

1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION

3 In the Matter of the)
4 Petition of) DOCKET NO. UT-030614
5)
6 QWEST CORPORATION) Volume VI
7) Pages 948 to 1262
8 For Competitive Classification)
9 of Basic Business Exchange)
10 Telecommunications Services.)
11 _____)

8

9 A hearing in the above matter was held on
10 October 1, 2003, from 9:35 a.m to 9:15 p.m., at 1300
11 South Evergreen Park Drive Southwest, Room 206, Olympia,
12 Washington, before Administrative Law Judge THEODORA
13 MACE and Chairwoman MARILYN SHOWALTER and Commissioner
14 PATRICK J. OSHIE.

15

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1 P R O C E E D I N G S

2 JUDGE MACE: Let's be on the record in Docket
3 Number UT-030614. This is the date that we have
4 scheduled for the continued hearing in this proceeding,
5 and my name is Theodora Mace, Administrative Law Judge.
6 Chairwoman Showalter and Commissioner Oshie are here on
7 the Bench with me. I would like to have oral
8 appearances of counsel beginning with the company.

9 MR. SHERR: Good morning, Adam Sherr for
10 Qwest.

11 MS. ANDERL: Lisa Anderl also representing
12 Qwest.

13 MS. JOHNSON: Karen Johnson for Integra
14 Telecom of Washington.

15 MR. LEVIN: Richard Levin for Advanced
16 Telcom, Inc., also known as ATG.

17 MS. SINGER NELSON: Michel Singer Nelson here
18 on behalf of MCI, good morning.

19 MR. BUTLER: Art Butler for WeBTEC.

20 MS. FRIESEN: Good morning, Letty Friesen
21 here on behalf of AT&T and TCG.

22 MR. FFITCH: Simon ffitch, Assistant Attorney
23 General for Public Counsel.

24 MS. WATSON: Lisa Watson, Assistant Attorney
25 General for Commission Staff.

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1 MR. THOMPSON: Jonathon Thompson for
2 Commission Staff.

3 JUDGE MACE: And on the conference bridge we
4 have a representative of the Department of Defense; is
5 that right?

6 MR. MELNIKOFF: That is correct, Your Honor,
7 Stephen Melnikoff.

8 JUDGE MACE: Do we have anyone else on the
9 conference bridge?

10 All right, I hear no response.

11 The parties have asked prior to us going on
12 the record this morning whether they can change the
13 order of the witnesses so that Mr. Cowan would be first,
14 then Mr. Stacy, then Mr. Gates.

15 It looks like that's acceptable, so then the
16 first witness would be Mr. Cowan. Is Mr. Cowan ready to
17 take the witness stand.

18 (Witness R. NEIL COWAN sworn in.)

19 JUDGE MACE: All right, please be seated.

20 Go ahead.

21

22 Whereupon,

23 R. NEIL COWAN,
24 having been first duly sworn, was called as a witness
25 herein and was examined and testified as follows:

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2

D I R E C T E X A M I N A T I O N

3

BY MS. FRIESEN:

4

Q. Good morning, Mr. Cowan, by whom are you
employed, please?

6

A. AT&T.

7

8

Q. You have before you what's been marked for
identification as Exhibits 701TC, 702RTC; is that
correct?

9

10

A. That is correct.

11

Q. Do you recognize 701?

12

A. Yes, that's my direct testimony in this case.

13

14

Q. Do you have any corrections to make to your
direct testimony today?

15

16

A. One small correction occurring on page 7,
Footnote Number 9, where it says or in that sentence it
should be for, F-O-R.

17

18

Q. Do you have any others to your direct?

19

A. No.

20

Q. Would you please take a look at Exhibit 702.

21

A. Yes.

22

Q. What is that, sir?

23

A. That's my rebuttal testimony.

24

25

Q. And do you have any corrections to make to
your rebuttal testimony?

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1 A. I have two small corrections in that.

2 Q. Would you please make those.

3 A. On page 9, Footnote Number 15, Economics and
4 Technology, Incorporated, and the slash needs to be
5 deleted. And after, the Enduring Local Bottleneck,
6 should be inserted the Roman Numeral II. And then
7 Monopoly --

8 JUDGE MACE: Can I just interrupt you for one
9 moment. It's going to read, Economics and Technology,
10 Inc., Hatfield Associates --

11 A. No, it should, sorry, it should read,
12 Hatfield Associates, Incorporated, the Enduring Local
13 Bottleneck II.

14 JUDGE MACE: Thank you.

15 A. And Monopoly Power should be deleted in that
16 footnote.

17 MS. ANDERL: I'm sorry, Your Honor, I'm
18 confused. So we delete Economics and Technology, Inc.?

19 JUDGE MACE: And it reads, Hatfield
20 Associates, Inc., the Enduring Local Bottleneck II,
21 Roman Numeral II.

22 A. That's my --

23 JUDGE MACE: Then the Local Exchange
24 Carriers?

25 A. Oh, excuse me, Monopoly Power should be

0958

1 included, so it says, Hatfield Associates, Incorporated,
2 Enduring Local Bottleneck II, Monopoly Power and Local
3 Exchange Carriers, Second Edition 1997, that's how it
4 should read.

5 JUDGE MACE: Second edition?

6 THE WITNESS: Yes.

7 JUDGE MACE: 1997?

8 THE WITNESS: Correct.

9 JUDGE MACE: Thank you.

10 A. And there is one other correction.

11 JUDGE MACE: Sorry to interrupt, but
12 presumably number 14 would change as well then, because
13 it refers to the prior and number 15, or is it, I'm
14 sorry, number 15 is the actual correct name?

15 THE WITNESS: Those are two different
16 editions.

17 JUDGE MACE: Okay.

18 MS. ANDERL: Perhaps I misheard, I thought
19 that this correction was to Footnote 15, or was it to
20 13?

21 JUDGE MACE: Is it to Footnote 15?

22 THE WITNESS: 15.

23 JUDGE MACE: Thank you.

24 THE WITNESS: And I have one other
25 correction, are we ready?

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1 JUDGE MACE: Go ahead.

2 THE WITNESS: Thank you.

3 A. And that occurs on page 11, line 17, the word
4 the after adopt should be deleted.

5 BY MS. FRIESEN:

6 Q. Now, Mr. Cowan, if I were to ask you the same
7 questions today with the corrections that you have made
8 in both your direct and rebuttal testimony, would your
9 answers be the same?

10 A. Yes, they would.

11 MS. FRIESEN: Your Honor, at this point I
12 move for the admission of Exhibits 701 and 702.

13 JUDGE MACE: Any objection to the admission
14 of those exhibits?

15 Hearing no objection, I will admit the
16 exhibits.

17 By my notes I see only Qwest and Staff signed
18 up for cross-examination of any of the witnesses today,
19 and my understanding of the order is that Qwest would be
20 first; is that correct?

21 MS. ANDERL: Yes.

22 JUDGE MACE: Go ahead.

23 MS. ANDERL: Thank you, Your Honor.

24

25

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1 C R O S S - E X A M I N A T I O N

2 BY MS. ANDERL:

3 Q. Good morning, Mr. Cowan.

4 A. Good morning.

5 Q. I'm Lisa Anderl, I represent Qwest, I have a
6 few questions for you this morning. Mr. Cowan, are you
7 appearing as an expert witness on behalf of AT&T?

8 A. Yes, I am.

9 Q. In AT&T, who do you work for, who is your
10 boss?

11 A. My direct boss?

12 Q. Yes.

13 A. My direct boss is Natalie Baker.

14 CHAIRWOMAN SHOWALTER: Ms. Anderl, is your
15 microphone on?

16 MS. ANDERL: Yes.

17 CHAIRWOMAN SHOWALTER: Okay.

18 MS. ANDERL: I will get closer to it.

19 CHAIRWOMAN SHOWALTER: Thank you, and
20 especially since remember we have listeners on the
21 conference bridge.

22 MS. ANDERL: Thank you.

23 BY MS. ANDERL:

24 Q. What organization are you in?

25 A. It's actually listed formally in my direct

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1 testimony, the Network System Division, Local Services
2 and Access Management.

3 Q. Do you have any employees who report directly
4 to you?

5 A. No, I do not.

6 Q. From reading your testimony, it appears as
7 though in the past your area of responsibility with AT&T
8 has been with regard to access charges assessed by
9 incumbent local exchange carriers; is that correct?

10 A. That is correct.

11 Q. Mr. Cowan, are access services competitive
12 services or monopoly services in your view?

13 A. The ones that we purchase are monopoly
14 services.

15 Q. So during your time with AT&T, you have been
16 there four years, right?

17 A. Correct.

18 Q. During that time, you have specialized in
19 review and analysis of what you consider to be monopoly
20 services and the charges for those services?

21 MS. FRIESEN: I'm going to object to the form
22 of the question. It assumes facts that aren't in
23 evidence. Mr. Cowan has just testified that he is in
24 the -- he does work with ILEC access, and she has just
25 said that he is an expert at monopoly services, so I'm

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1 going to object to the question.

2 MS. ANDERL: Well, Your Honor, I would be
3 happy to restate the question. I don't think the
4 objection is well founded. I asked him if in his view
5 he had specialized in the last four years in the
6 analysis of services that he considered to be monopoly
7 services. He had previously testified he reviewed
8 ILECs' access charges and that he believed those
9 services to be monopoly services, so it's hard for me to
10 understand how my question either misstates his
11 testimony or assumes any facts not already in evidence.

12 JUDGE MACE: I will allow the answer.

13 A. Can you restate the question then, please?

14 BY MS. ANDERL:

15 Q. Not exactly, but close.

16 Is it correct that during your four years
17 with AT&T you have specialized in the analysis of what
18 you consider to be monopoly services?

19 A. Yes.

20 Q. During your employment with AT&T, have you
21 ever previously analyzed an incumbent's services for
22 purposes of competitive classification?

23 A. No, I have not.

24 Q. Were you working for AT&T when AT&T
25 petitioned for competitive classification of its toll

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1 services, either at the state level or with the FCC?

2 A. And what were the dates, if you don't mind me
3 asking, what were the dates of those two petitions?

4 Q. Were you working for AT&T in 1986?

5 A. No, I was not.

6 Q. Have you read the Washington Commission order
7 granting AT&T's petition for competitive classification
8 of its toll services?

9 A. I have cursory knowledge of that order.

10 Q. Have you read either of the two previous
11 Commission decisions regarding competitive
12 classification of Qwest's business local exchange
13 services?

14 A. And what particular dockets are those? Are
15 you referring to the one regarding DS1 or higher
16 services?

17 Q. Are you familiar with the orders by docket
18 number, Mr. Cowan? If I were to give you the docket
19 numbers, could you answer?

20 A. Docket number and services involved I would
21 be.

22 Q. Have you read the Commission's orders in
23 Docket Number UT-990022 regarding high capacity
24 services?

25 A. I have cursory knowledge of that order.

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1 Q. Have you read the Commission's orders in
2 Docket Number 000883 regarding local exchange services,
3 business local exchange services?

4 A. Again cursory knowledge of that order.

5 Q. When you say cursory knowledge, what do you
6 mean?

7 A. Just a general sense of the order.

8 Q. Have you read the order or --

9 A. Parts.

10 Q. -- have you had it described to you?

11 A. Parts.

12 Q. What parts?

13 A. As I sit here today, I can't remember what
14 parts I read.

15 Q. When was the last time you looked at those
16 orders, Mr. Cowan?

17 A. That would be probably about a month or two
18 ago.

19 Q. Are you aware, Mr. Cowan, of AT&T's
20 announcement some years back that it intended to enter
21 the local exchange market through total service resale?

22 A. I don't recall that announcement, no.

23 Q. Are you aware of AT&T's announcements in the
24 past that it intended to enter the local exchange market
25 through a fixed wireless application called Project

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1 Angel?

2 A. I am aware of that project.

3 Q. Are you aware of AT&T's prior strategy to
4 enter the local exchange telephone market through the
5 provision of services over cable facilities?

6 A. I am aware of that.

7 Q. Mr. Cowan, is it now AT&T's strategy to enter
8 the local exchange market through UNE-P?

9 MS. FRIESEN: I'm going to object to this
10 line of questioning. It is well beyond the scope of his
11 direct and rebuttal testimony. Nowhere in that
12 testimony will you find anything about AT&T's strategies
13 or AT&T's products. If Ms. Anderl wants to cross
14 examine him on the testimony that he has provided to
15 this Commission, I would ask that she do that. I think
16 this is well, well beyond the scope of his testimony.

17 JUDGE MACE: Ms. Anderl.

18 MS. ANDERL: Well, Your Honor, this witness
19 testifies in opposition to Qwest's petition. In his
20 testimony he does discuss the state of the competitive
21 market. In his testimony at page 6, lines 3 through 5,
22 he states that the current state of the competitive
23 market is unstable and not particularly effective in the
24 long run. I believe that that type of general policy
25 testimony from an expert witness enables me to explore

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1 his knowledge of current and prior strategies and allows
2 me to lay a foundation to explore with him the basis of
3 his testimony. I don't think it's improper.

4 JUDGE MACE: Well, my sense of the questions
5 you're asking is that they're -- you're sort of putting
6 AT&T's competitive position at issue here. This case is
7 about Qwest's competitive services classification, and I
8 have a concern about -- let's hold on for just one
9 moment.

10 (Discussion on the Bench.)

11 JUDGE MACE: Overrule the objection.

12 You can answer the questions.

13 THE WITNESS: Can you restate your previous
14 question, please?

15 MS. ANDERL: I'm sorry, I've lost track of
16 where I was. I believe the question was simply whether
17 AT&T was now intending to enter the market through
18 UNE-P, but could you read that back.

19 (Record read as requested.)

20 A. I know that's one form of entry, yes.

21 BY MS. ANDERL:

22 Q. Is AT&T now serving business customers in the
23 state of Washington?

24 A. Yes.

25 Q. Via UNE-P?

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1 A. Yes.

2 Q. Mr. Cowan, are you aware that collocation is
3 not required for service to a customer via UNE-P?

4 A. Yes.

5 Q. Are you aware, Mr. Cowan, of any reason why
6 AT&T could not decide to serve a single customer in a
7 Qwest wire center by the use of UNE-P?

8 MS. FRIESEN: Again, I'm going to object,
9 this is well beyond the scope of his testimony, nor has
10 she laid a foundation that would suggest that Mr. Cowan
11 has any reason to know about the technical needs of AT&T
12 to serve any given customer at any place in this state.

13 MS. ANDERL: Well, Your Honor, again, I would
14 respond by saying this witness has testified about the
15 current state of competition. I am trying to explore
16 specifically how his testimony applies to AT&T in the
17 real world. He's made some broad generalizations, I
18 think it's perfectly legitimate to say, you know, how do
19 your broad generalizations play out vis a vis what AT&T
20 is actually doing or experiencing.

21 MS. FRIESEN: Your Honor, if I may respond.
22 His generalizations in his testimony is based upon the
23 evidence that Qwest and Staff has put into the record,
24 and it is limited to that. If you look back at his
25 testimony, you will see that that's what it's limited

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1 to. He has not offered up evidence in regard to what
2 AT&T does, he is not an expert on AT&T's strategies, he
3 is not an expert on AT&T entry plans.

4 CHAIRWOMAN SHOWALTER: Well, exactly what is
5 he an expert on?

6 MS. FRIESEN: He has offered up evidence or
7 he has offered up testimony in regard to what he thinks
8 the validity of the evidence that's in the record now is
9 and whether or not it supports effective competition.

10 CHAIRWOMAN SHOWALTER: Just a minute, excuse
11 me, I do not want people in the audience indicating
12 their agreement or disagreement. That's a form of
13 testifying, and the audience will not be demonstrative
14 in this hearing room.

15 All right, I'm sorry, I was distracted.

16 MS. FRIESEN: Mr. Cowan is here solely to
17 examine the quality of Qwest's petition and the Staff
18 investigation. That's what his testimony centers on.
19 You heard Ms. Anderl go over his background, what he
20 does and what he looks at, and his testimony is limited
21 to an examination of Qwest's petition and Staff's
22 investigation. He based his conclusions on that. You
23 know, I would suggest that going through what AT&T is
24 capable of doing with this particular witness or not
25 capable of doing is largely speculative in nature,

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1 because that is not his area of expertise, and that
2 forms the basis for my objections.

3 CHAIRWOMAN SHOWALTER: Isn't the issue what
4 forms of competitive entry various players have, AT&T
5 being one of them, and whether those forms are
6 meaningful or not?

7 MS. FRIESEN: I think we're going beyond the
8 mere forms of entry and into sort of the technical
9 requirements of that entry strategy, and it seems to me
10 we're diving deeper and deeper and deeper into that.
11 That's well beyond his knowledge.

12 CHAIRWOMAN SHOWALTER: Well, if it's beyond
13 his knowledge, then he need not answer it.

14 JUDGE MACE: Ms. Anderl, you may proceed with
15 your cross-examination.

16 MS. ANDERL: Mr. Cowan, I believe there was a
17 question pending. Your Honor --

18 JUDGE MACE: Ask the reporter.

19 MS. ANDERL: Is the question permitted?

20 JUDGE MACE: Yes.

21 MS. ANDERL: All right.

22 JUDGE MACE: That ruling was to overrule the
23 objection.

24 (Record read as requested.)

25 A. I don't know.

0970

1 BY MS. ANDERL:

2 Q. What information do you need, Mr. Cowan, to
3 enable you to answer that question?

4 A. Network specifics on, you know, where the
5 exchange is.

6 Q. Why would it matter where the exchange is?

7 A. I guess it's theoretically possible.

8 Q. Did you read Mr. Reynolds' testimony in this
9 case?

10 A. Yes, I did.

11 Q. Did you review the exhibits that he had in
12 his testimony, which were the information pages from the
13 telephone directory for Spokane?

14 JUDGE MACE: Do you have a specific
15 reference, Ms. Anderl?

16 MS. ANDERL: Your Honor, I thought I did. I
17 do.

18 BY MS. ANDERL:

19 Q. It's Exhibit 8.

20 JUDGE MACE: Thank you.

21 A. That was in his direct testimony?

22 Q. Rebuttal.

23 A. Rebuttal, I'm sorry. That's MSR-8, correct?

24 Q. Yes, it's also Exhibit 8 for the record.

25 Did you review that document prior to

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1 testifying here today?

2 A. Yes, a while back, yes.

3 Q. Can you take a look at page 2. Do you see
4 there at the top that it says, Spokane and vicinity
5 residence listings and that one of the towns for which
6 listings are provided includes the town of Elk in
7 Washington?

8 A. That's what it says.

9 Q. Can you turn to page 4. Do you see there it
10 indicates that it's a directory to phone service, and in
11 the lower right continuing over onto page 5 there's an
12 AT&T listing that AT&T offers both residential and
13 business service?

14 A. I see that, yes.

15 Q. Do you know if any business customer in Elk,
16 Washington has ever contacted AT&T and requested
17 business service from AT&T?

18 A. I'm not aware that they have.

19 Q. Do you know how AT&T would respond to such a
20 request?

21 A. I don't exactly know how they would respond,
22 no.

23 Q. You don't have any responsibilities with
24 regard to AT&T's entry into the local market, do you?

25 A. No.

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1 Q. Did you hear last month Ms. Friesen ask
2 Mr. Reynolds about the meaning of the phrase in the AT&T
3 price list to the effect that "services are available
4 where facilities permit"; do you recall that testimony?

5 A. Yeah, I recall that testimony.

6 Q. And if you turn to Exhibit Number 1, which is
7 Mr. Reynolds' direct testimony, if you need a reference
8 there, he discusses that same phrase on page 9, and he
9 states in his testimony that he has confirmed that such
10 a phrase exists in all 32 of the CLEC local service
11 price lists that were analyzed for purposes of this
12 proceeding. Did you undertake any effort to confirm or
13 deny that that phrase does indeed exist in the AT&T
14 local exchange price list?

15 A. I'm trying to catch the reference to his
16 testimony, what page was that on?

17 Q. Page 9.

18 A. Page 9?

19 JUDGE MACE: I believe it's in the Footnote
20 Number 6.

21 A. And your question is whether that's in AT&T's
22 price lists?

23 Q. The question was whether you undertook any
24 effort to confirm that that phrase does exist in the
25 AT&T price list?

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1 A. No.

2 Q. Okay. Can you tell me, assuming that it
3 does, that that phrase does exist in AT&T's local
4 service price list, what does that mean, services are
5 available where facilities permit?

6 MS. FRIESEN: Again I'm going to object. It
7 would have to be what does it mean based on this
8 witness's particular opinion, not necessarily what
9 AT&T's intent is with respect to that phrase.

10 MS. ANDERL: Well, Your Honor, I would
11 suggest that this witness is offered as AT&T's expert
12 and AT&T's only witness in this proceeding. This is an
13 area that Ms. Friesen explored with Mr. Reynolds. It's
14 obviously an area of interest for AT&T. It seems
15 perfectly appropriate to explore it with the company
16 representative and have his representations be those of
17 AT&T, not simply Neil Cowan.

18 JUDGE MACE: I will allow the answer if the
19 witness can make an answer on the basis of his
20 representation of AT&T.

21 THE WITNESS: The question was what does that
22 mean?

23 MS. ANDERL: Yes.

24 A. From what I know, that means where Qwest
25 facilities are present. Or actually, let me add on to

0974

1 that, where our facilities are present as well.

2 BY MS. ANDERL:

3 Q. What facilities does AT&T deploy when it
4 offers service over UNE-P?

5 A. I believe it may involve an interconnection
6 trunk in some instances. There's a possibility that
7 it's totally owned by Qwest facilities. I mean it just
8 depends on the configuration.

9 Q. Does that conclude your answer?

10 A. Yes.

11 Q. Do you know if AT&T has any local switches in
12 Washington?

13 A. I don't know how many, I believe there are
14 some.

15 Q. And what's the basis for your knowledge?

16 A. The basis of my knowledge is based on the
17 data that was provided to Staff would indicate that we
18 do have switches in the state of Washington.

19 Q. Serving local customers?

20 A. Yes.

21 JUDGE MACE: Your answer is?

22 THE WITNESS: Yes.

23 JUDGE MACE: Thank you.

24 BY MS. ANDERL:

25 Q. And do you know what markets those switches

0975

1 serve?

2 A. Not precisely, no.

3 Q. Generally?

4 A. I simply know that they're in the state. I
5 mean how -- that's how generally I know.

6 Q. Do you know what the geographic reach of
7 those switches is?

8 A. No.

9 Q. Do you know if they have LATAwide coverage or
10 something greater or something lesser than that?

11 MS. FRIESEN: Objection, asked and answered,
12 and again, this goes well beyond the scope of his direct
13 testimony. I understand that's been overruled, but for
14 the record I will interject the objections.

15 JUDGE MACE: I think the witness has answered
16 that he doesn't know.

17 BY MS. ANDERL:

18 Q. Mr. Cowan, turn to your Exhibit 701, please,
19 your direct testimony, page 6.

20 A. (Complies.)

21 Q. Lines 3 through 5, you state that:

22 The current state of the competitive
23 market is unstable and not particularly
24 effective over the long run.

25 Is that your testimony?

0976

1 A. That's correct.

2 Q. Mr. Cowan, is it your position that UNE-P
3 based competitive entry does not constitute effective
4 competition?

5 A. My opinion -- I mean that's a way to enter a
6 market. It does not necessarily mean you have any
7 degree of perfect competition based on the fact that it
8 has to purchase those services through Qwest in order to
9 provide those services.

10 Q. Mr. Cowan, is perfect competition the same
11 thing as effective competition?

12 A. I'm not making that equation, no.

13 Q. So my question to you, is it your position
14 that UNE-P based competitive entry does not constitute
15 effective competition?

16 A. Can you restate that question, please?

17 Q. Is it your position that UNE-P based
18 competitive entry does not constitute effective
19 competition?

20 A. If it's purely based on UNE-P, no.

21 Q. Did you tell me earlier that UNE-P was AT&T's
22 entry strategy?

23 A. It's one of them.

24 Q. Is it your position that UNE-P does not allow
25 you to effectively compete in the small business market?

0977

1 A. I'm sorry, can you restate that, please?

2 Q. Is it your position that UNE-P does not allow
3 you to effectively compete in the small business market?

4 A. It allows for competition, yes.

5 Q. But not effective competition?

6 A. Based -- I mean are we saying if all
7 competition is based on UNE-P, no.

8 Q. I'm asking you about your testimony,
9 Mr. Cowan. I'm asking you whether AT&T's position is
10 that UNE-P does not allow it to effectively compete in
11 the small business market, and I'm trying to explore
12 that premise with you.

13 A. It allows us to compete.

14 Q. Okay. Does it allow AT&T to compete
15 effectively the way you have used that word in your
16 testimony?

17 A. In the long run effectively, no.

18 Q. And what do you mean by that when you say
19 effectively?

20 A. UNE-P is one mode of entering into the
21 market.

22 Q. Does AT&T have plans to transition off of
23 UNE-P after it enters via UNE-P?

24 A. I don't precisely know our marketing plans,
25 no.

0978

1 Q. So you don't know whether AT&T plans to stay
2 with UNE-P or do something else?

3 A. I'm not, as I sit here today, I'm not
4 particularly sure of that, no.

5 Q. But it's your testimony that UNE-P is not an
6 effective way to compete in the long term?

7 A. I would agree with that.

8 Q. Why is that?

9 A. Because the underlying sole wholesale
10 provider is Qwest in that case.

11 Q. Why does that matter?

12 A. Because you have -- it's quite different than
13 if we were totally competing on a facilities versus
14 facilities basis. That would be more competitive than
15 purchasing the facilities from Qwest.

16 Q. Why?

17 A. Because it is a form of resale of Qwest
18 services. Qwest is the underlying provider.

19 Q. Mr. Cowan, I'm not understanding the
20 distinction that you're making. What about buying the
21 wholesale services from Qwest makes competition through
22 UNE-P not effective competition?

23 A. If I may, I will point us to my
24 recommendation just below lines 3 and 5.

25 JUDGE MACE: What page are you on?

0979

1 THE WITNESS: Same page, page 6, where the
2 last reference was.

3 JUDGE MACE: Okay.

4 A. At least two facilities based competitors
5 coupled with sufficient stable supply of UNE-L and
6 UNE-P, that's what I have recommended that the
7 Commission consider for effective competition.

8 BY MS. ANDERL:

9 Q. Yes, I understand that, Mr. Cowan. I'm
10 trying to go to the underlying rationale for your
11 conclusion. And so if you recall the question that I
12 asked, it was, what is it about purchasing underlying
13 wholesale services from Qwest that makes competition
14 through UNE-P not effective competition? Can you answer
15 that question?

16 A. I believe I provided the answer that because
17 it is dependent upon Qwest being the wholesale provider
18 that it's not effective.

19 Q. What is it about Qwest being the wholesale
20 provider that makes it not effective?

21 A. It's dependent on a competitor that competes
22 in the same market, and it's also dependent on Qwest
23 provisioning those services on an efficient and
24 effective basis.

25 Q. Mr. Cowan, are you familiar with how

0980

1 effective competition is defined in the competitive
2 classification statute here in Washington?

3 A. Yes.

4 Q. Does that definition take into account
5 whether competition is provided via purchase of
6 wholesale services from a competitor?

7 A. It doesn't single out wholesale services, no.

8 Q. Mr. Cowan, can I ask you to turn to Exhibit
9 707, please.

10 A. (Complies.)

11 Q. Do you recognize that, Mr. Cowan, as the
12 first six pages of AT&T's 2002 annual report?

13 MS. FRIESEN: I'm going to object again here,
14 and I understand it may be overruled. Mr. Cowan did not
15 testify to any of this stuff, and this is an incomplete
16 copy of our annual report. Quite as Qwest was upset
17 last we were together about producing a partial copy, I
18 too would prefer the entire copy be included in the
19 record.

20 JUDGE MACE: Ms. Anderl.

21 MS. ANDERL: Your Honor, we're happy to
22 provide a copy. We have a complete copy with us, and we
23 can certainly duplicate that. It's voluminous and has
24 quite a bit of financial information in it that has no
25 bearing on the case from our view. We didn't want to

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1 burden the record with 100 or more pages. We're happy
2 to make it available for the record if that's the
3 request as to the completeness issue.

4 I believe that it's clearly relevant. There
5 are statements in this document with regard to entry
6 through UNE-P, and I wanted to explore some of those
7 with this witness.

8 JUDGE MACE: I think the Commission would
9 like to have a full copy of the document. Do you have
10 copies with you here?

11 MS. ANDERL: I have just the one for now,
12 full one. We can make copies over the lunch hour.

13 JUDGE MACE: Very well.

14 MS. FRIESEN: Your Honor, one more
15 observation, if I may. If Ms. Anderl intends to go
16 through this document and ask this witness if the
17 document says what it says and AT&T is willing to
18 stipulate to the entry of this document into this
19 record, I don't think this is a witness that has
20 compiled our annual report and can't do anything other
21 than sit there and confirm that it says what it says.

22 JUDGE MACE: Ms. Anderl.

23 MS. ANDERL: Those were not the questions I
24 was going to ask. I wanted to ask Mr. Cowan about some
25 of the specific statements in there vis a vis the

0982

1 testimony he has just given.

2 JUDGE MACE: I think the witness is entitled
3 to ask the questions. I mean the counsel is entitled to
4 ask the questions, the witness can answer them.

5 CHAIRWOMAN SHOWALTER: We have to hear the
6 question before we -- Ms. Friesen, you might -- I mean
7 this witness is testifying, has testified about what he
8 feels is effective competition and the elements of it,
9 and I'm having a hard time understanding why it's
10 objectionable for Ms. Anderl to point to documents that
11 come from AT&T, this witness's employer, that bear on
12 the question of whether an element is or isn't
13 effective.

14 MS. FRIESEN: My concern is from a procedural
15 standpoint. This witness has been proffered by AT&T not
16 as an expert on all aspects of AT&T's business, but
17 rather to take a look at what is effective competition
18 under the statute as those terms are defined in the
19 statute and the evidence that's been laid before you and
20 what he perceives to be as valid evidence versus
21 non-valid evidence.

22 While I understand that you would like to
23 hear about AT&T's entry strategies and some of these
24 other things, I want it to be known to the Commission
25 that this witness is not the proper witness for that,

0983

1 he's not involved in that.

2 So while he is offered by AT&T, it's under --
3 it's important for you to understand the limits of his
4 ability to testify as a "competent witness" on some of
5 these issues that are extraneous to his testimony, and
6 that's the reason for my objections, so that you will
7 understand from a procedural standpoint for purposes of
8 the record what the limits are of his, not only of his
9 knowledge, but of his testimony in general. So it is in
10 a very real way outside the scope of his testimony, but,
11 you know, and I understand your concerns as well.

12 CHAIRWOMAN SHOWALTER: It doesn't seem to me
13 that -- it's not so much what this witness does or
14 doesn't know about a particular plan of AT&T as the fact
15 of the plan and how does that relate to these policy
16 arguments about whether this is or isn't effective.

17 MS. FRIESEN: And to the extent Ms. Anderl
18 draws those lines, I agree with you.

19 CHAIRWOMAN SHOWALTER: And the Commission
20 will draw those lines as well.

21 MS. FRIESEN: But I think a lot of the
22 questions that have been asked so far, for example entry
23 strategies and the technology related to serving a
24 particular customer goes well beyond his knowledge. She
25 has not been able to tie those back in.

0984

1 JUDGE MACE: Ms. Anderl, you may proceed.

2 MS. ANDERL: Thank you.

3 BY MS. ANDERL:

4 Q. Mr. Cowan, the first two pages of the annual
5 report are unnumbered, and then as you get to the
6 numbered pages I would ask you to turn to page 3.

7 A. (Complies.)

8 Q. Have you had a chance to read this prior to
9 taking the stand today?

10 A. Yes.

11 Q. In the fourth paragraph down the annual
12 report narrative begins to discuss UNE-P, and in the
13 fifth paragraph there's a representation there in the
14 last sentence that AT&T has more than 500,000 access
15 lines serving small businesses through UNE-P. Do you
16 see that?

17 A. Yes, I see that sentence.

18 Q. Do you see any statement in the annual report
19 to the effect that AT&T believes that serving businesses
20 through UNE-P is not an effective way to compete?

21 A. Anywhere in the annual report?

22 Q. Anywhere in the excerpt that I have given
23 you.

24 A. I would admit that it says 500,000 access
25 lines served through UNE-P. I don't know how that

0985

1 translates to, you know, the state of Washington. Those
2 are national numbers.

3 Q. That wasn't my question, Mr. Cowan.

4 Are you aware of any place where AT&T
5 discloses in the annual report that it is AT&T's
6 position that entry through UNE-P is not an effective
7 way to compete in the local exchange market?

8 A. No, I do not see that.

9 Q. Do you see in the paragraph that starts, more
10 consumers and small businesses; are you at that
11 paragraph?

12 A. Yes.

13 Q. Do you see the second sentence that indicates
14 that it is AT&T's belief that the RBOCs lobbied
15 furiously to eliminate UNE-P and reduce competitive
16 choice. Would you take from that that the continued
17 existence of UNE-P increases competitive choice?

18 A. I guess I would have to agree that it does
19 allow for additional choices.

20 Q. And does that same paragraph subsequently
21 indicate at least at the time that it was AT&T's belief
22 that it could enter the market and earn a reasonable
23 return using UNE-P?

24 A. Are you referring to the last sentence in the
25 sixth paragraph?

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1 Q. Yes.

2 A. That's what it says.

3 Q. Is there any indication there that AT&T
4 believes that such entry is not an effective way to
5 compete for local exchange business?

6 A. Can you restate that, please, or reask it?

7 Q. Is there any indication in that passage that
8 AT&T believes that entry into the local exchange market
9 through UNE-P is not an effective way to compete?

10 A. I don't believe it says that, no.

11 Q. Mr. Cowan, are you aware of what AT&T's
12 position is with regard to UNE-P in the triennial review
13 proceedings?

14 A. From a high level I am aware of that.

15 Q. And what is that?

16 A. Generally speaking that we are wanting UNE-P
17 to exist, that switching, specifically switching, it
18 would be impaired if it were not provided by the ILEC or
19 the RBOC.

20 Q. Turning back to your testimony, Exhibit 701,
21 at lines 14 through 19 you appear to criticize Qwest's
22 -- did I give a page number, I'm sorry.

23 JUDGE MACE: What page was it?

24 Q. Sorry, I just realized I hasn't done that,
25 page 6.

0987

1 A. Page 6.

2 Q. Where we were before, further down now, lines
3 14 through 19. You appear to criticize Qwest's petition
4 for failure to define the market on a granular basis; is
5 that correct?

6 A. Correct.

7 Q. Is AT&T competitively classified?

8 A. Yes.

9 Q. Do you have any idea how the market was
10 defined when AT&T was granted competitive
11 classification?

12 A. I believe 25% market share was the standard
13 that was used in that case.

14 Q. Actually, that's another question that I had
15 for you but not the one I just asked. The question was,
16 you were criticizing Qwest's petition for failure to
17 define the market on a granular basis in terms of a
18 specific geographic area; is that correct?

19 A. Yes.

20 Q. Okay. And you disagreed with Qwest's
21 petition to obtain competitive classification over the
22 entire state; is that also correct?

23 A. That's correct.

24 Q. Okay. Do you have any idea of how the
25 geographic market was defined when AT&T was granted

0988

1 competitive classification?

2 A. Not the geographic. I know it was for by
3 service. I believe that was the way it was looked at.

4 Q. Do you have any reason to believe it was a
5 geographic area that was smaller than the entire state?

6 A. I don't know.

7 Q. In going back to the answer you just gave me
8 with regard to 25% market share, what were you referring
9 to when you gave me that answer?

10 A. I use that in my rebuttal testimony. That
11 was U-86113.

12 Q. Is that AT&T's petition for competitive
13 classification of its toll services?

14 A. Yeah, for competitive telecommunications,
15 yeah, competitive classification, correct.

16 Q. And is it your testimony that after reading
17 the order in that docket it's your conclusion that that
18 petition was granted upon a showing by AT&T that it had
19 75% market share in this state?

20 A. Sorry, can you restate that question?

21 Q. Let me see if I can simplify it. You
22 mentioned earlier a 25% market share, and I asked you
23 what you were referring to. You just gave me a docket
24 number. Can you please explain what the 25% and that
25 reference to the docket number is meant to convey?

0989

1 A. My testimony stated that that was -- seemed
2 to be implied by Mr. Wilson in his testimony that that
3 was some sort of standard that had been used in the
4 past. That's what I address in my testimony.

5 Q. Can you turn to your direct testimony 701 on
6 page 9.

7 A. (Complies.)

8 Q. You state that Qwest has overstated the
9 number of competitive or alternative providers. That's
10 at line 3. Is there a threshold number that would be a
11 determinative number of competitive or alternative
12 providers in your view?

13 A. Page 9?

14 Q. Yes.

15 A. Line 3?

16 Q. Yes.

17 A. I'm not seeing that quote actually.

18 Q. Sometimes the pagination is off.

19 A. Oh, I had the wrong piece of testimony,
20 that's my fault. Page 3, correct?

21 Q. Page 9.

22 A. Page 9. There I address in the petition the
23 number of registered CLECs.

24 Q. Qwest did not claim that the number of
25 registered CLECs was representative of how many CLECs

0990

1 were actually providing competitive services, did it?

2 A. I believe that's in the -- it's been used as
3 directional evidence. I believe Mr. Teitzel called it
4 directional evidence in this record.

5 Q. Did Qwest claim that all 161 CLECs registered
6 with the Commission were actually providing competitive
7 services?

8 A. Simply that they are registered.

9 Q. Now you state you claim that Qwest has
10 overstated the number of alternative providers. Is
11 there a threshold number that would be determinative of
12 effective competition in your view?

13 A. I didn't make any recommendation on a
14 threshold level.

15 Q. Turn to page 10, please, and look at your
16 testimony, same piece of testimony, 701, page 10, lines
17 12 through 14, you state that:

18 The Commission should only consider
19 those companies that are operating and
20 the specific locations of their
21 customers.

22 Is that your testimony?

23 A. What lines again, please?

24 Q. 10 through 14.

25 A. Yes, I'm there, what was the question again?

0991

1 Q. Is it correct that it's your testimony that:
2 The Commission in this case should
3 consider only those companies that are
4 operating and the specific locations of
5 their customers.

6 A. Yeah, I would agree that that would be an
7 effective way of determining competition in an exchange.

8 Q. Did you review the UNE-P and UNE-L data that
9 Qwest submitted in this proceeding?

10 A. Yes, I did.

11 Q. Did you see that Qwest has provided
12 quantities of UNE-P and UNE-L by wire center?

13 A. Yes, I believe Mr. Teitzel provided that in
14 his direct testimony.

15 Q. Is it your contention that the analysis
16 should be even below the wire center level?

17 A. I only proffered up exchange or wire center
18 level, nothing below that.

19 Q. I'm going to be exploring your direct
20 testimony with you here for a while, so let's just flip
21 to the next page, page 11, lines 13 through 15. You
22 state there that:

23 The alternative providers of service do
24 not even offer a one for one comparison
25 of all the services in all the locations

0992

1 that Qwest wants reclassified.

2 Is that your testimony?

3 A. That's correct.

4 Q. And what's the basis for that testimony?

5 A. Examination of the price lists offered by

6 Mr. Reynolds.

7 Q. You didn't look at the underlying price
8 lists, you just looked at the synopsis that Mr. Reynolds
9 provided?

10 A. That's what I looked at.

11 Q. Is the fact that each service provider does
12 not offer a one for one comparison of the services that
13 Qwest does a basis upon which you think the Commission
14 should deny this petition?

15 A. Could you ask that question again, please?

16 MS. ANDERL: Sorry, could I have it read
17 back, please.

18 (Record read as requested.)

19 A. I mean that's just part of the evidence that
20 Qwest provided. I didn't think that was conclusive, no.

21 BY MS. ANDERL:

22 Q. You didn't think it was conclusive in what
23 way?

24 A. That that showed the number of competitors
25 actively in each market, I mean and then examination of

0993

1 that summary of services. There wasn't -- it wasn't
2 clear to me that we were -- some matched up while some
3 others didn't match up on their services.

4 Q. Is the fact that some of the competitors did
5 not match up, does that form a basis upon which you
6 think the Commission should deny the petition?

7 A. It could possibly be part of it, yeah, a
8 reason.

9 Q. Do the competing services need to be
10 identical to the services that Qwest is seeking
11 competitive classification of?

12 A. Yeah, I mean that's -- yes.

13 Q. What's your authority for that, or what's the
14 basis for that answer?

15 A. Basis, that's what's been asked as far as the
16 data in this case, that we have been asked to provide
17 line counts for those services. That's what you're
18 comparing to make market share judgments and other
19 judgments on the extent of competition.

20 Q. Mr. Cowan, are you an economist?

21 A. No.

22 Q. Do you have any background or training in
23 economics?

24 A. Some.

25 Q. What?

0994

1 A. I have had three classes in economics.

2 Q. Undergraduate level or graduate level?

3 A. Both.

4 Q. How many at the undergrad level?

5 A. Two.

6 Q. Do the, in your view, do the competing
7 services need to be identical to provide competition or
8 just substitutable?

9 A. Well, the statute says you have -- you can
10 consider, you know, substitute products, and to judge
11 Qwest's petition you have to look at competition on
12 those services. That's what I have addressed in my
13 testimony.

14 Q. So in your view, in order to be a substitute,
15 a service needs to be identical to the service for which
16 it is substituting?

17 A. Yes.

18 Q. And what's the basis for that conclusion?

19 A. Well, that's looking at the, you know, for --
20 at competition based -- oh, for those services that
21 Qwest is seeking reclassification.

22 Q. I'm sorry, could you restate your answer? I
23 didn't understand that. I asked you what the basis for
24 your conclusion is that in order to be substitutable for
25 a service, a competing service needs to be identical to

0995

1 it, what's the basis for that?

2 A. The data that's been provided in this docket.

3 Q. What do you mean by that?

4 A. The various line count data for the services
5 that Qwest provides, the CLECs have been asked to
6 provide such data for those services as well.

7 Q. And because the Commission asked the CLECs to
8 provide line count data, you believe that that means
9 that in order to be considered effective competition, a
10 service needs to be substitutable and also identical to
11 the service for which competitive classification is
12 sought?

13 A. Well, one of the analysis that has been done
14 in this --

15 Q. Mr. Cowan.

16 A. Yes.

17 Q. Could I ask you to please tell me if you
18 agree or disagree with my question and then give me the
19 explanation. I understand it was a long question, but
20 I'm trying to get an understanding of what it is you're
21 saying.

22 A. Could you ask the question again, and I will
23 give you the yes or no response and then my explanation.

24 Q. Is it your testimony that because the
25 Commission asked the CLECs to provide line count data,

0996

1 that is the basis for your conclusion that services need
2 to be substitutable for and identical to the services
3 for which competitive classification is sought?

4 A. Yes, for a comparative analysis of market
5 share, that's what was required, and that's the basis of
6 my response.

7 Q. Mr. Cowan, does in your view voice mail
8 service compete with telephone answering machines?

9 A. Do they compete?

10 Q. Yes.

11 A. I would agree to that, yes.

12 Q. Are those services identical?

13 A. I would say they're close, yeah.

14 Q. Are they identical?

15 A. No, one's more electronic versus one could be
16 a manual tape.

17 Q. Might a person choose to substitute one for
18 the other?

19 A. That's a possibility.

20 Q. Did you do any analysis of whether the
21 services offered by the 32 competing companies listed in
22 Mr. Reynolds' testimony are substitutable for the
23 business services that Qwest seeks to have reclassified?

24 A. I don't believe I did that particular
25 analysis on that, no.

0997

1 Q. Turn to page 12 of your testimony.

2 A. (Complies.)

3 Q. This is a confidential page, I don't believe
4 we need to have any discussion of confidential numbers
5 on the record though. You have a discussion about the
6 number of CLECs submitting local service requests at
7 lines 5 and 6. Did you perform any analysis as to the
8 identity of the CLECs submitting those local service
9 requests or LSRs?

10 A. No, I simply looked at Mr. Reynolds' exhibit
11 and took the number at face value.

12 Q. Did you perform any analysis as to the
13 services that were requested on those LSRs?

14 A. No, I did not.

15 Q. On line 14 you reference that the LSR might
16 have been used to order an interconnection trunk; is
17 that right?

18 A. Yes.

19 Q. Isn't it true that interconnection trunks are
20 not ordered on LSRs but rather are ordered on ASRs?

21 A. I believe they can be provided over an LSR if
22 it's predominantly a local service.

23 Q. Would you accept subject to your check that
24 Qwest's ordering process requires interconnection trunks
25 to be ordered on ASR?

0998

1 A. Yes.

2 Q. What about 911 trunks, are you aware under
3 Qwest's ordering process whether those are provided
4 under an LSR or an ASR?

5 A. I'm not particularly aware, no.

6 Q. Would you accept subject to your check that
7 they are not ordered on LSRs?

8 A. I suppose subject to check, yes.

9 Q. On page 13, generally you discuss the
10 quantities of UNE-P in service. Did AT&T respond to the
11 Commission's order requiring it to verify Qwest's line
12 count data for AT&T?

13 A. We responded, yes.

14 Q. Also on page 13 and on to page 14 you discuss
15 CLEC growth in market share and Qwest's decline in
16 market share. Do you have that testimony in mind?

17 A. 13 and 14?

18 Q. Yes.

19 A. Got it.

20 Q. You state that:

21 One of the reasons why a CLEC market
22 share might have grown and Qwest's might
23 have declined is that Qwest's business
24 customers might be going out of
25 business.

0999

1 Is that right?

2 A. Yes.

3 Q. Isn't it true that CLEC business customers
4 could be equally affected by this factor?

5 A. Yes, that's true.

6 Q. You state that:

7 Qwest business customers may have cut
8 costs by reducing the amount of
9 telecommunications services purchased.

10 Is it true that CLEC business customers could
11 be equally affected by this factor?

12 A. That is true.

13 Q. You also state that:

14 Qwest business customers might move to a
15 more advanced service with Qwest.

16 Is it correct that this might happen with
17 CLEC customers as well?

18 A. That could happen.

19 Q. Are there any factors that you have listed
20 that do not -- that affect Qwest's business customers
21 but do not affect CLEC customers?

22 A. One second, please.

23 I believe they face the same pressures.

24 Q. Turn next, Mr. Cowan, to your rebuttal
25 testimony, Exhibit 702.

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1 A. (Complies.)

2 Q. And turn to page 4, please.

3 A. (Complies.)

4 Q. Lines 11 through 15, you state there that:

5 Mr. Wilson concludes without evidence

6 that provisioning pairing, OSS

7 deployment, and change management

8 processes prove that Qwest faces

9 effective competition.

10 Do you see that testimony?

11 A. Yes.

12 Q. And is it correct that you go on to discuss

13 this issue through page 7 of your testimony?

14 A. I believe going into page 7 brings up the 271

15 as well.

16 Q. Now in support of that testimony that you

17 have given there with regard to what you believe

18 Mr. Wilson said, you cite to Mr. Wilson's own testimony.

19 Your testimony, and this is a little confusing but I

20 need to ask you about this, your testimony at Footnote 6

21 cites to Mr. Wilson's testimony at page 9; is that

22 right?

23 A. Yes.

24 Q. What I would like to explore with you is

25 where in Mr. Wilson's testimony does he conclude in your

1001

1 view that these factors that you have listed there prove
2 effective competition?

3 A. In my view, he draws a conclusion that opened
4 markets mean effective competition can occur.

5 Q. Isn't it correct, Mr. Cowan, that in part of
6 the testimony that you cited, Mr. Wilson is discussing
7 the fact that Qwest has opened the local market to
8 competition?

9 A. He discusses that, correct.

10 Q. And is that the same thing as facing
11 effective competition?

12 A. No, I would -- open market or opening per,
13 you know, opening -- market opening mechanisms are
14 definitely different than actual competition.

15 Q. And where in Mr. Wilson's testimony does he
16 say that they're the same thing?

17 A. Let me get his direct testimony. He offers
18 that along with the data that was provided by the CLECs.

19 Q. I'm asking you to point me, Mr. Cowan, to a
20 place in Mr. Wilson's testimony where he says that
21 opening the local market to competition is the same
22 thing as effective competition.

23 A. I don't believe it states in his testimony
24 verbatim that quote, no, or -- no. He relies on that to
25 show that it's open along with the data. That's what

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1 his analysis was.

2 Q. Well, but on page 4 of your testimony, didn't
3 you say that:

4 Mr. Wilson concludes that the existence
5 of provisioning pairing, OSS deployment,
6 and change management processes somehow
7 conclusively prove that Qwest faces
8 effective competition statewide for all
9 its basic business services.

10 That's your testimony, isn't it?

11 A. Yes.

12 Q. And I asked you to tell me where Mr. Wilson
13 said that opening the market to local competition is the
14 same thing as facing effective competition, and now you
15 have told me that he has not said that. Is that also
16 correct?

17 A. Not directly, no.

18 Q. Okay.

19 A. I mean he implies that the use -- implies
20 that an open market -- I mean, you know, it's implied I
21 would say.

22 Q. Mr. Cowan, could you turn to Exhibit 705 and
23 706.

24 A. (Complies.)

25 Q. Did you have a chance to review these two

1003

1 exhibits prior to taking the stand today?

2 A. Yes.

3 Q. Can you tell me, is there anything in Exhibit
4 705 that is incorrect with regard to AT&T's plan to
5 expand its local service?

6 A. If anything is incorrect?

7 Q. Yes.

8 A. I wouldn't know if anything is incorrect. I
9 know it says a press release.

10 Q. And on Exhibit 706, do you recognize that as
11 excerpts from AT&T's small and medium business Web site?

12 A. I'm not exactly sure what -- which Web site
13 or pages in the Web site you're looking at.

14 Q. After you received this exhibit, Mr. Cowan,
15 as a potential cross-examination exhibit, did you go to
16 the Web site to check whether these pages actually
17 appeared there?

18 A. I believe they said excerpts from the Web
19 site. I'm not sure exactly what pages you're referring
20 to though. That's what I'm --

21 Q. I'm referring to Exhibit 706, pages 1 through
22 7.

23 A. I mean I visited the Web site, but I mean if
24 you could show me what the -- what, you know, the Web
25 pages are that you're -- I'm not sure which ones you're

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1 looking at.

2 Q. I'm looking at page 1.

3 JUDGE MACE: Do you have before you Exhibit
4 706?

5 THE WITNESS: I have what I printed out from
6 that Web site.

7 JUDGE MACE: Does he have the marked Exhibit
8 706?

9 MS. FRIESEN: I thought that he did have 706,
10 let me bring mine up.

11 THE WITNESS: Not in its entirety.

12 MS. ANDERL: Your Honor, maybe we could
13 shortcut this. If Ms. Friesen would be willing to
14 stipulate its admission, I don't really have any other
15 questions on it.

16 JUDGE MACE: Ms. Friesen.

17 MS. FRIESEN: We will take subject to check
18 the authenticity of these excerpts from our Web pages.
19 I would ask, however, if we are allowed to stipulate or
20 if we are asked to stipulate that we are allowed to
21 augment this with anything we think is missing off those
22 Web sites with respect to these few pages that have been
23 excerpted. I don't understand the purpose of this
24 particular exhibit in relation to this witness, so it's
25 difficult for me to merely stipulate to this entering

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1 the record. I don't know what it purports to show.

2 JUDGE MACE: Do you have, well, do you have
3 an objection then?

4 MS. FRIESEN: Yes.

5 JUDGE MACE: Ms. Anderl.

6 MS. ANDERL: If I may seek clarification, is
7 the objection as to relevance?

8 JUDGE MACE: Ms. Friesen.

9 MS. FRIESEN: Yes. I seek clarification,
10 Your Honor, I don't understand the purpose of this
11 exhibit and particularly in relation to this witness.
12 AT&T has not denied that it offers business services to
13 small businesses in the state of Washington, hence this
14 becomes redundant evidence, if evidence at all, of
15 anything, so it's difficult for me to know what the
16 purpose of this is.

17 MS. ANDERL: Well, Your Honor, we simply
18 would like to have it as part of the record to have a
19 more full and complete description of the types of
20 services and service offerings that AT&T has, how it
21 competes for customers, what it tells potential
22 customers. Clearly based on prior discussions, this
23 witness will not be able to answer questions about that
24 subject, and we therefore think it is relevant to have
25 that type of information vis a vis AT&T in the record.

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1 MS. FRIESEN: And, Your Honor, there is no
2 foundation for this document. That said, we don't -- I
3 mean we certainly -- I'm not going to dispute with you
4 -- this may be AT&T's Web sites and it may indicate that
5 there are some competitive offerings in Washington. I
6 can't tell from this page itself or from any of the
7 pages contained whether these are, in fact, out of
8 Washington and what they purport to show.

9 (Discussion on the Bench.)

10 JUDGE MACE: We're going to admit the
11 exhibit, it's relevant with regard to this witness's
12 testimony about what does or doesn't constitute
13 effective competition. I would offer you the
14 opportunity, Ms. Friesen, to supplement this with, if
15 you feel this isn't a complete representation of AT&T's
16 Web site, to supplement with additional pages that would
17 complete the picture.

18 MS. FRIESEN: Thank you.

19 JUDGE MACE: But we will admit the exhibit.

20 MS. ANDERL: Thank you, Your Honor.

21 BY MS. ANDERL:

22 Q. Mr. Cowan, I would ask you also to turn to
23 Exhibits 708, 709, 710, and 711, and I simply would like
24 you to verify for me that those are, in fact, AT&T's
25 responses to Qwest Data Requests Number 6, 7, 8, and 17.

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1 A. You said 708?

2 Q. 708 through 711.

3 A. Yes.

4 MS. ANDERL: Thank you. Your Honor, I have
5 no further cross for this witness. I would offer all of
6 the cross exhibits with the exception of Exhibit 704,
7 which I did not use.

8 JUDGE MACE: I'm taking a quick glance at
9 what's marked as Exhibit 711, and it indicates
10 confidential per protective order, yet my copy is not on
11 yellow paper. Is that confidential?

12 MS. ANDERL: My copy, Your Honor, of AT&T's
13 response to Qwest Data Request Number 17 does not
14 indicate confidential on it. Oh, at the very top, I
15 see.

16 JUDGE MACE: Right.

17 MS. ANDERL: It is not on yellow. I do not
18 know that we received it on yellow.

19 JUDGE MACE: Ms. Friesen.

20 MS. FRIESEN: We probably served it on pink.

21 MS. ANDERL: Pink, well, colored paper.

22 JUDGE MACE: Well, let me just ask this, is
23 there an objection to the admission of the exhibits?
24 You can correct the designation as confidential after
25 you check to see whether it truly is confidential.

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1 MS. FRIESEN: There's no objection.

2 JUDGE MACE: All right, I will admit the
3 exhibits.

4 MS. ANDERL: Thank you, Your Honor.

5 JUDGE MACE: You also offered 703?

6 MS. ANDERL: I believe that's a Staff cross
7 exhibit.

8 JUDGE MACE: I'm sorry, you're right, that's
9 Staff, thank you.

10 MR. FFITCH: Your Honor, excuse me.

11 JUDGE MACE: Mr. ffitich.

12 MR. FFITCH: I just have a clarification
13 question. My set of exhibits, cross exhibits from
14 Qwest, has some pages in it that are answers to some
15 questions numbered, I guess it's at page numbers 2 and
16 3, there's some requests for admission.

17 JUDGE MACE: What are you referring to?

18 MR. FFITCH: Actually, I'm trying to describe
19 what I'm referring to right now. This is --

20 MS. ANDERL: I think I recognize the problem,
21 Your Honor. When we received the data request responses
22 from AT&T, they were multiple responses on a single
23 page, and we therefore had to, when we made a copy, we
24 provided this information in addition to what we wanted
25 simply to be an exhibit, but that was done as opposed to

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1 trying to alter or edit the AT&T response format in any
2 way.

3 JUDGE MACE: So that in effect what's marked
4 as Exhibit 708 is AT&T's response to Qwest Exhibit
5 Discovery Response 6?

6 MS. ANDERL: There may be --

7 JUDGE MACE: Even though there are references
8 to other portions of discovery responses on the page?

9 MS. ANDERL: That's right, Your Honor, and we
10 don't intend --

11 JUDGE MACE: If you look at your exhibit
12 list, Mr. ffitch, then 709 would be the response to
13 Number 7, 710 would be the response to Number 8, and 711
14 would be the response to Number 17.

15 MR. FFITCH: Thank you, that clarifies.

16 JUDGE MACE: And I just want to verify,
17 you're not offering proposed 704.

18 MS. ANDERL: That's right.

19 JUDGE MACE: But you are offering the
20 remainder of the exhibits marked 705 through 711?

21 MS. ANDERL: Yes.

22 JUDGE MACE: And they are admitted in
23 evidence since I heard no objection to their admission.

24 I would like to take a recess now for 15
25 minutes.

1010

1 (Recess taken.)

2 JUDGE MACE: Who will be crossing for Staff?

3 MS. WATSON: I will be, Your Honor.

4 JUDGE MACE: Go ahead.

5

6 C R O S S - E X A M I N A T I O N

7 BY MS. WATSON:

8 Q. Good morning.

9 A. Good morning.

10 Q. Would you please turn to Exhibit 701, page
11 16.

12 A. (Complies.)

13 Q. And I would like you to look at lines 14
14 through 16. Are you there?

15 A. Yes.

16 Q. You state that:

17 The competition Qwest faces via UNE-P
18 provision basic business service will at
19 least initially and in some cases
20 forever disappear.

21 Correct?

22 A. Correct.

23 Q. Are you referring to the potential effects of
24 the FCC's recently released triennial review order?

25 A. That is one factor leading to the

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1 disappearance of UNE-P or the potential, excuse me, the
2 potential disappearance of UNE-P.

3 Q. Are you aware that the triennial review
4 requires state commissions including this Commission to
5 conduct proceedings to analyze the local market to
6 determine whether impairment exists regarding certain
7 unbundled elements?

8 A. Yes.

9 Q. And a finding of no impairment means that a
10 lack of access to an incumbent's network elements does
11 not pose a barrier to entry that would make entry
12 uneconomic, correct?

13 A. Determination that the switching portion is
14 -- there's no impairment on that, is that correct; is
15 that what you're saying?

16 Q. Right.

17 A. That would be their, yeah, their ruling.

18 Q. And if the Commission finds impairment, then
19 Qwest would be required to continue providing the
20 unbundled elements, correct?

21 A. Correct.

22 Q. If I could turn your attention to that same
23 page, page 16 of 701 at lines 16 through 17, you state
24 there that:

25 The fact that UNE-P may or may not be

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1 allowed in the future creates
2 uncertainty in CLECs' business plans.
3 Correct?

4 A. Yes, I state that.

5 Q. The triennial review orders release has added
6 some certainty to CLEC business plans, hasn't it?

7 A. I would say some. However, I mean I'm
8 generally aware of motions at the federal level to stay
9 that order or to revise it in some way, so it's --
10 there's still a, you know, some uncertainty, yes.

11 Q. AT&T has reacted favorably to the triennial
12 review order, hasn't it?

13 A. Yes.

14 Q. Would you please turn to Exhibit 703.

15 A. (Complies.)

16 Q. This is an AT&T press release; is that
17 correct?

18 A. This is the press release on September 8th,
19 2003, right, yeah.

20 Q. And according to AT&T's press release, AT&T
21 is currently serving 1 Million small business phone
22 lines nationwide, correct?

23 A. That's what it indicates.

24 Q. And the plan through which AT&T serves those
25 customers is called the All In One Plan, correct?

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1 A. Referring to what, the second paragraph, yes.

2 Q. Are you familiar with the All In One Plan?

3 A. Generally.

4 Q. Could you describe what that plan provides?

5 A. I don't know all the specifics. I do know
6 that it tends to be, you know, provisioned through UNE-P
7 and some analog, maybe some digital components to it.

8 Q. And it combines local and long distance
9 calling on a single bill?

10 A. Yes.

11 Q. Do you know if it provides other services,
12 data services or other vertical features?

13 A. I'm not -- I don't know all the specifics of
14 the plan. I know it's a -- generally kind of a, you
15 know, a bundled offer.

16 Q. AT&T provides this plan primarily through
17 UNE-P, doesn't it?

18 A. Yes.

19 Q. On page 1 of Exhibit 703 in the third
20 paragraph under the bold print, do you see a quote from
21 David Dorman?

22 A. What's the paragraph again, I'm sorry?

23 Q. It's the third paragraph under the bold
24 print. It begins, our business milestone.

25 A. Yes, I see it.

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1 Q. Would you please explain who David Dorman is?

2 A. He's the Chairman and CEO of AT&T.

3 Q. In response to the triennial review order,

4 Mr. Dorman stated:

5 Our business milestone and consumer
6 commitment are acknowledgments of the
7 FCC's willingness to stick to the intent
8 of the Telecommunications Act, and we're
9 confident that the states will do the
10 same. The Commission, in this case
11 referring to the FCC, adopted, or I'm
12 sorry, opted to continue making the
13 benefits of local competition available
14 to the people who matter most, the
15 customer seeking the best value for
16 their telecommunications dollar.

17 Is that correct?

18 CHAIRWOMAN SHOWALTER: I'm going to interpose
19 my own -- the point of your question is to ask a
20 question, not to introduce testimony of another witness.
21 If you have a question to ask about that statement, you
22 can ask the witness to read to himself that statement or
23 for us to read that statement.

24 MS. WATSON: Okay, I guess I --

25 CHAIRWOMAN SHOWALTER: And then you can ask a

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1 question about it.

2 MS. WATSON: Okay, I'm sorry, I guess I went
3 about it the long way.

4 BY MS. WATSON:

5 Q. Do you have Mr. Dorman's statement in mind?

6 A. Is it in this press release?

7 Q. It is, it's in that third paragraph.

8 A. So it's the top two lines, correct?

9 Q. Actually, it's the entire paragraph.

10 A. Okay.

11 Q. It says said Mr. Dorman in the middle of his
12 statement.

13 A. I see the quote, yes.

14 Q. Okay. Mr. Dorman's statement along with the
15 rest of this press release are based on management's
16 beliefs and a number of assumptions regarding future
17 events, correct?

18 A. Yes, and that's why they would include the
19 safe harbor footnote to the press release, yes.

20 Q. Right, and I'm sorry about the language.

21 A. Right.

22 Q. So it's fair to say that AT&T is fairly happy
23 with the triennial review order and looking forward in
24 developing its business plan?

25 A. Generally, yeah, I would agree. And

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1 initially, you know, it was encouraging for the fact
2 that the mode of entry into the local market will be
3 preserved possibly. I mean of course there's
4 uncertainties surrounding that, but I think it was
5 encouraging to the company, yes.

6 Q. Now if you could please turn to Exhibit 701,
7 page 5, and I would like you to look at lines 21 through
8 24. You allege there among other things that:

9 Qwest might engage in poor wholesale
10 quality, delayed service provisioning,
11 and a myriad of other acts aimed at
12 destroying competition.

13 Correct?

14 A. Yes.

15 Q. Wholesale service quality includes service
16 provisioning issues, doesn't it?

17 A. Say that again.

18 Q. Service provisioning issues comes under
19 wholesale service quality, correct?

20 A. I believe it does, yes.

21 Q. And if you would refer to Exhibit 702, page
22 15, lines 12 through 14, you state there that:

23 CLECs must have a stable and reliable
24 source of wholesale supply in the
25 relevant market in order to even serve

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1 basic business customers in any given
2 wire center.

3 Correct?

4 A. Yes.

5 Q. Keeping those two statements in mind, I have
6 a couple of questions I would like to ask you. Are you
7 aware that the Commission would continue to have
8 regulatory authority over Qwest's wholesale services
9 even if competitive classification is granted?

10 A. I believe that's true, yes.

11 Q. So competitive classification in this case
12 would only apply to the retail services requested in
13 Qwest's petition, correct?

14 A. Yes. However, you know, the wholesale side
15 is, you know, input that I believe that should be looked
16 at in this case.

17 Q. And the primary result of competitive
18 classification would be to allow Qwest to utilize
19 pricing flexibility with regard to the services
20 classified as competitive, correct?

21 A. Can you say that again, sorry.

22 Q. The primary effect of competitive
23 classification in this case would be for Qwest to be
24 allowed to use pricing flexibility for the competitively
25 classified services?

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1 A. I believe that's their intent, yes.

2 Q. Is it your understanding that Qwest would be
3 required to charge prices for the competitive services
4 that cover the cost of providing those services?

5 A. I would hope that they would cover the costs.
6 I mean I don't want to get into a debate on what costs,
7 you know, on the various definitions of costs, but I
8 believe that it should cover, you know, cost, I mean
9 however you want to define it.

10 Q. Right, and without defining -- I don't want
11 to get too specific into what costs are, but what I
12 would like to -- what I would like to ask you is whether
13 you're aware that Qwest would be required to cover those
14 costs through the prices that they charge --

15 A. Yeah, I would hope --

16 Q. -- for those competitive services?

17 A. Yeah, I would hope that that would definitely
18 be a requirement.

19 Q. Are you aware that that is a requirement?

20 A. I don't know at the specific cite or
21 anything, no, but I believe that to be true.

22 Q. Is it your understanding that the Commission
23 may investigate prices charged for the competitive
24 services upon complaint?

25 A. Upon complaint, yes.

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1 Q. And the Commission may reclassify a
2 competitive service if reclassification is in the public
3 interest, correct?

4 A. I'm sorry, again.

5 Q. The Commission may reclassify a service
6 that's been competitively classified if reclassification
7 is in the public interest, correct?

8 A. Upon after receiving a complaint, that's how
9 I understand it, then they would be able to do that.

10 Q. The public interest could include
11 reclassification if Qwest engages in acts aimed at
12 destroying competition, couldn't it?

13 A. Yes.

14 MS. WATSON: If I could have just a moment.

15 At this time I would like to move for entry
16 of Exhibit 703.

17 JUDGE MACE: Any objection to the admission
18 of Exhibit 703?

19 MS. FRIESEN: No objection.

20 JUDGE MACE: I will admit that exhibit.

21 MS. WATSON: And I have no further questions.

22 JUDGE MACE: Let me turn then to the
23 commissioners.

24

25

1020

1 E X A M I N A T I O N

2 BY CHAIRWOMAN SHOWALTER:

3 Q. Yes, I have a question regarding your
4 testimony in Exhibit 701, page 6, and I'm looking at
5 lines 5 through 8 where you talk about your
6 recommendation of what we should consider before we find
7 an area to be subject to effective competition. My
8 first question is to get a common definition. When you
9 say facilities based competitors, first of all, are you
10 referring only to landline competitors?

11 A. I believe what I'm referring to there, Madam
12 Chairwoman, is where the CLEC has its own facilities in
13 the ground, not dependent on significant portions of
14 Qwest's network.

15 Q. All right. But from your answer, I assume
16 you're referring to landline competitors as distinct
17 from say wireless or voice over Internet?

18 A. Right.

19 Q. Or cable?

20 A. Yeah, that recommendation --

21 Q. If you could just answer my questions one at
22 a time, I'm going to take you through this.

23 A. Yes.

24 Q. So are you referring only to landline?

25 A. Yes.

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1 Q. All right. And second, when you say
2 facilities based, what facilities are you assuming are
3 owned by the landline CLEC?

4 A. I would believe it would be the
5 interconnection or the trunks from say for example
6 AT&T's POP or other local switch to the customer or the
7 loop.

8 Q. But not the loop itself?

9 A. No, in that case it would be the loop,
10 because I also refer to the UNE-L, that would have to be
11 another input to the recommendation.

12 Q. So when you say facilities based competition,
13 you're assuming ownership of facilities by competitors
14 up to the point of the loop; is that correct?

15 A. I would say up to and including the loop,
16 that would be even better.

17 Q. Well, I guess my question is, under your
18 definition or use of the term facilities based
19 competition, do you admit of any part of the facilities,
20 including the loop, that would be owned by Qwest, or are
21 you assuming that everything all the way right to the
22 house is owned by the competitor?

23 A. That's what I'm assuming, the latter.

24 Q. All right. So on line six here then, are you
25 saying that in order for us to find effective

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1 competition in let's say an exchange, that there needs
2 to be at least two CLECs who own everything up to and
3 including the loop to the house?

4 A. Yes.

5 Q. Next question, why two, why not one, why not
6 three?

7 A. I picked up this from advocacy use in other
8 jurisdictions. It seems to be company policy to suggest
9 this, and so that's what I used since the company has
10 basically allowed for it to be, you know, placed in the
11 public realm. That's what I believed should be used
12 rather than coming up with my own independent, you know,
13 recommendation.

14 Q. So you personally don't have an explanation
15 for why two is necessary and one facilities based
16 competitor will not suffice?

17 A. Well, I can provide a, you know, opinion. I
18 think, you know, the more facilities based competitors
19 would make it easier to declare effective competition.
20 In fact, the data that's been seen, if all those
21 numbered line counts were based on facilities based
22 carriers or CLEC owned lines, I think then there would
23 be, you know, a very good case to make for, you know,
24 effective competition.

25 Q. Yes, but one is more than zero, two is more

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1 than one, three is more than two.

2 A. Correct.

3 Q. That's why I'm asking why you draw the line
4 at two, and what I hear you saying is that's not your
5 personal informed opinion, it's the position of your
6 company?

7 A. Correct.

8 Q. Then you say there should be two facilities
9 based competitors coupled with a sufficiently stable
10 supply of UNE-L, UNE-P, and resale. Is it your view
11 that in any event there must be two facilities based
12 competitors or that if there were a greater degree of
13 the supply of UNE-L, UNE-P, and resale, that might
14 justify a lesser degree of facilities based competitors,
15 say one? And then flip side of that, if there were a
16 lesser degree of UNE-L, UNE-P, and resale, that might
17 call for three facilities based competitors? Are these
18 dependent or I think the economist term is
19 non-orthogonal, but will one dimension vary with the
20 other dimension, by which I mean one dimension being how
21 many facilities based competitors and the other the
22 presence of UNE-L, UNE-P, and resale?

23 A. I don't have an exact mix of, you know, if
24 you have X amount of UNE-P, UNE -- or X and Y of UNE-P
25 and UNE-L, does that offset the lack or the fact that

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1 there's only one facility, I don't have any sort of, you
2 know, analysis to that degree, no.

3 Q. Okay. And then in another place you talk
4 about the 25% market share, and I'm unclear whether you
5 think we need to find both the presence of these factors
6 on page 6 that we have just discussed as well as a
7 threshold market share, or are those stated in the
8 alternative?

9 A. That's not necessarily -- I didn't offer that
10 up as an alternative. That's what I have seen -- picked
11 from Mr. Wilson's testimony is implied and -- because it
12 -- I mean we have been looking at primarily market share
13 data and the HHI. I have not addressed the HHI data.
14 The market share data I believe he seems to imply that
15 from that case 25% was the benchmark used, so I simply
16 did an analysis, well, if that's what's used in this
17 case, then X amount of exchanges would qualify. I'm not
18 sure if he was offering that up as an exact benchmark.

19 Q. Okay. But then what I hear you saying is
20 your recommendation is actually here on page 6 that we
21 should find the presence of two facilities based
22 competitors coupled with the other services?

23 A. Yes.

24 Q. Before finding effective competition?

25 A. Yes.

1025

1 CHAIRWOMAN SHOWALTER: Thank you, I have no
2 further questions.

3 COMMISSIONER OSHIE: I have no questions.

4 JUDGE MACE: Redirect.

5 MS. FRIESEN: Yes.

6

7 R E D I R E C T E X A M I N A T I O N

8 BY MS. FRIESEN:

9 Q. Well, congratulations, Mr. Cowan, first time
10 you have ever testified.

11 A. Thanks.

12 Q. Are you nervous?

13 A. No.

14 Q. I would like to take you back to some
15 questions posed to you by Ms. Anderl. She asked you a
16 series of questions aimed at eliciting whether or not
17 you believed UNE-P in and of itself was "effective
18 competition". Do you recall those questions?

19 A. Yes, I do.

20 Q. Now when you use the term effective
21 competition, what definition are you using?

22 A. I believe the definition resides in the
23 statute. That's what -- where it is defined and all of
24 the components of what effective competition means.

25 Q. And does UNE-P by itself equal all of those

1 components in the statute?

2 A. No, that's just simply one mode of entry for
3 competitors.

4 Q. Does AT&T contest that UNE-P is a competitive
5 entry strategy?

6 A. It is a competitive entry strategy, yes.

7 Q. Okay. You also spoke with Ms. Anderl about
8 whether or not services have to be identical or
9 substitutes, and I was kind of unclear as to what you
10 were saying. If by identical -- well, let me back up.

11 By identical, did you mean they have to be
12 both analog services that are compared for purposes of
13 this proceeding, or could they be analog and digital?

14 A. Well, I guess this highlights one of my
15 confusion or my confusion in this case, and that's that
16 we have to -- the applications for analog services, and
17 yet there seems to be digital services that provide the
18 equivalent, and they could be identical.

19 Q. So by identical, when you were talking to
20 Ms. Anderl, by identical are you suggesting to the
21 Commission -- well, let me ask you this.

22 Could the Commission consider the substitutes
23 that Ms. Anderl offered up, that would be voice mail
24 versus an answering machine, would those be adequate
25 substitutes for this Commission to consider?

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1 A. That example was, you know, those were
2 adequate substitutes.

3 Q. Okay. And when you looked at Mr. Reynolds'
4 price matrix and you concluded that you couldn't do a
5 one for one comparison for identical services, what were
6 you trying to indicate there?

7 A. That that exhibit shows -- I mean this --
8 that there are a number of competitors out there
9 providing certain types of services, but, you know, like
10 1FB, 1FB across the board, I didn't see that comparison.
11 Some were individual case bases, there seemed some
12 discrepancy. I couldn't draw a firm conclusion from
13 that exhibit other than there's a possibility that they
14 could be providing the same service, analog, digital,
15 I'm not sure.

16 Q. Was it your understanding from this
17 particular petition that it's analog services that are
18 at issue?

19 A. Yes.

20 Q. And in addition to the discussions about
21 identical service versus substitutes and effective
22 competition, Ms. Anderl also talked to you about the
23 distinction between LSRs and ASRs. Do you know what
24 those are?

25 A. I know an LSR is a local service request and

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1 an ASR is an access service request.

2 Q. And is it your understanding that a CLEC
3 could order an entrance facility, which is an
4 interconnection trunk under Section 7 of Qwest's SGAT,
5 through an LSR?

6 A. I don't have that --

7 Q. You don't recall?

8 A. Yeah.

9 Q. Ms. Anderl also talked to you about
10 Mr. Wilson's testimony and the conclusion that you drew
11 from reading his testimony where you said it was implied
12 in his testimony that he equates open markets with
13 effective competition. Could you explain to me how you
14 came upon that understanding?

15 A. I believe he makes that implication on page 6
16 and 7 of his direct testimony where he lists the 11
17 prerequisites and then mentions, you know, the 271,
18 Qwest 271 cases, 271 case, and with the evidence that's
19 been aggregate, you know, compiled by Staff, I think he
20 draws that conclusion.

21 Q. So he's looked at the prerequisites to
22 competition out of other petitions on page 6 of his
23 testimony; is that where you are?

24 A. Yes.

25 Q. And he concludes based on those prerequisites

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1 and looking at the 271 proceeding that those
2 prerequisites have been met?

3 A. Yes, he concludes that.

4 Q. Okay. Staff spoke with you a little bit
5 about page 5, line 22 of your direct where you're
6 talking about wholesale service quality. Could you turn
7 to that, please.

8 A. (Complies.)

9 Q. I think the thrust of Staff's questions were
10 that because there's this wholesale service quality
11 mechanism and something called the performance assurance
12 plan coupled with the Commission's authority to enforce
13 those things that CLECs are somehow okay, that those
14 things can't be manipulated contrary to what you have
15 said at page 5, line 22 of your testimony. Could you
16 explain to me, say use collocation as an example, why a
17 late delivery of collocation even though there's a
18 penalty under PAP might not preserve the CLEC's business
19 customer?

20 A. Under collocation I am aware that the penalty
21 is that 1/10 of the nonrecurring charge per week that a
22 collocation is delayed, which I mean I believe that's
23 the number that I've gotten from one of my co-workers is
24 around about \$9,000 per instance per week.

25 Q. So if the collocation isn't delivered on

1030

1 time, can AT&T serve any customers that are dependent on
2 that collocation?

3 A. My understanding is no, they wouldn't be able
4 to.

5 Q. And while AT&T might receive a penalty, do
6 you think it will hang on to its customers?

7 A. I mean it's hard to say, but I mean if a
8 customer is needing service immediately, then they would
9 -- might seek to take their business elsewhere.

10 MS. FRIESEN: I have no further redirect,
11 Your Honor.

12 JUDGE MACE: Ms. Anderl.

13 MS. ANDERL: A few follow-up questions.

14

15 R E C R O S S - E X A M I N A T I O N

16 BY MS. ANDERL:

17 Q. Mr. Cowan, didn't we discuss earlier whether
18 there was a need for collocation in order to provision
19 services via UNE-P?

20 A. Yeah.

21 Q. And as I recall your testimony, it was your
22 belief at least that collocation was not necessary to
23 provision services via UNE-P; is that right?

24 A. From my understanding, it's not required.

25 Q. So if AT&T were providing services to a

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1 number of business customers via UNE-P and wished to
2 convert those customers to UNE-L and was waiting on a
3 collocation in order to do that, isn't it true that AT&T
4 could simply continue to provide service over UNE-P
5 until the collocation was ready?

6 A. I suppose that could happen, yes.

7 Q. You spoke with the Chairwoman about your
8 testimony in Exhibit 701, page 6, and at lines 5 through
9 8 you discussed that the Commission ought to only
10 consider whether there are at least two landline
11 facilities based competitors. Would that be in an
12 exchange or in a wire center?

13 A. I believe I mean for all intents and purposes
14 wire center and exchange are fairly similar. Yes, I
15 thought my testimony does go to that granular level.

16 Q. Now I understood you to say that optimally
17 those facilities based carriers would own all of the
18 network facilities including the local loop to the
19 customer; isn't that right?

20 A. Yes.

21 Q. Is that for every single customer in that
22 wire center or exchange or only for a portion of them?

23 A. I didn't break my -- I didn't -- my
24 recommendation doesn't go to that level, no.

25 Q. Can you tell me?

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1 A. No.

2 Q. So if a facilities based carrier owned
3 facilities to two customers in an exchange, would that
4 be enough?

5 A. I suppose it's possible that they could, you
6 know, have -- own loops to five customers and then
7 serve, you know, two via UNE-L. I guess that's a
8 possibility, yes.

9 Q. So you're not recommending that those
10 facilities based carriers be required to build networks
11 that are entirely identical to the underlying Qwest
12 network, are you?

13 A. I believe it -- I mean that would be better
14 than having dependence, you know, mostly on Qwest.

15 Q. So is it your testimony that prior to the
16 Commission granting Qwest competitive classification for
17 its analog business services, there should be two
18 facilities based carriers in the state of Washington who
19 have facilities to each and every Qwest business
20 customer location?

21 A. Just for the entire state or I mean in each
22 exchange?

23 Q. If the request is for a statewide grant of
24 authority or a competitive classification rather.

25 A. I think you have to look at the exchange

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1 level, yes. I think that has to be looked at.

2 Q. My question was, is it your recommendation
3 that there be two facilities based competitors with
4 facilities to each and every Qwest business customer
5 location prior to granting this petition?

6 A. Not each and every, no.

7 Q. How many?

8 A. I don't have a figure. I didn't take my
9 recommendation to that level, no.

10 MS. ANDERL: Thank you. Nothing else, Your
11 Honor.

12

13 E X A M I N A T I O N

14 BY CHAIRWOMAN SHOWALTER:

15 Q. I just have one clarifying my own question
16 earlier. I believe when we were discussing facilities
17 based I asked you if that would mean facilities up to
18 the house, and I should have said customer or business
19 customer. Would your answers have been the same had I
20 used that term?

21 A. Yeah, I made that assumption.

22 CHAIRWOMAN SHOWALTER: Thank you.

23 THE WITNESS: Thanks.

24 JUDGE MACE: Ms. Watson.

25 MS. WATSON: Commission Staff has no further

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1 questions.

2 JUDGE MACE: Thank you.

3 Thank you, Mr. Cowan, you're excused.

4 (Discussion on the Bench.)

5 JUDGE MACE: We'll resume at 1:30, we'll

6 recess now for lunch, thank you.

7 (Luncheon recess taken at 11:50 a.m.)

8

9 A F T E R N O O N S E S S I O N

10 (1:35 p.m.)

11 JUDGE MACE: The next witness is Mr. Stacy.

12 (Witness MARK L. STACY sworn in.)

13 JUDGE MACE: Please be seated.

14 Ms. Singer Nelson.

15 MS. SINGER NELSON: Thank you, Your Honor.

16

17 Whereupon,

18 MARK L. STACY,

19 having been first duly sworn, was called as a witness

20 herein and was examined and testified as follows:

21

22 D I R E C T E X A M I N A T I O N

23 BY MS. SINGER NELSON:

24 Q. Mr. Stacy, please state your name and your

25 business address for the record.

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1 A. My name is Mark Stacy. My business address
2 is 229 Stetson Drive, Cheyenne, Wyoming 82009.

3 Q. By whom are you employed?

4 A. QSI Consulting.

5 Q. Are you representing MCI in this proceeding?

6 A. Yes, I am.

7 Q. Did you prepare testimony which has been
8 marked as Exhibit 601T, the direct testimony of Mark
9 Stacy, on behalf of MCI in this proceeding?

10 A. Yes.

11 Q. Did you also prepare the exhibits attached to
12 that testimony, Exhibits 60 -- oh, I guess there's only
13 one exhibit attached to your direct testimony, Exhibit
14 602, which is your qualifications?

15 A. Yes.

16 Q. And then is your rebuttal testimony filed in
17 this proceeding marked as Exhibit 603T?

18 A. Yes, it is.

19 Q. And then did you prepare the exhibit attached
20 to your rebuttal testimony that's been pre-marked as
21 Exhibit 604, which is a spreadsheet entitled Qwest
22 Market Share - Market Concentration?

23 A. Yes, I did prepare that exhibit.

24 JUDGE MACE: And I would note that that
25 exhibit is a confidential exhibit.

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1 MS. SINGER NELSON: Yes.

2 BY MS. SINGER NELSON:

3 Q. Do you have any changes or corrections to any
4 of either your testimony or your exhibits today?

5 A. I do not.

6 Q. If I were to ask you the same questions today
7 as are posed in your testimony, would your answers be
8 the same?

9 A. Yes, they would.

10 MS. SINGER NELSON: Your Honor, I move for
11 the admission of Exhibits 601T through 604.

12 JUDGE MACE: Is there any objection to the
13 admission of those exhibits?

14 MR. SHERR: No objection.

15 JUDGE MACE: I will admit those exhibits.

16 MS. SINGER NELSON: Thank you, Mr. Stacy is
17 available for cross-examination.

18 JUDGE MACE: Mr. Sherr.

19 MR. SHERR: Thank you.

20

21 C R O S S - E X A M I N A T I O N

22 BY MR. SHERR:

23 Q. Good afternoon, Mr. Stacy.

24 A. Good afternoon.

25 Q. Adam Sherr of Qwest. You are testifying for

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1 MCI as an expert witness; is that correct?

2 A. That's correct.

3 Q. Have you testified previously in competitive
4 classification or price deregulation proceedings?

5 A. I can't specifically recall. I know that I
6 just wrote testimony in a competitive reclassification
7 case, but the case settled, and so I didn't testify. So
8 recently I would have to say -- I mean I don't know what
9 you mean by testify. I have written testimony, yes.

10 JUDGE MACE: Mr. Stacy, would you speak
11 directly into the microphone.

12 BY MR. SHERR:

13 Q. Do you know approximately how many times you
14 have submitted testimony in competitive classification
15 or price deregulation cases?

16 A. Not without going back and checking.

17 Q. Have you ever recommended that the ILEC in
18 question be granted price deregulation in any of the
19 testimony you have submitted?

20 A. Not to -- not as I recall, no.

21 Q. I would like you to please take a look at
22 your rebuttal testimony, which is Exhibit 603. I would
23 like you to look at page 3. Let me know when you're
24 there.

25 A. Okay, I'm there.

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1 Q. Between lines 60 and 64, you indicate that:
2 Qwest is the sole and monopoly provider
3 of wholesale services to CLECs serving
4 customers via resale and UNE-P.

5 Is that correct?

6 A. That's correct.

7 Q. And you go on to discuss that:
8 The Commission in evaluating CLEC market
9 share and market concentrations in
10 Washington should exclude UNE-P and
11 resale counts from the analysis.

12 Is that correct?

13 A. That's correct.

14 Q. First, by that logic, shouldn't UNE loops
15 purchased by CLECs from Qwest also be excluded from the
16 analysis?

17 A. It's not as clear cut, but I agree with you
18 that you could definitely make a case for the exclusion
19 of UNE loops from the market share analysis. To the
20 extent that the wholesale monopoly provider is under
21 control of those, that portion of the service, the
22 monopoly provider could exercise pricing tactics which
23 could be detrimental to competition in Washington.

24 Q. Is it your belief that Qwest is the sole
25 provider of wholesale loops in Qwest territory in

1039

1 Washington?

2 A. The sole provider?

3 Q. Right, is it your testimony that Qwest is the
4 sole provider on a wholesale basis of unbundled loops in
5 Qwest's territory in Washington?

6 A. No, I don't think that's my testimony. I'm
7 not sure about that.

8 Q. Do you know if any CLECs in Washington lease
9 loops to other CLECs in Qwest territory in Washington?

10 A. No, I don't know.

11 Q. If you could again look back at page 3, would
12 you please read aloud the sentence that starts on line
13 60, starts, as noted.

14 A. (Reading.)

15 As noted in my direct testimony, Qwest
16 is the sole supplier of wholesale inputs
17 for CLECs providing retail service via
18 UNE-P and/or resale, and therefore as
19 the monopoly provider to captive CLEC
20 customers of Qwest, Qwest is in the
21 position to dictate what services end
22 use customers may choose from and at
23 what price.

24 Q. And do you stand by that testimony?

25 A. Yes, I do.

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1 Q. I asked you a moment ago if you knew if CLECs
2 in Washington were leasing loops to other CLECs. Are
3 you aware whether CLECs in Washington are leasing
4 switching or transport to other CLECs?

5 A. I'm not aware of it, no.

6 Q. And just so that I'm clear, it's your
7 testimony that as an expert for MCI that Qwest controls
8 what types of services wholesale based CLECs can
9 purchase from Qwest?

10 A. Well, I stand, like I said, by my testimony.
11 Whether there are a few alternative providers for CLECs
12 to choose from, I don't know, which I just answered.
13 But it's in my testimony what I think is controlled by
14 Qwest, and that's that they're the -- that they are the
15 monopoly provider of the wholesale inputs that CLECs
16 rely upon.

17 Q. And I would appreciate it if you could try to
18 answer yes or no first and then give your explanation,
19 if possible.

20 And it's your testimony that Qwest controls
21 the price for the wholesale services that CLECs buy from
22 Qwest?

23 A. Well, the Commission controls the price.

24 Q. That's not what you said at line 64 of your
25 testimony, is it?

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1 A. No, I said at line 64 that Qwest is in the
2 position to dictate what end use customers can choose
3 from and at what price. It's probably a bit strong of a
4 statement since the Commission is actually obviously in
5 control of determining what proper UNE prices are.

6 Q. Okay. I would like to move you to the next
7 page of Exhibit 603. This is page 4, specifically lines
8 74 through 81. There you discuss the use of resale and
9 UNE-P as indicators of a market in its competitive
10 infancy; is that fair?

11 A. That's what the second sentence of that
12 paragraph says.

13 Q. When you say that a market is in its
14 competitive infancy, does that mean to you that -- well,
15 strike that.

16 In your view, can a market in its competitive
17 infancy be effectively competitive?

18 A. No, I don't, and the market as it stands in
19 Washington today would fit the parameters of a
20 competitive infancy in that the CLEC alternative
21 carriers in the state rely entirely, if they provide
22 over UNE-P for example, rely entirely upon Qwest to
23 provide those wholesale inputs.

24 Q. If an RBOC faces competition in a state and
25 some portion of that competition comes from resale or

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1 from UNE-P, is it your position that that market by
2 definition is in its infancy?

3 A. No, I don't think there's a clear definition
4 of a market that's in its infancy. What I think needs
5 to be considered most closely in this circumstance is
6 not the definition of market infancy or market maturity,
7 it's something that is relatively difficult to get your
8 arms around, but we have attempted to do that.
9 Mr. Gates has set forth some parameters that can be used
10 as guideposts to help the Commission.

11 My emphasis in this area of testimony that
12 you directed me to is more on the aspect of UNE-P and
13 resale where CLECs will use those vehicles to come in
14 and gain a toehold in the marketplace. From a
15 competitive standpoint, and you asked me if competition
16 offered via those vehicles was a representative market
17 in its competitive infancy, the extent to which that is
18 competition is something that needs to be clearly
19 understood in this case. Because there's a perception
20 of competition from a consumer who feels like he has a
21 choice of providers, and there's the actual occurrence
22 of competition in the marketplace, which is dictated by
23 market mechanisms. Consumers look at what they
24 perceive, and I think it's the Commission's job and our
25 job in this case to look a little bit deeper at the true

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1 market mechanisms.

2 Q. Let me ask you a slightly different question.
3 If Qwest in this case or an ILEC generally let's just
4 say, if an ILEC faces competition and some portion of
5 that competition comes in the form of resale or UNE-P,
6 is it your position that that ILEC is not facing
7 effective competition?

8 A. If it was solely total service resale or
9 UNE-P, then my answer is yes, it's not facing effective
10 competition.

11 Q. Okay, what if it's a combination of resale,
12 UNE-P, and facilities based competition?

13 A. There could be some combination thereof, and
14 I think that's defined by Mr. Gates in his testimony,
15 that would provide or hopefully provide significant or
16 sufficient protection to the marketplace that the
17 dominant carrier couldn't essentially run off its
18 competitors.

19 Q. Is there a threshold, I'm not asking about
20 Mr. Gates's testimony, but in your view, is there a
21 threshold in terms of how much of the competition has to
22 be facilities based versus UNE-P or resale?

23 A. Yes, there is, and that threshold should be
24 defined and addressed by the Commission. Like I said,
25 Mr. Gates, and I participated in the development of

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1 those to a certain extent, the parameters, has laid out
2 those as guideposts for the Commission to consider down
3 the road when we get close to those levels.

4 Q. And I believe you just testified that if the
5 ILEC faces competition solely from a combination of
6 resale and UNE-P that there is not effective
7 competition; is that correct?

8 A. That's what I think, yes.

9 Q. And you would characterize that as a market
10 in its competitive infancy?

11 A. Well --

12 MS. SINGER NELSON: Objection, asked and
13 answered.

14 JUDGE MACE: Mr. Sherr.

15 MR. SHERR: I don't believe this question has
16 been asked and answered.

17 JUDGE MACE: I will overrule.

18 A. Not really. I would -- competitive infancy
19 is more a figure of speech than a clearly defined term.
20 I would characterize a market that's dominated by total
21 service resale and UNE-P provisioning as being a market
22 that could not be considered to be effectively
23 competitive, which is something that we know a little
24 bit more about in terms of the meaning of those words.

25 BY MR. SHERR:

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1 Q. Well, assume for me that UNE-P is priced by
2 the Commission so attractively that a CLEC can not
3 justify investing in its own network and transitioning
4 away from UNE-P. Do you have that assumption in mind?

5 A. No, not really. Did you mean by on the
6 wholesale level or on the retail level?

7 Q. Well, UNE-P is a wholesale product, is it
8 not?

9 A. I just wanted to be clear as to what you're
10 asking me.

11 Q. Sure. I'm talking about the price that Qwest
12 is ordered to sell a UNE-P to CLECs at. So the
13 assumption I'm asking you to have in mind is that the
14 Commission sets the price that CLECs can purchase UNE-P
15 at so attractively that the CLEC can't justify expending
16 money on its own network and transitioning away from
17 UNE-P. Do you have that assumption in mind?

18 MS. SINGER NELSON: Objection to the extent
19 that the terms so attractively are ambiguous.

20 MR. SHERR: Do you need me to respond?

21 JUDGE MACE: We're going to overrule. If he
22 can't answer and he needs further definition, he can
23 indicate that to counsel.

24 BY MR. SHERR:

25 Q. In that scenario, is reliance on, to the

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1 extent competitors choose to rely on UNE-P, still a sign
2 that there's not effective competition, or is it a sign
3 that CLECs are making economically rational business
4 decisions?

5 A. Let me just -- would you rather I rephrase
6 the question to make sure I have it right or --

7 JUDGE MACE: I'm wondering if you can ask it,
8 it seems like it's sort of two questions, so if you
9 could focus the question a little bit better.

10 MR. SHERR: Sure, I can ask it in two parts.

11 BY MR. SHERR:

12 Q. In that scenario, is reliance on UNE-P,
13 widespread reliance on UNE-P, in your view, is that a
14 sign of competition in its infancy or -- let me ask it a
15 different way.

16 Is that a sign that the market is not
17 effectively competitive?

18 A. I'm sorry, in that scenario, could you --
19 could we start from the beginning?

20 Q. Sure. The scenario I'm asking you to keep in
21 mind is that the price that Qwest is allowed to charge
22 CLECs for UNE-P, that's set by the Commission, correct?

23 A. That's correct.

24 Q. And that the Commission sets that rate at
25 such an attractive level that CLECs can't justify

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1 building their own networks, building their own
2 facilities, and transitioning away from UNE-P. That was
3 the scenario.

4 A. Okay.

5 Q. Okay, so in that scenario, I'm asking whether
6 you believe that continued widespread reliance on UNE-P
7 is a sign of -- indicates that there is still not
8 effective competition necessarily?

9 A. Yes, that's an indicator if you're asking me
10 if there's very widespread use of UNE-P, and we won't
11 talk about percentages unless you want to, that that is
12 an indicator that there is not effective competition in
13 the market. And it's not -- and the reason is, and I
14 will just like to explain it, is that Qwest is the sole
15 provider of the underlying services that are provided to
16 the end use customers, and as I alluded to previously,
17 that's -- its not really competition that we're talking
18 about.

19 When I say competitive infancy, I mean that
20 what I refer to by that is that an alternative carrier
21 is gaining some market share in the marketplace so that
22 they can develop a toehold and get some name recognition
23 and get a stable customer base so that they can elect to
24 take the risk to invest in their own facilities, which
25 as you know is a significant risk.

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1 Using UNE-P to provide end use service to
2 customers is not -- is a mere retail, retailing on
3 behalf of Qwest, it's not competing with Qwest. Because
4 Qwest can, using certain pricing tactics which I discuss
5 in my testimony, make it difficult for those alternative
6 providers to continue to provide that retail service.
7 And once they're gone, those providers have nowhere to
8 go but back to Qwest. And so by virtue of the fact that
9 there are no facilities underlying that service, Qwest
10 is in total control of how the market goes.

11 Q. And would your answer be the same if that
12 hypothetical were extended so that the situation exists
13 for ten years in during which time CLECs amass 80% of
14 the market exclusively by UNE-P, would your answer be
15 the same in that situation?

16 A. My answer would be identical. The principles
17 that we -- that I sort just sort of went through with
18 you don't change. The fact that ten years down the road
19 CLECs as a group have 80% of the market is still
20 meaningless if Qwest is deregulated and then has the
21 ability to chip away at that market share through
22 pricing tactics. Those -- because there's no underlying
23 facilities that Qwest can fall back on, those customers
24 will all eventually come back to Qwest. So they could
25 anticipate no -- they could anticipate revenues from

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1 those customers at the end of the process of dealing
2 with their competitors.

3 Q. So Qwest will have in this scenario 20% of
4 the market, a 20% market share, but not face effective
5 competition?

6 A. Well, 20% of the retail market share would be
7 under control of Qwest. 100% of the market share would
8 be controlled by Qwest at least indirectly, because the
9 CLECs would be acting as retailers on behalf of Qwest,
10 selling Qwest services.

11 Q. Ask you to turn to page 5 of your rebuttal
12 testimony, Exhibit 603, specifically if you could just
13 take a look at the chart that you have included there.

14 A. Yes.

15 Q. If you would also take a look at Exhibit 610,
16 which is a cross exhibit. It is a press release from
17 the FCC and excerpts from a report called Trends in
18 Telephone Service.

19 MS. SINGER NELSON: What exhibit number is
20 that?

21 MR. SHERR: It's Exhibit 610.

22 BY MR. SHERR:

23 Q. Do you have a copy of Exhibit 610?

24 A. Yes, I do, I just had mislabeled it.

25 Q. Are you familiar with that report?

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1 A. In general, yes.

2 Q. Is this the report from which you derived the
3 data to compile your chart on page 5 of your testimony?

4 A. That's the source, yes.

5 Q. If you could look at the last page of Exhibit
6 610, which is marked in the lower right-hand corner as
7 page 10, so the 10th page, the final page of Exhibit
8 610, the FCC report.

9 A. I don't think I have that.

10 MR. SHERR: I wonder if counsel can provide a
11 copy.

12 THE WITNESS: I thought it was the press
13 release, and so I took the press release with me.

14 MS. SINGER NELSON: Which page are you
15 referring to?

16 MR. SHERR: I'm looking at the last page,
17 page 10.

18 MS. SINGER NELSON: Okay.

19 BY MR. SHERR:

20 Q. Are you there?

21 A. Yes, I see that.

22 Q. Okay. Do you see at the bottom there's a
23 table entitled Table 8.4?

24 A. Yes, I see that.

25 Q. And is this the table from which you derived

1051

1 the data to compile the chart that's on page 5 of your
2 rebuttal testimony?

3 A. Yes, I think it is.

4 Q. Looking back at the chart for a moment, but
5 if you could keep that open, Exhibit 610 open, that
6 would be helpful, looking back at the chart on page 5 of
7 your testimony, Exhibit 603, what do the numbers on the
8 vertical axis represent? There's a number 2000, 4000,
9 6000.

10 A. I believe they represent thousands of lines.

11 Q. I'm sorry, you say that's in the thousands,
12 right?

13 A. Yes.

14 Q. So where it says 2000, that really means 2
15 Million access lines?

16 A. That's right, that's my understanding.

17 Q. And if you look back at Table 8.4 from
18 Exhibit 610, in the title it says End User Switched
19 Access Lines in Thousands, correct?

20 A. Oh, yes, it does.

21 Q. Okay. If you could take a look at Table 8.4,
22 specifically the column entitled Total UNEs, which is
23 the third from the right. Are you there?

24 A. Yes, I am.

25 Q. Okay. If I'm reading this chart correctly,

1052

1 your chart in Table 8.4 correctly, the total number of
2 UNE access lines has grown from approximately 1.5
3 Million in December of 1999 to approximately 14 1/2
4 Million in December 2002; is that correct?

5 A. Yes.

6 Q. Would you accept subject to check that that's
7 an increase of about 870%?

8 A. Subject to check, yes.

9 Q. Okay. And that's in three years?

10 A. That's correct.

11 Q. And looking at the fifth column from the
12 left, the ones on Table 8.4 entitled Resold Lines.

13 A. Yes.

14 Q. That shows the number of resold lines sold by
15 ILECs to CLECs; is that correct?

16 A. I presume so, yes.

17 Q. And that shows a decrease in reliance on
18 resold lines from approximately 4.5 Million in December
19 of 1999 to approximately 2.7 Million in December 2002;
20 is that correct?

21 A. That's correct.

22 Q. And would you accept subject to check that
23 that's a decrease of about 39% in the use of resold
24 lines?

25 A. Subject to check.

1053

1 Q. And that's the same period in which we saw
2 the approximately 870% growth in UNEs?

3 A. That's correct. And there's some question in
4 my mind, other than the opportunity to compete more on a
5 -- on a -- or to -- it's just more of an economic
6 venture to rely on UNEs as opposed to resale. Actually,
7 under a deregulated market, under a market where Qwest
8 was deregulated, carriers who rely on UNEs are actually
9 more vulnerable to price squeeze activities than resale,
10 so I'm -- I understand why the resold lines is
11 decreasing, but I hope that that isn't -- doesn't end up
12 being a problem for these CLECs.

13 Q. Moving on, if you could look at Exhibit 604,
14 which was the attachment to your rebuttal testimony,
15 your spreadsheet.

16 A. Okay.

17 Q. We have already discussed UNE-P and resale a
18 bit, I just want to come back to that issue for a
19 moment. Your calculation of the CLEC market share and
20 the Qwest market share is set out in Exhibit 604; is
21 that correct? And this document, by the way, is
22 confidential.

23 A. 604 being my rebuttal exhibit?

24 Q. That's correct.

25 A. Yeah, no, the calculation is not set out.

1054

1 Q. If you look at the second column from the
2 right and the third column from the right, are those not
3 showing total Qwest market share and total CLEC market
4 share?

5 A. Second and third columns?

6 Q. From the right.

7 A. Yes, that's what they show.

8 Q. But you indicated this document doesn't show
9 market share?

10 A. No, I indicated that my calculations weren't
11 set out on this exhibit.

12 Q. Are there calculations set out on this
13 exhibit?

14 A. No. I don't mean to -- I have calculated the
15 numbers, if that will help things. I haven't
16 demonstrated my calculations on the exhibit. I thought
17 that's what you were asking me.

18 Q. Well, the two columns that I -- I'm sorry,
19 are you simply indicating that the math is not shown?

20 A. That's correct.

21 Q. But the resulting market shares are shown?

22 A. Yes.

23 Q. Okay.

24 A. I'm sorry, I misunderstood.

25 Q. And the vehicle that you used to -- I should

1055

1 say the formulas you used to calculate the market shares
2 as they appear on this spreadsheet are ingrained in the
3 electronic version of this spreadsheet; is that correct?

4 A. That's correct. Those, the total access
5 lines, just to be clear, were calculated by summing the
6 total CLEC lines and total Qwest lines, and the number
7 of lines -- that's how that calculation was made, just
8 by summing those lines. And then CLEC market share was
9 calculated by dividing UNE-L and owned lines by total
10 lines. That's how the calculations were made.

11 Q. How did you calculate the Qwest market share?

12 A. I subtracted the remainder from 1 or 100%.

13 Q. In your testimony, you take the position, as
14 we discussed a little while ago, that UNE-P and resale
15 should be excluded from the analysis; is that correct?

16 A. That's correct.

17 Q. And that's the analysis of both market share
18 and market concentration?

19 A. That's correct.

20 Q. Did you exclude UNE-P in resold lines from
21 the analysis as you suggest you should?

22 A. In this exhibit?

23 Q. Yes.

24 A. Yes. In calculating the CLEC market share,
25 those lines were not -- those lines were not included in

1056

1 the calculation of the CLEC market share.

2 Q. By the manner in which you calculated Qwest's
3 market share, in effect didn't you assign resold lines
4 and UNE-P lines to Qwest as if they were Qwest retail
5 lines?

6 A. Sure, they essentially are Qwest retail
7 lines. They're just provided on behalf of the CLECs
8 like I explained earlier.

9 Q. Did you --

10 A. They would have to go someplace, and Qwest is
11 where they would go if they were not used by the CLECs.

12 Q. And had you simply removed UNE-P and resold
13 lines from both sides of the analysis, you would have
14 ended up with a higher CLEC market share and a lower
15 Qwest market share; isn't that true?

16 A. I wouldn't do that. It wouldn't make any
17 sense.

18 Q. Okay, well, my question is, if you had done
19 that.

20 A. I'm not sure. I didn't do that. It would
21 have been silly for me to do that calculation. The
22 lines -- the lines are there. If they're -- if they
23 don't belong to a CLEC, then they belong to Qwest unless
24 there's a loss of lines. They go -- they would revert
25 back to Qwest, so it was appropriate to do what I did.

1057

1 Q. Is it your position that UNE-P and resold
2 lines sold by Qwest to CLECs to serve CLEC customers in
3 competition with Qwest are really Qwest retail lines?

4 A. Well, I will answer the question, no. But
5 let me explain or re-explain, and I should have put a
6 little bit finer point on it. You asked me if they were
7 sold in competition with Qwest, and as I explained
8 earlier, that's not the case. They're not sold in
9 competition with Qwest, because if Qwest is deregulated,
10 Qwest's -- the existence of those retailers that are
11 alternative to Qwest are -- the existence of those
12 retailers is at Qwest's pleasure. Qwest would have the
13 opportunity when and whenever they wanted to to weaken
14 or even eliminate those competitors and -- or see now
15 I'm calling them competitors -- those other retailers.
16 What is really happening is that these retailers are
17 selling Qwest service on behalf of Qwest. They're not
18 in competition with Qwest. They're selling Qwest
19 service on behalf of Qwest. If Qwest wasn't there,
20 these retailers wouldn't be there either. The
21 facilities, the underlying facilities are lock, stock,
22 and barrel Qwest facilities.

23 Q. In your rebuttal testimony where you made
24 reference to this analysis, and I'm pointing to Exhibit
25 604, did you explain that you believe that UNE-P and

1058

1 resold lines should be treated as Qwest retail lines in
2 evaluating the market shares of Qwest versus the CLECs?

3 A. Did I say that they should be treated as
4 Qwest retail lines?

5 Q. That's my question.

6 A. No.

7 Q. Did you explain that they should be included
8 within Qwest's market share?

9 A. Implicitly.

10 Q. But not explicitly?

11 A. Not explicitly.

12 Q. You simply said they should be excluded from
13 the analysis?

14 A. Can you point me to where? I mean I might
15 have said that. It would have been improper to just
16 eliminate those lines as if they vaporized. When a CLEC
17 customer -- when a CLEC goes out of business, those
18 people don't just stop using the phone. They at that
19 point are likely to go to Qwest service, particularly if
20 that's the only choice they have at that point.

21 Q. But if a UNE-P based CLEC goes out of
22 business, couldn't another UNE-P based CLEC pick up that
23 customer?

24 A. If they were fortunate enough to remain in
25 business while Qwest was deregulated, that could be

1059

1 possible, yes. Again, the extent to which they are in
2 business at all or the strength of their business is a
3 function of whether Qwest likes them to be in business
4 or not, because they control the market, the strength
5 and viability of these other retailers.

6 Q. Let me go on to a different issue with regard
7 to Exhibit 604. Leaving aside the UNE-P and resale
8 issue all together, isn't it true that in calculating
9 the CLEC and Qwest market shares in Exhibit 604 that you
10 included only basic business lines for the CLEC count
11 but included basic business lines, PBX, and Centrex on
12 the Qwest side?

13 A. I'm not sure. I'm relying on data that was
14 gathered by Staff. To the extent that that was true in
15 Staff's analysis, then it would be true in my analysis.

16 Q. Well, would you agree with me, just assume
17 that that's what occurred in Exhibit 604, that that
18 would be comparing apples and oranges?

19 A. I was more inclined to try to demonstrate
20 using Staff's data with, or my interpretation of Staff's
21 data, with the littlest manipulation as possible to keep
22 it clean, and so I didn't consider -- I didn't really
23 consider that. But since you brought it up, there are
24 some issues with the data that would make it seem or
25 definitely make it a big concern to me, because the

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1 method of gathering the data and I -- has resulted in a
2 pretty significant overstatement it appears of CLEC
3 lines in Washington.

4 MR. SHERR: Your Honor, I'm going to ask if
5 you would please direct Mr. Stacy to answer my question.
6 That last little bit was something completely unrelated
7 to my question.

8 JUDGE MACE: Mr. Stacy, generally we give
9 some latitude to an expert witness. If you answer the
10 question yes or no and then provide a brief explanation,
11 that's appropriate. But you do need to try to keep it
12 within the scope of the question.

13 Mr. Sherr, I have to ask you to repeat the
14 question actually if you wanted to go back to it or
15 rephrase it.

16 MR. SHERR: Sure, I was going to come back to
17 it.

18 BY MR. SHERR:

19 Q. My question is, if in Exhibit 604 the market
20 shares are calculated, whether you're aware of it or
21 not, just assume with me that the Qwest market share is
22 calculated by looking at basic business, PBX, and
23 Centrex, and the CLEC market share only consists of
24 basic business, wouldn't that be an apples to oranges
25 comparison?

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1 A. I think it probably would, and I think that
2 there's multiple instances in this case that have come
3 up that that could be said to be true for.

4 Q. Okay. And wouldn't that, under that
5 scenario, wouldn't that artificially increase the Qwest
6 market share and HHI score overall and decrease
7 artificially the CLEC market share?

8 A. It might. I know it goes the other way it
9 seems to me more often than not.

10 Q. I'm going to ask you to look back at your
11 rebuttal testimony, which is Exhibit 603.

12 A. Okay.

13 Q. Specifically at page 6.

14 A. Okay.

15 Q. I just need some clarification.

16 A. All right.

17 Q. At line 114 you have a question that says:
18 What does Staff's corrected data show in
19 terms of market concentration?

20 A. Right.

21 Q. What correction are you referring to there?

22 A. I was referring to the, well, I guess it's
23 Qwest's data corrected by and augmented by Staff. It --
24 what I mean by corrected is that it includes the owned
25 loops.

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1 Q. Are you referring to the removal of UNE-P and
2 resale there?

3 A. That as well, yes.

4 Q. Okay. And just to be clear, that's Staff's
5 data as corrected by MCI, correct?

6 A. Well, I think its Qwest's data as corrected
7 by Staff and then manipulated by me.

8 Q. Staff has not endorsed the correction insofar
9 as we're talking about removing UNE-P and resale; is
10 that correct?

11 A. No, I corrected it on my own.

12 Q. Your testimony discusses HHI, correct?

13 A. That's right.

14 Q. And HHI is used to measure market
15 concentration?

16 A. That's right.

17 Q. And you believe that market concentration is
18 relevant to determining whether Qwest faces effective
19 competition?

20 A. It has some relevance. I would say that
21 Qwest's ability to control the strength and viability of
22 the other alternative providers is of much greater
23 concern to me than market concentration.

24 Q. How is HHI calculated?

25 A. HHI is calculated by summing the squares of

1063

1 each participant in the marketplace.

2 Q. Were you here last, well, let's see, it was a
3 couple of weeks ago when Ms. Baldwin testified?

4 A. Yes, I was.

5 Q. And that's, what you just described is
6 consistent with the manner in which she calculates HHI;
7 is that correct?

8 A. I'm not sure.

9 Q. Okay. The way you just described the
10 calculation of HHI isn't how you calculated HHI in
11 Exhibit 604, is it?

12 A. No, it's not.

13 Q. How did you calculate it there?

14 A. I calculated the HHI rather than taking the
15 sum of the squares of the individual participant's
16 market share, I calculated this, the HHI number, by
17 taking the square of Qwest's market share and added to
18 that the square of the sum of the CLEC market share.
19 And I recognize that that's a slight deviation from
20 calculating HHI as it normally should be calculated, but
21 there's a reason why I did that, and it wasn't to
22 inflate any numbers or anything like that.

23 The reason was because I didn't have the
24 individual specific CLEC data for owned loops, and I
25 wanted to be careful and be sure to include the owned

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1 loops in my analysis since that is something that the
2 Commission should obviously be considering. So there
3 would be some deviation in the HHI numbers in my
4 rebuttal exhibit, however it's not a difference that
5 would change any conclusions that I reach.

6 And the only way that I can project that to
7 be true is that in order to see how big of a variance
8 was created by these different methodologies, I
9 calculated the HHI using both methodologies for each and
10 every wire center in Washington and took a look at the
11 difference just to make sure that I wasn't presenting
12 evidence or reaching conclusions that I couldn't
13 support, and there was some difference, and the HHI in
14 some instances was actually lower than it would have
15 been if I would have used the individual squares summed.

16 However, for lines or for wire centers where
17 the Qwest market share is 100%, obviously the HHI
18 remains at a 10,000 value, which indicates a pure
19 monopoly. And even in the places where there is not
20 100% Qwest market share, the market still indicates high
21 concentration regardless of the methodology.

22 Q. Assuming that there's more than one CLEC in a
23 market, won't the methodology that you adopted for
24 Exhibit 604 always in every case render a higher HHI
25 than the method you described earlier as the proper

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1 method of calculating HHI?

2 A. No, it won't.

3 Q. Can you give me an example of how you could
4 end up with a lower HHI?

5 A. Sure, absolutely. If you look at, well, it
6 won't be lower. If you look at --

7 Q. Well, that was my question. Okay, well,
8 leaving aside the 10,000, the areas where Qwest has
9 access or has all of the lines.

10 A. Yes.

11 Q. I will recognize along with you that that
12 won't change. Leaving those aside, if there is more
13 than one CLEC in a market, won't the methodology you
14 used in Exhibit 604 always render a higher HHI than the
15 proper calculation of HHI?

16 A. If you exclude the 28 or so wire centers that
17 Qwest has 100% market share, that would be true. And as
18 I said, I went through a -- I conducted an exercise to
19 ensure that the conclusions that the market is still
20 highly concentrated wouldn't change and did conclude
21 that it would not, in fact, change. In every instance,
22 even if the HHI was marginally lower, there would be
23 still considered a very highly concentrated market.

24 Q. So you did a separate calculation that you
25 didn't submit as part of your testimony where you

1066

1 calculated the HHI looking at each individual
2 competitor's individual market share?

3 A. I did that because I got an exhibit from you,
4 and I anticipated that that might become an issue.

5 Q. So you didn't do that prior to filing your
6 testimony?

7 A. No, I didn't do it prior to filing my
8 testimony. I did it post filing my testimony to verify
9 what I knew already to be true.

10 Q. And you obviously didn't update Exhibit 604?

11 A. I couldn't update Exhibit 604, because the
12 data I used to verify my theory is not the same data
13 that's used in Exhibit 604. That's what created the
14 problem in the first place. The data in Exhibit 604 is
15 data that doesn't include CLEC specific owned loop data,
16 and I wanted to use that data in my analysis. As Staff
17 pointed out, that was critical information.

18 Q. The method you used for calculating HHI in
19 Exhibit 604, that pretty much renders irrelevant the
20 number of competitors in the market?

21 A. Excuse me, can you ask that again?

22 Q. Sure. The method you used in Exhibit 604 for
23 calculating HHI, that method renders irrelevant, doesn't
24 it, the number of competitors in the particular market
25 you're looking at, because you're aggregating all of the

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1 CLEC totals?

2 A. It does aggregate the CLEC totals. The
3 relevance of the number of competitors in the market
4 could be significant if these HHI numbers weren't so
5 high up regardless of how the calculation was made.

6 I might add that on that, on my rebuttal
7 exhibit, the HHI numbers other than the 10,000, just to
8 be up front and clear, the HHI numbers other than the
9 10,000 numbers, which include multiple exchanges, those
10 10,000's do, would be likely slightly lower. It's
11 impossible for me to calculate it, because I don't have
12 the inputs necessary to make that calculation. I think
13 that information does exist, but I think we haven't been
14 able to see that information. But additionally, I would
15 say that the market shares are all completely accurate
16 as long as Staff's numbers are accurate.

17 MR. SHERR: Your Honor, I would like to make
18 a record requisition for the separate HHI analysis that
19 Mr. Stacy has discussed, and that would include not only
20 the -- that would include the resulting tabulation and
21 all underlying formula and data.

22 JUDGE MACE: That would be Record Requisition
23 Number 9.

24 MR. SHERR: If I can just have one moment.

25 JUDGE MACE: Definitely.

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1 MR. SHERR: Your Honor, that's all the
2 questions I have. I would like to move the admission of
3 some of the cross exhibits.

4 JUDGE MACE: Go ahead.

5 MR. SHERR: Thank you. Number 605, 606, 607,
6 608, and 610. Exhibit 608 is an electronic copy of
7 Exhibit 604. I brought with me a copy of that on a
8 disk, actually several copies. I would be happy to hand
9 one up to you.

10 JUDGE MACE: Yes, please.

11 MS. SINGER NELSON: Which exhibit was that,
12 Mr. Sherr?

13 MR. SHERR: 608.

14 MS. SINGER NELSON: Oh, okay.

15 MR. SHERR: And I will hand a copy to counsel
16 for MCI. This is a data request response that went to
17 everybody, so I think everybody in the room has an
18 electronic copy of this already.

19 JUDGE MACE: You're not offering what's been
20 marked as 609; is that correct?

21 MR. SHERR: That's correct, and I'm not
22 offering 611, which was --

23 JUDGE MACE: I understood that to be
24 withdrawn.

25 MR. SHERR: I had withdrawn it and prevented

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1 you on the 18th, the last day of our hearing, they used
2 611, which I distributed as well.

3 JUDGE MACE: But you're not offering it?

4 MR. SHERR: That's correct.

5 JUDGE MACE: Then is there any objection to
6 the admission of 605, 606, 607, 608, 610?

7 MS. SINGER NELSON: No objection.

8 JUDGE MACE: I will admit those.

9 And who will cross-examine for Staff?

10 MR. THOMPSON: I will be doing that, Your
11 Honor.

12 JUDGE MACE: Go ahead.

13 MR. THOMPSON: Actually, before I get
14 started, I just wanted to make sure, Mr. Stacy, do you
15 have in front of you a copy of I wanted to ask you some
16 questions about Mr. Reynolds' testimony, and
17 specifically an exhibit to his testimony which is marked
18 Number 6. Do you have that available to you?

19 THE WITNESS: I don't have it up here with
20 me.

21 MR. THOMPSON: Okay, maybe we could get you a
22 copy of that.

23 And I also have just a copy of one of our
24 rules from the Washington Administrative Code that I
25 want to hand out to everybody and have that in front of

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1 you as well, so I will do that now.

2 THE WITNESS: May I have a copy also?

3 MR. THOMPSON: Oh, sorry, I wasn't trying to
4 keep you in the dark.

5

6 C R O S S - E X A M I N A T I O N

7 BY MR. THOMPSON:

8 Q. Okay, the first thing I want to ask you
9 about, however, is just some portions of your direct
10 testimony, and that's Exhibit 601T, and my plan is to
11 just kind of get to the heart of what I think the
12 concern is that you're addressing in your direct
13 testimony, and I think maybe a good place to go for that
14 is page 18.

15 A. Okay.

16 Q. And do you see there the question there, it
17 says:

18 What sort of pricing tactics by Qwest
19 should the Commission be concerned
20 about?

21 And then you have a couple of enumerated
22 potentialities there. Am I correct in saying that this
23 is sort of the part of your testimony where you discuss
24 the potential harms that might result from a competitive
25 classification?

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1 A. I discuss specifically the activities that
2 Qwest has both the ability and incentive to participate
3 in if they are deregulated, yes.

4 Q. Okay. And it could be on the one hand
5 increasing prices and on the other hand lowering prices,
6 right, and potentially --

7 A. Retail prices, yes.

8 Q. Retail prices. And potentially doing so I
9 guess simultaneously, right?

10 A. Possibly.

11 Q. In other words --

12 A. Not necessarily.

13 Q. Well, okay. Well, is what you're talking
14 about here, could that be described as a predatory
15 pricing strategy; is that fair?

16 A. You could, you could say that, or
17 anticompetitive pricing or price squeezing.

18 Q. Okay. Down at the bottom of that page, page
19 18, starting on line 453, do you see that sentence that
20 starts there, a carrier; could you read that for me,
21 please.

22 A. (Reading.)

23 A carrier with a significant market
24 dominant position such as Qwest may view
25 short-term losses as a cost of doing

1072

1 business that would be more than
2 recovered in the long term when
3 competition is eliminated.

4 Q. Okay. Isn't that -- that's pretty much
5 predatory pricing, isn't it, the notion of subsidizing
6 losses that are taken in one market with below cost
7 pricing until competitors are driven out?

8 A. That's not really a condition of Qwest's
9 behaving that way. Like this sentence clearly describes
10 something that wouldn't include a subsidy at all, just
11 eating losses in terms of taking a loss until the
12 competition is gone with the anticipation of regaining
13 those losses once the competition is gone through
14 supercompetitive rates, higher rates than we have today.

15 Q. I see. So it wouldn't necessarily -- a
16 requisite of that would not be say taking above
17 competitive level profits in one part of the market and
18 paying for these losses as they go?

19 A. Not necessarily, and that's -- that's why I
20 didn't couch this in terms of predatory pricing. It
21 could be -- it could work that way for Qwest. On the
22 other hand, like I say, everything of value has a price.
23 A monopoly market in telecommunications in Washington
24 has a price. Maybe that price is taking some losses up
25 front.

1073

1 Q. How does -- and how does price -- so price
2 squeeze fits into this as well, that's the main emphasis
3 of your testimony?

4 A. That's correct.

5 Q. And price squeeze -- well, why don't you
6 describe briefly what conditions exist for there to be a
7 potential for a price squeeze?

8 A. Just to make it simple as can be, if a CLEC
9 purchases inputs from Qwest that are priced at a level
10 that is higher than Qwest offers that retail service at,
11 then in order to compete, in order to offer a
12 competitive price, the CLEC would have to price on a
13 retail level services that don't even recover what it
14 has to pay Qwest for the wholesale services, so it's a
15 loss. And obviously that's not a sustainable situation
16 for a CLEC, and they would exit the market or not enter
17 the market or whatever. The end result is Qwest
18 controls the market.

19 Q. And you're talking about, of course, the
20 situation of competitors in the local market who are
21 using unbundled network elements of the incumbent,
22 right?

23 A. That's right.

24 Q. Are there other examples in the
25 telecommunications industry where there is the potential

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1 for a price squeeze?

2 A. Probably.

3 Q. Could long distance service be one of those
4 where the competitors, well, let's say there's an
5 incumbent local exchange company that's providing long
6 distance service along with local service, and it's
7 competing against long distance companies who must get
8 an input namely, say terminating access, from that same
9 incumbent, isn't that also a potential price squeeze
10 situation?

11 A. The basic mechanics are set up in such a way
12 that a price squeeze could be executed. Long distance
13 market is so much more competitive that -- and market
14 bases are so much less stable than they are in the local
15 market that the market would kind of govern what losses
16 could be taken. It's a bit different situation.

17 Q. But it is --

18 A. But I'm not -- but to be honest with you, I
19 haven't really looked at it.

20 Q. Well, okay, but it is another instance in
21 which competitors are relying on an essential input from
22 the -- that they get from a company that they're
23 competing with, right?

24 A. I suppose so, yeah, yes.

25 Q. Okay. Now I want to -- I want to take a look

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1 at the conditions that you proposed to address in the
2 concern you raise, and I think the first place you do
3 that is page 7 of your direct testimony, same Exhibit,
4 601T.

5 A. Page 7?

6 Q. Yes.

7 A. Can you give me the line number?

8 Q. Yeah, sorry.

9 A. Because I don't think we're matching up.

10 Q. Well, I had marked that. I see your
11 discussion sort of starting at the very last carryover
12 paragraph at the bottom of page 7.

13 A. Okay.

14 Q. And then on page 8 you've got a
15 recommendation about setting a price floor, right?

16 A. Yes, I do.

17 Q. And can you tell how the -- can you tell us
18 how the price floor would address the price squeeze
19 concerns we were discussing earlier?

20 A. The price floor would prohibit the situation
21 that I described earlier where Qwest was selling
22 wholesale services to CLECs at a higher price than it
23 was selling retail services to end use customers.

24 Q. Okay. So in other words, Qwest would be
25 required to show that its retail prices are higher than

1076

1 the sum of all the UNE inputs that its competitors have
2 to buy to provide the same service, right, plus in your
3 number 2 there some increment to represent the, I guess
4 you had --

5 A. Retail.

6 Q. -- described them as retail related costs?

7 A. Yes.

8 Q. Okay. Would a total service long run
9 incremental cost method capture all these same costs
10 you're describing here?

11 A. No, it wouldn't.

12 Q. Why not?

13 A. Total service long run increment cost would
14 recover a certain amount of retail related costs, but
15 that's retail related costs related to retailing to
16 CLECs as opposed to end use customers. TSLRIC costs
17 therefore on the retail side associated with billing,
18 marketing, et cetera, et cetera, are actually -- are
19 obviously much smaller than they would be to mass market
20 billing and retailing and those, advertising, and those
21 types of things. So no, it wouldn't recover the costs
22 adequately to prevent price squeezes.

23 Q. Okay. Can you -- do you happen to know, what
24 is the, in your item number 2 on page 8, you suggest
25 using the avoided cost discount I guess that's used in

1077

1 total service retail, right?

2 A. Yes.

3 Q. And what is that percent?

4 A. 14.74%.

5 Q. Okay.

6 A. I think.

7 Q. Could I have you please take a look at what's

8 I guess in the record as Exhibit Number 6. It's a

9 confidential exhibit to Mr. Reynolds' direct testimony.

10 A. I still don't have that up here.

11 Q. Oh, sorry.

12 MS. SINGER NELSON: I thought you were going

13 to get it.

14 MR. THOMPSON: Oh, I'm sorry.

15 MS. SINGER NELSON: I didn't understand that

16 you wanted me to get it.

17 MR. THOMPSON: I'm sorry.

18 MS. SINGER NELSON: I've got it.

19 THE WITNESS: Thank you.

20 BY MR. THOMPSON:

21 Q. Okay, are you -- did you have a chance to

22 review this exhibit to Mr. Reynolds' testimony; have you

23 seen this before?

24 A. A long time ago, not recently I haven't

25 reviewed it. I think I know what it means though.

1078

1 Q. Okay. Well, is it your understanding, does
2 this, in your mind, does this represent kind of an
3 imputation analysis like in general terms like what
4 you're discussing in your testimony?

5 A. If I can refresh my memory by asking you a
6 question, is this the exhibit that Mr. Reynolds used to
7 provide that break even analysis?

8 Q. Right.

9 A. Then the answer is that's I think what it was
10 intended to show, yes.

11 Q. Okay.

12 A. That they have -- that Qwest is currently
13 meeting some imputation standard.

14 Q. Maybe if it would refresh your recollection,
15 I think at page 22 of your testimony, your direct
16 testimony again, line 537.

17 A. Okay.

18 Q. And it says, however, this testimony, I think
19 you're describing Mr. Reynolds' testimony.

20 A. Yes.

21 Q. (Reading.)

22 Only serves to provide an explanation as
23 to why competitive activity currently
24 exists, because the relationship
25 Mr. Reynolds describes must exist in

1079

1 order for CLECs to offer retail services
2 profitably.

3 And am I correct that the relationship that
4 you're referring to there is the relationship between
5 the totals that are set forth, well, the totals for the
6 costs of the various elements that go into UNE-P versus
7 the total revenue amounts that are set forth at the
8 bottom part of Mr. Reynolds' Exhibit 6?

9 A. I was describing the relationship
10 specifically between wholesale and resale prices.

11 Q. Oh, okay.

12 A. As I have discussed with you a couple of
13 times.

14 Q. Okay. So this consideration of this break
15 even analysis is not what you were referring to there?

16 A. I think he was referring to this when he put
17 forth that testimony, and so --

18 Q. Okay.

19 A. -- while I didn't specifically discuss this
20 exhibit, I think he was talking about this exhibit.

21 Q. Okay, well, do you have any reason to believe
22 that his calculations set forth here are incorrect?

23 A. I don't think they're calculations. I just
24 think they're rates, wholesale and resale rates, retail
25 rates.

1080

1 Q. Well, okay. Well, but his, let me put it
2 this way, but his method of adding up the total amount
3 that a competitor has to pay for various inputs for
4 UNE-P, that there's any reason to believe that that's
5 not correct?

6 A. It looks correct to me.

7 Q. Okay. And they differ by pricing zone,
8 right?

9 A. Yes, they appear to differ.

10 Q. Okay. And the comparison here is between
11 those input totals for the various zones to the revenue
12 potentials that are set forth on the bottom part of the
13 page, correct?

14 A. That's correct.

15 Q. Okay. So in other words -- and I have spoken
16 with Qwest about which parts of this are actually
17 designated confidential, and I think I can make this
18 comparison on the record. So, for example, in Zone 5, a
19 CLEC can expect to pay \$21.48 in monthly recurring
20 charges I believe for UNE-P, where for a customer served
21 being offered 1FB flat business service, they could
22 expect to get by comparison \$36.10 in revenue?

23 A. Who would get \$36.10?

24 Q. I'm sorry, I guess the, well --

25 A. I don't know that you said it wrong, I just

1081

1 didn't understand.

2 Q. Okay. I guess the idea is that the CLEC
3 would, right?

4 A. If the CLEC --

5 Q. Or had the potential. Sorry.

6 A. Not necessarily, because this is Qwest's
7 rate. The CLEC if it wanted to attract customers from
8 Qwest would price it lower than that.

9 Q. Right, okay. But presumably up to that
10 price, that total price, \$36.10?

11 A. On pure price competition that would be
12 accurate.

13 Q. Okay. When you're talking about your method
14 of setting a price floor, I assume you would start from
15 something like this, but then you would add to it some
16 amount, 14.74% I guess, for sales related costs, right?

17 A. Retail related costs, yes.

18 Q. Sorry, retail related costs.

19 A. Yes. That's my suggestion to the Commission.
20 Defining the price floor and the proper costs associated
21 with the price floor is, you know, the most critical
22 issue in this case if the Commission determines that
23 Qwest merits declassification, and I would -- I would be
24 surprised if based on the at least three different
25 versions of costs as defined by the parties in this

1082

1 case, TSLRIC I believe by Qwest, TELRIC by Staff, and
2 TELRIC plus retail by me, there just hasn't been much
3 explanation, much in terms of determining what the
4 proper price floor is, so I would -- I would think that
5 there would be more information needed before a price
6 floor could be determined.

7 Q. Have you looked at this enough, this analysis
8 enough set forth on Exhibit 6, to have an opinion
9 whether currently there is a price squeeze situation say
10 in Zone 5, the highest cost zone?

11 A. There doesn't appear to be currently, and I
12 wouldn't expect there to be currently. I don't expect
13 that the Commission will allow while under their
14 jurisdiction Qwest to execute price squeezes on CLECs in
15 Washington. My concern is not whether or not a price
16 squeeze exists now. My concern is once the Commission
17 gives up that ability to regulate that, that price
18 squeezes will exist in the future. There's obviously
19 some competition, some strides being made right now. My
20 concern is what happens afterward.

21 Q. I understand.

22 A. When these price squeezes are executed and we
23 start going backwards.

24 Q. Right. Let me ask you, however, wouldn't you
25 agree with me looking at the different zone rates here

1083

1 that if Qwest were to charge different rates
2 geographically and such that it lowered, it could lower
3 its rates considerably, could it not, in say Zone 1
4 without running into the price floor that you're
5 describing?

6 A. Oh, yes.

7 Q. Well --

8 A. It's --

9 Q. Well, let me just ask you. Would it be your
10 view that your tests should be applied in each of the
11 pricing zones or on some kind of average?

12 A. No, if Qwest has the ability to set wholesale
13 rates, or not set wholesale rates, but charge wholesale
14 rates to their competitors which are lower than what
15 they retail, what they sell retail for, that's a problem
16 no matter where you are. And so it needs to be applied
17 in such a way that a price squeeze is prevented in every
18 instance. Otherwise, Qwest will be able to control the
19 strength and viability of its supposed competitors.

20 Q. But in your view, is it consistent with the
21 public interest to allow the company to, Qwest that is,
22 to lower its rates in the lower cost zones while say
23 leaving them the same in the higher cost zones?

24 A. To lower its rates to what level?

25 Q. Well, assuming they stay above the price

1084

1 floor as you define it.

2 A. Sure, absolutely.

3 Q. Okay.

4 A. That would just drive people like my clients
5 to be more efficient and to meet those, meet those price
6 challenges. That's what competition is about.

7 Q. Okay. Can I have you turn to your direct
8 testimony again back at page 4 where you have a big
9 block quote of RCW 80.30.330 that begins on that page,
10 and then it carries over onto page 5, and the parts I
11 want to ask you about are actually on page 5. And first
12 I just want to direct your attention to subpart 3 of
13 that statute.

14 A. Okay.

15 Q. And I'm just going to read it and ask you a
16 quick question about it. It says:

17 Prices or rates charged for competitive
18 telecommunications --

19 JUDGE MACE: Mr. Thompson, we do have it
20 before us. If you have a question, we can just refer to
21 it.

22 MR. THOMPSON: All right, I just find it sort
23 of difficult to -- maybe if everybody would just take a
24 moment to read it just so everybody has in mind what I'm
25 talking about.

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1 JUDGE MACE: Go ahead, Mr. Thompson.

2 MR. THOMPSON: This is a general --

3 JUDGE MACE: I'm sorry.

4 All right, go ahead.

5 BY MR. THOMPSON:

6 Q. This is the provision in the statute that
7 requires prices charged for competitive services to
8 cover their cost, right?

9 A. That's roughly what it says, which is in
10 large part my concern with that particular section and
11 with the declassification of Qwest.

12 Q. Right, okay. But, well --

13 A. And the reason I'm concerned is the
14 definition of cost is something that is at this point in
15 these proceedings anyway unknown.

16 Q. Okay.

17 A. For example, the Staff has indicated I think
18 in Mr. Wilson's testimony that TELRIC would be an
19 appropriate price floor. If the Commission were to
20 determine that TELRIC is the appropriate price floor,
21 Qwest could literally squeeze the CLECs out of business
22 in this state. That's not the appropriate definition of
23 cost, for example. TSLRIC is another example.

24 Q. Oh, okay. You would -- the main difference
25 being that you would add an additional increment, the

1086

1 14.74% that we talked about for retail related costs?

2 A. That's a critical --

3 Q. Right.

4 A. That's a critical increment.

5 Q. Right, understood, just for clarity's sake.

6 And you also see down in subpart 6 further down in the
7 statute, there's a provision, is there not, for any
8 subsidies flowing from regulated services to basically
9 pay for these kinds of losses, right, below cost, that
10 might result from below cost pricing, that there's a
11 provision that those kinds of subsidies be subject to
12 refund, right?

13 A. That's what that says, and I can just remind
14 you that I mentioned previously that we -- there doesn't
15 need to be a situation in place for Qwest to price at
16 anticompetitive levels through subsidization from higher
17 profit services.

18 Q. They could just take a loss and not --

19 A. They could take a loss --

20 Q. -- subsidize?

21 A. -- as a cost of doing business, cost of
22 buying back the monopoly.

23 Q. And then try to make up for the loss later
24 when everyone is driven out of the market?

25 A. It would be easy to make up the loss then,

1087

1 yes.

2 Q. Of course, the Commission has the ability to
3 reclassify a company under the statute, does it not, in
4 other words, take away the competitive classification?

5 A. As I understand it, that's the case if CLECs
6 file complaints.

7 Q. Or Staff on its own motion?

8 A. Or Staff on its own motion. In effect, the
9 Commission is determining that the market is so strong
10 under those circumstances that they will give their
11 regulatory authority to the CLECs themselves or to
12 Staff.

13 Q. Let me have you take a look now at the
14 portion of the Washington Administrative Code that I
15 handed out earlier. It's WAC 480-80-204. Are you
16 familiar with this provision?

17 A. I am not very familiar with this, no.

18 Q. Okay. Well, do you recognize that it's
19 basically prescribing, well, as the title suggests,
20 format and content of price lists, right?

21 A. Yes.

22 Q. Okay. And I do want to have you look at
23 subsection 6 in particular.

24 A. Okay.

25 MR. THOMPSON: And at the risk of -- I would

1088

1 like to just read this, because I think it's -- just so
2 everybody --

3 JUDGE MACE: Go ahead, counsel.

4 MR. THOMPSON: Okay.

5 BY MR. THOMPSON:

6 Q. This says:

7 The rates, charges, and prices of
8 services classified as competitive under
9 RCW 80.36.330.

10 The statute we were just talking about.

11 Must cover the cost of providing the
12 service.

13 Okay, then it says:

14 Cost must be determined using a long run
15 incremental cost analysis including as
16 part of the incremental cost the price
17 charged by the offering company to other
18 telecommunications companies for any
19 essential function used to provide the
20 service or any other Commission approved
21 cost method.

22 MS. SINGER NELSON: Can I interrupt you for a
23 second. I would just ask that the witness be allowed to
24 review the entire WAC rule at this point in time before
25 he answers any questions relating to it, because he has

1089

1 stated that he's not familiar with this rule. And I
2 don't object to the questions relating to the rule, but
3 I want to make sure that the witness has enough time to
4 consider the entire rule instead of just subpart 6.

5 JUDGE MACE: What I want to suggest is that
6 we give the witness that opportunity, and perhaps we
7 could take a brief recess at this point, 15 minutes.

8 MS. SINGER NELSON: Thank you.

9 (Recess taken.)

10 JUDGE MACE: The Commissioners are here now,
11 and I just wanted to let you know that I engaged in a
12 little off the record discussion about briefing
13 schedule. Mr. ffitch also talked briefly about the
14 possibility of his filing supplemental testimony, and we
15 also were discussing what procedures would be followed
16 if highly confidential information was part of
17 cross-examination with regard to the raw CLEC data.

18 Just in order to move the record forward
19 right now, I would say it sounds like you have given
20 some thought to this, and maybe the parties could talk
21 about what a good way would be to handle the
22 cross-examination of raw CLEC data. And then later on
23 we can address it with the commissioners after you have
24 had a chance maybe to agree on a procedure to propose.

25 CHAIRWOMAN SHOWALTER: Mr. ffitch, have you

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1 determined that you are going to have supplemental
2 testimony and also that it will entail the highly, super
3 highly confidential information?

4 MR. FFITCH: No, we have not, Your Honor.
5 Our expert is in the middle of reviewing the material,
6 and I wanted to take this opportunity at the hearing to
7 at least have a date that we would have to file by so
8 that if we decide to do that rather than just use it for
9 cross-examination we would have a date that everybody
10 would be aware of that we would have to live with.

11 JUDGE MACE: Well, I suggest that we revisit
12 this maybe towards the end of our day today and get some
13 finality about some of this.

14 Meanwhile, Mr. Thompson.

15 MR. THOMPSON: Okay, we'll take that up when
16 we're all a lot fresher.

17 BY MR. THOMPSON:

18 Q. Okay, before the break, Mr. Stacy, we were
19 talking about the rule WAC 480-80-204. And again, in
20 particular I wanted to ask you about subpart 6. Have
21 you had a chance to review that rule?

22 A. Yes, I have.

23 Q. Okay. And would you agree with me that we
24 were talking about the statute earlier, 80.36.330, and
25 you had expressed a concern about the lack of definition

1091

1 of cost in that statute, right?

2 A. That's right. I was afraid that the -- that
3 it wouldn't provide adequate protection to the
4 marketplace.

5 Q. Okay. Well, would you agree with me that
6 subpart 6 of this rule provides something of an
7 interpretation of that cost language in the statute?

8 A. I don't think it does. I think it's a, as
9 you know, the definition of cost is subject to multiple,
10 multiple interpretations depending on the party. I can
11 just anticipate that my definition would be different
12 from yours would be different from Qwest's. Even though
13 there is some guidance provided here, it's not
14 straightforward.

15 Q. But you would agree, wouldn't you, that it at
16 least contains the idea of imputation?

17 A. Yeah, the idea is there.

18 Q. And isn't that in the, well, where it talks
19 about essential functions that are needed by
20 competitors?

21 A. It's essentially a broad description of an
22 imputation standard. It's definitely not specific
23 enough to offer any protection whatsoever under a price
24 floor.

25 Q. Well --

1092

1 A. And --

2 Q. It offers protection, does it not, but I
3 guess you're really -- your concern is that it might not
4 be interpreted in the manner that you think is
5 appropriate?

6 A. Well, right, there's no -- there's nothing
7 specific enough within this rule to let me know how to
8 calculate this beyond a shadow of a doubt, much less if
9 a CLEC who was after declassification occurred in charge
10 and fully responsible for bringing complaints to the
11 Commission to make this interpretation on services
12 throughout the state of Washington on a daily basis, et
13 cetera, et cetera. It's just neither the rule nor the
14 statute, given its provisions, which I know were likely
15 placed there by the legislature to protect CLECs, to
16 this point we don't have enough meat around that statute
17 to truly protect the marketplace and the competitors
18 that are currently in the marketplace or potentially
19 want to enter the marketplace.

20 Q. Would you agree that it's open, this language
21 in subsection 6 here, is open to the interpretation that
22 you're proposing?

23 A. Yes, absolutely, and so is the rule. It's
24 open to my interpretation, and obviously because we've
25 got three different definitions so far in this hearing,

1093

1 it's obviously open to other interpretations as well.
2 That's why I said it's so critical to figure out what
3 that would be should the Commission determine that
4 competitive classification is appropriate. Recall that
5 this is something that I think comes in to play only if
6 the Commission comes to that conclusion.

7 Q. So isn't it possible to view your argument in
8 your direct testimony as in a way a procedural argument
9 about when that price floor needs to be determined? In
10 other words, you would like it to be part of this
11 proceeding as opposed to part of a complaint proceeding
12 that arises after Qwest files a price list?

13 A. I would like it not to be part of either
14 proceeding.

15 Q. Oh.

16 A. I don't think that there's anywhere near the
17 evidence to warrant competitive classification, and so
18 under those circumstances, this doesn't even come into
19 play.

20 Q. Well, I understand that your testimony is in
21 opposition to the granting of the competitive
22 classification. But I take it you're assuming that
23 outcome, and under those, I should have stated that
24 assumption, but making the assumption that the
25 classification would be granted, you're essentially

1094

1 saying the Commission should make that determination now
2 rather than under complaint later?

3 A. Yes, I think so. Otherwise, the way I
4 interpret the statute is that the Commission can
5 determine that competitive classification is warranted,
6 and then I think the law was written in such a way that
7 there were protections included as subparts of the law,
8 and I don't know if that's the correct legal term, but
9 subparts of the law that would protect the marketplace
10 from total dominant, re-domination by the dominant
11 carrier. And without a clear idea of what the price
12 floor would be, there are no such protections that I can
13 see. Under two scenarios that we have seen in this case
14 so far, the protections would not be adequate, and the
15 potential for price squeeze based on Qwest's ability and
16 incentive would occur without a doubt in my mind.

17 Q. I want to shift gears a little bit at this
18 point to your rebuttal testimony, which is 603T, and I
19 won't spend much time on this, because Mr. Sherr asked
20 you a lot of questions on your rebuttal testimony, but I
21 do want to explore one statement that you made there on
22 page 9, and it's at lines 187 through 189. Could you
23 read the -- do you see that sentence there, it starts,
24 in short?

25 A. Yes.

1095

1 In short, the statement by Staff that
2 Qwest maintains a 75.5% market share
3 should not be interpreted to mean that
4 CLECs enjoy the market power of a single
5 firm with 24.5% market share.

6 Q. Well, first of all, that Staff market share
7 number has subsequently changed, right; do you recall
8 that?

9 A. Yes, I think it has.

10 Q. Okay. I have to admit to being a little bit
11 puzzled by this statement. A market with two firms
12 competing in it, for example, is not as competitive as
13 one that has more than two in it, correct, I mean all
14 other things being equal?

15 A. It would depend. If there was a dominant
16 firm with 30 firms in it, it's not considered
17 effectively competitive.

18 Q. Well, okay.

19 A. Should not be.

20 Q. I guess that's why I put in all other things
21 being equal. But just based on the, okay, just the
22 basic math of the HHI, if there's a single firm holding
23 the market share, this is the exact same road you went
24 down with Mr. Sherr, but if there is a single firm that
25 holds say 25% of the market and then there's another

1096

1 firm that holds the remaining 75%, that's going to give
2 you a higher market concentration number than if there
3 were -- there were that same 75% market share firm and
4 then say 25 firms with 1% of the market, right?

5 A. That's true, and neither one -- neither of
6 those numbers would necessarily indicate or refute that
7 there is competitive, effective competition.

8 Q. Well, I understand that that's --

9 A. I just want to emphasize that market share
10 and HHI and market concentration is a perhaps even
11 considered minor part of the analysis. The major thing
12 that we need to think about is Qwest's ability to
13 control its so-called competitors.

14 Q. I understand that to be your testimony, but I
15 am just trying to understand the statement that you
16 made. Isn't maybe the reason that the HHI gives you a
17 higher number under the circumstances I described where
18 there were two firms, doesn't that reflect the fact that
19 where you have fewer firms, they're more likely to
20 engage in, I don't know if oligopoly pricing is the
21 right word, but, you know, you're less likely to have
22 firms trying to underprice each other?

23 A. Theoretically I think I understand what
24 you're saying, and I think that I would agree with you.
25 The point I'm making with respect to that statement,

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1 that particular statement, is that there are, and I
2 don't have the numbers right off, if you will turn the
3 page to the market share comparison on page 10 of my
4 rebuttal testimony, it shows that the mean market share
5 and the medium CLEC market share are incredibly low.
6 And a CLEC with -- half of the CLECs in Washington have
7 a market share of less than .3%, .3 of 1%. And I didn't
8 want that to be equated in anyone's mind to be something
9 that would -- I lost my train of thought -- that would
10 be a significant -- as significant a threat to Qwest as
11 a single firm that constituted 24% of the market share
12 or a greater market share. I'm making the point here
13 that the bulk of the firms that are competing against
14 Qwest or attempting to have an extremely deminimus
15 market share.

16 Q. On that page, you, let's see, actually page
17 10. Well, actually, wasn't there a table where you
18 showed the, maybe it was in your direct testimony, where
19 you compared the --

20 A. That's the --

21 Q. -- median and the mean size of a CLEC?

22 A. That's the table I was just discussing.

23 Q. Right. Where --

24 A. On page 10 of my rebuttal.

25 Q. Oh, okay. Did you look at -- well, in other

1098

1 words, you looked at the average size of a CLEC and at
2 the CLEC that's in the middle, right, isn't that the
3 definition of the --

4 A. Median?

5 Q. -- median?

6 A. Yes.

7 Q. Couldn't that obscure, let's say there were a
8 couple of fairly good sized CLECs and a lot of very
9 small CLECs in terms of market share, couldn't your
10 analysis there obscure that fact just by virtue of the
11 fact that there's a lot of little guys?

12 A. Any time you use an average or a median
13 you're obscuring the ends of the spectrum.

14 Q. Did you look at the market share of the
15 larger CLECs?

16 A. Yes, I did.

17 Q. Is that confidential material? I don't know
18 who I would be asking that question to. I think it's
19 probably not. Did you -- do you -- could you give us a
20 sense of what the market share is that's held by the --
21 well, maybe that's not a good question. I might strike
22 that because we have so much dispute over the proper way
23 to measure market share.

24 MR. THOMPSON: So I think I will end my
25 questions there. Thanks, Mr. Stacy.

1099

1 THE WITNESS: Thank you.

2 JUDGE MACE: Commissioners.

3

4 E X A M I N A T I O N

5 BY CHAIRWOMAN SHOWALTER:

6 Q. Well, following up on your -- on the what is
7 the appropriate price floor. Am I correct that the
8 three in play in this hearing are TSLRIC, TELRIC, and
9 what you propose is TELRIC plus and shorthand is call it
10 14.7% is it?

11 A. That's true, it could be used as a proxy for
12 retail costs.

13 Q. All right. But is it 14.7, is it 14.7 or 14?

14 A. 14.74 if I recall correctly.

15 Q. All right, I will call it 14.7 recognizing
16 it's actually a little bit more than that. Are you
17 saying that if Qwest -- let me back up.

18 Assume we find that in every exchange Qwest
19 is at this moment subject to effective competition as
20 long as it does not price below a certain floor we're
21 now about to discuss.

22 A. Right.

23 Q. And maybe there might be as long as it does
24 not go above something to address your other concern,
25 but I just want to discuss this floor. What I'm trying

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1 to understand is if you take TELRIC plus 14.7%, what do
2 you get? Do you get a Zones 1 through 5 power place
3 prices plus then an absolute amount? What are you
4 proposing?

5 A. From a generic standpoint, what you get is
6 the price for which Qwest must -- Qwest must charge
7 retail price, for that which Qwest must charge in order
8 to recover its costs. I haven't and neither has any
9 other party here addressed the massive amount of details
10 that would go along with determining a proper price
11 floor in all of the -- in all of the zones and in
12 addressing issues such as bundling with unregulated
13 products. It's a significant and critical issue, and I
14 tried to bring that out earlier, that in my mind it
15 certainly hasn't been addressed to the point it needs to
16 be given its importance in this case if the Commission
17 makes a decision in favor of Qwest.

18 Q. But conceptually why is TELRIC plus the
19 retail 14.7% correct?

20 A. Conceptually it's correct because that is the
21 amount of money that Qwest must recover from its retail
22 customers in order to recover its costs. Otherwise,
23 Qwest would be charging something priced less than cost
24 to the disadvantage of its CLEC wholesale customers or
25 competitors which it would be impossible for those

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1 customers to recover in a competitive retail market. I
2 hope that didn't add confusion to it.

3 Q. Well, no, I think I followed. Do you agree
4 that the TELRIC part of it could vary from lower in Zone
5 1 to higher in Zone 5?

6 A. Yes. As long as there was a match between
7 retail and wholesale in the different zones, I think
8 that would work. I'm not sure, I haven't spent any time
9 whatsoever considering it beyond the generic standard
10 that I laid out in my testimony.

11 Q. Okay. Then could you also turn to Exhibit
12 504, your rebuttal, just a second here.

13 A. 5?

14 Q. No, no, just a minute, I tagged a different
15 set. The next witness will know what I'm going to ask.

16 I will just ask one more question, and it's
17 along the lines of all these hypotheticals that you have
18 been asked about, and I'm simply trying to understand
19 what factor you think is important. So assume in a
20 hypothetical a wholesale provider that owned 100% of the
21 wholesale market and supplied in effect a UNE-P to 30
22 evenly distributed competitors, retail competitors, but
23 that the wholesale provider was not in the retail
24 market.

25 A. Okay.

1102

1 Q. So all of the competitors are using the
2 facilities of one wholesale supplier.

3 A. Okay.

4 Q. In that scenario, do you think there's
5 effective competition?

6 A. There may be. Obviously in that scenario one
7 of the competitors doesn't control the inputs and can't
8 control the strength and viability of the rest of the
9 competitors. That's a situation that's vastly different
10 from the one that we're talking about here.

11 Q. I recognize that. But so that your problem
12 is not that competitors are using a common wholesale
13 platform, your problem is that the provider of that
14 wholesale platform is also a retail competitor?

15 A. Exactly.

16 Q. Okay.

17 A. One of the retail competitors in the market
18 is also the monopoly supplier to the rest of the retail
19 competitors.

20 Q. But if the retail price, if the wholesale
21 prices are set by regulation and if the retail floor is
22 set by regulation to cover costs, however you define it,
23 then how is it that the monopoly wholesale provider who
24 is also a competitor is going to drive out the
25 competitors if there is at the start of this scenario

1103

1 effective competition, meaning robust competition?

2 A. Right. Well, I think yeah, my concerns would
3 be much, much smaller if that were the case. If you
4 could point to robust competition already occurring,
5 then Qwest dropping its retail price to a price floor,
6 even a price floor that I would recommend, which would
7 be the highest of the three here, first of all, it
8 couldn't put anybody out of business. Those with
9 margins that were on the edge might feel some
10 discomfort, but if the competitors were viable and
11 robust competition was there, the marketplace wouldn't
12 be harmed. I shouldn't say that it wouldn't put anyone
13 out of business, it might. But the marketplace itself
14 and the ability of competition or of competition to
15 protect consumers would still be there. But as it
16 stands now, that circumstance does not exist, and so
17 even if --

18 Q. No, let me just stop you. You say that
19 circumstance doesn't exist because there aren't enough
20 competitors actually in the market to perform that
21 function or because you don't know what the price floor
22 is going to be or both?

23 A. No, both of those are a concern, but my
24 primary concern is that there are not enough customers
25 in the market who are not 100% reliant on Qwest to

1104

1 provide retail service. So in other words, like I was
2 saying, they're only providing Qwest service on behalf
3 of Qwest. They're not providing service in competition
4 with Qwest, and that's the critical thing to consider.
5 That's primarily the reason that or that is the reason
6 why I took the UNE-P and total service retail loops out
7 of the analysis.

8 Q. Okay. But then let me keep going back to
9 these hypotheticals. Supposing you have 31 competitors,
10 all with an equal market share, but one of the
11 competitors is also the wholesaler to the other 30 and
12 has 100% of the wholesale market, and all 30 rely on
13 UNE-P in this very even handed way, but in addition you
14 have a price floor, a retail price floor, that's binding
15 on that 31st wholesaler.

16 A. Right.

17 Q. Or retailer. And that floor is satisfactory
18 to you.

19 A. Right.

20 Q. And also in addition the wholesale price to
21 the other 30 is set by regulation satisfactory to you.

22 A. Right, okay.

23 Q. All right. In that situation, do you think
24 there's effective competition? That is, is the presence
25 of 30 evenly distributed retail competitors, all with a

1105

1 share equal to each other and equal to the 31st, is that
2 sufficient to keep the wholesaler from raising or
3 lowering prices in the circumstances I gave you?

4 A. Well, no, I don't think it would be a price
5 constraining situation. Because in that scenario, and
6 the principle, the underlying principle is the same,
7 that if the competitors are essentially retailers of one
8 of the other competitors, then they exist at the
9 pleasure of that one competitor.

10 Q. And why is that if -- this is the part -- I
11 understand you keep asserting that if the competitors
12 are simply selling the facilities of the underlying
13 wholesaler that that is not competition. I understand
14 your assertion. I'm trying to understand why. You
15 would have a situation of a single wholesaler and
16 multiple retailers, and the question would be, if the
17 wholesaler, who is also a retailer, is unable to lower
18 the price below a certain cost floor.

19 A. Right.

20 Q. And is also, I will posit this, also unable
21 to raise the price because the other 30 competitors
22 would come in under that, why isn't that effective
23 competition?

24 A. It's not effective in that under those
25 circumstances -- and the wholesaler would have a

1106

1 competitive classification?

2 Q. Yes.

3 A. In your --

4 Q. Yes.

5 A. Okay. Then under those circumstances, still
6 the wholesaler controls the strength and viability of
7 its competitors by having total control over its profit,
8 over its competitors' profit margins. They can go down
9 in your scenario to zero. They can't go below zero if
10 those conditions were met. But still one of the
11 participants in the market controls the strength and
12 viability of all of the other participants in the
13 market. That's not the case when you have owned loops,
14 CLEC owned loops.

15 CHAIRWOMAN SHOWALTER: All right. Thank you.

16 THE WITNESS: Thank you.

17 COMMISSIONER OSHIE: No questions.

18 JUDGE MACE: Redirect.

19 MS. SINGER NELSON: Yes, thank you, Your
20 Honor.

21

22 R E D I R E C T E X A M I N A T I O N

23 BY MS. SINGER NELSON:

24 Q. Mr. Stacy, do you recall Mr. Sherr asking you
25 about whether you have ever testified before in other

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1 jurisdictions and whether you ever recommended that an
2 ILEC petition be granted?

3 A. For competitive classification?

4 Q. Mm-hm.

5 A. Yes, I remember that.

6 Q. Have you always testified on behalf of CLECs?

7 A. No, I haven't.

8 Q. Who else have you testified on behalf of?

9 A. In telecommunications cases I have testified
10 on behalf of consumers.

11 Q. What do you mean?

12 A. As a consumer advocate.

13 Q. And were you also a member of a commission
14 staff?

15 A. Yes, I was the Chief Economist of the Wyoming
16 Public Service Commission, and under their -- and as --
17 in that capacity, I obviously didn't have any CLEC
18 clients.

19 Q. Do you recall Mr. Sherr asking you questions,
20 I realize it was quite a while ago, but do you recall
21 him asking you questions about whether or not you are
22 aware that CLECs in Washington lease loops to other
23 CLECs?

24 A. Yes, I recall that.

25 Q. Is there any evidence in this docket of CLECs

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1 providing UNE-P here in Washington or loops to other
2 CLECs here in Washington?

3 A. Not that I have seen, no.

4 Q. Do you also recall Mr. Sherr talking to you
5 about what threshold there would be in your mind of how
6 much has to be -- how much competition has to be
7 facilities based UNE-P and resale in order for you to
8 conclude that effective competition exists here in
9 Washington?

10 A. I remember something like that, yes.

11 Q. And you referred to Mr. Gates's testimony?

12 A. Yes.

13 Q. Do you have Mr. Gates's testimony in front of
14 you, his rebuttal testimony specifically?

15 A. His rebuttal, yes, I do.

16 Q. Which has been pre-marked as Exhibit 504T,
17 please turn to page 29 of that testimony.

18 A. Okay.

19 Q. Is that what you were referring to in
20 response to Mr. Sherr's question?

21 A. Yes, I referred to those as the guidelines,
22 not obviously set in stone or concrete standards, but
23 something that the Commission could use down the road
24 when we get close to a situation where there's actual
25 effective competition in Washington. Clearly none of

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1 those are met currently.

2 Q. If UNE-P is priced low, now I'm referring to
3 the series of questions that Mr. Sherr asked you about
4 UNE-P being priced attractively; do you recall that line
5 of questioning?

6 A. Yes.

7 Q. If UNE-P is priced low, would there be any
8 reason for the CLEC to want to move to its own network?

9 A. Even if UNE-P is priced low?

10 Q. (Nodding head.)

11 A. Certainly, absolutely. Regardless of the
12 wholesale price of the inputs, if Qwest still has the
13 ability to control the strength and viability of its
14 competitors, that's not a situation that those
15 competitors would want to remain in for an extended
16 period of time. It carries with it risk, because their
17 survivability depends on one of their competitors, which
18 is not the greatest position to be in. I think that's
19 why I consider the use of UNE-P as a sort of a
20 transitional infancy type of a vehicle used to
21 eventually develop, you know, real effective UNE or
22 facilities based competition.

23 Q. In addition to not having to rely on the
24 monopoly wholesaler competitor, what are other benefits
25 to a competitor being a facilities based competitor?

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1 A. Other benefits?

2 Q. Benefits to being a facilities based carrier.

3 A. Well, under those circumstances you avoid
4 risk, because you control your own destiny. It's easier
5 to attract investment capital, and so momentum grows,
6 and competition actually does become more effective in a
7 more rapid time frame.

8 Q. Do you have flexibility, more flexibility in
9 the type of service and the level of service that you
10 provide to your customers?

11 A. Oh, absolutely, yes.

12 Q. Do you have the ability to differentiate your
13 services from the monopoly provider services or the ILEC
14 services?

15 A. Yes, absolutely.

16 Q. More than if you would be providing services
17 via UNE-P?

18 A. Sure. If you're providing your own service
19 with your own underlying facilities as opposed to
20 serving a retail function for the monopoly wholesale
21 provider, you absolutely have more freedom to be
22 innovative, to broaden consumer offerings, so on and so
23 forth. There's a huge consumer benefit associated with
24 that type of competition as opposed to UNE-P. There's
25 no need to diminish UNE-P, because like I mentioned,

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1 it's an incredibly critical part of transitioning to
2 that best kind of competition.

3 Q. Do you recall the assumption that CLECs
4 provide services over UNE-P, and they have 80% of the
5 local business market share in Washington; do you
6 remember that set of questions from Mr. Sherr?

7 A. Yes.

8 Q. If CLECs have would have 80% of the resale
9 market, resale and UNE-P.

10 A. Yes.

11 Q. Might Qwest still have say 65% of the
12 revenues in that market?

13 A. Oh, absolutely. Even if they had -- even if
14 CLECs had 95% of the market, Qwest would still enjoy the
15 bulk of revenues. Because when you as an end user write
16 a check to CLEC A, most of that money is still going
17 straight to Qwest. It's their facilities, and they are
18 compensated with profit for offering those facilities.
19 Like I said, the CLEC is only performing a retail
20 function. They only get paid for the retail part.
21 Everything else still goes to Qwest.

22 Q. Let's go to Exhibit 604C, which is an
23 attachment to your testimony, the confidential
24 attachment.

25 A. Okay.

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1 Q. Your market share calculations utilize the
2 data that Staff provided; isn't that right?

3 A. That's correct.

4 Q. If the data is wrong, then the calculations
5 are wrong; isn't that right?

6 A. That's correct.

7 Q. And you didn't have the ability because of
8 the protective order in place in this case to review the
9 underlying data upon which Staff based its exhibits on;
10 isn't that right?

11 A. That's correct.

12 Let me go back in answer to your previous
13 question. The data itself doesn't make the calculations
14 wrong, doesn't make my calculations wrong. It may put
15 -- cast a shadow of doubt on the conclusions that are
16 drawn by anybody using that data if the data is wrong.
17 If the data, for example, overstates the CLEC market
18 share, then calculations would carry through that
19 overstatement to the end. And as I understand, that's
20 exactly what happened. So what you can say about this
21 exhibit is that the numbers that I have calculated here
22 are conservative numbers from the CLEC standpoint.

23 Q. What's the point of Exhibit 604C in your
24 mind?

25 A. I think it's to demonstrate the essentially

1113

1 total market dominance of Qwest still in Washington.

2 Q. And you allude to problems that exist in
3 Staff's numbers that you include in this spreadsheet; is
4 that right?

5 A. Right.

6 Q. What are those problems?

7 A. Well, I think there were some problems that
8 occurred that made the data less valuable to me at
9 least, and that's that the exhibit itself is not an
10 auditable exhibit. In other words, an electronic copy
11 of the exhibit won't allow you to determine where some
12 of the numbers came from. And there's, you know, maybe
13 some valid reason for hard coding those numbers in
14 there, but it made that particular exhibit less useful
15 to me.

16 The data upon which the exhibit was based,
17 and we're talking about TLW-4 and 5, Staff exhibits, and
18 I don't know their other numbers, but the data itself it
19 appears, certainly appears at this point to be flawed
20 and to understate Qwest's actual dominance of the
21 market. So there are some problems I think that maybe
22 the request that went out wasn't fully understood by the
23 respondents or something because the data is not very
24 accurate at this point. It's getting clearer all the
25 time.

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1 Q. On what do you base your conclusion that the
2 data is not accurate?

3 A. Well, I know, for instance, that MCI
4 inadvertently overestimated its lines by 80%, a
5 significant, significant overestimation. I think, I
6 have just heard, and I haven't looked at any numbers or
7 anything, that AT&T had a similar result, and so did
8 ATG. It comes down to the confusion between digital and
9 analog that we discussed not much today but a whole lot
10 a few weeks back.

11 Q. So are you saying that the figures that were
12 provided by those carriers were intentionally
13 misrepresented by those carriers in their responses?

14 A. I have no reason to believe they were, no. I
15 think there was -- there was just honest
16 miscommunication or confusion that resulted in those
17 pretty significant errors.

18 Q. Mr. Sherr asked you several questions about
19 the way that you calculated the HHI in this exhibit; do
20 you recall those?

21 A. Yes.

22 Q. Is there any way to calculate the HHI in this
23 case that would result in a number that was not highly
24 concentrated?

25 A. No, I tried to make that clear in discussing

1115

1 my kind of check and balance that I did using the other
2 data.

3 Q. Let's move to some of the questions that
4 Mr. Thompson asked you. Let's go directly to Exhibit
5 MSR-6C, which is I believe it was Exhibit 6 to
6 Mr. Reynolds' testimony.

7 A. Right.

8 Q. You had a pretty long discussion with
9 Mr. Thompson about this exhibit; is that right?

10 A. Yes.

11 Q. Was that discussion -- well, strike that.

12 Do you agree that the top half of this
13 exhibit would properly represent the imputation floor
14 that this Commission should adopt?

15 A. No, I don't, and I thought that I had made
16 that clear, that that's not the case.

17 Q. Why not?

18 A. Well, these totals here on the top half of
19 the exhibit wouldn't -- don't represent the nonrecurring
20 charges associated with offering the service, and there
21 are no retail charges associated with offering the
22 service, so these would understate the price floor. A
23 price floor that was set at this level would allow for
24 price squeezes to occur.

25 Q. You used the phrase pure price competition in

1116

1 your discussion with Mr. Thompson; do you recall that?

2 A. Yes.

3 Q. How would you define that term as you used
4 it?

5 A. Competition based on price alone, not based
6 on product differentiation, marketing, those types of
7 things.

8 Q. And in determining whether effective
9 competition exists in the state, does this Commission
10 have to consider things other than price competition,
11 pure price competition?

12 A. Sure, absolutely, oh, absolutely, there's
13 other -- there's more benefits to competition as we were
14 just discussing than driving prices down. There's
15 product innovation, increased consumer choice, et
16 cetera, et cetera.

17 Q. And finally, in your discussion with
18 Mr. Thompson about Exhibit 6, did you assume in your
19 responses that the CLECs would receive all of the
20 revenues that are articulated in the bottom half of the
21 exhibit?

22 A. Did I assume that?

23 Q. The CLECs would receive all of the revenues.

24 A. No. When I responded to his question, I said
25 that CLECs would likely receive less than that because

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1 they were pricing it competitively.

2 Q. But would you assume, looking at the
3 categories of revenues that are listed on this exhibit,
4 would you assume that CLECs would receive all of those
5 revenues?

6 A. Oh, probably not.

7 Q. Do you have an opinion on that?

8 A. Not really, not that I would like to -- I
9 haven't really thought about that sort of thing for a
10 while, so.

11 Q. That's fine.

12 A. Okay.

13 Q. Oh, when you were discussing with
14 Mr. Thompson your recommendation that the Commission set
15 a price floor and Mr. Thompson asked you about whether
16 you would ask the Commission to set that price floor in
17 this proceeding, I was unclear of your response. Do you
18 -- are you recommending that the Commission set a price
19 floor based on the evidence that's presented in this
20 proceeding?

21 A. No, there's insufficient evidence for the
22 Commission to set a price floor, I believe. It would be
23 appropriate, I think, should the Commission determine
24 that competitive classification is warranted for Qwest
25 for the Commission to open a proceeding that would allow

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1 for a full investigation of an appropriate price floor.

2 But I would caution the Commission not to
3 allow for a competitive classification until such a
4 price floor is determined. Because during the time that
5 the price floor didn't exist, an appropriate place --
6 during a time in which an appropriate price floor does
7 not exist, significant damage can be done to competitors
8 and the market in Washington.

9 Q. Next, do you have what's been marked as
10 Exhibit 611?

11 JUDGE MACE: 611 was not offered.

12 MS. SINGER NELSON: Your Honor, I think that
13 a large part of Mr. Thompson's questions actually
14 address the very illustration that is presented in
15 Exhibit 611, and it would illuminate the record to now
16 have Exhibit 611 included in the record. Mr. Thompson
17 and Chairwoman Showalter to some extent discussed the
18 issue of the difference between, primarily Mr. Thompson,
19 the difference between a market where several CLECs
20 exist and compete and the market where just a few CLECs
21 compete, and that's exactly the illustration presented
22 in Exhibit 611.

23 JUDGE MACE: Well, do you want to offer --

24 MS. SINGER NELSON: I would like to offer it
25 as an exhibit.

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1 JUDGE MACE: Is there any objection to the
2 admission of that proposed exhibit?

3 MR. SHERR: No objection from Qwest.

4 JUDGE MACE: I will admit it.

5 BY MS. SINGER NELSON:

6 Q. All right, Mr. Stacy, do you recall the
7 discussion with Mr. Thompson relating to your testimony,
8 I think it was on page 9 of Exhibit I think it was 603,
9 yes, and the point that you made in lines 187 through
10 189?

11 JUDGE MACE: What page are you on?

12 Q. I'm on page 9 of Exhibit 603T, lines 187
13 through 189.

14 A. Direct testimony?

15 Q. No, it is your rebuttal testimony.

16 A. Okay.

17 Q. Now please review again 187 through 189.

18 A. All right.

19 Q. And review Exhibit 611.

20 A. Okay.

21 Q. What is the difference between a market shown
22 by scenario A and scenario B?

23 A. Well, in scenario A, obviously the CLECs face
24 competition not only from Qwest but from one another.
25 In scenario B -- one another of which there are nine

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1 others or -- so they are obviously competing against a
2 greater number of CLECs than the CLECs are in scenario
3 B.

4 Q. So what does that do to Qwest market power?
5 Compare the two scenarios and your analysis of Qwest's
6 market power in each.

7 A. Qwest's market power would probably be
8 unaffected. There's a potential that the CLECs' market
9 power could be affected.

10 Q. How would that be affected?

11 A. Just in that they control less of the market
12 and are faced with competition from so many different
13 angles.

14 Q. Why does the HHI differ in the two
15 situations?

16 A. The result of the calculation shows, and
17 appropriately so, that market concentration are at
18 different levels.

19 Q. And why is that?

20 A. Mathematically?

21 Q. Yes.

22 A. Because the sum of the squares is less than
23 the square of a sum.

24 Q. When you look at these two scenarios
25 presented in Exhibit 611, would you conclude that any of

1121

1 the market share numbers are similar to the facts
2 presented in this case?

3 A. No, they're not indicative whatsoever of the
4 actual market shares in the case. A Qwest market share
5 of 55 is not something that we will find in Washington
6 that low even though it's still a high market share.
7 And the HHIs that are calculated in this scenario, even
8 though they both indicate concentrated markets, they are
9 much, much lower than any of the actual HHIs that are
10 calculated using actual data.

11 Q. Now recall the discussion that you had with
12 Chairwoman Showalter relating to the price floor that
13 you suggest. If Qwest doesn't violate the price floor
14 that you suggest, does that mean that Qwest is subject
15 to effective competition?

16 A. No.

17 Q. Why not?

18 A. The two things aren't even related. Qwest
19 pricing and the effectiveness of competition are two
20 completely different subjects.

21 Q. And then finally you discussed the importance
22 of price floors and protecting the market. If Qwest
23 bundles essential inputs with unregulated offerings,
24 would that be a problem even if the protections of the
25 statute and the regulations are in place?

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1 A. Yes, it would be difficult for anybody, the
2 Commission or the Staff, to separate out the appropriate
3 costs that are going into the price floor and into the
4 pricing. It would be even more difficult for CLECs who
5 at that point it would be their full responsibility to
6 monitor the pricing of Qwest and essentially take on the
7 burden that the Commission now has.

8 Q. What protections do CLECs have today when
9 Qwest is not competitively classified in its business
10 services against violations of price floors when
11 unbundled or when bundled offerings are put together by
12 Qwest?

13 A. I'm not sure.

14 Q. But your point is that if Qwest is
15 competitively classified in the business services market
16 that protections that CLECs currently have relating to
17 the price floor would go away?

18 A. Yes.

19 Q. Is that based on just the Commission not
20 having the oversight of the price floor relating to the
21 regulated services?

22 A. Yes. If that's the question that you asked
23 me, yeah, that's the answer. I thought it was more
24 complicated.

25 MS. SINGER NELSON: I have nothing further,

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1 thank you.

2 JUDGE MACE: Mr. Sherr.

3 MR. SHERR: Thank you.

4

5 R E C R O S S - E X A M I N A T I O N

6 BY MR. SHERR:

7 Q. If you could look back to Exhibit 6. Do you
8 have that?

9 A. Yes.

10 Q. I believe Ms. Singer Nelson asked if the top
11 portion of Exhibit 6 showed all the costs that the CLEC
12 would pay; is that correct?

13 A. The top portion? I thought she said the
14 bottom portion.

15 Q. The top portion of Exhibit 6 where it shows
16 the Zone 1 through 5 rates, I believe you answered that
17 it did not, that this section didn't show the
18 nonrecurring charges CLECs have to pay.

19 A. Oh, that's right.

20 Q. Isn't it true that this Exhibit 6 also does
21 not reflect any nonrecurring retail revenues a CLEC can
22 charge from its end user?

23 A. That's true.

24 MR. SHERR: That's all the questions I have,
25 thank you.

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1 JUDGE MACE: Mr. Thompson.

2 MR. THOMPSON: Just a couple questions.

3

4 R E C R O S S - E X A M I N A T I O N

5 BY MR. THOMPSON:

6 Q. Mr. Stacy, just looking at the Exhibit 611
7 just so I'm clear, what I understand you did on your
8 market share table is you, with the caveat that these
9 are not the same market share numbers --

10 A. Right.

11 Q. -- that you were dealing with there, you took
12 the CLECs as a total as if they were one entity and
13 squared that figure and then added it to the square of
14 the Qwest market share figure, right?

15 A. Yes, to calculate the HHI.

16 Q. And that represented -- and that results in a
17 higher number, in other words a more concentrated market
18 finding, than essentially I guess if you had cut it up
19 into any smaller portions, right?

20 A. Yes. Taking the square of the sum results in
21 a higher number than the sum of the squares. And so the
22 way that I calculated it was due to the fact that I
23 didn't have the sum of the squares to calculate, so I
24 used a proxy square of the sum.

25 Q. I understand.

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1 A. It didn't make a significant difference in
2 the conclusions.

3 Q. Okay. There was some discussion from
4 Ms. Singer Nelson about competition based on price as
5 opposed I guess to product differentiation. Do you
6 recall that discussion?

7 A. I recall her asking me that, yes.

8 Q. But aren't we in this petition really talking
9 about basically plain old telephone service and some
10 vertical features that go with that? I mean I guess my
11 question is, to what degree is it possible for phone
12 companies to offer, you know, a substitute for basic
13 phone service that's really differentiated?

14 A. To what degree is it possible?

15 Q. Well, doesn't it depend on the
16 functionalities that are available on switches? You
17 know, if, for example, you have something like the
18 ability to make a three-way call, have CLECs that have
19 their own facilities, have they invented new vertical
20 features that you're aware of?

21 A. Not that I'm aware of. I -- no, not that I'm
22 aware of.

23 Q. Okay. Isn't that ability based largely on
24 what software is available and sort of what the network
25 will allow?

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1 A. I'm not familiar at all with the technical
2 ways that innovations are developed.

3 Q. Okay.

4 A. But I just -- I'm familiar more with the
5 attendant benefits of competition, one of which is
6 increased customer choice.

7 MR. THOMPSON: I understand, thank you.

8 JUDGE MACE: That completes the
9 cross-examination of Mr. Stacy, thank you.

10 THE WITNESS: Thank you.

11 JUDGE MACE: You're excused. Our next
12 witness is Mr. Gates. I wanted to address the question
13 of scheduling with the Commissioners and the parties.
14 Are we going to try to finish him?

15 Let's be off the record.

16 (Discussion off the record.)

17 (Witness TIMOTHY J. GATES sworn in.)

18 JUDGE MACE: All right, please be seated.

19 THE WITNESS: Thank you.

20 JUDGE MACE: Ms. Singer Nelson.

21

22 Whereupon,

23 TIMOTHY J. GATES,

24 having been first duly sworn, was called as a witness

25 herein and was examined and testified as follows:

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1

2

D I R E C T E X A M I N A T I O N

3

BY MS. SINGER NELSON:

4

Q. Good afternoon, Mr. Gates. Please state your
5 name and your business address for the record.

6

A. My name is Timothy J. Gates. My business
7 address is 917 West Sage Sparrow Circle in Highlands
8 Ranch, Colorado 80129.

9

Q. By whom are you employed?

10

A. I'm employed by QSI Consulting.

11

Q. Are you representing MCI in this proceeding?

12

A. Yes, I am.

13

Q. Did you prepare testimony that's been
14 pre-marked as Exhibit 501T?

15

A. Yes, I did.

16

Q. And then exhibits, you attached two exhibits
17 to that testimony which had been marked as 502 and 503?

18

A. Yes.

19

Q. Have you also proposed testimony that's been
20 marked as 504T, your rebuttal testimony?

21

A. Yes.

22

Q. With Exhibits 505 and 506?

23

A. That's correct.

24

Q. Do you have any changes or corrections to any
25 of the testimony or the exhibits attached to that

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1 testimony?

2 A. Yes, I believe there was the omission of one
3 of the exhibits, the Colorado stipulation, so we'll have
4 to deal with that, but I do have some corrections.
5 Let's start with 501T.

6 Q. Well, the Colorado stipulation, can you
7 provide that to the Commission and to the parties?

8 A. Yes, I can.

9 MS. SINGER NELSON: Your Honor, can we mark
10 the Colorado stipulation as Exhibit 522.

11 JUDGE MACE: Very well.

12 MS. SINGER NELSON: Thank you.

13 JUDGE MACE: You have copies of it, I
14 presume, because --

15 MS. SINGER NELSON: Yes, we will produce
16 copies of it. We don't have them. I think we have one
17 copy of it, so we'll have to make copies and hand those
18 out to everybody or mail them to everybody.

19 JUDGE MACE: Very well.

20 MS. SINGER NELSON: Thank you.

21 BY MS. SINGER NELSON:

22 Q. Okay.

23 A. My first change would be at page 15, line
24 369.

25 Q. Of which exhibit?

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1 A. Of Exhibit 501T.

2 Q. Thank you.

3 A. Again, line 369, strike the word competitor,
4 and replace that with the word provider.

5 On that same page in the footnote below, the
6 line reads, that resale has not an effective competitive
7 strategy in Washington. Please insert the word been,
8 B-E-E-N, between -- the first line in the footnote at
9 the bottom, it's Footnote 16, which continues on from
10 the previous page, but it's the first line of footnote,
11 insert the word been, B-E-E-N, between the word not and
12 the word an. So that fragment would read, that resale
13 has not been an effective competitive strategy in
14 Washington.

15 And then on page 18, line 425, strike the
16 word its right before 271, again line 425, strike the
17 word its and replace it with Qwest's. That would be
18 Qwest with an apostrophe S.

19 Those are my only changes to 501T.

20 I do have some to 504T beginning at line 501.

21 JUDGE MACE: Which page?

22 A. That would be page 20, line 501, strike 151,
23 the number 151, and replace it with 147.

24 And then in the footnote below, Footnote 26,
25 I will replace those three HHI numbers. Please replace

1130

1 5,625 with 5,658. Please replace 5,776 with 5,805. And
2 finally at the end of that sentence replace 151 with
3 147. And the reason for those numerical changes was
4 that I did not include the market shares in the HHI
5 calculation for the CLECs. I was only calculating the
6 difference between the change in the Qwest market share,
7 and that was inappropriate, so these numbers reflect a
8 correct calculation of the HHI.

9 And then at line 594, which is on page 24, I
10 inadvertently referred to the article that I have
11 attached as a Qwest article. It was really just an
12 article on the Qwest Web site. So the sentence that
13 begins, even Qwest recognizes the, strike even Qwest,
14 and replace that with the following, an article on a
15 Qwest Web site. So that sentence would read, an article
16 on a Qwest Web site recognizes the problems with VoIP
17 telephony today.

18 Those are my only changes.

19 Q. Okay, considering those changes to your
20 testimony, if I asked you the same questions that are
21 contained in both your direct and rebuttal testimony
22 today, would your answers be the same?

23 A. Yes.

24 MS. SINGER NELSON: Thank you.

25 I move for the admission of Exhibits 501T,

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1 502, 503, 504T, 505, and 506.

2 JUDGE MACE: Any objection to the admission
3 of those exhibits?

4 MS. ANDERL: No, Your Honor.

5 JUDGE MACE: I will admit those exhibits.

6 MS. SINGER NELSON: Thank you. Mr. Gates is
7 available for cross-examination.

8 JUDGE MACE: Ms. Anderl.

9 MS. ANDERL: Thank you.

10

11 C R O S S - E X A M I N A T I O N

12 BY MS. ANDERL:

13 Q. Good afternoon, Mr. Gates.

14 A. Good afternoon.

15 Q. Are you appearing here today as an expert
16 witness on behalf of MCI?

17 A. Yes, I am.

18 Q. You're not currently an MCI employee, are
19 you?

20 A. No, I am not.

21 Q. And there are no MCI employees testifying in
22 this proceeding?

23 A. No.

24 Q. Have you read the two previous Commission
25 decisions regarding competitive classification of

1132

1 Qwest's business local exchange services?

2 A. I have gone through those orders. I may not
3 have read them in their entirety, but I have been
4 through them.

5 Q. Have you read any other Commission decisions
6 regarding competitive classification such as the AT&T
7 order from 1987 that's been discussed earlier today and
8 in other testimony?

9 A. I think I may have read that AT&T order. I
10 have read many orders on competitive classification over
11 the years.

12 Q. When you say you may have read it, could I
13 understand that to mean that you have not read it
14 recently?

15 A. In my mind's eye, I can see an order. I think
16 it was dated in -- was it -- what was the date on the
17 order? Was it like '87?

18 Q. I believe it was a 1986 docket.

19 A. '86.

20 Q. With an order issued in 1987.

21 A. I think I have read that, but I would be
22 happy to look at it to refresh my recollection.

23 Q. Mr. Gates, Exhibit 502, the CLEC market
24 capitalization report, can you tell me when that was
25 prepared?

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1 A. We have updated that on one occasion, so I
2 believe this was prepared initially about a year ago and
3 then updated about eight months ago. I guess I -- about
4 a year and a half ago initially and updated about eight
5 months ago.

6 Q. For what purpose was it originally prepared?

7 A. It was a white paper that QSI Consulting did
8 on its own to document what we saw as an implosion of
9 the CLEC market with respect to capitalization.

10 Q. So it was not commissioned by any client?

11 A. No, it was not.

12 Q. What about the update, was that commissioned
13 by any client?

14 A. No, but I updated it or had it updated for
15 purposes of a proceeding. I don't remember which
16 proceeding it was at this time.

17 Q. Turn to Exhibit 501, your direct testimony,
18 and look at page 11, please. And I actually, when you
19 were making corrections to your testimony, I noticed
20 that our pagination is off a little bit. What I'm
21 looking at is your discussion at lines 266 through 269.
22 Whether that's on your page 11 or not, I don't know.

23 A. Yes, it is. Is that the answer and response
24 to the question?

25 Q. Yes.

1134

1 A. Where CLECs are not providing services?

2 Q. Right.

3 A. Okay.

4 Q. I recognize that when you filed this
5 testimony, those five exchanges or areas appear to be
6 ones in which CLECs were not offering service. Based on
7 subsequent information in this docket, do you accept now
8 that Elk is the only area in which it appears that CLECs
9 are not offering service?

10 A. Well, that appears to be the case, although
11 with recent revelations about errors in the CLEC data,
12 it may not be the case.

13 Q. You say:

14 Based on this information, Qwest can not
15 meet the requirements of 80.36.331(b),
16 and competitive classification can not
17 be granted.

18 Do I understand correctly that your testimony
19 is that because CLECs are not offering service in Elk,
20 Qwest's petition should be denied?

21 A. Well, I -- no. Based on my parameters I
22 provided in my rebuttal testimony, that wouldn't be the
23 proposal. But it is clearly the case that based on the
24 Commission's previous decisions, it has decided that
25 where carriers were not actually in a particular

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1 exchange offering services and willing to continue to
2 offer services, that it decided in the past that that
3 was not the burden or that was not the standard to which
4 Qwest should be held. If you use that same standard in
5 this case, Elk would fail, in which case the Commission
6 may choose to strike that from any order that it might
7 have that might approve Qwest's petition in this case.

8 Q. Do you know how many business, how many Qwest
9 business lines there are in Elk?

10 A. No, I do not.

11 Q. Would you accept subject to your check that
12 it's fewer than 500?

13 A. I would accept that.

14 Q. Do you know how many Qwest business access
15 lines are the subject of this petition?

16 A. I do not know the exact number, but it's a
17 significant amount of lines.

18 Q. Would you accept subject to your check that
19 it's in excess of 500,000?

20 A. Yes.

21 Q. Is 500 a significant portion of 500,000?

22 A. I guess it depends on what you're talking
23 about, but just from a mathematical perspective it's not
24 a large proportion. I imagine the people in Elk think
25 that their service is significant and their presence is

1136

1 significant, but.

2 Q. You have discussed the standards in the
3 statute that the Commission needs to consider in making
4 a decision in this application; is that right?

5 A. I have discussed the statutory requirements
6 that the Commission must consider and discussed other
7 factors that the Commission should consider.

8 Q. Can you point me to which factor in your view
9 requires the Commission to consider competition on
10 either a wire center or exchange level in order to
11 establish effective competition statewide?

12 A. Could you repeat that question?

13 (Record read as requested.)

14 A. Thank you. I think the point is that in
15 order to get a picture of the statewide market as it's
16 been defined in the case, you have to start somewhere.
17 And we have exchange data, wireline data in the case, so
18 it's been rolled up. So I think the Commission can look
19 at the data on a statewide basis, and I think it's also
20 appropriate to look at the data on an exchange by
21 exchange basis, especially if there are areas where
22 there are maybe it's a pocket, maybe it's a certain part
23 of the state, maybe it's a rural-urban split, but there
24 may be situations where there are certain parts of the
25 state geographically that do not have the level of

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1 competition that you think is sufficient to justify a
2 competitive classification. Clearly the Commission
3 exercised that judgment in the previous case.

4 Q. Do you have in mind what geographic market
5 was considered in granting AT&T competitive
6 classification for its toll services?

7 A. I don't recall, it might have been a
8 statewide market, but I'm not sure.

9 Q. Mr. Gates, does MCI serve business customers
10 in Washington?

11 A. I believe it does, yes.

12 Q. Do you know if it does so via UNE-P or with
13 its own switch?

14 A. Yes.

15 Q. Both?

16 A. Yes.

17 Q. Okay, thank you. Does your testimony contain
18 any evidence with regard to the number of business
19 customers or lines that MCI serves in the state of
20 Washington?

21 A. No, my testimony addresses the data that
22 Staff gathered, the data that Qwest provided. My
23 testimony does not directly go to the MCI lines,
24 although I would note as Mr. Stacy noted that MCI
25 overstated its line count by some 80% in that they did

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1 provide analog and digital lines in their response to
2 Qwest, and I believe they have submitted a correction to
3 that data to Staff.

4 Q. Did you participate in either the initial
5 answer or the correction in preparing the line count
6 information?

7 A. I did not participate in preparing it, no.
8 But I was involved in asking questions, because I -- the
9 whole analog/digital split is so arbitrary and so
10 unusual, I wasn't sure that the respondents would give
11 an accurate response. I mean consumers don't care if a
12 service is provided over an analog circuit or a digital
13 circuit. All they care about is the functionality. So
14 I set about to find out who at MCI had provided the
15 response.

16 I called that person and talked with her and
17 reviewed a bunch of E-mails and found out that, in fact,
18 MCI had never been told to split out its numbers between
19 analog and digital. And I asked that person to do that
20 effort, to make that effort, and we finally got a
21 response, a complete response yesterday I believe it
22 was. And I understand that other carriers had the same
23 circumstances where they did not have a communication
24 with Staff and that they were never told to do an
25 analog/digital split.

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1 And the confusion is very similar to what we
2 heard from Qwest when Mr. Reynolds was on the stand. I
3 believe that Mr. Reynolds said that they still haven't
4 been able to figure out how to do this DS0 equivalent
5 analysis. Well, the carriers, the CLECs, evidently have
6 had that same difficulty and confusion, and with a
7 little clarification we were able to get them to do the
8 analysis, and the results are dramatically different
9 than what we have had originally in this case.

10 Q. And that's with regard to the CLEC owned
11 loops, right?

12 A. Yes.

13 Q. Okay. You said in your answer that consumers
14 don't care whether services are analog or digital; did I
15 understand that correctly?

16 A. Yeah, that was a broad statement on my part,
17 but I mean there may be sophisticated users out there
18 who definitely want a digital service. They might want
19 a DSL type service for their computer, and they know
20 that that's digital. But generally speaking, consumers
21 are looking for functionality, and they don't
22 necessarily care if it's analog or digital.

23 Q. Mr. Gates, isn't it correct that a consumer,
24 and we're talking about business consumers here, a
25 business consumer with an analog PBX would be very

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1 interested in making sure they had an analog PBX trunk
2 as opposed to a digital trunk?

3 A. Well, that's true, but you raise a good point
4 because I happen to know one carrier that submitted its
5 lines as analog, but in fact they were all digital PBX
6 lines and not analog, so I --

7 MS. ANDERL: Your Honor, I'm going to object
8 at this point and move to strike. This witness's
9 answers are going far beyond the scope of my questions,
10 and I believe those are objectionable.

11 JUDGE MACE: Ms. Singer Nelson.

12 MS. SINGER NELSON: Your Honor, I think that
13 Mr. Gates is responding to Ms. Anderl's questions. He
14 is attempting to have a yes or no answer preceded by his
15 explanation, or followed by his explanation, so I think
16 that his responses are appropriate.

17 (Discussion on the Bench.)

18 JUDGE MACE: Again, you may have been in the
19 hearing room when I instructed a prior witness, you need
20 to answer yes or no, and then you may give an
21 explanation. But you do need to stay within the general
22 scope of the question, and so the last answer may have
23 gone a little further afield than required, and I do
24 want you to be careful about your answers.

25 THE WITNESS: Yes, thank you, Your Honor.

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1 JUDGE MACE: So I won't strike, but I caution
2 the witness to be careful about his answers.

3 BY MS. ANDERL:

4 Q. Mr. Gates, prior to your testimony here
5 today, did you consult with anyone at MCI to get an
6 understanding of the extent to which MCI is competing
7 against Qwest for business customers in the state of
8 Washington?

9 A. Only in one respect.

10 Q. Can you tell me what that is.

11 A. I asked MCI two questions. One, do you
12 provide or offer a voice over IP service in the state of
13 Washington, and two, how many customers do you have.
14 And the answer was yes, and the second answer was one.
15 But I did not ask about any other services other than
16 the discussions that we discussed previously about the
17 data submitted to Staff.

18 Q. Can you please take a look at Exhibit 514,
19 which is a 10 page excerpt or printout from screens on
20 an MCI Web page, Web site rather.

21 A. Yes, I have that.

22 Q. And if you look at page 1, there are brief
23 descriptions of service packages called Business
24 Complete and MCI Business Solutions; do you see those?

25 A. I do.

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1 Q. And is it correct that on page 2 there's a
2 little bit more detail on Business Complete?

3 A. Yes, it appears to be additional detail.

4 Q. And the --

5 A. With additional links which I can't see.

6 Q. Does that appear to be an unlimited local and
7 long distance calling package for small and medium
8 business?

9 A. Well, first of all, let me say that I have
10 never seen this before prior to receiving this, and it
11 doesn't say anything about Washington or whether this is
12 intrastate or interstate or -- so I have a problem with
13 just identification. I really don't know the timing of
14 this, if it's still a valid advertisement, I just don't
15 know. So I guess it says what it says.

16 Q. Okay.

17 A. But I don't have an opinion on anything else.

18 Q. After you received this, did you check the
19 Web site?

20 A. No, I did not.

21 Q. Did you ask MCI if they were offering this
22 service in the state of Washington?

23 A. No, I asked about MCI Advantage.

24 Q. Do you have any reason to believe that the
25 MCI Business Complete is not offered in the state of

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1 Washington?

2 A. I don't know. Normally these types of
3 screens, and I have done the same thing with -- for
4 other carriers and other clients, usually you can click,
5 and you have a drop down, and you pick a state, and that
6 would -- and then you pick a type of service, and that
7 would stay resident on the printout. I don't see that
8 here. Maybe that's not a feature on MCI's Web site, I
9 just don't know. But that's what I'm used to in looking
10 at state specific information.

11 Q. Turn to your direct testimony, please, lines
12 327 and 328.

13 JUDGE MACE: What page again, counsel?

14 MS. ANDERL: Oh, I'm sorry, 12 in my version.

15 THE WITNESS: It's page 13 for me.

16 JUDGE MACE: And the line cite again?

17 MS. ANDERL: 327 and 328.

18 JUDGE MACE: 327 on page 12.

19 MS. ANDERL: Well, it may be on the top of
20 page 13.

21 THE WITNESS: It's the answer that reads, no,
22 I believe that CLECs would like consumers to perceive
23 their services are a complete alternative.

24 JUDGE MACE: Page 13 is what I have.

25 THE WITNESS: That's what I have as well.

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1 MS. SINGER NELSON: Your Honor, excuse me, I
2 realize that sometimes Mr. Gates' citations to pages are
3 inconsistent with what some of the parties have, and
4 that's why there's a sequential numbering of lines
5 throughout Mr. Gate's testimony so his line numbers
6 would be consistent.

7 JUDGE MACE: I understand that, thank you.

8 MS. SINGER NELSON: Okay, thank you, I just
9 wanted to make that clarification for the record.

10 MS. ANDERL: That does seem to help, thank
11 you.

12 BY MS. ANDERL:

13 Q. You state that generally speaking CLECs'
14 services are not a complete alternative to those of
15 Qwest; is that correct?

16 A. Yes, generally that's correct.

17 Q. Is that correct with regard to MCI's service
18 offerings to businesses in the state of Washington?

19 A. What, I'm sorry, I lost the train of thought
20 there, what are you suggesting?

21 Q. Is it correct that MCI's business service
22 offerings to small and large businesses in the state of
23 Washington are not a complete alternative to those of
24 Qwest?

25 A. Well, yes, and I think my question and answer

1145

1 there explains the context. But the important thing to
2 note is here I'm pointing out that consumers perceive
3 for instance The Neighborhood to be something built by
4 MCI and an offering from MCI.

5 MS. ANDERL: Well, Your Honor, I'm going to
6 object, there's no evidence in this record that The
7 Neighborhood is a business service, and I believe the
8 answer once again goes beyond the scope of my question.
9 My question was limited to business services, which are
10 the subject of this proceeding.

11 JUDGE MACE: Mr. Gates, I would like to have
12 you respond to the question.

13 THE WITNESS: Okay.

14 JUDGE MACE: Do you need to have it repeated?

15 THE WITNESS: No, I think I understand.

16 A. I was just trying to give an example.
17 Perhaps The Neighborhood wasn't a good example, and I
18 apologize.

19 Let's just say a generic business service
20 utilizing UNE-P or total service resale, MCI will market
21 that service as if it were an MCI service. You will get
22 a bill either from MCI or through Qwest on behalf of
23 MCI, and it will appear to be an MCI service, when in
24 fact the service is being offered by Qwest on behalf of
25 MCI.

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1 If you look at the Qwest product catalog, it
2 specifically described UNE-P POTS and UNE-P platform as
3 a finished service of Qwest offered on behalf of the
4 CLECs. So it does appear to consumers to be something,
5 you know, provided by MCI's network and MCI's switch,
6 MCI's loops, but in fact it's MCI retailing Qwest
7 services. That's the distinction I was drawing here.

8 BY MS. ANDERL:

9 Q. Turn back to Exhibit 514, please, and look
10 again at the description of the MCI Business Complete
11 service.

12 A. What page?

13 Q. 2.

14 A. Is this the hand numbered?

15 Q. It's hand numbered 2, that's correct.

16 A. Hand numbered page 2, okay.

17 Q. Can you tell me what's missing in MCI's
18 Business Complete service that makes it less than a
19 complete alternative to Qwest's service?

20 MS. SINGER NELSON: Your Honor, I would
21 object to asking Mr. Gates any more questions on this
22 exhibit. He says he's not familiar with the Web page.
23 He said he's not familiar with MCI's business offerings
24 as they're presented in this Web page. And so I would
25 ask that he not be questioned on services described in

1147

1 this exhibit. And there has been no foundation laid
2 that this exhibit is what it purports to be.

3 MS. ANDERL: Well, Your Honor, I'm going to
4 leave the foundational question aside for a moment, I
5 asked Mr. Gates specifically if his statement in his
6 testimony that CLECs' service offerings are not a
7 complete alternative to those of Qwest was true as to
8 MCI's services. I understood him to say yes, that's
9 true, MCI's service offerings are not a complete
10 alternative to those of Qwest. I then believe it's a
11 reasonable follow on question and would like to explore
12 with him this particular service offering, what aspects
13 of it fail to constitute a complete alternative, in
14 other words what's missing there. So I'm again, as with
15 the previous witness, here we have some really general
16 statements, and I just want to explore those using
17 specific examples.

18 MS. SINGER NELSON: But since there's no
19 foundation laid that this is what it purports to be,
20 then there's no -- there's no value to going through
21 that analysis as it relates to what's described in this
22 exhibit.

23 JUDGE MACE: He could answer based on the
24 list of services here, whether that's a complete list of
25 services.

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1 MS. ANDERL: We could use it as a
2 hypothetical, Your Honor, assuming for purposes of the
3 discussion that this is an accurate list of those
4 services.

5 MS. SINGER NELSON: I would have no objection
6 to using it as a hypothetical.

7 JUDGE MACE: Then if you will proceed on that
8 basis, go ahead.

9 THE WITNESS: May I add to the hypothetical
10 just to make it tie in right into my testimony, and that
11 might speed things up?

12 MS. ANDERL: Why don't you just answer my
13 question first, Mr. Gates, and then perhaps there might
14 be additional factors we could throw in.

15 BY MS. ANDERL:

16 Q. Is there anything that is not listed in the
17 Business Complete package that makes this particular
18 service offering less than a complete alternative to
19 Qwest's business service offering?

20 A. Yes.

21 Q. And what is that?

22 A. There is a complete lack of any description
23 as to how this service is provided. We don't know if
24 the service is provided using MCI's own loops, its own
25 network, its own switches. We don't know if it's

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1 provided via UNE-P or total service resale, we just
2 don't know. So we can't say based on my testimony and
3 the discussion of a complete alternative, we can't
4 without that knowledge, and that's what I wanted to put
5 into the assumption. If we assume, you know, a certain
6 type of service platform --

7 Q. Well, we're talking about consumer
8 perception, which is the testimony that you have given
9 at lines 327 and 328. How does the fact or how does the
10 method of service provisioning, either over UNE-P or
11 over its own switch, affect consumer perception of the
12 service as a complete alternative?

13 A. I believe it's in the best interests of the
14 CLECs to have the consumers perceive this as a CLEC
15 offering. Nobody wants to go out and say, I have this
16 service, sure it's a Qwest service, but I'm going to
17 rebill it and offer it to you, and I'm going to name it
18 something different. I mean how many people would be
19 too interested in that if you portrayed it in that
20 manner. Instead, people go out, as MCI and other
21 carriers have done, they're doing their best to attract
22 consumers, they portray these as their own services,
23 when in fact they're provided via resale or UNEs.

24 So from the consumers perspective, they
25 probably don't care. From the CLEC's perspective, they

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1 don't want the consumers to care, because it would
2 severely limit their ability to attract consumers.

3 Q. So if service, if Business Complete were
4 provided over UNE-P, how would it not be a complete
5 alternative to Qwest's service?

6 A. Because it would be a resale offering using
7 UNE-P. In other words, MCI wouldn't have the ability to
8 distinguish this service from that of Qwest other than
9 perhaps by name and by rate.

10 Q. For purposes of the end user customer,
11 couldn't the end user customer choose to have all of its
12 service provided by MCI and thereby no longer have an
13 end user customer relationship with Qwest?

14 A. They could never ask MCI at this point in
15 time to provide all of its services, because MCI doesn't
16 have the local loops, doesn't have the interexchange
17 network in most cases.

18 Q. Well --

19 A. MCI can provide many services, and it can
20 resale others so that it appears that it's providing
21 everything to the consumer.

22 Q. Mr. Gates, I think you're misapprehending my
23 question. When I say provide the services, I mean
24 provide services via UNE-P. I don't mean over MCI's own
25 facilities, so.

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1 A. I'm sorry, I thought you were talking about
2 consumer perception, and that's the distinction. I'm
3 sorry if I wasn't answering the question directly.

4 Q. If the consumer were to select to have all of
5 its business services provided by MCI via the MCI
6 Business Complete and no longer be a telephone customer
7 of Qwest, isn't it true that the consumer would have
8 selected MCI as a complete alternative to obtaining
9 service from Qwest?

10 A. That would be their perception if they didn't
11 know how the service was actually provided, yes.

12 Q. And it's correct, isn't it, that when a
13 customer goes to a CLEC who is providing service either
14 via UNE-P or resale that Qwest loses its retail
15 marketing relationship with that customer?

16 A. For some things it would. It certainly
17 wouldn't lose all the revenue stream, but it would lose
18 some of that relationship with the consumer, that's
19 correct.

20 Q. What retail marketing, what aspect of the
21 retail marketing relationship would it retain if the
22 customer left Qwest and went to a CLEC?

23 A. If they had multiple lines, they might choose
24 to keep a Qwest line and use the CLEC for a second line.
25 They might use a CLEC for some other type of service

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1 other than basic local exchange service.

2 Q. Again, Mr. Gates --

3 A. The business might use an alarm circuit that
4 would come from Qwest.

5 Q. Okay, Mr. Gates, if you don't understand the
6 question, please ask me to clarify it. I asked you the
7 question to the extent that a customer left Qwest and no
8 longer purchased any retail services from Qwest, went to
9 a CLEC to obtain services, what aspects of the retail
10 marketing relationship would that customer with Qwest
11 retain?

12 A. Perhaps none depending on the billing
13 arrangement with the CLEC and Qwest.

14 Q. When a CLEC serves a customer via UNE-P, is
15 it correct that the CLEC receives switched access
16 revenues or any toll calls originated or terminated to
17 that customer?

18 A. Yes, I believe that's correct.

19 Q. Are you aware of whether CLECs using UNE-P
20 are able to add enhanced features to the package that
21 are not included in the standard array of features they
22 receive from Qwest?

23 A. I'm not sure. I have gone through the Qwest
24 product catalog, and there are lists and lists and lists
25 of features that you can select from. I don't know if

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1 you can add to those features. I don't believe so. I
2 don't know how you would do that technically.

3 Q. But you don't know?

4 A. I don't think it's possible, but I don't
5 know. And the reason I don't think it's possible is
6 because with UNE-P you're using not only the local loop
7 but also the switching, which is where all the
8 intelligence and the features reside, so I don't know
9 how you would bring in a new feature from a CLEC through
10 that Qwest switch through a collo space and then to the
11 consumer, I just don't know how that would work. It may
12 be possible, I just don't think it's technically
13 feasible.

14 Q. Is it correct that there may be features
15 resident within the switch that Qwest has not activated
16 that the CLEC could activate?

17 A. I don't believe a CLEC can activate a switch
18 feature. When you buy say a Lucent switch and you have
19 to pick from there are thousands, maybe tens of
20 thousands of features, you activate those when you
21 activate the switch, and it's up to the switch owner
22 then to add features later on by paying a fee to
23 activate and include those new features. I don't think
24 the CLEC can activate a feature on a Qwest switch
25 unless, of course, they have Qwest do it on their

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1 behalf.

2 Q. So if they were to ask Qwest to do that, that
3 would be a way for them to differentiate their service
4 by offering a different feature than what Qwest offers
5 in its standard feature package?

6 A. No, because if Qwest activated that feature,
7 then it would be available not only to the CLEC but to
8 Qwest.

9 Q. Now you stated in your testimony, and I'm on
10 pages 14 and 15, but it's lines 371 through 375.

11 A. I think I'm there. I think it's at the
12 bottom of 15 and top of 16 for me.

13 Q. Really. Do you consider CLEC use of UNE-P to
14 be effective competition, that's the question?

15 A. Yes, that's correct.

16 Q. And even though you just said yes, you were
17 indicating that you agreed, that you understood where I
18 was, because I believe your answer to the actual
19 question in your testimony is no; is that right?

20 A. Yes, that's correct, thank you.

21 Q. This is --

22 A. It's late.

23 Q. But MCI does compete for business customers
24 using UNE-P; is that right?

25 A. Oh, absolutely, UNE-P is an excellent entry

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1 vehicle for carriers, and it's done a lot to enhance
2 competition over the last few years.

3 Q. Does competition through UNE-P constitute in
4 your view a reasonably available alternative to an end
5 user consumer?

6 A. No, it results in -- and the reason I said no
7 is because your use of that phrase from the statute has
8 a very specific meaning. If you were to ask a consumer,
9 do you consider it a reasonably available alternative,
10 the consumer would probably say, well, sure. But they
11 don't have the knowledge of how the service is actually
12 provided, assuming it's provided over UNE-P.
13 Alternatives mean exactly that. If all you have is
14 UNE-P competition, then the only service provider is
15 Qwest. So even though other people may be reselling or
16 retailing Qwest services, Qwest is still the only true
17 alternative.

18 Q. So the question of whether there's a
19 reasonably available alternative ought not to be
20 considered from the consumer perspective; is that what
21 you're saying?

22 A. That's correct. I think this Commission has
23 to evaluate the statutory mandate and the statutory
24 requirements specifically. What consumers think is
25 important, and their perceptions are important, but the

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1 Commission has a higher standard to meet than the
2 perceptions of consumers.

3 Q. To the extent that the market is open and
4 Qwest is provisioning UNE-P in compliance with all of
5 the requirements, do you agree with me that UNE-P is
6 reasonably available?

7 A. I would agree that UNE-P is reasonably
8 available assuming Qwest is provisioning in accordance
9 with their requirements. I mean if they're rejecting
10 orders if there are no facilities, if there are quality
11 issues, then it may not be reasonably available. But in
12 the general sense, in the big picture, yes, if Qwest is
13 providing UNE-P, it's available to CLECs.

14 Q. And so really why I asked you that was to see
15 if we could focus our difference as to whether we agreed
16 or disagreed -- well, let me strike that.

17 What I'm looking for is to kind of narrow
18 down where we disagree about whether UNE-P constitutes a
19 reasonably available alternative, and do I understand
20 from your testimony then that what you disagree with is
21 that it constitutes an alternative?

22 A. Yes, and I'm really going to the whole
23 concept of captive customer, because in my mind, a
24 captive customer is one that has only one choice or has
25 no choice of underlying service providers. And with

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1 UNE-P, Qwest is still the underlying service provider,
2 so I think that's the distinction.

3 Q. Is it your position that UNE-P does not allow
4 you to effectively compete in the small business market?

5 A. That's correct, effectively compete as
6 discussed in the statute. Does allow you to be a market
7 player and to compete to a limited extent and to gain
8 customers and revenues, which is all very good and in
9 the public interest. But does it rise to the level of
10 effective competition, no.

11 Q. If in your view service provided via UNE-P
12 does not constitute effective competition, should CLECs
13 who choose to enter using UNE-P be limited to only using
14 it for a defined period of time before being required to
15 build their own facilities?

16 A. No, I think that would be a mistake, and your
17 question is a bit vague when you talk about a defined
18 period of time. But I mean it is clear that Qwest is
19 trying through legal maneuvering to eliminate UNE-P
20 through the mandamus, the writ. So there is some
21 instability in the market, because people don't know
22 whether UNE-P is going to be available. As we have
23 seen, the market and consumers have benefitted over time
24 from UNE-P, there's no good reason to eliminate it.

25 Q. Mr. Gates, I only have one question for you

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1 about wireless. None of the market share calculations
2 in this case relies on wireless; isn't that correct?

3 A. That's correct.

4 Q. Okay, let's move through that wireless
5 testimony all the way to page I have 43, and I'm on line
6 1092. This is where you begin to discuss the market
7 capitalization analysis.

8 A. Yes, that would be page 46 in my version.

9 Q. Okay, thank you. Now on line 1115, you
10 describe a decline in market capitalization for CLECs
11 and wholesale suppliers during a defined period of time
12 as a staggering 86%. Do you see that testimony?

13 A. Yes, I do.

14 Q. Can you tell me what the decline in market
15 capitalization was for Qwest during this same period of
16 time?

17 A. Yes. For Qwest it was a negative 89.17%, but
18 as we know, Qwest has had some unique challenges over
19 time. We have seen in the news lately and we heard
20 yesterday that Qwest still hasn't filed its restated
21 books. We'll probably have to wait until November now
22 to get those. So there are some unique circumstances
23 associated with Qwest.

24 The other three RBOCs though averaged about a
25 40% decline while the CLECs and IXC's suffered, you know,

1159

1 89%, 92%, so about twice the loss in capitalization.

2 Q. Can you turn to, well, my page 47, your
3 probably page 51, line 1186.

4 A. Yes, I'm there.

5 Q. Now I recognize this is not your
6 recommendation, but you do state there that if the
7 Commission competitively classifies Qwest, it should
8 also remove service quality regulation; is that right?

9 A. No, I don't think that's my testimony. What
10 I was trying to express to the Commission was that if
11 there really were effective competition, then there
12 would be no need for service quality guarantees, because
13 the market discipline would be sufficient to ensure that
14 the quality was top notch and in fact improving over
15 time.

16 Q. Do you know if Qwest is asking for any relief
17 from retail service quality rules in this proceeding?

18 A. I believe I have heard testimony to the
19 effect that they are not.

20 Q. Are you aware of the service quality rules
21 that this Commission adopted not too long ago?

22 A. Yes, I am. Well, in what regard? Are you
23 talking about the performance assurance plan?

24 Q. No, not for Qwest, the industrywide
25 applicable service quality rules that the Commission has

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1 adopted for retail service provisioning.

2 A. I'm not aware of those.

3 Q. Are you aware of whether MCI in its provision
4 of retail service in the state of Washington is subject
5 to any service quality rules?

6 A. I don't know.

7 Q. But MCI is competitively classified; is that
8 right?

9 A. Yes, and the market will ensure that MCI's
10 services are of the highest quality, or they will just
11 lose market share.

12 Q. So would you tell this Commission then that
13 to the extent that service quality rules existed, those
14 were unnecessary?

15 A. I think they're absolutely necessary for
16 Qwest, because Qwest is the bottleneck provider.

17 Q. I'm sorry, we're still talking about MCI. To
18 the extent that retail service quality rules that apply
19 to MCI, would you tell the Commission that those rules
20 are unnecessary?

21 A. Well, I do believe that they are unnecessary.
22 I wouldn't suggest to the Commission that they made a
23 mistake by implementing service quality rules, because
24 there are situations where some carriers do abuse their
25 position as a provider and do not provide quality

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1 service, but I think generally speaking competitive
2 carriers care much more about their service quality than
3 the Commission does in that they know that their
4 livelihood depends on providing high quality service to
5 their customers.

6 Q. Mr. Gates, you have wanted in this proceeding
7 to discuss access charges, so let's do that for a little
8 while. Your testimony there on that issue begins on
9 line 1205, and in that regard can I ask you to please
10 turn to Exhibit 511.

11 A. Oh, yes, I have 511.

12 Q. Do you recognize that as a rate sheet from
13 Qwest's access service tariff from Washington?

14 A. Yes, it appears to be that.

15 Q. Can you look at Exhibits 512 and 513 for me.

16 A. All at once?

17 Q. Sequentially.

18 A. Oh, okay.

19 Q. Can you identify Exhibit 512?

20 A. Exhibit 512 has a title MCI WorldCom Network
21 Services, Inc. It appears to be a Washington price list
22 tariff and has an effective date of January 20th of
23 2000, and the title in this section is Message
24 Telecommunications Services.

25 Q. And can you identify Exhibit 513?

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1 A. I would caution you, I'm reading from them, I
2 can't really identify them. I don't have any personal
3 knowledge of these particular pages. I have no reason
4 to doubt their authenticity, but really what I'm doing
5 is just reading from them.

6 513 is MCI Metro Access Transmission
7 Services, price list number one, original sheet number
8 86, with an effective date of July 31st, 1998.

9 MS. SINGER NELSON: And, Your Honor, I would
10 just note that I would object to the admission of or
11 even the discussion of these exhibits to the extent no
12 foundation has been laid that they are what they purport
13 to be. However, I recognize that the Commission can
14 take administrative notice of what's contained in its
15 files, and so I have no objection to their admission
16 subject to check that they are, in fact, what is
17 contained in the Commission's files.

18 JUDGE MACE: Thank you.

19 A. Ms. Anderl, I would note that on 513, unlike
20 512, it doesn't say Washington. It just says price list
21 number one, and the previous one said Washington price
22 list number one. So I don't know if this is a
23 Washington specific document or not, but it's not clear
24 on its face.

25 BY MS. ANDERL:

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1 Q. Mr. Gates, when MCI provides local service in
2 the state of Washington to business customers, does it
3 assess originating and terminating access charges for
4 toll calls?

5 A. What was the first part of your question,
6 when they offer what type of service?

7 Q. Business local exchange service.

8 A. Business local exchange, I wouldn't expect
9 them to assess access charges or toll calls for business
10 local exchange.

11 Q. Do they assess access charges to carriers who
12 originate or terminate toll calls to those business
13 local exchange customers?

14 A. I don't know. I don't know how they bill for
15 those services. I don't know the assumptions underlying
16 your question. I don't know if you're talking about
17 UNE-P or owned loop or some other service, but I don't
18 know.

19 Q. Well, would it make any difference whether it
20 was UNE-P or owned loop to MCI's decision to assess
21 access charges to a toll carrier who originated or
22 terminated toll calls to an MCI customer?

23 A. I don't know if it would make any difference
24 to them, but it probably wouldn't, you're right, it
25 probably wouldn't be a distinction in that decision

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1 tree.

2 Q. Do you know what MCI's access charges for
3 intrastate calls in the state of Washington are?

4 A. I don't have any personal knowledge other
5 than these documents before me. If you tell me that
6 these are the rates for MCI, I would accept that subject
7 to check. It appears on Exhibit 512, however, up there
8 at the top, local access charges, it says, this rate
9 information is obtained from the applicable LEC tariff,
10 so it looks like MCI passes through the LEC access
11 charges, but again I'm just reading from this document.

12 Q. So the MCI access charges would mirror the
13 local, the incumbent local exchange carrier's access
14 charges?

15 A. It appears to in this instance on this page.

16 Q. And looking at Exhibit 513, do you see a
17 number of references there on page 1, well, on each page
18 to Seattle, Washington?

19 A. Yes.

20 Q. Does that change your view as to whether or
21 not this might be a Washington specific document?

22 A. I just don't know. It might be an interstate
23 offering, I just don't know. It probably is a
24 Washington document, that's probably where you got this,
25 but I just don't know personally.

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1 Q. You have contented that Qwest's access rates
2 provide a subsidy to universal service because they are
3 above cost; is that correct?

4 A. Generally that's correct. Well, and more
5 specifically I was referring to the interim terminating
6 access charge, the ITAC, that 2 cents. I mean that
7 seems to me to be a very specific USF surcharge under
8 the guise of access charges.

9 Q. If MCI's access charges were to mirror
10 Qwest's, would MCI's access charges then also be
11 providing a subsidy to universal service?

12 A. If they were charging the ITAC and providing
13 that to the Commission, I have never thought about it
14 that way. I would expect CLECs to mirror ILEC charges,
15 to be a price follower, because of the lack of
16 competition for that, for that service.

17 Q. And if MCI were mirroring the ILEC's access
18 charges and retaining the ITAC, would MCI be then
19 retaining a subsidy?

20 A. I'm hesitating because your question seems to
21 suggest some wrongdoing on the part of a carrier. I
22 don't know if they can charge an ITAC and just keep it.
23 My assumption is if the Commission ordered the ITAC that
24 it was for a very specific purpose, and that money,
25 those moneys are to be turned over for purposes of

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1 universal service in this state.

2 Q. Let me represent to you, Mr. Gates, that in
3 the state of Washington, and I don't want, Your Honor,
4 to run the risk of testifying here, but so that the
5 witness is clear, that the ITAC is permitted to be
6 retained by the carrier who charges it.

7 So with that assumption in mind and
8 suggesting no wrongdoing by the use of the word subsidy,
9 if MCI were to charge a rate that mirrored the Qwest
10 rate and included an ITAC and retained those funds,
11 would MCI be receiving a subsidy?

12 A. No, and the reason is that the cost studies
13 in Washington upon which the Commission relies to
14 develop access charges are Qwest cost studies, not MCI
15 or AT&T or Integra or anybody else. So the costs that
16 we're talking about are the costs of Qwest so -- and
17 when you determine a subsidy, you have to compare
18 revenues to cost. So all that's happening with the
19 CLECs is that they're mirroring the Qwest access
20 charges. I would suggest that if you reduced Qwest
21 access charges, the CLECs would as well, which would be
22 a good thing for consumers.

23 JUDGE MACE: Ms. Anderl, I don't want to
24 interrupt this particular train of your
25 cross-examination, but it is past 5:30, and we talked

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1 about breaking for lunch at 5:30, how much cross do you
2 have left for the witness?

3 MS. ANDERL: I am at the end of this topic,
4 I'm also ready to move to the witness's rebuttal
5 testimony, so it's probably a good time to break. I
6 probably do have 20 to 30 more minutes.

7 CHAIRWOMAN SHOWALTER: Well, what are
8 peoples's -- would you rather go to 6:00?

9 MS. WATSON: Sure.

10 MS. SINGER NELSON: That's fine.

11 Is that okay with you?

12 THE WITNESS: I'm fine if Mr. Stacy would get
13 me some more water.

14 JUDGE MACE: I'm sorry, this is off the
15 record, let's be off the record for a minute.

16 (Discussion off the record.)

17 BY MS. ANDERL:

18 Q. Let's look, Mr. Gates, at Exhibit 504.

19 A. Is that my rebuttal?

20 Q. Yes.

21 A. Thank you.

22 Q. And I'm looking at page 13, Footnote 15.

23 A. Yes.

24 Q. Are you contending in your testimony in that
25 footnote that Qwest could change provisions in the SGAT

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1 related to hot cuts or collocation without first
2 obtaining permission from this Commission and amending
3 an interconnecting carrier's interconnection agreement?

4 A. Oh, it certainly could, and it's done things
5 unilaterally in the industry that have disrupted the
6 marketplace. Most recently in June of this year when it
7 changed its digital loop provisioning guidelines and
8 disrupted the industry for several months before it
9 reverted back to its original provisioning policies.

10 Q. Is it your testimony that Qwest could
11 lawfully change the rates for collocation without first
12 obtaining permission from this Commission?

13 A. I won't give you a legal opinion on what they
14 can and can not do, but clearly there have been
15 instances when rates in an SGAT were wrong. They were
16 not the approved rates, and we brought them to Qwest's
17 attention, and they have been revised. So things do
18 happen, rates do change, and even after the SGAT has
19 been changed or amended, which it was recently, you
20 know, it takes time to get those rates into place, so
21 there's a timing issue as well.

22 So I'm not suggesting any illegal activities
23 on Qwest's part, but things do happen, and Qwest is
24 trying to eliminate UNE-P through legal procedures, and
25 if its petitions were granted, it would be gone in 45

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1 days or soon in any case. So the point is, as Mr. Stacy
2 explained earlier in the day, using UNE-P puts the CLECs
3 at a distinct disadvantage, because it has no control
4 over those facilities, Qwest has that control.

5 Q. Now at line, starting at line 315, the Q&A
6 that starts there, is it your testimony that CLEC
7 competition even with its own switch and a UNE loop does
8 not constitute effective competition?

9 A. No, that's not my testimony. I think
10 Mr. Sherr earlier suggested something to that effect.
11 But what I have said in this testimony and what I have
12 agreed is that UNE loops do provide a more effective
13 form of competition, not that that's effective
14 competition, but it provides more market constraining
15 discipline than either resale or UNE-P, because at least
16 the CLEC is using its own switch. It's still dependent
17 upon Qwest for the loop, so we have all of those
18 remaining problems on pricing, on quality, on
19 provisioning, those problems remain. But at least with
20 a significant sunk investment in the switch, it does
21 provide a more substantial competition to Qwest, and
22 that's why we have included it in the market share
23 calculations.

24 Q. Okay. But as I understand your testimony on
25 lines 315 through lines 317, you have stated that no,

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1 CLECs using UNE loops do not result in effective
2 competition for Qwest services in Washington. Am I
3 reading that incorrectly?

4 A. No, you're not, but -- they don't provide
5 effective competition because the CLEC is still reliant
6 upon Qwest for that loop. But we did include it in the
7 market share calculation, because at some point along
8 that continuum, I think from the start here with total
9 service retail, which has no good price constraining
10 effect, and then you go to UNE-P, which is a little bit
11 better because of the way it's priced, and then you go
12 to UNE loop, well at least with UNE loop you have some
13 investment, something you can point to, a sunk
14 investment. That's what the Department of Justice
15 looked for, and that means they're a committed entrant
16 in the market, so we did include that. Even though UNE
17 loop does not result in effective competition, we
18 included it in the market share because it was important
19 to weight it in the calculation for your decision.

20 Q. Well, I understand, Mr. Gates, that perhaps
21 it's a continuum, but let me see if I can try to define
22 that continuum. Is it your testimony that effective
23 competition can only be provided if a CLEC owns 100% of
24 the facilities over which it provides service?

25 A. No, that was kind of a very general

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1 statement, and I had to answer yes or no, so I picked
2 no. But if you look at my rebuttal testimony, you will
3 see that I have outlined four parameters for the
4 Commission to consider together, a trigger if you will,
5 to decide whether or not some combination of the
6 different forms of competition are sufficient to
7 constrain Qwest's actions in the market.

8 So what I'm saying is that if you have 30% of
9 facilities based competition, owned loops, and then
10 you've got another 15% of resale, whether that's UNE-P
11 or total service resale, and you've got one carrier that
12 has 10% of the market and you've got three CLECs, I mean
13 taken together I think the Commission can be somewhat
14 more comfortable than they are today at knowing that
15 there's enough competitive or rivalrous activity in the
16 market to feel secure in deregulating Qwest.

17 So I apologize for the long winded answer,
18 but the yes or no just didn't make it with that
19 question, sorry.

20 Q. On page 15 starting at line 356, you discuss
21 the horizontal merger guidelines; is that correct?

22 A. Yes.

23 Q. Is this case one in which a merger of two
24 firms is being considered?

25 A. No, this is, in my opinion, just as dire a

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1 circumstance or just as important a circumstance, but it
2 does not have to do with a merger. What we're talking
3 about here is deciding whether or not to deregulate or
4 reduce regulation for a carrier that has heretofore been
5 a monopolist, and I think that's perhaps a bigger
6 distinction than a merger in many or most cases.

7 The merger guidelines do tell us though that
8 this it is highly concentrated, and that should be of
9 concern.

10 JUDGE MACE: Well, Mr. Gates --

11 A. Thank you.

12 Q. Turn to page 20, and on some of these I'm
13 hesitating because I only have page numbers, I didn't
14 realize we would be off, so I'm looking for the line
15 references, line 513 where you talk about the
16 telecommunications pie.

17 A. Yes.

18 Q. Is it your contention that the market for
19 telecommunications services has grown in Washington over
20 the past two years?

21 A. I don't know, but I would expect that it
22 might have grown somewhat, but I don't know
23 specifically. I mean that's the stimulation that occurs
24 with competition is what I was referring to there.

25 Q. I forgot to tell your counsel that I had some

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1 questions for you on the horizontal merger guidelines,
2 that's Exhibit 224, do you happen to have that with you?

3 A. I have a version of the guidelines. I hope
4 it's the same ones you have.

5 MS. SINGER NELSON: You know, if we could
6 just talk off the record on that.

7 JUDGE MACE: Let's be off the record.

8 (Discussion off the record.)

9 BY MS. ANDERL:

10 Q. First, Mr. Gates, could you please look at
11 your testimony on lines 519 and 520, page 21 on my copy.

12 A. Yes, I'm there.

13 Q. You state there that the merger guidelines
14 would consider both resale and UNE-P providers to be
15 uncommitted entrants, and you cite as support for that
16 contention to the merger guidelines at Section 1.32; is
17 that correct?

18 A. Yes.

19 Q. Can you turn to the merger guidelines,
20 Exhibit 224, go to Section 1.32.

21 A. Yes, I'm there.

22 Q. And can you show me where it says there that
23 resale and UNE-P providers would be considered
24 uncommitted entrants?

25 A. No, I can not. There's no specific reference

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1 in these guidelines to any particular product or service
2 offering platform. It does, however, talk about
3 uncommitted entrants.

4 Q. Well, it defines uncommitted entrants,
5 doesn't it?

6 A. It does.

7 Q. And it defines uncommitted entrants as firms
8 not currently producing or selling the relevant product
9 in the relevant area?

10 A. That's exactly right, and that's my point,
11 the underlying provider with UNE-P and resale is Qwest,
12 not a CLEC.

13 Q. Is the CLEC selling -- when a CLEC offers a
14 business local exchange service through UNE-P, is it
15 correct to say that the CLEC is selling business
16 services to its end users?

17 A. It is selling, but it's retailing or
18 reselling services of Qwest.

19 Q. And where does it say in the Section 1.32
20 that a resaler would not be identified as an entrant or
21 a market participant?

22 A. Well, it doesn't really say that anywhere,
23 and that's why I called the Department of Justice and
24 talked to several of their lawyers about this issue.
25 And I described Washington's case and the dispute on

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1 both sides, and that's in part the basis of my
2 distinction here.

3 And according to the folks at DOJ, and I
4 realize this is hearsay, but they deal with this day in
5 and day out, and they interpret them day in and day out,
6 they said that whether they would consider resale or
7 UNE-P to be a committed entrant would -- in other words,
8 it would go to the competitive significance, so they
9 would give little weight to resale or resalers because
10 they are not the underlying provider.

11 Q. Can you please identify the employee with
12 whom you spoke that you reference on line 525?

13 A. Well, I will, but I told him I wouldn't do
14 any of this with attribution. I mean I could give you
15 his name, but I didn't -- I told him it was just for a
16 general discussion, so I feel -- I don't really want to
17 do that, but if ordered to, I certainly will.

18 MS. ANDERL: Your Honor, it's been put in
19 issue, I think it's appropriate unless MCI wishes to
20 withdraw this portion of the testimony. It seems as
21 though they are relying on this to further their cause,
22 and I believe I'm therefore entitled to explore it a
23 bit.

24 JUDGE MACE: Ms. Singer Nelson.

25 MS. SINGER NELSON: If I may respond. I

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1 don't think that the specific identity of the person to
2 whom Mr. Gates spoke is necessary for the Commission to
3 make an evaluation as to Mr. Gates's opinion. Mr. Gates
4 has stated under oath that he did call an employee of
5 the Department and discuss the situation, and he
6 received the response that he states in his testimony
7 that he received.

8 Experts are entitled to rely on many things
9 for their opinion, including those things that other
10 experts would reasonably rely upon in that field, and I
11 think a discussion that Mr. Gates had with an employee
12 of the Department of Justice relating to this issue
13 would be something that's legitimately reliable under
14 those circumstances.

15 And again, I don't think the specific
16 identity of the person is necessary for the Commission
17 to evaluate the issue.

18 (Discussion on the Bench.)

19 JUDGE MACE: You know, dealing with an expert
20 witness is I recognize that the expert can rely on many
21 sources of information. However, it's a little bit
22 different here, because he's not just relying on this
23 information, he's sort of quoting the employee and
24 bringing that testimony into the record. Under those
25 circumstances, if he doesn't want to or can't reveal the

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1 name of the employee, we would strike the testimony that
2 appears at lines 524 to 528.

3 MS. SINGER NELSON: May I ask whether
4 Mr. Gates would be able to provide that information to
5 the Commission under the protective order in this
6 proceeding.

7 CHAIRWOMAN SHOWALTER: Why would that be
8 confidential?

9 MS. ANDERL: Your Honor, I would object to
10 that.

11 CHAIRWOMAN SHOWALTER: Why would that be
12 confidential?

13 JUDGE MACE: It's not a trade secret or
14 sensitive commercial information.

15 MS. SINGER NELSON: Right, but it would be
16 something that would at least protect that person from
17 any type of --

18 CHAIRWOMAN SHOWALTER: Listen, if you're
19 going -- if this witness is going to recount in detail
20 what somebody said, then the parties have a right to
21 know who it is who said it and who that was. This
22 witness can state his general opinion, and it's okay for
23 us to know that he consulted with DOJ in forming that
24 opinion, but not going one step below in detail as to
25 what DOJ said. Otherwise, what's happening is you're

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1 bringing in basically expert testimony from DOJ without
2 us knowing if it is an expert or who is it or it's not
3 available to any kind of cross-examination.

4 THE WITNESS: Could we have a minute to talk
5 amongst ourselves?

6 CHAIRWOMAN SHOWALTER: Maybe we should have
7 dinner.

8 JUDGE MACE: Yes, why don't we have our
9 dinner break at this point, and we'll resume at 7:00.

10 (Dinner recess taken at 5:55 p.m.)

11

12 E V E N I N G S E S S I O N

13 (7:00 p.m.)

14

15 JUDGE MACE: Ms. Anderl.

16 MS. ANDERL: I believe when we left off, Your
17 Honor, there was going to be a consultation between
18 Mr. Gates and Ms. Singer Nelson with regard to the
19 identity of the DOJ employee.

20 JUDGE MACE: Oh, yes, thank you for
21 refreshing my memory.

22 MS. SINGER NELSON: Would you please direct
23 me to the page and line of that discussion in
24 Mr. Gates's testimony again.

25 MS. ANDERL: Yes, I have page 21 of Exhibit

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1 504, and it's lines 522 through 528. That's the whole
2 Q&A.

3 MS. SINGER NELSON: Under the circumstances,
4 MCI has no objection to the striking of the Q&A from
5 lines 22 through 28.

6 JUDGE MACE: Well, on that basis, we will
7 strike that testimony.

8 BY MS. ANDERL:

9 Q. Mr. Gates, turn to page 29 on that same
10 exhibit. There at line 741, there's the fourth of four
11 bullet points listed. Do you see that?

12 A. Yes, I do.

13 Q. Now you're recommending that the Commission
14 at least for purposes of this case establish a threshold
15 market share for Qwest of 55% or lower before it grants
16 competitive classification; is that right?

17 A. Yes, assuming that these other parameters are
18 also met.

19 Q. Right. And do you know if the Commission has
20 ever before applied such a standard in a competitive
21 classification docket?

22 A. I do not know.

23 Q. And do you know when the statute establishes
24 a market share test such as the market share test that
25 you have established here in bullet point four?

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1 A. Well, I believe the statute -- I believe this
2 proposal is an attempt to quantify the statutory
3 requirements. The statute doesn't mention any
4 particular numbers, but it does refer to the issues
5 associated with these parameters.

6 Q. Isn't each of the parameters a market share
7 parameter?

8 A. No, it's not.

9 Q. Well, let see, isn't the first bullet point,
10 require presence of at least three CLECs providing
11 services?

12 A. Yes, and there's no mention of market share
13 there.

14 Q. Not as a percent, but it does require a
15 certain minimum number of market participants; isn't
16 that right?

17 A. Yes, one of which will be providing services
18 from its own switch.

19 Q. And the second bullet point has a market
20 share test in it?

21 A. Yes.

22 Q. And the third bullet point as well?

23 A. Yes, in its attempt to get at market power.

24 MS. ANDERL: I have no other questions for
25 this witness, Your Honor.

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1 JUDGE MACE: Ms. Watson.

2 MS. ANDERL: Oh, thank you, Mr. Sherr has
3 reminded me that I probably want to move the cross
4 exhibits.

5 JUDGE MACE: Thank you.

6 MS. ANDERL: I would like to move all of the
7 Exhibits 511 through 521 inclusive.

8 JUDGE MACE: Any objection to the admission
9 of those proposed exhibits?

10 MS. SINGER NELSON: As long as they're
11 admitted under the terms that were discussed when each
12 of those exhibits were discussed, I have no objection.

13 JUDGE MACE: I will admit the exhibits.

14 And now, Ms. Watson.

15

16 C R O S S - E X A M I N A T I O N

17 BY MS. WATSON:

18 Q. Good evening.

19 A. Good evening.

20 Q. If you could please turn to your rebuttal
21 testimony, which is in Exhibit 504, I have page 29.

22 A. Yes, we were there when we left with Qwest,
23 so it's very convenient.

24 Q. Right. And I'm going to refer you to the
25 four prong test that you proposed that the Commission

1182

1 use in deciding this case. Would you please briefly
2 describe the basis for this four pronged test?

3 A. Yes. In proceedings like this, we frequently
4 have carriers that say you haven't met a particular
5 standard, and that's usually the focus of testimony.
6 And while we have made that same statement in this case,
7 we also wanted to provide some constructive guidelines
8 or help to the Commission in interpreting the statutory
9 requirements, because they are necessarily broad and
10 vague to allow the Commission a maximum amount of
11 latitude.

12 So what we have tried to do with these four
13 parameters is to take the effective competition ideas
14 from the statute and quantify them in a way that mixes
15 or weights the different forms of competition. You will
16 see in these four parameters we talked about resale, we
17 talked about UNE loop, we talked about owned loops, and
18 we include them together and weight them in a way.

19 Let's just go through them real briefly. The
20 first one --

21 Q. Actually, I just wanted you to give the basis
22 for them. They're listed out pretty clearly in the
23 testimony, if that's okay, unless you're going to give
24 the basis for each prong.

25 A. I see, I think I understand what you're

1183

1 asking. I can give you a basis for each prong I suppose
2 to help you understand kind of the support for each
3 parameter; is that what you're looking for?

4 Q. I'm looking for a brief explanation as to
5 where this four pronged test came from, and I think that
6 I got a sufficient answer. So if counsel wants to
7 follow up on redirect, they can do that.

8 A. That's fine.

9 Q. Thank you.
10 You discuss the horizontal merger guidelines
11 in your testimony, correct?

12 A. Yes.

13 Q. And the merger guidelines were developed by
14 DOJ and FTC, correct?

15 A. Yes.

16 Q. I'm going to refer to those two agencies
17 collectively as the agency in my next questions. The
18 merger guidelines were developed to evaluate whether the
19 agency would challenge a horizontal merger; is that
20 correct?

21 A. Yes, it's one step in the process. It
22 actually is a process, excuse me, yes.

23 Q. Would you please turn to Exhibit 224, which
24 is the horizontal merger guidelines.

25 CHAIRWOMAN SHOWALTER: What was the exhibit?

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1 MS. WATSON: I'm sorry, 224.

2 JUDGE MACE: If you will wait for just a
3 moment until we get there.

4 BY MS. WATSON:

5 Q. I would like you to turn to page 1 of that
6 exhibit, and I would like to turn your attention to the
7 second paragraph under Section 0, and about four lines
8 down there's a sentence that begins, because of specific
9 standards. Do you see that sentence?

10 JUDGE MACE: I'm not sure that you have the
11 same page, Mr. Gates.

12 THE WITNESS: I do.

13 JUDGE MACE: Oh, you have a different
14 version, I'm sorry.

15 THE WITNESS: Yes, I do have a different
16 version, but I'm on the right section, and I did find
17 the cite. Thank you though.

18 Because the specific standards, is that the
19 question?

20 MS. WATSON: Yes.

21 THE WITNESS: Or the sentence?

22 MS. WATSON: Yes.

23 THE WITNESS: Yes.

24 BY MS. WATSON:

25 Q. Would you please read that sentence.

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1 A. Yes. Aloud?

2 Q. Yes, please.

3 A. Okay.

4 Because the specific standards set forth
5 in the guidelines must be applied to a
6 broad range of possible factual
7 circumstances, mechanical application of
8 those standards may provide misleading
9 answers to the economic questions raised
10 under the antitrust laws.

11 Q. Is it fair to say that the agency recognizes
12 that the merger guidelines should not be applied
13 mechanically?

14 A. Yes.

15 Q. And the guidelines state that the agency will
16 apply the standards contained in the guidelines
17 reasonably and flexibly to the particular facts and
18 circumstances of each merger, correct?

19 A. Generally I would agree with that. I would
20 say that these guidelines are much like an alarm. When
21 you get to certain levels, then you have to pay
22 attention, and you have to investigate further.

23 Q. Okay.

24 A. Those are the safe harbor guidelines.

25 Q. The market share and market concentration are

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1 not the only considerations when evaluating mergers, are
2 they?

3 A. No, not really, although I was the MCI
4 witness in two major mergers, the MCI WorldCom and the
5 MCI Sprint mergers, and we applied and had to deal with
6 all of these DOJ merger guidelines. And as I understand
7 it, the MCI Sprint merger was denied in significant part
8 because the market share would have reached something
9 close to 30%.

10 Q. Okay. I'm actually going to go through some
11 of those considerations.

12 A. Okay.

13 Q. And we can go through those. So in addition
14 to market share and market concentration, another
15 consideration is potential adverse competitive effects,
16 correct?

17 A. Could you point me to a section in the
18 guidelines?

19 Q. Sure. I'm going to go ahead and refer to the
20 page as well for the record. It's Exhibit 224, page 3,
21 Section 0.2. And there's actually a sentence, I believe
22 it's the last sentence of the paragraph, of the last
23 paragraph on that page, starts with, the process of
24 assessing market concentration, and what I'm going to do
25 is go through those things listed in that sentence. Do

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1 you see that sentence?

2 A. Yes, I do.

3 Q. Okay. So one other consideration is
4 potential adverse competitive effects, correct?

5 A. Yes, that's the particular effect that they
6 deal with when you reach the safe harbor guidelines and
7 it becomes highly concentrated, they refer to those
8 potential adverse competitive effects.

9 Q. The analysis of adverse competitive effects
10 includes an analysis of products produced by the merging
11 companies and how closely related those products are; is
12 that correct?

13 It may be helpful for you to turn to Section
14 2.211, which is on page 23.

15 CHAIRWOMAN SHOWALTER: I'm assuming this is a
16 preliminary question getting to a question about this.

17 MS. WATSON: There is a point at the end of
18 it, I do want to walk through these things with him.

19 THE WITNESS: You said Section 2.211?

20 MS. WATSON: Correct.

21 THE WITNESS: And what was your point?

22 BY MS. WATSON:

23 Q. My question to you was, the analysis of
24 adverse competitive effects includes an analysis of the
25 products produced by the merging companies and how

1188

1 closely related those products are?

2 A. I think generally that's one of the things
3 that this section discusses.

4 Q. Entry is also a consideration when evaluating
5 merger, true?

6 A. I don't know what you mean by entry. I mean
7 if you're evaluating a merger, both firms are already in
8 the market, so I guess --

9 Q. I'm talking about ease of entry into the
10 market.

11 A. Ease of entry in what regard? I mean I know
12 we read that in the guidelines, but for purposes of this
13 case, I'm trying to understand in a merger situation
14 that you're referring me to how does entry affect this,
15 what are you referring to?

16 Q. Well, right now I'm just going through the
17 merger guidelines, which you discuss pretty extensively
18 in your testimony, and when I say entry, I mean ease of
19 entry in the general meaning of the term.

20 A. Okay, that's certainly an issue.

21 Q. Ease of entry if it's great enough can result
22 in a merger that will not likely create or enhance
23 market power, correct?

24 A. No, I -- we're talking in such generalities
25 here, let me give you an example where I can't say yes.

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1 When we talk about ease of entry, we've heard Qwest
2 talking about UNE-P and how easy you can get UNE-P
3 anywhere in the state, but that doesn't result in
4 effective competition. It's easy and it's quick because
5 it doesn't require a commitment on the part of the
6 entrants. They're simply using Qwest facilities and
7 services and reselling them.

8 Now the point that I'm talking about is
9 commitment or a committed entrant requires an
10 investment. So ease of entry may appear to be easy such
11 as UNE-P, but it doesn't really have a competitive
12 effect. That's the only distinction I was making with
13 your statement.

14 Q. And I'm not actually getting into those
15 details right now. I would like to stay pretty general.

16 A. Okay.

17 Q. In going through the merger guidelines. And
18 if I could just turn your attention to page 25, Section
19 3.0, my next two questions, well, my next two questions
20 are going to be based on this first paragraph there, so
21 if you could just have that paragraph in mind.

22 A. 3.0?

23 Q. Yes, sir.

24 A. Okay. And you said ease of entry, but I
25 would note on the next page it talks about committed

1190

1 entry and the difference.

2 Q. Could I have you read the first sentence in
3 3.0.

4 A. Sure.

5 A merger is not likely to create or
6 enhance market power or to facilitate
7 its exercise if entry into the market is
8 so easy that market participants after
9 the merger either collectively or
10 unilaterally could not profitably
11 maintain a price increase above
12 pre-merger levels.

13 Q. Thank you.

14 Another consideration under the merger
15 guidelines is the efficiencies gained by the merger that
16 can not be gained through other means; is that correct?

17 A. Yes. Can you point me to a section?

18 Q. Yes, page 3, Section 0.2.

19 A. Page 3?

20 Q. Yes, I'm going back to that same sentence
21 that listed the other considerations, and what I had
22 hoped to do was just tick off those considerations.

23 A. Okay. My one distinction, and I'm trying to
24 make this quick and easy, but when you talk about entry,
25 I don't believe these guidelines consider resale as an

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1 entry vehicle for purposes of calculating HHI or for
2 determining competitive significance. So we can talk
3 about ease of entry, but I won't agree that UNE-P or
4 total service resale is one of those.

5 Q. And at this point we're not talking about
6 UNE-P.

7 A. Okay.

8 Q. Or resale.

9 So under the merger guidelines, you would
10 agree that efficiencies gained by the merger is also
11 another consideration in evaluating a merger?

12 A. Yes.

13 Q. And a final consideration listed in that
14 sentence is failure, which is whether either party to
15 the merger would fail without the merger; is that
16 correct?

17 A. Yes.

18 Q. Earlier in response to a question from
19 Ms. Anderl, you agreed that whether a merger should be
20 challenged is a different question than whether
21 competitive classification should be granted; is that
22 correct?

23 A. Generally. I was trying to strike a
24 distinction between a merger analysis and this analysis.

25 Q. Well, just because a merger shouldn't be

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1 allowed doesn't mean that cost of service rate
2 regulation should be imposed on the largest firm in the
3 market, correct?

4 A. Well, no, there are plenty of other reasons
5 to impose rate of return regulation on the largest firm
6 in the market, especially when it's the monopoly and
7 dominant firm.

8 Q. But a question of whether the merger should
9 be allowed is different than whether --

10 A. Absolutely.

11 Q. -- rate regulation --

12 A. Yes. But the tool, the HHI measure for
13 determining dominance and market concentration is
14 valuable in both exercises.

15 Q. If you would turn to Section 1.52, which is
16 on page 17. In the first paragraph under the bold
17 heading:

18 The merger guidelines acknowledges that
19 market share and market concentration
20 may overstate or understate the
21 competitive significance of a particular
22 firm in a market.

23 Correct?

24 A. I'm sorry, I don't see that, where was it
25 again, under 1.52?

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1 Q. Yes, that first paragraph underneath the bold
2 but right above the subheading.

3 A. Yes. And would you repeat your statement?

4 Q. I will.

5 The merger guidelines acknowledges that
6 market share and market concentration
7 may overstate or understate the
8 competitive significance of a particular
9 firm in the market.

10 Correct?

11 A. Yes, and more specifically it's talking about
12 the likely future competitive significance, yes. I
13 think that's very important and something that's been
14 completely ignored in this docket.

15 Q. Would you please turn to your rebuttal
16 testimony, Exhibit 504, page 28. At line 711, you state
17 that Staff did not calculate a post competitive
18 classification HHI analysis, correct?

19 A. Yes, that was my previous point that I just
20 made.

21 Q. And the merger guidelines discusses post
22 merger HHI, correct?

23 A. Yes.

24 Q. In a merger, the market share firms changes
25 as a result of the merger, correct?

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1 A. In a static analysis, that's correct. If you
2 looked at just one point in time, one day it might be
3 10% each, and the next day it might be 20%. But the
4 goal, of course, or what you need to be concerned with
5 is how that market share might change in the future.

6 Q. Does granting competitive classification by
7 itself alter market share?

8 A. I think it seriously will. Qwest wouldn't be
9 here asking for this regulatory flexibility if they
10 didn't think that they would benefit from it. So I
11 would think that at a minimum their market share would
12 increase by some amount, and even a 1% increase would
13 increase the HHI by almost 150 points.

14 Q. But Qwest's market share would be the same
15 whether the Commission grants or denies the -- based on
16 the granting or denial of the petition; isn't that
17 correct?

18 A. On that day it's not likely to change, but --
19 actually, it would be a fruitless exercise to go through
20 all this work and have all these witnesses and
21 testimonies if they didn't think they were going to
22 benefit from it. They claim they need this flexibility,
23 although they haven't really used the flexibility of the
24 previous case, they claim they need it to respond to
25 competition. That's going to do one of two things.

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1 One, it's going to stop their supposed loss of lines, or
2 two, and this is the more likely scenario, they're going
3 to gain market share back, in which case the HHI would
4 increase.

5 Q. If you would turn to Exhibit 224, page 1. In
6 the second paragraph of Section 0, about seven lines
7 down, there's a sentence that begins, moreover
8 information is often incomplete. Do you see that
9 sentence?

10 A. Not yet. Section 0?

11 Q. Yes.

12 A. The first --

13 Q. The second paragraph, seven lines down.

14 A. Yes, I'm there.

15 Q. Would you please read that sentence.

16 A. (Reading.)

17 Moreover, information is often
18 incomplete, and the picture of
19 competitive conditions that develops
20 from historical evidence may provide an
21 incomplete answer to the forward looking
22 inquiry of the guidelines.

23 And that's exactly what we have been saying
24 in our testimony, you can't look at a static moment in
25 time. We should be looking at how Qwest might act after

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1 it receives this flexibility.

2 Q. Doesn't the sentence address the historical
3 evidence?

4 A. Yes, that it's often incomplete.

5 Q. Would you please turn to your direct
6 testimony, which is in Exhibit 501.

7 A. Yes.

8 Q. I would like you to go to page 17, please.
9 In particular, I would like you to look at page 4, or
10 I'm sorry, line 400 to 402. You state there that CLECs
11 have generally sought to use UNEs over resale because
12 the economics are more attractive, correct?

13 A. Yes, the economics.

14 Q. I'm sorry.

15 A. It's okay.

16 Q. It's getting late in the day.

17 A. Yes.

18 Q. Would you please explain how the economics of
19 UNEs are more attractive than the economics of resale?

20 A. Okay. Well, it is a different cost analysis
21 for each. For resale, the Commission went through an
22 avoided cost analysis to determine what retailing costs
23 Qwest would avoid, and that in this case turned out to
24 be, not in this case, but in Washington state turned out
25 to be about 14.74%. The UNE calculation or the cost

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1 calculation is based on a TELRIC or TSLRIC standard and
2 is set based on cost. So the cost level of the UNE
3 doesn't change over time whereas resale rates might
4 change over time if the retail, excuse me, the resale
5 amount might change over time if retail rates change.
6 So the difference is one is tied to retail rates, the
7 other one is tied to a cost standard.

8 Q. And is it your testimony that UNE-P is really
9 just resale under different rates, terms, and
10 conditions?

11 A. Yes.

12 Did you say UNE-P?

13 Q. Yes.

14 A. Yes.

15 Q. And you also testified that resale is not
16 effective competition, correct?

17 A. That's correct.

18 Q. Is this because resale is not price
19 constraining?

20 A. Yes. I mean we have been through dozens of
21 cases in the last 20 years, and resale has never been
22 considered an effective form of competition, and it's
23 frequently referred to as not price constraining, and
24 that is what, of course, this Commission found in the
25 previous case.

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1 Q. And resale is not price constraining because
2 the wholesale price rises in lock step with the retail
3 price, correct?

4 A. No, that's not why it's not price
5 constraining. It's not price constraining because the
6 dependent competitor is totally reliant upon the
7 underlying carrier. A resaler only exists by virtue of
8 reselling existing services of Qwest. And while that
9 has some benefit to consumers, it doesn't provide price
10 constraining competition.

11 Q. The reason that you just gave isn't the
12 reason that this Commission gave when it concluded that
13 resale was not price constraining, is it?

14 A. I don't recall exactly that paragraph. I
15 don't remember it.

16 Q. But you did read that order?

17 A. Oh, yes.

18 Q. Okay.

19 A. Whatever the basis, I agree with their
20 conclusion.

21 Q. Is it fair to say that you agree that the
22 primary difference between UNE-P and resale is price?

23 A. Yes, there are some other differences in the
24 way you order and provision them, but generally it's a
25 pricing distinction.

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1 Q. And you stated earlier that UNE-P is price
2 based on TELRIC or TSLRIC, correct?

3 A. Yes.

4 Q. I'm only going to refer to TELRIC in the next
5 couple of questions if that's okay.

6 A. I think that's more accurate.

7 Q. Okay. TELRIC is a hypothetical measurement
8 of what it would cost to build the most efficient
9 network today using the lowest cost network
10 configuration; is that correct or a fair statement of
11 what TELRIC is?

12 A. I will agree very generally. I spend a lot
13 of time testifying on TELRIC issues, so I like to be
14 very specific when I talk about what is TELRIC and what
15 isn't. But if you want to talk in just broad
16 generalities, I will agree to that.

17 Q. Do you have a brief more accurate statement
18 that you could give?

19 MS. SINGER NELSON: Your Honor, I think the
20 FCC rules spell out what TELRIC is, what makes TELRIC
21 up. So as far as if Ms. Watson is looking for a legal
22 definition of TELRIC, I would actually prefer that you
23 ask the witness questions based on the legal definition
24 of TELRIC as is used in the FCC rule.

25 MS. WATSON: I'm actually not looking for a

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1 legal definition. I just wanted to make sure that the
2 witness is on the same or at least that the witness had
3 an idea and was comfortable with the term as I'm using
4 it.

5 JUDGE MACE: Well, I think if the witness can
6 provide a brief answer, that's fine. I mean I think
7 there's a number of alternatives you could use here.
8 Why don't we let the witness see if he can take a crack
9 at it if it's different than what Ms. Watson stated.

10 THE WITNESS: Yeah, I don't see any reason to
11 spend ten minutes discussing TELRIC. I don't know where
12 she's going with the line of questions, and if it
13 becomes important to make a distinction later, I guess I
14 can do that.

15 JUDGE MACE: Very well.

16 MS. WATSON: That's fair.

17 BY MS. WATSON:

18 Q. Isn't it true that TELRIC prices are
19 determined by state commissions through cost dockets?

20 A. Yes.

21 Q. And TELRIC prices do not increase or decrease
22 without commission action, correct?

23 A. Yes.

24 Q. So UNE-P prices do not rise in lock step with
25 retail prices, correct?

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1 A. That's true.

2 Q. Would you agree then that UNE-P is at least
3 potentially cost constraining?

4 A. Yes, and I believe I say that in my
5 testimony. That's why in the continuum of competition
6 it's above total resale but below UNE loop, that it does
7 have a positive effect on the market, yes.

8 Q. Would you please turn to your rebuttal
9 testimony, Exhibit 504, page 7, and I'm going to turn
10 your attention to line 170. You state there that:

11 Mr. Wilson assumes that all modes of
12 entry are equal in their ability to
13 provide competition to Qwest services.

14 Correct?

15 A. Yes, based on the responses to
16 interrogatories and his general testimony.

17 Q. Can you point to where in Mr. Wilson's
18 testimony he states this assumption?

19 A. I probably could. Let me just tell you
20 generally my impression. Mr. Wilson talks about resale,
21 he talks about voice over IP, he talks about YFI and
22 various other forms of what he considers to be
23 competition. And he doesn't seem to distinguish, in
24 fact he does not distinguish, between the weight that
25 one would give those various forms of entry and

1202

1 including wireless.

2 And then we did ask him a very specific
3 question, does Staff consider competition or any form of
4 competition to be effective competition or something to
5 that effect. I apologize for not having it at my
6 recollection, but he answered specifically that yes,
7 that they are the same, and I think he provided some
8 clarification on the stand the other day and basically
9 changed that response.

10 But it was my impression in reading Staff's
11 testimony that the fact that there were all these
12 different supposed forms of competition, they were all
13 equal in their effect, and because of their existence or
14 their potential to be used that they were effective
15 competition, and I disagree with that.

16 Q. But, in fact, Mr. Wilson does not state the
17 assumption that all modes of entry are equal in their
18 ability to provide competition; isn't that correct?

19 A. I think if you read Mr. Wilson's testimony
20 from beginning to end, that would be your conclusion.

21 Q. But -- I'm sorry.

22 A. But I don't know if I can point you to
23 something specific without looking through his testimony
24 to support that. That was my perception, and based on
25 the cross that I have read and observed, I do believe

1203

1 that Staff has failed to weight the various forms of
2 entry.

3 Q. But this assumption is an assumption that you
4 made based on your reading of Mr. Wilson's testimony and
5 exhibits, correct?

6 A. Yes, and answers to discovery and his limited
7 cross and statements in both his direct and rebuttal.

8 Q. Well, your testimony was prepared before much
9 of that happened; isn't that correct?

10 A. Well, this is my rebuttal.

11 Q. Correct.

12 A. So we did have the benefit of discovery and
13 the direct testimony.

14 Q. But not the testimony on the stand?

15 A. Correct.

16 Q. Please turn to page 19 of that same exhibit.
17 At lines 472 to 474 you state that:

18 Staff calculated HHI using an erroneous
19 assumption that a cumulative market
20 share of all CLECs is an appropriate
21 measure.

22 Correct?

23 A. Yes.

24 Q. Is this an assumption that is explicitly
25 stated in Mr. Wilson's testimony?

1204

1 A. No. I believe it was based on the review of
2 the documents that we saw in the case. Instead of
3 summing the squares of the market share, it appeared
4 that he included all of the market shares of CLECs. In
5 other words, found Qwest's market share and assumed the
6 rest was one CLEC.

7 Q. Are you aware that Staff was complying with
8 an order to aggregate CLEC data?

9 A. An order from who?

10 Q. The Commission.

11 A. To aggregate the data?

12 Q. Yes, to --

13 A. Well, the data could have been aggregated
14 without summing the -- it could have been done the other
15 way. It could have been done the more appropriate way,
16 which would have reduced the CLEC market share.

17 Q. But the raw CLEC data, in order to protect
18 the CLEC identities, Staff was instructed to aggregate
19 that data.

20 A. Yes, but that doesn't prevent Staff from
21 having done the HHI calculation correctly with the
22 underlying data. That still would have protected all of
23 the competitive data from the carriers. Nobody would
24 have been able to recreate or go back into that
25 calculation to determine those market shares. It would

1205

1 have been impossible.

2 So Staff had the data. In fact, Staff and I
3 believe Public Counsel were the only parties that had
4 the data, and they could have done it correctly. My
5 partner, Mr. Stacy, had to do it a different way because
6 he didn't have the underlying data, but clearly Staff
7 did.

8 Q. And Public Counsel didn't receive the data
9 until the eve of the hearing; isn't that correct?

10 A. That's correct.

11 Q. Would you please turn to Exhibit 505. This
12 is the article written by Dr. Timothy Hall regarding
13 voice quality over VoIP; is that correct?

14 A. Yes, that's correct.

15 Q. And Dr. Hall's study was conducted in 1999?

16 A. I'm looking for a date. Do you see a date on
17 the document? I'm not disagreeing with your statement,
18 I just am trying to confirm it here.

19 Q. I don't see one right off the bat, but I do
20 remember having it. If you would just accept that
21 subject to check, and if it's wrong, we can --

22 A. I will.

23 Q. Are you familiar with best path routing
24 software techniques and enhanced protocols such as
25 multiprotocol label switching and session initiation

1206

1 protocol?

2 A. I'm generally familiar with them. I think I
3 know what the acronyms are, but I couldn't tell you how
4 they function technically.

5 JUDGE MACE: I would just ask you to try to
6 go a little slower when you're running through those
7 lists of technical words.

8 MS. WATSON: I will certainly try, Your
9 Honor.

10 BY MS. WATSON:

11 Q. Best path routing software techniques and
12 enhanced protocols can enhance voice quality over the
13 public Internet to near toll quality.

14 JUDGE MACE: To near?

15 MS. WATSON: Near toll quality.

16 JUDGE MACE: Toll quality.

17 BY MS. WATSON:

18 Q. Is that correct?

19 A. I believe that's a statement out of a
20 document that I have read somewhere. Maybe it was in a
21 piece of testimony I don't recall. That may be true.
22 They are making advances in voice quality over voice
23 over IP certainly since this article on how to measure
24 voice quality was written. So I would agree generally
25 that there are improvements in voice quality.

1207

1 Q. Okay.

2 Managed or engineered private IP
3 networks can provide VoIP with the same
4 voice transmission quality as the public
5 switched telephone network.

6 Would you agree with that?

7 A. I think that depends just entirely on just a
8 numerous number of issues. For instance, the hardware,
9 the routing software, the length of the links
10 themselves. There are so many things that feed into
11 that. Can you do it in a experimental classroom sort of
12 situation? Sure, you can get the quality up. Generally
13 speaking though, it still lacks severely.

14 I have had some experience with voice over IP
15 with certain clients, and there's a lot of clipping
16 still in certain situations, not every situation. It's
17 not to the point yet where you can rely on voice over IP
18 quality. And then when you get past that voice quality
19 issue, you still have the other technical issues like
20 power issues and survivability and 911. So voice is
21 important, it's not quite there yet, but we're getting
22 there on voice, but we still haven't overcome the E911
23 issues and other important technical issues.

24 Q. I didn't want to interrupt you there, but I
25 would like you to keep your answers focused if at all

1208

1 possible, because it is getting a bit late.

2 A. Just exciting stuff.

3 Q. It is very interesting.

4 Best path routing technology was not widely
5 used in 1999; is that correct?

6 A. I don't know.

7 Q. Okay. Would you agree that Dr. Hall's method
8 for testing voice quality is still valid today?

9 A. Really this article talks about trying to
10 determine parameters to measure voice over IP voice
11 quality, so.

12 Q. And I'm asking about the method that he used
13 to test voice quality, that method is still valid today;
14 is that correct?

15 A. I would think so. I don't know why it
16 wouldn't be, but I'm not sure.

17 Q. Are you familiar with the European
18 Telecommunications Standards Institute?

19 A. No.

20 Q. Okay. I'm going to ask you a few questions,
21 we'll see where we go with it. I'm also going to refer
22 to it as ETSI, E-T-S-I.

23 CHAIRWOMAN SHOWALTER: What is that?

24 MS. WATSON: The European Telecommunications
25 Standards Institute.

1209

1 CHAIRWOMAN SHOWALTER: Which he just said
2 he's not familiar with?

3 MS. WATSON: Right.

4 MS. SINGER NELSON: So I would object to any
5 questions on that basis since the witness has already
6 stated that he's not familiar with it.

7 MS. WATSON: I would like to ask him about a
8 report that they produced, and it was marked as a
9 cross-examination exhibit.

10 JUDGE MACE: Is that 509?

11 MS. WATSON: Yes. We actually only submitted
12 the press release, not the entire exhibit, because it
13 was quite technical.

14 JUDGE MACE: Well, again, the witness
15 indicated he's not familiar.

16 CHAIRWOMAN SHOWALTER: I guess just ask the
17 question first, and then we'll hear the objection.

18 MS. WATSON: Right, I think that -- well, I
19 will ask the question.

20 JUDGE MACE: Go ahead.

21 BY MS. WATSON:

22 Q. So it's fair to say that you're not familiar
23 with the ETSI report?

24 A. That's correct.

25 Q. Okay. And you have a copy of Exhibit 509?

1210

1 A. Yes, it appears to be a -- it's titled news
2 release.

3 Q. And the date on that is June 25th, 2002?

4 A. Yes.

5 Q. On page 1, the first paragraph, I'm sorry,
6 the first sentence in the second paragraph, it begins,
7 the report analyzes; do you see that sentence?

8 A. Yes.

9 Q. Would you please read that sentence.

10 MS. SINGER NELSON: Your Honor, I would be
11 willing to stipulate that the document says what it
12 says.

13 MS. WATSON: Actually, I didn't want to offer
14 it for really what it said. The purpose of having him
15 read it was to ask him if he agreed with the statement.

16 THE WITNESS: Well, I have never read the
17 report, so I can't agree on any statements about the
18 report, but I would be happy to read it and answer
19 appropriately.

20 JUDGE MACE: Go ahead.

21 A. (Reading.)

22 The report analyzes the results of a
23 special test event for voice over
24 Internet protocol, VoIP, speech quality
25 and confirms that VoIP voice quality can

1211

1 live up to the expectations of today's
2 telecom users providing to network
3 operators worldwide that the equipment
4 tested will not cause unacceptable voice
5 deterioration.

6 BY MS. WATSON:

7 Q. And my question to you is, do you agree with
8 that statement?

9 A. I have no basis to agree or disagree. I
10 don't know. I mean it could be. This could be an
11 equipment provider, you know, trying to sell some piece
12 of equipment. I don't know, I just have no basis for
13 answering that question.

14 Q. And would you please turn to Exhibit 510.
15 The last sentence on page 2 indicates that the tests
16 conducted by ESTI were similar in nature to Dr. Hall's
17 1999 test.

18 JUDGE MACE: I'm sorry, where are you,
19 counsel?

20 MS. WATSON: Exhibit 510, second page.

21 JUDGE MACE: Yes, page 2.

22 MS. WATSON: There's actually a footnote on
23 that page, and I'm not referring to that. I'm referring
24 to the last sentence in the text.

25 A. I'm sorry, you've lost me. Where are we?

1212

1 BY MS. WATSON:

2 Q. Okay, it's Exhibit 510.

3 A. Yes.

4 Q. The second page or page 2.

5 A. Yes.

6 Q. There's an incomplete paragraph and a
7 complete paragraph. I'm looking at the last sentence in
8 the complete paragraph. It starts, the tests were
9 similar in nature.

10 A. Oh, I see that.

11 Q. That sentence indicates that the tests
12 conducted by ETSI were similar in nature to Dr. Hall's
13 1999 test. Do you see that?

14 A. I see that. This appears to be a response
15 from Mr. Williamson. I see that statement, but --

16 MS. SINGER NELSON: Your Honor, I would
17 object to the extent that Staff is asking Mr. Gates
18 questions relating to a response that Mr. Williamson
19 provided to some discovery. I would suggest that it
20 would have been more appropriate for Mr. Williamson to
21 discuss his response to discovery.

22 JUDGE MACE: Ms. Watson.

23 MS. WATSON: I was going to ask this witness
24 to evaluate that statement.

25 CHAIRWOMAN SHOWALTER: Have you asked?

1213

1 MS. WATSON: I wasn't sure if I could
2 proceed.

3 CHAIRWOMAN SHOWALTER: Well, you need to ask
4 the question.

5 JUDGE MACE: Well, there's been an objection.

6 CHAIRWOMAN SHOWALTER: But what's the
7 objection to, what question?

8 MS. SINGER NELSON: She asked Mr. Gates to
9 read the response of Mr. Williamson to the data request.

10 CHAIRWOMAN SHOWALTER: Oh, I see.

11 JUDGE MACE: And it's Mr. Williamson's data
12 request.

13 MS. SINGER NELSON: That's correct.

14 JUDGE MACE: And the witness can -- I suppose
15 you can ask him to evaluate that line, but it is
16 Mr. Williamson's data request.

17 MS. WATSON: And I understand that. I was
18 using this for a fairly limited purpose.

19 JUDGE MACE: Well, just I guess I would say
20 just to expedite matters, if you want to have him look
21 at that sentence and say what's your evaluation of it.

22 CHAIRWOMAN SHOWALTER: Yeah, why don't you
23 have him not read it or have him read it to himself, and
24 then ask him if he --

25 MS. WATSON: Right, I didn't have him read

1214

1 it, it was -- well.

2 JUDGE MACE: Mr. Gates, would you read that
3 last sentence in the paragraph, and if you can give us
4 your evaluation of it.

5 CHAIRWOMAN SHOWALTER: Well, wait a minute,
6 wait. Read the sentence to yourself. Then let's hear a
7 question about it, and then we'll hear whether there is
8 an objection.

9 MS. SINGER NELSON: Thank you.

10 A. I have read the sentence.

11 BY MS. WATSON:

12 Q. Well, my pre-printed question was, does this
13 surprise you, so I suppose I will stick with that
14 question. Does it surprise you?

15 A. I don't understand what you mean by surprise.
16 This appears to be a statement of opinion from
17 Mr. Williamson based on I don't know what, but I don't
18 have any basis to agree or disagree with his opinion as
19 he states it here, so it doesn't surprise me one way or
20 the other I guess.

21 Q. Well, let me go about it a different way,
22 putting Exhibit 510 aside, and I won't offer that
23 exhibit.

24 Referring back to Exhibit 509 and
25 understanding that you haven't read the full report,

1215

1 would it surprise you to learn that a more recent test
2 of voice quality provided over VoIP indicates that voice
3 quality has improved significantly since 1999?

4 A. It would not surprise me to know that voice
5 quality for voice over IP has improved generally over
6 the last few years.

7 Q. Okay. You discuss wireless service in
8 Exhibit 501 starting at page 18; is that correct?

9 A. Yes.

10 Q. And at page, or I'm sorry, and at page 26 of
11 Exhibit 501 you state that enhanced 911 service is
12 available through only a few wireless providers; is that
13 correct?

14 A. Yes.

15 Q. Are you aware that there is an FCC mandate
16 for wireless E911?

17 A. I'm aware that there are numerous dockets and
18 proceedings at the FCC regarding E911, but it's my
19 understanding that E911 will not be mandated for several
20 years, and it will only be mandated for a few hand sets
21 for each provider. So it's going to be very limited,
22 and it's still several years off.

23 Q. So was the answer to my question no?

24 A. I'm sorry, I don't recall the question.

25 Q. My question was, are you aware that there is

1216

1 an FCC mandate for wireless E911?

2 A. I am aware, but I'm also aware that it's
3 years off into the future for compliance.

4 Q. Are you aware that E911 availability is
5 essentially complete in this state with wireless
6 carriers sending callback numbers to the public safety
7 answer points in all counties in this state?

8 A. Wireless?

9 Q. Yes.

10 A. E911 essentially complete? I don't know. I
11 would be surprised. I just finished a national survey
12 on 911 services, and I would be surprised to know that
13 Washington had completed E911 on a statewide basis. I
14 would be very, very surprised.

15 Q. But you don't --

16 A. If that's true, I hope that's true.

17 Q. But you don't --

18 A. But I don't know.

19 Q. I'm sorry.

20 A. I apologize, I don't know.

21 Q. I think you answered my question.

22 Please turn to page 25 of Exhibit 501. At
23 lines 586 to 587, you state that line number portability
24 is not yet available with wireless service, correct?

25 A. Local number portability, yes.

1217

1 Q. Isn't it true that the FCC has mandated
2 number portability for all cellular companies by the end
3 of November of 2003?

4 A. Yes, I think that's in one of my footnotes,
5 but they have mandated it for the last several years,
6 and they keep missing those deadlines, so I sincerely
7 hope they make this one.

8 Q. If we can go back to a few general terms, and
9 I'm not actually asking for detailed definitions but
10 just comparing the terms. My first question is whether
11 being able to offer service is different from offering
12 service?

13 A. Yes, it's very different.

14 Q. And offering service is different from
15 providing service, correct?

16 A. Yes.

17 Q. A company could be offering service but not
18 providing service; is that correct?

19 A. Well, probably be better to talk a little
20 more specifically than so generally, but I think it is
21 possible for a provider to be holding itself out and not
22 actually have a customer.

23 Q. Would you please turn to Exhibit 507, and I
24 would like you to turn to the first page of that
25 exhibit. Towards the bottom of that page, do you see a

1218

1 listing for a restaurant called Elkburger?

2 A. Yes.

3 Q. And would you accept that Elkburger is
4 located in Elk, Washington?

5 A. Yes, based on the address there, I would
6 accept that.

7 Q. Would you please turn to page 3 of that same
8 exhibit. There's a telephone number towards the
9 beginning of the page. Do you see that telephone
10 number?

11 A. Yes.

12 Q. Is that telephone number the same as the
13 telephone number shown on page 1 for Elkburger?

14 A. Yes.

15 Q. And page 3 states, your telephone number,
16 (509) 292-8087, is available for MCI Business Complete,
17 correct?

18 A. Yes, that's what it says.

19 Q. And page 3 indicates that Elkburger may
20 choose from two different plans; is that correct?

21 A. I don't know. As I testified earlier, I
22 don't know what these services are, and I don't know
23 what it means that it's available generally. So I mean
24 it says what it says.

25 Q. One plan that's listed on that page, page 3,

1219

1 is called the MCI Business Complete Unlimited and is
2 offered for \$59.99; is that correct?

3 A. I see that.

4 Q. And the second plan is called MCI Business
5 Complete Advantage and is offered for \$31.99; it's down
6 towards the bottom of page 3.

7 A. Yes, I see that. But, of course, these ads
8 don't mean that MCI has a customer in Elk. And, in
9 fact, I think that's the status of the data in the case
10 is that there are no consumers taking alternative
11 providers via any sort of platform in Elk. So this does
12 say what it says. It appears that these things are
13 available and may be available, whatever that means, in
14 Elk.

15 Q. And each of those plans listed on page 3
16 includes several different telephone features such as
17 voice and data services, correct?

18 A. It appears to be so.

19 Q. Would you please turn to Exhibit 508. On
20 page 1 of that exhibit, do you see a listing for CC's
21 Burgers in Seattle?

22 A. Yes, I do.

23 Q. And the telephone number for CC's Burgers on
24 page 1 is the same phone number as listed on page 3 of
25 that exhibit; is that correct?

1220

1 A. Yes, it is.

2 Q. And the plan choices listed on page 3 of
3 Exhibit 508 are the same as the plan choices listed on
4 page 3 of Exhibit 507; is that correct?

5 A. Yes, they appear to be the same.

6 Q. And the prices for each plan listed in
7 Exhibit 508 are the same as the prices listed in 507; is
8 that correct?

9 A. That appears to be the case, yes.

10 MS. WATSON: At this time I would like to
11 move for the admission of Exhibits 507, 508, and 509.

12 JUDGE MACE: Is there any objection to the
13 admission of those exhibits?

14 MS. SINGER NELSON: Your Honor, I would
15 object on the basis that there has been no foundation
16 laid for Mr. Gates's knowledge relating to these
17 exhibits, so I would object on that basis, there's no
18 foundation.

19 JUDGE MACE: Ms. Watson.

20 MS. WATSON: I think Mr. Gates indicated in
21 his testimony the level of his knowledge based on these
22 exhibits. I'm offering based -- I'm offering them based
23 on, well, I did have a testimony cite, but I don't seem
24 to have it here with me, but it does -- it goes towards
25 his analysis of the state of competition in this state.

1221

1 JUDGE MACE: Ms. Anderl, did you have
2 something to add?

3 MS. ANDERL: Your Honor, I just might add in
4 support of the admissibility, when I cross-examined
5 Mr. Gates on similar documents, he did actually make a
6 point of pointing out to me that his familiarity with
7 the MCI Web site was such that you could typically enter
8 a telephone number and have the Web site tell you
9 whether the service was available for you, and he did
10 not see such a telephone number entered on the exhibit
11 that I had given him. I believe --

12 MS. SINGER NELSON: No, that --

13 MS. ANDERL: -- that that demonstrates a
14 sufficient familiarity with the, by Mr. Gates, of the
15 Web sites and their workings for him to minimally
16 authenticate these documents to have them admitted.

17 MS. SINGER NELSON: I would --

18 JUDGE MACE: Ms. Singer Nelson.

19 MS. SINGER NELSON: My first response to
20 Ms. Anderl's statement is that that is not what
21 Mr. Gates said. Mr. Gates said that in his research of
22 Web sites in general, there typically is a link, and he
23 wasn't aware of whether or not such a link was on the
24 MCI Web site.

25 But it, you know, the problem remains that

1222

1 there has been no foundation laid for the authenticity
2 of these exhibits, and all that Mr. Gates did in
3 response to Staff's questions was read from the exhibits
4 as Staff has attempted to present them, so I just would
5 object to the admission of these exhibits on that basis.

6 JUDGE MACE: Anything else, Ms. Watson?

7 MS. WATSON: Well, it's sort of an inartful
8 response, but I believe that the foundation laid for
9 these exhibits was similar to the foundation laid for
10 other exhibits that contained Web pages. Those exhibits
11 were admitted, and I believe that the admission of these
12 exhibits would be consistent with that ruling.

13 CHAIRWOMAN SHOWALTER: Were those other
14 exhibits admitted over objection?

15 MS. WATSON: Yes.

16 CHAIRWOMAN SHOWALTER: Based on authenticity?

17 MS. WATSON: Yes.

18 CHAIRWOMAN SHOWALTER: I don't actually
19 remember that, but for what purpose are you offering
20 these exhibits?

21 MS. WATSON: There's been a lot of
22 discussions on Elk and whether service can be offered in
23 Elk. And admittedly we found this Web site fairly late
24 in the game, and I wanted to ask Mr. Gates a few
25 questions on those exhibits.

1224

1 exhibits, there's no -- there hasn't been sufficient
2 basis shown to allow their admission, and it's not
3 certain we could give them any weight in any event or
4 not significant weight, so we're not going to admit
5 them.

6 MS. WATSON: And what about Exhibit 509?

7 JUDGE MACE: I'm sorry, I was -- we were
8 primarily talking about -- that's true, the QwestDex
9 search documents, Staff Cross 12 which were 507 and 508.
10 I thought that you had included 509 with them.

11 Well, let me just back up then. 507 and 508
12 are not admitted.

13 And is there an objection to the admission of
14 509?

15 MS. SINGER NELSON: Yes, I would object to
16 the admission of 509 on the basis that this witness has
17 testified that he has not heard of ETSI and has never
18 reviewed any such report that is referred to in this
19 exhibit.

20 MS. WATSON: Mr. Gates did respond to
21 questions. My questions weren't based solely on the
22 content of the ETSI report, but rather his evaluation of
23 what that report, what the press report stated that that
24 report stated. Sorry, that was a little inartful. So I
25 believe to keep the record clear that that exhibit

1225

1 should come in based on Mr. Gates' testimony here
2 tonight.

3 (Discussion on the Bench.)

4 JUDGE MACE: Well, Mr. Gates indicated he had
5 no familiarity with the report, and there just isn't
6 enough to connect his testimony with this piece of
7 evidence that you're proffering, so we're not going to
8 admit this either.

9 Do you have any further cross?

10 MS. WATSON: No, I don't, that was the
11 conclusion of my questions, thank you.

12 MS. ANDERL: Your Honor, I had one brief area
13 to follow up on based on something that Ms. Watson asked
14 about. It might be more efficient to come back to me,
15 or I will be happy to wait.

16 JUDGE MACE: Go ahead.

17 MS. ANDERL: Thank you.

18

19 R E C R O S S - E X A M I N A T I O N

20 BY MS. ANDERL:

21 Q. Mr. Gates, could you please turn to Exhibit
22 504, line 472. You state there that taking the
23 cumulative market share of all CLECs as opposed to
24 taking them individually dramatically understates the
25 HHI. Is that your testimony?

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1 A. That's a typo, thank you, it should say
2 overstates.

3 JUDGE MACE: Where are you, counsel? I'm
4 sorry, I have to ask you for the reference again.

5 MS. ANDERL: Exhibit 504, starting at line
6 472.

7 JUDGE MACE: 472.

8 MS. ANDERL: But apparently Mr. Gates is now
9 making a correction to line 476.

10 JUDGE MACE: So that in line 476, the word
11 understates should be overstates?

12 THE WITNESS: That's correct.

13 BY MS. ANDERL:

14 Q. So then --

15 A. Well, let me explain, I'm sorry. It is late,
16 I apologize. When that statement was referring to the
17 HHI for the CLECs, okay, so --

18 Q. Well, then actually, Mr. Gates, let me ask
19 you though, aren't you responding in the question to an
20 allegation by Qwest and Staff that the HHI indices are
21 overstated, and isn't that allegation an allegation that
22 the indices are overstated with regard to Qwest?

23 A. My question is in this piece of testimony, it
24 says Staff and Qwest argue that the calculated HHIs are
25 overstated.

1227

1 Q. With regard --

2 A. And I did not --

3 Q. Isn't that --

4 A. -- agree.

5 Q. Doesn't that mean with regard to Qwest?

6 A. No. The HHI is not a calculation just for
7 Qwest.

8 Q. Okay.

9 A. We have discussed that at length today. You
10 have to sum all of the market shares, not just Qwest.

11 Q. Okay.

12 JUDGE MACE: So let me clarify then, are you
13 saying that that word understates in line 476 should be
14 changed or not?

15 THE WITNESS: What this calculation does by
16 taking the CLECs as a group, because it's a larger
17 number, and you square a larger number, it makes the HHI
18 greater, so that overstates the HHI for the CLECs, that
19 portion of the calculation.

20 CHAIRWOMAN SHOWALTER: Well, it seems like we
21 do need -- there's the HHI for Qwest and there's this
22 HHI for CLECs, and I'm not sure what was intended in the
23 question or in the response. But I think it would be
24 good if the witness could simply add in the words that
25 he means. That is, if you mean on line 476 to say

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1 overstates the HHI for the CLECs collectively, if that's
2 what you mean, we need to know what you mean before we
3 can understand the questions about it.

4 MS. ANDERL: Yes, well, Your Honor, Mr. Gates
5 just corrected me that there is in his view no HHI for
6 either Qwest or the CLECs, there's only a single HHI
7 number, and I would like to go ahead and pursue a couple
8 of additional questions with him if I might.

9 BY MS. ANDERL:

10 Q. Mr. Gates, were you in the room when
11 Mr. Sherr was questioning Mr. Stacy?

12 A. I believe I was here for the entire time.

13 Q. And did you hear Mr. Stacy agree that
14 aggregating the CLEC market share to a cumulative market
15 share in fact does create a higher HHI than would be
16 produced if the CLECs were taken individually?

17 MS. SINGER NELSON: Your Honor, I'm having a
18 hard time seeing how this line of questioning relates to
19 something that Staff raised, so it seems to me that this
20 is just outside the scope of Staff's questions, and I
21 thought that was really the intent of Ms. Anderl
22 interjecting at this point in time.

23 JUDGE MACE: I guess I understood it as
24 additional cross.

25 MS. ANDERL: It was a follow up. Ms. Watson

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1 did ask about this very passage in the testimony, and I
2 was simply following on with some additional questions.

3 BY MS. ANDERL:

4 Q. So, Mr. Gates, let me ask if you have had a
5 chance to review Exhibit 611. This is a document that
6 was prepared as an illustrative exhibit that Ms. Singer
7 Nelson asked be admitted into the record. I can provide
8 you a copy if you would like.

9 A. I have not reviewed it.

10 MS. ANDERL: May I approach, Your Honor?

11 JUDGE MACE: Yes.

12 THE WITNESS: Thank you.

13 BY MS. ANDERL:

14 Q. Now let me return for a moment to my
15 question.

16 JUDGE MACE: Can you hold on for just one
17 second.

18 MS. ANDERL: Yes.

19 JUDGE MACE: Okay, go ahead.

20 MS. ANDERL: May I?

21 JUDGE MACE: Go ahead.

22 MS. ANDERL: Oh, I'm sorry, I was just
23 waiting.

24 BY MS. ANDERL:

25 Q. Mr. Gates, you were in the room when

1230

1 Mr. Sherr was questioning Mr. Stacy; is that right?

2 A. Yes.

3 Q. Okay. And did you hear Mr. Stacy agree with
4 Mr. Sherr that the HHI would be higher if you took the
5 market share of all of the CLECs together as opposed to
6 taking the individual market shares of the CLECs
7 individually?

8 A. I remember that cross. It was just -- it's
9 not clear in my mind, I don't recall.

10 Q. Indeed, if you look at Exhibit 611, I believe
11 611, Exhibit 611 illustrates that very point.

12 Mr. Gates, do you see the top portion under scenario A
13 shows that if all of the CLEC market shares are taken
14 individually, the HHI is lower than that produced in
15 scenario B if those same market shares are taken
16 cumulatively?

17 A. Yes.

18 Q. And would you accept, Mr. Gates, subject to
19 your check that if there were a scenario C on that
20 exhibit where Qwest's market share were 55% and there
21 were one CLEC with a 45% market share, the HHI would be
22 even higher at 5,050?

23 A. Yes. And as Mr. Stacy pointed out, the real
24 issue here is Qwest's market share, because in any valid
25 approximation of Qwest's market share, it would be at

1231

1 least 75%, perhaps much more, and then the HHI is off
2 the scale, far over 5,000.

3 Q. Okay.

4 A. But in any case, every one of these results
5 is highly concentrated and almost double the safe harbor
6 guidelines and the merger guidelines.

7 Q. Let me take you back to your testimony,
8 Exhibit 504, line 470 and line 476. Is it correct that
9 line 476 should read overstates the HHI and not
10 understates the HHI?

11 A. It does, it does overstate the HHI, but that
12 is not consistent. If you read my testimony in context,
13 if you go back a page and keep coming up to this, you
14 will see that the point is that there are so many little
15 carriers out there that they have very little effect.

16 Q. Mr. Gates --

17 A. In terms of competitive significance.

18 Q. On line 470, you state, if anything, the
19 HHI's are understated. In light of the change that you
20 had to make to line 476, do you need to change anything
21 on line 470?

22 A. I would need to take a few minutes and go
23 back and read my testimony a little bit, put it in
24 context. It's getting late, calculations are difficult,
25 but if I had five minutes, I could probably do that.

1232

1 CHAIRWOMAN SHOWALTER: Let's take a pause.

2 JUDGE MACE: Let's take five minutes.

3 (Recess taken.)

4 MS. ANDERL: Your Honor, I believe that the
5 question pending before we recessed was whether
6 Mr. Gates needed to make any changes to his testimony on
7 line 470 in light of the change that he made to line
8 476.

9 A. Yes, no change is required there. If you
10 continue reading on, it says, including resale and UNE-P
11 lines overstates CLEC market share. So in other words,
12 by including resale and UNE-P, it overstated the CLEC
13 market share, which resulted in a lower HHI, so that
14 should not be changed at line 470. The change at line
15 46 is --

16 JUDGE MACE: You mean 476?

17 A. Yeah, 476, thank you, is fine.

18 BY MS. ANDERL:

19 Q. So you have been able to conclude that the
20 net effect is still to understate the HHI's?

21 A. Yes, by including the resale and UNE-P in
22 there dramatically overstates the market shares. If you
23 take those out, then the -- then Qwest's market share is
24 greater, and the HHI goes up.

25 CHAIRWOMAN SHOWALTER: Right, but now I'm

1233

1 still confused. We have a paragraph and testimony in
2 front of us, and the question is, is there any word in
3 the original testimony that should be changed?

4 THE WITNESS: Yes, at line 476, understates
5 should be overstates.

6 CHAIRWOMAN SHOWALTER: Okay, thank you.

7 BY MS. ANDERL:

8 Q. So the section of this answer that starts,
9 second, Staff calculates an HHI based on an erroneous
10 assumption, that portion of the testimony now with that
11 change doesn't really support your answer, does it?

12 A. Not really, it points at an error by Staff,
13 but it doesn't -- it's an offsetting error.

14 Q. Was it originally your belief when you made
15 this testimony that indeed this error did understate the
16 HHI?

17 A. The error of including resale and UNE-P?

18 Q. No, the error --

19 A. Absolutely.

20 Q. The error of using a cumulative market share
21 as opposed to individual market share.

22 A. No, I don't think so.

23 Q. So you didn't just realize that today?

24 A. No.

25 MS. ANDERL: All right, that's all I have,

1234

1 Your Honor. Thank you for allowing me to pick that up.

2 JUDGE MACE: Commissioners.

3

4 E X A M I N A T I O N

5 BY CHAIRWOMAN SHOWALTER:

6 Q. Yes, could you turn to page 4 of Exhibit 504.

7 A. Yes, I'm there.

8 Q. And I'm looking at the part of your testimony
9 where you quote from the Commission summary of RCW
10 80.36.330, but do you agree that the law lists A through
11 D as factors that the Commission must consider?

12 A. Yes, it does say, enumerates four factors
13 that the Commission shall consider, yes.

14 Q. And so do you agree that A through D are not
15 the minimum standards or mandatory standards for that
16 matter, they're simply factors that the Commission needs
17 to consider in reaching an ultimate conclusion about
18 effective competition?

19 A. Well, I think they are mandatory in that --

20 Q. Mandatory to consider?

21 A. Yes, that's correct.

22 Q. Okay. Now if you would turn to page 29, and
23 now I'm looking at your factors that you have listed,
24 and I believe you stated you set them out more or less
25 in response to the factors that are in the statute; is

1235

1 that correct?

2 A. Yes, it was our attempt to quantify those or
3 to provide parameters or quantification around those
4 factors, yes.

5 Q. But unlike the statute in which there are
6 factors listed, it appears to me you have converted the
7 factors into your version of minimum standards that must
8 be met before in your view the Commission should find
9 effective competition.

10 A. Yes.

11 Q. And as you point -- as you say, you seem to
12 say that you feel all, each and all four of these
13 factors should be met as quantified by you before we
14 find effective competition?

15 A. Yes, or as quantified by the Commission over
16 time. This would be the trigger, the starting point for
17 you.

18 Q. But supposing one of the factors was at a
19 higher rate than you have stated here. For example, the
20 first one you have is the presence of at least three
21 CLECs. Well, supposing there were seven. But in the
22 next factor the market share was 25%. I mean don't you
23 agree that to the extent that one of the factors is
24 stronger than your notion of a minimum that that might
25 allow another factor to be a little less than your

1236

1 notion of a minimum?

2 A. Perhaps, but in this proposal we're trying to
3 quantify what was before a more vague standard. So yes,
4 I mean there could be seven in the first one, but really
5 the key there is one of which must be providing services
6 from its own switch. Now that does not mean you have to
7 have a switch in every exchange, but that the carrier
8 must be providing the service from its own switch. So
9 it might be back hauling it 100 miles, but at least it's
10 providing it from its own switch.

11 Q. And why at least three CLECs, why not two?

12 A. Well, it's somewhat arbitrary I will admit,
13 but I think anyone would agree that three is better than
14 two, two is better than one. Certainly we need one with
15 facilities and then another three or so for good measure
16 I guess I would say.

17 Q. And regarding that factor, is there evidence
18 in the record that does demonstrate whether a CLEC
19 providing services in an exchange is providing it
20 through its own switch whether or not the switch is in
21 that exchange?

22 A. Yes, Your Honor, I think you can assume that
23 if someone is using a UNE loop that they're using their
24 own switch and their own facilities. It's not as good
25 as a CLEC owned loop, but it's better than resale or

1237

1 UNE-P.

2 Q. All right. Then on a different subject, you
3 talked about a continuum of competitive factors with
4 resale the least going through I think probably UNE-P,
5 UNE-L, and facilities based.

6 A. That's correct.

7 Q. Without quantification or setting
8 quantification aside, do you agree that wireless and
9 VoIP are also either part of that continuum or at least
10 maybe on a different axis, that is that those are
11 relevant to our inquiry?

12 A. No. And the reason is that those are
13 literally different services providing different
14 functionalities. In the continuum that I provided you,
15 it was essentially the same service. You can provide
16 that service from resale, you can do it with UNE-P, UNE
17 loop, or you can provide it yourself, but it's the same
18 service, okay, the same features, the same functions,
19 functionality to the consumer.

20 When you throw in wireless, you're talking
21 about a compliment, not a substitute in the vast
22 majority of the situations. There are some obviously
23 situations where maybe a college student can rely solely
24 on a wireless phone, but in most cases based on those 27
25 factors I put in my testimony, it's not a good

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1 substitute.

2 Same thing with voice over IP, there are
3 still so many issues that make that something that we're
4 looking forward to, we hope will be a good solution
5 going forward, more efficient, better use of bandwidth,
6 perhaps cheaper, but now there are still so many
7 technical issues and economic issues.

8 In order to use VoIP, you have to have a SIP
9 phone, Session Internet Protocol phone, so you've got to
10 go out to maybe Cisco and spend a minimum of \$200 for
11 each phone. You've also got the up front costs of
12 establishing the network and then buying the service and
13 NRC's, and then you don't have service quality
14 guarantees. And if your power goes out in your
15 building, your phone service is down. You don't have
16 that with regular wireline service. And a big one, of
17 course, is E911.

18 Q. Yes, but isn't your case more compelling if a
19 customer can only have one line or another from
20 somewhere else, then you have to make these hard
21 choices, well, what about 911, or what about when the
22 power goes out. But isn't the reality that people get
23 to have, if they want, multiple lines, some of which
24 might be partial substitutes for each other. I mean if
25 you're sitting in an office and you have a landline, it

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1 can ring, and if you have a little cell phone next to
2 it, you could receive a call on the cell phone while
3 you're on the landline.

4 A. You could, but would you want to pay those
5 costs associated with that cell phone if you go over 400
6 minutes or 600 minutes, whatever your plan might be.
7 And can you trust your employees in a business not to
8 use it for personal, can you control the quality, can
9 you make sure they're going to have that phone, are they
10 going to be accessible via that phone if they're between
11 two buildings in downtown Seattle, maybe not, probably
12 won't work, it will be a dead zone.

13 Q. But you could be sure that their landline
14 doesn't work between those two buildings.

15 A. True, but I just don't see that -- why would
16 someone pay \$100 for a phone or even get a free phone
17 and establish wireless service when you can get another
18 line for \$30 bucks.

19 Q. Well, again --

20 A. And not have to worry about penalty charges
21 and overages and roaming.

22 Q. Without quantifying the wireless issue, are
23 you impressed by the growth of wireless?

24 A. I am.

25 Q. Do you assume it's only for personal or

1240

1 overwhelmingly for personal use?

2 A. No, I think people are evolving their use of
3 telephones with wireless, hence it's now when I'm
4 driving sometimes I can be on the phone calling clients
5 and dealing with issues, and that helps me, but it's a
6 compliment to my wireline. I'm not going to replace my
7 wireline, I'm going to have both.

8 Q. And would the presence of a wireless mean
9 that, for example, you could be on a conference call
10 while in your car, whereas if you didn't have that
11 option you might have to get to an office in order to be
12 on that conference call?

13 A. Well, that's true, and what you're talking
14 about is functionality, which is fine, that's a good
15 thing to look at. But you also have to look at cost and
16 quality of service, survivability, and a lot of other
17 issues like even local number portability.

18 I mean a lot of those things are going to be
19 solved in the future, but today they aren't. You know,
20 businesses don't want to have dropped calls, they don't
21 want to have dead zones, they don't want to have to
22 worry about E911 issues, and you can't get an alarm
23 system over a wireless phone.

24 So you can add wireless to supplement your
25 phone service within your company, I think most

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1 companies do as kind of a perk and to help people become
2 more efficient. But it's not a replacement, it's a
3 compliment. So from an economic perspective, it's not a
4 good substitute, it's a compliment.

5 Q. So in your view if there were no wireless at
6 all, you think there would be no additional landlines
7 purchased for business or almost none?

8 A. No, I think -- if wireless didn't exist,
9 might people buy more landlines?

10 Q. Right.

11 A. They might, especially for kids, teenagers at
12 home.

13 Q. We're talking about business.

14 A. For business, I don't think you're seeing any
15 -- I haven't seen a study, we should do this study, I
16 don't think you'll see businesses ordering fewer
17 landlines because they also have cell phones. I don't
18 think you will see that just based on my experience in
19 the corporate world. They're going to keep their
20 landlines, they're also going to provide cell phones for
21 them to help them be more efficient, but they're not
22 going to reduce the number of landlines.

23 Q. Even for small businesses who just might have
24 one, two, or three lines?

25 A. Oh, there may be some landscapers that might

1242

1 benefit from that sort of thing, but I'm talking more
2 generally in the total market.

3 CHAIRWOMAN SHOWALTER: Thank you.

4 JUDGE MACE: Redirect.

5 MS. SINGER NELSON: Yes, briefly, Your Honor.

6

7 R E D I R E C T E X A M I N A T I O N

8 BY MS. SINGER NELSON:

9 Q. All right, Mr. Gates, I want to redirect your
10 attention to your discussion with Ms. Anderl the first
11 time she was asking you questions relating to the
12 discussion of Mr. Wilson's collection of CLEC data, and
13 specifically when she was discussing with you the errors
14 that you have addressed in the initial responses that
15 were provided by some of the CLECs. Do you recall that?

16 A. I do.

17 Q. Do you recall Ms. Anderl asking you whether
18 or not those corrections were limited to CLEC owned
19 loops?

20 A. I thought she limited that to -- I don't
21 recall. She limited it to one thing, as I recall. I
22 thought it might have been UNE-P, was it owned loops? I
23 don't recall.

24 Q. Do you have any basis to believe that the
25 corrections submitted by the CLECs was limited to CLEC

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1 owned loops, or were UNE loops also involved in those
2 corrections?

3 A. Yes, they were, it was not limited just to
4 CLEC owned loops. The corrections also included UNE
5 loop.

6 Q. And what do you base that on?

7 A. On my discussions with the business folks and
8 in soliciting their understanding of the Staff request
9 and then reviewing the data that they supplied after the
10 fact.

11 JUDGE MACE: Which business folks are you
12 talking about?

13 THE WITNESS: Well, thank you, the MCI
14 business folks who put this data together.

15 JUDGE MACE: Thank you.

16 BY MS. SINGER NELSON:

17 Q. Thank you. And then do you recall your
18 discussion with Ms. Anderl relating to whether UNE-P
19 being reasonably available to CLECs?

20 A. Yes.

21 Q. Do you recall that you agreed that UNE-P is
22 reasonably available to CLECs?

23 A. Yes, I believe I did.

24 Q. Now if UNE-P is reasonably available to
25 CLECs, why don't CLECs purchase UNE-P in all Qwest

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1 exchanges in Washington?

2 A. Good question. It is available to CLECs, and
3 it's readily available because it's resale. It doesn't
4 require a commitment of investment or resources, so it's
5 easy to get to.

6 The reason CLECs choose to use their own
7 facilities is because of the need to distinguish their
8 services from those of the underlying, or excuse me, of
9 Qwest, the heretofore monopoly provider. Carriers
10 always want to distinguish their products so that they
11 can use that distinction to gain additional customers.
12 Also when they use their own facilities, even if it's
13 only their own switch, they can develop their own
14 efficiencies and economies, which provide them with
15 reduced cost, which allow them to compete better on
16 price. And also if they use their own switch, they can
17 use their own features in that switch, and you know
18 there's thousands, probably tens of thousands of
19 features that are available in a 5ESS switch, for
20 instance. And they will use those features, that
21 feature rich functionality to try and distinguish their
22 services.

23 So it's always in the best interest to be in
24 charge of your own destiny. The only way you can do
25 that is with your own facilities. So someone might

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1 start resale, then they will go to UNE-P, then they'll
2 start using UNE loop when they've got a switch, and as
3 soon as they can, they're going to build their own loops
4 or fiber rings to reduce their dependency on Qwest.

5 Q. But, Mr. Gates, my question really was more
6 directed to the issue of why there are not CLECs doing
7 business in the Elk exchange.

8 MS. ANDERL: Your Honor, I object, I don't
9 believe that there's any foundation laid for this
10 witness to testify as to what other CLECs are doing or
11 why.

12 JUDGE MACE: Ms. Singer Nelson.

13 MS. SINGER NELSON: I disagree, I think that
14 Mr. Gates's testimony goes into a great deal of
15 discussion relating to the motivations that carriers
16 have in entering the market the way that they do, and
17 I'm asking his opinion as an economist in his evaluation
18 of the exchange from his position.

19 JUDGE MACE: I will allow the answer.

20 MS. SINGER NELSON: Thank you.

21 A. Okay, thank you. One reason why there may
22 not be any CLECs providing service today in Elk is just
23 because of the market itself. It's an economic decision
24 based on the market. It also could be based on the
25 availability of Qwest facilities in that area. We know

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1 in putting in LSRs, local service requests, that
2 frequently we get a response that says no facilities
3 available. That could be another reason. It could also
4 be a trunking issue depending on where it is relative to
5 their switch, so even if they buy UNE-P, they've still
6 got to get that traffic to the CLEC switch, excuse me,
7 for UNE loop, and for UNE-P it would be similar in terms
8 of location. So there's lots of economic reasons and
9 operational reasons why there may not be competition yet
10 in certain exchanges in the state.

11 BY MS. SINGER NELSON:

12 Q. Do you recall your discussion with Ms. Anderl
13 relating to access charges?

14 A. Yes.

15 Q. Is it your understanding that CLECs do not
16 receive access charge revenue from toll providers when
17 they provide service to a local exchange customer
18 through total service resale?

19 A. Yes.

20 Q. Then Ms. Anderl talked to you about MCI's
21 access charges; do you recall that?

22 A. Yes.

23 Q. And you stated that MCI's access rates mirror
24 Qwest's and that MCI was a price follower. What was the
25 basis for that opinion that MCI was a price follower,

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1 and what relevance does that have to our discussion?

2 A. Well, it's an indication of the level of
3 competition in the market. If MCI had its own
4 facilities everywhere and could benefit from those
5 economies and scale economies of having its own
6 facilities, it might be able to offer access charges
7 that might compete with those of Qwest. In the current
8 market where facilities based competition is very
9 limited and Qwest is generally the underlying provider
10 in the vast majority of the circumstances, CLECs are
11 price takers. I mean they will simply follow the price
12 that Qwest has for its access charges.

13 And they are based on Qwest costs, not MCI's
14 costs, because Qwest, of course, is the dominant
15 provider and the monopoly provider, and the TELRIC rules
16 tell us to base those TELRIC costs, UNE costs, on the
17 network and efficiencies of the underlying carrier or
18 the ILEC. So it doesn't surprise me at all that the
19 CLECs would be taking Qwest's access rates.

20 Q. You talked both with Ms. Anderl and with
21 Ms. Watson related to the horizontal merger guidelines,
22 and it was pointed out that this is not a merger
23 obviously, so why are the horizontal merger guidelines
24 relevant to the analysis in this case?

25 A. Well, the guidelines rely upon the Herfindahl

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1 Hirschmann Index, the HHI index we have been talking
2 about today, and that index is one measure of market
3 concentration and is another measure of dominance, and
4 it's a good way for the Commission to determine whether
5 there are some competitive issues to be concerned with.
6 And as you know, if the HHI exceeds 1,800, that means
7 it's highly concentrated and there is very significant
8 competitive issues to be considered. That's the purpose
9 of those safe harbor guidelines in the merger
10 guidelines, so we use that HHI in this case as just one
11 way to determine market concentration and the dominance
12 of Qwest.

13 Q. Okay, before I go on to a little bit more
14 discussion of the questions relating to the merger
15 guidelines, there was one other point that Ms. Anderl
16 made during her cross-examination of you, and would you
17 please turn to Exhibit 504T, which is your rebuttal
18 testimony, on page 21, and lines 522 through 528 have
19 been stricken.

20 A. Yes.

21 Q. Without that Q&A in your testimony, is your
22 opinion affected in any way by the exclusion of that
23 information?

24 MS. ANDERL: Your Honor, I object, I don't
25 think it's appropriate to ask the witness about

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1 testimony that's been stricken. It's not part of this
2 record, and it's inappropriate to try to introduce
3 reference to testimony that is no longer part of this
4 record through the back door of redirect.

5 MS. SINGER NELSON: Your Honor, that's not
6 what I was attempting to do. I wasn't attempting to
7 direct anybody's attention or direct the record's
8 attention to information that's no longer in the record,
9 but I did want Mr. Gates to inform the Commission as to
10 whether or not his opinion stands despite the fact that
11 during his cross-examination a portion of his testimony
12 had been stricken.

13 CHAIRWOMAN SHOWALTER: What's the question?

14 MS. SINGER NELSON: My question is simply
15 whether Mr. Gates's testimony has changed in any way
16 despite the fact that or because that portion of his
17 testimony has been stricken.

18 JUDGE MACE: I would just point out that no
19 other portion of his testimony has been stricken, and so
20 it's in the record.

21 CHAIRWOMAN SHOWALTER: That's right.

22 JUDGE MACE: So I will sustain the objection
23 then.

24 MS. SINGER NELSON: Okay.

25 BY MS. SINGER NELSON:

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1 Q. Do you recall your discussion with Ms. Anderl
2 relating to the merger guidelines reference to
3 uncommitted entrance?

4 A. Yes, I do.

5 Q. And on what do you base your opinion that
6 both resale and UNE-P providers would be uncommitted
7 entrants under the UNE-P guidelines?

8 A. Okay. In the merger guidelines it talks
9 about committed and uncommitted entrants, and the basis
10 of that distinction is whether or not they have
11 significant sunk costs. A resaler and a CLEC that uses
12 UNE-P, which is in effect resale, they do not have any
13 significant sunk costs, so they would not be a committed
14 entrant. In other words, if someone invests in a switch
15 or invests in loop facilities, that is an investment, a
16 sunk investment, and they will have every incentive to
17 stay in the market and do whatever it takes to stay in
18 the market and compete effectively because of that
19 investment. That's the distinction.

20 Q. Thank you. Let's turn to the merger
21 guidelines, which is Exhibit 224. Do you recall
22 Ms. Watson talking to you relating to the post merger
23 level of market concentration and change in
24 concentration post merger?

25 A. Yes.

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1 Q. Please go to Section 1.51, the general
2 standards.

3 A. Okay, I'm there.

4 Q. And in the very last subpart, subpart C where
5 the discussion is located relating to the post merger
6 HHI above 1,800; do you see that?

7 A. Yes, I do.

8 Q. At the end of that paragraph, I direct your
9 attention to the discussion about where the post merger
10 HHI exceeds 1,800, it will be presumed that mergers
11 producing an increase in the HHI of more than 100 points
12 are likely to create or enhance its market power
13 facilities.

14 A. Facilitate.

15 Q. Facilitate its exercise, thank you. Do you
16 see that?

17 A. Yes, I do.

18 Q. All right. Now I would like you to assume
19 that Qwest's market share pre-competitive classification
20 is 70%. Do you have that assumption in mind?

21 A. Yes, although I already did this calculation
22 in my testimony, but we can do this, that's fine, if
23 it's something similar.

24 Q. If Qwest's market share increases by only 2%?

25 A. From 70 to 72?

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1 Q. Yes. Would that affect the HHI
2 significantly?

3 MS. ANDERL: I object, Your Honor, Mr. Gates
4 is right, this is duplicative of information that he
5 already provided in his rebuttal testimony, specifically
6 Exhibit 504, Footnote 26, which is on page 20.

7 CHAIRWOMAN SHOWALTER: Mr. Gates also made
8 the same points on cross-examination.

9 MS. SINGER NELSON: That's fine, then I
10 withdraw the question.

11 JUDGE MACE: Thank you.

12 BY MS. SINGER NELSON:

13 Q. Mr. Gates, you were talking about the fact
14 that UNE-P is in fact price constraining, and that would
15 be compared to total services resale, and in your
16 opinion it's not price constraining; do you recall that
17 discussion?

18 A. Yes.

19 Q. If UNE-P is price constraining, then why is
20 it not the basis for effective competition?

21 A. Well, that's a really good point. UNE-P is
22 not effective competition, so using my own definition
23 then, I would also say it's not price constraining.
24 What I meant to say in that discussion was that it has
25 more of a price constraining effect than resale. So it

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1 does constrain pricing, but it's not a total price
2 constraining effect. And again, this is a continuum
3 issue. It's much more beneficial to the market than
4 resale but not as good as UNE loop or facilities based
5 competition, which is truly price constraining in every
6 aspect of the word.

7 Q. Wouldn't you agree that it would only be
8 price constraining so long as Qwest is regulated by the
9 Commission?

10 A. Yes. I mean there are circumstances where if
11 they were unregulated and they entered into predatory
12 pricing that it would have no price constraining effect
13 whatsoever.

14 Q. You used the word in your discussion of VoIP,
15 do you recall your use of the word clipping?

16 A. Yes.

17 Q. I don't think that's been defined in your
18 testimony, could you just define that?

19 A. Yes. In packet switching, if when you're
20 sending -- well, this is kind of difficult. Clipping is
21 the sound you get when you hear only parts of words and
22 you're talking over one another, it's generally referred
23 to clipping. It's because of dropping packets, the
24 packets getting lost in the transmission of data. With
25 packet switching, you could be sending packets, you

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1 know, up through North Dakota, down through Texas, and
2 it doesn't matter as long as it all gets to Seattle and
3 then it's all put back together. But sometimes in that
4 transit, packets are dropped, and you lose part of that
5 voice signal, which is one of the big quality issues
6 with respect to VoIP. So that's what I meant, just
7 losing parts of words.

8 Q. Thank you. And then your discussion finally,
9 I think this is my last question, in your discussion
10 with Chairwoman Showalter you talked about wireless
11 services being a compliment to business services,
12 business wireline services.

13 A. Yes.

14 Q. And not a substitute.

15 A. Yes.

16 Q. And there was reference to a term partial
17 substitute. Do you have any -- is there a definition of
18 partial substitute, do you know what a partial
19 substitute is in economic terms?

20 A. No, there -- we use the phrase close
21 substitute, good substitute, perfect substitute, but I'm
22 not sure what a partial substitute would be other than
23 again getting to kind of the compliment issue. It's not
24 really a substitute, but it does provide value and add
25 value for the consumer, so it's something that's added

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1 to your wireline service, a compliment.

2 Q. So would you agree that there really is no
3 such thing economically as a partial substitute?

4 A. I have never heard that.

5 MS. SINGER NELSON: Thank you.

6 JUDGE MACE: Ms. Watson.

7 MS. WATSON: I didn't want -- did you want to
8 go to Qwest first or --

9 JUDGE MACE: I'm sorry, it is late, I'm
10 sorry, Qwest.

11 MS. ANDERL: Yes, I have one area of follow
12 up.

13

14 R E C R O S S - E X A M I N A T I O N

15 BY MS. ANDERL:

16 Q. Mr. Gates, did I understand you in response
17 to a question from Ms. Singer Nelson to indicate that
18 uncommitted entrants are defined by whether or not they
19 have sunk costs?

20 A. Yes, that's one of the definitions or one of
21 the determinants, yes.

22 Q. Can you show me where in the horizontal
23 merger guidelines that is stated?

24 A. (Reading.)

25 Q. Well, let me -- actually, let me withdraw

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1 that question and direct you to page 11 of that Exhibit
2 224, Section 1.32. Do you see there that the first
3 sentence of Section 1.32 is a description of certain
4 types of firms and that the second sentence says that
5 those firms are termed uncommitted entrants?

6 A. Yes, and then it says:

7 These supply responses must be likely to
8 occur within one year and without the
9 expenditure of significant sunk costs of
10 entry and exit.

11 So an uncommitted one would be one who did
12 not have any significant sunk costs. So converse to
13 that, a committed entrant would be one that experiences
14 sunk costs.

15 Q. Well, let me ask you this. Is there anyplace
16 else in the horizontal merger guidelines where
17 uncommitted entrants are defined?

18 A. (Reading.)

19 I'm not sure they would occur or that
20 discussion would occur later, because it's a matter of
21 identifying the market.

22 Q. Okay. And if a firm is already operating in
23 the market and can make a supply response without an
24 expenditure of significant sunk costs, does that make it
25 an uncommitted entrant?

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1 A. I don't know what you mean. You mean like a
2 resaler?

3 Q. If a firm is --

4 A. That's not a true supply response.

5 Q. If a firm is currently producing or selling
6 the relevant product in the market and is able to make a
7 supply response without an expenditure of significant
8 sunk costs, is that firm an uncommitted entrant in your
9 view?

10 A. My view is that if it's resale, to make it
11 relevant to this case, that is not providing supply.
12 You're not generating anything, you're just retailing
13 Qwest services, so that would not be a supply function.

14 Q. And where does it, in the horizontal merger
15 guidelines, does it say that resale does not constitute
16 selling the relevant product in the relevant area?

17 A. As we discussed before, resale per se is not
18 discussed in these general guidelines. They are
19 necessarily general to apply to very different fact
20 situations. But I have been involved in two mergers
21 where we did apply these merger guidelines, I have had
22 meetings over the years with the DOJ, not only on merger
23 issues but on 271 and Telecom Act issues, so I am
24 somewhat familiar the way the guidelines are used, and I
25 think I'm definitely correct that resale is not

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1 considered supply. I mean a resaler is only retailing,
2 it's not producing anything.

3 Q. The merger guidelines do discuss the sale of
4 used, reconditioned, or recycled goods; isn't that
5 correct?

6 A. I don't know.

7 MS. ANDERL: I have no further questions.

8 JUDGE MACE: Ms. Watson.

9 MS. WATSON: I just have two questions.

10

11 R E C R O S S - E X A M I N A T I O N

12 BY MS. WATSON:

13 Q. Mr. Gates, do you remember your discussion
14 with Chairwoman Showalter about substitutes?

15 A. Yes.

16 Q. And you testified during that discussion that
17 VoIP does not work if the power goes out; do you
18 remember that?

19 A. Yes.

20 Q. When the power goes out, PBX systems also do
21 not work; is that true?

22 A. True, unless they have a backup power source,
23 which is pretty common when you have PBXs.

24 MS. WATSON: Thank you, I have no further
25 questions.

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1 JUDGE MACE: Thank you. I think your
2 cross-examination is concluded.

3 THE WITNESS: Thank you.

4 JUDGE MACE: And you're excused.

5 THE WITNESS: Thank you, Your Honor.

6 JUDGE MACE: We have Mr. Wilson on the 21st
7 of October. Before everybody closes up their folders, I
8 know it's late, but we're all here and I would like to
9 just briefly discuss two items. One is the question of
10 a briefing schedule, and the other is the question that
11 Mr. ffitch raised about a date for some filing if he
12 decides to make one.

13 So the first issue, the question of the
14 briefing schedule. I wanted to propose that we have a
15 briefing schedule that would call for briefs fairly
16 shortly after Mr. Wilson's testimony just because that
17 only leaves a very short period of time for the writing
18 of an order rather than waiting the traditional two
19 weeks for briefs, and so I would propose October 28th
20 but would like to hear from the parties if they have any
21 other suggestions.

22 MR. LEVIN: I'm wondering how quickly we will
23 have a transcript of that last session.

24 JUDGE MACE: Well, if you order an expedited
25 transcript, I believe you will have one fairly quickly,

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1 within a day or two.

2 MR. FFITCH: Can I just inquire, I believe my
3 recollection is the new statutory deadline is December
4 5th; is that correct?

5 JUDGE MACE: 4th I thought.

6 MS. ANDERL: I don't recall, we would have to
7 check the transcript. It's either the 4th or the 5th.

8 JUDGE MACE: Well, if Qwest isn't fussy we'll
9 make it the 5th.

10 So either everybody is unconscious or October
11 28th is okay.

12 MS. ANDERL: The 28th I guess poses a little
13 bit of a problem for us, but I can't really -- I don't
14 really have a better date other than --

15 MR. FFITCH: I think, Your Honor, just
16 thinking back to the earlier schedule where I can't
17 remember specifically, but I thought we had about the
18 due date was about 30 days in advance of the statutory
19 deadline, so this is ahead of that somewhat. If we went
20 by that, they would be due November 5th.

21 CHAIRWOMAN SHOWALTER: Is this just going to
22 be one round of briefs?

23 JUDGE MACE: That was my understanding, one
24 round of briefs.

25 MR. FFITCH: So I guess we would prefer to

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1 think about perhaps the 5th or October 31st just to --

2 JUDGE MACE: How about October 31st.

3 CHAIRWOMAN SHOWALTER: Wait a minute here.

4 It seems to me that it might benefit the Commission
5 quite a bit to have some kind of response brief. I mean
6 on a case like this I think it's unusual to have only
7 one round of briefs. What I'm wondering is if the 28th
8 would be all right and then a reply by the 5th. And,
9 you know, maybe digested the last day of testimony a
10 little bit by then. But personally it puts us in an
11 awkward position or sometimes can be a difficult
12 position if we have no reply briefs, because we don't
13 know what --

14 JUDGE MACE: Why don't we be off the record
15 for this discussion.

16 (Discussion off the record.)

17 JUDGE MACE: Let me just indicate for the
18 record that we have agreed to briefing dates of October
19 28th for an initial date and November 7th for a reply
20 brief.

21 And October 10th will be a prospective filing
22 date for Public Counsel if Public Counsel elects to file
23 testimony. And if there is a filing of brief testimony
24 about the raw CLEC data, the witness sponsoring the
25 testimony will be made available for cross-examination

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1 on the same day that Mr. Wilson will be crossed.

2 (Hearing adjourned at 9:15 p.m.)

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