C. ISSUES RAISED BY THE OPPOSING PARTIES

42 The opposing parties raise several objections to Qwest's and Staff's evidence and argumentation.

1. Is defining "relevant market" a pre-condition to selecting services for competitive classification?

43 Some of the opposing parties, notably Public Counsel,[74] seem to challenge Qwest's initial selection of services, on the ground that these services do not themselves define an appropriate "relevant market." They challenge, for example, the lumping together of basic business service with PBX and Centrex services, and the failure of Qwest to lump together analog and digital services. They recommend that the Commission apply standard economic principles to define the appropriate market, such as those contained in the Horizontal Merger Guidelines (HMG).[75] They contend that the HMG requires definition of the relevant product market according to what customers would demand as a substitute. They also contend that in terms of geographic scope, the definition of the market should focus on the wire center or the exchange, rather than the state as a whole, and should segment the market into small and large customer classes.[76]

44 Qwest and Staff respond (and WeBTEC seems to agree[77]) that RCW 80.36.330 does not require a company to pre-determine the "relevant market" in order to make the initial selection of services for competitive classification. Rather, once the services have been selected, the petitioner must demonstrate that the services are subject to effective competition. Among other things under the statute, this demonstration requires consideration of services available from alternative providers in the "relevant market." *RCW 80.36.330(1)(b).* Qwest points out that under the statute, a company can request a single "service" to be competitively classified if "the service" is subject to effective competition. *RCW 80.36.330(1).*

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[74] E.g., *Public Counsel's opening brief at 3 – 12.*
[75] *Exhibit 224, Section 1. at 4-5. See also fn 53.*
[76] *Public Counsel Initial Brief at 17-23.*
[77] *WeBTEC's Reply Brief at 2.*

45 **Discussion.** The statute does not require the company to define the "relevant market" before selecting a service for competitive classification. Under the statute, the company can propose any service for competitive classification. It then bears the burden, however, to show that the service or services are subject to effective competition. That burden includes providing evidence sufficient to allow the Commission to consider, as one of several factors, "the extent to which the services are available from alternative providers in the relevant market."[78] In considering that factor, it is necessary to define the "relevant market" in relation to the services selected for competitive classification. The "relevant market" is the range of services, within the relevant geographic scope, that may compete with the Selected Services. As we discuss later in this order, there may be a continuum of services that compete, to a greater or lesser degree, with the Selected Services. The closer a substitute an alternative is, the greater weight it carries in our analysis, and the more complete the evidence and analysis about it should be. We will view the parties' evidence and arguments about the "relevant market," including Public Counsel's, in that context, presently.

2. Should digital, wireless, and VoIP services be included in the analysis of competitive alternatives, and, if so, how?

46 Public Counsel and ATG argue that digitally provided business services are effective substitutes for the Selected Services, i.e., they are part of the "relevant market" and should have been included in Qwest's analysis. They claim, and say that Staff and Qwest confirm, that digital services provide functionally equivalent services to Qwest's basic business analog services.[79] For example, they assert, digitally provided Centrex is a service equivalent to analog PBX. ISDN BRS 2B+S[80] is a digital alternative that provides single-line business customers with two voice lines over the same two-wire copper loop, which effectively competes with analog voice lines. WeBTEC argues that because neither Staff nor Qwest carefully reviewed digital market data regarding substitutability or market share, the Commission can't appropriately judge whether the relevant market should include both analog and digital services in a combined voice services market.[81] In addition, ATG argues[82] that the line losses

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[78] *RCW 80.36.330(1).*

[79] *ATG initial brief at 11-14.*

[80] "Integrated Switched Digital Network – Basic Rate Service"

[81] *WebTEC's Initial Brief at 8-9; Public Counsel's Initial Brief at 3-6.*

Qwest complains of are due in part to Qwest analog customers upgrading to Qwest digital services. ATG points out that in Qwest's annual reports, Qwest indicates that its small business analog line losses are compensated for by the increase in those businesses converting to Qwest digital lines.[83] The Public Counsel also contend that failure to include digital services will impose administrative difficulties in implementing and monitoring rates that are split between analog and digital.

47 With respect to wireless and VoIP services, the opposing parties make the reverse argument. They argue that Qwest and Staff have unjustifiably pointed to these modes of competition in support of Qwest's petition. They assert that neither Qwest nor Staff has demonstrated that these modes are genuine competitive alternatives, so they should be disregarded in the analyses.[84] Public Counsel contends that these alternatives are actually digital in nature and would also require additional or new CPE.[85] MCI and ATG assert that wireless and VOIP, unlike digital services, do not provide functional equivalence.[86] For example, wireless does not lend itself to PBX or Centrex applications and is more of a supplement to, than a substitute for, business wireline service. VOIP is better used for data transmission.[87] The voice transmission quality and lack of 911 availability associated with VOIP, among other things, prevent its full substitution for basic business service.[88] The opposing parties also assert that there is no evidence in this record that a business customer has actually substituted wireless or VOIP for its voice wireline service. DOD raises the additional issue of security and interoperability problems that afflict wireless and VoIP.

48 Qwest and Staff defend their choice not to include digital services in their analysis of alternative services, in several ways. First, they argue that analog and digital services are not complete substitutes, because different CPE is needed—though they acknowledge that once that barrier is overcome, digital services can

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[82] *ATG initial brief at 17.*
[83] *Exhibits 84 and 86*
[84] *MCI Initial Brief at 12-25; ATG Initial Brief at 28-35.*
[85] *Public Counsel Reply Brief at 3.*
[86] *MCI Initial Brief at 12-25; ATG at 28-35.*
[87] *ATG initial brief at 29.*
[88] *Id.*

provide service functionally equivalent to analog service. Qwest asserts that the opposing parties' argument regarding digital services (asserting that digital service *is* a substitute) is at odds with their argument regarding wireless and VoIP (asserting that no weight should be given to wireless or VoIP services because they are *not* precise substitutes for landline voice service). Qwest speculates that had it included digital services in its Selected Services, the opposing parties would reverse themselves and make their "wireless" argument, by arguing that analog and digital services are not fully effective substitutes because the customer must buy different equipment for digital service. Qwest also argues that implementing and monitoring price lists for analog services will not be difficult because it requires only the posting of the appropriate lists based on the services identified in Exhibit 2 in this proceeding.

49 Finally, Qwest and Staff point out that even if digital services *were* counted in their analyses as competitive alternatives to the Selected Services, Qwest's case would only be strengthened. If all of Qwest's digital lines are assumed to be used at their maximum, single-line (DS0) equivalent, Qwest would have 175,000[89] digital lines. Based only on Qwest's wholesale data (i.e., not counting any additional CLEC-owned lines), CLECs would have 84,000[90] digital lines. Thus, conservatively viewed, CLECs would have at least a 32% share of the digital market. Because this share is greater than the CLECs' share of the analog market, the addition of digital services into the analysis of market share would only serve to strengthen Qwest's case for competitive classification.

50 With respect to wireless and VoIP services, Qwest and Staff say that their case does not rest on wireless or VoIP data, or the lack of it. They do not include any wireless or VoIP data in their line counts, market share or market concentration evidence. They have merely pointed to these intermodal forms of competition to demonstrate that their case is conservative—that, if anything, the environment is even more competitive than their analog market analysis suggests. Qwest makes this same point with respect to digital services.[91]

51 **Discussion.** The very purpose of competition, as envisioned in the 1996 Telecommunications Act and our own statutes, is to allow for differentiation in

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[89] *T 297-298.*

[90] *T 297.*

[91] *Qwest's Reply Brief at 4.*

the market: different providers, different services, different customer groups, different technologies, and different niches. It is expected, therefore, that as competition develops, there will also develop a continuum of services and providers that, *to a greater or lesser degree,* compete with one another. The argument that a service *cannot* be considered an alternative because it is not a complete and perfect substitute is just as misplaced as the argument that a service *must* be fully counted as an "alternative," even if it is only partially a substitute. Such an "all or nothing" approach does not comport with the real world. But it is not fatal if a company fails to conduct an exhaustive collection and analysis of data on all *possible* forms of competition, if that data will not alter the outcome of the case. Rather, the evidence presented and reliance upon it should be commensurate with its relevance to the critical questions in the case.

52 Regarding digital services, a Qwest analog retail customer contemplating a switch to functionally comparable digital service faces a barrier (the need to purchase digital equipment) that is not present when contemplating a switch to the comparable CLEC analog service. In this respect, competing analog services are closer substitutes for one another than are analog services competing with digital services. Qwest and Staff appropriately recognized this distinction, and their analyses appropriately concentrate on analog services. Qwest and the CLECs analog services are virtually complete substitutes for one another. Analog and digital services are not.

53 This is not to say, however, that the digital market is irrelevant. It *is* relevant, because at some price-point, a customer might choose digital service, after taking into account the cost of digital CPE and other factors. Additional evidence on the competitive role of digital services would have been admissible, but the lack of it is not fatal in this case, because, we find, it would not have changed the result. As Qwest and Staff point out, based on Qwest information alone (a conservative assumption, because it does not take into account data on CLEC-owned digital lines unknown to Qwest[92]), and using a voice-grade equivalent basis, inclusion of digital lines in a market share analysis would *increase* the CLECs' market share, thus strengthening Qwest's case for competitive classification of the Selected Services. While estimates based on voice-grade equivalents may not be precise, there is no basis whatever to believe that inclusion of digital data would

[92] *See fn. 29, supra.*

materially *decrease* CLEC market share. Because digital service is only a partial substitute, and because the evidence of record indicates a higher CLEC digital market share (compared to analog), we are satisfied with Qwest's and Staff's analyses that exclude digital data.

54 Wireless, VoIP, and other intermodal services are further along the continuum of competitive substitutes. This is not to say they aren't a competitive threat to the Selected Services. They may well be. But Qwest and Staff do not rely on these modes in proving that the Selected Services are subject to effective competition. They merely point to these modes as, if anything, adding to the competitive environment Qwest faces.[93] We give the evidence on these modes the same (light) weight.

3. Are Qwest's and Staff's market analyses based on unreliable data?

55 Several parties[94] attack Staff's evidence as unreliable. They contend that the Commission's order[95] in this case, requiring CLECs to disclose competitive business services they provided in Qwest's exchanges, did not specify that the services must include only analog services. They assert that the later clarification issued by the Commission[96] did not ameliorate the problem because Staff did not contact the CLEC parties' personnel in charge of providing the data to ascertain whether those parties excluded digital services. Although Qwest witness Reynolds defined analog services as those provided using analog CPE, the opposing parties question whether the distinction between analog and digital services was clear to the CLECs, since Mr. Reynolds also acknowledged that analog services can be provided over digital facilities terminating on analog CPE. Public Counsel witness Baldwin reduces Staff's business access line count for CLEC analog services by 50%, based on her conclusion that Staff did not properly exclude digital line counts from CLEC-provided data.

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[93] There is no suggestion whatsoever that inclusion in the analyses of intermodal alternatives would show an *increase* in Qwest's market share.

[94] ATG, AT&T, Integra, MCI, Public Counsel and WeBTEC.

[95] *Order No. 06,* June 30, 2003; *see also fn. 29, supra.*

[96] *Order No. 08,* July 22, 2003.

56 WeBTEC contends that Qwest inflated the CLEC line count in Qwest's wholesale data by assuming that all UNE-L loops serve business, and no residential, customers.[97]

57 Some parties argue that the Commission should not rely on the evidence of advertising and price lists and object to access line counts that they say are not sufficiently disaggregated or detailed. They contend that the Commission in its decision in Docket No. UT-000883 found that the evidence from these three categories was insufficient to support a grant of competitive classification. Moreover, they say that such evidence does not demonstrate that CLECs are actually providing services in competition with Qwest. They claim that neither Qwest nor Staff did any comparative analysis to link up the CLECs with actual customers and services.

58 Qwest and Staff point out that the Commission's concern about reliance on line count evidence in Docket No. UT-000883 was associated with situations where there might be only one CLEC serving a relatively large customer with a high line count. Qwest and Staff assert that the record here contains ample customer-location information revealing that CLECs serve numerous customers in most exchanges, and are not simply serving a single large business customer in any location.[98] Moreover, Qwest and Staff argue that wholesale line data, as well as CLEC advertising and price lists, demonstrate that CLECs are, in fact, using the lines purchased from Qwest to provide analog business services. Qwest's Exhibit 4 shows that 28 CLECs are offering basic business services. Staff witness Wilson testified that basic exchange service is a reasonable proxy for the analog small-business sector and that CLECs have captured 33% of that sector.[99] Also, Staff points out that CLECs have captured 46% of the analog PBX market[100] – clear evidence of a link between CLEC line counts and actual services provided by CLECs to businesses.

59 Qwest points out that UNE-L lines were designated as business lines consistent with how Qwest reported data in the 271 proceeding;[101] and that Qwest's data is

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[97] *WeBTEC Initial Brief at 14; T 289.*
[98] *Exhibits 204C at 3 (column I, at 5 (column H); Exhibit 232C (cell O-44).*
[99] *T 1279, 1411; Exhibit 470C. See also Qwest reply brief at ¶43.*
[100] *Exhibit 225C.*
[101] *T 289-290.*

understated in any event because it included only Qwest wholesale data and not CLEC-owned lines.

60 Staff points out that the Commission's Order No. 06 directed CLECs to provide data only on *business* services. Furthermore, Order No. 08 clarified that Staff should confirm CLECs' provision of only *analog* business services data. Staff asserts that it accurately compiled data it received from CLECs and that it revised its compilation each time it received revisions from the CLECs. Staff witness Wilson testified that he verified the exclusion of digital data from non-party CLECs, as required by the Commission.[102] Qwest observes that Public Counsel was granted access to the highly confidential CLEC raw data and did not dispute Staff's compilation of the data on the record.

61 Qwest contends that there is no confusion about the distinction between analog and digital services other than what has been created by the opposing parties. Qwest points out that Mr. Reynolds identified early in his testimony that the analog services were those defined by the limitations of the CPE involved. Mr. Reynolds acknowledged that similar services could be provided digitally, but they were not considered digital in Qwest's evidence unless the customer's equipment was also capable of receiving digital signal.[103]

62 **Discussion.** With regard to the reliability of Staff's data, the Commission is persuaded that Staff properly aggregated the CLEC data provided to it pursuant to Commission order. Staff witness Wilson acted diligently to collect and aggregate CLEC data submitted and contacted all non-party CLECs to ascertain whether they had adequately distinguished between analog and digital services in the information they submitted.[104] Mr. Wilson also took into account all the later revisions to data submitted by CLECs and filed revised exhibits to show the affect of the changes.[105] The revisions did not substantially alter the magnitude of the CLEC analog business competition in the state, largely because the revisions did not materially change the high level of wholesale-based competition.[106]

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[102] *Exhibit 201T at 10-13.*
[103] *T 111; 195-198.*
[104] *Exhibit 210C at 11; Exhibit 203C at 2; T 615-619.*
[105] *Exhibits 225C and 232C.*
[106] *Exhibits 225C and 232C; compare with Exhibit 53C.*

63 Regarding the possibility that Qwest may have included some residential UNE-L lines in its CLEC UNE-L wholesale purchase data, the Commission has little to go on, other than the unsubstantiated fear that WeBTEC raises in its initial brief. The CLEC parties, who would be in a better position to judge, did not raise this concern. The Commission also notes that Public Counsel did not raise this as an issue after reviewing the CLEC data. More to the point, Staff collected information pursuant to a Commission order *expressly* requesting *business* data. Staff's data show more CLEC business lines than Qwest's data show.[107] There is simply no reason to think that CLECs mistakenly included residential data, whether UNE-L or otherwise.

64 No set of data is perfect, but we find that both Staff's and Qwest's data are reliable. In fact, it is helpful to have both sets, derived from different sources, because they corroborate each other, within a reasonable range given both sets of data, we are satisfied that the data on business services are sufficiently reliable for purposes of this proceeding.

65 The Commission finds that evidence of advertising and price lists are proper, as adjuncts to the core evidence on CLEC and Qwest lines. CLEC advertising and price lists show that CLECs hold themselves out as providers of analog business service throughout the state. The Commission appropriately considers CLEC advertising, price list, and line count evidence (in conjunction with the relative ease of entry, statewide, for CLECs, through use of UNE-P, and other evidence in the record) in reaching it conclusions in this case, just as it did in Docket No. UT-000883. The conclusion in this case is different because the evidence itself, (and its weight) is different.

4. Do Qwest's and Staff's analyses sufficiently disaggregate the market, by geographic scope and customer size?

66 *Geographic Scope.* Public Counsel and others argue that Qwest's selection of a statewide geographic scope for its petition is improper because it makes no distinction between urban, suburban, and rural parts of the state.[108] Public Counsel further argues that the statewide geographic area selected by Qwest

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[107] *See fn. 29, supra.*

[108] *Public Counsel Initial Brief at 7; see also, ATG Initial Brief at 22; AT&T Initial Brief at 3.*

ignores the fact that the services at issue are local exchange services. For example, an end-use customer seeking service in Walla Walla cannot ask a CLEC located in Bellingham to provide it with analog business exchange service.[109]

67 Several parties argue that, in essence, every wire center or exchange should be treated as a separate market or geographic area, for purposes of determining whether competitive alternatives are present.[110]

68 Qwest responds that its selection of a statewide geographic scope for its petition is entirely appropriate and in keeping with prior petitions filed with the Commission under RCW 80.36.330. Qwest contends that historically, petitions for competitive classification have been filed and granted on a statewide geographic basis.[111] Of fourteen petitions the Commission has considered, the Commission granted statewide competitive classification in all but two. The remaining two were less-than-statewide grants because the underlying petitions were for less-than-a-statewide geographic scope.[112]

69 Qwest and Staff acknowledge that focusing on an exchange or wire-center level as a geographic market might be appropriate if the evidence of entry were limited to facilities-based CLECs, and there were not widespread, established CLEC entry by means of UNE-P and other wholesale products.[113] Qwest and Staff point out, though, that CLECs *are currently providing* analog business service, through use of resale, UNE-P and UNE-L, in addition to facilities-based competition, throughout Qwest's exchanges statewide.[114] Qwest observes that, not including CLEC facilities-based data, an average of 5.5 CLECs are providing analog business service in small wire centers (Zone 5) and an average of 24.5 CLECs are providing analog business exchange service in the largest wire centers (Zone 1).[115]

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[109] *Public Counsel Initial Brief at 8.*

[110] *AT&T Initial Brief at 4; DOD Initial Brief at 17.*

[111] *Qwest Initial Brief at 7-8.*

[112] *Id.*

[113] *See Qwest Reply Brief ¶ 29; Staff Initial Brief at 15; Staff Reply Brief at 9.*

[114] *Exhibit 201T at 14, 21, 25; Exhibit 204C; Exhibit 205C; Exhibit 232 (Column I and J, lines 16,17, 39, 40 and 41; Exhibit 8 at 4-10.*

[115] *Exhibit 201T at 19; Exhibit 208C; Qwest Initial Brief at 10.*

70 Qwest acknowledges that an end-use customer in Walla Walla cannot obtain service from a CLEC operating only in Bellingham. But Qwest contends that the almost universal presence of UNE-P, the existence of more than a dozen CLECs in Walla Walla itself, and the fact that many CLECs hold themselves out as willing to serve all of Washington, adequately rebuts Public Counsel's arguments against statewide geographic scope. Staff argues that CLECs are providing a rich level of facilities-based and all other types of service in remote and sparsely populated areas of the state.[116]

71 *Customer size.* Public Counsel and DOD further contend that Qwest and Staff did not demonstrate the presence of CLEC competition for small business customers (defined by Public Counsel as those who purchase three or fewer lines)[117] as opposed to medium or large business customers.[118] Public Counsel cites to the FCC's TRO, which singles out "mass market" customers (those with three or fewer lines) in support of its contention that this group must be separately analyzed.

72 Staff responds that, under anti-trust principles,[119] customer characteristics, such as whether a business end-use customer is small, medium, or large, are not part of what defines a market unless discrimination against the particular type of customer can be shown. Staff contends that no such discrimination has been shown here. Staff points out that CLEC price lists[120] do not differentiate customers on the basis of whether they buy three or fewer lines; rather, CLECs sell analog single business lines at one end of the customer spectrum and PBX/Centrex at the other end.[121] Staff witness Wilson testified that CLECs purchase wholesale basic business lines to serve small business customers and that CLECs offer PBX and Centrex services to serve medium and large size customers.[122] Staff's data show that CLECs hold a "strong one-third share" of the basic analog business lines.[123] Staff and Qwest assert that evidence of this type of

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[116] *Exhibit 201T at 4; T 709; Exhibit 8; Exhibit 469; T 651.*
[117] *Exhibit 401T at 35.*
[118] *Public Counsel Initial Brief at 9-10; DOD Initial Brief at 11.*
[119] *Exhibit 225 at 4.*
[120] *Exhibit 4.*
[121] *Id., T 768-770.*
[122] *T 1507-1508.*
[123] *Exhibit 225C.*

CLEC activity provides a segmented and granular view of the competition for small, medium, and large business customers,[124] and shows that all segments are competitively served.

73 Staff asserts that Centrex and PBX service are functional equivalents, and CLECs hold over 45% of the PBX trunk market in Qwest exchanges.[125] As with other business services, improvements in the market structure have resulted in reduced prices and ease of entry for CLECs who purchase UNEs from Qwest to serve these customers. In addition, Staff witness Wilson testified that both PBX and Centrex services are offered by CLECs using their own facilities, with the large majority of PBX lines being CLEC-owned facilities.[126]

74 **Discussion.** The issues presented here are how to measure availability of alternative services, when the petitioner has sought competitive classification of the Selected Services over a wide geographic area (in this case, statewide); and whether demand for the Selected Services and their alternatives should be differentiated among different customer groups (small, medium, and large customers).

75 The opposing parties contend, and Qwest and Staff don't really contest, that analysis of alternatives *only* at the macro, statewide level is insufficiently illuminating. We agree. Analysis only at the statewide level could obscure significant areas where customers might have no reasonably available alternatives.

76 It is important, therefore, to examine the evidence at a more granular level, as Qwest's and Staff's evidence allows us to do. That examination reveals, as summarized in our earlier review of their presentations, that alternative services are broadly available throughout Qwest's service territory. CLECs are present and serving customers in every exchange but one—exchanges covering 99.97% of Qwest's business customers. CLECs are providing these services in multiple ways, and (notably) are providing UNE-P based service in 63 of 68 exchanges—

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[124] *Exhibit 470C* (summarizes separate market shares for basic business lines, Centrex and PBX); *Exhibits 232C and 204C* (similarly demonstrate the level of competition for each of the product lines).

[125] *Exhibit 201T at 14 (revised).*

[126] *Exhibit 210T at 9-10.*

exchanges covering 99.73% of Qwest's business customers. UNE-P is available for CLECs to use in every exchange. Once a CLEC has established a presence in an area, it has an incentive to add more customers. Regardless of how the CLEC became established, UNE-P is an easy way, though by no means the only way, for the CLEC to add customers, at competitive rates. Thus we find that even at a more granular level, alternative services are reasonably available.

77 The necessity of this more-granular examination does not equate, and should not equate, to a finding that each exchange or each wire center must be viewed as its own "market." In a non-technical sense, markets are in the eye of the beholder. Competition fosters differentiation. A CLEC might target an urban area or a rural area or a mixed area. A CLEC might offer a broad array of services or a highly specialized single service. A CLEC might target small customers or very large customers. An "exchange area" or "wire center" might carry little significance to a CLEC with fiber-optic rings running through several exchanges. Each of these hypothetical CLECs legitimately might have a different definition of the "market" (i.e., current and potential end-use customers) for its services.[127]

78 Qwest, of course, is offering the Selected Services throughout its territory. Clearly, its "market" is broader than the exchange level. While there are certain characteristics that define an exchange—at least one prefix, at least one switch, a local service calling area—these do not necessarily define a market for regulatory purposes. Rather, when thinking about "markets," a wire center or exchange should be viewed in its broader context. Conversely, a company's statewide territory should be viewed as comprising many parts—exchanges and wire centers being two ways to view those parts, zones being another, perhaps Metropolitan Service Areas (MSAs) another. In other words, the competitive picture of the general area is informed by a view of its parts, and the competitive picture of a smaller area is informed by a view of the larger area surrounding it. Thus we find that the geographic scope of the relevant market in this case is Qwest's statewide service territory, examined at more granular levels, such as by exchange, region, zone, or other informative subdivision.

79 With respect to customer groups, we find that businesses of any size, from those who need one line to those who need many, have reasonably available

[127] *See, for example, witness Slater's description of how Integra aims to differentiate itself. T 851-852.*

alternatives. CLECs are in all but one exchange and have captured 33% (using Staff's data) of basic business service, the service small business customers use. This is an impressive figure. In every exchange, CLECs can use (and do use in 63 of 68 exchanges) UNE-P, which is very suitable for small-business customers, whether they use one line or several.[128] There is also strong evidence that CLECs serve many separate locations throughout Qwest's exchanges,[129] further support that they do serve and can serve small customers. This evidence is confirmed by Integra's witness, who testified that 20-30% of Integra's DS0 customers were small businesses.[130]

80 With respect to customers who use many lines, we note that CLECs enjoy 46% of the market for PBX lines. For these larger customers, PBX is a highly competitive substitute for Centrex features, which themselves were already classified as competitive, statewide.[131] The anti-competitive implication of the relatively high Qwest market share of Centrex lines (over 90%) is inapt because Centrex and PBX services are substitutes for one another, and because the market structure now allows relatively easy entry and exit for CLECs wishing to offer either service. In sum, this case yields evidence of robust competition relevant to customers of all sizes.

5. Are UNE-P, UNE-L, and resale price-constraining?

81 The opposing parties argue, for various reasons, that UNE-P, UNE-L, resale, and special access lines should be excluded from any market share analyses because they are not price-constraining. In general, Qwest and Staff respond that in view of Washington's market structure, these alternatives are price-constraining.

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[128] On Public Counsel's point regarding the TRO, the purpose of the TRO proceeding is to consider what the competitive landscape would look like *without* UNE-P. The instant proceeding is considering whether effective competition exists *with* UNE-P, which is available in every exchange. The competitive landscape for customers with three or fewer lines could look very different in the absence of UNE-P, but that analysis awaits the later proceeding.

[129] *Exhibits 204C at 3, 5; 232C.*

[130] *T 877.*

[131] With respect to PBX and Centrex, in Dockets UT-911488 and UT-911490 (*Fourth Supplemental Order Denying Complaint; Accepting Tariffs Conditionally; Requiring Tariff/Price List Refiling* (November 18, 1993), the Commission confirmed its earlier finding in Cause No. U-86-86 that PBX and Centrex service are functional equivalents. *Fourth Supplemental Order, April 7, 1987* at 8, 20.

82 At the outset, we want to observe that there are two conceptual ways to view what goes into "market share" analyses. In one approach, a service that is a substitute for the Selected Services—whether or not it is price-constraining—appropriately is included in "market share," at least for the purpose of determining availability of alternatives. Then, when considering the question of market power, one considers whether these alternatives are price-constraining. If not, they cannot temper the effects of high market concentrations.

83 The second conceptual approach is to analyze whether a service is price-constraining before it is counted anywhere—as an available alternative, or in market share, or in market concentration analyses. This is the approach generally followed by the opposing parties. In our view, this approach collapses several steps into one and does not follow our statutory scheme. In any event, though, because we find (in the following discussion) that the questioned services in Washington's business market *are* price constraining, we would reach the same end-result using either approach.

84 The opposing parties argue that evidence of competition in the state should exclude resale and UNE-P business lines because they are purchased from and controlled by the monopoly provider, Qwest. The only difference, they contend, between resale and UNE-P is the price Qwest charges for them.[132] These parties assert that competition through resale should be ignored, based on the Commission's finding in Docket No. UT-000883 that resale does not constrain Qwest's prices. Moreover, they contend that for both resale and UNE-P,[133] Qwest retains the revenues from the wholesale purchases. In addition, because resale and UNE-P require little investment on the part of CLECs, the opposing parties contend they are not evidence of committed entry into the market and therefore should not be included in any analysis of whether Qwest retains market power over analog business services in Washington. Based on this premise, MCI's market share analysis uses only CLEC-owned business line data and UNE-L data, discounting lines provided by resale and UNE-P. Moreover, MCI adds to Qwest's line counts, upon which Qwest based its market share results, those

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[132] *See fn. 11, supra.*

[133] CLECs also assert that even though CLECs own greater portions of their own facilities when they purchase UNE-L, the latter is still available only as provided by the monopoly provider Qwest.

resale and UNE-P lines MCI subtracted from CLEC line counts, arguing that the lines would revert to Qwest if the CLEC were to cease serving the customer.[134]

85 Public Counsel argues that section 271 approval has provided Qwest with a powerful marketing opportunity because it can now package long distance service with its local offerings. WeBTEC and Public Counsel, relying on an anti-trust analysis, argue that because Qwest's retail rates for analog business services are significantly above cost, and that Qwest has not lowered its prices in the face of competition, that Qwest charges "supra competitive" prices for its analog business services.[135]

86 With regard to growth in market share, MCI contends that when a small number of lines increases to a slightly larger number of lines, the percentage-growth figure may look impressive, but reflect only a small absolute increase in market share.[136] MCI argues that in seven years of competition, CLECs have garnered only 17% of the market for basic business.

87 The opposing parties further contend: that 271 approval does not mean that effective competition exists; that structural changes in the market resulting from 271 approval are already reflected in existing market share statistics; that Qwest and Staff have done little to investigate the true costs of entry and whether CLECs in the market today are profitable; that CLEC-owned entry is much more costly than UNE-P but is a truer indicator of effective competition; and that the presence of CLEC-owned facilities constitutes the only form of true "committed"

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[134] MCI and ATG, on brief, also raised questions about affiliated interests. Staff counted approximately five affiliated companies in its aggregation of CLEC data, treating each of those affiliates as separate companies. *T 1465*. No party challenged Staff's methodology. No opposing party offered any testimony on the subject. MCI argues that if the Commission defines the market as including digital and/or intermodal services, the Commission must address Qwest's affiliation with wireless or other intermodal providers. In light of our discussion on digital and intermodal data, this argument is moot. ATG argued that since Qwest is the sole provider of wholesale services to CLECs in Qwest exchanges, the affiliation of most voice services in the market is Qwest. This is a tautological argument, but, in any event, we find elsewhere in this order that retail services using Qwest's wholesale facilities are price-constraining in Washington's market structure.

[135] *WeBTEC Initial Brief at 24-25; Public Counsel Initial Brief at 21-22.*

[136] *MCI Reply Brief* at 19.

entry; but CLEC-owned loops are present in only 15 of 68[137] Qwest exchanges. Integra provided evidence of the population density and capital expenditure factors that inform its decision whether to expand its owned facilities into an exchange or community.[138]

88 Some opposing parties claim that Qwest did not include the costs of hot cuts, collocation, or other nonrecurring costs in reaching its conclusion about ease of entry. WeBTEC suggests that only CLEC-owned operations have the potential to actually increase the supply of loops, switches, and transport. Other forms of competition merely re-use already existing Qwest facilities and services.

89 WeBTEC argues that, based on traditional anti-trust analysis, high market share indicates that a firm may have market power. WeBTEC cites an anti-trust case where a market share of 65% was found by the Ninth Circuit Court of Appeals to be *prima facie* evidence of market power, as well as other cases where a 50% share was enough to show market power.[139]

90 AT&T recommends that Qwest be required to show that CLECs have captured a 25% market share in each wire center before the Commission finds effective competition statewide. Similarly, MCI recommends: 1) that there be three CLECs (one with owned facilities) in each exchange; 2) that there be facilities-based CLEC market share of 30% in 50% of exchanges; 3) that there be one CLEC with facilities-based market share of 10% in 50% of exchanges; and 4) that there be a total CLEC market share of 45%.

91 Qwest and Staff argue that UNE-P, and for that matter UNE-L competition, should not be excluded as alternative forms of available competition. They contend that CLEC retail services based on UNE-P are complete substitutes for Qwest's retail services because they are built from Qwest's facilities and therefore are capable of identical retail characteristics.[140]

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[137] *Exhibit 416C.*

[138] *Response to Bench Request No. 2.*

[139] *MetroNet Services. Corp. v. US WEST Communications., 329 F.3d 986 (9th Cir. 2003)* (referred to herein as "*MetroNet*"); *see also WeBTEC Initial Brief at 19.*

[140] *Qwest Initial Brief at 13; Staff Reply Brief at 14.*

92 Moreover, Qwest and Staff respond that all CLEC services (UNE-P, UNE-L, resale and CLEC-owned) are validly viewed as price-constraining. UNE-P allows alternative providers to reach every location where Qwest has facilities. Prices for UNEs are fixed, as set by the Commission from time to time. If Qwest were to raise its retail rates there would be no corresponding increase in UNE-P rates with the result that with the resulting increased margin, CLECs using UNEs would be able to compete all the more effectively. Qwest further argues that CLECs may differentiate UNE-P from Qwest's services by bundling UNE-P into packages containing other features, including long distance. Qwest contends that UNE-L-based service has not been shown to be functionally inferior to Qwest retail service and allows CLECs to offer services in addition to, and different from, Qwest services.[141] Staff points out that Qwest is required to provide UNEs at parity with the service quality level Qwest provides its own customers. Staff further emphasizes the importance of distinguishing the *wholesale* market, which is and will continue to be fully regulated, from the *retail* market, which our statutes allow to be more lightly regulated, if circumstances allow— those circumstances including the fully regulated wholesale market.

93 Regarding the price-constraining capacity of resale, Staff agrees that resale is for all practical purposes the same as UNE-P, but with two critical differences. First, UNE-P is available to CLECs at a lower price than resale. Because of this pricing differential, CLECs have migrated from resale to UNE-P. It costs a CLEC a mere $0.27 (nonrecurring) charge[142] to migrate a Qwest customer to UNE-P. From 2001 to 2002, resale lines decreased 41%.[143] During that same period, UNE-P lines increased 45%.[144] Second, as just stated, UNE-P prices, unlike resale prices, are not set based on Qwest's retail prices and do not move in lockstep with Quest's retail prices. Rather, UNE-P prices are fixed. If Qwest were to raise its retail prices, the already-significant migration from resale to UNE-P would accelerate.[145] Because CLECs can now switch their retail service from resale to

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[141] *Qwest Initial Brief* at 13.

[142] *Exhibit 1T at 15.* The $0.27 is the nonrecurring conversion charge for the first line. The nonrecurring conversion charge for additional lines is $0.14. Qwest witness Reynolds states that nonrecurring rates are the only ones that affect entry. *T 132.*

[143] *Exhibit 1T at 13.*

[144] *Id.*

[145] CLECs may buy resale from Qwest at 14.74% below the monthly Qwest recurring retail rate and a discount of 50% from the nonrecurring retail rate. The nonrecurring charge to convert a Qwest customer to CLEC resale is $5.73 for the first line. Conversion may be completed in one

UNE-P easily and inexpensively in the event of a Qwest retail price increase, Staff argues that resale where UNE-P is available should now be viewed as price-constraining.

94 Regarding special access, Staff views WeBTEC's argument as essentially a red herring. Staff points out that use of special access lines can be expected to dwindle, in light of newer, more favorable methods of service and entry. Staff also observes that no CLEC has raised this issue and WeBTEC offered no testimony on it.

95 **Discussion.** The Commission finds that market share and market power analyses appropriately include CLEC competition provided through UNE-P, UNE-L, and CLEC-owned facilities. All of these analog services are close substitutes for the Selected Services. The Commission therefore rejects MCI's exclusion of UNE-P from its market share analysis, and likewise rejects MCI's corresponding addition of CLEC UNE-P lines to Qwest's line counts.

96 The Commission rejects arguments that UNE-P or UNE-L are not price-constraining competition. When a CLEC provides its customer with service via UNE-P, it can provide the equivalent of a Qwest service. The CLEC has an unrestricted right to all revenues that flow from the provision of that service. The price the CLEC pays for a UNE is fixed, not tied in lock-step to Qwest' retail rates, as is the case with resale. If Qwest were to raise retail prices, the CLECs could use the increased margin between Qwest's new retail price and the CLECs' UNE-P/UNE-L cost to compete more effectively against Qwest's price. Moreover, the CLEC may offer its customers different bundles of services that incorporate UNE-P, thus differentiating itself from Qwest in more than price. UNE-L offers even greater opportunities for this differentiation. Staff's point emphasizing the important distinction between the wholesale market, which will remain fully regulated, and the retail market, is well-taken.

97 With regard to resale competition, much has changed since the Commission entered its Order in Docket No. UT-000883. The conclusion of Qwest's 271

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business day. CLECs may buy UNE-P from Qwest for $0.27 (nonrecurring) for the first line. Conversion may be completed within one day. The recurring charge for service varies according to the geographic pricing zone within which the customer is located. Recurring charges vary from $8.83 per month in Zone 1 to $21.48 per month in Zone 5.

proceeding, the advent of UNE-P, and the implementation of Qwest's Performance Assurance Plan required as part of Qwest's compliance with the 271 order, reflect a different market environment from what the Commission considered in Docket No.UT-000883— an environment that allows easy migration from resale to UNE-P for CLECs. While resale, standing alone, may not directly constrain Qwest's retail prices, the CLECs' ability, quickly and inexpensively, to migrate from resale to UNE-P, which does constrain Qwest's retail prices, makes resale a meaningful measure of competition.

98 WeBTEC's arguments regarding special access lines are overwrought. Its concern about the relatively high prices CLECs "have to" pay for special access lines begs the question whether CLECs "have to" buy them. More-attractive entry methods and services, notably UNE-P, are now available to serve these customers. There was no testimony, and no argument from CLECs, that any significant group of customers is bound to special access for any significant period of time.

99 The Commission is persuaded that the seemingly high market share and market concentration figures gleaned from Qwest and Staff's analyses are counterbalanced by evidence of a strongly pro-competitive market structure, which has undergone significant change since our decision in UT-000883. CLECs using UNE-P are present in 61 of 68 Qwest exchanges, where over 99% of Qwest's analog business customers reside. Competition in the form of UNE-P, UNE-L, or CLEC-owned facilities is present in all but one exchange. CLEC competition has contributed in a significant way to Qwest's line loss.[146] CLECs' market share, statewide and as more granularly examined, shows that CLECs provide workable and meaningful competition for local exchange analog business services.

100 WeBTEC's contention that federal courts in anti-trust cases have found that market shares between 50% and 65% are *prima facie* evidence of market power is not dispositive. First, this is not an anti-trust case. The key questions under our statute are: are there reasonably available alternatives, and is there a significant captive customer base. Although elements of anti-trust discourse are useful in

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[146] *Exhibit 82* (showing the reasons why Qwest business retail customers disconnect from Qwest service); *T 706*.

determining whether an incumbent has market power (and therefore a captive customer base), the statute does not require the Commission to be bound by anti-trust standards. Significantly, our statutes provide safeguards that are not typically available in an anti-trust case. These include a prohibition against below-cost pricing,[147] a prohibition against cross-subsidies from fully regulated services,[148] establishment by the Commission of prices for cost elements, the threat of re-classification,[149] and, in this case, an ongoing obligation to abide by the provisions of the statutes that prohibit undue or unreasonable preference[150] or discrimination[151] against similarly situated customers. As important, the pro-competitive nature of the market structure, previously discussed, puts into perspective the significance of market share evidence (as it also would in an anti-trust analysis). Finally, a careful reading of the *MetroNet*[152] case cited by WeBTEC reveals that the court did not find that a regulated company with a 65% market share is presumed to possess market power. Rather the court found that in cases involving regulated companies, reliance on statistical market share is improper when the predominant market share is the result of regulation.[153]

101 AT&T's and MCI's tests for market power based on strict numerical market share percentages in certain numbers of exchanges are also ill-founded. Such an approach is too mechanistic, inappropriately treats each exchange as a "market," and would preempt the Commission's role in balancing the factors required under the statute, particularly the role of market structure.

102 Public Counsel is correct that Qwest has an additional way to compete after 271 approval, because of its ability to create service packages including long distance. However, in order to gain 271 approval, Qwest demonstrated, both to this Commission and to the Federal Communications Commission (FCC), that it had opened its network to competitors. If CLECs have gained a significant competitive foothold in our state, as we find they have, then, like Qwest, they can create service packages (as they do now), in order to compete effectively.

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[147] *RCW 80.36.330(4).*
[148] *RCW 80.36.330(6).*
[149] *RCW 80.36.330(7)*
[150] *RCW 80.36.170.*
[151] *RCW 80.36.180.*
[152] *See footnote. 64, supra.*
[153] *MetroNet at 1003-1004.*

103 The Commission acknowledges MCI's point that an increase in a small number of CLEC lines may still be a small number in an absolute sense. That point, however, which is meant to demonstrate that an increase in CLECs' market share is not necessarily evidence of effective competition, is blunted by evidence of the CLECs' current absolute share: 28% of analog business lines, provided through a variety of methods.[154] MCI's point also fails in view of the pro-competitive structure of the market, just discussed.

104 With regard to the cost of market entry generally, beyond the nonrecurring costs described by Mr. Reynolds, we observe that between 27 and 40 CLECs, using a variety of strategies, are already present in Qwest's territory, are already incurring these costs, and are competing effectively. These costs won't necessarily change if the Selected Services are competitively classified. It may be that in low-cost zones (e.g., Zone 1), the CLECs will feel more pressure if Qwest lowers its prices there. But that is where competition is most robust, and there is no need to keep such a wide margin between Qwest's retail prices and its wholesale prices, which are based on its underlying costs.

6. Is there a significant captive customer base?

105 The opposing parties argue that there exists a significant captive customer base for the Selected Services. Their arguments follow naturally from their arguments that Qwest has failed to prove (for geographic, customer-size, product-substitutability and data-selection reasons) that customers have reasonably available alternatives, and that Qwest has failed to demonstrate (for reasons of market share, market concentration, market structure, market power, and other factors) that upon competitive classification of the Selected Services, Qwest will be constrained from raising or lowering its prices beyond competitive levels.

106 **Discussion.** The parties' arguments, and our responses, are covered in the previous sections. It also follows, from our discussions and findings in those sections, that we find no significant captive customer base. We found that all sizes of customers have reasonably available alternatives to the Selected Services throughout Qwest's territory, and that those alternatives (UNE-P, UNE-L, resale,

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[154] *Exhibit 232C.*

CLEC-owned) are price constraining. Therefore, there are no captive customers of any significant size. We will not repeat all the arguments, but we do want to focus on some aspects, particularly fears that Qwest will raise prices with impunity in rural areas, or lower prices predatorily in urban areas.

107 Some have concerns that in some rural exchanges or wire centers, where competitors' market share is lowest, Qwest might be able to raise prices with impunity. We believe these fears are unfounded for several reasons. First, competitors are in fact present in every exchange but Elk, and UNE-P is available in every exchange. Were Qwest to raise prices above competitive levels in selected rural exchanges, competitors could be expected to successfully respond, as previously discussed. In a more pragmatic sense, though, the scenario of Qwest raising prices in just a few selected exchanges or wire centers is unrealistic. For example, there are 7 wire centers where no CLEC is present.[155] But these 7 wire centers represent just .27% of Qwest's business lines.[156] For the sake of trying to gain a very small increased margin of income, Qwest would have to spend significant time and money, and incur significant ill will, in offering its services for higher prices in just those selected wire centers. We think it highly unlikely that Qwest's marketing department would find this exercise worth its while, especially in light of the competitors' ability to respond with UNE-P or resale services.

108 Just as important, however, are the constraints of RCW 80.36.170 and RCW 80.36.180, which will continue to govern Qwest if its petition is granted. These statutes prohibit Qwest from undue or unreasonable preference or discrimination in the treatment of its customers. If Qwest were to raise its prices in a manner that appeared to be an exercise of market power, it could expect a challenge under these statutes.[157] It could also expect a petition for reclassification of the Selected Services back to regulated rates, pursuant to RCW 80.36.330(7) which, if successful, would entirely defeat Qwest's purpose in this case. Again, the cost and risk to Qwest would simply not be worth the prospect of a small marginal increase in total revenue. For all these reasons, we conclude

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[155] *Exhibit 53C*

[156] *Id.*

[157] For example, if Qwest were to raise prices in some Zone 5 exchanges, but not other Zone 5 exchanges, it could expect at least an inquiry if not a complaint alleging discriminatory pricing. It would need to be prepared to provide satisfactory answers.

that Qwest would not be able, and likely will not be willing, to exercise market power in those areas.

109 In many areas, of course, Qwest can be expected to *lower* its business retail prices. In some areas—areas serving a very large number of Qwest customers—there is a substantial gap between the wholesale price that competitors pay for UNE-P, and the current, uniform statewide retail rate that Qwest currently must charge to all business customers. In these areas, competitive classification of the Selected Services will allow Qwest to depart from uniform rates and reduce its business retail prices (or increase services), bringing retail prices closer to costs. Reduced prices (or increased services) will be a benefit for consumers, and foster more competition.

110 Some fear that Qwest will lower its prices *too much*, in an attempt at predatory pricing. Our statutes, however, offer significant protections in that regard. Qwest is prohibited from pricing its services below cost[158] and from subsidizing its competitive services with revenues from noncompetitive services. Costs have been established by the Commission, and periodically are revised in thorough adjudicative proceedings. If the Commission initiates a complaint alleging that Qwest has violated these provisions, Qwest bears the burden to demonstrate otherwise.[159] Moreover, if the complaint were well-founded, Qwest would also risk re-classification of the Selected Services. We think all these protections will deter Qwest from predatory pricing, but if not, will offer redress.

7. Should this proceeding be guided by the TRO or await the outcome of the Commission's TRO or UNE Cost proceedings?

111 The opposing parties assert that the market analyses in this proceeding should be guided by the FCC's directives in the TRO regarding granularity of geographic scope and customer differentiation. They also assert that the TRO proceeding[160] threatens the existence of UNE-P, an important form of market entry and

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[158] *RCW 80.36.330(3).*

[159] *RCW 80.36.330(4).*

[160] Docket No. UT-033044 will address Qwest's petition for removal of its obligation to provide mass market switching pursuant to the FCC's TRO order. The proceeding will address whether competitors would be impaired if mass market switching were removed as an unbundled network element.

competition. In their view, even the uncertainty about the continued existence of UNE-P and UNE-L, or about the respective prices for those two wholesale products, jeopardizes entry. They urge deferral of this proceeding pending our TRO proceeding.

112 AT&T suggests that if the Commission grants this petition, the Commission should require Qwest to revisit the matter once the TRO proceeding is complete, or be required not to challenge the FCC's finding of impairment for ten years, or until the CLEC market share grows to 25% in all exchanges. With respect to our cost dockets, CLECs contend that UNE costs should be determined prior to action on Qwest's petition, because UNE costs have a bearing on the cost differential between Qwest retail rates and the rates CLECs can charge for their own retail services.

113 Public Counsel and WeBTEC argue that it is paradoxical that UNE-P is under attack by Qwest in the TRO proceeding at the same time that Qwest relies on UNE-P to support its petition here. They also argue that a finding of effective competition statewide in this case will provide an odd contrast to the TRO analysis, which must be based on a more granular approach. Moreover, there is substantial information coming into the TRO docket on discovery that would give the Commission significant assistance in reaching a determination in this case.

114 Qwest and Staff contend that pending TRO and cost proceedings should not control these proceedings on the instant petition. Staff argues that in the TRO proceeding, geographic areas where CLECs rely heavily on UNE-P are least likely to support a finding that elimination of UNE-P would not impair CLECs' ability to compete. Staff bases its argument on the types of triggers[161] established in the TRO to assist the states in determining whether there is impairment of competition in a given market. Even if the Commission were to remove mass-market switching (and consequently UNE-P) as a UNE as a result of the TRO proceeding, Qwest and Staff argue that CLECs would still have 27 months for

[161] The triggers required to make a finding of non-impairment for mass-market circuit switching include: the presence of 3 CLEC switches serving the market, or the presence of two or more wholesale switching providers that offer unbundled local switching, or a finding that, based on economic and operational factors, the market is suitable for self-provisioned switching to take place. *47 CFR 51.319(d)(2)(A)-(B).*

transition to a new basis for providing service to customers. The Commission could examine the effect on competition during that transition period. As to the pending cost dockets, Qwest and Staff correctly observe that prior competitive classification cases have been decided while such dockets have been pending and that any perceived rate instability due to pending cost dockets has not impeded CLECs' market entry, as evidenced by increasing CLEC market share.

115 **Discussion.** The Commission declines to delay this proceeding pending the conclusion of the TRO and generic cost proceedings, or to import into this proceeding new requirements from the TRO. Qwest is entitled to a ruling now on its petition, which can be re-examined at a later time, upon a proper motion. Likewise, the TRO and cost dockets should proceed on their own terms and timelines. With regard to pending cost dockets, the Commission notes that Qwest's cost issues have been removed from the currently pending cost docket, rendering this issue moot.[162] Cost dockets, in one form or another, arise periodically. Qwest's currently authorized costs will suffice until new ones are established, either in a cost docket or other appropriate proceeding.

8. Should the Commission establish a cost floor?

116 Several parties recommend that the Commission establish a cost or price floor for the Selected Services, if they are competitively classified. Public Counsel deferred to the other parties on this issue. DOD agreed with Qwest and Staff that it is unnecessary to do so in this case. Qwest and Staff note that the Commission declined to take a similar action recommended by some of the parties in Docket No. UT-000883.

117 The primary concern raised by the parties who recommend establishing a cost floor is that unless the Commission does so in concert with a grant of this petition, Qwest will be able to engage in discriminatory and predatory pricing practices. They claim Qwest could strategically raise and lower retail rates in selected areas of its territory in the state, in order to drive out competition and subject CLECs to a price squeeze.

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[162] Docket Nos. UT-023003 and 033034, *Seventeenth Supplemental Order*, November 25, 2003. AT&T, MCI, and WeBTEC, also opposing parties in this case, joined in the motion to remove Qwest from the cost dockets.

118 The CLECs propose several different methods of calculating a price floor. MCI and ATG suggest that the floor cover the imputed costs of all UNEs plus a measure of retail-related costs. AT&T proposes that a statewide average cost floor be established, as does WeBTEC, although WeBTEC indicates the record in this proceeding is insufficient to establish such a floor. Integra recommends that the cost floor analysis be done on an exchange-by-exchange basis. Integra also argues that Qwest's price-list filings should be automatically suspended and the burden of proof placed on Qwest to prove the reasonableness of its rates, on the premise that shifting the burden of proof to the CLECs and requiring CLECs to file complaints would provide redress too late to prevent damage to competition.

119 Staff argues there are protections available in the event that Qwest might either raise analog business retail rates above competitive levels, or lower them below cost. Staff posits that the current rates for Qwest's business retail services are, on average, above cost.[163] That is, Qwest's revenue-per-line data show that Qwest is able to achieve sufficient revenue from its retail operations in every wire center to cover the imputed cost of providing that service.[164] Retail rates were set on the basis of cost studies provided at the time the rates were filed. Also, the Commission has established TELRIC-based UNE rates for Qwest in prior UNE cost dockets. Those rates are still in effect. If this petition is granted, Qwest's initial prices will mirror its current tariffed prices, until and unless it submits a new price list. Staff contends that the prohibition against *below-cost* pricing after competitive classification has been granted is a key provision of the statute. Staff argues that estimates of TELRIC, plus some increment to represent CLEC retail related costs, would suffice as a price floor for future pricing of listed services if this petition is approved. Staff also responds that the market power analysis commanded by the statute is directed at determining whether the company will have the incentive or ability to raise its prices *above* competitive levels. The presence of effective competition will constrain Qwest from raising prices above those levels, lessening its financial ability to lower prices below cost in other areas.

120 **Discussion.** The Commission declines to set a cost or price floor in this case. In prior proceedings, the Commission has approved both Qwest's retail and

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[163] *Commission Staff Opening Brief at 38-39.*
[164] *Id at 38.*

wholesale rates and thus those rates are presumed to be fair, just, reasonable and sufficient unless shown otherwise in an appropriate proceeding before the Commission. The statute governing this case provides the Commission with the authority to investigate prices upon complaint initiated by the Commission or by other parties.[165] The statute authorizes the Commission to investigate allegations that Qwest is pricing its retail services below cost or is using revenues from regulated services to support deregulated services.[166] The Commission also notes that Qwest has not requested a waiver of the statutory prohibitions against undue and unreasonable preference and discrimination. These statutes provide customers further protection from below-cost pricing strategies by Qwest.

121 The Commission rejects the recommendation that it automatically suspend price lists filed by Qwest. Such an action would contradict the very purpose of the competitive classification statute.[167]

9. Should the Commission implement access charge reform?

122 MCI urges the Commission to recognize in this proceeding that Qwest's intrastate access charges are far above economic cost. MCI argues that Qwest will be able to use the subsidies implicit in access charges to subsidize its competitive offerings, to the disadvantage of competitors. MCI suggests that the Commission initiate a proceeding to address the complete elimination of the Interim Terminating Access Charge (ITAC). The proceeding should also revise Qwest's access rates to reflect economic cost. Finally, MCI recommends that the Commission establish an intrastate Universal Service Fund to ensure reasonable and affordable rates for all consumers in Washington.

123 No other party supported this proposal.

124 Qwest and Staff argue that access charge issues are outside the scope of this case. Staff points out that CLECs also recover *their* filed switched access charges from interexchange carriers at the rate levels contained in their filed price lists.

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[165] *RCW 80.36.330(4).*
[166] *RCW 80.36.330(3) and (6).*
[167] *RCW 80.36.330(2).*

125 **Discussion.** The Commission rejects MCI's proposal. The issue of access charge reform is not before the Commission in this case. There is no evidence on the record addressing the relevance of access charges to the issues in this docket. MCI may file a complaint or request for rulemaking if it desires to pursue the matter.

10. Should Qwest be required to modify its non-abandonment commitment?

126 Qwest committed itself to a non-abandonment provision that would become effective if this petition were granted. The provision states that until November 2009, Qwest will not abandon services in the exchange areas it currently serves, for the services listed in its petition. However, Qwest would not be prohibited from limiting services to existing customers ("grandfathering") or selling its facilities in those exchanges.[168]

127 In its post-hearing brief, AT&T recommends that the Commission eliminate Qwest's ability to sell its facilities. This would ensure that CLECs have access to those facilities and could thus continue to compete for basic analog business services using Qwest facilities. It would also require Qwest to continue to provide service in the event competition collapsed.

128 Qwest responds that AT&T's recommendation was not presented during the evidentiary hearing. Therefore, the parties did not have a chance to cross-examine AT&T's witness about the proposal. Moreover, Qwest contends it may be contrary to law.

129 **Discussion.** The Commission rejects AT&T's proposal. The proposal is unclear and AT&T failed to show the necessity for its adoption.

11. Should Qwest be required to provide quarterly reports?

130 ATG recommends that Qwest be required to report quarterly on its pricing actions, including data as to the exchanges affected, and on customer migration to Qwest's own digital services.

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[168] *Exhibit 7RT at 8, T 1344.*

131 Qwest points out that ATG presented no witnesses in this case and did not present its proposal at any time on the record. Qwest also contends that the competitive classification statute requires no such reporting and that such reporting would be counter to the Commission's rules regarding contracts for competitively classified services.

132 **Discussion.** The Commission has authority at any time to ask for virtually any information from Qwest.[169] While we could request additional reporting as a part of an order on Qwest's petition, ATG has not shown a need for us to do so. We expect that Staff and the other parties will be monitoring market patterns and will seek our assistance, if needed, in obtaining pertinent information.

12. Should Qwest be required to adhere to a policy on portability of DID[170] numbers?

133 WeBTEC contends that during the proceeding, Qwest indicated that, under its current Statement of Generally Available Terms (SGAT) and current local number portability policy, non-working DID numbers that are part of a block of telephone numbers assigned to or used by a business, are not eligible for local number portability. Thus, in order to change carriers, a business would have to be willing to give up its entire block of DID numbers. At the conclusion of the hearing, Qwest introduced Exhibit 85 into the record. This exhibit reflects a clarification of Qwest's local number portability policy. According to Exhibit 85, reserved numbers in a DID block that are identified to a customer service record, and paid for, are eligible for portability if the customer chooses to change service to a competitor.

134 WeBTEC contends that because of the prior level of uncertainty about this policy and the confusion about the meaning of the language in Qwest's SGAT, the Commission should make Qwest's adherence to the revised DID number portability policy contained in Exhibit 85 a condition for a grant of the petition. Further, the Commission should require Qwest to revise its SGAT to include the clarification of its policy.

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[169] *RCW 80.04.060.*

[170] Direct Inward Dial ("DID")

135 Qwest opposes WeBTEC's recommendation. Qwest contends that WeBTEC presented no testimony and thus the issue of portability of DID numbers was not properly raised on the record. Moreover, Qwest confirmed that its policy is as set forth in Exhibit 85.

136 No other party addressed this issue.

137 **Discussion.** The Commission declines to make Qwest's adherence to the policy set forth in Exhibit 85 a condition of approval of the petition. Nor does the Commission require Qwest to revise its SGAT in this regard. WeBTEC did not present evidence in support of a need for adoption of its proposal. Qwest has stated on the record that Exhibit 85 represents its policy on DID number portability, which is sufficient for purposes of this proceeding.

D. COMMISSION DECISION

138 Having examined Qwest's and Staff's case, having considered all of the objections raised by the opposing parties, having considered the factors laid out in the statute, and having considered the totality of evidence and arguments in the case, and bringing to bear our experience and expertise to the matter, we now turn to the ultimate question posed by RCW 80.36.330: whether the Selected Services are subject to effective competition.

139 We conclude that the Selected Services are subject to effective competition, statewide: i.e., that customers of these services have reasonably available alternatives, and that these services are not provided to a significant captive customer base.

140 Business analog services provided by CLECs—whether through UNE-P, UNE-L, special access lines, resale, or CLEC-owned facilities—are genuine alternatives (essentially complete substitutes) to the Selected Services. Competitors provide these services in all but one Qwest exchange, and the exchanges where competitors are active cover 99.97% of Qwest's analog business lines. The competitors enjoy a 28% market share for these services in Qwest's service territory. Between 27 and 40 competitors are active in the state, ranging from small, "niche" competitors to some of the largest telecommunications companies in the world.

141 Because of the pro-competitive market structure in Washington, the competitors' means of competition—UNE-P, UNE-L, resale, and CLEC-owned facilities—all help to discipline the market. That is, they serve as an effective restraint on Qwest's ability to raise prices above competitive levels.

142 An important feature of this structure is the availability to competitors of UNE-P, which is the entire platform (loop, transport and switch included) used by Qwest to serve a customer. The monthly wholesale price of UNE-P to competitors is based on Qwest's cost to provide it, and is fixed by the Commission for five different cost-zones. A competitor can transfer a Qwest customer to the competitor's own UNE-P-based service for a payment to Qwest of a mere 27 cents (in addition to the monthly charge), and the process takes one day. Thus, UNE-P is a fixed-price, cost-based, and speedy way for competitors to acquire new customers. Moreover, competitors can transfer their existing customers to UNE-P, thereby reducing their costs to the more attractive UNE-P prices. These advantages of UNE-P explain its popularity and rapid growth. Competitors are providing UNE-P-based retail service in 61 of Qwest's 68 exchanges, and these exchanges cover 99.7% of Qwest's analog business lines. UNE-P lines represent approximately 25%[171] of all competitors' analog business lines in Qwest's territory, and UNE-P lines increased 45% in the period December 2001 to December 2002.

143 The ubiquitous availability of UNE-P to CLECs provides an effective constraint against the ability of Qwest to exercise market power, that is, to raise its retail prices above competitive levels on a sustained basis. UNE-P is attractive to competitors, now. If Qwest were to raise its retail prices above competitive levels, competitors could compete all the more effectively by taking advantage of the greater margin between the UNE-P wholesale price, which is fixed, and Qwest's new, increased retail price. That dynamic will operate to constrain Qwest.

144 In light of the widespread availability of competitive offerings and a market structure that will constrain Qwest from exercising market power, there is no significant captive customer base.

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[171] *Exhibit 232C*

145 It is the policy of this state to encourage competition in the telecommunications industry.[172] The purposes of competition include expanding choices for customers, bringing prices closer to costs, spurring innovation, driving down costs, and driving up quality of service. Competitive classification of the Selected Services is one step in furthering those purposes, all of which are in the public interest. Qwest and its many competitors must now compete for business customers on more equal terms, though there remain significant regulatory protections for customers. We think Washington is ready for that competition.

146 In summary, Qwest has met its burden to show that analog business services are subject to effective competition, and we conclude competitive classification of these services is in the public interest.

III. FINDINGS OF FACT

147 Having discussed above all matters material to our decision, and having stated our findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.

(1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, accounts, securities, and transfers of public service companies, including telecommunications companies.

(2) Qwest Corporation is registered as a telecommunications company providing service within the state of Washington as a public service company.

(3) On May 1, 2003, Qwest filed a request, pursuant to RCW 80.36.330 and WAC 480-121-062, for competitive classification of its analog flat-rate and measured-rate business local exchange services, PBX, and Centrex, throughout the state of Washington.

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[172] *RCW 80.36.300.*

(4) Qwest will not waive the statutory prohibitions against undue or unreasonable preference or discrimination. *RCW 80.36.107 and RCW 80.36.108.*

(5) Qwest will not abandon service to existing business customers in the exchanges it currently serves until November 2009.

(6) Qwest's selection of services and geographic scope for its petition is appropriate and meets the requirements of RCW 80.36.330.

(7) Qwest and Staff provided sufficiently accurate and reliable data showing the level of competition from CLEC wholesale-purchased and CLEC-owned business analog alternatives to support Qwest's petition.

(8) The structure of the market in Qwest's serving territory is now pro-competitive and CLECs are easily able to enter the market anywhere in Qwest's serving territory to provide resale, UNE-P, UNE-L,and facilities-based services in competition with Qwest.

(9) By use of these different forms of entry, CLECs provide service to small, medium, and large business customers throughout Qwest's service territory in the form of basic business service, PBX, and Centrex Services.

(10) CLEC analog business services are a direct and complete substitute for Qwest's analog business services.

(11) Between 27 and 37 CLECs are actively providing analog business services to customers throughout Qwest's service territory in Washington.

(12) CLECs are serving approximately 28% of the analog basic business service market in Qwest exchanges, including to small business customers.

(13) CLECs serve over 46% of the analog PBX market in Qwest exchanges. Analog PBX service is a reasonably available alternative to analog Centrex service.

(14) Digital service, provided by both CLECs and Qwest, is not as close a substitute for analog service as analog alternatives, but is a relevant alternative to analog service.

(15) A conservative estimate of CLECs' market share for business digital services is greater than their share of business analog services.

(16) Wireless service, VOIP, and other modes of service are potential substitutes for analog services, but are accorded only light weight in this proceeding – as adding to the general competitive environment.

(17) The effectively competitive structure of Washington's analog business market at this time, coupled with the protective provisions of RCW 80.36.330(4), (6) and (7), RCW 80.36.170, and RCW 80.36.180, constrains Qwest from using its market share and market concentration to exercise market power.

(18) Based on the presence of a pro-competitive market structure, the presence of CLECs in every Qwest exchange, the availability of UNE-P in every exchange, and the active use of UNE-P in 61 of 68 Qwest exchanges that include 99.89% of Qwest's business customers, the number of possible captive business customers of Qwest is insignificant.

(19) The record, taken as a whole, including evidence on an exchange and wire-center basis, demonstrates that there is effective competition statewide for Qwest's analog basic business local exchange services, PBX service, and Centrex service, and that there is no significant captive customer base in Qwest's service territory for such services.

(20) Competitive classification of the Selected Services is consistent with the public interest.

IV. CONCLUSIONS OF LAW

148 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions of law pertaining to the ultimate decisions of the Commission are incorporated by this reference.

(1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and all parties to, these proceedings.

(2) Qwest has sustained its burden of proof, based on the entire record, to show that there is effective competition for the services selected in its petition throughout the geographic area covered by the petition.

(3) The Commission should grant the petition as filed.

V. ORDER

THE COMMISSION ORDERS That Qwest's petition is granted, effective January 1, 2004.

DATED at Olympia, Washington, and effective this 22nd day of December, 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

APPENDIX A

80.36.330. Classification as competitive telecommunications companies, services--Effective competition defined--Prices and rates--Reclassification

(1) The commission may classify a telecommunications service provided by a telecommunications company as a competitive telecommunications service if the service is subject to effective competition. Effective competition means that customers of the service have reasonably available alternatives and that the service is not provided to a significant captive customer base. In determining whether a service is competitive, factors the commission shall consider include but are not limited to:

(a) The number and size of alternative providers of services;

(b) The extent to which services are available from alternative providers in the relevant market;

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

(d) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

(2) When the commission finds that a telecommunications company has demonstrated that a telecommunications service is competitive, the commission may permit the service to be provided under a price list. The commission may adopt procedural rules necessary to implement this section.

(3) Prices or rates charged for competitive telecommunications services shall cover their cost. The commission shall determine proper cost standards to implement this section, provided that in making any assignment of costs or allocating any revenue requirement, the commission shall act to preserve

affordable universal telecommunications service.

(4) The commission may investigate prices for competitive telecommunications services upon complaint. In any complaint proceeding initiated by the commission, the telecommunications company providing the service shall bear the burden of proving that the prices charged cover cost, and are fair, just, and reasonable.

(5) Telecommunications companies shall provide the commission with all data it deems necessary to implement this section.

(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 which has paid excessive rates because of below cost pricing of competitive telecommunications services.

(7) The commission may reclassify any competitive telecommunications service if reclassification would protect the public interest.

(8) The commission may waive the requirements of RCW 80.36.170 and 80.36.180 in whole or in part for a service classified as competitive if it finds that competition will serve the same purpose and protect the public interest.