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Melissa E. Newman
Vice President – Federal Regulatory

Qwest.

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MAY 13 2005

Federal Communications Commission
Office of Secretary

REDACTED – FOR PUBLIC INSPECTION

May 13, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Section 272 (f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112; *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175 – **Withdrawal of Information**

Dear Ms. Dortch:

In responding to a recent request by Wireline Competition Bureau (or "WCB") staff to update certain information filed in response to earlier data requests in the above-captioned proceedings ("Sunset proceeding"), Qwest discovered that portions of its prior data submissions contained incorrect and mis-labelled data. These errors were primarily the result of combining "small business" data with "residence" data and mis-labelling it as "residential" data. Due to the magnitude of these discrepancies, Qwest is withdrawing certain attachments in their entirety. Qwest is re-submitting new attachments in a separate filing in response to the WCB's most recent request.[1]

To summarize, Qwest previously re-submitted (on May 17, 2004) but now withdraws certain attachments with the following descriptions.

- On January 29, 2004, Qwest (initially) filed a letter in WC Docket No. 02-112 and CC Docket No. 00-175. The letter, in both redacted and non-redacted forms, was

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List ABCDE

[1] *See* letter from Melissa E. Newman, Qwest to Marlene H. Dortch, FCC, filed on May 13, 2005, in WC Docket No. 02-112 and CC Docket No. 00-175 (Resubmission of Information).

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from Melissa Newman to Marlene Dortch. Appended to the letter were various attachments, including the following pages:
- Page 2, entitled "2. InterLATA BOC monthly minutes of use (MOU), by state for the period of 1/03 - 12/03"
- Page 4, entitled "4. Number of customers that have chosen BOC affiliates as their interLATA PIC by month by state for the period 1/03 - 12/03"
- Page 5, entitled "5. Number of BOC customers that have chosen a package that includes local exchange service and unlimited long distance by month by state for the period 1/03 – 12/03"

- On March 25, 2004, Qwest (initially) filed a letter in WC Docket No. 02-112 and CC Docket No. 00-175. The letter, in both redacted and non-redacted forms, was from Melissa Newman to Marlene Dortch. Appended to the letter were various attachments, including the following pages:
  - ATTACHMENT 1, entitled "Qwest LD Corp (QLDC) InterLATA Presubscribed Lines* by State - 2003"
  - ATTACHMENT 2, entitled "Qwest LD Corp. (QLDC) Subscribers* Purchasing Local and Long Distance Packages by State - 2003"

- On April 8, 2004, Qwest (initially) filed a letter in WC Docket No. 02-112 and CC Docket No. 00-175. The letter, in both redacted and non-redacted forms, was from Melissa Newman to Marlene Dortch. Appended to the letter was a corrected version of ATTACHMENT 1, which was originally submitted on March 25, 2004 (see item from previous bullet point), as follows:
  - ATTACHMENT 1-CORRECTED, entitled "Qwest LD Corp (QLDC) InterLATA Presubscribed Lines* by State - 2003"

Rather than asking the FCC to eliminate portions of the previously re-submitted correspondence (the specific attachments described in the preceding bullet points), alternatively, Qwest asks the FCC to discard the May 17, 2004 filing in its entirety and accept for inclusion in the record of the above-captioned proceedings a complete second re-submission (as previously marked stamped as RECEIVED by the Office of the Secretary) of the May 17, 2004 correspondence (redacted and non-redacted), with the delineated attachments removed. Each page (formerly) containing data that is being withdrawn has been copied on yellow paper (so that it can be identified easily) and annotated as follows: "**DATA WITHDRAWN BY QWEST ON MAY 13, 2005; NEW DATA PROVIDED ON MAY 13, 2005**". For pages with data that is not being replaced, the yellow sheet contains only the first half of this annotation.

With this submission, Qwest uses the same approach as it has used since May 17, 2004 in filing correspondence (enclosing confidential information) in WC Docket No. 02-112 and CC Docket No. 00-175. Thus, pursuant to the Wireline Competition Bureau's December 22, 2003 *Order*, and its appended *Protective Order*, in the above-captioned (and other) proceedings (18 FCC Rcd.

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26595), Qwest is serving a copy of the letter with the confidential attachments on Ms. Janice Myles[2] of the Competition Policy Division, Wireline Competition Bureau. Each page of the confidential attachments is marked with the legend specified in the *Order* ("CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 02-112, CC DOCKET NOS. 00-175, 01-337, 02-33, before the Federal Communications Commission").

Notwithstanding the *Protective Order* adopted in these proceedings, Qwest believes there is also a separate statutory basis for not making this confidential information available for public inspection. *See* 47 C.F.R. § 0.457(d). The non-redacted portions of this submission contain Qwest's confidential information. Disclosure may cause substantial competitive harm to Qwest. Accordingly, the non-redacted information is appropriate for non-disclosure both under Section 0.457(d) and the *Protective Order*.

As required by the Wireline Competition Bureau's *Order* and *Protective Order*, Qwest is submitting to the Secretary's office one (original) copy of the non-redacted re-submitted correspondence of May 17, 2004 (that included the January 29, 2004, March 25, 2004 and April 8, 2004 letters). As required by the *Order*, the cover letter and non-redacted copies include the following legend: "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 02-112, CC DOCKET NOS. 00-175, 01-337, 02-33, before the Federal Communications Commission". In addition, Qwest is simultaneously re-submitting under separate cover to the Secretary's office, two redacted copies (original and one copy) of the May 17, 2004 correspondence. As required by the *Order*, the cover letter and redacted copies include the following legend: "REDACTED – FOR PUBLIC INSPECTION".

[2] Courtesy copies of this letter are also being served on the FCC staff identified on page 4.

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Acknowledgment and date of receipt of this submission are requested. A duplicate copy is included for this purpose. Please date-stamp the duplicate copy upon receipt and return it to the courier. If you have any questions regarding this submission, please contact the undersigned at the contact information reflected in the letterhead.

Sincerely,

/s/ Melissa E. Newman
Melissa E. Newman
Vice President – Federal Regulatory

Attachments enclosed

cc: Renee Crittendon (via courier)
Pamela Megna (via courier)
Ben Childers (via courier)
William Kehoe (via courier)
Jon Minkoff (via courier)

34/2

Qwest.

Spirit of Service

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Melissa E. Newman
Vice President – Federal Regulatory

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MAY 1 7 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 17, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, DC 20554

Re: *In the Matter of Section 272(f)(1) Sunset of BOC Separate Affiliate and Related Requirements, WC Docket No. 02-112; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules, CC Docket No. 00-175*

Dear Ms. Dortch:

On December 22, 2003 the Wireline Competition Bureau adopted an *Order*, with an appended *Protective Order*, in the above-captioned (and other) proceedings (18 FCC Rcd. 26595) which required that Ms. Janice Myles, Competition Policy Division, Wireline Competition Bureau receive a copy of each document for which a party claimed confidential or proprietary treatment. Unfortunately, Qwest did not become aware of the Wireline Competition Bureau's *Order* and *Protective Order* until mid-April, 2004. On January 29, 2004, March 25, 2004 and April 8, 2004, Qwest submitted to the Secretary's office both redacted and non-redacted information in the above-captioned proceedings in response to a request by Commission staff. Qwest requested in its information submissions that the non-redacted information be designated as confidential and withheld from public inspection pursuant to Sections 0.457(d) and 0.459 of the Commission's rules.

By this letter, Qwest seeks to ensure that it has followed the process for the treatment of confidential or proprietary material as set forth in the Wireline Competition Bureau's *Order* and *Protective Order*. Thus, Qwest is serving under separate cover a letter (similar in content) and the aforementioned confidential submissions on Ms. Myles, with each page of the submissions marked with the legend specified in the *Order* ("CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 02-112, CC DOCKET NOS. 00-175, 01-337, 02-33, before the Federal Communications Commission"). In addition, Qwest is re-submitting (via the same separate cover) one copy of the non-redacted submissions of January 29, 2004, March 25, 2004[1] and April 8, 2004 to the Secretary's office. Qwest requests

[1] In the original non-redacted submissions to the Secretary's office for January 29, 2004 and March 25, 2004, Qwest did not segregate all of the confidential information from the non-confidential information as required by paragraph ten of the *Protective Order*. In the

that its original non-redacted submissions of January 29, 2004, March 25, 2004 and April 8, 2004 be destroyed.

Attached to this letter are two redacted copies of the January 29, 2004, March 25, 2004 and April 8, 2004 confidential submissions. As required by the *Order*, this cover letter and the redacted copies include the following legend: "REDACTED – FOR PUBLIC INSPECTION". Qwest requests that the Commission discard the original redacted submissions of January 29, 2004, March 25, 2004 and April 8, 2004.

Please contact the undersigned with any questions regarding this submission. Should Qwest file additional confidential or proprietary information in the future in these proceedings it will adhere to the procedures and requirements contained in the *Order* and *Protective Order*. Two additional copies of this letter are being provided, one for the Secretary's office and one to be stamped and returned to the courier. Thank you for your assistance with this matter and Qwest regrets any inconvenience these resubmissions have caused the staff of the Commission.

Respectfully,

/s/ Melissa E. Newman

cc: Janice M. Myles (cover letter only)

Attachments

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resubmissions being made today, the confidential portions of all documents have been segregated (either physically or by electronic redaction) from the remainder of the documents that are not confidential.

5+R

ride the light

Qwest.

Qwest
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Melissa E. Newman
Vice President – Federal Regulatory

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JAN 2 9 2004
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 29, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Section 272 (f)(1) Sunset of the BOC Separate Affiliate and Related Requirements,* WC Docket No. 02-112; *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules,* CC Docket No. 00-175

Dear Ms. Dortch:

In late December, 2003, Commission staff requested that Qwest and other large ILECs submit certain information in the above-captioned proceeding. Qwest's response to the Commission staff's information request is attached. Portions of the attachment are being redacted and designated as Confidential – Not for Public Disclosure. Pursuant to Sections 0.457(d) and 0.459 of the Commission's rules, 47 C.F.R. §§ 0.457(d) and 0.459, Qwest requests that the redacted information in the attachment be withheld from public inspection. The redacted portions of the attachment contain both Qwest's confidential information and the proprietary information of external research firms. Disclosure may cause substantial competitive harm to Qwest and these external research firms. Accordingly, the redacted information is appropriate for non-disclosure either under Sections 0.457(d) or 0.459 of the Commission's rules.

In accordance with Commission rules, Qwest is submitting this redacted version of the aforementioned attachment, to be available for public inspection in the above-captioned dockets. Acknowledgment and date of receipt of this submission are requested. An original, one copy and a duplicate copy of this request are provided. Please date-stamp the duplicate upon receipt and return it to the courier. If you have any questions regarding this filing, please contact the undersigned at the contact information reflected in the letterhead.

Sincerely,

/s/ Melissa E. Newman

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cc: Renee Crittendon (renee.crittendon@fcc.gov)
Brent Olson (brent.olson@fcc.gov)
Pamela Megna (pamela.megna@fcc.gov)
Ben Childers (ben.childers@fcc.gov)
Michael Carowitz (michael.carowitz@fcc.gov)
William Kehoe (william.kehoe@fcc.gov)
Jon Minkoff (jon.minkoff@fcc.gov)

Attachments

FCC DATA REQUEST
Sunset Proceeding (WC 02-112)
Qwest Responses

I. Mass Market

1. Number of BOC Local Service Access Lines, monthly data, by state for the period of 1/03 – 12/03. Includes retail residence and small business local access lines.

2003 Qwest Communications Residence and Business Access Lines

State	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
AZ	2368613	2362077	2346078	2316498	2295549	2273532	2253318	2222185	2195956	2162814	2125873	2100075
CO	2210772	2204083	2194514	2182451	2172493	2162979	2149694	2141021	2135133	2128453	2118785	2113110
IA	827211	827019	825575	822555	819354	814589	808559	804797	803169	799995	796764	794764
ID	457182	456733	456421	455520	453807	451341	449704	447988	447477	446600	444928	443737
MN	1575638	1568462	1560883	1550393	1540119	1527190	1507669	1482645	1474123	1459770	1440930	1429072
MT	309020	307966	306850	305758	304730	302762	301647	300471	300441	299565	298377	297473
ND	142349	141780	139919	138042	136164	133913	132035	131021	130651	129885	129028	128567
NE	325409	321836	318011	313511	308448	303575	298114	292546	289290	285878	281071	278699
NM	751151	752533	752971	749644	744502	740278	736180	734086	732171	730635	727815	726324
OR	1141925	1135621	1124327	1116164	1107989	1095756	1083329	1074067	1070674	1066579	1058431	1053778
SD	162573	160575	158430	157031	155358	153246	150739	147682	145679	144107	141806	140150
UT	835035	832310	829489	824163	816677	809841	803463	798429	796779	796228	793849	791421
WA	2002306	1996091	1989665	1982274	1974318	1964356	1951383	1940182	1936428	1929232	1916815	1911646
WY	193371	193691	193835	192344	191169	189607	189559	188384	188419	187840	186344	186012
Total	13302555	13260777	13196968	13106348	13020677	12922965	12815393	12705504	12646390	12567581	12460816	12394828

Note: Excludes Official Services, Resale and UNEs.

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1/27/04

DATA WITHDRAWN BY QWEST ON MAY 13, 2005

3. Any source of MOUs (or market shares) for all providers serving mass markets (e.g., analysts' reports or other studies).

Response: *Deutsche Bank, June 2003, "Long Distance Sector: Competition Taking its Toll"*
JP Morgan, November 2003, "U.S. Telecommunications – The Art of War"
FCC Industry Analysis and Technology Division, August 2003, "Trends in Telephone Service"

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DATA WITHDRAWN BY QWEST ON MAY 13, 2005;
NEW DATA PROVIDED ON MAY 13, 2005

**DATA WITHDRAWN BY QWEST ON MAY 13, 2005;
NEW DATA PROVIDED ON MAY 13, 2005**

II. **Mass Market – Broadband, xDSL**

1. Number of BOC customers choosing broadband/xDSL service by month, by state for the period of 1/03 – 12/03. This includes xDSL in cases where Qwest is or is not the internet access provider.

Total Qwest In Region DSL Data Subscribers			
1Q03	**2Q03**	**3Q03**	**4Q03**
526,300	535,954	576,760	636,614

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III. Local Service Market

1. Track A type of submissions, monthly data, by state 1/03 – 12/03 (similar to data provided under 271).

Response: Qwest does not have current Track A type data available. Attached is the December 22, 2003 Order from the State of Washington granting Qwest competitive classification of analog services for business local exchange customers. In making this determination the Washington State Commission considered: 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, including market share, growth in market share, ease of entry, and the affiliation of providers of services. Qwest believes that the Washington Commission's finding is indicative of the level of competition that it places in local exchange markets throughout its 14 state service area.

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IV. Enterprise Market – Broadband and InterLATA Services

1. Summarize what services BOCs (and/or their affiliates) are providing in-region and what they are providing out-of-region (footprint) and to whom (which customers). For example services may include frame relay, and ATM. The FCC is looking for facts around who is buying from the enterprise market and who, and what, is selling in that market.

Response:

Enterprise Market Definitions

- ***Qwest:*** *Qwest defines the Enterprise market based on three common criteria: number of employees, number of locations, and spend amount. For the Enterprise market the customer (account) will have more than 500 employees, have multiple locations both in and outside of Qwest's 14-state region, and, currently spend or have the opportunity to spend over $10,000 annually. Because of the size and locations of these accounts it is rare that they would have just one communications provider. Typically these customers purchase a wide variety of products and services from several providers to ensure redundancy and diversity.*
- ***Industry Definition:*** *large business, also known as an "enterprise," a large business is a company with 500 or more employees. (Source: IDC, Worldwide Conferencing Services Market Forecast and Analysis, 2000–2005, pg. 12)*

2. Where is the market (in vs. out-of-region).

Response: Qwest views the Enterprise market as a nationwide market. The customers making up this market normally have numerous locations and are concentrated in large metropolitan areas (i.e., "headquarters cities"). As a result, a significant majority of the Enterprise market is located outside of Qwest's local exchange area.

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3. Total BOC (and affiliate) enterprise revenue by month for the period 1/03 – 12/03.

Qwest In-region Enterprise Revenue - 2003*										
Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov

* Dec. data and data by State is unavailable.

4. Total value of the enterprise/broadband and interLATA market. What is the total size of the market?

Response: Qwest does not collect any data on the overall size of the enterprise market, but focuses on individual market segments, such as ATM, Frame Relay, Private Line and Dedicated Internet Access (see following tables).

ATM Market Share

ATM Service Market 2002
U.S. Revenue Share*

[redacted]	
AT&T	
MCI	
Sprint	
SBC	
Qwest	
Verizon	
BellSouth	
Other IXC	
Other LEC	
Total	100.0%

ATM Service Market 2002
U.S. Port Share**

[redacted]	
AT&T	
MCI	
SBC	
Sprint	
Verizon	
Qwest	
BellSouth	
Other IXC	
Other LEC	
Total	100.0%

Source: *Vertical Systems Group* Web database pulled 01.15.04

*ATM revenue share is based on the U.S. market total of $2.18 billion for 2002.
** U.S. ATM port shares for 2002 are calculated using the installed base of 33,080 customer ports as of the end of 2002. Figures include all port speeds and count equally in the calculations.

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Frame Relay Market Share

Frame Relay Service Market 2002
U.S. Revenue Share*

[redacted]	
AT&T	
MCI	
Sprint	
Qwest	
SBC	
Verizon	
BellSouth	
Other	
Total	100.0%

Frame Relay Service Market 2002
U.S. Port Share**

[redacted]	
AT&T	
MCI	
Sprint	
SBC	
Verizon	
Qwest	
BellSouth	
Other	
Total	100.0%

Source: *Vertical Systems Group* Web database pulled 01.15.04

*Revenue share is based on a total U.S. frame relay market of $8.64 billion for 2002.
**Port Share is calculated based on a total U.S. installed base of 1,347,990 frame relay ports as of year end 2002. All port speeds are counted equally for share calculations.

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Private Line Market Share

U .S. Private Line* Long Distance Revenue Share by Service Provider, 2002

[redacted]	
AT&T	
MCI	
Sprint	
Qwest	
Level 3	
Others (includes other ILECs & Nex Gen Providers)	
Total	100.0%

U .S. Private Line* Local Revenue Share by Service Provider, 2002

[redacted]	
Verizon	
SBC	
BellSouth	
Qwest	
Others (includes other ILECs & Nex Gen Providers)	
Total	100.0%

Source: IDC, *U.S. Private Line Forecast and Analysis, 2002 - 2007*, 12.03.03

*IDC's definition of Private Line includes the following speeds: 56/64Kbps, fractional T1/E1, T1/E1, fractional T3/E3, SONET, OCN: OC3/STM1, and OC12/STM4.

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Dedicated Internet Access (DIA) Market Share

U .S. DIA* Share by Service Provider, 2002

[redacted]		[redacted]	
AT&T			
MCI (WorldCom)		XO	
Sprint		Savvis	
Verizon		Allegiance	
Qwest		Cable & Wireless	
BellSouth		Other	
SBC		Total	100%

Source: IDC, 09/25/2003, Steve Harris

*In the Enterprise segment, most businesses use DIA to access the internet. DSL may be used by large enterprises, but typically in smaller, branch locations.

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QWEST, IN-REGION WIRELINE BROADBAND COMPETITORS

	ATM	Frame	DIA	DSL	OTHER/PL*

* Fractional T1, Fractional T3, Integrated T1, Metro Ethernet Services (Ethernet Internet Access, Ethernet Private Line, Transparent LANs/Virtual LANs), OC-3, OC-12, OC-48, T1s, T3s
Source: Qwest Internal Data and Company websites

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[Service Date December 22, 2003]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	
	)	
QWEST CORPORATION	)	DOCKET NO. UT-030614
	)	
For Competitive Classification of	)	
Basic Business Exchange	)	
Telecommunications Services	)	
....	)	

ORDER NO. 17

ORDER GRANTING COMPETITIVE CLASSIFICATION

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TABLE OF CONTENTS

Synopsis: The Commission grants Qwest's petition for statewide competitive classification of analog business local exchange services.

I. INTRODUCTION

1 **Nature of Proceeding:** Docket No. UT-030614 concerns a petition filed by Qwest Corporation (Qwest) on May 1, 2003, for competitive classification of analog business exchange telecommunications services pursuant to RCW 80.36.330.

2 **Hearing:** This matter was heard upon due and proper notice before Chairwoman Marilyn Showalter, Commissioners Richard Hemstad[1] and Patrick J. Oshie, and Administrative Law Judge Theodora M. Mace, on September 16-18, October 1 and October 21, 2003. A public hearing was held on September 17, 2003.

3 **Appearances.** Lisa Anderl, attorney, Seattle, Washington, represents Qwest. Jonathan C. Thompson and Lisa Watson, assistant Attorneys General, represent Commission Staff. Simon ffitch, assistant Attorney General, represents Public Counsel Section of the Office of Attorney General. Letty S. D. Friesen, attorney, Denver, Colorado, represents AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on Behalf of TCG Seattle and TCG Oregon (AT&T). Karen J. Johnson, attorney, Beaverton, Oregon, represents Integra Telecom of Washington, Inc. (Integra). Michel Singer-Nelson, attorney, Denver, Colorado, represents WorldCom/MCI. Lisa Rackner and Arthur A. Butler, attorneys, Seattle, represent Washington Electronic Business and Telecommunications Coalition (WeBTEC). Stephen S. Melnikoff, attorney, Arlington, Virginia, represents the United States Department of Defense and all other Federal Executive Agencies (DOD/FEA). Richard H. Levin, Santa Rosa, California, represents Advanced TelCom, Inc. (ATG).

4 **Commission.** The Commission grants Qwest's petition for statewide competitive classification of analog services for business local exchange customers. In so doing, the Commission notes Qwest's voluntary commitment to non-abandonment of service, more fully described below. The Commission also

[1] Commissioner Hemstad read the record of the proceeding, except for the October 21, 2003, hearing session at which he presided with the other Commissioners.

notes that Qwest does not seek a waiver of the prohibitions against undue or unreasonable preference or discrimination contained in RCW 80.36.170 and 80.36.180.[2]

II. MEMORANDUM

A. APPLICABLE LAW

5 Under RCW 80.36.330,[3] the Commission is authorized to "classify a telecommunications service provided by a telecommunications company as a competitive telecommunications service" if it finds that the service is "subject to effective competition." The statute defines "effective competition" to mean that: (1) "customers of the service have reasonably available alternatives" and (2) that "the service is not provided to a significant captive customer base."

6 In determining whether a particular service is subject to effective competition, the Commission must consider the following non-exclusive factors:

(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.

RCW 80.36.330(1)(a)-(d). In weighing the evidence and applying the statutory factors, the Commission is not governed by a precise recipe. Instead, the Commission considers the totality of the evidence presented on a case-by-case

[2] *T 274-275.*
[3] The complete text of the statute is included as Appendix A to this Order.

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basis.[4] The Commission may also rely on its own "institutional knowledge" of factors pertinent to the statutory standards. *In re Electric Lightwave, 123 Wn 2d 530, 549 (1994) (Electric Lightwave)*.[5]

7 Once competitive classification is granted for a particular service, the provider may offer the service under a price list (generally requiring 10 days' notice) rather than a tariff (generally requiring 30 days' notice).[6] In addition, uniform statewide retail pricing for the subject service is no longer required, with two limitations. First, the incumbent local exchange carrier (ILEC) cannot charge prices or rates below its cost, as determined by cost standards established by the Commission.[7] Second, unless waived by the Commission,[8] RCW 80.36.170 and RCW 80.36.180 prohibit the ILEC from offering a competitively classified service in a manner that is unduly or unreasonably discriminatory or preferential.

8 As an additional safeguard, the Commission may reclassify the service or services as noncompetitive, in order to protect the public interest.[9]

9 The petitioner, in this case Qwest, bears the burden to demonstrate that the services selected deserve competitive classification under the statute.[10]

10 In this case, Commission Staff recommends that the Commission grant Qwest's petition in its entirety. Because Staff and Qwest are fully aligned with respect to their ultimate recommendation that the petition be granted, the Commission will consider their evidence and arguments as representing one side of the case. The Commission will then address the issues raised by the remaining parties, who are recommending that the Commission deny Qwest's petition. The remaining parties are referred to as "opposing parties" in the body of this order, except where they are individually identified.

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[4] *Seventh Supplemental Order, Docket No. UT-000883, at ¶ 73.*

[5] *Electric Lightwave* involved RCW 80.36.320, which applies to a petition for competitive classification of companies. The statute at issue in the instant case, RCW 80.36.330, applies to petitions for competitive classification of *services*. In both statutes, the list of factors to be considered is the same.

[6] *RCW 80.36.330(2); WAC 480-80-205.*

[7] *RCW 80.36.330(3),(4) and (6); WAC 480-80-204(6).*

[8] *RCW 80.36.330(8); WAC 480-8-241, -242.*

[9] *RCW 80.36.330(7).*

[10] *RCW 80.36.330(2).*

11 The parties have presented a mass of facts and arguments. Much of it attempts to follow in outline the list of four factors that we must consider under the statute.[11] The result is considerable redundancy in recitation of evidence and arguments, because there is significant overlap in the factors themselves, and in how they relate to the ultimate tests posed by the statute, i.e., whether there are reasonably available alternatives and no significant captive customer base. While that approach was thorough, and ensures that we have considered those factors in our deliberations, we structure this order so as to cover all relevant issues, without unnecessary repetition, though some is unavoidable. Thus, some of Qwest's and Staff's presentation will be discussed in the context of the issues raised by the opposing parties' objections.

12 As we will further discuss in this order, the analytical framework of the statute is actually quite straightforward and involves three basic steps:

(A) Identify the services selected ("Selected Services") for competitive classification.

1) Identify the services
2) Identify the geographic scope for which classification is sought

(B) Determine whether customers of the Selected Services have reasonably available alternatives.

3) Identify what services constitute alternatives to the Selected Services.
4) Evaluate substitutability of potential alternative services for the Selected Services.
5) Determine the availability of the alternative services.
6) Evaluate whether these alternative services are reasonably available.

(C) Determine whether there is a significant captive customer base.

7) Consider market share and market concentration.

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[11] *RCW 80.36.330(1)(a) through (d).*

8) Consider market structure, including ease of entry, affiliated providers, and related statutory constraints.
9) Evaluate market share and market concentration in light of market structure for indications of market power.
10) Determine whether there is a significant base of customers of the Selected Services for which there is no reasonable alternative or for which the petitioner could exercise market power with respect to the Selected Services.

13 If, after completing this analysis, the Commission finds the Selected Services are subject to effective competition, the Commission "may" classify the Selected Services as competitive. We must exercise this discretion consistent with our general duty to regulate in the public interest.

14 With this framework in mind, we turn to the presentations of the parties.

B. PRESENTATIONS BY QWEST AND STAFF

1. Services selected by Qwest for competitive classification: nature and geographic scope.

15 Qwest and Staff identify two general markets for telecommunications services in Washington: retail and wholesale. Qwest provides residential and business retail telecommunications services, and it also sells wholesale services to competitive local exchange carriers (CLECs) in the form of total service resale (TSR or resale)[12] and unbundled network elements (UNEs).[13] The CLECs, in turn, use Qwest wholesale services to provide retail business and residential telecommunications services. CLECs may also serve customers using their own

[12] Total Service Resale, or "resale," means the purchase of a service from Qwest at a wholesale price that is marked down from Qwest's retail price for the service. Currently, this markdown, which is set by Commission order, is 14.74% lower than the price for Qwest's retail service.
[13] Unbundled network elements or "UNEs" are portions of Qwest's network that are available for purchase by CLECs at prices set by the Commission using a Total Element Long-run Incremental Cost standard (TELRIC). UNE-platform, or "UNE-P," is the purchase from Qwest by the CLEC of elements including a loop, switching and transport to provide a service to a CLEC customer. UNE-loop, or "UNE-L" means the CLEC has purchased only a loop from Qwest and the CLEC otherwise provides service through use of the CLEC's owned facilities.

facilities or a mix of purchased and owned facilities.[14] Qwest competes in the retail market with CLECs in providing the analog business services at issue in this case.

16 In this case Qwest has petitioned for competitive classification, in all of its exchanges in Washington (i.e., statewide),[15] of its retail analog flat-rate and measured-rate business exchange services, private branch exchange (PBX) trunks, Centrex services,[16] and vertical business features that are packaged with those services.[17] Qwest defines analog services as those services that terminate to analog customer premises equipment (CPE), although analog services may be provided over digital facilities that terminate to analog CPE.[18] A complete list of the selected services is set out in Exhibit 2,[19] but for simplicity we refer to them as

[14] CLECs also purchase special access lines from Qwest. A special access line is a dedicated line from a customer to a long distance company provided by a local phone company.

[15] The term "statewide" may be confusing, in the sense that Qwest does not serve all areas of the state. In areas outside its service territory, Qwest stands in the shoes of a CLEC. No one is contesting Qwest's right to compete in those areas. Thus, if the Selected Services are competitively classified in Qwest's territory, Qwest could offer the same types of services, on some competitive basis, anywhere in the state. In general, when using the term "statewide," in this proceeding, the parties and the Commission are referring to Qwest's 68-exchange service territory in the state of Washington.

[16] Centrex is a service used by medium to large customers that employs switching equipment and features at the telephone company's central office, with individual lines connecting the equipment and features to the instruments at the customer's premises. Private Branch Exchange, or PBX service, combines customer-owned equipment containing switching and features, located at the customer's premise, with telephone company-owned trunks connecting the customer's equipment to the telephone company's central office or switch.

[17] Qwest sought to have the same services as are at issue in this case competitively classified (in certain wire centers rather than statewide) in Docket No. UT-000883. The Commission granted that petition, limited to services provided over DS-1 and higher circuits, and in a more limited geographic area than Qwest sought. Seventh Supplemental Order, December 18, 2000. In Docket No. UT-021257, Qwest subsequently obtained competitive classification for digital services in the same wire centers and over the same capacity circuits for which services were competitively classified in Docket No. UT-000883.

[18] *T 111, 195-199.*

[19] In response to Bench Request No. 5, Qwest stated it had improperly included Centrex 21 – I (ISDN) and Centrex Prime – I (ISDN) in its retail line counts. Qwest also identified the following services that should be excluded from "Tenant Solutions" on Exhibit 2: DIGICOM I service; DIGICOM II service, Centrex 21 ISDN; Single Line ISDN service, Primary Rate Service (PRS) ISDN; High Capacity DS1 and DS3 services; Digital Switched Services; Frame Relay Service; and

analog basic business service, PBX, and Centrex, and we will refer to them collectively as the "Selected Services."

17 Having selected these services for competitive classification, Qwest seeks to demonstrate that these services are subject to effective competition, statewide. That is, it seeks to show that customers have reasonably available alternatives to the Selected Services, and that these services are not provided to a significant captive customer base. Staff joins Qwest in presenting evidence of effective competition.

2. What constitutes an alternative to the selected services

18 In order to show that customers have reasonably available alternatives, one must first define what it is that constitutes an alternative. In this case, Qwest and Staff rely on the availability of business analog services provided by CLECs, by means of UNE-P, UNE-L, resale, and CLEC-owned facilities.[20] They argue that these services are effective substitutes for the Selected Services because, like the Selected Services, they terminate to analog CPE. Qwest's business analog retail customers can choose one of these alternatives without buying new equipment, and obtain functionally equivalent service, i.e., basic connectivity to the public network for switched, voice-grade communications.

19 In addition to alternative analog services, Qwest and Staff cite intermodal forms of competition—notably, wireless and Voice over Internet Protocol (VoIP)—as deserving some weight as sources of competition for the Selected Services. Insofar as end-use customers may be choosing these modes over the Selected Services, these modes are competing with the Selected Services. However, Qwest and Staff do not rely on intermodal alternatives for proving a sufficient case under the statute. Rather, they assert that their case, in relying only on

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Uniform Access Solution service. The Commission here analyzes the revised list of services and line counts, but for simplicity, the Commission will refer to the revised list as Exhibit 2.

[20] *Exhibit 232C.* There is also a "miscellaneous" category, which includes special access lines. *See fn.* 13, *supra.* CLECs purchase special access lines under retail tariffs but use these lines to provide service to their own retail customers. They are therefore appropriately characterized as "wholesale" for purposes of analyzing CLEC lines. Approximately five-sixths of the special access lines included in *Exhibit 232C* are digital and so were removed from the numbers on which Staff calculated market share. *Wilson testimony, T 1363-1364.* The remaining special access lines are included in the calculations.

analog alternatives, understates the competitive environment and is therefore conservative; intermodal forms of competition further enhance the competitive picture.

20 Qwest and Staff do not rely on, and do not include, digital services as alternatives to the Selected Services. This point is more fully treated in a later section of this order.[21]

3. Geographic scope of the relevant market.

21 As the statute requires, Qwest and Staff evaluate, pursuant to RCW 80.36.330(1)(b), "the extent to which services are available from alternative providers in the relevant market." After defining "alternative providers" as primarily those that provide business analog services, there remains the question of the appropriate geographical scope of the "relevant market." Qwest asserts that the appropriate geographic scope is the entire state, but points out that evidence of competition is available at the exchange and wire-center level. Staff characterizes the appropriate geographic scope as "Qwest's statewide territory, defined at the exchange level."[22] Qwest and Staff then proceed to evaluate the number and size of alternative providers of analog business services, and the extent to which they are available throughout Qwest's territory, including at the exchange and wire-center level.

4. Availability of alternatives in the relevant market.

22 Qwest's and Staff's primary evidence derives from two major sources. Qwest compiled evidence regarding 37 CLECs[23] that purchase resale, UNE-P,[24] and UNE-L[25] on a wholesale basis from Qwest. Qwest's Exhibit 55C provides information about the size, as well as the number, of competitors using Qwest's wholesale services, including the number of lines provided by each CLEC in each exchange.[26]

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[21] See section II(C)(2) of this order.
[22] *Ex. 201T, p. 14.*
[23] *Exhibit 3.*
[24] *See fn. 11.*
[25] *Id.*
[26] *Exhibit 53C* provides the same information on a wire center basis.

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23 Staff compiled and aggregated data provided by 27 CLECs that responded to a Commission order (sent to over 200 registered CLECs[27]) requesting information about the analog business services they provide in competition with Qwest, using either lines purchased from Qwest or CLEC-owned lines. Most significantly, in Exhibits 204C and 205C, Staff produced evidence of CLEC services using CLEC-owned facilities[28] by exchange and by wire center. This information was not available to Qwest when it filed its petition.[29]

24 Qwest and Staff each provide a market share analysis. Relying solely on the number of CLEC wholesale lines upon which its petition is based, Qwest calculates its market share at 83% statewide.[30] By adding CLEC-owned lines to Staff's compilation of CLEC wholesale data, Staff estimated Qwest's market share of analog business lines at 71.88%, statewide.[31]

25 Both Qwest's and Staff's analyses include calculations at more granular levels. Qwest and Staff break their figures down by exchange and by wire center, and by mode (UNE-P, UNE-L, resale, CLEC-owned, miscellaneous), though some data are consolidated into groups of exchanges in order to mask highly confidential information.

26 Using both sets of data, Qwest and Staff demonstrate several aspects of competitive alternatives to the Selected Services, in Qwest's Washington exchanges, including:

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[27] *Exhibit 201T at 10.*

[28] In this order, we use the terms "CLEC-owned facilities," "facilities-based lines," and "CLEC-owned lines" interchangeably. All refer to lines provided over CLEC-built facilities, as opposed to lines provided by CLECs over lines purchased (leased) from Qwest.

[29] Qwest filed its petition on May 1, 2003. With its petition (as well as in *Exhibits 53C-55C*, filed with its direct case on July 1, 2003), Qwest provided data regarding its own internal counts of CLEC lines purchased from Qwest on a wholesale basis to serve CLEC business customers. Subsequent to the filing of the petition, the Commission entered Order Nos. 06 and 08 on June 30 and July 22, 2003, respectively, which required CLECs to disclose information about the analog business lines they provided to serve end-use customers in Qwest exchanges statewide. The information from CLECs provided pursuant to these orders included their wholesale-purchased lines, special access lines, and facilities-based lines. This information was designated highly confidential and was reviewed only by Staff and Public Counsel. It was not available to Qwest.

[30] *Exhibit 51T at 4.*

[31] *Exhibit 225C; see also fn. 29, supra.*

- CLECs serve analog business retail customers in all Qwest exchanges except the Elk[32] exchange, which has only .03% of Qwest's analog business lines.[33]

- CLECs provide at least 203,662 analog business lines, compared to 520,635 analog business lines provided by Qwest.[34] Using these figures, the CLEC share is 28.12%.[35] This percentage is conservative, however, because not all CLECs responded to the Commission's request for data.

- The Qwest exchanges where CLECs own or lease analog business lines (whether through resale, UNE-P, UNE-L, or CLEC-owned facilities) cover 99.8% of Qwest's analog business lines.[36]

- Of CLEC analog business lines[37] in Qwest exchanges, 20% are provided through CLEC-owned facilities, 27% through UNE-P, 43% through UNE-L, and 10% through resale.

- CLECs have approximately 33% of for analog basic business lines.[38]

- CLECs provide UNE-P-based services in 61 of Qwest's 68 exchanges,[39] and these exchanges cover 99.73% of Qwest's analog business lines.

- CLECs provide UNE-P service in all wire centers except Castle Rock, Easton, Elk, Green Bluff, Pateros, Liberty Lake and Northport. These named wire centers account for .27% of analog business lines in Qwest wire centers.[40]

- CLECs provide UNE-L-based service in 15 of Qwest's 68 exchanges,[41] and these exchanges cover 83.9% of Qwest's analog business lines.[42]

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[32] Elk is an exchange located in eastern Washington, north of Spokane, close to the Washington-Idaho border.

[33] *Exhibit* 232C; *Exhibit* 54C.

[34] *Exhibit* 225C.

[35] *Exhibit* 53C. Using Qwest's data, which excludes CLEC-owned and special access lines, the CLECs market share is 21%. *See also fn.* 153.

[36] *Exhibit* 232C.

[37] *Exhibits 210C at 10 and 232C.*

[38] *Exhibit* 232C.

[39] *Id.*

[40] *Exhibit* 53C

- CLECs provide resale service in 48 of Qwest's 68 exchanges, and those 48 exchanges cover 98.5% of Qwest's analog business lines.[43]
- CLECs have 46% of analog PBX lines and 5% of analog CENTREX lines.[44]

27 As further evidence of CLEC competition, Qwest and Staff present evidence of CLEC listings in the information pages of local telephone directories, and of CLEC websites.[45] They also cite to CLEC price lists filed with the Commission. Qwest also cites, as evidence of competitive pressure, its loss, between the end of 1999 and the end of 2002, of 118,333 analog business lines in Washington, while CLEC lines in the same period increased 333%.[46]

28 Qwest and Staff cite to further facts indicating that their quantitative analyses provide a conservative picture of the competitive landscape. Wireless and VoIP have already been mentioned. Witness Wilson points out that Qwest has interconnection agreements with 150 carriers, some of which are the largest corporations in the world.[47] Over 30 carriers were reflected in Qwest's data set, and several more were reflected in Staff's data set.[48] Witness Wilson estimated that there are about 40 CLECs in Washington actively competing against Qwest for analog business service.[49]

5. Market concentration analyses.

29 Staff presents a market concentration analysis.[50] Staff's market concentration calculations in Exhibits 208C and 209C are based on the Herfindahl-Hirschman Index (HHI). That index, described in the Department of Justice's Horizontal

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[41] Staff data in *Exhibit* 232 showed 79,846 loops; *see also fn. 29, supra.*
[42] *Id.*
[43] *Exhibit 54C.*
[44] *Exhibit 225C.*
[45] *Exhibit 8; Exhibit 469; Exhibit 101T* at 17-18.
[46] *Exhibit 8; Exhibit 20C at 2.*
[47] *Exhibit 201T at 16.*
[48] *Id.*
[49] *T. 1431-1432.*
[50] *Exhibits 208C and 209C.*

Merger Guidelines (HMG),[51] is calculated by summing the squares of the individual market shares of all the participating firms in the relevant market. According to the HMG, an HHI under 1,000 indicates an unconcentrated market. An HHI between 1,000 and 1,800 indicates a moderately concentrated market. An HHI over 1,800 indicates a highly concentrated market. An HHI of 10,000 indicates a 100% pure monopoly market.

30 Staff's HHI results show that in no exchange was the HHI less than 5,000. However, Qwest and Staff argue that reliance purely on market share and market concentration, as measures of effective competition, is improper.[52] They contend that HHI results should be viewed in light of other factors, primarily market structure. They point out that the Commission found in UT-000883 that even a very high market concentration index does not disqualify services from being competitively classified, if the market structure is sufficiently pro-competitive.[53]

31 As reviewed in the next section, Qwest and Staff contend that the market structure in Washington ensures that the CLECs provide effective competition, in spite of the HHI indications.

6. Market structure and market power analyses.

32 Market structure generally refers to the ease with which competitors may enter or exit a market and the ability of customers to obtain alternatives. Market structure includes the effect of federal and state statutes and proceedings, such as the section 271 application process[54] that resulted in Qwest's being permitted to compete in the interLATA telecommunications market.[55]

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[51] *Exhibit 224 at 15.* The Horizontal Merger Guidelines are used by the Department of Justice and the Federal Trade Commission to determine the effects of a merger on competition.
[52] *Staff Opening Brief at 3; 7*
[53] *UT-000883, ¶ 73.*
[54] *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271 and SGAT Pursuant to Section 252(f) of the Telecommunications Act of 1996, Docket No. UT-003033/UT-003040 (Section 271 proceeding).*
[55] Also affecting the structure are statutory constraints such as the prohibitions against undue or unreasonable preference or discrimination in *RCW 80.36.170* and *RCW 80.36.180.*

33 Market power in an anti-trust context has been defined as "the ability of a firm (or group of firms acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded."[56] Staff witness Wilson proposes a similar definition – that market power is the ability of a firm to profitably raise price above cost without losing market share.[57] Indicators relevant to market power include market share, market concentration, growth in market share, ease of entry, and the affiliation of providers of service.

34 Qwest and Staff point out that several factors now indicate the presence of an effectively competitive market structure. These include: Qwest's 271 application process and approval (which required that Qwest demonstrate it had opened its network to local competition); the widespread availability and use of UNE-P as an entry mechanism; the favorable pricing of UNE-P (compared to resale and other modes) to CLECs; and the operation of a performance assurance mechanism to protect against Qwest "backsliding" in providing UNEs fairly and efficiently.

35 Staff points first and foremost to UNE-P. A CLEC can convert a Qwest customer to UNE-P-based service upon payment of a nonrecurring charge of $0.27[58] for the first line. Conversion can be accomplished in one business day.[59] The CLEC then pays a monthly wholesale rate to Qwest that has been fixed by the Commission, based on TELRIC[60] cost, and that varies from Zone 1 (lowest-cost) exchanges to Zone 5 (highest-cost) exchanges.[61] Especially in the lowest-cost zones, UNE-P wholesale prices are substantially below Qwest's uniform statewide business retail line price.

36 UNE-P, Staff asserts, is a key protector against the exercise of market power by Qwest. If Qwest were to try to raise prices above competitive levels, the margin

[56] *Landes & Posner, "Market Power in Antitrust Cases," 94 Harv. L. Rev. 937 (1981), Exhibit 104 at 2. See also Exhibit 224, Horizontal Merger Guidelines, § 0.1.*
[57] *Exhibit 201T at 22; Exhibit 224 at 2.*
[58] *Exhibit 1T at 15.*
[59] A CLEC may convert a Qwest customer to resale service for a nonrecurring charge of $5.73 for the first line, and complete the conversion in one business day. CLEC purchase of UNE-L costs $37.53, with conversion accomplished in three business days. *Exhibit 1T at 15.*
[60] *Total Element Long Run Incremental Cost (TELRIC); see also fn. 11.*
[61] *Exhibit 6C.*

between Qwest's new retail prices and the fixed UNE-P wholesale prices would widen. CLECS, already present in every exchange but one, could compete even more effectively by taking advantage of the differential. CLECs that rely on resale (whose wholesale prices move in lockstep with Qwest's retail price), could quickly switch, for 27 cents, to UNE-P.

37 Therefore, UNE-P is price-constraining. Since UNE-P is available to CLECs in any exchange, including to CLECs providing resale, CLECs everywhere have access to a price-constraining form of competition. Qwest and Staff contend that UNE-P is the most advantageous method of market entry that has developed over the last few years, requiring little in the way of investment to acquire a customer. This ease of entry is reflected in the fact, previously mentioned, that CLECs provide retail service by means of UNE-P in 61 of the 68 Qwest exchanges, where 99.7% of Qwest analog business customers reside. It is also reflected by the rapid growth of UNE-P lines.[62]

38 Staff argues that the presence of CLECs in virtually every exchange, using a variety of facilities, is evidence of that CLECs believe they will be profitable and continue service. Staff contends that even though UNE-P requires little in the way of capital investment on the part of the CLEC, that is exactly why it is such an effective market entry tool for CLECs—entry barriers are extremely low.[63]

39 Ease and success of CLEC entry into the market is further supported, they say, by evidence of growth in CLEC analog business lines as a percentage of analog business lines. Qwest states that CLEC lines in its statewide territory have grown by 333% since 1999.[64] Not including CLEC-owned lines, CLEC lines increased 35% from 2000 to 2001 and 32% from 2001 to 2002.[65] Including CLEC-owned lines, CLEC analog business lines constitute 28.12% of total analog business lines in Qwest's exchanges statewide as of December 2002.[66]

[62] *Exhibit 1 at 13.*
[63] *Staff Reply Brief at 16.*
[64] *Exhibit* 20C at 2.
[65] *Exhibit 20C at 2.*
[66] *Exhibit 225C.*

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7. No significant captive customer base.

40 Qwest defines a captive customer as one that has no option but to take service from Qwest, not as a customer who has an option and elects not to take it.[67] Qwest asserts that it has no significant group of captive customers for analog business exchange services in Washington, as shown in the evidence demonstrating the number and diversity of CLECs and the presence and availability of price-constraining competitive services almost everywhere throughout Qwest's territory.[68] CLECs are active in the Qwest exchanges that include 99.89%[69] of Qwest business lines, and UNE-P is available in every exchange. Only 0.11%[70] of Qwest business lines might even be considered "captive," in their view, and they contend that this number is not significant.

41 Staff observes that there are CLECs serving in all exchanges but Elk and that even for Elk, the phone directory it uses shows 16 CLEC listings. Staff argues that customers in Elk are protected from unreasonable rates because Qwest is not seeking a waiver of the statutory requirements prohibiting undue and unreasonable preference or discrimination.[71] Staff contends that for that reason, Qwest would have to treat Elk customers the same as other similarly situated customers. Moreover, they contend that Elk represents less than .03% of the total access lines statewide[72] and Qwest competitors serve each surrounding wire center. Any CLEC seeking to serve an Elk customer could do so cheaply and virtually instantaneously via resale or UNE-P. Thus Qwest and Staff assert that ease of entry will protect Elk from any adverse consequence from granting this petition.[73]

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[67] *T.546-547.*

[68] This evidence is more fully recounted in sections II (B)(4)-(6) and II(C)(2)-(5).

[69] *Exhibit 51T at 9.*

[70] CLECs currently provide UNE-P service in 63 of 68 exchanges. The 63 exchanges cover 99.89% of Qwest's business lines. Thus, the exchanges where no UNE-P is present represent .11% of Qwest's business lines.

[71] *RCW 80.36.170 and RCW 80.36.180.*

[72] *Exhibit 53C.*

[73] *Commission Staff's Opening Brief at 35.*

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

[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 (DSO) 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

[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.

[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.

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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.*

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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.*