

**BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of) Docket No. UT-030614
QWEST CORPORATION)
For Competitive Classification of Basic)
Business Exchange Telecommunications)
Services)
_____)

REBUTTAL TESTIMONY

OF

R. NEIL COWAN

ON BEHALF OF

**AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE, AND TCG
OREGON (COLLECTIVELY "AT&T")**

August 29, 2003

REDACTED VERSION

1

I. INTRODUCTION

2 **Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS DOCKET?**

3 A. Yes. I filed direct testimony on August 13, 2003.

4 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

5 A. The purpose of my rebuttal testimony is to respond to Staff's testimony. I
6 will break this response into addressing essentially two concerns: (a) Staff's
7 assumption that prerequisites to or potential competition is equivalent to effective
8 competition and (b) Staff's failure to identify the appropriate standard and apply it
9 consistently to the relevant market. In this response I will, first, demonstrate that
10 the competitive prerequisites or potential competition cited by Staff, whether
11 developed through the § 271 process or other regulatory proceedings, only create
12 the landscape for competition in the State of Washington and do not measure
13 actual effective competition. Allowing for competition and obtaining competition
14 are two vastly different things.

15 Second, while Staff acknowledges that the relevant market must be defined, it
16 does little, if anything, to clarify what that market is and describe how it has
17 applied its other criteria to that market. Ultimately, I believe that neither Qwest
18 Corporation ("Qwest") nor Staff has done this and consequently both have failed
19 to make their cases.

1 Moreover, Staff does not have appeared to consider that the limited real
2 competition resident in Qwest's operating territory is dependent on Qwest being
3 the sole wholesale provider. Thus, competitive classification for Qwest at this
4 time would be premature, and is not in the interest of ensuring robust and
5 irreversible competition for the long term.

6 **Q. WHOSE TESTIMONY HAVE YOU REVIEWED?**

7 A. I have reviewed the testimony of Mr. Williamson and Mr. Wilson offered on
8 behalf of Staff.

9 **Q. PLEASE BRIEFLY SUMMARIZE MR. WILLIAMSON'S TESTIMONY.**

10 A. Basically, Mr. Williamson describes the difference between digital services and
11 analog services, and he discusses various types of technology over which carriers
12 might provide basic business service, such as Voice Over Internet Protocol
13 ("VOIP"), XDSL and so forth. He also criticizes the use of Intrado's 911
14 database for counting the number of CLEC business lines.

15 **Q. DOES HE OFFER ANY EVIDENCE DEMONSTRATING THAT THOSE**
16 **POTENTIAL TECHNOLOGIES ARE IN FACT BEING USED AS**
17 **SUBSTITUTES FOR QWEST'S BASIC BUSINESS SERVICES AND**
18 **WHERE THEY MIGHT BE OFFERED?**

19 A. No.

1 **Q. BRIEFLY, WHAT CONCLUSIONS HAS MR. WILSON DRAWN IN HIS**
2 **TESTIMONY?**

3 A. Mr. Wilson calls this docket a “milestone” in the context of the Regulatory
4 Flexibility Act of 1985.¹ While he provides a good summation of the competitive
5 and deregulatory history of telecommunications in the State of Washington since
6 the 1985 Act, he appears to place this docket as the next step in the Commission’s
7 relaxing of regulatory oversight and recommends that the Commission accept
8 Qwest’s Petition. He comes to this recommendation by attempting to show that a
9 number of prerequisites have been “measured and met,” and evidence of actual
10 competition shows that there is effective competition throughout Qwest’s
11 operating territory.²

12 **Q. DO YOU AGREE WITH MR. WILSON’S CONCLUSIONS?**

13 A. No. Mr. Wilson has demonstrated in his testimony that the competitive landscape
14 has been laid by this Commission, and he also shows that there is indeed
15 competition to varying degrees around Qwest’s operating territory. But I believe
16 he falls short in demonstrating that Qwest faces effective competition for basic
17 business services in all locations in the State.

¹ Direct Testimony of Thomas L. Wilson, Jr. at 2.

² *Id* at 7.

1 **II. PREREQUISITES TO AND POTENTIAL COMPETITION**

2 **Q. HOW DOES STAFF’S TESTIMONY RELY ON PREREQUISITES AND**
3 **POTENTIAL COMPETITION TO ALLEGEDLY PROVE EFFECTIVE**
4 **COMPETITION?**

5 A. In large measure, Staff relies upon the fact that Qwest received § 271 relief and
6 the existence of that proceeding to summarily conclude that Qwest has met the
7 burden of proving effective competition for basic business services throughout the
8 State. Mr. Wilson states that “[f]or effective local competition to take place, a
9 number of prerequisites had to be satisfied.”³ The prerequisites he identifies are
10 eleven conditions from a 1995 Electric Lightwave case,⁴ and then he proceeds to
11 state that those prerequisites have been met by the § 271 proceeding.⁵ He
12 concludes, without actually offering any record evidence, that alleged “findings”
13 regarding “provisioning parity, deployment of operations support systems, and
14 [sic] changed management processes”⁶ somehow conclusively prove that Qwest
15 faces effective competition statewide for all its basic business services. He also
16 relies upon the existence of the Qwest Statement of Generally Available Terms
17 (“SGAT”) and the Performance Assurance Plan (“PAP”)—without more—as
18 other indicia of effective competition.⁷

³ *Id.* at 4.

⁴ *Id.* at 6.

⁵ *Id.* at 7.

⁶ *Id.* at 9.

⁷ *Id.*

1 **Q. IS THERE ANY EVIDENCE IN THIS RECORD THAT QWEST IS**
2 **ACTUALLY COMPLYING WITH THE TERMS OF ITS SGAT FOR ANY**
3 **PARTICULAR CLEC?**

4 A. No, and in fact, during the § 271 proceeding there were at least two reasons to
5 believe that it was not complying. First, Qwest was not complying during the §
6 271 proceeding because Qwest's SGAT states, in the resale section and the
7 interconnection section, for example, that it treats "CLEC" in a nondiscriminatory
8 fashion.⁸ In reality, Qwest had cut secret deals with at least two CLECs to
9 provide 10% discounts on all services purchased by those CLECs so those CLECs
10 would not oppose Qwest's § 271 performance claims, among other things. The
11 10 % discounts applied to services including § 251(b) and (c) services as well as
12 access and others.⁹ Neither AT&T nor MCI were offered nor received these
13 discounts, among others. In addition, Qwest provided special treatment to at least
14 some carriers that resold and employed Qwest UNEs such that they received
15 service quality assurances different, and better than what Qwest offered and now
16 offers other CLECs in its SGAT. The SGAT indemnity provisions basically
17 provide the CLECs with a wholesale credit of the amount the CLEC paid to
18 Qwest for a resale service that was of poor quality. In contrast under the secret

⁸ SGAT at §§ 6.2.3 and 7.1.1.1.

⁹ See *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Findings of Fact, Conclusions, Recommendation and Memorandum, Minnesota Public Utilities Commission, Docket No. P-421/C-02-197, (Rel. September 20, 2002) and Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, (Rel. November 1, 2002); Also See *In the Matter of Qwest Corporation's Compliance With Section 252(e) of the Telecommunications Act of 1996*, Staff's Initial Post-Hearing Brief, Arizona Corporation Commission, Docket No. RT-00000F-02-0271, (May 1, 2003).

1 deals, Eschelon and McLeod obtained special on-sight Qwest personnel to
2 alleviate provisioning quality problems and the above-referenced 10% discount
3 on the cost of all services over-and-above the wholesale discount for resolution of
4 all disputes related to billing and service quality. Neither AT&T nor MCI
5 received this treatment.

6 The second reason to question Qwest's actual compliance is that many of the
7 provisions in that SGAT were created during the proceeding and few, if any,
8 Commissions actually made Qwest prove it had implemented those provisions
9 after they were agreed upon or determined by dispute resolution. In short, all the
10 SGAT shows is that Qwest has written obligations to act in accordance with the
11 SGAT, but the SGAT, itself, does not prove Qwest faces any actual competition.

12 **Q. ARE YOU FAMILIAR WITH THE CHANGE MANAGEMENT PROCESS**
13 **(“CMP”)?**

14 A. At a high level, yes.

15 **Q. WOULD YOU DESCRIBE FOR ME WHAT CMP IS AND WHETHER**
16 **YOU BELIEVE IT DEMONSTRATES THAT QWEST FACES**
17 **EFFECTIVE COMPETITION FOR ITS BASIC BUSINESS SERVICES ON**
18 **A STATEWIDE BASIS.**

19 A. CMP, as it exists today, is another creation of the § 271 process. It is my
20 understanding that during the proceeding Qwest asked the CLECs to help them
21 create a mechanism for introducing and implementing changes to the Operational

1 Support System (“OSS”) and to the product and process systems. The parties
2 worked on what was known as the “Master Document,” which basically describes
3 the CMP process. KPMG measured, inconclusively in certain instances, Qwest’s
4 actual compliance with its CMP process. And while AT&T believes the CMP is a
5 good mechanism for managing changes to the OSS, wholesale products and
6 services, it does not demonstrate any actual competition nor whether Qwest
7 will—going forward—devote the resources necessary to maintain the CMP.

8 **Q. WHAT ABOUT REFERENCES TO THE EXISTENCE OF A PAP,**
9 **ALLEGED PROVISIONING PARITY AND “DEPLOYMENT” OF AN**
10 **OSS; DO ANY OF THESE PROVE THAT QWEST FACES EFFECTIVE**
11 **COMPETITION FOR BASIC BUSINESS SERVICES STATEWIDE?**

12 A. No. Here again, the mere existence of these, which is all that Mr. Wilson testified
13 to, demonstrates that Qwest is likely providing some wholesale services to its
14 competitors, and in the case of the PAP, that those services may be delivered in a
15 manner and time that is within certain parameters or Qwest may face penalties.

16 All we can reasonably conclude from this is that Qwest may face some
17 competition from some CLECs; it does not show “effective competition” for basic
18 business services across the entire State.

19 **Q. HAS THE WASHINGTON COMMISSION MADE ANY STATEMENTS**
20 **AS TO WHAT QWEST’S § 271 RELIEF MIGHT ACTUALLY PROVE, IF**
21 **ANYTHING?**

1 A. Yes, according to the Washington Commission, it declared “The Commission has
2 stated that the basis for determining whether a BOC has opened its local exchange
3 market to competition is whether it has fully satisfied the fourteen-point
4 competitive checklist, not whether competing carriers have actually taken
5 advantage of the opportunity to enter the market.”¹⁰ Therefore, if no or few
6 carriers have taken advantage of the opening market, then Qwest faces minimal,
7 potential or illusory competition, but certainly not “effective” competition.

8 **Q. IN ADDITION TO THE PREREQUISITES AND THE § 271**
9 **PROCEEDING, MR. WILSON ALSO CITES TO A BOOK ENTITLED**
10 **“THE ENDURING LOCAL BOTTLENECK-MONOPOLY POWER AND**
11 **THE LOCAL EXCHANGE CARRIERS” BY ECONOMICS AND**
12 **TECHNOLOGY, INC./HATFIELD ASSOC., INC. OR DR. LEE SELWYN.**
13 **ARE YOU FAMILIAR WITH THAT BOOK?**

14 A. Yes, I am familiar with it, and the 1994 edition, which he cites, is not the more
15 recent version, as it has been revised several times.

16 **Q. HOW DOES MR. WILSON EMPLOY DR. SELWYN’S BOOK?**

17 A. Mr. Wilson uses it to support his position on the appropriate prerequisites¹¹ and he
18 suggests that the § 271 process measured and met all such prerequisites.¹² What
19 he doesn’t mention is that Dr. Selwyn stated that “[t]he relevant question is not

¹⁰ *In the Matter of Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Montana, Utah, Washington, and Wyoming.* WC Docket No. 02-189, July 26, 2002, at 28.

¹¹ Direct Testimony of Thomas L. Wilson, Jr. at 6-7.

¹² *Id.*

1 whether certain components of the traditional BOC monopoly have now been
2 opened to competition, but rather whether the *de facto* monopoly that is still
3 enjoyed by the BOCs with respect to any remaining service or network elements
4 is sufficient to permit the BOCs to harm competition”¹³ Staff did not address
5 the fact that Qwest is the *de facto* monopoly provider of the UNE loop and the
6 UNE platform over which Qwest bases its Petition and over which it will, no
7 doubt, try to withdraw in most portions of the State during the Triennial Review
8 cases.

9 **Q. DOES DR. SELWYN’S BOOK MAKE ANY OTHER OBSERVATIONS**
10 **ABOUT COMPETITION?**

11 A. Yes, there are two observations I’d like to share. First, the 1994 edition states, in
12 addition to describing conditions necessary to open the markets, that:

13 However, the level and scope of competitive entry is
14 unlikely to be sufficient to eliminate or even significantly
15 reduce the power of the BOCs. Additional time is required
16 for effective and sustainable local exchange competition to
17 emerge.¹⁴

18 The 1997 version of this book¹⁵ states succinctly the point I am trying to make in
19 relation to Staff’s suggestions that effective competition somehow equals the
20 opening of a market. That is, the book asserts:

21 The popular and business press often confuse the concepts of
22 competition and deregulation. The term “deregulation” is often

¹³ Economics & Technology, Inc./Hatfield Assoc., Inc., *The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers*, at Executive Summary ix (1994).

¹⁴ *Id.* at Executive Summary iii (1994).

¹⁵ Economics & Technology, Inc./Hatfield Assoc., Inc., *The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers* (2d ed. 1997).

1 used to refer both to the process of opening entry into a market and
2 to the process of reducing controls over pricing and profits. Unless
3 barriers to entry are low, the first (and maybe only) thing that
4 opening entry does is to change a market from a *de jure* to a *de*
5 *facto* monopoly. *A market becomes competitive only when*
6 *competitors actually enter and a significant portion of consumers*
7 *have an actual choice of suppliers. Deregulation of prices and*
8 *profits prior to the development of effective competition may*
9 *actually reduce competitive opportunities.*¹⁶

10 **Q. YOU ALSO MENTION THAT STAFF RELIES ON POTENTIAL**
11 **COMPETITION AS PURPORTED EVIDENCE OF EFFECTIVE**
12 **COMPETITION. WHAT DO YOU MEAN BY THAT?**

13 A. Although Mr. Wilson briefly mentions VOIP,¹⁷ the discussion of potential
14 competition is largely found in Mr. Williamson's testimony with his assertions
15 regarding VOIP, etc. There is no evidence in this record that VOIP, or even
16 wireless, for that matter, are indeed viable alternatives for small businesses or
17 large businesses to meet the business needs. Rather, Staff offers speculation
18 without proof. Clearly, the Commission would be making an arbitrary and
19 capricious decision if it granted Qwest's Petition based upon this alone. It is
20 extremely difficult to ascertain if these services are evidence of effective
21 competition based upon Staff's testimony.

22 **Q. DOESN'T MR. WILSON MENTION THAT COMCAST MAY HAVE A**
23 **VOIP PLAY PLANNED FOR 2004? DOES THAT CHANGE YOUR**
24 **VIEW?**

¹⁶ *Id.* at 7.

¹⁷ Direct Testimony of Thomas L. Wilson, Jr. at 29.

1 A. Yes, Mr. Wilson discusses Comcast's plans and no, it does not change my view.
2 Comcast's alleged VOIP play is still only "potential" and not actual competition.
3 More to the point, I believe Comcast's customers are largely residential customers
4 as apparently attested to by Mr. Wilson's cite to the "1.6 million homes"¹⁸
5 Comcast passes. Consequently, Comcast's potential VOIP plans have little, if
6 anything, to do with competition in the basic business market.

7 **III. STANDARD FOR EFFECTIVE COMPETITION & APPLICATION**
8 **TO THE RELEVANT MARKET**

9 **Q. LET'S TURN TO YOUR SECOND CONCERN REGARDING STAFF'S**
10 **FAILURE TO IDENTIFY THE RELEVANT STANDARD AND APPLY**
11 **IT TO THE RELEVANT MARKET. PLEASE DESCRIBE YOUR**
12 **CONCERN.**

13 A. Staff does not clearly define the standard it has taken from various prior
14 proceedings and consistently apply that precedent to the relevant market to
15 determine whether Qwest actually faces effective competition. I've already
16 mentioned the market opening prerequisites that must exist for competitive entry,
17 so I won't repeat that here. Staff also appears to adopt the from the AT&T case¹⁹

¹⁸ *Id.*

¹⁹ *In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc. for Classification as a Competitive Telecommunications Company*, Fourth Supplemental Order, Docket No. U-86-113 (June 5, 1987).

1 and a U S WEST DS3²⁰ case, use of a market share benchmark and relevant
2 market, respectively. That is, from the AT&T case, Staff suggests that a 25%
3 market share for CLECs is sufficient to show effective competition in a “relevant
4 market,” which was the DS3 market defined geographically in the U S WEST
5 case. Thus, for this case Staff should have defined the relevant market to be each
6 basic business service at issue offered in specific wire centers across Qwest’s
7 operating territory. It should then have examined those wire centers to determine
8 whether CLECs enjoyed a 25 % market share of basic business services.

9 **Q. HAVE YOU APPLIED THE BENCHMARK STANDARD IN THE**
10 **RELEVANT MARKET?**

11 A. Yes. Operating under the assumption that competitors in this case must obtain 25
12 % of the market share, I have analyzed Mr. Wilson’s proprietary exhibit TLW-C-
13 8. Here, the market share is listed for CLECs, and for Qwest, for basic business
14 services in each of Qwest’s wire centers. In table 1 presented below I list the
15 number of wire centers by CLEC market share.

²⁰ *In the Matter of the Petition of U S WEST Communications, Inc. for Competitive Classification of its High Capacity Circuits in Selected Geographical Locations*, Eighth Supplemental Order, Docket No. UT-990022 (Dec. 21, 1999).

1 considered in the aggregate. In the previous cases considered by the Commission,
2 it determined competitive classification for a specific service in specific wire
3 centers. This same analysis should have been conducted, along with having a
4 clear standard for measurement, to determine the level of competition, if any. As
5 Staff's analysis stands now, there is an insufficient basis to draw any conclusion
6 that there is effective competition in the relevant market for each of the basic
7 business services Qwest wants reclassified.

8 **Q. ARE THERE OTHER CONSIDERATIONS IN THE RELEVANT**
9 **MARKET THAT STAFF SHOULD HAVE CONSIDERED?**

10 A. Yes, within the relevant market Qwest is the sole provider of UNE-loops and
11 UNE-platforms. There are no other reasonable alternative suppliers. As such,
12 and consistent with Dr. Selwyn's discussions, Qwest has the ability to price
13 squeeze and control the sole supply of infrastructure available to essentially
14 destroy or undermine its competitors.

15 **Q. DOES MR. WILSON'S TESTIMONY ADDRESS QWEST AS THE SOLE**
16 **WHOLESALE SUPPLIER FOR BASIC BUSINESS SERVICES?**

17 A. No, not directly. While he does address service quality parity and operation
18 support system monitoring and reporting, he does not factor in that Qwest remains
19 the sole wholesale provider for resale, unbundled loops, and UNE-P services that
20 allow competitors into Qwest operating territory and upon which Qwest's petition
21 relies. Mr. Wilson claims that certain mandated provisions and safeguards from

1 Qwest's 271 proceedings justify complete competitive classification. This is
2 simply insufficient to make a finding of effective competition or ensure that what
3 competition does exist will survive. Complete competitive classification in areas
4 where Qwest is the only supplier and where there are limited or few alternative
5 basic business providers for each service is not a sustainable competitive
6 landscape, especially where the Commission can anticipate that Qwest will seek
7 to remove UNEs from its required supply obligations in the Triennial Review
8 process.

9 **Q. ARE YOU SUGGESTING THAT FOR COMPETITION TO BE**
10 **"EFFECTIVE" IT MUST ALSO BE STABLE WITHIN THE RELEVANT**
11 **MARKET?**

12 A. Yes. CLECs must have a stable and reliable source of wholesale supply in the
13 relevant market in order to even serve basic business customers in any given wire
14 center or exchange. Without the needed inputs to compete, Qwest faces little, if
15 any, facilities-based CLEC competition for basic business service in many of the
16 wire centers across the State.

17 **IV. CONCLUSION**

18 **Q. DO YOU HAVE ANY CONCLUDING REMARKS?**

19 A. Yes. While the Staff attempts to bolster Qwest's case through the material found
20 in Mr. Williamson's and Mr. Wilson's testimony, the ultimate burden lies with
21 Qwest. Staff's efforts, although valiant, do not assist Qwest in proving that it

1 faces effective competition for basic business services in all the exchanges or wire
2 centers in this State. Rather, Staff has shown only that the markets may be open
3 to competition and that some form of competition exists in some exchanges. This
4 is not “effective” competition either under the statutory requirements or the
5 various precedents set in other cases.

6 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

7 A. Yes it does