BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of QWEST CORPORATION For Competitive Classification of Basic Business Exchange Telecommunications Services.	DOCKET NO. UT-030614 **AT&T'S CLOSING BRIEF**

REDACTED VERSION

AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle (collectively "AT&T") hereby submit its initial Closing Brief in the above-captioned proceeding.

INTRODUCTION

Has Qwest Corporation ("Qwest") met its burden of proof in this proceeding? Has it shown that it faces *effective* competition for basic business "analog" services throughout the entire State? Would granting Qwest unfettered control over basic business retail pricing harm the competition that does exist?

To answer these questions, the Commission must judge Qwest's case against the standards set out by statute, but before it makes such judgment it must first determine the relevant market within which Qwest should be judged. Moreover, equity demands that the Commission consider Qwest's petition consistently with its past practices related to others seeking competitive classification under the same statute.

For the following reasons, AT&T will demonstrate that Qwest has failed to meet its burden of proof, that it does not face effective competition and that granting Qwest the relief it seeks, without more, will jeopardize and likely harm the competition that does exist.

In this brief, AT&T will show—by examining the applicable standards, the relevant market and the facts as they relate to the standards and market—that Qwest's Petition falls far short of its goal, and that the Commission must continue to protect any competition that exists in the basic business market from predatory pricing by Qwest.

DISCUSSION

I. STANDARDS

The standards[1] for determining whether the Commission may grant the petitioning utility competitive classification requires that the service under consideration be subject to "effective competition." Effective competition is defined as follows:

> Effective competition means that customers of the service have reasonably available alternatives and that the service is not provided to a significant captive customer base. In determining whether a service is competitive, factors that commission *shall* consider include but are not limited to:
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> (a) The number and size of alternative providers of services;
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> (b) The extent to which services are available from alternative providers in the relevant market;
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> (c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions; and
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> (d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.[2]

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[1] Such standards include consideration of the factors recited in both RCW 80.36.330 and WAC 480-121-062.

[2] RCW 80.36.330(1)(emphasis added).

Prior to actually applying the factors listed above, however, the Commission should clearly define and understand the relevant market to which those factors must be applied. Application of the factors may then be considered in light of the actual facts for a clearer understanding to the market dynamics and a determination of whether—if "effectively competitive"—it requires protection for a period of time through the imposition of conditions.

II. RELEVANT MARKET

The relevant market, by definition, has two components: (a) geographic area component and (b) product or services component.[3] An examination of each component and a determination of the definition of each in the context of this particular proceeding is necessary to a proper analysis.

A. The Geographic Market – Defined.

In this case, "Qwest attempts to convince the Commission that the entire state is a single geographic market"[4] while Staff suggests the geographic component is both the exchange and the entire Qwest service territory.[5] One advantage to Qwest of defining the geographic market broadly is that it may claim the "presence of numerous competitors" in Seattle, for example, is indicative of competition throughout the entire state.[6] But, as Ms. Baldwin notes, "[b]y grouping all exchanges within a single geographic market in its petition, Qwest ignores the disparate stages of competition that are emerging throughout

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[3] Transcript Vol. VII at 1316, ln. 16 - 1317, ln. 3; Exhibit 224, *Horizontal Merger Guidelines,* U.S. Department of Justice and the Federal Trade Commission (Rev. Apr. 8, 1997) at 4("A market is defined as a product or group of products and a geographic area in which it is produced or sold .... .").
[4] Exhibit 401T, Baldwin Direct Testimony at 10, ln. 11; Qwest Petition for Competitive Classification, Docket No. UT-030614 at 1, ln. 16.
[5] Exhibit 201T, Wilson Direct Testimony at 14, ln. 13; *cf.* Transcript Vol. VII at 1317, lns. 4-20.
[6] *See* Exhibit 401, Baldwin Direct Testimony at 13, ln. 13.

the state."[7] "Because a business cannot substitute the local service that is offered elsewhere in the state for Qwest's service, it is inappropriate to define Qwest's entire statewide service territory as a single geographic market."[8] In its past consideration of such petitions, the Commission has not ignored the disparate nature of competition from exchange-to-exchange[9] nor has Staff.[10] Neither should start now with this petition.

Another advantage to Qwest of defining the geographic market broadly is that the conclusions drawn do not distinguish between large or small business customers in varying exchanges.[11] As a result, overly broad definitions lead to faulty conclusions about competition within the geographic area.[12] And again, neither Staff nor the Commission in previous competitive classification cases has ignored the differences between large and small consumers.[13] Now is not the time to start.

AT&T recommends that the Commission continue to evaluate petitions for effective competition on an exchange-by-exchange basis or a geographic basis that takes into consideration the competitive disparity between exchange-type geographic areas. The disparity between the varying exchanges has frequently formed the basis for

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[7] *Id.* at 13, lns. 14-16.
[8] Exhibit 422RT, Baldwin Rebuttal Testimony at 3, ln. 11.
[9] *See e.g., In the Matter of the Petition of Qwest Corp. for Competitive Classification of DSS, ISDN and UAS Services within Specified Wire centers,* Staff's Open Meeting Memo for the November 27, 2002 Open Meeting, Docket No. UT-021257; *In the Matter of the Petition of Qwest Corp. for Competitive Classification of Business Services in Specified Wire Centers,* Seventh Supplemental Order Denying Petition and Accepting Staff's Proposal, Docket No. UT-000883 (Dec. 18, 2000); *In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc. for Classification as a Competitive Telecommunications Company,* Fourth Supplemental Order, Docket No. U-86-113 (June 5, 1987).
[10] Exhibit 231, Blackmon Testimony in Docket No. UT-000883 at 12, ln. 3.
[11] *Id.* at 37, lns. 3-7.
[12] *Id.* at 37, lns. 7-12 (cites to expert treatises omitted).
[13] *In the Matter of the Petition of U S WEST Communications, Inc. for Competitive Classification of its High Capacity Circuits in Selected Geographical Locations,* Eighth Supplemental Order, Docket No. UT-990022 (Dec. 21, 1999); *In the Matter of the Petition of Qwest Corp. for Competitive Classification of DSS, ISDN and UAS Services within Specified Wire centers,* Staff's Open Meeting Memo for the November 27, 2002 Open Meeting, Docket No. UT-021257; *In the Matter of the Petition of Qwest Corp. for Competitive Classification of Business Services in Specified Wire Centers,* Seventh Supplemental Order Denying Petition and Accepting Staff's Proposal, Docket No. UT-000883 (Dec. 18, 2000).

imposing conditions on petitioning parties to protect the varying degrees of competition enjoyed among exchanges and customer groups. The Commission should not abandon that practice here.

B. The Product Market – Defined.

As with the geographic area, Qwest defines its product market in an overly broad and confusing manner. That is, Mr. Reynolds identifies an allegedly "complete list"[14] of services and features for which Qwest seeks competitive classification.[15] By way of further refining the list, Mr. Reynolds draws a distinction between "analog" provisioned and "digital" provisioned services. Unfortunately, it wasn't until the hearing that Qwest revealed how it was defining the distinction between analog and digital services. Consequently, Staff's analysis was hampered by inaccurate data from both competitive local exchange carriers ("CLECs") and Qwest. Nonetheless, Mr. Reynolds offered the following definition of analog provisioned services:

> I think it's defined by the services that we provide or that we ask for competitive classification on in this docket. It's the analog PBXs, the analog Centrex services, and the analog business services as that's defined, and that is that *we deliver an analog signal to the customer rather than a digital signal that's integrated into the switch and also integrated into the CPE at the customer location. So that would probably be the differentiation between the types of services that we would—that we would call digital as opposed to those that we would call analog.*[16]

[14] Exhibit 1T, Reynolds Direct Testimony at 4, ln. 19.
[15] Exhibit 2, attached to Reynolds Direct MSR-2 (listing certain Qwest services by name and feature groups).
[16] Transcript Vol. III at 111, lns. 14 – 25(emphasis added).

Setting aside whether this definition truly, in the engineering sense,[17] defines analog services, the distinction as drawn provides the advantage to Qwest of not revealing its larger market shares if both digital and analog provisioned services were considered together.

Another important point to note here, is that Qwest[18] and Staff[19] provided only a perfunctory analysis of some, but not all, of the analog-provisioned services listed in Exhibit 2. Without noting where truly competing alternatives were offered by CLECs in the State, Qwest—and Staff—**actually** analyzed the number of CLEC lines acquired via unbundled loop, unbundled platform or CLEC-owned facilities.[20] The number of CLEC lines may or may not reveal competition for the basic, analog-provisioned, business services described in Mr. Reynolds' Exhibit 2.

Thus, if the Commission is to rely upon the evidence actually in the record, it must conclude that the product market is the analog-provisioned services contained in Exhibit 2 that might be offered over some of the lines considered in this proceeding.

C. Consistent Application of the Relevant Market Examination

In past proceedings the Staff and the Commission have largely considered

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[17] Exhibit 227 at 1(defining analog services as "analog voice transmissions end-to-end across all elements of the network.").

[18] *See e.g.,* Exhibit 4, Reynolds Direct MSR-4 and Exhibit 706(excerpt from AT&T national web site); Exhibit 514(excerpt from MCI national web site).

[19] Transcript Vol. VII at 1321, ln. 21 – 1323, ln. 2(admitting that Staff largely relied on CLEC responses to Order No. 6 (which did not request equivalent services offered by exchange), and Staff did not examine each of the Qwest's services listed in Exhibit 2 to determine whether CLECs offered a competing alternative in each exchange).

[20] *See e.g.,* Qwest Petition at 7 - 8("It is also important to note that a significant percentage (49.6 %) of CLEC market share cited in this petition is based on the CLEC's use of unbundled loops"); Exhibits 52 - 55C, DLT-2(examining switched access lines); DLT-3C(examining lines by wire center and exchange); DLT-4C(examining lines by exchange); DLT-5C(examining lines by masked CLEC); Exhibits 203C - 209C, TLW-4C(examining access lines by exchange); TLW-5C(examining access lines by wire center); TLW-6C(stating the quantity of PBX trunks in service); TLW-7C(examining the quantity of CENTRIX lines); TLW-8C(examining market share calculated using lines); TLW-9C(HHI calculated using lines).

competition from exchange-to-exchange or by wire center.[21] Likewise, in past proceedings the Staff and the Commission considered particular products sold to particular customer groups (*e.g.*, small business, large business or residential), unhampered by artificially imposed provisioning methodologies (*e.g.*, digital versus analog).[22]

Unfortunately some digitally provisioned basic business service has made its way into the CLEC data.[23] Qwest, on the other hand, allegedly stripped its own data of digitally provisioned services. Thus, the Commission is unable to conduct an "apples-to-apples" comparison, and it is, therefore, left with an ill-defined product market that overstates CLEC analog-provisioned services. Because the Commission is forced to rely on the line counts as a loosely associated surrogate for analog-provisioned basic business services, the line counts should be used with caution especially when considering the CLEC data and Staff's reliance thereon.

III. FACTORS CONSIDERED WITHIN THE RELEVANT MARKET

Assuming the relevant market is the resale, UNE-L, UNE-P and CLEC-owned lines potentially used for basic analog-provisioned services in each exchange, the Commission must consider the five effective competition factors in each exchange. That is it must essentially consider, among other things: (a) the number and size of alternative

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[21] *In the Matter of the Petition of U S WEST Communications, Inc. for Competitive Classification of its High Capacity Circuits in Selected Geographical Locations,* Eighth Supplemental Order, Docket No. UT-990022 (Dec. 21, 1999) (examining U S WEST DS3 services by wire center); *In the Matter of the Petition of Qwest Corp. for Competitive Classification of DSS, ISDN and UAS Services within Specified Wire centers,* Staff's Open Meeting Memo for the November 27, 2002 Open Meeting, Docket No. UT-021257; *In the Matter of the Petition of Qwest Corp. for Competitive Classification of Business Services in Specified Wire Centers,* Seventh Supplemental Order Denying Petition and Accepting Staff's Proposal, Docket No. UT-000883
[22] *Id.*
[23] *See e.g.,* multiple restatements of Exhibits TLW-C-5, TLW-3 and the underlying CLEC data considered by Staff; Exhibit 226, Transcript Vol. IV at 616 (admitting that Staff determined "digital" service based on the use of the term "digital" and not Qwest's definition).

providers; (b) whether services are available from alternative providers; (c) whether alternative providers can make functionally equivalent or substitute services readily available at competitive terms and rates; and (d) market power indicators such as market share, ease of entry and affiliation of providers.

A. Number and Size of Alternative Providers

Qwest and/or Staff offered spurious "evidence" of the number of alternative providers when they cited to, for example, the number of registered CLECs,[24] the number of interconnection agreements Qwest has with CLECs,[25] Voice over Internet Providers ("VoIP")[26] and wireless carriers.[27] The number of "registered" CLECs is not indicative of competition for basic, analog-provisioned, business service any more than the number of interconnection agreements is. Moreover, the record is devoid of sufficient evidence to conclude that VoIP is anything other than a future business play by many carriers and inconclusively "available" from others. The same is true of the wireless discussions.

The only evidence that might actually be on point is Qwest's confession that perhaps 35 CLECs might be providing competing alternative services in some portion the relevant market.[28] In fact, most of the actual competition is in the metropolitan exchanges as judged by line counts.[29] Furthermore, "if a CLEC serves one large business customer (i.e., a business with a large quantity of lines or trunks) in a relatively small

[24] Exhibit 1T, Reynolds Direct Testimony at 7, ln. 21; Exhibit 201T, Wilson Direct Testimony at 10, ln. 14.
[25] Exhibit 1T, Reynolds Direct Testimony at 7, ln. 22; Exhibit 201T, Wilson Direct Testimony at 16, ln. 7.
[26] Exhibit 51T, Teitzel Direct Testimony at 24, ln. 9 (discussing AT&T VoIP offerings that are neither specific to Washington and not yet in trial phase); Exhibit 201T, Wilson Direct Testimony at 29, lns. 1-16(citing Comcast—a largely residential provider's—future plans and alleged reasons to "begin" the convergence to VoIP).
[27] Exhibit 51T, Teitzel Direct Testimony at 15, ln.21.
[28] *See* Exhibit 1T, Reynolds Direct Testimony at 20, lns. 1 – 11(citing to the number of lines that 35 CLECs purchased from Qwest, which might be employed to offer competing services).
[29] Exhibit 55C, Teitzel Direct DLT-5C; Wilson Direct Revised TLW-4C; Exhibit 401T, Baldwin Direct Testimony at 13, lns. 11 – 21.

exchange,"[30] it will appear as though Qwest faces greater competition for basic, analog-provisioned service than it does. In short, the evidence is unclear as to how many CLECs are actually providing basic, analog-provisioned business services in each exchange, but the line counts suggest that some exchanges may be facing greater competition where others are not.

B. Service Available from Alternative Providers

As noted above, no real analysis is available to determine the extent to which CLECs actually make alternatives to the services listed in Mr. Reynolds' Exhibit 2 available in any specific area. Rather, line counts exist, and attempting to suggest that CLECs' tariffs or price lists demonstrate that they will serve any basic, analog-provisioned business customer anywhere in the State[31] is also unproven and a tactic previously rejected by this Commission.[32] Moreover, the line count information does not support that CLECs are offering basic, analog-provisioned service in all exchanges or wire centers. [33]

Furthermore, "the degree to which the CLECs are actually serving customers"[34] is the relevant measure here, not the "theoretical availability of service"[35] as Staff and Qwest suggest by reference to the § 271 proceeding and the availability of UNEs.[36] Nowhere does the statute or rule state that potential competition is a surrogate for

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30 Exhibit 401T, Baldwin Direct Testimony at 14, ln. 20.
31 Exhibit 1T, Reynolds Direct Testimony at 9, lns. 1 – 20.
32 The Commission rejected the use of CLEC advertising and price lists in a past proceeding. *In the Matter of the Petition of Qwest Corp. for Competitive Classification of Business Services in Specified Wire Centers,* Seventh Supplemental Order Denying Petition and Accepting Staff's Proposal, Docket No. UT-000883 (Dec. 18, 2000) at ¶ 69.
33 Exhibit 51T, Teitzel Direct Testimony at 9, lns. 9 – 12(admitting that CLECs are not "active" in five Qwest wire centers: Easton, Elk, Green Bluff, Liberty Lake and Northport).
34 Exhibit 401T, Baldwin Direct Testimony at 14, ln.. 18.
35 *Id.* at 14, ln. 16.
36 Exhibit 201T, Wilson Direct Testimony at 6, ln. 3; 9, lns. 8 – 16 & 20, lns. 12 – 18.

"effective" competition, and at one point, Staff apparently agreed by judging geographic areas based upon the financial "viability" and the "reasonable availability" of competing services to large and small business customers by exchange.[37] The Commission should not abandon it's own[38] or Staff's previous principles even though Staff has in this case.

The line counts at least demonstrate some actual CLEC competition, but here again, the line counts are largely concentrated in the metropolitan exchanges, not across the entire State. The line counts may reveal the real competitive alternatives, unlike reference to Qwest's OSS system, its § 271 relief or some assumed parity of UNE provisioning intervals. Public Counsel's witness identified the problem with Qwest's evidence, when she said:

> If CLECs are not actively marketing service to all business customers, and more importantly, if they are not serving business customers in sufficient quantity as to erode Qwest's market power, then the theoretical "availability" of their services is meaningless to consumers.
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> * * *
>
> [A]dopting wishful thinking where effective competition does not exist is a regulatory gamble that puts consumers at risk. Qwest apparently asks the Commission to treat the theoretical possibility of competition as representing sufficient market discipline so as to prevent Qwest from exerting market power.[39]

The line count evidence, in and of itself, does not reveal sufficient evidence of reasonably available, financially viable alternatives to the relevant services to

[37] Exhibit 231, Blackmon Direct Testimony in UT-000883 at 12, ln. 3 – 15, ln.7 (noting also that the "WUTC's role is ... to look for effective competition and to grant pricing flexibility if and only if it finds effective competition." at 4, lns. 19-20.).
[38] *In the Matter of the Petition of Qwest Corp. for Competitive Classification of Business Services in Specified Wire Centers,* Seventh Supplemental Order Denying Petition and Accepting Staff's Proposal, Docket No. UT-000883 (Dec. 18, 2000) at ¶ 66 (holding "Qwest asserts that the statute is met if competitors exist in the market who are capable of providing ("can" provide) alternative services. We are unable to accept this standard. In our view, we must also have confidence that competitors are offering and will offer competitive services.").
[39] Exhibit 401T, Baldwin Direct Testimony at 15, lns. 13-16 & 16, lns. 7-10.

demonstrate either erosion of Qwest's market power or ensure that Qwest won't engage in predatory pricing where it can. Thus, Qwest's proof of service available from alternative providers fails as a matter of law.

C. Functionally Equivalent or Substitute Services

Qwest asks the Commission to accept CLECs purchasing lines via resale, UNE loop or UNE platform as corroboration that CLECs readily make functionally equivalent or substitute services, to those listed in Mr. Reynolds' Exhibit 2, available across the entire State at competitive rates, terms and conditions.[40] The first flaw in the logic is that Qwest is comparing line counts to actual services and assuming that CLECs are offering "functionally equivalent or substitute services" over those lines. The assumption may or may not be true in the case of any given line.

Second, pointing to CLEC price lists or tariffs as evidence that functionally equivalent services exist will only take Qwest so far and it is not a substitute for actual proof that CLECs are offering, for example, an alternative to Business CUSTOMCHOICE[41] anywhere on competitive terms or at competitive rates. The evidence is simply insufficient in this record to determine where, if anyplace, CLECs make functionally equivalent or substitute services available, and to determine precisely what those services are.

Third, no evidence exists in the record that any Washington basic business consumer has replaced wireline service with: (a) VoIP service, (b) wireless service or (c)

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[40] Qwest Petition at 5, lns. 11 – 12.
[41] *See*, Exhibit 2, Reynolds Direct Testimony MSR-2.

any other new technology.[42] Discussions of limited VoIP offerings,[43] future plans to offer VoIP[44] and speculation about wireless as a replacement for wireline business services[45] is nothing more than pure conjecture. It does not form the foundation for a legally sound decision or legally cognizable claim of "effective" competition. Such conjecture regarding the alleged functional equivalence of VoIP and wireless alternatives should be weighed or considered for what it's worth: "zilch."

D. Market Power Indicators such as Market Share

In addition to the factors listed above, the Commission must consider other indicia of Qwest's market power such as market share, growth in market share and ease of entry, among other things. Further, in the context of CLECs, Qwest is the sole wholesale seller of essential inputs to the means of competition Qwest relies upon in its petition (*e.g.*, resale, UNE-L and UNE-P); if these methods of entry disappear, so too does Qwest's evidence of competition. AT&T will address each of the referenced statutory items in turn.

1. Market Share.

Based upon a Herfindahl Hirschman Index ("HHI") analysis of Qwest's own data[46] and "defining the geographic market as the exchange and the product market as the business line, the [data reveals the] local markets that Qwest serves throughout the state

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[42] Shooshan Direct Testimony at at 13 (discussing a SpectraLink product used to replace walkie-talkies inside large department stores; hardly an alternative for a business wireline phone that allows customers to call the store and the store to call customers).

[43] Exhibit 51T, Teitzel Direct Testimony at 22, lns. 9 – 18.

[44] Transcript Vol. IV at 428, lns. 1 – 19 (discussion VoIP planned trials, not general offerings).

[45] Transcript Vol. IV at 417, ln. 25 – 420, ln. 6.*but cf.* Exhibit 501T, Gates Direct Testimony at 21, ln. 500 – 36, ln. 853 (describing numerous proven ways in which wireless is not a functional equivalent of wireline, not the least of which is cost).

[46] Exhibit 401T, Baldwin Direct Testimony at 23, lns. 14 – 18 (relying on Qwest data to conduct HHI analysis and only CLEC owned-facilities data).

are highly concentrated."[47] Thus, Qwest's own data demonstrates that it dominates the local market for basic business lines.

Considering market share in other ways, for example, as a benchmark cited by Staff[48] from the AT&T case,[49] one could argue that Qwest must demonstrate that CLECs have obtained a 25% market share in each wire center prior to a finding of effective competition. Using Staff's data from the Confidential Exhibit TLW-C-8, reveals that for basic business services in each of Qwest's wire centers, CLECs do not meet the benchmark of market share necessary for a finding of effective competition in nearly 99 wire centers.[50] Table 1 presented below shows the benchmark distribution.

CONFIDENTIAL

[redacted]

[redacted]	[redacted]
[redacted]	
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	

Source: Confidential Exhibit TLW-C-8

END CONFIDENTIAL

Based upon a market share benchmark analysis, competitive classification should only be considered in very few of Qwest's wire centers. Moreover, the Staff data considered

[47] Exhibit 401T, Baldwin Direct Testimony at 25, lns. 6 – 8.
[48] Exhibit 201T, Wilson Direct Testimony at 8, ln. 2 (describing AT&T's market share as 75 % and thereby suggesting that competitors had a share of 25 %).
[49] *In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc. for Classification as a Competitive Telecommunications Company,* Fourth Supplemental Order, Docket No. U-86-113 (June 5, 1987).
[50] Exhibit 702RTC, Cowan Rebuttal Testimony at 13.

herein is the data that overstates the CLEC analog lines making the market shares overstated as well.[51] Even overstating CLEC analog lines does not assist Qwest.

Whether the Commission considers market share on a wire center, exchange or statewide basis will have a dramatic impact on Qwest's petition. It would harm consumers and competitors to sweep broadly and create an unwarranted advantage to Qwest to analyze market share on a statewide basis.[52] The Commission should reject Qwest's invitation to do so. A fairer picture of the competitive landscape is painted by wire center or exchange. The Commission should adopt such an analysis.

2. Growth in Market Share.

In general, growth in market share can be analyzed as growth in CLEC share or erosion in Qwest's share. Because the erosion in Qwest's share may be due to a multitude of factors having nothing to do with line loss to CLECs,[53] such erosion is unreliable as a source for measuring growth in market share and the Commission should reject it.

Looking at CLEC growth, Mr. Teitzel suggests that CLECs enjoyed a 20 % growth rate between December of 2001 and 2002 in Washington for residential and business lines.[54] Nonetheless, Ms. Baldwin points out that such growth only leads to a 10 % market share for all CLECs.[55] That share is miniscule in comparison to the incumbents' share retained over that same period. Moreover, "Qwest reported a 12.9 %

[51] *See e.g.,* AT&T Restated Responses to Order No. 6 and other CLECs' Revisions to their Responses.
[52] Exhibit 422RT, Baldwin Rebuttal at 7, lns. 6 – 8 (noting that market share calculated on a statewide average does not prove the existence of effective competition).
[53] Transcript Vol. IV at 420, ln. 10 – 421, ln. 25; Exhibit 701T, Cowan Direct Testimony at 15, lns. 1 – 16; Exhibit 401T, Baldwin Direct Testimony at 31, lns. 3 – 32, ln. 10, including Confidential Exhibit SMB-7C (a/k/a Exhibit 408C).
[54] Exhibit 51T, Teitzel Direct at 4, lns. 14 – 15.
[55] Exhibit 401T, Baldwin Direct at 26, ln. 6.

increase in voice-grade equivalent access lines provided to business customers"[56] throughout its territory.

If one examines basic business lines—to the extent possible in this proceeding—Qwest's share continues to dominate the market on an exchange-by-exchange analysis.[57] This suggests that CLECs' inroads are slow and do not render competition "effective" in most exchanges.

3. Ease of Entry.

The "evidence" of "ease" of entry in this proceeding borders on the ridiculous.[58] And nowhere does Qwest actually provide the real cost or considerations required of competitive entry via UNE-L, UNE-P or resale. Rather, it relies upon its own costs (ignoring its economies of scope and scale that don't apply to CLECs, recurring rates, non-recurring rates, and CLEC costs) and concludes that CLECs must be similarly situated such that they could realize the same profit margins.[59] Multiple other considerations exist for CLECs to decide to enter the market than those discussed by Qwest.[60] Not the least of which is that "the telecommunications industry is very dynamic and unpredictable, complicating" CLEC entry choices and making it impossible for them to acquire capital for necessary investment.[61] In short, Qwest's "ease of entry" evidence is simply insufficient to support its petition.

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[56] *Id.* at 32, ln. 13.
[57] *Id.* at 38, lns.3 – 21 & Exhibits SMB 13C, 14C, 15C and 16C (a/k/a 413C through 417C, respectively).
[58] Transcript Vol. VII at 1331, ln. 21 – 1335, ln. 3; Exhibit 1T, Reynolds Direct Testimony at 15, ln. 20 (suggesting that CLECs may acquire customers for as little as 27 cents); Transcript Vol. III at 160, lns. 8 – 17 (admitting that CLECs would pay more that 27 cents to service customers).
[59] Exhibit 1T, Reynolds Direct Testimony MSR-6C.
[60] Transcript Vol. VII at 1327, ln. 23 – 1330, ln. 19 (confirming CLECs consideration of legal issues, technical issues, potential losses, break even points, potential profits, customer price sensitivity, customer base to support investment, supply input stability, cost of inputs, etc.)
[61] Transcript Vol. VII at 1335, lns. 5 – 24.

IV. MARKET PROTECTION & CONDITIONS

Is the Washington market for basic, analog-provisioned business service "robust enough to withstand [pricing] deregulation of the dominant carrier"?[62] If not, competitive classification is premature at best and such classification could jeopardize the public interest through diminished growth in competition.[63] Hence, it is important that the Commission, in examining "other indicators of market power,"[64] consider whether certain protections are appropriate to ensure the continued growth of competition should it decide to grant a portion or all of the Petitioner's requests for reclassification. This is particularly true here, where unlike CLECs starting from a local customer base of zero, Qwest started with 100 % of the local customers in its territory and it has total wholesale market power over its competitors as shown by the data upon which it relies in its petition (*e.g.*, resale, UNE-L and UNE-P services). Qwest's position as wholesale supplier and dominant carrier-competitor warrant extra caution on the Commission's part, and the Commission has exercised such caution through the imposition of conditions in exchange for a grant of such petitions in the past.

Mr. Stacy succinctly described the problem granting Qwest's petition poses when he stated:

> the Commission has an interest in promoting a competitive market and ensuring that CLECs have the ability to compete on even footing with the incumbent (Qwest). Such competition promotes consumer welfare, and is in the public interest. Qwest, on the other hand, has no such interest. In fact, Qwest's interests are diametrically opposed to the Commission's obligation to ensure that Washington consumers have a choice of providers. While the Commission's oversight of the development of the market ... [is] driven by public interest objectives, Qwest's unregulated participation would be driven by financial objectives. Unfortunately the

[62] Exhibit 601T, Stacy Direct Testimony at 10, ln. 247.
[63] *Id.*
[64] RCW 80.36.330(1)(d).

> optimization of Qwest's financial objectives does not include the presence of real competitors or the protection of the public interest in a developing competitive market. In fact, Qwest can come closer to reaching its financial objectives by weakening its competitors and reducing consumer choice. ... It is critical for the Commission to recognize that given Qwest's powerful market position absent retail pricing restrictions set and enforced by this Commission, Qwest would have both the ability and the incentive to control the strength and viability of its competitors ... .[65]

The Commission's objective—in fact, its legal obligation—is to promote competition; hence, it is the Commission's objective that should prevail here, not Qwest's.

In order to ensure that the Commission's objective prevails, AT&T proposes imposition of the following conditions upon any grant of Qwest's petition for reclassification: (a) adherence to Commission-approved price floors for each of the reclassified services; (b) continued existence of UNE-P product; and (c) non-abandonment of all services reclassified. AT&T will discuss each of the proffered conditions.

A. Price Floors

Interestingly during this proceeding, Staff[66] and others have pointed out that Qwest has the current ability to lower its prices in response to competitive pressure. In large measure, however, Qwest has not employed the tools currently available to it to lower its retail basic, analog-provisioned business services. Such inaction on the part of Qwest leads one to conclude that Qwest filed this petition to acquire the right to selectively raise its prices more quickly, not lower them. In fact, Staff admitted that

> What Qwest will gain if its Petition is granted is simply the ability to make price changes more quickly. *Although illegal discrimination and undue preferences statutes and rules would no longer apply*, Qwest would still be

[65] Exhibit 601T, Stacy Direct Testimony at 17, lns. 407 – 423.
[66] Exhibit 210TC, Wilson Rebuttal Testimony at 1, lns. 12 – 14.

> required to comply with all statutes and rules other than those related to pricing authority.[67]

The ability to selectively lower and raise prices in differing exchanges for the same services is an enormous threat to continued growth in competition. Qwest could easily raise prices for basic business service in the exchanges that experience little to no competitive activity while lowering retail prices, all the way to the TELRIC rates according to Staff, in exchanges that currently enjoy greater competition.[68] In exchanges where Qwest's retail rates were dropped to TELRIC, which according to Staff is acceptable,[69] CLECs would experience the classic price squeeze.[70] Meanwhile, Qwest could use the extra profits from exchanges with higher prices to subsidize the destruction of competition in the competitive exchanges. Moreover, neither Staff nor the Attorney General's office propose any methodology to actually monitor and prevent such predatory pricing or discover it if cloaked inside a bundled offer or promotion.[71] "Consumer protection laws," whether state or federal, require that CLECs suffer the harm of predatory pricing before action is taken.[72] Such laws provide cold comfort to the Commission whose obligation it is to ensure continued growth in competition.

In short, the Commission should insist that Qwest agree to Commission-approved prices floors, established in an adjunct proceeding, upon the grant of any reclassification. This would essentially demand that Qwest price its basic, analog-provisioned business service across all exchanges at a statewide average or above. This would eliminate the threat that Qwest would selectively raise and lower prices in an effort to destroy

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[67] Exhibit 210TC, Wilson Rebuttal Testimony at 2, lns. 1 – 5 (emphasis added).
[68] Exhibit 601T, Stacy Direct Testimony at 18, lns. 446 – 451.
[69] Exhibit 210T, Wilson Rebuttal Testimony at 3, ln. 12; Transcript Vol. VII at 1339, lns. 19 - 24.
[70] Exhibit 601T, Stacy Direct Testimony at 19, lns. 466 – 474.
[71] Transcript Vol. VII at 1347, ln.12 – 1352, ln. 18.
[72] *Id.* at 1340, lns. 10 – 21.

competition. Such condition should be imposed for a period of time wherein the Commission, upon later evaluation, could determine that competition was robust enough to warrant releasing Qwest from its price floor obligations.

B. Continued Existence of UNE-P

Qwest's petition relies on the existence of CLEC competition through CLEC use of Qwest's UNE-P product.[73] In fact, **CONFIDENTIAL** [redacted] **END CONFIDENTIAL** Qwest faces comes from CLEC use of UNE-P.[74] The existence of competition from the UNE-P product is important because resale competition, as the Commission has previously noted, does not constrain prices.[75]

While the Commission will examine whether Qwest should continue to provide unbundled switching, a key ingredient to UNE-P, in the Triennial Review proceeding, it should consider here whether the absence of UNE-P and all the competitors that must rely on UNE-P to reach "95%" of Qwest's customer base are in jeopardy.

As Staff agreed, CLECs, in developing business cases to enter the market, or in some cases stay in the market, would consider the following factors, among others:

- they would consider whether the customer base they could acquire initially would warrant the necessary investment of equipment and personnel;[76]
- they would consider the stability and reliability of the supply inputs such as UNEs;[77] and

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[73] Qwest Petition at 5 (admitting "using UNE-P, the alternative provider can reach every location to which Qwest has facilities").
[74] Exhibit 701T, Cowan Direct Testimony at 17, ln.8.
[75] Exhibit 401T, Baldwin Direct Testimony at 9, ln. 10 (citing the Commission's Seventh Supplemental Order in Docket No. UT-000883).
[76] Transcript Vol. VII at 1329, lns. 20-24.
[77] *Id.* at 1329, ln. 25 – 1330, ln. 10.

- they would look at the price of the inputs.[78]

If the supply of UNE-P becomes unstable and the price is uncertain, some CLECs will conclude that they simply will not compete and others may stop competing where their investment in switching equipment and the necessary transport facilities cannot be recovered from current or future customer bases. Because CLEC reaction to the outcome of a Triennial Review case is an unknown factor that may have a dramatic impact on Qwest's competition for basic, analog-provisioned business services, the Commission should condition any grant of reclassification upon an agreement by Qwest to revisit its grant after the full impact of the Triennial Review case is known. Alternatively, the Commission could seek an agreement from Qwest not to challenge the FCC's finding of impairment for a period of years necessary to ensure that CLEC's customer bases grew to sizes sufficient to retain robust competition without use of the unbundled switching element (*e.g*, until CLEC market share grew to 25 % in all exchanges across Qwest's territory). In any event, the Commission should take seriously the impact on this petition removal of UNE-P competition would pose.

C. Non-Abandonment

While Qwest appears to have already agreed to "not abandon services," if its petition is granted,[79] it is not clear that the condition as agreed to is sufficient. Staff admits that "abandonment" in this context does not include Qwest's "ability to grandfather or sell" facilities.[80] And the condition, for unknown reasons, would only

[78] *Id.* at 1330, lns. 11 –17.

[79] Exhibit 7RT, Reynolds Rebuttal Testimony at 8, ln. 5 ("In discussions with Staff, Qwest has committed that, should the Commission grant Qwest's Petition, Qwest will not abandon services in the exchange areas it currently serves for the services listed in its Petition, consistent with the conditions stated in Staff's testimony.")

[80] Transcript Vol. VII at 1344, lns. 1- 6.

survive until November 7, 2009.[81] Clearly, if the Commission wishes to ensure that some carrier provides service to customers of basic, analog-provisioned business services, it must develop a non-abandonment condition that actually accomplishes that goal. Qwest's proposal is simply insufficient. AT&T recommends that the Commission eliminate Qwest's ability to sell its facilities, which would ensure that CLECs had access to those facilities to continue competing for basic analog-provisioned services and that Qwest would continue to serve in the event competition collapsed.

CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Commission reject Qwest's petition for competitive classification of basic, analog-provisioned business services on the ground that Qwest has failed to meet its burden of demonstrating that such service faces effective competition across the entire State. Alternatively, if the Commission finds that Qwest met its burden, then AT&T requests that the Commission impose the conditions discussed above on Qwest such that it cannot engage in predatory pricing to the detriment of competitors and consumers alike.

[81] *Id.* at 1344, lns. 7 – 15.

Respectfully submitted this 28th day of October 2003.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

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