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

NON-CONFIDENTIAL

INITIAL BRIEF OF PUBLIC COUNSEL

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE

OCTOBER 28, 2003

I. INTRODUCTION

1. Qwest, supported by Commission Staff, would have the Commission believe this is an easy and clear cut case. They rely on statewide averages, broad and questionable market definitions, anecdotal and impressionistic descriptions of the market and broad brush compilations of evidence that obscure the realities of the Washington business market, especially for small business and for non-urban Washington. They are wrong. This is not an easy or obvious case. Indeed, in order to agree with the conclusions and recommendations of Qwest and Staff, the Commission must accept the proponents' invitation to disregard:

- improperly defined product and geographic markets;
- clear, undisputed and detailed data showing overwhelming market concentration in every exchange in the state;
- Qwest's own dominant pricing behavior in the allegedly competitive market;
- impending potential for near-term dramatic changes in Washington's telecommunications market place resulting from state and federal regulatory action;
- broad opposition from the state's business community;
- the impact of the collapse of the technology sector.

2. Much is at stake for Washington business customers. At bottom, this petition asks the Commission to authorize retail rate deaveraging for thousands of businesses throughout the state and to delegate the implementation of that decision, for all practical purposes, entirely to Qwest. This is a major policy decision with very significant impact on the business economy in Washington. This decision should not be handed over to the company on the basis of the type of evidentiary showing that has been made in this case, and in the face of the many serious countervailing considerations presented to the Commission.

3. It is not only the business customers that will incur the harm if the Commission makes a premature decision based on poorly supported recommendations and an inadequate analysis.

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The success of local telecommunications competition in Washington may be placed in jeopardy by an erroneous decision to release the incumbent from regulatory oversight before competition has adequately developed. While local competition has clearly begun to emerge in Washington, the Commission should take care to avoid taking an action to stifle further growth in competition.

II. APPLICABLE LAW

4. This docket comes before the Commission on a petition by Qwest for competitive classification of certain local exchange business services and features. Under RCW 80.36.330, the Commission is authorized to "classify a telecommunications service provided by a telecommunications company as a competitive telecommunications service" if it finds that the service is "subject to effective competition." The statute defines "effective competition" to mean "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) sets out four factors that the Commission "shall consider" in determining whether it will exercise its discretion to grant the classification:

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

5. It is within the Commission's discretion to define the relevant market for analysis. *In re Electric Lightwave*, 123 Wn. 2d 530, 547 (1994). The burden lies with the petitioner, here Qwest, to demonstrate that it faces effective competition in the relevant market. Id. at 547. The statute is permissive. Even if the Commission finds that effective competition is present, it *may*, but is not required to, allow the classification. RCW 80.36.300(1).

III. QWEST HAS NOT PROPERLY DEFINED THE RELEVANT MARKET

A. The Product Market Has Not Been Properly Defined in This Case.

1. The Commission should apply standard economic principles.

6. A critical first step in determining the existence of effective competition is the definition of the relevant market. The Commission is not required to simply accept the market as defined in a petitioner's filing. *In re Electric Lightwave*, 123 Wn. 2d at 547. Instead, it must determine whether the market identified in a petition is in fact a reasonable and appropriate market from an economic perspective. A standard and generally accepted definition in economics of a relevant market for purposes of competition analysis is incorporated in the United States Department of Justice Horizontal Merger Guidelines:

> A market is defined as a product or group of products and a geographical area in which it is produced or sold such that a hypothetical profit maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is not bigger than necessary to satisfy this test…[.]
>
> Absent price discrimination, a relevant market is described by a product or group of products and a geographic area. In determining whether a hypothetical monopolist would be in a position to exercise market power, it is necessary to evaluate the likely demand responses of consumers to a price increase. A price increase could be made unprofitable by consumers either switching to other products or switching to the same product produced by firms at other locations. The nature and magnitude of these two types of demand responses respectively determines the scope of the product market and the geographic market. Ex. 224, § 1.0, pp. 4-5

Therefore, in defining the product market, the focus is on the products which the consumer would demand as a substitute. In the present case, the issue is whether analog services alone comprise a true market, and in addition, whether basic business, PBX, and Centrex are a single product, as Qwest asserts.

2. Qwest's "Analog Services" market is not an appropriate market definition.

7. Throughout the case, the parties and the Commission have struggled to make sense of Qwest's decision to propose a market definition limited to analog services. In the final analysis

the Commission should conclude it is simply not a workable or economically defensible framework for analysis or for competitive classification.

8. Qwest's own decision to choose this product market definition seems to be based not on economic and functional realities, but on simple practical considerations. As Mark Reynolds explained at the hearing, Qwest had problems identifying their own services and "synching up" the different types of services so that they could present an apples to apples comparison. Tr. 117-118. The fact that Qwest may have found it easier mechanically to identify analog services for purposes of drafting and filing a petition does not make analog services the correct market definition. Mr. Reynolds indicated, in fact, that Qwest plans to come in next with a digital filing for these same services. Tr. 117. The Commission is left to wonder why Qwest did not wait until it was able to present more straightforward petition for both analog and digital services.

9. Questions about Qwest's market definition are further underlined by the fact that the company's last petition for competitive classification, which included the identical services, for a number of the same exchanges covered in this case, made no distinction between analog and digital services.[1] The analog/digital issue was not addressed in that case and was not part of the Commission's analysis or decision in its Seventh Supplemental Order. Apparently, in 2000 when that petition was filed, Qwest believed that the relevant product market included both the analog and digital versions of the named services—in other words, the analog/digital distinction had no significance for purposes of competitive classification.

10. The technical differences between the analog and digital services are limited, and the explanations offered have been confusing and varied. The chief difference between the services appears to be the equipment that is used by the customer. Reynolds, Tr. 195-200. Both analog and digital services are for the most part carried over digital facilities. Id. Thus, from a

[1] *In the Matter of the Petition of Qwest Corporation for Competitive Classification of Business Service in Specified Wire Centers,* Docket No. UT-000883, Seventh Supplemental Order Denying Petition and Accepting Staff's Proposal ("UT-000883" or "Seventh Supplemental Order").

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technological perspective, there appears to be little practical difference between the digital and analog varieties of the service. [2]

11. Qwest also acknowledges that the analog services listed in the company petition and their digital counterparts are very similar in the functionality that they offer to the customer. Reynolds, Tr. 299-300. Mr. Wilson also observed that the functionality of the relevant market should be viewed from the customer perspective – a view consistent with the demand response approach of the Horizontal Merger Guidelines definition. "From the end-users' perspective, the application they want to do is the functionality, and they want to talk to each other." Wilson, Tr. 1327.

12. This similarity in functionality makes it difficult for proponents to argue that analog services occupy a distinct market of their own separate from Qwest or CLEC digital business services. Indeed, Staff witness Wilson testified in his prefiled Direct Testimony that

> While Qwest has limited the petition to analog services, competitors offer a plethora of analog and digital services in direct competition.

Wilson Direct, Ex..201T, p. 15, lines 3-6, *See also* Tr. 1295. He also urged the Commission not to "put blinders on" and to be aware that CLECs can take away Qwest analog customers by offering them digital service. Wilson, Tr. 1326. He went on to say:

> I think it's a mistake to assume that Qwest's ability to maintain prices in the relevant market, in this case, the analog business market is not affected, it is affected. Id.

All of this lends support to the argument that Qwest has simply mis-defined the market.

13. Interestingly, it appears Staff may agree. At the hearing, Mr. Wilson took pains to clarify that he does not necessarily adopt Qwest's market definition:

> Q: [Ms. Singer Nelson] Okay. Now you have argued that the analog business services market is a separate market from the digital business services market; isn't that right?

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[2] Staff has not done an analysis of what parts of the analog services are delivered digitally. Wilson, Tr. 1497.

> A: No, I have provided evidence on that market, but I haven't really---- I don't make that distinction necessarily. This is a distinction that Qwest has made in its petition. Tr. 1310-1311.

The chief reason why Staff did not analyze the market from this broader perspective seems to be that they simply accepted without question the analog market definition as filed by the company. Wilson, Tr. 1314. By not making an initial determination whether the analog market definition made sense, however, Staff omitted the critical first step in any analysis of a competitive market.

14. The mis-definition of the market by Qwest has created many difficulties in this case. Not least among these are the questions about the reliability of the data gathered to provide an accurate picture of the analog market in isolation. Line counts have been continually readjusted throughout the case in an effort to ensure that only lines used to provide analog services are included. This was highlighted again just yesterday when Qwest's Response to Bench Request No. 5 reported to the Commission that digital line counts for two Centrex services had erroneously been included in earlier data. While the numbers of lines involved may not be significant, the difficulty which even Qwest has in distinguishing between services raises the question of whether the distinction will be a viable one for Qwest to implement, for regulators to monitor, and for customers to understand.

15. It is not clear from the record what the result would be of an analysis of the combined analog and digital markets, and Qwest has avoided stating any definitive conclusions about the results of looking at combined analog/digital market share figures. Tr. 225.[3] In this case, Qwest has been very careful to add the qualification that its line counts and market share data are limited to the analog market only. This raises the tantalizing question of how market share numbers would be affected if the market were defined to include digital. As discussed below, there is evidence in the record provided by Qwest that shows growth in business lines and voice grade equivalents when we look beyond the narrow market definition offered here by Qwest. While there is inadequate evidence in the record for the Commission to do a full analysis of an

[3] Mr. Reynold stated: "I don't know that yet, and that's why we didn't file it."

alternative combined analog/digital market, the potential for a different outcome should be an additional warning sign to the Commission in reviewing this petition.

3. Basic Business/PBX/Centrex are not properly defined as one product.

16. Qwest blends together a long list of business services, subcategorized as basic business, PBX, Centrex, and features, and asks the Commission to treat them as one product, blurring important market distinctions. Even Qwest witness Reynolds acknowledged, however, that PBX and business line products are not functionally interchangeable. Tr. 268. Staff witness Wilson finds them sufficiently distinct to use them as surrogate market segments for small, medium, and large business customer classifications, but apparently views them as one blended "product" for purposes of analyzing the market. Tr. 1411.

B. Qwest's Petition Defines the Geographic Market Too Broadly.

17. Qwest, joined by Staff, attempts to convince the Commission that the appropriate geographic market in this case is the entire statewide service territory of Qwest. Just as Qwest lumps together all its basic business lines, PBX, Centrex and features into one combined product market, Qwest also makes no distinction between urban, suburban and rural parts of the state. There is no distinction made between large cities and medium and small towns, nor between Eastern and Western Washington or discrete regions such as the Olympic Peninsula. The premise that there is no difference between the local telecommunications market in such disparate areas not only defies common sense, it is not supported by the evidence in the case.

18. Mr. Wilson testified on direct that the market was a statewide market "Qwest service territory, defined at the exchange level." Ex. 201T, p. 14. When asked to clarify this at the hearing, he explained that he viewed the geographic market as co-extensive with the entire service territory, and was not suggesting that each exchange was a geographic market. Wilson, Tr. 1316-1319. Interestingly, both Staff and Qwest provide exhibits that subdivide the data they present into regions or zones and reflect geographic differences in the data. Ex. 51T, p. 7; Ex.

208C. They refrain from any suggestion, however, that these, or other smaller geographic areas be treated as separate geographic markets.

19. One major flaw in the statewide Qwest definition is that it ignores the fact that the services at issue are local services. A customer seeking basic business service in Walla Walla cannot call a CLEC who serves only Bellingham. That business customer must seek a competitor who provides service where the business is located. To determine what level of competitive activity exists in Walla Walla, the Commission cannot use line counts and market shares that include Seattle and Tacoma data. Yet, by repeatedly relying on statewide average market shares and other aggregations of data, Qwest and Staff obscure the very real differences between Washington communities.[4]

20. This case also represents a significant departure from prior analyses of the Qwest competitive market in RCW 80.36.330 petitions. In the UT 000883 docket, Qwest petitioned for classification on an exchange-by-exchange basis. That approach enabled the Commission to carefully evaluate the data on a much more granular basis Adopting the simplistic statewide geographic market analysis suggested by Qwest here will also set the Commission directly at odds with the granular analysis which it must undertake in the Commission's mass market switching docket, UT 033044, already under way. The FCC's Triennial Review Order expressly precludes use of a statewide market in analyzing competition and impairment in the mass market switching context. Ex. 230, ¶ 495. [5]

[4] Exhibit 415 C shows that Qwest dominates most local exchanges. Viewed on a statewide basis, the sheer quantity of lines in the urban areas mask the fact that customers in most of Qwest's 68 exchanges have negligible competition. Neither Qwest's petition nor Staff's analysis address the disparate stages of local telecommunications competition among the diverse 68 exchanges.

[5] In the Washington Triennial Review docket for mass market switching, UT 033044, Qwest was required to file by October 10, 2003 a Washington definition of the relevant market for purposes of its petition to end unbundling of mass market switching. Notwithstanding the clear directive of the Commission, Qwest's filing declined to provide any market definition whatever for purposes of the docket.

C. Qwest Ignores The Differences Between Small and Large Business Market Segments.

21. There can be little serious question that small business and large business customers represent two segments of the telecommunications market, each with their own characteristics. The Commission and its Staff recognized this in Docket UT-000883. See, e.g., Seventh Supplemental Order, ¶ 71; Ex. 231, p. 19. In its business market operations, Qwest clearly distinguishes between the two market segments. Qwest emphasizes different products for the different market segments. Id. Tr. 250, 264. Examples from its website of its small business and large business marketing focus are in the record. Ex. 26.

22. The FCC likewise has classified the market according to customer size. For general purposes, the FCC has defined very small business with three lines or less as part of the mass market.[6] In its Triennial Review Order, the FCC identifies three different market segments:

> the economic characteristics of the mass market, small and medium enterprise, and large enterprise customer classes can be sufficiently different that they constitute major market segments….These customer classes generally differ in the kinds of services they purchase, the service quality they expect, the prices they are willing to pay, the levels of revenue they generate, and the costs of delivering them service of the desired quality." Ex. 229, ¶ 123.[7]

Staff witness Wilson indicated he had not read the Triennial Review Order and was unaware that the FCC had adopted these market segment definitions. Tr. 1379-1381.

23. Although small and large business customers are distinguished, as noted, both by regulators and by Qwest in its own business operations, Qwest's petition and evidence in this case lump all business customers together. The company has not presented separate data or exhibits on the small business market in its testimony. Reynolds, Tr. 271-272. Staff has not presented a separate analysis of the small business market in this state, except to state that it views the basic business line market as the small business market. As Mr. Wilson conceded, however, this is only an "assumption" on his part. Tr. 1413. He stated: "I don't know what the

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[6] Ex. 401T, p. 35.

[7] Ex. 229, ¶¶ 127-129 contain descriptions of each customer class.

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real fact is, and I didn't testify about the fact." Id. The "real facts" in the record do not support Mr. Wilson's view that the small business market is coextensive with the analog basic business lines offered by Qwest. Ex. 411C shows for each exchange the varying proportions of Qwest total business lines that are small business/mass market customers. There is clearly no direct match between Qwest business lines and small business customers.

IV. REVIEW OF STATUTORY FACTORS FOR EVALUATING EFFECTIVE COMPETITION

A. Number and Size of Alternative Providers

1. Mere presence and capability do not establish effective competition.

24. There is much evidence in the record about the numbers of competitive providers operating in Qwest's territory. It is important to look at the evidence with precision before reaching conclusions, however. As the Commission has previously noted, Qwest's burden is not met merely by a showing of presence, and a capability to provide service. Seventh Supplemental Order, ¶ 66, 69.[8] Staff and Qwest would have the Commission look at the total numbers of CLECs present in Qwest exchanges as demonstrating effective competition. Merely looking at the total numbers, however, can be highly misleading.

2. Table A: Most CLECs Have Negligible Market Shares.

25. To illustrate this point, Public Counsel has prepared confidential Table A (attached) which pulls together Qwest wholesale data already in the record to show that most CLECs are operating on the fringe of the market, with market shares below **[Begin Confidential] ***************[End Confidential]** The market shares of the vast majority of CLECs operating in Washington are negligible and, even collectively, are insufficient to discipline the prices and quality of Qwest's basic business telecommunications services. Ex. 401T, pp. 14-15; Tr. 820. Qwest will continue to be the price setter when CLECs have very small market shares. Id. When these marginal carriers are removed from the tallies, the number of CLECs with

[8] Even if presence were enough, as the discussion in Section C below indicates, Public Counsel does not concede meaningful CLEC presence in many areas of the state.

competitive presence drops very significantly in comparison with the total numbers shown, for example, in Ex. 232, Column D.

B. Extent To Which Services Are Available From Alternative Providers In The Relevant Market.

26. Again, the theoretical availability of service is an insufficient basis upon which to determine that a market has effective competition. The Commission needs to examine the degree to which CLECs are actually serving customers. Ex. 401T, pp. 14-15. The illustrative Table A, and Exhibit 402C, show that it is important to look at individual exchanges, and at actual CLEC activity.

27. Mark Reynolds, in his direct testimony, asserted that if "indeed it is the case that the CLECs will offer service where facilities are available, and such facilities are available everywhere Qwest offers service, then CLEC services are available everywhere Qwest services are available." Ex. 1T, p. 9., Tr. 159. Unlike the last case, Staff did not examine this assertion by reviewing CLEC business plans or making test phone calls to CLECs to determine actual willingness to provide service. Tr. 1275-77, 1475; cf Exhibit 231, pp. 9-10. Mr. Reynolds' assertion appears to be a reprise of the argument Qwest made in Docket No. UT-000883 that competition can be presumed based on presence and capability. The Commission should again reject this form of showing as inadequate.

C. Ability Of Alternative Providers To Make Functionally Equivalent Or Substitute Services Available.

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

a. Not all wholesale-based competition deserves equal weight.

28. Qwest's case is based primarily on the wholesale competitive activity of CLECs in Washington using resale, UNE-P, and UNE-L. Ex. 1T, p. 5, lines 18-20. Qwest did not have information available to it regarding CLEC-owned loops and did not present such data in its petition or its direct testimony. Additional CLEC data, including information about CLEC-owned loops, became available in response to Order No. 06 and has been presented in Staff

testimony and exhibits. Mr. Wilson described the Qwest wholesale data contained in Exhibit 55 (Teitzel, DLT-5C) as the "actual core of the case" Tr. 1477, with "additional augmentation" provided by the highly confidential CLEC data reviewed. Id. The basic conclusion that Qwest and Staff urge the Commission to draw from this data is that CLECs are competing everywhere in Washington by means of purchased wholesale facilities. The actual data tells a more complicated and less rosy story about CLEC activity and the strength of competitive presence.

29. The first step in a careful review of the data is the removal of resale information from consideration. This Commission has already established in docket UT-000883 that resale activity is not price constraining and should not be considered for purposes of determining the level of competitive activity. Seventh Supplemental Order, ¶ 75.

30. In evaluating the vitality of competitive activity in Qwest exchanges, the Commission should also give differing weight to the type of wholesale-based activity by CLECs. Not every form of competitive activity deserves equal weight. The most compelling evidence of CLEC commitment to the market is shown by investment in owned loops. The next most significant is service to customers by means of UNE loops (UNE-L), since this generally indicates that the CLEC has invested in its own switching capacity. The least weight should be given to UNE-P. CLECs providing service via UNE-P have made no investment in their own facilities to serve the exchange. Tr. 800-801. In addition, UNE-P may not be available as a mode of entry after state impairment proceedings conclude.

31. With this in mind, the Commission should next look beyond aggregated information and statewide averages to specifics about the precise nature of CLEC activity in individual exchanges. The data tells a stark story. Exhibit 416C details the UNE-L activity in all Qwest exchanges. Of a total of 68 Qwest exchanges in the state, only **[Begin Confidential] *********[End Confidential]** percent), reflect CLEC activity by means of UNE-L activity, according to Qwest data. The remaining **[Begin Confidential] ** [End Confidential]** exchanges have **[Begin Confidential] **** [End Confidential]** UNE loops.

b. Table B: CLEC Investment Has Bypassed [Begin Confidential] ** [End Confidential] of 68 Qwest Exchanges.

32. Even more revealing is a correlation between the exchanges where CLECs provide no service whatever to customers using either UNE-L or CLEC-owned loops. Public Counsel has prepared an illustrative table providing that correlation with data drawn from exhibits in the record. Table B (attached). As this table shows rather dramatically, there are **[Begin Confidential] ** [End Confidential]** exchanges in this **[Begin Confidential] ************* [End Confidential]** category, over **[Begin Confidential] **** [End Confidential]** of Qwest's total exchanges. This evidence of minimal CLEC investment is reflected in every part of the state from Eastern Washington to the Olympic Peninsula, in rural communities, and small and medium cities. Cities in these exchanges include **[Begin Confidential] ** *********************** [End Confidential].**

33. Not only is investment minimal in these areas, but as the table shows, the UNE-P activity which is taking place is not seriously impacting Qwest's market share. Of the **[Begin Confidential] ** [End Confidential]** exchanges shown, only **[Begin Confidential] *** [End Confidential]** have Qwest market shares below **[Begin Confidential] ** [End Confidential]** percent. None have Qwest market shares below **[Begin Confidential] ** [End Confidential]** percent. The Staff calculated HHI calculations shown for these **[Begin Confidential] ** [End Confidential]** changes all show highly concentrated markets in the exchanges depicted. As discussed further below, even the competitive entry achieved here via UNE-P will no longer be available to CLECs if there is a finding of non-impairment in Washington, as Qwest requests.

2. CLEC-owned loops; Table C – CLECs Facilities Based Entry Via Owned Loops Bypasses [Begin Confidential] ** [End Confidential] of 68 Qwest Exchanges.

34. As noted above, neither Qwest's nor Staff's cases are based primarily on the existence of CLEC-owned loops. Nevertheless, both point to the supplementary evidence of owned-loops to

show that Qwest's filed case is conservative. At the hearing, Staff witness Wilson talked with enthusiasm about the evidence he saw of CLEC investment in unexpected places:

> Also, in Exhibit 204, you can find examples, *especially in the data showing lines via owned facilities*, which is especially important evidence of competition that the competitors are building their own lines even in places like **[Begin Confidential] ************ [End Confidential]**. So those are some of the additional kinds of examples of small business competition that are actually in the record.
>
> And again, I want to emphasize that I believe that *those examples are actually replete throughout the data*, but because its aggregated, you can't always see it, and so I have pointed at those few examples where without revealing confidentiality I can indicate that there really are these very surprising new developments in competition in our states. Tr. 1509

Public Counsel suggests that the Commission examine these examples. Data for **[Begin Confidential] ************ [End Confidential]** is shown on Exhibit 232C, Staff's most recent business line aggregation exhibit. It shows that for **[Begin Confidential] ************ [End Confidential]**, only **[Begin Confidential] **** [End Confidential]** total lines are reportedly served via owned loop, at **[Begin Confidential] **** [End Confidential]** reported locations. All remaining CLEC activity in **[Begin Confidential] ************ [End Confidential]** is via resale or UNE-P. There are **[Begin Confidential] **** [End Confidential]** lines or locations reported served by UNE-L.

35. Mr. Wilson suggests such examples of owned loops in unexpected places are "replete throughout the data." Tr. 1509. Public Counsel has examined Ex. 204C, which he cites, and prepared illustrative Table C (attached), which shows that **[Begin Confidential] ** [End Confidential]** of 68 Qwest exchanges in fact have no CLEC owned loops at all. It is hard to square this picture with the assertion that owned loop data provides "especially important evidence" of the existence of competition. Public Counsel believes it leads to the contrary conclusion.

3. Intermodal.

36. Evidence of wireless, VOIP and other intermodal services are not appropriately considered by the Commission in this case for several reasons. First, if Qwest seeks to restrict

the market definition to analog services, it cannot at the same time ask that non-analog services of this type be considered as services which compete in the same market. Secondly, the evidence presented in the case demonstrates that neither wireless nor VOIP service are functionally comparable substitutes for the range of analog services at issue. Gates Direct, Ex. 501T, pp. 18-36 (wireless); 37-38 (VOIP); Teitzel, Tr. 348-357, 422-423. Finally, even if such services are considered, there is not sufficient evidence in the record for the Commission to consider the extent of competition posed by these services. Wilson, Tr. 1418-1419.

D. Other Indicators Of Market Power.

37. Market power analysis is central to the determination of effective competition that the Commission must make under the competitive classification statutes. Market power to a seller is "the ability profitably to maintain prices above competitive levels for a significant period of time." Ex. 224, p. 2 (Horizontal Merger Guidelines). Tr. 1466 (Wilson concurring in the definition). Market share and market concentration are two accepted measures used to test for the existence of market power, although they are not the only indicators.

1. Market share analysis.

a. Market share issues.

38. Market share analysis in this case presents a number of issues. The Commission need not even reach market share analysis unless it accepts the Qwest analog market definition. The market share data presented is limited to the analog market. Even if that definition is accepted, determination of the market share raises the issue of the reliability of the data. Qwest and Staff have both acknowledged that their efforts to segregate digital from analog data have been difficult and have involved a number of subjective and technical judgments. *See, e.g.*, Reynolds, Tr. 117; Wilson, Tr. 1269-1270, 1280-1292.

b. Geographic market share.

39. Both Qwest and Staff attempt to keep the focus on statewide market share numbers. While even these numbers show high market shares for Qwest, it is important for the

Commission to look behind these numbers to the data for individual exchanges. As Table B (attached) shows, there are a large number of exchanges in the state where market shares exceed **[Begin Confidential] **[End Confidential]** percent.[9] When the geographic market is broken down below the statewide level, the market shares for Qwest climb dramatically in most non-urban areas of the state. Tr. 1530. Qwest and Staff have avoided confronting this reality by the use of the statewide geographic market.

c. Small business market share.

40. Market share must also be analyzed in terms of market segments, even if the analog product definition is used. As discussed above, it is clear that the business market in Washington consists of at least two segments, the large and small business customer. Market share data should therefore be analyzed on this basis, not on a combined basis. Neither Qwest not Staff has provided a market share analysis for the small business market segment. Reynolds, Tr. 271-272; Wilson, Tr. 1413-1414. Mr. Wilson acknowledges that there is limited data in the case to analyze on this point. Tr. 1228.

d. Qwest's new Section 271 authority.

41. A critical countervailing factor to the market share information presented by Qwest in this case is the impact of its new Section 271 authority to offer unrestricted long distance service in conjunction with its local service. Qwest is without question acting quickly and effectively to capitalize on this market opportunity. As the data in Ex. 24, p. 2, demonstrates, Qwest is steadily signing up customers for its new service at the rate of over **[Begin Confidential] **** [End Confidential]** per month (based on billed telephone numbers). Continuing at the same monthly rate for only another **[Begin Confidential] ***************** [End Confidential]** will enable Qwest to sign up a volume of customers comparable to the total CLEC business line counts in this record. As Exhibit 24 also shows, the focus of the marketing effort is on the bundling of

[9] There are also other exchanges where Qwest's market share exceeds **[Begin Confidential[*** [End Confidential]**, beyond those that fall into the **[Begin Confidential] ************* [End Confidential]** category highlighted in Table B. Examples include **[Begin Confidential] *************************************** ************************* [End Confidential]** Ex. 209C.

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Qwest local and long distance service. Qwest markets the bundled services with discounts for long term agreements which penalize customers for terminating. This new market position has only been available to Qwest since January. It is a powerful marketing opportunity, given that Qwest still serves the majority of local customers in its territory. As the growth data show, Qwest now has the means to consolidate and expand its current market position. It represents such a significant change in the Washington telecommunications market that the Commission should not classify Qwest local service as competitive until the impact of this new authority is clear.

e. Qwest's line loss data is not a reliable indicator of its market position.

42. Qwest makes much of presenting declining line counts for its business service in Washington, always being careful to add the qualification that the count relates only "to the services for which Qwest is seeking competitive classification." Exhibit 24, p. 2. Ex. 86.

43. Not all of Qwest's line loss however is attributable to competition, as the company concedes. Ex. 51T, p. 5. Public Counsel Exhibits 80 and 82 shows that line loss include migration of Qwest customers to other Qwest services. Indeed, Exhibit 80 shows that less than **[Begin Confidential] ** [End Confidential]** percent of Washington disconnect orders are attributable to competition. See also, Exhibit 408C. Qwest witness Teitzel acknowledged this on cross-examination. Tr. 476.

44. Qwest's own statements cast doubt on the company's characterization of steady line losses as being due to competition. In its 2001 Annual Report, describing growth in commercial services revenues and increases in access lines, Qwest stated:

> Local voice revenues grew as sales of access lines to businesses increased 5.7 % year-over-year in 2000. On a voice-grade equivalent basis, the Company's access lines sold to business grew by 30.5 % as compared to 1999. This increase was partially attributable to businesses converting their multiple single access lines to a lower number of high-speed, high capacity lines allowing for transport of multiple simultaneous phone calls and data transmissions at higher rates of speed. Ex. 84, p. 1; Ex. 86.

The record also reflects that Qwest subsequently reported a 12.9 percent increase for the fourth quarter of 2002 in voice-grade equivalent access lines provided to business customers. Ex. 401T, p. 32, line 13. When Public Counsel asked in discovery for analogous data on a Washington basis, Qwest disclosed that "total voice grade equivalent access lines for business customers in Washington" nearly **[Begin Confidential] *******[End Confidential]** between 1999 and 2002. Ex. 81, p. 3. While the business services included in this petition appear to be a subset of these large numbers, the voice grade equivalent product categories listed on Ex. 81, p. 4 include the services at issue in this case. This information again raises questions whether the narrow focus on analog services obscures a more complete and accurate picture of the business market.

2. Market Concentration Analysis.

45. When market concentration data is examined it is apparent that a fundamental weakness in Qwest's case is a failure to demonstrate the lack of market power throughout the service territory. The Herfindahl Hirschman Index (HHI) is a well-known and accepted measure of market share concentration. Ex. 401T, p. 19. If a single firm serves a market, the HHI is 10000, the highest possible HHI, and if two firms equally serve a market, the HHI of that market is 5000. The larger the HHI, the greater the concentration. Markets with HHI below 1000 are considered to be unconcentrated; those with an HHI between 1000 and 1800 to be moderately concentrated, and those with an HHI above 1800 to be highly concentrated. Id. Every HHI measurement in the record in this case very significantly exceeds 1800.

46. All of the market concentration analysis in the record indicates that the telecommunications market in every exchange in Qwest's service territory is highly concentrated.[10] Staff provided an HHI analysis on an exchange basis based on the wholesale data provided by Qwest in its direct testimony. Ex. 209C. Staff also grouped the data into the five zones used by the Commission in deaveraging wholesale rates. Ex. 208C. Staff did not

[10] The HHI analysis discussion here assumes only for purpose of argument that the analog market is the relevant market.

conduct an HHI analysis using the additional CLEC data reflected in Ex. 232C, which includes owned loops and additional lines in other categories. As explained by Mr. Wilson at the hearing:

> [O]nly the Qwest data on wholesale data provided at the wire center level by CLEC lent itself adequately to an HHI analysis in our opinion. The CLEC response data to Order Number 6 was not sufficiently consistent or clean, if you will, to enable that type of an analysis, and also it would have been very time consuming. Tr. 1377.

Mr. Wilson indicated on the witness stand, however, that the HHI calculations would likely not change significantly if the new CLEC data were included. Tr. 1377-78, 1429. He indicated that it remained appropriate for the Commission to consider the HHI analysis in Ex. 209C in making its decision. Tr. 1378.

47. Because the HHI data in this case indicates overwhelmingly that the market is highly concentrated, whether measured statewide, by zones, or by exchange, Qwest and Staff are forced to fashion a rationale to justify disregarding the data. First, Mr. Wilson suggests that HHI is unreliable because the measurement becomes stale. This is unpersuasive. Any measurement of market conditions is by its nature a record of the specific time the test is conducted. The data and HHI analyses in this case have been performed with the most up-to-date information available in a docket which only began in May. Economic markets like the one at issue here are by their nature continually changing. But changes are not so quick as to render statistical measurement meaningless. Under Mr. Wilson's argument, HHI or another measurement could never be employed. Staff, of course, submitted an HHI analysis for the record both in this case and in UT-000883.

48. The second argument made is the "market structure" approach suggested by Staff in UT-000883. Under that analysis, if wholesale competition structures such as UNEs are available to CLECs, and if they provide a financially viable route for entry, market concentration data is viewed as less significant. In UT-000883, Staff recommended against competitive classification of the small business market because the market structure was not adequately developed.

49. As Staff pointed out in Dr. Blackmon's testimony in UT-000883, "the WUTC must always consider both structural factors and market concentration." Ex.231, p. 18. Where the market structure is uncertain, however, Dr. Blackmon testified, market share is of more significance. Id., p. 19, ll. 6-12.

50. While Public Counsel does not agree that market concentration data should ever be given no weight, it certainly deserves notice where, as here, the telecommunications market structure in Washington is both uncertain and unstable. The continued availability of UNE-P to CLECs may be short-lived, depending on the outcome of UT-033044, the mass market switching docket. The Commission is currently reexamining the price to be set for the UNE-L in Washington in docket UT-023003. Adding uncertainty to the pricing picture, the FCC has recently initiated a rulemaking to reexamine TELRIC pricing issues, which could have additional significant effects on wholesale-based competitive activity.[11] In addition to all these factors, the recent approval of Qwest's 271 authority for Washington has introduced changes to the market structure in Washington which are only beginning to play out. Given all these uncertainties, the Commission must give significant weight to market concentration and market share analysis.

3. Ease of Entry.

51. Qwest and Staff both oversimplify entry costs. Qwest focuses on the company's requirements to offer UNEs and resale to new entrants. Mr. Wilson suggests that entry only requires registration and an interconnection agreement, and that customers are easily switched "almost automatically" for a small fee. Ex. 201T, p. 23 (revised Sept. 12, 2003). Contrary to these assertions, entry is not costless, riskless, or effortless. More than two-thirds of CLECs that were in existence two to three years ago no longer exist. Ex. 401T, p. 42. Those that have survived, like many in the energy and telecommunications industries, are finding a much cooler reception on Wall Street. Id. The testimony at the hearing of Mr. Slater eloquently described the considerations faced by a CLEC in deciding whether to enter particular markets. Tr. 880-882.

[11] FCC Notice of Proposed Rulemaking, WC Docket No. 03-173, September 15, 2003.

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4. Affiliations of providers of service.

52. As Ms. Baldwin's direct testimony discusses, it is significant that two large regional bell operating companies, Verizon (formerly Bell Atlantic and GTE) and SBC (formerly Ameritech and SBC) when seeking regulatory approval for their merger applications, promised to enter Seattle as an "out of region" competitor. Ex. 401T, p. 49. These are large companies with extensive experience in local markets and significant resources. If the local telecommunications market was as open to entry and as vibrantly competitive as proponents suggest, one would expect that these large players would have made significant headway in penetrating the market. As Exhibit 419C shows, **[Begin Confidential] ************************************* ***********************************[End Confidential].**

5. Other major indicators of Qwest market power: Qwest pricing.

53. One clear indicator that competition is present is a price reduction by an incumbent provider. There is a striking absence of any pricing behavior by Qwest in Washington consistent with a competitive marketplace. On the contrary, Mark Reynolds testified for Qwest that there is a substantial margin between Qwest prices and its underlying cost levels:

> Recurring retail rates for basic business exchange services and the accompanying revenue streams associated with the ancillary services exceed the wholesale UNE rates charged to CLECs by a significant margin. Ex. 1T, p. 18.

Qwest's ability to sustain prices significantly above cost in this manner is clear evidence of market power. Ex. 1T, p. 18.

54. When asked to provide evidence of reductions in response to discovery, Qwest was only able to provide examples of promotional price changes. Ex. 19; Tr. 231. Staff witness Wilson was unaware of any price reductions by Qwest for its business services, Tr. 1336, and testified that its rate for basic business service remains the same as the rate in effect during Docket UT-000883 - $26.89. Tr. 1416. In that docket, Dr. Blackmon testified:

> It is hard to imagine that a firm would let 40 percent of its market switch to competitors without responding by cutting prices. Qwest continues to charge the

> same price -- $26.89 per month --- in the purportedly competitive areas that it charges in areas where it has not competition. *This is simply not the behavior of a firm that is facing effective competition*. Ex. 231, p. 22, ll. 3-7.(emphasis added).

Identical testimony could have been filed in the current docket with equal validity. In this proceeding, however, by contrast, Staff conducted no analysis of Qwest's pricing behavior. Tr. 1416.[12]

55. Not only has Qwest not reduced its basic prices for the services at issue here, it has not taken advantage of the competitive flexibility which it received in Docket UT-000883 in Seattle, Bellevue, Spokane, and Vancouver. While those exchanges were found to be the most competitive in Qwest's territory, the company has made no move to respond to that competition by means of price changes. This is the case, even though, as Mr. Reynolds informed Chairwoman Showalter at the hearing, Qwest is losing market share in these exchanges. Tr. 311-312. In the words of Dr. Blackmon, "this is simply not the behavior of a firm that is facing effective competition." It is, however, behavior characteristic of a firm that retains market power.

E. Qwest Has Failed To Show It Does Not Provide Service To A Significant Captive Customer Base.

1. Small business customers are the most captive.

56. On this issue, as on others, Qwest has failed to carry its burden of proof. On the other hand, there is substantial evidence in the record to support a conclusion that many captive customers remain throughout the Washington service territory. Small business mass market customers are the most captive.

57. To provide an overall context, Exhibit 410 shows that 80 percent of incumbent carrier lines in Washington state are mass market lines. By contrast, less than 50 percent of CLEC lines

[12] In Docket UT-000883, Dr. Blackmon's analysis noted that Qwest had a range of options available to enable it to respond with flexibility to competition, including introduction of new services, offering promotions, winback incentives, banded rate tariffs, and lowering prices, and offering business service through its own CLEC. All of these options are still available to the company. Qwest's failure to lower prices has been discussed. Qwest also provided information in response to Public Counsel Record Request No. 3, Ex. 27, detailing its use of banded rate tariffs. While the exhibit shows that Qwest did file banded rate tariffs for some services, it also shows that, with a couple of exceptions, apparently for features, all the banded rate tariffs were cancelled at least a year ago.

serve the mass market. Exhibit 411C shows the percentage of total Qwest lines that consist of mass market[13] business customers on a wire center and statewide basis. By examining this exhibit, the Commission can compare the disparate percentages of small businesses in the many different local markets. The composition of exchanges on Ex. 411C with fewer than **[Begin Confidential] **** [End Confidential]** lines merits particular scrutiny.

58. Belfair Example: **[Begin Confidential] **[End Confidential]** percent of the **[Begin Confidential] *** [End Confidential]** Qwest business customers in Belfair are small business customers (three lines or less). Ex. 411C, p. 1. CLEC service is **[Begin Confidential] ****** ***************** [End Confidential]**, as shown on Ex. 232, line 7. For these **[Begin Confidential] ***** [End Confidential]** customers, CLEC-served **[Begin Confidential] ** [End Confidential].**

59. Green Bluff Example: **[Begin Confidential] **[End Confidential]** percent of the **[Begin Confidential] *** [End Confidential]** Qwest business customers in Green Bluff are small businesses (three lines or less). Ex. 411C, p.1. The average lines per location **[Begin Confidential] ** ****************************** [End Confidential]** Ex. 232, line 15.

60. These examples are consistent with the pattern that appears from the aggregate numbers in the record. Exhibit 412C shows that of Qwest's business line locations, **[Begin Confidential] **[End Confidential]** percent are associated with three or fewer lines, again corresponding with the FCC definition of mass market. The exhibit also shows that **[Begin Confidential] **************** [End Confidential]** Qwest lines are associated with mass market locations.

61. Exhibit 426C shows average lines per customer (location) for CLECs is **[Begin Confidential] **** [End Confidential]** lines. This exhibit is based on confidential Billed Telephone Number data provided by Qwest and on Staff's August 10 aggregation. Staff's more

[13] The FCC definition of mass market used in the local competition is a customer with three lines or less. Ex. 401T, p. 35, n. 59.

recent aggregation Exhibit 232C shows reporting CLECs serving **[Begin Confidential] *********************************** [End Confidential]**[14] for an average of **[Begin Confidential] ******* [End Confidential]** lines per location. For Qwest, the average lines per location is **[Begin Confidential] ***** [End Confidential]**.

62. Thus Qwest disproportionately serves the mass market. The data reflects that CLECs in general are providing service to larger customers, based on lines per location data. Significant numbers of customers remain captive to the incumbent. This conclusion is supported by the data on Table A showing neglible CLEC presence in a large number of exchanges, and in Table B showing minimal CLEC investment and high market shares

2. Public comment in this case overwhelmingly opposes the petition.

63. Exhibit 800 includes 264 public comments submitted to the Commission or to Public Counsel regarding this case. The overwhelming majority of those comments opposed Qwest's petition (233 or 88%). Of the 31 written comments supporting Qwest's petition, over half were submitted by Qwest employees. *See, e.g.*, Ex. 800, pp. 327-248. Of the public comments supporting Qwest's petition, either those made at the September 17, 2003 public hearing or submitted to the Commission in writing, only three (3) were from actual business customers, as opposed to Qwest employees, local Chambers of Commerce, Economic Development Corporations, or city officials. Ex. 800, p. 1; Tr. 574-580.

64. Organizations opposed to Qwest's petition include the Independent Business Association, which has about 4,800 members in Washington, the National Federation of Independent Businesses, which has about 15,000 members in Washington, the Neighborhood Business Council of Seattle, Roofing Contractors of Washington, the Washington Automotive Wholesalers Association, and the Washington Drywall Coalition, which represents

[14] Ex. 232, line 44. This calculation is an estimate. Staff has adjusted the **[Begin Confidential] ******* [End Confidential]** figure and now supports a figure of **[Begin Confidential] ******* [End Confidential]** for CLEC basic business lines. Ex. 225. Staff has not adjusted the location figures. **[Begin Confidential] ********* **
[End Confidential]

approximately 50 small businesses in the Puget Sound area and Spokane. (See Tr. Vol. IV, Public Hearing, pp. 591, 596, and 600)

65. A diverse range of business customers from all parts of Qwest's Washington service territory filed written comments opposing Qwest's petition. Businesses that oppose the petition include a construction company in Pasco, a chiropractic office in Centralia, a saw and supply shop in Aberdeen, real estate offices in Sequim and Federal Way, an auto parts store in Chehalis, a fireplace and patio shop in Olympia, a welding company in Spokane, an accounting firm in Bellevue, a professional support services company in Bellingham, an electrical supply distributor in Seattle, plumbing companies in Auburn and Spokane, a crane service company in Yakima, and roofing companies in Kent, Lakewood, Tacoma, and Seattle. Ex. 800.

Some examples of public comments are provided below.

> I have members in each of the 68 cities that Qwest currently serves. NFIB and its members are traditionally fierce defenders of the free enterprise system and, in most instances, favor less government regulation. This, however, is a rare instance where NFIB feels government oversight is necessary to protect the consumer from monopolistic practices and pricing.
>
> The entire case hinges on whether or not there is competition for local businesses in Qwest's service areas. The answer from my members is no. And furthermore, where there is alternative providers, most small business owners are not aware of the services and are not actively pursued by the competitors because they're too small and not to be bothered with.
>
> -- Mark Johnson, National Federation of Independent Businesses
> September 17, 2003 Public Hearing (Tr. 591-2)

> Today I'm representing the Washington Drywall Coalition, which is approximately 50 small businesses, mostly in Puget Sound area and Spokane, mostly drywall contractors, some drywall suppliers. And communicating with my membership on this issue over the last couple of weeks, they've all indicated that, in their locations, there is no competition. Even though they're in Puget Sound suburbia and Spokane, they tend to be outside of the urban cores or the city cores, in less dense areas, where competition has not found it economical to open up and go with the infrastructure or go after the business. They're basically captive of Qwest.
>
> -- Jim King, Washington Drywall Coalition,
> September 17, 2003 Public Hearing (Tr. 596)

I understand that the WUTC staff is recommending that you allow deregulation of Qwest business services.

It will harm countless small businesses in Washington if this is allowed, ours included. Qwest will be allowed to set their own pricing for business services and there will be no regulation of their charges. Deregulation is supposed to happen when there is significant competition in the local market. This competition does not exist in Washington. Qwest will be able to charge whatever they want and consumers will have no choice but the pay outrageous rates. (While they provide very poor customer service.)

-- Melody Ervin, UTEC Metals, Inc., Spokane. Ex. 800, p. 51.

I am opposed to any change in the status of business telephone service for Qwest in the state of Washington, for a couple of reasons; 1) I have no faith in the veracity of the statements they made to justify the change. Their track record for telling the truth to the public and/or government has not been too good lately and I don't trust their numbers they are too self-serving, and 2) there is just not enough competition in the telephone market place in Washington to insure that the telephone rates will not increase significantly. The business climate in Washington is dismal enough without adding to the burden with an increase in telephone rates.

-- Patrick Jackson, Realtor Associate, Home Realty, Sequim. Ex. 800, p. 91.

It is of great importance that you not deregulate business phone rates. We are a small business, struggling to keep our heads above water and stay in business. Yes, we only employ 38 people, but ours is the type of business that provides the largest numbers of jobs in today's economy.

Already our phone bills exceed several thousand's per month. Although I have tried, I have not been able to get service from other providers. The type of business we run requires a large amount of telephone equipment, time, and lines. With all of the taxes we must pay on phones services, increased rates would be the last straw. We are already facing great pressure from offshore companies, performing work over the Internet.

-- Michael Hastings, Medical Transcription Associates, Inc., Auburn. Id. p. 54.

As a small businessman I urge you to deny the request by Qwest for deregulation. All one has to do is follow the news and the downsides of deregulation become painfully apparent. There is certainly not enough competition in this area to allow the deregulation of business telephone rates.

-- Robin K. Mullins, 4th Corner Networks, Inc., Bellingham. Id., p. 69.

Deregulation is not a bad thing. But deregulation in the market place should only be introduced when there is substantial competition in the market to support deregulation. If true competition is not present then conditions exist for one business to dominate and maintain a monopolistic stranglehold on the market. This is not how we do business in America.

The current conditions in the marketplace in Washington do not support deregulating business local phone services for Qwest. First, Qwest does not have substantial competition statewide. In fact there are places in the state where they have no competition at all. Second, allowing Qwest to set their own pricing when they have no significant competition will hurt small businesses as many will have no choice but to pay Qwest's increased fees for services. This is not the way to spur economic progress!

I strongly urge you to consider carefully the final outcome of deregulation for Qwest. The decision you will be making will have a long lasting impact on our state and particularly on small businesses in our state. We need you to reject this proposal until true competition exists.

-- E. Levesque, Tacoma. Id., p. 100.

If deregulation of basic business local services is allowed, it will harm countless small businesses in Washington. Deregulation will authorize Qwest to set their own pricing for business services throughout the state, and you will no longer regulate what Qwest can charge customers. This is wrong. Deregulation is only supposed to happen when significant competition in the local phone service market exists. It does not exist in Washington statewide.

-- Donald Phelps, Kent. Id., p. 103.

As a small business owner in Washington state, I have seen my cost of doing business go up year after year with rising Worker's Compensation rates, Unemployment Insurance rate hikes, etc. If Qwest is allowed to deregulate its small business phone service, that would be one more cost increase to my business budget, that is already stretched to its limit

In most areas, Qwest is the only option for business phone service and until there is ample competition I fear that instead of pricing services based on a truly competitive basis, Qwest would be free to set rates that are significantly higher than what they are now, without the choice to switch providers.

Phone service is the life-blood of small business in Washington state and we need to keep it affordable. I kindly request that you deny Qwest's petition (UT-030614) to deregulate small business phone service in Washington state.

-- David Ward, Affordable Solutions (location not identified). Id., p. 174.

F. PBX, Centrex and Features.

66. Another problem with Qwest's petition is the fact that it groups together basic business service, PBX, and Centrex into one product market, although these are products which attract

significantly different levels of competitive interest. In general, the arguments made in this brief apply not only to basic business service but also to PBX and Centrex.

67. Qwest's restriction of the product market definition to analog services only is as flawed for PBX and Centrex as it is for basic business service. Qwest provides both digital and analog PBX service to its customers. The potential confusion between analog and digital PBX provisioning was explored during Mr. Reynold's cross examination. Tr. 203.

68. The extent to which services are available from alternative providers varies significantly as between PBX, Centrex and basic business service. Staff's PBX Exhibit 204C, p.3, indicates that the large majority of PBX service is provided in the **[Begin Confidential] ******* [End Confidential]** exchanges.

69. Staff's Centrex data, Exhibit 204C, p. 4, shows very low volumes of Centrex service through the service territory, with **[Begin Confidential] ********* [End Confidential]** the lines in the **[Begin Confidential] *** [End Confidential]** grouping which includes **[Begin Confidential] *******[End Confidential]**. In total, CLECs only have about **[Begin Confidential] *********[End Confidential]** of the Centrex market in Washington. Ex 470C; Ex. 201T (September 12, 2003, revision to page 14).

70. The consumer demand for features, shown in Qwest's confidential response to PC-2-3, viewed in tandem with the rates for these services, provided on its web site demonstrates that Qwest is able to extract monopoly rents from business local exchange service customers.[15] Confidential Exhibit SMB-420C includes customer demand data for 1999 through 2002 for selected features, and also shows the change in demand for feature expressed on a per-line basis. Were there effective competition for these features, one would expect the rates to decline toward their incremental cost.

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[15] http://tariffs.uswest.com:8000/docs/TARIFFS/Washington/WAET/wa_e_t_s005p081.pdf#USW-TOC000003, visited July 30, 2003. WN U-40, Exchange and Network Services, Washington, Section 5.4.3, Custom Calling Services.

V. OTHER ISSUES

A. Impact of Other Dockets.

71. The Triennial Review impairment docket, UT 033044, the pending cost dockets at the WUTC, and the FCC's TELRIC proceeding all introduce significant elements of uncertainty into the Washington telecommunications market. The outcome of the proceedings poses a high likelihood that the market will change in important ways, as will the factual underpinnings upon which a decision to allow competitive classification would be based. While it is true that a certain amount of change in the regulatory environment is a given, the confluence of these proceedings at the same time, and their direct bearing on the competitive position of Qwest and the CLECs, make this is an extremely risky time to introduce a dramatic shift in the marketplace.

72. It is especially paradoxical that the availability of UNE-P is under attack by Qwest in UT 033044 at the same time as it relies upon the existence of UNE-P based entry in this docket to demonstrate that the market is competitive. A finding by the Commission in this docket that competition is effectively present, based on evidence of UNE-P entry, will place the Commission in a difficult position a few months from now when, in Docket UT-033044, it must decide whether to eliminate UNE-P.

B. Cost Floor.

73. Public Counsel did not devote extensive testimony and will defer to other intervenors to address this issue. Public Counsel shares the concern that if the level of the price floor is uncertain, Qwest will have the ability to lower cost strategically to drive out competition and to raise prices again once competitors have abandoned the market.

C. Access Charges.

74. The issue of access charge pricing is beyond the scope of this proceeding. The Commission has adequate evidence before it to deny the Qwest petition.

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D. Proposed Conditions On Approval.

75. As a general proposition, Public Counsel opposes adoption of conditions in a competitive classification proceeding to the extent that they are an attempt to mitigate a failure to adequately meet the statutory requirements. In Docket UT-000883, for example, Staff proposed that the Commission "impose conditions to protect small customers in order to satisfy the statute's requirement that the service not be provided to a significant captive customer base." Seventh Supplemental Order, ¶ 71. The Commission declined to do so, holding:

> [B]efore we can classify a service as competitive or impose conditions on the provision of that service, the statute requires us first to find that the service "is not" provided to a significant captive customer base. Reasonable though the concept may be, we do not believe the statute permits us to impose future conditions to eliminate the significance of what currently is a captive customer base. Id.

VI. CONCLUSION

76. For the foregoing reasons, Qwest' petition fails to establish effective competition and should be denied. Even if the Commission concludes that effective competition has been shown, or shown to be present in some but not all exchanges, the petition should be denied on public interest grounds, given the substantial uncertainties about the the future of the local business telecommunications market in Washington.

DATED this 28th day of October, 2003.

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