I. INTRODUCTION - QWEST'S ENTRY INTO THE INTERLATA LONG DISTANCE MARKET IS NOT YET IN THE PUBLIC INTEREST

1. The policy decision by Congress as expressed in the Federal Telecommunications Act of 1996 is, to put it quite simply, a quid pro quo. In exchange for opening their local markets to competition a Regional Bell Operating Company ("RBOC," "BOC," "Baby Bell," or "Bell") is offered the opportunity to enter the interLATA long distance markets, thereby dissolving the primary restriction of the modified final judgement put in place by Judge Green in the AT&T antitrust case.

2. The Public Counsel Section of the Washington State Attorney General's Office[1] ("Public Counsel") believes Qwest's entry into the InterLATA long distance markets is not yet in the public interest. Qwest has failed to carry its burden of persuasion to demonstrate that its local markets, particularly the residential market, is irrevocably open to competition according to the record now before the Washington Utilities and Transportation Commission ("Commission").[2] Additionally, Qwest is not currently in compliance with the 14-point checklist, the Qwest Performance Assurance Plan ("QPAP") and Operations Support Systems ("OSS") testing is not yet complete.[3] Until all of these issues are resolved to the Commission's satisfaction the Commission should find Qwest's §271 application not in the public interest.

3. It is important to note that the OSS review and QPAP proceedings have been parallel but separate tracks to the 14-point checklist/SGAT review occurring in Washington in this

[1] RCW 80.01.100 and RCW 80.04.510 as recognized in *U S West v. Utils. And Transp. Comm'n*, 134 Wn.2d 74, 80, 949 P.2d 1337 (1997).

[2] For ease of reference the residential market and the long distance market will be referred to in this brief in the singular although each of these markets can, and often is, defined as containing a number of distinct markets or market segments.

[3] See orders from the first through the third workshops. Qwest has filed numerous revised SGATs and "SGAT Lite(s)," some of which resolved wholly, or in part, some of the issues of non-compliance identified in the Commission's orders. Public Counsel recommends that prior to the concluding adjudicatory phase (pursuant to the Commission's Order adopting Interpretive and Policy Statements) that a final "master issues matrix" be developed and distributed. This matrix would identify all contested issues of non-compliance with Commission orders so that all parties would have a clear understanding of what areas of non-compliance with the federal law remain and provide a framework for parties to litigate these issues prior to the Commission's final recommendation regarding Qwest's §271 application to the FCC.

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proceeding. It is time to bring these together and create a "feedback loop" of information by which the Commission can quantitatively and qualitatively evaluate Qwest's performance as a wholesale provider to its competitors. Public Counsel recommends the Commission approve a strong QPAP with significant penalties and no cap in order to deter anti-competitive conduct by Qwest. This QPAP should be in place upon approval by the Commission and Qwest should be required to publish the results of QPAP calculations therefrom on a monthly basis. Qwest should comply with the QPAP for 3 months without significant penalty using on-going performance data to demonstrate its markets are open to competitors. The Commission's approval of Qwest's application to the Federal Communications Commission ("FCC") should be conditional on Competitive Local Exchange Company ("CLEC") utilization of the Qwest OSS at full commercial volumes as described above as a check against the types of post-entry problems that have arisen in other states and to demonstrate Qwest's commitment to act as a wholesaler in a pro-competitive manner.

II. STANDARD OF REVIEW

A. The FCC Shall Consult With The Washington Commission To Verify Qwest's Compliance With Federal Law.

4. The Act requires the FCC to consult with State Commissions regarding the BOCs compliance with the terms of the Act.

> (B) Consultation with State Commissions. - Before making any determination under this subsection the Commission shall consult with the State Commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).

47 U.S.C. §271(d)(2)(B). (emphasis added)

5. As discussed below, this section of the Act has been interpreted to provide state Commissions such as the Washington Commission with broad authority to examine a BOC §271 application. The Commission's scope of authority is broader than the FCC's authority in this instance. Congress reserved to the states the authority to make a determination regarding the public interest, presumably regarding states as the finder of fact best able to make such a finding

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that is, by its nature, extremely state specific. *Transcript of Washington §271 Workshop Four and follow-up workshop* at 5028 ("Tr."). The state analysis is critical, and the FCC's deference to State Commissions on this point of inquiry is notable. The state Commissions have a consultative role that should be exercised with diligence. The Commission should consider relevant evidence including Washington-specific experience with Qwest.[4] If it does so, the Commission will note a pattern of conduct that also weighs against a public interest finding at this time.

B. The Act Requires The FCC To Find The Application In The Public Interest.

6. The Act also requires the FCC, and by extension, the Washington Commission in its recommendation, to make a finding regarding whether the Qwest's application is in the public interest.

> (C) The requested authorization is consistent with the public interest, convenience, and necessity. The Commission shall state the basis for its approval or denial of the application.

47 U.S.C. §271(d)(3)(C).

7. The Commission itself has found that consideration of the public interest element of the Act is within its obligation to consult with the FCC. See *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996, Order on Investigation,* Docket No. UT-970300 at p. 11 ("Order on Investigation"). The Commission can define the public interest broadly. Exh. 1070T at 7.

8. It is Public Counsel's position that viable competition in the residential markets is required for a finding in the public interest. *Id.* at 34-35. Tr. at 5041. As discussed in detail below, Public Counsel believes the record currently before the Commission in this docket weighs against such a finding at this time.

[4] In fact, Qwest has invited the Commission to do so. Tr. at 4873.

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C. Qwest Bears The Burden Of Proof.

9. As the applicant, Qwest bears the burden of persuasion in this proceeding to demonstrate that it has irrevocably opened its local markets, both business and residential, to competition by satisfying all the requirements of Section 271 of the Act. 47 U.S.C. §271(d)(3). This would be true even if no party opposed Qwest's application. Federal Communications Commission, *Memorandum Opinion and Order In the Matter of Application by Ameritech Michigan to Section 271 of the Telecommunications Act of 1934, as amended, to Provide In-Region, InterLATA Service in Michigan*, CC Docket 97-137, August 19, 1997 at 43 ("FCC Michigan").

10. Qwest has failed to meet its burden of persuasion at this time as to the public interest test and should be invited to request the Commission to re-examine its application with regard to the public interest test at such time as it has resolved all other aspects of its application (i.e. after the Commission has approved a QPAP, after its OSS testing is complete, and after Qwest has produced ninety days of OSS performance data that does not trigger significant penalties when the Commission approved QPAP is applied against it).

11. In addition, Qwest must demonstrate by a preponderance of the evidence that it has irrevocably opened its local markets to competition. *FCC Michigan* at 44. Qwest must present evidence in support of this application that is of greater weight and more convincing than that offered in opposition. *FCC Michigan* at 46. Qwest has failed to do so as to the public interest element of the Act.

D. Qwest Has Failed To Demonstrate Current Compliance With The Act.

12. Qwest bears the burden of demonstrating its current compliance with federal law in this proceeding. The FCC has stated that a BOC's promise of future performance has "no probative value in demonstrating its present compliance with the requirements of Section 271." *FCC Michigan* at para. 55.[5] This position appears based at least in part on an inability of the FCC to evaluate a constantly evolving record. *Id.* at para 54.

[5] Arguments that Qwest intends to come into compliance within the 90 day FCC review period is equally unpersuasive and should not be considered as evidence. *Id.*

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13. The FCC's analysis is equally applicable to the Commission's current review of the public interest. The Commission is being asked by Qwest to determine whether its application is in the public interest even though, by its own admission, the record is not yet complete as to the OSS testing process or the QPAP, both of which are subject to ongoing multi-state reviews which have not yet been brought back to Washington State for this Commission to review. *Twelfth Supplemental Order* in Docket UT-003022. Public Counsel does not believe it is possible to make a positive finding at this time other than concluding that Qwest's application is not in the public interest given that crucial elements of the Commission's public interest analysis are not available for the Commission to review, the lack of residential competition, and since outstanding issues of checklist non-compliance remain.

14. As stated above, the Act requires a public interest analysis and establishes it as an independent requirement that must be met for BOC entry into the interLATA long distance market. 47 U.S.C. §271(d)(3)(C). This point is reinforced by the FCC's own analysis finding that compliance with the 14-point checklist is not itself sufficient to justify approval of a BOC §271 application. *FCC Michigan* at 389-391. The FCC has determined that a number of factors should be considered in examining the public interest, including the nature and extent of actual local competition. *Id.*

III. FRAMEWORK FOR EVALUATING THE PUBLIC INTEREST

15. Public Counsel recommends that the Commission reject any inference from Qwest's arguments that the jurisdiction or scope of this Commission's public interest analysis is limited by prior FCC decisions. The FCC has made no explicit demarcation or limitation on this Commission's authority to consider evidence relevant to its public interest investigation. The FCC has broad authority to undertake a public interest analysis. *Evaluation of the United States Department of Justice*, CC Docket No. 97-137 at 384 (filed June 25, 1997) ("DOJ Michigan"). Similarly, this Commission has broad authority to conduct its public interest analysis both under Washington State law and under the authority delegated by Congress in the Act. Exh. 1070T at

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31 and Tr. at 4872. The Department of Justice ("DOJ") has stated its views regarding the necessary market conditions to support a finding that a BOC Section 271 application is in the public interest. *DOJ Michigan* at 3; Exh. 1070T at 6. The DOJ has made a clear distinction between the threshold requirements of the 14-point checklist and the broader requirements of the public interest element of the Act. Evaluation of the United States Department of Justice, Federal Communications Commission, *In the Matter of Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma*, CC Docket No. 97-121, May 16, 1997 ("DOJ, SBC"), at 38.

A. Public Counsel Recommends That This Commission Utilize The Market Analysis Framework Expressed By The DOJ In The Ameritech-Michigan Case As Discussed By Dr. Cooper In His Testimony.

16. In considering whether a BOC's application is in the public interest, the DOJ looks to see if there is competitive entry in more than a few, limited markets, and whether there is substantial competition that goes beyond the 14-point checklist threshold. The DOJ also looks to see not only if markets are open, but whether competitive entry is "sufficiently broad-based to support a presumption of openness." *DOJ Michigan.* at 30. As was stated regarding Ameritech's 1997 Michigan application: has the BOC demonstrated that its local markets are "fully and irreversibly open to competition." *Id.* at 29. The FCC is required to give substantial weight to the DOJ's analysis and it is similarly appropriate for this Commission to consider the DOJ's analytical framework when engaging in its public interest analysis. *See* 47 U.S.C. §271(d)(2)(A) and *FCC Michigan* at 383.

17. The DOJ seeks assurance that the barriers to competition have been removed and that there are objective criteria to ensure that barriers are not re-imposed after BOC entry into long distance market. *DOJ Michigan* at 29. Just as the DOJ concluded in Michigan, so Public Counsel believes the Commission will conclude similarly for Washington - that there is not yet enough local competition to warrant a general presumption of openness; and non-compliance

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with checklist items constitute evidence that barriers to entry remain. *Id.* at 30-31. As the Commission has to date found numerous instances of non-compliance with checklist items, barriers to entry clearly remain in force in Washington.

18. The Commission should apply a strict standard for §271 entry as occurred in New York. Exh. 1070T at 10. In applying such a standard it is important to remember the power inherent in Qwest's incumbent monopoly status. *Id.* at 13-14. Public Counsel believes the Commission will find that Qwest has not met its burden to demonstrate its application is in the public interest.

Another way to think about the public interest question is to consider whether an attempt to exercise market power by Qwest in any of its local markets (including the residential markets) would be constrained by a competitive reaction from a CLEC in that market. As discussed below, the evidence presented by Qwest does not demonstrate sufficient facility-based competition in the residential markets to constrain such an exercise of market power by Qwest.

B. Qwest's Proposed Framework For Analysis Should Be Rejected By The Commission As Contrary To The Intent Of The Telecom Act.

19. The primary purpose of the Telecom Act is to introduce competition into the historically monopolized local markets. To create an incentive for the BOCs to do this Congress created the "carrot" of entry into the interLATA long distance market, which they have been prohibited from entering since the modified final judgement was entered by Judge Green.

20. Significant portions of Qwest's testimony were devoted to extolling the public interest benefits of its proposed entry into the long distance markets. Exh. 1055-T at p. 3-5. The FCC has expressly rejected the concept that the public interest evaluation should be limited to the question of enhancing the competition in the long distance market. Instead, the local markets are properly the focus of the FCC's inquiry. *FCC Michigan* at 386. As such, the Commission should, as recommended by Dr. Cooper, view its authority to examine the public interest broadly, and, as invited to do so by Qwest, examine all relevant evidence, including that from other dockets. Tr. at p. 4872-4873; Exh. 1070-T at 31 and Exh. 1063-T at 22.. Such a review

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will lead to one conclusion: Qwest has not met its burden of persuasion and its entry into the interLATA long distance markets is not yet in the public interest.

IV. QWEST HAS FAILED TO IRREVOCABLY OPEN THE RESIDENTIAL MARKET TO COMPETITION TO THE DETRIMENT OF CONSUMERS

21. Assessments of the level of competition in a given market is probative, but not determinative of whether Qwest has irrevocably opened its markets to competition. As discussed below, the data indicates that Qwest's residential markets are not yet fully and irrevocably open to competition. Tr. at 5022. The next question is why? As stated by the FCC, "The more vigorous the competition is in the BOC's local market, the greater is the assurance that the BOC is cooperating in opening its market to competition…" *FCC Michigan* at 402.

22. One of the fundamental premises of the Act was that the development of competition would bring benefits to consumers both in the nature and quality of the services available; as well as price competition for those service. So far the vision of the Act has brought some benefits to business consumers of large quantities of telecommunications services, but small business and residential consumers have seen little if any impact in Washington on the choice of providers available to them. And as for price competition, while many economists argue that competition will tend to drive prices to marginal cost, this has yet to be seen by residential consumers in Washington; and indeed the fundamental assumption may be flawed when applied to the telecommunications field.[6]

A. Qwest's Markets Are Not Yet Fully And Irreversibly Open To Competition.

23. The evidence of checklist non-compliance is probative evidence that Qwest has failed to irreversibly open its local markets to competition. There is virtually no evidence in this record to support the conclusion that such competitive options are available for business customers with modest telecommunications demands or for the residential market.

24. The fact that Qwest's compliance with the terms of the Act comes slowly and largely as a result of the on-going workshop review process demonstrates that Qwest does not desire to open

[6] Gabel, David; *Current Issues in the Pricing of Telecommunications Services*, for AARP PPI (June 2001).

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its markets and will do so only to the extent ordered to do so by the Washington Commission and the FCC. In the five years since the passage of the Act Qwest could have made substantial progress towards compliance. It appears clear from the record before the Commission that Qwest may do what is necessary to achieve this Commission's approval of its §271 application to the FCC, but certainly not one iota more.

25. In particular, the overwhelming lack of facilities-based competition in the residential market is compelling evidence that Qwest has not taken the steps necessary to open its local markets to competition. Exh. 1070T at 30.

B. Qwest's Residential Markets Are Irrefutably Not Yet Fully Open To Competition.

26. In determining whether markets are open, one of the first sources of probative evidence is the extent of competition. Tr. at 5023. As the Commission's Order on Investigation made clear "real competition must exist in both residential and business services." *Order on Investigation* at 6. Further, such competition must be more than "token competition." *Id.* at p. 11. Qwest has failed to meet its burden of persuasion that greater than token competition exists in the residential market.

27. Qwest has calculated its competitive losses as approximately one- percent in the residential market. Exh.s. 1058C and 1162.[7] Based upon the data provided by Qwest, only 0.037 of that one percent is facilities-based with the remainder being resale of Qwest service.[8] Qwest would assert that the one- percent of competition it faces in the residential market, or more properly the 0.037 of one percent , is sufficient competition for this Commission to find its application in the public interest. One- percent competition in the residential market does not even amount to "token" competition in Public Counsel's view. Moreover, 0.037 of one percent of facilities-based residential competition, which this Commission has deemed the only form of

[7] Qwest maintains that their assumptions and calculation methodology were "conservative." Tr. at 4830. However, Mr. Teitzel also testified that he did not verify his methodology once he had access to the data necessary to do so. Tr. at 4894.

[8] This data is derived from a comparison of the Qwest data on CLEC residential lines in service, Residential Facility Bypass Lines, and Resold Access Lines/Residential Lines provided in Ex. 1058C. Qwest waived confidentiality as to this aggregated data during the 4th workshop. Tr. at 4825-4827.

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price constraining competition, is certainly equal to or less than the "token" competition the Commission said it was looking for.[9] *Seventh Supplemental Order from In the Matter of the Petition of Qwest Corporation for Competitive Classification of Business Services in Specified Wirecenters*, WUTC Docket No. UT-000883 (December 18, 2000) ("Comp. Class. Order") at 75 and *Order on Investigation* at 11. This evidence is strongly probative and supports Public Counsel's position that Qwest has not yet fully, let alone irrevocably, opened its residential markets to competition. The Commission should so find.[10]

28. Based upon the evidence Qwest has presented in this docket, and bearing in mind that Qwest bears the burden of persuasion to demonstrate the existence of competition, it is clear that price constraining, facilities-based competition in the residential markets is minimal, and is only occurring at a "token" level and therefore cannot be relied upon to constrain an exercise of market power by Qwest. Indeed, in many of Qwest's wirecenters facilities-based residential competition is likely non-existent.[11] As this Commission has stated, "real competition must exist in both residential and business service." *Order on Investigation* at 6. As the Commission noted there, it would examine the number of customers, the nature of the service, and other elements to determine if there was more than "token competition." *Id.* at 11.

29. Qwest may seek to argue on brief that its estimates are conservative and do not capture all the actual competition that is present in the residential market. This may be true to some minimal, yet indeterminate degree, but is in fact irrelevant. As the moving party in this proceeding Qwest bears the burden of persuasion and cannot rely upon mere allegations or

[9] The Commission's analysis of competition, and specifically what constitutes price constraining competition, is instructive. In that Order the Commission found that resale competition, while a viable means of entering a market, cannot be relied upon to constrain Qwest's pricing (i.e. an exercise of market power). *Comp. Class. Order* at para. 75. It is clear that the legal standards the Commission must apply in this proceeding are quite distinct from the requirements for competitive classification of a service under RCW 80.36.330 but it is Public Counsel's position that the Commission's analysis regarding the inability of resale to constrain pricing is applicable in this context.

[10] This issue is critically important given the changing landscape of the telecommunications industry and the recent failures of a number of significant CLECs.

[11] Again, this is unknown due to the lack of evidence presented by Qwest regarding the geographic distribution of competition in Washington. Tr. at 5040.

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unsubstantiated speculation to support its position. *FCC Michigan* at 43-48. As in the business competitive classification case, Qwest could have sought to undertake market studies or obtain additional evidence either independently or under the Commission's auspices to support its position. It chose not to do so and should receive no presumption from this Commission that competition in the residential markets is any greater than the evidence it has presented.

30. Qwest may also seek to argue that the degree of competition in the residential market is irrelevant to its application, and that in any event cannot be dispositive of it. Public Counsel would assert that the degree of competition in the residential market is strongly probative (but not determinative) of the question of whether Qwest has "fully and irrevocably" opened those markets to competition.[12] It is Public Counsel's position that Qwest has failed to fully and irrevocably open its local markets to competition, and that in particular, the residential markets are experiencing *de minimus* levels of competition. Further, Qwest's evidence demonstrates that there is virtually no price constraining, facilities-based competition in the residential market. For this reason, Public Counsel believes the Commission should find that Qwest has failed to fully and irrevocably open its residential markets to competition and until it does so its application is not in the public interest.

31. Qwest may also seek to argue, per the FCC order regarding Louisiana, that it is permissible to have all of its residential competition occur through resale. Respectfully, this Commission is not constrained by the FCC's failure to question the merits of the Louisiana Commission's decision as to what constitutes sufficient competition in the residential markets. If, as this Commission has determined, only facilities-based competition can be relied upon to control an exercise of market power by Qwest, then the lack of such competition necessarily

[12] It should be noted that Qwest has similarly argued that its QPAP is "probative" of whether its application is in the public interest. It is reasonable for the Commission to infer that the degree of competition is equally probative of the public interest question as Qwest's proposed QPAP. *Exhibit 1163, Exhibit K to Qwest's Statement of Generally Available Terms and Conditions and Supporting Comments (of Carl Inouye)*, (June 29, 2001), p. 1, para. 2.

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means some other constraint on the exercise of market power is necessary. Since none yet exists for the residential market, Qwest's §271 application is not yet in the public interest.

32. There is no "bright line" test for CLEC market share adopted by the FCC in considering §271 application from BOCs. State Commissions are encouraged to examine the individual circumstances in their state to determine whether sufficient competition exists. This Commission has framed the issue in the following manner: is there more than "token" competition? *Order on Investigation* at 11. As to the residential markets, the unfortunate answer is no.

33. Public Counsel does not have a "bright line" to propose for Washington although we believe it is within the scope of the Commission's authority to adopt a standard specific to Washington State if it deems Washington specific circumstances justify such a position. We can only recommend consideration of other states and the degree of CLEC penetration in the residential markets. In New York for example, seven- percent residential competition was present at the time the BOC's §271 application was approved. Exh. 1070T at 29. This begs the question of why Qwest has failed to make greater progress than Verizon did in New York in opening its markets to competition in the intervening time. Tr. at 5024.

34. Also notable by its absence in Qwest's application is the lack of evidence as to geographic distribution of competition in Washington. Tr. at 5040. Again, this is not dispositive as to the public interest test in and of itself, but its absence is a further indication (and permissible inference) that Qwest does not face geographically diverse competition from the CLECs. Tr. at 5040. There is likely no facilities-based competitive entry outside of a few cores, urban wirecenters. Unfortunately, again, Qwest has not provided any evidence on this point and has failed to establish even a prima facia case as to the geographic distribution of the competition it faces in the residential markets.

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V. BARRIERS TO ENTRY REMAIN

35. The most obvious evidence that barriers to entry remain are the Commission's own findings of Qwest's non-compliance with the checklist items required by the Act. Until such time as Qwest comports its conduct to the requirements of the Commission's orders of non-compliance this Commission should conclude that Qwest's entry into the long distance markets is not in the public interest. Qwest has stated that compliance with the checklist items is a significant factor in the public interest analysis. Exh. 1055T at 44. Qwest's on-going failure to comply with the requirements of the Act and this Commission's findings clearly demonstrate that Qwest's application cannot be in the public interest until these areas of non-compliance have been resolved by Qwest. As a predicate matter, this Commission should refuse to consider any approval of Qwest's application to the FCC until Qwest has altered the terms of its SGAT and changed the manner in which it does business to comply with the Commission's orders of non-compliance with the 14-point checklist item requirements/SGAT terms.

36. Additional barriers to competitive entry, particularly in the residential markets, remain. Uncertain UNE pricing, inhibits competition. Exh. 1070T at 26-27. Qwest's provisioning practices have also not lived up to the commitments Qwest is publicly making as testified to by many CLEC parties to this proceeding.

37. Qwest's "open door but no one comes" argument fails given the clearly more significant levels of residential competition in states which have received FCC approval of the BOC's §271 application. Industry Analysis Division, *Local Telephone Competition: Status as of December 31, 2000* (Federal Communications Commission, May 21, 2001).[13] Uncertainty in business conditions such as OSS, UNE pricing, and the QPAP terms serve to deter market entry by competitors. Again, Qwest bears the burden of demonstrating its markets are irrevocably open and has failed to do so. Tr. at 5025-5026.

38. Qwest argued repeatedly that there is more competition than their data can demonstrate. This is an unacceptable argument from a party that bears the burden of persuasion in a

[13] Note - this FCC report groups small business and residential customers in some of its tabulations.

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proceeding before this Commission. "Trust me" is not a sufficient ground for this Commission to determine that the local markets in Washington are sufficiently open to competition and are irrevocably open to competition. This is particularly true of the residential market, where competitive options are few or non-existent.

39. New York's OSS and PAP established the framework for open markets in that state. Qwest has not yet done this for Washington. One percent total residential competition with less than half of that one percent representing facilities-based residential competition is compelling evidence that the necessary framework is not yet in place to open those markets to competition, let alone sufficient evidence to determine that these markets are irrevocably open to competition.

40. Additional barriers to entry include the lack of a Commission approved QPAP, an OSS that has been tested against commercial volumes of traffic and which does not result in statistically significant penalties, cost-based UNE prices, and the absence of actual performance data tested against what we hope will be the rigorous QPAP that will eventually be adopted by this Commission. Exh. 1070T at 23-27.

A. QPAP.

41. Qwest has proposed its QPAP as its primary "anti-backsliding" mechanism and as a self-executing method of compensating CLECs for its failure to act in a pro-competitive manner as the wholesale supplier of services to CLECs. The FCC has made it clear that they are "particularly interested in whether such performance monitoring includes appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards." *FCC Michigan* at 394. Qwest's PAP for Washington could provide such a mechanism and is clearly intended by Qwest to serve this role. Despite Qwest's protestations that the QPAP is "voluntary" it is reasonable to conclude from the FCC's failure to approve any §271 application that did not contain anti-backsliding mechanisms like the QPAP that the QPAP is as voluntary for Qwest as is their §271 application. Neither need be made, but we are unlikely to see one without the other. Exh. 1070T at 4. Despite the importance of this

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aspect of the Commission's public interest analysis Qwest's public interest witness was unable to testify as to Qwest's current proposed QPAP. Tr. at 4846.

42. This Commission has joined the multi-state QPAP review process being facilitated by Mr. John Antonuk. Public Counsel has filed comments regarding Qwest's proposed QPAP and has been participating to the fullest extent possible in that proceeding. Public Counsel continues to urge this Commission to have a Washington specific review process for the QPAP after the multi-state proceeding has concluded. We believe that the multi-state proceeding may provide additional opportunities for Qwest to consider the perspectives of other parties, including that of the facilitator in his report once the review process is complete. At that point it will then be up to this Commission to review the record created in the multi-state proceeding and the facilitator's report and determine what is in the best interest of consumers in Washington. Public Counsel recommends that the post-multi-state Washington QPAP review present an opportunity for parties to present Washington specific evidence relevant to Qwest's OSS performance, how the QPAP would address it and whether Washington specific experiences with Qwest justify modifications to the proposal recommended by the multi-state facilitator.

43. Qwest's proposed penalty amounts may well be too low to capture the range of harm Qwest inflicts upon CLEC when it fails to perform reasonably as a wholesale provider. Customer acquisition costs, average investment per line, applicable labor rates for "lost efforts," network build-out that cannot be utilized, lost profits, and of course, the impairment of good will among lost and potential customers are all relevant factors for the Commission to consider when determining the appropriate levels for the individual penalties. These factors are of course, relevant only to the question of the economic harm to the CLEC of poor conduct by Qwest. The other set of factors the Commission should consider are the anti-competitive effect of Qwest's failure to perform adequately and whether and to what degree the Tier 1 and Tier 2 penalties should be scaled up in order to appropriately deter additional misconduct by Qwest.

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44. Public Counsel believes that a Performance Assurance Plan is a critical element in evaluating whether approval for entry into the long distance market is in the public interest. Many of the comments we filed in the multi-state QPAP review proceeding (comments filed August 3, 2001) pertained to the integrity of the QPAP. For example, we have several concerns with the audit and review provisions proposed by Qwest. We believe the mechanisms proposed by Qwest to audit the accuracy and integrity of the performance data and to review the integrity of the QPAP itself are construed much too narrowly and therefore raise serious concerns as to whether the QPAP would effectively deter anti-competitive conduct. In addition, we have advocated for stiff penalties for late reports, inaccurate reports and late payments--provisions that are also critical to protect the integrity of the QPAP. Until these and other issues relating to the QPAP are appropriately resolved in Washington, we believe that a finding by the Commission that Qwest's §271 application is in the public interest is premature.

45. Allowing the QPAP to go into effect prior to determining whether Qwest's §271 application is in the public interest will provide the Commission with the best possible information available for making that decision. The question is whether outside the realm of consultant testing and "pseudo-CLECs," can Qwest do what it must without incurring significant penalties? Only through reviewing actual OSS performance data and applying the QPAP structure will this Commission or any other interested party be able to determine whether Qwest is performing adequately as a wholesale provider and whether the penalty structure the Commission has approved will prove adequate. Public Counsel believes that once Qwest can demonstrate that it can act in a pro-competitive manner for ninety days, without incurring any significant penalties, it will then be possible, though not certain, for the Commission to conclude that Qwest's §271 application is in the public interest.[14] Tr. at 5043.

[14] Please note, Public Counsel does not take a position on whether Qwest should in fact pay penalties pursuant to the Commission approved PAP prior to the FCC's approval of Qwest's application.

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B. OSS.

46. Qwest's OSS testing has fallen behind schedule and it is not known on the record in Washington when it will be complete. As testified by Dr. Cooper, OSS parity is critically important. Exh. 1070T at 30 and "Reply Comments of the Attorneys General of Delaware, Florida, Iowa, Maryland, Massachusetts, Mississippi, Missouri, New York, North Dakota, Oklahoma, Utah, West Virginia and Wisconsin, *In the Matter of Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma*, Federal Communications Commission, CC Docket No. 97-121 ("Attorneys General"), at 8-9.

47. Public Counsel also believes it would be premature to make a determination regarding whether granting Qwest's 271 petition would be in the public interest before testing of Qwest's operational support system is completed. According to the ROC Master Project Schedule posted August 24, 2001 on the ROC OSS project management web site maintained by NRRI, the final report on OSS testing is expected to be completed November 30, 2001. It would be premature to consider a public interest finding prior to having some degree of confidence that Qwest's operational support systems are functioning appropriately, providing ease of access for CLECs that have entered or wish to enter Washington markets. Per an email notification from Qwest Counsel Steese, OSS data reconciliation is currently scheduled to conclude October 31, 2001. Public Counsel believes the Commission may take notice of the fact that the OSS consultant's deadlines have been missed repeatedly, and that the current deadlines assume no defects will be found. Such assumptions have proven wrong in the past.

C. Final Cost-Based Pricing.

48. One issue the DOJ evaluation of the Ameritech application in Michigan makes clear is that there is a relationship between the cost-based pricing standards in Section 252(d) of the Act and the Section 271 entry process. In Michigan, at that time, many prices were interim and had

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not been finally determined to be cost-based. *DOJ Michigan* at 40-41. Similarly, in Washington uncertainty still remains regarding a number of prices to be determined in the "new generic cost docket," WUTC Docket No. UT-003013. As Dr. Cooper testified, UNE pricing can constitute a significant barrier to entry. Exh. 1070T at 27 and Tr. at 5025. Until the Commission finalizes all its UNE pricing the economic uncertainty surrounding the costs of providing services to Washington consumers will serve to deter competitive entry. Exh. 1070T at 41-42. Tr. at 5025-5026.

D. Ninety days Of QPAP Compliance, Or Presumptively Pro-Competitive Behavior, Provides Assurance That Barriers To Entry Are Coming Down.

49. As to Qwest's wholesale performance, all this Commission has before it today is Qwest's "trust me" and the reports of a group of consultants. With all due respect to the ROC consultants, Verizon NY's OSS passed that Commission's evaluation (also largely consultant driven) but failed when it was required to perform under commercial traffic volumes. *Order Addressing OSS Issues*, (Bell-Atlantic's New York §271 Application, gen.) NY PUC, Cases 00-C-0008, 00-C-0009 and 99-C-0949 (July 24, 2000). Other BOCs are failing to meet commitments and are incurring significant penalties. *SBC Has Paid Big Penalties for Poor Service to Rivals*, Young, Shawn, Wall Street Journal, August 8, 2001. These troubling instances elsewhere should give the Commission pause to consider whether Washington should benefit from the misfortune of other states and act to prevent such problems (or others) from occurring here. This Commission should independently verify Qwest's wholesale performance in the simplest fashion available - use the tools Qwest has created to do so. The Commission should adopt a QPAP structure that has significant and strong penalties to deter anti-competitive attempts by Qwest to keep its markets closed or close them, post-entry. The Commission should order Qwest to run its 2001 historical and on-going OSS performance data against the QPAP, generating "mock reports" that reflect historical performance for the four quarters of 2001 and on a going forward basis. Once Qwest is in statistical compliance with this Commission's approved QPAP for ninety days and has not generated significant penalties, this Commission will have a

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"real world" assurance that Qwest is not willing to simply absorb penalties as a "cost of doing business" and has committed not to exercise market power through its conduct as a wholesale supplier of telecommunications infrastructure.

50. It is important to note that there are other avenues through which Qwest could exercise market power, particularly in the residential market where sufficient price-constraining facilities-based competition does not yet exist. Tr. at 4849. The Commission should not approve Qwest's §271 application to the FCC without sufficient assurances that the residential market is open to competition and that price-constraining facilities-based competition is in place and of sufficient geographic distribution to assure that future attempts to exercise market power in the residential markets will be constrained by competitive pressure from CLECs. Once Qwest lowers barriers to entry the competitors will enter and the parties to this proceeding and the Commission will no longer have to debate the significance of levels of competition.

VI. WASHINGTON SPECIFIC CIRCUMSTANCES THAT MITIGATE AGAINST A FINDING THAT QWEST'S APPLICATION IS IN THE PUBLIC INTEREST

51. Qwest recognized the FCC's interest in unusual circumstances that weigh against a public interest finding for a given state. Tr. at 4835. Qwest has provided a number of such examples, some of which are cited below, others of which were discussed in the direct testimony filed by CLECs in the fourth workshop regarding the public interest element.

A. The Washington Experience In The Qwest-U S West Merger Implementation Of Service Quality Commitments Is Instructive.

52. The FCC has stated its interest in evidence of the past history of a BOC applicant's discriminatory or other anti-competitive conduct or failure to comply with state and federal telecommunications regulations. *FCC Michigan* at 397. Qwest's history in Washington provides just such a history of anti-competitive misconduct.

53. Qwest agreed in the settlement of issues related to its merger with U.S. West, in part, to improve customer service quality and agreed to award customer credits if it failed to do so. *Ninth Supplemental Order Approving and Adopting Settlement Agreement and Granting*

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Application, In Re Application of U S West, Inc. and Qwest Communications International, Inc. for an Order disclaiming Jurisdiction, or in the Alternative, Approving the U S West, Inc. -- Qwest Communications International, Inc. Merger, WUTC Docket No. UT-991358 (June 19, 2000) ("Merger Order"). Qwest has made tremendous strides to improve service quality and Public Counsel commends the company for those improvements. The other half of the story however, are those areas it has not yet met the targets agreed to in the merger settlement, its on-going misrepresentation of its conduct in public fora, and the potential customer credits that are currently accruing under the merger agreement.[15] The settlement agreement implementation established performance measures, reporting structures, and required penalties for non-compliance, much like the PAP. *Merger Order* at para. 30. Qwest's performance has been improving significantly but remains problematic in some areas.

54. In the data Qwest is reporting to this Commission, for the first half of the year it has incurred significant potential penalties. The Commission can take official notice of this and in fact, Qwest, through the testimony of David Teitzel, has invited the Commission to do so. Tr. at 4873. The U S West - Qwest Merger Settlement Agreement, approved by the Commission as being in the public interest, included several provisions that addressed service quality issues. The "Retail Settlement Agreement" included: (1) infrastructure investment commitments, (2) customer-specific credits, and (3) the Service Quality Program, outlined in Attachment B to the Retail Merger Settlement. The Service Quality Program began January 1, 2001. The program specifies baseline levels of service to be provided by the company with respect to eight performance measures. The Service Quality Program places a total of $20 million at-risk

[15] Qwest CEO Joseph Nacchio stated on May 22, 2001 while visiting the Washington Commission that there were "Zero held orders in WA." The same day Qwest issued a press release saying essentially the same thing. *Qwest CEO Nacchio Announces Major Expansion of High-Speed Internet Service in Washington*, Qwest Press Release dated May 22, 2001. Almost two months later Qwest issued another press release stating "at the end of the [second] quarter, no customer in 9 states waited more than 30 days for the installation of the first telephone line." *Qwest Communications Announces Strong Improvement in Customer Service Through Second Quarter 2001*, Qwest Press release dated July 19, 2001. The first statement was a misrepresentation of Qwest retail service quality performance, at best. The second clarified that by its own, internal measure Qwest is meeting the target it set. A review of Qwest's service quality data filed with the Commission reveals that Washington was not one of the 9 states in which no customers waited more than 30 days for the installation of the first telephone line. *June Service Quality Performance Report*, filed with the Commission.

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annually. Performance credits first become payable in the first quarter of 2002, after one year of measurement. Based upon Qwest's performance as reported to the Commission for the first six months of 2001 (January through June, 2001), significant credits will be due (without mitigation). Qwest's performance has fallen below the baseline standard for five of the eight measures. Please note that these calculations are based on internal Public Counsel analysis, as derived from the data Qwest reports to the Commission.[16]

55. Public Counsel hopes that the Company's retail service quality will continue to improve. That said, the Commission's experience with Qwest's performance under the service quality commitments in the merger settlement agreement is instructive of the experience the Commission is likely to have with Qwest under the QPAP. Our experience is that even after standards are in place, reaching agreement on reporting format and content can take several months. We also note that Qwest has filed its reports late and reports have required subsequent revision to correct errors.

B. Qwest's History Of Pre-Merger Service Quality And Non-Compliance With Commission Orders Also Gives Cause For Concern.

Qwest's history as U S West (pre-merger) of poor customer service quality is notorious and need not be recited in brief. Even a cursory review of the decisions of the Washington Supreme Court upholding the Commission's decisions provides an accurate picture of the pre-merger U S West's lack of concern regarding its retail customers. *U S West v. Utils. And Transp. Comm'n*, 1334 Wn2d 48, 949 P.2d 13212 (1997). While Qwest may argue that it is an "internet broadband company" and not U S West; the fact remains that the majority of individuals employed by Qwest in Washington are the same U S West employees under whom Washington consumers suffered in the last decade. U S West's pattern of conduct has not been washed away since the merger. There have been some improvements in service quality, but much remains to be done. For these reasons, this Commission should be extremely skeptical of the commitments

[16] Specific references to the amount of the credits and the individual measures being missed has not been made to preserve Qwest's confidentiality.

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Qwest is making in this proceeding and require the strongest assurances, with concomitantly strong penalties for non-performance.

C. Qwest's Compliance With §271 Of The Act Comes Reluctantly, And Commonly Only After An Order Of The Commission.

56. What has been found so far in this docket? The Commission in final orders and in pending recommendations of the administrative law judges who have facilitated the workshops has found numerous areas of non-compliance by Qwest with the requirements of §271 of the Act. Qwest, formerly U S West, has known for the last five years what it needed to do to comport with federal law. Non-compliance with the requirements of the Act at this point cannot be excused. Given the repeated findings of non-compliance with the Act in this docket, as well as Qwest's prior poor conduct in Washington, the Commission must insist not only on full and complete compliance with the federal law, but require reasonable safeguards to protect Washington consumers by fostering competition in Qwest's conduct as a wholesale provider to the CLECs. The Commission must also build into the QPAP sufficiently strong incentives for Qwest to pursue pro-competitive policies and to deter Qwest from acting in an anti-competitive manner.

57. In the 15th Supplemental Order in this docket the Commission has ordered the Commission Staff to investigate the apparent illegal business practices engaged in by Qwest regarding Centrex rebates. *15th Supplemental Order* at 104 and 169. This example of alleged illegal conduct by Qwest during the course of this proceeding, when Qwest knew it would be receiving maximum scrutiny by the Commission, Public Counsel, and the CLECs raises serious questions not only about the underlying facts and allegations, but also about the nature of Qwest's business practices. If the allegations are confirmed, then the Commission must be extremely concerned about what may occur post-entry when Qwest will have even less incentive to "play by the rules." The Commission may also wish to determine whether any other state public utility commission has, in the course of a §271 proceeding, had to investigate the legality

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of the BOC's business practices. This example alone should raise serious public interest concerns for the Commission and the FCC.

58. If Qwest is sincere in asserting that it is not "the same old U S West" as their regulatory representatives insist, let them prove it. Let Qwest demonstrate that it can go ninety days without any anti-competitive acts which would create a significant violation of the QPAP this Commission eventually adopts. Qwest could be invited to do this with historical data specific to Washington, or with on-going data if the historical data is either unavailable or would reflect significant violations of the QPAP.

59. As stated previously, the FCC is concerned with state-specific evidence of a Bell applicant's anti-competitive conduct. *FCC Michigan* at 397. Below are several such examples. The Commission should also consider the examples found in Ms. Rasher's testimony on behalf of AT&T (adopted by Ms. Roth). Exh. 1076C. Tr. at 5049-5054. The Commission is of course free to consider others of which it may be privy, and should make a record of them in this proceeding.

1. *In the Matter of AT&T Corporation et. al. v. U S West Communications, Inc.*, CC Docket No. 98-242, Memorandum Opinion and Order (October 7, 1998).

60. The FCC found that two separate business arrangements, one between Ameritech and Qwest and one between U S West and Qwest, amounted to providing in-region, interLATA service prior to Section 271 authorization. Both Ameritech and U S West, who were not authorized to provide long distance service, had separately negotiated a "teaming arrangement" with Qwest to market a comprehensive package of telecommunications services to local customers that would include local and intraLATA services, features such as call waiting and caller ID, and long distance service. In both arrangements U.S. West and Ameritech would recommend Qwest long distance services in their bundled package in return for a per-customer commission from Qwest.

61. Shortly after the launch of these programs, several entities including AT&T, MCI, and McLeod USA filed a compliant in two federal courts alleging violations of Sections 251(g) and

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271 of the 1996 Telecommunications Act (the U.S. West complaint was filed in Washington and the Ameritech complaint in Illinois). The Washington District Court issued a preliminary injunction prohibiting U.S. West from marketing additional customers under the teaming arrangement with Qwest until the FCC determined whether the arrangement complied with the 1996 Act. *AT&T Corp. v. U S West Comm. Inc.*, 1998 WL 1284190 (W.D. Wash. 1998) (unreported order available on WestLaw). The Illinois court similarly referred the legality of the Ameritech arrangement to the FCC, though it declined to issue an injunction. Both parties argued before the FCC that the word "provide," as used in the part of Section 271 that says "no BOC or BOC affiliate may *provide* interLATA services except as provided in Section 271," should be narrowly construed to mean "to furnish." Their position was that under this narrow construction, Section 271 restricted BOCs only to the extent they actually transmit, or act as a reseller of interLATA services.

62. The FCC declined to assign a specific definition to the word "provide" and held that both arrangements were in violation of Section 271. The FCC noted that the most significant factor in its decision was that both Ameritech and U S West had become a one-stop shopping source for local and long distance when neither had adequately opened their local markets. This Commission should note that these instances of Qwest's violation of the Act occurred even prior to its acquisition of US West.

2. Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order, in Part, and Affirming, in Part, *MCI Metro Access Transmission Services, Inc. v. U S West Communications, Inc.*, Docket No. UT-971063 (February 10, 1999).

63. On June 26, 1997, MCI Metro filed a complaint with the Commission against U S West alleging breaches of contract and violations of law resulting from U S West's failure to adequately forecast network growth and provide timely interconnection facilities. MCI Metro and U S West had entered into 3 separate interconnection agreements from 1995 to 1997. In its initial order dated September 25, 1998, the Commission found that U S West (1) breached its interconnection agreements by failing to reasonably forecast and provision facilities; (2)

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breached its agreements and violated state law by failing to provide MCI Metro with notices of facilities exhaust, (3) violated state law by denying MCI Metro interconnection at its access tandem when facilities were unavailable at its local tandem, and (4) violated Commission regulation by causing call blocking on MCI Metro's trunk group.

64. In October 1998, all parties including Commission Staff petitioned for review various aspects of the September Order. In its final order dated February 10, 1999, the Commission affirmed in part and modified in part its September order, finding *inter alia* that (1) Seattle tandem capacity exhaust was caused by U S West's failure to reasonably forecast demand for facilities, (2) U S West did not timely initiate increases to capacity based upon its forecasting process, (3) U S West failed to complete numerous service orders on their requested or scheduled due dates, (4) U S West failed to notify MCI Metro of known or forecasted facilities exhaust, (5) U S West failed to reasonably increase capacity based on MCI Metro's needs on at least one occasion, and (6) call blocking occurred within U S West's network on a MCI Metro trunk group for an 18-day period in 1997. In so finding, the Commission ruled, *inter alia*, that (1) U S West violated certain provisions of its interconnection agreements with MCI Metro, (2) U S West's failure to increase capacity violated RCW 80.36.170, and (3) by causing call blocking U S West violated WAC 480-120-515. While the Commission described U S West's conduct as "egregious" it stopped short of finding that U S West engaged in willful and intentional misconduct. Nevertheless, non-monetary penalties were imposed. (In a partial dissent, Chairman Levinson argued that the conduct was willful and intentional and that monetary penalties should have been imposed).

3. *In the Matter of AT&T Corp. v. U S West Communications, Inc.*, DA Docket No. 01-418, Memorandum Opinion and Order (February 14, 2001).

65. AT&T and MCI filed a complaint with the FCC alleging U S West's 1-800-4USWEST service violated Section 271 of the 1996 Act. The service allowed U S West's local subscribers to place local and long distance calls originating inside and outside the U S West service area. The FCC concluded that this service, like a similar Ameritech service the Commission had

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recently reviewed, was a violation of Section 271 prohibiting BOC's from providing long distance service originating in the region where it provides local service prior to FCC approval.

VII. THERE ARE INSUFFICIENT ASSURANCES THAT MARKETS THAT ARE OPEN OR MAY BE OPENED IN THE FUTURE WILL REMAIN OPEN.

A. Civil And Antitrust Remedies Are Rarely Available To Assure Individual Markets Remain Open.

66. The Act expressly reserves the right of parties, including the states, to initiate civil or antitrust actions against Qwest in the future if it appears that such is warranted by Qwest's anti-competitive conduct at some future point in time. Qwest in fact relies upon this "carve out" in the Act to justify that its application is in the public interest. Exh. 1055T at 52. The fact is antitrust litigation of the scale sufficient to remedy any alleged anti-competitive conduct by Qwest is rare and expensive. It is important to remember that it was an antitrust proceeding initiated by the Justice Department that resulted in the break-up of AT&T into the regional bell operating companies that have recently consolidated down to four entities.

67. Public Counsel would argue that Qwest's anti-competitive conduct would have to be severe and long standing before any party is likely to marshal the resources to initiate litigation to address it. Any such litigation would become a "war of attrition" which Qwest would be better positioned to survive than virtually any CLEC or state regulatory entity. Tr. at 5089. Undue reliance on this remedy to deter Qwest's anti-competitive conduct in the near term is reliance misplaced. Additionally disturbing is Qwest's apparent refusal during the multi-state QPAP to clarify that the terms of its QPAP does not impair recourse to civil and antitrust remedies.[17] Finally, it does not appear that Congress intended antitrust litigation to be the primary remedy in the Act. Rather, the policy is one of requiring local markets be opened to competitors without the necessity of such extreme measures.

[17] Qwest's position on this is unknown since it offered no proposal to resolve Public Counsel's concern in this regard. Qwest's multi-state QPAP testifying witness, Carl Inouye, did not read the comments filed by Public Counsel in that proceeding. *Multi-state QPAP transcript*, vol. 1 at 164.

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B. The QPAP Cannot Deter All Forms Of Anti-Competitive Conduct By Qwest.

68. Qwest similarly relies on the existence of the QPAP to argue that its §271 application is in the public interest. The Commission should note that there are many avenues for Qwest to exploit its market power in the local markets which would not be identified, let alone addressed, by the QPAP. Only Qwest's performance as a wholesale supplier is addressed by the OSS performance data and QPAP penalty structures that are currently being developed. There are many other avenues for Qwest to engage in anti-competitive conduct which would not trigger QPAP penalties or raise CLEC complaints regarding provisioning.

VIII. CONCLUSION

69. Qwest's entry into the interLATA long distance markets is not yet in the public interest. Qwest has not demonstrated compliance with the 14-point checklist and this Commission has not yet adopted a QPAP by which Qwest's OSS can be evaluated. The OSS itself is not yet finalized. There has been no "real world" assessment of the OSS against the final QPAP this Commission will adopt.

70. Once Qwest has completed its OSS, this Commission has finalized a QPAP which Qwest can prove it has been in statistical compliance with for ninety days, and the level of facilities-based competition in the residential markets exceeds "token" levels, Qwest should be invited to request that the Commission re-examine whether its application is in the public interest at that time and the Commission should provide a brief opportunity for parties to litigate the alleged change in circumstance at that time. Until such time, Qwest's §271 application is not in the public interest and the Commission should not recommend to the FCC that it be approved.

RESPECTIFULLY SUBMITTED this 7th day of September, 2001.

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