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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of Qwest Corporation for Competitive Classification of Business Services in Specified Wire Centers	)	
	)	DOCKET NO. UT-000883
	)	
	)	BRIEF OF QWEST CORPORATION
	)	
_____		

COMES NOW Qwest Corporation (“Qwest”) and files its brief in the above referenced proceeding. Qwest submits that based on the evidence, the Commission should grant Qwest’s petition for competitive classification of the business services listed in Attachment A to the Petition, for the thirty one wire centers cited on page one of the Petition. In the alternative, if the Commission determines not to grant the relief requested in the Petition as filed, it should grant Qwest’s petition for the areas described and subject to the conditions in Dr. Blackmon’s testimony, Ex. 201TC, for the “broader” alternative, with the conditions terminating when Qwest receives Section 271 relief.

1 **I. INTRODUCTION**

2 This is a proceeding pursuant to RCW 80.36.330 for the competitive classification of  
3 certain business telecommunications services provided by Qwest in thirty one wire centers in the  
4 Seattle, Bellevue, Issaquah, Kent, Renton, Auburn, Tacoma, Spokane and Vancouver areas. The  
5 services involved are listed in Attachment A of the petition, and include Basic Business Local  
6 Exchange Service, Centrex Services, Private Branch Exchange Trunks and Basic Business  
7 Features. Qwest seeks an order of the Commission that declares that the subject services are  
8 subject to effective competition and may therefore be subject to flexible pricing by Qwest, in lieu  
9 of the tariff process. Pursuant to WAC 480-120-023, Qwest filed its petition June 7, 2000.  
10 According to the requirements of the amended RCW 80.36.310, the Commission must issue a  
11 decision on the petition within six months from the date of filing. Qwest waived the statutory  
12 deadline to and including December 18, 2000 (Tr. 77). TRACER, the Office of Public Counsel,  
13 XO (Nextlink), ELI, MCIWorldcom, AT&T, Metronet, ATG, Focal Communications,  
14 McLeodUSA Telecommunications Services, and Eschelon intervened in opposition to the  
15 Petition. Hearings were held October 30, 2000 through November 2, 2000.

16 **II. LEGAL FRAMEWORK**

17 **A. Statutory Requirements**

18 The statutory requirements for the Commission’s decision are specified in RCW  
19 80.36.330. Upon proof that a service is subject to effective competition, the Commission may  
20 classify that service as competitive, and permit it to be provided under a price list. Effective  
21 competition means that the customers of the service have reasonably available alternatives and  
22 that the service is not provided to a significant captive customer base. In deciding whether  
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1 services are effectively competitive, the Commission must consider factors including the number  
2 and size of alternative providers of services, the extent to which services are available from  
3 alternative providers in the relevant market, the ability of alternative providers to make  
4 functionally equivalent or substitute services readily available at competitive rates, terms, and  
5 conditions, and other indicators of market power which may include market share, growth in  
6 market share, ease of entry, and the affiliation of providers of services.

7 Courts have construed these standards twice, in connection with the parallel RCW  
8 80.36.320 for competitive classification of companies. The factors which the Commission is to  
9 consider in classifying companies or services as competitive, respectively, are the same in both  
10 statutes. The definitions of the statutory term “effective competition” are identical in the two  
11 statutes. In *In re Electric Lightwave*, 123 Wn. 2d 530, 547, 869 P. 2d 1045 (1994) the court held  
12 that it was within the Commission’s authority to define the relevant market for analysis of the  
13 factors specified in RCW 80.36.320. The court also held that the Commission possessed, and  
14 could rely on, in addition to testimony in the case, its own “institutional knowledge” of facts  
15 pertinent to the statutory standards in determining that an applicant had met the statutory  
16 standards. (Id. at p. 549) In *U S WEST Communications, Inc. v. Wash. Util. & Transp. Comm.*,  
17 86 Wn. App. 719, 728, 937 P. 2d 1326 (Div. 1 1997), the court held that the “customer” to which  
18 RCW 80.36.320 refers is the ratepayer, or end use customer, and not the carriers which use a  
19 company’s access service. The court quoted from the legislative history of RCW 80.36.320 on  
20 the meaning of the ambiguous term “significant captive customer base” as a threat to the  
21 development of effective competition, and interpreted the term as “*consisting of ratepayers who*  
22 *have no choice of service providers*” [emphasis is the court’s].

1            *In In the Matter of the Petition of U S WEST Communications, Inc. for Competitive*  
2 *Classification of its High Capacity Circuits in Selected Geographical Locations*, Docket No. UT-  
3 990022, Eighth Supplemental Order, at p. 13 the Commission applied RCW 80.36.330 in  
4 granting a request by U S WEST for competitive classification of high capacity circuits and held  
5 that “... because competitors have the ability to construct their own facilities or to lease  
6 unbundled network elements at cost-based rates or resell existing facilities pursuant to the  
7 Telecommunications Act of 1996, U S WEST lacks the ability to sustain prices substantially  
8 above cost in these two areas [the subject of the amended application] without losing market  
9 share.” The Commission held that U S WEST had no significant captive customer base because  
10 “[m]ultiple providers operate in these business-oriented, downtown commercial centers, utilizing  
11 a combination of owned and leased facilities.” (Id.) The Commission found based on the  
12 evidence that “U S WEST does not have a significant captive customer base because there are  
13 reasonably available alternatives to the services of U S WEST. Alternative providers can make  
14 functionally equivalent or substitute services readily available at competitive rates, terms and  
15 conditions.” (Id.) The Commission found that U S WEST’s market share varied from 33% to  
16 88%. (Id.) The Commission indicated that it relied on a Staff analysis that showed that  
17 U S WEST’s market share was diminishing over time. (Id. at p. 14) The Commission found that  
18 it had reason to believe that entry continued to occur, which was contrary to the existence of  
19 market power. (Id.) Finally, the Commission held that alleged defects in U S WEST’s carrier to  
20 carrier service quality would not alone justify rejecting U S WEST’s petition for competitive  
21 classification. (Id.)  
22  
23

1 **B. Relationship to Requirements of Section 271**

2           There is no direct relationship between either the issues involved or the grant of a petition  
3 for classification of services as competitive pursuant to RCW 80.36.330 and the grant of relief  
4 from the restrictions imposed by 47 U.S.C. §271(a) against the provision by Qwest of interLATA  
5 services that originate in Qwest’s serving areas in Washington. RCW 80.36.330 relates to only  
6 the relief of using price lists instead of tariffs to provide services classified as competitive. The  
7 standard under RCW 80.36.330 for when services are subject to effective competition is when  
8 customers have reasonably available alternatives and when the company involved has no  
9 significant captive customer base. The standard under 47 U.S.C. §271(c) for obtaining relief  
10 from the prohibition against providing interLATA services is very different from the standard in  
11 RCW 80.36.330. The federal standard requires existence of a binding agreement with one or  
12 more facilities based competitors to whom Qwest is providing access and interconnection for the  
13 purpose of serving residential and business customers, or the existence of a general offer to  
14 provide such access and interconnection. The federal standard also requires that the access and  
15 interconnection under the agreement(s) or the offer meet the fourteen point checklist in 47 U.S.C.  
16 §271(c)(2)(B). The competitive checklist generally sets standards for the unbundling of elements,  
17 access to network elements, poles and conduits, telephone numbers and routing databases,  
18 number portability, dialing parity, interconnection and resale.

19           Services that may be classified as competitive under RCW 80.36.330 include all  
20 telecommunications services. Only interLATA services are addressed by 47 U.S.C. §271. The  
21 existence of effective competition as defined in RCW 80.36.330 for the services at issue in this  
22 case does not require compliance with §271. The Commission has already found that Qwest’s

1 high capacity services in certain areas and intraLATA toll services are subject to effective  
2 competition, without any prior finding that Qwest had complied with the 47 U.S.C. §271(c)  
3 checklist.

### 4 III. EVALUATION OF QWEST PETITION

#### 5 A. Definition of Relevant Market

6 Qwest defined the relevant market with both geographic and product dimensions. The  
7 geographic scope of the relevant market consists of the areas served by the thirty one Qwest wire  
8 centers listed in the Petition (Ex. 12C, p. 1).<sup>1</sup> The product scope of the relevant market consists  
9 of the services listed in Attachment A to the Petition and any combinations thereof. These  
10 proposed definitions are reasonable based on the evidence.

#### 11 1. Relevant Geographic Market

12 The relevant geographic markets should be defined based on the available evidence and  
13 in accordance with the normal principles for defining such markets. Those principles include the  
14 notion that if consumers would choose to purchase a product from a neighboring area in response  
15 to a price increase for a locally produced similar product, then the neighboring area is part of the  
16 relevant geographic market (Ex. 231T, p. 6). Key to the use of the wire center as the proper  
17 relevant geographic market definition is the fact that the law requires that Qwest permit  
18 competitors to collocate facilities in Qwest's central offices (Id. at p. 10). Collocation means that  
19 competitors can extend services to all of Qwest's customers in a given wire center, regardless of

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20 <sup>1</sup> Bellevue Glencourt, Bellevue Sherwood, Issaquah, Kent O'Brien, Auburn, Renton, Seattle Atwater, Seattle  
21 Campus, Seattle Cherry, Seattle Duwamish, Seattle East, Seattle Elliott, Seattle Emerson, Seattle Lakeview, Seattle  
22 Main, Seattle Sunset, Seattle West, Spokane Chestnut, Spokane Fairfax, Spokane Hudson, Spokane Keystone,  
23 Spokane Moran, Spokane Riverside, Spokane Walnut, Spokane Whitworth, Tacoma Fawcett, Tacoma Greenfield,  
24 Tacoma Juniper, Tacoma Waverly, Vancouver Orchards and Vancouver Oxford.

1 where they are physically located in the wire center (Id.).

2 Qwest offered evidence of defined geographic areas consisting of the thirty-one wire  
3 centers, and the existence of two-hundred-fifty-seven competitors' switches capable of serving  
4 those areas, forty-five of which are located within the wire centers, and the existence of  
5 competitors' backbone network facilities in certain of those areas and the holding out by those  
6 competitors to serve business customers in those areas (Ex. 12C, Attachments B, D and L ).

7 None of this evidence was controverted. The evidence showed that nineteen CLECs operate in  
8 the Seattle Main wire center (Ex. 115C). Additional evidence showed that in each of the wire  
9 centers at issue, no fewer than three carriers that use ported numbers are operating (Ex. 116C). It  
10 is reasonable to conclude that competitors who port numbers from Qwest are facilities based  
11 (Id.). Qwest's evidence showed that competitors are collocated in the wire centers at issue,  
12 except for Spokane Chestnut (Ex. 2C).<sup>2</sup> All of the other wire centers except Auburn, Issaquah  
13 and Spokane Moran have at least five collocators.<sup>3</sup>

14 Qwest's evidence (Ex. 4C) showed that from several hundred to several thousand ported  
15 numbers were being used in each of the wire centers at issue as of June 30, 2000. This is  
16 evidence of substantial facilities based competition in each of the wire centers. The fact that the  
17 numbers are ported means that consumers choose to purchase services in the wire center so that  
18 they can retain their existing telephone numbers that are associated with the geographic area in  
19 that wire center.

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20 <sup>2</sup> Spokane Chestnut business customers can be readily served from the Qwest Spokane Riverside wire center location  
21 utilizing remote switching technology. The densest service area is concentrated at the Fairchild Air Force Base.  
See Exhibit 12, Attachment M.

22 <sup>3</sup> Spokane Moran business customers can be served from either the Qwest Spokane Keystone or Spokane Riverside  
wire centers (Tr. 193; Exhibit 12, Attachment M).

1 Staff requested data for its market share analysis by wire center. Staff analyzed  
2 competitive alternatives using exchanges rather than wire centers because CLECs were unable to  
3 provide data in accordance with the boundaries of Qwest's wire centers (Ex. 191T, p. 5).

4 Public Counsel/TRACER argued that Qwest's proposed relevant geographic market  
5 definition was under-inclusive because it did not capture business customer demands for services  
6 that can only be delivered across multiple wire centers such as the demands of very large  
7 businesses (Ex. 166T, p. 28). Under cross examination, Dr. Goodfriend admitted that "very large  
8 businesses" desire to use their purchasing power across wire centers to "drive a bargain" (Tr.  
9 628). According to Dr. Goodfriend large business customers already receive their services under  
10 contract (Tr. 573). Dr. Blackmon confirmed this from personal knowledge (Tr. 733). The  
11 outcome of this proceeding will not affect the ability of large businesses to enter individual  
12 contracts for services with Qwest over areas larger than a single wire center. Public  
13 Counsel/TRACER failed to show that Qwest's proposed relevant geographic market definition is  
14 under-inclusive.

15 Public Counsel/TRACER also claimed that Qwest's proposed relevant geographic market  
16 definition created a focus on collocation which according to Dr. Goodfriend has no direct  
17 relationship with CLECs' ability to supply alternatives for Qwest's services (Ex. 166T, p. 28).  
18 Exhibit 12C, Attachment M shows that CLECs have located some forty five switches within the  
19 physical boundaries of the thirty one wire centers at issue here. There is no evidence to support  
20 Dr. Goodfriend's argument that CLECs would go to the expense of collocating their equipment  
21 in Qwest's central offices and then not use that equipment in providing alternatives for the  
22 switched services in Attachment A to the Petition. Exhibit 174 indicates that Dr. Goodfriend did  
23



1 no empirical study to support her opinion. The only testimony submitted by a facilities based  
2 CLEC indicates that Nextlink (XO) uses unbundled loops to gain access to customer premises  
3 via equipment that XO has collocated in Qwest's offices (Exhibit 281-T, p. 4). The use of  
4 unbundled loops allows CLECs to duplicate the geographic scope of the Qwest service in the  
5 wire center, and the evidence in Ex. 12C, Attachment G shows that unbundled loops are being  
6 used in the same wire centers where CLECs have located their own switches.

7 ATG/Metronet and Public Counsel/TRACER argue, without citing specifics, that  
8 Qwest's proposed use of the wire centers in the Petition as the relevant geographic markets, is  
9 over inclusive because there may be areas within the wire center that are not "on or very near" a  
10 competitor's fiber route, where customers have no reasonably available competitive alternatives  
11 (Ex. 241T, p. 25; Ex. 166T, pp. 9-10). This argument is erroneous because it is clear from  
12 Exhibits 2C and 3C that CLECs are readily using unbundled loops to reach customers within the  
13 wire centers at issue. The argument really holds that if, and only if, each customer in the wire  
14 center can be physically reached with a CLEC's own fiber, is there effective competition  
15 throughout the wire center. This is certainly not the test that the Commission applied in the  
16 Eighth Supplemental Order in Docket No. UT-990022. Instead the Commission there relied on  
17 the facts that competitive investment was taking place, that CLECs had the ability to gain access  
18 to commercial buildings, that resale and use of UNEs were viable forms of competition, that the  
19 market was growing rapidly and Qwest's market share was diminishing, to find that the services  
20 in that proceeding were subject to effective competition (Eighth Supplemental Order, Docket No.  
21 UT-990022, at p. 14). Qwest proved the same facts in the instant case. Even Dr. Goodfriend  
22 agreed that there has been rapid deployment of switches and facilities by CLECs (Tr. 616). The  
23

1 test proposed by Qwest's opponents is not supported by the statute or by economic theory (Ex.  
2 231T, p. 9).

3 Qwest's opponents' argument also is based on an effectively impossible standard of  
4 proof. In Docket No. UT-990022, the Commission acknowledged that Qwest did not have the  
5 pertinent information on all of its competitors' operations because not all of such competitors  
6 were parties to the case (Docket No. UT-990022, Eighth Supplemental Order at p. 14). Only the  
7 CLECs have the pertinent information on their strategies and the geographic reach of their  
8 existing networks within the wire center, in terms of the distances beyond the fiber that the  
9 CLECs are building out to reach customers (Tr. 587). CLECs believe this information is  
10 proprietary (Id.). None of the CLECs who are facilities based in Washington, and *who are*  
11 *parties to this case*, introduced any evidence on the geographic reach of their networks. RCW  
12 80.36.330 authorizes *the Commission* to require telecommunications companies to provide all  
13 information necessary to implement the statute. If information on the geographic reach of  
14 competitors' networks is necessary for relevant market definition, then the Commission should  
15 require CLECs to produce that information. When Qwest has made a prima facie showing that  
16 competition exists within the wire center, the Commission should not adopt a different  
17 geographic relevant market definition whose proof relies on information that is not a part of the  
18 record and is only available from CLECs, without also vigorously enforcing disclosure of that  
19 information so that Qwest may attempt to meet its burden.

20 Public Counsel/TRACER also argued for, in effect, a CLEC specific geographic relevant  
21 market definition, relying on an account of Focal Communications' entry strategy. This  
22 argument is not credible, either. Dr. Goodfriend admitted that it would be prudent to check  
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1 information provided by someone such as the analyst quoted in Ex. 169, who had a financial  
2 interest (Tr. 504). She admitted that the analyst in Ex. 169 had such an interest in Focal, and she  
3 was unable to reconcile inconsistencies in the data in the account without resort to this same  
4 financially interested person (Tr. 503-505). The Public Counsel/TRACER argument exacerbates  
5 the impossibility of proof discussed above.

## 6 **2. Relevant Product Market**

7 Qwest proposed a relevant product market definition of each of the services listed in  
8 Attachment A to the Petition, or any combination thereof, to business customers in the thirty-one  
9 wire centers. Qwest showed with Attachment B to the Petition that each of these services is  
10 being provided by one or more competitors in Washington. Qwest showed with Attachment D to  
11 the Petition, the prices at which competitors named in the Petition, provide the services. Qwest  
12 showed with Attachment C to the Petition that although the price lists may name features  
13 differently than Qwest names them, the underlying technical switch and software functions are  
14 the same whether the service is provided by Qwest or a competitor. None of the price list pages  
15 for competitors or Qwest's own tariffs, restricts any customer from purchasing any of the  
16 services based on categorizing the customer as large or small business, or based on the specific  
17 industry in which the business operates (Tr. 490, 576).<sup>4</sup>

18 The purpose of a relevant product market definition is to include those products that  
19 represent substitutes from the consumer's standpoint, which would be possible purchase  
20 alternatives if Qwest were to increase its prices for its services (Ex. 231T, p. 8). Based on this  
21 purpose, it is clear that Qwest's proposed product definition meets the test. Qwest's Centrex

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22 <sup>4</sup> Certain services may be more attractive to a particular size of business than to a different size of business because  
23 of the nature of the service, such as Centrex, but that is not a restriction on the purchase of the service. Similarly, a

1 customers would, based on the price lists in Attachment D to the Petition, perceive Centrex  
2 provided by CLECs to be a possible purchase option if Qwest were to raise the price of its  
3 Centrex (Tr. 577).<sup>5</sup> Qwest customers would perceive the CLEC provided features listed in  
4 Attachment D to the Petition as substitutes for the same respective features that Qwest provides  
5 because they are the same features provided over identical switches using identical software (Ex.  
6 76T, p. 17). Thus the functionality of the CLECs' offerings should be the same as those of  
7 Qwest.

8 Public Counsel/TRACER argue that Qwest should have segmented the relevant product  
9 market through "customer-product clusters" (Ex. 166T, pp. 19-21). Dr. Goodfriend gave the  
10 example of six broad categories of customer that Qwest allegedly uses for marketing, as the type  
11 of clustering that Qwest should have done (Id. p. 19). Under cross examination, she stated that it  
12 was not her testimony that Qwest should have done such clustering using these categories of  
13 customers (Tr. 507).

14 Public Counsel/TRACER's argument confuses marketing strategies with the definition of  
15 a relevant product market (Ex. 231T, p. 8). To define a relevant market it is only necessary to  
16 identify the designated product, the reasonably exhaustive list of acceptable substitutes and the  
17 smallest geographic area within which the products may be available to consumers (Id.). Qwest  
18 has done this in its evidence. Dr. Goodfriend gave the example of how Qwest supposedly  
19 defined the product market in Docket No. UT-990022 as "business customers of DS1 and

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20 PBX trunk is only attractive if the customer owns or operates a PBX, but that is not a restriction on the purchase of  
21 the service.

22 <sup>5</sup> The use of the term "Centrex" is actually the name for a package of services typically used by customers who desire  
23 certain features and functions. These same customers may also select a PBX with comparable services in lieu of  
24 Centrex.

1 higher” services, as what Qwest should have done here. That argument is both incorrect factually  
2 and logically wide of the mark. Qwest proposed a market definition in Docket No. UT-990022  
3 of “mid-sized to large businesses, carriers using high-capacity transport facilities, and resellers”  
4 within specified wire centers.<sup>6</sup> This definition was equivalent to saying “all sales of high  
5 capacity services” in those wire centers. Qwest argued against a retail/wholesale market  
6 segmentation.<sup>7</sup> So Qwest did not propose in Docket No. UT-990022 the relevant market  
7 definition Dr. Goodfriend attributes to it in her testimony. In any case, the Commission  
8 considered in that docket, analyses of both the retail and wholesale market demands for DS1 and  
9 higher circuits.<sup>8</sup> Qwest here has proposed a relevant market definition of specific services  
10 purchased by business customers, as listed in Attachment A to the Petition, within thirty-one wire  
11 centers.

12 ATG/Metronet claims that Qwest has included in its proposed relevant product market  
13 definition, services that Qwest supposedly “readily admits” are not provided by its competitors  
14 (Ex. 241T, p. 22). Under cross examination, Mr. Wood stated that the “admission” is Mr.  
15 Teitzel’s testimony about Attachment C to the Petition (Tr. 855). The testimony of Mr. Teitzel is  
16 that Attachment C to the Petition is a basis to determine that, despite differing nomenclature  
17 between Qwest and competitors as shown in the price lists, the same features Qwest provides are  
18 actually features of the switches and software that are used by competitors (Ex. 76T, p. 17).  
19 Attachment B to the Petition is evidence that each service and feature in the Petition is being  
20 offered by at least one competitor. Qwest has not admitted that any services in the Petition are  
21 not being offered by competitors.

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22 <sup>6</sup> Eighth Supplemental Order, Docket No. UT-990022, at p. 5, reciting U S WEST’s characterization of the relevant  
23 end user market.

23 <sup>7</sup> Id. at p. 7

1 Public Counsel/TRACER claimed that the Staff had defined DS1 and higher capacity  
2 circuits as the relevant product market (Ex. 168T, p. 25). Under cross examination, Dr.  
3 Goodfriend admitted that such a definition did not appear in Staff’s testimony and that it was Dr.  
4 Goodfriend’s conclusion that Staff “necessarily” defined DS1 and higher services as the relevant  
5 product market because it was proposing to grant pricing flexibility for retail business services  
6 that “ride” on a DS1 or higher capacity circuit (Tr. 588). Dr. Blackmon refuted this conclusion at  
7 the hearing by pointing out that it is possible for a retail service to be subject to effective  
8 competition, without an underlying service that is necessary to provide that retail service being  
9 effectively competitive, and citing intraLATA toll service as an example (Tr. 710-711). The  
10 correct relevant product market definition is the individual services listed in Attachment A to Ex.  
11 12C, and that does not include the underlying DS1 or higher capacity circuits for services that are  
12 provisioned on such circuits.

13 **a. Customers Have Reasonably Available Alternatives**

14 Qwest has demonstrated that customers have reasonably available alternatives. Under  
15 RCW 80.36.330 and the Commission’s interpretation of that statute in Docket No. UT-990022,  
16 Qwest is not required to show that alternatives are available to every possible customer in every  
17 location using every mode of providing service. Rather, the standard is “reasonably available  
18 alternatives.” Exhibit 12C, Attachment D shows that there are generally available alternatives to  
19 Qwest’s services that show the same characteristics as the Qwest service and demonstrate  
20 variability in price. In Docket No. UT-990022, the Commission found such variability of  
21 competitors’ prices compared to Qwest’s prices, indicative of a competitive market.<sup>9</sup> Exhibit

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22 <sup>8</sup> Id. at p. 14.

23 <sup>9</sup> Id.

1 12C, Attachment D includes price lists from several competitors which hold the competitors out  
2 to the public, to provide the services listed at the prices stated.

3 Qwest has shown through Ex. 12C, Attachments B and C that the alternatives offered by  
4 competitors have reasonably similar features, quality and reliability to Qwest's services because  
5 they are provided on the same types of switches using the same software releases (Ex. 76T, p.  
6 17). Exhibit 904HC also shows that some competitors' services in the wire centers at issue are  
7 provided through the use of unbundled loops. Qwest does not have direct information on the  
8 quality and reliability of services its competitors provide over their own facilities or facilities  
9 leased from other companies. However, many of the competitors were parties to this case. They  
10 have not suggested that their services provided over their own facilities or those of other  
11 companies were lower in quality and reliability than Qwest's service.

12 In the Eighth Supplemental Order in Docket No. UT-990022, the Commission held that  
13 because competitors had the ability to construct their own facilities or to lease unbundled  
14 network elements at cost-based rates or resell existing facilities pursuant to the  
15 Telecommunications Act of 1996, U S WEST lacked the ability to sustain prices substantially  
16 above cost without losing market share. The Commission considered in deciding whether Qwest  
17 could exercise market power, the *ability* of competitors to respond by building facilities, leasing  
18 UNEs or reselling. The Commission did not require that Qwest prove that the facilities had  
19 *already* been built in every location, or that the UNEs had *already* been leased to serve every  
20 customer or that the competing service had *already* been resold. In the instant case, Qwest has  
21 demonstrated the use of UNEs, resold services and the same ability of its competitors to use  
22 CLEC provisioned services in the thirty-one wire centers. Qwest has shown the existence of  
23

1 reasonably available alternatives to Qwest’s service. Public Counsel/TRACER’s witness  
2 testified that the Commission had acted correctly in finding the high capacity markets to be  
3 subject to effective competition in Docket No. UT-990022 (Tr. 616), but when she was read the  
4 above Commission finding from that order on the ability of competitors to respond to attempted  
5 exercises of market power by Qwest, she disagreed with it (Tr.580-581). Dr. Goodfriend’s  
6 testimony on this issue is hopelessly confused.

7 XO introduced evidence in contesting Qwest’s Petition that sought to show that its held  
8 order and repair experience using Qwest’s unbundled loops, was less than what it would have  
9 liked (Ex. 281T). This evidence does not address the issue of whether the provisioning and  
10 repair intervals represent comparable product quality to that of Qwest’s own service, and  
11 therefore does not show that the competitors’ service using UNEs is not reasonably available.  
12 The Staff’s analysis of provisioning and repair intervals for CLECs in comparison to Qwest’s  
13 service shows some variability in intervals, but none of the CLEC intervals in that analysis is  
14 close to supporting the claims by XO of intervals following April 2000 in Seattle and Spokane  
15 (Ex. 203C). XO was unable to indicate current conditions or document how many of the repair  
16 tickets were out of service claims (Ex. 284, 285).

17 Public Counsel/TRACER claimed that Qwest “likely” had product monopolies on  
18 services sold to very large firms, Centrex 21-CustomChoice, and Market Expansion Line (Ex.  
19 166T, pp. 22, 26). There is no evidence to support this claim. Dr. Goodfriend admitted that at  
20 least one very large firm is served by a CLEC (Tr. 515). There is no evidence that there is such a  
21 product as Centrex 21-CustomChoice.<sup>10</sup> Attachment A to Ex. 12C does not list such an item as

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22 <sup>10</sup> Features provided on a Centrex system have already been classified as subject to effective competition in Cause  
23 No. U-8686. Qwest does offer Centrex 21 service, CustomChoice and Market Expansion Line service. Centrex 21



1 within the services for which Qwest seeks competitive classification. Attachment C to Ex. 12C  
2 shows that the vertical features are created by the switches and software which are available to all  
3 competitors (Ex. 76T, p. 17). Attachment D to Ex. 12C shows that there are competitors who  
4 provide Centrex service. Dr. Goodfriend conceded under cross examination that Market  
5 Expansion Line is simply a switching function (Tr. 510). Exhibit 905 shows that many CLECs  
6 have switches capable of serving major intraLATA markets with Market Expansion Lines such  
7 as Seattle, Tacoma, Issaquah, Auburn, Renton and Kent. As in the case of features, competitors  
8 who operate their own switches or who use Qwest's unbundled switching and transport can  
9 provide substitute services to Market Expansion Line.

10 **b. Qwest has No Significant Captive Customer Base**

11 Qwest has shown that it does not have a significant captive customer base for the services  
12 at issue in the thirty-one wire centers. Qwest has shown through Ex. 12C and its attachments,  
13 Ex. 2C, Ex. 3C, Ex. 4C, Ex. 5C, Ex. 6, Ex. 8C and Ex. 10C that multiple providers operate in  
14 these wire centers, utilizing a combination of owned and leased facilities. Based on just such  
15 evidence, the Commission found that Qwest had met its burden in Docket No. UT-990022.<sup>11</sup>  
16 Exhibit 12C, Attachment D shows that multiple very large, well funded competitors such as  
17 AT&T, MCIWorldcom, XO, and ELI hold themselves out to provide the same services that  
18 Qwest seeks to have classified as competitive, and Staff has shown that they in fact operate in the

19 \_\_\_\_\_  
20 and CustomChoice are simply packages of the features listed at Attachment A to Exhibit 12C. Market Expansion  
21 Line is the product name for a variation of permanent Call Forwarding.

22 <sup>11</sup> Docket No. UT-990022, Eighth Supplemental Order, at p. 13.

1 wire centers at issue (Ex. 904HC).

2           These competitors have invested in their own network facilities to provide services,  
3 according to the publicly available 1999 CLEC Report (Ex. 12, Attachment E). AT&T had a  
4 Lucent 5ESS switch to serve Seattle in 1999, and some 21,397 fiber miles serving 85 on net  
5 buildings using collocations in eleven central offices (Id.). Electric Lightwave had DMS 500  
6 switches in Seattle and Spokane, with a total of over thirty thousand fiber miles and over one  
7 hundred on net buildings (Id.). Time Warner (formerly GST) also operated DMS 500 switches in  
8 Seattle and Spokane and served Vancouver (Id.). MCI has an AXE switch in Seattle (Id.). XO  
9 operated a DMS 500 switch in Spokane and planned one in Seattle (Id.). Exhibit 12C,  
10 Attachment K shows that competitors have invested in providing fiber networks in Seattle and  
11 Spokane. In Docket No. UT-990022 the Commission found that competitors had access to over  
12 three hundred buildings in Seattle alone.<sup>12</sup>

13           Exhibit 2C shows that in each of the wire centers at issue, there are no fewer than four  
14 competitors, and in most there are more than ten competitors to Qwest, excluding carriers that  
15 are pure DLECs. Exhibit 3C shows, by totaling the numbers in the column entitled “# of  
16 unbundled loops” that as of June 30, 2000 there were over eleven thousand unbundled loops that  
17 were in use in the thirty-one wire centers. Exhibit 10C shows, by totaling the numbers in the  
18 “unbundled loops in service” column for thirty of the thirty-one wire centers, that just two  
19 months later that number had increased by 27% to almost fourteen thousand.<sup>13</sup> This growth  
20 occurred in twenty nine of the thirty one wire centers.<sup>14</sup> According to ATG/Metronet, “earlier  
21 this year,” referring to February, 2000, Qwest had said there were only 6,526 unbundled loops in

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22 <sup>12</sup>.Id. at p. 14.

23 <sup>13</sup> Spokane Chestnut does not appear on Ex. 10C.

1 service in the entire state (Ex. 241T, p. 16). Ex. 10C shows a state unbundled loop total for the  
2 end of August 2000 that is almost three times that number, demonstrating dynamic growth during  
3 2000 in use of unbundled loops for entry. Dr. Goodfriend criticized Qwest for not addressing the  
4 impact of the Twenty-Fourth Supplemental Order in Docket No. UT-960369 which deaveraged  
5 UNE rates, on the markets for UNEs (Ex. 166T, pp. 6-7). In fact as shown by the above exhibits  
6 much of the growth in use of UNEs in the wire centers at issue occurred after that order was  
7 issued. While none of the CLECs who were parties testified that they would stop using UNEs in  
8 response to the deaveraged UNE rates when those rates become effective, the prospect of the  
9 deaveraged rates becoming effective at higher levels than existing rates in four of the five zones  
10 has not caused growth in use of UNEs to stop.

11 Exhibit 8C shows that there has been significant growth in the counts of ported telephone  
12 numbers in the thirty-one wire centers between June 1, 1999 and June 1, 2000. Such significant  
13 growth in ported numbers, in the range of seven hundred percent in a one year period, evidences  
14 dynamic competitive activity. Ported numbers are used by facilities based competitors (Ex. 1T,  
15 p. 7).

16 Exhibit 6 shows that competitors such as XO and ELI earn almost half of their revenues  
17 through the provision of switched local services which are those in these carriers' price lists in  
18 Ex. 12C, Attachment D. XO's and ELI's 1999 annual revenues for Washington respectively  
19 were \$12.3 million and \$7.2 million (Ex. 195). Exhibit 902 shows that Qwest has lost to  
20 competitors Billed Telephone Numbers (BTNs) that correspond roughly to customers, in both the  
21 large and small business categories in all of the wire centers at issue. The customer-reported  
22 losses by Qwest to competitors over the 1998-1999 period range in the small business category

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23 <sup>14</sup> No growth in unbundled loops occurred in Spokane Moran, and as noted above Spokane Chestnut does not appear

1 from approximately 1.2% for Auburn to 11.2% for Spokane Riverside, with several wire centers  
2 at between 5.0% and 7.5%.<sup>15</sup> In the large business category Qwest's customer-reported losses to  
3 competitors range from approximately 0.4% for Renton to 7.1% for Spokane Walnut.<sup>16</sup> It is  
4 important to recognize that these counts are only of customers who voluntarily disclosed that  
5 they were leaving Qwest to use a competitor's service (Ex. 76T, p. 4 n. 1). These counts also do  
6 not include losses of growth lines that Qwest customers purchase from CLECs or customers who  
7 were never Qwest's customers who initially obtain service from CLECs (Id.).

8 The true total of Qwest's competitive losses is undoubtedly far higher than these  
9 numbers. Confirmation of this fact can be seen by comparing Exhibit 193 with the above  
10 calculations. The Staff's evidence, based on responses by CLECs to the order to disclose, shows  
11 far higher competitive losses in all of the geographic areas at issue here than calculations that can  
12 be made considering only information in Qwest's possession. This is to be expected. However,  
13 what the Qwest competitive loss data in Exhibits 902C and 903C do show is that Qwest's  
14 proportional and identifiable customer-reported loss to competitors of small business customers  
15 is greater than its loss of large business customers in the thirty-one wire centers.

16 Qwest's evidence also demonstrates significant resale competition (Ex. 2C; Ex. 3C).  
17 Staff did not include resold lines in its market share analysis and believed that resale was not  
18 price constraining and so "should not count" in determining whether services are subject to  
19 effective competition (Tr. 709). ATG/Metronet also claimed that resale competition is not price

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20 in the August data.

21 <sup>15</sup> These calculations are simply adding the figures on Attachments C and D to Ex. 902 for CLACs affected YTD  
22 total for each wire center for SBG, and dividing the total by the total 8/00 BTN count on Ex. 903 for the same wire  
23 center for SBG. Qwest does not have individual wire center win back numbers. On a statewide average basis the  
24 SBG win back appears to be in the range of 18% of the losses, computed as the sum of the Attachment B, Ex. 902  
25 numbers for SBG divided by the sum of the Attachment C and D, Ex. 902 losses for the state under the CLACs  
affected YTD total column.

1 constraining (Ex. 241T, p. 17). Qwest showed that resale can be price constraining if the  
2 underlying carrier attempts to increase retail prices without a corresponding increase in actual  
3 retailing costs (Tr. 246). In any case local service is resold with other services including long  
4 distance (Ex. 12C, p. 13; Ex. 78T, p. 13). Resellers typically compete with the underlying carrier  
5 for the bundle of services, not on a service by service basis (Id.). Exhibit 8C shows 64% growth  
6 in resale competition in the thirty-one wire centers during the one year period from June 1999 to  
7 June 2000. This growth in resale also supports the conclusion that Qwest has no significant  
8 captive customer base in the wire centers at issue. The resale end user customers receive service  
9 that is comparable in quality and reliability to Qwest's retail service, because it is Qwest's  
10 service. Resold service is available in each of the thirty-one wire centers (Ex. 2C). Furthermore,  
11 the Commission included the existence of resold service as a factor in determining that Qwest  
12 had no significant captive customer base for high capacity circuits in Docket No. UT-990022.

13 Staff testified that Qwest has a significant captive customer base in customers whose  
14 service does not "ride" on DS1 or higher capacity circuits and in wire centers outside the Seattle,  
15 Bellevue, Spokane and Vancouver areas, unless the market is viewed as a whole and Staff's  
16 conditions are accepted (Ex. 201TC, pp. 10, 23; Tr. 692). The evidence on which Dr. Blackmon  
17 relied was the HHI index calculations as to the Issaquah, Kent, Auburn, Renton and Tacoma wire  
18 centers, and the results of an informal canvass of certain competitors for the small business  
19 customers (Ex. 201TC, pp. 20-21). Qwest analyzes the HHI calculations below. The evidence  
20 on which Dr. Blackmon relied to conclude that small business customers have no alternative  
21 providers, is insufficient and contrary to other record evidence. First, Dr. Blackmon contacted  
22 only two providers and used information from the web sites of only two others to conclude that

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23 <sup>16</sup> The calculation is similar to that discussed in the preceding footnote for SBG. On the same basis, BGS win back

1 no competitors are interested in serving small business customers (Ex. 201TC, pp. 20-21). Dr.  
2 Blackmon did not contact MCI, which is a very large competitor (Id.). Dr. Blackmon did not  
3 contact the twenty-seven other competitors Qwest listed in its Petition, nor almost one hundred  
4 competitors who have registered since Qwest filed its Petition. Dr. Blackmon inferred from the  
5 fact that XO did not return his telephone call that the company is not interested in serving small  
6 business customers (Ex. 201TC, p. 21). There is no evidence to support this inference.

7         During the Olympia public hearing, Mr. Paxhia of Renton testified that two different  
8 competitors had accepted his orders for fewer than five business lines (Tr. 566-567). The fact  
9 that apparently some implementation problems prevented his receiving timely service does not  
10 detract from the fact that competitors are seeking the business of small customers such as Mr.  
11 Paxhia. Qwest introduced in evidence advertising of several competitors who specifically state  
12 that they serve small business customers (Exhibits 79-83). In addition, the business plans  
13 submitted by CLECs in response to Staff's request indicate that many CLECs specifically target  
14 small to medium sized businesses. The director of the Auburn Chamber of Commerce testified  
15 that small business customers have alternatives to Qwest (Tr. 558-559).

16         Dr. Blackmon also speculated that a few large business customers lost to competitors  
17 could account for the forty-odd percent loss in market share of business lines that Staff's study  
18 disclosed in Seattle, Spokane and Vancouver (Ex. 201TC, p. 22). However, Qwest's response to  
19 Staff Data Request 01-001, Attachments C and D (Ex. 902C), suggests a different interpretation,  
20 although Ex. 902C does not include lines that were never provided by Qwest. Qwest has lost to  
21 competitors, according to that exhibit, (which includes only customers who self-reported that  
22 they were going to competitors) approximately 8% of small business customers in Spokane, 4%

23 \_\_\_\_\_  
24 appears in the range of 1.4% of losses during the period.

1 of such customers in Seattle and 3.5% in Vancouver. The percent losses of large business  
2 customers are much smaller than these percentages. Because the numbers of small business  
3 customer BTN's are almost three times greater than those of large business customers, the  
4 numbers of lost small business customers are also much greater than the numbers of lost large  
5 business customers. Based on the evidence summarized above, coupled with consideration of  
6 lost small business customers who did not disclose to Qwest that they were going to competitors,  
7 and small business customers of CLECs who were never Qwest's customers, the Commission  
8 should conclude that the market share data in Ex. 193 and the customer loss data in Ex. 902C  
9 show effective competition for small as well as large business customers.

10 Based on this evidence, the Commission should find that CLECs are operating in these  
11 thirty-one wire centers, providing services that are substitutes for Qwest service and are readily  
12 available so that Qwest has no significant captive customer base.

### 13 **A. Market Concentration**

14 Qwest submits that the important issues relating to market concentration in determining  
15 whether to classify the services in Attachment A to the Petition as competitive in the thirty-one  
16 wire centers at issue here, are both the *trend* in market concentration, and a snapshot calculation  
17 as of the current time (Ex. 231T, p. 21). Although it had no *de jure* monopoly, *In re Electric*  
18 *Lightwave, supra*, Qwest at some time in the past enjoyed virtually one hundred percent market  
19 share for the services and wire centers at issue (Ex. 231T, p. 21; Tr. 577). This represents the  
20 highest possible market concentration. As Qwest's services have become subject to more and  
21 more competition, and as shown by Attachment G and H to Ex. 12C compared to Ex. 8C, the  
22 markets have become less concentrated. The normal use of market concentration analysis is to  
23

1 determine whether or not a merger, which results in a diminution of the number of competitors in  
2 a market (and by definition an increase in market concentration), should proceed (Ex. 231T at p.  
3 20). Also, the market concentration analysis is not used by federal authorities to decide whether  
4 or not to subject the prices of services to regulation (Tr. 706).

5 The issue of market concentration is actually part of the analysis of the factor in RCW  
6 80.36.330(1)(d): “Other indicators of market power.” The Commission should be cautious in  
7 using market concentration data because when market concentration is *decreasing*, as it is in the  
8 markets at issue in this case, a “high” market concentration by itself does not make it more or  
9 less likely that one or more firms can exercise market power (Ex. 231T, pp. 13, 21). This is  
10 because the key variables are whether or not significant excess capacity exists and whether such  
11 capacity is concentrated (Id. at pp. 24-25).

12 The evidence in this case is that substantial excess capacity exists and that capacity is not  
13 concentrated.<sup>17</sup> Modern digital switches are modular and scalable in design (Tr. 283). Exhibit  
14 2C and Ex. 12C, Attachment E demonstrate that investment in switching capacity is not  
15 concentrated. AT&T, ELI, MCI and Nextlink all operate modern digital switches in Seattle (Id.).  
16 Nextlink operates a switch in Spokane (Id.). Qwest has no control over its competitors’ access to  
17 switching capacity.

18 The trend in market concentration is clearly towards lower concentration. When Qwest  
19 filed its petition in June 2000, there were thirty-one registered competitors who held themselves  
20 out to provide local service in the thirty-one wire centers. (Ex. 12C, Attachment F) By the time  
21 of hearing, less than five months later, that number had increased to over one-hundred-twenty  
22 (Ex. 9). Competitors, as well as competitive access providers, wireless and PCS providers have

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23 <sup>17</sup> This issue is discussed below.



1 installed over two-hundred-fifty switches capable of serving the thirty one wire centers (Ex.  
2 231T, p. 18). Forty-five of the CLECs' switches are located within the geographic boundaries of  
3 the wire centers at issue (Ex. 2C). In 1999, the available data in the CLEC Report showed only  
4 eight competitors' local exchange switches in Washington (Ex. 12C, Attachment E). The number  
5 of resellers operating in the thirty-one wire centers has increased (Ex. 2C). The count of ported  
6 numbers has increased sevenfold in one year (Ex. 8C). Examination of Exhibit 902C,  
7 Attachments C and D shows that Qwest continues to lose both small business and large business  
8 customers in the wire centers at issue from year to year, and in some cases at an accelerating rate.  
9 The facts are that the number of entrants is increasing, the number of switches operated by the  
10 entrants is increasing, the number of unbundled loops is increasing, and all of these are  
11 increasing at a rate that is faster than Qwest's growth in business access lines.

12 This evidence shows that Qwest's market share for the services at issue in this case is  
13 diminishing. In the Eighth Supplemental Order in Docket No. UT-990022, the Commission  
14 stated at page 14 that it relied in finding effective competition on a Staff analysis that showed  
15 that Qwest's market share was diminishing over time. Thus, it is not merely the absolute level of  
16 market share that the Commission has considered, but the direction of change in that share. It  
17 has found a diminishing share to be consistent with the existence of effective competition.

18 ATG/Metronet introduced evidence that Qwest's internal projections showed that it would have  
19 market share in 2005 that was only four percent below its current level (Ex. 241TC, p. 36).

20 However, Mr. Wood admitted that this number was not specific to Washington, and that the  
21 document was labeled "draft" (Tr. 859). Even this evidence supports a finding that Qwest's  
22 market share is diminishing and Qwest expects that share to continue to diminish.

1 The Staff's market share evidence shows that in each of the exchanges at issue (the  
2 market share data were not available by wire center) Qwest's market share based on access lines  
3 served is within the range that the Commission found was consistent with the existence of  
4 effective competition in Docket No. UT-990022, Eighth Supplemental Order. In that order, at  
5 page 13, the Commission found Qwest's market share to be between 33% and 88%. Exhibit 193  
6 shows that in some exchanges Qwest's share of existing access lines is as low as 40% and  
7 nowhere is it higher than 86%.<sup>18</sup>

### 8 **1. Antitrust Merger Guidelines**

9 The Department of Justice's Horizontal Merger Guidelines are used for the purpose of  
10 analyzing mergers and market power (Ex. 231T, p. 5). The guidelines are useful in this case for  
11 determining a portion of the relevant product market for purposes of analyzing the "market  
12 power" factor in RCW 80.36.330(1)(d) (Id.). The guidelines define market power as the "ability  
13 profitably to maintain prices above competitive levels for a significant period of time" and/or  
14 lessen competition in non/price dimensions such as product quality, service or innovation (Id. at  
15 p. 13). Dr. Taylor pointed out that the FCC goes beyond the merger guidelines and also  
16 examines substitutability in supply in its decisions under comparable federal regulations to RCW  
17 80.36.330 (Id.). The Commission did not apply the merger guidelines in its Eighth Supplemental  
18 Order in Docket No. UT-990022.

19 The merger guidelines evaluate whether a merger should continue based on the likely  
20 response of market participants, both purchasers and sellers, to a hypothetical price increase by  
21 the merged firm (Ex. 231T, pp. 5, 7). If it is viewed as unlikely that the merged firm could  
22 maintain a small but significant price increase over a long time without losing sales and hence

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23 <sup>18</sup> Qwest discusses below the issue that the more appropriate measure of market share is capacity.

1 market share, then that indication would be favorable to allowing the merger to proceed.  
2 Reactions of sellers to increase sales of competing products and reactions of purchasers to  
3 purchase substitutes, are all considered in the analysis (Id.). Public Counsel/TRACER have  
4 misapplied the merger guidelines (Id. p. 7). Public Counsel/TRACER's test of substitutability of  
5 demand focuses on a single hypothetical customer, without establishing that all customers would  
6 act in the same way or that the hypothetical is representative (Id.).

7         The merger guidelines clearly require consideration of the likely response of firms not  
8 currently producing or selling the products in the geographic area, to a small but significant and  
9 nontransitory price increase, if such firms would probably respond, so long as there would not be  
10 significant sunk costs of entry and exit (Id. at pp. 10-11). Here, multiple very large, well-funded  
11 competitors including AT&T, MCI, ELI and XO have already invested in modern, scalable  
12 digital switches that are located in Seattle, Spokane and other Washington cities (Ex. 905). At  
13 least some of these carriers are now providing service in some of the wire centers at issue  
14 through use of unbundled loops (Ex. 904HC). Also, the availability of unbundled network  
15 elements including the UNE platform (UNE-P), means that competitors who are capable of  
16 providing innovative services can now lease the portions of the network that they require, thus  
17 avoiding sunk costs of entry or exit except those of developing a customer base (Ex. 231T, pp.  
18 11-12).

19         These facts support a finding that these large competitors would respond to a significant  
20 nontransitory price increase by Qwest by seeking to provide the same services to customers in the  
21 thirty one wire centers. Public Counsel/TRACER claimed that CLECs would not respond to  
22 such an increase, notwithstanding the above facts on existing investment, very large, well funded  
23

1 competitors and scalable capacity of switches, because such a response would represent an  
2 “opportunity cost” that would detract from the CLECs’ existing business plans to use their own  
3 fiber to reach customers (Ex. 166T, p. 39). This is a circular and internally inconsistent  
4 argument. Dr. Goodfriend defined the assumptions of the CLECs’ supposed business plans, so  
5 her hypothetical is oriented to the result she wants to produce. Public Counsel/TRACER did not  
6 introduce any such CLEC business plans in evidence. Dr. Goodfriend denied that the  
7 hypothesized significant nontransitory Qwest price increase would represent a new profit  
8 opportunity for CLECs that had not existed when they had made their supposed business plans  
9 (Tr. 578). Dr. Goodfriend also denied that this supposed CLEC perception was because  
10 according to her Qwest would “manage entry” (Id.). Yet that is the only explanation in Ex. 166T  
11 for CLECs to fail to reevaluate their profit opportunities in response to the hypothetically  
12 significant Qwest price increase (Ex. 166T, p. 41).

13           Aside from this contradiction, Public Counsel/TRACER’s attempt in Ex. 166T to explain  
14 why CLECs would not view a Qwest price increase as a new profit opportunity does not bear  
15 scrutiny. That attempt is based on the notion that notwithstanding the fact, as the Commission  
16 would have had to find, that services are effectively competitive, Qwest could price predatorily to  
17 deter the competitive entry, and finance the predation by overcharging other customers (Id.).  
18 This argument is internally inconsistent because the predatory pricing to foreclose entry is  
19 mutually exclusive of the “significant nontransitory price increase” that must be assumed for  
20 purposes of the merger guidelines to stimulate entry. Qwest could not simultaneously increase  
21 prices above a competitive level to targeted customers and also price at predatorily low levels to  
22 those same customers in order to foreclose competitive entry. The argument is circular because

1 assuming that the predation could occur consistently with the assumed price increase that would  
2 stimulate entry, the argument holds that Qwest could overcharge other customers in the  
3 competitively classified area to finance the predation, and uses that assumption to justify a  
4 finding that the area should not be competitively classified to start with. Dr. Blackmon agreed  
5 that this argument is flawed (Tr. 708-709). Other than this flawed and illogical argument, there  
6 is no evidence to support Public Counsel/TRACER's position. Exhibit 174 shows that Dr.  
7 Goodfriend did no empirical analysis to support her conclusions about CLECs' behavior in the  
8 face of assumed Qwest price increases.

## 9 **2. HHI Analysis**

10 Staff was the only party who introduced evidence of HHI calculations. Staff's position is  
11 that these calculations by themselves do not support any conclusion one way or the other about  
12 whether the markets at issue in this case are subject to effective competition (Ex. 191T, p. 8; Tr.  
13 705). Dr. Blackmon testified that the market structure was the same across all of the markets at  
14 issue, and that he used the HHI calculations to demarcate the exchanges that he would  
15 recommend for competitive classification based on whether the index was above or below 5000  
16 (Ex. 201TC, p. 17).

17 In Docket No. UT-990022, Staff argued that the Commission should look beyond the  
18 market share numbers to the structure of the market itself and whether competitors are actually  
19 offering service in the relevant market.<sup>19</sup> Since Staff in this case concluded that the market  
20 structure was similar in each of the thirty-one wire centers, there is no rationale for using the HHI  
21 calculations only as the litmus test of effective competition.

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22 <sup>19</sup> Docket No. UT-990022, Eighth Supplemental Order, p. 12.

1 Furthermore, Staff relies on the HHI data because of “uncertainties about the structural  
2 characteristics of this market—particularly questions about competitors’ ability to get timely  
3 provisioning and repair” (Ex. 201TC, p. 18). One of three concerns of Staff in this regard is the  
4 allegation that CLECs using unbundled loops are three times more likely to have orders held for  
5 facilities reasons (Id. at p. 15). However, the data furnished in Ex. 157C contradicts the analysis.  
6 This exhibit shows, at page 1, the same months analyzed in Ex. 203C. A comparison of the  
7 averages for those months of the days delay for facilities reasons incurred by CLECs using two  
8 wire analog unbundled loops and the delays for Qwest’s retail business service, shows 21.64 for  
9 Qwest retail and 23.7 for unbundled loops. This does not support the claim that delays for  
10 facilities reasons are three times more likely for CLECs than for Qwest.

11 Another concern of Staff is that installation intervals are several days longer for CLECs  
12 using unbundled loops than for Qwest retail service (Ex. 201TC, p. 15). The same exhibit 157C  
13 shows at page 10 for the same months, average installation intervals for Qwest retail of 6.58 days  
14 and for two wire unbundled analog loops of 6.9 days. This is hardly “several extra days” of  
15 installation time for CLECs. Additionally, some loops require conditioning (i.e., removal of load  
16 coils or bridged taps). This requires the dispatch of a technician and adds time to the installation  
17 process for loops which is not present in the provision of retail services.

18 The third and last of the “uncertainties” discussed by Staff as reasons to use HHI  
19 calculations to demarcate exchanges for competitive classification is a disparity in repair  
20 intervals, with CLEC intervals being longer than Qwest retail intervals (Ex. 201TC, p. 15).  
21 Exhibit 203C shows that the average repair interval was actually less for CLECs than for Qwest’s  
22 own service in two of the six months studied. Given that the Staff’s only stated basis for using  
23

1 HHI calculations to demarcate exchanges or wire centers for competitive classification is based  
2 on conclusions that are not supported by the record, Qwest submits that there is no reason to deny  
3 competitive classification to the Auburn, Kent, Issaquah and Tacoma wire centers based on the  
4 fact that HHI calculations for exchanges that include those wire centers exceed the 5000 level.

5 The Staff chose to use an HHI benchmark of 5000 to separate the exchanges that should  
6 be classified as effectively competitive from those that should not. The only explanation of why  
7 this number is appropriate is at Ex. 201TC, page 18, where Dr. Blackmon states that this is the  
8 number that would be calculated for a market with only two companies, each of which held one  
9 half of the market. Clearly, the evidence produced in this record indicates that several companies  
10 provide local exchange service in each wire center area. Use of HHI calculations to deny  
11 competitive classification in some exchanges where the assumptions of the calculation conflict  
12 with the evidence presented would produce unreasonable results (Ex. 231T, p. 23).

13 Public Counsel/TRACER's witness testified that the information provided by the HHI is  
14 useful for evaluating the applicability of theories which explain how "high" market concentration  
15 may facilitate coordinated interaction by market participants (Ex. 166T, p. 34). There is no  
16 evidence that any of the CLEC market participants has demonstrated the slightest inclination to  
17 collude with Qwest. In fact the parties other than Staff all oppose Qwest's Petition and they  
18 refused to allow this matter to proceed without a hearing.

19 The Staff's HHI market concentration numbers are not appropriate for use in determining  
20 whether Qwest can exercise market power (Ex. 231T, p. 14). First, the Staff's numbers are for  
21 exchanges, not wire centers, and tend to overstate concentration because concentration would be  
22 less in the thirty one wire centers than outside those areas (Id.). Also, calculating market share  
23

1 based on lines served overstates concentration because CLECs focus on high revenue per line  
2 customers (Id. at p. 15). HHI calculations provide almost no information about the potential  
3 exercise of market power when concentrations are diminishing (Id. at p. 23). Dr. Taylor was not  
4 cross examined on this evidence. A more appropriate measure of market share, if that is used to  
5 determine whether Qwest can exercise market power if it is granted pricing flexibility, would be  
6 capacity (Id. at p. 17). Qwest discusses this issue below in the section on market power.

7       Based on the foregoing analysis, and the evidence, the Commission should not find that  
8 the HHI calculations that have been introduced are an indicator of any ability by Qwest to  
9 exercise market power if its petition is granted.

## 10 **B. Market Structure**

11       Qwest has demonstrated with uncontradicted evidence that the market structure is  
12 characterized by a significant number of large, well financed competitors which are using a  
13 variety of serving approaches to compete with Qwest and which are not affiliated with Qwest.  
14 (Ex. 12C, p. 12, Attachments G and H; Ex. 904HC). Qwest has shown that AT&T,  
15 MCIWorldcom, and XO are all large, well financed competitors (Ex. 12C, p. 12). These  
16 competitors are holding themselves out to provide the same services that Qwest seeks to have  
17 classified as subject to effective competition (Ex. 12C, Attachment D). The competitors are  
18 using UNEs, resale and either their own facilities or facilities leased from other providers, to  
19 compete (Exhibits 2C, 3C, and 904HC). Competitors are able to use Qwest's UNEs, purchased  
20 at cost based prices, to compete with Qwest. Alternatively, competitors can resell Qwest's  
21 service, paying the retail price minus a 14.74% discount. Competitors can market a complete  
22 service, through the UNE-P, purchased at cost based rates. Competitors have access to the same  
23



1 types of switches and software that Qwest uses (Ex. 12C, Attachment C), or they can purchase  
2 unbundled switching at cost based prices from Qwest. Competitors who use UNEs for their  
3 service do not face any sunk costs of entry or exit except the normal costs of developing a  
4 customer base (Ex. 231T, pp. 11-12). The same is true of resellers. Thus competitors can freely  
5 enter and exit the market.

### 6 **1. Entry is Easy**

7 Qwest has shown, both by evidence of actual entry through accelerating use of unbundled  
8 loops, ported numbers, collocation, investment in switching capacity and resale (Exhibits 2C, 3C,  
9 and 8C), and through the statements of the CLECs themselves to the Commission when they  
10 sought competitive classification, that entry in the local exchange markets at issue here is easy  
11 (Ex. 11). Thus in Ex. 11 at page 2, ATG, which opposes Qwest's Petition, told the Commission  
12 in a successful bid for its own pricing flexibility that "[e]ntry into the local exchange market is  
13 accomplished with relative ease." The same exhibit shows that McLeodUSA  
14 Telecommunications Services, Inc., which also opposes Qwest's petition, told the Commission in  
15 Docket No. UT-991062 that "[e]ntry into the markets for *all of the services at issue in this*  
16 *petition* is accomplished with relative ease" [emphasis added]. Eschelon Telecom of  
17 Washington, another opponent of Qwest's Petition, told the Commission in Docket No. UT-  
18 970538 that "[e]ntry into the local exchange market is accomplished with relative ease, as  
19 evidenced by the large and growing number of market participants" (Ex. 11, p. 2).

20 Qwest has shown evidence that supports these statements. Over one-hundred-twenty  
21 CLECs are registered to provide local exchange service. That number is an increase of four  
22 hundred percent in only five months from the count that existed when Qwest filed its Petition.

1 The number of unbundled loops in service has increased by three hundred percent in one year.  
2 Ported numbers have increased by seven hundred percent. Resale has increased by fifty percent.

3         Against this compelling evidence of easy entry other parties have claimed: (1) that resale  
4 “does not count,” (Staff); (2) that UNEs and UNE-platform are not yet an entry vehicle (Staff,  
5 Public Counsel/TRACER and ATG/Metronet) and (3) Qwest can “manage” or “preempt” entry  
6 by predatory pricing (Public Counsel/TRACER and ATG/Metronet) or failing to plan for  
7 collocation (XO). Qwest addresses below the issue of resale as entry. Qwest has shown with  
8 actual data that UNEs are being used, and at an accelerating rate (Ex. 2C). Dr. Blackmon who  
9 claimed that UNEs were not “proven,” was unable to provide an objective test for when UNEs or  
10 UNE-P would be a “proven commercial product,” except when Qwest’s systems could process  
11 “commercial quantities” of orders (Tr. 684-685) There is no evidence in this record that Qwest  
12 has turned away UNE orders because they were too voluminous. Dr. Blackmon also testified that  
13 the UNE-P was not “readily available” because Qwest was imposing nonrecurring charges equal  
14 to the sum of the nonrecurring charges for each of the unbundled elements, and that the resulting  
15 charge was too high for CLECs to use UNE-P as an efficient entry vehicle (Ex. 201TC, p. 17).  
16 During the hearing, Dr. Blackmon agreed that Qwest has already moved to address Staff’s  
17 concern about the level of nonrecurring charges for the UNE-P by proposing reductions in those  
18 charges to reasonable levels in Docket No. UT-003013 and proposing to include the reduced  
19 charges in amendments to interconnection agreements with CLECs (Tr. 685-686).

20         ATG/Metronet also argue that entry is not easy because Qwest can use its knowledge of  
21 competitors’ business plans obtained through collocation and UNE orders to target areas of  
22 competitive entry and use the predatory pricing to “preempt” the competitors’ entry (Ex. 241TC,  
23

1 p. 12). This claim is based on generalizing from the statement that Qwest allegedly provided the  
2 competitive information in Ex. 2C and 3C to its “retail operations” for purposes of litigating this  
3 proceeding, to a conclusion that Qwest can and will use the information for marketing to  
4 customers (Id.). The generalization that ATG/Metronet seek to make is unsupported by any  
5 evidence and is contrary to the evidence on what Qwest has done with the information and what  
6 Qwest's corporate policy would permit to be done with the information.

7 Mr. Wood stated that the only place that Qwest could have obtained the information in  
8 Ex. 12C, Attachments G and H was from its wholesale operation (Tr. 851). However, the  
9 evidence is that ATG’s agreement with Qwest permits Qwest to use that information for  
10 purposes of regulatory proceedings (Ex. 14; Tr. 242). Metronet has not purchased any services  
11 under its agreement with Qwest (Tr. 242). ATG/Metronet did not introduce evidence of any  
12 other agreement between Qwest and a CLEC, that would affect Qwest’s right to use the  
13 information in this proceeding.

14 The information in Ex. 12C, Attachments G and H is clearly relevant to the issues.  
15 Qwest’s opponents, including ATG/Metronet, have argued that Qwest must prove the existence  
16 of facilities based competition, in detail, in order to prevail in this case (Ex. 241TC, p. 38).  
17 ATG/Metronet’s argument represents a whipsaw. ATG/Metronet argues that specific evidence  
18 on the existence of competitors’ facilities is necessary for Qwest to prove that it has no market  
19 power. ATG/Metronet then argues that Qwest’s use of the specific evidence which is necessary  
20 to meet its burden and cannot be obtained any other way is evidence of Qwest’s market power  
21 because Qwest obtained that evidence by providing wholesale service.

1           There is no evidence that Qwest has used the wholesale data for any purpose other than  
2 seeking relief in this docket (Tr. 851). Qwest's evidence is that the wholesale data has not been  
3 used to develop marketing strategies or otherwise disadvantage competitors (Ex. 78T, p. 8).  
4 Qwest's corporate policy precludes use of the information other than in aggregate as permitted  
5 under the Telecommunications Act of 1996, for marketing to customers (Ex. 15C).  
6 ATG/Metronet did not introduce evidence that Qwest had used the wholesale information in an  
7 unlawful way to market services. Mr. Teitzel testified in Ex. 78T at page 8 and on redirect that  
8 the information had not been misused (Tr. 488-489). ATG/Metronet's claim is simply an attempt  
9 to distract from the real issues and it should be rejected by the Commission.

10           XO's argument that Qwest has failed to plan for collocation in one of the thirty one wire  
11 centers at issue, Bellevue Glencourt, is not a basis for finding that entry is not easy. Ex. 2C  
12 shows that UNEs are actually being used in this wire center. Exhibit 117C, page 1 shows that  
13 there is a switch collocated in this wire center. XO's argument is actually an individual dispute  
14 with Qwest. Thus XO argues that Qwest's Petition should be denied because of a disagreement  
15 between XO and Qwest over payment for XO's collocation expenses (Ex. 281T, p. 6). XO  
16 claims that Qwest did not plan for power augmentation to serve XO at the Bellevue Glencourt  
17 central office, but Mr. Hooks testified that XO never provided Qwest any forecast of its intention  
18 to collocate which would have enabled Qwest to do such planning (Ex. 156T, p. 5). In the  
19 Eighth Supplemental Order in Docket No. UT-990022, the Commission held at page 13 that  
20 carrier to carrier service quality issues such as those raised by XO in this case would not be a  
21 basis to deny a petition under RCW 80.36.330.

1           Based on this evidence, the Commission should find that entry to the markets at issue in  
2 this case is easy.

### 3                           **2. Qwest Cannot Exercise Market Power in the Relevant Markets**

4           Based on the clear evidence that there are large, well financed competitors which have  
5 invested in switches and other facilities, and which can use Qwest's UNEs or resell Qwest's  
6 services, or which can obtain facilities from other providers, and the evidence of substantial  
7 excess capacity in these relevant markets, the Commission should find that Qwest cannot  
8 exercise market power in the markets. The FCC and this Commission long ago declared long  
9 distance subject to effective competition although AT&T then enjoyed a very high market share  
10 in terms of minutes of use carried, precisely because the competing long distance providers had  
11 enough installed capacity to be able to serve the entire demand of all of AT&T's customers as  
12 well as the demand of their own customers, should AT&T have sought to raise prices. (Ex. 231T,  
13 p. 23) The existence of the excess capacity is what made the exercise of market power by AT&T  
14 impossible. The same principle applies here. Dr. Goodfriend admitted that evidence of excess  
15 CLEC switch capacity would show a lack of ability of Qwest to exercise market power (Tr. 619-  
16 620).

17           Clearly substantial excess capacity exists in the wire centers at issue here (Ex. 231T at p.  
18 18). More than two-hundred-fifty switches have been installed to serve the areas that are already  
19 served by Qwest's approximately thirty-five switches in those wire centers. (Id.; Tr. 275) Even if  
20 such competitors' switches are individually the smallest increments that can be purchased (and  
21 only the CLECs know what capacities their switches have, and they have not volunteered the  
22  
23

1 information), these switches collectively represent significant excess capacity to Qwest's  
2 switches.

3 The increments of switch capacity are ten to twenty thousand lines (Tr. 283). Exhibit  
4 117C, which was a work paper for Ex. 2C, is uncontradicted evidence of excess switch capacity.  
5 It is important to note that the switches listed in this exhibit are only those that are located within  
6 the geographic boundaries of Qwest's wire centers.<sup>20</sup> Pages 1 and 2 of the exhibit show Qwest's  
7 wire centers and associated CLEC switches in Bellevue, Renton, Seattle, Spokane, Tacoma and  
8 Vancouver. The exhibit shows two Lucent 5ESS-2000 switches, two Western Electric 5ESS  
9 switches, one Western Electric 4ESS switch, one Northern Telecom switch, one Enterprise  
10 EDS450 digital switch, two Mitel GX5000 digital switches, one Nortel DMS100/200 switch, one  
11 Nortel DMS 10S switch and two Nortel DMS250 switches in the area associated with the  
12 STTLWA06 wire center which corresponds to Seattle Main, using the switch designators on Ex.  
13 163. Even at only ten thousand lines apiece, which is the minimum installed capacity, these  
14 CLEC switches comprise one hundred thirty thousand lines total capacity. According to page 4 of  
15 Ex. 117C, that is over one and one-half times the number of business lines that Qwest serves in

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16 <sup>20</sup> While Ex. 117C shows only one collocated switch in Renton, for example, Ex. 905 shows at least fourteen CLEC  
17 switches that are listed in the LERG as linked to the Renton rate center. According to the LERG, these switches are  
18 owned by such competitors as Allegiance Telecom of Washington, Inc., American Telephone Technology, Inc. –  
19 WA, Electric Lightwave, Inc.- Washington (2 switches), Focal Comm. Corp. of Washington, Frontier Local Services  
20 Inc. – WA, Great West Services, Ltd. – WA, MCIMetro, ATS, Inc., McLeodUSA Telecommunications Services,  
21 Inc. – WA, OGC Telecomm, Ltd. – WA, Pac-West Telecomm, Inc., SBC Telecom, Inc. – WA, Sprint  
22 Communications Company, L.P. – WA, and Worldcom Technologies, Inc. – WA. This total does not include XO's  
23 switch that is listed in the LERG as a competitive access provider's switch or any PCS, wireless or other CAP  
switch. The total also does not include AT&T Local's Point of Interconnection (POI) which Ex. 905 indicates in the  
"General Information" section at p. 5, is not a physical switch but is an identifier for a switch located elsewhere to  
which a local NPA NXX has been or may be assigned. Two of the above named Renton switch operators were not  
listed as CLECs in Attachment F to Ex. 12C, namely McLeod and OGC. Clearly the excess capacity shown by only  
the collocated CLEC switches vastly understates the true excess capacity in the markets. Dr. Goodfriend testified  
that excess capacity could be estimated from LERG data. (Tr. 638) Auburn is shown without a CLEC switch in Ex.  
117C; Ex. 905 shows at least eleven CLEC switches for Auburn. Kent, also without a CLEC switch in Ex. 117C, is  
shown as being served by seventeen CLEC switches in Ex. 905. Issaquah, which lacks a CLEC switch in Ex. 117C  
is served by at least ten CLEC switches according to Ex. 905.

1 the Seattle Main wire center. By the capacity measure, using Qwest's served lines as its capacity,  
2 Qwest's market share is at most only forty percent in this wire center compared to these CLEC  
3 switches. The Commission has already found that there is abundant capacity in the CLECs' fiber  
4 networks and ready access to commercial buildings in Seattle, in the Docket No. UT-990022  
5 Eighth Supplemental Order. Dr. Taylor rebutted Public Counsel/TRACER's argument that  
6 excess capacity should not be double counted by pointing out that multiple services can be  
7 provided over the same unit of capacity (Ex. 231T, p. 19). Dr. Goodfriend admitted this (Tr.  
8 578).

9 The same Exhibit 117C shows three Northern Telecom switches, one Nortel DMS500  
10 switch, one Nortel DMS100/200 switch, one Digital Telecommunications, Inc. DXC-4K switch  
11 and one Lucent 5ESS switch in the STTLWAEL or Seattle Elliott wire center area (Ex. 163).  
12 According to page 4 of the same Exhibit 117C, at ten thousand lines apiece minimum capacity,  
13 the total capacity of those CLEC switches is triple the number of business lines that Qwest serves  
14 in the Elliott wire center. In the STTLWACH or Seattle Cherry wire center, the exhibit shows  
15 one Western Electric 5ESS switch and a Northern Telecom switch in addition to a tandem  
16 switch. According to page 4 of the exhibit, at minimum installed capacity for the end office  
17 switches, the CLEC owned switches have more capacity than Qwest serves business lines in the  
18 Cherry wire center.

19 The same exhibit 117C shows in the STTLWA05 or Seattle Atwater wire center, two  
20 Nortel DMS10S switches (Ex. 163). At minimum installed capacity of twenty thousand lines,  
21 these CLEC switches can serve almost double the number of business lines that Qwest serves in  
22 the Atwater wire center. In the STTLWA03 or Seattle Emerson wire center, Ex. 117C shows one  
23

1 CLEC Nortel DMS500 switch. At minimum installed capacity, that CLEC switch can serve  
2 approximately the number of business lines that Qwest serves in the Emerson wire center. The  
3 total capacity at minimum installed levels of the twenty-seven CLEC switches that are in the  
4 Seattle wire centers, greatly exceeds the total number of business lines that Qwest serves in all of  
5 the Seattle wire centers that are at issue. On a capacity basis, treating Qwest's business lines  
6 served as its capacity for purposes of determining Qwest's ability to exercise market power,  
7 Qwest's market share in all of the Seattle wire centers at issue combined is less than forty-four  
8 percent, according to the business line counts on Ex. 117C, page 4 and the number of collocated  
9 CLEC switches at assumed minimum installed line capacities.

10 In the SPKNWA01 or Spokane Riverside wire center, the same exhibit 117C shows one  
11 4ESS switch, two Northern Telecom switches, one Nortel DMS100/200 switch, one Mitel  
12 GX5000 digital switch, one Harris Rural Electronic Exchange switch and one Siemens EWSD  
13 switch. At minimum installed capacity, those CLEC switches can serve almost five times the  
14 number of lines that Qwest serves in the Riverside wire center, according to page 4 of the exhibit.

15 In the SPKNWAWA or Spokane Walnut wire center, page 2 of Ex. 117C shows two Nortel  
16 switches, one DMS 10S and one DMS250 and one remote digital electronic switch (Ex. 163).  
17 The capacity of these CLEC switches at the above minimum installed levels is still almost double  
18 the number of business lines that Qwest serves in the Walnut wire center according to page 4 of  
19 the same exhibit. In fact the total minimum capacity of the CLEC switches in the Riverside and  
20 Walnut wire center areas combined exceeds the total number of business lines that Qwest serves  
21 in the eight Spokane wire centers that are at issue, according to page 4 of Ex. 117C. On a  
22 capacity basis, at minimum installed levels for CLEC switches, and using Qwest's served lines as  
23



1 its capacity for purposes of determining its ability to exercise market power, Qwest's market  
2 share in the Spokane wire centers is no greater than one third.

3         The same Ex. 117C shows for the VANCWA01 or Vancouver Orchards wire center, one  
4 Nortel DMS100/200 switch and a Nortel remote switching center (Ex. 163). At minimum  
5 installed capacity of ten thousand lines apiece, those CLEC switches can serve one and one half  
6 times the number of business lines that Qwest serves in the Orchards wire center, according to  
7 page 4 of Ex. 117C. Thus on a capacity basis, using Qwest's served lines as its capacity and  
8 CLEC switches at their minimum installed capacity, Qwest's market share is no greater than  
9 forty percent. In the BLLVWAGL or Bellevue Glencourt wire center, page one of Ex. 117C  
10 shows one CLEC Northern Telecom digital switch (Ex. 163). At minimum installed capacity,  
11 that switch can serve approximately forty percent of the business lines that Qwest serves in  
12 Bellevue Glencourt, according to page 4 of Ex. 117C. On a capacity basis, using Qwest's served  
13 lines as its capacity, and minimum installed per switch capacity for CLECs, Qwest's market  
14 share in Bellevue Glencourt is seventy-one percent. In the RNTNWA01 or Renton wire center,  
15 page one of Ex. 117C shows one CLEC Northern Telecom digital switch (Ex. 163). At  
16 minimum installed capacity, that switch can serve approximately eighty percent of the business  
17 lines that Qwest serves in Renton as shown on page 4 of Ex. 117C. Thus on a capacity basis,  
18 using Qwest's served lines as its capacity, and minimum installed capacity for the CLECs,  
19 Qwest's market share is no greater than fifty-five percent.

20         Exhibit 117C shows for the TACMWAFWA or Tacoma Fawcett wire center, one CLEC  
21 Western Electric 4ESS switch. At minimum capacity according to the record, that switch can  
22 serve half of the business lines that Qwest serves in the Fawcett wire center as shown on page 4  
23

1 of Ex. 117C. Thus on a capacity basis, using Qwest's served lines as its capacity and minimum  
2 installed capacity for the CLECs, Qwest's market share in Fawcett is no greater than sixty-seven  
3 percent. The above calculations do not reflect the fact that CLECs are able to expand capacity on  
4 their switches or use Qwest's unbundled switching and loops to provide service in response to a  
5 significant nontransitory price increase. In fact CLECs can use the very same switching capacity  
6 and loops that Qwest may have been using to serve a customer, when they win that customer  
7 from Qwest by offering a lower price in response to a hypothetical Qwest price increase (Ex.  
8 231T, p. 11). Thus there is no capacity constraint to competitive entry to serve existing Qwest  
9 customers, even for those CLECs who have not collocated switches. This structural feature of  
10 the market means that for purposes of the merger guidelines, the Commission should find, as it  
11 did in Docket No. UT-990022, that Qwest is unable to maintain a significant nontransitory price  
12 increase in the relevant markets without losing market share. Qwest is therefore unable to  
13 exercise market power in the relevant markets.

14           Public Counsel/TRACER argue that Qwest has market power for services provided to  
15 very large customers (Ex. 166T, p. 5). This argument is not supported by any evidence. The  
16 Public Counsel/TRACER witness had done no empirical study to support her opinion on this  
17 point (Ex. 174, 175). The Public Counsel/TRACER witness admitted that she had only spoken  
18 to TRACER members and not any other business customers (Tr. 595). Exhibit 184 shows that  
19 only two TRACER members appear on the list of large customers (Ex. 166T, p. 9).

20           The Public Counsel/TRACER witness claimed that Qwest had market power over  
21 services provided to very small customers because such customers are supposedly distributed  
22 widely in the wire centers and are not located closely enough to CLECs' fiber backbones to make  
23

1 it profitable for CLECs to serve them (Ex. 166T, p. 32). Dr. Goodfriend admitted that she had  
2 done no “exhaustive” research on the dispersion of small business customers, but relied on the  
3 number of business licenses in Seattle by zip code (Id. at pp. 10-11).<sup>21</sup> Examination of the  
4 dispersion of the zip codes that contain 92.5% of the Seattle business licenses indicates that such  
5 zip codes are the 44% of such codes that are clustered in the core areas of the city (Ex. 183; Tr.  
6 502-503, 511). These are the same areas that are included in the wire centers that Qwest seeks to  
7 have classified as effectively competitive, where there are at least twenty-seven CLEC switches  
8 (Ex. 2C) and where the Commission has already found that there is abundant CLEC fiber and  
9 ready access to commercial buildings.<sup>22</sup> There is, of course, access to Qwest’s UNEs in these  
10 areas as well.

11 XO introduced testimony that it had experienced delays in provisioning of UNEs and in  
12 closing trouble tickets (Ex. 281T). According to XO, because XO is dissatisfied with UNE  
13 provisioning and repair intervals, that means that Qwest can exercise market power (Id. at p. 3).  
14 As discussed above, Ex. 157C refutes the claim that Qwest is exercising market power in its  
15 provisioning and Ex. 203C refutes the claim as to repairs. Also as noted, according to the Eighth  
16 Supplemental Order in Docket No. UT-990022, these facts are not a basis to deny Qwest’s  
17 petition in this case.

18 ATG/Metronet introduced at the time of cross examination of Mr. Teitzel, exhibits which  
19 supposedly demonstrated a “conspiracy” by Qwest to diminish the resale of Centrex Plus as a  
20 substitute for one party flat business lines, and apparently intend to argue that this evidence is  
21 indicative of the existence of market power in the relevant markets (Exhibits 16C-20C and 86C-

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22 <sup>21</sup> While Dr. Goodfriend testified that “the location of firms is important information,” Ex. 166T at p. 10, she  
23 provided no information at all concerning the distribution of small businesses versus large businesses or the locations  
of such businesses vis a vis CLECs’ facilities.

1 99C). This argument is actually a furtherance of ATG/Metronet’s meritless individual dispute  
2 with Qwest over the issue of rate arbitrage in antitrust litigation and it is not properly a part of  
3 this proceeding.

4 Even if the Commission considers the argument despite the above facts, it should reject  
5 the proposed conclusion. The argument at its base is internally contradictory. At Ex. 241TC,  
6 page 17, the ATG/Metronet witness argues that resale should be disregarded in determining  
7 whether or not effective competition exists in the relevant markets. Disregarding resale in  
8 determining whether effective competition exists would require the Commission to disregard in  
9 this case the alleged impacts of Qwest’s actions on the resale of Centrex. Mr. Wood admitted  
10 that Qwest is required to make retail services available for resale and that Qwest cannot  
11 unilaterally diminish the amount of the wholesale discount (Tr. 854).

12 It is clear that ATG/Metronet’s sole interest is to preserve their ability to garner a *higher*  
13 effective discount than that available for resale of a single service by purchasing Centrex Plus  
14 and reselling it piecemeal “as” one party flat business service (Tr. 879; 884-885). It is only in  
15 this context that ATG/Metronet’s claims of “price squeeze” make any sense. Dr. Taylor refuted  
16 the claims of Mr. Wood that Qwest would “price squeeze” in an actual resale situation by  
17 showing mathematically that the wholesale discount makes Qwest financially indifferent to  
18 resale (Ex. 231T, pp. 37-38).

19 Mr. Wood claimed that Centrex and 1FB were “the same service” (Tr. 879-880). But it is  
20 clear that Centrex and 1FB are different offerings, provided at different prices, under different  
21 tariff provisions. Dr. Taylor described what an actual price squeeze is (Ex. 231T, p. 36). That is  
22 where one carrier provides both an essential wholesale service and competes for a downstream

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23 <sup>22</sup> Docket No. UT-990022, Eighth Supplemental Order at pp. 13-14.

1 retail service for which that essential wholesale service is an input, and charges less for the retail  
2 service than it imputes to itself for the wholesale input (Id.). There is no evidence that Centrex  
3 Plus is an essential wholesale input for Qwest's retail 1FB service.

4 Mr. Wood claimed that what rate arbitrageurs such as ATG/Metronet do by reselling  
5 Centrex "as" a 1FB and offering end users a lower price than the 1FB rate, is what "efficient  
6 markets" would do (Tr. 880). But he said that it would only be appropriate for Qwest to reduce  
7 the 1FB rate to the Centrex rate level if the resulting price would be above the applicable cost  
8 floor (Tr. 885). Logically, at least one of these statements must be untrue. If Centrex and 1FB  
9 are really the same service, and if both prices are lawful, then it should be proper, in an "efficient  
10 market," for Qwest to reduce the price for 1FBs without the qualification Mr. Wood attached.  
11 What ATG/Metronet are seeking is not what efficient markets would do, which is to eliminate  
12 the conditions that give rise to the opportunity for rate arbitrage. These carriers are seeking the  
13 perpetuation of that opportunity. Thus the premise that it is anti-competitive and an exercise of  
14 market power for Qwest to seek to eliminate the conditions that give rise to the arbitrage  
15 opportunity, is unsupported by any evidence.

16 There are other areas of contradiction in the ATG/Metronet case. Mr. Wood complains  
17 that Qwest will engage in a "price squeeze" against Centrex arbitrageurs by reducing the price of  
18 the 1FB, but he also says that Qwest will finance its supposed predation to foreclose entry by  
19 raising prices to other business customers (Ex. 241T, p. 13). The 1FB is Qwest's product for  
20 small business customers. ATG/Metronet does not explain how it is possible for Qwest to  
21 simultaneously squeeze the Centrex arbitrageurs by reducing the price of the 1FB, and also  
22 finance the predation that discourages entry by raising prices to business customers generally.

1 The other way in which a “price squeeze” against the arbitrageurs could theoretically occur is  
2 through raising the price of Centrex (Id. at p. 35). But Centrex is available from other providers  
3 than Qwest (Ex. 12C, Attachment D). If Qwest’s Centrex Plus retail prices are above cost, as  
4 Mr. Wood implied, then ATG/Metronet can escape any attempted Qwest price squeeze against  
5 1FB arbitrageurs by purchasing Centrex for resale from Qwest’s competitors. If Qwest’s Centrex  
6 Plus prices are below cost, then it would not be a price squeeze for Qwest to raise its prices to  
7 cover cost. ATG/Metronet also can purchase UNEs at cost based rates.<sup>23</sup>

8 **3. Resale is an Effective Measure of Competition, but Qwest Does Not Rely on Resale**  
9 **Alone to Demonstrate the Existence of Effective Competition.**

10 Resale is a required means of competitive entry under the Telecommunications Act of  
11 1996. Resale allows competitors to enter, build brand loyalty and a customer base, without the  
12 need to make significant capital investments (Ex. 231T, p. 35 n. 26). Mr. Wood testified that  
13 resale would not prevent the underlying carrier from raising retail prices one hundred percent  
14 without any cost basis (Ex. 241TC, p. 17). In Public Counsel/TRACER’s cross examination and  
15 Qwest’s redirect of Ms. Jensen, Qwest demonstrated the fallacy of that testimony (Tr. 198, 245-  
16 246). So long as retailing costs did not increase, the underlying carrier would not be able to  
17 sustain the one hundred percent retail price increase against resellers whose input costs did not  
18 actually rise one hundred percent (Id.). While Qwest agrees that resale cannot be the sole  
19 criterion on which effective competition is judged, it is a valid criterion. Qwest has not asked for  
20 competitive classification based solely on resale evidence. Qwest has demonstrated effective  
21 competition without relying on resale.

22 **IV. OTHER**

23 \_\_\_\_\_  
24 <sup>23</sup> The UNE prices for discretionary services established in Docket No. UT-003013 are embedded in the unbundled

1 **A. The Commission Should Waive RCW 80.36.170 and RCW 80.36.180**

2 Pursuant to RCW 80.36.330(5), Qwest asks that the Commission waive the provisions of  
3 RCW 80.36.170 and RCW 80.36.180 for the services that will be classified as effectively  
4 competitive. The purpose of these statutes is to protect against the exercise of monopoly power.  
5 Competition will protect the public interest as well as these restrictions, for services classified as  
6 competitive. As a common carrier, Qwest is already required by the common law not to  
7 discriminate unduly.

8 **B. The Commission Should Not Break Qwest’s Existing Contracts With Customers**

9 Eschelon sought to use this case to reargue the issues that the Commission decided  
10 against it in Docket No. UT-991476. Thus Mr. Davis’ testimony argued that because Eschelon  
11 supposedly had difficulty “unhooking” customers from Qwest’s existing contracts due to the  
12 terms and termination liabilities therein, Qwest’s Petition should be denied unless those  
13 termination liabilities were eliminated (Ex. 261T, p. 3). The Commission should reject this  
14 argument. Eschelon has already had its day in court on those provisions of Qwest’s existing  
15 customer agreements (Ex. 85). The Commission rejected Eschelon’s arguments (Id.). Eschelon  
16 itself uses term contracts with termination liability provisions, as do many other industry  
17 members (Ex. 262). Eschelon’s argument is nothing but a self-serving attempt by a competitor to  
18 better its own position through the use of litigation leverage.

19 **V. RECOMMENDATIONS REGARDING DIFFERENT PROPOSALS**

20 **A. Qwest Proposal (with Staff conditions) regarding Thirty-One Wire Centers**

21 Although Qwest believes, as argued above, that it has met its burden of proof to establish  
22 with evidence the existence of effective competition as defined in RCW 80.36.330 in all thirty-

23 \_\_\_\_\_  
switching network element.

1 one wire centers, and it asks the Commission to so find, if the Commission does not so find  
2 Qwest has agreed to the conditions recommended by the Staff, effective until Section 271 relief  
3 is granted to Qwest in Washington (Tr. 215). Although the Staff recommended that the Petition  
4 be granted subject to the conditions in only the Seattle, Bellevue, Spokane and Vancouver wire  
5 centers, Qwest would agree to imposition of the conditions in all thirty one wire centers. Qwest  
6 agreed to these conditions in an attempt to compromise differences with the Staff. Qwest  
7 submits that the evidence shows that the markets at issue are subject to effective competition.  
8 The Staff's conditions provide an extra measure of confidence for the Commission in light of the  
9 Staff's views that the markets are mixed in their competitive status, with overall there being  
10 effective competition but that it is really impractical to administer a dual system with service to  
11 customers whose service is provisioned on one type of facility being classified as effectively  
12 competitive but other customers not being so classified.

13 Qwest would agree as a condition of the grant of pricing flexibility as qualified above not  
14 to revise the terms under which it offers service within these wire centers in any way, including  
15 any reduction in its obligation to serve, which would also preclude Qwest from placing a cap on  
16 growth of Centrex Plus services to existing customers, withdrawing Centrex Plus if there were  
17 demand for the service or prohibiting supersedure of Centrex Plus (Ex. 8T, p. 9; Tr. 111-114).  
18 Qwest would agree to continue to offer the guarantees in the consumer bill of rights and it would  
19 agree not to increase rates or reduce availability relative to current tariffed levels, of any business  
20 local exchange service within these wire centers (Ex. 8T, p. 10). This commitment, if adopted by  
21 the Commission, addresses and makes moot the claims by Public Counsel/TRACER and  
22 ATG/Metronet that Qwest would use its pricing flexibility to engage in predatory pricing,  
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1 financed by rate increases within the thirty one wire centers to customers who had no competitive  
2 choices.<sup>24</sup>

3 **1. The Commission Should Consider Vacating the Conditions Upon its Approval of**  
4 **Section 271 Relief**

5 Qwest agreed with the Staff's recommendation that the above conditions should  
6 terminate upon the FCC's approval of Qwest's request for authorization to provide interLATA  
7 services originating in its Washington service areas under section 271 of the  
8 Telecommunications Act (Ex. 8T, p. 11). However, Qwest submits that once it has convinced  
9 this Commission that it has fulfilled the requirements of 47 U.S.C. §271(c), that would also be an  
10 appropriate time for the conditions to be vacated (Id.). There is no reason why full pricing  
11 flexibility should be delayed during the ninety or more days that FCC review of the application  
12 will take, once the key determination has been made by this Commission (Tr. 213).

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13 <sup>24</sup> Qwest previously demonstrated the logical errors of this argument by its opponents.  
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**B. The Staff Alternatives**

**1. Four Areas: Services Over DS1 or Higher Capacity Circuits**

The Staff proposed that Qwest’s Petition be granted in part. The relief the Staff supported was a grant of pricing flexibility for all business local exchange services that are actually provisioned over a DS1 or higher capacity circuit, and only in the wire centers at issue that are in Seattle, Bellevue, Spokane and Vancouver (Ex. 201TC, p. 10). As discussed above, Qwest believes that the evidence supports an unrestricted grant of competitive classification for all the services requested and in all thirty one wire centers. Also as discussed above, Qwest believes that the reasoning provided by the Staff for restricting the relief it recommends, is not supported by the record. Staff’s recommendation to limit the products classified as competitive to those that are provided over DS1 or higher capacity circuits unless Staff’s conditions are imposed was based on Staff’s conclusion that Qwest has no significant captive customer base of large business customers (Id.). Qwest has demonstrated that competitors are advertising to small business customers, and that Qwest has lost significant numbers and percentages of small business customers to competitors in the wire centers at issue (Exhibits 79-83 and 902C). Even Public Counsel/TRACER introduced evidence that CLECs are seeking the business of small business customers (Ex. 166T, p. 20, n. 13). Staff’s proposed restriction of relief to the Seattle, Bellevue Spokane and Vancouver area wire centers is based exclusively on the HHI market concentration data (Ex. 201TC, p. 18). Qwest has shown in its arguments in preceding sections that these data are inappropriate for use in this case to gauge the possible use by Qwest of market power, and that by the appropriate measure, capacity, Qwest cannot exercise market power.

1 In summary, Qwest submits that the Staff's "narrow" recommendation for relief only for  
2 services that are provisioned over high capacity circuits substantially understates the services and  
3 areas that should be found to be effectively competitive. The Commission should grant relief for  
4 the areas and services in the "narrow" Staff recommendation because the Staff correctly found  
5 that the services are subject to effective competition in those areas but it should also grant relief  
6 for the other services and areas that Qwest has sought.

7 **2. Four Areas: All Business Services.**

8 Qwest submits that, for the reasons stated above the "broader" Staff recommendation also  
9 understates the areas for which Qwest should receive classification as subject to effective  
10 competition. However, should the Commission determine to limit relief to the twenty-three wire  
11 centers at issue located in the Bellevue, Seattle, Spokane and Vancouver areas, Qwest accepts the  
12 imposition of the conditions proposed by the Staff, as discussed previously. Qwest does not  
13 object to a determination by the Commission that the conditions would eliminate any potential  
14 for a significant captive customer base. Qwest agrees generally with the determination by the  
15 Commission in Docket No. UT-990022 not to impose conditions on grants of pricing flexibility,  
16 but in the current case Qwest has agreed with Staff to the conditions in an attempt to compromise  
17 differences. Qwest submits that the relatively short time that the conditions can be expected to  
18 remain in effect until Qwest achieves relief under section 271 of the Telecommunications Act,  
19 means that their adverse effect on competition will be limited in time as well.

20 Public Counsel/TRACER criticized the Staff proposal, but the criticism is without merit.  
21 Dr. Goodfriend chided the Staff for its "analytical framework" (Ex. 168T, p. 6), but Staff's  
22 approach is clearly based on the requirements of RCW 80.36.330. Dr. Goodfriend erroneously  
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1 assumed that Staff had identified DS1 and higher capacity circuits as the relevant product, but  
2 that is clearly not the case (Id. at p. 25; Tr. 604, 710-711). It appears that Public  
3 Counsel/TRACER did not understand the Staff's evidence. Public Counsel/TRACER also  
4 criticized the Staff for proposing to grant competitive classification before Qwest received  
5 Section 271 relief, on the basis that Qwest had incentives to discriminate against competitors in  
6 provisioning, thus raising entrants' costs because supposedly \$20 million in penalties for such  
7 discrimination would be trivial to Qwest (Ex. 168T, p. 34). Under cross examination Dr.  
8 Goodfriend admitted that Qwest had incentives to obtain Section 271 relief, that discrimination  
9 in provisioning would be examined in the Section 271 case and that she had no evidence that  
10 Qwest viewed \$20 million in penalties as trivial (Tr. 592).

### 11 **3. The ATG/Metronet Proposed Conditions Should Be Rejected**

12 ATG/Metronet proposed five conditions if the Commission determines to grant Qwest's  
13 petition. None of these conditions should be imposed. The first condition is that only wire  
14 centers within which Qwest faces facilities-based competition should be classified as subject to  
15 effective competition (Ex. 241TC, p. 38). This condition is based on the argument that resale  
16 competition is not price constraining. Qwest has addressed above the argument and shown that  
17 resale can be price constraining. In any case, the argument ignores the fact that the merger  
18 guidelines contemplate consideration of probable responses by firms that are not now producing  
19 or selling in the market (Ex. 231T, p. 10). The argument is moot because the fact is that all of  
20 the wire centers demonstrate the use of UNEs, and therefore all of the wire centers have facilities  
21 based competition. The substantial counts of ported numbers in all of the wire centers also point  
22 to facilities based competition across the board.

1           The second of ATG/Metronet’s proposed conditions would forbid Qwest to use its  
2 pricing flexibility to differentiate between business customers within a wire center. This  
3 proposal is partially based on the internally inconsistent and fallacious argument, discussed in  
4 preceding sections, that Qwest can price above a competitive level to some customers in a wire  
5 center while reducing prices to others (Ex. 241TC, p. 39). The remaining argument is that  
6 market forces will prevent Qwest from pricing in any way other than identical prices to all  
7 customers in the wire center (Id.). The latter argument is a *non sequitur* for the proposal. If  
8 market forces will produce the same result as the restriction, then the restriction is unneeded.  
9 However, the argument is flawed because Dr. Taylor explains that competitive markets do not  
10 result in identical prices to all consumers (Ex. 231T, pp. 39-40). The Commission has already  
11 found in the Eighth Supplemental Order in Docket No. 990022 that competitive markets result in  
12 a variety of prices for the same service. The only real impact of the restriction is to continue the  
13 pricing umbrella that Qwest is compelled to provide its competitors. Furthermore, Qwest like  
14 other providers currently does not price identically to all customers within a wire center. The  
15 restriction should be rejected.

16           The third ATG/Metronet proposed restriction is that Qwest may not deaverage prices  
17 with more granularity than the UNE zone, in order that Qwest’s ability to deaverage its retail  
18 prices not exceed competitors’ ability to deaverage their costs (Ex. 241TC p. 40). This proposal  
19 is simply a rehash of the preceding proposal because the UNE zone prices apply within specific  
20 wire centers. This proposal should also be rejected. There is no demonstration on this record  
21 that Qwest’s UNEs are essential for any competitor. The issue of Qwest’s cost floor for purposes  
22 of pricing its flexibly priced services is addressed below.

1           The fourth ATG/Metronet proposed restriction is that upward pricing flexibility for resold  
2 services must be limited supposedly because resellers are captive customers. This proposed  
3 restriction is based on a false premise. The evidence is undisputed that other providers than  
4 Qwest sell Centrex service (Ex. 12C, Attachment D). There is no evidence that resellers must  
5 resell only Qwest's service in order to resell Centrex. Also, the existence of the alternative  
6 Centrex providers will constrain Qwest's ability to raise prices for Centrex. The proposed  
7 restriction continues to display the flawed logic that assumes that notwithstanding the finding of  
8 effective competition, Qwest could raise prices above competitive levels. The proposed  
9 restriction also would make upward pricing flexibility impossible inasmuch as all retail services  
10 are subject to resale. ATG/Metronet do not explain how the restriction would work, or what its  
11 effect would be other than supposedly to avoid a price squeeze. This stated purpose deprives the  
12 restriction of a function. Mr. Wood admitted that Qwest cannot change the wholesale discount  
13 of a resold service by changing a retail price (Tr. 854). The proposed restriction should not be  
14 adopted.

15           The concluding proposed ATG/Metronet restriction would require that any new offering,  
16 including an unaccepted offer to a customer, become the new resale price for the service, minus  
17 the wholesale discount (Ex. 241TC, p. 41). This is a completely self serving proposal that would  
18 represent far more intrusive regulation, not less than under the current system, that would be  
19 unworkable and that would stifle competition in the market. The ATG/Metronet proposal does  
20 not explain how a site-specific, configuration-specific customer proposal, even if unaccepted,  
21 could become the new generally applicable price for purposes of computing the wholesale  
22 discount. Qwest is already required by the Telecommunications Act to make any retail service

1 available for resale at the retail price less the wholesale discount. The retail price for one  
2 customer is not necessarily the retail price for another customer, under existing practices for  
3 contracted services. The proposal is actually a restriction that Qwest and only Qwest be subject  
4 again to what amounts to tariffed regulation, because supposedly each price listed offering to a  
5 customer would be applicable to all customers. This proposed restriction defeats the intent of the  
6 Legislature in providing for pricing flexibility in RCW 80.36.330 and it should be rejected.

#### 7 **4. Qwest's Petition Should Not Be Denied**

8 Public Counsel/TRACER, ATG/Metronet, AT&T and the Joint CLECs seek a denial of  
9 Qwest's Petition. Qwest's Petition should not be denied. Public Counsel/TRACER opposed  
10 Qwest's petition in Docket No. UT-990022 for no apparent reason and their participation in this  
11 case opposing Qwest's current Petition continues the enigma. TRACER's members extensively  
12 purchase service under contracts and that would not be affected by a grant or denial of Qwest's  
13 Petition (Tr. 573-574). AT&T introduced no evidence and except for one cross examination  
14 question did not participate in the hearing other than to echo positions on objections to evidence  
15 made by Qwest's other opponents. The Joint CLECs introduced no evidence except for  
16 testimony on XO's experience in one wire center with an inability to obtain power for collocation  
17 and some provisioning and repair issues for UNEs. In the Eighth Supplemental Order in Docket  
18 No. UT-990022, the Commission held that carrier to carrier service quality issues between  
19 CLECs and Qwest would not be sufficient, standing alone, to warrant rejection of a Qwest  
20 request for competitive classification. The parties which urge denial of Qwest's Petition argue  
21 that Qwest's customers have no alternatives and that Qwest has a significant captive customer  
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1 base according to various theories. Qwest has addressed these arguments in the preceding  
2 sections of this brief, and it refers the Commission to those arguments.

### 3 **VI. APPROPRIATE COST STANDARD**

4 RCW 80.36.330(3) provides that competitive services must be priced at levels that cover  
5 their cost, and it requires the Commission to adopt standards to implement the section. The  
6 statute does not require such standards to be adopted in connection with a specific application for  
7 competitive classification by one company. Qwest has on file with the Commission, cost studies  
8 for each of the services listed in Attachment A to the Petition (Ex. 12C, p. 19; Ex. 78T, p. 7).  
9 Qwest has committed that it will not price its retail services in such a way as to create a price  
10 squeeze for any competitors for any essential inputs that such competitors must use to compete  
11 with Qwest (Ex. 78T, p. 12). Qwest submits that there is no need for the Commission to make a  
12 determination at this juncture on the appropriate cost standard to be used in determining whether  
13 Qwest's prices for competitive services cover cost. If the Commission does determine that it  
14 needs to decide the appropriate cost standard for a price floor for Qwest's flexibly priced retail  
15 services in this docket, Qwest submits that the evidence of record supports a finding that the  
16 standard should be Total Service Long Run Incremental Cost (Id.). The Commission should not  
17 make a finding that any retail price should necessarily exceed any UNE price because there is no  
18 evidence that UNEs are always essential to the provision of retail services that compete with  
19 Qwest's retail services. The evidence is that UNEs are in use in the same wire centers as those in  
20 which Qwest has lost business lines, but the numbers of UNEs in Ex. 2C in these wire centers are  
21 not the same as the numbers of lost business lines in Ex. 902C for the same wire centers. By  
22 comparing the numbers of lost business lines in Ex. 902C and the numbers of UNEs in Ex. 2C



1 with the highly confidential numbers of CLEC lines in the Staff's market share study, the  
2 Commission can determine to what extent Qwest's UNEs are essential for competitors to provide  
3 their services.

## 4 VII. CONCLUSION

5 Qwest has shown with evidence that there is effective competition for the services Qwest  
6 provides in the subject wire centers. Qwest has identified the competitors who offer alternatives  
7 to Qwest's services, it has identified the prices at which they offer services, and it has identified  
8 the facilities the competitors use to compete. The competition is vibrant. Qwest has shown that  
9 the competition has resulted in losses of customers in the wire centers at issue. Qwest has shown  
10 that it lacks a significant captive customer base. Qwest has shown that entry is easy, that the  
11 excess capacity of competitors in the wire centers means that Qwest cannot exercise market  
12 power and that Qwest's Petition should be granted. Alternatively, the Petition should be granted  
13 subject to the Staff's conditions, with the conditions terminating when Qwest receives Section  
14 271 relief.

15 Respectfully submitted this 17<sup>th</sup> day of November, 2000.

16 QWEST CORPORATION

17 LAW OFFICES OF DOUGLAS N. OWENS

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