

JOHN GANNON (ISB #1975)
Attorney at Law
1101 West River, Suite 110
Boise, Idaho 83702
Telephone No. (208) 433-0629
Attorney for Intervener Meierotto et al

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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

CASE NO. QWE-T-02-25
INTERVENERS POST HEARING
MEMORANDUM

INTERVENERS POSITION

Intervenors contend cell phone technology does not offer competition for local land lines because it won't work. In particular it will not operate a small business phone system of any kind. Cell phone technology will not operate most home phone extension phone systems and will not conveniently serve as a home phone for Idaho households and larger homes. Regardless of

whether "local service" or "basic local exchange service" is the term used in Idaho Code 62-622(3)(b), the failure to operate phone systems means cell phone technology is not the "functional equivalent" and is not "reasonably available". Further in considering the term "competitively priced", all characteristics of the product must be considered, not just a few

customers will not have effective competition, especially because cell phones cannot normally operate home extension phone systems.

If any deregulation is to occur, the public interest requires that there be safeguards for those customers who will have no choice, and one safeguard intervenor recommend is a mandatory, very informal arbitration program to resolve billing and service disputes because of Qwest's poor history in these areas.

Further, instead of deregulation, the land line system should be strengthened and preserved by charging the same fees and taxes on cell phones as land lines. Since intervening, the Legislature has taken one step in this direction by extending the 911 charge to cell phones. This trend should continue and intervenors hope the Commission will support implementation of this philosophy by legislative and other policy making bodies.

BURDEN OF PROOF

Regardless of Intervener's position, the first and most important aspect of this case is

that Qwest has the burden of proof for each element of its claim. This burden is met by presenting real evidence. Intervener's don't have to disprove claims, statements or unsubstantiated testimony. Interveners, or Staff for that matter, need only challenge or refute real credible evidence that is presented.

While this may seem elementary, it does appear, that from time to time Qwest has submitted evidence which lacks foundation, relevancy and the quality that one would expect in a quasi judicial proceeding. (See for example Intervenor's Objections to the Testimony of David

Tolson. This testimony was sufficient to make a claim, but this is not evidence which proves their

With these considerations in mind, Interveners review the elements of proof and some of the claims and evidence presented.

APPLICANTS MUST PROVE THE FOLLOWING ELEMENTS

1. Functional Equivalent

“Functional Equivalent” certainly implies that there is some kind of end result. In other words how can any technology be equivalent if it cannot be used at all by the end user? The answer is the technology cannot be the equivalent under this circumstance, regardless of whether the legal consideration is “voice to voice” transmission or “local service”.

Then there is a second question to ask in regard to this term. If the product can be used, but the product is more expensive, difficult, or inferior in its ultimate use, can it be the functional equivalent of another product. Interveners note that there was some evidence that cell phone voice to voice transmissions are inferior and not reliable. (For example see Sales Tr 599 L 13-18). Giving Qwest the benefit of the doubt on this issue, which is really not appropriate because Qwest has the burden of proof, the question is still whether the end result of the voice to voice transmission must be considered. If the technology drops calls or won't operate a home extension phone for example, then how can it be the equivalent of a land line? If the technology costs more for a telephone book listing and doesn't allow number portability it cannot be the equivalent. Qwests position ignores the fact that the voice to voice transmission in a cell phone is a different technology from the land line transmission. This means the result of such trasmissions are different and must be considered.

2. Comparatively Priced

Cell phone technology and land line technology price comparisons cannot consider just a

voice transmission price comparison even if “basic local exchange service” is substituted for “local service. Qwest’s own witnesses agreed that all aspects of a product are considered by a consumer when purchasing it.

Dr. Lincoln testified:

“...consumers buy and consume products because of their value in use.

Consumers buy products according to their perceived benefits. They buy products for what they want or expect them to ‘do’ for them.”
(Lincoln Reb Tr p262 L 19-21)

Mr. Teitzel testified:

“Dr.Lincoln discusses in his testimony how customers base purchasing decisions on all attributes of alternative services...” (Teitzel Reb Tr 395 L 15-17)

Regardless of whether “basic local exchange service” or “local service” is used, the term “comparatively priced” therefore requires that all the features of the land line and wireless line be compared in order to achieve a conclusion regarding price comparison.

Unfortunately, there is no evidence before this commission regarding the relative price values between land line and wireless, because every bit of evidence offered failed to include any value for wireline features such as fax operation, data transmission, extension phones, number portability, and other wireline benefits. In fact Mr.Teitzel agreed that a “customer might well consider” a list of several different factors which were suggested to him as a basis for the wireless or wireline decision. (Teitzel Tr 478). These factors were generally not included in the studies presented by Qwest, Nor was any value added for mobility, which is the chief benefit of the wireless technology, although on several occasions Qwest witnesses thought that was important and commented that mobility added value for wireless.

More precisely, \$26 for a landline buys much more than voice to voice transmission or

local service. It buys data transmission, phone system and extension phone operations, and a permanent phone number. How much of the \$26 charge is for voice to voice and how much is allocated for these other benefits? Qwest witnesses repeatedly failed to consider this aspect, and for that reason the price comparisons offered do not meet the burden of proof regarding “comparatively priced”. Its not Interveners job or the Commission’s job to figure this out. This evidence should have been presented by the Applicant.

Of course there can be no comparative pricing if one technology simply won’t work for a customer as in the case of small business.

3. Reasonably Available

Applicant must prove cell phone technology is reasonably available. This very phrase implies that the technology can be used. Available certainly implies that the user can use it. For example, how can cell phone technology be reasonably available if the small business cannot integrate it into any known office phone system? How can a residential home phone system that uses extension phones have cell phone technology reasonably available if it won’t work?

It really makes no difference for this analysis whether “local service” means “basic local service exchange” or not. Regardless of which term is used, “availability” implies that the voice to voice transmission, or the broader “local service” transmission can be used reasonably by the recipient.

4. Residential and Small Business

Qwest must prove that both residential and small business meet all the legal requirements before deregulation can occur. The statute is conjunctive, not disjunctive. Therefore, the Commission must find that Qwest has met its burden of proof for both groups before deregulation

can occur.

Qwest's case has completely failed to prove that the majority of small business customers can even use the cell phone technology.

A.

**The Majority of Small Business Customers Have Multiple Lines,
Which Cell Phone Technology Cannot Operate**

There are approximately 26,000 small business primary lines in the 7 exchanges. The source for this figure is Dr. Lincoln's Direct Testimony on page 25 L 1-6 where he states:

"The small business list of numbers was drawn randomly from a list of

26,183 small business billing phone numbers (rollovers and multiple lines eliminated) in the seven exchanges. The list of total population numbers was provided by Qwest and included only businesses with five or fewer lines" (Lincoln Tr 231 L 1-6)

Mr. Teitzel agreed there were roughly 25,000 small business lines and 57,000 multiple lines and that the vast majority of multiple lines were used by small business. (Tr p 486). On page 729 L 1-24, Mr. Hart testified that at least 50% of the business customers subscribe to more than one line at the same location based upon information in Qwest's annual report. To be fair, Qwest's counsel objected to a followup question on page 730 stating that Mr. Teitzel wasn't sure about the 25,000 figure and Mr. Hart was testifying outside the scope of his original testimony. The objection to the last question was sustained on this basis.

Never the less, the record does reflect that Dr. Lincoln clearly stated there are 26,183 business lines, and that Mr. Hart did testify without objection that more than 50% of the business customers subscribe to more than one line at the same location.

Thus, if the majority of small business customers have multiple lines and there is no cell phone technology which will operate those lines, then Qwest's case must completely fail.

Intervenors testimony demonstrates time and again the need for small business phone systems whether they are described as "PBX" or "Digital" or any other type. (Neal Tr 547-550) (Sales Tr 598-602) (Chattin Tr 570-574) (Boyce Tr 611-614) (McManamon Tr 620-624) Qwest made a weak attempt to show that there was technology available in Mr. Teitzel's discussion of Ascendent Technology. Mr. Teitzel said:

"~~Ascendent technology is not a reasonable alternative for a key type phone system.~~

demonstrate that any perceptions that wireless service is not a viable substitute for wireline service for these reasons is simply not accurate. Therefore, the concerns raised by the Intervenors Meierotto should be seen as being both misperceptions" (Teitzel Reb P74 L 3-8)

However, at the hearing he admitted that Ascendent technology is not a reasonable alternative for a key type phone system. (Tr. P 484 L 10-14). He agreed it was designed for a PBX system and it is only an alternative for more than 5 users, although he was unclear as to whether a minimum of 50 were needed. (Teitzel Tr P 485 L 2-5). Mr. Teitzel could locate only one cell operated Fax machine. (Teitzel Tr 482 L 11-13) and it was apparent there is no reasonable cell technology that is available in Idaho to operate a Fax machine. (Teitzel Tr 482-483).

If anything, the evidence shows that the majority of small businesses have multiple lines which cannot be serviced by cell phone technology. Therefore there is no functional equivalent, comparatively priced and reasonably available alternative for this class of customers..

Five of the intervenors and their witnesses testified regarding the need for small business systems for themselves and their type of business. They have been in business a long time and they have extensive personal knowledge and experience regarding the communication needs of their business. They didn't testify regarding hearsay or repeat the testimony of others. In many ways they are the best evidence of the needs and requirements of people who use communications devices in the Boise Meridian and Nampa exchanges.

And their testimony was essentially unrefuted



An attorney (Gary Neal); a small realtor (Steve Chattin); a CPA (Carolyn Boyce); a small contractor (Joel Sales); a small business and former telephone sales and installation manager (Dennis McManamon) all testified that wireless technology cannot be used in a small office with multiple lines and that a wireline was usually essential for any size business. Each of them had 5 wire lines or less and was therefore within the statutory definition of a regulated small business.

Of every witness presented by all parties in this case, Dennis McManamon has the best hands on, every day familiarity with the communication needs of small business and residential. He sold and installed telephone systems for 10 years and he has actually "lived" the business here in the Boise/Meridian/Nampa exchange. From 1998 - 2000 he sold wireless equipment. His testimony was unrefuted by anyone. He testified very succinctly:

"There is no cell phone phone system available on the market that could substitute for our land line telephone system at Awnings Unlimited. Cell Phone technology has not developed such that any combination of cell phones could allow all lines to be included in one phone and in all extension phones."
(McManamon Tr 621 L 24-25; Tr 622 L 1-3).

He testified that he was unable to sell cell phone technology to small business customers to replace their land line system:

“.... I was unsuccessful. The technology is simply not here yet to enable most serious small businesses to operate without a land line system. Certainly, I occasionally sold cell phones to someone who worked part time out of the home or did a little consulting.” (McManamon Tr 623 L 3-5)

It is not in the public interest to deregulate local service line charges “because cell phones can’t compete, as I have described, so prices would just go up.” (McManamon Tr 623 L 11-12)

Realtor Steve Chattin testified that he is not aware of any real estate office that relies on an office cell phone system. (Chattin Tr 572 L 15-16). He reviewed a list of real estate brokers and agents in the Treasure Valley, and concluded the phone numbers listed were almost all land lines, and nearly every listing had a fax number. (Chattin Tr 573 L 20-21) (Intervenor Ex 208).

Attorney Gary Neal reviewed the current list of attorneys and concluded they all have fax machines and appeared to have land line prefixes. (Intervenors Ex 202). Similarly CPA Carolyn Boyce reviewed the current list of CPA’s on the internet and came to a similar conclusion. (Intervenors Ex 204). Both testified they could not operate their offices without landlines.

Intervenor Witness Joel Sales, who has spent 20 years in the glass industry, summed up the ultimate issue in this case when he was asked whether a cell phone is a replacement or something used in conjunction with a land line.

“It is a convenience.” (Sales Tr P 608 L 18)

C.

Dr. Lincolns Survey Fails to Prove Small Business Even Perceives It Can Use Cell Phone Technology

Dr. Lincolns survey addressed perception, which makes its value of less importance than the reality that has already been described in this brief.

But the survey, unfortunately, did not ask several followup questions which would make

the survey results more valuable, and there is a serious methodology issue because 33% of respondents did not answer the phone after 3 calls.

i. Followup Questions Were Not Asked

The Small Business perception result was that only 31% thought they could solely rely on a cell phone. The vast majority did not and that on its face hurts Qwest's position. .

Not a single one of the 31% was asked a followup question to determine the depth of their knowledge or to determine the basis for their response. (Lincoln Tr P 324)

But the "No" answers were asked such a followup question. They were asked for the primary reason why they answered "No." Many responded with a "data transmission" concern. Dr. Lincoln then added those data transmission respondents to the "Yes" answers and claimed that 87% of small business users meant to answer "Yes".

However, the data transmission respondent was not asked whether there was another reason why the respondent might would answer "No." Dr.Lincoln agreed these "data transmission" respondents might have given another reason why they could not solely rely on a cell phone for their business. (Lincoln Tr P 327 L 13-24).

The problem with the survey result then, is that at least two more key questions should have been asked so that there is a real foundation and evidence to support the claimed conclusion.

ii. 33% Didn't Answer the Phone

And there is one more problem, which goes to methodology. Fully 33% of the business respondents did not answer their phone after 3 separate calls according to those who performed the survey! (Lincoln Tr P325 L 5-13); (Exhibit 6 Page 1). This makes no sense whatsoever, since as Dr. Lincoln agreed, a basic principle of business marketing is "answer the phone." This result

makes even less sense when the residential respondents failed to answer the phone only 25% of the time. (Exhibit 6 Page 2) The only inference has to be that the original list given to Dr Lincoln

Intervenors concede that some people, especially young single people such as college students probably use the cell phone as their sole phone. Intervener Witness Joel Sales said as much in describing the communication devices used by his son who attends college. But the issue is more complex. Does that cell phone replace a land line, or is it in addition to a land line?

This is why evidence of why Qwest lost 14,000 land lines is so important. These land lines might have been lost because:

1. The economy has slowed down and people are reducing costs.
2. Some small businesses may have closed (Souba Tr p 112) .
3. People are dissatisfied with Qwest billing and service practices. Intervenors note that Mr.Souba acknowledged these practices were so serious that the Idaho Attorney General had to step in and a payment of money by Qwest was made to settle its problems. (Souba Tr 128 L 17-22). Both Mrs.Herrick (Herrick Tr 585 L 12-14) and Mr.Neal (Neal Tr 553 L 11-13) considered using alternative services after their billing disputes with Qwest.

4. Switching one of the home lines to DSL, and there was testimony that 1400 of the 14,000 lines may be in this category. (Souba Tr 145 L 14-19).

Qwest could conduct brief land line termination interviews which would probably be helpful to the company and the issues before this Commission. Again, though, it is Qwests job to prove why 14,000 land lines have been lost.

Qwest also presented Dr.Lincolns survey but the same basic concerns apply to the residential part of the survey as apply to the small business part of the survey.

First, the 50% of respondents who said they “could rely” were not asked any followup question to ascertain the basis or degree to which they could rely. (Lincoln Tr P317 L 17-19).

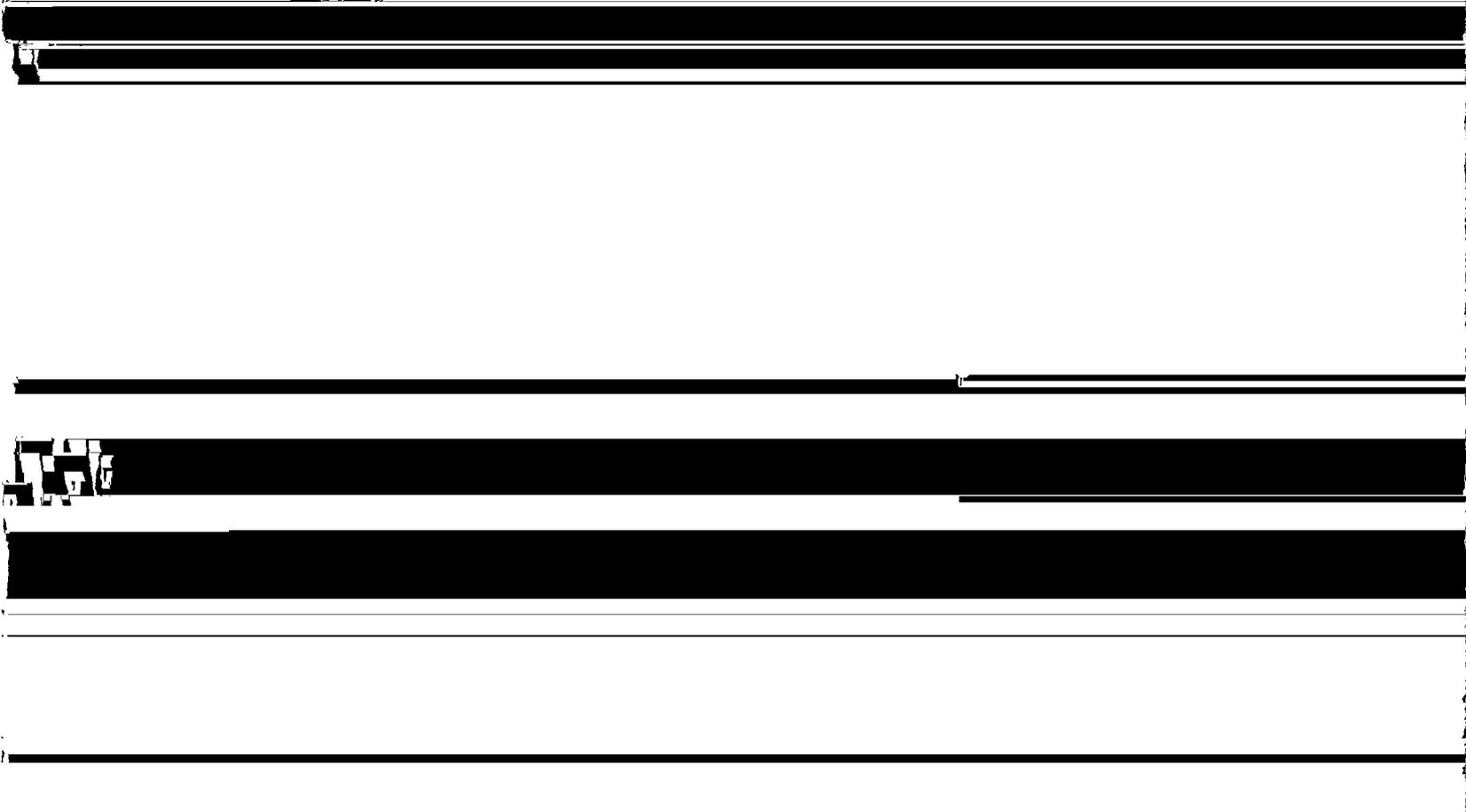
For example they could have been asked about extension phones in their home, fax machines, the cost of a phone book listing, number portability, or the threshold at which they “would” rely on cell phone technology. The 12% of “data transmission” respondents were not asked a followup question as to whether there might be some other reason why they can’t use cell phone technology. (Lincoln Tr 323 L 19-23).

For these reasons and others, such as outlined in the Objections to the Testimony of David Teitzel and elsewhere in this brief, Intervenors do not believe Qwest has met its burden of proof.

ARBITRATION OF BILLING/SALES DISPUTES

Because of the state of the evidence, it seems likely that Qwests Application will be denied. Thus, the public interest conditions concerning deregulation won’t be addressed and Intervenors request that the public interest include an arbitration requirement for all small bill and sales disputes would probably be moot.

Intervenors have presented evidence that there are serious customer relation problems for



Qwest billings. (Herrick Tr 585).

Qwest discussed "concessions" in some of its testimony and any future consideration of a deregulation request should include this proposal in order to protect the public interest.

FAIR TAX TREATMENT FOR BOTH TECHNOLOGIES

Intervenors believe the land line system should be preserved and that Qwest should recover a reasonable profit from the system. There is no reason to treat the land line system differently from the wireless system, and therefore taxes should be equally assessed. Otherwise, government action will prefer one system over another and artificially support that preference.

Dated this 27th day of June, 2003

By _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THE 27th DAY OF JUNE, 2003, I SERVED THE FOREGOING PLEADING IN CASE NO QWE-T-02-25. BY MAILING A COPY THEREOF, POSTAGE PREPAID, (UNLESS OTHERWISE INDICATED) TO THE FOLLOWING:

MARY S HOBSON
STOEL RIVES LLP
SUITE 1900
101 S CAPITOL BLVD
BOISE, ID 83702

ADAM L SHERR
QWEST
1600 7th AVE, ROOM 3206
SEATTLE, WA 98191

CONLEY WARD
GIVENS PURSLEY LLP
277 N 6th ST, SUITE 200
PO BOX 2720
BOISE, ID 83702-2720

CLAY R STURGIS
MOSS ADAMS LLP
601 W RIVERSIDE, SUITE 1800
SPOKANE, WA 99201-0663

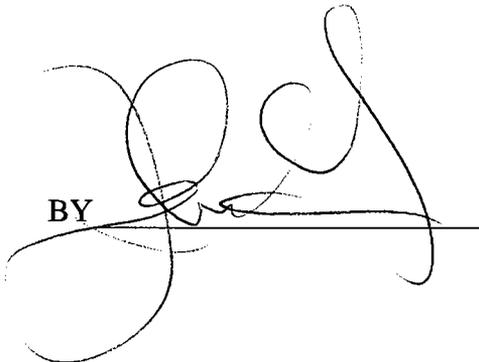
DEAN J MILLER
McDEVITT & MILLER LLP
PO BOX 2564
BOISE, ID 83701

BRIAN THOMAS
TIME WARNER TELECOM
223 TAYLOR AVE NORTH
SEATTLE, WA 98109

(PERSONAL SERVICE)
WELDON STUTZMAN
DEPUTY ATTORNEY GENERAL
IPUC
PO BOX 83720
BOISE, ID 83720-0074

DEAN RANDALL
VERIZON NORTHWEST INC.
17933 NW EVERGREEN PKWY
BEAVERTON, OR 97006-7438

MARLIN D ARD
WILLARD L FORSYTH
HERSHNER, HUNTER, ET AL
180 E 11th AVE PO BOX 1475
EUGENE, OR 97440-1475

BY 

CERTIFICATE OF SERVICE