

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of
QWEST CORPORATION

For Competitive Classification of Basic Business
Exchange Telecommunications Services

Docket No. UT-030614

QWEST'S OPENING BRIEF

NON-CONFIDENTIAL VERSION

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I. INTRODUCTION

1 In this case, Qwest asks Commission to grant Qwest competitive classification for all its analog business services statewide. Qwest initially supported its petition with data showing substantial wholesale-based competitive activity in nearly every corner of Washington. Qwest's petition was bolstered by Commission Staff, which added to the evidence of active competition by gathering, analyzing and aggregating data from twenty-seven CLECs regarding their current provision of analog business services to end users in the state. Qwest and Staff have provided the Commission detailed, credible evidence of effective competition in Washington for all the services at issue in this docket.

2 The opposition to Qwest's petition has been loud, but scattered. So-called consumer groups (Public Counsel, WeBTEC and DOD/FEA) and CLECs (AT&T, MCI, Integra and ATG) (collectively, the "opponents") have focused very little on rebutting Qwest's and Staff's extensive hard data of *actual* competition in Washington for analog business services. Instead, the opponents, have:

- sought to create confusion for the Commission regarding the services subject to this proceeding and the data supporting Qwest's petition;
- focused extensively on issues that are peripheral to this proceeding and introduced by Qwest merely for context;
- sought to introduce delay;
- engaged in fear tactics by urging the Commission to focus on hypothetical, future doomsday scenarios rather than the current competitive landscape; and
- urged the Commission to employ standards and thresholds that, if adopted, would either permanently preclude Qwest from obtaining competitive classification or make it unattainable unless and until Qwest has lost most of the access lines in its service territory.

3 The Commission should not be distracted by the opponents' shotgun approach. It is an undeniable reality that old paradigms have changed and that the local exchange industry has evolved. Qwest –

facing mounting pressure from its nimble and innovative intramodal and intermodal competitors – no longer has any captive business customers in Washington. Qwest and Staff have provided substantial credible evidence (much of which originates from the CLECs themselves) that Qwest has already lost approximately thirty percent of the analog business market in this state to wholesale- and facilities-based competitors active in every wire center in the state other than tiny Elk, Washington. That figure does not account for the lines and usage lost to intermodal competitors whose services grow in popularity and functionality on a daily basis. Effective competition is uncontrovertible.

4 Qwest is rapidly losing access lines. To effectively compete, Qwest must become more nimble and more responsive like its competitors. Qwest needs the flexibility to modify its pricing structure so that it can respond to competition where competition is most active. It also needs the ability to target market and, like its competitors, to respond more quickly to competitive offerings and strategies. Granting Qwest such relief will not only benefit Qwest; it will also benefit the broader public interest by compelling all carriers to lower prices, improve service quality and innovate. The Commission should grant Qwest’s petition without any of the conditions suggested by the opponents.

II. APPLICABLE LAW

5 Qwest’s May 1, 2003 petition was filed pursuant to the Regulatory Flexibility Act, codified in relevant part at RCW 80.36.330. That statute directs that the Commission may classify a telecommunications service provided by a telecommunications company as a competitive service if the service is subject to effective competition. “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. *RCW 80.36.330(1)*. The statute identifies four, non-exclusive factors in determining whether a service is competitive:

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

- (b) The extent to which services are available from alternative providers in the relevant market;
- (c) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions; and
- (d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of service.

6 *RCW 80.36.330(1)(a)-(d)*. In weighing the evidence and applying the statutory factors, the Commission's analysis is not governed by a precise recipe. Instead, the Commission must consider the totality of the evidence presented on a case-by-case basis.¹

7 Once competitive classification is granted for a particular service, the provider may offer the service under a price list (generally requiring 10 days notice) rather than a tariff (generally requiring 30 days notice). *RCW 80.36.330(2); WAC 480-80-205*. Once services are competitively classified by the Commission, statewide average pricing is no longer mandated, with two limitations. First, the ILEC can not charge prices or rates below its cost, as determined by proper long-run incremental cost standards established by the Commission. *RCW 80.36.330(3)-(4); WAC 480-80-204(6)*. Second, unless the Commission grants a general waiver of *RCW 80.36.170* and *.180*, the ILEC can not offer a competitively-classified service at different prices (or under different terms or conditions) for similarly-situated customers except through a contract for services.² *RCW 80.36.170, .180, .330(8); WAC 480-80-241, -242*.

8 An ILEC granted competitive classification under this statute can not recover losses incurred while provisioning competitive services through rates for noncompetitive services. *RCW 80.36.330(6)*.

Finally, and critically, the Commission retains the authority to reclassify the service as non-competitive

¹ *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 73.*

² Such a contract, if it offers retail services at rates or under terms or conditions inconsistent with the carrier's price list, must be submitted for Commission review prior to its effective date. *RCW 80.36.150; WAC 480-80-241.*

(and thus again subject to full regulation) “if reclassification would protect the public interest.” *RCW 80.36.330(7)*.

9 The purposes of the Regulatory Flexibility Act, as articulated by the Washington Legislature, include the promotion of diversity in the supply of telecommunications services and products in telecommunications markets throughout the state *and* the permission of flexible regulation of competitive telecommunications companies and services. *RCW 80.36.310(5)-(6)*.

III. DEFINITION OF RELEVANT MARKET

A. Definition of product market

10 Under the statute, the existence of effective competition is to be analyzed in the context of the “relevant market.” While the statute provides no guidance as to what that term means, the Commission has interpreted the term to entail “product, service, geographic, or perhaps even temporal aspects of definition.”³ In this case, the parties have focused on Qwest’s definition of the product market and geographic market.

11 The relevant product market at issue in this case consists of analog business exchange services and the features that are available by virtue of having purchased a line-based product. This includes analog flat and measured business exchange service, Centrex service and private branch exchange (PBX) service and vertical business features. *Ex. 1T (Reynolds Direct)*, at 4; *Ex. 2*. Qwest has throughout this proceeding made clear that this product market excludes all digital services. *Petition*, at 8, *ln. 23, Attachment A*; *Ex. 1T*, at 5; *Ex. 2*; *Ex. 7RT (Reynolds Rebuttal)*, at 5-6; *Ex. 51T (Teitzel Direct)*, at 8; *Tr. 111, 458-471*; *Response to Bench Request No. 5*. In its recent order denying the joint motion to force Staff to re-survey CLECs, the Commission made clear that this

³ *Eighth Supplemental Order Granting Amended Petition for Competitive Classification, Docket No. UT-990022, at 5.*

distinction has been present throughout this proceeding.⁴

12 As Mr. Reynolds explained during the hearing, the distinction between analog and digital services does not center on the facility over which the service is provided, as analog services can be and are routinely served over digital facilities. Thus, the focus is not analog versus digital *servicing facilities*. Instead, the distinction derives from whether the service is in analog or digital format at the point that it terminates to the customer premise equipment (CPE). *Tr. 111, 195-198*. The simple distinction between analog and digital services is that digital service requires digital CPE and analog services require analog CPE. This distinction is logical given that markets are defined on the demand side -- by customers in their demand for service. That demand will be substantially impacted by the CPE the customer already owns and whether it is willing to invest in entirely new CPE to accommodate digital service. *Tr. 184-186, 298-300, 529, 538-541*.

13 Notwithstanding the apparent confusion of Public Counsel,⁵ the services that are the subject of Qwest's petition are identical to the set of services for which Qwest sought competitive classification in 31 wire centers in Docket No. UT-000883.⁶ As it did in the last case,⁷ Commission Staff does

⁴ *Order No. 16, at ¶ 12* (“The CLEC parties had ample notification that digital services were not part of this petition and that their line counts submitted to Staff should exclude digital services.”). *See also, Order No. 8, at ¶¶ 25, 27, 29, 35*.

⁵ During cross examination, Public Counsel witness Baldwin testified that Qwest's petition in Docket No. UT-000883 involved a different set of services, including both analog and digital services. *Tr. 780-781, 796, 837*. Ms. Baldwin's testimony reflects a misunderstanding as to what Qwest sought and what the Commission granted in Docket No. UT-000883. Qwest sought, and the Commission granted in limited fashion, competitive classification of the same analog business services as are at issue in this case. It is not true, as Ms. Baldwin attempted to assert at hearing, that “the relevant market defined by the Commission as being appropriate in that case included the provision of analog *and digital services* provided over DS1 or higher capacity loops.” *Tr. 780-781 (italics added)*. This is made obvious both from a simple reading of the Commission's Seventh Supplemental Order in that case and from the fact that Qwest separately thereafter sought and obtained competitive classification of its digital business services (UAS, ISDN, DSS) in the same exchanges. *See Docket No. UT-021257*. If Ms. Baldwin was correct, Qwest would have had no reason to file that subsequent petition.

⁶ *See Petition of US WEST Communications, Inc., Docket No. UT-000883, Attachment A*. The only difference between the list of services in the instant case and the list of services in UT-000883 is that the list in the current list explicitly states exclusions (including an exclusion of digital services) and includes three Qwest services (Business Custom Choice, Qwest Business Line Plus and Qwest Utility Line) not listed in the prior docket. Two of these services (Qwest Business Line Plus and Qwest Utility Line) did not yet exist. *See Docket Nos. UT-011531 and UT-011536*. Qwest did not include the custom choice package under its belief that it was covered by the inclusion of its component parts, that is the flat business line and features.

⁷ In Docket No. UT-000883, Staff recognized that while Qwest's petition covered several distinct services, most are “add-ons” to three basic types of service – PBX, Centrex and basic business exchange service. Staff indicated that while one might theoretically separately examine PBX, Centrex and basic business exchange services, this separation is not desirable because Qwest's competitors do not operate as if they are separate markets and because each of the three types of services can be a substitute for the other two, at least in some circumstances. *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 33*.

not contest that Qwest has appropriately identified the product market. *Tr. 1311.*

- 14 The opponents in this case have seized on Qwest's definition of the product market from a variety of angles (some of which are irreconcilable with one another) in order to inject both confusion and delay into this proceeding. While, to its credit, WeBTEC attempted to clarify the issue months ago,⁸ other parties to this case persist in the assertion that the analog-digital distinction drawn by Qwest is arbitrary or perplexing. It is neither, as recognized by the Commission's Order No. 16 in this case and the Commission's limited grant of competitive classification for the same basket of services in Docket No. UT-000883.
- 15 Public Counsel attacks Qwest's product market definition as being too *broad*. Ms. Baldwin criticizes Qwest for grouping together Centrex, PBX and individual line service, products (according to Ms. Baldwin) which attract "significantly different levels of competitive interest." *Ex. 401T (Baldwin Direct)*, at 39; *Tr. 682*. She continues that Qwest "neglects to analyze these different markets, and instead, attempts to depict the entire group of local business telecommunications services as constituting a single product market." *Id.* On the opposite end of the spectrum, other opponents (including MCI, Integra, WeBTEC and ATG) seek to convince the Commission that Qwest's product market is arbitrarily *narrow* because, in some circumstances, digital services are substitutable for analog services. *See, e.g., Tr. 179-186 (ATG cross of Qwest witness Reynolds)*.
- 16 At hearing, Qwest witness Shooshan correctly explained that reasonable persons can disagree on the proper definition of a relevant product market and that, no matter how Qwest would have defined the market in this case, its opponents would have attacked its definition as being too broad or too narrow. *Tr. 538*. Mr. Shooshan's analysis is borne out by the diametrically-opposed attacks raised by the opponents in this case. Qwest's product market definition is quite reasonable. That said, if the

⁸ In a July 10 pleading, WeBTEC specifically recognized the analog-digital distinction (acknowledging that Qwest had purported to exclude digital services from the scope of its petition) and requested the Commission to ensure that CLÉCs would properly exclude digital services from the line counts they reported in response to Order No. 6. *WeBTEC's Petition for Interlocutory Review of Orders 05, 06 and 07 and Response to Public Counsel's Petition for Review*, at 8.

Commission is interested in reviewing the data on a more granular, segment-by-segment basis, the evidence submitted by Qwest and Staff can be disaggregated. *See Ex. 470C (summarizing the separate market shares for basic exchange line services and Centrex/PBX services).*

17 Qwest's definition of the relevant product market is appropriate. The opponents' criticisms that Qwest's market definition is too narrow or too broad should be dismissed.

B. Definition of geographic market

18 Qwest seeks competitive classification of its analog business services throughout its service territory statewide. The nature of the competition faced by Qwest shows that its competitors can and do compete anywhere and everywhere that Qwest serves customers. The data of wholesale-based and facilities-based competition in the record demonstrates that Qwest's competitors serve business customers in every wire center in Washington except for Elk. *Ex. 201T (Wilson Direct), at 3.*⁹ The number of Qwest analog business access lines in Elk amounts to less than .03% of the such access lines statewide. *Tr. 710; Ex. 416C.*

19 Commission precedent shows that Qwest's statewide market definition is perfectly appropriate. Since RCW 80.36.330 was adopted in its original form in 1985, Qwest's research reveals that the Commission has considered and approved (at least in part) fourteen (14) competitive classification petitions under RCW 80.36.330.¹⁰ Nine of the eleven were filed by Qwest or its predecessors,¹¹ three were filed by Verizon/GTE¹² and one each was filed by Contel of the Northwest¹³ and United

⁹ At hearing, Staff witness Wilson explained that multiple carriers' websites (including MCI's) indicate that they will serve customers in Elk. *Tr. 1277.*

¹⁰ Note that a number of additional petitions have been considered and granted under RCW 80.36.320, a companion statute which permits the Commission to competitively classify an entire telecommunications company, as opposed to competitively classifying particular services offered by a telecommunications company. *See, e.g., U-86-113 (AT&T Communications of the Pacific Northwest, Inc.).*

¹¹ The nine Qwest dockets include this docket and Docket Nos. UT-000883 (basic business services), UT-990259 (directory assistance), UT-990021 (intraLATA toll), UT-990022 (high capacity loops), UT-980630 (1-800-4USWEST calling card service), U-88-2052-P (MTS and private line services), U-88-1997-P (billing and collection services), U-86-35, et al. (Intracall, speed calling service, Scan Alert, Centrex and private line transport services).

¹² *See Docket Nos. UT-020101 (directory assistance), UT-970767 (intraLATA toll) and UT-920575 (billing and collection services).*

Telephone Company.¹⁴ Of the fourteen, in all but two¹⁵ competitive classification was granted statewide for the identified services. In the two exceptions, Qwest itself sought geographically-limited relief. In Docket No. UT-990022, Qwest pursued competitive classification for its high capacity circuits in the Greater Seattle, Vancouver and Spokane areas. In Docket No. UT-000883, Qwest sought competitive classification for its basic business exchange services in 31 wire centers. That the Commission granted Qwest limited relief in a subset of its statewide service territory was necessitated by the limited scope of Qwest's petitions in the first instance. Those decisions do not stand for the proposition that the entire state is an inappropriate geographic market in an RCW 80.36.330 petition. Twelve previous decisions of this Commission confirm that fact.

20 Nevertheless, the opponents attack Qwest's definition of the geographic market as being too broad. Public Counsel's opposition on this point is perhaps most vexing. Despite stating with confidence that the state is too broad a geographical market, Public Counsel refused to take a firm position which might assist the Commission in determining what is the appropriate geographic unit to consider. *Tr. 673-677 (wherein Ms. Baldwin explained twice that it is Qwest's burden to "do its homework" and identify appropriate markets, and that she should not have to do that for Qwest)*. When pressed by Qwest, Ms. Baldwin stated that the Commission should focus *either* on the wire center or the exchange. *Tr. 677*.¹⁶ Leaving aside Public Counsel's refusal to take a firm position, its allusion to a wire center-level review is in direct conflict with the position it took in Docket No. UT-000883. As mentioned, in that case Qwest sought relief regarding the same set of services in only 31 wire centers and provided data to support its petition on a wire center level. Public Counsel argued there that

¹³ See Docket No. UT-87-2186-P (*Centrex and enhanced custom calling*).

¹⁴ See Docket No. UT-87-1566-P (*billing and collection services*).

¹⁵ *Eighth Supplemental Order, Docket No. UT-990022, at 6 (Indicating that the petition in that case represented the first petition limited to specific geographic boundary constraints)*. In a subsequent docket, UT-000883, US WEST likewise sought more limited relief, in that case seeking competitive classification for basic business exchange services in 31 wire centers.

¹⁶ Ms. Baldwin hedged her "recommendation" by saying that it was premature (as of the date of hearing) to define the geographic market. *Tr. 677*.

defining the market by wire center was too narrow because some customers have locations in multiple wire centers that cannot be served from a single wire center. *Ex. 103RT (Shooshan Rebuttal), at 3 (referencing Docket No. UT-000883, Direct Testimony of Sarah J. Goodfriend, at 35).*

21 The circumstances of this case validate consideration of the relevant geographic market to be Qwest's entire statewide service territory. However, the data at the Commission's disposal can be reviewed at the wire center level, at the exchange level or at the level of larger geographic areas identified in Qwest's petition and in Mr. Teitzel's direct testimony. *See Exs. 51T, at 7-8, and 53C (nine larger geographical areas); Ex. 54C (exchange); Ex. 55C (wire center and exchange); Exs. 204C and 205C (wire center, exchange and larger areas); Ex. 208 (zone and wire center); Ex. 209C (wire center).*

22 Qwest has appropriately defined the geographic market for the relevant services. As it has done at least twelve times before, the Commission should grant competitive competition under RCW 80.36.330 on a statewide basis given that the record evidence proves that Qwest faces effective competition for analog business exchange services throughout Washington.

IV. REVIEW OF STATUTORY FACTORS FOR EVALUATING EFFECTIVE COMPETITION

A. Number and size of alternative providers

23 Intramodal (CLEC) competition in Washington is flourishing. As of March 2003, the Commission's website listed 161 registered CLECs, 152 of which had interconnection agreements with Qwest as of December 2002. *Ex. 1T, at 7; Ex. 51T, at 6.*¹⁷ As of April 2003, 78 CLECs, ranging in size from national carriers such as AT&T to smaller carriers such as Integra and Rainier Connect, were actively

¹⁷ The opponents have attempted to portray Qwest's use of this data as an attempt to exaggerate the level of competition. *Ex. 401T, at 14; Ex. 501T (Gates Direct), at lns. 218-253; Ex. 701TC (Cowan Direct), at 9; Tr. 211.* As Qwest witness Teitzel explained, this information is simply provided as context, as a barometer of CLEC interest in the state. *Ex. 60RT (Teitzel Rebuttal), at 16.* Qwest does not contend that it faces competition from 161 CLECs in Washington for its analog business services. *Id.* It simply provides this information so that the record accurately reflects the current state of competition in Washington.

purchasing wholesale services from Qwest to serve their Washington customers. *Ex. 51T, at 6.* Of that number, 37 CLECs provide wholesale-based competitive services of the type at issue in this proceeding. *Ex. 1T, at 20; Ex. 3; Tr. 283.*

24 These 37 CLECs provide services throughout the state. *Ex. 201T, at 19; Ex. 208C.* When viewed by deaveraged rate zone, the average (mean) number of CLECs providing wholesale services per wire center is: 24.5 (Zone 1); 11.8 (Zone 2); 13.3 (Zone 3); 11.4 (Zone 4); and 5.5 (Zone 5). *Id.*¹⁸

25 The above data does not include the significant number of intermodal competitors in the marketplace. This includes wireless companies, VoIP providers and cable companies. Data compiled by the FCC and released in June 2003 shows that there were (as of December 2002) 2,866,458 wireless sets in service in Washington. This equates to almost 75% the number of wireline lines in service. *Ex. 51T, at 15-16.*¹⁹

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

26 The record evidence makes it clear that Washington CLECs offer comparable services at comparable prices to Qwest's analog business services. This is confirmed both by where CLECs are actually serving customers and where CLECs hold themselves out as serving customers.

27 *Actual service of customers.* As discussed above, CLECs are providing analog business services in competition with Qwest in every Qwest wire center in Washington aside from Elk. This competition comes in the form of resale, UNE-P, unbundled loops and facilities-based competition, to say nothing of cable, wireless and VoIP competition. *See sections III.B and IV.A. above.* It is abundantly clear from the data in the record that services are broadly available from alternative providers in and throughout the relevant market.

¹⁸ Note that the per-wire center breakdown would undoubtedly be even higher if facilities-based competition were also included.

¹⁹ Qwest freely admits that no direct conclusions can or should be drawn from this data given that the FCC's data on wireless and wireline "lines" in service cover all types of service and is not (like the hard CLEC data before the Commission in this case) limited to analog business services.

- 28 *CLEC advertising.* The evidence shows that Washington CLECs hold themselves out as providing services comparable to Qwest analog business services throughout the entire state. *See Ex. 4.* Virtually all of the CLECs' price lists contain language to the effect that service is available where facilities exist.²⁰ If indeed it is the case that the CLECs will offer service where facilities are available, and such facilities are available anywhere Qwest currently offers service, then CLEC services are available everywhere Qwest services are available. *Ex. 1T, at 8-9.* This interpretation was confirmed by AT&T witness Cowan during the evidentiary hearing. *Tr. 973-974.*
- 29 In her direct testimony, Public Counsel witness Baldwin opined that businesses within the five small exchanges having no wholesale-based competition would "likely be surprised to learn that there is local telecommunications competition in their communities." *Ex. 401T, at 15.* It is simply untrue that CLECs ignore smaller Washington communities. For example, the "information pages" of the Qwest Dex directory covering Elk, Greenbluff and Liberty Lake identify sixteen separate competitors offering services to those areas. *Ex. 7RT, at 14-15; Ex. 8.* At hearing, Ms. Baldwin admitted that a CLEC advertisement in the information pages indicates to her that the CLEC is presumably offering to serve customers in the area covered by the advertisement. *Tr. 678-680; Ex. 469.*
- 30 Similarly, many CLECs (including each CLEC sponsoring a witness in this proceeding) advertise their services over the Internet, a form of advertisement that is available to any Washington resident (regardless of location) with access to the worldwide web. *Ex. 514 (MCI); Ex. 706 (AT&T); Ex. 752 (Integra); Tr. 852-853, 1277.* The Internet advertising of Integra, AT&T and MCI makes clear that these parties offer services to and target small- and medium-sized businesses. *Id.*
- 31 Hence, it is clear that services from alternate providers are broadly available in and throughout the relevant market.

²⁰ Each of the thirty-two CLEC price lists detailed in Exhibit 4 contains language similar to "service is available where facilities permit."

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

32 There is significant overlap among many of the factors the Commission is to consider in evaluating a competitive classification petition. For instance, the ability of alternate providers to make functionally equivalent or substitute services available (RCW 80.36.330(1)(c)) is inextricably linked to the preceding factor – the extent to which services *are* available from alternate providers in the relevant market (RCW 80.36.330(1)(b)). Evidence that such services *are available and being provided* by alternate carriers in the relevant market makes obvious the fact that alternative providers *are able* to provide such services. Similarly, this factor is directly linked to ease of entry, a factor for Commission consideration pursuant to RCW 80.36.330(1)(d). Rather than repeat its analysis of .330(1)(b)²¹ or .330(1)(d),²² Qwest will simply incorporate those discussions by this reference.

1. Wholesale-based services (resale; UNE-P; UNE-L)

33 In addition to focusing on the actual provision of services in competition with Qwest and the ease of entry, this factor (the ability of alternative providers to make functionally equivalent or substitute services available) appears to focus on a customer's perception of whether a CLEC's analog business service is functionally equivalent to or substitutable for Qwest's analog business offering. In the context of total service resale²³ or UNE-P, there is no doubt that such service is functionally equivalent and fully substitutable for Qwest's service given that the underlying service being provided is Qwest's end-to-end service merely re-branded under the name of the CLEC.

34 In the context of unbundled loops (UNE-L), competitors have even more flexibility, as they can utilize the functionalities of their own switches to offer services different from and in addition to those that Qwest customers enjoy. It is this differentiation that drives some CLECs to migrate to unbundled

²¹ See section IV.B. above.

²² See section IV.D.3. below.

²³ By definition, resellers are restricted to reselling services under the same terms and conditions applicable to Qwest and users. See *Tariff WN U-43 Resale of Regulated Telecommunications Services Washington*, §2.1.B.2 (*original sheet 2*). This provision of Qwest's resale tariff assures that a resold service and its corollary Qwest retail service are functionally identical.

loops (and eventually CLEC-owned facilities) and away from resale and UNE-P. By way of illustration, Integra witness Slater testified:

From a strategic perspective, Integra has made the determination that we are going to differentiate ourselves and we are going to compete in the marketplace based upon service, and we believe very strongly that in order for us to look a customer in the eye and truly compete on service, we need to own substantially all of the electronics, which really is what governs the quality of service and manages the traffic. And for that reason, to compete on service from a strategic differentiation standpoint, we made the decision to invest in our own network, which is a long way of saying we don't use resale because we believe that it's fundamentally still Qwest providing the service but someone else's brand is on it. That's the strategic consideration.²⁴

35 There is no evidence in the record that wholesale-based competition results in service to the customer that is functionally inferior or in any way falls short of being fully substitutable for Qwest analog business services.

2. CLEC-owned loops

36 Similarly, there is no evidence in the record contesting the fact that CLECs that serve customers via their own facilities provide services that are anything less than functionally equivalent and fully substitutable.

3. Intermodal (wireless, VoIP, Wi Fi, cable, etc.)

37 In framing and supporting its petition, Qwest paid only passing attention to wireless and VoIP service. Notwithstanding the peripheral role of intermodal competition in this docket, the CLEC opponents have paid enormous attention to the question of whether wireless and VoIP services are functionally equivalent to Qwest analog business services. MCI, for instance, dedicated 23 pages of its pre-filed testimony and virtually its entire cross examination of Mr. Teitzel to this issue. Ignoring the wholesale data sponsored by Mr. Teitzel, MCI asked 177 of its 185 questions during cross examination about

²⁴ *Tr.* 851-852.

wireless and VoIP. *Tr. 334-416*. This included an extensive review of opinion surveys conducted in Idaho and Iowa regarding wireless service. Similarly, AT&T asked all 51 cross examination questions of Mr. Teitzel about wireless and VoIP. *Tr. 416-434*.

38 Qwest interprets this incredible interest in wireless and VoIP issues to be an attempt by the opponents to distract the Commission from the central issues at hand. Mr. Teitzel testified from the very beginning of this case that Qwest is not maintaining that wireless service is generally viewed as a complete substitute for Qwest business exchange service. *Ex. 51T, at 16*. Mr. Teitzel pointed out that large Centrex and PBX systems may not lend themselves to a full wireless application. *Id.* Again, Qwest simply raised wireless and VoIP service as context for the Commission in order to give it, at least qualitatively if not quantitatively, a more complete view of the competitive landscape for business telephony services. That said, as Mr. Teitzel explains, wireless and VoIP technologies²⁵ are increasing dramatically in popularity, coverage, price-competitiveness and functionality and Washington business customers are increasingly substituting these other modes of communication on a line and usage basis for landline technology. *See Exs. 51T, at 15-27; 56; 57; 58; 59; 60RT (Teitzel Rebuttal), at 18-31*.

D. Other indicators of market power

39 The factors discussed above (those set out in RCW 80.36.330(1)(a)-(c)) are non-exclusive. The Commission is also required to consider other indicators of market power, possibly including market share, growth in market share, ease of entry and the affiliation of providers of services. When viewed in the light of the evidence in the record, the Commission should conclude that Qwest lacks market power in the analog business services market.

²⁵ Staff engineer Robert Williamson, the only technical expert to appear in this proceeding provides evidence of the substitutability of VoIP technology. *Ex. 30IT (Williamson direct), at 5-7*.

1. Market share analysis

40 Despite the assertions of the opponents that Qwest is seeking competitive classification based on theoretical, or nascent competition,²⁶ both Qwest and Staff have come forward with conservatively-drawn hard evidence of actual competition for Qwest analog business services throughout Washington. Qwest's and Staff's presentation of data has, not surprisingly, met loud opposition by the opponents, who as recently as October 7, 2003 tried to persuade this Commission to set aside Staff's data and begin the process over.²⁷ That attempt was quickly and appropriately dismissed by the Commission.²⁸ In this section, Qwest will review the Commission's precedent regarding market share, will summarize Qwest's and Staff's data gathering processes and findings, will discuss growth in market share, will explain and respond to the various attacks launched by the opponents and will review the market share analyses sponsored by the opponents.

a) Commission precedent regarding market share

41 The statute does not establish a hard-and-fast market share test for consideration in competitive classification cases. Nor has the Commission ever developed or imposed such a test. Instead, the Commission weighs all the facts on a case-by-case basis to determine whether there is effective competition in the relevant market.²⁹ Ultimately, the Commission is more concerned with structural factors than any particular measure of market share or market concentration.³⁰ Notwithstanding that caveat, market share data provides perhaps the most tangible evidence of competition, and for that reason it has received considerable attention by all parties.

42 The Commission's historical practice provides some insight. In the AT&T competitive classification

²⁶ See, e.g., *Ex. 501T*, at *Ins. 210-309*.

²⁷ *Joint Motion to Require Staff to Re-Survey and Recompile CLEC Data, Or to Disregard Results of Previous CLEC Survey and Data Compilation ("Joint Motion")*.

²⁸ *Order No. 16*.

²⁹ *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 73*.

³⁰ *Id.*

case, the Commission granted AT&T relief under RCW 80.36.320 (thus removing all AT&T's services from full regulation) based on a finding that AT&T had lost 25% of the relevant market statewide.³¹ In Docket No. UT-000883, the Commission found sufficient (but not explicitly necessary) a 30-40% market share loss in the relevant market.³² In Docket No. UT-970767, the Commission granted GTE competitive classification for its intraLATA toll services. At the time of its petition, GTE possessed a 78% market share.³³

b) **The process of gathering data**

43 Both Qwest and Staff engaged in extensive data gathering and analysis. Both parties' findings support Qwest's petition for competitive classification.

44 In support of its petition, Qwest submitted wholesale data broken down on a wire center, exchange and larger geographic area basis. The data was provided on both an aggregated (for all CLECs) and disaggregated (by CLEC, the identity of which was masked) basis. *Exs. 53C; 54C; 55C*. By "wholesale data," Qwest is referring to separate counts for all resold, UNE-P and unbundled loop services³⁴ sold by Qwest in Washington to its CLEC customers for use in serving business end users in competition with Qwest. Because the data submitted by Qwest excludes access lines served via CLEC-owned loop facilities, it *understates* the actual number of business CLEC lines in service. *Ex. 51T, at 7*. Qwest could not provide meaningful data regarding the extent of pure facilities-based competition because the CLECs, not Qwest, possess that information. *Id. at 3*.

45 Recognizing the need for the Commission to review the entire competitive landscape – including

³¹ *Fourth Supplemental Order, Docket No. U-86-113, at 16-18*. In that case, AT&T's witness Richard Cabe testified that the Commission should not simply consider AT&T's high remaining market share as determinative. Mr. Cabe testified that this fact was offset by the fact that there were thirty registered telecommunications carriers in Washington (plus a number others not registered), AT&T's market share had been declining and there was ease of entry. *Id. at 17-18*. The Commission agreed with Mr. Cabe's analysis. *Id. at 32-33*.

³² *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 75*.

³³ *First Supplemental Order, Docket No. UT-970767, at 2*.

³⁴ To ensure that the Commission had appropriate data before it to base its evaluation of the competitive landscape for the relevant business services, Qwest was very careful to exclude digital services from the CLEC resale, UNE-P and UNE-L line count data it provided in the petition and in testimony. *Tr. 116, 118-119, 174*.

facilities-based competition – Commission Staff filed a motion on June 12 requesting the Commission to order Washington CLECs to produce information concerning the form and extent of their competitive activities in Washington.³⁵ Over the resistance of the CLEC parties to this case, the Commission granted Staff’s motion.³⁶ The Commission’s request for data to CLECs was communicated in the form of a Commission order, Order No. 6.³⁷

46 In its July 10 petition for interlocutory review of Orders 05, 06 and 07, WeBTEC asked the Commission to clarify the requirements of Order No. 6 so as to ensure that reporting CLECs did not thereafter submit data of both digital and analog services given WeBTEC’s acknowledgement that Qwest’s petition “purports to exclude digital services from the scope of its petition.”³⁸ As a result, the Commission directed Staff to ascertain that CLEC line counts are accurate and exclude digital services.³⁹

47 Twenty-seven (27) CLECs submitted data in response to Order No. 6.⁴⁰ Staff analyzed and provided (on an aggregated basis) the CLEC data in connection with Mr. Wilson’s direct and response testimony filings on August 13 and August 29, respectively.⁴¹ In his prefiled testimony and upon cross examination, Mr. Wilson explained that he verified to the best of his ability that all the data displayed in Exhibit 204C (his aggregation of CLEC data) represents analog services, not digital services.⁴²

³⁵ *Commission Staff Motion Requesting the Commission Order CLECs to Produce Information.*

³⁶ *Order No. 5.*

³⁷ Order No. 6 required all CLECs providing business service in Washington to report to the Commission on a highly-confidential basis the following information: (1) a description of each business service offered and the geographic area in which it is offered; (2) the number of lines for each such service by Qwest wire center as of December 31, 2002; and (3) the total number of business locations served as of December 31, 2002. The Commission also ordered CLECs to verify the wholesale data presented by Qwest. *Order No. 6, at ¶ 5.*

³⁸ *WeBTEC’s Petition for Interlocutory Review of Orders 05, 06 and 07 and Response to Public Counsel’s Petition for Review, at 8.*

³⁹ *Order No. 8, at ¶¶ 29, 35.*

⁴⁰ *Ex. 201T, at 9; Ex. 210T (Wilson Rebuttal), at 6.*

⁴¹ *Exs. 204C; 205C; 232C.*

⁴² *Ex. 210-TC, at 11-12; Ex. 203C, at 2 (Ins. 85, 131); Tr. 615-619.*

c) The results of Qwest's and Staff's data gathering

48 Based on wholesale-based competition alone, Qwest identified 104,019 CLEC lines carrying analog business services in Washington, or 17% of the total market even before CLEC-owned facilities are considered. *Ex. 51T, at 8.*⁴³ Adding the CLEC-owned data collected, analyzed and aggregated by Staff, the total number of CLEC lines carrying analog business services in Washington climbs to 231,030, or 30.74% of the total relevant market. *Ex. 201C, at 14.*⁴⁴ Even as Public Counsel does the math -- which is to use Qwest's wholesale totals (which are lower than Staff's) -- Qwest has lost 203,652 lines carrying analog business services, or 28.1% of the total relevant market. *Ex. 427C (total of columns D and F).*

49 As discussed above, the roughly 30% of the market controlled by CLECs is dispersed geographically, reaching every wire center in Washington apart from Elk. It is also dispersed broadly in terms of the technology of choice. According to Qwest's wholesale data (*see Ex. 54C*):

- CLECs are using resale in 48 of 68 Qwest exchanges; those 48 exchanges cover 98.5% of Qwest's access lines carrying analog business services in Washington.
- CLECs are using UNE-P in 61 of 68 Qwest exchanges; those exchanges cover 99.7% of Qwest's access lines carrying analog business service in Washington.⁴⁵

⁴³ As discussed above, paragraph 5 of Order No. 6 required Staff to confirm Qwest's wholesale data with the CLECs. Staff's research into CLEC wholesale-based competition actually resulted in Staff finding much higher wholesale totals than did Qwest. Whereas Qwest identified 7,275 resold lines for the relevant product market as of December 2002, Staff found 18,952. *Exs. 53C, at 4; 205C (cell F43).* Whereas Qwest identified 45,168 UNE-P lines, Staff found 50,379. *Exs. 53C, at 4; 205C (cell H43).* And, whereas Qwest identified 51,576 unbundled loops, Staff found 79,846. *Exs. 53C, at 4; 205C (cell G43).* Qwest believes that the differences between Staff's wholesale data and Qwest's wholesale data may relate to several factors: (1) timing differences (CLECs may have provided mid-2003 data rather than December 2002 data); (2) confusion on the part of CLECs between different types of services; and (3) Staff's inclusion of Qwest's exclusion of analog business services served over special access and digital facilities. *Tr. 174, 297.*

⁴⁴ Please note that this calculation utilizes Mr. Wilson's data shown in Exhibit 205C, and not in Exhibit 232C. As discussed in section IV.D.1.e(2) below, the very recent CLEC opponents' revisions have not yet been accepted by the Commission, and at least some are questionable, at best. Even assuming *arguendo* that the Commission accepts these revisions, Staff's data still shows CLEC market share at 28.12% statewide. *Ex. 225C.*

⁴⁵ The larger number of exchanges with UNE-P activity than with resale activity is consistent with Qwest's findings that CLECs have migrated rapidly from resale to UNE-P. Between December 2001 and December 2002, for example, Qwest's data shows a 45% increase in the purchase of UNE-P analog business lines and a 41% decrease in the use of resold lines. *Ex. 1T, at 13.* This is consistent with national trend data, which shows a 39% decrease in the use of resale between December 1999 and December 2002 and an 870% increase in the use of UNEs during that same period. *Ex. 610, at 10; Tr. 1049-1053.* During cross examination, Public Counsel

- CLECs are using UNE-L in 15 of 68 Qwest exchanges; those exchanges cover 83.9% of Qwest's access lines carrying analog business services in Washington.

50 Staff's aggregated data likewise shows a broad dispersion of CLEC-owned loops throughout Washington. *Exs. 204C; 205C; 232C*. The available data thus shows that Qwest has already lost significant market share across all regions of Washington and via all forms of intramodal competition.

d) **Growth in market share**

51 Because market share data is static by its very nature, growth in market share is instructive to evaluating the competitive landscape.⁴⁶ In this proceeding, Qwest has submitted un rebutted evidence that CLEC wholesale line counts and market share in the relevant market grew dramatically each year between December 1999 and December 2002. *Ex. 20C, at 2.*⁴⁷ Qwest's wholesale data reveals that CLECs were purchasing 25,543 wholesale lines in the relevant market as of December 1999. *Ex. 20C, at 2*. That amounted to 3.8% of the market. *Id.* The CLEC market share increased 141% between 1999 and 2000, 35% between 2000 and 2001 and 32% between 2001 and 2002. *Id.* In summary, the CLEC market share of the relevant market has increased a staggering 333% between December 1999 and December 2002. *Id.* Again, these findings include wholesale-based competition only. The line count and market share would invariably increase if facilities-based data was included.

52 During the same period, Qwest experienced line loss in the relevant market. Between December 1999 and December 2002, Qwest lost 118,333 access lines in the relevant market, a decrease of 19%. *Ex. 20C, at 2*. Qwest's access line loss has continued in 2003. *Ex. 24C, at 2*. Based on partial CLEC data alone, the record is clear that CLECs' growth in both access lines and market

witness Baldwin admitted that the importance of resale as a market entry vehicle has declined since the availability of UNE-P. *Tr. 737*.

⁴⁶ *Ex. 101T (Shooshan Direct), at 7-8*.

⁴⁷ *See also Ex. 1T, at 13, 17, 20; Ex. 5C; Tr. 108-111*.

share in the relevant market have grown, and dramatically so, in recent years.

e) **Opponents' criticisms of Qwest and Staff data**

53 Not surprisingly, the opponents have employed a shotgun approach to criticizing the data submitted by Qwest and Staff. The positions of the various opponents are inconsistent, except for the ultimate goal of muddying the waters and convincing the Commission to find the record evidence to be unreliable. Interestingly, the opponents devote almost no attention to arguing that the results are insufficient to support a finding of effective competition.

(1) **The opponents' argument to exclude wholesale-based data is misplaced and self serving.**

54 One common theme (although one that takes many diverging forms) found in the testimony of the opponents is that the Commission should ignore evidence of wholesale-based competition when calculating relative market shares. Quite bluntly, the CLEC opponents want things both ways. While they are making huge inroads into the Washington market using unbundled loops, UNE-P and (to a lesser degree) resale, they want the Commission to view those modes of competition as vulnerable and not really competition at all. This position is blatantly self-serving and absurd.

55 MCI takes the position that resale and UNE-P should be "excluded from the analysis" of calculating relative market share because Qwest is the sole supplier of wholesale inputs for CLECs providing retail service via UNE-P and/or resale. Therefore, MCI argues, as a monopoly provider to captive CLEC customers of Qwest,⁴⁸ Qwest is in the position to dictate what services end-use customers may choose from and at what price. *Ex. 603T (Stacy Rebuttal), at lns. 50-70; Tr. 1055-1056.* Based on this exclusion theory, MCI witness Stacy then purports to offer an appropriate calculation of relative market share. *Exs. 604C (spreadsheet); 608C (electronic copy of Ex. 604C).* While MCI's pre-filed testimony was not clear on this point, at hearing Mr. Stacy clarified that by "exclude

⁴⁸ Oddly, despite reliance on a rationale that extends on its face to the exclusion of all wholesale services, MCI has not urged the Commission to exclude UNE-L counts from the relative market share data.

from the analysis,” he meant that resale and UNE-P line totals should be counted by the Commission as *Qwest* retail lines. *Tr. 1055-1059*. Despite the fact that these lines are procured by CLECs to serve customers in competition with Qwest, who retains no relationship with the end users, Mr. Stacy testified that to do otherwise would be “silly.” *Tr. 1056*.

56 Public Counsel, although it does not directly urge the Commission to exclude resale, UNE-P and UNE-L competition, attempts to cast a shadow over the all three forms of entry and indicates that “wholesale-based competition does not translate into effective competition.” *Ex. 401T, at 29*.⁴⁹ Public Counsel notes that CLECs’ reliance on Qwest makes CLECs vulnerable. *Id.* That criticism notwithstanding, Public Counsel concedes that “where there is UNE and resale activity, the market is more likely to support competitive alternatives to Qwest.” *Id.*

57 Integra and AT&T approach this issue from a high level. Integra argues that wholesale competition (that is, where Qwest retains a “monopoly” on the last mile) does not support a finding of effective competition because wholesale-based CLECs are reliant on Qwest and the health of the competitive market is thus too dependent on Qwest and its underlying cost structure. *Ex. 751T (Slater Direct), at 5-6*. AT&T witness Neil Cowan implies that resale and UNE-P are not true competition because Qwest “—as the sole supplier of these essential facilities—can engage in price manipulations, poor wholesale service quality, delayed service provisioning and myriad other acts aimed at destroying the competition.” *Ex. 701T, at 5*. Mr. Cowan opines that “[t]his ‘dominant retail provider, sole wholesale supplier’ relationship makes competition inherently unstable, and therefore not particularly ‘effective’ over the long run.” *Id. at 6*.

58 On all these points, the opponents are simply wrong. Aside from the sheer hypocrisy of arguing that the technology that they are using successfully to compete in Washington does not and cannot support

⁴⁹ Ms. Baldwin states, “Qwest, for strategic business reasons or for reasons beyond its control may fail to meet performance standards for its wholesale services in the upcoming years, thus affecting CLECs’ relationships with their customers.....If Qwest does not install a CLEC’s local service in a timely manner, this delay harms CLEC’s relationship with its customer, making it that much harder for them to overcome other customers’ inertia.” *Ex. 401T, at 29*.

effective competition,⁵⁰ the opponents are intentionally ignoring an entire universe of CLEC protections which exist as a matter of federal, state and contract law.

59 First, both this Commission and the FCC have found that Qwest has fully opened the local exchange market in Washington to competition. In Order FCC 02-332, released December 23, 2002 concerning Qwest's application to reenter the interLATA long distance market in nine states (including Washington), the FCC stated:

In this Order, we grant Qwest's application for the nine states that are the subject of its September 30, 2002 application, based on our conclusion that Qwest has taken the statutorily required steps to open its local exchange markets in these states to competition.⁵¹

60 Second, the opponents' unsupported assertions that Qwest controls what services are available at wholesale and the price and the quality of those services, is utterly untrue. This assertion ignores the following realities, all of which are well known by the opponents:

- The Qwest Performance Assurance Plan deters Qwest from manipulating the provision of service to CLECs or offering inferior services to CLECs by imposing on Qwest significant, self-executing payment requirements to CLECs and the state for failure to meet certain agreed-upon performance measures.⁵²
- CLECs have the right to seek expedited arbitration of disputes relating to the negotiation of an interconnection agreement. 47 U.S.C. § 252(b).⁵³
- CLECs have the right to seek expedited resolution of disputes relating to enforcement of an existing interconnection agreement. WAC 480-

⁵⁰ AT&T not only competes via UNE-P, but it lauds its UNE-P success in its annual report to shareholders. *Ex. 707, at 3.* As confirmed by Mr. Cowan, nowhere does AT&T in its annual report indicate that UNE-P is not an effective way to compete in the local exchange market. *Id.*; *Tr. 980-986.*

⁵¹ *Order FCC 02-332, at ¶ 1.*

⁵² *30th Supplemental Order, Docket Nos. UT-003022/003040, at ¶ 43; 39th Supplemental Order, Docket Nos. UT-003022/003040 (approving the SGAT and QPAP).*

⁵³ In fact, AT&T and Qwest are presently in the midst of litigating in Washington such an arbitration initiated by AT&T. *See Docket No. UT-033035.*

09-530; WAC 480-07-650 (proposed).

- CLECs may file formal complaints against Qwest in connection with the provision of wholesale services. RCW 80.04.110.⁵⁴
- The Commission itself may launch a formal complaint or investigation concerning Qwest's wholesale practices.
- The Commission, and not Qwest, sets wholesale rates through generic cost dockets.⁵⁵
- A generic, template interconnection agreement, the SGAT (Statement of Generally Available Terms) has been developed with the input of Qwest, CLECs and the Commission, and is available to any Washington CLEC without the need to expend resources negotiating a unique interconnection agreement.

61 The opponents freely admit that Qwest is not seeking wholesale deregulation or the relaxation of any restrictions or requirements that apply to its wholesale services. *Tr.* 724-725, 844. As such, the reality is that Qwest controls *neither* the services available via wholesale, nor the prices, terms or conditions thereof. To argue otherwise is to wholly ignore this Commission's extensive efforts during the Washington 271 proceedings and the enormous investment Qwest has made to ensure that its systems and processes comply with the market-opening requirements of Section 271.

62 Finally, MCI's "implicit"⁵⁶ assertion that the Commission should not only exclude resale and UNE-P counts from CLEC line totals, but actually include them as Qwest retail lines, is without merit. Qwest has no relationship with the end user.⁵⁷ The end user orders the service from the CLEC, under prices, terms and conditions controlled by the CLEC, and communicates solely with the CLEC. Once Qwest loses the access line to the CLEC, it loses all vertical feature revenue opportunities as well.

⁵⁴ In 2002, for example, AT&T brought a complaint against Qwest regarding alleged reverse slamming by Qwest. *See Docket No. UT-020388.*

⁵⁵ On cross examination, MCI witness Stacy – who had stated in pre-filed testimony that Qwest dictates the price of wholesale services – conceded that he had overstated the situation. *Tr.* 1041 (“*It's probably a bit strong of a statement since the Commission is actually obviously in control of determining what proper UNE prices are.*”)

⁵⁶ *Tr.* 1058.

⁵⁷ In response to a Qwest data request, Public Counsel admitted that Qwest has no customer relationship with CLECs' end-users served via Qwest wholesale services. *Ex.* 457. MCI was unable to offer an opinion on this question. *Ex.* 606.

Ex. 60RT, at 18; Ex. 6C (showing vertical feature revenue).

63 In calculating the relative market share between Qwest and CLECs, resale and UNE-P should not be excluded, and should certainly not be added (as MCI suggests) to Qwest's retail total.

(2) The opponents' argument that Staff's data is unreliable is not credible.

64 As discussed above, the opponents have aggressively sought to convince the Commission that Staff witness Wilson has erroneously compiled the data received from Washington CLECs in response to Order No. 6. Ms. Baldwin, in her rebuttal testimony, applied a 50% factor to reduce the number of lines carrying basic business service considered by the Commission in calculating the parties' relative market shares. *Ex. 425C, at 3.* Ms. Baldwin did this out of concern that Staff's data (notwithstanding Order No. 8) may include both digital and analog services. *Id.* More recently, WeBTEC, ATG, Integra and MCI joined in a motion requesting the Commission to essentially halt and restart this proceeding by re-surveying all Washington CLECs.⁵⁸ Public Counsel and DOD/FEA supported the Joint Motion.⁵⁹ WeBTEC, ATG, Integra and MCI purportedly brought the motion out of concern that Staff had failed to communicate with responding CLECs (as required pursuant to Order No. 8) to ensure that the line counts submitted to the Commission were limited to analog services. Notwithstanding that Qwest has all along limited this proceeding to the consideration of analog services, that WeBTEC specifically acknowledged the distinction in its July 10 pleading and that the Commission's Order No. 8 made crystal clear that CLEC data should include only analog business services, the Joint Parties feigned surprise at the analog-digital distinction. For example, on September 30, 2003, Integra filed and served notice that it was revising its earlier data based on the following:

⁵⁸ *Joint Motion.*

⁵⁹ *Public Counsel Response to Joint Motion to Require Re-Survey; the United States Department of Defense and All Other Federal Executive Agencies' Comments on Joint Motion.*

Subsequent to the hearings held in this matter on September 16 – 18, 2003, Integra reviewed the information that it previously had submitted in response to the data request and certification of information from Qwest and realized that it had overstated its responses. The data Integra submitted and the information that Qwest delivered and Integra certified included both analog and digital data. *Until the testimony brought forth in the hearing, Integra was not aware that it was to provide only information on analog services.* Neither the questions below nor the worksheets provided by Staff indicated to Integra that it should make the analog-digital distinction, and Qwest's information included all services that Integra purchases.⁶⁰ (emphasis added)

65 Staff and Qwest opposed the Joint Motion and Qwest specifically requested that the Commission require any CLEC revising its response to Order No. 6 to fully and specifically describe all criteria applied by that CLEC in originally replying to Order No. 6 and all criteria applied by that CLEC in recasting or revising its response.⁶¹ The Commission denied the Joint Motion.⁶² In doing so, the Commission indicated that the CLEC parties had ample notification that digital services were not part of the petition and that their line counts submitted to Staff should exclude digital services.⁶³ Furthermore, the Commission ordered ATG, MCI, Integra and (later) AT&T to specifically describe by October 17 all criteria regarding analog and digital services applied when originally replying to Order No. 6 and when revising responses to Order No. 6.⁶⁴

66 All four CLECs submitted the required responses by October 17. Since Qwest received only the explanations and not the underlying revised data, Qwest will have to defer to those with greater access to determine whether the revised data appears credible.⁶⁵ However, simply by reviewing the

⁶⁰ *Supplemental Response to Order No. 06-Order Requiring Disclosure of Information and Certification of Information Supplied by Qwest Corporation, September 30, 2003.*

⁶¹ *Commission Staff's Response to Joint Motion Regarding CLEC Data; Qwest's Response to Joint Motion Regarding Revised CLEC Responses, at 5-6.*

⁶² *Order No. 16.*

⁶³ *Id. at ¶ 12.*

⁶⁴ *Id. at ¶¶ 13-14; Notice Requiring Provision of Information.*

⁶⁵ At hearing, Mr. Wilson indicated that he included all of the revisions into his Exhibit 232C, but did not indicate that he had done so based on his belief that the revisions are accurate or appropriate. *Tr. 1463.*

explanation of the criteria used by these carriers, Qwest is quite concerned that some of these revisions may be inappropriate. Most notably, MCI's explanation of criteria indicates that its focus in re-casting its data was on the facilities used to deliver the service, and not the service itself.

WorldCom personnel reviewed the data *to determine the particular technology over which the services contained in the responses are provided.* WorldCom had provided separate responses for MCImetro and MFS. For both companies, the unbundled loop services are provided over analog lines. With regard to MFS, in the category of Basic Business Service, MFS originally included both business analog services and special access services. *The special access services are provided over digital facilities. Therefore, in the revised MFS responses, WorldCom removed the special access lines from its total of basic business services.* (emphasis added).⁶⁶

67 If MCI removed all digital lines – regardless of whether the underlying service is analog or digital – it excluded too much when revising its data.⁶⁷ The focus of this case, once again, is on analog *services*, not analog *servicing facilities*, as an analog service can be delivered over either a digital or analog facility.⁶⁸ MCI's revised data should thus be closely scrutinized and perhaps even rejected.

68 Based on the opaque descriptions offered by Integra and ATG, it is impossible for Qwest to opine on whether the Commission should accept their revised data. Certainly, close scrutiny is required. Even if, however, the Commission accepts all revisions offered by MCI, ATG, Integra and AT&T (a point Qwest certainly does not concede), the impact on the overall CLEC market share is minimal, changing from 30.74% to 28.12%. *Ex. 225C.* These revisions – even if accepted – should not sway the Commission's analysis of this case. The capture of over 28% of the market by competitors is extremely significant, especially in light of the broad geographic and technological dispersion

⁶⁶ *Answer of WorldCom, Inc. to Order Number 16, at 3.*

⁶⁷ How MCI could be confused on this issue continues to perplex Qwest. It is apparent from a review of the transcript that MCI's counsel understood the distinction on the first day of the evidentiary hearing. *Tr.111-114, 119.*

⁶⁸ *See Order No. 8, at ¶ 29 (“Staff should ascertain that CELC line counts are accurate, that they exclude **digital services**, and should include this information in its distribution to parties to the proceeding.”) (bold added)*

demonstrated by the record evidence, the growth in market share and the structure of the market.

f) **The opponents' market share analyses are inaccurate**

69 While each of the opponents criticizes Qwest's and Staff's data and methodology, only two (Public Counsel and MCI) offer the Commission alternative market share analyses. Both are flawed and should be disregarded by the Commission.

70 Public Counsel actually provides an array of illustrative exhibits providing different looks at the data. *See Exs. 424C, 425C, 427C.* In Exhibit 425C, Public Counsel looked at the basic business exchange component of the product market identified by Qwest. This look excluded analog Centrex and PBX services. Based on the totals found at the bottom of that exhibit, Public Counsel believes that CLECs have a [REDACTED] %⁶⁹ market share statewide. That percentage is significant in and of itself, but is also understated. First, it reflects a 50% reduction of the CLEC-owned loops reported by Staff to account for "the presence of digital lines." *Ex. 425C, at 3.* Public Counsel admits that the level of its factor (50%) was arbitrary and that it is wholly inappropriate if the Commission concludes that Staff properly excluded digital services, as Mr. Wilson has testified. *Tr. 697-698, 816.* In addition, Public Counsel's analysis uses Qwest's lower wholesale counts as opposed to Staff's counts derived from communicating with the CLECs themselves. Qwest knows that its wholesale data is understated,⁷⁰ and thus Public Counsel's reliance on Qwest's wholesale data has the effect of understating the level of competition in the state. Qwest's analysis shows that CLECs actually enjoy a [REDACTED] % market share in the basic exchange line segment of the analog business service market. *Ex. 470C (cell C-1).* Once PBX and Centrex services are added to the analysis, Public Counsel finds a 28.1% total CLEC market share statewide. *Ex. 427C.* Again, this relies on Qwest's data for the wholesale piece, resulting in an understatement of the CLEC market share. Overall, Qwest believes that the Commission should view Public Counsel's market share data with the understanding that the CLEC

⁶⁹ *Ex. 425C, at 2 (calculation: Total column F [REDACTED] divided by Total column H [REDACTED] = [REDACTED]).*

⁷⁰ *See footnote 43 above.*

totals are understated, in some ways dramatically so.

71 MCI's market share data is also dramatically off base and should be flatly rejected by the Commission. First, as discussed above, MCI not only erroneously removes resold and UNE-P lines from the CLEC totals, but it actually manipulates the arithmetic in a way so as to add those lines as Qwest retail lines. *See section IV.D.1.e(1) above.* Such self-serving analysis should clearly be rejected out of hand.⁷¹ In addition, Mr Stacy apparently unwittingly offers the commission an apples-to-oranges comparison in his market share analysis. For the Qwest total, Mr. Stacy used data in Exhibit 209. *Ex. 604C (Total Qwest Lines column header).* That data includes Qwest basic exchange, PBX, and Centrex services, as is made evident by the column total of 520,635. *Ex. 2; Ex. 51T, at 8; Ex. 209C; Ex. 604C.* On the other hand, the CLEC total count includes only basic exchange services. Mr. Stacy's source of the CLEC data, Exhibit 205C, reports only basic exchange service, while PBX and Centrex data is separately reported by Mr. Wilson in Exhibit 204C. *Ex. 204C, at 3-4; Ex. 205C (cell B-12); Ex. 604C (note at bottom).* When confronted with this issue on cross examination, Mr. Stacy stated he was unaware of this error and admitted that, if true, the error would render his analysis an apples-to-oranges comparison. *Tr. 1059-1061.*

72 In the final analysis, Qwest and Staff have presented the Commission far more reliable, thoughtful and even-handed market share data and analysis. While Qwest believes that data should be viewed considering basic exchange services, Centrex and PBX services combined for all exchanges statewide, the data has been presented in a manner that allows disaggregation. Exhibit 470C, for example, disaggregates the product market and reveals that CLECs enjoy █% of the basic exchange line segment and █% of the combined PBX and Centrex segment of the market.

⁷¹ Assuming *arguendo* the Commission were to give any weight to MCI's market share data, even MCI's tortured analysis reveals significant competition. While Mr. Stacy's spreadsheet (Exhibit 604C) shows an aggregate CLEC market share of 16.07%. That total market share figure increases to 18.3% if UNE-P and resold lines are simply excluded rather than being added to Qwest's line total. *Ex. 604C (calculation: (Total Lines via UNE Loop [█] + Total Lines via Owned Loop [█]) divided by (Total Lines via UNE Loop [█] + Total Lines via Owned Loop [█] + Total Qwest Lines [520,635]) = █).*

2. Market concentration analysis

73 Although not specifically delineated in the statute, the Commission has in the past considered market concentration measures as a factor in evaluating whether a petitioning company has market power. The best known measure of market power is the Herfindahl Hirschman Index (“HHI”), a measure developed in connection with evaluating mergers to determine if the resulting merged company would have market power. In this section, Qwest will define and describe the HHI and discuss why the HHI, by itself, is not a valuable tool in evaluating whether there is effective competition in the relevant market. Qwest will also discuss the opponents’ failure and refusal to provide meaningful and reliable HHI data and standards to the Commission for use in evaluating Qwest’s petition.

a) The Herfindahl Hirschman Index

74 The HHI is an analytical tool developed by enforcers of antitrust laws to analyze mergers and acquisitions. *Ex. 101T, at 3*. Mechanically, the only accepted manner of calculating the HHI is by summing the squares of each competitors market share in the relevant market. *Ex. 401T, at 19; Tr. 698, 1062-1063*. For example, if three firms -- one with a 55% market share, one with a 35% market share and one with a 10% market share -- compete in a market, the HHI for the market would be 4,350 ($[55*55] + [35*35] + [10*10]$). *Ex. 611 (Scenario B)*. The greater the HHI result, the greater the market concentration. *Ex. 401T, at 19*. With regard to mergers and acquisitions: an HHI below 1000 signifies an unconcentrated market; an HHI of between 1000 and 1800 signifies a moderately concentrated market; and an HHI of above 1800 signifies a highly concentrated market. *Id.* The Commission has never adopted this framework as the appropriate benchmark for adjudging whether there is effective competition for purposes of RCW 80.36.330. In fact, in Docket No. UT-000883, the Commission expressly stated that competitive classification might well be appropriate (and has been found to be so in the past) even where the HHI indicates market concentration well above the threshold for “highly concentrated” markets under typical merger standards. In this regard, the Commission stated:

The weight we give to these factors will vary from case to case. For example, in the competitive classification of the local toll services of GTE *** and US WEST *** the market concentration index values would have been substantially above 5,000 in each case, but the structural factors strongly suggested that it was easy for firms to enter and leave the market and for customers to switch among companies. The structure of the market was sufficiently pro-competitive that even the very high market concentration index values did not disqualify the services from competitive classification. (citations omitted)⁷²

b) **Market concentration analysis is not probative to the issue of effective competition**

75 The Commission should not rely on concentration ratios *per se* because they, by themselves, are not enough to demonstrate market power. *Ex. 101T, at 8*. If one views concentration ratios in isolation (apart from considerations of market demand and supply elasticity, including ease of entry), they will almost certainly provide the wrong answer to the question of whether a market is workably competitive.⁷³ A market can appear to be concentrated and yet be workably competitive if these other factors are taken into consideration. *Ex. 103RT, at 17*. For example, in reviewing a merger, antitrust authorities examine a variety of factors *in addition to* structure (or concentration). The Merger Guidelines require an examination of “the ease of entry by new firms into the markets.”⁷⁴

76 It is important to note that, in this proceeding, Qwest is seeking competitive classification in order to obtain the flexibility it needs for its business services to enable it *to respond to growing competition*. Focusing on market concentration can be counterproductive in this situation.⁷⁵ Such a focus suggests

⁷² *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 73.*

⁷³ *Ex. 101T, at 9 (explaining that Professor Landes and Judge Posner discuss “pitfalls in mechanically using” such tools to measure market power. See William M. Landes and Richard A. Posner, “Market Power in Antitrust Cases,” 94 Harvard Law Review 937 (1981), at 937-996.)*

⁷⁴ *Id. (citing U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) & 13,104.)*

⁷⁵ Interestingly, even the opponents are not united that HHI is a meaningful measure. On cross examination, MCI witness Stacy discounted the value that should be assigned to market concentration results. He indicated that Qwest’s (alleged) ability to control the strength and viability of the other alternative providers is of much greater concern to him than market concentration. *Tr. 1062*.

that Qwest should stop competing until its share falls or the market reaches an “acceptable” level of concentration in order to win its freedom to compete. It is difficult to see how this result benefits business customers in Washington. *Id. at 9.*

77 What matters for market power is the ability to restrict market output profitably -- in this case, in the market for basic business exchange services. Thus, one has to assess the actual and potential supply capabilities of competing firms (i.e., their capacity). Here, by virtue of the universal availability of UNEs and resale, competitors have the ability to expand output and extend capacity throughout Qwest’s local market. *Id. at 9-10.*

78 Qwest’s position on this matter is echoed by Staff economist Tom Wilson. *Ex. 201T, at 24-25; Tr. 1527.*

c) **The opponents have refused to provide guidance to the Commission regarding the appropriate HHI threshold for this case**

79 Both Public Counsel and MCI have offered the Commission HHI analyses for its review in this case. However, neither party has affirmatively offered the Commission specific guidance as to a bright line above which the Commission should consider a market or market segment to be so highly concentrated so as to preclude a finding of effective competition. On cross examination, Public Counsel witness Baldwin was specifically asked to identify a standard, but refused, stating instead that it was Qwest’s burden to “come up with a reasonable petition.” *Tr. 701-703.* The most specific Ms. Baldwin would be was that the Commission should not exceed 5,000 as a guidepost,⁷⁶ but did not offer an explanation why. *Id.* It is worth noting that while Public Counsel’s witness offered up at hearing 5,000 as a possible guidepost, in its testimony, responses to discovery and while cross-examining other parties’ witnesses, Public Counsel attempted to highlight that available (albeit incomplete) HHI analyses showed HHI results above 1,800. *Ex. 401T, at 22; Ex. 442; Tr. 1378.*⁷⁷

⁷⁶ Ms. Baldwin’s literal answer was that the Commission should not go “below” 5,000. *Tr. 703.* Qwest interprets that as simply a misstatement and that Ms. Baldwin meant to say “above” 5,000.

⁷⁷ Counsel for DOD/FEA likewise sought through cross examination of Mr. Wilson to highlight that available HHI results show

This connotes to Qwest that these parties may want the Commission to apply 1,800 as the appropriate standard. If so, a simple calculation reveals that an HHI of 1800 could only be achieved in a market or market segment in which Qwest had already lost over 58% market share to competitors.⁷⁸ Any suggestion by the opponents, even if indirect, that effective competition can not be found (and thus competitive classification should be denied) unless and until Qwest loses 58% of the market is absurd.

d) **The HHI analyses provided by Public Counsel and MCI are unreliable.**

80 Even should the Commission find it necessary to factor HHI data into its review of Qwest's petition, the opponents supporting such a result fail to provide reliable HHI analyses. Public Counsel's most current HHI analysis is contained in the same document (Exhibit 425C) containing its market share analysis. As discussed above, that analysis is flawed and unreliable because it artificially lowers the CLEC market share (thus artificially increasing the applicable HHI) by applying a 50% factor to reduce CLEC facilities-based data on the false premise that Staff's data includes digital lines. *See section IV.D.1.f above; Ex. 225C, at 1, 3; Tr. 694-698.* Ms. Baldwin, the sponsor of that exhibit, admits that if the Commission concludes that Staff did properly exclude digital services from its line count, her 50% factor would be inappropriate. *Tr. 697-698.* Removal of the factor would increase CLECs' market share and decrease both Qwest's market share and the HHI. *Id.* Furthermore, Public Counsel's HHI analysis is limited to basic exchange line services and excludes PBX and Centrex data. *Ex. 425C.* As such, it provides HHI data on only one segment of the relevant market.

81 MCI's HHI analysis (the same document as the market share document discussed in section *IV.D.1.f* above) is perhaps even more flawed. First, MCI's HHI calculation stems from its market share calculation, which (as discussed above) erroneously excludes UNE-P and resold services from the

market concentrations above 1,800. *Tr. 1429.*

⁷⁸ Under the absurd yet conservative hypothetical that Qwest retains only 42% of the market share and 58 competitors each have 1% of the market, the HHI for that market would be 1,822.

CLEC count⁷⁹ and adds those to the Qwest retail count. It also erroneously compares CLEC basic exchange service totals with Qwest basic exchange PBX and Centrex services. *See section IV.D.1.f above.* The result is to artificially decrease the apparent CLEC market share and artificially increase the Qwest market share and HHI. Second, MCI's "HHI" calculation utilizes an algorithm that even its sponsor, Mr. Stacy, admits is not an HHI calculation at all. *Tr. 1063.* Rather than squaring the sums of each competitor's market share, Mr. Stacy simply squared the aggregate CLEC market share and added that to the square of the inflated Qwest market share he calculated. *Exs. 604C; 608C; Tr. 1063.* Doing so erroneously inflates the resulting "HHI" because adding together the square of two larger numbers always nets a higher result than adding together the sum of smaller component figures. This is illustrated by Exhibit 611.

82 When confronted on cross examination with the manner in which he chose to calculate what he labeled "HHI," Mr. Stacy admitted how he had made his calculation, but mentioned for the first time that as a precaution he had made a separate HHI calculation to ensure that the differences between how he had displayed the HHI on Exhibit 604C and actual HHI were not significant. *Tr. 1063-1067.* That separate analysis, obtained through a record requisition, does not corroborate Mr. Stacy's explanation. *See Ex. 612C.* And, quite frankly, it could not. To make a proper HHI calculation, one would have to know each competitor's market share. Since MCI (like Qwest) is not privy to the precise disbursement of CLEC-owned lines (by wire center and by CLEC), Mr. Stacy had no way to calculate each carrier's market share in each wire center. It is unclear how he purported to do so in Exhibit 612C. Furthermore, the "insignificant differences" displayed in Exhibit 612C do not appear to correlate to the HHI figures shown on Exhibit 604C, the "HHI" analysis on which MCI asks the Commission to rely. For example, while Mr. Stacy shows an HHI of 10,000 for Aberdeen in Exhibit

⁷⁹ Similar to Mr. Stacy, Mr. Gates urges the Commission to exclude resale and UNE-P counts when calculating the HHI. Mr. Gates claims that doing so is consistent with the Horizontal Merger Guidelines. *Ex. 54T, at lns. 516-521 (citing the Merger Guidelines at Section 1.32).* However, when asked where in Section 1.32 such conclusion could be found, Mr. Gates agreed that that statement was not in the Merger Guidelines. *Tr. 1173-1174.* Mr. Gates further claimed that under the Merger Guidelines, resellers and UNE-P providers would be considered "uncommitted entrants". *Tr. 1174.* However, Section 1.32 defines "uncommitted entrants" as those companies who neither produce nor sell the relevant product in the relevant market. Since resellers and UNE-P providers clearly do sell analog business services in competition with Qwest, it is incomprehensible how Mr. Gates can make the claim that he does.

604C, his separate analysis (if Qwest is interpreting it correctly) shows that a proper analysis would have generated an HHI of 7,387. That is not an insignificant difference.⁸⁰ MCI's analysis (Exhibit 604C) is not reliable.

3. Ease of entry

83 The evidence in the record makes clear that there is considerable ease of entry⁸¹ for CLECs choosing to serve the relevant market, especially by the use of Qwest wholesale services. *Ex. 1T, at 14*. In the Washington 271 proceeding, the Commission reviewed and approved Qwest's ordering procedures and installation and repair intervals. *Id.* Converting business customers from Qwest to a competitor utilizing Qwest's facilities is inexpensive and fast. In his direct testimony (*Id. at 15*), Mr. Reynolds offered the following examples, which illustrate the charges and timeframes for a CLEC to convert a Qwest retail POTS business customer to competitive CLEC service.⁸²

Qwest retail business customer converts to CLEC resold service:

POTS Customer Transfer Charge (nonrecurring)

First Line: \$5.73

Additional Line: \$5.61

Conversion Completed: Same business day

Qwest retail business customer converts to CLEC UNE-P service:

UNE-P POTS Conversion Charge (nonrecurring)

First Line: \$0.27

Additional Line: \$0.14

Conversion Completed: Same business day

Qwest retail business customer converts to CLEC facilities; CLEC purchases unbundled loop:

⁸⁰ Qwest suspects MCI will explain this large difference by the fact that Exhibit 612C includes UNE-P and resale data. If so, then Mr. Stacy's sworn testimony that his separate analysis confirms his findings in Exhibit 604C is not credible.

⁸¹ Ease of entry refers not only (as some CLEC cross examination questions imply) to start up companies entering the market, but also to established CLECs entering the market or a segment of the market.

⁸² These examples assume that the customer maintains service "as is" and the CLEC submits a mechanized LSR before Noon Mountain Time.

Basic installation without testing (nonrecurring)
First Loop \$37.53
Additional Loops \$34.78
Installation: Quick Loop, (1-24 lines) - 3 business days

84 Clearly, when competitors can switch Qwest’s basic business customers located anywhere in the state to comparable business service for as little as \$0.27, and with same day service, competitive alternatives are reasonably available throughout Qwest’s territory. *Id.* According to Qwest’s wholesale data, CLECs are currently provisioning retail business basic exchange service over Qwest’s facilities in all but five Qwest exchanges. Those exchanges are: Easton, Elk, Green Bluff, Liberty Lake, and Northport.⁸³ *Ex. 1T, at 15.* Although CLECs are not currently serving customers in those exchanges *over Qwest’s facilities*, it is not due to lack of alternative providers or facilities, high costs or any other perceivable barriers to entry. *Id.* As has been demonstrated, CLECs can and in fact do offer to serve any customer that Qwest serves over Qwest’s facilities. *See section IV.B above.*

85 The significance of competitors’ ease of entry is twofold. First, the rapid growth in CLEC penetration and the significant levels achieved by CLECs in the local exchange market indicate that the provisioning process is working. Second, Qwest must be aware of the ease of additional entry and further expansion by CLECs as it makes its retail pricing decisions throughout its service territory. *Ex. 101T, at 10-11.*⁸⁴

86 The ability of CLECs to expand their capacity by leasing facilities from Qwest limits Qwest’s ability to exercise market power. Market power is defined as the ability to *profitably* raise prices without fear of competitive losses. If Qwest were to raise its prices for basic business exchange services in the

⁸³ Staff’s data shows that CLECs are serving customers in the relevant market in Easton, Green Bluff, Liberty Lake and Northport. *Ex. 201T, at 26.*

⁸⁴ In his direct testimony, Mr. Shooshan explained that economists call a market with such relative ease of entry (and exit) a “contestable market.” *Ex. 101T, at 11 (citing William J. Baumol, John Panzar and Robert Willig, Contestable Markets and the Theory of Industry Structure (New York: Harcourt Brace Jovanovich) (1982)).*

current competitive environment, CLECs could expand and extend their service offerings. Qwest would then risk losing additional business customers to its competitors. If enough business customers have alternatives (which they clearly do), their ability to switch providers will discipline the market in the absence of retail price regulation. It is difficult to justify continued regulation of retail prices in a market with such conditions. *Id. at 11.*

4. Affiliation of providers of service

87 This factor has drawn little attention in this docket. This statutory factor focuses on whether one or more carriers competing with Qwest are Qwest affiliates.⁸⁵ Qwest assumes that this factor stems out of a concern that “competition” between affiliates is not meaningfully price-constraining or behavior-affecting. There is no evidence in the record linking Qwest to any of the CLECs having market share in the relevant market, and thus this factor weighs in support of granting Qwest’s petition.

5. Other

88 Qwest is unaware of any other factors required to assess whether Qwest has market power. Qwest reserves the right to respond to any such information or advocacy raised by the other parties to this proceeding.

E. Significant captive customer base

89 This statutory factor allows that competitive classification may be appropriate if there are some captive customers, as long as the number or percentage of captive customers is not significant. *RCW 80.36.330(1)*. Qwest quite easily satisfies this statutory prong since it has no captive customers in Washington for analog business services.⁸⁶

90 A captive customer is one without viable alternatives to Qwest with respect to its telecommunications

⁸⁵ See *First Supplemental Order, Docket No. UT-970767, at 3.*

⁸⁶ This conclusion is supported by Commission Staff. *Ex. 201T, at 26.*

needs. This is contrary to Public Counsel’s rather remarkable definition of the term. On cross examination, Commissioner Oshie asked Ms. Baldwin how she defined “captive customer.” *Tr. 818*. Ms. Baldwin replied that any customer who has not already left Qwest is, *per se*, captive of Qwest. *Id.* As a result, Ms. Baldwin uses market share as an indicator of the number of captive customers remaining. *Id.* Asked for clarification by Commissioner Oshie, Ms. Baldwin explained that all Qwest customers are captive, either because they have no choice or because of customer inertia. *Tr. 819*.

91 Qwest is not aware of any support for Public Counsel’s incredibly broad and self-serving definition of “captive customer.” Public Counsel has provided none. The correct interpretation of that term – and the one that Commissioner Oshie indicated was his as well – is that a captive customer is one without choice (*Tr. 819*), not one who simply has not yet exercised that choice. Mr. Shooshan explained this concept succinctly during cross examination by Chairwoman Showalter.

...I think the problem is the concept of captive customer, and I did a little research on this before filing testimony here, is really not a term that's used anywhere outside the public utility regulation, and so I don't know that captive customer, you know, has a meaning in terms of antitrust analysis.

What it suggests to me is that it's a customer that has no option. Not, by the way, someone who has an option and elects for various reasons not to take it; i.e., says, Look, I know I have a choice, but I'm going to stay with the incumbent, but someone who has no choice.

And it seems to me that, again, as I look at it, there's evidence in this case that there are literally no captive customers, certainly not a significant number of captive customers, if any, in the state; that they have options by virtue of the universal availability of unbundled network elements and wholesale resale.⁸⁷

92 As Mr. Shooshan indicated in response to the Chairwoman, Public Counsel’s assertion that there remains in Washington a significant captive customer base is contradicted by the evidence relating to the other statutory factors. It is contradicted by the number and diversity of competitors serving every

⁸⁷ *Tr. 546-547.*

corner of Washington. *See section IV.A. above.* It is contradicted by the fact that analog business services are available from alternate providers in the relevant market. *See section IV.B. above.* It is contradicted by alternate providers' ability to make functionally equivalent or substitute services available via resale, UNE-P, unbundled loops, CLEC-owned loops and intermodal (wireless, VoIP, cable, etc.) platforms. *See section IV.C. above.* Perhaps most obviously, it is contradicted by the fact that approximately 30% of the relevant market is already being served by CLECs, which collectively have enjoyed incredible growth in lines and market share each year over the past four years. *See sections IV.D.1. and IV.D.4. above.* Finally, it is contradicted by the how quickly and cheaply CLECs can enter a particular market or market segment to offer services in competition with Qwest. *See section IV.D.3. above.*

V. OTHER ISSUES

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

- 93 *Triennial Review.* In its direct case, Qwest recommended that this case should not be delayed pending the outcome of the Triennial Review proceeding. *Ex. 101T, at 18.* Other parties disagree, arguing, among other things, that competition might be adversely impacted by that proceeding.⁸⁸
- 94 The pending Triennial Review proceedings should not cause the Commission to delay deciding this case. In the first place, the Triennial Review relates to the structure of the wholesale market, not the retail market that is the subject of this case. A finding of “no impairment” by the Commission in the mass market switching phase of the nine month proceeding would only come after the Commission had found that alternatives (including self-supply) are readily available and that competition would not be impaired if certain UNEs were removed from the list. If this Commission were to remove UNE-P from the list of required unbundled network elements for business customers, the CLECs that rely on

⁸⁸ These parties contend that the Commission should delay its decision in this case because of the Triennial Review *Ex. 501T, at lns. 1388-1426; Ex. 401T, at 60-61; Ex. 701T, at 16.*

UNE-P will have a 27-month transition period during which it would still be available for existing business customers.⁸⁹

95 In addition, competitors would still be able to use UNE loops and resale. Today, in virtually all parts of the state, competitors are using either resale or loops or both *in addition to* UNE-P. *Ex. 103T, at 20*. Finally, it is of course wildly inconsistent that the opponents argue, on the one hand, that UNE-based competition should not be considered in assessing the competitiveness of the retail market for business exchange services and, on the other hand, that uncertainty about the future of UNE-P should be grounds for delaying the decision in the present case.

96 *Cost Docket*. Other parties have also suggested that the existence of a pending cost docket creates too much uncertainty about Qwest's wholesale rates and that a decision in this case should be deferred until the pending docket is complete. *Ex. 751T, at 7*. Qwest disagrees with this contention. First, as anyone familiar with the issue knows, there has been a cost docket open in Washington regarding Qwest's wholesale rates since November 1996, when the Commission opened Docket Nos. UT-960369, 370, and 371. Thus, under Public Counsel's theory, the Commission could not have acted on Qwest's two prior petitions for competitive classification, Docket Nos. UT-990022 and UT-000883. That was clearly not the case. Second, CLECs clearly perceive that the necessary rate stability exists for them to make market entry decisions, as evidenced by the increasing CLEC market share and their use of UNEs.

97 Finally, to the extent that a concern about rate stability exists, that concern should be moot in light of recent developments in the current cost proceeding. On October 24, 2003, a number of parties, including Qwest, AT&T, XO, MCI, and WeBTEC, filed a motion with the Commission in the current

⁸⁹ *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advance Telecommunications Capability, CC Docket Nos. 01-338, 96-98 and 98-147 (August 21, 2003), at ¶ 532.*

cost docket asking the Commission to exclude Qwest's rate issues from consideration in that case.⁹⁰

If the motion is granted, there would be considerable certainty about Qwest's wholesale rates for some time.

B. Cost floor

98 Several parties recommended that Qwest be required to price its services in accordance with a predetermined cost floor. For example, MCI states that if the Commission decides to grant some level of regulatory freedom to Qwest, it should require that Qwest use some form of UNE imputation as a price floor, below which it could not price its retail basis business exchange services.⁹¹ Qwest disagrees that the Commission should establish a cost floor in this proceeding. First, that issue is not squarely before the Commission in this case, has not been thoroughly analyzed in testimony and it can be resolved in a subsequent proceeding if necessary. *Tr. 1273, 1347, 1419-1420*. Second, there are already adequate safeguards in place to address below-cost pricing concerns.

99 The safeguards are inherent in the statutory authority of the Commission to regulate the price floor (i.e., cost coverage) for all Qwest's services that it regulates, whether competitively classified or not, and the authority to regulate the prices, terms and conditions for Qwest's wholesale services. The relevant statutory provisions are set forth in RCW 80.36.330, which provides, in part, that:

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

(4) The commission may investigate prices for competitive telecommunications services upon complaint. In any complaint proceeding initiated by the commission, the telecommunications company providing the

⁹⁰ *Joint Motion to Exclude Qwest Rate Issues, Docket No. UT-033034.*

⁹¹ *Ex. 601T, at lns. 191-213*. Integra witness Slater also addresses this subject on page 6, lines 2-7 of his direct testimony (*Ex. 751T*).

service shall bear the burden of proving that the prices charged cover cost, and are fair, just, and reasonable.

* * *

(6) No losses incurred by a telecommunications company in the provision of competitive services may be recovered through rates for noncompetitive services. The commission may order refunds or credits to any class of subscribers to a noncompetitive telecommunications service which has paid excessive rates because of below cost pricing of competitive telecommunications services.

(7) The commission may reclassify any competitive telecommunications service if reclassification would protect the public interest.

100 Consequently, even though a service may be competitively classified, the Commission retains a great deal of authority to ensure that Qwest does not engage in below-cost pricing by virtue of its pricing flexibility. Furthermore, because the Commission regulates virtually all aspects of Qwest's wholesale services,⁹² CLECs are guaranteed an open forum for having their concerns reviewed regarding the services they may be purchasing from Qwest.

101 Qwest will explain below why there is no need to establish a cost standard in this case. However, it may be helpful to briefly discuss the various cost standards that were mentioned in this proceeding. As Mr. Reynolds explained, the cost standard that is typically applied to Qwest's retail services is TSLRIC (total service long run incremental cost). *Tr. 301*. This cost standard captures all of the relevant costs of providing a retail service, including marketing and other retailing costs. Those costs would not be reflected in a TELRIC (total element long run incremental cost) analysis. Though Staff initially stated that a TELRIC analysis could be used, Mr. Wilson clarified that Staff was not proposing that the Commission adopt a particular cost standard in this case. *Tr. 1273, 1419-1420*.

⁹² See section IV.D.1.e above.

102 Qwest agrees that the Commission does not need to establish a price floor or cost standard in this proceeding, as it has all the authority it requires to ensure that Qwest is not pricing its services below cost. It should be noted that Qwest is not seeking any rate changes for its services in this proceeding, and thus has not filed any cost analysis.⁹³ This is consistent with how this issue was addressed in Docket No. UT-000883.⁹⁴ There, the Commission declined to adopt a cost standard, and noted that “the current rates for Qwest’s basic business exchange service were supported by cost studies demonstrating rates were above the costs of providing the service” and declined to require a further showing with regard to costs in that case. Furthermore, although the Commission noted in that same order that rates would be required to cover their costs and pass an imputation test, Qwest suggests that an imputation requirement fails to acknowledge that there is significant facilities-based competition in which the CLECs purchase no wholesale services from Qwest.⁹⁵ Nevertheless, because Qwest must receive Commission approval for both its wholesale and retail costs, the Commission is in an adequate position to ensure that Qwest’s retail prices cover their costs. No further decision on this issue is necessary or appropriate in this proceeding.

C. Access charges

103 MCI raised the issue of access charge reform in this docket. *Ex. 501T, at lns. 1205-1387*. Access charges are clearly outside the scope of this proceeding. As a purely technical matter, MCI cannot broaden the issues in this proceeding – it was granted a general intervention, not a special intervention.⁹⁶ As a practical matter, access charges have no bearing on any of the issues the

⁹³ In his direct testimony, Mr. Stacy seems to suggest that Qwest should file a cost analysis with its Petition. *Ex. 601T, at lns. 677-693*. As stated above, Qwest seeks no rate changes at this time and thus a cost analysis is not necessary because Qwest’s business service rates were last established by Commission Order and are presumed to be lawful.

⁹⁴ *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 77*.

⁹⁵ Qwest can and will explain the imputation issue in a future proceeding if necessary, and will demonstrate why a traditional “imputation” test such as is used for toll services is not appropriate for other types of services.

⁹⁶ A general intervention is one in which the intervenor commits not to broaden the issues, while a special intervention allows the intervenor to bring new issues into the proceeding. *WAC 480-09-430(1), (2)*. Clearly, access charges are not within the scope of the statutory criteria the Commission will consider in making a decision in this case, and MCI has not otherwise made a showing that the issue of access charges has any reasonable relationship to this proceeding.

Commission must consider in this case.

104 Mr. Gates maintains that Qwest should not be granted competitive classification until it lowers its switched access charges. However, rate levels for Qwest's intrastate switched access service have no bearing on the Commission granting Qwest's petition. RCW 80.36.330(6) clearly addresses MCI's concern about the possibility of implicit subsidization from intrastate switched access charges:

(6) No losses incurred by a telecommunications company in the provision of competitive services may be recovered through rates for noncompetitive services. The commission may order refunds or credits to any class of subscribers to a noncompetitive telecommunications service which has paid excessive rates because of below cost pricing of competitive telecommunications services.

105 It should also be noted that for their own business exchange services CLECs have the ability to recover their filed switched access charges from inter-exchange carriers at the rate levels they have price-listed with the Commission. Qwest has found that a number of CLECs' intrastate switched access rates, including MCI's and AT&T's, are equal to, or greater than, Qwest's intrastate switched access rates. *Ex. 7RT, at 13*. This clearly demonstrates that rate levels for Qwest's switched access service elements should have no bearing on Qwest Petition in this docket. *Id.*

D. Proposed conditions on approval

106 The question of proposed conditions regarding approval of the petition actually encompasses two separate issues. First, there is the issue, raised by AT&T and MCI, of whether the Commission should establish quantitative measures of competitive presence and then require a showing that those measures are satisfied as a precondition to granting the petition. The other issue is whether the Commission should grant the petition, but impose certain conditions upon Qwest. Each of these issues is discussed below.

107 *Preconditions for Approval.* AT&T and MCI both propose that the Commission should establish some sort of threshold determination for competitive presence and should deny the petition unless that threshold is met. For example, AT&T proposed that “the Commission consider whether there exists at least two facilities-based competitors coupled with a sufficiently stable supply of UNE-L, UNE-P and resale over the long run before it finds competition in any given geographic area is ‘effective.’” *Ex. 701T, at 6.* MCI made a similar proposal, with additional recommended “trigger” mechanisms that MCI contends should be in place prior to granting the application.⁹⁷

108 These preconditions are not appropriate. First, the Commission has never before adopted any sort of a mechanical or quantitative test of competition – the Commission has never adopted a specific market share percentage, or any other numerical benchmark, as the “magic number” that justifies a grant of competitive classification. Second, the statute does not contemplate that type of a mechanical test, directing the Commission instead to consider a variety of factors, but to apply its own judgment with regard to the weighting and significance of each factor. Third, neither AT&T nor MCI provided any reasoned support for the quantities selected as threshold measures. AT&T witness Cowan merely stated that the presence of at least two facilities-based competitors was simply the company’s position, but was unable to explain why two was an appropriate number, or how extensive the competitors’ networks should be. *Tr. 1022, 1031–1032.* MCI was also unable to provide a rationale supporting its trigger mechanism. Indeed, Mr. Gates agrees that unlike the statute, which directs the Commission to consider various factors, MCI has converted the factors into minimum standards that must be met before the Commission should find effective competition. However, he was unable to provide a rationale or support for the minimum standards he selected, and agreed that the standards were somewhat arbitrary. *Tr. 1234–1236.*

⁹⁷ (1) The presence of at least three CLECs providing services, one of which must be providing services from its own switch, (Standard to apply to each exchange, statewide), (2) Facilities-based (owned loop and/or UNE-Loop) CLEC market share of at least 30 percent, (Standard to apply in at least 50% of exchanges statewide), (3) At least one CLEC with a facilities-based market share of at least 10 percent, (Standard to apply in at least 50% of exchanges statewide), and (4) Total CLEC market share (resale and facilities-based) of at least 45 percent (Statewide average). *Ex. 54T at 29.*

109 *Conditions on Approval.* Several parties suggested that the Commission might impose certain conditions on Qwest if the Commission decides that the petition should otherwise be granted. For example, during cross-examination of Mr. Wilson, AT&T suggested that it might be appropriate for the Commission to condition the grant of the petition upon the imposition of a price floor, the existence of the SGAT/QPAP for a defined period of time, and/or the continued existence of the UNE-P product. *Tr. 1347, 1352, 1354.* However, at this point it is unclear if AT&T will actually advocate that the Commission should impose these conditions. Thus, Qwest will respond to these points, and any other issues that might be raised, in its reply brief.

110 One condition that is acceptable to Qwest, if the Commission determines that it is appropriate, is a limitation on Qwest's ability to exit the market. One of the hallmarks of a competitive market is the freedom of competitors to enter and exit at will. To the extent that there is a concern about this issue, Qwest has committed that, should the Commission grant Qwest's petition, Qwest will not abandon service in the exchange areas it currently serves for the services listed in its petition, consistent with the conditions stated in Staff's testimony. *Ex. 7RT, at 8; Ex. 201T, at 2.*⁹⁸

E. Other

111 In this section, Qwest will discuss (1) the opponents' strategic emphasis on theoretical doomsday predictions, (2) how competitive classification will benefit Qwest and (3) how competitive classification will benefit the public interest.

1. The Commission should not be distracted by the opponents' premature and hypothetical predictions about the future.

112 Permeating the opponents' pre-filed and oral testimony of the opponents are a number of dire

⁹⁸ Mr. Wilson clarified at the hearing that Staff was not recommending any conditions upon the granting of Qwest's petition in this matter. *Tr. 1343, 1355.* However, the conditions that accompany Qwest's commitment are in the record in this case in Mr. Wilson's testimony, where he simply recites his understanding of what Qwest was willing to agree to. Those conditions are that the commitment is effective until November 7, 2009, and will not affect Qwest's ability to grandfather the services listed in the Petition or to sell any or all of its business in the service areas where it currently offers such services. Qwest's obligation to serve under other statutes and rules would not be altered by this condition.

predictions about what will happen to Washington consumers and competition in the state should the Commission grant Qwest's petition. For example, multiple opponents discuss and predict that Qwest will engage in predatory pricing practices by lowering retail prices and creating a price squeeze. *Ex. 401T, at 3, 43, 59; Ex. 601T, at lns. 436-642; Ex. 701TC, at 5-6.* Seemingly inconsistently, two of these same opponents also warn that Qwest might raise retail prices upon receiving competitive classification. *Ex. 401T, at 56-57; Ex. 601T, at lns. 436-452.* Finally, multiple opponents warn that Qwest might provide poor service quality and delayed provisioning to its wholesale customers. *Ex. 401T, at 29; Ex. 701TC, at 5-6.*

113 The opponents' attempt to distract the Commission's attention from the current competitive environment should not be countenanced. As the Commission noted in Docket No. UT-000883, the focus of RCW 80.36.330 and of the Commission in evaluating competitive classification petitions is today's competitive environment.⁹⁹ Should Qwest abuse the freedoms it acquires, or should the competitive environment otherwise substantially change in the future, the Commission remains empowered pull Qwest's analog business services under full regulation if doing so would protect the public interest. *RCW 80.36.330(7).*

114 In addition, at least one of the opponents making these dire predictions admits that the concerns are purely theoretical and speculative. In response to Qwest data requests, Public Counsel witness Baldwin admitted that the concern she stated in her testimony regarding "high prices or poor service quality" in the future was theoretical, that the concern she discussed in her testimony about inferior wholesale installation performance by Qwest was theoretical and that an evaluation of a price squeeze is premature. *Ex. 436, 446, 449.* The opponents' admitted speculation and fear tactics should not obscure the substantial evidence of effective competition presented by Qwest and Staff.

⁹⁹ *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 65.*

2. Qwest's need for competitive classification.

115 It is important for the Commission to understand why Qwest is seeking competitive classification. Qwest offers this information not because it has an affirmative obligation under RCW 80.36.330 to do so, but instead because context is always helpful.

116 Qwest continues to lose access lines at an alarming rate.¹⁰⁰ For all the reasons discussed above, Qwest has no market power in the analog business market in Washington. *Tr. 1373-1374*. This is made obvious by the fact that Qwest's line counts have dropped (in absolute terms) from 638,968 in December 1999 to 520,635 in December 2002.¹⁰¹ *Ex. 20C*. This correlates to a 19% decline. Based on wholesale data alone, CLEC line counts have grown 307% and market share has grown 333% during the same period. *Id.* To slow, stem and hopefully reverse the loss of lines, Qwest needs the freedom to compete on equal terms with its competitors. *Ex. 1T, at 5; Tr. 176-178*. This includes being able to target market, modify its rate structure to respond to competitive activities and offer new services, packages, rates and terms on shortened time and with reduced administrative burden. During this case, Qwest has been attacked several times for not having made ample use of the competitive classification granted in UT-000883. *See, e.g., Ex. 501T, at Ins. 942-947*. As Qwest has explained, that is largely because of the nature and scope of the grant. *Tr. 150, 286*. If the Commission grants competitive classification on a statewide basis as requested by Qwest in this docket, Qwest will be much better positioned to make use of that freedom in order to respond to competition more nimbly.

¹⁰⁰ Public Counsel urges the Commission to believe that most of Qwest's line loss stems from "economic reasons" as opposed to CLEC competition. *Ex. 201T (Baldwin Direct), at 31-32; Ex. 208T; Ex 82C*. On cross examination, however, Public Counsel witness Susan Baldwin admitted that competition was the largest source of recorded reasons for disconnects, that she had incorrectly labeled her Exhibit 408C as "Disconnects Related to Economic Downturn," and that all the reasons she characterized as "economic reasons" for disconnection occur during good and bad economic times. *Tr. 704-705*. She also admitted that more lines were reportedly lost to competition than to what she labeled "economic reasons." *Tr. 705-706*.

¹⁰¹ Qwest's line loss has continued in 2003, and as of August 2003 had dropped to 498,125. *Ex. 24, at 2*.

3. Approval of Qwest's petition will benefit the public interest as well as Qwest.

117 Approval of Qwest's petition will benefit the public interest more generally as well. Active, evenhanded competition will drive competitors to lower prices and improve customer service in order to win and retain customers.¹⁰² Such competition may encourage competitors to migrate to facilities-based competition in order to enhance product differentiation. *Tr.* 851-852. Consumers will benefit from such differentiation and innovation. Customers will benefit from Qwest being able to respond on a more customer-specific basis to customers' particular operational and financial parameters rather than having to offer all services in a one-size-fits-all manner. When similarly-equipped suppliers are forced to battle for non-captive customers, those customers are the primary beneficiaries of such competition.

VI. CONCLUSION

118 The evidence in the record overwhelmingly supports approval of Qwest's petition for competitive classification in this case. Qwest and Staff have submitted substantial, reliable data proving that there are a numerous alternative providers in the relevant market offering functionally equivalent or substitutable services. This competition comes in a variety of intramodal and intermodal forms. Washington CLECs have already captured approximately 30% of the relevant market and their collective market share has grown dramatically (333%) over the past few years. The structure of the market – governed by statutory, regulatory and contractual protections for competitive carriers – assures ease of entry and that Qwest has no market power in the relevant market. The opponents, having worked hard to distract the Commission and muddy the waters, have not succeeded in diluting Qwest's and Staff's evidence of effective competition. The Commission should grant Qwest's petition without conditions.

¹⁰² In her direct testimony, Ms. Baldwin warned the Commission that "Qwest could subsequently lower rates or improve service quality to drive away the new competition" if granted competitive classification. *Ex. 401T, at 16*. So long as there are no unlawful pricing practices, Qwest believes this is a "risk" the Commission should be willing to take.

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