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

POST-HEARING BRIEF OF

ELECTRIC LIGHTWAVE, INC.

FOCAL COMMUNICATIONS OF WASHINGTON

GLOBAL CROSSING LOCAL SERVICES, INC./TELEMANAGEMENT

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

and

XO WASHINGTON, INC., f/k/a NEXTLINK WASHINGTON, INC.

November 17, 2000

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I. INTRODUCTION

1. Qwest Corporation, f/k/a U S WEST Communications, Inc. ("Qwest"), has petitioned the Commission to classify Qwest's business exchange services as competitive in 31 wire centers in the greater Seattle, Bellevue, Tacoma, Vancouver, and Spokane areas. Qwest contends that it needs this grant of competitive classification to have the flexibility to compete effectively with other local exchange companies. The record belies Qwest's claims and demonstrates that Qwest's actual goal is to hamper the ability of the Commission, competitors, and the public to monitor and remedy Qwest actions that would undermine the development of effective local exchange competition.

2. Qwest currently enjoys sufficient pricing flexibility to accomplish all of its stated goals without competitive classification. Qwest can file banded tariffs under which Qwest may price services within an appropriate price floor and ceiling on 10 days notice. RCW 80.36.340; WAC 480-80-045; Ex. 241-TC (ATG/MetroNet Woods) at 32. Even without a banded tariff, Qwest may reduce tariff rates on 10 days notice. RCW 80.36.110(2). Qwest also may enter into individual contracts with customers for business exchange services on rates, terms, and conditions that vary from Qwest's tariff "based upon a customer requirement or competitive necessity." RCW 80.36.150. General tariff rate increases changes and other changes become effective only after 30 days notice, *e.g.*, RCW 80.36.110(1), but Qwest has not identified any instance in which a competitor has modified its price list in response and effective prior to a Qwest tariff revision, nor has Qwest identified any other competitive disadvantage or harm that Qwest has suffered because it must file tariffs instead of price lists. Ex. 129 (Qwest Response to Joint CLEC Data Request No. 01-002). Competitive classification of Qwest's business exchange services thus would not result in any significant enhancement of Qwest's ability to compete

effectively to serve business exchange customers. Ex. 201-TC (Staff Blackmon) at 4-8; Ex. 241-TC (ATG/MetroNet Woods) at 31-34.

3. On the other hand, competitive classification would substantially increase Qwest's ability to engage in anticompetitive behavior. Price lists are not subject to suspension prior to going into effect, and any challenge to price list rates, terms, and conditions may be made only by bringing a complaint where the complainant (other than the Commission), rather than Qwest, bears the burden to prove that those rates, terms, or conditions do not comply with applicable law. *See* RCW 80.36.330(2) & (4); RCW 80.04.110. Yet, Qwest has refused to provide cost studies, price floors, or any other data on its costs to provide any of its business exchange services, including any imputation analysis. Exs. 130-34 (Qwest Responses to Joint CLEC Data Requests Nos. 01-003 through 007). Qwest thus seeks the ability to file price list changes that are not subject to Commission or public scrutiny before taking effect, that are without publicly available cost support, and that any interested party must prove is not fair, just, reasonable, and nondiscriminatory through the complaint process.

4. Qwest's decision to pursue competitive classification, rather than an alternative form of regulation ("AFOR") authorized by the legislature at Qwest's urging last year, underscores Qwest's anticompetitive intent. Similar – and in some cases greater – regulatory flexibility is available under the AFOR, but an AFOR must include wholesale service quality standards and remedies. RCW 80.36.135. No such standards or remedies exist today, either in Commission rules or interconnection agreements. Qwest thus seeks flexibility in dealing with end user customers while avoiding accountability for the quality and reliability of the bottleneck monopoly facilities and services on which competitors depend to be able to provide an effectively competitive alternative to Qwest's retail services.

5. Effective competition for business exchange services does not exist anywhere in Washington and will not exist until competitors have access to Qwest bottleneck facilities used to provide those services on the same terms and conditions that Qwest provides those facilities to itself. Accordingly, Electric Lightwave, Inc., Focal Communications Corporation of Washington, Global Crossing Local Services/Telemanagement, McLeodUSA Telecommunications Services, Inc., and XO Washington, Inc., f/k/a NEXTLINK Washington, Inc. (collectively "Joint CLECs") urge the Commission to deny Qwest's Petition.

II. LEGAL FRAMEWORK

A. Statutory Requirements

6. The authority on which Qwest relies to support its Petition is RCW 80.36.330, which authorizes the Commission to "classify a telecommunications service provided by a telecommunications company as a competitive telecommunications service if it finds, after notice and hearing, that the service is subject to effective competition." RCW 80.36.330(1). The statute defines "effective competition" to mean that "customers of the service have reasonably available alternatives and that the service is not provided to a significant captive customer base." *Id*. The statute does not define "customers" or "customer base," but the Commission has interpreted those terms to focus on end-user customers, rather than other carriers – an interpretation that was upheld by the Court of Appeals in the context of competitively classified companies under RCW 80.36.320. *U S WEST v. WUTC*, 86 Wn. App. 719, 727-30, 937 P.2d 1326 (1997). These statutory terms should be interpreted consistently in light of the legislature's ultimate goal to protect "'ratepayers who have no choice of service providers.'" *Id*. at 728 (quoting report of the Joint Select Committee on Telecommunications). Qwest, however, does not benefit from such statutory construction.

7. The Court of Appeals determined that switched access service provided by competing local exchange companies ("CLECs") was subject to effective competition because the CLECs lack market power and "have every incentive not to jeopardize their relationships with US West, which has nearly 100 percent of the market share for local service within its territory. Given the dominance of US West, preservation of access to US West customers will be critical for [CLECs]." *Id*. at 729-30. The same cannot be said for Qwest when provisioning business exchange services. CLECs obtain facilities from Qwest, including unbundled loops and high capacity circuits, to enable CLECs to provide basic business services. Unless competitors can obtain these facilities on the same rates, terms, and conditions that Qwest provides those facilities to itself, competitors cannot offer end user customers business exchange service that is comparable to Qwest's service. Qwest, as the incumbent monopoly provider, thus has every incentive to limit competitors' ability to use Qwest's own facilities to take customers away from Qwest. In sharp contrast to switched access services provided by CLECs, therefore, Qwest's provisioning of facilities and services to competing carriers has a direct and substantial impact on the extent to which business exchange services are subject to effective competition from the end users' perspective.

8. Qwest, moreover, quickly abandons its purported focus on end user customers and claims that *competitors* could provide competing service to all customers should they choose to do so, and that competitively classifying Qwest's business exchange services will prompt competitors to provide those services to all customers. *E.g.*, Ex. 7-T (Qwest Jensen Rebuttal) at 3 & 17. Not only does the record fail to support Qwest's claims, but RCW 80.36.330 simply is not susceptible to Qwest's interpretation. The statute requires the Commission to determine whether end users *actually have* a choice of service providers, not whether carriers other than

Qwest *could or should* be providing competitive services. The plain statutory language authorizes the Commission to grant competitive classification only if the service "*is* subject to effective competition," which "means that customers *have* reasonably available alternatives and that the service *is not* provided to a captive customer base." RCW 80.36.330 (emphasis added). By definition, effective competition does not exist unless consumers currently have a viable alternative to the services provided by the incumbent monopoly provider. Accordingly, the proper inquiry under the statute is whether end user customers have, not could or should have, an effective alternative to Qwest services.

B. Relationship to Requirements of Section 271

9. Congress shares the goal of the Washington legislature to foster the development of effective local exchange competition, but section 271 of the federal Telecommunications Act of 1996 ("Act") approaches that goal from a different angle than RCW 80.36.330. While the state statute looks at the state of competition from an end user customer perspective, Section 271 requires regulatory review primarily from the point of view of competitors of the incumbent provider. The Act provides that Qwest is not entitled to offer interLATA services until Qwest can demonstrate that it is providing CLECs with access to, and interconnection with, its network as required under the Act and consistent with state commission-approved interconnection agreements. 47 U.S.C. § 271(c). The objective of the Federal Communications Commission ("FCC") in its review of an application under Section 271 is to determine whether the incumbent has sufficiently complied with its legal obligations so that the local exchange market in a state is "irreversibly open" to competition.

10. Section 271, at a minimum, provides guidance on the type of inquiry the Commission should conduct to determine one aspect of whether effective competition exists in a

particular geographic area. In determining the existence of effective competition, the Washington legislature has required the Commission to consider "[t]he ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions." RCW 80.36.330(1)(c). Evidence that Qwest is providing CLECs with access to, and interconnection with, its network in compliance with federal and state law under Section 271 would tend to prove that competitors are able to provide functionally equivalent or substitute services to consumers. The lack of such evidence, or the presentation of evidence that Qwest is *not* providing the requisite access to, and interconnection with, its network, demonstrates that competitors are *unable* to provide such alternatives. Thus, although Section 271 is not expressly incorporated into RCW 80.36.330, the federal statute provides a framework for determining the availability of competitive alternatives and, in turn, whether a service is subject to effective competition.

11. Qwest has largely failed to produce any evidence that it is providing CLECs with access to, and interconnection with, its network as required by federal and state law, much less that Qwest has satisfied the specific requirements in Section 271. Commission Staff and the CLECs, on the other hand, have produced substantial evidence that Qwest is not complying with these legal obligations. In the absence of competing networks that wholly duplicate Qwest's network, alternative providers cannot "make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions" unless those providers are able to use Qwest facilities to serve end user customers under terms and conditions that are equivalent to Qwest's ability to use those facilities. The record conclusively demonstrates that CLECs do not have such access to Qwest facilities and that the local exchange market in the 31 wire centers specified in Qwest's Petition is neither "irreversibly open to competition" under Section 271 nor

"subject to effective competition" as required by RCW 80.36.330.

III. EVALUATION OF QWEST PETITION

12. Qwest has failed to present sufficient evidence to carry its burden to prove the existence of effective competition for business exchange services in any of the 31 wire centers specified in Qwest's Petition. Qwest purports to identify the location of CLEC facilities in these wire centers, but to the extent the maps Qwest provides have any value, they demonstrate only that competitors can access the majority of customer locations in these wire centers only through use of Qwest facilities. Qwest asserts that competitors are, in fact, using Qwest facilities to serve business exchange customers, but Qwest produced no evidence to prove that these facilities are available to CLECs at nondiscriminatory rates, terms, and conditions, including service quality and reliability, that would enable competitors to provide "reasonably available alternatives" to Qwest's retail service. To the contrary, Qwest ignores evidence presented by both Commission staff and CLECs demonstrating that Qwest discriminates against CLECs when provisioning and repairing the facilities on which CLECs rely to provide competing services and that Qwest fails to provide such facilities in a manner that permits CLECs to comply with the Commission's retail service quality standards, much less match or exceed Qwest's retail service quality. The Commission cannot grant Qwest's Petition in light of this record.

A. Definition of Relevant Market

1. Relevant Geographic Market

13. Qwest requests competitive classification of its business exchange services in 31 wire centers, while Staff has recommended a grant of pricing flexibility in four exchanges. The statute does not address classification of a telecommunications service as competitive in a geographic area that is less than the company's statewide service territory, much less specify

how such an area may be designated. The Joint CLECs take no position on whether any such geographic area can or should be determined at the wire center or exchange level. Regardless of whether the geographic market is defined in terms of a wire center or an exchange, however, the statute requires that effective competition exist *throughout* the geographic market before the Commission may classify any service as competitive in that market. Effective competition does not exist throughout any of the 31 wire centers Qwest has specified, much less throughout any of the four exchanges Staff has proposed, as discussed in more detail below. The determination of the "relevant geographic market," therefore, is irrelevant, because Qwest has not demonstrated that effective competition exists in *any* geographic market.

2. Relevant Product Market

14. The statute authorizes the Commission to classify a "telecommunications *service* provided by a telecommunications company as a competitive telecommunications *service*." RCW 80.36.330 (emphasis added). Qwest has specified several "services" for which it seeks competitive classification in this proceeding. The "relevant product market," therefore, is each such service. Commission staff, however, has recommended that the Commission classify services as competitive in certain exchanges "limited at this time to customers served on a DS-1 or larger circuit." Ex. 201-TC (Staff Blackmon) at 10. The Commission cannot adopt Staff's recommendation consistent with state law.

15. Neither the legislature nor the Commission has defined "telecommunications service," but Congress has defined that term as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." 47 U.S.C. § 153(46). Staff's proposal to limit the Commission's consideration of a "service" based on the facilities used to provide that service is fundamentally inconsistent with this definition. Even if the Commission were to adopt

a different definition, RCW 80.36.330 is not susceptible to Staff's interpretation. The Commission may classify a service as competitive, but nothing in the statute authorizes the Commission to classify a *portion* of a service as competitive. Indeed, Dr. Blackmon candidly admitted that "these are the same services being provided," regardless of the size of the customer or the facilities used to provision the service, and that Staff "thought some about how the company would need to structure its price list and its tariff if only the larger [customer] segment is to be in the price list, and we're not exactly sure how to do that." Tr. at 751. The only relevant product market the Commission can consider, therefore, is each entire service for which Qwest seeks competitive classification.

a. Do customers have reasonably available alternatives (price, product features, product quality/reliability)?

16. Customers do not have reasonably available alternatives to any of the services for which Qwest seeks competitive classification throughout any of the 31 wire centers. No CLEC network, either individually or collectively, approaches the size and scope of Qwest's network, and even Qwest does not contend that business exchange customers throughout each wire center have access to service from a competitor using solely its own facilities. *See* Tr. at 720 (Staff Blackmon examination) ("the facilities of competitors . . . by themselves would not justify the recommendation that staff is making"); Ex. 12-C (Qwest Petition) at Attachment K; Ex. 137 (Qwest Response to Joint CLEC Data Request No. 01-010).

17. Most consumers, therefore, can obtain service from a CLEC only to the extent that CLECs can obtain the necessary facilities from Qwest, either to connect the customer location with the CLEC's network (*i.e.*, unbundled loops, including high capacity circuits) or to provide the entire functionality of the service (*i.e.*, through a platform of unbundled network

elements ("UNE-P") or resale).[1] Under these circumstances, Qwest cannot demonstrate that customers have access to "reasonably available alternatives" unless Qwest affirmatively proves that competitors have access to Qwest facilities at rates, terms, and conditions that are just, reasonable, and nondiscriminatory – in other words, on the same basis that Qwest provides those facilities to itself. Qwest has not offered such proof, and the record evidence demonstrates the contrary – that competitors are unable to provide "reasonably available alternatives" to Qwest business exchange service if they must rely on facilities and services provided by Qwest.

Product Quality/Reliability

18. Commission Staff analyzed the limited performance data available and concluded that unbundled network elements are not a viable source of price-constraining competition for Qwest's business exchange service. Ex. 201-TC (Staff Blackmon) at 13-15. The record evidence amply supports this conclusion. Provisioning and repair data demonstrates that Qwest consistently discriminates against CLECs, taking far longer to provision and repair facilities provided to competitors than Qwest takes to provision and repair those facilities for itself. *Id*.; Ex. 203-C (Staff Blackmon Exhibit GCB-3C); Exhibits 157-C through 159-C (Qwest Responses to WUTC Data Requests). Qwest's provisioning intervals for facilities provided to CLECs are also substantially longer than the five business days in which the Commission requires all local exchange companies to provide basic business exchange service. *Id*.; *see* WAC 480-120-051. XO's experience is consistent with, if not worse than, Staff's figures, having had more than half of its orders for unbundled loops held for an average of 7 days beyond the due date, with a mean time to repair of over 40 hours. Ex. 281-T (XO Anderson) at 4-6.

[1] The inability of resale to provide any meaningful market pressure on Qwest's business service is discussed in Section III.C.3, *infra*.

19. Qwest's provisioning and repair of high capacity circuits to CLECs is even worse than Qwest's provisioning and repair of unbundled loops. Between April 1 and September 1 of this year, Qwest held 68% of XO's orders for high capacity circuits beyond the due date for an average of 18 days. *Id*. at 4. During that same time period, XO opened over 200 trouble tickets for Qwest high capacity circuits in Seattle and Spokane, with a mean time for Qwest to repair those circuits of 90 hours. *Id*. at 6. Commission Staff, however, did not investigate Qwest provisioning and repair of high capacity circuits, in sharp contrast to Staff's review of provisioning and repair of Qwest unbundled loops. Staff nevertheless recognizes that there are provisioning issues for such circuits, stating, "Orders are more likely to be held or denied than are business exchange orders." Ex. 202 (Staff Blackmon Exhibit GCB-2). Yet, despite problems that are similar to, or worse than, Qwest's provisioning of unbundled loops, Staff recommends that the existence of Qwest special access circuits "[j]ustifies competitive classification of business exchange service for customers served by DS-1 or larger circuits." *Id*. The record evidence flatly contradicts Staff's recommendation and demonstrates, without contradiction, that CLECs cannot provide business exchange service that is at least equal in quality to Qwest's service quality when using either Qwest high capacity circuits or unbundled loops.

20. Qwest ignores the service quality issue except to contend that XO's "allegations are very general and lack sufficient detail to allow Qwest to formulate a specific response." Ex. 156-T (Qwest Hooks Rebuttal) at 9.[2] Qwest, however, as the provider of the circuits and loops,

[2] Qwest also claims that it cannot meet competitors' needs in the absence of CLEC forecasts, *id*. at 5, but Qwest does not require forecasts from any other customers and is able to provision far more facilities to those customers in a more timely manner. Ex. 160 (Qwest Response to Data Joint CLEC Request No. 02-013). Even when Qwest obtains such forecasts, moreover, Qwest does not rely on those forecasts and refuses to represent that facilities will be available to meet forecasted needs. Ex. 161 (Qwest Response to Joint CLEC Data Request No. 02-014).

should have all the information it needs to determine the quality of service it provides to XO. Indeed, if Qwest cannot even measure the service quality it provides to competitors, the Commission should seriously question any contention by Qwest in this or any other proceeding that Qwest is complying with its service quality obligations. Even if Qwest could plausibly claim that it cannot determine the level of service quality it provides to XO without XO's assistance, Qwest produced no evidence that it even requested any more detailed information. The Commission, therefore, should construe Qwest's failure to contest XO's evidence as establishment of the fact that Qwest is not providing unbundled loops or high capacity circuits to competitors at a level of service quality that is at least equal to the service quality Qwest provides to itself.

21. Qwest seeks to minimize its implicit concession that it provides competitors with inferior service quality with the suggestion that XO "has the ability to raise these issues with its Qwest account team or in a formal complaint if it deems the allegations to be sufficiently serious to warrant that action." *Id*. Qwest misses the point. The Commission must determine whether *customers* of Qwest business service have access to reasonably available alternatives. CLECs cannot provision or repair service to customers any better than Qwest provides and repairs the underlying facilities to the CLECs. Regardless of any redress that *competitors* may have for the discriminatory and poor service quality they receive from Qwest, their *customers* have no alternative to Qwest service that is comparable in quality and reliability to the service Qwest provides if Qwest provides discriminatory and poor quality service to CLECs. Any *potential* future redress for wholesale service quality thus is irrelevant in light of undisputed evidence that CLECs *currently* cannot provide "readily available" and competitive retail alternatives to Qwest business services throughout a Qwest wire center or exchange.

22. Nor do CLECs have any effective means of redress for the level of service quality they receive from Qwest. None of the interconnection agreements the Commission has approved in Washington include any remedy for Qwest's failure to provide the service quality required by the Act. Ex. 162 (Qwest Response to Joint CLEC Data Request No. 02-015). The Commission has terminated the rulemaking in Docket No. UT-990261 without establishing any carrier-to-carrier service quality standards, much less remedies for failure to comply with any such standards.[3] In the only complaint proceeding brought to compel Qwest to comply with its interconnection obligations, the Commission refused to penalize Qwest for violation of federal and state law other than to order Qwest to take actions that Qwest was already obligated to take. *MCImetro v. U S WEST*, Docket No. UT-971063. Neither CLECs nor customers benefit when competitors must devote limited resources and months or years in litigation in an attempt to obtain better service while the only consequence Qwest faces for nondiscriminatory and inadequate provisioning and repair is an order reaffirming Qwest's original obligations.

23. XO and other facilities-based CLECs cannot provide business exchange services to customers throughout a Qwest wire center or exchange without relying on unbundled loops or special access services that are provided by Qwest. These CLECs, however, not only cannot match the service quality that Qwest provides to its end user customers, these CLECs cannot

[3] The Commission approved a stipulation in the U S WEST/Qwest merger proceeding, Docket No. UT-991358, in which Qwest agreed to certain monetary remedies for failure to comply with wholesale provisioning standards. Those remedies, however, do no go into effect until January 2001, and there is no evidence that these standards and remedies will improve Qwest's wholesale service quality, much less that they will enable CLECs to use Qwest facilities to provide effectively competitive alternative services to consumers. To the contrary even if Qwest complied with the provisioning standards in the settlement, CLECs could not provision service to end user customers using Qwest facilities in compliance with the Commission's retail service quality requirements. Remedies for nonperformance, moreover, are limited and subject to numerous conditions, and the most stringent remedies do not apply until 15 days *after* the provisioning deadlines, further limiting any theoretical potential effectiveness they may have.

avoid violating the Commission's service quality standards when using Qwest facilities. The record thus demonstrates that a significant number of consumers in each of the 31 wire centers Qwest has identified do not have readily available alternatives to Qwest services with respect to product quality and reliability.

Price

24. The other area in which CLECs cannot provide reasonably available alternatives to Qwest service is price, at least with respect to many of the 31 wire centers in which Qwest seeks competitive classification. Unless the Commission grants the pending request for reconsideration of its final order in the generic costing and pricing proceeding, Docket Nos. UT-960369, *et al*., CLECs face a substantial increase in the recurring and nonrecurring rates they pay to Qwest for unbundled loops. *See, e.g.*, Ex. 281-T (XO Anderson) at 9. Facilities-based CLECs operating in Spokane will be particularly hard hit, with the unbundled loop prices in five of the eight wire centers increasing 81% to $24.18, which when combined with the nonrecurring charge of $161.81 for provisioning, coordinated cut-over, and testing, exceeds the recurring and nonrecurring retail rates for Qwest's basic business exchange service. *Id*. at 9-10. Qwest's own witness conceded that CLECs will not use unbundled loops that are priced at this level to provide competing local exchange service. Tr. at 244 (Qwest Jensen Redirect).

25. The Commission has yet to address, much less establish, appropriate forward-looking cost-based rates for DS-1 and DS-3 loops, and the evidentiary hearings on these and other issues to be considered in Part B of the new generic costing and pricing proceeding, Docket No. UT-003013, have been continued until March and April of next year. CLECs, therefore, must obtain high capacity circuits out of the Qwest's tariffs and price lists at prices that far exceed forward-looking cost and thus significantly limit the financial viability of using those

circuits to provide business exchange service. Although Qwest apparently is willing to offer DS-1 and DS-3 loops at the prices Qwest has proposed in Docket No. UT-003013, those rates also substantially exceed Qwest's forward-looking costs, and Qwest proposes to impose full nonrecurring charges and enormous retroactive liability if a CLEC attempts to convert existing tariffed or price listed services to unbundled network elements.

26. No party has identified a source for unbundled loops or high capacity circuits to customer locations other than facilities provided by Qwest or constructed by the CLEC itself. No CLEC has facilities constructed to anywhere close to every business location in any of the 31 wire centers specified in Qwest's petition. Even Qwest concedes that a CLEC cannot rely on Qwest facilities if the price of those facilities approaches or exceeds Qwest's retail rates for the services those facilities are used to provide. At least with respect to all but one of the wire centers in the Spokane exchange, as well as to other wire centers in deaveraged loop price zones 4 and 5, CLECs cannot economically use Qwest facilities to provide basic business exchange service, leaving the majority of customers in those wire centers without "reasonably available alternatives" to Qwest retail service.

b. Does Qwest have a significant captive customer base?

27. Qwest has a significant captive customer base for all of the services for which Qwest seeks competitive classification. As discussed above, competitors cannot provide customers with reasonably available alternatives to Qwest services in any location in which those competitors have not installed their own facilities, and CLECs have not installed their own facilities in the majority of the geographic area in each Qwest wire center service territory. Qwest customers without reasonably available alternatives are "captive," and when the majority of Qwest customers in a geographic area are captive, the only reasonable conclusion is that Qwest has a significant captive customer base.

28. Staff takes a different view of the statutory term "significant captive customer base." Staff agrees that small business customers represent a captive customer base, but staff contends that these captive customers are not "significant" if the Commission adopts conditions that protect them from Qwest's ability to exercise its monopoly market power. *See* Tr. at 693 (Staff Blackmon examination). Such an interpretation would render RCW 80.36.330 meaningless.

29. Washington statutes already provide conditions for protecting captive customers from the exercise of monopoly power by requiring the incumbent monopoly provider to file tariffs and be subject to the Commission's full regulatory oversight. The conditions Staff proposes not only effectively incorporate these existing regulatory protections, but "create some risk for [Qwest] that they will end up with more regulation of that segment of the market." Tr. at 699 (Staff Blackmon examination). If the application of such conditions to a captive customer base rendered it insignificant, every service Qwest provides could be classified as competitive as long as Qwest is subject to conditions that perpetuate or increase existing regulation. The statute simply is not susceptible to such a construction.

30. The purpose of RCW 80.36.330 is to recognize when the market, instead of the Commission, can discipline the incumbent monopoly service provider and to permit the market, rather than the Commission, to exercise that discipline. Classifying a service as competitive subject to additional regulatory restrictions is inherently contradictory. By finding that regulatory conditions are required to protect consumers, the Commission necessarily recognizes that the market cannot provide that protection. More specifically, the Commission cannot logically conclude that a captive customer base is not "significant" if those customers merit special conditions because they are sufficiently numerous and in need of protection from

monopoly market power.

31. The Joint CLECs agree with Staff that the market cannot discipline Qwest's exercise of monopoly market power over small business customers. The Joint CLECs part company with Staff on the statute's requirements under these circumstances. If continued regulation is necessary to protect these customers, the services they obtain from Qwest cannot be classified as competitive. Any other conclusion is fundamentally inconsistent with RCW 80.36.330.

B. Market Concentration

32. Market concentration, *i.e.*, the level of Qwest's market share, is largely irrelevant in the absence of evidence proving that competitors have access to the entire market. As discussed above, CLECs are foreclosed from providing "readily available" alternatives to customers to whom only Qwest currently has facilities constructed, and thus Qwest's market share statistics reflect a significant captive customer base, regardless of the evidence of CLEC penetration into a portion of Qwest's market. Accordingly, the Joint CLECs do not address the issue of market concentration other than to note that this factor does not and cannot overcome Qwest's failure of proof on the ability of competitors to provide "readily available" alternatives to substantially all business exchange customers.

C. Market Structure

1. Ease of Entry

33. "Ease of entry" is little more than a different way of determining the ability of competitors to provide "readily available" alternative sources of telecommunications service. The Commission has facilitated *legal* entry by simplifying and streamlining the process for obtaining registration and competitive classification as a telecommunications company.

Practical barriers to entry remain in the form of CLECs' inability to obtain facilities from Qwest on fair, just, reasonable, and nondiscriminatory rates, terms, and conditions, as well as the time and enormous financial resources required to construct a network. *E.g.*, Ex. 241-TC (ATG/MetroNet Wood) at 28. As long as both of these barriers exist, no CLEC can enter the market and readily provide competitive business exchange services to substantially all or even the majority of customers in any of the 31 wire centers Qwest specifies in its Petition.

2. Exercise of Market Power

34. Qwest continues to exercise significant market power throughout its service territory in Washington. Qwest could not discriminate against CLECs in the provisioning and repair of facilities or provide those facilities at unacceptable levels of quality and reliability if CLECs had any economically viable alternative to obtain the facilities necessary to serve end user customers. Consumers seeking alternatives to Qwest service, therefore, either must be served entirely over a CLEC's own network or accept service quality that is substantially inferior to the service they receive from Qwest. As long as customer choice is so limited, Qwest continues to enjoy, and will continue to exercise, monopoly market power. *See, e.g.*, Ex. 241-TC (ATG/MetroNet Wood) at 28-30.

3. Resellers (e.g., Is resale an effective measure of competition?)

35. Resale is not an effective measure of competition, nor can resellers exert any significant market discipline on Qwest. Resellers are wholly reliant on Qwest to provide the service to end user customers and thus have no control or ability to improve service quality. Nor can resellers constrain Qwest's pricing. Resellers obtain services from Qwest for resale at approximately 15% off of the retail rate, which represents the costs Qwest reasonably avoids in providing the service to a wholesale, rather than a retail, customer. Qwest continues to receive

the End User Common Line ("EUCL") and other surcharges, as well as all access charges for toll calls made to or by the end user customers. Accordingly, Qwest can raise its retail rates at will without any constraint from resellers, whose discount off of the retail price remains the same. *See* Ex. 241-TC (ATG/MetroNet Wood) at 17-19; Ex. 202 (Staff Blackmon Ex.GB-2).

36. Qwest, however, contends that a reseller recovers its costs through application of the discount to the original retail price, so that it could underprice Qwest if Qwest were to raise the retail price and force Qwest to reduce that price to its original level. *See* Tr. at 245-46 (Qwest Jensen redirect). Qwest's argument does not withstand scrutiny. Assume, using the example of a service with a retail price of $100 and a resale price of $85, that Qwest raises the retail price by 20% to $120, correspondingly increasing the resale price to $102 (15% off the $120 retail rate). Even if a reseller offered the service at $117 (the resale price plus the $15 original avoided cost discount amount), Qwest would generate $102 (plus surcharges and access) in revenues for every resold service – $2 *more* than Qwest generated per service by providing the service to retail customers at the original price. Qwest, therefore, theoretically could lose every retail customer to a reseller in this scenario and generate more revenues than it would generate by providing that service to retail customers at the original retail price. Qwest cannot credibly claim that resellers exert any pricing constraints when Qwest can increase both its retail rates and its revenues regardless of resellers' response to a retail price increase.

37. Qwest also ignores its own evidence on the extent to which CLECs resell Qwest services, as well as its own internal analysis of resale. Qwest's Petition demonstrates that only a small fraction of its business lines are resold in the 31 wire centers specified in Qwest's Petition, and that percentage in many cases is remaining constant or *declining*. Ex. 2-C (Revised Attachment G, Exhibit TAJ-2C) at columns SUM(G) and G/G+N. At least one internal Qwest

document confirms this trend, noting a far larger percentage of resold lines less than four years ago along with the assumption that resellers are "shifting customers over to their own network as rapidly as possible to avoid access charges and to increase the utilization of their network – and thereby gaining complete customer control." Ex. 91-C (U S WEST Strategy Document). Even Qwest, therefore, recognizes that resale is not a viable long-term strategy for competitive entry, and resale currently is not exerting, and cannot exert in the future, any constraints on Qwest market power.

IV. OTHER – POLICY CONSIDERATIONS

38. "The commission *may* classify a telecommunications service" as competitive if effective competition exists. RCW 80.36.330(1) (emphasis added). The use of the permissive "may classify" is significantly different than the mandatory "shall classify" used in the companion statute for classifying companies as competitive. RCW 80.36.320. The Commission thus may, but need not, classify as competitive an individual service provided by Qwest, even if Qwest is able to demonstrate that a service is subject to "effective competition." The statute does not expressly identify factors the Commission should consider other than those related to the existence of effective competition, but the legislature has provided guidance through its policy declaration. In particular, Washington public policy is to "[m]aintain and advance the efficiency and availability of telecommunications service" and to "[p]romote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state." RCW 80.36.300(2) & (5).

39. Qwest has consistently attempted to undermine these public policies. The Commission established a lower rate of return for Qwest in its last rate case because of Qwest's repeated failure to provide adequate service to both end-user and carrier customers. *WUTC v.*

U S WEST, Docket No. UT-950200, Fifteenth Supp. Order (April 11, 1996), *aff'd*, 134 Wn. 2d 74, 949 P.2d 1337 (1997). Qwest has also failed to comply with state and federal laws requiring that it allow competing providers nondiscriminatory access to its network. *E.g., MCImetro Access Transmission Services v. U S WEST*, Docket No. UT-971063, Commission Decision and Final Order (Feb. 10, 1999). Qwest implicitly acknowledges its refusal to comply with these legal obligations by producing no evidence whatsoever in this proceeding to prove that Qwest is providing competitors with fair, just, reasonable, and nondiscriminatory access to, and interconnection with, its network.

40. The Commission should carefully consider Qwest's antipathy to the development of local exchange competition in Washington when evaluating Qwest's Petition for greater flexibility in providing business exchange services. Qwest has consistently demonstrated that it would like nothing more than to preclude CLECs from using Qwest facilities and services to compete with Qwest. CLECs, however, rely heavily on such facilities and services to provide basic voice grade services to consumers. Indeed, no economically rational CLEC would continue to purchase unbundled loops and high capacity circuits at the discriminatory and inferior quality Qwest provides if the CLEC had an economically viable alternative. Granting Qwest's Petition not only potentially harms further development of effective competition but would not even benefit consumers, according to Staff, whose experience has been that when the Commission grants "competitive classifications, not much happens afterwards." Tr. at 715 (Staff Blackmon examination); *see id*. at 733 (testifying that large business customers do not benefit from the additional pricing flexibility for competitively classified services).

41. Accordingly, even if Qwest could demonstrate that business exchange services are subject to effective competition – which, as discussed above, Qwest has not done and cannot

do – the Commission should not grant Qwest's Petition, at least until sufficient competitive safeguards have been established, including completion of cost docket proceedings and promulgation of adequate carrier-to-carrier service quality measures and remedies. Prematurely granting such flexibility to Qwest would allow it to use reduced regulation to its competitive advantage, to further limit customer choice, and to hamper the ability of CLECs to provide viable alternative sources of basic local exchange services to Washington consumers.

V. RECOMMENDATIONS REGARDING DIFFERENT PROPOSALS

A. Qwest Proposal (with Staff conditions) re 31 wire centers

42. Qwest has not carried its burden to prove that effective competition exists in any of the 31 wire centers specified in its Petition. The Staff conditions implicitly acknowledge that fact by imposing what amounts to potentially even greater regulatory constraint on Qwest's provisioning of service to small business customers than is currently in place. Qwest, moreover, would extend the application of these conditions to wire centers in which even Staff did not believe that the conditions would be sufficient to protect consumers. Qwest's proposal is inconsistent with RCW 80.36.330, lacks record evidence support, and should be rejected.

B. Staff Alternatives

1. 4 Areas; services over DS-1 or bigger

43. Qwest's failure to prove the existence of effective competition for any business exchange service in any wire center precludes any grant of Qwest's Petition. Even were that not the case, RCW 80.36.330 authorizes the Commission to classify a telecommunications service as competitive, but the statute does not permit classification of only a portion of a telecommunications service based on the size of the customer. Indeed, such a grant of competitive classification would conflict with statutory restrictions on unreasonable preference

and rate discrimination. RCW 80.36.170 & 180. Commission Staff, moreover, cannot even determine how this proposal could be implemented. Staff's first alternative proposal thus is inconsistent with RCW 80.36.330, lacks record evidence support, and should be rejected.

2. 4 areas; all business services

44. Staff's second alternative proposal suffers from the same deficiencies as Qwest's proposal. The record amply demonstrates that consumers other than the minority in locations to which CLECs have constructed their own facilities do not have "reasonably available alternatives" to Qwest business exchange service. These consumers represent a "significant captive customer base," and Staff's proposed conditions adding regulatory constraints to protect small business customers are fundamentally inconsistent with competitive classification and serve only to highlight, rather than remedy, the absence of effective competition. Accordingly, Staff's second alternative proposal, like its first proposal, is inconsistent with RCW 80.36.330, lacks record evidence support, and should be rejected.

C. MetroNet/ATG proposed conditions

45. The Joint CLECs agree with Mr. Wood's recommendation that the Commission reject Qwest's Petition. *See* Ex. 241-TC (ATG/MetroNet Wood) at 37. If the Commission were to grant competitive classification for any service in any wire center Qwest has requested, the Joint CLECs would also support Mr. Wood's restrictions on any such grant. Even under those restrictions, however, the record evidence would not support any grant of competitive classification. Mr. Wood, for example, recommends that competitive classification be granted only in areas where Qwest faces significant facilities-based competition, including "the existence (not just potential) of properly priced and reliable unbundled loops – provisioned in a timely manner." *Id*. at 38. The record conclusively demonstrates that Qwest does not provide

unbundled loops or high capacity circuits consistent with this proposed restriction. Accordingly, the Commission should deny Qwest's Petition.

D. Deny petition altogether

46. Qwest has failed to prove the existence of effective competition for business exchange service in any of its wire centers. The statute authorizes a grant of competitive classification only on a finding of effective competition. The Commission, therefore, cannot classify Qwest's business services as competitive. Even if Qwest could prove the existence of effective competition in any wire center, the Commission should deny the Petition until the Commission has completed proceedings in the generic costing and pricing proceedings and adopts appropriate wholesale service quality standards and remedies.

VI. APPROPRIATE COST STANDARD

47. Another troubling aspect of Qwest's Petition in addition to the lack of a demonstration of effective competition, is any specific proposal for ensuring compliance with the requirement that "[p]rices or rates charged for competitive telecommunications services shall cover their cost." RCW 80.36.330(3). Qwest proposed only to represent that it would comply with this requirement and other aspects of state law, but refused to provide cost studies or to conduct an imputation analysis. Exs. 131-36 (Qwest Responses to Joint CLEC Data Requests Nos. 01-004 through 009). Qwest, however, indicated that an imputation standard would be appropriate to prevent a price squeeze:

> Qwest will ensure that its retail pricing does not effectuate a price squeeze by pricing its retail services at a level above its comparable wholesale service prices. For example, Qwest will price its retail flat-rated business basic exchange service at a rate higher than the imputed price for an unbundled loop plus all other relevant TSLRIC costs of providing the service purchased on a wholesale basis.

Ex. 101 (Qwest Response to ATG/MetroNet Data Request No. 03-042).

48. The Commission has adopted an imputation requirement in other proceedings. *E.g.*, *MCI, et al. v. U S WEST, et al.*, Docket No. UT-970658, Final Order Granting Petition (March 1999) (requiring imputation of wholesale input price and rejecting use of TSLRIC study to prevent predatory pricing). Several CLECs proposed a rule that would codify this requirement in the Telecommunications Rulemaking, Docket Nos. UT-990146, *et al.*, based on a Utah statute. *See* Utah Code Ann. § 54-8b-3.3(3). Commission Staff, however, has declined to include the CLECs' proposed rule or any other codification of the Commission's imputation requirement in the rules Staff intends to propose to the Commission for adoption in that proceeding.

49. If the Commission competitively classifies any Qwest business exchange service, the Commission should reaffirm its requirement that Qwest's retail price(s) for that service must exceed (1) the rates charged to competitors for bottleneck facilities, including the recurring and nonrecurring charges for all component unbundled network elements, plus (2) the total service long-run incremental costs ("TSLRIC") of all other facilities and services used to provide that service, including retailing costs. Such a requirement is critical to the ability of competitors to provide "reasonably available" alternatives to Qwest retail service, as well as a check on the accuracy and reasonableness of both Qwest's retail and wholesale pricing.

VII. CONCLUSION

50. Qwest has failed to demonstrate that any of its business exchange services are subject to effective competition. Accordingly, the Joint CLECs urge the Commission to deny Qwest's Petition.

RESPECTFULLY SUBMITTED this 17th day of November, 2000.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Electric Lightwave, Inc., Focal Communications Corporation of Washington, Global Crossing Local Services, Inc./Telemanagement, McLeodUSA Telecommunications Services, Inc., and XO Washington, Inc.

By _____
Gregory J. Kopta