

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

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

REDACTED VERSION

AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively “AT&T”) hereby submit their Reply Brief in the above-captioned proceeding.

INTRODUCTION

In Qwest Corporation’s (“Qwest”) Opening Brief it disparages the Competitive Local Exchange Carriers’ (“CLECs”) concerns as “self-serving,”¹ “absurd,”² and “sheer hypocrisy;”³ it also accuses CLECs of engaging in a conspiracy to “inject both confusion and delay into this proceeding.”⁴ It’s fair to say that Qwest does not appreciate that others find fault with its arguments and evidence. But simply because Qwest would ignore the CLECs concerns, this Commission should not. Instead, AT&T requests that the Commission carefully consider the CLEC concerns as genuine because it is the CLECs alone that compete for every single customer they acquire; it is the CLECs alone that know—through experience—the difficulties of market entry and exit; and it is the CLECs alone that have accepted the risks inherent in competing with a market dominant,

¹ Qwest Opening Brief at 21, ¶ 54.

² *Id.*

³ *Id.* at 23, ¶ 58.

⁴ *Id.* at 6, ¶ 14.

former-monopolist that sits as the chief supplier of many of the necessary inputs to compete with it.

The Commission should consider the quality of the evidence offered in this proceeding in support of Qwest's petition, and it should determine for itself, whether Staff's reliance upon it is prudent. It should also determine for itself whether the data that Staff was able to collect actually portrays the story Staff believes. AT&T suggests that careful analysis may cause the Commission some concern such that it cannot grant Qwest the relief it seeks in this proceeding based upon evidence placed before it.

DISCUSSION

In this Reply Brief, AT&T will address Qwest and Staff's assertions regarding the relevant market definition, the quality of the CLEC data, including Staff's analysis thereof and the imposition of a potential price floor as a condition to Qwest's receiving competitive classification.

I. RELEVANT MARKET DEFINITION

A. Product Market

For purposes of defining the product market, Qwest attempted to separate its basic business services into those provisioned using analog signals and those provisioned using digital signals.⁵ In its brief, Qwest claims that its analog versus digital distinction is "logical given that markets are defined on the demand side – by customer demand for service."⁶ The evidence, however, seems to be to the contrary, customers don't demand

⁵ Transcript Vol. III at 111, lns. 14 – 25 (describing the analog signal sent to the customer premises equipment as determinative of the distinction between analog and digital services).

⁶ Qwest Opening Brief at 5, ¶ 12.

analog versus digital service; rather, they demand basic business services.⁷ They simply want to call each other.⁸ In fact, the evidence revealed that digital and analog services are inextricably linked.⁹ Moreover, the evidence also revealed that many digital services compete with similarly functioning analog services.¹⁰ Thus, Qwest's unusual distinction is an artificial one at best that utterly confused the product definition, not to mention the data gathering process.¹¹

Moreover, the data actually analyzed by Staff and Qwest, when examining market share, market power and competitive "in-roads" either across the entire territory or by exchange or by wire center was line count information, not the analog-provisioned, basic business services described in Qwest's Exhibit 2 to Mr. Reynolds' direct testimony.¹² The only information one can reasonably glean from line count material is that some, but certainly not all, of the services flowing over such lines *might* be analog, provisioned basic business services as defined in this proceeding.¹³ Beyond that, Qwest and Staff engage in pure speculation with regard to what is actually purchased by the CLEC customers being served over the lines in question.

⁷ Transcript Vol. VI at 1139, lns. 13 – 22; Transcript Vol. V at 843, ln. 23 – 844, ln. 4 (describing the type of business services typically sought by small business customers as being a mix of voice and data services offered over a variety of, usually digital, platforms).

⁸ Transcript Vol. VII at 1326, ln. 24 – 1327, ln. 5.

⁹ *Id.* at 1326, lns. 8-17; Transcript Vol. I at 117, ln. X – 118, ln. X (describing Qwest's difficulty in making the distinction among its own services); *In the Matter of the Petition of Qwest Corp. for Competitive Classification of Business Service in Specified Wire Centers*, Seventh Supplemental Order Denying Petition and Accepting Staff's Proposal, Docket No. UT-000883 (Qwest seeks relief for the same services in this docket as well as the pending docket) (hereinafter "Docket 000883"); Qwest Opening Brief at 5, ¶ 13 (admitting the services in Docket No. Ut-000883 are identical to those services here); Bench Request No. 5 (describing Qwest's own failure to extract its digital services from its analog services).

¹⁰ Transcript Vol. I. at 179, ln. X.

¹¹ Transcript Vol. VI at 1137, ln. 25 (noting that MCI overstated its line count by approximately 80 % by providing analog and digital services in response to Order No. 6 requests for information).

¹² *See e.g.*, Exhibits 51T, 53C, 55C, 204C, 205C, 208 and 209C.

¹³ Even though some CLECs were asked to identify analog versus basic business services no definition was given to make such a distinction and, at least in the case of AT&T, it could not—with respect to many lines—determine whether the services were analog or digital. *See*, AT&T's Highly Confidential Restated Responses.

And whether one considers the product definition too narrow or too broad¹⁴ is of no moment. The problem—as manifest throughout this proceeding—is that the product definition is insufficiently concise such that it impedes the Commission’s ability to judge the confusing data and make any determination based thereon that a reviewing court would not find arbitrary and capricious. Thus, the Commission should deny the competitive classification request and simply send Qwest back to the drawing board to precisely define its product market and try again.

B. Geographic Market

In its brief, Qwest looks to Commission-precedent to summarily conclude its “statewide [geographic] market definition is perfectly appropriate.”¹⁵ The difficulty with such a conclusion is that, while recognizing that statewide geographic definitions may be appropriate with respect to some products (*e.g.*, statewide long distance offerings), it is not appropriate with respect all products (*e.g.*, local business services offered only in the metropolitan exchanges). That is, a basic business customer in Elk may not purchase local service from a CLEC serving only the exchanges in Seattle. And if no CLEC serves Elk, then Qwest remains the monopolist in that exchange. In contrast, for example, AT&T’s long distance service is uniformly available across the entire Qwest serving territory.

Furthermore, pointing to CLEC national web sites¹⁶ that reference business service does not prove that such CLECs offer analog-provisioned, basic business services

¹⁴ Qwest Opening Brief at 6, ¶ 15 (complaining that Public Counsel says the product market definition is too broad while MCI, Integra, WeBTEC and ATG say the definition is too narrow).

¹⁵ Qwest Opening Brief at 7, ¶ 19.

¹⁶ *Id.* at 12, ¶ 30; *cf.* Transcript Vol. VI at 1142, ln. 6 – 1143, ln. 10 (describing the general requirement to “click on” the state specific material to determine what services are available); Transcript Vol. V at 853, lns. 17 – 24 (describing the requirement to “drill down into the web site” to discovery the offerings unique to each geographic market).

even in the State of Washington, let alone in the various exchanges throughout the State. Nor does reference to CLEC annual reports or other investor statements suggest any service, let alone statewide service, is available in the State of Washington.¹⁷

Finally, Qwest suggests that because CLEC tariffs or price lists allege they will serve customer “where facilities are available” means where Qwest’s facilities are available is utterly unproven speculation on Qwest’s part. And it is an enormous leap in logic to assume that means CLECs are actually willing to serve customers in all four corners of the State. AT&T knows of no CLEC, nor is there evidence in this proceeding, proving that CLECs base their service offerings in any given territory on Qwest’s facilities alone.¹⁸ Rather, decisions to serve customers in this State are consistent with the considerations described in the testimony of Mr. Slater:

Q. [by Ms. Anderl] What business considerations drive the decision to offer customer service through total service resale as opposed to UNE-P or UNE-L?

A. There’s really two considerations from Integra’s perspective, and they are service, which is a strategic consideration and cost, which is you know, clearly an economic consideration.¹⁹

Likewise, Staff confirmed in its discussions with a CLEC that to just serve Seattle, the CLEC considered whether it was legal, technically feasible and economical.²⁰ Mr. Slater went on to confirm that CLEC facilities are limited both economically and technically in their ability to reach all customers in the State; he said:

¹⁷ Transcript Vol. VI at 980, ln. 8 – 986, ln. 10; Transcript Vol. V at 846, 6 – 847, ln. 10.

¹⁸ Transcript Vol. VI at 973, ln. 2 – 974, ln. 1 (In its brief, Qwest relied upon witness speculation—not evidence to make its assertion. (Qwest Opening Brief at 11, ¶ 28) There Qwest engaged in cross examination of a witness, clearly not competent to testify regarding the line of questioning, and the witness’ speculation that the line “where facilities are available means where Qwest’s *and* the CLECs’ facilities are available. Hence, most courts would reject such statements as proof of anything.); *but cf.*, Transcript Vol. V at 849, ln. 2 - 850, ln. 19 (describing Integra’s reliance on its own facilities and minimal reliance upon Qwest’s facilities).

¹⁹ *Id.* at 851, lns. 6 – 12.

²⁰ Transcript Vol. VII at 1328, lns. 7 – 16.

Q. What geographic area can be served by Integra's switch?

A. I don't know the answer to that question from a switching perspective. From a practical perspective, our geographic service area is limited by where we're collocated.

Q. So if you were collocated in every central office, every Qwest central office in the state of Washington, could your switch serve every central office or could your switch serve the entire geographic territory that is Qwest's serving area in Washington?

A. I would not be comfortable collocating in the four corners of Washington and serving it from a single switch in Kent, no.

Q. Why not?

A. Mostly for economic reasons, although I suspect there's technical limitations.²¹

The colloquy between Ms. Anderl and Mr. Slater, along with Staff's discussions, demonstrates that CLEC's desire and service to any given customers in any given geographic area comes down to decisions based upon legality, cost and technical feasibility, not the existence of Qwest's facilities. Thus, the CLEC often only provides service where it has a "footprint."²² That said, the mere potential availability of Qwest facilities for resale or UNE-P provisioning of competitive service does not prove that CLECs offer analog-provisioned, basic business service throughout Qwest's entire service territory. Rather, it demonstrates that the choice of Qwest's entire service territory as the geographic market is not an appropriate choice for the services under consideration.

²¹ Transcript Vol. V 848, ln. 16 – 849, ln. 7.

²² Transcript Vol. V. 858, lns. 1 – 4.

II. QWEST DATA, CLEC DATA & STAFF'S ANALYSIS

From both Qwest and Staff's perspective, the wholesale information provided by Qwest is sufficient for the Commission to approve the petition.²³ As described in AT&T's initial brief and the testimony of many witnesses, however, the wholesale information has inherent limitations in its ability to prove that Qwest faces effective competition for analog-provisioned, basic business services throughout its entire territory. These limitations make it particularly difficult for the Commission to base a legally sound decision upon such data. Moreover, the potential absence of a large percentage of the wholesale data (UNE-P) which allegedly shows competition—effective or not—would dramatically alter the foundation upon which Qwest's petition would have been granted. AT&T asks that the Commission carefully consider the inherent difficulties with the wholesale data, the Staff collected data and the potential loss of UNE-P, when making any decisions based upon such material.

A. Inherent Difficulties in Assessing Qwest's Data

The data attached to Qwest's petition is data related to speculation about what the number of registered CLECs means, what the number of interconnection agreements ("ICAs") means, what the CLEC price lists or tariffs prove and what the CLEC line counts prove. Contrary to Staff's claim, for example, that Exhibit 55C shows "CLECs providing basic business exchange access lines through wholesale inputs,"²⁴ this Exhibit is only Qwest's speculation that the access lines to which it points are indeed used for business services and not administrative needs and that the services offered over those

²³ See e.g., Staff Opening Brief at 17 – 18.

²⁴ Staff Opening Brief at 17, ¶ 43.

lines is actually analog-provisioned, basic business services consistent with the services described in Mr. Reynold's Exhibit 2.

Staff claims also, that Exhibit 55C provides the Commission with information “about the size, as well as the number, of competitors using wholesale inputs because the information shows the number of lines provided by each company by exchange.”²⁵ Line counts, by exchange, show only that: line counts, acquired by resale, UNE-L and UNE-P, distributed over exchanges. They do not reveal the actual size or total number of competitors; they reveal only that the lines acquired by some competitors via resale, UNE-L and UNE-P exist in some exchanges to a greater extent than in other exchanges. Both Staff and Qwest read more into this data than is actually revealed by it.

B. Inherent Difficulties in Separating Analog From Digital Services

Although Qwest accuses the CLECs of injecting confusion into the proceeding,²⁶ clearly the analog/digital distinction is what caused the problem. Without requesting or defining any distinctions between analog and digital services Staff—through Commission Order No. 6—requested that some 200 CLECs provide information on “basic business, PBX and Centrex services.”²⁷ It's fair to say that the majority of these CLECs provided no or little useful information. Those that did provide useful information provided it in such a way that Staff had to attempt on its own to separate digital from analog services.²⁸ Staff did not use the definition of analog services provided by Mr. Reynolds at hearing.²⁹

After Mr. Reynolds revealed his definition of analog service, the CLECs upon whose data Staff largely relied restated their responses to Order No. 6, which among

²⁵ *Id.* at 17, ¶ 19.

²⁶ Qwest Opening Brief at 6, ¶ 14.

²⁷ Staff Opening Brief at 18, ¶ 44.

²⁸ Transcript Vol. IV at 616, ln. 17 – 617, ln. 12.

²⁹ *Id.*

other things, meant that Staff’s original analysis was unreliable. In addition to the CLECs restating their data, Qwest itself failed to adequately separate its digital and analog services.³⁰ And where CLECs cannot tell by merely looking at for example UNE-L or special access lines whether those lines are used for analog or digital services, Staff essentially guessed.³¹ Furthermore, by Qwest’s own admission, many of its alleged “analog” services in this proceeding are identical to those covered in its previous petition.³² Not only is the analog/digital distinction difficult to accomplish, but it appears to make this petition largely unmanageable and the Commission’s reliance upon the data unsustainable.

C. What the Staff-Collected Data Actually Reveals and Analysis of Such Data

Staff alleges “the data collected offers a representative sample of the market and supports approval of Qwest’s petition.”³³ The Staff collected data, however, offers a representative snapshot of the number of CLEC lines that may or may not be used to provision competing analog-provisioned, basic business services in some exchanges in Washington. It bears little to no relation to the services described in Mr. Reynold’s Exhibit 2.³⁴ Building assumptions into what the line counts mean does not create an evidentiary basis upon which a finding of effective competition may be made.

Staff, while recognizing the difficulty, really failed to address the difficulty created by drawing the distinction between analog and digital services. By assuming that services for PBXs or other such business services were analog, Staff’s analysis contained

³⁰ Response to Bench Request No. 5.

³¹ Transcript Vol. VII at 1369 - 1368 (compare for inaccuracy Mr. Wilson’s testimony to the highly confidential responses provided by the CLECs).

³² Qwest Opening Brief at 5, n. 5.

³³ Staff Opening Brief at 18, ¶ 45.

³⁴ Transcript Vol. VII at 1320, ln. 20 – 1323, ln. 2 (admitting that Staff did not determine whether CLECs offered the services listed on Exhibit 2 in any of the wire centers).

built-in fallacies. This was confirmed on the stand by Mr. Slater; he stated in response to just such an assumption the following:

Q. [by Ms. Anderl] Would that, if a basic business line were being used for that service then as a trunk for a key system or a PBX, would that correctly be described as an analog PBX trunk?

A. I would not draw that conclusion, no.³⁵

Thus, it appears that what Staff actually analyzed is line counts for some form of business services offered in this State to varying degrees in various exchanges and wire centers. Such analysis will not support a Commission decision in this proceeding.

D. Loss of the UNE-P Data Point Relied Upon

Qwest suggests in its brief that the Commission need not delay deciding the issues in this proceeding because, among other things, “the Triennial Review relates to the structure of the wholesale market, not the retail market that is the subject of this case.”³⁶ Given that Qwest relies upon the number of lines sold in the wholesale market upon which to base its claim that effective competition exists, AT&T would suggest that this case does relate to both the retail and wholesale markets in this State. And in fact, Qwest’s petition is wholly dependent upon the success of the wholesale market, with 100 % of the competition that Qwest points to being provisioned using resale, UNE-L or UNE-P and almost **CONFIDENTIAL XXXX END CONFIDENTIAL** of that competition being provisioned over UNE-P alone.

In addition to the weak attempt to distinguish the proceedings, Qwest also claims that if the Commission finds in the mass market, switching phase (*i.e.*, the phase that could spell the end of UNE-P) of the Triennial Review, that there is no impairment, then

³⁵ Transcript at Vol. V at 856, lns. 10 – 14.

³⁶ Qwest Opening Brief at 40, ¶ 94.

CLECs would presumably have other alternatives to Qwest's switching and they would have 27 months to move to those alternatives.³⁷ Again, Qwest's suggestions do not square with the testimony in this proceeding. That is, the CLECs that do not own switches, and even those that do, would have to determine whether it made legal, economic and technical sense to continue to provide or start providing service if the Commission removed the UNE-P alternative. Not only would those CLECs have to obtain switches they would also have to collocate in the many wire centers to pick up the loops of those customers they wanted to continue to serve.³⁸ Given that CLEC market share is minimal in some exchanges, and where it does exist, if it is provisioned largely by UNE-P, then the Commission can expect to see CLECs pulling out of the market if they are not in a position to invest the capital necessary to continue serving those small business customers. That said, the Commission would be well advised to delay this proceeding or deny the petition pending the outcome of the Triennial Review proceeding.

III. PRICE FLOORS AS A CONDITION

Price floors ensure that Qwest does not price its basic business services below that which the CLECs cannot compete. For the reasons discussed below, AT&T suggests that the Commission seriously consider whether it is prudent to grant Qwest the relief it seeks without protecting the nascent competition from extinction if Qwest engages in predatory pricing, which is more likely than not if Qwest can discriminate between various exchanges in the rates it charges for the same business services.

³⁷ *Id.* at 41 - 42, ¶ 94.

³⁸ Transcript Vol. V at 848, ln.18 – 849, ln. 4.

A. Price Floors Protect Competition and the Issue is Squarely Before the Commission in this Proceeding

In its brief, Qwest argues that the Commission need not establish price floors because (1) the issue is allegedly not squarely before the Commission and (2) there are already adequate safeguards in place to address pricing below cost.³⁹ Turning to the first claim, Qwest is incorrect in suggesting that price floors are not squarely before the Commission in this proceeding. The concern over price floors is discussed in the testimony of Mr. Stacy,⁴⁰ in the testimony of Mr. Cowan,⁴¹ and in the testimony of Mr. Wilson.⁴² Thus, the issue is properly before the Commission. Whether the Commission determines in this proceeding or an adjunct proceeding what those price floors ought to be, does not mean that the issue is not properly before the Commission or that the Commission cannot order price floors as a condition precedent to Qwest receiving the relief it seeks.

Turning to the second issue, the alleged adequate safeguards are, in the mind of Staff at least, federal anti-trust law and a State statute prohibiting pricing below costs. Qwest may only be referring to the pricing below cost statute. Either way, neither provides the protection necessary to maintain competition in the Washington market. In fact, it was quite clear that Staff—at least—had no idea how to monitor, let alone enforce, pricing below cost or what such investigation would entail, but it did suggest that CLECs

³⁹ Qwest Opening Brief at 42, ¶ 98.

⁴⁰ Exhibit 601T, Stacy Direct Testimony at 8 – 21 (discussed floors in the context of price squeeze and describing how to set them properly).

⁴¹ Exhibit 701T, Cowan Direct Testimony at 19 (expressly asking that the Commission establish price floors).

⁴² Exhibit 210T, Wilson Rebuttal Testimony at 3(discussing TELRIC as a price floor below which Qwest should not be allowed to go).

could file complaints.⁴³ Presumably Staff is the entity that would monitor Qwest for pricing below cost, and the evidence reveals that it is ill-prepared to do that.

Moreover, at least one CLEC described the practical impact of expecting CLECs to bring complaints for after-the-fact violations by Qwest; Mr. Slater said:

Q. [by Ms. Anderl] If the Washington statutes governing this petition preserved the relationship between Qwest wholesale and retail rates, would that address your concern that you expressed in your testimony⁷ here?

A. No, it really would not address my concern because in that example where somebody might show me some regulations that give me confident that it wouldn't -- that were Qwest to exercise its monopoly advantages by owning all the local loops in the areas where Qwest serves, that I would have a remedy available to me in the form of initiating a proceeding, prosecuting a proceeding, and presumably being victorious in enforcing rules against Qwest. I have very little comfort in that for two reasons.

One is in my judgment as the Chief Executive Officer, the horse is already out of the barn. In my opinion the market moves much faster than, with all due respect, the regulatory process would. And secondly, as I stated earlier, my assessment of the issues around here both relate to perceived risks as well as actual actions taken by Qwest

And the reason I have to do that from a practical standpoint is I found that in running a startup company that relies upon private equity investors and banks, and they are very sensitive to the risks related to this industry and the markets in which I compete, and I have to be responsive to those sensitivities and those risks. And I don't believe the regulatory remedy that you're describing as potentially available adequately addresses those risks.⁴⁴

Thus, the fact that CLECs may have a remedy after they discover Qwest has cheated, places the burden on the CLECs to monitor Qwest's multiple pricing strategies and suffer harm before the predatory pricing is stopped. Moreover, if Staff is only monitoring Qwest's conduct by ensuring it prices its services at TELRIC, then Staff is allowing

⁴³ Transcript Vol. VII at 1347, ln. 12 – 1351, ln. 21.

⁴⁴ Transcript Vol. V at 867, ln. 9 – 868, ln. 12.

CLECs to suffer a price squeeze and unrealistically expecting CLECs to survive such conduct. In short, Qwest, by getting the relief it seeks without some realistic price floor determination will be able to act on the very incentives that drive it to maximize its profits for shareholder gain and kill the competition.⁴⁵ Is this the environment this Commission really wants to leave the CLECs and consumers? Probably not. Therefore, the Commission should reject Qwest's petition unless it agrees to comply with Commission-determined price floors.

CONCLUSION

For the foregoing reasons, AT&T respectfully suggests that the Commission deny Qwest's petition or alternatively condition its grant upon Qwest's acceptance of the conditions proposed by AT&T.

Submitted this 7th day of November, 2003.

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

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⁴⁵ Exhibit 601T, Stacy Direct Testimony at 17, Ins. 410 – 425.