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**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF THE APPLICATION  
OF QWEST CORPORATION FOR PRICE  
DEREGULATION OF BASIC LOCAL  
EXCHANGE SERVICES**

**Case. No. QWE-T-02-25**

**QWEST CORPORATION'S ANSWER TO  
PETITION FOR DECLARATORY RULING  
AND CROSS-PETITION**

Qwest Corporation ("Qwest"), by and through its undersigned counsel, hereby answers Staff's April 30, 2003 Petition for a Declaratory Ruling ("Staff's petition") and cross-petitions for a declaratory ruling. By its cross-petition, Qwest seeks the Commission's order affirmatively endorsing Qwest's statutory interpretation of Idaho Code §§ 62-622(3) and 62-603(1).

**I. INTRODUCTION**

In its application and direct testimony filed on December 17, 2002, Qwest set forth and supported its position that its provision of basic local exchange services in the seven exchanges should be price deregulated pursuant to Idaho Code § 62-622(3)(b) based on the existence of effective competition from multiple unaffiliated wireless carriers. Qwest's prefiled testimony

referred to the fact that data-related services, being excluded from the definition of “basic local exchange services” under Idaho Code § 62-603(1), are irrelevant to the evidence Qwest must offer in this docket. Teitzel Direct, pp. 14-15. To put it another way, since it filed this case Qwest has openly stated its position that it need not demonstrate that wireless carriers can provide data-related services on a par with Qwest’s wireline offerings to meet the statutory standard of “functionally equivalent” and “competitively priced” local services. *See, e.g.*, Teitzel Direct, pp. 13-14.

In its petition, Staff states that it disagrees with Qwest’s interpretation of sections 62-603(1) and 62-622(3)(b), that it has filed testimony and exhibits supporting an alternative interpretation of these provisions, and that the disagreement is so fundamental that it has led to “confusion and inconsistency” that requires resolution through this declaratory ruling process. Staff’s petition, p. 1.

The timing of Staff’s petition is, to say the least, peculiar. Staff knew of Qwest’s position on the interpretation of the statutes when the application was filed. But, rather than seeking clarification from the Commission in the three months between the filing of Qwest’s application and Staff’s deadline for submission of its testimony, Staff instead filed testimony offering its own statutory interpretation on March 19, 2003. Thereafter, fully aware of the competing statutory interpretations, Staff still did not seek clarification from the Commission until after Qwest filed its rebuttal testimony, which among other things, provided the Commission more guidance as to why Staff’s interpretation of section 62-622(3)(b) is erroneous. *See, e.g.*, Souba Rebuttal, pp. 4-13; Teitzel Rebuttal, pp. 2-5. Finally, on April 30, 2003, some four and a half months after Qwest filed its direct testimony setting forth its position regarding the appropriate

scope of Commission's analysis in this case, Staff filed its petition for declaratory ruling. Qwest respectfully suggests that to the extent any "confusion and inconsistency" has accompanied the presentations of the parties in this case, it has been exacerbated, if not created, by Staff's decisions to 1) adopt a divergent and unfounded interpretation of statute, and 2) to delay bringing its petition for declaratory ruling until the eve of the Commission's hearing of the merits of Qwest's application, and after all parties have submitted their prefiled cases.

In the argument below Qwest will demonstrate that Staff's position is without merit. Staff would have the Commission interpret key statutory provisions in a manner that eludes logic, runs afoul of the very canons of statutory interpretation Staff cites and produces results that are inconsistent with the Commission's own decisions.

## II. DISCUSSION

### A. The Statutes.

Central to Staff's petition is the meaning of the term "local services" as used in section 62-622(3)(b) and the meaning of the term "basic local exchange services," as defined in section 62-603(1). Sections 62-622 and 62-603(1) provide as follows:

**62-622. Regulation of basic local exchange rates, services and price lists.** – (1) The commission shall regulate the prices for basic local exchange services for incumbent telephone corporations in accordance with the following provisions:

(a) At the request of the incumbent telephone corporation, the commission shall establish maximum just and reasonable rates for basic local exchange service. Maximum basic local exchange rates shall be sufficient to recover the costs incurred to provide the services. Costs shall include authorized depreciation, a reasonable portion of shared and common costs, and a reasonable profit. Authorized depreciation lives shall use forward-looking competitive market lives. Authorized depreciation lives shall be applied prospectively and to undepreciated balances.

(b) At the request of the telephone corporation, the commission may find that existing rates for local services constitute the maximum rates.

(c) The commission shall issue its order establishing maximum rates no later than one hundred eighty (180) days after the filing of the request unless the telephone corporation consents to a longer period.

(d) An incumbent telephone corporation may charge prices lower than the maximum basic local exchange rates established by the commission. Provided however, upon the petition of a non-incumbent telephone corporation, the commission shall establish a minimum price for the incumbent telephone corporation's basic local exchange service if the commission finds, by a preponderance of the evidence, that the incumbent telephone corporation's prices for basic local exchange services in the local exchange area are below the incumbent telephone corporation's average variable cost of providing such services.

(e) After the commission has established maximum basic local exchange rates, an incumbent telephone corporation may change its tariffs or price lists reflecting the availability, price, terms and conditions for local exchange service effective not less than ten (10) days after filing with the commission and giving notice to affected customers. Changes to tariffs or price lists that are for nonrecurring services and that are quoted directly to the customer when an order for service is placed, or changes that result in price reductions or new service offerings, shall be effective immediately upon filing with the commission and no other notice shall be required.

(2) The commission shall not regulate the prices for basic local exchange services for telephone corporations that were not providing such local service on or before February 8, 1996. Provided however, such telephone corporation providing basic local exchange services shall file price lists with the commission that reflect the availability, price, terms and conditions for such services. Changes to such price lists shall be effective not less than ten (10) days after filing with the commission and giving notice to affected customers. Changes to price lists that are for nonrecurring services and that are quoted directly to the customer when an order for service is placed, or changes that result in price reductions or new service offerings, shall be effective immediately upon filing with the commission and no other notice shall be required.

(3) The commission shall cease regulating basic local exchange rates in a local exchange calling area upon a showing by an incumbent telephone corporation that effective competition exists for basic local exchange service throughout the local

exchange calling area. Effective competition exists throughout a local exchange calling area when either

(a) Actual competition from a facilities-based competitor is present for both residential and small business basic local exchange customers; or

(b) There are functionally equivalent, competitively priced local services reasonably available to both residential and small business customers from a telephone corporation unaffiliated with the incumbent telephone corporation.

(4) Telephone corporations shall not resell

(a) A telecommunications service that is available at retail only to a category of subscribers to a different category of subscribers;

(b) A means-tested service to ineligible customers; or

(c) A category of service to circumvent switched or special access charges.

(5) The commission shall determine the non-economic regulatory requirements for all telephone corporations providing basic local exchange service or designated as an eligible telecommunications carrier pursuant to sections 62-610A through 62-610F, Idaho Code, including, but not limited to, such matters as service quality standards, provision of access to carriers providing message telecommunications service, filing of price lists, customer notice and customer relation rules. (underlining added)

**62-603. Definitions** – As used in this chapter [Chapter 6, Title 62]:

(1) “Basic local exchange service” means the provision of access lines to residential and small business customers with the associated transmission of two-way interactive switched voice communication within a local exchange calling area (underlining added).

**B. The term “local services,” as used in section 62-622(3)(b), is simply short-hand for “basic local exchange services.”**

**1. Staff’s position is wholly illogical and unfounded.**

Staff’s discussion begins with the provocative statement, “drawing upon the definition of basic local exchange service stated at Idaho Code § 62-603(1), Qwest contends Section 62-622(3)(b) *severely limits* the determination for the Commission when an application is filed under that section.” Staff petition, p. 3 (emphasis added). The statement is provocative but untrue. Qwest is merely reading section 62-622(3) in context of the statutory scheme in which it appears.

Section 62-622(3) requires the Commission to cease regulating basic local exchange rates when “effective competition” for basic local exchange services exists throughout the local exchange calling area. The legislature has told us that “effective competition exists throughout a local exchange calling area” when the conditions of either of the statute’s two subsections are met. Subsection (a) focuses on actual competition from facilities-based competitors. Subsection (b) focuses on the reasonable availability of functionally equivalent and competitively priced alternative services, i.e., effective competition exists when “there are functionally equivalent, competitively priced *local services* reasonably available to both residential and small business customers from a telephone corporation unaffiliated with the incumbent telephone corporation.” Idaho Code § 62-622(3)(b) (emphasis added).

The entire dispute presented by Staff’s petition is whether the term “local services” is merely a short-hand reference to the term “basic local exchange services,” which appears in section 62-662(3) (Qwest’s position), or whether it means something else (Staff’s advocacy). Significantly, Staff does not actually offer an alternative definition for the term “local services”.

In fact Staff admits that the term “local services” is not defined in any Idaho statute. Staff petition, p. 3. Instead of presenting a viable, or even plausible, alternative definition, Staff chooses to mischaracterize Qwest’s position as an attempt to “severely limit[]” the Commission’s determination in this case. Id.

In essence, Staff is arguing that because the legislature used an undefined term, any attempt to define that term from context of the remainder of the statute is to defy the legislature’s intent and to “severely limit” the Commission’s determinations under the statute. This is, of course, absurd. The statute in question is titled “Regulation of *basic local exchange* rates, *services* and price lists”. Section (3) focuses upon when the Commission is required to “cease regulating” *basic local exchange service*. Subsections (a) and (b) of section (3) provide two alternative means by which the incumbent can demonstrate that “*effective competition exists for basic local exchange service.*”

By arguing that the legislature meant something different than “basic local exchange services” by its use of “local services” in section 62-622(3)(b), Staff is petitioning the Commission to require incumbents to prove effective competition (in the form of functionally equivalent, competitively priced, reasonably available alternatives) for services *other than* basic local exchange service in order to prove that there is effective competition *for* basic local exchange service. Staff fails to articulate any conceivable reason why the legislature would have had such a counterintuitive purpose.

In contrast to Staff’s tortured interpretation, Qwest’s position is simply that the term “local services” in section 62-622(3)(b) is short-hand for the term “basic local exchange services” used in section 62-622(3). Aside from the fact that rules of statutory interpretation, as

discussed below, support it, Qwest's position is the only one that passes a common sense test. It is simply not credible that the legislature would require an incumbent to prove effective competition for an undefined set of services and functionalities as a prerequisite for price deregulation of "basic local exchange service," the only service still price regulated by the Commission and a service that is fully defined under statute.

**2. Basic rules of statutory interpretation support Qwest's position.**

Staff attempts to focus the Commission's attention on several fundamental principles of statutory construction. Staff petition, p. 4. The petition correctly observes that statutory interpretation begins with the words of the statute and should give the language used its plain, obvious and rational meaning. Staff petition, p. 5. Staff is also correct that the purpose of statutory construction is to ascertain and give effect to the legislative purpose. *Id.*

Where Staff has erred is in its application of these principles and its attempt to distort these rules to fit its narrow purpose of persuading the Commission that "other uses of wireline service, such as Internet connection and data (facsimile) transmission" must be considered in determining whether effective competition exists for basic local exchange service. Staff petition, p. 5. For example, Staff cites the *Wilson* case for the proposition that "the plain, obvious, and rational meaning is always preferred to any hidden, narrow, or irrational meaning."<sup>1</sup> Yet Staff cannot point to a single fact or argument to support the allegation that the plain and obvious meaning of the term "local services" as used in section 62-622(3)(b) is "Internet connection and data (facsimile) transmission," particularly where the legislature never mentions the internet or facsimiles in Title 61 or Title 62. Instead of giving effect to the plain, obvious and rational

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<sup>1</sup> *Wilson v. State*, 133 Idaho 874, 880, 993 P. 2d 1205 (Ct App 2000)

meaning of the language used, Staff's interpretation appears to be an example of the kind of "hidden, narrow, or irrational meaning" that *Wilson* counsels against. Furthermore, Staff makes no attempt to demonstrate that the legislature intended that to prove the existence of effective competition for basic local exchange service, an incumbent must prove that customers have "functionally equivalent" and "competitively priced" access to the internet. Hence Staff seems to ignore, rather than rely on the principles of statutory construction it cites.

Staff also errs by failing to discuss several other key canons of statutory interpretation that apply here. For example, it is well established that the courts are required to give effect to every word, clause and sentence of a statute, and the construction of the statute should be adopted which does not deprive provisions of the statute of meaning. *Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P 2d 1385 (1990). Similarly, a statute must be construed so that effect is given to its provisions, and no part is rendered superfluous or insignificant. *Hoskins v. Howard*, 132 Idaho 311, 315, 971 P. 2d 1135 (1999). And, wherever possible, the courts are to construe statutes relating to the same subject harmoniously even where they are in apparent conflict. *Edwards v. Industrial Commission*, 130 Idaho 457, 461, 943 P 2d. 47 (1997). Furthermore, the statute must be construed as a whole. *Id.*

It is apparent Staff's interpretation of the term "local services" requires that the term be read in isolation, without attempting to construe the statute as a whole and without attempting to harmonize the interpretation with the remainder of Title 62. In contrast, there can be no doubt that the legislature intended "local services" in section 62-622(3)(b) as a short-hand reference to "basic local exchange services" when the terms are read in context and the statute construed as a

harmonious whole. Section 62-622 is entirely focused (as its title indicates) on basic local exchange services. .

Staff's attempts to bolster its argument that "local services" means something different than "basic local exchange service" with the assertion that "[t]he *only place* the legislature used a short-hand reference to **basic local exchange service** occurs in paragraph (2) of the statute [62-622], where the phrase **such services** is used to refer to **basic local exchange services** appearing earlier in the same sentence." Staff petition, p. 5 (Italics added). Thus, Staff would have the Commission believe that the legislature used "basic local exchange service" exclusively throughout section 62-622, except for one obvious short-hand reference in section 62-622(2). From this Staff hopes to suggest that the reference to "local services" in section 62-622(3)(b) is a deliberate choice to interject a new concept rather than a reference to the subject of statute, i.e., basic local exchange service.

A simple review of the statute shows, however, that the legislature repeatedly used short hand references throughout section 62-622. By way of example, in section 62-622(1)(a) the legislature uses the terms, "basic local exchange service" and the short hand term "the service"; in section 62-622(1)(b) the legislature uses the term "local services"; and in section 62-622(1)(e) the legislature uses "basic local exchange service", "local exchange service", and "services." The repeated usage of these other, similar terms throughout section 62-622 is evidence that the legislature did not intend to introduce a new concept with the use of the term "local services" in section 62-622(3)(b), but instead used common sense, short hand references throughout the statute. Staff's assertion that there is only one short-hand reference, at best, reflects Staff's serious misreading of the statute. A careful review of section 62-622 shows that the legislature

liberally used short-hand. It in fact used more short-hand references (12) to “basic local exchange services” than it used the long-hand form of that term (11). Put simply, the entire section, as its title indicates, concerns “basic local exchange services.” Concluding, as it should, that “local services” in section 62-622(3)(b) is simply a short-hand reference to “basic local exchange services,” the Commission would give full effect to the legislature’s language and intent and would reach the only conclusion that harmonizes the various parts of section 62-622.

**C. Staff’s parsing of section 62-603(1) is equally unsupportable.**

The second part of Staff’s attempt to persuade the Commission that Qwest is taking some unreasonable approach to statutory interpretation is to suggest that Qwest “unduly focuses on only part of the definition” of “basic local exchange service”. Staff petition, p. 5. Ironically, it is Staff’s analysis that ignores part of the language of the statutory definition and runs afoul of the rules of statutory construction Staff itself cited.

The legislature defined “basic local exchange services” as meaning “the provision of access lines to residential and small business customers *with the associated transmission of two-way interactive switched voice communication* within a local exchange calling area.” Idaho Code § 62-603(1) (emphasis added). To give effect to all the legislature’s chosen language, the Commission must conclude that basic local exchange service includes three central, equally-critical attributes: (a) the provision of access lines to residential and small business customers; (b) the associated transmission of two-way interactive switched voice communication; and (c) within a local exchange calling area.

Staff argues, however, “the definition of basic local exchange service is *primarily* ‘the provision of access lines’.” Staff petition p. 5 (emphasis added). Staff explains that since “it is

the access lines themselves” that make voice and various other forms of communication possible, “comparison of the functionality of basic local exchange service . . . must consider all that is available by ‘the provision of access lines,’ not merely . . . voice communication.” This amounts to an argument that the Commission eliminate all language from the definition of “basic local exchange service” after the phrase, “the provision of access lines to residential and small business customers.” Staff’s reading would render meaningless two of the three major concepts from the definition -- “the associated transmission of two-way interactive switched voice communication” and “within a local exchange calling area”.

The rules of statutory construction prohibit Staff’s approach. The Commission is required to give effect to every word, clause and sentence of a statute. *Watkins Family*, 118 Idaho at 540, 797 P.2d at 1388 (1990). As cited above, the Idaho courts reject statutory constructions that render words and phrases superfluous. *Hoskins*, 132 Idaho at 314, 971 P 2d at 1138. Rather than “unduly focus[ing] on only part of the definition” as Staff alleges (Staff petition, p. 5), Qwest’s interpretation gives effect to all three central components of the definition of basic local exchange service. Plainly it is Staff who focuses too closely and who ignores part of the term’s definition. Qwest urges the Commission to disregard Staff’s illogical reading of section 62-603 (1).

**D. Internet access is not a local service.**

Not only does Staff’s interpretation of “basic local exchange service” ignore that it is, by definition, voice communication, it also appears to overlook that it is service rendered “within a local exchange calling area.” The sole purpose of Staff’s statutory interpretation is to try to persuade the Commission to engraft an additional requirement on the standard contained in

section 62-622. Thus, when the Commission considers whether Qwest has shown that “effective competition exists for basic local exchange service,” Staff would have it consider the level of competition for services that are *not* basic local exchange service, specifically internet access and data transmission. Neither of these services is defined in statute, nor has the Commission historically regulated “internet access.”

The internet is “an international network of interconnected computers that enables millions of people to communicate with one another in ‘cyberspace’ and to access vast amounts of information from around the world.” *Reno v. ACLU*, 521 U. S. 844, 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). The Federal Communications Commission (FCC), when considering the question of reciprocal compensation for competing local exchange companies, determined that calls to internet service providers (ISPs) within the caller’s local calling area are not local but rather extend beyond the local ISP to websites out-of-state and around the world. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation of ISP-Bound Traffic*, 14 FCC Rcd 3689, 3690 (¶1) (1999). Although a federal court has now vacated and remanded the FCC’s decision on the merits of the reciprocal compensation issue, it stated that the FCC’s use of the so called “end-to-end” analysis is justified in determining whether a particular communication is jurisdictionally interstate. *Bell Atlantic Tel. Cos. v. FCC*, 206 F. 3d 1, 340 U. S. App. D.C. 328 (DC Cir 2000). Jurisdictionally, therefore, calls to an ISP are interstate calls; not local.

Thus, regardless of whether the Commission focuses on the term “basic local exchange service” or even the term “local services” in section 62-622(3)(b), dial-up internet access does not meet the definition because the communication is not local. Staff’s position that the Commission must

consider whether Qwest has proved “effective competition” not only for voice communications but also for dial-up access to the internet is contrary to Idaho statute.

**E. Staff’s interpretation is inconsistent with the Commission’s prior rulings.**

In the *Burley*<sup>2</sup> case, Qwest’s predecessor, U S WEST Communications, Inc. (U S WEST), sought price deregulation under section 62-622(3)(a) based on the facilities-based competition presented by Project Mutual Telephone Cooperative Association (“PMT”). PMT’s facilities reached approximately 30% of the Burley exchange. The Commission held that approving U S WEST’s application would be contrary to the public interest based on the limited nature of PMT’s coverage.<sup>3</sup> In its order the Commission stated:

Our concern regarding the public interest is the same as that which prompted the legislature to require substantive, meaningful competition throughout the local calling area before basic rates are deregulated. It is the concern “that U S WEST could cover its competitive losses by raising its rates for those customers within the local calling area who have no choice of service providers.” Tr. p.260. That amounts to more than 70% of the Burley exchange customers. *The economic incentive to ignore those areas where no competition or regulation exists could also jeopardize the availability of high quality universal service at just and reasonable rates.*

Order No. 28369, p. 10 (emphasis added)

This reference to the availability of “high quality universal service” demonstrates the Commission’s awareness of the connection between “basic local exchange service” and the concept of universal service. Idaho Code § 62-610C (1) provides that “universal service is an

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<sup>2</sup> *In the Matter of the Application of U S WEST Communications, Inc. for Deregulation of Basic Local Exchange Rates in Its Burley, Idaho, Exchange*, Case No. USW-T-99-15.

<sup>3</sup> Staff’s attempt at pages 7-8 of its petition to turn the decision in the *Burley* case into some kind of precedent for its unreasonable interpretations of sections 62-66(3)(b) and 62-603(1) is unfounded. The Commission denied U S WEST’s application because it found, after hearing on the merits, that U S WEST’s evidence showed the presence of a competitor but not the existence of “effective, substantive, and meaningful competition” involving a significant number of customers. Although U S WEST disagreed with that conclusion, it was, nonetheless a conclusion reached on the basis of the evidence as to how many customers had a competitive choice.

evolving level of telecommunications services to which consumers in all regions of the state should have access.” The statute further provides:

The commission shall review the level of telecommunications services within the state on a periodic basis and designate those service(s) which should be made available to consumers by eligible telecommunications carriers to meet their obligation to provide universal service. The commission shall, if services in addition to basic local exchange service are to be designated, consider the extent to which such other telecommunications services:

- (a) Have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
- (b) Are being deployed in public telecommunications networks by telecommunications carriers; and
- (c) Are consistent with the public interest, convenience and necessity.
- (d) The commission shall also consider definitions of universal service adopted by the federal communications commission pursuant to the telecommunications act of 1996.

Idaho Code § 62-610C(2).

Thus, the Commission has the authority to designate services “in addition to basic local exchange service” that are so crucial to the public interest, convenience and necessity that they are to be included in what every carrier that attains “eligible telecommunications carrier” (ETC) status must provide.

The Commission exercised its authority granted under section 62-610C in Order No. 27715<sup>4</sup>. The first item on the Commission’s list was “voice grade access to the public switched network”. *Id.*, p. 1. The Commission did not designate “data transmission” or “access to the

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<sup>4</sup> *In the Matter of Designating Telecommunications Services, in Addition to Basic Local Exchange Service, As Universal Services for the Purposes of Receiving 1998 Telecommunications Universal Service Funds*, order entered, September 8, 1998.

internet”. This is significant because the statute, section 62-610C, provides that the Commission designate services “in addition” to basic local exchange service. Under a strict reading of the statute the Commission could have left voice service off the list since, as even Staff would have to admit, voice grade access to the public switched network is included within the definition of “basic local exchange service.” Having decided to list it, however, the Commission certainly would have listed “data transmission” and “internet access” had the Commission shared Staff’s view that these capabilities are part of the definition of basic local exchange service.

Staff’s position in this case comes to this: although data transmission and internet access have not been deemed by the Commission to have the attributes of wide subscribership and consistency with the public interest, convenience and necessity such that they are designated as part of the definition of “universal service,” nevertheless Qwest must prove “effective competition” for these services in order that it sustain its burden of showing an adequate level of competition to justify deregulation of services that *are* part of the definition of universal service. Under this scenario, Qwest could face robust, even crippling, competition from one or more ETCs in its service territory and still not meet Staff’s standard. This result is not consistent with the Commission’s order in the *Burley* case in which the Commission focused on the Company’s potential to raise basic local exchange service prices and thereby potentially threaten universal service.

In entering the order on universal service the Commission stated, “the Commission finds that universal services are not necessarily all those services the Commission would like customers throughout Idaho to have.” Order No. 27715, p. 6. Similarly, a correct reading of sections 62-622(3)(b) and 62-603(1) may not result in a standard of proof concerning

competition for all the services the Staff might wish to see included. However, as the Commission observed,

The Commission must balance its designation with the effect the designation may have on competition. It is the provision of different services that may distinguish among competitive local exchange carriers and foster a competitive atmosphere.

Id., pp. 6-7.

The focus of section 62-622 is on “effective competition” for “basic local exchange service”. Upon a showing of such competition, the legislature has provided that the Commission must cease price regulation. The rationale for this is that when effective competition is shown, the marketplace and not the Commission, will constrain prices. The fact that wireless and wireline services may have differing strengths does not mean that they do not pose effective competition for each other, indeed, as the Commission noted, it may be these very differences that foster competition and provide customer options.

**F. Staff’s assertion that Qwest is putting undue emphasis on subsection (b), to the exclusion of other statutory requirements is both untrue and inappropriate for consideration under a petition for declaratory ruling.**

Staff alleges that “Qwest focuses on the means by which competition might appear, set forth in subparagraph (b), to the exclusion of the requirement that effective competition might actually exist.” Staff petition, p. 6. In this way, Staff suggests, Qwest hopes to dissuade the Commission from “even inquir[ing], whether wireless service is actually competing for customers with Qwest for basic local exchange service.” Id. at 4. Nothing could be further from the truth.

Qwest understands that section 62-622(3) eliminates price regulation only when sufficient competition for basic local exchange service has developed such that the marketplace,

and not the Commission, should regulate Qwest's prices. Viewed on a more granular level, marketplace regulation is required if alternative services from one or more unaffiliated providers are providing functionally equivalent, competitively priced and reasonably available basic local exchange service such that, if Qwest were to significantly increase its rates, customers would "vote with their feet" and migrate to the alternative service.

Qwest demonstrates in its extensive prefiled testimony that the six wireless providers covering the seven exchanges provide exactly the type of effective competition intended by the legislature when it enacted section 62-622(3)(b). Qwest believes that the evidence once presented on the record will overwhelmingly show that, if Qwest were to significantly increase its basic local exchange rates in the seven exchanges after obtaining pricing deregulation, a large percentage of its customers would or could (if they were so inclined) migrate to a wireless service. Even Dr. Johnson, who filed extensive direct testimony opposing Qwest's application at every level, made the following astonishing admission that Qwest's advocacy is precisely correct.

Likewise, I *could* get rid of my wireline service but I'm not willing to – unless someone forces me to (*e.g. by drastically raising the price*).

Johnson Direct, pp. 19-20. (emphasis added).

The substitutable nature of wireless services combined with the vast popularity of such services in Idaho<sup>5</sup> and the fact that wireless companies are specifically marketing their products as wireline substitutes,<sup>6</sup> make it clear that wireless service is actual, substantive, meaningful, and effective competition for Qwest's wireline basic local exchange services.

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<sup>5</sup> Mr. Souba's rebuttal testimony states that presently there are 577,000 active wireless phones in Idaho.

<sup>6</sup> See, e.g., Lincoln Rebuttal, pp. 36-37; Appendices 1 & 2.

Qwest looks forward to the opportunity to present its case on these and other issues at hearing. Staff's suggestion that Qwest's straightforward reading of the statutes is some attempt to avoid demonstrating actual and effective competition is a wholesale mischaracterization of Qwest's position. To the extent Staff is attempting to comment at this time on the amount or credibility of evidence presented by Qwest, it is entirely inappropriate that it do so with this petition for declaratory ruling, which was allegedly brought to obtain a "legal construction of Idaho Code § 62-622(3)" in order that the evidentiary hearing might be "more efficient and useful." Staff's petition, pp.1-2.

**G. Staff's analogy to bottled water vs. tap water is off base and unhelpful.**

In its last effort to discredit Qwest's case before it is presented, Staff offers an "analogy" that is truly inapt. Staff petition, pp. 9-10. Staff refers to the "explosion" in the sale of bottled water and states that, under Qwest's interpretation, application of section 62-622(3)(b) to a water utility would require the Commission to cease regulating water rates by virtue of the competition presented by bottled water companies.

That this analogy is presented in the context of debate over statutory interpretation and raised by petition for declaratory ruling is most strange. Obviously, section 62-622(3)(b) does not apply to water companies and to attempt to extend by analogy requires that a critical question be answered: Does the hypothetical statute relate to deregulation of something analogous to basic local exchange service, e.g., "drinking water", or does it instead apply to something more analogous to telecommunications services in general, e.g., "water"? Without knowing what the supposed water deregulation statute actually provides, it is not possible to determine whether there is any similarity between Staff's proposed analogy and the present case. That question in

the context of the telecommunications industry is, of course, the very question at issue by virtue of Staff's petition, i.e., is Qwest required to demonstrate that "effective competition exists for basic local exchange service" (I.C. § 62-622(3)), or is Qwest required to show that there is effective competition for some more broadly defined concept that includes services that, by definition, are not basic local exchange service? Staff's analogy begs the question rather than answers it.

There are numerous other flaws in the analogy. Even if there were an analogous statute for water companies and even if that statute applied to "drinking water," the incumbent water corporation would have a very difficult time showing competitive pricing. Whereas an Idaho water utility may deliver 100 gallons to one's residence for approximately 17 cents, the same 100 gallons of bottled water, which is typically not delivered, would cost approximately \$413.00 based on the assumption that a one liter bottle costs \$1.09. The 242,952% differential in pricing would, it is safe to assume, make the competitively-priced requirement difficult to satisfy.<sup>7</sup>

Moreover, if one assumes the hypothetical statute applies to water in general, as opposed to just drinking water, there are numerous other flaws with the analogy. For example, bottled water is not packaged, priced or marketed as a substitute for home water uses such as bathing, toilets, sinks, lawn care, cooking, watering plants, operating dishwashers, laundry, washing cars, and so on. Indeed, it is difficult to imagine how bottled water could be used for some the common purposes for which tap water is used - showers and dishwasher operations, for example

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<sup>7</sup> As an aside, Qwest finds it curious, given Staff's advocacy in this case that the Commission must apply the narrowest possible interpretation of functional equivalence and competitive pricing that Staff states (at page 10) that bottled water and tap water are functionally equivalent and competitively priced. Further, for Staff to even imply that the pricing differentials that exist between tap and bottled water also exist between wireless and wireline telephony service is unconscionable. Mr. Teitzel's rebuttal Exhibit No. 19 details, for each wireless carrier, for each class of Qwest wireline service, and for several different prototypical wireline usages levels that the pricing of wireline and wireless services are truly competitive.

- without major changes to home plumbing and appliances that would permit bottled water to be stored, heated and pressurized for those applications. No one would suggest that if the water utility dramatically raised its rates, large numbers of consumers could readily switch to bottled water for all their home water needs.

For Staff to suggest that bottled water's effect on water utilities is in any way analogous to the competition wireline telephone providers face from wireless competitors is to ignore the detailed and comprehensive evidence that Qwest has presented in its prefiled case. For Staff to ignore Qwest's evidence while it advocates its contrary position is one thing, for Staff to encourage the Commission to ignore it before Qwest is even allowed to present it is irresponsible.

In summary, Staff's analogy is inapt and unhelpful because it rests on a comparison of products that are plainly not competitively priced and not functionally equivalent for most purposes. The only way to save the analogy on the question of functional equivalence is to assume that the scope of the hypothetical water deregulation statute is so narrow that bottled water in fact presents a competitive alternative. Of course, doing so assumes away the very question that the analogy is allegedly offered to answer, i.e., how is the statute to be interpreted?

Fortunately for the Commission, answering that question in the context of Staff's petition for declaratory ruling does not require that the Commission guess, or seek out obscure analogies, it simply requires that the Commission consult the plain meaning of the words chosen by the legislature, just as Staff itself suggested. Doing so results in the common sense conclusion that section 62-622(3)(b) requires that to obtain pricing deregulation Qwest must demonstrate that there is "effective competition for basic local exchange service" by demonstrating that there are

“functionally equivalent, competitively priced” alternatives reasonably available to customers for basic local exchange service throughout the local exchange calling area.

### III. CONCLUSION

For the reasons stated above, Qwest respectfully requests the Commission deny Staff’s petition and grant Qwest’s cross-petition for declaratory ruling. In so doing, Qwest requests that the Commission enter an order declaring the following:

A. The term “local services” as used in Idaho Code § 62-622(3)(b) is a short-hand reference to “basic local exchange services,” as that term is used in Idaho Code § 62-622(3) and defined in Idaho Code § 62-603(1);

B. While the facilities providing “basic local exchange service,” as defined in Idaho Code § 62-603(1), may permit data-related functionality, data applications (such as dial-up internet access and facsimile capability) are outside the statutory definition of “basic local exchange services”; and

C. In evaluating whether “effective competition” from unaffiliated providers exists pursuant to Idaho Code § 62-622(3)(b), the Commission shall consider whether “functionally equivalent, competitively priced” alternatives to “basic local exchange services” as defined in Idaho Code § 62-603(1) are present, and shall not require the incumbent telephone corporation to demonstrate effective competition for additional services that may also be available over wireline facilities.

Submitted this 13th day of May, 2003.

Qwest Corporation



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of May, 2003, I served the foregoing **QWEST CORPORATION'S ANSWER TO PETITION FOR DECLARATORY RULING AND CROSS-PETITION** upon all parties of record in this matter as follows:

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