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FISCAL IMPACT REPORT

ORIGINAL DATE 01/28/10
 LAST UPDATED 02/12/10 **HB**

SPONSOR Cisneros

SHORT TITLE PRC Jurisdiction Over Certain Telecomm Rates **SB** 37/aSCORC

ANALYST Lucero

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	None		

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY10	FY11	FY12		
	(\$5,000.0) (possible other indeterminate amounts, see fiscal impact discussion)	(\$5,000.0) (possible other indeterminate amounts, see fiscal impact discussion)	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Indeterminate, but possibly moderate			Nonrecurring and Recurring *	General Fund and other various funds

(*see PED fiscal impact)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Public Regulation Commission (PRC)
- Attorney General's Office (AGO)
- General Services Department (GSD)
- Department of Information Technology (DoIT)
- Public Education Department (PED)

SUMMARY

Synopsis of SCORC Amendment

Senate Corporations and Transportation Committee Amendment (SCORC) to Senate Bill 37 makes revisions to:

1. Specifically incorporate NMSA §63-9A-9. This section grants authority to the Commission to regulate “rates terms and conditions for individual contracts for public telecommunications services in a manner which facilitates effective competition[.]”
2. Specifically incorporate “interexchange carriers and competitive local exchange carriers.”
3. Attempts to grant additional authority to the Commission to regulate quality of service rules.

Synopsis of Original Bill

Senate Bill 37 makes revisions to Section 63-9A-8 NMSA 1978, the Telecommunications Act, concerning a finding of effective competition in public telecommunications service. Such a finding would result in the elimination of all regulatory requirements for all retail telecommunications services for all telecommunications providers within a specified service area.

SB 37 eliminates Public Regulation Commission jurisdiction over Qwest, the largest provider of telecommunications in the state (in many areas the only such provider). The elimination of all regulatory requirements over retail telecommunications services would be predicated on one of two possible factual findings:

A finding would be made by the Public Regulation Commission (PRC), within 120 days of a filed request, upon a showing of either:

- That “effective competition” exists in over 50% of the relevant market areas; or
- That the incumbent carrier has lost over 33% of its access lines since December 31, 2001.

FISCAL IMPLICATIONS

Under present law, Section 63-7-20 NMSA 1978, telecommunications providers who are “*subject to the control and jurisdiction of the commission by virtue of the provision of Article 11 of the constitution of New Mexico with respect to its rates and service shall pay annually to the commission a fee.*” The fee is a utility and carrier inspection fee and is based on gross receipts. Thus, if SB 37 results in deregulation or partial deregulation, it is unclear whether the PRC could lawfully continue to impose the fee on that portion of gross receipts subject to the deregulation. As noted in the significant issues sections, the bill creates the opportunity for a telecommunications company to litigate, to gain clarity where conflict exists in statute, and in the provisions of the bill and in practice by the PRC.

It appears that the past and current practice of collecting the carrier inspection fee differs from statute, and calls into question whether or not the fee would continue to be collected in the same manner as in the past if this bill were to be enacted. The amount paid by telecommunications providers is not readily available to LFC staff, but total general fund distributions of the fee have averaged \$5 million per year in recent years.

It is possible that the deregulated rates of at least some electing companies may increase substantially from existing regulated rates which may impact consumers; conversely, the rates could decrease. In Ohio rates increased after deregulation, in Nebraska little changes, other states that passed similar legislation include Idaho, Iowa, and Indiana.

Although the bill pertains primarily to whether a service provider may be released from regulation, the bill is silent about existing contractual obligations related to previous settlement agreements. The sole settlement agreement that addresses noncompliance with previous alternative form of regulation (AFOR) plans - a settlement agreement that has been approved by the PRC - is a settlement that obligates Qwest to make certain investments primarily in facilities. Should Qwest become deregulated, in part or in whole, it may render the AFOR contract subject to challenge in court, or weaken the validity of the contract.

The PRC may have a moderate administrative impact. (See Administrative Implications below)

The growing use of wireless and Voice over Internet Protocol (VoIP) can cause concern for cities and states regarding a shift of the tax base. The Telecommunications Act of 1996 addressed this change and, as use of traditional landlines has decreased and use of wireless technology increased, there exists a possible tax base shift from local and state tax bases to federal. At this time, it is uncertain whether VoIP is more prevalent in urban areas.

As more customers shift to VoIP or wireless services, the New Mexico telecommunications fund may receive less revenue. The telecommunications fund, deposits excess revenue to the general fund. Therefore, there is a potential impact to general fund revenues which are not quantifiable or indeterminate at this time.

The Public Education Department (PED) reports that the bill may result in higher than expected Enhancing Education Through Technology grant applications administered by the PED, and may result in the need for additional staff.

SIGNIFICANT ISSUES

In regards to the SCORC amendment, the Attorney General's Office notes:

The language in these amendments is likely to lead to confusion and may spark some litigation.

It is unclear what purpose item #1 as identified in synopsis has, because the bill wouldn't necessarily eliminate the already existing authority in the New Mexico Telecommunications Act for the PRC to regulate individual contracts.

Item #2 specifically incorporates two additional classes of telecommunications providers, *viz.*, "interexchange carriers" (IXC) and "competitive local exchange carriers" (CLECs). It is unclear how the specific inclusion of these classes of carriers changes the bill in any significant way, because they are already regulated in a manner different from an "incumbent local exchange carrier" (ILEC).

Item #3 is confusingly drafted. The goal is to try to maintain some PRC authority over quality of service standards, yet the bill is drafted in such a convoluted manner that it is not clear if this objective is achieved. The language states: "[...] the commission may

impose consumer protection and quality of service rules on that provider “consistent with the findings of effective competition [...]” This underlined phrase is problematic because it is amenable to widely varying interpretations. There is no clear definition of the phrase “consistent with the findings of effective competition.” Because the PRC “shall eliminate rules, regulations and other requirements applicable to the provision of such service, including the fixing and determining of specific rates, tariffs or fares for the service”; it appears that this amendment flatly contradicts the core directive of the effective competition statute. Plus it is couched in permissive language (“may”) whereas the “effective competition” language is drafted as a legislative command. Thus it is not clear that the PRC would act upon this portion of the statute.

In regards to the SCORC amendment, the PRC notes:

Both large and mid size Incumbent Local Exchange Carriers [“ILECs”] currently are subject to rules regarding service quality and consumer protection. In addition, the Commission recently adopted an AFOR governing Qwest for the next three years, which contains specific customer credits for failure to meet service quality standards.

PRC staff reports the bill provides that any elimination of regulatory requirements for all retail telecommunications services would apply to the entire service territory of the carrier for all providers of those services in that service territory. Although the bill focuses on rates and terms of service, which could rise and fall statewide with market conditions, the elimination of all regulation would mean that consumer protection and service quality rules and standards would no longer be applicable, statewide, even in any areas where competition may not in fact exist, and where consumers may not have viable alternatives. Furthermore, rules and proceedings requiring investment sufficient to sustain a reliable network infrastructure would also be eliminated. However, at this time, it is not clear whether and the extent to which viable competition exists or would exist in areas of the state if the incumbent telecommunications provider fails to provide its customers with adequate and reasonably priced services.

According to information from the Attorney General’s Office (AGO) this bill raises numerous significant issues of public policy and utility regulation. There may be legal ramification of this legislation that is difficult to quantify and prognosticate about. Whatever legal authority the PRC currently possesses to order infrastructure investment would be eliminated with this bill. Passage of this bill would potentially eliminate all recourse that customers presently have in the case of billing disputes, service quality issues, and other complaints of that nature.

Both the PRC and AGO expressed the following similar concerns with the bill regarding the two measures to determine if effective competition exists:

- 1) A comparable service or facility is available from another provider in the area; and
- 2) Market forces in the area are sufficient to assure just and reasonable rate through competition, without regulation.

The second point, in turn, requires the Commission to consider market forces resulting from the presence or absence of:

- A) Wireless service;
- B) Cable telephony service;
- C) Voice over internet {VOIP}service; and
- D) Loss of access lines by the incumbent telecommunications company.

The PRC notes that there is no factual proof for the proposition that loss of access lines is in itself evidence of the existence of effective competition, in the transition away from traditional monopoly regulation toward a more balanced market.

The AGO notes the fact that Qwest has lost 33% of its access lines in the past decade; is problematic as well. Access line loss, in and of itself, is subject to multiple legal interpretations of this language. Some investment analysts have found that phone companies experience a net benefit from the loss of access lines. For example operating expenses are reduced and aging outside infrastructure can be retired. Also balancing the access line loss is the huge increase in revenues that Qwest is experiencing due to the “special access” revenues it obtains from connecting cell towers to its central offices.

Changes to subsection A in the bill at lines 20 and 21 of page 2 would provide deregulation for all companies in the same market areas if any one company meets the requirements for deregulation. This could allow companies that do not face effective competition to gain deregulation because another company does face competition.

The new subsection D proposed in the bill would deregulate a company’s entire service area if effective competition is found to be present in markets accounting for over 50 percent of the retail switched access lines served by the company. This criterion can be met by the number of lines in the Albuquerque area alone. Thus, statewide telecommunications services could be deregulated even if the Albuquerque area is the only area where effective competition exists. One possible consequence is that a deregulated carrier could raise rates in the areas of the state that lack competition so they can lower them in the areas where they face competition. This practice, known as “cross subsidization,” is prohibited in present law, in what would become new subsection F in the bill. However, the changes to this subsection, on page 5 lines 1 through 6 create significant new hurdles for any party alleging cross subsidization. The burden of proof would be shifted to the party making the claim, and the standard of proof would be raised to include a showing that the prices violate “antitrust or predatory pricing laws.” Since these terms are not defined, it is unclear what laws this refers to, and the problem will be that the person making the claim will not have access to the financial information needed to prove the case. Thus, it may be effectively impossible to prove cross subsidization under the bill

PERFORMANCE IMPLICATIONS

The SCORC amendment attempts to address the AGO’s concern that Legislators might see an increase in consumer complaints, as New Mexicans would no longer have a regulatory authority to air grievances and seek resolution over issues they may have with telecommunications. However, as noted in significant issues, the amendment raises other concerns. Additionally, protracted and expensive litigation to ascertain the meaning of these amendments is very possible.

ADMINISTRATIVE IMPLICATIONS

PRC proceedings pursuant to this bill require expedited treatment of termination within 120 days. This could put a strain on PRC resources, as no such petitions have been considered in the past; there is no precedent or regulatory structure that currently exists to evaluate the administrative implications. However, if regulatory requirements are eliminated as provided

in this bill, one portion of the regulatory workload would diminish. Consumer complaints, however, might increase, but would no longer be subject to consumer protection remedies from the PRC.

RELATIONSHIP

Relates to HB107 “Telecommunication Relocation Costs To Customers”

TECHNICAL ISSUES

In regards to the SCORC amendment, the PRC notes:

The purpose and effect of adding the reference to Section 63-9A-9 is not clear. Additional ambiguity is created by the fact that Section 63-9A-9 is part of the New Mexico Telecommunications Act, so that it is not clear why Section 63-9A-9 is specifically reference in the amendment.

Currently there are no rules for service quality for service providers other than ILEC’s. Thus this amendment that a petitioner for effective competition is subject to the same rules as others in the market might be interpreted as elimination of service quality regulation; or new rules would have to be developed.

Both the PRC and AGO expressed the following similar concerns:

The PRC notes there is an issue concerning the burden of proof for demonstrating that a given service is not priced below cost, which currently is upon the carrier. This bill would require that a challenger to a price or service would have the burden of proving that the service is priced below cost, is predatory pricing or in violation of antitrust laws.

Similarly, the AGO states that existing law dictates that if a telecommunications company offers a promotion, it has the burden of showing that the price of the promotion still meets the cost it incurs to provide that service. This legislation would reverse that, meaning that a competitor would have to show that the promotion is being offered below cost. However, once deregulated, the telecommunications company could consider most of its cost information proprietary and may not have share that information. There may need to be additional language relating withholding of proprietary information.

OTHER SUBSTANTIVE ISSUES

This bill impedes the PRC’s ability to manage a “transition” from regulation to competition as set out in the purpose of the New Mexico Telecom Act. It would also hinder the PRC’s ability to identify and correct any anti-competitive behavior, and creates significant risk that rural areas of the state will lag further behind in obtaining access to broadband communications.

Current law allows a telecommunications company to make a factual showing at the PRC of “effective competition” as a prerequisite for reduced regulation in certain areas of the state. It should be noted that Qwest has never attempted to create the factual showing necessary for effective competition under existing law. The criteria set out in this bill for the PRC to use in determining “effective competition” removes the PRC processes, expertise and judgment and its ability to assess, by service and geographic area, whether there is a degree of competition that rises to the level of “effective” and to protect consumers from inaccurate bills or arbitrary cutoffs.

In considering whether market forces exist in the relevant market area, the PRC is further directed to consider, at a minimum, whether wireless, cable or VoIP services are or are not available in the market. By contrast, the existing provisions of law provide that the PRC should consider the extent to which *services* are reasonably available from alternative providers in the relevant market area, the *ability* of the alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions and any existing economic or regulatory barriers.

Although the primary focus of the bill is on basic service, its effect on designed services, those purchased by large commercial customers and internet service providers, is difficult to quantify. Those rates are not set by the PRC currently, but they are subject to the filed rate doctrine as it applies to tariffed services.

A question remains over whether sufficient competition exists. A report by the Attorney General’s Office shows that only 8 percent of New Mexicans are served by competitive local exchange carriers, smaller companies that compete with the established carrier (QWEST) to provide telephone and Internet services. The report recognizes that the causes of limited competition are diverse including limited service availability and affordability for cable phone services. **(Please see attached report *Status of Competition in Quest’s Certificated Areas in New Mexico*)**

CURRENT FEDERAL REGULATION

The passage of the federal Telecommunications Act of 1996 reflected a change in federal policy from legal monopoly to an emphasis on competition. The 1996 Act opened local exchange markets by requiring the incumbent local exchange carriers to open their networks to competitor companies. Competitors may access the network by purchasing services at wholesale rates for resale, leasing elements of the network on an unbundled basis at wholesale cost for resale, or interconnecting the competitor's own facilities directly to the incumbent carrier's network. This network access must also be provided without unreasonable or discriminatory conditions or limitations on the resale of telecommunications services. If the incumbent carrier cannot agree on terms with the competitor requesting access, the parties may request arbitration services from a state commission, such as the Public Regulation Commission.

AMENDMENTS

The bill could be amended to protect the AFOR settlement.

ALTERNATIVES

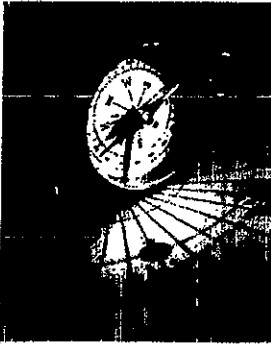
In 2005, Iowa approved House File 277 which deregulated a portion of telecommunication rates in that state. However, the bill included a provision for re-regulation by the Iowa Utilities Board, the equivalent of New Mexico's PRC, if after notice and opportunity for hearing; it finds that one or more companies have market power in a particular market. The power to re-regulate the industry is a powerful tool to insure rates remain competitive, consumers have choice, and services are of a quality nature.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The current scheme of alternative form of regulation, with price caps and service quality standards, including customer credits for noncompliance, would apply to incumbent local exchange carriers with more than 50,000 access lines.

Mid-size carriers would continue to abide by existing regulations on service quality. All other Commission rules, including consumer protection rules, would continue to apply to the providers of regulated telecommunications services.

DL/mt:svb



QSI TECHNICAL DOCUMENTATION

Document Number: 013009A

Prepared on Behalf of the New Mexico Attorney General

Status of Competition in Qwest's Certificated Areas in New Mexico

Preliminary Analysis

New Mexico Public Regulation Commission
Case No. 08-00353-UT



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EXECUTIVE SUMMARY

The level of competition in New Mexico's public telecommunications marketplace is dead last among the states in terms of lines served by Competitive Local Exchange Carriers ("CLECs"). There are many reasons for this low ranking. When compared to other states, Qwest-New Mexico's wholesale rates for many services stand out as too high. Qwest, as a general rule, has the highest nonrecurring collocation charges of the major phone companies. Qwest dominates the retail market because of its ownership of essential bottleneck facilities, which continue to be the major barrier to competitive entry.

New Mexico is not an easy state for CLEC operations. Because of the low population density, costs are relatively high, resulting in low operating margins. Competition is thus focused on niche markets, with the largest players concentrated in Albuquerque and a handful of other towns. While the past few years have seen a marked decrease in the competitiveness of the industry, largely as a result of several Federal decisions that overturned previous pro-competition policies, New Mexico has seen even greater declines.

It is interesting that Qwest is the dominant incumbent in three of the states -- Arizona, South Dakota and Nebraska-- having the *most* competition, indicating that New Mexico's low CLEC market share cannot be explained solely by the phone company's competitive strength and/or business practices. Further, the presence of relatively small and low population density states on this list (South Dakota and Nebraska) also suggests that New Mexico's low CLEC market share cannot be attributed purely to the size of the local market and population density.

Finally, the viability of the business model that relies heavily on over-building facilities (as opposed to leasing existing facilities from Qwest) has been questioned by market observers:

In the past, the availability of inexpensive financing combined with rapid revenue growth had made duplicate networks viable. But with hard economic times, 2009 may see a fundamental change of ideology, with regulators determining that a single network with shared ownership and open access is the best way forward.

In other words, the importance of unbundled network elements (UNEs) and other wholesale alternatives will increase as the economy is facing hard times.

Therefore, it becomes even more important that the Commission undertake additional efforts to improve the business environment in which CLECs operate. The Commission should not take at face value Qwest's claims of increased competition and instead, should impose the burden of proof on Qwest and undertake a careful geographically-disaggregated market-by-market analysis similar to the one undertaken by the Federal Communications Commission in Qwest's forbearance docket. The Commission should recognize the inextricable link between wholesale and retail competition, which requires evaluation of Qwest's rates and practices related to leasing

essential bottleneck facilities. Finally, the Commission should revisit Qwest's wholesale rates.

NEW MEXICO IS DEAD LAST IN COMPETITIVE PENETRATION

As of the most recent Federal Communications Commission report shows, New Mexico ranks dead last among the states in percentage of end-user switched access lines served by Competitive Local Exchange Carriers.¹ The level of competition is best demonstrated by the FCC data, which reports the number of switched access and broadband lines by state and year in its "Local Telephone Competition" and "Broadband Competition" reports.² As of year end 2007 (the most recent data point available), the five least competitive states, and their CLEC market share, were as follows:

States With the Smallest Share of CLEC End User Access Lines*

State	CLEC Market Share
Vermont	12%
Idaho	11%
Mississippi	10%
Indiana	9%
New Mexico	8%

* -- Based on the FCC Report "Local Telephone Competition: Status as of December 31, 2007" released in September, 2008.

Clearly, New Mexico's position is not enviable. Compare the CLEC market share with the five most competitive states:

¹ FCC report, *Local Telephone Competition: Status as of December 31, 2007*, table 7.

² These reports (officially named "Local Telephone Competition" and "High-Speed Services for Internet Access") are compiled by the FCC from the data collection Form 477 – the form that telecommunications carriers file with the FCC twice a year, where they report voice, broadband and wireless subscribership.

States With the Largest Share of CLEC End User Access Lines*

State	CLEC Market Share
Rhode Island	48%
Arizona	34%
South Dakota	31%
Nebraska	30%
New York	29%

* -- Based on the FCC Report "Local Telephone Competition: Status as of December 31, 2007" released in September, 2008.

It is interesting that Qwest is the dominant incumbent local exchange carrier (ILEC) in three of these states (Arizona, South Dakota and Nebraska), indicating that New Mexico's low CLEC market share cannot be explained by the ILEC's competitive strength or/and business practices (which are typically determined at the holding company's level). Further, the presence of relatively small and low population density states on this list (South Dakota and Nebraska) also suggests that New Mexico's low CLEC market share cannot be attributed purely to the size of the local market and population density. Indeed, if we look at all states in the contingent US and select states with similarly low population size and density, we find that six other states, all of which are served by Qwest, have population size smaller than New Mexico (Nebraska, Idaho, Montana, South Dakota, North Dakota and Wyoming).³ The following table provides details on the demographics in these states, as well as the CLEC market share, listing states in descending order in terms of population:

New Mexico Compared to Other Low Population Density States*

Measure	NM	NE	ID	MT	SD	ND	WY
Population	1,984,356	1,783,432	1,523,816	967,440	804,194	641,481	532,668
Population Density per Sq Mile	16	23	18	7	11	9	5
Median Household Income	\$ 42,760	\$ 49,342	\$ 48,354	\$42,963	\$46,567	\$44,708	\$48,560
Rank of "Top 100 MSA" in State	84 (Albuquerque)	85 (Omaha)	none	none	none	none	none
CLEC Market Share	8%	30%	11%	18%	31%	22%	18%

* -- Sources: CLEC market share is from FCC Report "Local Telephone Competition: Status as of December 31, 2007" released in September, 2008. All other data are from the Census Bureau. Population and population density estimates for July 2008 available at <http://www.census.gov/popest/galler/maps/popdens-2008.html>; Median household income is an average of 2006 and 2007 available at <http://www.census.gov/hhes/www/income/statemedfaminc.html>. MSA population is based on 2007 population estimates and is available at <http://www.census.gov/popest/metro/CBSA-est2007-annual.html>.

³ This list was generated by selecting states with population under 2 million and population density under 25 persons per square mile. (The density criterion "filtered out" Hawaii and seven East Coast states, including, for example, Rhode Island with population density of 1,016 persons per square mile).

As seen from this table, the six states that have population smaller than New Mexico have similarly small population densities, smaller urban areas and small household income. Yet, all of them have higher CLEC market shares than New Mexico. Further, as discussed above, two of these states -- Nebraska and South Dakota -- belong to the top 5 US states in terms of the CLEC market share.

There are also valuable insights gained from looking at the change in the level of competition in New Mexico over time. The dynamics are captured in the following table:

End-User Switched Access Lines by Provider -- New Mexico, 2004-2007*

Date	ILEC	CLEC Lines				
		Total CLEC Lines	Resold Lines	UNEs	CLEC-Owned	CLEC Market Share
Dec-07	815,565	72,932	29,219	25,781	17,932	8%
Dec-06	859,647	75,169	29,998	20,504	24,667	8%
Dec-05	892,715	65,122	30,693	23,130	11,299	7%
Dec-04	879,539	76,443	14,556	47,444	14,443	8%

* -- Compiled from the FCC Local Competition Reports.

As demonstrated by this table, CLEC market share in New Mexico has consistently been at or below the current level of 8%.⁴ Further, New Mexico's *relative* position has deteriorated over time: While today New Mexico ranks dead last nationwide in terms of CLEC market share, this was not the case several years ago. Specifically, as of January, 2004, three states (North Dakota, Idaho and Montana) had smaller CLEC market shares than New Mexico.⁵ But all three states have seen major increases in the market share, reaching 22, 11 and 18% respectively. The nationwide average market share of CLEC lines has remained at approximately 18% over that time.

The above table also provides a breakdown of the New Mexico CLEC lines by the alternative means in which these lines are provisioned -- Resale, UNEs or CLEC-owned last mile facilities. As seen in the above table, the composition of CLEC lines in New Mexico has shifted over time towards Resale, which currently amounts for 40% of CLEC lines. It is worth noting that in terms of the relative share of Resale lines, New Mexico ranks *third* in the nation, meaning that only two other states (New Jersey and Maryland) have a higher share of Resale lines in total CLEC lines. This fact is captured in the following table, which summarizes New Mexico's ranking for various measures of voice telecommunications markets, as well as demographics:⁶

⁴ In fact, prior to 2004, New Mexico had too few CLECs for the FCC to report their collective share without violating confidentiality.

⁵ The specific CLEC market shares were as follows: 7.8% for North Dakota, 6.7% for Idaho, and 3.8% for Montana, while New Mexico had 7.9%.

⁶ The ranking is in descending order, meaning that a rank of 1 corresponds to the highest value among all states.

**New Mexico Voice Telecommunications Market in Comparison to
Other States (as of 12/31/2007)**

Measure	Amount	Rank Among States	Number of States Compared ¹
Wireline Industry^{**}			
Landline Lines -- Total	888 496	38	49
ILEC Lines -- Total	815 565	36	51
CLEC Lines -- Total	72 931	46	49
Resale	29 219	33	47
UNE	25 781	41	47
CLEC-Owned Last Mile	17 932	44	47
Resale as % CLEC Lines	40%	3	47
UNE as % of CLEC Lines	35%	24	47
CLEC-Owned as % CLEC Lines	25%	34	47
CLEC Lines as % Total Landline Lines	8%	49	49
Wireless Industry^{**}			
Wireless Mobile Lines	1 489 120	36	49
Demographics^{***}			
Population	1 984 356	36	51
Population Density per Sq. Mile	16	46	51
Median Household Income	\$ 42 760	41	51

* -- Includes District of Columbia

** -- Line count data taken from the FCC Report "Local Telephone Competition: Status as of December 31, 2007" released in September 2008.

*** -- Census Data: Population and population density estimates for July 2008 available at <http://www.census.gov/popest/gallery/maps/popdens-2008.html>; Median household income is an average of 2006 and 2007 available at <http://www.census.gov/hhes/www/income/statemedfaminc.html>.

As seen in the above table, the majority of measures, including the total landline and wireless line counts, are "in line" with the New Mexico's relative position in terms of population (by which count New Mexico is the 36th largest state out of 51 entities).⁷ The only measure that is standing out is the high share of Resale based CLEC lines.⁸

⁷ Including 50 states and the District of Columbia.

⁸ The relatively high ranking for the percent of UNE Lines (24) is driven by high resale, and low CLEC-owned line counts. Indeed, in absolute terms New Mexico ranks 41 out of 47 states when the number of UNE Lines is considered.

Qwest Operations in New Mexico

Qwest is the largest ILEC in New Mexico. For example, according to the most recent National Exchange Carrier Association's ("NECA") federal Universal Service Fund ("USF") filing, Qwest served 84% of the state's incumbent USF Loops in 2007.⁹ Qwest also serves more urban areas where competitive entry is more likely to occur.

Qwest makes publicly available certain line count and wholesale performance measurement data that provides an insight into the degree of competition faced by Qwest. Specifically, as part of its wholesale performance measures¹⁰ Qwest reports the total number of CLEC-leased products and services in New Mexico, such as the number of resold and UNE services by product type, as well as the "retail" analog (product used as a yardstick when judging Qwest's wholesale service quality) of the CLEC services. These data are useful not only because it provides a breakdown of CLEC lines by the specific product types, but also because it captures up-to-date counts of CLEC lines (the most recent data available is for December 2008). The two tables that follow contain the counts of CLEC-leased circuits for December 2007 and December 2008, and compare the changes in the CLEC-leased circuits during these 12 months to the changes in Qwest's retail analogs for these services.¹¹ Note that in these tables lines are counted in terms of the number of circuits, which is different from the above discussed FCC statistics, where lines are counted on a voice-grade equivalency basis (meaning that one DS1 circuit would be counted as 1 in Qwest's performance measures data, but as 24 voice-grade equivalents in the FCC data).

The first table contains CLECs' total resale line counts in New Mexico:

⁹ This filing, which contains cost and loop count data for all ILECs in the country, is available at <http://www.fcc.gov/wcb/iatd/neca.html>.

¹⁰ These reports, titled "Performance Results" are issued monthly and are available at <http://www.qwest.com/wholesale/results/roc.html>. They contain wholesale performance measures defined in SGAT's Exhibit B "Service Performance Indicator Definitions (PID). 14-State 271 PID Version 8.1."

¹¹ The data were compiled from Qwest's two most recent "Performance Results" report, the denominator of measure MR-8 "Trouble Rate Percent."

CLEC Resale and Qwest Retail Circuit Counts by Service in New Mexico (December 2007 to December 2008)*

Retail Service	CLECs Resale			Qwest's Retail Equivalent			CLECs Market Share in 2008**
	2008	2007	2008 as % of 2007	2008	2007	2008 as % of 2007	
Residential POTS	152	251	61%	416,144	463,911	90%	0%
Business POTS	263	292	90%	131,394	135,619	97%	0%
Centrex 21	99	74	134%	5,483	5,721	96%	2%
PBX	47	90	52%	13,357	15,065	89%	0%
Basic Rate ISDN	70	56	125%	1,112	1,367	81%	6%
Prime Rate ISDN	360	384	94%	43,784	41,371	106%	1%
DS0	4	4	100%	8,411	8,484	99%	0%
DS1	7	11	64%	3,657	3,166	116%	0%
DS3	3	3	100%	403	465	87%	1%

* -- Source: Qwest Performance Results Reports for New Mexico, Denominator of PID measure MR-8.

** -- Calculated as CLEC Circuit Counts divided by the sum of CLEC and Qwest's Circuit Counts for its Retail Equivalent in 2008

The remarkable point identified by this table is that so few services are being leased on a resale basis, especially when compared to the five-digit statewide FCC figure (the figure that was expressed in voice-grade equivalents).¹² The table above shows that Prime Rate ISDN is the most "popular" resale product (currently at 360 circuits), and that the share of resale-based CLECs (depicted in the last column) is close to zero for most services. Also notable is the fact that during the 12 months between December 2008 and December 2007 CLECs lost ground – compared to Qwest – on a number of services, including Prime Rate ISDN, Business and Residential POTS,¹³ PBX and DS1 services.¹⁴

The following table contains CLEC counts for various UNE products leased from Qwest in New Mexico:

¹² As discussed in the previous section, New Mexico statewide CLEC resale-based lines reported for 2007 in the FCC Local Telephone Competition Report were 29,219.

¹³ "POTS" stands for "Plain Old Telephone Service."

¹⁴ This can be seen by comparing the CLECs' and Qwest's columns "2008 as % of 2007." CLECs lost ground in cases where their 12-months change was less favorable than the respective Qwest's measure.

CLECs UNE and Qwest Retail Circuit Counts by Service in New Mexico (December 2007 to December 2008)^{*}

Service	CLECs UNE			Qwest's Retail Equivalent				CLECs Market Share in 2008 ^{***}
	2008	2007	2008 as % of 2007	2008	2007	2008 as % of 2007	Name of Qwest's Retail Equivalent ^{**}	
Unbundled Dedicated Interoffice Transport:								
UDIT DS1	82	85	96%	3 657	3 166	116%	DS [*] Private Line	
UDIT above DS1	38	37	103%	403	465	87%	Private Line above DS [*]	
Unbundled Loops:								
Analog	4 937	6 604	75%	547 541	599 530	91%	Bus and Res POTS	1%
2 Wire Unloaded	793	1 086	73%	1 110	1 364	81%	BRI ISDN	
DS1-Capable	845	747	113%	3 657	3 166	116%	DS [*] Private Line	19%
xDSL-Capable	88	68	129%	3 655	3 166	115%	ISDN	
ISDN-Capable	225	317	71%	1 110	1 364	81%	BRI ISDN	
ADSL-Qualified	772	684	113%	1 110	1 364	81%	Qwest DSL	
Enhanced Extended Loops:								
EEL DS1	737	845	87%	3 657	3 166	116%	DS [*] Private Line	17%
EEL DS3	24	24	100%	NA	NA	NA	NA	

^{*} -- Source: Qwest Performance Results Reports for New Mexico. Denominator of P/D measure MR-8.

^{**} -- Based on P/D measure definitions contained in NM SGAT, Exhibit B.

^{***} -- Calculated as CLEC Circuit Counts divided by the sum of CLEC and Qwest's Circuit Counts for its Retail Equivalent in 2008.

This table shows that during the 12 months between December 2008 and December 2007 CLECs UNE circuit counts decreased for many services, including analog, 2-wire unloaded and ISDN-capable loops, DS1 Enhanced Extended Loops (“EELs”) and DS1 Unbundled Dedicated Interoffice Transport (“UDITs”). Similarly, CLECs lost ground – compared to Qwest’s retail analog – on all of these UNE services, as well as DS1 Capable loops (which grew, but at a smaller rate than Qwest’s retail analog “DS1 Private Line”). Also notable in this table are the measures of CLEC market shares for POTS and DS1 private line services: While the share of UNE-based CLECs in the POTS market is very small at 1%, the CLECs’ share in the DS1 market is relatively high. Specifically, DS1 Capable UNE loops constitute 19% of the combined Qwest DS1 Private Line/CLEC DS1 UNE loop market.¹⁵

¹⁵ We do not include DS1 EELs in this calculation, and instead report their market share separately (at 17%) because it is not clear from Qwest’s Performance Measure reports whether the loop portion of DS1 EELs is also double-counted under the UNE Loop section. Further, we recognize that regulators chose Qwest’s “retail analog” services to provide a yardstick for service quality, rather than a perfect measure of comparable retail markets.

Access Line Loss Is an Incomplete Metric of Competition

Another source of data that provides certain insight into the geography of competition in New Mexico is Qwest's database of its retail POTS line counts by wire center.¹⁶ QSI compared the most recent available line counts (for 2007) with the line counts five years ago (for 2002). While such comparison does not provide a perfect measure of changes in Qwest's retail lines due to competition (for example, it would not capture changes line counts attributable to population changes or the fact that losses in the secondary residential line used for dial-up are compensated by increased subscription to Qwest's DSL service), it nevertheless may be useful. The following table contains the results of this comparison:

¹⁶ Qwest's most recent retail line counts by wire center are contained in Qwest's Iconn database posted at http://www.qwest.com/cgi-bin/iconn/iconn_centraloffice.pl.

**Qwest's New Mexico Retail Business and Residential Line Counts by Wire
Center: Change between 2002 and 2007***

Office Name	Switch Code	Business Lines			Residential Lines		
		2007	2002	2007 as % of 2002	2007	2002	2007 as % of 2002
ALBQ ACADEMY	ALBQNMACDS0	8,587	7,913	109%	21,115	27,096	78%
ALBQ CORRALES	ALBQNMCRDS0	6,747	6,749	100%	26,235	31,770	83%
ALBQ EAST	ALBQNMHEADS0	8,767	10,622	83%	16,893	26,099	65%
ALBQ MAIN ACD	ALBQNMMADES1	-	-	-	2	-	-
ALBQ MAIN	ALBQNMMADES2	22,550	33,283	68%	10,261	15,786	65%
ALBQ NORTHEAST	ALBQNMNEDS0	10,979	13,261	83%	39,607	56,265	70%
ALBQ NORTH	ALBQNMNODS0	9,753	10,267	95%	9,857	11,900	83%
ALBQ RIO RANCHO	ALBQNMRRDS0	3,806	3,751	101%	18,779	20,233	93%
ALBQ SAN MATEO	ALBQNMMSDS0	14,610	18,466	79%	10,110	15,632	65%
ALBQ SOUTHWEST	ALBQNMSSWDS0	2,439	2,444	100%	10,392	12,367	84%
ALBQ WEST	ALBQNMWEDS0	3,951	3,957	100%	20,503	23,223	88%
ALAMOGORDO MAIN	ALMGNMMADES0	4,524	5,814	78%	11,729	14,938	79%
ALAMOGORDO WEST	ALMGNMWEWS1	212	333	64%	369	1,597	23%
ANGEL FIRE	ANFRNMMAWS1	607	669	91%	2,915	2,918	100%
ANTHONY	ANTHNMMAWSA	768	722	106%	3,203	3,892	82%
ARTESIA	ARTSNMMAWS1	2,231	2,915	77%	3,188	5,565	57%
AZTEC MAIN	AZTCNM03RS1	1,728	1,819	95%	5,509	6,515	85%
AZTEC BLOOMFIELD	AZTCNMBLRS1	1,518	1,275	119%	5,333	6,241	85%
BELEN (SNSE)	BELNNMMADES0	1,675	1,739	96%	7,338	8,822	83%
BERNALILLO	BRNLNMMADES0	2,445	2,448	100%	9,251	9,127	101%
BAYARD	BYRDNMMAWS1	458	587	78%	2,185	2,563	85%
CHAPARRAL	CHAPNMMAWS1	346	220	157%	2,524	3,113	81%
CLOVIS MAIN	CLVSNMMADES0	3,211	5,185	52%	8,820	13,625	65%
CLOVIS WEST	CLVSNMWEWS1	295	346	85%	395	1,696	23%
CIMARRON	CMRNNMMAWS1	258	226	114%	494	535	92%
DEMING	DMNGNMMADES0	2,506	2,952	85%	6,638	7,886	84%
ESTANCIA	ESTNNMMAWS1	395	400	99%	1,734	1,815	96%
FARMINGTON MAIN	FRTNNMMADES0	11,849	13,590	87%	14,499	18,058	80%
FARMINGTON WEST	FRTNNMWEWS1	593	725	96%	2,449	3,133	78%
GALLUP EAST	GLLPNMEARS1	198	199	99%	706	871	81%
FT WINGATE	GLLPNMFWS1	105	136	77%	403	489	82%
GALLUP MAIN	GLLPNMMADES0	5,591	6,851	82%	6,559	8,351	78%
GRANTS MAIN	GRNTNMMADES0	2,398	2,640	91%	4,265	5,272	81%
HATCH	HATCNMMAWS1	493	525	94%	1,470	1,681	87%
LAGUNA ACOMA	LAACNM01RS1	696	697	100%	1,703	1,976	86%
LA MESA	LAMSNMMAWS1	362	366	99%	2,035	2,456	83%
LOS ALAMOS	LSALNMMADES0	2,699	4,004	67%	4,286	5,935	72%
WHITE ROCK	LSALNMWEWS1	311	410	76%	2,209	2,629	84%
AMBER MESA	LSCRNM16DS0	626	570	110%	6,420	5,794	94%
LAS CRUCES DS0	LSCRNMMADES0	12,328	14,217	87%	20,721	27,801	75%
LAS CRUCES TELSHOR	LSCRNM18DS0	4,627	4,957	93%	8,489	11,462	74%
LOS LUNAS MAIN	LSLNNMMADES0	2,367	2,238	106%	10,083	11,939	84%
LOS LUNAS NORTH	LSLNNMNSRS1	615	636	97%	2,941	3,486	84%
LAS VEGAS	LSVGNMMADES0	2,713	3,693	73%	6,595	8,092	82%
MORIARTY	MRTYNMMAWS1	824	847	97%	2,542	2,957	86%
MOUNTAIN AIR	MTNRNMMAWS1	236	185	128%	832	824	101%

Office Name	Switch Code	Business Lines			Residential Lines		
		2007	2002	2007 as % of 2002	2007	2002	2007 as % of 2002
PENA BLANCA	PNBLNMMARS1	289	846	34%	1,056	1,162	91%
PENASCO	PNSCNMMARS1	191	226	85%	1,256	1,190	106%
PORTALES	PTLSNMMARS1	1,073	1,877	57%	3,026	5,527	55%
QUESTA	QUSTNMMARS1	301	317	95%	1,386	1,444	96%
RATON	RATNMMADS0	1,540	1,860	83%	3,044	3,667	83%
RED RIVER	RDRVNMMARS1	294	327	90%	953	1,034	92%
ROSWELL MAIN	RSWLNMMADS0	7,359	9,800	75%	14,160	19,189	74%
ROSWELL SOUTH	RSWLNMSORS1	514	579	89%	937	1,285	73%
SOCORRO	SCRRNMMARS1	1,694	1,824	93%	3,261	4,283	76%
SILVER CITY	SLCYNMMADS0	2,681	4,279	63%	6,819	8,304	82%
SANTA FE - ELDORADO	SNFENM5ORS1	457	454	101%	4,258	5,122	83%
SANTA FE MAIN	SNFENMMADS0	16,052	18,976	85%	22,614	27,867	81%
SANTA FE NORTH	SNFENMNORS1	769	729	105%	2,354	2,794	84%
SANTA FE SW	SNFENMSWDS0	7,563	12,160	62%	17,960	21,572	83%
SANTA TERESA	SNTSNMAARS3A	1,636	1,601	102%	3,816	5,039	76%
SPRINGER	SPRNMMARS1	331	429	77%	601	689	87%
TAOS MAIN	TAOSNMMADS0	4,574	4,981	92%	8,247	9,126	90%
TAOS NORTH	TAOSNMNORS1	375	354	106%	2,595	2,638	98%
TUCUMCARI	TCMCNMMARS1	1,320	1,613	82%	2,115	2,768	76%
TJERAS	TJRSNMMADS0	1,388	1,294	107%	11,202	12,523	89%
State Total		215,498	261,375	82%	466,245	592,649	79%

* -- Source: Qwest's Iconn Database available at http://www.qwest.com/cgi-bin/iconn/iconn_centraloffice.pl.

As seen from the last row of the above table, between 2002 and 2007 Qwest lost 18% of business and 21% of residential retail POTS lines.¹⁷ In absolute numbers the losses were 45,872 business and 126,399 residential lines. However, from Qwest's ARMIS report 43-08 (which report the same statewide measures) we know that approximately 43,000 residential lines lost (or, equivalently, a third of residential line losses) between 2002 and 2007 were losses of secondary lines (which often means that Qwest lost a POTS line but gained a higher-revenue DSL line). In other words, when analyzing changes in residential line counts presented in the above table it is important to keep in mind that likely one third of the losses may have been due to the product substitution to Qwest DSL. This is consistent with the fact that despite access line losses, Qwest's financial performance has been robust.

The above table also shows that approximately 40% of Qwest's retail lines in New Mexico are located in Albuquerque wire centers. These wire centers lost, on aggregate, 17% of business and 24% of residential retail lines, with New Mexico's largest wire center, Albuquerque Main, losing significantly more lines at 32% of business and 35% of residential lines.

¹⁷ Calculated at 100%-82% and 100%-79% correspondingly.

Impairments to the Development of Effective Competition

New Mexico is not an easy state for CLEC operations. Because of the low population density costs are relatively high, resulting in low operating margins. Competition is thus focused on niche markets, with the largest players concentrated in Albuquerque and a handful of other smaller population centers.

While the past few years have seen a marked decrease in the competitiveness of the industry, largely as a result of several FCC decisions that overturned previous pro-competition policies, New Mexico has seen even greater declines, as shown in the previous section.

Most competitive growth nationwide has been in cable-based lines; a short-lived multi-carrier market is becoming more of a duopoly. UNEs, a common avenue of market entry and competition, have declined precipitously since the FCC's 2003 Triennial Review Order reduced their availability, forcing CLEC to purchase more expensive alternatives. As discussed above, in New Mexico, the number of UNE-based lines fell from 47,000 in January, 2004 to 21,000 in December, 2006. It has since edged up to 26,000 as of the end of 2007.

Cable system services are primarily provided to residential customers. But New Mexico's cable systems are far behind the national average in providing non-television services. While 96% of cable lines nationwide provide cable modem service (a prerequisite – though not a sufficient condition – for cable telephony), only 77% of New Mexico's cable systems offer it.¹⁸ Again, this is near the bottom of state rankings.¹⁹ It is also important to keep in mind that cable companies have a limited network footprint, and as such, do not pass every residence in New Mexico.

CLECs (other than cable-based CLECs) in New Mexico primarily focus on business customers. Only 20% of CLEC lines are provided to residential subscribers, vs. a national average of 42%.²⁰ Again, this seems to be heavily influenced by cable telephony penetration. The states with the highest CLEC penetration (Rhode Island, South Dakota and Arizona) have strong cable telephony markets; that explains why, for example, 71% of CLEC lines in South Dakota are residential lines.²¹ By way of comparison, 69% of ILEC lines in New Mexico are residential, as are 64% of ILEC lines in both South Dakota and Rhode Island.²²

The causes of limited competition in New Mexico may be diverse. Here are some of the issues that may impair competition in New Mexico.

¹⁸ FCC report, *High Speed Services for Internet Access, Status as of December 31, 2007*, Table 14, High Speed Lines by State.

¹⁹ The exact rank is unclear because numbers for several states and the District of Columbia are redacted; but only one state, Arkansas, reports a lower percentage.

²⁰ FCC Report "Local Telephone Competition: Status as of December 31, 2007," Table 12.

²¹ *Id.*

²² *Id.*

Qwest's Wholesale Rates Produce a "Price Squeeze"

When compared to other states, Qwest-New Mexico wholesale rates for many services stand out as too high. One example is New Mexico's current recurring rate for the basic 2-wire UNE loop, which is \$20.43 per month in the lowest-cost Zone 1 (zone that includes the major urban and suburban wire centers). The basic 2-wire loop is as high as \$100.98 in Zone 3, which includes a few rural wire centers. These rates were raised in 2007; the earlier rates ranged between \$16.27 and \$30.85. Compare these rates to the Qwest's other states, for example, South Dakota, where rates for 2-wire UNE loops range between \$15.20 and \$21.77. Examples of Qwest's rates in other states include Minnesota \$5.98-\$15.66; Colorado: \$5.91-\$32.41; and Arizona \$9.05-\$36.44. Examples of 2-wire UNE loops for some "rural" states in other BOC's serving territory include Texas (AT&T) \$12.26-\$16.34; Mississippi \$11.01-\$13.10 and Maine (Fairpoint/Verizon rates) \$11.44-\$18.75.

While it may be plausible that relatively low population density states like New Mexico would have loop rates higher than loop rates in more dense states (because customer density is one of the most important cost drivers for loop facilities), it is also unreasonable that the New Mexico "highest density" UNE zone (the zone that includes metropolitan Albuquerque, which is more urbanized than some other states' largest cities) has rates similar to rates in South Dakota's "lowest density zone." The following table provides further comparison of New Mexico wholesale rates with wholesale rates in other small low population density states (the six Qwest states that have been discussed above):

Qwest-New Mexico Wholesale Rates Compared to Qwest Rates in Other Low Population Density States*

Rate	NM	NE	ID	MT	SD	ND	WY
Resale Discount (POTS Lines)	15.05% / 15.34%	16.00%	18.25% / 19.37%	18.10%	15.55%	16.15%	13.00% / 15.70%
2-wire UNE Loop Recurring Rate							
Base Rate				\$23.10			\$22.39
Zone 1	\$20.43	\$12.14	\$15.65	\$23.90	\$15.20	\$14.53	\$31.70
Zone 2	\$68.37	\$28.11	\$23.76	\$27.13	\$16.56	\$24.49	\$35.33
Zone 3	\$100.98	\$62.50	\$40.50	\$29.29	\$21.77	\$55.47	\$40.45
2-wire UNE Loop Installation Charge							
Manual	\$103.65	\$59.81	\$59.81	\$59.81	\$59.81	\$59.81	\$120.80
Mechanized	\$69.91						
DS1 UNE Loop Recurring Rate							
Base Rate							\$90.85
Zone 1	\$72.23	\$74.88	\$86.48	\$96.46	\$120.17	\$74.88	\$105.07
Zone 2	\$72.23	\$78.63	\$86.46	\$96.46	\$120.93	\$78.63	\$114.63
Zone 3	\$72.23	\$83.57	\$99.96	\$96.46	\$123.65	\$83.57	\$118.05
DS1 UNE Loop Installation Charge							
	\$130.01	\$144.75	\$135.78	\$160.32	\$189.06	\$115.22	\$210.81
Qwest Local Services Platform™ Port Rates (per Line per Month)							
Business Analog Basic Port	\$ 7.07	\$ 9.43	\$ 6.21	\$ 6.45	\$ 8.80	7.23	\$ 4.73
Residential Analog Port	\$ 5.29	\$ 4.27	\$ 3.14	\$ 3.38	\$ 3.64	2.27	\$ 4.44

* Resale Discounts and UNE Rates are from Qwest's ICA Negotiation templates Exhibit A, available at <http://www.qwest.com/wholesale/clecs/sgatewiring.html>. Qwest Local Service Platform is Qwest's Commercial offering that substitutes unbundled Local Switching and UNE-P switching components (available at <http://www.qwest.com/wholesale/clecs/commercialagreements.html>).

As shown in this table, four out of six "low population density" states have lower 2-wire UNE loop rates in the lowest-cost zone than New Mexico (Nebraska, Idaho, South Dakota and North Dakota). As discussed above, only Nebraska has an urbanized area similar to the Albuquerque area (the Omaha MSA), while other states do not even have a "top 100 MSA." A further confirmation that the New Mexico 2-wire recurring UNE loop rates are too high comes from a comparison of these rates to Qwest's New Mexico DS1 UNE loop rate (\$72.33 in all zones): In Zone 3 DS1 UNE loop costs almost \$30 less than a basic analog 2-wire loop, and in Zone 2 a 2-wire loop costs almost as much as a DS1 loop. Because a DS1 loop is essentially *two* 2-wire loops *plus* electronics, this cost relation does not make any sense.

The table above also shows that New Mexico has higher installation charges for 2-wire loops than all other states in this table except for Wyoming. It also shows that New Mexico has the smallest resale discount out of these states. Therefore, even more unexpected is the above discussed observation that based on the FCC data, New Mexico CLECs rely on resale more than any other state in the nation other than New Jersey and Maryland.

Finally, the above table lists Qwest's local switching port rates offered under Qwest's "Commercial agreements" – agreements that replaced cost-based rates for unbundled local switching. As seen from the table, local switching port rates from commercial agreements vary widely across states and differ by the end-user (business versus residential). Currently Qwest offers the highest residential port rate in New Mexico (\$5.29 per month) compared to other low population density states. For business ports, the New Mexico rate (\$7.07) is on the higher end of the observed rate variations, which range from \$4.73 in Wyoming to \$9.43 in Nebraska. It is also worth comparing the New Mexico basic port rates offered in Qwest's current commercial agreements (\$5.29 residential port and \$7.07 business port) to the cost-based basic port rate that existed in New Mexico prior to TRO, which was \$2.05 a month. In other words, when price regulation was removed from the unbundled switch port rates, purportedly because of competitive alternatives, Qwest New Mexico increased these rates approximately three-fold. Such a result is contrary to what one would expect in a "competitive" market.

The high rates for wholesale services necessary to provide basic residential and business line services create a price squeeze when the cost faced by a UNE-based CLEC is compared with Qwest's basic service charges. The basic residential rate of \$13.50 (before the subscriber line charge) is far below the UNE cost of the loop. The \$38.00 month-to-month business line rate, bundled with three features, provides a slight window of opportunity, but Qwest's 3-year commitment rate of \$30.40 provides less of a profit opportunity, and locks in ratepayers.

Collocation in Qwest's Wire Centers is Costly

In order to use UNE Loops, a CLEC must collocate at the ILEC wire center. Qwest, as a general rule, has the highest *nonrecurring* collocation charges of the major ILECs. Collocation prices are a combination of many rate elements. Cageless physical collocation is the least-costly way to access loops for UNE-L and will be used for reference here.

The Qwest-New Mexico rate for collocation includes a nonrecurring charge of \$20,970.67 for "Space construction for two bays" (\$478.65 is waived for a single bay.) This rate, while typical of Qwest, is unjustified because cageless collocation requires no space construction. The CLEC brings a rack to the designated site and installs its equipment there. The only work that Qwest needs to do is locate an empty spot in the collocation room and mark the floor with chalk or tape so that the CLEC knows where to put its rack.

Qwest has additional nonrecurring charges for power installation (\$3,563.29 for the smallest size, 20 Amps) and cross-connect cables (several thousand dollars for a typical collocation, a mix of line sizes). These activities actually do involve a cost. Some ILECs permit or require the CLEC to hire an approved vendor of its choice to do this work, but Qwest does not offer this option. Hence the nonrecurring charge for a typical collocation will approach \$30,000.

A small cageless collocation in other ILEC territories is more likely to have a nonrecurring charge in the range of \$10,000. For a CLEC that might be able to put 200 lines into a wire center over the life of a collocation, the disparity between Qwest's rates

and cost-based rates are estimated to be about \$100 per line. Because these moneys are paid up front, it is especially difficult for smaller cash-strapped CLECs to deal with. Other than the "space construction" charge, Qwest's collocation rates, monthly and nonrecurring, appear to be in line with the rates of other states. Hence the Commission could do much to promote competition by revisiting the established rate for collocation in Qwest's central offices.

Transit Rates are High

According to the FCC, "transiting occurs when two carriers that are not directly interconnected exchange nonaccess traffic by routing the traffic through an intermediary carrier's network. Typically, the intermediary carrier is an incumbent LEC and the transited traffic is routed from the originating carrier through the incumbent LEC's tandem switch to the terminating carrier."²³ By way of example, transiting works as follows: a customer of Provider A (originating carrier) calls a customer of Provider B (terminating carrier), and since Providers A and B are not directly interconnected, they utilize another carrier's transiting service as an indirect interconnection so that the call can terminate to Provider B's customer.

In the absence of transiting, each carrier (CLEC/CMRS²⁴/small LECs) would be forced to establish direct interconnection trunks with every other CLEC/CMRS/small LEC carrier with which it exchanges local traffic in order for all of its customers' calls to be completed. Duplicating the incumbent's network has never been viewed as an economic way to enter the market, as it is simply not cost effective or efficient to establish these multiple, duplicative networks.

A New Mexico CLEC typically interconnects with Qwest at the Albuquerque tandem. Local traffic exchanged between Qwest and the CLEC is subject to reciprocal compensation (and is governed by Section 251(b)(5) of the 1996 Act). When the CLEC interconnects with a wireless carrier or another CLEC, though, the Qwest tandem is providing "transit" service.²⁵ As opposed to reciprocal compensation (where the traffic typically goes in both direction, from Qwest to CLEC, and from CLEC to Qwest), Qwest (and never the CLEC) is the only provider of tandem transit service for virtually any CLEC in the state.²⁶

Up until recently Qwest applied its cost-based reciprocal compensation rates to transit traffic. For example, as recent as its February 11, 2005 version of its New Mexico SGAT Exhibit A (the rate sheet), section "Local Transit" simply referenced the tandem transport and switching elements of the reciprocal compensation section and listed "6 miles" as the applicable mileage. Under that provision of SGAT the effective transit rate was

²³ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, Federal Communications Commission, 20 FCC Rcd 4685; 2005 FCC LEXIS 1390, FCC 05-33, rel. March 3, 2005 ("ICF FNPRM"), ¶ 120.

²⁴ CMRS stands for Commercial Mobile Radio Service.

²⁵ In theory, CLECs and wireless carriers can interconnect directly, bypassing the ILEC tandem, but this is impractical for low-volume routes.

²⁶ While alternative tandem providers are becoming available in some states, they are not available everywhere, and ILECs continue to provide the bulk of tandem services.

\$0.001948 per minute.²⁷ Yet, recently Qwest revised its policy and started offering a much higher rate (\$.0045 per minute) in its ICA negotiation templates. An additional charge of \$.0025 per record is now applied for call detail (Category 11 Mechanized Record Charge, per Record), which is sometimes required in order to properly identify and bill the counterparty of each call.

Interconnection Terms are Slanted

Incumbent carriers have advantages in simple issues of network interconnection. Interconnection is the physical linking of local networks for the purpose of exchanging traffic between customers subscribed to the respective networks.²⁸ In order for CLECs and Qwest to exchange traffic between their respective customers, they must interconnect their networks, and the physical location at which that interconnection takes place is the Point of Interconnection or "POI." The POI is also the financial demarcation point that defines where one party's financial obligations end and the other party's begin.

ILEC networks were developed in monopoly environments and are ubiquitous, so they can meet other carriers anywhere at minimal expense. This is reflected in the FCC's "any technically feasible point" and "single Point of Interconnection" ("POI") rules, but they are not always agreed to in interconnection arbitrations. These and other details make competition more difficult and result in time consuming and expensive arbitrations before the Commission. A so-called level playing field is anything but level when the players are so different and have different incentives.

Qwest's boilerplate terms and conditions (currently the "Negotiation Template 12/29/08") reflect Qwest's ongoing attempts to make all interconnection agreements the same and, among other things, to ban Virtual NXX (CLEC foreign exchange) traffic. This service is used for serving ISP dial-up traffic which, while declining, is still significant, especially in rural areas. Qwest, as the incumbent, has physical switches and buildings across its territory; CLECs do not. Hence CLECs generally utilize a more aggregated network architecture in which a single switch (often a softswitch) serves a wide area out of a single site. This architecture makes it logical to place modems near a CLEC switch, rather than near the calling end-users. Qwest considers this service to be "virtual NXX" and has asked states to ban it or treat it as switched access traffic. (To date, Oregon has been the only Qwest state to ban it.)

FCC rules normally require ILEC-provided entrance facilities to be charged to the originating carrier on a proportion-of-use basis. But for both VNXX and local ISP-bound traffic, Qwest disclaims that responsibility: "For purposes of determining the relative use factor, the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic."

²⁷ Calculated as \$0.001616 (tandem switching) + \$0.000302 (tandem transport for band 0 to 8 miles fixed) + 6 miles * \$0.00005 (tandem transport for band 0 to 8 miles per mile).

²⁸ 47 C.F.R. § 51.5 defines "Interconnection" as: "the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic." See also *In The Matter Of Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15,499, ¶ 176 (rel. Aug 8, 1996) ("*Local Competition Order*"). ("We conclude that the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic.")

Qwest also disclaims all reciprocal compensation for VNXX traffic, and states, "Qwest's agreement to the terms in this paragraph is without waiver or prejudice to Qwest's position is that it has never agreed to exchange VNXX traffic with CLEC." It later states, "CLEC represents and warrants that it is serving End User Customers physically located within each local calling area for which it wishes to exchange traffic within Qwest territory." We suggest that these terms do not comport with the most recent (11/5/08) FCC Order on Remand concerning ISP-bound traffic, which does not limit its "just and reasonable" .0007 rate to "local" traffic.

Qwest's boilerplate ICA terms require that intraLATA toll be delivered on separate trunks from its Local Interconnection Service ("LIS") trunks. Since the meet-point trunks used for interLATA toll calls are also separate, this creates a requirement for three trunk groups into the tandem. The two toll trunk groups are charged at access tariff rates, which are much higher than the TELRIC-based LIS trunk rate specified in the ICA. In a large state like New Mexico, this can be a serious hurdle for a provider not near the tandem (Albuquerque).

PRELIMINARY CONCLUSION

New Mexico law dictates that "[i]n determining whether a service is subject to effective competition, the commission shall consider the following:

- (1) the extent to which services are reasonably available from alternate providers in the relevant market area;
- (2) the ability of alternate providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions; and
- (3) existing economic or regulatory barriers."²⁹

The above analysis, consistent with the parameters identified by the New Mexico statute, showed that competition in the New Mexico telecommunications industry is at most in its early stages of development, lagging behind *every* other state in the country. Our conclusion is that absent a few potential areas (e.g. Albuquerque), the vast majority of Qwest's serving territory in New Mexico is not subject to effective competition.

Qwest dominates the retail New Mexico markets because of its ownership of essential bottleneck facilities, which continue to be the major economic barrier to competitive entry. New Mexico's low population density makes low of the priority list for competitors with limited resources to build their own facilities; which, because of the large fixed cost, is economical only when certain large volumes are reached. Hence, traditional wireline competitors typically use the ILEC's wholesale services (which may include total service resale, UNE, commercial agreements and tariffed access services) to reach end users. In New Mexico competitors rely heavily on Qwest's total service resale – a business model that is typical for the "infancy" stage of competition and that is not viable in the long run because it does not allow the CLEC to distinguish its products from

²⁹ NMSA 1978, Section 63-9A-8(B).

Qwest's products. Further, as noted herein, total service resale is not effective competition.

A UNE-based entry model has proved somewhat success in other states. In such a business model the CLEC leases Qwest's "last mile" facilities and, as its business grows, deploys its own switching and fiber transport facilities. Yet the success of this business model is heavily dependent on the reasonableness of UNE, collocation and interconnection rates (as well as their relationship to rates for Qwest's retail products for which CLECs compete). As explained above, Qwest's UNE, collocation and interconnection rates in New Mexico are unreasonably high, even when compared to other "rural/frontier" states. Similarly, Qwest's business practices related to other aspects of wholesale services, including the Interconnection Agreement ("ICA") negotiations and billing practices, created additional operation difficulties to CLECs. Experience shows that the level of UNE rates and the ICA terms and conditions are determined not only by "objective" cost drivers (inputs to Qwest cost models) and business needs, but also by the degree of CLEC legal involvement in UNE cases and contract negotiations. New Mexico CLECs are in a position of Catch 22: Because there are so few of them and because they are not strong, they cannot expend significant resources to investigate and dispute Qwest's unreasonable rates, terms and conditions as CLECs can in larger states.

A more recent development in the New Mexico telecommunications markets is cable company entry in the voice communications arena, in which they use their own switching and "last mile" facilities to provide telephone over broadband IP facilities. While cable companies do serve *some* of Qwest's communities in New Mexico, the availability of voice phone services from these companies is limited. First, in order to provide voice communications services, cable companies need to upgrade their hybrid fiber/coaxial networks (transport and switching). Second, cable companies cater mostly to residential customers, which is where they have network facilities. And third, many end-users may find that cable telephony simply does not offer "affordable" telephone packages. For example, Comcast New Mexico's *cheapest* stand-alone local residential digital phone offering is currently \$34.95 per month.³⁰ Further in order to use the Comcast service, one must have a broadband connection, which increases the ultimate cost of the service. This cost, plus perceived concerns over power outages and E911 capabilities, would seem to show that the Comcast service is not a valid alternative to Qwest's basic residential line rate of \$13.50 per month (even if Qwest's subscriber line charges are factored in).

Finally, the near future viability of the business model that relies heavily on over-building facilities (as opposed to leasing the existing incumbent's facilities) has been questioned by a recent Deloitte TMT Report.³¹ This report noted as follows:

In the past, the availability of inexpensive financing combined with rapid revenue growth had made duplicate networks viable. But with hard economic times, 2009 may see a fundamental change of ideology, with

³⁰ The plan is called "Local with More Only." See <https://www.comcast.com/Corporate/About/PhoneTermsOfService/ComcastDigitalVoice/StatePricingLists/NewMexico.html>.

³¹ See <http://www.deloitte.com/dtt/article/0,1002,cid%253D243599,00.html>.

regulators determining that a single network with shared ownership and open access is the best way forward.³²

In other words, the Deloitte TMT Report suggests that competition from over-builders such as cable companies would likely slow down, and the importance of UNE and other wholesale alternatives should increase as the economy is facing hard times.

Therefore, it becomes even more important that the Commission undertake additional efforts to improve the business environment in which CLECs operate. The Commission should not take at face value Qwest's claims of increased competition and instead, should impose the burden of proof on Qwest and undertake a careful geographically-disaggregated market-by-market analysis similar to the one undertaken by the FCC in Qwest's forbearance docket.³³ The Commission should recognize the inextricable link between wholesale and retail competition and define the effective retail competition in relation to wholesale markets, which requires evaluation of Qwest's rates and practices related to leasing essential bottleneck facilities. The Commission should revisit Qwest's UNE rates. The Commission should enforce previous orders related to competitive practices, such as the imputation standard.

³² Id.

³³ See Qwest's Forbearance Order.