

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In the Matter of the Petition of

QWEST CORPORATION

For Competitive Classification of
Basic Business Exchange
Telecommunications Services.

Docket No. UT-030614

THE UNITED STATES DEPARTMENT
OF DEFENSE AND ALL OTHER
FEDERAL EXECUTIVE AGENCIES'

COMMENTS ON JOINT MOTION

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by

THE UNITED STATES DEPARTMENT OF DEFENSE AND
ALL OTHER FEDERAL EXECUTIVE AGENCIES

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Filing Due: October 10, 2003

Dated: October 10, 2003

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The Secretary of Defense, through duly authorized counsel, on behalf of the customer interests of the United States Department of Defense and All Other Federal Executive Agencies (collectively referred to herein as "DoD/FEA"), hereby submits its Comments on the "Joint Motion to Require Staff to Re-Survey and Recompile CLEC Data, Or to Disregard Results of Previous CLEC Survey and Data Compilation (hereafter, the "Joint Motion"). The Joint Motion, filed on October 7, 2003 by WeBTEC, Advanced TelCom, Inc., Intergra Telecom of Washington, Inc. and MCI Communications (the "Moving Parties"), asks that the Commission require the Staff to conduct a new survey detailing the number and location of business exchange lines served by competitive local exchange carriers ("CLECs") in Washington. In the alternative, the Moving Parties ask that the Commission enter an order finding that the data in the survey conducted by the Staff pursuant to Order No. 6 in this proceeding is "inherently unreliable and will not form a basis for decision in this case."¹ By "Notice of Opportunity to Respond" issued October 8, 2003, Administrative Law Judge Theodora

¹ Joint Motion, p. 1.

M. Mace invited parties to respond to the Joint Motion. For the reasons set forth below, DoD/FEA supports the Joint Motion and urges the Commission to order its Staff, in cooperation with Public Counsel, to conduct a new survey on an expedited basis.

In considering a Petition for Reclassification filed pursuant to Washington statutes and the Commission's Rules, a carrier must make a detailed showing and the Commission shall consider factors that include, *inter alia*, the relevant market, the number and size of providers of services that are competitive alternatives to the service for which reclassification is sought, and the market shares of the competing providers of the subject service.² Qwest filed its petition to reclassify its basic business exchange services throughout Washington as competitive, and included data therein as to the number and location of lines that were provided by CLECs using Qwest facilities in whole or in part. Qwest stated, however, that it did not include the number of CLEC business lines that were provided without Qwest wholesale services because it did not have that information. Following the filing of the petition, the Commission issued Order No. 6 requiring all CLECs authorized to provide service in Washington to identify and provide, among other data, the number and location of all of their business exchange lines. The Staff compiled that data, included Qwest-provided business lines and provided the resulting summary to all parties. That study and the Staff's related testimony and exhibits have not yet been received in evidence.

The Moving Parties state that Qwest has petitioned for reclassification of only analog business service, and that its access line count submitted in the record (and thus used in the Staff's study) excludes digital services. The Moving Parties state that in response to Order No. 6, however, some responding CLECS filed line counts of both

² See RCW 80.36.330(1) and WAC 480-121-061(4) and (5).

analog and digital business services. According to the Moving Parties, the instructions provided to the CLECs did not state that digital services were to be removed from the line count. The Moving Parties attach two Declarations and one Affidavit from employees who compiled their companies' responses, and each stated that the response did not exclude digital services. Therefore the Moving Parties conclude that because Qwest submitted a count of only analog lines, but certain CLECs included counts of both analog and digital lines, the CLEC market shares that the Staff computed when the line counts were combined are overstated, to the possible degree of significantly altering the Staff's market analysis and conclusions. Accordingly, state the Moving Parties, the survey results are unreliable and worthless for decisional purposes in this docket.

DoD/FEA supports the Joint Motion and urges the Commission to require a new CLEC line count of only analog lines, corresponding with Qwest's counts. We believe that the error that has resulted from the apparent confusion surrounding the survey instructions is not minor, and directly affects a critical part of the record herein. A crucial and disputed issue in this case is the extent to which CLECs provide competing services throughout Washington – not just on a state-wide basis but as to exactly where in the state those services are provided. The current survey purports to show competitive business services in all but one exchange, and that finding appears to underlie the Staff's belief that the relevant market³ is the entire state. But the extent and location of CLEC analog business service lines are now seriously cast as unreliable for decisional purposes. Thus, the Staff's (and any such similar) view can now only be gravely suspect, at best. Although the Joint Motion does not quantify the extent of the differences between the

³ DoD/FEA, by these comments, takes no position whether the appropriate "relevant market" to analyze, regardless of the bounds of Qwest's petition for reclassification, is analog alone or combined analog and digital services. It is crucial, however, that comparable CLEC and Qwest data be compiled and analyzed.

three CLECs' original line count and their new line counts, we note that MCI witness Stacy testified on redirect examination on October 1, 2003 (and was not challenged) that MCI's line count was overstated by around 80% because of the apparent confusion surrounding the survey instructions. Obviously, such a significant line count overstatement could also grossly alter the related location data indicative of where services competitive to Qwest's basic business exchange services are provided. Other CLEC counts may be similarly overstated. Clearly, the Commission may not base a decision on a record that is now known to be flawed and unreliable in a crucial area where the factors are required by statute.⁴ The appropriate response is the preparation of a new study by the Staff with its "supplemental report or testimony for presentation, cross-examination, and consideration by the Commission."⁵ We would strongly urge that a similar opportunity be afforded to at least Public Counsel, if access to the raw data continues to be prohibited to the other parties.

DoD/FEA recognizes that a new study could delay completion of this proceeding, which already has been extended, with Qwest's concurrence, beyond the statutory deadline. But we believe that the CLECs, as necessary, could promptly revise and resubmit their data -- the Moving Parties' declarations state that certain CLECs already have started that process. Such an attempt at remedying the defective current study and record, while not a perfect solution⁶, seems preferable to the consequences of heedlessly proceeding forward -- an unreliable, flawed record incapable of supporting a defensible, reasoned decision. Recognizing this predicament, the Moving Parties suggest as an

⁴ A Commission decision based on the current study would, in light of the defective line and location counts, be seriously exposed to judicial reversal because of fatal material error.

⁵ Joint Motion, p. 3.

⁶ Whether Qwest has even met the threshold showing necessary to sustain its burden of proof still remains in question.

alternative that the Commission declare that the unreliable current study and related testimony and exhibits simply cannot form any decisional basis in this proceeding. Accurate and consistent line counts by exchanges and wire centers are required, at a minimum, for a defensible, reasoned Commission decision as to the relevant market, the number and size of competitors, and the market shares of the competing providers -- the measure of "effective competition".

Accordingly, DoD/FEA supports the Joint Motion.

Respectfully Submitted,

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For

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And

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Dated: October 10, 2003