Office of the Secretary
Service Date
October 20, 2003

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF QWEST CORPORATION FOR DEREGULATION OF BASIC LOCAL EXCHANGE RATES IN ITS BOISE, NAMPA, CALDWELL, MERIDIAN, TWIN FALLS, IDAHO FALLS, AND POCATELLO EXCHANGES.	)	**CASE NO. QWE-T-02-25** **ORDER NO. 29360**

Idaho Law requires that the Idaho Public Utilities Commission cease regulating basic local telephone rates in a local calling area when evidence presented to the Commission establishes that "effective competition exists for basic local exchange service throughout the local exchange calling area." *Idaho Code* § 62-622(3). On December 17, 2002, Qwest Corporation filed an application asking the Commission for an order "deregulating Qwest's basic local exchange service rates for the Boise, Caldwell, Idaho Falls, Meridian, Nampa, Pocatello, and Twin Falls exchanges based upon the fact that effective competition exists in those seven exchanges." Qwest Application, p. 9. Qwest's Application was premised on its belief that "effective competition exists from a multitude of unaffiliated wireless [cellular] service providers in the seven exchanges." Qwest Application, p. 2. After a review of the evidence presented by Qwest, the Commission denies Qwest's Application, and also denies a motion to re-open the record filed by Qwest four weeks after the case was fully submitted. The Commission approves, in part, a request for intervenor funding filed by private party intervenors.

PROCEDURAL HISTORY

Following the filing of Qwest's Application, the Commission on December 18, 2002, issued a Notice of Application and Notice of Right to Intervene. Petitions to intervene were filed by the Idaho Telephone Association, Time Warner Telecom, WorldCom, Inc., Verizon Northwest, Inc., and six individuals represented by one attorney. WorldCom subsequently withdrew from the case, and none of the other industry intervenors participated in the case. Only the private party intervenors, usually identified in the pleadings by the name of the first individual listed, Sidney Meirerotto, participated in the hearing. Accordingly, in this order the term "Intervenors" refers only to the private party intervenors.

On February 10, 2003, the Commission issued an order establishing a procedural schedule and a hearing date for April 29-30, 2003. The Commission also on February 24, 2003, issued a Notice of Public Workshops. The public workshops were convened by the Commission Staff to "provide an opportunity for members of the public to ask questions of Staff and the Company, and to provide written comments regarding Qwest's Application." Public workshops subsequently were held in Pocatello, Twin Falls, and Boise. On April 22, 2003, the Staff filed a Motion to Strike or In the Alternative to Vacate Hearing Date. Staff contended Qwest filed late testimony and exhibits that were "voluminous and contained substantial information not responsive to the direct testimony filed by Staff witnesses on March 19, 2003." Staff Motion to Strike, p. 1. On April 24, 2003, the day before the oral argument scheduled on Staff's Motion to Strike, the parties filed a Stipulation to Vacate the Hearing and Oral Argument Hearing Date. The Stipulation allowed an opportunity for additional discovery on the testimony and exhibits filed by Qwest and rescheduled the hearing date. The Commission subsequently issued Order No. 29233 approving the Stipulation filed by the parties, vacating the hearing date and rescheduling it for June 4-5, 2003.

On April 30, 2003, the Commission Staff filed a Petition for Declaratory Ruling and a Memorandum in Support of the Petition. Staff contended in its Petition that the parties substantially disagreed on the interpretation of *Idaho Code* § 62-622(3)(b), the section under which Qwest filed its Application. According to Staff's Petition, "each party filed its evidence and exhibits based on its own interpretation of the statute, leading to confusion and inconsistency that would be resolved by the Commission providing a ruling on the interpretation of Section 62-622(3)." Staff Petition for Declaratory Ruling, p. 1. Responses to Staff's Petition were filed by Qwest and the intervenors, and Qwest also filed a Cross-Petition for Declaratory Ruling. The Commission convened an oral argument hearing on May 22, 2003. At the oral argument hearing on the Petitions, the Commission declined to issue a declaratory ruling and determined to proceed to hearing on June 4, 2003. The hearing concluded on June 5, and post-hearing briefs, at the request of the parties, were filed on June 27, 2003 and July 11, 2003.

On July 9, 2003, the Intervenors Meirerotto filed a request for intervenor funding pursuant to the Commission's Rules of Procedure and *Idaho Code* § 61-617A. Qwest filed a Motion in Opposition to Request for Intervenor Funding on July 23, 2003.

On August 14, 2003, Qwest filed a Motion to Re-open the Record, which had been closed and fully submitted as of July 11, 2003. Qwest requested permission to file supplemental testimony of James Schmit that accompanied its Motion. The Commission Staff filed a Response on August 22, 2003, objecting to the re-opening of the closed record. Staff argued that "Qwest does not state a valid reason to re-open, and seeks an opportunity to fundamentally change the case, without benefit of evidence or hearing, from a deregulation case to a price cap case that should have been filed under Section 62-622(1)(a)." Staff Response to Motion to Re-open, p. 7. The Intervenors also filed an Objection to Qwest's Motion to Re-open on August 26, 2003, and on the same date Qwest filed a reply to Staff's Response to Qwest's Motion to Re-open.

QWEST'S MOTION TO RE-OPEN

The Commission will first address Qwest's Motion to Re-open the Record filed August 14, 2003. Qwest requested permission to re-open the record in order to file additional testimony of James Schmit, a Qwest witness who initially filed testimony in Qwest's rebuttal filing. Qwest did not ask for a hearing to spread the testimony and allow parties an opportunity to cross-examine the witness on the new testimony, although it recognized "that the Commission and parties had not had the opportunity to question Mr. Schmit on the matters contained in his proposed testimony." Instead, Qwest stated "it will promptly respond to any questions concerning Mr. Schmit's testimony in writing and will make no objection should the parties wish to file affidavits or written comments in response to the supplemental testimony." Qwest Motion, p. 1-2.

Qwest in its Motion to Re-open provided little justification for the request. The Motion states: "Having attended the hearings, heard the questions and statements of the Commissioners and parties and their representatives and having read the legal briefs and analysis, Qwest is aware that the other parties remain hesitant to support Qwest's request for price deregulation in the seven exchanges primarily out of a concern that competition will not adequately constrain Qwest's pricing." Qwest's Motion to Re-open, p. 2. The Motion also states that "Qwest is sensitive to the other parties' continuing concerns." Motion to Re-open, p. 3. Because of its awareness of the other parties' continuing concerns, Qwest in its proposed supplemental testimony "now proposes that the Commission approve Qwest's Application in the

form of a provisional Pilot Project, the terms of which are more fully set out in Mr. Schmit's proposed testimony." Motion to Re-open, p. 3.

In its response to Qwest's Motion, Staff argued that Qwest's request that the Commission approve a provisional pilot project is inconsistent with issues formulated by Qwest's Application, and presents issues not previously addressed by any party. Also, according to Staff, Qwest's Motion does not provide a legitimate reason to re-open the record, and is merely an attempt by Qwest to obtain an opportunity for an additional response to the evidence presented by the Staff and Intervenors. Staff also argued that Qwest's Motion to Re-open and its proposed supplemental testimony do not address issues relevant to a case filed under Section 62-622(3)(b).

The Intervenors also filed a response objecting to Qwest's Motion. The Intervenors argued that Qwest "has not cited any rule or legal basis for making this unusual motion," and that Qwest "has asked that the relief sought in the original complaint be changed or essentially 'amended' at a very late date without citing any new decision, statute or other change in circumstances." Intervenors' Response to Motion, p. 1. In light of the fact that Qwest proposed to submit the supplemental testimony without a hearing, Intervenors argued that "admission of the proposed testimony is not supported by any rule of procedure and raises serious due process issues which cannot be resolved without a new hearing and a new discovery and briefing schedule." Intervenors' Response to Motion, p. 3.

Qwest filed a reply to Staff's response to Qwest's Motion to Re-open on August 26, 2003. Qwest characterized Staff's response as an attempt "to convince the Commission that Qwest has failed to meet some standard of justification for re-opening the record." Qwest's Reply, p. 4. Qwest refers to Commission Rule of Procedure No. 13, which provides that the Commission's rules "will be liberally construed to secure just, speedy and economical determination of all issues presented to the Commission. Unless prohibited by statute, the Commission may permit deviation from these rules when it finds compliance with them is impracticable, unnecessary or not in the public interest." Commission Rule of Procedure 13, IDAPA 31.01.01.013. Qwest stated it "is unaware of any Commission rule or precedent that justifies narrowing the range of possible solutions to a difficult case or cutting off potentially fruitful discussion, simply because the record has been 'closed'." Qwest's Reply, pp. 4-5.

The Commission's Rules of Procedure do not specifically address a motion to re-open, and thus a particular standard for re-opening a closed record is not provided by rule. The decision to re-open a closed record is within the discretion of the Commission. Nonetheless, re-opening the record once a case is fully submitted is an unusual procedure and will not be granted by the Commission without some substantial justification provided by the moving party.

In this case, Qwest does not identify in its Motion a significant reason to re-open the record. Qwest does not contend it did not have a full and fair opportunity to present its case to the Commission, nor does Qwest argue any unfairness or deficiency in the hearing process that could be corrected by re-opening the record. In addition, Qwest's proposed supplemental testimony introduces new issues not identified by Qwest's original application. Accordingly, rather than securing a just, speedy and economical determination of the issues presented in this case, granting Qwest's Motion to Re-open would unnecessarily delay resolution of the issues presented by the Application. In order to develop the new issues presented by Qwest and afford the other parties an opportunity to cross-examine the witness, a new round of litigation including a new hearing would be required for Qwest to present its new issues.

Finally, Qwest's proposed supplemental testimony does not address the standards for approving price deregulation set forth in Section 62-622(3)(b) and Qwest concedes that "Mr. Schmit's testimony is not directed at meeting the requirements of Section 62-622(3)." Qwest's Reply, p. 3. Qwest's proposed supplemental testimony may be relevant to public interest issues, which the Commission is directed to consider when reviewing an application for price deregulation. The Commission concludes that Qwest failed in this case to present evidence establishing that the standards for price deregulation set forth in Section 62-622(3) are met, and thus the new testimony Qwest proposes on public interest issues does not affect the Commission's consideration of Qwest's Application. For these reasons the Commission denies Qwest's Motion to Re-open the Record.

THE STATUTORY STANDARDS FOR PRICE DEREGULATION

The statute under which Qwest filed its Application provides the standards for the Commission to discontinue price regulation of basic local telephone service. Section 62-622(3)(b) states:

> (3) The commission shall cease regulating basic local exchange rates in a local exchange calling area upon a showing by an incumbent telephone corporation that effective competition exists for basic local exchange

service throughout the local exchange calling area. Effective competition exists throughout a local exchange calling area when either:

(a) . . . or

(b) There are functionally equivalent, competitively priced local services reasonably available to both residential and small business customers from a telephone corporation unaffiliated with the incumbent telephone corporation.

The legislature provided additional clarification and guidance for the Commission's review of the evidence presented in a deregulation case filed under Section 62-622(3). At *Idaho Code* § 62-602, the legislature codified its express intent regarding deregulation of local telephone service rates:

(1) The legislature of the state of Idaho hereby finds that universally available telecommunications services are essential to the health, welfare and economic well-being of the citizens of the state of Idaho and there is a need for establishing legislation to protect and maintain high-quality universal telecommunications at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition.

(2) It is the intent of this legislature that effective competition throughout a local exchange calling area will involve a significant number of customers having both service provider and service option choices *and that actual competition means more than the mere presence of a competitor. Instead, for there to be actual and effective competition there needs to be substantive and meaningful competition throughout the incumbent telephone corporation's local exchange calling area.* (italics added).

(3) It is the further intent of the legislature that the commission, in its deliberation of deregulation of the incumbent telephone corporations, will examine the impact such deregulation will have on the public interest in accordance with the general grant of authority given to the commission by the legislature and that all parties be allowed to comment thereon in such proceeding.

In addition to the statutory standards and legislative intent, the Commission previously decided a case filed under Section 62-622(3) by U S WEST, Qwest's predecessor. U S WEST's Application in Case No. USW-T-99-15 was filed under paragraph (a) rather than paragraph (b), but parts of the Commission's review of the evidence required by the legislature

should have guided Qwest's preparation of this case. For one thing, the Commission concluded in final Order No. 28369 entered in the earlier case that the legislature's specific intent expressed in Section 62-602 will be used to guide the Commission and is not to be ignored. U S WEST had argued "that the Commission should disregard the legislature's expressly stated intent because 'when applying a statute that is clear on its face, a reviewing body should not look elsewhere for the legislature's intent in using particular language.'" Order No. 28369, p. 5. U S WEST also asserted that "Idaho law does not allow for cross-statute modification of Section 62-622(3) because the statute is plain and unambiguous on its face." *Id.* The Commission rejected U S WEST's argument because "the primary purpose in agency construction of a statute is to 'determine legislative intent and give effect thereto.'" Order No. 28369, p. 5. In accomplishing that goal, "clearly then an agency should be guided by the expressly stated intent of the legislature in order to give effect to that intent." Order No. 28369, p. 5-6. Using the words adopted by the legislature for its specific intent, the Commission concluded it must "review the evidence presented to determine whether it shows a level of competition that is effective, actual, substantive, meaningful, involving a significant number of customers, and is not just a mere presence." Order No. 28369, p. 8. Thus, Order No. 28369 clearly established that the Commission will give effect to the legislature's stated intent and that substantive effective competition must actually exist throughout a local exchange calling area in order to satisfy the statutory standards for price deregulation.

Qwest's witnesses declared throughout their testimony that the Company's evidence meets the statutory standards for deregulation. One witness stated, for example, that the Company "strongly believes the evidence it is presenting in this docket satisfies the requirements of subsection 622(3)(b) and that, as a result, the Commission should enter an order ceasing regulation of local exchange service rates in the seven exchanges." Tr. p. 54. Qwest's belief in the strength of its evidence, however, was premised on its interpretation of the statutory requirements for price deregulation. Qwest prepared and presented its case to satisfy a narrow interpretation of the statute, but nonetheless also maintains that its evidence demonstrates that cellular service does actually compete for customers with Qwest's basic local service. We thus review the evidence Qwest presented to determine whether the record demonstrates that cellular service provides effective competition to Qwest's basic local service, and that cellular service is functionally equivalent to and competitively priced with Qwest's local service.

THERE IS LITTLE OR NO EVIDENCE THAT CELLULAR SERVICE COMPETES EFFECTIVELY WITH QWEST'S BASIC LOCAL SERVICE

Beyond bare assertions by Qwest witnesses that "there is little doubt that customers have embraced wireless technology as a competitive alternative to traditional landline service," there is scant evidence in the record to support the statement. Tr. p. 69. Qwest presented evidence showing that the number of cellular customers in Idaho significantly increased in the last five years and that Qwest's basic service access lines declined in six of the seven exchanges from December 2000 through September 2002. In addition, Qwest presented the results of a customer survey the Company commissioned. A Qwest witness offered his belief that "it's both reasonable and obvious in light of Dr. Lincoln's survey as well as numerous articles and interviews from various media that many customers are choosing wireless service over traditional landline service." *Id.* The witness accordingly asserted that "wireless service is effectively competing with landline service to fulfill customers' basic local exchange service needs." Tr. p. 94. We thus turn to Dr. Lincoln's survey and the other evidence offered by Qwest to determine whether the evidence demonstrates it is reasonable and obvious to conclude that many customers are choosing wireless service as a replacement for Qwest's landline service, thereby effectively competing with Qwest's basic service in each of the seven exchanges.

We note first that Qwest presented very little evidence specific to each exchange, because as explained by Qwest's survey witness, "Qwest is applying for deregulation of all exchanges in total, not an exchange-by-exchange deregulation process." Tr. p. 308. Qwest's aggregated approach is not consistent with Section 62-622(3), which requires the Commission to cease regulating rates "in a local exchange calling area" when the requisite standards for competition are met for that specific local calling area. In this case there is no exchange specific information at all showing, for example, what number or percentage of customers in each exchange have substituted cellular service for their Qwest basic local service. When the Commission considers whether the statutory standards for deregulation are met in the Idaho Falls exchange, for example, there is practically no evidence to show that customers in Idaho Falls have "embraced wireless technology as a competitive alternative."

The statistical data Qwest did offer, in addition to being aggregated, shows little more than that cellular service is available; it does not establish that wireless service is competing with Qwest's basic local service. Exhibit 1 shows an increase in the number of cell phone customers

in all of Idaho from approximately 167,000 in April 1999 to approximately 540,000 in June 2002. Exhibit 2 shows declines in the number of Qwest's basic service access lines in five of the seven exchanges from December 2000 to September 2002. In a sixth exchange (Pocatello), the number of Qwest access lines declined from December 1999 through September 2002, Exhibit 2 p. 7, and the number of Qwest lines in one exchange (Meridian) only increased from December 1999 through September 2002. Exhibit 2, p. 5. Qwest provided no evidence to show a direct correlation between the substantial increase in cellular customers and the relatively small decrease in its local service lines in six exchanges. For example, there is no evidence to show how many of the 540,000 cellular customers are in the Twin Falls exchange, or that cell phone purchases in Twin Falls had anything to do with the decline of approximately 200 in Qwest's access lines. Qwest candidly admitted it "never attempted to prove a precise loss of lines attributable to wireless competition." Tr. p. 94. On cross-examination, Qwest's witness admitted the Company had no information on several different possible causes for the decline in access lines in the Nampa exchange, Tr. p. 112, or for the increase in lines in the Meridian exchange. Tr. pp. 113-14.

Nor does the survey commissioned by Qwest provide objective evidence that cell phone service effectively competes with Qwest's basic local service. We note first that the very purpose of the survey limits its usefulness to this case. Dr. Lincoln testified that the survey was designed as "marketing research to determine if customers in those exchanges *perceive* wireless phone service to represent effective competition with Qwest's basic local exchange service." Tr. p. 207 (emphasis added). In other words, the survey made no attempt to obtain objective data about customers' actual conduct or purchasing decisions that might be relevant to show whether cellular service is actually competing with Qwest's local service. Qwest instead obtained "marketing research" designed to gauge customers' perceptions.

The survey questions and results demonstrate the limited nature and effectiveness of the survey. For example, only one question in the survey addressed whether cellular service might be a substitute for wireline service. The question was narrowly focused, asking: "For the purpose of making and receiving local calls, could your household solely rely on cell phone service?" Exhibit 8, p. 2. By focusing the question on only use of a phone for local calling, the survey question minimized the chance respondents would think of other reasons or differences in uses that make cell phones as a wireline substitute impossible or impracticable. The question

also asked for a response to a mere possibility, and did not seek information on the likelihood the customer would actually replace his wireline service with cell phone service. The survey pool was Qwest's basic local service customers in the seven exchanges, so each respondent that stated use of a cell phone also used Qwest's wireline service. The survey made no attempt to ascertain the reasons the customers used both services and did not substitute wireline service with cellular service. Indeed, when Dr. Lincoln was asked on cross-examination about possible follow-up questions designed to explore reasons the customers chose not to substitute, he answered "it would be a waste of time and money to do that." Tr. p. 318.

Finally, because Qwest filed its Application seeking deregulation of the seven exchanges in the aggregate, the survey results are not reliable for each of the seven individual exchanges. Dr. Lincoln testified the survey "population was defined as the seven exchanges together ... and the reporting is based on that." Tr. p. 308. As the result, Dr. Lincoln stated he "cannot draw statistical inferences [from the survey] for any of these seven exchanges, not very strongly." Tr. p. 308. Exhibit 113, which shows the survey results for each exchange, confirms Dr. Linclon's testimony. For example, when the Commission considers the evidence on effective competition in the Meridian exchange, it is not meaningful that eleven residential customers in Meridian stated it might be possible for them to rely on their cell phones for local calling. Exhibit 113, p. 3.

Nor do the "media articles and interviews" offered by Qwest provide convincing information that cell phone service competes effectively with Qwest's service in each of the seven exchanges. Most of the newspaper articles mentioned by Qwest's witnesses do not contain any information about cellular customers in Idaho. For example, one witness stated "[t]here are numerous anecdotes of consumers declining to install wireline service (i.e., upon moving to a new location) when they can be reached conveniently over their wireless phones," and cited a *New York Times* article. Tr. p. 156-57. The witness' testimony was offered to provide a "national perspective" on local telecommunications competition, Tr. p. 153, and he conceded his testimony did not provide any evidence specific to the seven local exchanges in this case. Tr. p. 202.

One Qwest witness did briefly discuss an article in the Boise newspaper about farmers' use of cell phones in their business operations. According to the witness, the article stated that farmers spend less time driving to their homes to make and receive calls, which

increases the lives of their pick-up trucks. Tr. p. 372. The witness concluded that, "In this industry, wireless service has clearly been accepted as a cost-saving alternative to basic local exchange service." *Id.* Qwest did not provide the article as an exhibit, so the Commission has no way to determine if the witness' conclusion is sound based on the text of the article. In addition, Qwest did not provide any objective data to assess whether farmers have replaced their local exchange service with cell phones as a cost-saving alternative, relying instead on its witness' hearsay statements about the information in the article. The Commission cannot find, on the survey evidence and media interviews and articles in the record, that many customers in the seven exchanges "are choosing wireless service over traditional landline service."

The statistical data on cell phone use Qwest did provide contains little information relevant to this case. Qwest at several points in the record mentioned a study by the Federal Communications Commission indicating that three to five percent of wireline customers nationwide may have discontinued use of their wireline service in favor of cellular service. *E.g.,* Tr. p. 159. There is no evidence to indicate whether the FCC survey includes Idaho customer data, nor did Qwest attempt to ascertain whether the three to five percent estimate is valid in the seven Idaho exchanges. In short, the record is practically devoid of information to show that cellular service competes effectively with Qwest's basic local service in the seven exchanges named in Qwest's Application.

By reviewing the record and finding it devoid of evidence showing that customers are switching to cellular service in place of wireline service, the Commission does not suggest an applicant must show a specific number or percentage of customers have been lost to competitors to be successful under Section 62-622(3)(b). As Qwest correctly noted, "the standard is not whether most customers have already moved to a competitor." Qwest Post-Hearing Brief, p. 12. We also reject, however, the standard for an adequate level of competition argued by Qwest: "The standard is whether there is a competitor for them to move to if, for example, Qwest uses its pricing freedom to dramatically increase prices." *Id.* The statute requires evidence demonstrating that an alternative local service is actually competing for customers with Qwest's local wireline service, and evidence showing that customers are replacing their Qwest local service with another service clearly would help provide the necessary proof. In this case, Qwest presented practically no evidence that customers in the seven exchanges are replacing wireline service with wireless service, and instead it assumed replacement was occurring or could occur

based on the significant increase in wireless subscribers in Idaho. The best Qwest offered was a witness' unsupported opinion "that, absent wireless competition, Qwest would likely be serving the needs of many thousands of those [wireless] customers and would probably not be experiencing loss of access lines." Tr. p. 95.

EVIDENCE ON FUNCTIONAL EQUIVALENCE AND PRICE COMPETITIVENESS

An applicant filing for price deregulation under Section 62-622(3)(b) must present evidence showing the service alleged to be effective competition to basic local service is functionally equivalent to and competitively priced with the wireline service. We turn next to the evidence Qwest presented on these statutory requirements.

Qwest again relied primarily on its survey – particularly the question on whether a customer might be able to rely solely on a cell phone for local calling – on advertisements by cell phone companies touting their service as an alternative to basic local service, and on the nationwide three to five percent substitution rate mentioned in the FCC survey findings. As with the question of effective competition, the limited relevance of the Qwest survey and national FCC survey provide little information on whether cellular service provides a functionally equivalent service to customers in each of the seven Idaho exchanges. Nor do the advertisements promoting cell phones as an alternative to basic local service provide much useful information. Qwest made no effort to demonstrate whether the advertisements have had any effect in these exchanges by convincing customers that the functional differences between wireless and wireline services are insignificant. On the other hand, there is evidence in the record showing the functional differences mean cellular service does not actually compete with Qwest's basic local service.

The evidence presented by the Intervenors primarily addressed the functional differences that prevent cellular services from competing effectively for small business customers. The Intervenor witnesses explained why their small businesses use cell phones in addition to Qwest's wireline services, and why it is not possible for them to rely solely on cellular service. The small business wireline service provides functions that allow use of multiple extension phones, and a "roll over" feature that allows an incoming call to ring on any of the local lines serving the small business. Tr. p. 547. Small businesses rely on their local wireline service to enable use of facsimile machines and access to the Internet that provides

electronic mail and research features. Tr. pp. 549-550. Intervenor witnesses explained why Qwest's wireline service, which enables use of a facsimile machine and Internet connection, is essential to a small law firm, Tr. pp. 548-550, and a small real estate brokerage business. Tr. pp. 570-573.

Nor did Qwest present evidence showing that cellular service is competitively priced with Qwest's basic local exchange service. In its case-in-chief, Qwest provided copies of cell phone advertisements, its survey results and Exhibit 5, which shows only "examples of how three different wireless pricing plans can be placed into a competitive map with Qwest's wireline service." Tr. p. 274. Qwest did not attempt a side-by-side comparison of wireless and basic local service rates until it filed a rebuttal exhibit in response to Staff's price comparison exhibit. Qwest apparently did not attempt a direct comparison of prices based on its belief that such comparisons are not the best way to determine price competitiveness. According to Qwest's survey witness, "A better approach involves studying actual consumer price perceptions. Such perceptions will influence consumers' willingness to substitute. Until they learn that their perceptions are different than reality, perception will drive their behavior." Tr. p. 277. According to Qwest, the survey "provides the most valuable scientific evidence relating to the statutory requirement of competitively priced service." *Id.* Thus Qwest recommended the Commission strongly consider the marketing research it compiled on customers' perceptions when evaluating the evidence on competitive pricing. Tr. p. 510.

Qwest's survey is limited and provides little useful evidence on the competitive pricing standard. First, the Commission is not convinced a marketing survey designed to capture limited consumer perceptions is a sound basis for deciding statutory, regulatory issues. As Qwest noted, "[c]onsumer price perceptions are formed in many ways: salesperson presentations, seeing price tickets, seeing advertisements, talking with others, reading and paying bills, etc." Tr. p. 271. It may be, as Qwest testified, "a rudimentary marketing principle that, for initial purchasing decisions, consumer perceptions on pricing influence their behavior far more than the reality of pricing decisions." Tr. p. 271. The Commission is not asked in this case to decide issues of rudimentary marketing principles, however, and would be remiss in its duty if it based significant, legal decisions on customer perceptions that may be erroneous. The Commission must base its decisions on reality, knowing that customers some day will learn that reality may be different than their perceptions.

Second, the relevant survey question and the results are so limited as to be of little practical use in determining whether cellular service is competitively priced with basic local service. All survey respondents were Qwest basic local service customers, so all respondents that stated they used a cell phone (approximately 67% of residential and 60% of small business customers) currently used both services and thus were not relying solely on cell phone service. Tr. p. 296, Exhibit 113, pp. 2 and 10. The survey question asked respondents if they "think the monthly price of using cell phone service for your household is about the same, more than, or less than the price of using traditional service?" Exhibit 8, p. 5. The survey did not attempt to ascertain what customers' perceptions of relative costs would be if they were to rely solely on cell phone service. Even with that limitation, the survey results do not establish that customers in the seven exchanges perceive wireless and wireline services to be competitively priced. For example, the Idaho Falls exchange contains approximately 39,000 basic local exchange customers, and only 23 residential and twelve business customers in Idaho Falls stated they thought their current monthly cell phone service costs the same or less than their basic local service. Exhibit 113, pp. 6 and 14. In the Meridian exchange, which contains approximately 22,000 access lines, eleven residential and nine business customers stated a similar belief. *Id.*

The more objective data on price competitiveness is contained in the price comparison exhibits submitted by Staff (Exhibit 101) and Qwest (Exhibit 19 and 20). In Exhibit 20, Qwest presented a comparison of all the cell phone plans available in the seven exchanges. Because cell phone service usually is priced by minutes of use, Qwest ascertained average minutes of use for its customers and categorized them as low use, average use, and high use customers. Tr. p. 462. In determining its customers' minutes of use, however, Qwest used call hold-time statistics from 1996, rather from 2002. As Qwest explained, "[u]ntil 1996, the average hold-time was relatively flat for all classes of service. So to ... normalize the information to take out the data usage, we selected a point of time before the call rate ramped up dramatically, so we're using that as a proxy for voice usage in 2002." Tr. p. 464. If more current calling data were used, the average customer usage for Qwest's flat-rate customers, which is more than 95% of its residential customers, would be more than double the minutes of use Qwest used to make its price comparisons in Exhibits 19 and 20. Tr. p. 465.

Even with the lowered minutes of use Qwest utilized, its price comparison exhibits show significant disparity between prices for wireless and wireline service. For average use

residential customers, Exhibit 19 shows that wireless plans are priced from $3.95 per month to $58.67 per month higher than Qwest's basic local service, and the cell phone prices do not include $1.50 per month customers would pay for a directory listing, or fees for 911 service and number portability that will soon appear on cell phone service bills. Tr. pp. 458-59. Staff Exhibit 101, which assumed higher minutes of use than did Qwest's exhibits, shows even greater disparities between Qwest's local service and cell phone service plans.

Qwest believes its Exhibit 19 demonstrates prices are competitive because "for every class of customer and for every usage level, Idaho wireless competitors offer a calling plan for local voice communications at a price within $10.00 of the price of Qwest's basic local exchange service." Qwest Post-Hearing Reply Brief, p. 10. According to Qwest, services priced within $10 of Qwest's basic local service are "affordable alternatives for the customer to select." Tr. p. 492. Qwest also stated it considers wireless service plans to be competitive because it could not impose significant rate increases without fear of losing customers. Tr. p. 61. Qwest argued that, because many customers voluntarily "pay for wireline, wireless and cable broadband services simultaneously, it is very unlikely that they would feel uncomfortable about migrating to wireless for local voice calling if Qwest were to significantly raise its basic local service rates." Qwest's Post-Hearing Reply Brief, p. 27. Qwest also provided testimony on what it regards as significant but not unreasonable rate increases. Noting that Qwest's residential rate in the seven exchanges is $17.50 per month, and that customers of companies operating in rural areas pay $24.10 per month, a Qwest witness testified that "even a significant increase by Qwest would not seem to implicate unreasonable rates given the $24.10 residential rate charged, by order of the Commission, by rural phone companies." Tr. p. 92.

The Commission cannot find, on the evidence presented, that cell phone service in the seven exchanges is competitively priced with Qwest's basic local service. The standards advocated by Qwest, that cell phone plans are available within $10 per month of Qwest's service, and that it could not dramatically increase its rates without fear of losing customers, does not demonstrate a level of competitive pricing that will effectively protect consumers, in the absence of regulation, from significant, unrestricted rate increases.

QWEST'S EVIDENCE WAS CONSISTENT WITH ITS INTERPRETATION OF THE STATUTE

Using its own narrow interpretation of Section 62-622(3)(b), it is not surprising that Qwest's evidence fails to show that cellular service effectively competes with Qwest's basic local service, or that it is functionally equivalent and competitively priced. After all, "Qwest's evidence is consistent with its legal interpretation of the statutes." Qwest Post-Hearing Reply Brief, p. 9.

Qwest construed the "functionally equivalent" and "competitively priced" standards in the statute as satisfied at very low thresholds, and especially made its burden of proof easy on the functional equivalence requirement by its interpretation for that standard. In its rebuttal testimony filing, Qwest directly stated its interpretation of Section 62-622(3)(b). Noting that paragraph (b) references functionally equivalent "local services", and that the term local services is not defined in the statute, Qwest assumed the term means "basic local exchange services." Qwest then further narrowed the functional equivalent standard by focusing on the reference to voice communications in the "basic local exchange service" definition. A Qwest witness provided his layman's opinion regarding the legislature's intent for this section: "I believe the only logical interpretation of the term 'local services,' as used in Section 62-622(3)(b) is as a shorthand reference to 'basic local exchange service', defined as two-way interactive switched voice communication services provided by non-incumbent service providers." Tr. pp. 76-77. By Qwest's interpretation, the question of functional equivalence ends if it is established that the alternative service provides switched voice communication. Qwest's witnesses thus consistently insisted throughout their testimony that any discussion of cell phone or wireline telephone functions other than voice communication was irrelevant to its case. *See e.g.,* Tr, pp. 398, 430, 435-36, 439, 441.

Qwest's interpretation of paragraph (b) was disputed by Staff and the intervenors, and the parties' positions were presented to the Commission in the petitions for declaratory ruling filed by Staff and Qwest. The Commission did not rule on the petitions, and now rejects the narrow interpretation Qwest places on the statute's "functional equivalent" standard for several reasons. First, the legislature selected the term "local services" for paragraph (b) and readily could have used the term "basic local exchange service," a term defined in statute, if it had intended that specific definition in the paragraph. Absent an absurd result by application of the

words used by the legislature, the Commission will not assume a meaning or words different from the ones actually appearing in the statute. *See e.g., Inama v. Boise County ex rel Bd. of Commissioners,* ___ Idaho ___, 63 P.3d 450 (2003)(The words of a statute must be given their plain, usual, and ordinary meaning; unless the result is palpably absurd, the courts will assume the legislature meant what is stated in the statute.).

Second, Qwest places too narrow a definition on the term "basic local exchange service," defined at *Idaho Code* § 62-603(1) as "the provision of access lines to residential and small business customers with the associated transmission of two-way interactive switched voice communication within a local exchange calling area." Clearly the access lines provided for basic local exchange service allow for functions in addition to voice communication, such as facsimile transmission and Internet connection. Qwest's witness readily conceded that "when a . . . Title 61 residential customer or small business customer uses their access line for a fax machine or to connect to a computer, that is billed by Qwest as basic local exchange service." Tr. p. 115. Accordingly, even if Qwest's argument were accepted, that the legislature intended the term "basic local exchange services" when it used the term "local services" in paragraph (b), the definition of the first term would not restrict a review of functions solely to determine whether voice communication is provided.

Finally, the narrow standard placed by Qwest on the functionally equivalent requirement runs counter to the purpose of the statute. If the purpose is to determine whether an alternative service is actually competing with basic local service, evidence must demonstrate the other service functions in similar enough ways that customers are able and willing to switch as an alternative to basic local service. If the functional equivalence inquiry ends with voice communication, as Qwest insisted in its testimony, it would be irrelevant that other functions of the two services are unique enough that customers do not purchase them as alternative, competitive products, thereby negating the purpose of the statute.

By its interpretation of Section 62-622(3)(b), Qwest claimed it need only show that cellular service provides voice communication, that it is offered at prices within an undefined range to Qwest's local service, and that it is reasonably available. On that evidence, Qwest asserted all statutory requirements for price deregulation are met, including the legislature's specific intent that "for there to be actual and effective competition there needs to be substantive and meaningful competition throughout the incumbent telephone corporation's local exchange

calling area." *Idaho Code* § 62-602(2). So for example, a Qwest witness testified that if "Staff's testimony attempts to convince the Commission that Qwest does not face 'effective competition' Staff must overcome Qwest's evidence that it has met the statutory standard by showing that 'functionally equivalent' and 'competitively priced' local services are available from a number of unaffiliated wireless providers." Tr. p. 88. Qwest's interpretation of the statute would mean the incumbent provider's local service prices would become deregulated if an alternative voice communication service was merely offered, at competitive prices, even if for some reason not a single customer was willing to purchase the alternative service. That result is contrary to the words and purpose of the statute, and the legislature's intent that effective competition must be substantive and meaningful, and "more than the mere presence of a competitor." *Idaho Code* § 62-602(2). The result of Qwest's interpretation is that "the legislature's express requirement that competition be effective, actual, substantive, meaningful, involving a significant number of customers, and throughout the local calling area is all rendered meaningless." Order No. 28369, p. 6. Qwest in its post-hearing reply brief noted the disagreement over its interpretation of the statute, and acknowledged "the outcome of that debate may very well determine the outcome of the case." Qwest's Post-Hearing Brief, p. 9.

REQUEST FOR INTERVENOR FUNDING

The Intervenors filed a request for intervenor funding on July 9, 2003, requesting an award of $12,500, pursuant to *Idaho Code* § 61-117A and the Commission's Rules of Procedure 161 – 170. Intervenor funding may be available to cover expenses in a case in furtherance of the legislature's policy "to encourage participation at all stages of all proceedings before the commission so that all affected customers receive full and fair representation in those proceedings." *Idaho Code* § 61-117A(1). The Commission's determination to approve intervenor funding is to be based on the following considerations: (a) that the participation of the intervenor has materially contributed to the decision rendered by the commission, (b) that the costs of intervention are reasonable in amount and would be a significant financial hardship for the intervenor, (c) the recommendation made by the intervenor differed materially from the testimony and exhibits of the commission staff, and (d) the testimony and participation of the intervenor addressed issues of concern to the general body of users or consumers. *Idaho Code* § 61-617A(2).

After reviewing all the evidence submitted by the Intervenors and their participation at the hearing, the Commission has determined to approve in part their request for intervenor funding. Although much of the testimony offered by the Intervenors is similar to Staff's testimony, the information provided by the Intervenors did materially contribute to the record on the functional differences between wireless and wireline service, particularly for small business customers. Although Staff testified that the functional differences mean small business customers are not able to substitute cell phone service for their Qwest basic local service, the evidence provided by the Intervenors was more specific, and was made more effective by the testimony of actual business customers. The Commission accordingly is approving an intervenor funding award in the amount of $6,000. The Commission finds an award of that amount will further the statute's purpose of encouraging "participation at all stages of all proceedings before the commission so that all affected customers receive full and fair representation in those proceedings."

CONCLUSION

Qwest filed its Application for deregulation of its rates for basic local exchange service in seven specific exchanges in southern Idaho, arguing that cell phone service provides effective competition for its local services in those exchanges. The Commission was not persuaded by Qwest's evidence that cellular service effectively competes for local service customers of Qwest's wireline service. On the evidence presented to us, we cannot find that cell phones are functionally equivalent and competitively priced to Qwest's local service. Qwest's reference to an FCC study indicating that nationwide three to five percent of wireline customers have replaced their wireline service with cell phone service is not adequate evidence for the finding Qwest asks the Commission to make. Even if Qwest had presented evidence establishing the same rates of replacement in the exchanges named in its Application, substitution rates of three to five percent do not demonstrate that cell phone service effectively competes with wireline service.

Our conclusion based upon the evidence in this proceeding is similar to a conclusion recently reached by the FCC. In its Triennial Review Order[1] issued August 21, 2003, the FCC stated that "Neither wireless nor cable has blossomed into a full substitute for wireline telephony." FCC Triennial Review Order, paragraph 245. The FCC found that, "despite evidence demonstrating that narrowband local services are widely available through CMRS [wireless] providers, wireless is not yet a suitable substitute for local circuit switching." FCC Triennial Review Order, paragraph 445. The FCC further stated that "only about three to five percent of CMRS subscribers use their service as a replacement for primary fixed voice wireline service, which indicates that wireless switches do not yet act broadly as an intermodal replacement for traditional wireline circuit switches." *Id.* The FCC apparently was convinced that functional differences prevent a higher substitution rate, because it noted "the record demonstrates that wireless CMRS connections in general do not yet equal traditional landline facilities in their quality and their ability to handle data traffic.[1363]" *Id.* (The FCC noted in footnote 1363 industry representative comments "stating that wireless service is engineered to provide only roughly 70% call completion rate while wireline call completion rates exceed 99%.)

Finally, because *Idaho Code* § 62-602(3) directs the Commission to consider the impact deregulation would have on the public interest, the Commission will comment briefly on public interest issues. One of the most significant public interest concerns, of course, is the impact on customer rates the Commission's action would have, and it became clear that Qwest would increase its rates if they were unregulated. Nowhere in the record does Qwest contend it is considering lowering its basic local service rates as the result of the competitive pressure it currently faces from cellular service. In fact, in response to Staff's concern Qwest would raise its rates, Qwest volunteered only to forego rate increases through 2004, and then limit its rate increases "to $6.60 per month for residential customers and $9.49 per month for small business customers" through 2007. Staff Response to Qwest's Motion to Re-open Record, p. 7. The public interest is served if basic service rates are deregulated only when effective competitive forces exist to protect customers from monopoly pricing. In that environment, it would not be necessary for Qwest to volunteer to limit increases in its local service rates.

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[1] The FCC Order is called the Triennial Review Order because it is entered in three FCC Dockets: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug 21, 2003).

The public interest also is served when the Commission's regulation does not unduly restrict utility operations, because unnecessarily restrictive regulation could have a stifling effect on companies. The legislature addressed that concern for telecommunication services when it enacted the Idaho Telecommunications Act of 1988, in part to "encourage innovation within the industry by a balanced program of regulation and competition." *Idaho Code* § 62-602(1). Pursuant to that Act, "[f]or the last 13 years, Qwest has operated with its prices economically deregulated for nearly all services other than basic local exchange service for residential and small business customers." Tr. p. 50. With that regulatory freedom, Qwest currently is able to package services and products and adjust its package prices, to attract customers and respond to perceived customer demands. Tr. p. 116. Qwest stated that "customers tend to stay with you longer when they have a package," and acknowledged that Qwest currently "can offer discounts through certain packaging strategies." Tr. p. 494. Qwest overstated it by asserting its "ability to respond to wireless competition quickly with targeted landline promotions and packages is currently limited because of the constraints of full regulation compared to its competitors, who are unconstrained as to pricing." Tr. p. 65.

ORDER

IT IS HEREBY ORDERED that Qwest's Application for deregulation of its rates for basic local exchange service in the Boise, Nampa, Caldwell, Meridian, Twin Falls, Idaho Falls and Pocatello exchanges is denied.

IT IS FURTHERED ORDERED that the Meirerotto Intervenors are awarded intervenor funding in the amount of $6,000. Qwest is directed to pay that amount to the Intervenors. Pursuant to Commission Rule of Procedure 165.03, the intervenor funding amount of $6,000 will be allowed as a business expense in Qwest's next rate case, chargeable to the small business class of customers. IDAPA 31.01.01.165.03.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No. QWE-T-02-25 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this Case No. QWE-T-02-25. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* §§ 61-626 and 62-619.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 20th day of October 2003.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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