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2 **I. INTRODUCTION**

3 MetroNet Services Corporation ("MetroNet") and Advanced TelCom Group, Inc.  
4 ("ATG") submit this Post-Hearing Brief ("Brief") in opposition to the petition of Qwest  
5 Corporation ("Qwest") for competitive classification of a broad range of business services in  
6 31 wire centers ("Petition").<sup>1</sup> Qwest has failed to demonstrate, in the Petition or at hearing, that  
7 its customers have reasonable alternatives to its services and that it has no significant captive  
8 customer base. Moreover, Qwest has failed to establish how it will ensure that it would continue  
9 to price above an appropriate cost floor. Finally, a grant of competitive classification—even if  
10 the minimum statutory prerequisites were met—would not be in the public interest.  
11 Accordingly, the Petition should be denied.

12 **II. LEGAL FRAMEWORK**

13 **A. Statutory Requirements**

14 Under RCW 80.36.330, the Commission may grant a petition for competitive  
15 classification for services only where a carrier demonstrates that the services are subject to  
16 effective competition:

17 The Commission *may* classify a telecommunications service provided by a  
18 telecommunications company as a competitive telecommunications service if the  
19 service is subject to *effective competition*. Effective competition means that  
20 customers of the service have *reasonably available alternatives* and that the  
21 service is not provided to a *significant captive customer base*. In determining  
22 whether a service is competitive, factors the commission shall consider include  
23 but are not limited to:

- 24 (a) The number and size of alternative providers of services;  
25 (b) The extent to which services are available from alternative providers in the  
26 relevant market;  
27 (c) The ability of alternative providers to make functionally equivalent or  
28 substitute services readily available at competitive rates, terms, and conditions;  
29 and

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36 <sup>1</sup> The wire centers are specified on page 1 of the Petition.

1 (d) Other indicators of market power, which may include market share, growth in  
2 market share, ease of entry, and the affiliation of providers of services.

3 RCW 80.36.330 (*emphasis added*).

4 The entire section is worded in the present tense, including all aspects and  
5 examples of factors the Commission must consider. The statute focuses on whether customers  
6 "have" reasonably available alternatives and service "is" provided to a significant captive  
7 customer base. It does not state that a service can be classified as competitive if a CLEC  
8 "should," "can," "will," or "may" offer customers reasonably available alternatives. The plain  
9 and unambiguous wording of the statute evidences a clear legislative intent that competitive  
10 classification may be granted only where there is present, not future or potential, competition.  
11 This is the standard the Commission should apply. *Burlington Northern v. Jonston*, 89 Wn 2d  
12 231, 333, 572 P.2d 1085, 1091 (1977). ("[A]n administrative agency cannot alter or amend a  
13 statute by interpretation, even with legislative acquiescence, and the court must give effect to the  
14 plain meaning of the language used."). Although the capabilities of competitors are one factor  
15 for the Commission to consider, the primary focus of RCW 80.26.330 is on the customers of  
16 Qwest: "Effective competition means that *customers* of the service have reasonably available  
17 alternatives. . . ." *Id.* (*emphasis added*).

18 Even assuming, for the sake of argument, that Qwest had meet its burden of  
19 demonstrating the existence of effective competition to the full extent of the geographic and  
20 product markets it chose for its Petition, the Commission is not compelled by the statute to grant  
21 the Petition. The Commission can and should withhold competitive classification if it is not in  
22 the public interest to grant it. RCW 80.36.330 states that the Commission "may" grant  
23 competitive classification upon a showing of effective competition. Consideration of the public  
24 interest is inherent in the Commission's role in any proceeding. *E.g.* RCW 80.01.040(2) (the  
25 Commission shall "[r]egulate in the public interest." Furthermore, the competitive classification  
26 statute permits revocation of competitive classification as necessary to protect the public interest.

1 RCW 80.36.330(7). Therefore, the Commission should not grant competitive classification if it  
2 is not in the public interest, including consideration of the impact on further development of  
3 competition and on all customers of telecommunications services.

4 Finally, RCW 80.36.330 directs the Commission to determine and implement a  
5 cost standard to be used to establish price floors for competitive services. RCW 80.36.330 (3)  
6 states in part that “[p]rices or rates charged for competitive telecommunications services shall  
7 cover their cost. The Commission shall determine proper cost standards to implement this  
8 section.” As a result, the Commission must evaluate the likely impacts of the requested  
9 competitive classification and determine what cost-based price floor should be implemented.

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

11 Despite Qwest's assertions, Section 271 has little relevance to this proceeding.<sup>2</sup>  
12 The Commission's Section 271 proceeding, Docket UT-003022, will address whether Qwest has  
13 met the 14 point checklist in that section of the 1996 Telecommunications Act. Meeting the  
14 checklist is a prerequisite to Qwest's offering of originating, in-region, interLATA service. *See*  
15 47 U.S.C. 271. To do this, the Commission is examining Qwest's total service territory within  
16 the state. The focus of Section 271 is structural and clearly prospective. Qwest can be granted  
17 Section 271 authorization without showing the existence of *any* competition. *See, e.g.,* 47 U.S.C.  
18 § 271(c)(1)(B). In contrast, RCW 80.36.330 requires the Commission to examine the level of  
19 existing competition for specified business services within 31 wire centers, which is a different  
20 and in certain ways much higher burden of proof.

21  
22 <sup>2</sup> Arguably Qwest's failure to achieve Section 271 compliance yet could be grounds for denial of  
23 this petition. The reason is that Qwest's petition places heavy reliance on competitors' ability to  
24 use unbundled network elements ("UNEs") to compete for the services that are listed in Qwest's  
25 petition. Until such time as Qwest has established that the CLECs truly do have non-  
26 discriminatory access to UNEs, including the all-important OSS parity, it is difficult to see how  
UNE-based competition can be viewed as "effective." The converse of this argument is not true,  
however, since access to UNEs does not, by itself, demonstrate that Qwest's customers have  
"reasonably available" competitive alternatives.

1 Further, the Commission could reject Qwest's Petition in this proceeding based on  
2 Qwest's failure to develop an adequate record to meet the requirements of RCW 80.36.330, but  
3 still grant Qwest's Section 271 petition if the record in that proceeding is adequate to meet the  
4 different burden of proof under Section 271. Comparing the two different proceedings is a  
5 proverbial "apples and oranges" comparison. The Commission should not implicitly or  
6 explicitly tie the two proceedings together, either as a surrogate for meeting the required burdens  
7 of proof or as a trigger for grant of competitive classification or removal of conditions.

### 8 **III. EVALUATION OF QWEST'S PETITION**

9 Qwest's Petition and the supporting testimony do not contain adequate or reliable  
10 evidence that Qwest's customers have reasonably available alternatives and that Qwest's  
11 customers are not captive. Qwest's conclusions about the scope and breadth of competition are  
12 purely speculative. Qwest developed its Petition based on convenience and marketing goals.  
13 *See, e.g., Ex. 102-C.* It did not perform a serious analysis of the markets. Nor did it undertake  
14 any significant effort to develop evidence necessary to establish that effective competition exists  
15 as broadly as its chosen market definitions. Instead it gathered the evidence that was readily  
16 available to it, including confidential CLEC data that was not supposed to be used for Qwest's  
17 retail purposes. That evidence clearly shows the existence of *some competition*, but not *effective*  
18 *competition* in the requested markets. Thus the Commission is faced with a record that is  
19 insufficient to support a grant of the Petition.

#### 20 **A. Definition of the Relevant Market**

21 A principal shortcoming of Qwest's Petition is the geographic and product  
22 markets that Qwest selected. There is a good possibility that Qwest could have defined narrower  
23 markets and been able to gather evidence sufficient to meet the prerequisites of RCW 80.36.330.  
24 Considerable effort was expended by the Staff and the Commissioners at the hearing to identify a  
25 narrower scope of services and geographic areas that could be demonstrated to be subject to  
26 effective competition. In the end, ATG and MetroNet respectfully submit that these efforts

1 failed. Because of Qwest's approach, the record makes it impossible to "fix" the Petition so that  
2 it could be granted as to more narrowly defined markets.

3 **1. The Relevant Geographic Market**

4 The Commission has the flexibility to define the geographic scope of the markets  
5 at issue. *See* RCW 80.36.330. The Commission could define the market as broadly as the entire  
6 state or as narrowly as individual city blocks or buildings. In this case, Qwest has asked the  
7 Commission to define the market by "wire center," which is the location of a switching facility.  
8 Ex. 12-C at 1. Qwest's witness David Teitzel explained that "Qwest has chosen wire centers as  
9 its relevant market for competitive classification purposes for ease of measurement and  
10 implementation." Ex. 76-T at 6, l. 18-19 (Teitzel). At this time, however, a wire center is too  
11 large an area for grant of competitive classification, because not all customers served by a given  
12 wire center have reasonable access to competitive alternatives.

13 Mr. Teitzel argued for competitive classification based on his contention that  
14 "[t]oday, in every one of the thirty one wire centers, customers can go to the well-advertised and  
15 widely available competitors of Qwest to purchase equivalent service offerings." Teitzel at 15.  
16 Yet Qwest has failed to provide sufficient evidence that effective competition for the selected  
17 services is available to customers widely or even uniformly throughout the 31 wire centers. As  
18 MetroNet and ATG's witness, Don Wood, explained:

19 Some customers served by a given wire center, especially those located on or very  
20 near a competitive carrier's fiber route, may have reasonably available  
21 competitive alternatives for a given business service. *Other customers served by*  
22 *that same wire center, however, may have no alternatives at all.* Unfortunately  
23 for this second group of customers, Qwest is asking for competitive  
24 classification—and the commensurate upward and downward pricing flexibility—  
25 for the service for the entire wire center area.

26 Ex. 241-T at 25, l. 10-16 (Wood).

1                   **a.       Resale and UNE loop data in Attachments G and H show some**  
2                   **competitive entry but not widespread effective competition.**

3                   Qwest argues that UNEs and resale provide effective competition, but the record  
4 shows that these forms of competition are insufficient to constrain Qwest prices or other exercise  
5 of market power at this time. For example, Qwest asserts that Attachments G and H to the  
6 Petition show "multiple competitors in each of the wire centers." Ex. 12-C at 5-6. Yet,  
7 Attachments G and H merely show that *some* competitive entry has occurred to some degree in  
8 each of the 31 wire centers. Competitors have ported more than 10% of the telephone numbers  
9 in only {PROPRIETARY} of the 31 wire centers. Ex. 241-TC at 20, l. 12-13 (Wood).  
10 Resellers have a market share of greater than 10% in only {PROPRIETARY} of the 31 wire  
11 centers. *Id.*, l. 13-14. This shows widely varying levels of competitive entry and low market  
12 shares for Qwest's competitors, which does not constitute effective competition.

13                   Qwest's witness Theresa Jensen argues that the Bellevue Sherwood and Seattle  
14 Elliott wire centers illustrate the state of competition. Ex. 1-T, l. 6-8 (Jensen). In fact, these wire  
15 centers are not representative of the 31 at issue. In {PROPRIETARY} of the 31 wire centers,  
16 resellers have a lower market share than in Bellevue Sherwood, and in {PROPRIETARY} of  
17 the 31 they have a lower market share than in Seattle Elliott. Facilities-based carriers have a  
18 lower percentage of posted numbers in {PROPRIETARY} of the 31 wire centers than in  
19 Bellevue Sherwood, and in {PROPRIETARY} of the 31 they have a lower percentage than in  
20 Seattle Elliott. Even if they were representative, Bellevue Sherwood and Seattle Elliott are still  
21 not competitive. According to Qwest's data, resellers have only {PROPRIETARY}% of the  
22 business lines in Bellevue Sherwood, while facilities-based competitors have ported only  
23 {PROPRIETARY}% of the lines. Ex. 241-TC at p. 21, l. 2-18 (Wood).

24                   Attachment G suggests that each CLEC has a very low market share, thus  
25 reducing their ability to restrain Qwest. An average of {PROPRIETARY} resellers share less  
26 than {PROPRIETARY}% of the market in a wire center, while Qwest retains almost

1 {PROPRIETARY}% of the lines. 241-TC at p. 30, l. 17-19 (Wood). Similarly, in a typical  
2 scenario an average of {PROPRIETARY} CLECs will share less than {PROPRIETARY}% of  
3 the total posted numbers, while Qwest retains the remaining {PROPRIETARY}% of the  
4 numbers. Such a dramatic difference in the market share of Qwest and its competitors  
5 demonstrates that Qwest enjoys substantial market power relative to the miniscule operations of  
6 its competitors and will continue to do so in the foreseeable future.

7 In sum, Attachments G and H merely suggest that competitive alternatives exist  
8 for *some customers* in the identified wire centers. This is insufficient to show that all, most, or  
9 even a significant number of Qwest's customers throughout the geographic scope of the 31 wire  
10 centers have "reasonably available" access to price-constraining competitive options. *See*  
11 Ex. 241-TC at 15-19 (Wood). Because Qwest "did not identify specific market segments" for  
12 geographical areas smaller than a wire center, Ex. 58, there is nothing in the record that indicates  
13 the alternatives that customers throughout the wire center *actually* have. As a result, the  
14 Commission is forced to guess how many customers in the 31 wire centers have "reasonably  
15 available" alternative providers and how many do not.

16 Qwest could have provided more detailed information rather than rely on  
17 guesswork and unsupported extrapolation from limited, easy to acquire data. For example,  
18 Qwest provided highly detailed information about customer locations and proximity to facilities  
19 in the "high-cap" proceeding, Docket No. UT-990022. As Ms. Jensen described, the information  
20 in that case "was an analysis of every circuit in Qwest's database and the information specific to  
21 that circuit that an outside firm then spent literally months pulling together the information that  
22 shows the distance of those circuits from the serving wire center." TR at 178, l. 1-6. The outside  
23 firm "physically walked every street in the downtown corridor to look at where the networks of  
24 other providers were, and then they looked at every physical circuit identified in our system to  
25 complete this analysis." TR at 178, l. 18-24. Compared to Qwest's relatively well-developed  
26

1 record in the high-cap proceeding, Qwest's Petition here is vague and based on unsupported, self-  
2 serving conclusions.

3 Guesswork is not an acceptable substitute for evidence of record. Qwest's need  
4 for "ease of measurement and implementation" does not outweigh the Commission's need for  
5 evidence in the record to support the findings and conclusions required by law. Because Qwest  
6 has failed to prove that the existence of effective competition is as broad as the geographic  
7 market it defined, the Petition should be denied.

8 **2. Relevant Product Market**

9 **a. Do Customers Have Reasonably Available Alternatives?**

10 **(1) Qwest's "evidence" that CLECs offer available service  
11 alternatives is pure conjecture.**

12 Mr. Teitzel argued that the data presented by Qwest "unequivocally demonstrates  
13 that competition for Qwest's basic business services exists in Washington." Ex. 76-T, l. 15-16  
14 (Teitzel). While that statement may be true, it glosses over the kind of analysis that is needed to  
15 determine if there is effective competition for the services. If competitors can offer comparable  
16 services to Qwest but only a higher prices, then such competition will not be effective at  
17 constraining prices.<sup>3</sup>

18 In a further indication of Qwest's superficial approach to defining the market and  
19 measuring competition, Qwest determined what services are available from CLECs by  
20 "compar[ing] its list of its services to services or features available from the various switch  
21 manufacturers utilized by its competitors. If the switch manufacturer utilized by the CLEC  
22 offered the feature or service, Qwest included the product in its list of competitive services."  
23 Ex. 76-T at 18, l. 15-18 (Teitzel).

24 <sup>3</sup> If such a situation existed, the Commission might well wish to inquire why. It might indicate  
25 that Qwest's services are priced below an appropriate price floor. Alternatively, it could indicate  
26 barriers to entry. Either situation would suggest conditions are not ripe for competitive  
classification.



1 The technical capability of a switch does not indicate what CLECs actually can or  
2 will provide. Most importantly, it does not indicate the existence of price-constraining  
3 competition. As Mr. Wood explained, Qwest's approach "ignores the fact that the manufacturers  
4 of these switches expect to be paid for these features, and that the cost to a carrier of providing a  
5 given service extends well beyond the simple cost of acquiring the needed underlying feature  
6 from an equipment vendor." Ex. 241-T at 23, l. 9-12 (Wood). The Petition lacks any  
7 information about whether CLECs really do offer these features and services and at what prices.

8 (2) **Qwest failed to support its contention that CLECs can**  
9 **serve all customers in the wire centers but refuse to do**  
10 **so.**

11 Ms. Jensen alleged that many CLECs could serve all customers in the 31 wire  
12 centers but "chose" not to do so. TR 223, l. 10 to 224, l. 3. Qwest provided no evidence to  
13 support this argument. When Chairwoman Showalter asked Ms. Jensen for support, Ms. Jensen  
14 could not cite any study or business records. Instead, Ms. Jensen replied that, "I continue to  
15 receive calls about competitive activity from all different size customers" that allegedly confirm  
16 this assertion. TR 225, ll. 2-3. Chairwoman Showalter properly characterized this as "anecdotal  
17 evidence," TR at 225, l. 22, and asked again for Qwest's evidence. Ms. Jensen conceded that  
18 "[w]hat I haven't done is collected actual bids, although I do have some bids . . . ." TR 226, l. 21-  
19 22. Ms. Jensen finally admitted that "Qwest merely relied on [CLEC] tariffs that hold  
20 themselves out to offer these services across the state." TR 227, l. 1-3.

21 Since Ms. Jensen again provided no specifics, Chairwoman Showalter described  
22 exactly what she was looking for:

23 If there were evidence that there were six or seven or 10 or 12 competitors in an  
24 area, and one or two or three or four declined to serve a customer, yet there is  
25 somebody else willing to step in, or two or three or four willing to step in, then it  
26 seems to me that from the customer's point of view there are alternatives. I'd like  
to be pointed to the evidence in the record that gets at that.

TR 227, l. 24 to 228, l. 6. In response, Ms. Jensen directed Ms. Showalter to the general  
information contained in Attachment H, but stated that "I can't tell you specifically which

1 customers are served within [the Bellevue] wire center and which customers are not given that  
2 choice." TR 229, l. 5-7. Finally Ms. Jensen asserted generally that "there is a provider that is  
3 willing to serve any customer that comes to them." TR 231, l. 2-3. The record belies this  
4 assertion, however. The cross by the Chairwoman makes the point that Qwest has no real  
5 evidence about whether CLECs currently will or will not serve all Qwest customers. Again,  
6 Qwest's conclusions are conjectural.

7 Ms. Jensen's unsupported assertions also fail to address whether or not the  
8 purported ubiquitous competitors can provide price constraint to Qwest. The Staff's research  
9 indicated that facilities-based competitors really don't serve the smaller business customers. *See*  
10 Ex. 201-TC at p. 20, l. 7 to p. 22, l. 7 (Blackmon). Ms. Jensen admitted that "many" of the  
11 supposedly ubiquitous CLECs were in fact resellers. TR 239, l. 9-20. As Mr. Wood  
12 demonstrated, resellers do not provide effective competition and cannot effectively constrain  
13 Qwest's prices. Ex. 241-TC at 17, l. 5-8; 40, l. 14-19 (Wood). Of course both facilities-based  
14 CLECs and resellers incur costs to acquire new customers, including marketing and sales costs  
15 and non-recurring charges paid to Qwest. Therefore there are good reasons why they may not be  
16 able to compete for smaller businesses at the rates Qwest currently charges.

17 **(3) UNEs and Resale do not offer effective competition**  
18 **because they rely too heavily on Qwest's quality control,**  
19 **features and prices.**

20 When cross-examining Mr. Teitzel, Commissioner Gillis observed that  
21 Attachment H to the Petition showed that Qwest provides very few UNE loops to competitors.  
22 TR 463, l. 21 to 464, l. 18. In particular, there are a number of "empty cells"<sup>4</sup> in Attachment H,  
23 reflecting that most of the competitors don't use *any* UNE loops in most of the wire centers. The  
24 conclusion that can be drawn from this observation is that most of the competition within the  
25 wire centers is being provided with the CLECs own facilities and, to a lesser extent, resale.

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26 <sup>4</sup> "Cells" was erroneously transposed to "Sales" in the transcript.

1 Mr. Teitzel agreed that "there certainly are fewer unbundled loops shown on this report than  
2 there would be resale or other forms of competition." TR 464, 19-22. Of course, if that is the  
3 case, then the bulk of the competition must be occurring only where the CLECs have facilities,  
4 not throughout the 31 wire centers.

5 Commissioner Gillis also asked Mr. Teitzel whether a CLEC "might be hesitant to  
6 use UNEs or resale to reach a customer, because of concerns about what that would mean for  
7 their underlying service quality?" TR 468 at 4-7. Mr. Teitzel responded that, where service  
8 quality is at issue, "I would agree with you that the competitor would not have as much direct  
9 control if they were to buy . . . Qwest facilities as they would if they were to offer their own  
10 facilities." TR 468 at 14-18. The Staff's exhibit clearly shows that Qwest's UNE loop  
11 provisioning to CLECs is far from even approaching parity with Qwest's provisioning to itself.  
12 For these reasons, "[t]he current situation is that unbundled loops and the UNE-P are not readily  
13 available for serving the mass market business customer segment. They cannot be counted on to  
14 constrain Qwest from raising retail prices." Ex. 201-TC at 14, l. 16-19 (Blackmon).

15 In addition to quality concerns, CLECs must pay a UNE loop rate. The rates were  
16 a state-wide average of as low as \$11.33. The average rate will be increasing to \$18.16 soon, but  
17 on a deaveraged basis. TR 128, l. 4 to 129, l. 14. Since there is no experience under the new  
18 rates it is impossible to know for certain if they will stimulate additional UNE-based competition  
19 or not. Even if the Commission could predict the future of UNE loop competition, that would be  
20 irrelevant to the statute, which frames the test in the present tense.

21 Resale is even less capable than UNEs of ensuring that customers have a  
22 "reasonably available" competitive alternative. In addition to relying on Qwest's quality control,  
23 resellers cannot offer features and functions beyond those already offered by Qwest. Resellers  
24 also cannot restrain Qwest's prices. As Mr. Wood explained, "[b]ecause a reseller's cost of  
25 providing service is tied directly to the retail price of the incumbent, the reseller can exert no  
26 price discipline in the market to prevent Qwest from charging excessive prices to customers."

1 Ex. 241-TC at 17, l. 16-18 (Wood). Even Qwest's witness William Taylor agreed that "resale  
2 competition by itself, that is, with no UNEs or no [sic] anything else, cannot provide complete  
3 protection for price. . . ." TR 790, l. 16-19.

4 Qwest's resellers are also particularly vulnerable to a price squeeze. Mr. Wood  
5 illustrated this point using the example of Centrex Plus resale. Ex. 241-TC at 19, l. 17-22  
6 (Wood). Centrex Plus resellers must obtain the underlying Centrex Plus service from Qwest.  
7 So, the resellers' prices are tied to the price charged by Qwest for Centrex Plus. If the Petition  
8 were granted, Qwest could increase the rates for Centrex Plus and reduce the rates for competing  
9 services designed by Qwest to be non-viable for resale. Indeed, Qwest's own documents reflect  
10 that is precisely Qwest's strategy. Ex. 90-C, 92-C.<sup>5</sup> Under these circumstances, "Qwest would  
11 have the ability to squeeze many resellers out of the market." Ex. 241-TC at 19, l. 17-22  
12 (Wood). Dr. Taylor failed to consider this scenario, focusing instead only on the situation where  
13 the reseller's price is a fixed percentage of the Qwest retail price.

14 **(4) Qwest has provided meaningless data regarding**  
15 **competitive alternative**

16 Mr. Teitzel in his rebuttal testimony argues that Teligent, Sprint, Eschelon, and  
17 ATG target "small and medium-sized business customers." Ex. 78-T at 1, l. 1-24 (Teitzel). Yet,  
18 Mr. Teitzel agreed that Qwest and U S WEST had defined "small business" very differently in  
19 the past, ranging from five to twenty lines, and he did not know how Teligent, ATG, Sprint, or  
20 Eschelon defined it. TR 358, l. 23 to 361, l. 9. Thus Qwest's evidence is not at all probative of  
21 the existence of effective competition for small business customers. The only probative evidence  
22 in the record is the Staff survey, which showed that smaller customers are not currently served  
23 by CLECs. *See* Ex. 201-TC at p. 20, l. 7 to p. 22, l. 7 (Blackmon).

24 Further, Qwest's competitive loss information in Exhibits 114-C and 123-C  
25 overstates CLEC's gains. Mr. Teitzel admitted on cross-examination that these exhibits did not

26 <sup>5</sup> Ms. Jensen admitted at hearing that Qwest plans to implement an increase in Centrex Plus  
pricing, although she called it a "rate rebalancing." TR 126, l. 6-7.

1 take into account situations where a customer has split its service between Qwest and a  
2 competitor. TR 462, l. 1-10. So, in many cases, Qwest has reported a "loss" when it actually  
3 still serves that customer. Mr. Teitzel also agreed that the exhibits "will understate the number  
4 of competitive gains of Qwest from CLECs" due to the fact that they do not account for  
5 customers that left Qwest for a competitor then subsequently returned. TR 479, l. 5-18.

6 **(5) Qwest Witness Taylor Ignored The Statutory Standard**  
7 **In Washington Requiring "Effective Competition"**

8 Dr. Taylor argues that this Commission can grant the Petition where it has found  
9 the "potential" for effective competition. Ex. 231-T at 10, l. 9-11 (Taylor). He believes that the  
10 Commission could find that carriers which have a "physical presence at this time but have  
11 negligible supply or market share" provide effective competition for Qwest. Ex. 231-T at 11,  
12 l. 7-8 (Taylor). However, under the statute, potential competition is insufficient. As  
13 Chairwoman Showalter stated, "we need to find under the statute that there is effective  
14 competition *before* we classify an area or service of competitive, regardless of what conditions  
15 we put on it. . . . [W]e can't get to effective competition by imposing conditions. We need to  
16 find them first and then fashion the appropriate order." TR 216, l. 16-25 (*emphasis added*).  
17 Dr. Blackmon agreed, stating "the WUTC must decide this case based on facts as they exist  
18 now." Ex. 201-T at 14, l. 16.

19 Potential competition provided by carriers with "negligible" market share cannot  
20 provide customers with "reasonably available alternatives" as required by RCW 80.36.330.  
21 Dr. Taylor either ignored the statutory standard or misunderstood it. His failure to properly  
22 consider Washington law led him to criticize Mr. Wood because "he also appears to argue that  
23 the Commission should withhold any grant of flexibility *until* the market is effectively  
24 competitive." Ex. 231-T at 29, l. 7-9 (Taylor). Of course, that is *exactly what the statute*  
25 *requires*. Dr. Taylor's testimony also adds no probative evidence to the record because it is  
26 based on information in Qwest's Petition and accompanying testimony by Qwest witnesses

1 Theresa Jensen and David Teitzel. Ex. 231-T at 9, l. 22-23 (Taylor). As noted throughout this  
2 Brief, their data are either faulty or thinly supported.

3 Because Dr. Taylor's testimony is based on a standard that conflicts with  
4 applicable law and as he had no independent evidence of the present existence of effective  
5 competition, his conclusions are not helpful. The Commission could not grant competitive  
6 classification based on his testimony.

7 **b. Does Qwest Have A Significant Captive Customer Base?**

8 **(1) The Petition provides virtually no evidence regarding**  
9 **Qwest's captive customers.**

10 Qwest argues that Attachments G, H, K, and M show that it has no captive  
11 customers. In reality, they do not even make a prima facie case for no captive customers. All  
12 they show is that every wire center has competitive activity. They show that the levels of  
13 competitive activity vary significantly from wire center to wire center. But what they fail to  
14 show is whether or not the competitors provide ubiquitous service, to all customer types and  
15 sizes, and for all the services listed in the petition.

16 The "captive customer" analysis is very similar to the "reasonably available  
17 alternatives" analysis. Accordingly, the discussion above is relevant here, particularly  
18 Mr. Wood's observation that "some customers served by a given wire center . . . may have  
19 reasonably available competitive alternatives. . . . *Other customers served by that same wire*  
20 *center, however, may have no alternatives at all.*" Ex. 241-TC at 25, l. 10-14 (Wood).  
21 (*emphasis added*). The latter customers are the captive customer base.

22 ATG and MetroNet submit that the "significant captive customer base" test is  
23 really the same test as "reasonable alternatives" but at a lower threshold and for fewer customers.  
24 In other words a petitioner must first show that the defined market generally must have  
25 reasonable alternatives. To protect individual customers or classes of customers within the  
26 broader market, the legislature also required that a petitioner show that it has no significant

1 captive customer base. This subset of the defined market does not need to have "reasonable"  
2 alternatives, but must have *some* alternative or it is considered "captive." This subset of the  
3 defined market does not need to be large to deny the Petition. It only needs to be "significant."  
4 RCW 80.36.330. If Qwest fails to meet *either* the "alternative" or "captive customer" test, the  
5 statute requires denial of the Petition. *Id.*

6 As is discussed above, the record in this docket shows significant competition by  
7 facilities-based competitors. Thus, customers served by CLEC facilities are unlikely to be  
8 considered captive. The shortcoming of Qwest's Petition, however, is well-illustrated by the  
9 system maps at Attachments K and M. Ex. 12-C. They show very limited deployment relative  
10 to Qwest's network, which is truly geographically ubiquitous. TR-141, l. 19-21. Again, the  
11 Commission must guess how many captive customers exist. The most probative evidence in the  
12 docket on the issue of captive customers was provided by Staff. Staff found that smaller  
13 business customers really do not have any alternatives, probably because they simply do not  
14 generate enough revenue to overcome the barriers to entry, such as non-recurring charges or  
15 costs. *See* Ex. 202.

16 It is possible Qwest believes that it has no captive customers because "[g]ranting  
17 Qwest's Petition will increase pressure on alternative providers to expand the services they offer  
18 in the identified geographic areas to more customers, not just the provider-preferred customers  
19 that they market to in these same areas." Ex. 7-T at 17, l. 5-8 (Jensen). This theory ignores the  
20 fact that CLECs may not currently be able to serve many of these areas profitably. Qwest's own  
21 testimony identified a captive customer base, although Qwest's witnesses could not quantify its  
22 size or scope. The captive customer base was simply referred to as the served or marketed to by  
23 CLECs ("served") and those which CLECs do not serve or market ("unserved"). Ex. 7-T at 3,  
24 l. 5-11 (Jensen); TR 138, l. 25 to 139, l. 2.

25 Qwest witness Ms. Jensen acknowledged that customers are "served" because  
26 they are profitable. TR at 105, l. 16-18. Conversely, the unserved customers are unprofitable or

1 at least less profitable. TR 234, l. 17-19. Given those considerations, there is no evidence that  
2 CLECs can or will abandon their "provider-preferred" customers in order to serve the currently  
3 unserved market. In fact unprofitable customers will remain unserved until they became  
4 profitable, if that ever occurs. This leaves them captive to Qwest until that time.

5 It is essential to know how many of these captive, unserved customers exist, but  
6 the Petition does not provide that information. Commissioner Hemstad asked whether Qwest  
7 could show effective competition if a "measurable group of business customers cannot receive  
8 service from CLECs because they won't provide it, even though they are capable of providing it,"  
9 Ms. Jensen replied that "I would have a difficult time agreeing that that standard has been met."  
10 TR 236, l. 2-10.

11 The practical outcome of competitive classification for captive customers would  
12 be disastrous. Customers who have competitive alternatives because they are profitable will  
13 receive attractive rates, at least initially. Qwest can then raise rates for customers with no  
14 competitive alternatives to fund Qwest's efforts to attract profitable customers. Ex. 241-T at 13,  
15 l. 3-13 (Wood). Qwest will curtail CLEC entry into the profitable market or even retake market  
16 share. Further, Qwest can increase prices to the "unserved" customers to fund its efforts to  
17 respond to the CLECs competitive threat to the "served."

18 Finally, while the ATG and MetroNet have not shown (and do not need to show  
19 since Qwest has the burden of proof) that there are captive retail customers, the record here  
20 clearly shows that Centrex Plus resellers are carriers that are captive customers of Qwest, though  
21 on a wholesale rather than retail basis.<sup>6</sup> These customers are subject to price squeezes and the  
22 elimination of products, which are discussed elsewhere in this Brief.

23  
24  
25 \_\_\_\_\_  
26 <sup>6</sup> As Ms. Jensen stated, the term "customer" includes carriers. TR at 96, l. 18-21.



1           **B.     Market Concentration**

2                   **1.     Antitrust merger guidelines and HHI analysis**

3                           **a.     The Staff's analysis clearly shows a high degree of market**  
4                                   **concentration.**

5           The Staff's Market Concentration analysis revealed Herfindahl-Hirschman Index  
6 ("HHI") numbers ranging from 4,167 to 7,478. Ex. 193-C. These high numbers by themselves  
7 are sufficient to deny the Petition. But these numbers do not fully reveal the high degree of  
8 market concentration in any or all of the 31 wire centers. This study is on an exchange level,  
9 which is much larger than the wire center market identified by Qwest. Based on the observations  
10 of Commissioner Gillis, a more detailed study would almost certainly show that concentration is  
11 even higher in most areas except for the limited areas that are adjacent to CLEC facilities.  
12 TR 463, l. 21 t 464, l. 18. The unevenness of market concentration is even more pronounced if  
13 competition based on resale is excluded, as Mr. Wood recommends. Ex. 241-TC at 17, l. 16-18  
14 (Wood).

15           ATG and MetroNet's cross-examination of Ms. Jensen illustrated why relative  
16 market shares, which is part of what the HHI indicates, can be important, using the example of  
17 unbundled loops. TR 108, l. 1-19. With pricing flexibility, Qwest could offer to reduce its  
18 business line rate by \$10 a line per month to *every single one* of the CLECs customers now being  
19 served by Qwest's 17,377 UNE loops (Qwest's estimate of total Washington UNE loops). This  
20 would reduce Qwest's annual revenues by less than two million dollars (TR at 108-109) and  
21 would have a negligible effect on Qwest, because it is less than two percent of Qwest's total  
22 revenues, TR 109, l. 5. In contrast, the reduction of unbundled loop rates by \$10 would be  
23 disastrous for CLECs, who would have to meet the Qwest price to compete. Their relative  
24 reduction of revenues would be proportionately much greater. In fact, if they are competing  
25 solely using UNEs and Qwest reduces its rates to the price floor, their profits could evaporate.  
26 While this is a hypothetical, it illustrates why analysis of market share is important, especially

1 when there is a Goliath like Qwest and all of its competitors (even if numerous) have miniscule  
2 market shares.

3 As the foregoing hypothetical illustrates, while the Commission can use the very  
4 high HHI concentration numbers to show that the market is too concentrated to be considered  
5 effectively competitive, the converse could not be said to be true, even were the numbers lower  
6 in this docket. The reason is that concentration varies both among wire centers as well as  
7 geographically within the wire centers in the exchanges the Staff studied. The Commission  
8 cannot assume that all or even most customers in a given area have the same degree of access to  
9 competitive alternatives.

10 In summary, the HHI numbers developed by Staff cannot support a grant of  
11 Qwest's petition, but do support a denial.

12 **C. Market Structure**

13 **1. Ease of Entry**

14 Mr. Teitzel argues that the presence of a number of facilities-based providers  
15 operating in a given wire center area "clearly indicates no barrier to entry and extensive  
16 competitive alternatives." Ex. 76-T at 13, l. 11-12 (Teitzel). However, the mere presence of  
17 competitors in a given area says little about their ability to provide effective competition. Of  
18 course Mr. Teitzel does not even believe that the need for investment is a barrier to entry when,  
19 in fact, the need for investment is one of the most fundamental barriers to entry for new entrants.  
20 TR 149, l. 22 to 150, l. 2.

21 Qwest's superficial and flawed support for its claim of no barriers to entry is  
22 grounds for denial of the Petition, based on a failure to meet the burden of proof. Moreover,  
23 other parties, including ATG and MetroNet, noted significant evidence that barriers to entry do  
24 exist in Washington. As Mr. Wood explained:

25 From an economic standpoint, barriers to entry are more accurately described as "barriers  
26 to effective entry." A barrier may exist that prevents a potential competitor from entering  
a market at all, but a more subtle – but from the viewpoint of customer benefit, equally

1 effective – barrier may exist that prevents a carrier that is otherwise capable of  
2 successfully competing from doing so. The relatively modest success of competing  
3 providers in the majority of the 31 wire centers at issue suggests the existence of this  
4 second, more subtle barrier.

5 Ex. 241-TC at 28, l. 11-17 (Wood). As the discussion below regarding Qwest's use of its market  
6 power to curtail Centrex resale illustrates, Qwest itself has raised barriers to entry by resellers,  
7 one of the main sources of the competition alleged in the Petition.

8 Another barrier to entry, as Mr. Wood pointed out, is Qwest's superior access to  
9 its competitors' proprietary information, including where competitors plan to enter or expand  
10 their service offerings. For example, if the competitor is utilizing UNEs, Qwest has access to  
11 both the current orders and the forecasted needs of that competitor. A competitor that is placing  
12 its own facilities, instead of or in conjunction with UNEs, must still request collocation space in  
13 a given Qwest central office months, if not years, before actually offering retail services.

14 Mr. Wood described how this unequal access to competitors plans can be a barrier to entry:

15 If a competitor considering expansion into a business service market in Washington<sup>7</sup>  
16 knows that it must notify Qwest of those plans well in advance by requesting collocation,  
17 ordering UNEs, and worse – providing forecasts of future UNE needs – it will also be  
18 aware that Qwest can engage in a pre-emptive strike by targeting customers in that new  
19 market before the competitor's arrival. *The ability of Qwest to engage in such a strategy*  
20 *is a highly effective barrier to entry*, and comparable in its effect to a refusal by Qwest to  
21 comply with the requirements of sections 251 and 252 of the Act.

22 Ex. 241-TC at 13, l. 15-21 (Wood).

23 Although Qwest will vehemently deny that it has misused competitors'  
24 proprietary information, the improper use of such information was clearly demonstrated in this  
25 proceeding. This issue is discussed further below. But even assuming that Qwest *were* to  
26 scrupulously avoid misuse of the information, Qwest's access to the information is a barrier  
because there is always a possibility for Qwest to use the information. Because CLECs do not  
even have access to such information, Qwest does has no reason to have the same concerns.

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<sup>7</sup> Such an expansion could be represented by the offering of a new service or the offering of existing services in a new geographic area.

1                   **2.     Exercise of Market Power**

2                   Ms. Jensen argues that "all competitors, including Qwest, must be given parity in  
3 regulatory treatment." Ex. 1-T at 16-17 (Jensen). Likewise, Mr. Teitzel says that Qwest needs  
4 "to respond to the competitive business market *under the same conditions currently enjoyed by*  
5 *its competitors*" (emphasis added). Ex. 76-T at 9, l. 21-22. These pleas are disingenuous, as  
6 Qwest would never tolerate parity with its competitors. Parity would mean that Qwest, like all  
7 CLECs, would have to:

- 8                   • Rely on its competitors to provision network facilities essential to Qwest's services in  
9 a timely manner.
- 10                  • Rely on its competitors to maintain and operate their networks so that Qwest's service  
11 to its customers would not be interrupted.
- 12                  • Rely on its competitors to make collocation space available in their central offices.
- 13                  • Rely on its competitors to take reasonable steps to plan for Qwest's needs when  
14 planning their own network deployment.
- Rely in each of these ways on competitors who can unilaterally dictate how services  
                  will be provided.

15 Ex. 241-TC at 9, l. 13 to 10, l. 19 (Wood). Further, Qwest would need to begin to compete with  
16 no network facilities in place, obtain the capital necessary to build a ubiquitous network without  
17 an existing revenue base and build out a ubiquitous network in a short time frame. Of course,  
18 CLECs struggle with these realities every day.

19                   It is clear from the record that Qwest has substantial market power and will  
20 continue to have market power for some time to come. Mr. Wood analyzed Qwest's support for  
21 its contention that it does not have market power and determined that the data actually shows the  
22 opposite. Ex. 241-TC at 28, l. 18 to 30, l. 24 (Wood). Particularly telling is how Qwest has been  
23 able to use its market power to segment the business markets so as to curb resale of Centrex Plus  
24 while at the same time offering steeply discounted rates to more favored retail customers, as  
25 demonstrated by the documents ATG and MetroNet introduced over Qwest's strenuous  
26 objections. See Ex. 86-C to 99-C, 102-C. This issue is discussed further in the next section. But

1 Qwest's ability to segment the market — even its apparent belief that it *can* segment the market  
2 — is a very strong indicator of market power.

### 3 3. Resellers

4 Qwest is systematically discriminating against resellers by strategic pricing of the  
5 most commonly resold services while at the same time migrating retail customers of those  
6 service to new services that are not being effectively resold. This reduces the available  
7 alternatives that would otherwise provide effective competition. Qwest's actions toward Centrex  
8 Plus, described below, illustrate this problem.

#### 9 a. Qwest Is Attempting to Curtail or Eliminate Centrex Resale, 10 Thereby Reducing Available Alternatives For Customers

11 U S WEST, Qwest's predecessor, introduced Centrex Plus service in Washington  
12 in 1992. By 1995, {PROPRIETARY} for Centrex Plus. Exhibit 94-C. This conflicted with  
13 U S WEST's original goals for Centrex Plus, which {PROPRIETARY} Exhibit 94-C.  
14 U S WEST became concerned that resellers were {PROPRIETARY} Exhibit 94-C.

15 So, U S WEST examined approaches to combat Centrex resale. U S WEST's first  
16 proposed response, {PROPRIETARY}.<sup>8</sup> Ex. 88-C. After {PROPRIETARY} U S WEST  
17 planned to introduce a new Centrex {PROPRIETARY} Exhibit 88-C. U S WEST perceived  
18 that this would {PROPRIETARY} Ex. 88-C. The new Centrex service did not take effect  
19 immediately. A September 1996 internal U S WEST memorandum reported that  
20 {PROPRIETARY} Exhibit 89-C. The memo further noted that {PROPRIETARY} *Id.*  
21 (*emphasis in original*).

22 U S WEST began implementing its anti-resale strategy when it introduced  
23 Centrex 21 in 1996, which {PROPRIETARY} Exhibit 90-C. Understandably, Centrex Plus

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24  
25 <sup>8</sup> "Grandfathering", described by Ms. Jensen, is "where you no longer offer a given service to  
26 new customers, and then there can be questions about existing customers and how they might  
obtain the service." TR 110, l. 10-13.

1 continued to be the preferred choice of resellers because of its {PROPRIETARY} as  
2 characterized by U S WEST. Exhibit 90-C at p. 1.

3 Centrex Prime, introduced in 1997, was even less amenable to resale. Centrex  
4 Prime contained {PROPRIETARY} *Id.* For example, U S WEST {PROPRIETARY}  
5 Exhibit 97-C. This hurts resellers because they must aggregate lines at many locations to obtain  
6 discounts for their geographically disbursed smaller customers. U S WEST also planned to  
7 {PROPRIETARY}" Exhibit 92-C.<sup>9</sup> Qwest also planned to {PROPRIETARY} Exhibit 92-C.  
8 After migrating the retail customers to new services, U S WEST would then be able to  
9 grandfather Centrex Plus, effectively starving the CLECs of the ability to serve new customers.

10 The ATG and MetroNet confidential hearing exhibits show how Qwest designed  
11 both Centrex 21 and Centrex Prime to be "available" for resale in name only and to be non-viable  
12 for resellers. Qwest's success is clear from the fact that of all the {PROPRIETARY} resold  
13 Centrex lines in Washington, {PROPRIETARY} are Centrex Plus, {PROPRIETARY} are  
14 Centrex 21, and {PROPRIETARY} are Centrex Prime. Ex. 17-C and 72-C. Clearly, granting  
15 Qwest competitive classification will enable it to implement its strategy to eliminate the only  
16 significant resale alternative to its services. This is grounds for both disregarding evidence of  
17 resale competition in determining whether effective competition exists as well as denying the  
18 petition because Centrex resellers are captive customers.

19 **b. Qwest Makes Resale Of Its ICB Contracts Impossible, Thereby**  
20 **Reducing Available Resale Alternatives For Customers**

21 Qwest's practices for filing individual case basis ("ICB") contracts as confidential  
22 makes it impossible for resellers to effectively offer these contracts for resale. Only summary  
23 data regarding the quantities of service being provisioned under the contracts and the total or  
24 gross price is made publicly available to CLECs. TR 362, l. 17-22. Under these circumstances,  
25 CLECs have no way to know what Qwest charges for a particular line or feature.

26 <sup>9</sup> {PROPRIETARY} Exhibit 19-C; Exhibit 20-C.

1 Cross-examination of Mr. Teitzel revealed a convoluted and impractical  
2 procedure whereby CLECs could theoretically resell these contracts. Mr. Teitzel stated that, to  
3 resell an ICB contract, "[a] CLEC could approach Qwest, asserted [sic] that you are aware that  
4 contracts are being offered by virtue of the fact that they are being filed with the Commission,  
5 assert that you may have a *similar system configuration* as a particular retail customer, and ask  
6 for a quote." TR 364, l. 19-29 (*emphasis added*). Mr. Teitzel introduced, but could not describe  
7 objectively, an additional and new prerequisite to resale of ICB contracts: a "similar  
8 configuration requirement." TR 365, l. 4-6. When pressed, Mr. Teitzel refused to provide any  
9 details regarding this concept, except to say that the geographic markets and loop numbers  
10 should be "similar." TR 366, l. 3-4. CLECs could not expedite the process by reviewing these  
11 contracts.

12 Although Mr. Teitzel first stated that a CLEC "could approach the Commission  
13 staff who would have access to the contract and request that information on a confidential basis,"  
14 TR 363, l. 1-3, he later refused to say that Qwest would provide the contracts to CLECs upon  
15 request because they are "proprietary." TR 368, l. 9-14. Mr. Teitzel's proposed procedures for  
16 reselling ICB contracts are totally incompatible with the realities of marketing and selling to  
17 customers. In order to be successful, a CLEC needs to ask a customer what they are currently  
18 paying and then say "we can beat that." Yet, under Qwest's ICB resale approach, the CLEC  
19 salesperson would have to say instead, "we will be back to you in a month to see if we can beat  
20 that." Even Mr. Teitzel agreed that a CLEC cannot actually offer services until it knows the  
21 price it can propose. TR 366, l. 18 to 367, l. 1. In the meantime, Qwest has learned that the  
22 CLEC has targeted the customer, and Qwest could begin the winback process before the CLEC  
23 is even able to learn what price it can charge.

24 Even if CLECs could effectively market in this "horse before the cart"  
25 environment, inevitable disagreements between the CLEC and Qwest over the meaning of the  
26 term "similar" would also add additional time, cost, and uncertainty to the process. Of course, a

1 CLEC will be at Qwest's mercy regarding determination of whether a contract is "similar,"  
2 because the CLEC will have no access to the underlying contract, even though the CLEC has a  
3 right to resell it.

4 Clearly, Qwest has "gamed" the process so that ICB contracts for services such as  
5 Centrex Prime are effectively unavailable for resale. Like elimination of Centrex resale, it is yet  
6 another potential competitive alternative that Qwest is working to eliminate.

7 **IV. OTHER**

8 **A. Quest Has Improperly Used Confidential CLEC Information in This**  
9 **Proceeding.**

10 Mr. Teitzel's rebuttal testimony states that "Qwest has internal policies that  
11 prohibit the sharing of carrier-specific information between its wholesale and retail divisions. . . .  
12 In the immediate proceeding, no retail market employees have reviewed or used carrier-specific  
13 wholesale information." Ex. 78-T at 8, l. 17-20 (Teitzel). This assertion was revealed at the  
14 hearing to be untrue. Ms. Jensen, who helped develop and support the petition in this case for  
15 the benefit of Qwest's retail division, prepared and delivered the carrier-specific, "unmasked"  
16 information in Attachments G and H to Staff. TR 744, l. 15 to 745, l. 7.

17 Even if this is the only instance of Qwest using carrier-specific information in this  
18 docket, the fact remains that Qwest's use of the aggregated and "masked" proprietary CLEC  
19 information to benefit its retail side is also highly improper and violates at least two  
20 interconnection agreements and Qwest's SGAT. TR 116, l.24 to 119, l. 6. Though it remains to  
21 be seen how Qwest will address this issue on brief, at the hearing Qwest seemed not to  
22 understand this point. Qwest seems to believe that if it does not disclose carrier-specific  
23 information, it is free to use the CLEC information improve its competitive position against the  
24 CLECs.

25 What Qwest appears to overlook is the fact that the SGAT and various  
26 interconnection agreements prohibit not only unapproved *disclosure* of the propriety



1 information, but also unapproved *use* of the information. As a Qwest internal memorandum to  
2 the team planning for the Petition in this case clearly shows, CLEC data was not only used, but  
3 considered essential to the Petition. **{PROPRIETARY}** Ex. 102-C at 1.

4 MetroNet and ATG's interconnection agreements<sup>10</sup> with Qwest expressly prohibit  
5 these uses of this information. They state that "[e]ach Party shall keep all the other Parties'  
6 Proprietary Information confidential and shall *use* the other Parties' Proprietary Information *only*  
7 *in connection with this Agreement*. Neither Party shall *use* the other Party's Proprietary  
8 Information for *any other purpose*. . . ." Ex. 13 at 110; Ex. 14 at 24; TR 117, l. 19 to 118, l. 1  
9 (*emphasis added*). In this case, Qwest never inquired whether ATG nor MetroNet agreed to  
10 permit Qwest to use its proprietary information for this Petition.<sup>11</sup> TR 118, l. 4-25. Nor is there  
11 any evidence that Qwest asked any other CLEC for permission to use their proprietary data to  
12 support Qwest's retail initiative.

13 The Commission should not allow Qwest to benefit from its misuse of  
14 confidential CLEC data. The Commission should disregard the ill-gotten data in reviewing  
15 Qwest's petition. Moreover, the Commission should find that it is not in the public interest to  
16 grant a petition for competitive classification of retail services that relies on data that Qwest is  
17 only supposed to use to perform its duties to its wholesale customers.

18 **B. Public Interest Considerations**

19 **1. Qwest does not need competitive classification because it already has**  
20 **tools to compete at its disposal.**

21 Qwest has several arguments why it allegedly needs competitive classification.  
22 Qwest contends it needs competitive classification because its competitors can change prices

23 \_\_\_\_\_  
24 <sup>10</sup> Which are substantially the same as other interconnection agreements and Qwest's SGAT.  
TR 119, l. 1-6.

25 <sup>11</sup> Qwest will probably argue that MetroNet's agreement has not yet been implemented. Since  
26 the clause in question is a common form, that argument does not excuse Qwest's evident breach  
of its interconnection agreements with other CLECs, including ATG.

1 with only 10 days notice and it is required to provide 30 days. Ex. 78-T at 8, l. 20-22 (Teitzel).  
2 This argument is not well founded. First, Qwest was unable to identify a single customer they  
3 believe that they lost due to the 30 day price change requirement for ICB contracts. Ex. 64.  
4 Moreover, Qwest *can* change prices with 10 days notice. Qwest needs only keep the rates within  
5 a band previously approved by the Commission. Although Mr. Teitzel complained at the hearing  
6 that Qwest would have to offer banded rates on a statewide basis, there is no such requirement.  
7 Ex. TR 456, l. 6-17; *See* RCW 80.36.340.

8 Mr. Teitzel's complaint that banded rates "still require a price floor and a price  
9 ceiling," Ex. 76-T at 10, l. 1-2 (Teitzel), is revealing because Qwest would have to price the  
10 service above its cost as it must do currently. RCW 80.36.330(3). Clearly, Qwest needs relief  
11 from the approved price ceilings so it can *raise* prices, not lower them. *See* Ex. 241-TC at 32,  
12 l. 7-9 (Wood).

13 Mr. Teitzel also argues that competitors can price a service below the level of a  
14 statewide average rate, but he fails to recognize the limitations in that flexibility. Ex. 76-T at 9,  
15 l. 4-5 (Teitzel). As Mr. Wood explained, "[r]esellers can deaverage at a level no greater than the  
16 level [of] rate deaveraging by Qwest. Facilities-based competitors that rely on UNEs can  
17 deaverage only to the level of the five zones for deaveraged loops." Ex. 241-T at 32, l. 16 19  
18 (Wood).

19 Mr. Teitzel contended that many of Qwest's competitors can offer interLATA  
20 services that Qwest is currently prohibited from providing. Ex. 76-T at 9, l. 9-13 (Teitzel). Of  
21 course, this prohibition is due to Section 271 of the Telecommunications Act of 1996, which is  
22 not at issue in this proceeding, as Qwest admits. Ex. 62.

23 Mr. Teitzel complained that Qwest is prevented from offering certain  
24 "technologically advanced" services. Yet, he could not identify a single service at the hearing  
25 that Qwest would be able to offer with competitive classification that it cannot offer without such  
26 classification. TR 370, l. 16-19.

1           Despite its claimed need to be able to offer ICB contracts, Qwest admitted it  
2 already has the ability to meet customer needs by offering contracts on an individual case basis.  
3 TR at 116, l. 17-19. The only qualification is that the ICB prices must bear a relationship to cost.  
4 RCW 80.36.330(3). Thus Qwest is essentially seeking to be able to offer special ICB pricing  
5 *without* an underlying cost basis. Since the market is supposed to be effectively competitive,  
6 which implies prices will be driven toward cost, the Commission should question whether the  
7 public interest will benefit from giving Qwest the ability to target prices to customers without  
8 any regard for the underlying costs. ATG and MetroNet posit that Qwest will offer aggressive  
9 pricing to the "served" to keep out the competition, and significantly higher prices to the  
10 "unserved."

11           As staff witness Dr. Blackmon stated, "the reality is that Qwest has many tools at  
12 its disposal that it could be using to be more competitive with other providers of local exchange  
13 service. Qwest appears not to want to use those tools, probably because they involve lowering  
14 prices for consumers." Ex. 201-T at p. 4, l. 13-16 (Blackmon). Qwest plainly wants pricing  
15 flexibility so that it can maintain or raise prices for "unserved" customers to fund its effort to  
16 retain the most profitable customers.

17           Qwest's Petition does not show that it would be in the public interest to grant  
18 competitive classification. Evidence developed by ATG, MetroNet, and other parties, including  
19 misuse of confidential information and a strategy to curb or eliminate Centrex resale,  
20 demonstrates that Qwest's petition is not in the public interest.

21 **V. RECOMMENDATIONS REGARDING DIFFERENT PROPOSALS**

22 **A. Qwest Proposal (With Staff Conditions) Regarding 31 Wire Centers**

23           The Commission should reject Qwest's Petition. As discussed throughout this  
24 Brief, Qwest has failed to build a record that demonstrates the presence of effective competition  
25 based on available alternatives and the absence of significant numbers of captive customers in  
26 the markets it has chosen. Granting the Petition under these circumstances would not only

1 violate the statute, it could eliminate the few remaining protections its customers (particularly  
2 resellers) have from Qwest's ability to exercise its market power. As Mr. Wood pointed out in  
3 his rebuttal testimony, the Staff's proposed conditions will not protect development of  
4 competition. Ex. 243-T at 6, l. 13-20 (Wood).

5 But more importantly, as Dr. Blackmon appeared to concede, the conditions he  
6 proposed are not a substitute for a finding of effective competition as required by  
7 RCW 80.36.330. See TR 693, l. 25 to 694, l. 3 (Blackmon). Since the record does not support a  
8 finding of effective competition, the "conditions" alternative is a moot point.

9 **1. Variation: Lift Conditions Upon State Approval of Section 271**

10 As ATG and MetroNet argued earlier in this Brief, Section 271 and this  
11 proceeding involve different facts and law. For the reasons discussed above, the outcome of that  
12 proceeding should not affect this one. Additionally, the question of duration of conditions is  
13 irrelevant because Qwest has not established the existence of effective competition.

14 **B. Staff Alternatives**

15 **1. 4 Areas; Services Over DS-1 Or Bigger**

16 Dr. Blackmon's Primary Recommendation is to deny the Petition for the majority  
17 of wire centers but grant competitive classification to Qwest for the Seattle, Bellevue, Spokane,  
18 and Vancouver exchanges for services provided via a DS-1 or larger circuits. TR 689, l. 22  
19 to 690, l. 2. Dr. Blackmon advises that, if the Commission finds that the large and small  
20 business customers are in two separate markets, then the Commission should grant competitive  
21 classification only for services to large customers. If the Commission finds that the markets are  
22 inseparable, then he believes that the Commission should grant competitive classification for the  
23 entire market, with conditions. TR 735, l. 22 to 736, l. 10.

24 ATG and MetroNet oppose this recommendation for a number of reasons. First,  
25 even if the Commission looks at the market as being a single market, the fact that smaller  
26 customers within that market do not have access to competitive alternatives means that Qwest

1 has a significant captive customer base, i.e. the smaller customers. Viewed in light of the  
2 applicable law, the basis for Dr. Blackmon's recommendation is unclear. The Commission  
3 cannot grant competitive classification where there is no effective competition. This  
4 recommendation is especially puzzling given Dr. Blackmon's testimony that "I think that, to me,  
5 the evidence is very clear that the small end of the market customers do not have enough choice  
6 to grant unfettered pricing flexibility." TR 694, l. 24 to 695, l. 2 (Blackmon).

7           The second concern that ATG and MetroNet have with this recommendation is  
8 that while Staff's research clearly indicated that small business customers do not have  
9 competitive choices, it did not show that large customers *do* have choices throughout the entire  
10 geographic and product markets Qwest selected for its Petition. Coupled with the lack of  
11 probative evidence from Qwest and the substantial evidence from ATG and MetroNet and other  
12 parties opposed to the Petition, the record simply does not support the require threshold finding  
13 of effective competition to support competitive classification even for large customers. Perhaps  
14 Dr. Blackmon was attempting to somehow extrapolate the results of the "high-cap" docket,  
15 No. UT-990022. However, the Commission's refusal to grant competitive classification here  
16 would be fully consistent with its findings in the high-cap docket. *See Eighth Supplemental*  
17 *Order*, Docket UT-990022 at p. 14 (Dec. 1999).

18           In the high-cap case, the Commission examined high capacity *facilities*, such as  
19 DS-1s and higher. This focused on facilities-based competitors and available capacity. In this  
20 case, the Commission is examining *services* provided over those facilities, which involves  
21 facilities-based carriers, resellers, and UNE-P CLECs. The record and the issues in both cases  
22 are totally different, as confirmed by the fact that they were addressed in different proceedings.  
23 Nothing prohibits the Commission from determining that the facilities are competitive while the  
24 services are not.

1                   **2.       4 Areas; All Business Services**

2                   Under Dr. Blackmon's Alternative Recommendation, the Commission would  
3 grant Qwest pricing flexibility for all customer segments of the business services market,  
4 including the small business market, subject to certain conditions. Ex. 201-T at 23, l. 9-14  
5 (Blackmon). ATG and MetroNet oppose this recommendation because, again, the record is  
6 totally inadequate to support a grant of competitive classification under any conditions, as  
7 explained above. It is also inconsistent with Dr. Blackmon's conclusion that "there's not  
8 effective competition for small business customers." TR 693, l. 18-19. Although he stated that  
9 "there is some reason to believe that [unbundled loops] will become more viable over time,"  
10 Ex. 201-T at 23, l. 7-8 (Blackmon), this Commission can only consider present competition and  
11 available alternatives, not potential, hypothetical competition. RCW 80.36.330.

12                   Even though Dr. Blackmon believes that while Qwest's "captive customer base" is  
13 "less substantial" with the conditions in place, TR 692, l. 23 to 693, l. 6 (Blackmon), conditions  
14 are not a substitute for effective competition as a matter of law. Additionally, the conditions  
15 contained in the Alternative Recommendation will not protect small business customers. As  
16 Mr. Wood testified, Qwest could still:

- 17                   • Engage in a price squeeze of resellers by offering a discount to a customer that  
18                   is greater than the resale discount (and by failing to make the discounted price  
19                   available as the new resale price);
- 20                   • Offer discounts to customers who currently have competitive alternatives,  
21                   while denying those discounts to customers in the same wire center area  
22                   without existing alternatives;
- 23                   • Discourage competitive entry through geographically limited price reductions;  
24                   and,
- 25                   • Effectively "redline" the geographic area in these exchanges by freezing in  
26                   place the number and location of customers who have competitive alternatives  
                    and those who do not.

1 Ex. 243-T at 6, l. 13-20 (Wood). MetroNet and ATG therefore agree with Dr. Blackmon's  
2 statement that "[i]f you choose to define the market as being the small customers, then even with  
3 the conditions, I don't think there is effective competition." TR 693, l. 25 to 694, l. 3.

4 In the end, even Dr. Blackmon seemed to back away from this recommendation.  
5 He explained that he offered it as an "alternative" because "it is undesirable for the WUTC to  
6 impose any restrictions, beyond those in the statutes, on a grant of competitive classification.  
7 The WUTC should generally either grant the pricing flexibility or deny it." Ex. 201-T at 24, l. 8-  
8 10 (Blackmon). MetroNet and ATG agree and accordingly believe that the Alternative  
9 Recommendation is inappropriate under RCW 80.36.330.

10 **C. MetroNet/ATG Proposed Conditions**

11 ATG and MetroNet vigorously oppose competitive classification of any sort for  
12 Qwest based on this thin record. However, if the Commission grants a portion of Qwest's  
13 petition in this proceeding, it should do so only in conjunction with the following restrictions.

14 **1. Competitive classification should be granted only for portions of those**  
15 **wire centers where Qwest faces significant facilities-based**  
16 **competition.**

17 Since resale and UNEs cannot constrain price increases, the Commission can only  
18 grant flexibility where facilities-based alternatives can provide price discipline. This should be  
19 narrowly tailored. For example, high volume facilities that can only be used to serve customers  
20 with a large number of lines do not justify competitive classification of services for customers  
21 with fewer lines.

22 **2. Competitive offerings made to a business customer served by a given**  
23 **wire center must be made to all customers served by that wire center.**

24 As explained previously, Qwest is asking for pricing flexibility for areas where  
25 some customers may have reasonably available competitive alternatives, but other customers do  
26 not. So, the Commission should require Qwest to make all offerings available to all customers  
served by the wire center in question. This will ensure that both retail customers and resellers of

1 Qwest's services benefit from appropriate competitive pricing responses by Qwest. It will also  
2 discourage Qwest from predatory or unsustainable pricing just to win back CLEC customers.

3 **3. The ability of Qwest to deaverage its prices must be limited to the**  
4 **ability of a competitor utilizing UNEs to deaverage.**

5 The current zone pricing of UNE loops means that the facilities-based competitors  
6 of Qwest's business services experience costs that are averaged at the wire center level. Qwest  
7 should not have greater flexibility than these competitors.

8 **4. Specific requirements are necessary to ensure that resale is a**  
9 **competitive alternative for consumers and an entry vehicle for**  
10 **competitors.**

11 The Commission should limit Qwest's ability to engage in a price squeeze by  
12 limiting Qwest's upward pricing flexibility. This is necessary because resellers remain captive  
13 customers. The Commission should exclude from competitive classification services such as  
14 Centrex Plus that have little downward flexibility and are a primary vehicle for resellers. The  
15 Commission should also prohibit Qwest from "grandfathering" or eliminating these services.

16 Second, the price for any new offering by Qwest must become the new resale  
17 price for the service, minus the appropriate resale discount. In order for this mechanism to be  
18 effective, both customer contracts and offer sheets to potential customers must be defined as  
19 offerings subject to resale and available upon request from Qwest within a short time frame.  
20 Only customer identities should be withheld from public scrutiny. Without such a requirement,  
21 Qwest will always be able to undercut the price of a competing reseller.

22 Finally, the Commission must determine the cost standard to be used to establish  
23 price floors for competitive services, if the Commission can do so based on the scant record.  
24 This is discussed further under Section F of this brief.

25 **D. Deny Petition Altogether**

26 MetroNet's and ATG's primary recommendation is to deny the Petition because  
the record does not show that Qwest is subject to effective competition in the geographic markets



1 it has chosen. Pricing flexibility would permit Qwest to slash prices selectively to the CLECs'  
2 customers and raise prices for the captive, "unserved" business customers which have no  
3 competitive alternatives. Qwest's competitors have no such captive customers, so they must  
4 meet Qwest's price floor offering and lose money, or attempt to recover their costs and lose the  
5 customer.

6 Although Mr. Teitzel argues that "Qwest will lose market share if it attempts to  
7 sustain prices that are not market-based" (Ex. 72-C at 8, l. 15-16), this is currently only true for  
8 those customers who have facilities-based competitive alternatives. The unserved customers will  
9 be forced to pay higher rates. Finally, Centrex Plus resellers will be squeezed out. Qwest can  
10 always file a new petition that presents a full, well-supported record as it did in the "high-cap"  
11 docket. Until that time, Qwest will suffer no prejudice, as it remains the dominant carrier in all  
12 markets and has other avenues for competitive pricing available to it.

13 **VI. APPROPRIATE COST STANDARD**

14 **A. The Commission Must Determine the Cost Standard to Be Used to Establish**  
15 **Price Floors for Competitive Services.**

16 RCW 80.36.330(3) states in part that "[p]rices or rates charged for competitive  
17 telecommunications services shall cover their cost. The Commission shall determine proper cost  
18 standards to implement this section." Based on well-established precedent, were the  
19 Commission to grant the Petition it should require Qwest to set the cost standard by imputing the  
20 cost of essential network services. ATG and MetroNet do not believe that the record in this  
21 docket provides the Commission with a good basis to determine what elements to impute,  
22 however. Accordingly, the Commission should either deny the Petition or require imputation of  
23 *all* UNEs that Qwest uses in providing any services that the Commission approves for  
24 competitive classification.

25 The Commission has long used imputation to determine whether Qwest gives  
26 itself an undue preference or advantage or subjects other carriers to competitive disadvantage.

1 For example, the Commission first approved the principle of imputation in the "access charge"  
2 case, Docket No. U-85-23. The Commission developed imputation more fully and applied it to  
3 toll services in the "Prime Saver" case. Fifth Supplemental Order, Docket No. U-87-1083-T,  
4 *WUTC v. Pacific Northwest Bell Telephone Company*. The Commission also employed  
5 imputation with certain of Qwest's high-volume toll offerings in Docket No. U-88-2052-P.

6 This Commission reaffirmed imputation in its Fourth Supplemental Order  
7 Denying Complaint, Accepting Tariffs Conditionally; Requiring Tariff-Price List Refiling,  
8 *WUTC v. U S West Communications*, Docket No. UT-911488, et al. (WUTC 1993) ("*Centrex*  
9 *Plus Order*"). In the *Centrex Plus Order*, the Commission made it clear that imputation  
10 requirements would continue to be a central policy of the Commission to protect all types of  
11 emerging competitive services. Further, the Commission will apply imputation standards in *any*  
12 context where there is competition or emerging competition to Qwest's services and the  
13 competitors are dependent on Qwest for certain bottleneck inputs of their services, not just toll  
14 services:

15 [T]he Commission believes the principles of imputation are appropriate for  
16 pricing essential monopoly elements of competitive services.

17 *Id.* at 13. The Commission noted that imputation is needed to prevent price squeeze.

18 It is clear that an order to avoid a *price squeeze* on competitors dependent upon  
19 the same monopoly service elements that U S West uses in its competing service,  
20 the essential monopoly elements must be priced for U S West independent  
21 competitors equivocally. *Imputation was developed to deal with this issue*; here,  
22 tariffing the essential elements serves the same purpose, to protect the public  
23 interest.

24 . . .

25 By requiring imputation, the Commission intends to restrict U S West's ability to  
26 impede competition by charging dependent competitors more for an essential  
monopoly function when the function is used by the competitor to provide a  
service that is substitutable for a service offered by U S West.

*Centrex Plus Order* at 11, 13 (emphasis added).

1 In the Order Granting Complaint In Part, *Northwest Payphone Association, et.*  
2 *al. v. U S West Communications, Inc.*, Docket No. UT-920174 (March 17, 1995) ("*Payphone*  
3 *Order*"), the Commission fully developed and reaffirmed the concept of imputation and  
4 explained how failure to pass imputation harms competition by imposing a price squeeze on  
5 competitors.

6 A price squeeze exists when the monopolist sets the price for its monopoly input  
7 and for the "competitive" downstream produce in such a manner that the  
8 dependent competitors that are just as efficient as the monopolist cannot charge  
the same price for the output that the monopolist charges and still cover all their  
costs due to the higher price that they must pay for the monopoly input.

9 *Payphone Order* at 7 (quoting Dr. Nina Cornell). In that order, the Commission expressed a  
10 clear policy, consistent with RCW 80.36.186, that imputation should be required for essentially  
11 all monopoly services:

12 It remains the Commission's policy to require imputation where there is  
13 competition, or emerging competition, to U S West's services and the competitors  
14 are dependent upon U S West for certain essential bottleneck inputs in order to  
provide their services.

15 *Payphone Order* at 8.

16 Despite this substantial precedent, Qwest intends to use TSLRIC pricing when  
17 determining its own cost floor. TR 444, l. 18-20. On brief Qwest may point to the  
18 Commission's decision to employ TSLRIC, non-imputed pricing in UT-990022, the high-cap  
19 docket. That decision and the circumstances behind it are easily distinguishable.<sup>12</sup> In the high-  
20 cap docket, the Commission classified *facilities* as competitive. Because the Commission found  
21 there was effective competition for the facilities, that in effect constituted a finding that they  
22 were not monopoly or bottleneck facilities. *See Eighth Supplemental Order*, Docket UT-990022  
23 at p. 14 (Dec. 1999). Thus, imputation was not required under RCW 80.36.186 or prior  
24 Commission precedent. In contrast, in this docket Qwest seeks competitive classification of

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25 <sup>12</sup> Although by this argument ATG and MetroNet are not necessarily signalling agreement with  
26 the decision.

1 *services*. Those services ride on facilities that have not been found to be competitive,<sup>13</sup> and thus  
2 involve the use of bottleneck monopoly elements, which clearly triggers an imputation  
3 requirement. Since competitors must pay UNE rates for all the underlying facilities, those are  
4 the appropriate rates for Qwest to impute.

5           It would be extremely anti-competitive to allow Qwest to price below UNE rates  
6 to TSLRIC. As Mr. Teitzel admitted, "UNE rates would always be above TSLRIC." TR 476,  
7 l. 4-7. So, companies using UNEs would pay more than Qwest for the same services and thus  
8 could not offer a competitive alternative. It would be particularly inappropriate to require a cost  
9 floor below UNE rates in this docket when a key component of Qwest's purported "proof" of  
10 effective competition is CLEC's ability to use UNEs to compete. Under these circumstances,  
11 pricing at TSLRIC would be a per se price squeeze of UNE-P competitors.

12           The Commission must establish a cost standard based on imputation *before* Qwest  
13 receives competitive classification. As Mr. Wood explained, "[o]nce Qwest has the ability to  
14 exercise this additional flexibility in the marketplace, it will be difficult, if not impossible, for the  
15 Commission to "unscramble the egg" and retroactively enforce competitive safeguards. . . . By  
16 that time the damage has already been done and no remedy exists for the affected carriers."  
17 Ex. 241-T at 5, l. 7-11 (Wood).

18           ATG and MetroNet urge the Commission, if it grants the Petition, to require  
19 Qwest to price no lower than the sum of the prices of all the UNEs it uses in the service(s).  
20 Since Qwest only attempted to show that certain *services* are competitive, the record contains no  
21 basis to find any of the underlying UNEs are effectively competitive. Thus, all UNEs should be  
22 imputed, and TSLRIC should not be relied upon for any part of determination of the appropriate  
23 price floor.

24  
25  
26 <sup>13</sup> Except within the much narrower scope of competitive classification in the high-cap docket.

1 **VII. CONCLUSION**

2 For all the foregoing reasons, Qwest's Petition should be denied.

3 DATED this \_\_\_\_\_ day of November, 2000.

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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

IN THE MATTER OF THE PETITION OF  
U S WEST COMMUNICATIONS, INC.  
FOR COMPETITIVE CLASSIFICATION

Docket No. UT-000883

NON-CONFIDENTIAL POST-HEARING BRIEF  
OF  
METRONET SERVICES CORPORATION  
AND  
ADVANCED TELCOM, INC.

November 17, 2000