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**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of)	
QWEST CORPORATION)	Docket No. UT - 030614
)	
For Competitive Classification of)	
Basic Business Exchange)	
Telecommunications Services)	

**POST HEARING BRIEF
OF
INTEGRA TELECOM OF WASHINGTON, INC.**

October 28, 2003

1 revised its data. Qwest submitted its Response to Bench Request #5 on October 27, 2003 and
2 revised the list of services subject to the Petition and revised its data.

3
4 **ARGUMENT**

5 Qwest has failed to meet the burden of proof and failed to satisfy the statutory
6 requirements necessary to establish entitlement to competitive classification. Therefore, the
7 Commission has no choice but to deny Qwest's Petition for Competitive Classification of its
8 Basic Business Services.

9 In order to grant Qwest's request the Commission must find that the necessary
10 requirements have been satisfied¹. Of these requirements, five are clearly not satisfied:

- 11 (1) Alternative providers are subject to monopoly power Qwest enjoys over wholesale services
12 (UNE-L, UNE-P and resale) and therefore cannot make functionally equivalent services
13 available ON THE SAME BASIS as Qwest, (2) Qwest's monopoly over the local loop clearly is
14 an 'other indication of market power', (3) Qwest has failed to define the relevant market,
15 (4) Qwest has failed to establish that there is effective competition in Washington, and
16 (5) Qwest has failed to take into account the open issues facing the telecommunications
17 industry.

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19
20
21 ¹ RCW 80.36.330 (1) provides that the Commission may classify a telecommunications service as a competitive
22 telecommunications service if the service is subject to effective competition. The rule then sets forth certain factors
that the Commission must consider:

- 23 A. The number and size of alternative providers of services;
24 B. The extent to which services are available from alternate providers in the relevant market;
25 C. The ability of alternate 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 services.

In addition, WAC 480-121-062(5)(g) requires:

- E. A statement of whether the petitioner has a significant captive customer base and the bases for any
contention that it does not.

1 **I. Alternative providers cannot provide equivalent services on the same basis as Qwest**

2 RCW 80.36.330 (C) requires that the Commission find that alternative providers can
3 freely and readily make functionally equivalent services available to the market “under
4 competitive conditions equivalent” to Qwest. Qwest maintains monopoly control over the
5 wholesale services that all competitors rely upon in serving the market. This monopoly control
6 is evidenced by Qwest and Staff in their reliance on Qwest UNE-L, UNE-P and resale line
7 counts as the basis for establishing the portions of the retail market served by Qwest and the
8 CLECs. This monopoly advantage enjoyed by Qwest does not allow CLECs to “make
9 equivalent services available on competitively equivalent terms” to Qwest. The failure in
10 satisfying this requirement requires that the Commission deny Qwest’s petition.

11
12 **II. Qwest’s monopoly over the local loop clearly is an ‘other indication of market power’.**

13 RCW 80.36.330 (D) requires that the Commission consider ‘other indications of market
14 power’. The record has established that Qwest enjoys a monopoly over the wholesale services
15 that all CLECs rely upon to provide a competitive alternative. As indicated by Mr. Slater,
16 “..CLEC(s)...(are) totally reliant upon and subject to the monopoly position Qwest enjoys in its
17 ownership of the last mile”. *Exhibit 751T @ p. 5, ln. 22-23* . This monopoly control over the
18 last mile is ‘other indication of market power’ which, if abused, could “seriously and negatively
19 impair the competitive” market. *Exhibit 751T @ p. 6, ln. 5-6*. This is precisely the type of
20 “market power” RCW 80.36.330 (D) was written to guard against. Neither Qwest nor Staff
21 have disputed Qwest’s monopoly control over wholesale services and, therefore, this
22 Commission has an obligation to deny the Petition on this basis.

1 responses to Order No 6, and the Qwest-CLEC market share into serious question and is a
2 violation of due process.

3
4 **IV. Qwest has failed to establish that there is effective competition in Washington.**

5 Qwest has failed to establish that there is effective competition in the State of
6 Washington. Specifically, Qwest and Staff have (A) failed to establish an accurate count of the
7 number of CLEC competitors, (B) failed to remove UNE-P and resale type services from the
8 universe of competitors providing true competition, (C) failed to obtain reliable competitive data
9 on the analog services that are the subject of the petition, and (D) failed to address the question
10 as to whether the petitioner has a captive customer base RCW 80.36.330 (E).

11
12 **Failure to establish the number of competitors.**

13 Qwest has not proved there are alternate providers of the basic business services on the
14 Response to Bench Request #5 – Confidential Attachment A. First, Qwest lists the number of
15 companies authorized to provide services as competitive providers; *Petition @ p. 3, ln. 25*,
16 Qwest lists the number of entities that have valid interconnection agreements, *Petition @ p. 4,*
17 *ln. 5*, and finally Qwest admits that as of December 31, 2002 only 35 companies are actively
18 purchasing services from it in the State of Washington. *Petition @ p. 7, ln. 12-14.*

19 Significantly, only 24 CLECs responded to the Data Request from the Commission.
20 *Exhibit 201T @ p. 12, ln. 4-5.* Considering the volatility of the CLEC industry, there is no
21 evidence of how many potential alternative providers are currently operating in the State of
22 Washington. But, more importantly, there is no evidence in the record that there are alternate
23 providers of the analog services from Bench Request #5 - Confidential Attachment A they are
24 providing.

1 **Failure to exclude resale and UNE-P data from analysis.**

2 Qwest has misrepresented its market power in its Petition and in its evidence. In its
3 initial petition and through-out its testimony, Qwest misrepresented the CLEC market share.
4 *Petition, pg. 8, Tables A and B.* The market share Qwest quoted included resale and UNE-P
5 access lines in the percentages it attributes to the CLECs. The true measure of the CLEC
6 market share or concentration should be based upon facilities-based services; market share
7 cannot be based upon resale and UNE-P. Qwest retains total control over the rates and quality
8 of the services provisioned as resale and UNE-P. The Commission correctly excluded the
9 analysis of resale lines in UT-000883. *Docket UT-000883, Seventh Supplemental Order @*
10 *para. 75.*

11 Of the **XX** Qwest exchanges set forth in Exhibit 55C, very few of the exchanges have
12 CLECs providing service over UNE-L services. **XX** of the exchanges are served by CLECs, if
13 at all, only by resale or UNE-P. **XX** of the remaining exchanges only have **XX** CLEC ordering
14 UNE-L from Qwest. *Exhibit 55C.* Clearly, most of the market in the State of Washington is
15 subject to Qwest control.

16 Integra believes that the health of the long-term competitive market cannot be based
17 upon resale or UNE-P; a long-term strategy must be based upon investment in one's own
18 network. "we don't use resale because we believe that it's fundamentally still Qwest providing
19 the service . . . and we can generate higher margins by investing in our own switching and
20 transport network and relying upon leasing loops on a UNE basis from the incumbent carrier.
21 *TR., 10/18/03 p. 851, ln. 21 through p. 852, ln. 8, Slater.* At best, an increase in resale and
22 UNE-P figures may be evidence of a growing ease of market entrance.

23 So, if one looks at Qwest's percentages in the original Petition with CLEC figures based
24 upon UNE-L, the CLECs have only an 8% market-share and in a very limited number of
25 exchanges. *Petition and Exhibit 55C.* The total number of access lines, represented by Qwest in

1 the initial petition, was 624,654, and Qwest's total number of access lines were 520,635.
2 *Petition @ p. 8, Tables A and B.* The access lines attributed to the CLECs included 51,576
3 UNE-L lines and 52,443 resale and UNE-P lines. Since resale and UNE-P are totally controlled
4 by Qwest, that amount should have been added to Qwest's total access lines, rendering Qwest's
5 total 573,078. Of the total access lines, the CLECs have only 51,576 UNE-L access lines
6 (requiring facilities-based service through a CLEC owned switch) out of 624,654 lines or about
7 8% market share.

8 On October 27, 2003, Qwest revised its access line count on the analog only product set
9 significantly, down from the 624,654 quoted above to **XX**. Qwest made no similar adjustment
10 to the CLEC access line counts, so there is no credible evidence of Qwest's or the CLECs'
11 market share. *Response to Bench Request #5- Confidential Attachment A*

12
13 **Qwest petition and Staff recommendation relies upon faulty data.**

14 Qwest has misrepresented and changed its data, and the Commission cannot rely upon
15 the market analysis completed by Staff. The Revised Aggregated Staff Report, *Exhibit 232*, is
16 unreliable due to the numerous problems and mistakes with the CLEC data collection pursuant
17 to Orders No. 6 and No. 8. The four CLEC parties, who comprise approximately **XX** % of the
18 reported number of access lines, *Response to Bench Request #4*, all submitted supplemental
19 responses to the data requested by the Commission in Order No. 6 and to the certification of the
20 information submitted by Qwest indicating a misunderstanding and misreporting of figures
21 having included digital information instead of responding with "analog" only access line
22 information. *Supplemental Responses to Order No. 6 submitted by AT&T, MCI, ATG, and*
23 *Integra.*

24 Equally important, the above information from Qwest and from Staff is based upon
25 access lines, not customers. Qwest has proffered no evidence about customers and no support

1 for its statement that it has no captive customer base. Staff asked no questions about the number
2 of customers.

3
4 **Qwest has a captive customer base.**

5 RCW 80.36.330 (E) requires the petitioner to support its contention that the petitioner
6 does not have a captive customer base. Qwest has failed to do so. But, more importantly, Qwest
7 has failed to acknowledge the largest of all captive customers: the entire CLEC industry. As
8 the monopoly supplier of the local loop, the last mile, Qwest totally controls not only resale and
9 UNE-P services, but the entire the market. Qwest has offered no evidence of the existence of
10 other providers for the local loop at the ‘basic business’, ‘analog’, or ‘small business service’
11 market across the State of Washington, as there are none. As stated by Mr. Slater,

12 A CLEC, such as Integra, is totally reliant upon and subject to the monopoly position
13 Qwest enjoys in its ownership of the last mile. The health of the competitive market
14 intimately depends on the relationship between Qwest’s UNE prices for the last mile and
15 Qwest’s underlying cost structure. Historically, the WUTC has consistently set Qwest’s
16 retail service prices using a methodology that also relies on Qwest’s underlying cost
17 structure. This common linkage of utilizing Qwest’s underlying cost structure to set both
18 UNE and retail rates has created an important and intimate relationship between Qwest’s
19 ‘wholesale’ (UNE) and ‘retail’ rates that competitive entrants like Integra have relied
20 upon. To sever and break apart this relationship would seriously and negatively impair
21 the competitive forces the WUTC and the Telecommunications Act of 1996 have
22 attempted to foster. . . . Presently, the WUTC has regulatory oversight for both the Qwest
23 wholesale UNE offerings and the Qwest retail offerings that directly compete against
24 Integra and all other CLECs. This WUTC oversight ensures both the wholesale and
25 retail operations of Qwest are not anti-competitive, are in accordance with laws, are not
being cross-subsidized, and together foster competition. As long as the last mile remains
under monopoly control by any single competitor it is vital that the WUTC continue to
exercise its responsibility insuring the above relationship is not abused for the
competitive advantage to any single competitor.

23 *Exhibit 751T @ p. 5, ln. 22 through p. 6, ln. 22, Slater.* “The last mile is economically and
24 practically impossible for a CLEC to duplicate and leaves the CLEC totally reliant upon Qwest,
25 its number one competitor.” *Exhibit 751T @ p. 7, ln. 15-16, Slater.*

1 Qwest's monopoly power over the wholesale services upon which the competitive
2 industry relies provides Qwest with the ability to exert monopolistic practices over the market,
3 including price squeezes between retail and wholesale rates, poor wholesale service quality,
4 delayed provisioning, and other opportunities to adversely impact and destroy the competitive
5 market by exercising its monopoly advantages.

6 The testimony of MCI's witnesses on September 17, 2003 brought to light a glaring
7 example of Qwest's use of its monopolistic power that occurred during the summer of 2003. In
8 June, Qwest unilaterally changed its procedure and wrongly included the removal of load coils
9 and bridge taps in the facilities build procedures. Services that had not fallen into the "held for
10 no facilities" situation suddenly without notice started falling into "held for facilities" jeopardy
11 situations. Orders were placed on hold; CLECs lost customers. CLECs complained, but
12 obtained no explanation and no relief. It was not until the middle of August that Qwest admitted
13 it was wrong and immediately stopped the offending policy, credited the CLECs costs, and
14 forced CLECs to incur the time and expense of submitting orders to convert services that had
15 been installed as special access. Many CLECs lost customers. The damages to the CLECs and
16 their reputations is immeasurable.

17
18 **V. Qwest has failed to take into account the open issues facing the**
19 **telecommunications industry.**

20 Qwest and Staff have failed to take into account the open issues facing the
21 telecommunications community. The regulatory climate and the price of UNEs are uncertain
22 making the ability of CLECs to obtain financial backing for expansion extremely difficult.
23 *Exhibit 751T @ p. 7, ln. 6-9, Slater.* Staff witness, Thomas Wilson admitted the number and
24 magnitude of the open issues in his cross examination, to name just a few: the impact of the
25 Federal Triennial Review Order and the current challenges to that Order pending before the

1 Second Circuit Court of Appeals; the state Triennial Review proceedings, including
2 Washington’s investigation, UT-0033025 and UT-033044; the FCC’s recent initiation of an
3 investigation of the TELRIC pricing methods, FCC 03-224; and completion of the Washington
4 UNE Cost Docket, UT-203003. The telecommunications industry is in upheaval.

5 The prospect of changing UNE rates and services due to these various regulatory
6 initiatives is very likely, making this time premature for the Commission to rely on Qwest and
7 the infant competitive market to manage competition and fair pricing. As stated above, there is a
8 delicate balance between wholesale and retail rates based upon Qwest’s actual costs. “A CLEC
9 cannot compete and continue to service customers if the margin between the UNE rates and
10 their [SIC] largest competitor Qwest is so narrow or non-existent that the CLEC’s costs cannot
11 be recovered.” *Exhibit 751T @ p. 7, ln. 4-6, Slater*. If the Commission retains control of the
12 UNE rates, but has little and practically no control over the retail rates, Qwest would be able to
13 reduce its retail rates to cost and remove any margin the CLEC has. Further, any remedy to the
14 CLECs through theoretical ‘price floor’ protections would be too burdensome to prove and too
15 delayed in their realization to provide meaningful protection against such anticompetitive
16 market abuse.

17
18 **VI. If approved, proposed conditions on approval.**

19 Integra strongly urges the Commission not to approve this Petition, but in the event that
20 the Commission does approve Qwest’s Petition for Competitive Classification, the Commission
21 must, at a bare minimum, insure that Qwest does not abuse its monopoly wholesale power to
22 cause an unfair ‘price squeeze’ for CLECs between Qwest’s retail (price listed) and wholesale
23 rates, and require Qwest to adequately describe the markets and the services subject to
24 competitive pricing. The services must be defined in a way that the public will understand what
25 services are being provided under the price list.

1 The Commission must take proactive steps to insure that Qwest does not use its
2 monopoly wholesale market power to its competitive advantage. The Commission must require
3 that declassified or price-listed services are priced at a sufficient margin above UNE-L, UNE-P
4 and resale services (wholesale) as to insure the health of the competitive market in Washington
5 and to insure that Qwest does not sell services below its costs.

6 Additionally, as the granting of competitive classification and the price listing of services
7 typically shifts the burden of proving rates from the carrier submitting the price list to persons or
8 companies who would challenge those rates, the Commission must not allow that change to
9 occur. The shift would place undue burden on the public and/or the CLEC community to file a
10 complaint and bear the burden of proof that the rates as set forth by Qwest on the price list were
11 inequitable. If the Commission grants competitive classification for Qwest's analog basic
12 business services, the Commission must adopt a new response to challenges to Qwest's price
13 lists. Upon the filing of a challenge to a Qwest price list, instead of requiring the challenger to
14 prove the rates are inequitable, the Commission should on its own initiative immediately
15 suspend the price list, open an inquiry and investigation, and require Qwest to prove-up its rates.
16 The right to file a complaint after a rate has been changed and the competitive damage done, and
17 then, on top of that, carry the burden of proving a rate case is no right at all. As Mr. Slater
18 testified, "The horse is out of the barn." *TR. 9/18/03, p.867, ln. 20.*

19 The Commission must prohibit Qwest from providing services over digital facilities.
20 Qwest has offered no evidence and the Commission has no evidence of effective competition in
21 Qwest's self proclaimed "digital" basic business market. The Commission cannot allow digital
22 services or those services that Qwest has admitted have digital components (*Response to Bench*
23 *Request #5*) to be offered on a analog services price list.

24 The Commission must define the product set and the market area in its order to protect
25 each business consumer in the State of Washington. The comments from the public clearly

1 indicate that true competition has not reached the majority of the exchanges in Washington.
2 *Exhibit 800*. The Commission must prohibit Qwest from setting prices below cost in each
3 exchange and from allowing one area to subsidize another area to the detriment of the business
4 community.

5 Finally, the Commission must not grant Qwest waiver of compliance with any statute or
6 rule designed to protect the business customer, including but not limited to: service quality
7 reporting.

8
9 **CONCLUSION**

10 While Washington is obviously very proud of the regulatory climate it has created, one
11 that is opening markets and encouraging competition, it is the Commission's regulation of the
12 ILEC that is protecting the competitive environment. For all the reasons set forth above, the
13 Commission must not prematurely grant the wholesale monopoly provider and owner of the
14 local loop, the retail pricing flexibility to destroy the very competition that Washington is
15 striving so hard to be the first in the nation to obtain. Integra Telecom of Washington, Inc. prays
16 that the Washington Utilities and Transportation Commission deny Qwest Corporation's
17 Petition Competitive Classification of Basic Business Exchange Telecommunications Services.
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19
20 Respectfully submitted,

21 **INTEGRA TELECOM OF WASHINGTON, INC.**

22
23 _____
24 Deborah Harwood, WSBA #13137
25 Karen J. Johnson, WSBA #26875