

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

THE UNITED STATES DEPARTMENT  
OF DEFENSE AND ALL OTHER  
FEDERAL EXECUTIVE AGENCIES'

REPLY BRIEF

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The Secretary of Defense, through duly authorized counsel, on behalf of the customer interests of the United States Department of Defense and All Other Federal Executive Agencies (collectively referred to herein as "DoD/FEA"), hereby submits its Reply Brief in the above-captioned proceeding. In our Initial Brief filed on October 28, 2003, DoD/FEA recommended that the Washington Utilities and Transportation Commission ("the Commission") deny the petition filed by Qwest Corporation ("Qwest") on May 1, 2003 ("the Petition"), in which it seeks reclassification of its analog basic business exchange telecommunications services throughout the state as competitive, pursuant to RCW 80.36.330 and WAC 480-121-062. We have reviewed the briefs filed by other parties in this proceeding, and find no reason to change that recommendation.

The record in this proceeding contains extensive testimony and exhibits, which the parties have addressed in detail in their briefs. DoD/FEA does not want to burden this voluminous record with a repetition of analysis found elsewhere. We wish to point out, however, that there are significant differences between the positions of Qwest and Staff, on the one hand, and all other parties on a crucial issue – the definition of the

relevant market. The parties agree that the relevant market encompasses both the product market and the geographic market. Beyond that, Qwest and Staff take a position fundamentally at odds with the other parties, and contrary to positions of the Commission, the Federal Communications Commission ("FCC") and other state commissions.

Staff maintains that the relevant product market is all analog services that provide business customers with connectivity to the network for switched, voice-grade communications.<sup>1</sup> In their view, one should not, when defining the relevant product market, look to customer characteristics unless it appears that there is discrimination against a particular type of customer.<sup>2</sup> Thus, Staff disagrees with testimony that small businesses customers constitute a separate market.<sup>3</sup>

DoD/FEA will not address whether Staff's market definition analysis would be upheld in an antitrust proceeding involving the Horizontal Merger Guidelines. Whatever relevance those guidelines have in an antitrust context, it is clear that regulatory agencies, in the context of addressing competition for local exchange service, **have** looked to customer characteristics and thus defined a product market considered to be small business. This Commission acknowledged such a group in the *2000 Reclassification Order*.<sup>4</sup> As pointed out in DoD/FEA's letter asking the Commission to convene a public hearing on the Petition, New Jersey's reclassification of business exchange service had a threshold exempting customers with three or fewer lines, while Pennsylvania looked to

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<sup>1</sup> Commission Staff's Opening Brief, p. 9 ("Staff Brief").

<sup>2</sup> *Id.*, p. 13, citing the Department of Justice Horizontal Merger Guidelines.

<sup>3</sup> *Id.*

<sup>4</sup> Petition of Qwest Corporation for Competitive Classification of Business Service in Specified Wire Centers, *Seventh Supplemental Order Denying Petition and Accepting Staff's Proposal*, Docket No. UT-000883 (released December 21, 2000) ("*2000 Reclassification Order*"). The Commission's threshold for reclassification was service on DS-1 circuits.

revenues for the reclassification threshold.<sup>5</sup> When the FCC initially adopted rules implementing the Telecommunications Act of 1996, it used four lines as the demarcation point associated with the requirement that incumbent local exchange carriers offer local switching as an unbundled network element in certain markets.<sup>6</sup> More recently, the FCC, in the *Triennial Review Order*, discussed product market and customer characteristics at length and adopted differing rules for customers according to their usage characteristics.<sup>7</sup> In short, use of a threshold to differentiate between business customer classes in connection with local service regulation is well established and essential to ensure that small business customers are included as recipients of the benefits of competition and are not adversely impacted by competition.

The Staff discusses no precedent to support or distinguish its position on product market, relying entirely on the Horizontal Merger Guidelines. Thus, it criticizes Public Counsel witness Baldwin for not accepting its "orthodoxy" in this regard.<sup>8</sup> It is in fact the Staff that has ignored considerable precedent as to the relevant product market, and has departed from even its own concern in Docket No. UT-000883 that small business customers must be accorded specific safeguards should reclassification be granted.

In his testimony, Staff witness Wilson employed a single product market but nevertheless divided total business lines into three categories: Basic Business, PBX and

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<sup>5</sup> Letter from Stephen S. Melnikoff, Counsel for DoD/FEA, to the Commission's Secretary, May 27, 2003, p. 2, n. 4.

<sup>6</sup> Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth FNPRM*, 15 FCC Rcd 3696 (1999). See former 47 CFR §51.319(c)(2).

<sup>7</sup> Review of the Section 251 Unbundling Obligations of Local Exchange Carriers, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36 (released Aug. 21, 2003) ("*Triennial Review Order*"). Likewise, as we noted in our Initial Brief, the FCC's semi-annual reports concerning the implementation of local competition aggregate small business and residential customers into one category, with larger business customers (those with four or more access lines) placed in a separate reporting category. DoD/FEA Initial Brief, p. 12.

<sup>8</sup> Staff Brief, p. 13.

Centrex.<sup>9</sup> The Staff's Brief mentions these three categories in its discussion of the product market, but it is not clear what significance, if any, they have concerning Staff's recommendation.<sup>10</sup> What is clear, however, is the fact that the Qwest share of the Centrex "market" is extremely high, and if the Commission considers Staff's categories to have meaning in the context of a product market, that fact must be acknowledged. (In its brief discussing that analysis, Qwest obscures its high Centrex share by combining PBX and Centrex lines, thus changing the Staff's breakdown into two, not three, categories.)<sup>11</sup>

The Staff's "analysis" of the geographic market is even less refined. After acknowledging that in the past two Qwest proceedings involving reclassification of exchange service the market was exchanges or wire centers, not the entire state, the Staff explains its crucial position that the entire state is the relevant geographic market here in nine lines of text.<sup>12</sup> It cites as support that "CLECs are providing services in competition with Qwest ubiquitously throughout Qwest's wire centers."<sup>13</sup> What constitutes "ubiquitous" provision of service is open to disagreement. DoD/FEA's review of the CLEC presence, as contained in Staff's exhibits, confirms that the measure of the aggregate CLEC presence in the exchanges and wire centers is so widely varied that reference to a statewide market is meaningless. Many wire centers or groups of centers have no CLEC services provided using CLEC-owned facilities.<sup>14</sup> For a reasoned

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<sup>9</sup> Ex. 201T, p. 14.

<sup>10</sup> Staff Brief, p. 16.

<sup>11</sup> Qwest's Opening Brief, p. 30. Qwest refers to the categories as "market segments." *Id.*

<sup>12</sup> Staff Brief, p. 16. Qwest also lists 12 reclassification proceedings that used a statewide geographic market, but it is obvious that all of those proceedings did not involve local exchange service. Qwest's Opening Brief, p. 8.

<sup>13</sup> Staff Brief, p. 16.

<sup>14</sup> Ex. 205C. The Staff counters the marked absence of CLECs providing services in whole or in part using their own facilities in many areas by noting the presence of CLECs using UNE-P. Staff Brief, p. 16. The Commission now has under consideration a Qwest petition seeking elimination of UNE-P, but Staff asserts, inconsistent with its reliance on UNE-P as a statewide indicator of competition, that elimination of UNE-P

resolution of this proceeding, the Commission should look closely at the data. The Commission will conclude from that review that reclassification requires a more granular geographic market.

As we noted in our Initial Brief, the impact of the use of inappropriately-defined and broad product and geographic markets masks the ability to analyze and determine whether there is a captive customer base and, thus, whether “effective competition” exists. The flaws in the analyses and recommendations of Qwest and Staff for defining the product and geographic markets mandate that the Commission deny the Petition. Without determination of a proper relevant market, no findings with any degree of reasonable certainty can be made under the statutory criteria. The lack of data also precludes the Commission from partially granting the Petition.

Respectfully Submitted,

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would not affect its decision in this proceeding. Staff Brief, p. 38. Staff also fails to recognize that the FCC has directed the states **not** to define the market as the entire state when considering the elimination of mass market UNE switching. *Triennial Review Order*, para. 495.