

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION
OF QWEST CORPORATION FOR
COMPETITIVE CLASSIFICATION OF
BUSINESS SERVICES IN SPECIFIED
WIRE CENTERS

Docket No. UT-000883

BRIEF OF PUBLIC COUNSEL AND TRACER

November 17, 2000

I. INTRODUCTION

1. Qwest has not brought in forward in its petition sufficient evidence to demonstrate that effective competition exists in the 31 specific wire centers for the business services listed on Attachment A to the Petition. Qwest has failed to demonstrate that effective competition exists today; that customers of its business services have reasonably available alternatives and that there will be no significant captive customer base if this Petition were to be granted.
2. In 1995 US West argued during its rate case that the existence of any competition required the Commission to treat them as though the market were fully competitive. Qwest returns five years later with a slightly more refined version of the same, failed argument. At its essence, Qwest's argument is that there is a competitive "presence" in each of the wire centers it identified, that therefore business customers have a competitor "capable" of offering service, in turn, therefore, Qwest's customers can not be "captive," and that therefore there is "effective competition."
3. Granting this Petition will adversely affect all business customers-, small, medium, and large in the affected wire centers. Small and medium sized business customers almost certainly form the bulk of the existing captive customer base and have few if any alternatives to Qwest business services today. TRACER's client members oppose the Petition because the CLECs are currently unable to profitably offer services to very large business customers. This Petition would prematurely classify services as competitive which are not yet subject to effective competition. Both Public Counsel and TRACER support the development of a competitive marketplace for telecommunications services. The benefits that will flow from a truly competitive marketplace will benefit all consumers of telecommunications services. However, until effective competition exists in fact and not merely in theory, any grant of competitive classification would be premature, and would create a grave risk of an exercise of market power by Qwest. The stakes here are high. A premature grant of competitive classification would not

only expose business customers in Washington's major urban areas to real and irreparable economic harm, but would severely threaten the development of a real, competitive market in this state.

II. LEGAL FRAMEWORK

4. The issue presented by this case is whether Qwest has met the statutory requirements of RCW 80.36.330. At the outset it is important to remember that the statute is permissive, and thus the Commission may nevertheless deny the Petition if it finds a grant would not be in the public interest.

5. In considering whether granting the Petition would be in the public interest, the Commission ought to be sensitive to the related legal and public policy issues implicated by the Petition. These issues include the degree to which Qwest can already achieve its stated goals through the regulatory tools the Commission has in place and which are available to Qwest (such as its banded-rate tariff authority); the relationship of this Petition to other proceedings involving Qwest (See Section IV.); and the public policy implications of prematurely granting this Petition at this time. Further, even if competitive classification were granted, the Commission has discretion to waive or not waive regulatory conditions, such as the prohibitions against undue preferences and discrimination contained in RCW 80.36.170 and RCW 80.36.180.

A. Statutory Requirements

1. The Legal Framework Governing Qwest's Business Services Today.

6. Qwest's marketing of its business services is currently regulated by the Commission in the public interest. Through this Petition Qwest is seeking to competitively classify its business services in 31 wire centers and, presumably, to be freed from the restrictions of RCW 80.36.170 and RCW 80.36.180. As discussed below, Qwest already has the ability to meet all but one of its goals through the use of its banded rate tariff authority. It is clear that what Qwest seeks is not to "even" the competitive landscape, but to obtain for itself the freedom to discriminate against

customers without alternatives to Qwest's business services and to raise or artificially maintain prices for these customers who do not have reasonably available alternatives today.

a. Qwest Possesses Pricing Flexibility Today.

7. Qwest's Petition states that it needs competitive classification in order to overcome the disabilities attendant to 30 day notice of changes to tariffed rates, and its inability to offer interLATA long distance services. Ex. 12, p. 2, ll. 8-23. Qwest Witness Theresa A. Jensen's stated goal is to obtain "parity of regulatory treatment..." for Qwest vis-a-vis the CLECs. Ex. 1-T, p. 16, l. 16 - p. 17, l. 1. Mr. Teitzel identifies the following four activities as benefits to Qwest of competitive classification: (a) changing price, terms and conditions on ten days notice, (b) implementing promotions on ten days notice, (c) offer customer incentives on ten days notice, and (d) customer specific pricing of services. Ex. 76-T, p. 8, l. 2-8.
8. Excepting 271 relief, all but one of the "constraints" identified by Qwest and the company's witnesses are addressable within the existing regulatory framework the Commission has provided to Qwest. As Dr. Blackmon testified, Qwest can achieve the majority of its goals through tools the Commission has placed at the company's disposal. Ex. 201-T, p. 5, l. 3 - p. 8, l. 2. First, it is clear that Qwest's ability to offer interLATA service is contingent upon a successful Section 271 application which cannot be decided in this docket. Second, Qwest already possesses the authority to change prices, terms, conditions, promotions, and incentives under its banded rate authority. See RCW 80.36.340 and *Washington Utilities and Transportation Commission v. US West Communications, Inc.*, Docket UT-950200, Fifteenth Supplemental Order, Commission Decision and Order Rejecting Tariff Revisions; Requiring Refiling, p. 95. Third, Qwest is free to request that the Commission waive the thirty day notice requirement for *any* change in rates where it can show good cause for doing so (not just under the banded rate tariff). RCW 80.36.110. Qwest has not sought to do so regarding its recent promotional offers. Tr. p. 390, ll. 15-18.

9. Qwest already possesses the ability to flexibly price its business services in every wire center it serves in the state of Washington. Under the banded rate tariff authority this Commission expressly granted to Qwest in its 1995 rate case, Qwest can price its services anywhere within the band comprised of a floor of its cost of service and a ceiling of its currently tariffed rates. *Id.* Qwest's internal documents support the conclusion that they are well aware of their ability to avoid the 30-day notice period via their banded rate tariff. Ex.s 121 and 122.

10. As Qwest witness Mr. Teitzel testified, Qwest could utilize the banded rate authority to change its business service on 10 days notice. Mr. Teitzel testified that Qwest could not, under its banded-rate authority, price services on a wire center basis instead of state-wide. Tr. p. 418, ll. 2-12. Qwest can flexibly price all its business services in all its wire centers under its banded rate tariff authority and thereby achieve the major stated goals of the Petition and the company's witnesses. Qwest has, for reasons of its own and unknown to this Commission, chosen not to utilize its banded rate authority to market its business services. What Qwest cannot currently do is explicitly discriminate in price amongst its customers.

11. There is no evidence in the record that the banded rate tariff would be inadequate to address the "30 day vs. 10 day notice" issue, or that Qwest has tried and failed to obtain the Commission's permission to waive the 30 day notice requirement on a regular basis such that it has impeded Qwest's ability to compete.

b. Qwest is Currently Prohibited from Price Discrimination Except by Contact.

12. The only stated goals which Qwest cannot achieve under the existing regulatory structure is to exercise undue preference and discriminate in pricing services. RCW 80.36.180. Ex. 76-T, p.8, l. 8. Such price discrimination is of course, prone to abuse and would allow Qwest to exercise market power by raising the rates of business customers who currently lack real alternatives and constitute a significant captive customer base.

13. Qwest is already allowed to discriminate in price through the use of individual customer contracts. Tr. p. 116, ll. 7-21. As Dr. Blackmon testified, such individual customer contracts provide Qwest the ability to price flexibly to respond to competition. Tr. p. 733, ll. 3-16.
14. Dr. Taylor testified on behalf of Qwest that the Commission need not concern itself about price discrimination because the non-captive customers would, in effect, protect the captive customers. Tr. p. 796, ll. 10-17.¹ Dr. Taylor made an analogy to the price of a pound of tomatoes at his neighborhood grocery. Qwest has the technical capacity (and desires through this Petition the legal authority) to price discriminate against customers on an individual basis, or with geographic granularity. For example, a grocery store would have a difficult time charging the \$500/week customers less for their pound of tomatoes than it charges the \$30/week customers since they all see the same stated price above the tomatoes in the vegetable section of the grocery store. Unlike a grocery store, Qwest is quite capable of dividing its business customers into groups which it values, and groups which it does not. And of course, the majority of customers can only shop at the Qwest “grocery store.” Ex. 29. Tr. p. 391, l. 24-p. 397, l. 23. It would be relatively simple for Qwest to begin price discriminating against its business customers based on their “value” to Qwest, such that the “Gold +” customers would receive the competitive price decreases while the “Bronze” customers receive price increases. Ex. 29-C.
15. Qwest possesses the pricing flexibility it needs to compete via its banded rate tariff authority (which also provides for the ten day notice period Qwest has also asserted as a justification for the grant of this Petition), its ability to obtain a waiver of the 30 day notice period, and its ability to enter into individual customer contracts. Significantly, Qwest has presented no evidence that its inability to price discriminate is impeding its ability to compete. Further, Qwest has presented no study or analysis supporting its need to price discriminate amongst its customers.

¹ The Commission should note that Dr. Taylor’s opinion that the non-captive customers can protect the captive customers directly contradicts his and other Qwest witness testimony that there are no captive customers at all. Tr. p. 387, ll. 17-20 (Teitzel). Tr. p. 823, l. 25 - p. 824, l. 15 (Taylor).

Due to the real risk of an exercise of market power by Qwest the Commission should be extremely cautious regarding any de-regulation that would allow price discrimination.

2. Qwest Must Satisfy the Requirements of RCW 80.36.330.

16. RCW 80.36.330 requires that services that are requested to be competitively classified be subject to effective competition.

The commission *may* classify a telecommunications service provided by a telecommunications company as a competitive telecommunications service if the service *is* subject to effective competition.

(emphasis added) RCW 80.36.330(1) .

The statute is clearly permissive and the Commission is not obligated to grant competitive classification even if a company were successful in meeting the statutory requirements. Further, the requirement that effective competition exist is stated in the present tense. The law does not require that there exist competitors “capable of serving all customers” (Jensen - Tr. p. 136, l. 12) or that the “right structural conditions exist for the emergence of viable and effective competition” (Taylor – Ex. 231-T, p. 43, ll. 2-3). The law requires that *effective competition* must exist *today*.

a. Qwest Must Demonstrate that its Business Services are Subject to Effective Competition under RCW 80.36.330.

17. The existence of “effective competition” is to be measured by whether customers have “readily available alternatives” to the services for which competitive classification is sought, and whether there exists a “significant captive customer base” for the services sought to be competitively classified.

Effective competition means that customers of the service have reasonably available alternatives and that the service is not provided to a significant captive customer base.

RCW 80.36.330(1) .

Ms. Jensen agreed that in order to grant Qwest’s Petition the Commission must find that effective competition exists. Tr. p. 217, ll. 7-113. Mr. Hooks also agreed that this was the case and conceded that a “meaningful opportunity” to compete did not constitute actual competition

as is required by Washington law. Tr. p. 272, l. 21-p. 273, ll. 12.² The statute is clear, the Commission must be able to make a finding of fact that effective competition exists in each of the 31 wire centers for each of the services listed in Attachment A of the Petition if it is to consider granting the Petition.

18. Qwest has focused its Petition, exhibits, and testimony on demonstrating the existence of competitors *capable* of serving its customers. Ex. 12, p. 15, ll. 7-9. Qwest has provided virtually no evidence to demonstrate that *today* all its customers have readily available alternatives to Qwest's business services. Further, Qwest has failed to produce any data or make even a prima facie case that it does not possess a significant captive customer base. Ex. 36. The record now before the Commission demonstrates that Qwest has not met its burden of persuasion.

(1) Qwest has Not Demonstrated that Reasonably Available Alternatives to its Business Services Exist Today in All 31 Wire centers.

In order to demonstrate that Qwest customers have reasonably available alternatives Qwest must show that competitors exist who offer such services, and that these services are in fact offered to the affected customers in the relevant geographic market. While this issue is discussed in greater detail in Section II.A.2.a. of this brief, it is important to note that Qwest has relied solely upon the "presence" of competitors "capable" of serving business customers in each of its wire centers to fulfill this statutory requirement and has made no effort at qualitative or quantitative analysis of this statutory element which its Petition must satisfy.

19. Qualitatively, Qwest has made little effort to study and determine if reasonably available alternatives to each of the business services it listed in Attachment A to its Petition are being offered by competitors in the 31 wire centers. Ex. 12, Att. A. It identified the feature set or functionality available through a variety of switching technology. Ex. 12, Att. C. Qwest compiled a table comparing a limited set of services amongst a set of CLECs and itself and

² Mr. Hooks also admitted that he had not read RCW 80.36.330 prior to filing his testimony. Tr. p. 275, ll. 2-5.

included a set of previously filed price lists. Ex. 12, Att. D. Qwest printed various CLECs marketing materials. Ex. 12, Att. J. It appended CLEC press releases. Ex. 12, Att. L. Qwest also identified wireless carriers and some of their feature sets. Ex. 12, Att. N. It is Qwest's position that if CLECs are "capable" of providing equivalent services regardless of whether the services are currently provided, then all customers have reasonably available alternatives. Tr. p. 167, ll. 2-6. Tr. p. 169, ll. 12-18.

20. The only vaguely qualitative analysis Qwest conducted was a checklist of features CLECs offer. Ex. 12, Att. B. This is patently inadequate as all this table does is compare price listed features of competitors to Qwest. The table does not identify which of the listed services are subject to the Petition. Even a cursory comparison of Attachments A and B identifies services listed in Attachment A for which Qwest is seeking competitive classification but for which no comparable competitor service is identified in Attachment B (Joint User Service, stand-by line, Answer Supervision, and Dial lock for example.). It may be that services offered by competitors are the functional equivalent of the services Qwest identified in Attachment A but not in Attachment B. Unfortunately, we do not know. Qwest's failure to perform a comprehensive analysis and comparison of the functions of Qwest's business services and competitors services renders this Commission unable to determine whether functional equivalents exist in fact for the Qwest services it seeks to have competitively classified.

21. What Qwest has also failed to do is ascertain whether the features and services it identifies as CLEC existing or potential capabilities are *in fact* offered in the 31 wire centers subject to the Petition. It is Qwest's burden to demonstrate that equivalent service are being offered by competitors for each of the services it listed in Attachment A. As Mr. Wood stated, however, Qwest has included services in its Petition which CLECs are not actually providing today but which Qwest contends they could supply if they choose to do so. Tr. p. 856, ll. 1-5. What a CLEC "could supply" is not a sufficient basis for finding that an alternative to Qwest business services is in fact available today. Qwest could have performed a detailed qualitative analysis to

compare the services each CLEC is offering to determine whether the CLECs are offering in fact the reasonably available alternatives the statute requires. Qwest has not done so.

22. Quantitatively, Qwest has failed to study and determine whether each of the reasonably available alternatives it should have identified for each of its business services listed in Attachment A to its Petition are *in fact* offered by competitors in each of the 31 wire centers which are covered by the Petition. In fact, Ms. Jensen conceded that CLECs won't serve all customers. Tr. p. 137, ll. 3-24. Ms. Jensen admitted that Qwest has a number of data systems that possess relevant data but that the company made no effort to coordinate that information and provide it in support of their Petition. Tr. p. 174, l. 12-p. 175, l. 9. Ms. Jensen also testified that a complex analysis was made in support of the high capacity petition but was not performed here, presumably due to difficulty or expense. Tr. p. 177, l. 24-p. 179, l. 3. See also Tr. p. 353, ll. 3-16. It is reasonable for this Commission to infer from the lack of presentation of such an analysis that the results would not have supported Qwest's Petition. Regardless of inferences, the lack of specific, credible data supporting Qwest's assertions that reasonably available alternatives are in fact available in all 31 wire centers means that its Petition fails to satisfy this element of the definition of effective competition found in RCW 80.36.330.

(2) Qwest has not Demonstrated that it Does Not Possess a Significant Captive Customer Base.

23. Qwest has performed no analysis or study to determine the size and significance of its existing captive customer base.³ This is despite the fact that Qwest cannot say which customers in fact have choices today. Tr. p. 229, ll. 5-7. Notably, Qwest maintains that it does not possess a single captive customer. Tr. p. 387, ll. 17-20. Tr. p. 823, l. 25-p. 824, l. 25. Qwest has further been unwilling to discuss or analyze the distinction between competitors willing to serve all customers in a wire center, or some subset thereof (i.e. an in-significant captive customer base).⁴

³ This issue is discussed in further detail in Section II.A.2.b. of this brief.

⁴ Qwest has repeatedly asserted that it need not prove that each and every customer has a reasonably available alternative. Tr. p. 241, l. 25. Ex. 231-T, p. 3, ll. 6-8. This is a false

24. Given Qwest's historical monopoly status where it possessed 100% of the market, a presumption exists that it possesses a significant captive customer base. It is Qwest's burden under RCW 80.36.330 to demonstrate that as a matter of *fact* it does not possess a significant captive customer base. Further, Qwest's burden as the incumbent monopolist in this or any other proceeding under RCW 80.36.330 is to rebut the presumption that it still possesses its historical, significant captive customer base. In the context of a historical monopoly telecommunications company, determination of the "significance" of the existing captive customer base is a critical issue. Again, Qwest has failed to produce any data in this docket to support its contention that none of its customers are captive, or to assist the Commission with its analysis.

25. Qwest currently enjoys a significant captive customer base as that phrase is used in RCW 80.36.330. There is no evidence in this proceeding that Qwest does not continue to enjoy a monopoly relationship with a significant number of business customers and other consumers of business services. Ex. 201-T, p. 20, ll. 3-5. Tr. pp. 37-56. Tr. pp. 520-572. Ex. 400. Tr. p. 692, ll. 7-14. It is these customers that RCW 80.36.330 was drafted to protect. The law is designed to protect consumers and not competitors. *US West*, at pp. 728-730. This law was drafted to avoid a circumstance where a significant number of consumers (of business services in this case) would be left without competitive alternatives available to them and without the protection of the Commission's regulation of Qwest's business services. If this Petition is prematurely granted it is these customers, the unknown thousands of consumers of Qwest's business services, who would be at the mercy of an exercise of market power by Qwest. Ex. 400.

b. Qwest has Not Produced Persuasive Evidence that All its Business Services are Competitive.

26. In determining whether a service is competitive a non-exclusive list of criteria are found in the statute.

(a) The number and size of alternative providers of services;

- (b) The extent to which services are available from alternative providers in the relevant market;
- (c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions; and
- (d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

RCW 80.36.330(1).

27. While the statute does not limit the Commission's consideration to these factors, they are important in determining whether a given service is competitive. The Commission should note that Qwest did not attempt to analyze each of the services listed in Attachment A to the Petition to determine whether each of the services met some or all of these four factors. Instead, Qwest views all its business services as competitive because, in its view, its competitors are capable of providing similar services in each of the 31 wire centers. Setting aside the lack of factual support for the assertion, Qwest's circular view towards the application of these statutory criteria reflects its overall approach to the evidence necessary to support its Petition. Simply put, it is Qwest's view that competitors capable of serving customers equals reasonably available alternatives, equals no captive customers, equals effective competition, and therefore all services should be competitively classified. Qwest's position is unsupported by the record.
28. The hard data Qwest has provided is limited primarily to the wire center specific totals of ported numbers, resold lines, and provisioned loops. Ex.s 2-C, 3-C, 4-C, 5-C, 8-C, and 10-C. Ex. 12, Att.s G, H, and I. While this data may reflect some competitive "presence" in the relevant wire centers, it says nothing about the nature of the services being provisioned or whether they are in fact reasonable equivalents for the Qwest services listed on Attachment A. This data also provides no assistance to the Commission regarding the size or significance of Qwest's existing captive customer base.
29. As Ms. Jensen acknowledged during cross-examination, other than the data on ported numbers, resold lines, and provisioned loops Qwest has only anecdotal and circumstantial evidence regarding the competitive presence in each of the 31 wire centers. Tr. p. 134, l. 7-p.

135, l. 21. Tr. p. 224, l. 1 - p. 225, l. 22. Anecdotal and circumstantial evidence is not a sufficient factual basis for this Commission to conclude that effective competition exists in all 31 wire centers for all services identified in Attachment A to the Petition.

30. The fact that competitors have obtained customers from Qwest who have ported their telephone numbers to the competitor says nothing about the nature of the services these customers are receiving through that ported number. The same is true of resold lines and provisioned loops. The number of provisioned loops says nothing about the service being provided over those loops. As Ms. Jensen conceded in her direct testimony, most of the loops are being used for DSL service; which is not subject to this Petition. Ex. 1-T, p. 10, ll. 9-11. Without more specific information on the nature of the services provided over these circuits it is impossible for this Commission to determine whether the services being provided are reasonably equivalent to the Qwest business services.

31. Even more striking is the inadequacy of the data presented regarding the size and significance of Qwest's captive customer base. There is none at all. Qwest summarily cites to the attachments to its Petition to conclude that it has no captive customers at all. Ex. 12, p. 18, l. 22 - p. 19, l. 5. Ex. 12, Att.s D, G, H, K, and M. This is a contention Qwest witnesses boldly maintained upon cross-examination. Tr. p. 387, ll. 17-20. Tr. p. 823, l. 25 - p. 824, l. 15. It flies in the face of reason to assume that a company which had a historical monopoly position with 100% market share no longer possesses a single captive customer who does not possess alternatives to Qwest service. In fact, the public testimony the Commission received from actual business customers was diametrically opposed to Qwest's view. Tr. pp. 37-56. Tr. pp. 520-572. Ex. 400.

32. It is clear from the record, in particular Dr. Blackmon's testimony, that captive customers exist in every wire center. Ex. 201-T, p. 20, ll. 3-5. Tr. p. 692, ll. 7-14. Qwest has failed to carry its burden to demonstrate that its business services in the 31 wire centers are subject to

effective competition. Moreover, it can find no comfort or support in the caselaw in Washington which examines that standard.

3. There is No Existing Caselaw Interpreting RCW 80.36.330, but Three Cases are Instructive.

33. There has been no reported appellate review of the language of RCW 80.36.330. There are three cases reported which have examined the analogous definition of “effective competition” in RCW 80.36.320(1) which is virtually identical to the language used by RCW 80.36.330(1). See *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 547, 869 P.2d 1045 (1994) (affirming the Commission’s authority to define the relevant market for the services sought to be classified as competitive.); *American Network v. WUTC*, 113 Wn.2d 59, 776 P.2d 950 (1989); and *US West v. WUTC*, 86 Wn.App. 719, 937 P.2d 1326 (1997).
34. In *US West vs. WUTC*, the court upheld the Commission’s decision to competitively classify ELI and TCG since they had no captive customer base and their customers had reasonably available alternatives. *US West* at 730. The court also noted that the legislative intent behind RCW 80.36.320 was to protect ratepayers and that ELI and TCG’s position in the market was quite distinguishable from US West’s “dominance.” *US West* at pp. 728 – 730. The same analysis is applicable to RCW 80.36.330 in this proceeding. The legislative intent expressed in RCW 80.36.330 is to protect ratepayers. The Commission should note that Qwest witness Jensen conceded upon questioning from the bench that RCW 80.36.330 is focused on customers and not competitors. Tr. p. 232, l. 7.
35. The existing caselaw clearly indicates that it the purpose of the competitive classification statutes is to protect consumers; and that it is within the Commission’s discretion to properly define the applicable markets when determining whether a given service is subject to effective competition. In this case, the record now before the Commission indicates that granting Qwest’s Petition would not be in the public interest. In addition, that neither Qwest nor Commission Staff have engaged in the proper market definition analysis.

III. EVALUATION OF QWEST'S PETITION

36. In its Petition, Qwest claims that the Attachments appended thereto provide this Commission with unequivocal “evidence” of effective competition as required in RCW 80.36.330. Qwest claims that its statistics regarding “competitive losses” show that there is effective competition for all business services in all 31 wire centers for which it has requested flexibility. Moreover, Qwest claims that these same statistics and documentation show that there is no significant captive customer base in any of the 31 wire centers for which flexibility has been requested and that all business customers have reasonably available alternatives to Qwest services. Contrary to these claims, a careful review of Qwest’s Petition shows that it has failed to meet the statute’s requirements. *First*, and foremost, in framing its evidence and arguments, Qwest has failed to employ a reasonable economic framework. Because it has defined the relevant product and geographic markets far too broadly, Qwest has conflated critical and distinct analytical issues, thus completely undermining the relevance and usefulness of the data it has presented. *Second*, in support of its Petition, Qwest has presented only very general information that it collects in its ordinary course of business. By failing to gather detailed and granular data, Qwest has left this Commission without a basis on which to rule in its favor. *And third*, the scanty useful data that Qwest has presented in this case strongly suggests that despite Qwest’s claims of effective competition, the CLECs have enjoyed only limited success in their attempts to compete with Qwest for business customers. Significantly, those successes appear to have been with large, as opposed to very large or small businesses, and almost certainly, those large business customers located within the dense urban core areas. This fact strongly suggests that many customers in the 31 wire centers do not have reasonably available alternatives to Qwest services, and that Qwest enjoys a significant captive customer bases.

37. Qwest’s Petition asks the Commission to classify the company’s business services as competitive pursuant to RCW 80.36.330 and WAC 480-120-023. Qwest requests this classification for the geographic areas served by 31 wire centers: Bellevue Glencourt, Bellevue

Sherwood, Issaquah, Kent O'Brien, Auburn, Renton, Seattle Atwater, Seattle Campus, Seattle Cherry, Seattle Duwamish, Seattle East, Seattle Elliott, Seattle Emerson, Seattle Lakeview, Seattle Main, Seattle Sunset. Seattle West, Spokane Chestnut, Spokane Fairfax, Spokane Hudson, Spokane Keystone, Spokane Moran, Spokane Riverside, Spokane Walnut, Spokane Whitworth Tacoma Fawcett, Tacoma Greenfield, Tacoma Juniper, Tacoma Waverly, Vancouver Orchards, and Vancouver Oxford. Ex.12, p. 1. The specific business services for which Qwest is requesting competitive classification are identified in Attachment A to the Petition, and include all of Qwest's Basic Business Services and Feature offered in Washington, including Basic Business Local Exchange Service; Centrex Services; Private Branch Exchange Trunks; and Basic Business Features. Ex. 12, Att. A. In its Petition, Qwest claims that competitive classification of its business services will produce a more vibrant competitive market place, and allow Qwest to compete for business services on a more equal basis with Qwest's competitors. Ex. 12-C, pp. 2-3.

38. In support of its Petition, Qwest has compiled certain information which it claims demonstrates that the market for its business services in the 31 wire centers is fully competitive, that all business customers have reasonably available alternatives, and that significant captive customers do not exist for any business services in any of the 31 wire centers. See Ex. 12-C, Attachments A-M.

39. As will be shown below, in presenting its evidence, Qwest has failed to appropriately define the relevant product and geographic markets, thus rendering its analysis virtually meaningless.

A. Definition of Relevant Markets

40. In order for this Commission to find that effective competition exists in the markets for which Qwest is seeking pricing flexibility, it must first find that (a) business customers in the 31 wire centers have reasonably available alternatives to Qwest's business services, and (b) that Qwest is not currently providing service to a significant captive customer base in any of the 31

wire centers. RCW 80.36.330(1). The first step in making these determinations is the proper definition of the relevant market.

41. In determining the relevant market, the Commission must, at the outset, evaluate to what extent Qwest can exercise market power in the 31 wire centers with respect to all business services for which it is seeking flexibility. Economists often analyze this question by studying how profitable it would be for a carrier to impose a “small but significant and nontransitory” increase in price to a product. It will be unprofitable for the carrier to impose a small but significant increase in price if its customers for the product have access to reasonable alternatives to the carrier’s product, because it is assumed the customers can purchase the same or similar product from a competitor. If, on the other hand, the carrier’s customers do not have reasonable alternatives to the carrier’s product, it will prove profitable for the carrier to sustain a small but significant nontransitory increase in price because the customers will have no alternative supplier for the product. In determining whether the carriers’ customers have reasonable alternatives to the carrier’s product, economists look at whether alternatives already exist in the market, and whether, in the case of a small but significant nontransitory increase in price, competitors will enter the market with reasonable alternatives for the carrier’s customer. Ex. 166-TC, p. 12, l. 14- p. 13, l. 14.

42. A proper definition of the relevant market is the fundamental building block of this and indeed any sound competition analysis. If the market is properly defined, both from a product and geographic perspective, it will identify the products and suppliers that can and would provide an economically meaningful response to a price increase. Ex. 166-TC, p. 14, ll. 9-10. On the other hand, an improperly defined market will distort any competition analysis. Defined too narrowly, products that constitute good substitutes for the products studied are excluded; defined too broadly, products that are not good substitutes are included. Whenever markets are defined too broadly, market concentration and dominant firm market share will be understated. Ex. 166-TC p. 14, ll. 14-20.

43. By “lumping together” all business services in all areas of the 31 wire centers, Qwest has defined the relevant market far too broadly to allow it to produce valid evidence in support of its Petition.

1. Definition of Geographic Markets

44. Qwest has made two geographic determinations in order to define the relevant market. First, Qwest has chosen the wire center as its unit of study. Second, Qwest recommended that it be granted flexibility with respect the area contained within the boundaries of the 32 wire centers named in its Petition. Ex. 12, pp. 1-2. Both are overbroad.

45. Defining the correct geographic market involves a determination of the locations of both the suppliers who can offer reasonably alternative products, and the customers for whom the reasonable alternatives exist. In order to do so, economists collect and review (1) data regarding the geographic location of customers for particular products, and (2) data regarding the geographic location of competitors producing the same or similar products, and the geographic scope of competitive alternatives. Then, after gathering and studying the data, economists propose a geographic market definition based upon geographic areas where customers truly have access to alternatives. By Qwest’s own admission, no such process was employed. See discussion *infra*, Tr. p. 761, l. 14-p. 762, l. 18.

46. In this case Qwest has chosen the wire center as the unit of study, not because it had data to support its use or because it made analytic sense to do so, but rather because Qwest that already tracked data on a wire center basis and it was therefore “easy” to offer that same wire center data in support of its Petition.⁵ Ex. 76-T, p. 6, ll. 16-21.

47. Unfortunately, as explained by both Dr. Goodfriend and Mr. Wood, the wire center is a poor geographic unit for several reasons. First and foremost, the wire center is too large a unit of study because customers are situated quite differently within the wire center with respect to

⁵ Moreover, Qwest chose the geographic region for which it would be requesting pricing flexibility without consultation or advice from economists. Tr. p. 76, l. 17-p. 77, l. 4.

competitors capable of and ready to respond to a price increase. As will be discussed in more detail below, customers located in the dense areas within core downtown area will normally have access to competitive alternatives while customers in less dense areas will not. Thus, Qwest's failure to even examine competition below the wire center level constitutes a significant flaw in its analytic design. Ex. 166-TC, p. 28, ll. 10-18, Ex. 241-TC, p. 19, l. 24-p. 21, l. 25. Moreover, with respect to some product markets, Qwest's choice of the wire center fails to capture business customer demands for products that can only be delivered across wire centers. Ex. 166-TC, p. 27, ll. 5-7.

48. Thus, while it might have been convenient for Qwest, its sole focus on the wire center forecloses at the outset any possibility that its analysis will yield useful result.

49. It should also be noted that Qwest did not simply choose the wrong unit of study—rather more disturbingly, Qwest made no attempt to determine whether the wire center was the correct unit of study. Moreover it is also disturbing that Qwest has made no effort to identify specific market segments *within* a given wire center. Ex. 58. When asked whether anyone in the company had made any effort to quantify the level of competition within wire centers, by comparing the level of competition along competitors' facilities as opposed to elsewhere in the wire center, Jensen stated: "we would have no way of doing that." Tr. p. 134, l. 20 – p. 135, l. 1. While Tracer and Public Counsel dispute this statement as obviously incorrect, the fact remains that indeed Qwest has made no effort to properly analyze the appropriate geographic market for their business services.

50. Second, Qwest has requested pricing flexibility for 31 wire centers which appear to vary drastically in the degree to which competitors will be able to offer competitive alternatives. Attachment H to Qwest's Petition (Ex. 12-C) provides information regarding the number of unbundled loops that competitors purchase in each of the 31 wire centers. While the numbers are low in all wire centers, there are some wire centers where competitors are purchasing no unbundled loops. Similarly, while the data for ported numbers is quite low across the board,

there are wire centers where ported numbers are virtually nonexistent. There are also significant differences between wire centers as to the number of switches and collocations located in each wire center. Ex. 12-C, Attachments G and H. Because Qwest has supplied insufficient detail as to the nature and capacities of the collocated equipment and switches, however, the actual significance of these disparities cannot be determined.

51. Another omission in Qwest's data suggests that Qwest has inappropriately defined the geographic market for which it is requesting pricing flexibility. Attachment K to the Petition (Ex. 12) provides maps of competitors' fiber facilities in downtown Spokane, Seattle Duwamish, Seattle Campus, Seattle Elliot, Seattle Main and Bellevue Glencourt. These maps illustrate the actual fiber route of a number of competitors in these densely populated areas. Qwest used these maps in support of its petition for the deregulation of its high capacity circuits in UT 990022, offering in tandem evidence that the vast majority of U S WEST high capacity customers were located within an extremely short distance from the competitors' fiber routes. *In the Matter of the Petition of U S West Communications, Inc., for Competitive Classification of Its High Capacity Circuits in Selected Geographic Locations*; Docket No. UT-990022; Eighth Supplemental Order Granting Amended Petition for Competitive Classification, December 20, 1999 (High Cap Order), pp. 9, 15. Qwest has attached the maps in this case stating that they show "a measurable competitive presence in each of the competitive geographic areas contained in the Petition." Ex. 1, p. 13. ll. 3-8. This statement highlights what Qwest clearly recognizes, that while maps contained in Attachment K are indicative of substantial investment by the CLECs in order to serve business customers in core downtown areas, they say nothing about competitive alternatives in areas beyond the near vicinity of the competitive fiber routes, let alone in wire centers many miles away.

52. At hearing, Ms. Jensen was asked why Qwest did not offer updated maps of competitive fiber for all 31 of the wire centers for which it is requesting pricing flexibility. Initially, Ms. Jensen answered that producing the maps was simply just too expensive. Tr. p. 187, ll. 16-24.

Given Qwest's financial stake in seeing its Petition granted, this answer is far from satisfying. More instructive is the second reason offered by Ms. Jensen for not offering updated maps. Ms. Jensen stated: "The basis of our petition is what the [competitive] providers themselves hold themselves out to offer. It is not based on their deployment of facilities." Tr. p. 187, l. 24 - p. 188, l. 2. This comment, in a nutshell, sums up Qwest's strategy in this case. In the absence of direct evidence of the competitors' actual deployment of facilities and delivery of services, Qwest is asking this Commission to grant it pricing flexibility based upon what Qwest believes the competitors "hold themselves out" to offer. In other words, Qwest believes that the Petition should be granted because it believes that the competitors could or should provide particular services. This is wrong because the legal standard Qwest must meet to satisfy RCW 80.36.330 is effective competition today, and not what competition could, or should exist in Qwest's view. With respect to deployment of facilities, there is nothing in the record to suggest that competitors have extended their fiber networks beyond the dense urban core areas into the less populated regions covered by their Petition.

2. Definition of Product Markets

53. In addition to geography, economists also evaluate what products are to be included in the definition of the relevant market. It is only by properly defining the relevant product market that the analysis will be able to identify which products will serve as reasonable alternatives to those offered by Qwest. Indeed, the Merger Guidelines direct that the analysis of the relevant market begins with an examination of "*each product (narrowly defined) produced or sold by each merging firm.*" ...[Italics added] See Department of Justice, Federal Trade Commission, Antitrust Division, 1992 Horizontal Merger Guidelines (REVISED APRIL 8, 1997) 57 Fed.Reg. 41552, § 1.1 (hereinafter DOJ). Ex. 166-TC, p. 15, l. 21 – p., 16, l. 7.

54. In defining the relevant product market, economists also evaluate the different types of buyers in the market and how they may be differently or similarly situated with respect to the products studied. Ex. 166-TC, p. 16, ll. 9-10. Economists recognize that while a particular

competitive Product B may be a reasonable substitute for Qwest Product A in the eyes of some buyers, it may be that in the eyes of other buyers there are no acceptable substitutes. Thus, a properly conducted analysis would determine each customer segment's use of each of the products at issue, and then make a determination as to how well each of the possible competitive alternatives would be perceived as acceptable, reasonable alternatives by each customer segment. In this way the study would reveal the conditions under which Qwest could profitably raise prices to these buyers because potential alternatives did not constitute reasonable alternatives.

55. In its Petition, Qwest has requested pricing flexibility for all business services to all customer segments in all 31 wire centers covered by its Petition. By "lumping together" distinct product markets, it has guaranteed that it will be unable to produce reliable or useful information. Commission Staff's analysis was handicapped by the inadequacy of the data presented by Qwest and made available by the CLECs who were solicited.⁶

a. Do Customers Have Reasonably Available Alternatives?

56. As discussed above, in order for Qwest to show that the markets in the 31 wire centers are experiencing "effective competition" Qwest must show that the customers within the markets have access to reasonably available alternatives. This assessment can only be made if the product market is first properly defined. And in turn, in order for the product market to be properly defined, Qwest must consider the distinct product demands of distinct customer segments. The reason for this is simple, where customers and circumstances differ, the products

⁶ It was a denial of procedural due process for the Staff to do more than simply aggregate the data they received and place the data and analysis performed outside the record, thus making it impossible for other parties or an appellate court to review their actions. See June 22, 2000 letter to CLECs and Prehearing Conference Orders. Public Counsel assumed an aggregation would be performed consistent with the Commission's order. Instead, a market share percentage and HHI calculation was provided. This is not what was contemplated at the prehearing conference. The issue raised in the Public Counsel's Motion which was denied was not the results of the Staff's analysis, rather that data was not simply aggregated, it was aggregated, analyzed, and an "HHI" market analysis was produced with almost no information regarding how it was achieved. At a minimum a bare aggregation should have been made available to non-party experts for review and analysis. As it stands Staff has been allowed to make a record that is beyond review by the parties or the appellate courts.

they buy from Qwest and the products they perceive will be good substitutes for Qwest services will differ. A business customer currently using a single access line product differs in its product demands from a Centrex customer or a PBX customer. This is why antitrust product market definition begins with each product sold and examines the response of the buyers to possible substitutes Ex. 166-TC, p. 21, ll.8-11.

57. Business size is probably the most significant determinant of customer market segment. Cahners In-Stat group, a research and information consulting firm specializing in telecom and information analysis, develops customer profiles based on four distinct business sectors. Small office, home office, less than 5; Small Business Market, less than 100; Middle Market, less than 1000; and 1000+ Enterprise Market. Ex. 166-TC, p. 21, ll. 1-6. However, the type of business, and the degree to which the business uses advanced and/or complex telecommunications services are also important factors. Ex. 166-TC, p. 31, ll. 9-12.

58. In response to data requests, Qwest's has produced marketing materials showing that Qwest recognizes quite well not only the existence of highly differentiated customer segments, but the significance of those customer segments for product market definition.. See, Ex. 29. Yet, curiously, Qwest's Petition ignores this commercially and economically significant feature of market segmentation. Ex. 12, p. 18, l. 17 – p. 19, l. 7. Qwest has simply sidestepped the issue of business heterogeneity completely. The fact is that Qwest continues to possess its historic monopoly on certain business products for certain business customers.

(1) Product Demands of Very Large Businesses

59. First, Qwest enjoys a monopoly on business products sold to very large firms, in particular, those very large firms which are located outside of core urban areas. At hearing, the Commissioners expressed some skepticism on this point, reasoning that because these very large customers represent such high volume, they should be attractive to CLECs who would target them as customers. And while this inference is a logical one, unfortunately for TRACER members, it has not turned out to be the case. As explained by Dr. Goodfriend, TRACER

members have been, and continue to be, highly motivated to secure alternatives to Qwest's services. This makes sense, as some are dissatisfied with Qwest service quality, and it is simply good business practice for large businesses that are highly dependent on telecommunications services to have redundant systems. Tr. p. 627, ll. 2-18. Yet, despite significant efforts the part of these very sophisticated telecommunications users, TRACER members have (with one exception) been unable to secure reasonable alternatives. Tr. at id., and p. 597, ll. 3-16.

60. While neither TRACER nor Public Counsel is privy to CLEC business strategies, there are some obvious reasons why the competitors been unable to provide substitutes to Qwest services. First, as illustrated by the network maps discussed above, CLEC facilities in Seattle and Spokane virtually follows the grid pattern of the streets in the downtown business core. Ex. 12, Att. M. This practice is consistent with the findings of U S WEST engineering consultants submitted in support of U S WEST's petition for pricing flexibility filed in UT 990022. In that study supporting U S WEST's high capacity petition the engineering consultants identified 3 basic imperatives for CLEC customer acquisition:

1. Target customer locations with high service volumes near existing competitor facilities;
2. Extend facilities routes over time; and
3. Extend long distances only where volume is high and path costs are low.

Ex. 69, p.-16. Ex. 166-TC, p. 24, ll. 3-12.

These three imperatives illustrate why TRACER members would not be attractive to the CLECS.

61. As explained by Dr. Goodfriend, like TRACER members such as Boeing, Weyerhaeuser and Paccar, many very large business customers are industrial in nature and therefore some or all of their operations will be located outside the core urban areas. Tr. p. 626, l. 20 – p. 627, l. 18. Thus while their volume needs are unquestionably very high, the costs of serving these customers are similarly high. To begin with, network facilities build out to these very large business is likely to be extremely expensive. Clearly, long distances are involved. Moreover, outside the urban core, CLECs are unlikely to obtain the same facilities- sharing arrangements

that they can and usually do within the more densely concentrated business area. Ex. 166-TC, p. 23, l. 13-p. 24, l. 12.

62. There are other factors that make it impossible for the CLECs to compete on price with an incumbent for the very large business customer's business. As explained by Dr. Goodfriend in her testimony, the very large business is frequently spread over several locations. To the extent that these are all located in the ILEC's territory, the very large customer will have some bargaining power to request lower prices, and the ILEC will be motivated to secure that customer. CLECs do not have the ubiquitous network that the ILEC controls, are less likely to be in a position to offer facilities based services to all locations, and are less likely to offer a volume discount. Tr. p. 627, l. 25 – p. 628, l. 22.
63. CLECs which lack facilities may be reluctant to offer services to very large customers knowing that, due to their dependence on the ILEC's facilities, they will be unable to provide the customer with adequate service quality. In these cases, the CLECs are well aware that their customers orders are likely to be held, and that service interruptions will be lengthy. The CLECs inability to secure adequate trunking to carry the customer's traffic, or being subjected to an inability to make seamless cutovers, impairs their ability to market the services, particularly regarding service quality.
64. Moreover, even a facilities-based CLEC which is large enough to replicate the ILEC's capacity, would still need to execute the service change without significant disruption to the very large customers' business. Ex. 166-TC, p. 25, l. 20-p. 26, l. 4. The prospect of being held responsible for a significant "down" period caused by the ILEC's ability to "slowball" the cutover process, could prove particularly daunting in the case of a 5000 plus employee business.
65. Where CLECs *have* offered to provide service to very large customers, they have required payments for substantial up-front costs or very long-term contracts. This fact should not be surprising given the very significant amount of money in sunk costs that the CLEC must expend in order to provide service to the very large customer. Moreover, additional sunk costs are

involved whether the CLEC would be using all of its own facilities or unbundled loops. A very large company's demand may utilize a large portion of the capacity of an individual voice switch. Even if the CLEC used the very large firm as an "anchor tenant" on its switch, it would need to coordinate this service delivery with its collocation and traffic aggregation strategy directed towards its targeted business customers in the area. This situation may require the CLEC to incur the cost of modifying its entry schedule to accommodate the large firm and/or to incur some period of excess capacity in the switch and or transport facilities it installs to carry the traffic from the ILEC wire center to its switch. Ex. 166-TC, p. 25, ll. 10-19.

(2) Product Demands Requiring Geographic Reach and Flexibility

66. Qwest also maintains a monopoly on those products which rely upon the company's ubiquitous network in its service territory. Two examples of such products are Market Extension Service and the Centrex 21 CustomChoice feature group.

67. Market Extension Line is a "super FX" (foreign exchange) product, which provides a local telephone numbers anywhere in Qwest's service area for businesses located elsewhere in Qwest's service area. A customer who has purchased Market Extension Line can have all calls placed on that line automatically routed to any location of its choice. If a CLEC has a customer in Seattle that wishes to establish a local phone number in an area where the CLEC has no facilities, the CLEC will have to inform the customer that it cannot fulfill its need.⁷

68. Similarly, because CLECs lack ubiquitous networks, they cannot provide alternatives to Qwest's Centrex21 - CustomChoice. That product is advertised by Qwest as: "It's portable - if your business moves anywhere within U S WEST's 14-state region, you can take your Centrex21-CustomChoice with you." Ex. 166-TC p. 26, ll. 15-16 and fn. 20. Clearly, this is a product for which the CLECs have no substitutes.

⁷ It should be noted that Winstar is the only CLEC offering any type of FX service at all. Ex. 166-TC, p. 26, ll. 9-15 and fn. 20.

(3) Product Demand of Small Business Customers

69. There is also ample evidence in the record to suggest that small business customers are without alternatives to Qwest services, not because the CLECs are unable to serve them from a technical perspective, but rather because it would not prove profitable for them to do so. At the outset, there appears to be a consensus among the parties that CLECs are not targeting small business customers, but rather are targeting the type of high volume, low cost customer described in the by U S WEST's engineering consultants in Ex. 69. Qwest's witnesses readily acknowledge the fact that CLECs are targeting high volume, high margin customers close in to their urban facilities. Ex. 7, p. 2, l. 17 - p.3, l. 11, and fn. 2.
70. Moreover, the abysmally low number of unbundled loops being purchased by CLECs provides strong evidence that small businesses are not being targeted. As illustrated in Exhibit 12, Attachment H, CLECs are not purchasing anywhere near a significant number of unbundled loops in any of the 31 wire centers. For instance, in Bellevue Sherwood, of 10 alternative providers, only two use unbundled loops. The total number of loops purchased by CLECs is extremely low, and this number falls to the level of negligible when one factors in the fact that well over half of these loops are being purchased by DLECs in order to provide DSL services. Ex. 241, p. 16. ll. 9-11. It is also discouraging to observe the low levels of unbundled loops purchased by CLECs in even the dense urban areas of Seattle and Bellevue. CLECs appear instead to be serving customers over their fiber routes, which as noted tend to be in core downtown areas, or over DS-1 circuits which are efficient only for the larger businesses. Ex. 166-TC, p. 30, ll. 4-16. On the other hand, small businesses that are best served by unbundled loops are almost certainly being neglected by the CLECs. Thus, the evidence would certainly suggest that the CLECs are serving very few small business customers. Ex. 166-TC, p. 30, l. 18- p. 31, l.2.
71. It should also be pointed out that the currently low level of unbundled loops being utilized to provide service might well drop even further. As pointed out by Nextlink witness, Kaylene

Anderson in her prefiled testimony, the Commission's recently adopted deaveraged rates for unbundled loops will result, if finalized, in price increases for loops in four out of five of the geographic zones. Ex. 281-T, p. 9, l. 15 - p. 10, l. 13. In three out of five of the zones, the increase ranges from steep to very steep. See, *In the Matter of Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale*; Docket No. UT-960369,-960370,-960371; Twenty-Fourth Supplemental Order and Order Rejecting Tariffs; Authorizing Refiling, May 4, 2000.

72. Confidential Attachment A to this Brief lists each wire center for which Qwest is seeking pricing flexibility, and indicates which zone the wire center falls into, the loop price adopted by the Commission. This attachment illustrates the fact that prices for unbundled loops in the vast majority of the 31 wire centers will be increasing substantially. This fact strongly suggests that those few CLECs which have made a business decision to serve customers with unbundled loops may soon find themselves priced out of the market entirely. See Attachment A.

73. Despite all of these facts, Qwest continues to claim that all customers all 31 wire centers have "available" alternatives to Qwest services. However, a colloquy between Commission Showalter and Theresa Jensen illustrates the fact that Qwest interprets the word "available" in a rather unorthodox manner. Indeed, the following exchange makes clear the fact that when Qwest claims that alternatives are "available," it actually means that in the company's opinion, the CLECs "could" serve a particular customer if it decided to do so.

Q. Let's assume for the moment that . . . there is an ability [to serve], whatever that means. I think that you could argue about what it means. . . It could mean physical ability or financial ability or other kinds of ability, but in your testimony, you said that the CLECs are choosing not to serve some customers, and it seems to me that gets to B; that is, are services available from alternative providers if the providers are choosing not to make them available?

A. They are available. The extent to which the services are available, and it's kind a Catch 22, I agree, is that services are available.

Tr. p. 223, ll. 1-12.

74. This definition of “available” renders the statutory language meaningless from the customer perspective, who is not interested in the carriers’ financial or technical ability to serve, rather the carriers’ willingness to serve.

75. The fact is that Qwest has offered only anecdotal and circumstantial evidence to support its contention that Qwest business customers have reasonably available alternatives. The following colloquy between Commissioner Showalter and Ms. Jensen is illustrative:

Q. But you went on to say that you think if I persisted and called every CLEC in my wire center or maybe my exchange, that I would in the areas that you have petitioned for, I would find someone who could serve me other than Qwest.

A. Yes.

Q. What is your evidence for that?

A. I probably get at least three calls a day from Qwest sales representatives who run into competitors at their customers’ business locations, and I’ll share. I mean, they are interesting. Some less today but probably three years ago, I would get a lot of calls that could they do that? Can they offer service to our customers? Of course they can, but it took our employees a while to understand that this market was open and that competition was allowed.

Today I continue to receive calls about competitive activity from all different size customers. Some of them are resellers; some are a facility-based providers where our folks don’t believe that they can draft a response that compete with the type of packages that are available by other providers in the market...

Tr. p. 224, l. 11 – p. 225, l. 1.

Q. I appreciate the anecdotal evidence. What I’m looking for is where in the exhibits or testimony can I find that if I am an informed, eager business in each of these wire centers, how can I know or how can the Commission know that this hypothetical business can get alternative service. I’m aware of the advertising, I think that you have granted that despite the advertising, CLECs are choosing not to serve some segments, so what I would I want to find out is where is the evidence that there are alternatives for those who want it?

A. I think I understand your question. The difficulty in the evidence that we presented is that the providers that we highlighted in this petition, which were registered in June of 2000, hold themselves out to offer service in Washington. They don’t specify that they don’t serve certain areas in Washington or certain size customers. In fact, I believe there is a statute that requires them to serve a customer, and it’s reasonably entitled to serve them. So what we have provided is a listing of whom those carriers are, a sampling of certain carriers and the services that they hold themselves out to offer coupled with the statute.

76. This type of circular reasoning characterizes Qwest's position in the case. At the end of the day, Qwest never provides the evidence that its customers have reasonably available alternatives.

b. Does Qwest Have a Significant Captive Customer Base?

77. In order for a service to be declared competitive, the Commission must find that within the geographic areas for which the competitive classification is sought, that there is no significant captive customer base for the service. RCW 80.36.330(1). The statute does not quantify the term "significant," but as pointed out by Dr. Goodfriend, it is in the public interest to set a low threshold for the test. Ex. 166-TC, p. 43, l. 14 – p. 44, l. 7. In this case, Qwest has failed to provide evidence that a significant captive customer base does not exist. Indeed, Qwest appears to have made no effort to identify the existence of *any* captive customers that may exist. Nevertheless, the evidence introduced at hearing provides the Commission with strong evidence that a significant captive customer base *does in fact exist*.

78. At the outset, it is important to note that Qwest reinterprets the meaning of "no significant captive customer base" in much the same way it interprets the corollary requirement of "reasonably available alternatives." That is, Qwest's claims that there is no significant captive customer base rests on its position that a customer base is not captive if there is a CLEC which in Qwest's opinion, *could* or *should* offer alternative services. In keeping with this view, Qwest does not appear to exert any effort in order to show that Qwest does not have a customer base without alternatives. Instead, Qwest expends enormous effort attempting to prove that the CLECs could serve those customers if only they chose to, and that they are errant, and even in violation of the law for not doing so. Tr. p. 226, ll. 8-20.

79. For example, one colloquy between Qwest witness Mr. Teitzel and Public Counsel Mr. Cromwell was strikingly similar to the above exchanges between Chairwoman Showalter and Ms. Jensen.

Q. Am I correct in understanding that it is Qwest's position that none of its business customers in the 31 wire centers are captive customers, as that term is used in RCW 80.36.330?

- A. I'd respond by saying in our petition, in our testimony, we maintain that each business customer in each of these wire centers has choice today. In that sense ,they are not captive.
- Q. So if I'm to understand your answer, it is correct that it is Qwest's position that no customers are captive , as the term is used by this statute?
- A. Absolutely.
- Q. Has Qwest determined what number or percentage of business customers in each of the 31 wire centers CLECs would, in fact, be willing or able to serve?
- A. I believe that's a compound question, but I can answer it in two parts.
- Q. I'd be happy to rephrase it if you would like.
- A. You said "willing and able." I think those are two different thoughts.
- Q. I'd be happy to rephrase the question. Mr. Teitzel, has Qwest determined what number or percentage of business customers in each of the wire centers CLECs are, in fact, able to serve?
- A. Yes, we have determined that percentage.
- Q. What is that percentage?
- A. 100 percent.
- Q. Has Qwest determined what number or percentage of business customers in each of the wire centers CLECs are willing to serve?
- A. I'd answer that by saying I am not privy to any of the CLECs' marketing plans. That's very confidential information..."

Tr. p. 387, l. 9 – p. 388, l. 18.

80. Qwest's interpretation of what constitutes a significant captive customer base may be an expedient one for the company, given the dearth of hard evidence to support their case in the record. Their interpretation, however, does not comport with the plain language of the statute.

81. There is ample evidence in the record to suggest the existence of a substantial and significant captive customer base. Qwest admits that competitors tend not to serve the "less profitable" customers in a wire center. In her rebuttal testimony, Ms. Jensen declares that the competitors will *continue* to selectively serve customers in markets where it is profitable while they deny

service to less profitable customers in the same areas. Ex. 17-T, p. 17, ll. 15-17. See also Tr. p. 135, l. 22 – p. 136. l. 24, and Tr. p. 137, ll. 11-15.

82. Moreover, the wire center maps Qwest filed in Attachment M to the Petition also suggest the existence of significant captive customer bases. A number of these maps show few or no competitive switches or collocations, and small dense core areas, coupled with vast areas which are suburban or rural in nature. When asked about these areas, Ms. Jensen admitted that it would be expected that the CLECs who were “present” in the wire center would be focussing their efforts on providing services to businesses located in the small concentrated areas of the wire center. In addition, Ms. Jensen offered her (unsupported) opinion that “you wouldn’t find much business in the outlying areas, other than perhaps someone who is operating a business out of their home.” Tr. p. 190, l. 19 – p. 191, l. 16. However, when asked whether Qwest has provided any evidence to demonstrate that there is not a captive customer base in the outlying areas of the wire centers, Ms. Jensen contradicted her earlier statement, saying:

I’m not saying that there aren’t [businesses in the outlying areas]. I’m saying that the commercial area tends to be in the dense area which would typically be where your businesses are located. That doesn’t mean that there aren’t businesses located in these other areas, but as you can see from this map, it’s very rural in nature.

Tr. p. 192, ll. 3-8.

Ms. Jensen went on to concede:

...Obviously, you can have a hospital or an Air Force base or even, for instance, a Hewlett-Packard plant that may not be located in these dense areas, but a carrier is more—if you look at where their networks are deployed, which is in Attachment M, they tend to be in these same dense areas because that’s where the concentration of business customers is.

Tr. p. 193, ll. 12-19.

Thus, Qwest has openly admitted the distinct possibility that it retains a captive customer base despite the competitive inroads it believes that the CLECs have made. And it has further admitted the possibility that this captive customer base exists within the same two groups identified by Dr. Goodfriend—the small and very large customer. It is true that Qwest has not

agreed that this captive customer base is significant. On the other hand, Qwest has supplied the

Commission with no evidence on which the Commission can conclude that the captive customer base is *not* significant.

83. Indeed, it would appear that Qwest is simply resting on its position that that there is no significant captive customer base if the CLECs could and should serve all customers; otherwise, there is no reasonable explanation for Qwest's failure make any legitimate attempt to show the absence of captive customers. And it is certainly clear that Qwest could have attempted to make such a showing if it had chosen to do so. For instance, at hearing, Ms. Jensen described the efforts Qwest exerted in their attempt to make a similar type of showing in UT-990022 . Qwest hired a consulting engineering firm to analysis competition in the area, and regarding the PEI study that was the result of the firm's work, Ms. Jensen stated:

This information was an analysis of every circuit in Qwest's database and the information specific to that circuit that an outside firm then spent literally months pulling together the information that shows the distance of those circuits from the serving wire center...

They physically walked every street in the downtown corridor to look at where the networks of other providers were, and then they looked at every physical circuit identified in our system to complete this analysis.

Tr. p. 177, l. 12 – p. 178, l. 22.

84. Ms. Jensen goes on to state that this analysis was "fairly simple" because of the scope of the geographic areas involved and the number of circuits, suggesting that it would be impossible or at least impractical to undertake a study of this type with respect to all business services in the 31 wire centers for which flexibility is requested in this case. *Id.* See also, Tr. p. 351, l. 19 – p. 352, l. 4. However, as mentioned above, given Qwest's obvious financial stake in this case, this explanation is not entirely plausible. More importantly, Qwest offers no explanation whatsoever as to why it has made no effort to employ any type of empirical study at any level.

85. Similarly, instead of providing real data that the CLECs can and will offer alternatives to Qwest's business customers, Qwest is content to argue that the existence of unspecified collocated equipment and switches indicates a sufficient "competitive presence" to meet the requisite level for "effective competition." This kind of argument is unavailing as undefined

collocations and switches provide only the weakest evidence of competitive activity with respect to the correct product market.

86. First, as explained by Dr. Goodfriend, the incidence of collocation bears no direct relationship with CLECs' ability to supply alternatives. Collocation can provide access to UNEs and it can serve as a method of interconnection. Ex. 166-TC, p. 28, ll. 17-18. It can also house DSLAMs which are collocated for the sole purpose of providing DSL services. Qwest has made no attempt to separate out those collocations which are being used for delivery of business services in the wire center (let alone the subset of services which are the functional equivalents to Qwest services), from those which being used for interconnection, or those which used for DSL services. Thus, Qwest's evidence regarding collocations per se says nothing about what market segments are being served and which services are being delivered. Ex. 166-TC, p. 29, l. 10 – p. 30, l. 3.

87. Qwest's reliance on the total number of switches in the state or wire center is similarly misplaced. Dr. Taylor's conclusions seem to rest quite heavily upon his finding that there are 257 "competitive switches" in the state of Washington. Ex. 231-T, p. 18, l. 8-p. 19, l. 4. However, upon cross-examination, Dr. Taylor admitted that this statistic includes independent telephone company switches, packet switches, cellular switches, and switches used only for interconnection. Tr. p. 768, l. 5 – p. 769, l. 3. These are quite clearly used for other purposes than the provisioning of dialtone for Washington businesses. Other than the above, Dr. Taylor has provided no information regarding the location of switches and no information whatsoever regard the capacity and or functions of the switches, and no information re CLEC facilities extended from the switches. Tr. p. 276, l. 24 – p. 278, l. 11. Even Mr. Hooks Qwest's witness identified as the most knowledgeable regarding switch capacity admitted that he would have no way of knowing which of these switches can provide the services that Qwest is seeking competitive classification on. Tr. p. 279, l. 22 – p. 280. L. 7.

88. On the other hand, the Qwest Petition, does not provide a statewide number of switches, but rather provide the number of switches per wire center. Ex. 52-C, the document which Qwest provided as support for its switch count, shows total of 46 switches in the 31 wire centers at issue in the petition. At least two of these are POI's as opposed to dial tone switches. Id. Several of them are remote switches that rely on a host. With regard to line capacity, Mr. Hooks explained that these switches are scalable. That means that they can be purchased with a lesser capacity, and can be upgraded to a greater capacity. As a result, Mr. Hooks could not determine the line capacity of the switches on Ex. 52-C. TR. p. 283, l. 20 – p. 285, l. 16. Clearly, despite Qwest's claims there is no evidence to suggest that, even if they chose to do so, the CLECs currently have the capacity to serve Qwest's captive customers.

89. To the contrary, the evidence in the record suggests that the CLECs do *not* have excess switch capacity. Again, as Mr. Hooks testified, most switches are scalable; the CLECs tend to buy for what they need, and then add capacity when only as necessary. However, Dr. Goodfriend explained that it is not always to easy to “scale up” switch capacity. First, many of the small switches, (identified by Mr. Hooks as many of the switches listed in Ex. 52-C, see Tr., p. 280, l. 14- 290, l. 12) have maximum capacity limits at two to three thousand. Moreover, lack of ports and overburdened processors will often render a CLEC unable to add more customers to its system. Thus, it is unlikely that the CLECs could serve Qwest's current customers without incurring very substantial sunk costs. Tr., p. 624 l.18 – p. 625, l.13

90. Finally, it is important to note that Qwest while arguing that no significant captive customer base exists, has failed to define what it intends by the term “significant.” Do they mean any number less than 50%, 10%, 5%?

91. It is clear that the captive customer class for whom there are no reasonably available alternatives remains “significant.” Those customers either too small to justify the cost of building out network facilities to serve their needs, and/or are too far from existing network facilities will have no competitive alternatives for the foreseeable future.

92. Thus, Qwest has not proven that the CLECs are even capable of serving all customers in the 31 wire centers, much less that the CLECs are willing to and would serve all customers in the 31 wire centers.⁸

B. Market Concentration

1. Antitrust Merger Guidelines.

93. The Merger Guidelines are a useful tool. If properly applied, they can give this Commission some assurance that, when and if they are to find that effective competition exists under the statute, that Qwest will not be in a position to exercise market power through an inappropriate and premature grant of pricing flexibility. Tr. p. 609, l. 17 – p. 610, l. 5. As such, they have served as a touchstone for defining markets for all three of the economists who have offered testimony in this case. See generally, Ex.s 166-T, 168-T, 201-TC, and 231-T.

94. Even a quick review of the guidelines confirms Dr. Goodfriend's analysis that neither Qwest or Staff have employed the degree of care necessary for properly defining markets under the Guidelines. In Section 1.11, the Guidelines require state:" [T]he Agency will begin with each product (narrowly defined) produced or sold by each merging firm " In Section 1.21 the Guidelines state: "in defining the geographic market or markets affected by a merger, the Agency will begin with the location of each merging firm (or each plant of a multiplant firm)." By broadly defining the market to include all 31 wire centers and all business products without first performing a more detailed study, Qwest has entirely failed to adhere to the Guideline's most basic requirements. Staff has attempted to more finely define the product and geographic

⁸ In a futile attempt to argue no significant captive customer base, Qwest argues that customers also have choice of wireless and cable technologies. However, Jensen admits that she does not know what additional work will be necessary to update cable facilities so that they can carry voice and data Tr. p. 144, ll. 5-7. And while touting the ubiquitous reach of fixed wireless carriers such as Teligent and Winstar, seemingly ignorant that that technology is in its infancy, and that service is significantly degraded in areas with weather and topography like most of Western Washington State. In the Matter of Implementation of § 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fifth Report, FCC 00-289 (2000).

markets by narrowing the number of wire centers, and dividing the product market into services delivered on circuits below and above the DS-1 level. Unfortunately it also has failed to adhere to the Guideline's requirements as it has gone about the task in a flawed, and at times, arbitrary fashion. See generally, Section V below and Ex. 168, pp. 1-14.

95. The DOJ Horizontal Merger Guidelines are applicable to the analytical process this Commission must engage in, not because it is a statutory prerequisite for determining whether Qwest's Petition has met the statutory standard for consideration of competitive classification of its business services in 31 wire centers, but because it is the proper analytical framework for determining relevant product and geographic markets. This analysis is directly relevant to the legal issues of whether Qwest has properly defined the markets it has asserted as "relevant" and whether, in these markets, there exists effective competition today. It is important to note that the Merger Guidelines are a framework for market definition and cannot substitute for the legal analysis this Commission must perform. The Merger Guidelines do not require the existence of "Effective competition" as our laws do. To put it another way, use of the Merger Guidelines is a necessary, but not sufficient part of the analysis this Commission must engage in.

2. HHI Analysis

96. The Herfindahl-Hirschman Index ("HHI") has been adopted by the DOJ as a method for measuring market concentration. DOJ, § 1.5. Authorities use the HHI in order to determine whether a particular market structure will allow or will allow one or more of the participants to exercise market power, either unilaterally or in concert with other participants. HHI measures the number of suppliers participating in the market and their relative sizes with a single number. The DOJ regards markets with post-merger HHI below 1000 to be unconcentrated. Post merger HHI between 1000 and 1800 is regarded by the DOJ to be moderately concentrated and requiring further analysis. HHI above 1800 is regarded as concentrated. The Guidelines state as follows: "Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an

increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.” Id.

97. Public Counsel and TRACER have objected to the fact that they have been denied access to certain of the raw data on which Staff bases its calculations. Nevertheless, they would point out that even accepting those calculations as accurate, the HHIs for the wire centers for which Qwest is requesting pricing flexibility are all extremely high many are well above the level that the DOJ say create a presumption of market power. See Ex. 193. This fact alone suggests that Qwest’s petition should be denied. Moreover, Staff’s calculations appear to be flawed.

98. The HHI is used by authorities to help determine whether a particular market structure is such that participants can exercise market power, either unilaterally or in concert with other participants. HHI measures the number of suppliers participating in the market, and their relative sizes with a single number. Markets with a number above 1800 are deemed “highly concentrated,” which may facilitate exercise of market power. Markets with HHI’s of below 1000 are unconcentrated. Ex. 166-TC, p. 33, l. 18-p. 38, l.15.

99. Commission Staff has identified two separate product markets, DS-1 and above and below DS-1. Yet the data on which Staff bases its HHI combines both product groups. Moreover, Staff used line counts to perform its calculations. As acknowledged by Staff witness Ms. Bhattacharya, financial analysts examine revenue per line instead. Thus Staff’s basic calculations are subject to substantial error. See Ex.. 168-T, p. 25, ll. 10-17.

100. Dr Taylor argues that the HHI should not apply in the same way in this case as it does in the case of a Merger. He reasons that in a merger situation, the market is moving from less to more concentrated. In this case, the telecommunications market is presumably becoming less concentrated over time. Therefore, Dr. Taylor suggests that the very high HHI’s present in the 31 wire centers should be tolerated. Ex. 231, pp. 22 –227. Significantly, however, Dr. Taylor cites no authorities which support his opinion. Dr. Goodfriend, however, points out the flaw in Dr. Taylor’s reasoning, noting that in this case, the firm being scrutinized is an incumbent

monopoly provider. As such, Qwest enjoys substantial legal and de facto advantages that the CLECs do not experience. In that sense, the difference in circumstances between a merger, and the instant evaluation balance each other out. Tr. p. 610, l. 14 - p. 611, l. 7.

101. The HHI's calculated in this case clearly indicate a highly concentrated market with Qwest as the dominant provider. These numbers alone strongly suggest that if granted pricing flexibility, Qwest will be free to exercise its market power.

102. Commission Staff has arbitrarily chosen to recommend pricing flexibility for those wire centers where the HHI is below 5000. Staff gives no rationale for choosing this number other than observing that it is the number which "would obtain in a market with only two competitors, each holding 50 percent of the market. Ex. 201-TC p. 18, ll. 4-6. Given that Qwest's evidence suggests that there are significantly greater than 2 competitors in each wire center, and given that Qwest's numbers also suggest that it holds significantly greater than 50% of the market in each of the wire centers, Staff's observation hardly seems relevant.

C. Market Structure

103. Market structure refers to the way firms relate to each other, their suppliers and their customers, and how easy it is for firms to enter and exit the market and how easy it is for customers to change from one competitor to another are all relevant market structure factors. Ex. 201-TC, p. 11, ll. 4-7. In this case, numerous factors indicate a market structure which makes it difficult for competitors to enter, and leaves Qwest free to exercise significant market power.

1. Barriers to Entry/Ease of Entry

104. Throughout this proceeding, in both written and oral testimony at hearing, Qwest's witnesses have repeatedly claimed that there are "no barriers to entry." Qwest claims that this position is supported by the "competitive loss" data that it produced in Attachment F to Ex. 12, and in the "competitive presence" data contained in Ex. 2-C and Ex. 3-C. On the contrary, the competitive loss and competitive presence data reveal only nascent competition, with CLECs making only

modest inroads in the business market. This fact suggests that there are real barriers to competitive entry.

105. As has been the case with the Qwest's use of other critical terms of analysis (i.e. reasonably available alternatives and significant captive customer base) it appears that Qwest relies on an unusual definition of the term "barrier to entry." When asked to define his use of the term, Mr. Teitzel stated, "I would respond by saying I would maintain that barriers to entry is a subjective term." Tr. p. 355, ll. 4-10. However, upon close examination of Qwest's testimony, it appears that Qwest has narrowed the definition to refer to an obstacle that prevents any entry entirely. In support of Qwest's statement that there are no barriers to entry, Qwest points to what it terms "competitive presence." However, the mere fact that competitors are "present" in a particular wire center says very little about the existence or absence of barriers to entry. Ex. 241-TC, p. 28, ll. 4-10.

106. Proper definition of barrier to entry is anything that raises the competitors costs of entry above the costs incurred by the incumbent. Mr. Wood offers another perspective when he states that the term barrier to entry should really be understood as "barrier to effective entry." Ex. 241-TC, p. 28, ll. 11-17. The testimony in this case amply illustrates the existence of substantial and numerous barriers. These can best be found in a summary form in the Direct Testimony of ATG and MetroNet witness Don Wood as he characterizes the barriers which Qwest would have to face if it were to experience true parity with the CLECs. In short, Mr. Wood points out that if Qwest truly desires parity, it will have to subject itself to the following:

1. Rely on Qwest's competitors to provision network facilities essential to its services.
2. Accept that Qwest has no control over poor service quality delivered to its customers.
3. Rely on Qwest's competitors to make collocation space available in a timely manner.
4. Rely on Qwest's competitors to plan for Qwest's needs when planning construction and network deployment.

Ex. 241-TC, p. 9, l. 1-p. 11, l. 4.

107. The testimony of Kaylene Anderson of Nextlink (now XO Washington) further illustrates the barriers to entry experienced by the CLECs. Ms. Anderson testified to astoundingly high

percentages of held orders for both high capacity circuits and unbundled loops ordered from Qwest. Ms. Anderson also testified to lengthy time periods for these held orders. Ex. 281-T, pp. 4-6. Moreover, Ms. Anderson's testimony illustrates that when Qwest provides the ordered facilities, Qwest fails to properly maintain and repair facilities. Ms. Anderson testified to significant problems with outages and other service interruptions attributable to Qwest on unbundled loops and high cap circuits. And notably, Qwest takes considerably more time to repair these interruptions and outages for Nextlink customers than it takes to repair the same problems for its own customers. As Dr. Blackmon observes, a customer who chooses service from a competitor can expect to wait several days longer to obtain that service. Moreover, a CLEC customer's order is substantially more likely than the ILEC customer's order to be held for facilities reasons, and these held orders tend to require construction work by Qwest and typically result in very lengthy delays. Ex. 201-TC, p. 15, ll. 13-20.

2. Exercise of Market Power

108. Market power, as it has been defined by economists, is the ability of a supplier to sustain prices above the level which would attain in a fully competitive market, or, seen another way, the degree to which it would be profitable for that carrier to sustain a small but significant nontransitory increase in price in the market. DOJ § 0.1. Market power can be exercised collusively, with other suppliers in the market; or it can be exercised unilaterally. Economists are concerned about both. Id. Logically, the existence of a significant captive customer base confers the ability to exercise market power.

109. If Qwest is granted pricing flexibility, and if any captive customer base exists, Qwest will increase prices to those captive customers because it will be in its rational economic self-interest to do so. Tr. p. 613, l. 19 – p. 615, l. 18. Indeed, Qwest will be able to more finely discriminate among its customers, raising its prices wherever it can, while offering competitive contracts wherever it is experiencing competition. With respect to resale, Qwest will be able to choose

between driving entrants out of the market with a price squeeze, or raising resellers cost and engaging in upward umbrella pricing. Id.

110. Even with the conditions recommended by Dr. Blackmon, if Qwest is allowed pricing flexibility with respect to services delivered on “low capacity circuits,” Qwest will be able to exercise market power. Dr. Goodfriend explained that Dr. Blackmon’s recommended conditions for pricing flexibility for small business services includes a requirement that *current services and prices* be frozen. However, as technology evolves and Qwest develops new and improved products, through advertising, Qwest will be able to move small business customers off the “price frozen” services, and migrate them to the newer services for which Qwest will have complete pricing flexibility. In this way Qwest will be able to circumvent Staff’s restrictions. Tr. p. 622, l. 20 – p.624, l. 17.

111. Market share data produced in this case shows that Qwest retains significant power with respect to business services. As pointed out in Mr. Woods testimony, regarding Attachment G to Qwest’s Petition (Ex. 12-C), a small number of resellers share a tiny fraction of the total market, while Qwest retains the lion’s share. The same is true regarding ported numbers as well as unbundled loops. Ex. 12-C, Attachment G. These numbers reveal a highly concentrated market.

112. Commission Staff’s calculations have produced evidence of a relatively less concentrated market. Exhibit 193. However, even by Staff’s calculations, the market for business services across the 31 wire centers is “highly concentrated” as defined by the Department of Justice. DOJ § 1.5.

113. However, the calculations are performed, the inescapable fact is that Qwest can exercise market power with respect to business services because not all customers have reasonably available alternatives, and because Qwest enjoys a significant and substantial captive customer base. This means that once it is granted competitive classification, Qwest will be free to raise its prices for services for which it is not facing competition (such as services to small business customers) while it lowers its prices for services for which it is facing competition. Or, if freed

from the prohibitions against undue preference and discrimination, Qwest will have the ability to further discriminate among its customers on a finer and finer basis. Thus, whether the Commission accepts Staff's market share data, or the data presented by Qwest, it must nevertheless conclude that if granted the flexibility it requests, Qwest can and will exercise its market power to the detriment of Washington's business customers.

3. Resale

114. In evaluating Qwest's ability to exercise market power with respect to business services, it is essential that the Commission recognize that resold services are unable to offer customers any protection against excessive prices. This is true because when service is being resold, competitive market constraints that would otherwise control prices do not exist. Ex. 241-TC, p. 17, ll. 5-8. If this Commission wishes to evaluate the level of competition and in particular which competitors can constrain an exercise of market power by Qwest in the 31 wire centers at issue in Qwest's Petition, it should not consider resale.

115. As explained in detail in Mr. Wood's testimony, the rates at which competitors purchase services for resale consist of the ILEC's retail price, less an avoided cost discount. The competitors' costs in providing resold services therefore increase in lockstep with the incumbents' retail prices. Thus if the CLEC is to make a profit on resold services, or even break even, it must raise prices in lockstep with the ILEC. Ex. 241-TC, p. 18, ll. 11-22.

116. Qwest maintains nevertheless that competition in general maintains prices at competitive levels and that there is nothing unique about resellers ability to protect a customer from increased prices. Ex. 53. However, when pressed on that statement at hearing, Ms. Jensen agreed that if Qwest increased prices significantly, that resellers prices would have to substantially follow. Moreover she agreed that in that event, in order to hold down prices, the CLEC would be forced to resort to unbundled loops or to purchase services from another carrier. Tr. p. 199, ll. 3-9.

IV. OTHER

A. Public Policy Considerations

117. In addition to Qwest's failure to establish the existence of effective competition under the standards of Washington law, Qwest's petition also raises significant policy questions.

1. Relationship to the Merger

118. In reviewing Qwest's Petition, the Commission should also be cognizant of the Petitioner's relationship to the U S West/Qwest merger settlement conditions, adopted and approved by the Commission earlier this year. The terms of the merger agreement preclude Qwest from increasing the rate for any of the services covered by this petition prior to January 1, 2004. *In re the Application of U S West, Inc., And Qwest Communications International, Inc., For An Order Disclaiming Jurisdiction, Or In The Alternative, Approving the U S West, Inc.-Qwest Communications International, Inc. Merger*, Docket No. UT-991358, Ninth Supplemental Order Approving and Adopting Settlement Agreements and Granting Application ("Merger Order"), Appendix A, Section IV. B., p. 9-10. While it is true that the settlement agreement does not preclude Qwest from petitioning for competitive classification for any service, *id. p. 10*, the timing and scope of this Petition are troubling to say the least.

119. U S West filed its petition for competitive classification on June 7, 2000, only two weeks after the merger settlement agreement was signed, and before the settlement had been adopted by the Commission. Theresa Jensen confirmed at the hearing that the Petition was being considered prior to the Qwest merger. Tr. p. 206, ll. 17-23. Thus, this broad petition, dramatically at odds with the spirit of the merger conditions, was planned simultaneously with the negotiation of the rate freeze in the merger.

120. The rate provisions were an important element of the merger settlement. As the Commission noted:

At the settlement review hearing, Ms. Jensen testified that the Retail Settlement Agreement (Exhibit No. 320) *provides for rate stability* for Washington consumers in that it imposes a moratorium on any general rate increase filing during the settlement period or until January 1, 2004[.]

Tr. p. 371. Merger Order, p. 17. (emphasis added).

121. Dr. Blackmon testified that the imposition of a rate moratorium is appropriate given the many financial adjustments that are expected to occur in connection with the merger. *Id.* Dr. Blackmon went on to testify:

By adopting the Retail Settlement Agreement the Commission would effectively impose conditions on the merger adequate to ensure that consumers are protected while the merger goes forward.

Merger Order, p. 18.

122. On the basis of this and other evidence regarding the proposed conditions, the Commission determined that “[c]onsidering the record as a whole, we find the Retail Settlement Agreement is a fair and reasonable resolution of the retail service issues as presented principally by Staff and Public Counsel. We conclude that our approval ... is in the public interest.” *Id.*, p. 19.

123. What is significant here is that the rate stability component of the merger, as Dr. Blackmon observed, was a critical ingredient because it helped to ensure that business and residential consumers would not inappropriately bear merger costs through rate increases. It is troubling that at the same time Qwest was agreeing to this rate moratorium, unbeknownst to the Commission or the parties to the settlement, it was planning to request pricing flexibility for the majority of its business customers in the state, one of the very customer classes designed to be protected by the rate moratorium. The result of the requested competitive classification in this proceeding is that those customers will no longer be protected from “the many financial adjustments” which Qwest may experience as the merger is implemented.⁹ An important assumption on which the merger approval was based is now in question. Public Counsel and TRACER asks that the Commission keep the merger agreement in mind as it considers the impact of this request in the larger context.

⁹ It is true that all customers would still be insulated from the merger costs catalogued in Section IV.C. Merger Order, App. A, p. 10. As a practical matter however, identifying an improper pass-through of merger costs would be very difficult in an environment of pricing flexibility.

2. The Relationship Between Section 271 and Washington's Competitive Classification Statute

124. While Section 271 does not preempt or trump Washington's competitive classification statute, the Commission should nonetheless give careful consideration to the relationship of this proceeding with the Section 271 proceeding now under way.

125. The competitive classification statutes were initially adopted in 1985, over a decade prior to the enactment of the Telecommunications Act of 1996. The general purpose of the Washington law was to provide for regulatory flexibility as retail competition was shown to be developing, RCW 80.36.300(5), (6). It is beyond debate, however, that local service competition for incumbent de facto monopoly companies has been slow to arrive, both in Washington and nationally.

126. In recognition of this fact, the 1996 Act was adopted with the central purpose of further encouraging competition in the local telecommunications market, this time with a significantly greater focus on the wholesale market. To this end, the Act mandates that incumbent LECs open their local markets through interconnection, unbundling of network elements, and resale. Moreover, as an incentive to comply with this mandate, RBOCs such as Qwest are offered the opportunity in Section 271 of the Act to enter their in-region intraLATA market in return for satisfactory opening of their local markets.

127. As the Commission is well aware, the Section 271 review process is an exhaustive one. Through its review of the 14 point "competitive checklist" and the other statutory factors, through the gathering of the evidence laid out in the Commission's Interpretive and Policy Statements, and through the OSS development and evaluation process, the Commission will develop a broad picture of the degree to which Washington's local market is open to competition. The information, evidence, and analysis gathered in the Section 271 case will far exceed the information available in this record. What is significant is that the information being gathered in the 271 case will give the Commission a more comprehensive and accurate picture of whether competitors have available to them the means necessary to enter and remain in the

market, or whether they continue to encounter barriers to entry, service quality problems, and anticompetitive behavior. Ex. 201-T, p. 8, ll. 11-14. Ex. 202-T. Ex. 281, p. 4, l. 13 - p. 6, l. 11.

As Dr. Goodfriend testified at the hearing:

[F]rom the FCC's point of view, 271 provides some of the necessary conditions for a meaningful opportunity to compete to be assured and establishes irreversibility of those conditions. And in that way, I think the 271 standards are complementary and I believe should precede our finding such as that or a stronger foundation would raise the foundation the Commission would have for granting a proposal such as this.

Tr. p. 651, ll. 4-18.

128. A clear overlap exists between the matters at issue in the 271 proceeding and those at issue in the competitive classification case. Section 271 was not contemplated when RCW 80.36.330 was enacted. Now, however, the Commission is faced with simultaneous proceedings considering closely related questions. There is a strong argument to be made that a competitive classification determination of this scope would be better made with the benefit of the record and determinations made in the Section 271 case. While there is no legal requirement that this approach be taken, however, the Commission should adhere to sound public policy considerations and require Qwest to obtain Section 271 approval before its request for pricing flexibility is granted.

3. Qwest Already Has Sufficient Pricing Flexibility

129. Qwest's justification for the petition, the need for greater pricing flexibility, is not persuasive. As pointed out in the "legal framework" section of this brief, Qwest already has available to it virtually all of the pricing flexibility it needs to lower prices where it sees a need to do so. The fact that it has used its existing flexibility rarely, if at all, casts serious doubt on claims that it faces substantial competitive pressures of the type alleged here.

4. Qwest's Use of Confidential Competitor Information In Its Wholesale and Retail Strategies.

130. Qwest's possible misuse of confidential CLEC information in furtherance of its wholesale and retail operations is a matter of grave concern. Tr. p. 119, l. 7 - p. 121, l. 3. Tr. p. 377, ll. 4-

16. The Commission should take this conduct into account in evaluating whether competitive conditions in Washington yet warrant this classification.

B. Public Publication

131. The Commission held public hearings in Vancouver on October 12th, 2000 and in Olympia on November 1st, 2000. While the turnout was limited, the majority of those who did testify opposed the competitive classification. Two chamber of commerce representatives and one communications consultant spoke in favor of the Petition.

132. Customer reaction to the requested competitive classification has been strong and it has been unfavorable. The contents of illustrative Exhibit 400 are the comment letters received up through November 7th, 2000. Of the 66 letters, emails, and Commission website comment forms and or other written comment contained in the exhibit, 49 oppose Qwest's requested competitive classification of its business services, 3 are in favor, and 14 either had other complaints about Qwest or requested additional information.¹⁰

133. The following are excerpts from some of the letters opposing the Petition:¹¹

The National Federation of Independent Business (NFIB), on behalf of its 15,000 small business members in Washington state, would like to urge the commission not to adopt the petition by US West to classify their business telephone services as competitive (Docket #UT 000883). (p 1)

I look to competition, as that is what keeps business on it toes and reduces prices to all. I look to more than one supplier to serve my small business and I am sure that all other small businesses look to competition to keep the prices down and give choices. (p 5)

We must have competition and choices at all times, I vote no to QWEST petition/proposal. (p 5)

If we had a choice, U.S. West is the last company we would choose to do business with. (p 15)

While I receive at least on [sic] call a week from a company offering a "new, lower" pricing plan for long distance calls, I do not remember ever having such a

¹⁰ In passing, it is significant to note the number of customers expressing concern about the unclear nature of the notice provided.

¹¹The quotes are referenced by page number to Exhibit 400. The given number refers to the Bate Stamp number in the filed exhibit.

solicitation for local service. My fear is that, if the Commission's approval process is abandoned, then small firms, with relatively few phone lines, will see prices go up, at least in the foreseeable future.

Rein this monster in and grant it no further authority. Please also require it to adopt reasonable business procedures, including publication of contact/complaint addresses, and implementation of realistic reasonable procedures for telephone business, i.e. make them do what they promise to do in a timely fashion and quit making people wait on hold. (pp 16 & 17)

I am disgusted that I have no choice. Since I have no choice you should exercise the utmost care and authority to assure that the captive customers of this monster are not victimized by it, as has occurred with me. (p 17)

It has been our experience that they indiscriminately raise fees and/or add on for services that are not provided, and I am not in favor of providing them with any opportunity, whatsoever, to repeat this kind of business activity. (p 20)

I'm against this proposal because it gives QWEST too much latitude while the present rate review process gives us better checks and balances for the consumers. (p 39)

I absolutely do not want US West to offer any more services, they cannot manage the ones currently in use. I am distressed that they have a monopoly and I have to use them at all, if there is ever a competitor they will have my business phone line dollars. (p 43)

We would like to state that if US West is allowed to increase their rates, we will suffer. The small business groups who do not require all of the "extra features" US West would like to be able to offer us, will wind up paying for the extra cost of offering these services, even if we do not require them. (p 44)

Progress is fine and wonderful, however, we hope that US West will not be allowed to charge extra fees to everyone just because they will now be able to offer more services. (p 44)

I have no idea whether rate changes will be up or down, services deleted or added. This proposal is absurd. Kindly reject it! (p 45)

So - as a customer - I would say USWest's request for competitive declassification in the Issaquah area is premature until real competition emerges. (p 48)

As regulatory overseer with responsibility in this area, I urge you in the strongest terms to refuse US West's request, to keep a tight lid on local voice and data telecommunication service prices and to creatively explore ways of lowering telecommunication service prices and to increase competition in the local market. (p 51)

My comment is: the notice nowhere indicates what "competitive classification" means, nor what its effect would be to anyone. I still don't know. (p 54)

Vote No! No to higher rates. Does the WUTC ever say no to US West? It's about time that Washington business get the preference.
(p 58)

I am in favor of competitive classification of US West' business and basic exchange telecommunications services ONLY IF they have bona fide competition. To date, I am unaware of a single competitor, and hence am currently not in favor of this new proposed classification. (P 60)

I'm against this proposal because it gives QWEST too much latitude while the present rate review process gives us better checks and balances for the consumers.
(p 67)

We need competition to avoid monopolistic control. Please deny Qwest's petition. (P 69)

Since there isn't anyone else to buy from, they can raise the rates as much as they want without fear of losing customers. Until there is real competition, there needs to be regulation. (p 70)

134. These characterizations are typical of the customer sentiments expressed in the illustrative exhibit. What is significant about these comments, in addition to the basic opposition which they convey, is the fact that so many of the customers raise the very concerns raised by the parties to this case, a sentiment that they have no alternative but Qwest.

V. RECOMMENDATIONS REGARDING DIFFERENT PROPOSALS

135. Public Counsel and TRACER urge the Commission to deny Qwest's Petition because the company has not met its burden of persuasion to demonstrate the existence of effective competition in the 31 wire centers for the business services identified in Attachment A to the Petition.

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

136. Public Counsel and TRACER oppose Qwest's proposal to adopt Dr. Blackmon's proposed conditions contained in Ms. Jensen's rebuttal testimony, Ex. 7-T. As discussed further below, the selection of DS-1 service as a "break-point" between large and small customers is both arbitrary and contrary to proper market analysis. Further, it would be unlawful to provide competitive classification with Dr. Blackmon's conditions for less-than DS-1 capacity customers where the Commission cannot make a finding that the market is subject to effective competition.

1. Variation: Lift conditions upon state approval of 271

137. Qwest's request to modify the "sunset" date of Dr. Blackmon's conditions should similarly be rejected as there is no legal basis for imposing the conditions at all. In addition, accelerating the sunset date would only allow Qwest to exercise market power against its captive customer base even sooner than Dr. Blackmon would propose allowing. Finally, it is not at all clear whether Qwest's interpretation of Dr. Blackmon's conditions are those Dr. Blackmon himself would give to the conditions. Tr. p. 109, l. 6 - p. 114, l. 19.

B. Staff Alternatives

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

138. Public Counsel and TRACER oppose Dr. Blackmon's proposed resolution of this docket by competitively classifying DS-1 or greater services and, despite the market not yet being subject to effective competition, allowing the competitive classification of DS-1 or smaller service customers subject to a list of conditions. As discussed previously and in further detail below, Dr. Blackmon's DS-1 breakpoint" is arbitrary and should not be countenanced by the Commission.

a. Dr. Blackmon's "DS-1 or greater" Break-Point is Arbitrary

139. Dr. Blackmon proposes classifying as competitive services received by customers whose capacity requirements are DS-1 or greater. Ex. 201-T, p. 10, ll. 7-12. Dr. Blackmon's proposal is both arbitrary and contrary to proper market definition analysis.

140. Dr. Blackmon has selected "DS-1 or greater" customers because he believes their service demands justify a DS-1 or greater circuit and they "appear to have reasonable available alternatives in some exchanges." Ex. 201-T, p. 12, ll. 7-9. Dr. Blackmon clarified on the stand that he is not recommending competitive classification of the DS-1 circuits themselves, just the services delivered thereby. Tr. p. 711, ll. 7-11. There is no evidence in the record to support Dr. Blackmon's selection of DS-1 or greater as a de-facto definition of large customers other than Dr. Blackmon's own testimony. It is in fact quite different from the way that Qwest itself

defines small and large business customer segments.¹² His selection of DS-1 may be convenient, but it has no factual or legal basis in the record now before the Commission. Because his selection of DS-1 service as a "break-point" between large and small customers is arbitrary it should be rejected by the Commission.

141. An additional reason to reject Dr. Blackmon's DS-1 break-point is that it is inapplicable to the proper market definition analysis this Commission should engage in. DS-1 service is a measure of the capacity of a circuit a customer or group of customer's require for the functional services they are seeking. Qwest has not Petitioned for competitive classification of services based upon the capacity of the "pipe." This case is about the competitive classification of a group of functional services and not the degree of capacity required for the services. The Commission should also note that small and large business customers may both be served by DS-1 or greater capacity circuits. Multiple small customers may be aggregated on to a DS-1 or greater circuit, thereby blurring the distinction between large and small business customers that Dr. Blackmon appeared to be attempting to make with his DS-1 or greater break-point. Dr. Blackmon analogized between switched access/toll service and DS-1 circuits/large business customers. Tr. p. 711, ll. 7-11. His analogy is misplaced. Here, many if not all of the services Qwest seeks competitive classification for could travel over a DS-1 circuit. DS-1 circuits are not a "touchstone" or indicia solely of a large business customer. Dr. Blackmon's DS-1 breakpoint is not directly relevant to the request presented by Qwest's Petition and should be rejected as arbitrary, and not the product of a proper market analysis.

b. Dr. Blackmon's Selection of 4 Exchanges is not Supported by the Evidence

142. Dr. Blackmon recommended competitive classification for DS-1 or greater customers in four exchanges, Seattle, Bellevue, Vancouver, and Spokane. Ex. 201, p. 10, ll. 7-12. Dr. Blackmon's

¹² Although Qwest's witnesses and documents were inconsistent in how they defined small businesses (anywhere from 3-5, 1-3, or up to 20 lines); no Qwest definition of its business customer segments depended upon the capacity of the circuit serving that customer, such as Dr. Blackmon's DS-1 standard. Tr. p. 359, l. 6 - p. 360, l. 2. Tr. pp. 391-408. Ex. 29-C.

recommendation is not supported by sufficient evidence and should be rejected by the Commission.

143. Dr. Blackmon bases his geographic recommendation on the existing market structure and the market share analysis performed on an exchange-by-exchange basis. Ex. 201-T, p. 17, l. 18 - p. 18, l. 10. As discussed above, proper definition of the relevant geographic market is an important predicate to the analysis this Commission must perform in considering this Petition. Commission Staff selected exchanges as the most convenient geographic area due to the availability of information from the CLECs on an exchange basis. Ex. 191-T, p. 5, ll. 3-6. Dr. Blackmon has not engaged in the proper geographic market definition analysis and his selection of exchanges as the proper geographic market definition should be rejected on that basis. As with Qwest's selection of wire centers, the Commission Staff's selection of exchanges is flawed since it was selected for administrative convenience and not based upon the relevant geographic market for the services which are the subject of this Petition. Wire centers, exchanges, LATAs, and the entire state are all proper geographic markets in different contexts; as the Commission has found in the past. The simple fact is that Qwest and Commission Staff have not produced a sufficient factual basis in this docket for the Commission to conclude that either wire centers or exchanges are the proper geographic market definition to act as the predicate to the Commission's analysis under RCW 80.36.330.

2. 4 areas; all business services

144. It is axiomatic under RCW 80.36.330 that this Commission must first find effective competition to then legally classify a service as competitive; and before it can impose conditions upon that classification. It is equally clear from Dr. Blackmon's own testimony that he does not believe customers served by DS-1 or less circuits are receiving services subject to effective competition. Tr. p. 692, ll. 7-14. Ex. 201-TC, p. 20, ll. 3-5. Since Qwest has not presented sufficient evidence for this Commission to enter a finding that such customers receive services subject to effective competition it would be unlawful for the Commission to grant competitive

classification. The Commission cannot impose conditions on its grant of competitive classification without first entering findings of fact and conclusions of law that support its decision to competitively classify the services in question.

145. Dr. Blackmon conceded during cross-examination that it is difficult to reconcile his recommendations with the requirements of RCW 80.36.330. Tr. p. 739, ll. 1-7. Dr. Blackmon also conceded that there was not yet effective competition for small business customers. Tr. p. 692, ll. 7-14. This is consistent with his testimony that small business customers are still captive as that term is used in the statute. Ex. 201-TC, p. 20, ll. 3-5. Finally, Dr. Blackmon conceded that his conditions do not eliminate the captive small business customers. Just that we can “worry less” about them being captive. Tr. p. 692, l. 23 - p. 693, l. 6. This seems a far cry from proper regulatory oversight.

146. Dr. Blackmon expressed during cross-examination for the first time the view that if you define the market as one large, undifferentiated market with all customers equal, regardless of demand characteristics, than the Commission can legally impose his conditions. Tr. p. 738, ll. 3-23. This attempt by Dr. Blackmon to reconcile his opinion with Washington State law fails for the same reason several of his other opinions fail; namely that it constitutes an unsupported market definition. Qwest clearly defines the market according to demand and “value” characteristics. Ex. 29-C. All other parties to the proceeding who have addressed the issue have criticized both Qwest and Dr. Blackmon’s market definitions. Further, under Dr. Blackmon’s new framework the existence of effective competition apparently depends upon an over-broad market definition. Respectfully, effective competition either exists in fact or it does not. This new market definition whereby Dr. Blackmon attempts to finesse the legality of his proposed conditions should be rejected by the Commission.

C. MetroNet/ATG proposed conditions

147. We concur with Mr. Wood’s primary recommendation that the Petition should be denied. Public Counsel and TRACER believe that Mr. Wood’s proposed conditions provide a reasonable

framework for Qwest to consider should this Commission deny its Petition, and the company desires to re-file it at some future time. Mr. Wood's conditions regarding cost and pricing issues are discussed below in section VI. Ex. 241-TC, p. 41.

D. Public Counsel and TRACER recommend that the Commission deny Qwest's Petition in its entirety.

148. Qwest has not presented adequate information regarding the reasonably available alternatives to its services that it seeks to have competitively classified. Qwest has asserted that CLECs are present in each of the 31 wire centers who are "Capable" of providing service. As the record, or lack thereof, in this docket has demonstrated, Qwest has failed to even identify whether the CLEC switches located in the 31 wire centers are technologically capable of providing the services it seeks competitive classification for; let alone whether the CLECs in question actually offer in those wire centers equivalent services to those services which are the subject of the Petition.

149. Qwest has also failed to present any credible evidence regarding the size and significance of its captive customer base. Moreover, there is evidence in the record that a significant captive customer base remains. Absent this information the Commission cannot make a finding that any of the services for which Qwest has sought competitive classification is in fact subject to effective competition at this time. Qwest has failed to meet its burden of persuasion to this Commission that any of the services listed on Attachment A to the Petition are subject to effective competition today and its Petition must fail as a result.

150. In the alternative, if the Commission decides to grant Qwest's Petition in whole or part, Public Counsel and TRACER request that the Commission not waive the application of RCW 80.36.170 and RCW 80.36.180 to any competitively classified services.

VI. APPROPRIATE COST STANDARD

151. In the event that a service is classified as competitive under RCW 80.36.330, the statute sets a lower limit or "price floor" for the prices which can be charged by a provider which obtains pricing flexibility. RCW 80.36.330(3) provides:

Prices or rates charged for competitive telecommunications services shall cover their cost. The commission shall determine proper cost standards to implement this section, provided that in making any assignment of costs or allocating any revenue requirement, the commission shall act to preserve affordable universal telecommunications service.

RCW 80.36.330(4) goes on to provide that the Commission may investigate prices for telecommunications services upon complaint and that the burden of proof is on the company providing the service to show that prices cover cost and are “fair, just, and reasonable.”

152. From Public Counsel’s perspective, this issue does not arise in this proceeding. Qwest has not carried its burden of proof to show the existence of effective competition and pricing flexibility is therefore not appropriate in any event.

153. In the event that the Commission is considering any grant of pricing flexibility in this docket, we concur with MetroNet witness Wood’s testimony that the existing pricing floor framework creates problems. Mr. Wood points out that because the company will use TSLRIC as a price floor, while the cost incurred by CLECs is based on UNE prices, which exceed TSLRIC, Qwest will have the ability to under-price CLECs even with the price floor limitation. Tr. 865 (*see also* Tr. pp. 472-476 (Teitzel)). Mr. Wood suggests two reasonable measures to address this problem in the event pricing flexibility is granted: (1) make the UNE price part of the floor, and (2) require that Qwest make offerings equally across the wire center. Tr. pp. 865-866. Public Counsel supports these recommendations.

VII. CONCLUSION

154. Qwest has not met its burden of proof in this proceeding to demonstrate effective competition exists in the 31 wire centers and that no significant captive customer base exists for its business services. Qwest has failed to demonstrate that customers today have reasonably available alternatives to the business services Qwest provides. Granting this petition would be premature and would irrevocably harm the development of competition for business services in Washington state.

155. Public Counsel and TRACER respectfully request that the Commission deny Qwest's Petition.

Respectfully Submitted on this ____ day of November, 2000.

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