BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	Docket No. UT-003040

BRIEF OF AT&T REGARDING PUBLIC INTEREST

(NON-PROPRIETARY VERSION)

INTRODUCTION

The fundamental problem with Qwest's presentation on the issue of public interest is that it improperly downplays, and in some instances completely ignores, the real and substantial market power which Qwest has, and its ability and incentive to use that market power to exclude competitors from the local exchange marketplace. The result is an almost bizarre bid on the part of the company to obtain from this Commission a willing suspension of disbelief akin to that of a movie-goer at a screening of Cocoon: according to Qwest, competition in the State of Washington will never get sick, and it will live forever.

The plain and simple fact is that Qwest's markets are not open to competition, and there are no genuine assurances—apart from Qwest's own empty promises—that those markets, once open, will remain so. Moreover, Qwest cannot presently satisfy its burden to show that its interLATA authorization would be "consistent with the public interest, convenience, and necessity." 47 U.S.C. 271(d)(3)(C). Qwest has not demonstrated compliance with the 14 point check list. But even more importantly, checklist compliance alone is not sufficient to satisfy the public interest requirement:

> In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of section 271, basic principles of statutory construction, and sound public policy….[1]

As the FCC has repeatedly confirmed, "the public interest requirement is independent of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."[2] It requires the Commission "to review the circumstances presented by the applications to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open."[3] In short, the essence of the public interest inquiry is for the Commission to determine whether, notwithstanding checklist compliance, the BOC applicant's local markets are irreversibly open to competition.

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[1] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd 20543 (1997), at para. 389.

[2] See, for example, *In the Matter of the Joint Application by 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 Kansas and Oklahoma*, 2001 FCC LEXIS 1202, (2001) at para. 267; *In the Matter of the Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Texas*, 15 FCC Rcd 18354 (2000), at para. 417; and *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, 15 FCC Rcd 3953 (1999), at para. 423.

[3] E.g., the *Kansas-Oklahoma 271 Order* at para. 267 (emphasis supplied); *New York 271 Order* at para. 423.

As shown below, numerous "relevant factors" confirm that the local residential market in Washington is nowhere close to being open to competition today, and—absent significant steps on the part of Qwest—will not be open to competition in the near future.

Qwest's own data show that there is virtually no facilities-based and UNE-based competition for residential customers today. Moreover, there is no genuine prospect for increased UNE-based or facilities-based residential competition in the near future.

A. Qwest Maintains Monopoly Power over Residential Service.

There is a pervasive lack of meaningful facilities-based or UNE-based competition for residential customers in Washington. This lack of competition is a factor directly relevant to whether the local market is open. To be sure, the FCC has repeatedly declined to identify a minimum market share that CLECs must capture before the commission will declare a market to be open. But this Commission need not impose a minimum market share in order to take into account the fact that *no* CLECs today are able to mount any kind of meaningful competitive threat whatsoever to Qwest's monopoly control of residential local service in Washington.

Even the data presented by Qwest show that CLEC penetration in Washington to date is minimal and, in particular, facilities-based and UNE-based competition for residential service is almost non-existent. David Teitzel, testifying on behalf of Qwest in these proceedings, estimates that CLECs are providing an aggregate of approximately **[XXXXXXXXXXXXXXXX]** lines to residential customers in Washington. However, this includes some **[XXXXXXXXXXXXXXXXXXXXXXXXX]** resold lines. So, of a total of **[XXXXXXXXXXXXXXXXXXXXXX]** residential lines in Washington, by Qwest's own reckoning CLECs are currently providing only **[XXXXXXXXXXXXXXXXXXXX]** of the total residential lines in service. See Confidential Exhibit 1058-C. That figure is a fraction of Qwest's estimate of CLEC residential market penetration in North Dakota.[4]

Even without further scrutiny, these figures simply do not support the notion that the residential local exchange market in Washington is open to competition. Furthermore, even if this percentage were increased by a factor of five, it would still represent a level of competition which could best be described as anemic.

However, these estimates are clearly unreliable; a fact that is demonstrated by even the most cursory examination of the method by which Qwest arrived at them. Briefly, Mr. Teitzel believes that he can estimate CLEC facilities-based line counts in the state of Washington by dividing the number of ported numbers by two, and subtracting the number of Qwest-provided unbundled loops. See Teitzel Direct, p. 35, lines 5-9. The underlying problem here is that Qwest postulates the existence of a statistical link between cumulative ported telephone numbers and Qwest-provided UNEs on the one hand, and CLEC facilities-based lines in service on the other. Yet, Qwest provides absolutely no statistical support for such a proposition. And that is because no such statistical link exists. See July 16 Transcript at pp. 4891-2, and 4946-7.

Curiously, Mr. Teitzel has also filed a similar, but not identical, analysis in the multi-state proceedings. There, he assumes that CLEC facilities-based line counts can be estimated by taking total cumulative ported numbers, subtracting two-times the number

[4] See Teitzel Direct, confidential exhibit DLT-8, in the multi-state proceedings, Idaho Public Utilities Commission Docket No. USW-T-00-3, Iowa Utilities Board Docket No. INU-00-2, Montana Public Service Commission Docket No. D2000.5.70, North Dakota Public Service Commission Docket No. PU-314-97-193, Utah Public Service Commission Docket No. 00-049-08, Wyoming Public Service Commission Docket No. 70000-TA-00-599, and New Mexico Public Regulation Commission Docket No. 3269 ("Multi-State Proceedings").

of stand-alone UNE loops in service, and then dividing the result by two.[5] Arithmetically, the result may look the same as that achieved in the Washington workshop, but changing the steps no doubt contributes a needed air of mystery and obfuscation to an already questionable methodology.

In Colorado, Mr. Teitzel changes his methodology once again, first dividing the number of ported numbers by two, then subtracting the number of Qwest-provided unbundled loops, and then adding back residential white page listings. See Teitzel Direct, p. 33, in Docket No. 97I-198T, Colorado Public Utilities Commission.

The result is that Qwest's "methodology" for estimating CLEC-owned facilities changes, chameleon-like, from jurisdiction to jurisdiction, depending on the circumstances, the mood, and perhaps the position of the stars.

AT&T believes the only accurate way to assess the current level of competition in Washington is for the Commission itself to compile numbers based on interrogatories or on a line-count survey of CLECs. AT&T has resisted providing this information to Qwest because of the sensitive, proprietary nature of that information, and because Qwest is AT&T's main competitor in the local exchange market. AT&T has also filed herein a Motion for Extraordinary Protective Order which, if granted, will allow the Commission to gather and assess this line count information without the competitive risks inherent in releasing this information to Qwest or to the new entrants.

As things stand, according to its own data, Qwest retains approximately **[XXXXXXXXXXXXXXXXXXXXXXXXXX]** of the residential market in Washington. Assuming Qwest's data are indeed conservative, as the company insists, CLEC market

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[5] See Confidential Late-File Exhibit 1171-C, Multi-State Proceedings, *supra*, June 26 Transcript at pages 109 and 174.

share in the state of Washington is still not likely to exceed **[XXXXXXXXXXXXXXX]**. The fact is that Qwest retains a strangle hold on the residential market for local exchange service throughout Washington. And even millions of dollars worth of smoke and mirrors will not hide that fact.

B. The Evidence of Insufficient Margins Demonstrates that Qwest's Local Residential Markets are Closed to Competition.

Another relevant factor is whether, under prevailing UNE rates, competitive entry is economically viable. As the FCC acknowledged in its *Ameritech Michigan 271 Order*, *supra*, "efficient competitive entry into the local market is vitally dependent upon appropriate pricing of the checklist items," (*id*., at para. 281), and so competitive pricing is obviously "a relevant concern in [the FCC's] public interest inquiry under section 271(d)(3)(C)." *Id*., at para. 288. That remains true whether or not a state commission has made a finding that UNE rates comply with TELRIC, because the FCC has made it clear it is prepared to find that a wide range of rates can satisfy TELRIC. Accordingly, where the evidence indicates that UNE rates, set at the upper boundary of TELRIC, preclude competitors from profitably using UNEs to enter the local market, that fact is clearly relevant to whether the local market is open. In those circumstances, the fact that UNE-based entry is unprofitable need not necessarily entail a review of the applicant's retail rates, for it would also be open to the BOC and the state commission to set new TELRIC rates at the lower, rather than the upper, reaches of what the FCC's rules permit.

In the instant case, however, this analysis is simplified by the fact that, in Washington, Qwest's Commission approved UNEs are priced considerably above cost. The pricing of UNEs in excess of economic cost creates a clear barrier to CLEC entry into Qwest's local residential market in this state.[6] Although Mr. Teitzel states that Qwest has entered into interconnection agreements that provide for "cost-based pricing of access, interconnection, and unbundled network elements and for wholesale discounts to reflect avoided costs,"[7] the fact is that Qwest's pricing is far from cost-based, and has been a primary factor in keeping its local, residential market closed to competition.

As demonstrated below, Commission ordered UNE rates are so high in comparison to retail rates, that CLECs cannot compete with Qwest for residential customers using the UNE-Platform ("UNE-P"):

QWEST'S WHOLESALE UNE-P RATES IN WASHINGTON COMPARED WITH QWEST'S RETAIL RATES FOR A RESIDENTIAL LINE

Monthly Recurring Charge ("MRC")		**Non-Recurring Charge ("NRC")**	
UNE-P[8] w/ features	1FR	UNE-P	1FR
Zone 1: $9.81	$12.50	$70.55	$31.00
Zone 2: 16.03	$12.50	$70.55	$31.00
Zone 3: 17.80	$12.50	$70.55	$31.00
Zone 4: 19.75	$12.50	$70.55	$31.00
Zone 5: 25.72	$12.50	$70.55	$31.00

In other words, outside of two wire centers serving downtown Seattle, Qwest's monthly recurring charges ("MRC") on the wholesale side vary from 128 to 205 percent of Qwest's own retail rates for residential lines; and similarly Qwest's non-recurring

[6] The wholesale loop price in two downtown Seattle wire centers stands at $7.91, plus the price of other necessary components such as switching and usage. As a result, the wholesale price for UNE-P in these two Seattle wire centers (which in all likelihood do not serve residential customers to any meaningful degree) stands at approximately $10.00, compared to a retail price for residential local exchange service of $12.50. See July 17 Transcript, pp. 4989 and 5049. In all other wire centers throughout the state, the wholesale price for UNE-P exceeds the retail price for residential service.

[7] Teitzel Direct, p. 67, lines 15-17. Mr. Teitzel's assertion that Qwest has cost-based access rates clearly fails the straight-faced test.

[8] All UNE-P MRCs include: analog loop + analog port + (750 minutes local usage) + 400 minutes shared transport.

charges ("NRC") on the wholesale side are greater than twice the corresponding retail charges for residential service.[9]

Although Qwest may argue that competitors "have not availed themselves" of the opportunity to compete in Washington using the UNE-Platform, the fact of the matter is that UNE-P pricing stands as an insurmountable barrier to such entry. By one estimate, the current UNE-P pricing structure excludes CLECs from 98 to 99 percent of the residential market in this state.[10] Moreover, the FCC has made it clear that one important aspect of any public interest analysis is the question of whether and to what extent *all* statutory paths to competition are open:

> [A]s we noted at the outset of this Order, it is essential to local competition that the various methods of entry contemplated by the 1996 Act be truly available. The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).[11]

In the instant case, the record demonstrates that the UNE path to residential competition is blocked as a result of the pricing disparity outlined above.[12]

The fact that local entry is unprofitable at prevailing UNE rates is, on its face, precisely the sort of "relevant factor" that "would frustrate the congressional intent that markets be open" before interLATA entry is approved, *Bell Atlantic New York 271 Order*, para. 423, particularly because it is obvious that local entry "is vitally dependent

[9] The two wire centers in Zone 1 serve approximately 5 percent of the loops in Qwest's Washington service area. Given their downtown location, it is doubtful that these wire centers serve a significant number of residential lines. See July 17 Transcript, at p. 5080.
[10] *Id*., p. 5080, lines 18-23.
[11] *Ameritech Michigan 271 Order*, para. 391.
[12] See Roth/Rasher Direct at pages 5-7.

on appropriate pricing" of UNEs. *Ameritech Michigan 271 Order*, para. 281. Put simply, regardless of a BOC's checklist compliance (which has not even been remotely demonstrated here by Qwest), if CLECs cannot profitably enter local telephone markets, then those markets, as a practical matter, are not open to competition. Because the fundamental purpose of section 271 is to bar BOC entry until such time as local markets are open to competition, the profitability of entry is necessarily relevant to the public interest analysis.[13]

The record in these proceedings demonstrates unequivocally that even a perfectly efficient CLEC could not profitably utilize the UNE platform to provide local residential service in Washington. This analysis confirms not only that unduly high UNE rates are helping keep CLEC customer-volumes low, but that the local residential market will remain closed to competition at least until such time as those rates are substantially reduced.

C. Prospects for Facilities-Based and UNE-Based Residential Competition are Poor.

The obstacles to UNE-based residential competition are particularly important because neither resale nor facilities-based competition is likely to provide a significant, viable source of competition for Qwest in Washington during any foreseeable timeframe. Resale is an inherently limited competitive vehicle, because the competitor cannot alter the nature of the service it is reselling, and thus cannot utilize the resold service to

[13] The profitability of entry is also relevant to the competitive checklist because the inability of competitors to enter profitably is a strong indication that UNE prices exceed the incumbent's costs, and thus violate the Act and the FCC's pricing rules. While not conclusive proof of a checklist violation, such evidence is grounds for the Washington Commission to continue to conduct a more rigorous determination as to whether the applicant's UNE prices are cost-based.

provide its customers with innovative or improved service. And in any case, resale is priced in a manner that precludes its use in all but the most selectively chosen circumstances.[14]

The prospects for facilities-based competition are not brighter. In stark contrast to Qwest's dominant position, the CLEC industry now faces significant obstacles in raising the capital necessary to compete broadly with Qwest and the other BOCs. Competitive LECs have become "marginalized" because they do not "own the strategic assets" necessary to compete but must "rely on the ubiquitous Bell network," a network that remains largely closed to new entrants.[15] Qwest's anti-competitive actions, coupled with adverse market conditions, have now threatened the minute level of CLEC market penetration that existed in the local market. Despite five years and millions of dollars of investment, CLECs and Data Local Exchange Carriers ("DLECs") have been kept at bay by Qwest's anti-competitive actions, and have been unable to make any significant inroads into Qwest's local markets. These same CLECs and DLECs are now suffering from the drought in the capital funding market and have either succumbed or are clinging precariously to life support. ICG Communications, Convergent Communications, Jato

[14] The avoided cost discount has proven inadequate to provide CLECs a basis for profitable entry for most consumers. For example, as monopolists, the incumbents do not face (and therefore do not "avoid") the huge customer acquisition costs that CLECs confront, nor do they face the lack of economies of scale that a new entrant must address. For these reasons, CLECs seeking—over the long term—to provide a broad-based, significant competitive alternative to the incumbents' local residential monopoly cannot do so through the resale of local service.

[15] See Roth/Rasher Direct at 20, quoting J. Whitman, *New Entrants: Battling the Bells*, Wall Street Journal, at R17 (Sept. 18, 2000).

Communications, GST Telecommunications, eSpire, Pathnet, NorthPoint, PSINet, 360Networks, Inc., Winstar Communications, Inc., Teligent, Rhythms, NetConnections, Inc., and Covad Communications are all examples of CLECs and DLECs that have filed for bankruptcy or gone out of business in the last twelve months. And the list continues to grow.

In March 2000, four of the major DLECs—Covad, NorthPoint, Rhythms, and DSL.Net—had a combined market capitalization of $21.4 billion. One year later, the combined market capitalization of these DLECs was less than $0.4 billion, or approximately 2 cents on the dollar compared to their standing a year ago. CLECs have not fared much better. The combined market capitalization of five major CLECs has collapsed from $16.9 billion in March 2000, to $1.2 billion a year later, or approximately 7 cents on the dollar. Among the larger IXCs, AT&T, MCI WorldCom, and Sprint, have collectively lost over $280 billion in market capitalization in the last year.[16]

Even SBC Communications, *itself a BOC*, has found it impossible to break into Qwest's monopoly local markets. Under the terms of its acquisition of Ameritech, two years ago, SBC had agreed to enter thirty new markets throughout the United States. It has now closed most of its newly-opened regional sales offices, including (in the Qwest service territory) Denver, Minneapolis, and Seattle.

Qwest might attempt to argue that some of these CLECs' and DLECs' problems stem from poor management, under-financing, or other sources. However, the point that

[16] Roth/Rasher Direct, page 21.

cannot be ignored is that there is a trilogy of factors common to all of these carriers: their dependence on Qwest for interconnection, Qwest's poor level of wholesale service quality, and the excessive prices which Qwest charges for that interconnection.

At the same time that Qwest was successfully driving its DSL competitors out of the market, it ran full-page ads in local papers throughout its service territory capitalizing on consumer's fears regarding the reliability of DSL providers, touting its own DSL service, and mocking the demise of the DSL providers. See Roth/Rasher Exhibit 9. Qwest also sent an e-mail with a similar message to its customers after Jato Communications folded its operations. See Roth/Rasher Exhibit 10.

As a result of these and other strategies, Qwest now leads the market in DSL penetration and plans to double its DSL customer base in 2001.[17] Meanwhile, its competitors are in shambles. Moreover, Qwest's anticompetitive behavior does not stop with its pricing practices, but extends much further. Many of the specifics of Qwest's anti-competitive behavior are being addressed in the Checklist Workshops. Still, it is instructive, and relevant from a public interest perspective, to outline at least some of the more blatant abuses which competitors have suffered at the hands of Qwest. See Section E of this brief, *infra*.

The critical element relating to the prospects for competition is that Qwest does not provide the same level of service to its wholesale customers that it provides to its retail customers. The net effect of that anti-competitive and discriminatory behavior is that the prospects for facilities-based and UNE-based competition are poor. Moreover,

[17] Roth/Rasher Direct, page 22, quoting Qwest's annual report for the year 2000.

this situation is aggravated by the current well-publicized drought in available capital. For now, and in the immediate future, progress toward a competitive local exchange market is stalled, and customers and competitors are unable to reap the benefits of competition envisioned by Congress and the states. The local exchange market is not open, and it would therefore be premature and contrary to the public interest to allow Qwest into the interLATA market.

D. Qwest's Proposed InterLATA Market Entry Will Not Make that Market More Competitive.

Qwest argues that it should be allowed into the interLATA market in order to provide a "one-stop shopping" alternative to customers in geographic areas which "CLECs have decided are not attractive to serve at this time." Teitzel Direct at 54-5.[18] Qwest also states that it is somehow "ironic" that Qwest is the only local exchange carrier not allowed to compete for intrastate, interLATA business.[19]

The fact is that Qwest's entry into the long distance market is entirely inconsistent with the public interest because Qwest's exorbitant intrastate access rates, priced significantly above cost, provide it with a source to subsidize its other products and services. These access rates are set out in detail on the record in Roth/Rasher Direct, at

[18] Mark Cooper, testifying on behalf of Public Counsel, correctly observed that CLECs cannot make business decisions to enter markets until business conditions namely, OSS, prices, and PAP are finalized and known. Transcript pp. 5025-5026.

[19] Teitzel Direct, p. 54, line 1. Far from being "ironic," however, the prohibition on Qwest's entry into the interLATA marketplace is firmly grounded in law, and in a recognition of the RBOCs' ability (including Qwest's) to abuse competitors by means of their control over bottleneck local exchange facilities. Initially, the prohibition was put into force and effect by the U.S. District Court as a result of the largest and most extensive antitrust litigation in history. See *United States v. American Tel. and Tel. Co.*, 552 F.Supp. 131 (1982). Subsequently, the prohibition became part of the Telecommunications Act of 1996, P.L. 104-104, codified at 47 U.S.C. 271(a) and 271(b). The legislative history of the federal Act reveals that Qwest's predecessor, U S WEST, supported passage of the federal Act, including the prohibition mentioned. The fact that Qwest now finds this prohibition "ironic" demonstrates its continuing efforts to downplay—or, as here, its hope and expectation that others will completely ignore—the substantial market power which it wields.

pages 7-10. Briefly, however, Qwest's current intrastate access charges in Washington stand at $0.022 per "originating" access minute, and $0.0235 per "terminating" access minute.[20] The FCC, on the other hand, has established an interstate access target rate for BOCs of $0.0055 per access minute on the originating and terminating side as well, or slightly more than one-half cent per access minute.[21] The costs of providing intrastate access are no different than the costs of providing interstate access. Moreover, the FCC target rate is based on a variety of cost studies, and is therefore a proper surrogate for the cost of intrastate switched access, at least until Qwest's actual costs for intrastate access have been expressly determined.

For toll calls that originate and terminate in Washington (*i.e.*, a two-sided call, which is also termed a "conversation minute"), using the interstate target rate as a cost surrogate, it is conservative to estimate that Qwest's intrastate access rates are more than 400 percent in excess of its costs.

So, for example, with Qwest's intrastate access charges set at current levels, Qwest's competitors will be required to pay more than four and a half cents per minute for access. This means that, for an IXC to make money on that call, it must charge its own end user a minimum of $0.0454 per minute, plus the IXC's own costs, including network costs, call set-up, and other costs and overhead. Essentially, four and a half

[20] An "access" minute is either the originating or terminating end of a call. A "conversation" minute combines both the originating and terminating ends of a call. Carriers are billed for access on both ends of a call, or "per conversation minute." However, an IXC might be billed by one ILEC for both originating and terminating access, or it might be billed by one ILEC for "originating" access on a call, and another ILEC for "terminating" access, depending on where the call begins and where the call ends. Thus, if access charges are quoted at a rate of $0.022 per "originating" access minute, and $0.0235 per "terminating" access minute, then the charges for access paid by the IXC will ultimately be $0.0454 per "conversation" minute. See Roth/Rasher Direct, at p. 8.

[21] *In the Matter of Access Charge Reform*, CC Docket No. 96-262, FCC No. 00-193, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45 (released May 31, 2000), §61.3(qq), p. B-21.

cents per minute (plus its own costs) represents a floor below which the IXC cannot price that call.

On the other hand, Qwest's *cost* of providing *itself* access—as opposed to its *price* for providing access to IXCs—is only about one cent per conversation minute (using the FCC target rate as a surrogate for cost). Clearly, then, Qwest can price its own retail long distance service well below four and a half cents per minute and still make money.

At the present time, most states have "imputation" requirements, which means that Qwest must "impute" within its own retail rates the access rates it charges other carriers. On the face of things, this might appear to be an equitable arrangement: after all, so long as imputation requirements are in place, Qwest is unable to undercut its competitors' prices. However, the problem is that ultimately, when companies are competing head to head, the question becomes, "Which company has the stronger margins?" That company will ultimately be the winner.

Competition within the interLATA long distance market is strong today because incumbent monopoly local exchange carriers, including Qwest, have been excluded from that market. The excessive margins they derive from access are not a factor in the interLATA market because these ILECs are not able to compete head to head in that market. But were Qwest to enter the interLATA long distance market, it would be able to bundle its local service with a long distance offering.[22] Competitors, not afforded the same monopoly subsidization contained in intrastate switched access rates, will be squeezed out of *both* the local and long distance markets. Rather than being a boon to

[22] As it did illegally in 1997 and 1998. See discussion in Section E of this brief, *infra*. See also *AT&T Corporation, et. al. v. U S West Communications, Inc., and Qwest Corporation*, file No. E-98-42 (consolidated with File Nos. E-98-41 and E-98-43), FCC 98-242, Memorandum Opinion And Order (rel. to the public October 7, 1998) para. 52.

consumers, as Qwest has portrayed it, the notion that Qwest might provide "one stop shopping" where others cannot will actually sound a death knell for competition in those markets. The result, rather than fostering and encouraging competition, will be the remonopolization of the local and long distance markets.

This Commission must address Qwest's anti-competitive, exorbitant access charges *before* Qwest receives approval to provide in-region interLATA services in Washington.[23] The forward-looking economic cost for Qwest to provide access to itself for intrastate long distance calls is substantially less than the price that Qwest charges IXCs for the same, identical access. As demonstrated above, Qwest's competitors will be disadvantaged by a perpetuation of the current access pricing structure, unless it is corrected prior to Qwest's entry into the in-region long distance market. To allow that entry prior to fixing access rates at or near the true cost of providing access will be contrary to the public interest, and will ultimately damage or destroy the vibrant competition which currently exists in the interLATA marketplace.

E. Qwest has Exhibited a Constant and Continuing Pattern of Anti-Competitive Behavior.

Another relevant factor which the FCC takes into account when examining whether a 271 application is in the public interest is whether the BOC has cooperated in opening its local market to competition, or whether it has engaged in tactics to stall or frustrate market entry. To quote the FCC directly in this regard:

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[23] AT&T is encouraged in this regard by actions taken by some state commissions to examine access pricing policies. For example, the Colorado Commission has opened Docket No. 00I-494T to examine all forms of intercarrier compensation. In addition, the Montana Commission has opened a docket to examine the impact of access charge prices on interLATA competition in a post-271 environment. See *In the Matter of the Commission's Investigation of the Need to Reduce Qwest's Carrier Access Charge Rates with Associated and Necessary Rebalancing and Mitigation Measures*, Utility Division Docket No. D2001.6.76 (Montana, June 28, 2001).

> Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anti-competitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.[24]

Thus, evidence that a BOC has either (1) disobeyed federal or state telecommunications regulations or (2) engaged in a pattern of anticompetitive conduct, is sufficient to demonstrate that the BOC has not cooperated in opening its local market to competition. The evidence that Qwest has not cooperated in opening its local market to competition is particularly compelling because the evidence consists of *both* types of behavior.

There is no question that Qwest (and its predecessor U S WEST) has routinely disobeyed federal telecommunications regulations. Indeed, the company now known as Qwest violated section 271 as early as April 1997, when the federal Act was little more than one year old. Without opening its local markets to competition and without even seeking FCC approval, Qwest entered the long distance market in violation of the statutory framework involved in these very proceedings. The FCC ruled this year, three and a half years after the complaint was filed, that:

> In sum, USWest's participation in the long distance market through its 1-800-4USWEST Service enables it to obtain significant competitive advantages…The Service allows USWest to build goodwill with its local-service customers, depicting itself as a full-service provider prior to receiving section 271 approval. Indeed, the full-service, or one-stop shopping, advantages provided by the Service appear to have been USWest's primary objective in implementing the Service in the first place.

[24] *Ameritech Michigan 271 Order,* para. 397.

> As the Commission held in the *1-800-AMERITECH Order,* these competitive advantages could reduce USWest's incentive to open its local market to competition and, thus, run counter to Congress's intent in enacting section 271.[25]

Similarly, in another proceeding, the FCC found that the former U S WEST's "provision of nonlocal directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service as defined in section 271(a) of the Act."[26] So, once again, Qwest provided in-region, interLATA service without first demonstrating that its local markets were open to competition, without FCC approval, and in violation of section 271.

In yet a third proceeding, the FCC addressed U S WEST's pre-merger business arrangement with Qwest, and Ameritech's similar arrangement with Qwest.[27] Under the business arrangement, U S WEST and Ameritech provided their local customers with a "one-stop shopping" opportunity that included interLATA services, without first opening their local markets to competition, without FCC approval, and in violation of section 271.[28] With the local market not open to competition, the results of offering local customers one-stop shopping were astoundingly anti-competitive. By leveraging its dominance in the local market to gain long distance customers, U S WEST persuaded *130,000* of its local customers to purchase Qwest's long distance service in just four

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[25] *In the Matter of AT&T Corporation v. U S WEST Communications, Inc., In the Matter of MCI Telecommunications Corporation, Inc. v. U S WEST Communications, Inc.,* Memorandum Opinion and Order, Adopted February 14, 2001, Released February 16, 2001, DA 01-418, para. 19. Footnotes omitted.
[26] *See Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc.* for Forbearance, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (rel. Sept. 27, 1999), paras. 2, 63.
[27] *AT&T Corporation, et. al. v. U S West Communications, Inc., and Qwest Corporation,* file No. E-98-42 (consolidated with File Nos. E-98-41 and E-98-43), FCC 98-242, Memorandum Opinion And Order (rel. to the public October 7, 1998) para. 52.
[28] *Id*., para. 44.

weeks of marketing the one-stop shopping program.[29] Consequently, if Qwest is granted 271 relief before its local markets are open to competition, the same anti-competitive results will occur. Qwest will be able to leverage its dominance in the local market and extend it into the long distance market.

Qwest's violations of section 271 are ongoing. Through review of Qwest's April 16, 2001 Auditor's Report and the accompanying certification submitted to the FCC as required in the FCC's approval of the Qwest-U S WEST merger, AT&T discovered Qwest's further violations of section 271. The Auditor's Report finds that in-region private line services for 266 large business customers were "billed and branded as Qwest services" and that revenues associated with these services from July 2000 through March 2001 exceeded $2.2 million. Through its branding of in-region interLATA transport services as its own, Qwest has once again violated section 271, and there is no knowing when Qwest will stop doing so.

AT&T has requested that the FCC take action against Qwest for its continuing violations of section 271.[30] Good grounds exist to believe that Qwest is further violating section 271 by reason of its teaming arrangements with long distance carriers to provide long distance services to federal agencies located within Qwest's local region.

Most recently, Touch America, Inc., has filed a complaint against Qwest asserting *inter alia* that, contrary to its obligations under both section 271 and the USWest merger agreement, Qwest continues to market and provide in-region interLATA services through its "Q-Wave" service, which provides interLATA capable dark fiber facilities. See

[29] *Id.*

[30] See Roth/Rasher Direct, exhibit 1.

Touch America, Inc. v. Qwest Communications International, Inc., Cause No. CV01148M-DWM, U.S. District Court, District of Montana, Missoula Division (J. Molloy), filed August 22, 2001.

Also related to Qwest's outright violations of section 271 are Qwest's efforts in Arizona and other states to make an end run around the law and provide long distance service without opening its local market to competition and without FCC approval. Qwest sought to remove the LATA boundary within Arizona by asking the Arizona Corporation Commission to abolish the boundary. Qwest's plan was that once the LATA boundary was gone, Qwest could provide long distance service throughout the state because such service could not be characterized as "interLATA service" within the prohibitions of section 271. The FCC responded by threatening to initiate charges against U S WEST (now Qwest) if it were to proceed with its plan.[31]

Although Qwest may claim to welcome competition with open arms, its actions demonstrate that it actually seeks entrance into the long distance market without fulfilling its obligation to let other carriers into its local markets. Qwest has a long history of maintaining its firm grip on its local markets through the use of anti-competitive behavior. Other examples include:

- Qwest's violation of state and federal law (and violation of its interconnection agreement with AT&T) in Minnesota by its refusal to cooperate with various testing procedures. The matter is currently before the Minnesota Public Utilities Commission.

- Qwest's refusal to provide access to NIDs and inside wiring at multi-tenant dwellings in the state of Washington. Qwest's behavior reached a new level of outrageousness here, and included ripping out wiring installed by AT&T technicians, and padlocking control panels to exclude competitors.

[31] Roth/Rasher Direct, exhibit 2.

- Qwest's failure and refusal to convert SunWest Communications' customers from resale lines to UNEs in Colorado. In addition, Qwest has deliberately failed to provide interconnection to SunWest customers, depriving them of telephone service entirely.

- Qwest's apparently deliberate delay in providing interconnection to MCI Metro in the state of Washington, which recently caused WUTC Chair Levinson to write: "This is a consistent pattern of behaviors that all operated to U S WEST's advantage, gave it undue preferences, and subjected MCI to an undue competitive disadvantage and improper discrimination."

- Qwest's refusal to provide Rhythms, and other competitors, with ADSL- capable loops and ISDN-capable loops in Colorado and throughout the 14 Qwest states.[32]

Although these examples are state-specific, Qwest's operating systems, processes and training are region-wide. Thus, it is reasonable to conclude that this same anti-competitive behavior by Qwest is not restricted by state boundary. These examples make it clear that Qwest continues to have no intention of opening its local market.

Qwest's numerous past and ongoing violations of section 271, coupled with its continuing efforts to avoid compliance, should cause this Commission to conclude that Qwest has truly failed and refused to open its local markets in compliance with section 271. The Commission should also lack confidence that Qwest will comply with section 271 in the future.[33]

F. Qwest has not Provided Adequate Assurances that its Local Markets, Once Opened to Competition, Will Remain So.

Another factor the FCC considers under the public interest requirement is whether the BOC has provided adequate assurance that its local markets will remain open to competition if the FCC grants 271 relief and allows the BOC to enter the interLATA

[32] For additional details on these violations, see Roth/Rasher Direct, pp. 14-19.

[33] *See Ameritech Michigan 271 Order*, para. 399, "[W]e need to be confident that we can rely on the petitioning BOC to continue to comply with the requirements of section 271 after receiving authority to enter into the long distance market." It is difficult to have such confidence with Qwest, given its history of noncompliance with section 271.

market in its service region.[34] Mr. Teitzel's testimony indicates that Qwest will rely on a Performance Assurance Plan ("PAP") to demonstrate such assurance.[35] However, the PAP itself is the subject of proceedings which are entirely separate and apart from the public interest portion of this workshop. As a result, it is impossible to find in Mr. Teitzel's testimony any assurance whatsoever of future market openness. The closest to an assurance which Mr. Teitzel can offer here is in his direct testimony, when he states:

> While I am not an expert on the Qwest PAP, I do know that Qwest has developed its plan by adopting the statistical testing and payment structure elements of the SBC plans that have been reviewed and approved by the FCC in SBC's Texas 271 applications in Texas, Kansas, and Oklahoma.[36]

However, Dr. Cooper, testifying on behalf of the Public Counsel, has pointed out that:

> The ink hasn't dried on the PAP. We don't know what the PAP is… We've got issues outstanding. And so we continue to put the cart before the horse, and it's very important to look very carefully.
>
> We heard a lot about Kansas and Oklahoma. It now looks like the FCC acted hastily in Kansas and Oklahoma. We have discovered that they were misled, and there's a proceeding ongoing to investigate what the implications are of faulty information.[37]

At this point, the PAP is clearly a work in progress and not a completed document or process. There are a variety of proposals which have been submitted in those separate PAP proceedings, and it is impossible at this time to evaluate which elements of which proposals will be incorporated into the final document.

Thus, even assuming that at some time in the future Qwest's local markets will be open to competition (a point which AT&T does not concede), Qwest has not yet provided

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[34] *SBC Texas 271 Order*, para. 420; *SBC Kansas/Oklahoma 271 Order*, para. 269.
[35] Teitzel Direct, p. 49, *et seq*.
[36] Teitzel Direct, at p. 51, lines 8-11.
[37] July 17 Transcript, p. 5027, at lines 11-20.

any genuine assurances that its local markets will remain open to competition.

Furthermore, Qwest has consistently and vigorously resisted any and all attempts to establish backsliding penalties in the various states. For example, Iowa House Study Bill ("HSB") 158 had sought to (1) establish continuing standards for the provision of interconnection by ILECs to competitors; (2) allow competitors to pursue private rights of action in order to enforce those continuing standards; and (3) allow for the recovery of actual and punitive damages by competitors harmed by any failure on the part of ILECs to meet those continuing standards. Qwest's direct and vigorous opposition to this bill is another strong indicator of its true intention regarding any accountability once it has received 271 relief.

Qwest has made a shell game of the question of state and federal authority over any PAP, claiming to state authorities that jurisdiction resides with the FCC, and claiming in front of the FCC that such authority resides with the states. For example, before the New Mexico Public Regulation Commission, Qwest argued:

> The aforementioned subsections of proposed Rule 17.11.18 address quality of service standards, performance measures, minimum performance standards and financial incentives relating to the failure to achieve minimum performance standards. These proposed rules are unnecessary and conflict with the federal rules; therefore they should not be adopted by the Commission.[38]

In Minnesota, Qwest again challenged the State Commission's authority to establish wholesale quality service standards. Qwest argued federal preemption over

[38] *Before the New Mexico Public Regulation Commission, In The Matter Of The Adoption Of A Rule Ensuring The Accessibility Of Interconnection By Competitive Local Exchange Carriers In Both Urban And Rural Areas Of New Mexico Pursuant To House Bill 400,* Utility Case No. 3439, Qwest's Comments To The Proposed Rules For Interconnection And Unbundled Network Elements, p. 19.

quality of service standards proposed by the MPUC.[39]

However, at the FCC, Qwest argued:

> **States do not need guidance with respect to implementation of sections 251 and 252.** They have primary jurisdiction over privately-negotiated contracts under those sections, and have been exercising such authority through legislatively-endorsed mediation and arbitration authority unencumbered by federal rules regarding performance measurements for quite some time…There are considerable jurisdictional questions around the establishment of federal performance measurements under sections 251 and 252.[40]

Furthermore, Qwest has resisted any efforts to make a performance assurance plan mandatory.[41] Qwest informed the Executive Committee for the Regional Oversight Committee ("ROC") for the Operational Support Systems ("OSS") test effort currently underway, that "a performance assurance plan is not a 271 requirement, nor is it designed to prove 271 compliance. Instead, *it is a voluntary undertaking*, which creates future obligations with significant corresponding penalties. *Qwest cannot allow* a voluntary undertaking of this magnitude to be subject to modification through an informal ROC governance process where the lines are not clearly drawn between negotiations participants and decision makers."[42]

AT&T believes that "adequate assurances" that markets will remain open after a

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[39] *Before the Minnesota Public Utilities Commission ("MPUC"), In the Matter of Qwest Wholesale Service Quality Standards*, MPUC Docket No. P421/AM-00-849, Qwest Corporation's Reply Comments Regarding The Joint Proposal For Qwest Wholesale Service Quality Standards, January 25, 2001.

[40] *Before the Federal Communications Commission; In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56; RM-9101, Comments of U S WEST Communications, Inc.; June 2, 1998, p. 15 (bolded text included in the original U S WEST filing, footnote omitted) and p. 20 (footnote omitted).

[41] See, for example, Exhibit 1163, pp. 1 and 2.

[42] Letter from R. Steven Davis, Qwest, Senior Vice President, Policy and Law, to Bob Rowe, Allan Thoms, Marilyn Showalter, Stephen F. Mecham, Anne Boyle, Ray Gifford, and Ed Garvey, December 15, 2000, p. 2, (emphasis added).

grant of 271 authority should not begin and end with a PAP. Instead, the Commission should look to a combination of potential rights and remedies, including:

- Automatic and self-executing penalties imposed by a PAP;
- Private rights of action for violation of interconnection agreements, wholesale service quality standards, state rules and regulations, and federal law;
- A wide spectrum of potential remedies, including fines payable to the state general fund, penalties payable directly to a CLEC's end user customers, recovery of actual and punitive damages; and imposition of other penalties and assessments.

Consideration should also be given to a structural separation of Qwest's wholesale and retail operations. There is a clear, fundamental conflict of interest between Qwest's relationship with its retail customers, on the one hand, and its relationship with its wholesale customers on the other. Since the passage of the federal Act, Qwest and its predecessor U S WEST have failed and refused to recognize any of their obligations to wholesale customers. The only way to remedy this situation is to require the structural separation of Qwest's retail group from its wholesale operations, and require the retail group to buy from Qwest's wholesale group in the same way that CLECs do.

Until a comprehensive approach is taken to eliminate Qwest's anti-competitive behavior, with proper safeguards in place to curb Qwest's discriminatory treatment of CLECs, it is premature for the Commission to determine whether the public interest would be served by Qwest's entry into the long distance market. The clear danger here is that, absent such an approach, the result will be a remonopolization of the local and long distance markets in Washington.

CONCLUSION

The record in these proceedings demonstrates that Qwest has failed and refused to open its local markets to competition as required by section 271 of the federal Act.

Indeed, Qwest retains an obvious stranglehold on the local exchange market, and especially the residential market in Washington. Moreover, the prospects for the development of competition in those markets are, at present, extremely poor.

In addition, the record shows that Qwest's proposed entry into the interLATA market will not make that market more competitive; in fact, quite the contrary. Qwest's proposed entry, without a prior adjustment to access charge rates and pricing structure, will result in one player having substantially greater margins on its own long distance services, and having the unique ability to profit from calls placed over its competitors' facilities.

Qwest's continued pattern of anti-competitive behavior, and violation of state and federal law, present additional impediments to its 271 application, especially in the context of a public interest analysis. The public interest will not be served by rewarding this constant and prolonged behavior through a grant of 271 authority.

Lastly in this regard, the record here shows a complete lack of appropriate, adequate assurances that Qwest will keep its local exchange markets open, once they are made open to competitors. The PAP upon which Qwest relies here is at best a work in progress, lacking in finality. It is not at all clear, at this juncture, whether the PAP can provide adequate incentives to Qwest to ensure an appropriate level of wholesale service within the state going forward, or, on the other hand, whether its penalties will become merely a cost of doing business for Qwest.

Pure and simple, it is not presently in the public interest for Qwest to be granted authority to provide in-region long distance service on an interLATA basis. The

Commission here should deny Qwest's application for that authority until such time as the numerous public interest issues have been properly resolved.

Respectfully submitted this 6th day of September 2001.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

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