



1           The Commission cannot adequately discharge its responsibility here merely by  
2 cataloging various indicators of competition beginning to gain a foothold, and speculating  
3 about the possible future capabilities of new technologies, and competitors and would-be  
4 competitors, however promising they may seem. The Commission needs to look  
5 carefully beyond the ballyhoo of new technology to review the quantity of competition  
6 actually present; that is one significant factor under the law. But even the quantity of  
7 competition is meaningless unless the Commission first correctly determines the product,  
8 customer and geographic scope of the market. In the absence of proper market definition,  
9 quantification provides no guidance and does not satisfy the applicable statutory  
10 requirements.

11           Moreover, an examination of the quantity of competition is not complete without  
12 a review of the *qualities* of the competition. If apparently competitive services are not  
13 price constraining or are so controlled by the applicant that they can be squashed by the  
14 exercise of the very freedom sought in the proceeding, then the quantity of these types of  
15 competition, even if relatively large, is not significant.

16           The services at issue in this case are particularly important. The services for  
17 which competitive reclassification are sought are part of the small, medium and large  
18 business voice services market. The applicant has indicated its intent to file a follow-on  
19 application for the remainder of the applicant's services in this market. The decision  
20 which the Commission makes here will create the precedent for the review of that  
21 application. And so, in effect, the Commission here effectively decides the future of the  
22 business voice services market in the Qwest service area in Washington.

1           Because this docket is so very important to the future of competition in  
2 Washington, rather than searching the record for shreds of support for Staff’s misguided  
3 advocacy of the monopoly’s every claim, the statute compels the Commission to engage  
4 in its own searching review and to reach its own conclusions. The Commission’s own  
5 analysis of competition must go well beyond the superficial to a deeper understanding of  
6 what actually and substantially competes with what, who has the power in the market,  
7 how effective the limited competition which exists is to constrain monopoly power, and,  
8 in the end, what is at risk if the Commission gets it wrong.

9       II.     Applicable Law

10           Washington’s effective competition statute places the burden on the applicant to  
11 prove that the service or services for which competitive classification are sought are  
12 subject to effective competition.

13           (1) The commission may classify a telecommunications service provided by a  
14 telecommunications company as a competitive telecommunications service if the  
15 service is subject to effective competition. Effective competition means that  
16 customers of the service have reasonably available alternatives and that the  
17 service is not provided to a significant captive customer base. In determining  
18 whether a service is competitive, factors the commission shall consider include  
19 but are not limited to:

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

21           (b) The extent to which services are available from alternative providers in the  
22 relevant market;

23           (c) The ability of alternative providers to make functionally equivalent or  
24 substitute services readily available at competitive rates, terms, and conditions;  
25 and

26           (d) Other indicators of market power, which may include market share, growth  
27 in market share, ease of entry, and the affiliation of providers of services.

28           RCW 80.36.330

1           The statute uses the language of **effective competition** rather than merely  
2 “competition,” and must be interpreted so as to give meaning to the legislative intent and  
3 purpose. *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn. 2d 493, 816 P.2d 725 (1991).  
4 Moreover, the effective competitive statute needs to be read as a whole. *Burlington*  
5 *Northern, Inc. v. Johnston*, 89 Wn.2d 321, 326, 572 P.2d 1085 (1977). The Commission  
6 cannot read one part in isolation from the others, and must understand the meaning by  
7 seeing the words in the context of the broader statutory scheme. *Dept. of Ecology v.*  
8 *Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002). For these reasons, when the  
9 statute says that there is effective competition if customers have readily available choices  
10 and there are not captive customers, that must be understood in terms of the tests for  
11 effective competition which follow. And those effective competition tests are plainly  
12 designed to compel the Commission to determine whether competition is mature and  
13 powerful enough to survive as a check on monopolistic practices if the relief available  
14 under the statute is granted. The tests for effective competition provided in the statute  
15 demand that the Commission look at the real competitive landscape in the real market for  
16 the services in question to see whether the proponent of reclassification has market  
17 power. The first three items in the statutory list are designed to get at the market power  
18 issue, and the final factor indicates that the first three are there as indicators of market  
19 power, and that other indicators of such power should also be considered. In the present  
20 case, this includes not only the amount of competition, but the nature of the competition  
21 itself.

22           Of course, the Commission cannot consider what market power is with respect to  
23 any set of services without developing an understanding of what the market is for the

1 services in question. It makes no sense to talk about market power without a definition of  
2 the market.

3 A market for a service has product, geographical, and customer aspects, as the  
4 Commission has previously recognized. Docket No. UT-990022, p. 6 (“market may  
5 entail product, service, geographic, or perhaps even temporal aspects of definition”). The  
6 Commission needs to understand the substitution of other products, because the market  
7 may be different than those services which are put forward by the applicant for  
8 competitive classification. If the Commission does not make a realistic and current  
9 assessment of the product market, it cannot reach any conclusions about market power.  
10 Similarly, the Commission must also reach a determination of the customer and  
11 geographic market for the service.

12 On the service end, the Commission must examine whether there are product  
13 substitutes in the market of a nature, quantity and availability to give real choice to  
14 customers, irrespective of the actions of dominant company. If there are real substitutes,  
15 then monopolist cannot exercise monopoly power, because customers would leave in  
16 droves if it did.

17 Market power then is the key and proper market definition is a critical first step in  
18 making that determination. The goal here is to be sure that the competition is truly  
19 effective. Effectiveness is measured by the ability of the competitive marketplace to  
20 constrain monopoly abuse. If there are substitutable alternatives in the market in  
21 sufficient quantity, availability and price, and will remain so even after reclassification,

1 beyond the power of the petitioner to affect, then the Commission has the assurance  
2 required by the statute to reclassify the service as competitive.

3 On the other hand, if the competition is limited or would not operate to constrain  
4 monopoly power due to its nature, competition and hence consumers are at risk from  
5 competitive classification, and it should not be granted.

6 It is not enough that customers can supplement their monopoly services with  
7 another modality or service. The only competition which really restrains monopoly  
8 power is the ability of customers to give up their monopoly service provider entirely, to  
9 leave its control, once competitive classification is granted and the monopolist begins to  
10 exercise its powers.

11 Similarly, it is not enough that there may be a handful of customers who are  
12 substituting for some services because of the particular nature of their business, because  
13 all customers will be exposed to the exercise of monopoly power. So if there are isolated  
14 salespersons who no longer need a landline due to cellular phone availability, that is not  
15 sufficient to reclassify service for all salespersons and certainly not for all landline  
16 business customers.

17 In like manner, intriguing or even promising alternative service technologies do  
18 not create effective competition. Until the technologies are tested by the rigors of the  
19 market and find substantial acceptance as a substitute for the monopoly services, they  
20 cannot be relied upon to protect consumers from monopoly abuse.

21 The Washington Legislature and this Commission have had a long-standing  
22 policy in favor of competition. The goal is to benefit consumers with the fruits of  
23 competitive enterprise, while recognizing that competition as it develops will exist in an

1 environment which is still under the dominance of a single party with monopoly power.  
2 Until competitive enterprise has broken the market power of the monopolist, consumers  
3 are at risk if the Commission gives up its monopoly-constraining role of retail price  
4 control.

5 For this reason, the statute also directs the Commission to examine whether the  
6 provider seeking competitive classification has captive customers for the services at  
7 issue. **If the bulk of the customers cannot escape the monopoly power of the**  
8 **dominant carrier through competitive alternatives, then they are captive customers.**

9 The power of the monopolist creates the captivity. Where supposedly competitive  
10 services customers are in fact served entirely through the facilities of the monopolist, they  
11 are captives of the monopolist's control over those facilities. Either the competition is  
12 not price-constraining at all (TSR) or the monopolist has the power to make their  
13 competitive alternatives go away through unilaterally lowering its retail prices close to or  
14 below its wholesale prices (UNE-P) as a result of the competitive reclassification it seeks.

15 After the fact action under the statute does not cure the problem. If that were the  
16 case, there would be no need for the competitive classification statute in the first place.  
17 The legislature could have reclassified all services as competitive and left it all to an  
18 after-the-fact complaint mechanism. That the Legislature did not do this, and instead  
19 provided a before-the-fact intensive analysis of the competitive landscape, shows that the  
20 Legislature does not consider the after-the-fact mechanism adequate as a principal  
21 approach. There is good reason for this.<sup>1</sup> As the Commission is aware, the regulatory

---

<sup>1</sup> Public Counsel witness Baldwin noted that "once the cat's out of the bag, once the services have been classified prematurely as competitive, it's much harder to then go back to this point in time, and the burden does then shift from Qwest, who bears the burden in this proceeding, to consumers and competitors." Tr. 792-793.

1 process may not move as quickly as the marketplace, and irreparable damage can be done  
2 before there is any hope of regulatory relief. In addition, the legal process provides for  
3 necessary, but time-consuming appeals, and monopolists can spend a lot of money on  
4 legal expenses to maintain the anti-competitive pressure created by their activities.  
5 Moreover, the complaint process shifts the burden of proof to the complaining party,  
6 which increases the expense and difficulty of obtaining relief from destructive monopoly  
7 price squeezes and other anti-competitive behavior.

8           The Commission has previously found that Qwest has the burden “to demonstrate  
9 that it faces effective competition in the relevant market.” Docket No. UT-000883, par.  
10 10. In that case, the Commission denied in part an application for reclassification of the  
11 same services involved in the present case, finding that the market of large vs. small  
12 business customers could be differentiated based on facilities used to serve the customer.  
13 In addition, the Commission found that the geographic market for these large business  
14 services was limited to a few specific exchanges. In that case, the Commission correctly  
15 found that it is the present state of competition in a market, rather than speculation about  
16 the possibility of the development of future competition, which is the basis for  
17 determining whether there are captive customers and whether effective competition exists  
18 in the market identified. Docket No. UT-000883, par. 65.

19           In that case, the Commission found that the focus of the statute and the  
20 Commission is on the end user, rather than other carriers. This means that from the  
21 customer perspective, are customer choices real and sustainable if reclassification is  
22 granted, or are they subject to reduction or elimination if the Commission were to grant  
23 the petition for reclassification. If the competition which exists is largely subject to

1 potential unilateral suppression by the petitioning carrier with market power if the  
2 petition is granted, then from the customer perspective, there is no effective competition.  
3 The competition which exists is not effective if its continued existence is subject to the  
4 whim of the monopolist once the petition is granted. As the Commission found in that  
5 case, Docket No. UT-000883, par. 66-7, **the question is not just whether competitors**  
6 **are offering competitive service, but also whether they will be able to continue to**  
7 **provide competitive services, based on the actual structure of the market—whether**  
8 **“they do, can, and will provide” in the way of alternative services to customers if the**  
9 **petition for reclassification were granted.** Where the structure of the market is such  
10 that the competitors’ market share is small relative to the dominant carrier, and a  
11 substantial portion of the competition which exists is wholly provided over the monopoly  
12 carrier’s facilities, the statutory test is not satisfied. An analysis which ignores the effects  
13 of the grant of the reclassification application is fundamentally flawed.

14 In Docket No. UT-000883, the Commission noted that line based market  
15 concentration, competitors’ presence as shown by business plans and actual behavior,  
16 market structure, ease of entry, line loss data, and customer loss data, in the context of the  
17 properly defined market are among the factors it will consider in evaluating a petition for  
18 reclassification of services. All of these factors necessarily depend on first correctly  
19 determining the market for services.<sup>2</sup>

---

<sup>2</sup> As the Commission noted, Qwest has options for competing with competitive carriers other than the granting of a petition for reclassification of these services. It “can use banded rate tariffs, offer business services through a competitive affiliate, offer promotions, offer winback incentives, and lower prices in response to competition.” Docket No. UT-000883, para. 70.

1           In Docket No. UT-990022, the Commission held that “(i)n the final analysis, it is  
2 U S WEST’s burden to convince us that the record, considered as a whole, supports a  
3 determination that the services for which it seeks competitive classification are subject to  
4 “effective competition”—*i.e.*, that ‘customers of the service have reasonably available  
5 alternatives and that the service is not provided to a significant captive customer base.’”  
6 In that case, the Commission found that U S WEST market share as low as 33% and that  
7 much of the competition was facilities based on-network direct wiring of downtown  
8 office buildings.

9           In *US WEST Communications, Inc. v. WUTC*, 86 Wn. App. 719, 937 P.2d 1326  
10 (1997), the Court of Appeals affirmed a finding that competitor services of ELI and TCG  
11 were effectively competitive. The Court affirmed the WUTC’s finding that ELI and TCG  
12 had no market power, and that therefore they could not hold their end user customers  
13 captive. It is thus market power which makes the customers captive. It is not just  
14 whether there are competitive alternatives, but whether the existence of those competitive  
15 alternatives, in the absence of Commission regulation, is sufficient to prevent monopoly  
16 abuse.

17           Finally, the Commission’s decision on all of these issues must be supported by  
18 substantial evidence, viewed in light of the whole record, and the Commission may not  
19 erroneously interpret or apply the applicable law. RCW § 34.05.570(3)(d),(e).  
20 Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person  
21 of the truth of the declared premises.” *Olmstead v. Department of Health, Med. Section*,  
22 61 Wn. App. 888, 893, 812 P.2d 527 (1991) (quoting *Green Thumb, Inc. v. Tiegs*, 45 Wn.

1 App. 672, 676, 726 P.2d 1024 (1986); *In Re Registration of Electric Lightwave*, 123  
2 Wn.2d 530, 869 P.2d 1045 (1994).

3 III. Definition of relevant market

4 A. Definition of product market.

5 The definition of the product market is critical in an effective competition case.  
6 This is because the statute requires that the Commission review not merely the services  
7 for which competitive classification is sought, but also the services which customers  
8 substitute for them. It is this cross-elasticity of demand for services which defines the  
9 product market, rather than the choice of services which happen to be chosen by the  
10 ILEC for its petition. Both Staff and Qwest implicitly admit this by bringing VoIP, a  
11 digital service, and digital and analog wireless service forward for the Commission's  
12 consideration as substitutes for the analog services for which Qwest claims to seek  
13 competitive classification here. Ex. 51T, pp. 15-27. Indeed at Ex. 201T, pp. 15-16, Staff  
14 stated:

15 Some customers choose to upgrade voice systems when they look at digital  
16 substitutes, getting more for their dollar, or satisfying other tastes and preferences,  
17 or specific or unique needs. Qwest basic business exchange, PBX and centrex  
18 services face increasing competition from numerous alternative technologies and  
19 solutions.

20  
21 Mr. Williamson went so far as to indicate that CLEC supplied digital services  
22 compete with analog services. Ex. 301T, pp. 7-9. Nevertheless, inexplicably, when  
23 describing and measuring the market, Staff totally failed to take Qwest's own digital  
24 services (or for that matter the CLECs' digital services) into account in this case.

25 Under cross-examination, Staff witness Wilson made it clear that Staff did not  
26 even do the most rudimentary examination of which other Qwest and CLEC services may

1 be readily substituted for the services at issue in this docket. However, as Mr. Wilson  
2 admitted, this is an important step in defining the product market under the statute. Tr.  
3 613. Mr. Wilson agreed that, if you do not know what the correct market is for a service,  
4 it is impossible to judge whether a service has effective competition, because you do not  
5 know what you are looking at as competition, and that how one chooses to define the  
6 market very well might have a critical bearing on the outcome of the case. A key issue in  
7 this case under the Washington effective competition statute is whether consumers are  
8 substituting other products for the product for which effective competition status is  
9 sought—and that is another way of saying whether there is cross-elasticity of demand. Tr.  
10 615,

11 The record in this case shows repeatedly, out of the mouths of Qwest and Staff  
12 witnesses, that the market as defined by Qwest and accepted uncritically by Staff does  
13 not in fact define the correct market in which Qwest’s analog business services exist,  
14 because there is ready substitution or cross-elasticity of demand between analog and  
15 business products offered by Qwest and its competitors.

16 For example, Qwest witness Reynolds stated that, “Some of our digital exchange  
17 services have similar functionality to our analog services” Tr. 112. He found that it was  
18 hard to distinguish digital from analog services because “they definitely fit in the same  
19 area as these [analog] services.” Tr. 118. He admitted that the CLEC competitors’  
20 digital services are competing with the Qwest PBX, Centrex and business lines which are  
21 the subject of this proceeding. Tr. 179.

22 Mr. Reynolds readily agreed a that market share analysis usually looks at what the  
23 market is, including what customers buy and what they substitute. Tr. 181. Services

1 which effectively compete should be considered in unison, according to Mr. Reynolds.  
2 Tr. 220-1. In fact, he admitted that Qwest uses *digital* intermodal competition as  
3 evidence that customers have substitutes for Qwest analog services. Tr.181-2, 221-2.<sup>3</sup>

4 Turning to a specific small business example, Qwest witness Reynolds agreed that  
5 Qwest had not included Integrated Services Digital Network (ISDN) BRS in its petition,  
6 because it is digital, even though it provides small businesses with two voice channels  
7 plus a data channel over the same copper pair which is used to provide single line analog  
8 voice service. Tr. 199-200. Thus, a small business customer with a single line analog  
9 service can order service over the same two wire copper loop that is digital and which  
10 provides two voice channels and a bonus data channel. Tr. 201-2. Mr. Reynolds stated  
11 that this service is not merely attractive to a small business which needs two business  
12 lines and a data channel, but “It seems like it would be designed for them.” *Id.* The only  
13 equipment which the customer needs to take advantage of this advantageous service  
14 arrangements is a \$200 telephone unit, and of course the customer will make a  
15 calculation whether to replace his or her analog service based on whether there is an  
16 overall cost savings from ordering the digital service. Tr. 327-8.<sup>4</sup> Qwest witness Teitzel  
17 struggled with the illogic of Qwest digital exclusion another version of its own Qwest  
18 ISDN service, the BRS 2B+S service, from the same market voice market as analog voice  
19 lines. From the customer’s perspective, Teitzel said, 2B+S ISDN service is treated as an  
20 analog type service, because it looks just like an analog service to the customer, and is  
21 offered as a voice service only. Tr. 462-5. Nevertheless, Qwest has not included these

---

<sup>3</sup> Similarly, Qwest witness Teitzel included both digital and analog wireless service as alleged substitutes for Qwest voice analog business services. Tr. 436-7.

<sup>4</sup> Of course, a new equipment purchase is also required to take utilize digital VoIP service and wireless service. This new equipment requirement does not seem to have slowed Qwest and Staff’s urging that these intermodal services compete with Qwest’s analog services.

1 ISDN BRS lines in its line count or market share analysis, and did not provide quantities  
2 for the Commission's consideration. Tr. 465.

3 Somewhat ironically, Mr. Reynolds agreed that not all services in the Qwest  
4 petition are interchangeable for all customers. Tr. 268-271. Customer choices in  
5 equipment will limit the choices which customers make between the analog services  
6 which are the subject of the Qwest petition in this docket; a customer is unlikely to  
7 substitute a PBX for its current three line analog telephone. Tr. 335. In other words there  
8 is clear evidence of the lack of interchangeability of some services within the analog  
9 category, while at the same time those analog services are interchangeable with similar  
10 digital voice services.

11 Indeed, Qwest has shown a remarkable lack of interest in and attention to the  
12 substitutability of its own products in this state for its analog voice products. While  
13 Qwest is generally aware that its customers migrate from Qwest business local exchange  
14 lines to other Qwest products, neither Qwest nor anyone on behalf of Qwest has studied  
15 this substitution in past 5 years. Tr. 473-4.

16 On cross-examination, Staff witness Williamson agreed that Qwest's own digital  
17 services can be used as substitutes for Qwest's business basic exchange services, and that  
18 the market for all of these services is the voice services market for business. From a  
19 technical perspective, the voice services market is single market whether provided over  
20 analog or digital facilities. Tr. 898-900. In his prefiled testimony, Mr. Williamson had  
21 also stated that digital services such as T1, ISDN BRI, and xDSL supplied by CLECs  
22 "can be used as substitutes for business basic exchange service. Ex. 301, pp. 6-9.

1 Staff's failure to conceive of the market as broader than the services proposed for  
2 treatment in Qwest's petition reflects the fact that Staff applied no independent analysis  
3 to the definition of the market in the case. Staff did not go through the Qwest tariffs as  
4 part of analyzing Qwest's case and look to see, without regard for digital or analog,  
5 which services might be substituted for other services are part of its analysis of Qwest's  
6 case. Rather, Staff blindly accepted Qwest's characterization of a limit set of its services  
7 as being a market, because that was what Qwest sought in its petition. On cross-  
8 examination, however, Staff agreed that the fact that Qwest petitioned for some services  
9 and treated those services as a market, does not necessarily satisfy the test of whether it is  
10 a market. The economist should do his or her own analysis to determine whether it is a  
11 market. Tr. 639-40. This Staff entirely failed to do, instead accepting at face value  
12 Qwest's representations that the services for which it petitioned constituted a market. Tr.  
13 640-42.

14 Nevertheless, Staff witness Wilson recognized that from the customer viewpoint,  
15 the distinction between analog and digital services is most often meaningless. "Business  
16 customers simply choose the functionality they need, often with little regard to how the  
17 service was provided..." and "whether it came to them over an analog or digital medium,  
18 wireless, wire, you name it, they don't care. They just want to talk to the other party...I  
19 mean, if the functional equivalency is there, that's the main thing to them. They're like  
20 me. They're not interested in the technical stuff too much, maybe." Tr. 643.

21 Notwithstanding this insight, Staff inexplicably excluded all Qwest digital services from  
22 consideration as substitutes and part of the same market.<sup>5</sup>

---

<sup>5</sup> Staff and Qwest also excluded from their analyses a Qwest analog service which provides business lines to small businesses. Tr. 636-7. Qwest's semi-public coin phone plus extension services permit a business

1           **By failing to define the market properly, Qwest and Staff have also failed to**  
2 **measure it properly.** All of the information on market shares of Qwest and the CLECs  
3 is premised on a product market which has not been demonstrated to exist. This  
4 information is therefore useless, because it looks at a limited set of monopoly services  
5 compared to the same limited set of CLEC services, without regard for the larger  
6 business voice services market, of which they are but a part.

7           Because numerous digital services offered by Qwest and the CLECs are  
8 substitutable for analog services for which competitive classification is sought, and  
9 customers are making choices between digital and analog services to meet the same  
10 needs for business voice services, the market is that broader market.

11           In a competitive analysis, market definition properly “focuses solely on demand  
12 substitution factors, i.e., possible consumer responses...A price increase could be made  
13 unprofitable by consumers either switching to other products or switching to the same  
14 product produced by firms at other locations. **The nature and magnitude of these two**  
15 **types of demand responses respectively determine the scope of the product market**  
16 **and the geographic market.”** DOJ Merger Guidelines, Exhibit 224 (emphasis added).  
17 In other words, when consumers can thwart a price increase by choosing other products,  
18 those products are part of the same product market as the product for which consumers  
19 would make the substitution. And when consumers can thwart a price increase by  
20 choosing services offered at another location, the limits of those other locations defines  
21 the relevant product market.

---

owner to place a pay phone line in his or her own calling array and to add extra business lines that way. Neither Staff nor Qwest included these lines in their market share analysis, even though the Qwest tariffs show expressly that these analog services create a substitute for a second business line. Exhibit 64.

1           The evidence in this case shows that many of Qwest’s own digital services readily  
2 substitute for the services at issue in the case. Indeed, Qwest’s own Annual Reports  
3 show that very substitution being made by customers with Qwest’s own digital, hi-  
4 capacity circuits. Exhibits 84 and 86. For example, Qwest’s 2000 Annual Report, in its  
5 discussion of Revenues for the previous year, reports:

6  
7           Local voice revenues grew despite the fact that access line growth slowed to  
8 approximately 2 percent year-over-year. Total access lines increased by 341,000  
9 with business lines comprising the majority of the change. **The decline in**  
10 **access line growth was partially attributable to businesses converting**  
11 **single access lines to a lower number of high-speed, high-capacity lines**  
12 **allowing for transport of data at higher rates of speed. On a voice-grade**  
13 **equivalent basis, the Company’s business access lines grew by 30.5**  
14 **percent as compared to 1999.**

15  
16 (emphasis added).

17  
18 Similarly, Qwest’s 2001 Annual Report states:

19  
20           The increase in commercial services revenues was partially offset by a decrease  
21 in local voice service revenues sold to businesses as a result of the slowing  
22 economy, competitive losses and technology displacement. **Access lines used**  
23 **by small business customers decreased by 147,000 in 2001 over 2000. This**  
24 **reflects the fact that businesses were converting their multiple single**  
25 **access lines to a lower number of high-speed, high-capacity lines allowing**  
26 **for the transport of multiple simultaneous telephone calls and transmission**  
27 **of data at higher rates of speed. On a voice-grade equivalent basis, however,**  
28 **total business access lines grew 31.9% when comparing 2001 to 2000. A voice-**  
29 **grade equivalent is the amount of capacity equal to one telephone call. A voice-**  
30 **grade equivalent basis is the outcome of measuring all residential and business**  
31 **access lines as if they were converted to single access lines that have the ability**  
32 **to transmit and receive only one voice transmission at a time.**

33  
34 (emphasis added).

35  
36           For the Commission to conclude that digital and analog services are not part of  
37 the same market would require that the Commission ignore Qwest’s own repeated  
38 statements in its reports to its investors. Qwest’s small business customers have been  
39 converting their single analog access lines to hi-capacity digital lines, increasing their

1 services, while decreasing the number of lines they purchase from Qwest, and shifting  
2 their services from analog to digital at the same time. It is obvious that the reason that  
3 Qwest has greatly increased its voice-grade equivalents at the same time is that Qwest is  
4 selling small businesses digital services over channelized DS-1 and other high capacity  
5 facilities. By seeking to force consideration of only its analog services in this docket,  
6 Qwest keeps the Commission from seeing the real picture of what Qwest services its  
7 customers are substituting for the analog service which they are discontinuing. Qwest  
8 should not be permitted to benefit from its own chicanery. The Commission should insist  
9 that this interchangeability of services to small business customers which Qwest so  
10 readily admits to its investors be reflected in the market definition in this state.

11 Of course, because the CLECs offer digital services which are functionally similar  
12 to those offered by Qwest, those services too are part of the market. For the Commission  
13 to reach any conclusions about the product market in this case, it would need to be  
14 presented by the applicant or Staff with evidence on the entire, real, substitutable market.<sup>6</sup>

15 Qwest suggested that customer costs of customer premises equipment could drive  
16 customer choice between digital and analog services, yet offered no evidence of any kind  
17 in support of that hypothesis. It is obvious that equipment costs are part of customer  
18 decision making. However, that raises questions, but does not establish that there is a  
19 separate analog marketplace. For example, even for customers with PBXs, the most

---

<sup>6</sup> Qwest witness Shooshan attempted in oral testimony to sidestep this obvious problem in the evidence by terming analog and digital services “adjacent markets.” Tr. 553. There is no evidence that the economic literature makes any such distinction for competitive markets, and certainly Staff’s testimony demonstrates just the opposite to be the case in Washington, where CLEC and Qwest digital services are interchangeable with Qwest analog services. See discussion above at pages 12-16 of this Brief. Where the services may be substituted, they are in the same market. Where they may not be substituted, then they are in different markets. See Exhibit 224. Mr. Shooshan recognized the substitution of digital for analog services and therefore implicitly recognized that the market for business voice services includes both digital and analog delivery of those services. His attempt to jury-rig economic theory to fit Qwest’s theory of the case should be summarily rejected.

1 expensive type of customer-owned equipment, merely because a customer has equipment  
2 costs, either sunk or replacement, does not mean that the respective services associated  
3 with those choices are not in the same market. Analog PBXs are available used, not new.  
4 An old analog PBX may have significantly higher maintenance and repair costs,  
5 replacement parts may be difficult and expensive to obtain, qualified service people could  
6 prove difficult to find, and may require more in-house staff than its digital replacement.  
7 The replacement digital services may be less expensive on a unit of service basis, and  
8 may offer features which save personnel costs. Digital PBX vendors undoubtedly know  
9 well how to use factors such as these to convince customers to move to their products,  
10 based on an analysis of short and long term costs and features. Considerations such as  
11 these almost certainly place digital and analog PBX trunks in the same product market.  
12 There is no evidence in the record that they are not.<sup>7</sup> Even Qwest's witness agreed that a  
13 new medium-sized business entering the Washington market would make the decision  
14 whether to utilize analog or digital services based on its costs and service needs rather  
15 than the technology. Tr. 184-186.

16 Moreover, Centrex is a substitute for both analog and digital PBXs. It offers a  
17 company which has grown to the level of needing PBX functionality or has outgrown the  
18 level of its current PBX a means to upgrade service without large initial equipment costs.  
19 And of course, the digital services of wireless and VoIP Internet voice companies which  
20 Qwest and Staff tout as substitutes for analog services also require the purchase of new  
21 equipment--so the fact that equipment must be purchased does not wall off a service from  
22 functioning as a substitute, by Qwest's and Staff's own admission. Tr. 423.

---

<sup>7</sup> In fact, Qwest's witness agreed that if one wished to purchase an analog PBX at this point, one would have to purchase it on eBay. Tr. 929-31. No one is manufacturing this old technology anymore, so all PBX replacements with new PBX equipment will necessarily be digital and require digital services.

1 Another example of a ready substitution between analog and digital services is  
2 demonstrated in basic business lines. Qwest's own Integrated Service Digital Network  
3 BRS 2B+S service offers single line business customers the opportunity to obtain two  
4 voice lines over the same copper two wire loop which currently serves their business.  
5 The expenditure for equipment to utilize this service may be as little as \$200. Tr. 327-  
6 328. Thus, a customer may rationally conclude that it can expand its line capacity and  
7 recover its equipment costs to convert to the Qwest digital service over a relatively short  
8 time period. Even Qwest's own witness, Mr. Teitzel, had a difficult time classifying this  
9 digital service as separate from the analog market. Tr. 462-464. In addition, if the  
10 customer purchases Qwest's ISDN BRS services in its 2B+D configuration, the customer  
11 gets not only the capability of two voice lines over two wire copper, but the additional  
12 functionality of a data channel (the D channel) which can be used for email electronic  
13 confirmation of credit card transactions. This additional functionality makes the 2B+D  
14 Qwest ISDN BRS service a substitutable product to simple single or even dual basic  
15 business lines for small retail businesses. Staff witness Mr. Wilson agreed that customers  
16 can readily substitute Qwest's ISDN BRS 2B + S digital product for analog business  
17 access lines from Qwest, getting two voice lines over the same two wire copper which  
18 previously supplied them with a single analog business line. Tr. 634-6.

19 *Despite this admitted and obvious substitutable use for basic business lines,*  
20 *Qwest excluded all of its 2B+S and 2B+D small business voice use of ISDN BRS from*  
21 *this case.* Tr. 637. We simply have no idea how large even that segment of Qwest's  
22 small business voice service digital product offering is. For all we know, if included in  
23 this docket, it would substantially affect Qwest's and Staff's market share comparisons.

1 If it did not have that effect, Qwest could have come forward with the numbers of lines of  
2 this service it sells to show a de minimus impact. The fact that it did not suggests that the  
3 effect would be substantially greater.

4 In the Centrex and business line market, there is evidence in the record which  
5 suggests that digital Centrex and digital business lines are in the same market. Centrex  
6 requires little business customer purchase of equipment to utilize. The customer  
7 purchases analog phone sets if it wants analog Centrex and digital phone sets if it wants  
8 digital Centrex. Tr. 326-327. There are vendors in the marketplace offering both types of  
9 sets to business customers, and the purchases are typically made, as Staff Wilson aptly  
10 noted, on the basis of functionality, rather than technology.

11 Qwest's effort to segment the market based on the products for which it seeks  
12 competitive classification is also inconsistent with its current Qwest filings in other  
13 states. For example, in Qwest's Idaho filing, it has claimed that wireless service  
14 competes with all of its voice services, without any distinction between analog and digital  
15 services.<sup>8</sup>

16 In short, Qwest's definition of the product market as those products which it  
17 wants reclassified falls far short of the analysis required by this Commission. The failure  
18 of both Qwest and Staff to include Qwest's own substitutable digital services in the  
19 product market renders the market analysis and resulting market share and market power  
20 analyses meaningless.

---

<sup>8</sup> That petition has very recently been resoundingly rejected by the Idaho Commission. See discussion below regarding wireless services as competition.

1 B. Definition of geographic market

2 It is obvious from the evidence that the nature of competition varies greatly across  
3 Qwest's service area in Washington. Some areas have little or no competition, some  
4 areas have essentially all of the competition by total service resale or by UNE-P, and  
5 some areas have a mixture of these types of competition together with UNE loop and, in  
6 some cases, CLEC owned loops. Lumping these areas together as Qwest has done in its  
7 regionalization of competition obscures and suppresses the differences between  
8 communities in these areas. The differences are readily demonstrated by Ms. Baldwin's  
9 analysis. Exhibits 401T, 403C. The fact that a customer in some downtown urban areas  
10 may be able to get service from a competitor over a UNE loop, does not necessarily mean  
11 that customers outside the downtown area of that same city have access to competitor  
12 services over UNE loops, and certainly not that customers in outlying areas in the same  
13 general region of that city have access to competitor services over UNE loops. The  
14 evidence shows that even for CLECs which have switches in a city in Washington, the  
15 area that they can reach with UNE loops from that switch is constrained by whether they  
16 have collocations in Qwest's central office in an area. There is considerable expense in  
17 building, equipping and maintaining a collocation, and CLECs cannot afford to do that  
18 without making a determination that their customer densities in the area will support the  
19 great expense and effort involved in facilities-based competition. Tr. 164-168, 215-216.

20 Because Qwest had the burden to show that in the market area it chose the  
21 services offered by its competitors are effectively competitive, the fact that many areas  
22 are not makes its petition unsupported as to geographic market. Therefore the application  
23 should be denied.

1 IV. Review of statutory factors for evaluating effective competition.

2 A. Number and size of alternative providers.

3 The number and size of alternative providers is a consideration under the statute  
4 because it is one potential indicator of the strength of providers of alternative services in  
5 the market. The competitive industry for the past few years has been in an economic  
6 tailspin, and the CLEC landscape is littered with bankruptcies and ailing companies.  
7 Even the former stars of the industry have faltered, and many have fallen. Mr. Gates  
8 presented evidence of the weakness of the competitive industry, and reflected on how it is  
9 currently held in low regard by market analysts and investors. Ex. 503, 501T, pp. 49-51.  
10 As a result of these events, the competitive industry has not been able to attract  
11 investment, and has downsized considerably. Thus the economic strength of the  
12 remaining players in the competitive marketplace is very limited, and they are as a result  
13 strictly price followers of the ILEC petitioner Qwest. Their numbers are more apparent  
14 than they are real, because so many of them have an insignificant share of the local  
15 market and, in some cases, are even inactive.

16 B. Extent to which services are available from alternative providers in the relevant  
17 market.

18 Services which compete in the voice market are available from alternative  
19 providers in Washington, but to varying degrees which, as described above, varies with  
20 geographic area. The majority of the exchanges in the state have little or no facilities-  
21 based competition. As described below, that is a critical distinction, because competition  
22 is not effective if it is captive competition. *However, in addition, what is unsaid by these*  
23 *statistics, is that there a whole class of services which “compete” with the services which*

1 *are the subject of this petition are provided by the applicant, Qwest, itself.* These are  
2 Qwest's digital voice services for business. And these are not provided by alternative  
3 providers, but by Qwest itself. As discussed above, Qwest's own corporate annual  
4 reports for the two most recent years for which the reports were available through the  
5 hearing in this case show that Qwest itself attributes a significant amount of its reported  
6 decline in business voice lines to customers migrating to Qwest's own high capacity  
7 digital services. Thus, Qwest's evidence of decline in its numbers of analog business  
8 lines does not necessarily demonstrate loss of business to competitors as much as it  
9 demonstrates migration of Qwest customers to services which are not part of Qwest's  
10 petition and proof in this docket.

11 C. Ability of alternative providers to make functionally equivalent or substitute  
12 services available.

13 Qwest has based its principal and only quantitative proof in this docket on the  
14 presence of Competitive Local Exchange Carriers (CLECs) in the market, providing  
15 services through Total Service Resale (TSR), Unbundled Network Element-Platform  
16 (UNE-P), Unbundled Loops combined with CLEC switching (UNE-L), and CLEC-  
17 owned loops. The first two of these involve resale of Qwest services, with no  
18 telecommunications services provided by the CLECs. The third, UNE-L, involves loops  
19 leased from Qwest. Only the fourth of these involves entirely CLEC-owned facilities.

20 Secondly, and without quantification for the Washington business market,  
21 Qwest points to digital voice services provided by Voice Over Internet Protocol (VoIP)  
22 companies, and digital and analog services provided by commercial mobile wireless  
23 carriers. Finally, one Qwest witness has speculated about the potential of WiFi cordless

1 handsets to supplement VoIP in corporate network settings, based on a single trial at a  
2 hardware chain store.

3 1. Wholesale-based services

4 i. Total Service Resale As Competition

5 The Commission has previously held, and correctly so, that Total Service Resale  
6 (TSR) is not evidence of effective competition, and should not be included as competitive  
7 service in any market share analysis. This was based on the Commission's conclusion in  
8 Docket No. UT-000883 that TSR is not price-constraining. There is no evidence in this  
9 case to the contrary. Notwithstanding, both Qwest, and Staff, in its misguided effort to  
10 support Qwest's position at all costs, included TSR in their market share analysis.

11 Indeed, the Qwest witness went so far as to state that if the entire competitive market  
12 competition consisted of TSR only, in his opinion the market would be effectively  
13 competitive. Tr. 189-190.

14 Of course, a major reason why TSR is not price constraining is that it consists of a  
15 fixed percentage discount from Qwest's retail price. That discount, currently 14.74%,  
16 must cover all of the CLEC's costs, including its profit. That margin cannot be improved  
17 by the CLEC by its own efforts to become more efficient. It will always be the same. So  
18 when the monopoly provider obtains permission to move its retail price for a service, the  
19 wholesale price will move lockstep with the ILEC's retail price, putting enormous  
20 pressure on the CLEC to move its price to avoid ruin. Ex. 501T, pp. 14-15.

21 Therefore, under the Commission's own precedent, and the lack of contrary  
22 evidence in this docket on which a different decision could be reached, the Commission

1 should reject evidence of the competitive significance of Total Service Resale out of  
2 hand.

3 ii. UNE Platform as Competition

4 The UNE Platform is TSR by another name and with a different pricing basis.  
5 The CLEC is still reselling a finished service provided by Qwest. However, in this  
6 instance, the CLEC purchases the service based on the price of the constituent Unbundled  
7 Network Elements which make up the service involved. In the case of basic business  
8 lines, this generally means a loop, a port, local switching and transport.

9 Because of the nature of UNE Platform as resale, all services are provided by  
10 Qwest.

11 UNE-P on the surface appears potentially somewhat more price-constraining than  
12 TSR because its cost to the CLEC does not vary with Qwest's retail price for the finished  
13 service. Ex. 501T, pp. 16-17. However, that aspect of price constraint would disappear if  
14 the Commission granted the petition of Qwest in this docket. For if Qwest obtained  
15 pricing flexibility, it could choose to lower its retail prices for its competing products to  
16 lower than 14.74% above the combination price for the UNEs which make up the UNE-P  
17 version of its product. This would lower CLEC margins to less than the margin for Total  
18 Service Resale! Under such a circumstance, UNE-P providers would rationally move to  
19 Total Service Resale, because it would offer better margins. Even if Qwest just chose to  
20 lower its retail price to the same level as the UNE-P elements plus 14.74%, UNE-P  
21 would have no pricing advantage for the CLEC over resale. **Thus, until and unless the**  
22 **market power of the monopoly provider is broken, UNE-P should not be seen as a**  
23 **competitive panacea, because UNE-P's strength depends on the Commission not**

1 **granting Qwest's petition in this docket. Qwest otherwise will have the ability to**  
2 **unilaterally hobble or eliminate UNE-P as a source of competition in the state.**

3 In addition, the very existence of UNE-P is threatened. First, there is a Triennial  
4 Review proceeding in this and other states in which UNE switching (an essential UNE-P  
5 element) is threatened, with the presence of certain "triggers" enough to terminate the  
6 availability of this element. If there is a finding that the absence of UNE switching does  
7 not impair the ability of CLECs to compete under the new FCC rules, that ruling would  
8 not save the market share currently held by UNE-P service providers. Instead that market  
9 share would disappear or turn into total service resale quickly. And of course, this  
10 Commission has previously ruled in Docket No. UT-000883 that TSR should not be  
11 considered in market share determinations because total service resale is not price-  
12 constraining.

13 Moreover, Qwest and the other RBOCs along with USTA have filed writ of  
14 mandamus in the DC Circuit, seeking the end of UNE-P by emergency relief on 45 days  
15 action. Exhibit 105. This is same circuit court which has twice reversed rules of the FCC  
16 on unbundling decisions. And this new RBOC challenge is not by appeal but by writ.  
17 Qwest believes that the FCC's rules on UNE switching (without which there is no UNE-  
18 P) are in direct violation of the previous rulings of the DC Circuit on the same matters,  
19 and are subject to summary reversal. Despite Qwest's urging in this case that the Cmn  
20 will be able to examine and make a determination of impairment regarding UNE  
21 switching in its Triennial Review proceeding, Qwest in fact believes that the state  
22 commissions have no business dealing with this issue and that they have already won the  
23 issue before the Federal Courts. They are so certain of this, that they have proceeded by

1 writ, an expedited extraordinary proceeding, rather than by appeal. Qwest and its allies  
2 wrote:

3 But what is needed right now – and what is clearly warranted in light of the  
4 FCC’s continued intransigence – is a writ of mandamus directing the FCC to  
5 decide the issue that Congress required it to decide. Only such affirmative relief  
6 will establish a federal standard, check the unbundling efforts of the state  
7 commissions, and rescue incumbents from the irreparable harm they are suffering  
8 under the existing, unlawful regime.

9  
10 Accordingly, the Court should vacate the FCC’s rules governing the unbundling  
11 of mass-market switching and high-capacity facilities...Consistent with the  
12 statutory requirement that a lawful finding of impairment must *precede*  
13 unbundling, the FCC should also be directed – if it is unable to justify continued  
14 unbundling under the proper legal standards – to put a halt to new UNE-P  
15 customers and adopt a plan to end existing UNE-P arrangements.

16  
17 Ex. 105 at pp. 29-30 (numbering of original).

18 2. CLEC-owned loops.

19 CLEC owned loops, when coupled with CLEC owned switches, are the only competition  
20 where Qwest’s services are out of the picture entirely for local service delivery. Of  
21 course, these companies may still be dependent on Qwest for collocation, interoffice  
22 transport, and so on, so they are not necessarily entirely self-sufficient just because they  
23 have loops and switches. Nevertheless, they exercise the most freedom of action on the  
24 service delivery side, and have the potential to place the greatest amount of constraints on  
25 Qwest’s pricing behavior. However, they represent a very small fraction of the loops  
26 used by competitors, and at this point do not enjoy sufficient market share to constitute  
27 effective competition for Qwest’s services. See Ex. 401T, 401C.

28 3. Intermodal “Competition”

29 **Voice Over Internet Protocol as Competition**

1           Voice over Internet Protocol service (VoIP), according to the evidence in the case,  
2 is of two basic types. The first is as a digital transmission mode for corporate networks,  
3 including virtual private networks. In this use, VoIP replaces long distance service, not  
4 local service. Virtual private networks have been around for many years, and have used a  
5 variety of digital transmission modes to transmit voice. Tr. 907-9. VoIP is just the latest  
6 of these modes. These corporate networks provide a way for corporations with high toll  
7 usage between dispersed corporate locations to set up private always-on connections  
8 using dedicated or virtually dedicated facilities, thereby avoiding heavy toll charges. Tr.  
9 907-9. VoIP provides a more efficient way in which to transmit voice traffic over these  
10 networks, without requiring a separate network for moving corporate data. Tr. 910.  
11 As such, VoIP merely provides a much more efficient mode of doing the same  
12 substitution for long distance service that virtual private networks did in 1995, well  
13 before the advent of VoIP. In fact, VoIP can also ride on the same digital T1 facilities as  
14 earlier corporate networks. Tr. 911-12. The heavy users of VoIP of this type are large  
15 companies and institution, “enterprise customers” in telecom parlance. Tr. 913. There is  
16 no evidence in the case at all that this corporate use of VoIP is serving as a substitute for  
17 local service. To the contrary, the evidence uniformly shows that corporate use of voice  
18 over IP substitutes for long distance service, which of course is not one of the services  
19 involved in the petition in this proceeding.

20           The second use of VoIP is the Vonage/Packet8 type use, where the calls move  
21 over the Internet, using VoIP technology. This use of the Internet requires a high speed  
22 connection and is a promising technology. However, it has not been demonstrated at this  
23 time to be effective competition for local business lines in Washington. First, there is no

1 evidence in the case that any of these companies actually have any customers in  
2 Washington. The only quantity evidence on lines sold is national information for  
3 combined residential and business lines for the Vonage. That information shows that  
4 approximately 50,000 combined residential and business lines have been sold nationally.  
5 This amounts to an extraordinarily tiny percentage of all lines nationally. Even assuming  
6 that Washington customers purchased in proportion to population—and there is no  
7 evidence of this—less than 3% of the nation’s population resides in Washington.<sup>9</sup> On a  
8 population basis, this would place fewer than 1,500 lines in service in Washington.  
9 Assuming that 80% of those lines are residential, which is probably a conservative  
10 estimate, that would mean that fewer than 300 business lines have been sold in all of  
11 Washington. This of course is an insignificant presence in the state, certainly not the type  
12 of competition envisioned by the statute as “effective competition.”

13           Moreover, there are very good reasons why, in this state, the Vonages of the  
14 world are likely to have a tough time penetrating the business and institutional  
15 marketplace to any significant degree. The customers of these Internet-based providers  
16 are not entitled to an automatic directory listing, and must arrange for one on their own,  
17 at extra cost. Tr. 915-6. Customers have to install the service themselves. When a  
18 customer signs up, a package comes in the mail, and the customer installs his or her own  
19 service. All of the problems which may come up in installation, which are listed in Ex.  
20 314, the customer must deal with on his or her own, except perhaps with some telephone  
21 support. If a problem arises with the service, the customer troubleshoots and resolves it  
22 on his or her own. If the Vonage equipment malfunctions and the customer has

---

<sup>9</sup> Washington had fewer than 6 million of a total 284 million United States population as of 2001, according to the U.S. Bureau of the Census estimates. See <http://quickfacts.census.gov/qfd/states/53000.html>.

1 disconnected its regular telephone service, the customer has no phone service until  
2 Vonage can ship a replacement unit. If the customer's high speed connection is DSL, the  
3 customer still must keep his or her regular telephone line. Tr. 917. Moreover, under  
4 applicable state law, many PBX operators are required to update 911 records  
5 automatically through services called ALI or PSALI, which provide Automatic Line  
6 Identification. The PBX operator must subscribe to those services from phone company  
7 to comply with Washington law. With Automatic Line Identification, E911 gives you a  
8 specific telephone location (e.g. in an office park) and a callback number. Tr. 918.  
9 However, Vonage service does not provide E911 service, only the rough equivalent of  
10 regular 911 service, with no Automatic Line Identification at all. Tr. 919-20. As a result,  
11 there may be problem as matter of policy using Vonage service in any place where state  
12 law and rule require ALI. The onus of this state law falls on those who purchase  
13 telephone service and provide it to others, like in schools or office complexes, and shared  
14 tenant situations. Tr. 921. If a PBX provider decides to substitute Vonage through PBX  
15 for the service it has now, it will lose E911 capability on those lines. Indeed, even  
16 Vonage's regular 911 service is a just-released addition to the service, introduced in April  
17 2003. Tr. 922-3. Vonage itself demands a complete release of liability for its inadequate  
18 911 service, obviously not showing a high degree of confidence in its very recent service  
19 addition. *Id.*

20 It gets worse. A power failure may cause user to have to reset or reconfigure its  
21 phone service before can make even the limited 911 calls Vonage claims to permit. And a  
22 user has no 911 service at all unless the user activates it when he or she gets his or her  
23 Vonage phone. And if the customer gives Vonage a wrong address, Vonage has no way

1 to check on it. If the customer changes its phone number, then the customer has do it all  
2 over again—manually. Tr. 922-3. Whereas, with Qwest service, a new E911 address  
3 comes with new number automatically from the phone company. Tr. 924.

4 Finally, adding insult to injury, Vonage’s service agreement says that the  
5 company can terminate the customer at any time in Vonage’s sole discretion, a fact  
6 unlikely to sit well with businesses concerned with reliability and continuity of service.  
7 For many businesses their telephone is a lifeline or primary route by which business  
8 comes to them. Tr. 925.

9 While VoIP over the Internet is improved somewhat from its earlier quality  
10 problems, according to Staff witness Mr. Williamson, VoIP not yet a totally mature  
11 technology. Tr. 927. The Commission plainly cannot count on this technology at its  
12 present stage of development to constrain monopoly behavior in the business voice  
13 marketplace. It is barely beyond the hobbyist phase, and is still fraught with severe  
14 problems as a substitute for business voice service.

15 The evidence regarding VoIP thus shows that its current uses are (1) as a  
16 substitute for toll in corporate Virtual Private Networks, replacing other digital  
17 technologies which already perform the same function and (2) and as a nascent  
18 technology shipping voice over the Internet which still suffers from limitations and  
19 problems which, at the current state of development, substantially constrain its adoption  
20 as a substitute for voice business services in this state. There is no evidence than anyone  
21 is using the technology as a substitute for business voice service in this state,<sup>10</sup> and even a

---

<sup>10</sup> Qwest witness Mr. Teitzel agreed that there is no evidence in this case that any Qwest customer in Washington has substituted VoIP for wireline service. Tr. 431.

1 statistical allocation of reported lines nationally shows not more than an insignificant  
2 presence likely in this state.<sup>11</sup>

3 The public interest would be ill-served at this time for the Commission to rely to  
4 any extent on VoIP as evidence of effective competition for business voice services  
5 provided by Qwest.

### 6 **Wireless Service as Competition**

7 Qwest suggests that some customers may be substituting wireless service for  
8 some analog business voice lines. It offers no evidence for this proposition, other than  
9 surveys of Idaho and Iowa wireline customers, which purport to test whether Qwest's  
10 wireline customers in those states might or could substitute wireless service for some of  
11 their Qwest wireline services. There is no evidence that, even in those states, the  
12 customers have made that substitution. Nor is there any evidence at all that those surveys  
13 are applicable to the Washington market, or that there are a substantial number of  
14 Washington customers who hold similar opinions.

15 Moreover, on October 20, 2003, the Idaho Public Utilities Commission rejected  
16 that same Qwest survey as evidence of substitution and effective competition, in a  
17 lengthy and well-reasoned decision in Case No. QWE-T-02-25, Order No. 29360 (copy  
18 attached) (hereinafter ID Order). The Idaho PUC found that the survey designer testified  
19 that the survey was designed as “marketing research to determine if customers in those  
20 exchanges *perceive* wireless phone service to constitute effective competition with

---

<sup>11</sup> There was also a suggestion that VoIP coupled with WiFi, a short-range wireless Internet radio access technology, is a substitute for voice business lines. In fact, the evidence adduced shows only that WiFi phones have been substituted for other wireless handsets as a trial in a hardware retailer setting, and then hooked into existing corporate networks to save toll charges. There is no evidence that this usage substitutes for business lines, that any such service has been deployed in Washington, or that this will ever move beyond the experimental stage. Ex. 101, footnote 11, and associated URL cited therein.

1 Qwest's basic local exchange service." ID Order at 9. The Idaho PUC found that "the  
2 survey made no attempt to obtain objective data about customers' actual conduct or  
3 purchasing decisions that might be relevant to show whether cellular service is actually  
4 competing with Qwest's local service. Qwest instead obtained 'marketing research'  
5 designed to gauge customers' perceptions." *Id.* The Idaho PUC found that the survey  
6 was of a limit nature and effectiveness, because it "did not seek information on the  
7 likelihood the customer would actually replace his wireline service with cell phone  
8 service." ID Order at 9-10. In addition, "the survey made no attempt to ascertain the  
9 reasons the customers used both [wireline and wireless] services and did not substitute  
10 wireline with cellular service." ID order at 10. The Idaho Commission found that no  
11 substitution had been established, but that even if the FCC's nationwide information that  
12 three to five percent of customers have replaced their wireline service with wireless  
13 service were true for Idaho, that would not be sufficient "to demonstrate that cell phone  
14 service effectively competes with wireline services." ID Order at 19. The Iowa survey  
15 was of a similar design to the Idaho survey, and therefore suffers from the same  
16 infirmities.

17 Moreover, the Idaho PUC found additional support for its decision in the  
18 conclusions of the Federal Communications Commission in its recent Triennial Review  
19 Order, in which the FCC found that "neither wireless nor cable has blossomed into a full  
20 substitute for wireline telephony," and that "despite evidence demonstrating that  
21 narrowband local services are widely available through CMRS [wireless] providers,  
22 wireless is not yet a suitable substitute for local switching." The FCC also found that the  
23 fact that there is limited substitution demonstrates that "wireless switches do not yet act

1 broadly as an intermodal replacement for traditional wireline circuit switches,” and that  
2 “wireless CMRS connections in general do not yet equal traditional landline facilities in  
3 their quality.” ID Order at 20 citing and quoting the FCC’s TRO order.

4 If these surveys are not valid evidence of substitution and effective competition  
5 for the states which they purport to study, then they can hardly form any basis of support  
6 at all for the question of effective competition in Washington.

7 The other evidence by which Qwest purports to show substitution of wireless for  
8 wireline service was proffered by Qwest witness Mr. Teitzel. Mr. Teitzel reported that  
9 there is a national company which is offering a new enhancement to corporate PBXs  
10 which allow cellular phones to function as extensions of the PBX. On cross-examination,  
11 however, Mr. Teitzel allowed as how it was just a likely that this use of the cellular phone  
12 increased the need for wireline service, due to the integration of the cellular phone into  
13 the wireline service, increasing the load on the wireline service. Indeed, even to install  
14 this new service requires that the PBX owner order an additional T-1 line from its local  
15 provider. Tr. 455-456.

16 Thus there is no competent evidence in this case of substitution of wireless  
17 service for business analog voice services in the State of Washington.

18 D. Other indicators of market power.

19 1. Market share analysis.

20 Market share analysis is, of course, closely related to market concentration  
21 analysis. The most commonly used measure of market concentration, the HHI from the  
22 U.S. Department of Justice’s Merger Guidelines, requires that the market first be properly

1 defined, that the market shares then be determined, and the results computed to determine  
2 a quantitative measure of market concentration.

3 As explained above, the market share data put forward by Qwest and Staff is  
4 useless because of the erroneous definition of the market. Therefore, there is no  
5 competent evidence in the case on market shares, and the Commission cannot evaluate  
6 the respective shares of Qwest and its competitors. Qwest has failed to carry its burden  
7 in this regard, and its petition should be denied on this basis alone.

8 Nevertheless, there has been extensive discussion of market shares in this case,  
9 and we therefore need to address this issue as well.

10 The purpose of the market share analysis is a way of understanding the market  
11 power of the applicant and the other participants in the market. If a market is highly  
12 concentrated, then the market power of the dominant company prevents effective  
13 competition, because removal of Commission first instance oversight over retail pricing  
14 will inevitably give the ILEC the power to constrain or eliminate competitive activity.

## 15 2. Market concentration analysis.

16 Market concentration is a quantitative measure of the degree to which monopoly  
17 power exists in a properly defined market. The HHI Index contained in the Merger  
18 Guidelines of the US Department of Justice has been widely employed as an objective  
19 measure of market concentration. As witness Susan Baldwin testified, the use of the HHI  
20 index to determine market concentration is properly the primary part of the analysis of  
21 market power. An HHI of above 1800 indicates a high degree of market concentration.  
22 In Docket No. UT-000883, the Commission noted and effectively adopted Staff's  
23 conclusion that an HHI of above 5000 for Qwest's services was sufficiently large to

1 create a threshold which Qwest must fall below before competitive classification should  
2 not be granted for the same services which are at issue in this docket! All of the services  
3 in this docket are above that level on a statewide basis, by any reasonable measure.<sup>12</sup>

4 The evidence in the present case shows that under any analysis even of the analog  
5 services alone, the HHI is well above 5,000 for these services. Under the Staff's and the  
6 Commission's own precedents, this application should be denied on that basis alone.

7 Staff and Qwest have attempted to avoid this obvious conclusion by seeking to  
8 downplay the significance of HHI analysis in this case. They have done this by simply  
9 saying that they did not consider it important, without much reasoning, or by trying to  
10 show that there are other factors which undercut the obvious import of the extraordinarily  
11 high HHI numbers. These include what they perceive as trends in the market to favor  
12 competitors, including allegedly growing diminution of Qwest's market share. The  
13 obvious problem with this analysis is that Qwest's own documents show that the loss of  
14 its analog customer lines is largely driven by customer migration to Qwest's own, high-  
15 capacity, digital services! Ex. 84 and 86, discussed above. This of course is a part of the  
16 same voice services market, which neither Qwest nor Staff have included in their  
17 analysis. In fact, Qwest reports an overall growth in lines, despite its protestations in this

---

<sup>12</sup> Qwest's effort to inject the quantification of DS0 equivalents between the CLECs and Qwest by the back door as a measure of the nature of the digital market share should be rejected out of hand. First, as Qwest witness Teitzel indicated in response to a line of inquiry initiated by the Chairwoman, the digital DS0 equivalents include not only those provided on DS1s, but also in far greater numbers for those DS0 equivalents provided on DS3s, OC3s, OC12s, OC48s and others. Tr. 511-513. There is no evidence of quantities of DS0 equivalents for any party in this docket which includes all of the ways in which DS0 channels are created in the real world. Second, the comparison of the CLEC DS1s with the Qwest DS1s assumes that the maximum number of channels have been created and are in use by customers. However, there is no evidence that this is the case for the CLECs or for Qwest, and it is clear that if there is any difference between Qwest's overall channelization of DS1s and the CLECs, it could substantially affect the analysis. Finally, because the DS1 channels may be used for voice or data, without a quite granular analysis of actual use of the channels which are created by Qwest and its competitors, assuming anything about the number of business voice lines which are created as DS0 channels in DS1s is purely speculative and without factual foundation.

1 case. In the absence of comprehensive data collection and analysis of the entire business  
2 voice market, these supposed factors alleged to undercut the importance of HHI analysis  
3 are wholly unsubstantiated.

4 3. Ease of entry.

5 Ease of market entry is significant as an indicator of an effectively competitive  
6 market because if it is impossible or extremely difficult for competitors to enter a market,  
7 there is little or no chance that the competitors will ever be able to effectively compete.  
8 However, the form of market entry for which entry is relatively more or less easy is  
9 equally significant. For example, ease of market entry by total service resale or UNE-P is  
10 less significant than ease of market entry by UNE loops and CLEC owned loops. Ex.  
11 501T, pp. 13-17.

12 4. Affiliation of providers of service.

13 Qwest dominates the business voice services market in virtually all respects, and  
14 the bulk of the services in the market are provided by Qwest directly or through CLECs.  
15 The competing services, as described above, by Qwest's own admissions, include large  
16 quantities of digital services provided by Qwest itself, which Qwest says have accounted  
17 for a migration and diminishment in the number of lines purchased by businesses. Total  
18 service resale is just re-billed Qwest services, and does not represent a competitive threat  
19 or constraint on Qwest freedom of action. UNE-P competition is more apparent than real  
20 and could be snuffed out quickly if Qwest gets the freedom it is seeking. Again, it is  
21 Qwest's service with a CLEC label. (Moreover, Qwest's petition for a writ of mandamus  
22 to the United States Court of Appeals for the DC Circuit makes the very survival of this

1 form of competition problematic). Therefore, the affiliation of the provider of most of  
2 the voice services in the market is Qwest.

3 E. Significant captive customer base.

4 Qwest's captive customer base includes all the business customers whom CLECs  
5 have not been able to serve using UNE loops or CLEC owned loops. Even with the  
6 distorted and inadequate market definition employed by Qwest and Staff in their analysis  
7 in this docket, the percentage of customers reached by CLEC UNE loops and CLEC  
8 owned loops is very small, and there are many exchanges in the state where there is no  
9 competition of this type at all. Competition by UNE loops and CLEC owned loops  
10 requires that a CLEC have facilities collocated in the immediate area of the exchange,  
11 and there are simply not sufficient customer concentrations for CLECs to invest in  
12 collocation in all exchanges.

13 As the Commission has previously found, total service resale is just rebranded  
14 Qwest service, and does not constrain Qwest pricing. The reasons for this are that the  
15 service is just rebilled Qwest service, and that the resale discount is constant and is never  
16 greater or less than the 14.74% approved by the Commission. So it is Qwest service  
17 rebranded and priced at a fixed discount to the CLEC. For this reason, although the  
18 customers are apparently customers of the CLEC, the appearance is deceiving, and they  
19 are structurally actually customers of Qwest. Tr. 1148-1150.

20 UNE-P customers of CLECs are also captive customers of Qwest. If Qwest gets  
21 the pricing freedom it is seeking here, it will have the ability to force CLECs to price  
22 their UNE-P services below cost and thus to face imminent demise if they seek to  
23 continue to compete by this method. The fact that the fundamental change in regulation

1 sought here by Qwest will permit that company to eliminate economic competition by  
2 UNE-P. This will in turn discourage CLECs from new competition by UNE-P and will  
3 chill the Washington market for new competitive entry. Ultimately, this will give Qwest  
4 the ability to drive competitors from the market and then selectively raise the prices it  
5 charges its own customers for critical services without fear of competitive challenge.  
6 What Qwest seeks here is the ability to shape its competitive response to exclude  
7 competition, and once excluded, to raise prices to its customers at will.

8 V. Other Issues.

9 A. Impact of other dockets (TRO, cost dockets, etc.).

10 The TRO proceeding will affect the issues in this docket in a fundamental  
11 manner. If the Commission finds that CLEC service will not be impaired without UNE  
12 switching, then the UNE-P portion of the market will quickly either become total service  
13 resale or return to Qwest direct services. Moreover, the Commission has initiated the  
14 process of gathering the detailed information which will be needed from providers in the  
15 market, much which is the same information which the Commission needed, but did not  
16 have, to evaluate Qwest's application in this docket. For this reason alone the  
17 Commission should deny the Qwest petition in this docket.

18 B. Cost floor.

19 The Commission should not grant Qwest's petition, for the reasons explained in  
20 this brief. However, if the Commission is inclined to entertain Qwest's petition, it should  
21 not do so without setting appropriate cost floors for Qwest's services. The statute gives  
22 the Commission broad discretion to determine the appropriate price floors for these  
23 services.

1 Prices or rates charged for competitive telecommunications services shall cover  
2 their cost. The commission shall determine proper cost standards to implement  
3 this section, provided that in making any assignment of costs or allocating any  
4 revenue requirement, the commission shall act to preserve affordable universal  
5 telecommunications service.  
6

7 RCW 80.36.330 (3)

8 In order to avoid a price squeeze, the Commission should set an imputed cost  
9 floor, as recommended by MCI's witness Mark Stacy. This includes the cost of the  
10 UNEs which Qwest provides to UNE-P providers to provide the service, plus 14.74% as  
11 a surrogate for its own retail costs which are not part of the UNE costs. Ex. 601T, p. 33.

12 C. Access charges.

13 ATG does not believe that resolution of issues relating to access charges are a  
14 necessary part of this docket, and therefore respectfully chooses not to brief this issue.

15 D. Proposed conditions on approval.

16 If the Commission were to grant the application, the Commission should require  
17 initial reporting quarterly by Qwest as to pricing actions which it has taken using the  
18 pricing authority granted in the docket. Where price changes are not made statewide or  
19 are made by individual customer contract (ICB), Qwest should be required to report the  
20 changes in detail by exchanges affected. In addition, Qwest should be required to  
21 provide a report to the Commission on a quarterly basis on customer migration from its  
22 analog to its own digital services of all types and vice-versa. This is important to track,  
23 because it should be an issue when Qwest files its petition for the same treatment for its  
24 digital voice business services.

1 E. Other: Miscounting of CLEC services

2 One of the problems with Staff's information in this docket has been the  
3 misreporting of CLEC services due to unclear instructions and follow-up by Staff.  
4 Despite the dictates of Order Number 8, Staff kept no record of its re-contact of CLECs  
5 to determine whether the lines they had reported were digital or analog, so there is no  
6 way to be certain what happened. However, ATG's experience may be typical. Staff re-  
7 contacted the company (before its intervention in this case was granted), but did not ask  
8 whether the services which it had reported were digital or analog. See ATG Answer to  
9 Order No. 16 herein. According to ATG's experience and the implication of the  
10 testimony by the Staff witness at hearing, it appears that Staff probably did not call or did  
11 not ask about digital vs. analog where the reporting CLEC had without qualification  
12 placed the services in the three categories provided in the Staff worksheet.<sup>13</sup> Tr. 615-616  
13 In addition, where Staff could no re-contact the CLEC, it assumed that all services were  
14 analog, despite the lack of any instruction to CLECs to report only analog services. The  
15 result is undoubtedly significant over-reporting of lines by CLECs. This might not be as  
16 much of a problem if Qwest had reported its digital lines as well, but because it did not,  
17 the CLEC figures are not reliable and should not be used as a basis for the Commission's  
18 decision in this docket.

19 VI. Conclusion.

20 The Commission should grant Qwest's petition only if it is willing to jeopardize  
21 most of the remnants of competitive investment in the state. The competitive industry is

---

<sup>13</sup> Mr. Wilson testified: "And finding out if there was any ambiguity, as I explained in my testimony and notes. *If there was any ambiguity at all, then we checked.*" Apparently no check was made where Staff did not find any ambiguity. There was deemed to be no ambiguity if the CLEC simply fit its numbers into the Staff's columns, whatever the underlying reality.

1 in desperate straits. The very last thing competition and its consumer beneficiaries need  
2 is for its monopoly competitors to have complete control over the margins for the  
3 competitors' services. If the Commission were to grant Qwest's petition, that is exactly  
4 what Qwest would gain, excepting only competitors who provide their own loops.

5 The Commission should conclude that a separate analog business voice services  
6 market has not been shown to exist. As a result, the market share and market power  
7 analysis urged by Qwest and Staff in this docket is fatally flawed, because they did not  
8 study the share of the market held by Qwest's own digital services nor the share held by  
9 the CLECs' digital services.

10 Even if the Commission were to entertain the analog market share figures, those  
11 show extremely high levels of concentration, well beyond a cautionary level for such  
12 substantial deregulation of the market. And to the extent that market concentration is  
13 diminishing, the evidence shows that a large part of the diminishment is due to customers  
14 moving to Qwest's own hi-capacity digital services, which were not part of this docket.

15 The Commission should also find that Qwest's selective and inconsistent use of  
16 information from other states in this proceeding is nothing short of astounding, and  
17 provides no support for Qwest's petition here. For example, Qwest put in evidence the  
18 results of a survey of Idaho customers for their attitudes toward wireless usage, which  
19 Qwest considers relevant to this Washington proceeding. However, when it was pointed  
20 out that in Qwest's deregulatory proceeding in Idaho, Qwest considers analog and digital  
21 services part of the same market, and that Qwest does not apparently consider the  
22 presence of UNE-P service to be a basis of proof of effective competition in Idaho, Qwest  
23 countered that was due to differences in the markets in the two states! Of course, Qwest

1 did not describe those differences; that might undercut its selective use of information  
2 from Idaho.

3 Qwest has simply not carried its burden of proof in this case. It has not properly  
4 defined the product or geographic market, and has offered flawed theory and incomplete  
5 evidence in support of its application. Staff's work has not added an iota of strength to  
6 the Qwest petition, because Staff accepted Qwest's position on the product market as a  
7 given, and then set out uncritically to support that flawed market. Most of the  
8 competition which exists in most of the exchanges in this state is subject to termination at  
9 the whim of Qwest if its petition is granted. There has been no demonstration that any  
10 form of intermodal competition at its present state of development is sufficient to  
11 constrain monopoly behavior. Qwest thus retains its market power, despite its many  
12 smokescreens, and the Commission should not grant its petition.

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

Respectfully submitted,

ADVANCED TELCOM, INC.

---

Richard H. Levin  
Attorney at Law  
3554 Round Barn Boulevard  
Suite 303  
Santa Rosa, California 95403  
Telephone: (707) 523-4223  
Fax: (707) 788-3507

Date: October 28, 2003

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	DOCKET NO. UT-030614
	)	
QWEST CORPORATION	)	
	)	Certificate of Service of
	)	Brief of Advanced TelCom, Inc.
For Competitive Classification of	)	
Business Basic Exchange	)	
Telecommunications Services	)	

I hereby certify that I have this day served this document upon all parties of record on the attached list in this proceeding, by email and first class mail with postage prepaid.

Dated at Santa Rosa, California, this 28<sup>th</sup> day of October, 2003.

---

Richard H. Levin  
Attorney at Law  
3554 Round Barn Boulevard  
Suite 303  
Santa Rosa, California 95403  
Telephone: (707) 523-4223  
Fax: (707) 788-3507