

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

MCI REPLY BRIEF

WorldCom, Inc., (n/k/a/ "MCI"), on behalf of its regulated subsidiaries in Washington, hereby presents its reply brief in this matter.

I. INTRODUCTION

1 Qwest argues in the Introduction to its Brief that it is rapidly losing access lines and that Qwest must become more nimble and more responsive "like its competitors," in order to effectively compete. It also needs the ability to target market and, "like its competitors," to respond more quickly to competitive offerings and strategies.¹ The Commission should not be swayed by this "cry for help" from Qwest, the incumbent monopolist.

2 MCI asks the Commission to keep in mind that a primary purpose of the 1996 Telecommunications Act is to reduce the number of local exchange access lines held by the incumbent local exchange carriers. Before 1996, Qwest possessed 100% of the market in its territory in Washington. It took years for competitors to obtain, according to Qwest, approximately 19% of Qwest's access lines, the preponderance of which is via resale.² During

¹ See Qwest Opening Brief at para. 4.

² Qwest Opening Brief at para. 52. This is the percentage of access lines lost by Qwest from December 1999 until the end of December 2003. As noted herein, the CLECs have shown that total service resale and UNE-P is more appropriately considered resale since Qwest owns and controls all of the underlying facilities.

these years of alleged competitive growth, the Commission possessed regulatory oversight of Qwest's pricing, provisioning and service quality. Competition was able to develop as a result of the protections offered by that oversight. Qwest's proposal here removes much of the protection by minimizing Commission oversight.

3 Moreover, using Qwest's numbers, Qwest, merely one of the local exchange carriers in Qwest territory in Washington, continues to possess 81% of the lines that it held in December 1999. The other 161 registered LECs share the remaining 19% of the lines³. Thus, despite its loss of lines, Qwest maintains significant dominance in its territory in Washington.

4 Additionally, Qwest is not "like" its competitors. The other local exchange carriers in Qwest territory rely on their competitor, Qwest, to provide services to end-users. Qwest does not rely on any of its competitors to provide service to its end users in Washington. Thus, despite its claim that its Petition seeks a level playing field for Qwest, the reality is that as long as it is the wholesale supplier to its dependent competitors, Qwest will always possess competitive advantages and market power over its competitors. A level playing field is not possible.

5 The parties' opening briefs reflect the confusion in the data relating to the correct number of CLEC access lines to be considered by the Commission here in evaluating Qwest's Petition. This leads, in turn, to confusion regarding market share, to the point that the Commission does not have a reliable set of numbers upon which it can base any decision here.

6 For all of the reasons set forth in MCI's testimony, its Opening Brief and this brief, MCI requests

³ Qwest Opening Brief at para. 23. Qwest also represents that 152 CLECs have interconnection agreements with Qwest; 78 CLECs purchase wholesale services from Qwest in Washington, and 37 CLECs provide services of the type subject to this proceeding. Regardless of the number, the point is that, despite the loss of lines, Qwest maintains significant dominance in its territory in Washington.

that this Commission reject Qwest's Petition.

II. DEFINITION OF RELEVANT MARKET

A. Definition of product market

7 Qwest argues that the relevant product market at issue in this case consists of analog business exchange services and the features that are available by virtue of having purchased a line-based product.⁴ MCI disagrees with Qwest and agrees with the arguments of Public Counsel and Advanced Telecom, Inc. on this issue.⁵

8 The Commission should apply standard economic principles to define the appropriate product market rather than simply accepting that presented by the Petitioner. It stands to reason that a petitioner seeking competitive classification would define the market in the fashion most favorable to its request. The market analysis presented in the United States Department of Justice Horizontal Merger Guidelines, as proposed by Public Counsel, is an objective and reasonable standard to use to develop market definition.⁶ The focus is on the products that the customer would demand as a substitute.⁷

9 Analog service is not an appropriate market definition. Qwest's decision to limit the market to analog services is not based on economic principles but on practical and strategic considerations.⁸

⁴ Qwest Opening Brief at para. 11.

⁵ Initial Brief of Public Counsel, confidential version at paras. 6-16; Brief of ATI at pp. 11-22.

⁶ Exhibit 224, Section 1, pp. 4-5. In the Triennial Review Order, although the FCC did not adopt the HMG to analyze "impairment" under the federal Act, it recognized the usefulness of the HMG to analyze market power and the **question of whether an incumbent LEC could raise its retail prices unchecked. TRO at paragraph 109.**

⁷ Initial Brief of Public Counsel, confidential version at para. 6.

⁸ Tr. at 113-118.

Further, the technical differences between analog and digital services are limited and the explanations confused and varied.⁹ Moreover, although Staff supports Qwest's narrow definition of the market, Staff did not independently conclude that it was appropriate. Staff simply accepted Qwest's definition as filed.¹⁰ The relevant market here is properly defined to include both analog and digital business services.

10 From a customer perspective, the parties agree that generally analog and digital voice business products are substitutable. Both Qwest and Staff argue that competitors' digital services are a threat to Qwest's market share of analog business services.¹¹ MCI agrees that digital services may be substitutable for Qwest's analog business services. The record here is devoid, however, of evidence of the entire market of substitutable services, including the percentage of the business services market held by Qwest's digital business services.¹²

11 Qwest annual reports claim that Qwest's business access lines grew substantially from 1999-2001 as a result of customers transferring from Qwest analog to Qwest digital services.¹³ The Commission cannot make a finding as to whether effective competition exists as to the Petitioned Services without knowing the market share held by Qwest for both analog and digital services.

12 The Commission's decision on the product scope of the relevant market impacts all of the factors to be considered as to whether effective competition exists in Washington. If the Commission finds that the appropriate market is the analog market, it should evaluate market share and the

⁹ Initial Brief of Public Counsel, confidential version at paras. 8-10.

¹⁰ Tr. at 1507.

¹¹ Tr. at 179-183, 299-300; Exhibit 201T at p. 15; Tr. at 1295; Qwest Opening Brief at paras. 23, 25 and 38.

¹² Tr. at 536.

¹³ See Exhibits 84 and 86.

other statutory criteria in the context of competing analog services. No information about competitors' digital services or "intramodal" services should be included in the analysis. If, on the other hand, the Commission determines that the relevant product market is both analog and digital services, the Commission should include in its analysis both analog and digital services provided by all carriers serving business customers in Qwest territory, including Qwest's. Likewise, if the market definition is expanded to include competitors' wireless and VoIP services, so should those provided by Qwest be considered. To do otherwise would be to underestimate the market share of the dominant provider in Qwest territory and render the market share analysis meaningless.

B. Definition of geographic and customer class market

13 Qwest seeks competitive classification of its analog business services throughout its service territory statewide.¹⁴ Qwest does not distinguish in its Petition between customer classes. MCI agrees with Public Counsel that the Commission should follow its analysis in Qwest's previous competitive classification case and review the availability of competition on a wire center or an exchange-by-exchange basis as well as on a small and large business customer basis.¹⁵

14 Obviously, a statewide definition waters down the actual and significant differences that exist in the level of competitive activity in each of Qwest's exchanges, particularly the differences between rural and urban areas of the state. The Commission recognized these differences in Qwest's previous competitive classification docket and declined to grant Qwest's Petition in

¹⁴ Qwest Opening Brief at para. 18.

¹⁵ Initial Brief of Public Counsel, confidential version at paras. 17-23.

those exchanges where Qwest failed to demonstrate that a significant number of customers switched to a competitive provider.¹⁶

15 The FCC's TRO provides guidance on the defining markets according to geography and customer class. FCC rules require that states define each geographic market on a granular level and "take into consideration the locations of mass market customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies."¹⁷

16 In addition, the FCC held that state commissions cannot define a market as encompassing an entire state and should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market.¹⁸

17 Customers can be distinguished into three classes: mass market, small and medium enterprise, and large enterprise. These classes are distinguished by services purchased, costs of providing these services, and revenues generated.¹⁹ Mass-market customers consist of residential customers and very small business customers.²⁰

¹⁶ Commission 2000 Order at para. 76.

¹⁷ Before the Federal Communications Commission; **REPORT AND ORDER AND ORDER ON REMAND AND FURTHER NOTICE OF PROPOSED RULEMAKING**; CC Docket Nos. 01-338, 96-98, and 98-147; Released August 21, 2003 at para. 495. Hereinafter referred to as the "TRO."

¹⁸ TRO at para. 495.

¹⁹ TRO at paras. 123-129

²⁰ TRO at para. 127. FCC will usually include very small businesses in the mass market. However, FCC may include them with other enterprise customers, if appropriate. TRO at para. 127 n.432

18 The FCC recommends that in defining a market, state commissions should consider how competitors' ability to provide alternative services varies geographically and should attempt to distinguish among markets where different findings of impairment are likely. For instance, in the impairment analysis, states can consider variance in UNE loop rates, retail rates, number of high-revenue customers, cost, and capabilities of wire centers to handle large numbers of hot cuts. The FCC also commented that states could use existing market definitions, such as rate zones, to define markets, if it determines these are appropriate.²¹

19 The Commission should reject Qwest's proposal to define the market in this case to include all of Qwest's territory statewide. Qwest failed to demonstrate that competitors' ability to provide alternative services does not vary geographically across the state. In fact, the evidence demonstrates the opposite. For instance, competitors' underlying costs of providing UNE based services varies depending upon the end user's rate zone.²² Qwest has also failed to demonstrate that effective competition exists for both small and large business customers statewide in the state of Washington. Therefore, Qwest's Petition should be denied.

III. REVIEW OF STATUTORY FACTORS FOR EVALUATING EFFECTIVE COMPETITION

A. Number and size of alternative providers

20 Qwest argues that CLEC competition in Washington is flourishing. In support of this argument, it cites the numbers of competitors registered in Washington, the number of competitors purchasing Qwest wholesale services, and the number of competitors providing services of the

²¹ TRO at paras. 495-496.

²² See Exhibit 6C.

type subject to this Petition.²³ The mere presence of competitors in the state, however, does not establish that effective competition exists. Instead, Qwest must prove that competitors:

Are offering and will offer competitive services. This determination turns on the presence of competitors, their actual current availability to customers, and a judgment, from their current behavior and the current market structure, that they do, can and will provide alternative service to end users.”²⁴

21 Evidence showing the mere presence of competitors does not establish that those competitors are providing reasonable alternatives to Qwest’s business services.²⁵

22 Qwest paid little attention in its testimony and brief to the statutory criterion regarding the size of alternative providers. This Commission should not ignore this important consideration. The market share held by individual CLECs is insignificant in comparison to Qwest’s dominant position. As presented in Mr. Stacy’s testimony, CLEC mean market share is 1.5% and CLEC median market share is .3%.²⁶ Thus, the market shares of the majority of CLECs operating in Washington are insufficient to discipline the prices and quality of Qwest’s basic business telecommunications services. Moreover, should Qwest receive the relief it seeks here, individual CLECs would be extremely vulnerable to Qwest targeting strategies.²⁷

B. Extent to which services are available from alternative providers in the relevant market

23 This criterion and the next require consideration of many of the same factors. Qwest argues that Washington CLECs offer comparable services at comparable prices to Qwest’s analog business

²³ Qwest Opening Brief at paras. 23-24.

²⁴ Seventh Supplemental Order Denying Petition and Accepting Staff’s Proposal, WUTC Docket No. UT 000883 (December 2000) (hereafter “Commission’s 2000 Order”) at para. 66.

²⁵ See Commission’s 2000 Order at para. 69.

²⁶ Exhibit 603T at p. 10.

²⁷ Exhibit 603T at p. 10.

services in the form of resale, UNE-P, unbundled loops, facilities-based competition, cable, wireless and VoIP.²⁸ Qwest also argues that the Commission should consider CLEC advertising as evidence of the presence of competition.²⁹

24 The Commission has already determined that competition through resale is not price constraining.³⁰ Likewise, the provisioning of services through Qwest's UNE-P product is simply Qwest providing the service *on behalf of a CLEC*.³¹ Qwest controls its competitors' costs as well as quality of service provided to the end user.³² Moreover, UNE-P may not be continue to be a mode of entry after state Triennial Review Order impairment proceedings conclude. As the FCC recognized in the TRO:

In many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs; **thus, a standard that takes away UNEs when a retail competition threshold has been met could be circular.**³³

25 Although to a lesser degree than resale and UNE-P, Qwest also controls some of its competitors' costs and service quality when a competitor provides local exchange services through Qwest's unbundled loop services. Qwest maintains control of the last mile.

26 Significantly, in each of these services, Qwest also maintains a share of the revenue relating to the customer that switches to a competitor. Unlike with facilities-based competition, when Qwest

²⁸ Qwest Opening Brief at paras. 26-27.

²⁹ Qwest Opening Brief at paras. 28-31.

³⁰ Commission 2000 Order at p. 20.

³¹ MCI Opening Brief at p. 11.

³² See discussion at MCI's Opening Brief at pp. 9-12.

³³ TRO at para. 114.

loses a customer to a competitor providing services through resale or UNEs, it does not lose the entire revenue stream. The Commission should take these factors into consideration when it evaluates the vitality of competitive activity in each of Qwest's exchanges.

27 The discussion in Qwest's brief about intermodal competition underscores the lack of clarity presented by Qwest's testimony on whether and how it wants the Commission to consider the presence of intermodal competition in its analysis of Qwest's Petition.³⁴ MCI agrees with Qwest that wireless service is not a substitute for Qwest business exchange service and that large Centrex and PBX systems may not lend themselves to a full wireless application.³⁵ These are but two of the many reasons why the Commission should find that wireless and VoIP are not substitutable for Qwest's business services at issue in this proceeding.³⁶

28 Qwest argues that CLEC advertising and price lists should be considered by this Commission as evidence that CLEC services are available in and throughout the relevant market.³⁷ The Commission rejected this argument of Qwest in its 2000 Order and should reject it again here:

Qwest refers to the presence of switches, price lists filed with the Commission and advertising by CLECs to show that CLECs are capable of providing or hold themselves out to provide services comparable to Qwest's business services. None of these exhibits shows that competitors *in fact* are offering services in the relevant geographic market.³⁸

³⁴ Qwest's Opening Brief at paras. 37-38.

³⁵ Qwest's Opening Brief at para. 38.

³⁶ See MCI Opening Brief at pages 12-25. In the interest of efficiency, MCI does not repeat those points here and instead incorporates them herein by reference.

³⁷ Qwest Opening Brief at paras. 28-30.

³⁸ Commission's 2000 Order at para. 69.

C. Ability of alternative providers to make functionally equivalent or substitute services available

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

29 Much of the preceding discussion applies equally to this criterion. Analyzing the extent to which services are available and the ability of alternative providers to make substitute services available requires consideration of many of the same factors. In its discussion of this criterion, Qwest contends that no evidence has been presented that Qwest's provision of its wholesale services are in any way inferior to its provision of its retail services. Qwest claims that total services resale and UNE-P are "functionally equivalent and fully substitutable for Qwest's service given that the underlying service being provided is Qwest's end-to-end service merely re-branded under the name of the CLEC."³⁹

30 This is exactly the point Messrs. Gates and Stacy made in their discussion of whether and how the Commission should consider Qwest's provision of resale and UNE-P to be an alternative to Qwest's retail business services. Qwest's wholesale service is not an alternative to Qwest's service; *it is in fact, Qwest's service*. Qwest controls the end-to-end provisioning and performance of the service. Qwest controls the electronics. Qwest controls CLEC costs. By doing so, Qwest controls the ability of its competitors to provide functionally equivalent or substitutable services. In its Brief, Qwest highlights the statement of Integra's Chief Executive Officer, Dudley Slater, on this issue. MCI agrees that Mr. Slater's quote is instructive.

From a strategic perspective, Integra has made the determination that we are going to differentiate ourselves and we are going to compete in the

³⁹ Qwest Opening Brief at para. 33.

marketplace based upon service, and we believe very strongly that in order for us to look a customer in the eye and truly compete on service, we need to own substantially all of the electronics, which really is what governs the quality of service and manages the traffic. And for that reason, to compete on service from a strategic differentiation standpoint, we made the decision to invest in our own network, *which is a long way of saying we don't use resale because we believe that it's fundamentally still Qwest providing the service but someone else's brand is on it.* That's the strategic consideration.⁴⁰ (Emphasis added)

31 A competitor cannot differentiate its service from Qwest's service, if its service is in fact Qwest's service.

32 MCI's Opening Brief presents its testimony and arguments about why this Commission should not consider resale or UNE-P to be a competitive alternative to the business services subject to Qwest's Petition in this docket.⁴¹ For all those reasons, as well as the reasons stated herein, MCI asks the Commission to conclude that Qwest has failed to demonstrate that competitive services provided via resale or UNE-P are competitive alternatives to Qwest's service.

2. CLEC-owned loops

33 Qwest contends that there is no evidence in the record that CLECs that serve customers via their own facilities provide services that are anything less than functionally equivalent and fully substitutable of Qwest's service.⁴² Qwest's argument has the burden of proof backwards. Qwest has the burden to demonstrate that CLEC-owned loops are functionally equivalent or substitutable to Qwest's services at issue here.⁴³ Qwest fails to cite to evidence on this point in its Brief. Qwest admits that its Petition does not rely on the presence of CLEC-owned facilities in

⁴⁰ Tr. 851-852.

⁴¹ MCI Opening Brief at pp. 9-12.

⁴² Qwest Opening Brief at para. 36.

⁴³ Commission's 2000 Order at p. 3.

the relevant market. Qwest logically therefore did not present evidence on the substitutability of competitors' facilities-based services. In sum, Qwest failed to satisfy its burden of proof on this issue. The Commission should reject Qwest's attempt to shift this burden to the other parties.

34 Staff presented evidence about CLEC-owned loops in the state of Washington. However, Staff did not present evidence of whether those CLEC-owned loops are functionally equivalent or fully substitutable for Qwest's business services. Consequently the Commission should find that no evidence exists in the record to enable it to make a finding on this issue.

3. Intermodal (wireless, VoIP, Wi Fi, cable, etc.)

35 Qwest interprets the other parties' criticism of Qwest's arguments on the substitutability of wireless and VoIP services for Qwest services as "an attempt by the opponents to distract the Commission from the central issues at hand." To the contrary, the point of the other parties' testimony and cross-examination on this issue was to demonstrate that Qwest's and Staff's evidence on the substitutability of intermodal competition for Qwest's business services is insufficient, unreliable, flawed and misleading. Mr. Gates' testimony demonstrates that wireless services are not functionally equivalent to business wireline services; the quality of wireless is inferior to that of wireline services; and the evidence is insufficient to demonstrate that the pricing of business wireline and wireless services is comparable.⁴⁴ Similarly, no evidence exists in the record as to the number of end users utilizing wireless, VoIP or any other form of intermodal service as a substitute for wireline business analog services.⁴⁵ In addition, the cross examination of Mr. Teitzel revealed that although he claimed that surveys that Qwest performed in Iowa and

⁴⁴ Exhibit 501T at pp. 19-32.

⁴⁵ Tr. at 349-351, 355-357.

Idaho support Qwest's argument that wireless is a functional substitute for business wireline service, in fact, the surveys do nothing of the sort.⁴⁶

36 In the TRO, the FCC again provides this Commission some guidance. It determined that wireless is not a substitute for wireline services. The FCC found that wireless does not yet equal wireline quality, ability to handle data traffic and ubiquity.⁴⁷ The Idaho Commission recently issued detailed findings, reaching the same conclusions in its rejection of Qwest's request for deregulation of its residential and business services there.⁴⁸

37 For all of the reasons set forth in this brief and MCI's Opening Brief, MCI requests that the Commission find that the evidence herein is insufficient to prove that wireless and VoIP are functionally equivalent and substitutable for Qwest business services at issue in this docket.

D. Other indicators of market power

38 Qwest asks the Commission to conclude that Qwest lacks market power in the analog business services market. MCI asks the Commission to reject Qwest's request.

1. Market share

39 Although Qwest minimizes the utility of market share analysis in a determination of whether effective competition exists, it acknowledges that market share data provides the most tangible evidence of competition.⁴⁹

40 **Commission precedent** Qwest cites previous Commission rulings as background for its

⁴⁶ Confidential Tr. at 380-415.

⁴⁷ TRO at paras. 230 and 445.

⁴⁸ Order No. 29360, Idaho Public Utilities Commission, Case No. Qwe-T-02-25 (October 20, 2003).

⁴⁹ Qwest's Opening Brief at paras. 41-42.

analysis, highlighting the Commission's decisions in the AT&T competitive classification case,⁵⁰ the GTE competitive classification case⁵¹ and the previous Qwest competitive classification case.⁵² Notably, in each of those cases, the market share of the dominant carrier was less than the market share presented by Qwest in its Petition here – 83%.⁵³ Other than Staff's estimate (which should be disregarded for reasons discussed elsewhere in this Brief), none of the market share estimates provided by parties to this case fall within the range found to be sufficient by the Commission to support a finding of effective competition. Indeed, by any measure of market presence submitted in this case, Qwest's dominance is indisputable.

41 In addition, in the AT&T and GTE cases, those carriers did not provision the services provided by the alternative carriers on an end-to-end basis, as Qwest does here. Thus, GTE and AT&T maintained less control over their competitors' competing services than that maintained by Qwest here.

42 MCI agrees with Qwest that the Commission's analysis of this Petition should be consistent with the Commission's analysis of Qwest's previous competitive classification docket. However, if the Commission were to adopt a loss of 30-40% of the relevant market as a benchmark for a finding of "effective competition," (which is not satisfied in this docket) the Commission should

⁵⁰ *Fourth Supplemental Order, Docket No. U-86-113, at 16-18.* In that case, AT&T's witness Richard Cabe testified that the Commission should not simply consider AT&T's high remaining market share as determinative. Mr. Cabe testified that this fact was offset by the fact that there were thirty registered telecommunications carriers in Washington (plus a number others not registered), AT&T's market share had been declining and there was ease of entry. *Id. at 17-18.* The Commission agreed with Mr. Cabe's analysis. *Id. at 32-33.*

⁵¹ *First Supplemental Order, Docket No. UT-970767, at 2.*

⁵² *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 75.*

⁵³ Qwest's Petition and Mr. Teitzel's direct testimony each claim a Qwest market share of 83% based on its wholesale services. Staff has presented evidence that it now believes Qwest's market share to be somewhere in the low 70 percent range, depending on which version of Staff's testimony and exhibits are used. For reasons stated elsewhere in this Brief, MCI believes Staff's market share calculation should be disregarded. Mr. Stacy's analysis demonstrates that Qwest's market share remains at 84%, when the resale and UNE-P lines are removed from the calculation.

also follow the additional reasoning set forth by the Commission in that decision on the appropriate market share analysis, including its definition of the relevant market and its consideration of market concentration.

43 **The process of gathering data.** Qwest next argues that both Qwest and Staff engaged in extensive data gathering and analysis.⁵⁴ The record calls into question the accuracy of both Qwest's and Staff's data, however.

44 Qwest witness, Mr. Reynolds, admitted that Qwest had difficulty identifying its own services to include in this Petition and making sure that Qwest was able to categorize competitive services and its own services "on the same footing."⁵⁵ In addition, Staff and Qwest numbers concerning the wholesale services competitors ordered were not always consistent.⁵⁶ The record reveals no evidence that Qwest or Staff took reasonable steps to reconcile those differences.⁵⁷

45 Staff believed it appropriate to supplement the record with information regarding services provided by CLECs over "owned" facilities. In an effort to collect that data, on June 30, 2003, the served Order No. 6 on 200 registered CLECs in Washington.⁵⁸

46 The responses were initially due on July 18, 2003. The deadline was subsequently extended to July 31, 2003. Mr. Wilson testified that he received one to two hundred e-mails and phone calls

⁵⁴ Qwest Opening Brief at para. 44.

⁵⁵ Tr. at 117.

⁵⁶ Tr. at 1300-1302.

⁵⁷ Tr. at 1300-1305. Mr. Wilson offers an explanation about how he attempted to reconcile the data, including his judgment about whether the person responding to the questionnaire on behalf of the CLEC was "experienced" or "inexperienced."

⁵⁸ Tr. at 1279.

from CLECs around the state asking questions about the questionnaire. Some asked about the definition of special access and whether residential lines should be included. None asked about whether they should submit both analog and digital lines because, in Mr. Wilson's opinion, "there was no clue to them to ask such a question."⁵⁹

47 On July 22, 2003, the Commission issued Order No. 8, which among other matters, required Staff to contact all of the CLECs to determine whether the information they submitted, or were preparing to submit, included analog lines only. Mr. Wilson testified that he contacted some of the CLECs, but not all 200. He kept no notes of the conversations or of the particular CLECs contacted. In addition, with regard to the CLECs that he contacted, he did not provide a definition for the CLECs to use to distinguish between analog and digital services.⁶⁰ When the CLEC responded stating that it could not distinguish between analog and digital lines, Mr. Wilson testified that he included all of the lines in his CLEC access line totals.⁶¹ In addition, after the party CLECs submitted corrected data in October, Mr. Wilson contacted no other non-party CLECs to determine whether their interpretation of "analog" and "digital" services was consistent with that used by Qwest in its analysis.⁶²

48 Twenty-seven (27) CLECs submitted data in response to Order No. 6.⁶³ Mr. Wilson received the majority of the data from the CLECs on July 31. He reviewed, analyzed, aggregated and provided the aggregation to the other parties to the proceeding on August 6, 2003. After

⁵⁹ Tr. at 1282-1283.

⁶⁰ Tr. at 1293-1294.

⁶¹ Tr. at 1294.

⁶² Tr. at 1295.

⁶³ *Ex. 201T, at 9; Ex. 210T (Wilson Rebuttal), at 6.*

correcting numerous errors, Mr. Wilson resubmitted it to the parties on August 10, 2003.⁶⁴ Another correction was submitted on August 11, 2003. Two days later, on August 13, Staff submitted its direct testimony. In short, Mr. Wilson had a short amount of time to review and analyze “thousands and thousands of data points, and aggregate them and report them out accurately.”⁶⁵

49 After the testimony was filed, at the hearing as well as after the hearing, Staff presented additional changes to the data submitted in its testimony on the number of CLEC access lines, its market share estimates and its spreadsheets reflecting the data aggregation.⁶⁶ Changes were due to errors in Mr. Wilson’s interpretation of the data, additional and corrected information provided by CLECs in response to the Staff Questionnaire, and clarifications to the spreadsheet format.⁶⁷

50 The record demonstrates that in fact the process of collecting and analyzing relevant data and presenting testimony on the data was rushed and arbitrary, particularly with regard to Staff’s data collection and analysis. Staff had insufficient time and resources to properly conduct its investigation. Moreover, the questions submitted to the CLEC community could be and were, interpreted myriad ways. In sum, no valid conclusions may be drawn from Staff’s data and analysis.

51 MCI is puzzled by Qwest’s reference at paragraph 50 of its brief to “all forms of intramodal competition.” First, Qwest has stated repeatedly in its Brief that it is not relying on intermodal

⁶⁴ Tr. 1288-1291.

⁶⁵ Tr. at 1291.

⁶⁶ Tr. at 1269-1270.

⁶⁷ Tr. at 1269-1270

competition to demonstrate effective competition. Second, Staff's survey did not seek information about service provided by competitors in Washington through wireless, VoIP or cable technologies. Consequently, information about intramodal competition is not included in Staff's spreadsheets. Moreover, Staff otherwise presented no empirical data about the extent to which services are actually available in the relevant market through intramodal services, nor did any other party. The Commission should disregard Qwest's comment on this point since it is unsupported by the record.

52 **Growth in market share.** Qwest next claims that it has submitted unrebutted evidence that CLEC wholesale line counts and market share in the relevant market grew dramatically each year between December 1999 and December 2002.⁶⁸ Qwest's wholesale data reveals that CLECs were purchasing 25,543 wholesale lines in the relevant market as of December 1999, which amounted to 3.8% of the market.⁶⁹

53 Using Qwest's numbers relating to wholesale-based data, between December 1999 and December 2002, CLECs gained 13.2% of the market. Qwest characterizes the CLEC market share growth over these three years as 333%. This figure is misleading. Qwest's arguments on growth in CLEC market share should be placed in proper context. Growth from 1 customer to 333 customers over a three-year timeframe also constitutes a 333% increase. Growth in market share from 0% to 17% over a seven-year period or from 3.8% to 17% in a three-year period, is not a clear indicator that effective competition exists for Qwest's business services on a statewide basis today in Washington.

⁶⁸ Qwest Opening Brief at para. 51.

⁶⁹ Qwest Opening Brief at para. 51.

54 **Opponents' criticisms of Qwest and Staff data.** Qwest characterizes opposition to the granting of its Petition as a “shotgun approach to criticizing the data submitted by Qwest and Staff.”⁷⁰ Qwest argues, “The positions of the various opponents are inconsistent, except for the ultimate goal of muddying the waters and convincing the Commission to find the record evidence to be unreliable. Interestingly, the opponents devote almost no attention to arguing that the results are insufficient to support a finding of effective competition.”⁷¹

55 MCI agrees that opponents to Qwest’s Petition in this case criticize Qwest and Staff’s evidence from differing and multiple perspectives. Some of the opponents presented the criticisms of Qwest wholesale customers and competitors, while others presented the criticisms of Qwest’s business retail customers. The Commission should keep in mind in its analysis of this case that all of the parties opposing Qwest’s Petition in this docket are Qwest customers. Although for different reasons and utilizing different approaches, Qwest’s customers unanimously argue that Qwest has failed to demonstrate that it has satisfied the statutory criteria for obtaining competitive classification for its analog business services. Contrary to Qwest’s contention, all of the opponents urge the Commission to deny Qwest’s Petition because Qwest and Staff’s evidence, independently and collectively, is insufficient to support a finding of effective competition for the services at issue here.

56 Qwest first attacks its customers’ arguments that the Commission should ignore evidence of wholesale-based competition when calculating relative market shares. Specifically, Qwest criticizes MCI’s argument that resale and UNE-P should be excluded from the analysis of

⁷⁰ Qwest Opening Brief at para. 53.

⁷¹ Qwest Opening Brief at para. 53.

calculating relative market share because Qwest is the sole supplier of wholesale inputs for CLECs providing retail service via UNE-P and/or resale.

57 Mr. Stacy testifies that, as a monopoly provider to captive CLEC customers of Qwest, Qwest is in the position to dictate what services end-use customers may choose from and at what price. Because Qwest is the monopoly supplier to its “competitors,” Qwest can control the retail market because it can control the strength and viability of its customer/competitors. Mr. Stacy then offers an appropriate calculation of relative market share.⁷² As discussed above, Mr. Stacy testified that, as part of his analysis, the Commission should count the resale and UNE-P line totals as Qwest retail lines.⁷³ Qwest apparently disagrees with Mr. Stacy’s approach.

58 Not surprisingly, Qwest also disagrees with Public Counsel, AT&T and Integra’s criticisms of Qwest’s case. Qwest responds summarily, “[O]n all these points, the opponents are simply wrong.”⁷⁴ Qwest does not rebut Mr. Stacy’s testimony that Qwest is in the position to dictate what services end users may choose from and at what price. Instead, it proceeds to support its conclusion by citing to the market opening findings in its Section 271 docket and the “protections” offered by the Qwest Performance Assurance Plan, statutory and regulatory rights to seek arbitration and file complaints against Qwest for unlawful practices, the Commission’s ability to set Qwest wholesale rates and the existence of Qwest’s SGAT.

59 Many of these alleged protections relate only to the wholesale services provisioned by Qwest, e.g., Section 271, the PAP, the wholesale cost docket and the SGAT. At issue here is the

⁷² Exhibit 604C.

⁷³ *Tr. 1055-1059*

⁷⁴ Qwest Initial Brief at para. 58.

flexibility given to Qwest with regard to its *retail* services, if its Petition were granted. MCI recognizes that the relationship between Qwest's wholesale services and its retail services is discussed extensively throughout the case and relevant to many of the issues. The concern with the alleged "protections," however, is that they do not sufficiently constrain Qwest's retail activity. For one, the SGAT contains nothing that would protect CLECs from anti-competitive pricing.

60 Moreover, the complaint and dispute resolution processes of the rules and statute place the burden on Qwest's competitors/customers to monitor and regulate Qwest's conduct in the retail market. Monitoring Qwest's offerings and filing and litigating a complaint against Qwest are both prohibitively resource intensive and financially draining.

61 In sum, the availability of these "protections" provides merely the appearance of security, particularly when Qwest maintains such dominance in the market and competition exists primarily in the form of Qwest's wholesale services.

62 Despite its previous acknowledgement that competitive services provided via Qwest resale and UNE-P are simply Qwest's end-to-end service with the CLECs' brand, Qwest next claims in support of its arguments that CLEC concerns are unfounded, that it controls *neither* the services available via wholesale, nor the prices, terms or conditions thereof and that Qwest has no relationship with the end user.⁷⁵

63 The Commission should reject this argument since it is inconsistent with the evidence in the record. MCI recognizes that Qwest does not submit a bill to a customer that switches to a

⁷⁵ Qwest Opening Brief at paras. 61-62.

competitive carrier or respond directly to phone calls regarding service problems. However, it is undisputed that Qwest provides the network and electronics required for a CLEC to provide an end user service through resale or UNE-P. Qwest's argument places form over substance. The reality is that Qwest is providing the service on behalf of the CLEC.⁷⁶

64 Qwest argues that the CLECs' corrected data is not reliable and should be discounted by the Commission.⁷⁷ The Commission cannot selectively reject the final submission of data by the CLEC parties if it agrees that the information should be rejected. Instead, the Commission must reject all of the CLEC data. The problem is systemic; it is not isolated to MCI's definition of analog and digital services.

65 Qwest's argument and the CLEC submission of corrected data, highlight the problem with this Commission relying on Staff's analysis in any way in its consideration of Qwest's Petition. Each of the CLEC parties that provided supplementation uses definitions of analog and digital services that differ from those used by the others. Definitions of these terms were not included in the Commission orders submitted to CLECs. Mr. Wilson contacted some carriers to determine whether digital lines were included in their numbers but he did not contact others. Mr. Wilson did not recall presenting a definition to carriers that he contacted on the analog/digital issue, leaving carriers to interpret the terms in their own, perhaps differing ways.⁷⁸

66 After fully understanding the Staff Questionnaire, all of the party CLECs revised their line count numbers. Although MCI is not aware of the percentage of change reflected by each party's

⁷⁶ Tr. at 124-125; Qwest Opening Brief at para. 33.

⁷⁷ Qwest Opening Brief at para. 64.

⁷⁸ Tr. at 1288-1295.

revision, MCI's correction caused an 80% change in the number of lines originally submitted by MCI's two responding CLEC entities. This change is significant. Based on the affidavits filed by the other CLEC parties in fact, each party's initial line count was reduced significantly by the removal of the digital facilities.

67 One hundred percent of the party CLECs reduced their numbers after they heard Mr. Reynolds testify about Qwest's distinction between analog and digital lines. It is reasonable therefore to assume that a similar downward trend would apply to the remainder of the CLECs that responded to Staff's questionnaire. It is possible, and appropriate, to correct the market share data in the record to reflect this trend.

68 Using a 70% reduction (this is conservative considering MCI's percentage reduction), if the Commission rejects MCI's argument that UNE-P and TSR are not appropriate to include in the CLEC line count, Qwest's market share changes from 73% to 92%. If the Commission accepts MCI's argument, the market share goes from 84% to 95%. Neither of these figures supports a finding of effective competition.

69 In short, for these and the reasons discussed elsewhere in this Brief, the Commission cannot be confident that the access line numbers reflected in Staff's exhibits and testimony accurately reflect CLEC market share in the analog business services market in Qwest territory in Washington.

70 Qwest next argues that MCI's market share analysis is "off base" and should be flatly rejected by the Commission. Qwest contends that Mr. Stacy offers the commission an apples-to-oranges comparison in his market share analysis.

71 MCI's market share data provides the most accurate market share information submitted in this proceeding. As explained in Mr. Stacy's testimony, MCI properly removes UNE-P and total service resale lines from CLEC market share numbers.⁷⁹ Further, MCI's attribution of the UNE-P and resale lines to Qwest does not constitute an arithmetic manipulation, rather, it is the appropriate assignment of the lines to the carrier that owns and controls them. As noted, and supported by Qwest's own documentation, those lines are offered to retail customers by Qwest "on behalf of" CLECs.

72 Qwest maintains control of all facilities, retains all but retail related revenues, recovers all costs and earns TELRIC profits associated with those lines. So it is clear that Qwest has the relationship with the customer by virtue of the physical network existing between Qwest and the customer. The CLEC relationship is simply a "retailing" relationship. If Qwest is granted the relief requested in its Petition, it is likely that it would regain all of the end user relationship.

73 Contrary to Qwest's characterization, none of MCI's analysis was done "unwittingly". Mr. Stacy includes data from two of Mr. Wilson's exhibits in order to attempt to provide valuable information to the Commission. Mr. Wilson's original Exhibit TLW-5 (Exhibit 205C) provides CLEC line-count information broken out into its resale, UNE-P, UNE-L, and owned loop components, but does not provide any comparative Qwest data. Mr. Wilson's original exhibit TLW-9 (Exhibit 209C) provides Qwest data, but does not provide CLEC line-count data broken out into its component parts. In order to provide the Commission with the critical market-share information included in Mr. Stacy's original Exhibit 604C, Mr. Stacy relied on the data that was

⁷⁹ Exhibit 603T at pp. 3-4.

available to him gathered by Staff. This way of comparing Qwest and CLEC data was not intended to “manipulate” the results, or to provide an “apples to oranges” analysis. Rather, it was intended to provide the Commission with the most critical information in this case with respect to market-share data, that is, Qwest’s market-share excluding CLEC lines provided via UNE-P and TSR.

74 MCI admits that the data used in its analysis (as provided by Staff) are open to question. As discussed elsewhere in this Brief, the methodologies used by Staff to gather and compile the data are flawed. The quality of the Staff’s data and Staff’s analysis is at issue between the parties. Mr. Wilson explained during the hearing that Staff was harried and had little time to perform the analysis of the CLEC data before filing testimony explaining the results – resulting in serious errors and limited the extent of the analysis. These problems in the data set that Mr. Stacy was forced to work with should not be attributed to Mr. Stacy.

75 What the data show is that CLEC line-counts, and therefore CLEC market-shares, have been grossly overstated by Staff. No party has presented evidence that Qwest does not hold a dominant market-share position in Washington. Regardless of what data was used, or in what combination, the conclusions are identical, that being that Qwest dominates the market. Mr. Stacy’s analysis is obviously quite damaging to the cases of Qwest and Staff. This analysis should not be “flatly rejected” by the Commission as Qwest states, but accepted for what it is, the most conservative estimation of Qwest’s market share presented in this proceeding, which shows a continued market dominance by Qwest.

2. Market concentration

76 The parties seem to agree to basic tenets of market concentration analysis and the Herfindal-Hirshman Index (“HHI”), that is, that it’s an analytical tool developed by enforcers of antitrust laws to analyze the potential impact of mergers and acquisitions. The greater the HHI result, the greater the market concentration. An HHI below 1000 signifies an unconcentrated market; an HHI of between 1000 and 1800 signifies a moderately concentrated market; and an HHI of above 1800 signifies a highly concentrated market.⁸⁰

77 In Docket No. UT-000883, Commission Staff used the HHI to measure market concentration because it provided, “an easy way to gauge the market concentration from available evidence of the relative output of firms in a given market.”⁸¹ In that case, Staff chose a threshold of 5000 for Qwest’s business services market structure and acknowledged that different levels of market concentration would be acceptable with different market structures.⁸² Five of the nine exchanges in which Qwest sought competitive classification exceeded the 5,000 threshold of the HHI. Thus, Staff recommended that those five exchanges should not be considered for competitive classification.⁸³ The Commission ultimately agreed with Staff that the market concentration in those exchanges was too high to warrant competitive classification of Qwest’s services.⁸⁴

78 Qwest argues that the Commission should not rely on concentration ratios *per se* because they, by

⁸⁰ Exhibit 224.

⁸¹ See Commission 2000 Order at para. 25.

⁸² See Commission 2000 Order at para. 26.

⁸³ See Commission 2000 Order at para. 26.

⁸⁴ Commission 2000 Order at para. 76.

themselves, are not enough to demonstrate market power.⁸⁵ MCI agrees that market concentration should not be considered in an analysis of effective competition to the exclusion of other market share information. Nonetheless, it also should not be ignored, particularly when all of the HHI analyses in the record in this docket indicate that the market in every exchange in Qwest's territory is highly concentrated.⁸⁶

79 Qwest criticizes Public Counsel and MCI's HHI analyses, arguing that neither party offered the Commission specific guidance as to a bright line above which the Commission should consider a market or market segment to be so highly concentrated so as to preclude a finding of effective competition and that both analyses are flawed.⁸⁷

80 MCI recommends that the Commission utilize HHI in the same manner it utilized it in Docket No. 000883. The Commission should consider "the totality of the evidence presented, including the line-based market concentration" . . .⁸⁸ Because the services subject to Qwest's Petition here are identical to those subject to Qwest's petition in Docket No. 000883, the Commission should also use the same market concentration benchmark of 5,000 to determine whether the market concentration index warrants competitive classification of Qwest's services.

81 As explained above, Mr. Stacy had no access to the raw data used by Mr. Wilson in his spreadsheets. Unfortunately, Mr. Stacy was forced to rely on Mr. Wilson's collection and compilation of the data for his analysis. Thus, Mr. Stacy's HHI calculations were made using the

⁸⁵ Qwest Opening Brief at para. 75.

⁸⁶ See Exhibits 208C, 209C and 604C.

⁸⁷ Qwest Opening Brief at paras. 79-82.

⁸⁸ Commission 2000 Order at para. 73.

only methodology possible given the data to which MCI had access.

82 That said, contrary to Qwest's assertion, Mr. Stacy's work papers, Exhibit 612C, does in fact corroborate the conclusions that the market is extremely concentrated, and that Qwest dominates the market. In fact, Exhibit 612C demonstrates (even without excluding UNE-P and TSR) the following (using the data gathered by Staff in Exhibit TLW 9):

- 5% of Washington exchanges have an HHI of 10,000.
- 18% of Washington exchanges have an HHI of at least 9,000.
- 42% of Washington exchanges have an HHI of at least 8,000.
- 70% of Washington exchanges have an HHI of at least 7,000.
- 96% of Washington exchanges have an HHI of at least 6,000.
- Not a single Washington exchange has an HHI of less than 5,500.

83 This record request relied upon by Qwest in its brief to cast dispersions on Mr. Stacy's analysis, therefore, only bolsters his analysis and credibility. Even relying on Staff's data (which overstates CLEC market share by including UNE-P and TSR), Mr. Stacy's conclusion reached in Exhibit 604C is fully supported and corroborated. The exchange with the lowest HHI in Washington (identified in Exhibit 209C as STTLWADU) has an HHI of 5628 – higher than the Commission's benchmark in Docket No. 000883 and more than three times higher than what has been defined to be highly concentrated in the Merger Guidelines. The Merger Guidelines state, "Mergers producing an increase in HHI of more than 50 points in highly concentrated markets post merger potentially raise significant competitive concerns..." "Where post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create of enhance market power or facilitate its exercise."⁸⁹ Qwest and the Staff have completely ignored this "significant competitive concern."

⁸⁹ Exhibit 224 at section 1.51.

84 Therefore, as noted by Mr. Stacy during the hearing, his conclusions with respect to market concentration remain valid, and conservative.

85 In Qwest's Brief, it concedes that it is struggling to understand the data used in Mr. Stacy's analysis. Using the Aberdeen exchange as an example, Qwest attempts to establish that differences between the sum of the squares and the squared sum methodology do in fact amount to significant differences. That argument does not, however, affect the ultimate conclusion that the Commission should reach in this docket: the market is highly concentrated and Qwest is the dominant provider.

86 The reason a difference exists between the two analyses of the Aberdeen exchange is that UNE-P and resale lines are included in one analysis and excluded in the other – not because of the different methodologies used. Moreover, if it were possible to exclude resale and UNE-P from the analysis in Exhibit 612C, BOTH analyses would indicate an HHI of 10,000. In short, Qwest misunderstands and mischaracterizes Mr. Stacy's analysis and conclusions.

87 Based on the arguments presented here and in MCI's Opening Brief on this issue, MCI asks the Commission to reject Qwest's and Staff's market share analyses and deny Qwest's Petition.

3. Ease of entry

88 Qwest's brief on this issue minimizes the efforts and costs that CLECs face to enter the business services market in Washington.

89 In the TRO, the FCC lists a variety of factors that affect a competitor's barriers to entry, such as: sunk costs, scale economies, scope economies, absolute cost advantages, capital requirement,

first-mover advantages, strategic behavior by the incumbent, product differentiation, long-term contracts, and network externalities.⁹⁰

90 A firm's ability to enter a market is affected by the costs incurred, revenues obtained, and risk involved in entering a market. Operational barriers must also be taken into consideration in determining the likelihood and extent of entry.⁹¹

91 The FCC recognizes that ease of entry varies according to geography and customer class:

- But the studies do highlight factors that should be evaluated in market-specific analysis. (¶ 472)
- Studies show that whether entry will be economic depends critically on values of factors affecting costs and revenues and these vary significantly among locations and customer types. (¶ 485)
- Entry is more likely to be economic in high density areas with low loop rates, and in areas with high retail rates relative to cost, high subscription rates for vertical features, and high numbers of business customers. (¶ 484 n.1499)
- Competitors have presented evidence that impairment is especially likely in wire centers below a particular line density. (¶ 520)
- Even BOC studies suggest it would be uneconomic for CLECs to serve customers in smaller wire centers. (¶ 484)

92 As Mr. Gates testified during the hearing in this matter. The availability of resale and UNE-P across the state does not end the inquiry as to whether competitors will enter a particular exchange:

One reason why there may not be any CLECs providing service today in Elk is just because of the market itself. It's an economic decision based on the market. It also could be based on the availability of Qwest facilities in that area. We know

⁹⁰ TRO at para. 75.

⁹¹ TRO at para. 77.

in putting in LSRs, local service requests, that frequently we get a response that says no facilities available. That could be another reason. It could also be a trunking issue depending on where it is relative to their switch, so even if they buy UNE-P, they've still got to get that traffic to the CLEC switch, excuse me, for UNE loop, and for UNE-P it would be similar in terms of location. So there's lots of economic reasons and operational reasons why there may not be competition yet in certain exchanges in the state.⁹²

4. Affiliation of providers of service

93 This factor has drawn little attention in this docket. This statutory factor focuses on whether one or more carriers competing with Qwest are Qwest affiliates.⁹³ Qwest assumes that this factor stems out of a concern that “competition” between affiliates is not meaningfully price constraining or behavior affecting. Qwest argues that there is no evidence in the record linking Qwest to any of the CLECs having market share in the relevant market, and thus this factor weighs in support of granting Qwest’s petition.

94 MCI disagrees. Qwest is the provider of its own retail services and the wholesale provider of the resale and UNE-based competitive services. In addition, if the market is defined to include digital services and/or intramodal services, Qwest’s affiliation with wireless and other intramodal competition must be examined. Insufficient evidence exists in the record now for the Commission to opine on this issue.

⁹² Tr. at 1245-1246.

⁹³ See *First Supplemental Order, Docket No. UT-970767, at 3.*

B. Significant captive customer base

95 MCI disagrees with Qwest's assertion that no captive customer base remains in Washington. Based on much of the above discussion as to why no reasonably available alternative exists, a captive customer base exists in Washington. MCI bases this conclusion on Qwest's definition of captive customer, which is one without viable alternatives to Qwest with respect to its telecommunications needs.⁹⁴

96 First, CLECs that provide retail business services by purchasing Qwest's total services resale and UNE-P fit the definition of captive customers of Qwest. They are captive if no viable alternatives to providing services through Qwest's wholesale products are available to meet their telecommunications needs, for example, in those locations where no other wholesale, facilities-based local exchange provider exists. Mr. Wilson's exhibits disclose that facilities-based competitors are not present in several exchanges in Qwest territory. Thus, at a minimum, captive customers remain in those exchanges.

IV. OTHER ISSUES

1. TRO

The TRO recognizes that retail competition that relies on UNEs would decrease or disappear without those UNEs:

[T]he relationship between retail competition and unbundling is complex. In many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs; thus, a standard that takes away UNEs when a retail competition threshold has been met could be circular. While evidence of retail competition over non-incumbent LEC facilities is highly relevant to our impairment analysis as explained above, retail competition that relies on incumbent LEC facilities – whether UNEs, resale, or tariffed services – does less to inform our impairment analysis.⁹⁵

⁹⁴ Qwest Opening Brief at para. 90.

⁹⁵ TRO at para. 114.

This is additional authority to lead the Commission to conclude that it is wise to wait until the state impairment proceedings are concluded before it makes a decision on Qwest's Petition in this docket.

2. Cost floor

97 Qwest argues that the Commission should not establish a cost floor in this proceeding, contending that the issue has not been thoroughly analyzed here and there are already adequate safeguards in place to address below-cost pricing concerns.⁹⁶ MCI asks the Commission to establish a price floor if the Commission approves all or part of Qwest's Petition.

98 The safeguards that Qwest refers to will not serve their purpose, however, if the Commission grants Qwest's Petition and does not simultaneously set a price floor. The statutes and regulations cited by Qwest as alleged safeguards against price squeeze do not define "cost." Consequently, parties are free to interpret "cost" differently depending upon their financial interests. This is demonstrated by the parties' positions on this issue in this case.

99 Qwest argues that "cost" means Total Services Long Run Cost or TSLRIC.⁹⁷ Staff took the position in its written testimony that "cost" means TELRIC. Mr. Wilson modified his opinion during the hearing, however, and recognized that TELRIC does not account for CLEC non-recurring and sunk costs. Mr. Stacy, on behalf of MCI, asks the Commission to define "cost" as (1) the imputed costs of all the UNEs used to provide the service, including non recurring costs; and (2) a measure of minimum retail related costs, such as the resale discount adopted by this

⁹⁶ Qwest Opening Brief at para. 98.

⁹⁷ Qwest Opening Brief at para. 101.

Commission for total service resale, 14.74%.⁹⁸

100 If the Commission adopts Qwest and Staff's recommendations and thus fails to define cost as something other than TELRIC upon its approval of Qwest's Petition, Qwest will not be clearly prohibited from pricing at TELRIC. If then Qwest in fact prices its retail services at TELRIC, competitors would not be able to compete by setting prices at the same, or a lower level than Qwest. CLECs could not recover all of their costs and make a reasonable profit at TELRIC. This will obviously undermine the CLECs' continued ability to provide services in competition with Qwest.

101 Contrary to Qwest's contention, the complaint process is insufficient to protect CLECs from the harm described above. Approving Qwest's Petition absent a definition of cost shifts the burden of regulatory oversight of Qwest prices from the Commission to Qwest's competitors. The complaint process is expensive, resource intensive and slower than the oversight process currently in place for Qwest's retail business services. Moreover, it is difficult to pursue a complaint if the standard alleged to be violated is not clearly defined, particularly if Qwest provides bundled offerings.⁹⁹

102 In order to protect CLECs against this price squeeze tactic by Qwest, if it approves any or part of Qwest's Petition in this docket, the Commission should also establish a price floor as recommended by MCI.

⁹⁸ MCI Opening Brief at pp. 41-48.

⁹⁹ Tr. at 1121-1122.

3. Access charges

103 Qwest argues that access charges are outside the scope of this proceeding. MCI disagrees. The statute cited by Qwest in its Brief, RCW 80.36.330(6) explains the relationship of MCI's concern about the possibility of implicit subsidization from intrastate switched access charges to the issues in this proceeding:

(6) No losses incurred by a telecommunications company in the provision of competitive services may be recovered through rates for noncompetitive services. The commission may order refunds or credits to any class of subscribers to a noncompetitive telecommunications service that has paid excessive rates because of below cost pricing of competitive telecommunications services.

104 If the Commission grants Qwest's Petition, it should also reduce Qwest's access rates to cost, to ensure that Qwest does not violate RCW 80.36.330(6). Historically, access rates are priced above cost to subsidize Qwest's retail local service rates. Qwest admits that it has not filed any rate changes as part of this Petition. Access rate reductions are required to remove the subsidies that currently exist for the business services subject to Qwest's Petition. By removing those subsidies, the Commission ensures that Qwest is not recovering losses relating to its retail business services through its above cost access rates.

4. Proposed conditions on approval

105 In addition to MCI's proposal regarding the price floor, AT&T and MCI both propose that the Commission should establish a threshold determination for competitive presence and should deny the petition unless that threshold is met. MCI made a proposal, with recommended "trigger" mechanisms that MCI urges the Commission to adopt prior to a granting of the application.¹⁰⁰

¹⁰⁰ (1) The presence of at least three CLECs providing services, one of which must be providing services from its own switch, (Standard to apply to each exchange, statewide), (2) Facilities-based (owned loop and/or UNE-Loop) CLEC market

Mr. Gates proposes the following parameters to help the Commission determine when effective competition exists in an exchange:

- The presence of at least three CLECs providing services, one of which must be providing services from its own switch;
- Facilities-based (owned loop and/or UNE-Loop) CLEC market share of at least 30 percent;
- At least one CLEC with a facilities-based market share of at least 10 percent;
- Total CLEC market share (resale and facilities-based) of at least 45 percent.

These parameters reflect many of the considerations discussed in the Horizontal Merger Guidelines and the TRO. As the Commission noted in its 2000 Order, this analysis is not an exact science. If the Commission were to adopt a set of benchmarks, MCI believes these, together, would be reasonable to ensure that the Qwest would be limited in its ability to unreasonably exercise market power.

V. CONCLUSION

For all the reasons set forth herein and MCI's Opening Brief and testimony, MCI respectfully requests that the Commission deny Qwest's Petition.

share of at least 30 percent, (Standard to apply in at least 50% of exchanges statewide), (3) At least one CLEC with a facilities-based market share of at least 10 percent, (Standard to apply in at least 50% of exchanges statewide), and (4) Total CLEC market share (resale and facilities-based) of at least 45 percent (Statewide average). *Ex. 54T at 29.*

Dated this 7th day of November 2003.

Respectfully submitted,

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