLECs will be a piece
2 of information that Qwest cannot more fully exploit
3 to its own profit advantage.

4 Q. Directing your attention now to Exhibit
5 168, page five, line 16. What you recount there is
6 your interpretation of Dr. Blackmon's recommendation
7 and not something that he actually says; is that
8 correct?

9 A. It's definitely my interpretation. There
10 are points in his testimony, of course, where I
11 directly quote his analysis.

12 Q. At the top of page seven, beginning at line
13 one, you provide your interpretation of a phrase in
14 the Merger Guidelines, the phrase "can constrain;" is
15 that correct?

16 A. No, I'm not. In fact, my footnote to the
17 Merger Guidelines refers back to my direct testimony,
18 but it's quite clear that the guideline standard is
19 will constrain. And my problem with both the Staff
20 analysis and the Qwest analysis is that its framework
21 can only examine the issue of can constrain, and
22 therefore is inadequate.

23 Q. Is it your testimony that the Merger
24 Guidelines use the quoted phrase "will constrain?"

25 A. My interpretation is that if you --

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1 Q. Can you answer yes or no?

2 A. I'll have to look specifically at the
3 guidelines. Could you provide me a copy, please?

4 Q. I don't have them.

5 A. Okay. To the best of my recollection, the
6 portion of the guidelines that I quote, it's either
7 very clear from the context of those sentences that
8 the analytical idea there is will constrain, because,
9 of course, in order to make the exercise of market
10 power unprofitable, the behavior of the CLECs has to
11 be interpreted in a way such that it does constrain.
12 That is, it will constrain an attempted exercise in
13 market power.

14 Q. But right now, you don't know whether that
15 phrase actually appears there, will constrain?

16 A. I can't say for sure without looking at the
17 text.

18 Q. So you would disagree with any finding
19 that, because competitors have the ability to
20 construct their own facilities or lease UNEs at
21 cost-based rates or resell existing facilities
22 pursuant to the Telecommunications Act of 1996, Qwest
23 lacks the ability to sustain prices substantially
24 above cost without losing market share; would that be
25 true?

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1 A. If what you're saying is merely because the
2 CLECs have a capability to construct facilities, the
3 answer is I disagree with that, yes.

4 MR. OWENS: Your Honor --

5 JUDGE CAILLE: Excuse me, Dr. Goodfriend.
6 If you could please answer the question with a yes or
7 no, and then follow up with an explanation. Thank
8 you.

9 THE WITNESS: Okay.

10 Q. Now, at the top of page eight of Exhibit
11 168-T, you attribute to Dr. Blackmon an
12 acknowledgement that his recommendation for a grant
13 of flexibility rests fundamentally on his conclusions
14 regarding the ready availability and financial
15 viability, that phrase in quotes, of using Qwest's
16 special access facilities for entry and for providing
17 service to DS1 and larger customers, which provides
18 effective competition for the Qwest service. Where
19 in his testimony do you find that acknowledgement?

20 A. If you'll look first to Dr. Blackmon's --
21 one of the attachments to his testimony.

22 MS. RACKNER: Do you have an exhibit number
23 for that? I believe you're looking for 202; is that
24 correct?

25 THE WITNESS: Yes, thank you. 202, or

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1 Exhibit BGB-2, is a table provided at the end of Dr.
2 Blackmon's testimony.

3 Q. So that's your interpretation of that
4 table, not something that he stated in so many words;
5 is that correct?

6 A. No, I'm also going to cite to you, after I
7 look at my testimony, cross-references to his
8 testimony. If you look at the last column of the
9 exhibit that I just showed to you, also a statement
10 in his direct testimony, which is -- my citation is
11 to page 12, lines four through nine. I believe there
12 are other direct -- I think he uses those phrases
13 directly in his testimony at certain points.

14 Q. I'm asking you to locate them, where he
15 says that his recommendation for a grant of
16 flexibility rests fundamentally on his conclusions
17 regarding, quote, ready availability and financial
18 viability, unquote, of using Qwest's special access
19 facilities for entry and for providing service to DS1
20 and larger customers?

21 A. If you'll look at the final column of his
22 Exhibit 201 --

23 MS. RACKNER: 202.

24 THE WITNESS: 202. The last column he has
25 on the far left-hand side, various access methods, he

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1 then summarizes for each access method geographic
2 scope, customer size requirements, provisioning
3 issues and overall assessment.

4 If you turn your attention to the last two
5 columns, for example, for competitive fiber, with
6 provisioning, he says they are expensive and
7 time-consuming to install; once they're completed,
8 adding customers is quick and easy. His overall
9 assessment is too narrowly available to justify
10 competitive classification.

11 MR. OWENS: Your Honor, this is going well
12 beyond my question. I asked where in Dr. Blackmon's
13 testimony can we find his statement that his
14 recommendation for a grant of flexibility rests
15 fundamentally on his conclusions regarding ready
16 availability and financial viability. The witness is
17 pointing to the text that she identified in the prior
18 answer, but I'm not getting an answer to that
19 question.

20 MS. RACKNER: I believe that the witness is
21 directing Mr. Owens' attention directly to the place
22 in Dr. Blackmon's testimony which answers his
23 question and shows his reliance on special access for
24 -- which justifies competitive classification. And
25 she directed his attention to it once, he didn't --

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1 he didn't seem to understand. She's now trying to
2 explain. And in order to explain, I do believe that
3 Dr. Goodfriend is going to have to go through and
4 explain how this chart justifies her assessment that
5 he is resting his recommendation fundamentally on the
6 availability of special access.

7 MR. OWENS: Well, Counsel has just put her
8 finger on the point. I was asking for a place where
9 Dr. Blackmon acknowledged, rather than what the
10 witness thought he said.

11 JUDGE CAILLE: I understand. Can you find
12 a reference for that, Dr. Goodfriend, in his
13 testimony?

14 THE WITNESS: Yes, if you'll turn to his
15 testimony on page 12, the question that he asks
16 himself is can every competitor reach every customer
17 through every one of these methods, referring back to
18 the access methods that were being cataloged in the
19 exhibits. His answer is, No, the viability of each
20 method as a mode of competition varies based on
21 geography, customer size and availability, which were
22 the columns I was discussing earlier.

23 Staff believes there's no evidence to
24 suggest that small business customers have any viable
25 alternative to Qwest business exchange service,

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1 because none of the methods I just listed is
2 reasonably available and financially viable for that
3 market segment. However, the large business segment,
4 i.e., any customer whose demand can justify a DS1 or
5 larger circuit, does appear to have reasonably
6 available alternatives in some exchanges.

7 Q. That's your answer?

8 A. That's a portion of my answer, yes.

9 Q. That's the place in the testimony which you
10 believe is the acknowledgement that you recite at
11 page eight, line one or line two of Exhibit 168-T?

12 A. There are others.

13 Q. Where are they, please?

14 A. Page 14. I'll direct you to phrases with
15 this -- lines with the phrase. With respect to the
16 UNE platform, line 11, Indeed with a viable UNE-P
17 alternative, the classification might well include
18 all areas of the state. Beginning on line 16 through
19 line 17, same page, The current situation is that
20 unbundled loops in the UNE-P are not readily
21 available for serving the mass market small business
22 customer segment. On line 20 and 21, There's
23 literally no end to the performance metrics one could
24 consider in attempting to gauge whether unbundled
25 loops are a readily available alternative to retail

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1 service.

2 Returning to the Exhibit 202, in the last
3 column, as I was talking about competitive fiber, he
4 uses the term in the last column, too narrowly
5 available. Qwest special access -- he says, in the
6 next to last-most column, Ordering and provisioning
7 are well-established. With respect to unbundled
8 loops, provisioning issues, he concludes, Not yet a
9 ready source of access for competitors. In the
10 overall assessment, he says, It would justify
11 classification for the entire wire center with
12 collocation if it were readily available, but it is
13 not.

14 If you go to the -- his discussion of the
15 unbundled network platform, he examines, as he does
16 in all cases, the geographic availability of the
17 service. He says that, in terms of provisioning
18 issues, ordering and provisioning remain -- issues
19 remain unresolved, and his overall assessment would
20 justify competitive classification if it were readily
21 available, but it is not. And for resale, it doesn't
22 satisfy his standards at all for ready availability
23 as a price constraining source of competition as an
24 access method.

25 Q. Does that complete your answer?

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1 A. Yes, sir.

2 Q. At page 11 of Exhibit 168-T, you say,
3 Without knowing more about CLECs' strategies -- this
4 begins at line nine.

5 A. I'm not there yet.

6 Q. Oh, sorry.

7 A. Yes, thank you.

8 Q. You're welcome. Without knowing more about
9 CLEC strategies and these customers, the CLEC product
10 found to be a good substitute, customer location in
11 the wire center and so forth, one cannot generalize
12 from the mere existence of the customers referred to
13 in the previous sentence.

14 Isn't it true that the CLECs are the ones
15 who have the information about their strategies?

16 A. Yes, CLECs know most about their
17 strategies.

18 Q. Would you agree with me that, at least as
19 exemplified by activities in this docket, we have
20 reason to believe that most CLECs consider those
21 strategies to be proprietary information?

22 A. Yes. My point here was something
23 different.

24 Q. It's correct, isn't it, that you haven't
25 presented any evidence of any terms in any existing

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1 arbitration agreements?

2 A. There are places in my testimony where I
3 argued the arbitration agreements are not
4 controlling.

5 Q. Well, that wasn't my question. If you'd
6 listened to my question, I asked if you had presented
7 any evidence in this case of any terms in any
8 existing arbitration agreements?

9 A. I haven't quoted any arbitration agreements
10 in my testimony.

11 Q. At page 27 of Exhibit 168-T, beginning at
12 line 12, you say that Staff identifies DS1 and higher
13 circuits as a relevant product. Would you point me
14 to where in Dr. Blackmon's or Ms. Bhattacharya's
15 testimony that identification appears?

16 A. Could I have the line number again, please?

17 Q. I'm sorry. Line 12.

18 A. It's implied by their service analysis.
19 That's where they draw the product boundary.

20 Q. So that's your conclusion, rather than
21 something that they specifically say?

22 A. Yes, it's necessary to the way they draw
23 their product boundary.

24 Q. At page 32 of Exhibit 168-T, beginning at
25 line 18, you attribute to Dr. Blackmon an invitation

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1 to Qwest to anticompetitively discriminate in service
2 provisioning.

3 It's true, isn't it, that Qwest still must
4 go through the Section 271 process in the state of
5 Washington at this time. It hasn't completed that?

6 A. That's certainly true.

7 Q. And isn't it true that whether or not Qwest
8 is engaging in the kind of conduct that you say Dr.
9 Blackmon invites, it's an issue that is likely to be
10 considered in the Section 271 proceedings?

11 A. No, sir, not entirely.

12 Q. So you don't believe this Commission will
13 consider whether or not Qwest is anticompetitively
14 discriminating in service provisioning in the 271
15 case; is that a fair understanding of your answer?

16 A. No, that's not my testimony. If you'll
17 look at my explanation for that statement, if you
18 continue down the page, the question beginning at
19 line 22, Please explain why Dr. Blackmon invites
20 anticompetitive service provisioning, I say, He
21 creates, by permitting the flexibility prior to
22 establishing irreversibility conditions required by
23 271 -- he creates incentives for Qwest to design and
24 manage its provisioning systems, not for
25 impartiality, but to hide finely-tuned discrimination

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1 of the sort that is already difficult to detect. For
2 example, in response to a data request, Qwest told us
3 that it does not examine provisioning on a wire
4 center basis. Its analysis is not that --

5 MR. OWENS: Your Honor, this is going well
6 beyond my question. I simply asked if it was her
7 testimony that this Commission would not consider the
8 alleged anticompetitive discrimination and
9 provisioning in the Section 271 proceeding, and now
10 we're simply getting a repetition of the material
11 that's already in the testimony.

12 MS. RACKNER: Well, it was well within the
13 scope of the question that you asked her. The fact
14 that you asked her a question where the answer lay
15 within her prefiled testimony doesn't prohibit her
16 from answering your question.

17 MR. OWENS: The question called for a yes
18 or no answer.

19 CHAIRWOMAN SHOWALTER: I think the witness
20 should remember there is an opportunity for your own
21 counsel to ask you questions within the scope of the
22 cross-examination that may well elicit further
23 response.

24 THE WITNESS: Thank you.

25 Q. Let me ask this again. Yes or no, is it

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1 your testimony the Commission will not consider any
2 allegations of alleged discrimination in provisioning
3 by Qwest in the Section 271 proceeding?

4 A. Yes, the Commission certainly will consider
5 them.

6 Q. Thank you. Do you believe Qwest has an
7 incentive to satisfy this condition that it has
8 complied with the Section 271 checklist items in
9 order to gain this Commission's favorable
10 recommendation on its 271 application?

11 A. Yes, I say so in my testimony.

12 Q. Is it your testimony that Qwest has
13 advanced knowledge of what the performance metrics
14 that may be established in the 271 proceeding with
15 regard to provisioning discrimination will be?

16 A. My understanding is those are under
17 development at this time, so knowledge is equal among
18 the parties participating.

19 Q. So is the answer no, you're not testifying
20 Qwest has advanced knowledge?

21 A. That's correct, no.

22 Q. It's true, isn't it, that Qwest uses the
23 same operational support systems across all of its 14
24 states?

25 A. Yes, there are common elements. I don't

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1 know the extent to which they are absolutely
2 identical.

3 Q. And it's also true that not all 14 states
4 have a competitive classification statute similar to
5 that in Washington?

6 A. To my knowledge, they do not.

7 Q. Page 34 of Exhibit 168-T, beginning at line
8 two, you say -- I guess it's line three -- you said,
9 Differently, \$20 million can be a small price to pay
10 under the circumstances that you give in this
11 statement. Do you have any evidence that Qwest
12 considers \$20 million a small price to pay for those
13 benefits?

14 A. Only by the behavior of other ILECs that
15 have paid very large penalties.

16 Q. But you don't have any internal documents
17 or records of interviews with any Qwest policy makers
18 in which they say that they consider \$20 million a
19 small price to pay; is that correct?

20 A. That's correct.

21 MR. OWENS: Nothing further. Thank you.

22 JUDGE CAILLE: Commission Staff.

23 MS. JOHNSTON: Yes, thank you.

24

25

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

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1 BY MS. JOHNSTON:

2 Q. Good afternoon, Dr. Goodfriend.

3 A. Good afternoon, Ms. Johnston.

4 Q. Now, in your practice, do you develop
5 business cases or perform market studies for either
6 CLECs or large business customers?

7 A. I have performed a marketing study of a
8 sort, yes, while I was under employment by MCI in the
9 context of a merger proceeding.

10 Q. And while you were employed at MCI, did you
11 work on any specific customer accounts?

12 A. No.

13 Q. Please turn to page nine of Exhibit 166-T.
14 Do you see the box there?

15 A. Yes, I do.

16 Q. Could you please identify for the record
17 the Tracer members listed there in that box on page
18 nine?

19 A. Boeing is a Tracer member, Group Health
20 Cooperative is a Tracer member. I'm not sure about
21 Sisters of Providence or the other listed firms.

22 Q. But they may be Tracer members?

23 A. Yes, they may be.

24 MS. JOHNSTON: Your Honor, I'd like to have
25 that be the next record requisition, please.

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1 MR. OWENS: Except for US West, of course.

2 JUDGE CAILLE: All right. That will be
3 Record Requisition Four, and it's to identify the
4 Tracer members on page nine of Exhibit 166-T.

5 MS. JOHNSTON: Contained in that box, yes.

6 JUDGE CAILLE: Contained in that box.

7 MS. JOHNSTON: Okay, thank you.

8 Q. Staying on that page, did you have the
9 occasion to interview any individual firms while
10 preparing the testimony there?

11 A. Yes, I did.

12 Q. Could you please tell me which firms you
13 interviewed?

14 A. I spoke with Paccar, I spoke with Group
15 Health, I spoke with Boeing. There's another concern
16 that I spoke with, but I don't recall the name of the
17 company at this point. There may have been others,
18 but those are the ones I recollect.

19 Q. Please turn to page 22 of your direct
20 testimony, Exhibit 166-T. I'd like to ask you a few
21 questions now about your testimony concerning the
22 product demands of very large buyers. What
23 investigation did you undertake to reach the
24 conclusions that you reached concerning the product
25 demands of very large buyers?

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1 A. I spoke with the Tracer members that I
2 named. I had understood that their view was that
3 they were not finding competitive opportunities in
4 the marketplace, and so I spoke with them to
5 understand better what that concern was and then,
6 based on their responses, I applied my interpretation
7 in terms of the -- to economic framework that I
8 thought properly explained the nature of their
9 demands and the nature of the difficulties I cite for
10 CLECs at this point to be able to provide comparable
11 services for these kinds of firms.

12 Q. You stated that you interviewed some Tracer
13 members. Did you interview any firms that are
14 non-Tracer members as a part of your analysis?

15 A. No.

16 Q. Do you see, at lines 20 through 21 on page
17 22, where you state that the ILEC is clearly in a
18 better position to serve these very large firms?

19 A. Yes.

20 Q. Did you base this conclusion on specific
21 information from Tracer members?

22 A. Yes.

23 Q. If so, what sort?

24 A. Yes, in my analysis, one of the issues that
25 I stress is the ubiquity of the network and the past

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1 history of the network in terms of being developed
2 with the demands of these very large buyers in mind.
3 And --

4 Q. Actually --

5 A. And the nature of the demands. There's, in
6 the paragraph above, I talk about characteristics of
7 very large customers. One is the need to network
8 many and diverse business locations. There are
9 court-ordered locations. There are also relatively
10 remote locations. Some of them have private network
11 that they interconnect with the public switched
12 network. Typically, they require a high quality
13 redundant kind of interconnection.

14 There's also, as I say, an ability to
15 economize on procurement cost and management
16 oversight by working with a single firm. That also
17 provides some degree of technical assurance in terms
18 of the interconnectivity that they're looking for,
19 and that these characteristics, in the past
20 development of the network, create a situation where
21 Qwest is uniquely suited at this time, that is, at
22 this level of CLEC investment and development, to
23 provide services to these large customers that CLECs
24 cannot, on a quality, price, ubiquity dimension,
25 cannot replicate at this point.

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1 Q. Actually, the focus of my question was not
2 so much on generalities, but on specific Tracer
3 members and their peculiar needs. Do you know if any
4 of the Tracer member companies have conducted an RFP
5 process to consider alternative providers of local
6 exchange service?

7 A. I believe they have. Sometimes more
8 formally, sometimes less formally.

9 Q. Could you be more specific? Describe the
10 nature of the RFPs.

11 A. I didn't find -- I did not find it
12 relevant. No, I can't, because I didn't find it
13 relevant whether their procurement process was a very
14 formal RFP-type institutionalized process or a more
15 informal search in terms of what's out there for them
16 in terms of substitutes.

17 Q. Does your testimony regarding large
18 business customers also apply to large governmental
19 customers? For example, the University of Washington
20 or King County?

21 A. I didn't make an analysis of the extent to
22 which their needs and the nature of their business
23 would fit within the problems that I saw or not fit
24 within those problems, so I don't -- I don't know.

25 Q. Isn't the answer, then, to my question no,

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1 that your testimony regarding large business
2 customers doesn't, in fact, apply to large
3 governmental customers?

4 A. I don't know whether it applies or not.

5 Q. Do you know whether or not the University
6 of Washington uses a single provider or more than one
7 provider?

8 A. No, I don't.

9 Q. Please turn to page 23 of Exhibit 166-T.
10 Is it your impression that AT&T, WorldCom, Electric
11 Lightwave and X O share your view that they lack the
12 ability to serve large business?

13 A. I don't know what their view of their
14 competitive status is.

15 Q. Please turn to page 24 of Exhibit 166-T.
16 Now, there you state that, beginning at line 12, you
17 state that very large customers are unattractive to
18 CLECs. Is it your opinion that CLECs would find
19 Microsoft unattractive?

20 A. My testimony is that I don't know whether
21 CLECs would find Microsoft unattractive, because I
22 haven't, again, looked at Microsoft in the confines
23 of the characteristics that I describe.

24 Q. What CLECs did you interview to support
25 this testimony?

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1 A. I didn't speak with any CLECs. I looked at
2 customer needs and customer viewpoints.

3 Q. Did you review any of the special contracts
4 filed here at the Commission by the CLECs?

5 A. I didn't see any CLEC contracts, no.

6 Q. When you testify that the CLECs are not
7 capable of serving large businesses, do you include
8 incumbent local companies that go outside their
9 historical boundaries? For example, SBC Telecom or
10 Verizon offering service in Seattle?

11 A. Yes, as an entrant, until they reach a
12 certain level of ubiquity, redundancy, et cetera,
13 they're not going to be -- they're simply like any
14 other entrant.

15 Q. What about Qwest? What if Qwest were to go
16 outside its boundaries? In your view, would it be
17 capable of serving large customers, say, for example,
18 in Verizon's service area?

19 A. Depending on the maturation of the CLECs,
20 the ubiquity they establish as they grow. If it's at
21 the stage of development -- Qwest development is at
22 the stage of the development that it is for CLECs
23 here, then the answer would be no. There will be a
24 point at which CLECs will be able to serve large
25 business customers attractively and take those

00600

1 product demands away from Qwest.

2 Q. Are you saying that today Qwest is
3 incapable of serving customers in Redmond or Everett?

4 A. No.

5 Q. Please turn to page 25 of Exhibit 166-T.
6 There you talk about whether or not CLECs have
7 approached very large companies with offers to place
8 locations on net. Do you see that?

9 A. Yes, I do.

10 Q. What specific CLECs do you have in mind
11 there?

12 A. I don't know the name of the CLEC. This
13 was a discussion with one or more Tracer members as
14 to the extent to which they'd been approached and the
15 terms and conditions and their evaluation of those
16 terms and conditions.

17 Q. Well, you used CLECs in the plural there.
18 How many did you have in mind?

19 A. It's a general statement about differences
20 between the CLEC, when they move away from the, if
21 you will, more standardized large business customer,
22 and requirements that would make a somewhat
23 idiosyncratic very large customer as attractive,
24 certain terms and conditions, and that's what I'm
25 discussing in this paragraph. Again, this is based

00601

1 on my discussion with large customers and the terms
2 and conditions that the CLECs required in providing
3 service.

4 Q. Thank you. Please turn now to your
5 rebuttal testimony, Exhibit 168-T, specifically page
6 15.

7 CHAIRWOMAN SHOWALTER: Fifteen?

8 MS. JOHNSTON: Fifteen.

9 Q. Now, with regard to your discussion of
10 Section 271, is it your testimony that the standards
11 for grant of competitive classification under RCW
12 80.36.330 are the same as those for approval of a
13 section -- in Section 271 application?

14 A. No, that's not my testimony.

15 Q. Is it your opinion that Section 271 has, in
16 effect, preempted RCW 80.36.330?

17 A. No, 271 has to do with what the FCC
18 considers necessary conditions for a meaningful
19 opportunity to compete. The statute here is about
20 effective competition.

21 Q. Thank you. Please turn to page 20, staying
22 with Exhibit 168-T. At lines four through six,
23 there's a sentence there that reads, quote, This fact
24 is true, even if the Commission require imputation of
25 prices or costs, which I understand it does not, end

00602

1 quote. Do you see that?

2 A. Yes.

3 Q. Now, what is the basis and source for your
4 understanding that the Commission does not require
5 imputation?

6 A. My discussion with counsel that there is no
7 strict imputation section or rules used by the
8 Commission.

9 Q. By that, do you mean that it's your belief
10 that the Commission would allow Qwest to, for
11 example, create a price squeeze for its competitors?

12 A. Certainly not consciously.

13 Q. Please turn to page 24. Is it your
14 testimony that Staff's recommendation of limited
15 pricing flexibility is based on the Commission's
16 decision in the high capacity docket, UT-990022?

17 A. No, Staff rejects that framework as the
18 proper framework.

19 Q. Well, then, could you please explain what
20 you meant at line 14 when you referenced an extension
21 of pricing flexibility?

22 A. Staff was recommending an outcome similar
23 to the outcome in that docket in that -- and I have
24 the -- at page -- Exhibit 170, I list the wire
25 centers that were provided pricing flexibility in

00603

1 that docket. 171, I show the wire centers to where
2 Staff would extend that flexibility.

3 Q. Well, at line 17, you state, To the extent
4 Staff relies on previous commitment pricing of
5 competitive classification, blah, blah, blah, what's
6 the basis for that? I'm trying to ascertain where
7 you get the impression that Commission Staff is
8 somehow relying on the Commission's decision in the
9 high capacity docket?

10 A. We found, through discovery, which we have
11 included, that I believe Dr. Blackmon explicitly
12 rejects that. However, from reading his testimony,
13 before we had discovery, it seemed to me, and it
14 still does seem to me necessary, as a proper
15 justification, that that framework be used. And so
16 you'll see that I qualify that, to the extent that
17 Staff relies, assuming Staff would place some
18 reliance on that framework.

19 Q. So then, actually, I think what you're
20 telling me here now, then, is that if the phrase, the
21 conditional phrase, quote, unquote, "to the extent"
22 were stricken from line 17, then the balance of that
23 sentence would be irrelevant?

24 A. That's correct.

25 Q. Okay. Please turn to page 25 of Exhibit

00604

1 168-T. I'd like to direct your attention to lines
2 two through four there. And then you see the
3 reference to classify DS1 and higher capacity
4 circuits as subject to effective competition?

5 A. Yes, I do.

6 Q. Is it your understanding that Staff is
7 recommending that DS1 and higher circuits be
8 classified as competitive in this docket?

9 A. By recommending that services that ride
10 those circuits be classified, it's necessary, in my
11 opinion, that the input for those services be found
12 classified as competitive. Otherwise, there's no
13 basis for finding the services to be classified as
14 competitive.

15 Q. But that's your opinion, as opposed to
16 Staff, would you agree with that? Or can you show me
17 where Staff is recommending that DS1 and higher
18 circuits be classified as competitive?

19 A. Staff's recommending that services, all
20 services that ride over DS1 circuits, where customers
21 are served by those circuits, be classified as
22 competitive.

23 Q. Thank you. Have you finished?

24 A. Would you like me to illustrate?

25 Q. Not particularly.

00605

1 A. Okay. I'll do that later.

2 Q. Okay. Also, now, pages -- stay with page
3 25, but also your testimony carrying over to page 26.
4 Page 25, lines 18 through 23, carrying over to page
5 26, lines one through 12, that's where you make
6 reference to Staff's HHI analysis?

7 A. Yes.

8 Q. Do you understand correctly that Staff
9 here, that Staff's HHI values are, in fact, not based
10 on capacity?

11 A. They're based on access lines, which is a
12 switch capacity measure.

13 Q. Could you please say yes or no?

14 A. No.

15 Q. Do you understand that the Staff HHI values
16 are not based on capacity?

17 A. I understand that, in Staff's view, they're
18 not based on capacity.

19 Q. On page 27, I realize Mr. Owens covered
20 this ground, but I'd like to touch on it a bit here.
21 At page 27, lines 12 and 13, there you state that,
22 quote, Staff identifies DS1 and higher circuits as a
23 relevant product, but Staff measures market share
24 using all business access lines, end quote. Do you
25 see that testimony?

00606

1 A. Yes.

2 Q. Where exactly does Staff identify DS1 as a
3 relevant product?

4 A. As I said, that's implied by creating a
5 boundary between services that ride over DS1s and
6 other services that ride over lower capacity
7 circuits. That's my interpretation.

8 Q. It's your interpretation. Thank you.
9 Please turn to page 28 of your rebuttal testimony.
10 Do you see at line 10, you have a phrase in quotation
11 marks, adjusted out?

12 A. Yes.

13 Q. Now, as I read it, your use of quotation
14 marks makes it appear as though you're quoting
15 Staff's testimony. Could you point to where Staff
16 uses this phrase?

17 A. No, that's my interpretation of the effect
18 of the combination of approaches he uses in his
19 justification for what he's done.

20 Q. Thank you. Please turn to page 29. At
21 lines five through six, you state that Staff's
22 analysis may include resold lines in CLEC market
23 shares. Do you see that?

24 A. Yes.

25 Q. Would you accept, subject to check, that

00607

1 the Staff data request directed companies to report
2 resold service separately from facilities-based
3 service?

4 A. Yes.

5 Q. Please turn to page 30. At lines two
6 through four, you state, quote, I suspect that were
7 the effect of DS3 circuits removed from the data, the
8 cost share in Staff's HHIs would be significantly
9 higher than what we observe in Exhibit GB-3. Do you
10 see that?

11 A. Yes.

12 Q. What did you mean when you stated the
13 effect of DS3 circuits? What effect are you
14 referring to?

15 A. What I meant there was access lines related
16 to businesses whose demands are at that level versus
17 businesses whose demands are at smaller levels.

18 Q. Please turn to page 32. At line -- are you
19 there?

20 A. Yes.

21 Q. At line 13, you state that Staff fails to
22 demonstrate that any parity which now exists is
23 irreversible. Do you see that?

24 A. Yes.

25 Q. Is it your understanding that if the

00608

1 Commission grants competitive classification of a
2 service, it cannot later withdraw that
3 classification?

4 A. The Commission can withdraw that
5 classification.

6 Q. Why, in your view, does Staff have to
7 demonstrate that competition is, quote, unquote,
8 irreversible?

9 A. Because the cost to the entrants to pursue
10 the rescission of the Commission's order is
11 anticompetitive. They would have costs that Qwest
12 would not bear as a consequence of having to try to
13 get that redress.

14 MS. JOHNSTON: That's all I have. Thank
15 you.

16 JUDGE CAILLE: Is there any other cross by
17 the parties before we go to the Bench? Chairwoman
18 Showalter.

19 MR. OWENS: I did have one question, based
20 on a question that Staff asked.

21 JUDGE CAILLE: Go ahead, Mr. Owens.

22

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

24 BY MR. OWENS:

25 Q. Are you aware, Dr. Goodfriend, of any

00609

1 businesses that buy local exchange service on a DS3?

2 A. You mean retail businesses?

3 Q. Yes.

4 A. No, can't name one offhand.

5 MR. OWENS: Thank you.

6

7

E X A M I N A T I O N

8 BY CHAIRWOMAN SHOWALTER:

9 Q. Well, I'm looking for my little Post-Its,
10 but the one question I have is the relationship of
11 the Merger Guidelines to our statute, and of what
12 significance the Merger Guidelines are. Is it your
13 view that we should be using them as the determinant
14 of whether there is effective competition, that it is
15 the measure of whether there is effective
16 competition?

17 A. I believe my answer to that is yes, because
18 the Merger Guidelines provide the Commission -- or
19 hopefully, if used properly, provide the Commission
20 some security that, when they find effective
21 competition, that, as a result of the analysis, Qwest
22 will not be able to exercise market power, that there
23 is effective competition, that prices will be moved
24 to cost, and that the market will function that way.

25 And because I see effective competition in

00610

1 the statute here, I cite, I think, to some
2 legislative construction that, as public interest
3 protects from the exercise of monopoly power and
4 market power, so effective competition should protect
5 in the same way.

6 Q. Does it make any difference that mergers
7 are generally born of a broader competitive market
8 and two competitors are merging and, therefore, the
9 market threatens to become less competitive when, in
10 a prior sense, it was more competitive versus the
11 operation of our state statute, which is looking at a
12 business that was a monopoly and is seeking to
13 declare a service or region competitive in order to
14 get some flexibility?

15 Is the line one and the same, that is,
16 coming from either end, a merger should not be
17 allowed absent passing the Merger Guidelines test and
18 flexibility, under our state statute, should not be
19 allowed unless the very same test is passed?

20 A. I don't think they have to be identical. I
21 think the application of what you're looking at is
22 the ability to exercise unilateral market power, as
23 the FERC does when it grants pricing flexibility, as
24 the FCC has when it has also allowed pricing
25 flexibility. In my view, those authorities have, at

00611

1 times, employed different levels of HHI to recognize
2 moving from a monopoly position.

3 But, as a general matter, I think that the
4 analysis should be the same because there are legacy
5 advantages of monopoly, incumbency advantages that
6 can affect the operation of the market when moving
7 from monopoly toward competition.

8 Q. Okay. And then there is a lot of
9 discussion about can and will, and in our statute, we
10 don't have those words. That is, we're simply
11 finding that a service is competitive, and so it's --
12 things are stated in the present, so that then begs
13 the question of, well, what does it mean when
14 something is competitive. And for starters, the use
15 of the word will is obviously a prediction, so we
16 can't, I don't believe, find, as a matter of fact,
17 that prices will be constrained. Do you agree with
18 that?

19 A. Yes, I do. I agree with that.

20 Q. So but we might be able to exercise
21 judgment in predicting that prices will be
22 constrained?

23 A. My purpose of using that was an attempt to
24 contrast what I saw as the company's position, which
25 is that the capability exists to constrain, a can, as

00612

1 opposed to a behavioral result that the operation of
2 the market, the CLEC response to an attempted price
3 increase will restrain because of how Qwest --
4 Qwest's evaluation of that CLEC ability to respond,
5 and that's the sense in which I was trying to
6 demonstrate that will is a behavioral standard, where
7 can is not necessarily a behavioral standard about
8 how prices are under effective competition.

9 Q. All right. But in either case, we have to
10 root our judgment about whether it's will or a can in
11 the present, that is what we have -- what facts we
12 have in front of us about the market today. Do you
13 agree with that?

14 A. Yes.

15 Q. And in that respect, because we don't have
16 the conditions that we are asked to approve here, we
17 can't say, as a matter of fact, that prices are or
18 are not constrained today, because, of course,
19 they're not being tested today?

20 A. Yes.

21 Q. So doesn't this get back to what kind of
22 competition is present today, and that that's
23 something we can find as a matter of fact?

24 A. Yes.

25 Q. And from whatever facts we can derive about

00613

1 today, we can make a prediction about the future, and
2 that prediction might be in the form of -- might be
3 in the form of competitors can or have the capability
4 to constrain or it might be in the form of we believe
5 competitors will constrain?

6 A. Yes, both of those options are available to
7 you, as I see under your statute.

8 Q. And you would advocate the will standard?

9 A. Yes, I would.

10 Q. All right. Now, setting aside the
11 predictions and getting down to the facts that we can
12 find before us, and let's say using the will
13 standard, without repeating all of your testimony,
14 what is your central reason for saying that we cannot
15 find that prices will be constrained? Let's begin in
16 the case of the four geographic areas that Staff
17 recommends be competitively classified for DS1 or
18 higher.

19 A. I don't mean to confront the Staff or the
20 Company with an insurmountable evidentiary standard,
21 but the way the Company has approached the problem
22 does not provide sufficient evidence, in my view, for
23 the Commission to conclude that prices will be
24 constrained, because the evidence about the existing
25 capacity of CLEC switches, their location, therefore,

00614

1 implications about their ability, capability to serve
2 customers, all kinds of customers, about the ways in
3 which CLECs would respond to an attempted price
4 increase, when I looked at information in this regard
5 it suggested to me that, to the extent the CLECs had
6 not built out their network and there are gaps now
7 among certain customer groups where the CLECs are not
8 yet really targeting those customer groups, that
9 should Qwest be granted pricing flexibility those
10 gaps would constitute a captive customer base for you
11 to decide it significant, and that Qwest could
12 exercise market, Qwest would exercise using Qwest's
13 rational economic interest to exercise market power
14 because the marketplace conditions would not suggest
15 to Qwest that that attempted exercise would be
16 unprofitable and irrational.

17 Q. Okay. I heard several parts to your
18 answer. And the first part was, I think you said you
19 don't think that Qwest has mounted a case. That is,
20 the burden of proof is on them, and you don't think
21 they have shown that prices will be constrained?

22 A. That's correct.

23 Q. All right. But then, did I also hear you
24 say that, looking at what evidence they have put
25 forward, you affirmatively think prices will not be

00615

1 constrained?

2 A. Yes.

3 Q. And does that conclusion depend on the
4 assumption that Qwest will, in fact, move to raise
5 prices or selectively court certain customers and not
6 others?

7 A. Yes, and that Qwest will be, through the
8 grant of the flexibilities of effective competition,
9 Qwest will be able to more finely discriminate among
10 its customer classes in terms of raising prices and
11 lowering prices. In my analysis, looking at resale,
12 for example, suggests to me that with pricing
13 flexibility, Qwest can choose to either drive the
14 entrants out of the market with a price squeeze or
15 create a situation where, by raising entrants' costs,
16 can engage in even more umbrella pricing in an upward
17 direction when resellers are the predominant
18 competitive threat for a particular set of customers.

19 Q. All right.

20 A. For example.

21 Q. In our previous competitive classification
22 case, the 990022, are you familiar with that case?

23 A. Yes, I am.

24 Q. Do you have any evidence or information
25 about what dynamic had occurred in those areas since

00616

1 the competitive classification in December?

2 A. Evidence of behavioral --

3 Q. Of adverse behavior?

4 A. It seems to me that CLECs were continuing
5 to build network fiber and switches, and that the
6 classification of those circuits in those areas had
7 pro-competitive effects on the market.

8 Q. Okay. So I take it -- am I correct to say
9 that, so far, for that classification, you think
10 things are working relatively well?

11 A. I looked at the framework the Commission
12 employed, the evidence before the Commission, and it
13 certainly was adequate in framework to answer the
14 question that I raise about that will, about behavior that
15 will happen, and will market power be exercised.

16 Q. Actually, I wasn't really getting at what
17 we knew when we ordered that, but what the outcome
18 has been since that time. Do you have any knowledge
19 of what the outcome of that classification has been
20 since it was ordered?

21 A. I have no specific knowledge, just the
22 impression that, particularly in the Seattle area,
23 for example, there continues to be rapid deployment
24 by CLECs, switches and facilities.

25 Q. Okay. Then getting back to what evidence

00617

1 we did have in that order, what is it centrally that
2 you think was present there that is not present here?
3 Again, I'm limiting my questions at the moment to the
4 narrow recommendation of Staff for DS1 or higher.

5 A. Mm-hmm. In that case, the Commission was
6 asked to look at circuits, DS1 circuits and DS3
7 circuits in wholesale and retail. And the Commission
8 had before it the relevant market, it had the Company
9 provide both economic and engineering analysis that
10 looked essentially at the question of ease of entry
11 in building -- CLECs building facilities. So there
12 was a facility product market and there was a
13 question about the ability to raise price and the
14 ability of CLECs in those core areas, where they
15 built their fiber networks, to respond if Qwest
16 attempted to raise prices to its customers. That was
17 essentially the PEI study that looked at the cost and
18 timeliness of CLEC response.

19 And the economists used that study, then,
20 to conclude that the nature of the CLEC response,
21 Qwest's economist, would preclude -- would make it
22 irrational for Qwest to attempt to exercise market
23 power in that situation. This is different, to the
24 extent that we're looking at services now, not
25 capacity products, but differentiated services. And

00618

1 so the definition of the relevant market is a much --
2 in my view, much more difficult issue, because the
3 product differentiation, because instead of looking
4 at DS1 and DS3 circuits, Qwest has brought to you an
5 extremely broad range of products with an extremely
6 heterogeneous set of customers, who have very diverse
7 demands for those kind of products.

8 Q. Even when we're limiting ourselves to the
9 services over DS1 or larger and the customers who use
10 that?

11 A. Yes, in the sense that, in order to find
12 that the services that ride that are competitive, it
13 seems to me that the facilities, which were one of
14 the inputs to the services, by implication have to be
15 found to be competitive. Otherwise, even if the
16 services could be, if the DS1 circuit wasn't, you've
17 got a monopoly bottleneck element. So to that
18 extent, my answer is yes, and there may be issues
19 having to do with services now. There's switched T-1
20 services.

21 I really -- I didn't ask myself the
22 question that you're asking me with respect to those
23 services, but on first impression, because there are
24 services involved as well as circuits, the evidence
25 that I looked at suggested that it was a more

00619

1 difficult evaluation than if it was simply circuits.

2 Q. Okay. But I actually want to follow up
3 that distinction. Let's assume we get over the
4 hurdle of the circuit issue. Let's say that, as far
5 as the circuits are concerned or what we might call
6 the expansion of the 0022 order to somewhat more wire
7 centers.

8 A. Yes.

9 Q. Let's say that part is justified, and now
10 some services are riding over that.

11 A. Right.

12 Q. What is your concern about the customers of
13 those services?

14 A. My concern is that in order to create the
15 services, you need both the circuit and a switch,
16 particularly if you're going to differentiate your
17 product. As a CLEC, you need to have your own switch
18 so you can have your own set of products and you can
19 control what your products look like.

20 So in my view, Qwest, for that and for the
21 other products, should have brought information about
22 switch deployment, about facilities-based competition
23 in the wire centers, to suggest that not only the
24 circuit, but the nature of the switches -- a critical
25 element is the capacity of the switch and whether or

00620

1 not excess capacity exists.

2 When you're talking about a circuit, you're
3 talking about building in a way that naturally
4 provides a lot of capacity. When you talk about a
5 switch, you're talking about CLECs trying to put in
6 small, modular, test the market, and the ability to,
7 with modularity, increase the size of the switch in
8 response to demand. So the excess capacity situation
9 that could characterize a circuit is, in my view,
10 very unlikely to characterize a switch. And when
11 both of those facilities have to be relied on,
12 there's additional evidence and questions and
13 analysis that has to be done with respect to the
14 expansion of the switch, the CLECs' expansion of
15 their switch to provide switch, plus circuit,
16 competitive, availability, response, et cetera.

17 Q. So this is where your concern comes in,
18 that the competitors may not be able to place their
19 switches timely or perhaps in a financially
20 profitable way?

21 A. To the extent they're targeting customers,
22 that either the capacity that exists will be followed
23 along with target customers, and it's not clear to
24 me, looking at the DS1, DS3 services, or better said,
25 Qwest has not provided the evidence, in my view. It

00621

1 may be readily available to provide, but I haven't
2 seen that, which would allow me to apply the
3 framework with a switch in the same way that the
4 Commission applied the framework in 990022.

5 Q. Okay. And then switching over to switching
6 for a minute, to business services, the broader set
7 of services, if the conditions that Staff suggests
8 were in place, do you nevertheless have concerns
9 about market power for Qwest?

10 A. Yes, I do.

11 Q. And what are they?

12 A. I understand the structure of Dr.
13 Blackmon's four conditions, to the objective of that,
14 to provide a safe harbor, to protect customers, his
15 various conditions. What I say in my testimony is
16 Qwest has a legal right, as they do, to bring in new
17 products all the time, new tariffs, and essentially
18 what I believe will happen is that that tariff that
19 exists now that every customer can get will become
20 what I call a backwater tariff. In other words,
21 Qwest, as they do now when they introduce new
22 services and new combinations, will provide what will
23 become attractive -- they will essentially, by
24 providing new tariffs, migrate customers from a less
25 preferred product to a more preferred product, and

00622

1 although the product's more preferred, Qwest will
2 also be able to exercise market power.

3 I provide an example of that with a Centrex
4 product where Qwest -- I'd have to look and tell you
5 the exact nature of it, but prices increased about 22
6 percent for the addition of a product that cost cents
7 to produce, in terms of the software. So my question
8 goes to the issue of the effectiveness and the
9 enforceability in terms of how the market will
10 operate under those rules.

11 Q. So your concern is that even though the
12 safe harbor service would remain as a condition, it
13 would have to remain, that customers wouldn't know
14 about it or would somehow get persuaded to buy a more
15 expensive product?

16 A. No, I'm not explaining myself well. So if
17 you don't mind, I'm going to take a look at what I
18 have here.

19 Q. Sure.

20 A. His condition number one freezes services
21 at current levels. And because Qwest has a legal
22 authority to and will evolve its service offerings
23 with improvements in switch technology, software and
24 facilities investment, I think a strict application
25 of that requirement would leave customers worse off,

00623

1 and I am talking about Qwest bringing in new products
2 and new services for customers in that case.

3 Q. Worse off than they are today or worse off
4 than they would be if there were no competitive
5 classification? In other words, if there is a
6 condition like that, doesn't the customer have the
7 right to have whatever service they're getting today
8 for that --

9 A. Yes.

10 Q. -- price; it's just that things improve?

11 A. Yes.

12 Q. And so what your concern is, I take it, is
13 that --

14 A. My concern is that Qwest would, by
15 providing more desirable services which were not
16 subject to the backstop provisions --

17 Q. Right.

18 A. -- would migrate -- attempt to migrate
19 customers away from the backstop provisions whereby
20 they would obtain all the flexibilities that Dr.
21 Blackmon would preclude them from obtaining. And I
22 believe, in looking at Qwest's interpretation of his
23 conditions, they certainly allow themselves that
24 avenue.

25 Q. And so is your concern that customers will

00624

1 be -- won't know that they can stay on the old
2 service and therefore be no worse off, or that they
3 will be relatively worse off because they're on a
4 more antiquated service and there's something better?

5 A. I think they'll be moved to services where
6 Qwest will have unrestrained pricing flexibility. I
7 grant you they will prefer that service, but as I say
8 in my testimony, instead of prices moving toward
9 cost, Qwest will be able to capture the value of that
10 preferred service in its pricing. And if the
11 migration is toward a service in that situation,
12 prices aren't moving toward cost, even though the
13 customer might value the service more than the
14 backstop service.

15 So what you have is the exercise of market
16 power, which is what Dr. Blackmon hopes to preclude
17 occurring.

18 Q. Okay. If you could turn to page 25 of your
19 rebuttal testimony, Exhibit 168-T. Ms. Johnston left
20 you hanging. Looking at lines 20 and 21, I thought
21 you might be implying that while Dr. Blackmon doesn't
22 think that he is dealing with a capacity measure,
23 maybe you are. And could you just explain that?
24 First of all, is that inference correct?

25 A. Yes, in that, again, looking at switch and

00625

1 switch capacities, the number of access lines a
2 switch can handle is basically the -- they hit
3 capacity limits. Smaller switches, sometimes two or
4 3,000 lines is the limit of that small switch.
5 That's because physically there aren't ports at that
6 point. There's also -- processors sometimes become
7 overburdened. And the CLECs have employed -- we've
8 talked -- I guess Mr. Hooks talked a bit about large
9 switches. If you look to switches out there, there's
10 some very small switches, typically geared for
11 entering the market, serving existing customers, but
12 not capable of expanding to serve Qwest customers
13 without investment.

14 Q. Then, on page 30 of your rebuttal, lines
15 three and four, both Ms. Johnston and Mr. Owens asked
16 you questions about your suspicion that if the
17 effective DS3 circuits were removed, the Qwest share
18 of Staff's HHI would be significantly higher. Does
19 that imply that someone other than Qwest has a
20 disproportionately higher share of DS3 circuits, in
21 your opinion?

22 A. That's probably not worded very well. What
23 I'm trying to convey is that, as I think the evidence
24 has suggested, the CLECs have been targeting
25 typically large customers and that if you -- if the

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1 Staff could have had data that would have allowed a
2 large customer, for example, a large customer-small
3 customer split, particularly along the lines of the
4 very small customers, however you chop that up, that
5 the market shares would reflect that. It would
6 reflect that the concentration of a CLEC lines are
7 for large customers.

8 Q. Well, does that mean that you think there
9 are a significant number of CLECs providing DS3
10 circuits such that if you removed that from the
11 calculation, you would get a higher HHI because, in
12 relative terms, they have more of the DS3 share?

13 A. Yes, that's what they'd be targeting.

14 Q. Okay. Well, then, if that's the case, if,
15 in relative terms only, the CLECs have a greater -- a
16 relatively larger share of DS3, compared to DS1 or
17 other lines, that serves primarily large customers;
18 am I right?

19 A. Yes.

20 Q. Well, then, my question is, if Tracer
21 represents large customers, why is it that they are
22 not the beneficiaries of DS3 or DS1? Why are they
23 being left out? And I've read some of your testimony
24 to this effect, but who are these other large
25 customers, for whom things are working, versus Tracer

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1 customers?

2 A. The other large customers are those located
3 -- whose facilities are located in the business core,
4 where the CLEC fiber backbone exists, where CLEC
5 expansions through facility are moving through the
6 business core and outward. Large businesses, like
7 some of Tracer's businesses, tend to have some core
8 services. And there is a Tracer customer in Spokane
9 that is, because they didn't like the quality of the
10 Qwest product, using a CLEC for their core business
11 location, but that the nature of Tracer members, one
12 might say finance and banking firms, other kinds of
13 large firms that would tend to locate all of their
14 operations in a downtown business district,
15 industrial firms, like Paccar, for example, are going
16 to have some of their warehouses and some of their
17 industrial facilities away from the central business
18 district.

19 Q. Well, and that leads to my questions about
20 ubiquity. You, I think, testified that ubiquity is
21 important to attracting customers, especially of the
22 sort that Tracer might be, with offices in different
23 locations; is that correct?

24 A. Yes.

25 Q. How does that square with businesses that

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1 are located in several states, where traditionally
2 there has been one incumbent or another incumbent?
3 Why is it so important to be served by a single
4 provider versus one provider in one less location and
5 maybe another ILEC in another state and maybe another
6 ILEC in an outlying area?

7 A. My understanding, there may be technical
8 considerations, but I think, in large part, it's the
9 ability to, by being a large purchaser, try to drive
10 -- to try to drive a bargain, to try to have
11 negotiation. And to the extent there aren't other
12 customers or other CLEC-type options or
13 opportunities, then Qwest, the ubiquitous supplier,
14 knows that the bargaining position of the large
15 customer isn't as strong as it would be otherwise.

16 Q. So as far as offices or services that are
17 outside even the ILEC's territory, that that sort of
18 large customer's on the same grounds with everyone
19 else, but to the extent that offices are located
20 within an ILEC's ubiquitous territory, there's a
21 bargaining advantage?

22 A. Yes. I can't speak to kind of the national
23 policy in terms of -- I haven't investigated the
24 extent to which companies are willing to, because
25 they find the ubiquity, they find the service

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1 quality, are willing to mix and match for their
2 entire set of telecommunications services across the
3 nation or international.

4 Q. But that's a necessity, isn't it, today,
5 until there is someone who provides local service
6 everywhere in the country or the world?

7 A. Yes, yes.

8 Q. Can you turn to page 34 of your rebuttal
9 testimony, 168? I think you discuss generally here
10 the incentives for Qwest to, on line five, for
11 example, slow-ball entrance. If Qwest pays
12 commissions to their wholesale salesmen, does that
13 provide them an incentive, either the salesmen or the
14 company as a whole, not to slow-ball?

15 A. If Qwest wanted to pay commissions in a
16 structure that way, that would indicate perhaps that
17 they were valuing the wholesale revenue they were
18 able to gain, even though there was a net loss, if
19 you will, loss of the retail service picking up the
20 wholesale service.

21 My concern about the slow-ball issue are
22 when Qwest has discretion in the way it sizes its
23 trunks, the way it does its forecasting, the way it
24 provides or fails to provide collocation space, those
25 are all business decisions by Qwest, Mr. Hooks

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1 testified to them, where, to the extent Qwest is
2 discriminating against a particular CLEC, it would be
3 very difficult to detect that sort of discrimination,
4 and that's the sense in which I'm discussing the
5 slow-balling.

6 Q. Do the concerns that you have that Qwest
7 will have an incentive to discriminate against
8 competitors for retail market power reasons run
9 counter to Qwest's other role as a wholesale
10 provider?

11 A. Yes.

12 Q. And to the extent, if it is the case, that
13 Qwest sees itself in the role of a wholesale
14 provider, isn't there created an internal tension
15 between those two dynamics?

16 A. And that's absolutely what happened in the
17 long distance market where, you know, initially there
18 was real -- you know, AT&T didn't make it easy for
19 the MCIs of this world to get into the business. But
20 over time, there came to be institutionalized -- I
21 think they were called co-carrier arrangements, but
22 there became divisions whose purpose it was, as a
23 profit center, to go out and get wholesale business,
24 but until -- that was because there were, at that
25 point, many other wholesale providers.

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1 At the point where it's simply a decision
2 for the firm whether to keep the retail or, with
3 certainty, they'll get the wholesale, because there's
4 no one else, then that decision's pretty clear,
5 because they can employ more of their network and
6 facilities and have higher profit margins on the
7 retail service.

8 Q. So your fear is that they will think more
9 of their retail flank than their wholesale flank if
10 they are competitively classified in these zones?

11 A. Until such time as there's enough network
12 buildout, other wholesalers, retailers' ability to
13 use other wholesalers' networks, then the loss to
14 Qwest isn't a choice between retail by discouraging
15 other wholesale providers; it's a choice between
16 nothing and being the chosen wholesale provider.

17 Q. All right. Then would you turn to Exhibit
18 175. You were asked some questions about Tracer
19 members, and I think you said that most or nearly all
20 Tracer members are very large firms?

21 A. Yes, that's my understanding.

22 Q. What was your definition of very large
23 firm?

24 A. In the body of my testimony, I believe it
25 was above 5,000 employees or above.

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1 Q. So you were not speaking in terms of
2 numbers of lines?

3 A. No, I didn't make that kind of cut.

4 Q. Okay. Then can you turn to Exhibit 180?
5 Your response says, Qwest is the only carrier used by
6 Tracer members except -- highly confidential. Is
7 this the extent of the answer in our evidence or is
8 there a place in our evidence where we have whatever
9 the highly confidential portion of this is?

10 A. I have the highly confidential answer. I
11 can't --

12 Q. It may be a question for your counsel
13 later. Sometimes we see these things and they're
14 redacted, but there's some other part of the answer
15 somewhere else, and I just didn't know if that was it
16 or not.

17 A. I didn't prepare this data response.

18 CHAIRWOMAN SHOWALTER: Okay. Raise it
19 later. I think that's all my questions. Thanks.

20

21 E X A M I N A T I O N

22 BY COMMISSIONER HEMSTAD:

23 Q. Good afternoon, Dr. Goodfriend.

24 A. Good afternoon.

25 Q. Nice to see you again.

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1 A. Nice to see you, Commissioner.

2 Q. I'll try to make this brief. I think
3 Chairwoman Showalter covered various things I might
4 have. Just a couple of areas.

5 You spent a lot of time critiquing Dr.
6 Blackmon's standards. With regard to his Exhibit
7 202, and there was a lot of discussion about this in
8 your cross-examination from Counsel for the company,
9 do you generally agree with the methodology used by
10 Dr. Blackmon, but then disagree with how he has
11 applied it?

12 A. Yes, I disagree with some of the
13 particulars. I believe the methodology is sound.
14 There are particulars with which I disagree.

15 Q. Okay. I think somewhere in the
16 cross-examination you didn't make the -- you did make
17 the comment or the inference that you didn't want to
18 create such a high hurdle that it could never be
19 gotten over. And perhaps your responses to the
20 Chairwoman's questions covered this, but could you
21 briefly describe the environment that would be
22 necessary for you to find that any petition for
23 classification broadly of a large group of services
24 like this, that effective competition is, in fact,
25 present?

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1 A. I think it's difficult, given the kind of
2 record here, to be comfortable that there aren't some
3 gaps somewhere in the availability of service, so one
4 of the messes that you all were discussing earlier
5 was a survey kind of technique. I mean, Mr. Blackmon
6 called to find out what was available. You heard
7 public witnesses who were -- did their own search.
8 Pretty unusual.

9 Q. Okay. Now, I'm not as much concerned about
10 process, but ultimate substance. I mean, what would
11 have to be put in front of us, from your perspective,
12 in order to carry the burden?

13 A. A process which did survey, arguably the
14 Commission doing the survey as an audit sort of
15 situation. Not Qwest doing the survey, but arguably
16 Qwest paying for a survey like that, where sort of a
17 nice representative sample of business customers were
18 investigated; evidence that suggested that, as a
19 general matter, they had choices would, I think, be
20 very useful.

21 Q. But would a prerequisite for choice be, you
22 know, in place, a filled out, facilities-based
23 competitive environment?

24 A. Yes, sir, and that would be kind of
25 ultimate evidence based on evidentiary showings of

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1 the nature of the network. So to the extent nature
2 of the network type questions, that kind of evidence
3 was provided, the sort of back-end customer survey
4 wouldn't be necessary, but that might be another way
5 to get at, as you suggest, the same issue, the extent
6 to which the CLECs are far enough along in their
7 business plans that they there are unlikely to be
8 captive customers.

9 Q. And then would that be demonstrated by --
10 call it dramatically falling market share for the
11 incumbent?

12 A. I would look to the existence of
13 facilities. Market share, as we've seen, a lot of
14 the market share growth for the CLECs are new
15 customers, rather than market share loss, in terms of
16 what used to be Qwest customers. But I think,
17 consistent with what I'm talking about, would
18 probably be relative to the two percent, three
19 percent, the very small numbers on Exhibit 12-G,
20 would probably be larger numbers of the loss of
21 existing customers, customers affirmatively moving
22 from Qwest to another provider. The facilities would
23 have to be there for that to be occurring to a more
24 significant degree than it is now.

25 Q. And to me, the effective competition

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1 standards require that all business customers in a
2 given wire center or exchange would have access to
3 competitive choice?

4 A. No, I think that's a judgment call for you
5 to make, and I think your statute's clear about your
6 determination of what a significant captive customer
7 base means, and it's your judgment to weigh the
8 beneficial effects of the pricing flexibility with
9 the likelihood or existence of what you determine to
10 be a significant captive customer base.

11 Q. Do you know, from your experience, any
12 markets in the United States where there is effective
13 competition for business customers?

14 A. Well, I had hoped, with the Seattle,
15 Bellevue, Everett area being one of the top 35
16 markets, that the company -- I believe the company
17 today could very possibly present the kind of
18 evidence for that market, but they chose to use kind
19 of a different technique and examine the broader
20 markets.

21 So my understanding is, among those 35
22 major market areas, I believe there's a data request
23 that shows -- I believe there's at least one
24 Commission that's granted pricing flexibility. I
25 don't know if that's in the Qwest -- I think there's

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1 one in the Qwest area, but what I'm trying to say is
2 that, you know, the New York market, of course, has
3 always been considered extremely competitive, and
4 those first tier markets, including the Seattle
5 market, would be where I would look expecting to see
6 that facilities expansion be such that the CLECs were
7 quite far along in their business plan, had been
8 working their way into the smaller and smaller
9 segments of the business market.

10 Q. Well, now, do you know -- because I don't
11 know what the state law says, but do you know whether
12 the New York market has been declared effectively
13 competitive?

14 A. I don't know that.

15 COMMISSIONER HEMSTAD: That's all I have.
16 Thank you.

17 JUDGE CAILLE: Any follow up?

18 MR. OWENS: One or two follow up. Thank
19 you.

20

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

22 BY MR. OWENS:

23 Q. Dr. Goodfriend, in response to a question
24 from Chairwoman Showalter, I believe you faulted
25 Qwest's evidence for not showing for the CLEC

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1 switches, for each switch, I guess, the excess
2 capacity. Did I understand you right?

3 A. No.

4 Q. All right. What should Qwest have shown
5 with regard to excess capacity on switches in order
6 not to have this defect in its case, as far as you're
7 concerned?

8 A. I think it would be helpful for Qwest, and
9 there are documents to do this, to show the extent of
10 switches, location of switches, There is information
11 on the size of the switch, its capacity, its maximum
12 capacity, and I think that kind of information would
13 be helpful demonstrating that the trunks are there
14 for those switches, that there's an easy ability to
15 expand service in the areas where those switches were
16 concentrated with the growth and demand, including
17 the migration of Qwest customers off the Qwest
18 network to these CLEC networks.

19 Q. Just so it's clear, you're not expecting
20 Qwest to show what a CLEC's switched excess capacity
21 is; is that correct?

22 A. Given what's in the LERG, I believe it's
23 possible for Qwest to do an analysis of the --
24 looking at the nature of the switches that have been
25 purchased, to do some portion of that kind of

00639

1 analysis.

2 Q. Are you saying you could -- Qwest would
3 know, without information from the CLEC, how many
4 active circuits are connected to each CLEC's switch?

5 A. Actually, with the access lines that the
6 Staff found, looking at CLEC access lines, with
7 knowledge of the size of the switches, one could
8 begin to even go so far as looking at loadings, given
9 knowledge of whether there's an E5 out there or a
10 DMS-10. I think there's an ability to approach that
11 kind of information to make some attempt to introduce
12 that kind of information into the record.

13 Q. I suppose if Qwest had had the CLEC's
14 specific access lines, it could have done that. Are
15 you saying you think Qwest did have CLEC-specific
16 access lines from the Staff or anyplace else?

17 A. We could go to the CLEC 2000 Report. There
18 are -- I think there are ways for Qwest to -- Qwest
19 has its own loss data, it has its -- it knows it's --
20 the big business segmentation information we had, it
21 knows what the revenue growth that it's missing looks
22 like. I think it's possible for the company to make
23 an estimate of that. And it may be that the company
24 has to work with Staff, as it did here, to provide a
25 fuller analysis than the company may be able to

00640

1 provide individually. Clearly, the statute allows
2 the Commission to get the information that it needs.

3 Q. I guess what I'm trying to get to is are
4 you suggesting that you think Qwest could have
5 received from the Staff the CLEC-specific access
6 lines that the Staff had?

7 A. Not that specific information, no.

8 Q. And does the CLEC report that you mentioned
9 associate active circuits with particular CLEC
10 switches in particular locations?

11 A. Not to my knowledge.

12 Q. And do you have the identities of the other
13 large businesses located in the Seattle Center core
14 area that you mentioned in response to a question, I
15 believe it was from Chairwoman Showalter, other than
16 Tracer members?

17 A. No, I don't.

18 Q. I think you answered Commissioner Hemstad,
19 who asked you what areas you would expect to be
20 effectively competitive, and you said the Seattle,
21 Bellevue, Everett area. You're aware that Qwest
22 doesn't serve Everett as an incumbent, aren't you?

23 A. The MSA area is Seattle, Bellevue, Everett,
24 so Everett -- Everett's switches could be serving
25 Bellevue-Seattle customers. In general --

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1 Q. My question -- I'm sorry.

2 A. Thank you. I'm aware that Qwest does not
3 serve Everett.

4 MR. OWENS: Thank you. That's all.

5 MS. JOHNSTON: Your Honor, may I ask one?

6 JUDGE CAILLE: Yes.

7 MS. JOHNSTON: Thank you.

8

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

10 BY MS. JOHNSTON:

11 Q. You were asked some questions by Chairwoman
12 Showalter concerning the role Merger Guidelines play.
13 If the government were to deny merger because it
14 failed to comply with the Merger Guidelines, do you
15 believe that the government should then regulate the
16 prices of the larger firm in the proposed merger?

17 A. No.

18 MS. JOHNSTON: That's all I have. Thank
19 you.

20 JUDGE CAILLE: Okay. Anything else?

21 Redirect?

22 MS. RACKNER: I actually have quite a bit
23 of redirect. And if I may, I'd either like to take a
24 break or break for the evening, given the time, and
25 come back tomorrow morning. Dr. Goodfriend will be

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1 here tomorrow morning. I also think that I can
2 probably distill it down a bit.

3 JUDGE CAILLE: Okay. We will break. I
4 just want to remind everyone that we have a
5 commitment to another witness to be heard the first
6 thing in the morning. It should be very short. And
7 then we can take up with Dr. Goodfriend. Also, I
8 think we should begin at 9:00 tomorrow morning and
9 perhaps make arrangements, in case we may need to
10 stay late tomorrow night. And we do have some time
11 set aside on Friday morning, but we have still quite
12 a bit to cover, so --

13 COMMISSIONER HEMSTAD: So talk fast.

14 MR. KOPTA: No, no, no.

15 MS. JOHNSTON: May I just inquire of Ms.
16 Rackner, do you have a time estimate for redirect?

17 MS. RACKNER: I don't, but say 20 minutes.
18 I mean, that's a guess right now.

19 MS. JOHNSTON: Okay, thank you.

20 CHAIRWOMAN SHOWALTER: We might take a
21 one-hour lunch tomorrow, as well.

22 JUDGE CAILLE: All right. Thank you.

23 (Proceedings adjourned at 5:08 p.m.)

24

25

