BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

NON-CONFIDENTIAL VERSION

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

TABLE OF CONTENTS

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

I. INTRODUCTION

1 In its opening brief, Qwest recounted that the opponents in this case have focused less on rebutting Qwest's and Staff's extensive evidence of competition and more on creating confusion, distracting the Commission from the core issues at hand, seeking delay, engaging in fear tactics and urging the Commission to adopt onerous standards and thresholds. *Qwest Brief, at ¶ 2.* The opening briefs filed by the opponents continued in this pattern.

2 The opponents to Qwest's petition have not offered the Commission compelling evidence or argument that should lead the Commission to deny Qwest's petition. The opponents do not rebut the facts most essential to this case:

- that Qwest has lost approximately 30% of the relevant market to competitors, whose collective market shares are growing rapidly year-over-year;
- that the wholesale market is and will remain open to competition and highly regulated;
- that Qwest has no captive customers in the relevant market; and
- that the Commission will retain the authority to reclassify Qwest's competitively-classified services and to police Qwest's conduct after competitive classification is granted.

3 Qwest's opening brief anticipated most, if not all, of the arguments raised by the opponents in their opening briefs. As such, Qwest will as much as possible simply refer back to its opening brief to simplify the Commission's review. In sum, the Commission should grant Qwest's petition based on the substantial record evidence of effective competition throughout the state from a variety of carriers with diverse competitive strategies.

4 Prior to providing its reply comments, one introductory matter requires discussion. Each party had the right to designate one or more individuals to provide testimony. Three parties – ATG,

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

DOD and WeBTEC – chose not to do so, which is also their right. Qwest has no objection to these parties engaging in discovery, cross-examining witnesses and submitting post-hearing briefs. However, Qwest is concerned that each of these parties, having chosen not to offer up a witness to testify and stand cross examination, inappropriately included in its opening brief facts, recommendations and/or documents outside the record and, thus, not subject to inquiry or development by the parties or the bench through discovery or at hearing.[1] While the offending data offered by these parties will have little bearing on this docket, the Commission might wish to explicitly refuse to consider it in order to deter such conduct in the future.

II. APPLICABLE LAW

5 All parties agree that this case is governed by RCW 80.36.330 and that the Commission has broad discretion in analyzing the record evidence and applying the statutory factors. Qwest will respond in the substantive sections to follow on particular legal citations offered by the parties.

III. DEFINITION OF RELEVANT MARKET

A. Definition of Product Market

6 As it did in Docket No. UT-000883,[2] in this case Qwest is seeking competitive classification of its analog business exchange services and features. *Qwest Brief, at ¶ 11.* As anticipated by Qwest, some opponents argue that Qwest's product definition is too narrow. Some argue that it is too broad. Some even argue that it is both too narrow and too broad. In addition, the opponents offer a number of alternative product market definitions, some of which conflict

[1] More specifically, ATG proposes a quarterly reporting regime as a condition on approval. *ATG Brief, at 41.* DOD sets out facts not in the record relating to its relationship with Qwest, its activities in Washington and its experience searching Qwest's website. *DOD Brief, at 1-2, 13.* WeBTEC proposes a condition on approval relating to DID number portability and attaches several documents relating to the adoption of the Regulatory Flexibility Act in 1985. *WeBTEC Brief, at 29-30, Attachments A-C.*

[2] Contrary to Ms. Baldwin's testimony on cross examination, Public Counsel now appears to acknowledge that Qwest is seeking competitive classification of the same set of services in this case as it did in the prior case. *Tr. 780-781, 796, 837; cf. PC Brief, at ¶ 9. See also ATG Brief, at 8.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

with those parties' advocacy regarding Qwest's definition. Finally, each of the opponents strives to muddy the waters by disparaging Qwest's product market definition as confusing, ever-changing and/or meaningless.[3] None of these arguments withstands scrutiny.

1. Qwest's product definition is not too narrow.

7 Several opponents begin their attack on Qwest's case by noting that Qwest's product market definition is too narrow because it does not include every conceivable substitute or partial substitute for analog business exchange service. *ATG Brief, at 5, 11-21; PC Brief, at ¶ 6; WeBTEC Brief, at 8.* On that basis, these parties argue that Qwest should have sought competitive classification for and provided market share data on all business services, digital and analog. Two opponents go so far as to speculate that Qwest only excluded digital services because the inclusion of Qwest and CLEC digital business services would have diluted CLEC market share and weakened Qwest's case. *AT&T Brief ("[T]he distinction as drawn provides the advantage to Qwest of not revealing its larger market shares if both digital and analog provisioned services were considered together."), at 6; PC Brief, at ¶ 15 (Stating that Qwest's exclusion of digital data "raises the tantalizing question of how market share numbers would be affected if the market share were defined to include digital.").*

8 The opponents' arguments have no merit for several reasons. First, the statute governing this proceeding (RCW 80.36.330) does not support the opponents' position that Qwest has defined the product market too narrowly. Instead, the statute offers wide latitude to define the product market, as appropriate. The statute speaks of seeking competitive classification of even a single "service." The opponents' argument that every conceivable partial or full substitute

[3] The opponents are also fond of arguing that Qwest acted inconsistently in its price deregulation case in Idaho. *See ATG Brief, at 21; DOD Brief, at 14.* The opponents assert that Qwest did not raise an analog-digital distinction in Idaho, and thus Qwest's advocacy in this case is disingenuous. The opponents simply misunderstand the Idaho case. In that case, Qwest sought price deregulation of "basic local exchange services," a group of services *defined by statute* as two-way interactive switched voice communications within a local exchange calling area. *Idaho Code §§ 62-603(1), -622(3).* Qwest sought price deregulation of those services because those services are the only ones remaining under full regulation as a matter of statute. This Commission can hardly draw too many lessons as to the propriety of the analog-digital distinction from Qwest's prosecution of a case in another state under a very different statutory scheme.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

must be included to properly define a product market finds no support in the statute.

9 Second, as discussed, the set of services at issue in this docket are the identical services as those put at issue in Docket No. UT-000883. It is no small matter that the Commission granted Qwest competitive classification of those same services in that docket. That fact dramatically undercuts the opponents' position that Qwest is now relying on an overly-narrow product market definition in an attempt to engineer the competitive data to its advantage.

10 Third, the opponents' argument is directly at odds with their advocacy that the Commission should dismiss any consideration of wireless and VoIP services because those products, in their opinion, are not precise or full substitutes for landline business exchange service. *ATG Brief, at 6, 11, 18, 28-35; PC Brief, at ¶ 36; WeBTEC Brief, at 18-19.* The opponents ask the Commission to believe that Qwest is being equally duplicitous by limiting its product market definition to analog business services, yet at the same time relying generally on the existence of alternate technologies to support its case. *See, e.g., PC Brief, at ¶ 36.* This is simply not the case. Qwest believes that the market is properly defined based on the differing CPE required for analog services,[4] and was thus very careful to exclude any digital service data from the CLEC line counts.[5] *Tr. 116, 118-119, 174.* The exclusion of such data from the line counts does not, however, limit Qwest's ability to legitimately identify alternative products available to its customers as partial or full substitutes for analog business exchange services. Qwest included reference to intermodal competition in its petition and testimony merely to provide the Commission assurance that there are other additional forms of pressure, aside from CLEC analog business services, to discipline Qwest's behavior after competitive classification is granted. Digital services provided by all carriers will similarly discipline Qwest's behavior.

---

4 *Tr. 111, 195-198.*

5 As Integra stresses, Qwest did recently discover that it had inadvertently included a few digital services in its own line counts. *Integra Brief, at 5.* However, only [redacted] digital lines were included and their inclusion only hurts Qwest's case by increasing Qwest's market share; it does not advantage Qwest. *Response to Bench Request No. 5, Confidential Attachment A, 1 (Centrex 21-I Total), 2 (Centrex Prime-I Total).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

While all alternative services are relevant, it would have been inappropriate for Qwest to have sought to establish a Qwest market share in a market (all business voice services, as ATG suggests) when it is seeking competitive classification in this case of only its analog business services.

11 Fourth, had Qwest included all digital and analog business services in its petition, the opponents would have undoubtedly complained that the product market definition is too broad. This is corroborated by the opponents' briefs, in which the they take wildly inconsistent (often internally inconsistent) positions on this issue. In addition to arguing that Qwest's product definition is too narrow, ATG, Public Counsel and WeBTEC also comfortably argue that the product definition is too broad because each of the services listed in Exhibit 2 is not perfectly interchangeable with one another. *See section III.A.2. below.* The opponents' ends-oriented analysis begs the question of how Qwest could possibly define a product market that passes muster if a set of services is, at the same time, both too narrow and too broad. Then again, it does not appear to be the aim of these parties to identify meaningful standards which might assist the Commission in analyzing a competitive classification petition or assist Qwest in proving up such a case. The goal of these opponents appears to be simply to oppose.

12 Finally, AT&T's and Public Counsel's accusation that Qwest is gaming the data is unsupported and reprehensible. These opponents offer nothing but their conjecture to support their claim. The only evidence in the record – Mr. Reynolds' colloquy with Chairwoman Showalter about the approximate number of Qwest and CLEC digital services voice grade equivalents[6] – reveals that inclusion of the digital data may well have improved Qwest's case. Mr. Reynolds approximated that, on a voice grade equivalent basis, there are somewhere under 175,000 Qwest retail lines carrying digital services and approximately 84,000 CLEC wholesale lines

[6] As Mr. Reynolds explained at hearing, Qwest does not believe that a simple voice grade equivalent comparison provides precise enough data upon which it could file a competitive classification petition. The comparison was made to provide a ballpark comparison in response to the Chairwoman's request.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

carrying digital services. *Tr. 293-298.* The CLEC figure *does* not include CLEC-owned loops carrying digital services, as those are not known to Qwest. Assuming hypothetically that the 84,000 and 175,000 reflect the actual number of lines, CLECs would have more than 32% of the digital services market, slightly increasing the overall CLEC market share for the analog and digital markets combined. Again, that is before adding CLEC-owned digital service lines to the CLEC count. Contrary to AT&T's and Public Counsel's accusations, Qwest (as Mr. Reynolds explained) excluded digital services data because (1) they are not part of the product market for which Qwest is seeking competitive classification, and (2) Qwest has not yet finalized its review of the data and does not feel comfortable asking the Commission to grant it relief when the numbers have not been completely scrubbed, from Qwest's perspective. *Tr. 294.* This decision reflects Qwest's conscientious approach to this case, not an attempt to manipulate the Commission.

2. Qwest's definition is not too broad.

13 As noted above, the same opponents who argue that Qwest's product market definition is too narrow show no hesitancy in arguing that the same product market definition is too broad. ATG argues that there is a lack of interchangeability among some of the services in Exhibit 2. *ATG Brief, at 6.* Similarly, Public Counsel argues that Qwest is asking the Commission to blur important market distinctions by blending together basic business, PBX and Centrex services. *PC Brief, at ¶¶ 16, 66-70.* WeBTEC complains that Qwest has simply lumped numerous services together "as if each service is a perfect substitute for all of the others." *WeBTEC Brief, at 9-10.*

14 The opponents are wrong. Leaving aside the latitude provided by the statute and the Commission's grant of competitive classification in Docket No. UT-000883, the opponents' position that two or more services can not co-exist in a product market unless they are pure substitutes turns the statute on its head. The Commission's analysis must focus on whether

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

there are alternate providers of the subject services that can discipline Qwest's post-competitive classification behavior. The question is not whether a basic business line and a PBX trunk are perfect substitutes. The data submitted by Qwest and Staff reveals that, for both product segments (basic business line and PBX/Centrex[7]), there are alternative providers with sufficient and growing market shares and an absence of captive customers.

3. The Commission should give no weight to the various alternative product market definitions suggested by the opponents.

15 While the opponents appear to be in solidarity that Qwest's product market definition is wrong, there is little agreement among them as to what the appropriate definition would be. WeBTEC candidly admits that, while it knows Qwest is wrong, it has no idea what the appropriate product market definition should be. *WeBTEC Brief, at 9 ("WeBTEC does not know whether a proper analysis of the relevant market would result in the inclusion of both analog and digital services in a combined voice services market").* ATG argues that the product market can only be appropriately defined as the "business voice market." *ATG Brief, at 14, 23, 37, 38, 43.* As evidenced by its crisscrossing advocacy in this case, ATG would invariably have argued that an analog 1FB is not interchangeable with a digital ISDN PRI service had Qwest defined the product market as ATG now suggests.

16 AT&T (although it is unclear whether it was mischaracterizing Qwest's product market definition or suggesting its own) repeatedly discusses the "analog-provisioned" services market. *AT&T Brief, at 5-7.* As discussed in Qwest's opening brief, this case does not involve a distinction based on the whether the serving facility is analog or digital. Instead, due to the differing CPE required, it focuses on whether the underlying service (however carried to the

[7] As ATG acknowledges, PBX and Centrex services are competitive services. *ATG Brief, at 19.* Qwest, too, believes that those products can be properly viewed collectively as a single product segment within the larger analog business services market. Thus, to the extent the Commission is interested in viewing market share data disaggregated below the total market level, it is appropriate to view basic exchange service as one segment and PBX/Centrex as another. *See, e.g., Ex. 470C. See NEWTON'S TELECOM DICTIONARY 137 (17th ed. 2001) (Defining Centrex as a substitute for PBX service).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

customer's premise) is analog or digital. *See Qwest Brief, at ¶ 12.* Accepting AT&T's premise (if that is its premise) that the Commission should view analog-provisioned services as a distinct market, that would lead to the illogical treatment of a 1FB served over an analog facility as being in a different product market than a functionally-identical, identically-priced 1FB served over a digital facility.

17 Finally, DOD suggests that the Commission refuse to look at product markets in terms of the services provided or whether the services are provided to residential or business customers. Instead, DOD suggests that there are three (and only three) product markets: (1) products serving mass market customers; (2) products serving small and medium enterprise customers; and (3) products serving large enterprise customers. *DOD Brief, at 11, 14-15.* With all due respect, DOD's analysis makes little sense. DOD's product market definition seems to entirely ignore the *product* component. Under DOD's analysis, it would appear that the Commission should treat a 1FB provided to a residential or small business customer as being in a distinct product market from a 1FB supplied by Qwest to DOD or another large enterprise customer. DOD's alternative product market definition should be given little weight.

4. The analog-digital distinction is not confusing, is not in flux and will be simple to implement.

18 The final grouping of opponent attacks can be summarized as arguing that the analog-digital distinction drawn by Qwest is meaningless, unsupported, confusing, in flux and impossible to implement. Again, these attacks only reflect the opponents' desire to distract and confuse, but add little to the Commission's analysis.

19 Several opponents assert that the analog-digital distinction followed by Qwest in this case and in Docket No. UT-000883 is confusing, unsupported, overblown and was unclear until the hearing. *AT&T Brief, at 5; DOD Brief, at 14; Integra Brief, at 5; PC Brief, at ¶ 10.* This is simply untrue. As the Commission noted in its denial of the Joint Motion, the analog-digital

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

distinction has been apparent since early in this case. *See Qwest Brief, at ¶¶ 11, 14, 64-65.* The distinction is neither confusing, nor arbitrary. It relates directly to the CPE used by the business customer.[8] *Id. at ¶¶ 11-12.* Given the opponents' obsessive focus on customer demand as a tool to argue that Qwest's product market definition is too narrow, the opponents' disregard for the impact of CPE on consumers is difficult to reconcile.[9]

20 Integra's take on this argument is perhaps most interesting. Integra asserts that Qwest does not understand its own distinction and that both Qwest's position and data are still evolving. *Integra Brief, at 3, 5.* Integra's basis for this position is its reference to Qwest's response to Bench Request No. 5, in which Qwest clarified (as it had at hearing)[10] which services related to those on Exhibit 2 are digital, and thus excluded from the scope of this petition. Qwest clarified that digital PBX, digital Centrex 21 (ISDN), digital Centrex Prime (ISDN) and digital variations of Tenant Solutions were all excluded. *Response to Bench Request No. 5.* Contrary to Integra's characterization, Qwest's response did not represent a change in position. Exhibit 2 (which was Attachment A to the petition) has always included a specific exclusion of all digital services. *Ex. 2.* Qwest's response to the bench request simply clarified which services related to those identified in Exhibit 2 were outside the scope of the petition. As to Integra's assertion that Qwest was still revising its data, to some extent that is true. Qwest, wanting to provide the Commission with the most accurate evidence on which to make its decision, did (in responding to the bench request) indicate that it had inadvertently included [redacted] digital lines in *its retail* line counts.[11] The accidental inclusion of this data inflated Qwest's market share

---

[8] ATG asserts that the CPE discussion is meaningless because analog PBX equipment can not today be purchased new. *ATG Brief, at 18-19.* ATG's comment is as off-point as it is obscure. The relevant customer base is not limited to start-up businesses, but extends to existing businesses with existing infrastructure. A business that has already invested considerable resources into analog PBX CPE would likely look first to alternative analog PBX solutions when considering whether to switch carriers. That a start-up business may be unable to purchase new analog PBX equipment is hardly the point.

[9] It is an unrebutted fact in this proceeding that analog CPE will not work with a digital exchange service (and vice versa). This is not a confusing concept. Rather, it is a technological reality.

[10] *Tr. 515-519.*

[11] *See footnote 5 above.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

(very slightly, of course). Qwest's efforts to constantly scrub the data to ensure its accuracy should be applauded, not assailed as a sign of weakness or confusion.

21 Public Counsel similarly argues that even Qwest does not understand the distinction between analog and digital services. *PC Brief, at ¶ 8.* Public Counsel apparently reaches this conclusion from Mr. Reynolds' explanation that Qwest has not yet fully synched up its digital services data, and thus has not yet asked the Commission for competitive classification of digital services. *Tr. 117-118.* Public Counsel is taking Mr. Reynolds' comments out of context. Mr. Reynolds was merely explaining that Qwest was still working on converting its digital services data to a common unit of measure (i.e., whether and how to report the data on a DS0 or DS1 basis). *Id.* Mr. Reynolds did not concede any difficulty in distinguishing between digital and analog services. Public Counsel's next assertion, that Qwest should have waited to file this case until it could jointly present analog and digital data, is impossible to reconcile with its advocacy that Qwest's product market definition is too broad. *PC Brief, at ¶¶ 16, 66-70.* It is also one of many delaying tactics apparent in this case.

22 Finally, Public Counsel argues that the analog-digital distinction will prove difficult for the company to implement, the Commission to monitor and customers to understand. *PC Brief, at ¶ 14.* This is untrue. Once the Commission grants Qwest's petition, certain services (those listed in Exhibit 2, as clarified by Qwest's response to Bench Request No. 5) will be moved to Qwest's price list. There will be no confusion as to which services are competitively classified, or where. This is in contrast to the limited relief granted to Qwest in Docket No. UT-000883, which provided Qwest competitive classification in certain locations when particular services were provided over DS1 or greater facilities. As Qwest has explained, that grant of relief – as would be any grant of relief following the opponents' theory that the Commission should review each service in each wire center in isolation – proved impractical for Qwest to implement. *Qwest Brief, at ¶ 116.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

23 In the final analysis, the opponents' transparent, internally-inconsistent and shotgun-style attacks on Qwest's product market definition are not compelling.

B. Definition of Geographic Market

24 In attacking Qwest's request for statewide competitive classification, the opponents misconstrue Commission precedent and the TRO, incorrectly argue that a more granular review is needed and falsely allege that Qwest is attempting to game the system by seeking statewide relief. The opponents' hyperbole[12] and attempt to misdirect the Commission's focus should be given little weight.

25 As anticipated by Qwest,[13] numerous opponents point to the Commission's exchange-specific relief in Docket No. UT-000883 as a basis to argue that Commission precedent supports or requires an exchange-by-exchange review in this case. *ATG Brief, at 8; AT&T Brief, at 4, 6-7; DOD Brief, at 17; PC Brief, at ¶ 20.* AT&T and Public Counsel take the analysis a step further by asserting that an exchange-by-exchange review is the default, and that a statewide review would, in Public Counsel's words, represent "a significant departure from prior analyses of the Qwest competitive market in RCW 80.36.330 petitions." *AT&T Brief, at 4-7; PC Brief, at ¶ 20.* These suggestions are false and misleading. As Qwest delineated in its opening brief, this Commission has granted *statewide* competitive classification under RCW 80.36.330 at least twelve times.[14] *Qwest Brief, at ¶ 19.* The opponents ignore all of those prior decisions. Instead, they focus on Docket Nos. UT-990022 and UT-000883 because the Commission's grant of relief in those cases was limited to particular exchanges. The

---

12 *See, e.g., WeBTEC Brief, at 11 (Labeling Qwest's statewide filing "ridiculous" and "simply indefensible").*

13 *Qwest Brief, at ¶ 19.*

14 In its opening brief, Qwest inadvertently excluded its most recent competitive classification petition (Docket No. UT-021257; UAS, DSS, ISDN in certain exchanges) in its discussion of Commission precedent. That docket brings the total number of cases to fifteen and the total number of Qwest cases to ten. Twelve of the fifteen involved statewide grants of competitive classification.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

opponents ignore the critical distinction that, in those two cases, Qwest had not asked for statewide relief, but had at all times sought relief only in limited geographic areas. That the Commission did not grant Qwest statewide competitive classification is hardly proof that it is Commission practice or precedent to focus on a more granular geographic area when evaluating RCW 80.36.330 petitions.

26 DOD and Public Counsel also believe the Commission must put great stock in the fact that the TRO precludes a statewide definition of the market for purposes of an impairment analysis. *DOD Brief, at 17; PC Brief, at ¶ 20.* Qwest disagrees. DOD and Public Counsel fail to explain why the Commission should follow this directive about defining markets in an entirely different context (determining impairment vs. determining effective competition) which is governed by an entirely different statutory and regulatory scheme. It is not clear why the FCC determined that the market must be smaller than the state for an impairment analysis. Similarly, it is unclear why DOD and Public Counsel believe this has any impact on this case.

27 Under the circumstances of this case, there is certainly no need to review the competitive data on a wire-center-specific or exchange-specific basis, although the data submitted in this case can be viewed in that manner. *Qwest Brief, at ¶ 21.* Several opponents disagree, arguing that the level of competition varies throughout the state and that there is little or no competition in some areas. *ATG Brief, at 22; AT&T Brief, at 3-4; DOD Brief, at 16; WeBTEC Brief, at 11, 16.* Similarly, Public Counsel argues that a more geographically-granular review is needed because telephone service is inherently local by nature. *PC Brief, at ¶ 19.* The evidence in this case contradicts the opponents' arguments.

28 The opponents' assertions are very generalized and ignore the record evidence showing the significant number of competitors in each wire center statewide (with the exception of Elk). As Qwest detailed in its opening brief, based on wholesale data alone, there are an average of

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

5.5 CLECs actually serving customers in the smallest (Zone 5) wire centers, and an average of 24.5 CLECs actually serving customers in the largest (Zone 1) wire centers. *Qwest Brief, at ¶ 24.* The universal availability of UNEs and resold services under universal wholesale protections makes a locale-by-locale review unnecessary. While it is true that a Walla Walla business must limit itself to carriers willing to serve it in Walla Walla, the record is replete with evidence showing the number of CLECs actually serving customers via wholesale services in Walla Walla ([redacted]) and the even higher number of carriers who through their price lists, telephone directory listings and Internet advertising hold themselves out as being willing to serve all corners of Washington, including Walla Walla. *Ex. 208, at 10; Qwest Brief, at ¶¶ 28-30.* Simply because there are more CLECs active in Seattle does not mean that having [redacted] CLECs in Walla Walla is insufficient.

29 The opponents' call for a more granular review would be more compelling if Qwest were relying exclusively on CLEC-owned facility competition and were otherwise unclear whether CLECs (collectively) owned facilities serving all corners of the state. Given the broader scope of Qwest's proof in this case, that consideration is far less critical.

30 Finally, without any support for its accusation, AT&T asserts that Qwest has presented a statewide petition in order to gain some unfair and unwarranted advantage. *AT&T Brief, at 3-4.* This is false. Qwest seeks statewide relief because the structure of the market permits such a review and the evidence of actual CLEC marketing and activity reveals that CLECs are effectively competing with Qwest throughout Washington. Further, Qwest and Staff have provided competitive data in both aggregated and disaggregated formats. Ms. Baldwin conceded on cross examination that, even if under her belief that a more granular review is necessary, a single petition is appropriate if effective competition can be proven in each of those more granular units. *Tr. 677-678.* AT&T's accusations should be ignored.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

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

IV. REVIEW OF STATUTORY FACTORS FOR EVALUATING EFFECTIVE COMPETITION

A. Number and Size of Alternative Providers

32 In its opening brief, Qwest summarized the record evidence showing tremendous geographically and technologically diverse competitive activity in the state. *Qwest Brief, at ¶¶ 23-25.*

33 As anticipated, the opponents accuse Qwest and Staff of exaggerating the number of alternative providers in the market[15] and then set off to convince the Commission that numerous categories of competitors should be ignored for one reason or another.

34 ATG implies that CLECs relying on resale or UNEs should not be counted as alternative providers because "competition is not effective if it is captive competition." *ATG Brief, at 23.* This argument is unsupported by the statute. The statute requires an analysis of the number and size of alternative providers of services (in the relevant market); it imposes no proviso that alternative providers should only count if they are facilities-based. *RCW 80.36.330(1)(a).* ATG's argument also ignores the universe of wholesale protections which assure that a CLEC relying on UNE-P can provide effective competition for Qwest retail activities. *Qwest Brief, at ¶¶ 58-61.*

35 DOD asks the Commission to disregard any CLEC that failed to respond to Order No. 6. *DOD*

[15] *See, e.g., AT&T Brief, at 8; DOD Brief, at 19-20.* As Qwest explained in its opening brief, the number of registered CLECs, the number of CLECs with interconnection agreements and the number of CLECs providing wholesale services are relevant, but were offered by Qwest as mere context. The opponents' suggestion that this evidence is viewed by Qwest as core data is a straw man, and the Commission should not allow itself to be distracted by this argument.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Brief, at 20. DOD provides no rationale for why a CLEC actually competing with Qwest in the relevant market should be ignored by virtue of the fact that it did not respond to the Commission's order. At hearing, Staff witness Wilson testified that the 60% response rate[16] to Order No. 6 was actually a fairly high rate based on his experience. *Tr. 1429.* Thus, while the opponents would like the Commission to infer that all ten non-responding CLECs must have shut down, there is nothing in the record to support leaping to that conclusion.[17] The record shows that all 37 carriers purchase wholesale services from Qwest to serve business customers in competition with Qwest. *Ex. 1T, at 20; Ex. 3; Tr. 283.*

36 Similarly, several opponents argue that small ("*de minimus*") carriers should not be counted as alternative providers. *DOD Brief, at 19, 20-21; MCI Brief, at 5; PC Brief, at ¶ 25, Attachment A.*[18] Again, the opponent's advocacy is inconsistent with the governing statute. The statute does not direct the Commission to ignore all carriers with fewer than 10,000 lines (*see DOD Brief, at 19-20*) or other smaller carriers. The opponents have not pointed the Commission to any authority requiring it to ignore every individual competitor unless that individual competitor could, alone, create effective competition for Qwest by virtue of its size and resources. Given the favorable market structure for all competitors, a slew of smaller competitors, acting in competition with one another as well as Qwest, is equally likely to put competitive pressure on Qwest than would a duopolistic situation in which Qwest faces only one, sizeable alternative provider.

---

[16] Actually, the response rate here was approximately 72%, with 27 of 37 CLECs competing in the relevant market having responded to Order No. 6.

[17] When counsel for DOD asked the same question of Mr. Teitzel, Mr. Teitzel logically hypothesized that some CLECs simply had not responded; Mr. Teitzel did not agree that a CLEC's failure to respond is tantamount to the CLEC no longer existing. *Tr. 482.*

[18] The table attached to Public Counsel's brief as corrected Attachment A is also deceptive in that, in calculating the number of carriers with greater than 1%, 2% or 5% of the market, it appears Public Counsel relied entirely upon Exhibit 209C, which only provides CLEC-specific relative market share based on wholesale services. *Ex. 209C.* It does not factor in an individual CLEC's market share including CLEC-owned facilities. *Id.* Thus, Public Counsel's analysis ignores approximately [redacted] CLEC-owned loops. *Ex. 204C (p. 3, cell D-19; p. 4, column G); Ex. 232C (cell L-44).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

37 ATG and MCI stress the general financial weakness among CLECs, suggesting that the Commission should assess the financial viability of each competitor before determining whether the CLEC can be counted at all. *ATG Brief, at 23; MCI Brief, at 37-39.* Again, the opponents seem to be attempting to re-write the statutory factors. In addition, the Commission should not confuse the weakness or bankruptcy of particular CLECs as a sign that the CLEC sector in general is weak. The evidence in this case proves otherwise, showing that CLECs in Washington cumulatively now possess approximately 30% of the analog business services market and that their collective market share grew more than 333% between December 1999 and December 2003. *Qwest Brief, at ¶¶ 48-52.* Contrasting that data to Qwest's contemporaneous line loss, it is evident that in Washington CLEC-based competitors are thriving. Finally, as with the opponents' other doomsday scenarios, should the CLEC sector melt down in Washington and should CLECs lose most of their market share, the Commission retains the ability to reclassify the subject services and return them to full regulation. *RCW 80.36.330(7).*

38 Finally, AT&T argues that Qwest's evidence on this factor is insufficient because it is unclear to what extent CLECs are providing services beyond the metropolitan areas. *AT&T Brief, at 8-10.* However, the record is filled with data showing, in both aggregated and disaggregated formats, the dispersion of CLEC competition throughout the state. *See, e.g., Ex.53C; Ex. 54C; Ex. 55C; Ex. 204C; Ex. 205C; Ex. 208C; Ex. 209C; Ex. 232C.* AT&T's empty rhetoric should not be given serious consideration.

39 The record evidence, taken as a whole, shows that Qwest faces competition from numerous, diverse CLECs in all corners of Washington and via all forms of intramodal and intermodal technologies.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

B. Extent to which Services are Available from Alternative Providers in the Relevant Market

40 For the most part, the opponents offer the same arguments on this factor as they do for the previous factor. *See, e.g., ATG Brief, at 23 (the Commission should only consider CLEC-owned loop competitors); AT&T Brief, at 9 (lack of data that CLECs offering basic analog services in all exchanges).* Qwest will not repeat its reply to these points. *See section IV.A. above.*

41 Additionally, the opponents repeat their claim that theoretical competition is insufficient, and that Qwest's case amounts to little more than proof of theoretical competition. *AT&T Brief, at 9 (referencing Qwest's 271 authority); DOD Brief, at 23; PC Brief, at ¶¶ 26-27.* It is not Qwest's position that this Commission's and the FCC's grant of 271 authority amounts to a finding of effective competition. Qwest has made this point clear since the beginning of this case. At hearing, Mr. Teitzel had the following exchange with counsel for DOD:[19]

> Q. Is it your view that because of the Section 271 finding of open competition, that that represents effective competition within the meaning of the statute, and that Qwest has met its burden under the reclassification statute?
>
> A. It's my opinion and my testimony that effective competition is here because markets are open, so they are certainly related. I'm not testifying that Section 271 approval equals effective competition. It doesn't, but it sets the stage for effective competition that is now here.

42 Given how clearly Mr. Teitzel explained Qwest's position, one must ask why the opponents persist in mischaracterizing Qwest's advocacy. It is further unclear how the opponents can assert that Qwest is asking for competitive classification based only on the prospect of theoretical competition. The record evidence shows the existence and rapid growth of actual

[19] *Tr. 485.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

competition from numerous carriers serving every corner of Washington (except Elk).[20] *Qwest Brief, at ¶¶ 23-52.*

43 Finally, DOD implies that CLECs in Washington do not offer comparable services for the small business owner. *DOD Brief, at 22-23.* This claim too is simply unsupportable upon reviewing the record. Exhibit 4, for example, identifies twenty-eight (28) carriers offering flat-rated business service.[21] DOD's claim is further discredited by the fact that CLECs have captured [redacted]% of the analog basic exchange services market segment in Washington.[22] *Ex. 470C.*

44 It is clear that services from alternate providers are broadly available in and throughout the relevant market.

C. Ability of Alternative Providers to Make Functionally Equivalent or Substitute Services Available

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

45 This factor requires an evaluation of whether the alternative services are functionally equivalent or substitutable. However, the opponents urge the Commission not to consider wholesale-based competition at all. Several opponents argue, for example, that resale can not be considered because it is not price constraining. *ATG Brief, at 25; MCI Brief, at 9-10; PC*

[20] MCI suggests that the Commission, at bare minimum, must deny competitive classification for analog business services in Elk. *MCI Brief, at 6-7.* Doing so would be putting form over substance and logic. Elk represents less than .03% of the lines statewide in the relevant market. *Tr. 710; Ex. 416C.* MCI's argument is undermined by the following: Qwest competitors serve each surrounding wire center; any CLEC seeking to serve an Elk customer could do so cheaply and virtually instantaneously by using Qwest wholesale services; and CLECs advertise to Elk customers in their price lists, in the local telephone directory and over the Internet. *Qwest Brief, at ¶¶ 28-30.*

[21] Those 28 carriers are: Adelphia Business Solutions Operations; ATG; Allegiance Telecom of Washington; AT&T Local; Citizens Telecommunications; Electric Lightwave; Eschelon; Focal Communications; Global Crossing Local Services, Inc.; ICG Telecom Group, Inc; Integra; International Telecom; Local Access Prime, LLC; Marathon Communications; MCIMetro Access; McLeod USA; NOS Communications; Pac-West Telecom, Inc.; Rainier Connect, Inc.; SBC Telecom, Inc.; Shared Communications; Sprint Local; TCG of Seattle; Tel West Communications; Time Warner Telecom of Washington; Verizon Select Services Inc.; World Communications; and XO Communications. *Ex. 4.*

[22] At hearing, Staff witness Wilson testified that he considers basic exchange service to be a reasonable proxy for evaluating the small business sector. *Tr. 1279, 1411.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Brief, at ¶ 29. ATG and MCI argue that UNE-P competition should not be considered because it is simply resold service under a different pricing structure. *ATG Brief, at 26; MCI Brief, at 9, 11-12.* Others argue that wholesale services more generally can not be considered because Qwest is the "monopoly" wholesale provider and is capable of suffocating competition as a result. *ATG Brief, at 27; AT&T Brief, at 16; Integra Brief, at 4.* Others complain that UNE-L competition does not exist in many wire centers in Washington. *Integra Brief, at 7-8; PC Brief, at ¶¶ 31-33, Attachment B; WeBTEC Brief, at 15-16.* Qwest addressed these arguments, albeit in different contexts, in its opening brief. *Qwest Brief, at ¶¶ 54-63 (UNE-P should not count; Qwest as the monopoly wholesale provider), ¶ 49 (UNE-L not widely utilized).*[23]

46 None of the opponents' arguments has any bearing on this particular factor, the purpose of which is to assess whether particular forms of competition offer functionally equivalent and substitutable alternatives to Qwest analog business services. *RCW 80.36.330(1)(c).* As Qwest explained in its opening brief, resale and UNE-P are functionally-equivalent to Qwest retail service since they are simply Qwest retail service rebranded. *Qwest Brief, at ¶ 33.* Similarly, there is no evidence in the record that UNE-L-based service is functionally inferior; the only evidence on this point shows that competitors strive to provide UNE-L service in order to achieve greater efficiencies and product differentiation. *Id. at ¶¶ 34-35.*

47 The only opponent to take on the issue of functional equivalence was DOD, who argues that resale is not functionally equivalent to Qwest retail service. *DOD Brief, at 24.* DOD fails to explain its position. Because resold service is simply rebranded Qwest service, it is functionally identical, let alone functionally equivalent.

---

[23] Based on Qwest's admittedly-understated wholesale data alone, CLECs provide UNE-L service in 15 Washington exchanges; those exchanges cover 83.9% of Qwest's access lines carrying analog business services in the state. *Qwest Brief, at ¶ 49.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

2. CLEC-owned loops

48 None of the opponents alleges that service provided over CLEC-owned facilities is functionally inferior. However, ATG (harkening back to its claim that wholesale services are not real competition because they rely on Qwest) warns that even CLEC-owned facility competition is not entirely in the clear because "these companies may still be dependent on Qwest for collocation, interoffice transport, and so on..." *ATG Brief, at 28.* While completely off topic (as this factor focus on functional equivalence, not the breadth of deployment), Public Counsel again complains that CLEC-owned facilities are present in only 26 Qwest exchanges. *PC Brief, at ¶¶ 34-35, Attachment C.* Public Counsel neglects to inform the Commission that those 26 exchanges house 83.5% of Qwest's access lines carrying analog business services in the state. *PC Brief, at Attachment C; Ex. 54C (column E).*

3. Intermodal (wireless, VoIP, WiFi, cable, etc.)

49 Qwest explained in its opening brief that, in framing and supporting its petition, Qwest paid only passing attention to wireless and VoIP service. As they did in their pre-filed testimony and during the evidentiary hearing, the opponents devote tremendous attention to the functional equivalence of wireless and VoIP technologies. *ATG Brief, at 28-35; DOD Brief, at 28-30; MCI Brief, at 12-25; PC Brief, at ¶ 36; WeBTEC Brief, at 18-19.* Again, the opponents seek to topple the straw man of their own invention by dramatically overstating Qwest's reliance on intermodal competition. *See, e.g., WeBTEC Brief, at 17 (Characterizing Qwest's position as being that the Commission should consider wireless, VoIP, WiFi and cable services as "substitutes justifying competitive classification of Qwest's business exchange services").* As discussed above, Qwest references intermodal competition in order to provide the Commission context and a more complete view of the competitive landscape. Because intermodal forms of competition are substitutes for some, they should be considered. That is very different, however, from arguing (as the opponents would like the Commission to believe Qwest is

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

arguing) that the existence of intermodal competition alone is sufficient (without further analysis or data) to prove effective competition. That is not Qwest's position, nor has it ever been Qwest's position in this case. That said, intermodal competition is available and, for some, is a viable alternative to Qwest analog business services. *Qwest Brief, at ¶ 38.*[24]

D. Other Indicators of Market Power

1. Market share analysis

50 As predicted, the opponents go to great lengths to confuse the issues and misdirect the Commission's attention. ATG and AT&T, for instance, try to re-focus the Commission from considering relative market shares at all; instead, these parties urge the Commission to consider market concentration (and HHI) as a proxy for considering market share. *ATG Brief, at 35-38; AT&T Brief, at 12-13.* Clearly, the Commission should not ignore a statutory factor.

a) Commission precedent regarding market share

51 In its opening brief, Qwest explained that the Commission does not apply hard-and-fast standards, but instead weighs all facts on a case-by-case basis. *Qwest Brief, at ¶ 41.* Qwest also reviewed the Commission's finding (as they relate to market share) in a few of its previous competitive classification cases. *Id. at ¶ 42.* In their opening briefs, the opponents offer very little (if anything) by way of legal analysis relating to this factor.

52 WeBTEC, however, cites several federal court cases to suggest that, as a matter of law, a 50% or 65% market share *per se* confirms that a company has market power. *WeBTEC Brief, at 19.* However, a close reading of those cases confirms only that judicial bodies are loathe to adopt hard-and-fast market share tests for determining market power, especially in the case of

[24] As discussed above, Qwest's position that one can consider "out of market" substitutes without including them in the relevant market (and thus part of the market share analysis) is not at all inconsistent, as Public Counsel suggests. *PC Brief, at ¶ 36 ("[I]f Qwest seeks to restrict the market definition to analog services, it cannot at the same time ask that [intermodal] non-analog services of this type be considered as services which compete in the same market."). See section III.A.1. above.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

regulated industries. For example, in the *Wilk* case cited by WeBTEC, the 7th Circuit made plain that the determination of market power is a fact-bound question, that market share tests for market power are generally disfavored and that market share tests are most useful when there are "barriers to entry and no substitutes from the consumer's perspective.[25] The record in this case reflects that there are practically no barriers to entry and that ample substitutes from numerous competitors exist throughout Washington. If presented with these circumstances, it is doubtful that the *Wilk* court would have applied a hard-and-fast market share test to determine market power.

53 WeBTEC misrepresents the Court's analysis in the *MetroNet* decision. WeBTEC cited the decision for the proposition that "a market share of 65% is considered to be prima facie evidence of market power." *WeBTEC Brief, at 14.* However, the paragraph cited by WeBTEC, when reviewed in its entirety, directly undercuts the inference WeBTEC has drawn from the decision:

> The district court was correct to focus its attention on Qwest's ability to exclude competition and control prices, rather than simply on market share. In general, a plaintiff may establish a prima facie case of market power by showing that the defendant has a 65 percent or greater market share. *** *However, in cases involving regulated industries, "[r]eliance on statistical market share . . . is downright folly where, as here, the predominant market share is the result of regulation." *** We have held that "[i]n such cases, the court should focus directly on the regulated firm's ability to control prices or exclude competition."* (citations omitted; emphasis added)[26]

54 As discussed numerous times already, Qwest does not control wholesale prices and can not exclude competition given the variety of wholesale protections afforded to its competitors under federal, state, and contract law. *Qwest Brief, at ¶¶ 48-61.* As such, the cases cited by

---

25 *Wilk v. American Med. Ass'n, 895 F.2d 352, 360 (7th Cir. 1990).*

26 *MetroNet Servs. Corp. v. U S WEST Communs., 325 F.3d 1086, 1102-1103 (9th Cir. 2003).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

WeBTEC actually support Qwest's interpretation of the law and of this Commission's role in applying the market share factor.

b) The process of gathering data

55 Not surprisingly, the opponents challenge every aspect of the data gathering process. WeBTEC suggests that Qwest inflated the CLEC line count by assuming that all UNE-L loops serve business (not residential) customers. *WeBTEC Brief, at 14.* WeBTEC's accusation is off-base for several reasons. First, as Mr. Reynolds explained at hearing, the designation of UNE-L lines as business is consistent with the manner in which Qwest reported its data in the 271 proceeding. *Tr. 289-290.* Second, the record evidence shows that Qwest has been exceedingly conservative in this case and understated (perhaps significantly so) the CLEC line count. *Qwest Brief, at ¶ 48.* This is confirmed by Staff's findings of much higher CLEC wholesale activity across the board (resale, UNE-P and UNE-L). *Id.* Finally, it is instructive that none of the CLEC opponents raised this concern in testimony, in cross examination or in their opening briefs. Were it the case that UNE-L is being used to serve residential customers, it is safe to assume that the CLEC opponents would have taken the opportunity to attack Qwest on this point to show that Qwest has inflated the CLEC line totals.

56 The opponents also attack Staff's efforts and credibility,[27] particularly with regard to the gathering and aggregation of CLEC data reported in response to Order No. 6. Two opponents urge the Commission to wholly ignore the data gathered by Staff because the data is useless given the improperly-defined product market being analyzed. *ATG Brief, at 16, 36; WeBTEC Brief, at 19-20.* As discussed above, the product market definition utilized by Qwest and supported by Staff is perfectly appropriate. *See section III.A. above.* It also noteworthy that, when they believe it suits their advocacy, ATG and WeBTEC are quick to rely on the same line

[27] *See, e.g., ATG Brief at 15, 44 (Accusing Staff of applying no independent analysis, blindly accepting Qwest's characterizations and intentionally setting out to support Qwest's "flawed" theories); AT&T Brief, at 10 (Accusing Staff of abandoning its principles by its support of Qwest's petition).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

count data. For example, both parties, argue that the Commission should deny Qwest's petition based on the HHI results found after analyzing Qwest and CLEC line totals. *ATG Brief, at 37; WeBTEC Brief, at 22.* If the product market definition followed in this case renders the market share data useless, it must also render the HHI results useless since they were derived from the same data. The opponents can not have it both ways.

57 The opponents also accuse Mr. Wilson of having reported inaccurate and unreliable data. *ATG Brief, at 42; AT&T Brief, at 7, 13-14; Integra Brief, at 8; MCI Brief, at 5; PC Brief, at ¶¶ 14, 38; WeBTEC Brief, at 14.* The record reflects that Mr. Wilson worked diligently to gather and assimilate a great deal of data received from 27 different respondents. His numerous revisions to his exhibits reflect conscientiousness, not incompetence. There is no evidence in the record that Staff over-reported CLEC data. While the CLEC opponents complain bitterly that they misunderstood Order No. 6 (and, thus, every other CLEC must have as well), it should be noted that Mr. Wilson accepted and incorporated the CLECs' late-revised data. *Ex. 225C; Ex. 232C; Tr. 1463.* He also testified that he contacted each of the non-party CLECs to clarify that they had reported analog services only. *Ex. 210-TC, at 11-2; Ex. 203C, at 2 (Ins. 85, 131); Tr. 615-619.* It is also unclear that the CLEC opponents correctly revised their data last month. Clearly, MCI misreported their revised data based on the false premise that the distinguishing factor in this case is the serving facility, not the underlying service. To date, the Commission has not accepted the revisions provided by the CLEC opponents. *Qwest Brief, at ¶¶ 66-68.* The opponents' attacks on Mr. Wilson are greatly overstated and provide yet more evidence of their desire to muddy the waters and cause confusion under the theory that if the Commission believes the data presented is questionable, the Commission will simply deny Qwest's petition. This strategy is particularly offensive given that it is the CLECs who, if indeed the data is murky, supplied the murky data. It is self-serving for these same parties to turn around and use their intentional or unwitting misreporting as a basis to deny Qwest's petition.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

58 It is also telling that Public Counsel did not submit supplemental testimony or exhibits disagreeing with Mr. Wilson's findings. At the prehearing conference held on September 12, Public Counsel protested its lack of access to the highly confidential CLEC responses. *Tr. 56-57.* Public Counsel was thereafter granted such access,[28] an extra month to review the data and an opportunity to submit supplemental testimony regarding the CLEC data. Public Counsel was given until October 10 submit supplemental testimony,[29] but did not do so. It also did not offer supplemental, highly-confidential cross exhibits for Mr. Wilson relating to the CLEC data. It is reasonable for the Commission to infer that Public Counsel simply found no cause or basis to file supplemental testimony refuting Staff's findings and aggregation.

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

59 In addition to arguing that Qwest's and Staff's data gathering processes were unreliable, the opponents also argue that the results, if accepted, do not support Qwest's petition. The opponents are incorrect.

60 Several opponents argue that statewide market share data is not probative because (they argue) Qwest serves high percentages of customers in many wire centers. *AT&T Brief, at 13 (arguing that Qwest serves more than 75% of the market in 99 wire centers); DOD Brief, at 33; PC Brief, at ¶ 39 (Qwest serves more than 90% of customers in many exchanges).* Both AT&T's and Public Counsel's analysis relies solely on Qwest's understated wholesale data, and ignores Staff's higher wholesale figures and CLEC-owned facility competition. Public Counsel's analysis also excludes resold lines. AT&T also mischaracterizes the Commission's finding in the 1987 AT&T competitive classification case as setting a hard-and-fast 75% benchmark. As discussed above, the Commission has not and does not apply hard-and-fast market share tests to determine effective competition. *See section IV.D.1.a. above.* Furthermore, the opponents'

---

28 *Order No. 15.*

29 *Notice of Amendments to Schedule (Oct. 3, 2003).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

argument is simply false, as both Qwest and Staff provided extensive geographically-disaggregated market share data. *See Exs. 51T, at 7-8, and 53C; Ex. 54C; Ex . 55C; Exs. 204C and 205C; Ex. 208; Ex. 209C; Ex. 232C.* As does the statewide market share data, the geographically disaggregated data shows that Qwest is facing broad competition from numerous carriers throughout the state.

61 Public Counsel also attacks the probative value of the market share data based on Qwest's and Staff's alleged failure to provide "a market share analysis for the small business market segment." *PC Brief, at ¶ 40.* However, the data can be viewed and disaggregated in many ways, including with an eye towards examining the relative market share for the small business segment of the relevant market. The data shows that CLECs have captured [redacted]% of the basic business line segment; that segment, per Mr. Wilson, serves as a reasonable proxy for evaluating competition for small business customers. *See section IV.B. above.* Qwest and Staff also provided extensive evidence showing how CLECs, including Integra, AT&T and MCI, aggressively market to small and medium sized businesses through their price lists and their directory and Internet advertisements. *See section III.B. above.*

62 Several opponents persist in arguing that the Commission should exclude all wholesale-based competition from the market share analysis. *Integra Brief, at 7; MCI Brief, at 26-29; WeBTEC Brief, at 20-21.*[30] Qwest will resist the temptation of responding to that argument again. *See Qwest Brief, at ¶¶ 54-63.*

63 Several opponents also criticize Qwest and Staff for not providing a customer-focused market share analysis (as opposed to a line-based market share analysis). *DOD Brief, at 34; Integra*

[30] WeBTEC also criticized Staff's inclusion of CLEC analog business services served over special access circuits. WeBTEC's analysis is misplaced. The service, not the serving facility, is the only meaningful reference point. Also, it should be noted that Qwest underreported CLEC line figures by not including special access data (because Qwest can not specifically assess how the circuits are being used). Also, the Commission can assume that the serving CLEC does so because it is efficient and cost-effective to do so. Otherwise, the CLEC would invariably choose other means of serving customers.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Brief, at 8-9; MCI Brief, at 4. While Qwest did not provide discrete customer-based market share analyses, the record contains ample customer-location information revealing that CLECs serve numerous customers in each exchange, and are not simply serving a single large business in any location. *See, e.g., Ex. 204C; Ex. 232C.* Staff's data shows that CLECs serve [redacted] separate locations statewide with basic business service, [redacted] separate locations with PBX service and [redacted] separate locations with Centrex service. *Ex. 204C, at 3 (column I), 5 (column H); Ex. 232C (cell O-44).* The Commission's concern in Docket No. UT-000883 was that line-based market share analyses could, in isolation, provide a skewed view of the competitive landscape since a small number of large customers could represent a majority of the lines.[31] The Commission was concerned that this type of proof alone could lead to premature competitive classification when no small business customers were receiving service from competitors.[32] In this case, the CLEC market share of the basic business line segment and the large number of customer locations displayed in Staff's data confirm that the Commission need not be concerned about such an occurrence in this case.

64 Finally, MCI vaguely (but repeatedly) asserts that, despite seven years of trying, CLECs have lured away only a small number of Qwest customers in Washington. *MCI Brief, at 5, 26, 28, 37.* MCI's assertion is contradicted a hundred times over by the evidence in the record showing that CLECs have "lured away" approximately 30% of the analog business market, have increased their market share at least 333% since December 1999 and are reaching and winning customers in every corner of the state.

d) Growth in market share

65 One recurring theme in this case is that the opponents ask the Commission to ignore any data that works in support of Qwest's petition. Growth in market share is no exception. Despite the

---

31 *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 68.*

32 *Id.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

understated[33] 333% growth in market share enjoyed by CLECs between December 1999 and December 2002, the opponents argue that this growth in market share is overblown because Qwest continues to possess a large market share. *AT&T Brief, at 14-15; MCI Brief, at 36.* Aside from the obvious fact that the opponents' advocacy is tantamount to urging the Commission to ignore a statutory factor, it is also nothing more than empty rhetoric. A loss of 30% market share is no insignificant matter.

66 As a second line of defense against the growth in market share data, several opponents argue that Qwest's line loss is not necessarily attributable to competition,[34] but reflects migration to other Qwest (digital) services or reflects other factors. *ATG Brief, at 24; AT&T Brief, at 14; PC Brief, at ¶¶ 43-44.* ATG actually claims that Qwest access lines are growing in the aggregate based on the statements in Qwest's 2000 and 2001 annual reports regarding the number of voice grade equivalents. *ATG Brief, at 17, 37.* The digital-migration argument is a red herring and reflects the opponents' willingness to contradict their own reasoning to try and make a point that might frustrate Qwest's efforts in this case.[35] CLECs have the same ability to "migrate" analog service customers to digital serves. To the extent they have, their analog business line count and market share has been reduced accordingly. ATG and Public Counsel have offered no proof (nor even the suggestion) that digital migration is affecting Qwest's line counts differently from the CLECs' line counts. Furthermore, the opponents' attempt to discount (or otherwise explain) Qwest's line loss is yet another attempt to ignore a statutory factor the opponents know to be unhelpful to their cause. The test is not whether Qwest is

---

[33] As Qwest explained in its opening brief, the 333% growth rate does not include any consideration of CLEC-owned loops; it is premised solely on Qwest's wholesale data. *Qwest Brief, at ¶ 51.*

[34] As it did in its pre-filed testimony, Public Counsel asserts that less than half of Qwest's line loss is due to competition. *PC Brief, at ¶ 42.* Public Counsel fails to note in its brief (although it conceded at hearing) that competitive-related reasons are the most prominent reason for disconnection, according to Qwest's data. *Tr. 706; Ex. 82.*

[35] ATG preaches that "Qwest's effort to inject the quantification of DS0 equivalents between the CLECs and Qwest by the back door as a measure of the nature of the digital market share should be rejected out of hand" because a voice grade equivalent measure is not an accurate quantification of actual access lines. On the very same page of its brief, ATG turns on its own logic by stating that "Qwest's own documents [the annual reports] show that the loss of its analog customer lines is largely driven by customer migration to Qwest's own, high-capacity, digital services." *Id. at 37.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

adding or losing access lines; it is whether Qwest's competitors' market share is growing, shrinking or staying constant. The only data in the record shows it is growing at a very rapid rate.

2. Market concentration analysis

67 The opponents argue that HHI results are critical, and that an HHI result showing high concentration (i.e., over 1,800) should *per se* result in denial of Qwest's petition. *ATG Brief, at 36; AT&T Brief, at 12-13; PC Brief, at ¶¶ 33, 45-47; WeBTEC Brief, at 22.*[36] HHI, by itself, is not a valuable tool in evaluating whether there is effective competition in the relevant market. *Qwest Brief, at ¶¶ 74-78.* Precluding competitive classification until Qwest can prove the HHI for a particular market is below 1,800 is absurd, in that it would (by definition) require that Qwest lose at least 58% market share before seeking competitive classification. *Id. at ¶ 79.* Beyond defying logic, this position (as well as ATG's alternate argument that an HHI over 5,000 is grounds for denial) run directly afoul of the Commission's analysis in Docket No. UT-000883. The Commission held that, depending on structural factors, competitive classification might be appropriate even if the market concentration index values are substantially about 5,000.[37]

68 Furthermore, MCI's brief reveals that the opponents' rigid reliance on HHI is inappropriate and at odds with the Horizontal Merger Guidelines. The quotation from the Merger Guidelines included at page 29 of MCI's brief shows that the standards under the Merger Guidelines, including the HHI, (1) exist to evaluate an entirely different context (i.e., the evaluation of *mergers* under antitrust laws) and (2) should not be applied mechanically, as the "standards may provide misleading answers to the economic questions raised under the antitrust laws."

---

[36] DOD also argues in very general terms that it "believes that the market concentration analyses contained in the record provide further evidence that the Petition must be denied." *DOD Brief, at 36.*

[37] *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 73; see also Qwest's Brief, at ¶ 74.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

MCI Brief, at 29. Despite this warning, the opponents implore the Commission to deny Qwest's application based on the HHI results in the record. It is also interesting that, while ATG and MCI accuse Qwest of downplaying a factor that ostensibly works against it, MCI witness Stacy testified that HHI is a far less important measure of market power than is market structure. *ATG Brief, at 37; MCI Brief, at 32; Tr. 1062.*

3. Ease of entry

69 The opponents appear to acknowledge that there is considerable ease of entry for resale- and UNE-P based competition. *DOD Brief, at 37;*[38] *Integra Brief, at 7.* ATG, however, would have the Commission ignore this factor as it relates to resale and UNE-P since, according to ATG, those two forms of market entry do not constitute real competition. *ATG Brief, at 38.* ATG offers no rationale or authority for its theory that on its face contradicts RCW 80.36.330(1)(d). That statute does not restrict of analysis of ease of entry to forms of competition that can (beyond any doubt or argument) independently serve as effective competition.

70 Several opponents also argue that Qwest significantly understated or ignored many costs of entry, especially as those relate to facilities-based and UNE-L competition. *AT&T Brief, at 15; DOD Brief, at 37-38; WeBTEC Brief, at 23.* The opponents imply that these greater costs pose a barrier to entry. The record in this case and common sense do not bear that out. If this were true, UNE-L and owned-facilities competition in Washington would not be so prevalent. Counting only UNE-L and CLEC-owned lines, Staff's data shows [redacted] CLEC lines in the relevant market, broken down as follows:[39]

---

[38] DOD candidly admits, "There is no question that entry into the provision of local exchange service has eased since passage of the Telecommunications Act of 1996, and the market-opening activities that incumbent carriers have implemented pursuant to law. There is no regulatory barrier to entry." *Id.*

[39] *Ex. 204C, at 3 (columns F, H), 4 (columns E, G); Ex. 232C (cells I-44, L-44).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

	Basic Exchange	PBX	Centrex
UNE-L	[redacted]	[redacted]	[redacted]
CLEC-owned	[redacted]	[redacted]	[redacted]
TOTAL	[redacted]	[redacted]	[redacted]

71 In addition, while there may indeed be entry costs greater than $0.27 associated with UNE-L and owned-facilities competition, those forms of competition permit CLECs greater flexibility to provide bundled and differentiated products. This pricing and packaging freedom enables CLECs to recover the additional costs. As such, they are able to viably compete. Again, the proof is in the pudding -- CLECs have almost [redacted] access lines via UNE-L and owned facilities.

72 The opponents would also like the Commission to believe that all CLECs are all start-ups struggling to generate enough revenue to hire staff and buy office furniture. That argument assumes that "ease of entry" refers only to new business entry, and not also to expansion into and throughout the state by existing carriers. It refers to both. As to the latter category, it is worth noting that some CLECs, most notably AT&T, are far larger companies than Qwest. According to the report submitted by MCI witness Gates, AT&T had (as of January 17, 2003) a market capitalization in excess of $20 billion, which was more than two times larger than Qwest's. *Ex. 503, Attachment 1.*

73 The bottom line is that there are all manner of competitors, some small and some large. For small competitors, resale and UNE-P may well be the most appropriate entry vehicles, at least as they transition into serving customers. Even the opponents admit there is ease of entry via those methods. For mid-sized and larger competitors, UNE-L and owned facilities may make more sense. As confirmed by the above data and this Commission's and the FCC's findings in Qwest's 271 proceedings, the market is open to competition. The record evidence in this case establishes that there is ease of entry in the relevant market. *Qwest Brief, at ¶¶ 83-86.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

4. Affiliation of providers of service

74 As Qwest noted in its opening brief, this factor has drawn little attention in this docket. In the opening briefs, the factor was ignored by AT&T, Integra, MCI and Public Counsel.[40] WeBTEC criticized Staff for treating affiliated CLECs as separate competitors. *WeBTEC Brief, at 24.* Qwest questions whether WeBTEC's concern is really what this factor seeks to test. Qwest assumes that the statutory factor is intended to determine whether any of the alternate providers are affiliated with Qwest. *Qwest Brief, at ¶ 87.* Even if WeBTEC's focus is determined to be within the proper scope of the statute, the evidence developed at hearing shows that WeBTEC's concern is limited to a very few (less than five) other carriers. *Tr. 1464-1465.* There is insufficient information in the record to determine that counting AT&T and TCG as separate competitors is meaningful in any way.

75 The only other substantive argument posed regarding this factor was ATG's assertion that the affiliation of most of the voice services in the market is Qwest, based on the substantial resale and UNE competition in Washington. *ATG Brief, at 38-39.* This appears to be yet another variation on the theme that the Commission should ignore wholesale-based competition in this proceeding. The Commission should not entertain that self-serving argument.

5. Other

76 In their opening briefs, the opponents raise two "other" arguments for Commission consideration. WeBTEC and Public Counsel claim that Qwest's continuing market power is proven by the fact that it has sustained a large market share despite having supra-competitive retail prices. *PC Brief, at ¶¶ 53-54; WeBTEC Brief, at 24-25.*[41] Their argument is flawed for

[40] While Public Counsel did nominally dedicate a paragraph to the factor, its discussion had nothing to do with Qwest. Instead, it focused on the fact that SBC, Verizon and Bell South have not entered the Seattle market as "out of region" competitors. *PC Brief, at ¶ 52.* Qwest does not understand how Public Counsel's discussion relates to whether the alternate providers in the relevant market are affiliated with Qwest so as to diminish their capability of truly competing.

[41] Similarly, MCI argues that "[n]o evidence exists in the record to show that CLECs would expand or extend their service offerings if Qwest raised its retail rates." *MCI Brief, at 25.* The statute does not impose such a burden on Qwest. Furthermore, Qwest responds that there is likewise no evidence that CLECs would not do so.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

several reasons. First, the opponents falsely assume that any gap between Qwest's retail rates and the TELRIC for the wholesale equivalent services or piece parts proves that Qwest's rates are supra-competitive or substantially above cost. It does not. The TELRIC rates do not reflect Qwest's actual cost of serving retail customers. Instead, they reflect the Commission's judgment as to what the long-run cost of service would be in a forward-looking, hypothetical environment using the most efficient, currently-available telecommunications technology and the lowest cost network configuration, given the existing location of the ILEC's wire centers. 47 C.F.R. § 51.505. Second, Qwest's lack of pricing flexibility has likely permitted and encouraged CLECs to charge only slightly less (if not more) than Qwest retail rates. *See Ex. 4.* Knowing that Qwest had no ability to lower prices (apart from statewide price reductions or promotions), CLECs have logically seen no reason to offer service far below Qwest's retail rates. Qwest would expect more intense downward pricing pressure and competition once Qwest's petition is granted. Finally, the opponents are wrong to dismiss Qwest's numerous promotions as being irrelevant to this discussion. Given the lack of flexibility, and because permanent statewide price reductions are not a viable alternative in the long term, Qwest's active promotional activity evidences that Qwest has (at least temporarily) lowered its prices to attract and win back customers lost to competitors. *See Ex. 19.* Thus, the opponents' characterization that Qwest has maintained supra-competitive rates is unfounded.

77 Public Counsel also suggests that Qwest's 271 approval and its ability to sell interLATA long distance weighs in favor of a finding that Qwest has market power.[42] *PC Brief, at ¶ 41.*[43] Public Counsel points the Commission to the number of Washington customers in the relevant market that have subscribed to Qwest interLATA long distance, and then explains that *if* Qwest

[42] Interestingly, DOD argues (in the same section of its brief) that this Commission should ignore Qwest's 271 authority, as it is irrelevant to the Commission's determination in this case except with regard to ease of entry. *DOD Brief, at 41.*

[43] In a familiar delaying tactic, Public Counsel also argues that Qwest's new 271 authority "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." *Id.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

continued adding long distance customers at the same rate, in 18 months it would sign up as many long distance customers as CLECs have lines. *Id.* Qwest has no idea (and Public Counsel fails to explain) why Public Counsel believes its projection is reasonable or why the Commission should find that comparable (Qwest long-distance customers vs. CLEC local customers) to be probative or instructive in this case. More importantly, Public Counsel's implicit argument that Qwest's ability to market interLATA long distance increases its market power is undermined by the *fact* that Qwest has continued to lose access lines in the relevant market month after month in 2003, even after it began adding long distance customers starting in January. *Ex. 24C, at 2.* Finally, while Public Counsel suggests in its brief that Qwest's bundling of local and long distance services is a sign of market power, Public Counsel's witness admitted at hearing that there is nothing inherently anti-competitive about bundling services. *Tr. 717-718.*

E. Significant Captive Customer Base

78 In its opening brief, Qwest explained that it has no captive customers (let alone a significant captive customer base) in the relevant market, and discussed Ms. Baldwin's colorful definition of a captive customer as being any customer still receiving Qwest service. *Qwest Brief, at ¶¶ 89-92.* ATG adopts Ms. Baldwin's definition. *ATG Brief, at 7, 39.* ATG takes the argument an absurd step further by arguing that, in addition to all Qwest customers being *per se* captive, all CLEC customers receiving service via UNE-P are also captive customers of Qwest. *Id. at 39.*[44] Neither Public Counsel nor ATG offer any support or authority for their theories. In addition to the arguments raised by Qwest in its opening brief, Public Counsel's and ATG's definition would render RCW 80.36.330(1)(d) superfluous as it relates market share. Having determined whether Qwest still retained significant market share (as ATG and Public Counsel

[44] Integra also argues that the entire CLEC industry is a captive customer base of Qwest, as it is the "monopoly" provider of wholesale services. *Integra Brief, at 9.* Given that Qwest is seeking *retail* competitive classification and not *wholesale* deregulation of any kind, Integra's argument is inapposite.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

construe this factor), there would be no reason for the Commission to also conduct a separate market share analysis under RCW 80.36.330(1)(d). Also, assuming that "significant" might equate to a 20%-30% standard, these parties' interpretation would, in effect, require Qwest to lose 70%-80% market share before being eligible for competitive classification. Obviously, this is another attempt by the opponents to create impossible standards which will have the convenient impact of permanently precluding competitive classification.

79 Finally, DOD and Public Counsel assert that small business customers are captive of Qwest. *DOD Brief, at 43; PC Brief, at ¶¶ 21-23, 56.* The opponents offer very little by way of analysis for this allegation which appears to be largely based on supposition. Also, it is directly contradicted by the evidence of the CLECs' specific marketing efforts directed to winning smaller customers and of the CLECs' capture of [redacted]% of the basic exchange line market segment.

V. OTHER ISSUES

A. Impact of Other Dockets (TRO, Cost Dockets, etc.)

80 Each of the opponents addresses the issue of the TRO and the Commission proceeding to implement the order. *PC Brief, at ¶¶ 71-72; MCI Brief, at 39-41; WeBTEC Brief, at 25-27; ATG Brief, at 40; DOD Brief, at 44-47; AT&T Brief, at 19-20; Integra Brief, at 10-11.* In general, the parties state that the TRO will have a fundamental impact on this proceeding and that the potential for the elimination of UNE-P should be enough for the Commission to deny Qwest's petition at this time.[45] Qwest disagrees. Qwest set forth its rationale in its opening

---

[45] AT&T states that the Commission should condition any grant of the petition on Qwest's agreement to revisit the grant after the full impact of the TRO is known. *AT&T Brief, at 20.* AT&T later recommends that the Commission deny the petition. *Id at 21.* However, AT&T's condition is unnecessary, since the Commission has the authority to reevaluate any competitively classified company or service at any time, and may revoke the grant is such revocation would protect the public interest. *RCW 80.36.330(7).* DOD states that the possibility of elimination of UNE-P should cause the Commission to take a measured and incremental approach to reclassification, but later recommends that the Commission deny the petition in its entirety. *DOD Brief, at 47, 49.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

brief and will not repeat those same arguments here. *Qwest Brief, at ¶¶ 93-95.* The Commission should recognize that this proceeding is separate and different from the TRO proceeding. The TRO addresses the wholesale market, and this case addresses the retail market. The petition can be granted now, based on the evidence presented in this case.

81 If subsequent events create a need to revisit the issues, the Commission can certainly do so when the time is right. However, the opponents' dire warnings of an immediate end to competition if the Commission grants the petition are clearly speculative. The simple fact is that no one can predict what effect there will be on the competitive market if unbundled switching is eliminated. It may be that the Commission will find "no impairment" and unbundled switching will be eliminated over time.[46] Competitors will then compete via resale, UNE-L, and their own facilities, as they do today. Impacts on market share, market power, ease of entry, etc., simply cannot be predicted at this time, and speculation about those impacts cannot form the basis for denial of this petition.

82 The Commission will decide the impairment issue in July 2004. A finding of "no impairment" by the Commission in the mass market switching phase of the nine month proceeding would only come after the Commission had found that alternatives (including self-supply) are readily available and that competition would not be impaired if certain UNEs were removed from the list. If this Commission were to remove UNE-P from the list of required unbundled network elements for business customers, the CLECs that rely on UNE-P will have a 27-month transition period during which it would still be available for existing business customers.[47]

---

[46] On this point, MCI makes the somewhat absurd claim that if the Commission finds "no impairment", competition will be impaired. *MCI Brief, at 40.* With all due respect, this is a logical impossibility, and it is difficult to see how MCI can reach that conclusion.

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

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Any impact on the state of the competitive market can be evaluated during the transition off of UNE-P. There is also the possibility of rolling access to UNE-P, that is CLECs being permitted to utilize UNE-P to serve a customer for a particular period of time before being required to transition that customer's service to another platform.[48] Clearly, the opponents' request that the Commission determine today the competitive impact of the TRO proceeding is premature.

B. Cost Floor

83 Many parties recommend that the Commission establish some sort of cost (price) floor in this proceeding. *MCI Brief, at 41-48; WeBTEC Brief, at 28-29; ATG Brief, at 40-41; AT&T Brief, at 17-19; Integra Brief, at 11-13.* Public Counsel deferred to the other parties on this issue. *PC Brief, at ¶ 73.* DOD agreed with Qwest and Staff that it is unnecessary for the Commission to establish a cost floor or pricing principles in this case, noting that in a similar situation, the Commission declined to do so in Docket No. UT-000883. *DOD Brief, at 48.*

84 The primary concern raised by the parties who recommended establishing a cost floor is that unless the Commission establishes a cost floor now, Qwest will have the ability to engage in discriminatory and predatory pricing practices – strategically raising and lowering retail rates to drive out competition, and subjecting CLECs to a price squeeze. *See, e.g., MCI Brief, at 42-43; AT&T Brief, at 18.*

85 As a solution for this concern, some opponents propose that the Commission establish a specific formula for calculating a price floor, to be established at the imputed costs of all UNEs plus a measure of retail related costs. *MCI Brief, at 47-48; ATG Brief, at 41.* Another proposes that the Commission establish a statewide average price floor. *AT&T Brief, at 18.* WeBTEC also offers a formula for establishing a price floor, but agrees that the Commission

[48] *TRO, at ¶¶ 521-524.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

does not have a proper record in this proceeding to tackle this issue. *WeBTEC Brief, at 29.*

86 Qwest agrees with DOD that a formula should not be established in this case, consistent with how the issue was addressed in Docket No. UT-000883.[49] There, the Commission declined to adopt a cost standard, and noted that "the current rates for Qwest's basic business exchange service were supported by cost studies demonstrating rates were above the costs of providing the service" and declined to require a further showing with regard to costs in that case.

87 As to the recommendations of the opponents, they are at best mutually exclusive, and at worst simply unlawful. MCI's recommendation is that the cost floor be the sum of the TELRIC rates of the UNEs, plus an allowance for retailing costs, while AT&T recommends a statewide average floor. Because the TELRIC for the local loop is deaveraged by wire center, and priced separately in the five zones ordered in the cost docket, it is impossible to have a cost floor that meets both MCI's and AT&T's standards. Integra throws yet another formula into the mix, which is inconsistent with both AT&T and MCI, by suggesting that the cost floor analysis should be done on an exchange by exchange basis. *Integra Brief, at 13.* Qwest's exchanges do not match the five zones ordered for loop deaveraging, and thus Integra's proposal does not match either MCI's or AT&T's. These late entries[50] regarding the issue of establishing a cost floor demonstrate clearly that the Commission should defer this issue to another proceeding, when the issue is squarely before it.

88 In addition, AT&T's proposal is contrary to the competitive classification statute, and is thus likely unlawful. If the Commission were to establish a statewide average cost floor, unrelated to the deaveraged wholesale rates, the Commission would essentially still be regulating Qwest's retail rates and the margins it is able to charge over cost. This is simply contrary to

---

[49] *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 77.*

[50] Neither Integra nor AT&T made these proposals in testimony, but rather offered them for the first time on brief, depriving the parties and the Commission to explore the proposals through cross-examination.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

the entire premise of competitive classification, which contemplates pricing flexibility through the filing of price lists, and requires an aggrieved party to file a complaint against those prices to properly raise any issue. *RCW 80.36.330(4).* Integra's related proposal,[51] that a price list change should be automatically suspended and the burden of proof placed on Qwest to prove the reasonableness of its rates, is similarly unlawful, in that it is contrary to the clear language of the statute on this issue. *Id.*

89 Finally, the parties' complaints that they do not wish to monitor Qwest's pricing practices should be given little if any weight by the Commission. In a competitive market, that is what competitors do – just as QFC no doubt devotes resources to monitoring the pricing at Safeway and Albertson's, so must competitors in the telecommunications industry do so. Qwest's price list filings will be a matter of public record, available for any CLEC to inspect the day they are made. The CLECs may choose to do so in order to be responsive to the competitive market, and if any CLEC observes a pricing practice that it believes is actionable, it may certainly file a complaint or take other action is deems appropriate.

C. Access Charges

90 MCI raised the issue of access charge reform in this docket. *MCI Brief, at 48-53.* Access charges are clearly outside the scope of this proceeding. *Qwest Brief, at ¶¶ 103-105.* Other parties agree. ATG chose not to brief this issue as being unnecessary to the resolution of this proceeding. *ATG Brief, at 41.* Public Counsel stated that this issue is beyond the scope of the proceeding. *PC Brief, at¶ 74.* DOD agrees that there is no need to consider the issue of access charges in this case, and points out that access charge reform was not an issue in Docket No. UT-000883. *DOD Brief, at 49.* All of the other parties simply ignored the issue.[52]

---

[51] This issue is raised at page 12 (Section VI.) of Integra's brief, under "proposed conditions on approval". However, it is clearly related to the issue of a cost floor and is thus addressed here.

[52] The briefs of AT&T, Integra, and WeBTEC do not address this issue at all.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

91 MCI's argument on brief does not shed any light on why the Commission should consider access charges in this case. MCI cites the *AT&T v. Verizon* case, recently decided by the Commission in Docket No. UT-020406. However, that case was a complaint against Verizon, not Qwest, and was decided based on the facts presented in that case, none of which is shown to be present or relevant in this proceeding. MCI also cites various FCC orders regarding Universal Service and access charge reform, and a Colorado stipulation that never took effect. *MCI Brief, at 50-52.* Ultimately, MCI wants this Commission to open a docket to consider various access-charge related issues. *Id. at 52-53.* However, such a proposal is not properly made in a closing brief – if MCI is serious about this issue, it is incumbent upon MCI to take the proper procedural steps to ask the Commission to open an adjudicative or rulemaking docket to consider it.

D. Proposed Conditions on Approval

92 Some of the opponents propose that the Commission impose several conditions upon Qwest if the Commission would otherwise grant the petition. *WeBTEC Brief, at 29-30; ATG Brief, at 41; AT&T Brief, at 20-21; Integra Brief, at 11-13.* Other opponents recognize that it is not appropriate for the Commission to impose conditions, and/or simply recommend that the Commission deny the petition. *PC Brief, at ¶ 75; DOD Brief, at 49.*

93 The condition recommended by WeBTEC is that Qwest be required to amend its SGAT to confirm a position set forth in Exhibit 85. Qwest does not believe that such a condition should be imposed – the portability of DID numbers was not properly raised by WeBTEC in testimony, and is not related to the state of effective competition in the market. Further, Qwest has already confirmed that its policy is as set forth in Exhibit 85.

94 The conditions recommended by ATG should similarly be rejected. ATG proposes a myriad of requirements (including substantial reporting requirements) that the parties and the

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Commission have seen for the first time on brief. Qwest believes that a party who wishes to make an affirmative proposal for Commission action in an adjudicative proceeding should be required to present that proposal in testimony, so that it may be rebutted and explored through cross examination. ATG's proposal should be rejected for that reason alone. However, ATG's conditions are also contrary to the competitive classification statute, which contains no such reporting requirements. *RCW 80.36.330.* They are also contrary to the Commission's rules regarding contracts for competitively classified services, which also contain no requirement that a company compile reports on its ICB contracts. *RCW 480-80-241, -242.*

95 The conditions recommended by AT&T should be rejected. AT&T claims that Qwest's "non-abandonment" commitment is too weak. *AT&T Brief, at 20-21.* AT&T proposes that the Commission strengthen it by forbidding Qwest to sell any of its facilities. Since this condition was raised in Staff's testimony on August 13, 2003, AT&T could have filed responsive testimony on August 29 setting forth this proposed enhancement to that condition. That is did not do so (but does on brief) is improper, as it deprived the Commission and the parties the opportunity to ask Mr. Cowan about this condition, and to explore with him how this would be implemented and why it was proper. This is important because AT&T's proposed condition is likely contrary to law. AT&T is essentially asking the Commission to rule on any future application for a transfer of property that Qwest might file under Chapter 80.12 RCW and deny that application in this proceeding. Clearly, the Commission can not act preemptively on a matter that is not currently before it.

96 The conditions recommended by Integra should also be rejected. Integra proposes certain conditions regarding price list filings that have already been addressed above. Integra also proposes that Qwest be prohibited from providing services over digital facilities. *Integra Brief, at 12.* This is simply absurd. The distinction between digital facilities and digital services is clear. That this petition does not ask for competitive classification of digital services is also

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

clear. However, it is evident that the analog services that are the subject of this petition may be provided over either analog or digital facilities. *Qwest Brief, at ¶ 12.* Under the circumstances, Integra's proposed condition makes no sense at all.

E. Other

97 The opponents' briefs contain a host of other issues requiring mention. The most prominent "other" theme found in the opponents' briefs is the anticipated rush of doomsday predictions the opponents believe justify denial of Qwest's petition. *See, e.g., ATG Brief, at 2, 3, 8, 27, 38, 39, 40, 42, 43; AT&T Brief, at 16-18; Integra Brief, at 10; MCI Brief, at 6, 8, 30; WeBTEC Brief, at 15.* While far too many doomsday scenarios were offered to discuss each one, most involve the death of UNE-P and other wholesale competition, price squeezes and Qwest's raising retail rates. In dramatic fashion, ATG predicts that "the fundamental change in regulation sought here by Qwest will permit that company to eliminate economic competition by UNE-P." *ATG Brief, at 39-40.* ATG also exclaims that the Commission "should grant Qwest's petition only if it is willing to jeopardize most of the remnants of competitive investment in the state." *Id. at 42.* MCI also predicts without support that an unregulated Qwest, driven by financial objectives, will have little incentive to ensure that Washington consumers have a choice of providers. *MCI Brief, at 8.*[53]

98 Based on the opponents' testimony and cross examination, Qwest has already addressed why the Commission should not allow itself to be distracted by the opponents' dire predictions. *Qwest Brief, at ¶¶ 112-114.* Qwest's analysis includes reference to the fact that the Commission will retain the power to reclassify Qwest's services as fully regulated if the public

[53] MCI's argument ignores that Qwest will not be freed from the considerable wholesale regulation governing its behavior. Furthermore, that Qwest is driven by financial objectives is hardly novel or damning. Viewed more appropriately, that motivation would seem to encourage Qwest to act within the federal, state and contractual constraints so as to avoid litigation, penalties, QPAP liability, reclassification of its services or rescission of its 271 authority.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

interest so requires.[54] The Commission should see what this line of rhetoric really is – another attempt to misdirect the Commission from its statutory requirement to analyze the *current* competitive environment to determine whether Qwest *today* faces effective competition in the relevant market. The record overwhelmingly shows that Qwest does.

99 Several opponents also argue that Qwest has not proven that it needs competitive classification in light of the other "tools" at its disposal. *ATG Brief, at 9; AT&T Brief, at 17; MCI Brief, at 1, 25.* Similarly, Public Counsel implies that competitive classification should be denied because Qwest has not made full use of the competitive classification it received in Docket No. UT-000883. *PC Brief, at ¶ 55.* None of these "factors" are specified by RCW 80.36.330 or Commission precedent as being required elements of proof in a competitive classification case. Furthermore, Qwest has already explained at length why it does need competitive classification and why it has been unable to take advantage of the relief granted in the prior case. *Qwest Brief, at ¶¶ 115-116.*

100 Finally, Public Counsel suggests that approval of Qwest's petition will harm the public interest. For that argument, Public Counsel relies upon public comments received during the case. Public Counsel characterizes the comments as overwhelmingly opposing the petition. *PC Brief, at ¶¶ 63-65.* While Qwest certainly believes that public input is valuable,[55] Qwest is concerned with the apparently contrived nature of much of the opposition in the record. For example, the packet of public comments contains numerous form-style opposition statements.[56]

---

[54] ATG argues that after-the-fact mechanisms are no cure. ATG argues that, if they were, the Legislature would have simply statutorily reclassified all services and left it up to third parties to police Qwest via after-the-fact mechanisms. *ATG Brief, at 7.* ATG's argument makes little sense. The Regulatory Flexibility Act reflects a balance between preserving universal service and relaxing regulation when it is no longer necessary. *RCW 80.36.310.* The Legislature's analysis of how best to achieve that balance was reflective of its time; in 1985, Qwest's predecessor faced virtually no competition. Perhaps if the Legislature were today setting out to enact new legislation, it would agree with ATG and simply relax regulation across the board, but empower the Commission and third parties with enforcement mechanisms to check the ILECs' practices. However, that is not what this state's law provides, and thus ATG's comments are not instructive.

[55] For example, Qwest heartily supported Public Counsel's request for a public hearing. *Qwest Corporation's Response to Public Counsel's Request for Public Hearings.*

[56] Qwest notes that the form letter did not offer individuals an opportunity to support Qwest's petition.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

See, e.g., Ex. 800, at 4, 5, 67, 113, 116, 123, 125, 126, 127, 129, 131, 132, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 150, 151, 152,153, 155, 156, 157, 158, 159, 160,161, 162, 163, 165, 168, 169, 170, 171, 172, 175, 176, 177, 178, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 212, 213, 214, 215, 216. Qwest does not know whether those forms were circulated by Public Counsel or an allied organization. Furthermore, Public Counsel's disregard for the input of Qwest employees, Chambers of Commerce, EDCs and city officials is both unexplained and offensive.

101 Finally, the record developed at the public hearing reflects that there is considerable support for Qwest's petition. That support comes not only from Qwest employees, but also from small business customers and civic leaders throughout the state. *Tr. 571-574 (Dennis Matson, Thurston County EDC), 574-577 (Joe Homan, Tacoma small business customer), 577-579 (Jim Sullivan, Renton small business owner), 580-581 (Ted Sprague, Cowlitz County EDC and small business customer), 581-585 (Karen Rogers, Port Angeles City Council Member and small business owner).* Eight of the twelve speakers at the public hearing supported Qwest's petition. Public Counsel's characterization of overwhelming opposition is plainly false.

VI. CONCLUSION

102 Based on the foregoing and the reasons stated in Qwest's opening brief, the Commission should unconditionally grant Qwest's petition for competitive classification.

DATED this 7th day of November, 2003.

QWEST

Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040