PUBLIC VERSION

BEFORE THE WASHINGTON STATE 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

QWEST'S BRIEF IN SUPPORT OF ITS SHOWING OF COMPLIANCE WITH THE TRACK A ENTRY REQUIREMENTS OF 47 U.S.C. § 271(c)(1)(A) AND THE PUBLIC INTEREST TEST OF 47 U.S.C. § 271(d)(3)(C)

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INTRODUCTION

Qwest Corporation ("Qwest") submits this brief to demonstrate that it has complied with the requirements of 47 U.S.C. §§ 271(c)(1)(A) and 271(d)(3)(C) in the State of Washington. The former section of the Act (the "Track A requirements") requires Qwest to demonstrate that it has signed binding interconnection agreements with one or more facilities-based competitor — a category that includes competitors leasing unbundled network elements from Qwest — that collectively are providing telephone exchange service to business and residential customers in Washington. The latter section (the "public interest requirements") requires Qwest to show that it has opened its local exchange market and has provided adequate assurances that the market will remain open in the future, making the grant of its application consistent with the public interest. The Federal Communications Commission ("FCC") has found that compliance with the fourteen-point competitive checklist is a strong indicator that the market is now open, and the presence of a performance assurance plan provides "probative evidence" that the market will remain open after grant of the application.[1] Despite the relentless efforts of intervenors, the FCC has never found any "unusual circumstances" that warrant a determination that a section 271 application is inconsistent with the public interest.

Both sections of the Act require Qwest to show that it has taken those actions within its control to enable competitors to enter its markets, if they so choose. Nothing in the Act or the FCC orders implementing the Act requires Qwest to ensure that its competitors actually enter any particular segment of the market on any given scale, or to guarantee that the individual business plans of competitive local exchange carriers ("CLECs") will turn a profit or satisfy prospective lenders or investors. As the FCC has emphasized:

> [P]ursuant to section 271(c)(2)(B) [the competitive checklist], the Act provides for long distance entry even where there is no facilities-based competition satisfying section 271(c)(1)(A) [Track A]. This underscores Congress' desire to condition approval *solely on whether the applicant has opened the door* for local entry

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[1] Memorandum Opinion and Order, 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 ¶¶ 422-23, 429 (1999) ("Bell Atlantic New York Order"), aff'd sub nom. AT&T Corp. v. FCC, 220 F.3d 607 (D.C. Cir. 2000).

> through full checklist compliance, *not on whether competing LECs actually take advantage of the opportunity to enter* the market.[2]

According to the FCC, "compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest,"[3] since it demonstrates that the Bell Operating Company ("BOC") has laid the preconditions for CLEC entry, regardless of whether the CLECs have chosen to enter.

Through its testimony, Qwest has demonstrated by a "preponderance of the evidence"[4] that it has satisfied the Track A requirements and — assuming the Washington Utilities and Transportation Commission (the "Commission") finds in other workshops in this proceeding that Qwest has complied with the competitive checklist and adopted an adequate performance assurance plan — that its entry into the long distance market would serve the public interest. With respect to the Track A requirements, Qwest demonstrated that it has signed binding interconnection agreements with multiple carriers that are collectively providing telephone exchange service for a fee to business and residential customers in Washington using their own facilities or network elements leased from Qwest. And with respect to the public interest test, Qwest demonstrated that there are no "unusual circumstances" in Washington that would overcome the checklist compliance's "strong indica[tion]" that Qwest's markets are now open, or the performance assurance plan's "probative evidence" that those markets will stay open after entry. In both cases, Qwest made exactly the type of showing that the FCC has required in its recent orders granting BOC applications for interLATA authority.

The CLECs have not attempted to rebut these showings directly. Indeed, they give no more than lip service to the FCC orders defining the Track A and public interest requirements. Instead, they have — in direct defiance of those orders — urged this Commission to impose CLEC market share, geographic scope, and CLEC profitability tests that the FCC has

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2 Id. at ¶ 427 (emphases added).

3 Id. at ¶ 422.

4 Id. at ¶ 48 ("[W]e reiterate that the BOC needs only to prove each element by 'a preponderance of the evidence,' which generally means 'the greater weight of the evidence, evidence which is more convincing than the evidence which is offered in opposition to it.'"). As the FCC has represented to the D.C. Circuit, "the burden of proof imposed on a BOC under section 271 does not require the BOC to produce evidence that eliminates all doubt in the record." Brief of Appellee, Sprint Communications L.P. v. FCC, No. 01-1076 (D.C. Cir. filed June 14, 2001).

expressly rejected. They have also used this workshop as a platform for demanding a grab-bag of regulatory requirements, such as access charge adjustments and structural separation, that the FCC has *never* required as a condition of section 271 approval. Finally, the CLECs attempt to blame Qwest for factors that are entirely beyond its control, such as the capital markets' turning sour on CLECs' business plans and the inherent difficulties in entering dispersed and rural markets. Qwest respectfully asks the Commission to find that Qwest has met all the requirements that the FCC has established and reject the CLECs' attempts to invent new ones.

I. QWEST HAS SATISFIED ALL OF THE TRACK A REQUIREMENTS.

The Track A provision, 47 U.S.C. § 271(c)(1)(A), states as follows:

> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR. — A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 … specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) … but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

The FCC has interpreted this language to require a BOC to demonstrate four things: (1) that it has one or more binding agreements with CLECs that have been approved under section 252 of the Act; (2) that it provides access and interconnection to unaffiliated competing providers of telephone exchange service; (3) that these competitors collectively provide telephone exchange service to residential and business subscribers; and (4) that these competing providers offer telephone exchange service either exclusively or predominantly over their own telephone service facilities (which include the unbundled network elements ("UNEs") they lease from Qwest) in combination with resale.[5] Qwest addresses each of these requirements in turn.

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[5] See Memorandum Opinion and Order, 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, 20577-99 ¶¶ 62-104 (1997) ("Ameritech Michigan Order").

A. Qwest Has Entered into One or More Binding Agreements That Have Been Approved Under Section 252.

To satisfy the first element of Track A, an applicant must demonstrate by a preponderance of the evidence that it has "entered into one or more binding agreements that have been approved under section 252 … specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities."[6] Section 252 of the Act in turn lays out the procedures and standards by which state commissions arbitrate and approve BOC–CLEC interconnection agreements. The FCC has affirmed that agreements approved by a state commission pursuant to section 252 are "binding" within the meaning of Track A in that they define the obligations of each party — specifically, the "rates, terms, and conditions under which the [BOC] will provide access and interconnection to its network facilities."[7] The FCC has also made clear that individual state-approved agreements need not address every single one of the checklist items enumerated in section 271(c)(2) in order to count for Track A compliance: "[W]e find nothing in section 271(c)(1)(A) that requires each interconnection agreement to include every possible checklist item, even those that a new entrant has not requested, in order to be a binding agreement for purposes of section 271(c)(1)(A)."[8] No party has challenged Qwest's compliance with this requirement.

Qwest has shown, in full compliance with this first prong of Track A, that as of March 31, 2001, Qwest had entered into 81 binding and approved wireline interconnection agreements in Washington pursuant to section 252 of the Act.[9] Another 33 interconnection agreements (including wireline, resale, wireless, paging, and EAS agreements) were awaiting Commission approval as of the same date.[10] In addition to these interconnection agreements with individual carriers, Qwest has submitted a comprehensive Statement of Generally Available Terms and Conditions ("SGAT") pursuant to 47 U.S.C. § 252(f) that contains terms, conditions, and prices

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6 47 U.S.C. § 271(c)(1)(A).

7 Ameritech Michigan Order at ¶ 72.

8 Id.

9 See Direct Testimony of David L. Teitzel on Behalf of Qwest Corporation Re: Public Interest and Track A (May 16, 2001), In the Matter of the Investigation into Qwest Corporation's Compliance with § 271(c) of the Telecommunications Act of 1996, Docket No. UT-003022 ("Teitzel Direct"), Exhibit 1055T at 11, 12; see also Exhibit 1059. Qwest has also concluded another 59 approved resale, wireless, paging, and EAS agreements. Id.

10 See Exhibit 1059.

applicable to the provision of all aspects of interconnection, including all checklist items.[11] The FCC has acknowledged that SGATs impose binding legal obligations on a BOC just as individual interconnection agreements do, and has held that SGATs can also be used to demonstrate compliance with section 271, even in a Track A application.[12] Finally, as noted in David L. Teitzel's direct testimony, the Commission has also approved Qwest's resale tariff, which contains terms, conditions, and prices applicable to the provision of network interconnection, access to unbundled network elements, ancillary network services, and telecommunications services available for resale in Washington.[13]

Qwest should therefore be deemed in full compliance with the first prong of 47 U.S.C. § 271(c)(1)(A).

B. Qwest Provides Access and Interconnection to Unaffiliated Competing Providers of Telephone Exchange Service.

Track A requires that an applicant provide access and interconnection to "one or more *unaffiliated competing providers of telephone exchange service*."[14] The FCC has determined that a CLEC qualifies as a "competing provider" so long as it provides service "'*somewhere in the state*'" — not necessarily throughout the state (or the BOC's service territory) as a whole.[15] As the *Ameritech Michigan Order* notes, the Act does not condition BOC entry into long distance upon CLECs' having achieved a ubiquitous presence throughout a state; both the House of Representatives and the Senate explicitly rejected amendments that would have imposed such geographic scope requirements.[16] The FCC has declared unequivocally that it

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[11] See Teitzel Direct, Exhibit 1055T at 12:13-18.

[12] See Bell Atlantic New York Order at ¶ 20 ("[T]he Commission must consult with the relevant state commission to verify that the BOC has one or more state approved interconnection agreements with a facilities-based competitor, or a statement of generally available terms and conditions (SGAT), and that either the agreement(s) or general statement satisfy the 'competitive checklist.'"). See also Memorandum Opinion and Order, 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 ¶ 11 (2000) ("SBC Texas Order") (illustrating use of an SGAT — in this instance, an SBC SGAT known as T2A — to test compliance with the checklist requirements, rather than individual agreements).

[13] See Teitzel Direct, Exhibit 1055T at 12:18 to 13:4.

[14] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

[15] Ameritech Michigan Order at ¶ 76 (quoting H.R. Rep. No. 104-204, at 77 (1995)) (emphasis in original).

[16] Id. at ¶ 76 & n.170.

"do[es] not read section 271(c)(1)(A) to require any specified level of geographic penetration by a competing provider."[17]

Nor must a CLEC gain any minimum market share before it may be deemed a "competing provider[]."[18] Track A does not encompass a CLEC market share test, and a finding of Track A compliance would not require or entail any finding that a certain level of competition exists on the ground in Washington. The FCC has spoken plainly on this point as well: "We have never required, however, an applicant to demonstrate that it processes and provisions a substantial commercial volume of orders, or has achieved a *specific market share* in its service area, as a prerequisite for satisfying the competitive checklist."[19] The Senate specifically rejected language that would have required the BOC to prove that there are CLECs in operation that are "capable of providing a *substantial* number of business and residential customers" with service.[20] FCC Chairman Powell has recently emphasized that neither Track A, the public interest requirement, nor any other part of section 271 imposes the type of market share test that the CLECs have urged in this workshop:

> Some of the critics wish it was a market share test. And I won't even opine on whether that's good or bad, but I know that was expressly rejected by the Congress. It doesn't say if there aren't more than 10% of people in the market don't approve them. That's just not what 271 says. And I know that's what a lot of people wish it said. But it doesn't.[21]

Therefore, the Track A requirement is *not* a requirement that a certain level of competition exists in Washington. As long as CLECs are "serving more than a *de minimis* number of end-users for

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[17] Id. at ¶ 76.

[18] Id. at ¶ 77 (explaining that Congress considered and rejected language that would have imposed a "market share" requirement in section 271(c)(1)(A)); see also Memorandum Opinion and Order, 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, CC Docket No. 00-217, FCC 01-29 (rel. Jan. 22, 2001) at ¶ 268 ("SBC Kansas/Oklahoma Order").

[19] SBC Kansas/Oklahoma Order at n.78 (emphasis added) (explaining that Congress considered and rejected language that would have imposed a "market share" requirement in section 271(c)(1)(A)).

[20] Ameritech Michigan Order at ¶ 76 & n.170 (quoting 141 Cong. Rec. S8319-26 (daily ed. June 14, 1995)) (emphasis in original).

[21] "Powell Defends Stance on Telecom Competition," Communications Daily, May 22, 2001, Vol. 21, No. 99 (2001 WL 5053238).

a fee in their respective service areas," the FCC will "find that each of these carriers is an actual commercial alternative to the BOC" sufficient for the Track A requirement.[22]

Qwest has fully satisfied this element of Track A, a fact that no party has attempted to dispute. Confidential Exhibit 1056C provides a comprehensive list of the unaffiliated CLECs that are active in Washington, with information regarding the type of facilities and services that each CLEC is purchasing from Qwest. This chart shows exactly what UNEs, LIS trunks, resale, and other interconnection services and facilities each CLEC was purchasing from Qwest as of April 30, 2001.[23]

The following summary, drawn in large measure directly from David L. Teitzel's May 16, 2001, direct testimony[24] and the partial CLEC responses to Qwest's discovery requests that Qwest has received to date, demonstrates that Qwest's competitors are in fact providing facilities-based (including UNE-based) competition in Washington. The CLECs described below are fully operational and are providing service for a fee to customers.[25]

In all, as of March 2001, Qwest had leased 58,782 unbundled loops to CLECs in Washington, and Washington CLECs provided an estimated 66,987 access lines to customers through full facilities bypass on that date (60,288 business and 6,699 residential) and another 66,265 access lines via resale, for a total of 192,034 CLEC access lines relevant for purposes of Track A.[26]

1. **WorldCom**. WorldCom acknowledged in its response to Qwest's data request that it **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXXXXXXXXXXXXXX XXXXX XXXXXXXXXXX CONFIDENTIAL DATA ENDS]** in Washington using a

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[22] Ameritech Michigan Order at ¶78. To be clear, no particular amount of competition is required to comply with Track A. See Bell Atlantic New York Order at ¶ 427. However, in Washington there are actually many CLECs providing service to more than a de minimis number of customers.

[23] See Confidential Exhibit 1056C (revised June 29, 2001).

[24] See generally Teitzel Direct, Exhibit 1055T at 16:6 to 32:12.

[25] See Transcript of Workshop Proceedings, In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with Section 271(c) of the Telecommunications Act of 1996, Docket No. UT-003022, July 16, 2001 ("7/16/01 Tr."), at 4818:5-9 ("[W]e show specific CLECs with interconnection agreements in place and only those CLECs who are currently purchasing services from Qwest.") (testimony of David L. Teitzel).

[26] See Confidential Exhibit 1058C. The ported number methodology used to estimate the number of access lines provided through full facilities bypass is discussed below in Section I.D, see infra text accompanying notes 99-106. Additionally, the LIS trunk methodology discussed infra produces a higher estimate of CLEC full facilities bypass access lines.

combination of its own facilities and unbundled network elements.[27] While WorldCom stated that it does not keep track of the total number of business lines it provides via facilities-based competition, it did report that it provided services over **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** total circuits (including lines and trunks) through a combination of its own facilities and special access facilities leased from Qwest in Washington as of May 31, 2001.[28] Of that total, WorldCom provided **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX CONFIDENTIAL DATA ENDS]** business customers via facilities-based competition as of the same date.[29]

WorldCom has traditionally targeted large businesses for voice and data services, including long distance, local, high capacity, and data.[30] In Washington, WorldCom has an operational local voice network in Kirkland and Seattle, and an operational data network in Seattle capable of providing ATM and Frame Relay services, Internet protocol, and DSL.[31] As of April 2000, WorldCom had more than 370 total fiber miles in the Seattle-Tacoma metropolitan area.[32]

WorldCom has also strengthened its position in several respects in the last few years. WorldCom acquired Brooks Fiber in 1997, enabling it to add 44 local facilities-based networks to its portfolio, and received FCC approval for its $37 billion merger with MCI in September 1998.[33] In August 2000, the company announced that it had filed its first round of applications for authority to offer broadband fixed wireless services in more than 60 markets nationwide.[34] Finally, WorldCom recently strengthened its ability to offer web-hosting and applications

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[27] See Responses of WorldCom, Inc. to Qwest's Second Set of Informal Discovery, In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271 (c) of the Telecommunications Act of 1996, Docket No. UT-003022, Confidential Exhibit 1069C, at Attachment A.

[28] Id.

[29] Id.

[30] See Teitzel Direct, Exhibit 1055T at 25:7-8.

[31] Id. at 25:9-12, 26:1-2 (citing CLEC Report 2001, New Paradigm Resources Group, Inc., ("CLEC Report 2001")).

[32] Id. at 26:3-4 (citing April 2000 U S WEST MIDS Report, Seattle-Tacoma MSA "State of Competition").

[33] Id. at 25:2-6 (citing CLEC Report 2001).

[34] Id. at 26:10-12.

services with its acquisition of Intermedia, thus giving WorldCom a controlling interest in Digex, a leading provider of those services.[35]

2. **AT&T**. AT&T has moved boldly into the cable telephony market in recent years and is currently one of the largest CLECs in Washington.[36] AT&T's $11.3 billion takeover of Teleport Communications Group, approved by the FCC on July 23, 1998, provided AT&T with direct access to facilities-based local exchange and high capacity markets in Seattle and other major urban centers around the country.[37] AT&T has stated that the merger will enable it to sell packages of local, long distance, and data communications to businesses.[38]

AT&T Broadband is currently providing cable telephony in a number of locations throughout Washington, including West Seattle, Tacoma, Issaquah, and Vancouver. In southwest Washington, at least 500,000 customers now have a choice between Qwest and AT&T for local telephone service.[39] And AT&T has publicly stated that every home in Clark County with access to AT&T's cable service will also have access to AT&T's local phone service by the end of 2001.[40] AT&T's local service is presently available in a third of the 180,000 homes in Clark County that have access to cable service, including the Vancouver, Camas, and Washougal areas.[41] AT&T is also in the process of upgrading its cable systems in Seattle, Kirkland, Bothell, Centralia, and Woodinville[42] and is offering local digital telephone services in Kent in competition with Qwest.[43]

According to the New Paradigm Resources Group, AT&T has operational local voice networks in Bellingham, Seattle, and Spokane, with a local voice network planned for Tacoma.[44]

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35 Id. at 26:12-15.

36 Qwest notes that AT&T has refused to answer Qwest's data requests regarding the numbers of access lines and customers AT&T serves in Washington. In fact, AT&T has filed a motion to prohibit Qwest from being able to see or to review this access line information at all, even though Qwest is the applicant in this proceeding and the access lines are indisputably relevant.

37 Id. at 16:7-10.

38 Id. at 16:13-14 (citing "AT&T's Teleport Takeover OK'd," Arizona Republic, July 24, 1998).

39 Id. at 18:12-13 (citing www.columbian.com/03092001/opinion/183002.htm, May 8, 2001).

40 Id. at 18:14-15 (citing www.columbian.com/09142000/business/149513.htm, May 8, 2001).

41 Id. at 18:16-17, 19:1.

42 Id. at 19:1-3 (citing www.seattlep-i.nwsource.com/local/cable17.shtml, May 8, 2001).

43 Id. at 19:2-4 (citing www.seattlep-i.nwsource.com/business/19305_tbrf19.shtml, May 8, 2001).

44 Id. at 17:16-17, 18:1 (citing CLEC Report 2001 at 19-23).

In Seattle, AT&T has a fiber network in place with at least 85 buildings on the network, and has an operational Lucent 5ESS voice switch.[45] In addition, AT&T has an operation data network in Seattle capable of providing ATM, frame relay, and DSL services.[46] As of April of last year, AT&T had over 210 total fiber miles in the Seattle/Tacoma metropolitan area.[47]

3. **Electric Lightwave**. Electric Lightwave, Inc. ("ELI") was the first telecommunications company in the western United States authorized as an alternative local and long distance service provider.[48] A subsidiary of Citizens Utilities Company, it began its operations in the early 1990s in Washington and Oregon.[49] ELI acknowledged in its response to Qwest's data request that it **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX CONFIDENTIAL DATA ENDS]** in Washington.[50] According to ELI, it provided **[CONFIDENTIAL DATA BEGINS: XXXXX XXXXXXXXXXXXXXXXXXXX CONFIDENTIAL DATA ENDS]** business customers via facilities-based competition in Washington as of July 9, 2001.[51]

In July 2000, ELI announced that it had completed the last three segments of its $131 million long-haul fiber optic network, which will interconnect with existing long-haul routes to Spokane and Seattle, as well as with each of ELI's extensive Metropolitan Area Networks cities, including Boise, Phoenix, Portland, Sacramento, Salt Lake City, Seattle, and Spokane.[52] ELI holds itself out as a full-service provider, offering integrated communications service packages including local service, switched and dedicated long distance, private networks, advanced data and Internet access services, nationwide videoconferencing, and prepaid services to customers in

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[45] Id. at 18:2-3.

[46] Id. at 18:3-5.

[47] Id. at 18:5-7 (citing April 2000 U S WEST MIDS Report, Seattle-Tacoma MSA "State of Competition").

[48] Id. at 19:8-10 (citing www.eli.net/about/index.shtm, May 4, 2001).

[49] Id. at 19:10-13 (citing www.onlineproxy.com/citizens/2001, April 13, 2001).

[50] See Responses of Electric Lightwave, Inc., to Qwest Data Requests Dated June 13, 2001, In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271 (c) of the Telecommunications Act of 1996, Docket No. UT-003022, Confidential Exhibit 1160C, at 1-2.

[51] Id. at 2-3.

[52] See Teitzel Direct, Exhibit 1055T at 20:4-10 (citing www.eli.net/media/releases/JULY13.00.shtm, May 4, 2001).

Spokane, Tacoma, and Seattle.[53] As of April 2000, ELI had almost 111 total fiber miles in the Seattle-Tacoma metropolitan area.[54]

4. **XO Communications**. XO, formerly known as NEXTLINK, operates as a facilities-based provider in Seattle and Spokane.[55] XO acknowledged in its response to Qwest's data request that it **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX CONFIDENTIAL DATA ENDS]** in Washington.[56] According to XO, it provided **[CONFIDENTIAL DATA BEGINS: XXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX CONFIDENTIAL DATA ENDS]** total lines provided via facilities-based competition in Washington as of July 9, 2001.[57] XO served **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** business customers via facilities-based competition as of the same date.[58] In addition, XO provided **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXXXXXXXXXXXXXXXXX CONFIDENTIAL DATA ENDS]** residential customers via UNEs and/or UNE combinations.[59]

XO has more than 570,000 local and inter-city fiber miles in operation and is also the largest holder of fixed broadband wireless spectrum in North America, with licenses covering 95% of the population of the 30 largest cities in the United States, including Seattle.[60] XO aggressively markets data and voice services to small and medium-sized business customers: The company began offering customers an integrated, flat-rate package of local and long

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53 Id. at 21:2-6 (citing www.eli.net/service/index.shtml, May 4, 2001).

54 Id. at 21:6-7 (citing April 2000 U S WEST MIDS Report, Seattle-Tacoma MSA "State of Competition").

55 Id. at 28:2-3.

56 See Responses of XO Washington, Inc., to Qwest Data Requests Dated June 13, 2001, In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271 (c) of the Telecommunications Act of 1996, Docket No. UT-003022, Confidential Exhibit 1161C, at 1-2.

57 Id. at 2-3.

58 Id. at 3.

59 Id. at 1-2.

60 See Teitzel Direct, Exhibit 1055T at 28:5-8 (citing "XO Completes Consecutive Point Broadband Wireless Tests," Dec. 5, 2000, available at www.xo.com/news/51.html).

distance voice, Internet access, and web hosting services in September 2000.[61] XO is expanding rapidly and will begin to serve larger business customers as its network capacity increases.[62]

5. **Advanced Telcom**. In its response to Qwest's data request, Advanced Telcom Group, Inc. ("ATG") acknowledged that it **[CONFIDENTIAL DATA BEGINS: XXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX CONFIDENTIAL DATA ENDS]** in Washington.[63] According to ATG, as of May 31, 2001, it was using its own facilities to provide **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXX CONFIDENTIAL DATA ENDS]** in Washington.[64] Founded in 1998, ATG is already offering Internet and telephone services via its own digital network to medium-sized communities in Washington, Northern California, Oregon, Nevada, Maryland, Virginia, Connecticut, and New York.[65]

6. **Teligent**. Teligent is a facilities-based carrier currently providing service in Seattle.[66] In its response to Qwest's data request, Teligent acknowledged that it **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXX CONFIDENTIAL DATA ENDS]** in Washington.[67] According to Teligent, as of June 27, 2001, it was using its own facilities to provide **[CONFIDENTIAL DATA BEGINS: XXX CONFIDENTIAL DATA ENDS]** business access lines in the state.[68]

Teligent claims that it can provide to a company of any size the same communications power, services, and savings once reserved for only the largest companies.[69] Teligent offers business customers local and long-distance phone service and Internet access on one bill at

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61 Id. at 28:8-15.

62 Id. at 28:11-12.

63 See Responses to Qwest's First Set of Informal Discovery to Advanced Telcom Group, Inc., In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271 (c) of the Telecommunications Act of 1996, Docket No. UT-003022, Confidential Exhibit 1067C, at 15.

64 Id. at 16, 22.

65 See www2.callatg.com/index_sub1.html.

66 See Teitzel Direct, Exhibit 1055T at 27:2-3.

67 See Responses of Teligent Services, Inc., to Qwest's First Set of Informal Discovery, In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271 (c) of the Telecommunications Act of 1996, Docket No. UT-003022, Confidential Exhibit 1068C at 14.

68 Id. at 16.

69 See Teitzel Direct, Exhibit 1055T at 27:3-5 (citing www.teligent.com/docs/aboutus/html, May 4, 2001).

savings of up to 30% off traditional local phone service.[70] Teligent offers a fixed wireless service using digital microwave communications to send voice and data signals over very high radio frequencies.[71]

7. **Eschelon Telecom**. Eschelon, formerly known as Advanced Telecommunications, Inc., is an integrated communications provider of voice, data, and Internet services operating primarily in the northwest and southwest United States.[72] Eschelon focuses largely on small to medium businesses and provides a comprehensive line of telecommunications products and services, including local service.[73] Although Eschelon initially used only leased facilities to provide service, it recently began installing its own switches and other facilities.[74] Eschelon announced last fall that it had completed the installation of its network facilities in Seattle, allowing it to offer voice, data, and Internet services over its own facilities.[75] Eschelon is also completing a major investment in building facilities in Tacoma.[76] The Seattle network moves Eschelon closer to its stated goal of expanding the company's service footprint to a total of 26 markets by the end of 2001.[77] Moreover, Eschelon and Qwest recently signed an agreement that will enable Eschelon to provide voice and data services to small and medium business customers via UNEs leased from Qwest.[78]

8. **Allegiance Telecom**. Allegiance is a facilities-based competitive local exchange carrier that offers small to medium-sized business customers a competitive package of telecommunications services, including local, long-distance, and Internet services.[79] The

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[70] Id. at 27:5-7.

[71] Id. at 27:7-9.

[72] Id. at 21:9-11.

[73] Id. at 21:11-13.

[74] Id. at 21:13-15.

[75] Id. at 21:15-18 to 22:1 (citing "Eschelon Telecom, Inc. Completes Installation of Network Facilities in Seattle," www.businesswire.com/webbox/bw.091100/202554908.htm, May 4, 2001).

[76] Id. at 22:1-2.

[77] Id. at 22:2-4.

[78] Id. at 22:8-14. See also "Qwest Communications and Eschelon Telecom Announce $150 Million Wholesale Contract for Voice and Data Service," Businesswire, Nov. 16, 2000, available at www.businesswire.com/webbox/bw.111600/203214892.htm.

[79] See Teitzel Direct, Exhibit 1055T at 23:2-5 (citing "Investor Relations," May 23, 2001, available at www.algx.com/investor_relations/index.jsp).

company was active in 29 markets, including Seattle, by the end of the first quarter of this year.[80] On April 24, 2001, Allegiance and Qwest announced the completion of electronic bonding between their operations support systems, an arrangement that will reduce the time required to process customer orders for local telephone service, as well as facilitate competition by making it easier for business customers in the Allegiance market to switch from one local service provider to another.[81] Allegiance becomes the thirteenth CLEC in Washington to have electronic bonding in place between itself and Qwest for the purpose of service order processing.

9. **Sprint**. Sprint is currently providing local service to both residential and small-business customers in the Seattle area.[82] It began offering its integrated communications system, Sprint ION, to customers in Seattle in November 1999.[83] Sprint had over 80 total fiber miles in place in the Seattle-Tacoma metropolitan area as of April 2000.[84]

* * *

As demonstrated by this partial survey, Qwest provides access and interconnection to numerous unaffiliated competing providers in Washington. And this survey is merely a sampling of the existing competitive market: there are other CLECs offering facilities-based service in the state. Qwest has not received CLEC responses to many of its discovery requests and has no other means of obtaining up-to-date information on its competitors' activities in Washington.

As noted, the FCC's only requirement is that these carriers be "serving more than a *de minimis* number of end-users for a fee in their respective service areas."[85] The numbers set forth above and the data on loops and access lines in Section I.D and Confidential Exhibit 1056C demonstrate that the facilities-based CLECs active in Washington are collectively providing

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80 Id. at 23:7-8.

81 Id. at 23:11-16, 24:1-4 (citing "Allegiance Telecom Continues on Plan With Record Setting First Quarter Results," April 24, 2001, available at www.algx.com/about_allegiance/in_the_news/1q01_results.php).

82 Id. at 24:6-7.

83 Id. at 24:7-9 (citing "Sprint Begins Marketing Sprint Ion Services in Denver, Kansas City, & Seattle," www.sprint.com, May 4, 2001).

84 Id. at 24:13-14 (citing April 2000 U S WEST MIDS Report, Seattle-Tacoma MSA "State of Competition").

85 Ameritech Michigan Order at ¶ 78.

service to more than a *de minimis* number of customers. Therefore, Qwest has satisfied this prong of the Track A test.

C. Unaffiliated Competitors Are Providing Telephone Exchange Service to Residential and Business Subscribers.

Section 271(c)(1)(A) further requires that the competitors described above provide "telephone exchange service . . . *to residential and business subscribers*."[86] The FCC has made clear that the relevant question is whether the CLECs in a state are *collectively* serving both residential and business customers, not whether any single carrier is serving both groups.[87] Congress specifically amended the Act to "eliminat[e] the requirements that one carrier serve *both* residential and business customers, and allow[] instead, multiple carriers to serve such subscribers."[88] This remains the FCC's view, as articulated most recently in its order granting Verizon's section 271 application for Connecticut.[89] Therefore, so long as residential and business customers are being served in a state — by one CLEC or by some combination of CLECs — this requirement of Track A is satisfied.

As discussed in detail in the previous section and demonstrated in the workshop testimony, CLECs are collectively providing telephone exchange service to residential and business subscribers in Washington. Although no such showing is required for section 271 approval, Qwest has also adduced evidence demonstrating that individual CLECs are, in fact, simultaneously providing both business and residential services in the state.[90] AT&T, for instance — despite its refusal to respond to Qwest's data requests in this proceeding — has heralded its own growing presence in both the local business and residential markets in

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[86] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

[87] See Ameritech Michigan Order at ¶ 82.

[88] Id. at ¶ 84 (emphasis added).

[89] See Memorandum Opinion and Order, Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut, CC Docket No. 01-100, FCC 01-208 (rel. July 20, 2001) ("Verizon Connecticut Order") at App. D ¶ 15; see also Memorandum Opinion and Order, Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, FCC 01-130 (rel. April 16, 2001) at ¶ 223 ("Verizon Massachusetts Order").

[90] See supra text accompanying notes 50, 56.

Washington.[91] Qwest is therefore in compliance with the third element of 47 U.S.C. § 271(c)(1)(A).

D. Competitors Are Providing Telephone Exchange Service Either Exclusively over Their Own Telephone Exchange Service Facilities or Predominantly over Their Own Telephone Exchange Service Facilities in Combination with Resale.

The fourth element of the FCC's Track A test requires that competing providers offer telephone exchange service "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[92] The FCC has made clear that a CLEC's "own telephone exchange service facilities" in this context include the unbundled network elements it leases from the incumbent.[93] Moreover, the FCC has determined that this element of Track A is satisfied even if only one CLEC in a state is offering service exclusively or predominantly over its own facilities; it need not be the case that other CLECs (or all CLECs) use their own facilities as well.[94]

The carriers identified in Section I.B are indeed providing service over "their own telephone exchange service facilities," as the FCC defines that phrase. First, more than one carrier in Washington has leased unbundled loops from Qwest, and these are deemed the CLECs' "own . . . facilities" under the FCC's rules: there were 58,782 unbundled loops in service and 29 CLECs using unbundled loops in Washington as of March 2001.[95]

These unbundled loop numbers greatly understate the amount of own-facilities competition in Washington. The CLECs plainly serve a significant number of customers by bypassing Qwest's network entirely. As noted in the workshop, however, only the CLECs have

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[91] See supra text accompanying notes 37-43; see also Exhibit 1057 (featuring an AT&T broadband advertisement).

[92] 47 U.S.C. § 271(c)(1)(A).

[93] Ameritech Michigan Order at ¶ 99.

[94] Id. at ¶ 104 (determining that because one CLEC was offering service exclusively over its own facilities, the BOCs' interconnection agreement with that CLEC satisfied the statutory requirement and made it unnecessary to examine whether additional interconnection agreements with other CLECs also satisfied the requirement).

[95] See Confidential Exhibit 1058C (providing the total number of unbundled loops in service, as of March 2001); Teitzel Direct, Exhibit 1055T at 41:12 (providing the number of CLECs using unbundled loops in Washington, as of March 31, 2001).

full information on their facilities bypass activities,[96] and the only concrete data that Qwest could obtain was through the formal discovery process in this proceeding. Therefore, Qwest could obtain data only from carriers that intervened and became parties — which constitute only a subset of the CLECs actually operating in Washington. (Even then, several carriers — including major Washington CLECs such as AT&T and Sprint — have refused to respond at all to Qwest's data requests.[97]) Qwest prefers concrete data to estimates and has urged the Commission to consider these statistics as they become available.[98]

In the absence of complete responses from the CLECs, Qwest has had to estimate the number of CLEC facilities bypass lines in Washington.[99] Two estimation methods were discussed in the Washington workshop. First, Qwest developed a very conservative methodology based on the number of telephone numbers ported from Qwest to CLECs.[100] Qwest ports a telephone number to a CLEC in only two instances: (1) when the CLEC provisions service to a former Qwest customer entirely over its own network, *or* (2) when the CLEC provisions service to a former Qwest customer using a stand-alone UNE loop from Qwest that is connected to the CLEC's own switch.[101] Since a CLEC might not actually be using every telephone number ported to it (for example, if the CLEC customer moves away and the CLEC fails to re-port the number to Qwest), Qwest made the extremely conservative assumption that only one out of every two telephone numbers ported to a CLEC is actually in service at any given time; hence, it divided the number of ported telephone numbers in half.[102] Qwest then estimated the number of access lines provided by CLEC full facilities bypass networks by subtracting the number of stand-alone unbundled loops Qwest provisions that are connected to

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[96] See 7/16/01 Tr. at 4827:12-21; 4939:16 to 4940:19 (testimony of David L. Teitzel).

[97] In light of AT&T's refusal to respond to Qwest's data request, it is ironic that AT&T counsel Gary Witt asserted that "the best evidence of what CLECs are doing … on a facilities basis is their own information and not something that Qwest would have." Id. at 4941:17-25.

[98] Id. at 4832:25 to 4833:4. See also id. 4942:19-22 ("You're assuming that the CLEC is providing accurate data. That's what we would rather have, because we want the actual numbers to be able to present to the Washington Commission.").

[99] In this respect, Qwest is no different than the applicants in every 271 application granted by the FCC, all of which relied on estimates for the number of CLEC facilities bypass lines.

[100] See Teitzel Direct, Exhibit 1055T at 34:11 to 35:13; 7/16/01 Tr. at 4828:1 to 4830:19.

[101] This is the link, or nexus, between ported numbers and CLEC facilities bypass lines.

[102] See Teitzel Direct, Exhibit 1055T at 34:11 to 35:13; 7/16/01 Tr. at 4828:1 to 4830:19.

CLEC switches, a known quantity.[103] This conservative calculation indicates that there are 66,987 CLEC facilities bypass lines in service in Washington.[104] In all likelihood there are many more; since this estimation method relies on ported telephone numbers, it fails to count CLEC access lines for which no telephone number has been ported. Qwest ports a number to a CLEC only if the CLEC wins the customer from Qwest and the customer chooses to keep his or her phone number. If the customer is new to the area and was never a Qwest customer, or if a customer accepts a different telephone number upon switching to a CLEC, this estimation method will not capture the CLEC's access line.[105]

As noted above, Qwest has no way of knowing exactly how many of the estimated CLEC access lines serve residential customers and how many serve business customers. Therefore, as in Public Interest and Track A proceedings in other states, Qwest has assumed that 90 percent of CLEC access lines are dedicated to business customers and the remaining 10 percent to residential customers, in light of the fact that local exchange competition has been present for a substantially longer period for the former customers than for the latter.[106] The resulting estimates of CLEC residential and business facilities bypass lines in service in Washington are presented in the chart below:

Estimated Competitive Bypass Lines in Service
(as of March 2001) (Ported Number Method)

Residential	6,699
Business	60,288
Full Facilities Bypass Lines in Service	66,987

These conservative estimates clearly demonstrate that CLECs in Washington are offering services either exclusively or predominantly over their own facilities.

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[103] Id.

[104] Id.

[105] Id.

[106] See 7/16/01 Tr. at 4947:18 to 4948:21 (explaining that the 90-10 split "was based on the competitive market in the state and the fact that the business competitive market is a more mature market than is a residential market") (testimony of David L. Teitzel).

Qwest witness David L. Teitzel also discussed a second estimation methodology, which the FCC permitted SBC to use in support of its successful section 271 applications in Texas, Kansas, and Oklahoma.[107] This estimation method assumes that CLECs provide 2.75 access lines through facilities bypass for every interconnection (LIS) trunk they obtain.[108] Exhibit 1059, submitted with David L. Teitzel's direct testimony of May 16, 2001, presents the number of LIS trunks Qwest provisioned to CLECs as of March 31, 2001.[109] Taking those numbers and multiplying by 2.75 yields the following estimates of CLEC bypass lines in service:

Estimated Competitive Bypass Lines in Service (as of March 2001)
(LIS Trunk Method)

Interconnection (LIS) trunks in service (as of 3/31/01)[110]	149,847
SBC ratio of CLEC facility-based access lines to LIS trunks in service	2.75
Estimated number of CLEC facility-based access lines[111]	412,079

A comparison of the results of the two estimation methodologies reinforces just how conservative the ported number methodology actually is:

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107 See Teitzel Direct, Exhibit 1055T at 35:7-13 & n.87; 7/16/01 Tr. at 4830:20 to 4832:3 (testimony of David L. Teitzel).

108 See SBC Kansas/Oklahoma Order ¶ 42 & n.96. See also Teitzel Direct, Exhibit 1055T at 35:7-13 & n.87; 7/16/01 Tr. at 4830:20 to 4831:8 (testimony of David L. Teitzel).

109 Mr. Teitzel testified at the workshop that LIS Trunks are synonymous with total interconnection trunks in service (as reported on Exhibit 1059). See 7/16/01 Tr. at 4831:15-20.

110 See Exhibit 1059.

111 Results are rounded to the nearest whole number.

Comparison of Ported Number/LIS Trunk Estimation Methods (Expressed as a Percent) (as of March 2001)

Estimated number of CLEC facility-based access lines using the **LIS trunk methodology** (Number of LIS trunks x 2.75)[112]	412,079
Estimated number of CLEC facility-based access lines (CLEC-owned and stand-alone UNE loops) using the **ported number methodology**[113]	101,277
Percent higher CLEC facility-based access line total using LIS trunk method vs. ported number method[114]	307%

It is clear under either approach that CLECs are in fact serving the market using their own telephone exchange service facilities.

Finally, the CLECs' limited responses to Qwest's data requests provide further evidence that CLECs are in fact providing service "exclusively" or "predominantly" over their own facilities. For example, XO Washington reports that, as of May 2001, it served **[CONFIDENTIAL DATA BEGINS: XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXX**[115] **CONFIDENTIAL DATA ENDS]** As noted above, the FCC has clarified that the fourth element of Track A is satisfied if only one CLEC is offering services exclusively or predominantly over its own facilities.[116] Thus, the services offered by XO Washington alone would satisfy this prong of the Track A analysis without a need to examine data from other CLECs in Washington.[117]

Accordingly, Qwest satisfies all four prongs of the Track A requirements in Washington.

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[112] Results are rounded to the nearest whole number. LIS trunks are used for CLEC full facilities bypass lines and stand-alone unbundled loops, but not for UNE-P loops or resale lines.

[113] The 101,277 access line figure is derived by adding the ported number–based estimate of CLEC facility-based access lines (66,987) and the number of stand-alone unbundled loops provided to CLECs (34,290), a number that Qwest can track and identify with certainty.

[114] Results are rounded to the nearest whole number.

[115] See Confidential Exhibit 1161C at 3.

[116] See Ameritech Michigan Order at ¶ 104.

[117] As previously discussed, the FCC has determined that Track A is satisfied even if only one CLEC in a state is offering service exclusively or predominantly over its own facilities. See supra note 94 and accompanying text.

II. QWEST'S ENTRY INTO THE INTERLATA MARKET IN WASHINGTON IS CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY.

An applicant for section 271 authority must demonstrate that "the requested authorization is consistent with the public interest, convenience, and necessity."[118] The FCC's orders make clear that the public interest inquiry is neither a standardless exercise nor an open invitation for CLECs to submit their wish lists. The public interest analysis should focus on whether the local market is open to competition and whether there is adequate assurance that the local market will remain open after the section 271 application is granted. The FCC has repeatedly held that "compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest."[119] The public interest inquiry is simply "an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected."[120] Qwest has never suggested that the public interest test encompasses nothing beyond checklist compliance. However, checklist compliance, as per Congress's design, is a strong *indication* that Qwest's market is open and that entry would be in the public interest. There is no question that the public interest inquiry is separate from the checklist, but it does not therefore follow that the public interest test can be used to impose an unrestricted wish list of regulatory obligations on Qwest, or that it authorizes a standardless gut call on whether entry is justified. The FCC has held that a BOC's entry into the long distance market, once it has met the checklist, would be contrary to the public interest only in "*unusual* circumstances."[121] Indeed, the FCC has *never* rejected a section 271 application on these grounds where the BOC has met the checklist requirements.

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[118] 47 U.S.C. § 271(d)(3)(C).

[119] Bell Atlantic New York Order at ¶ 422. See also SBC Kansas/Oklahoma Order at ¶ 268 (reaffirming that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist").

[120] Verizon Connecticut Order at Appendix D ¶ 72.

[121] Id. (emphasis added).

There are three parts to the FCC's section 271 public interest inquiry. First, the FCC determines whether granting the application "is consistent with promoting competition in the local and long distance telecommunications markets," giving substantial weight to Congress's presumption that when a BOC is in compliance with the competitive checklist, the local market is open and long-distance entry would benefit consumers.[122] Second, the FCC looks for assurances that the market will stay open after a section 271 application is granted. In this analysis, the FCC reviews the BOC's performance assurance plan (if the BOC has adopted one) and other available enforcement tools for adequate assurances that the BOC "would continue to satisfy the requirements of section 271 after entering the long distance market."[123] Finally, the FCC considers whether there are any remaining "unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications."[124] Qwest addresses each step in turn.

A. Qwest's Application Is Consistent with Promoting Competition in Both the Local and Long Distance Markets in Washington.

1. The Local Market

Qwest's compliance with the elements of the Act's competitive checklist in Washington is the subject of a series of other workshops in this proceeding. Qwest's compliance with particular interconnection duties and checklist requirements were appropriately addressed in those workshops. Should the Commission find that Qwest has met the checklist requirements in Washington, that finding is of significant probative value, since checklist compliance "is, itself, a strong indicator that long distance entry is consistent with the public interest."[125]

As the FCC has held, nothing in the Act requires a BOC to prove that CLECs have in fact entered the market in any significant number or achieved a particular level of market penetration:

> Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here. Moreover, pursuant to section

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[122] SBC Kansas/Oklahoma Order at ¶ 268.

[123] Id. at ¶ 269.

[124] Id. at ¶ 267; see also id. at ¶¶ 281-82.

[125] Bell Atlantic New York Order at ¶ 422; see also SBC Texas Order at ¶ 416.

> 271(c)(2)(B) [the competitive checklist], the Act provides for long distance entry even where there is no facilities-based competition satisfying section 271(c)(1)(A) [Track A]. This underscores Congress' desire to condition approval solely on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity to enter the market.[126]

Accordingly, Qwest is not *required* to demonstrate that CLECs have actually entered its market in order to obtain section 271 approval. Nevertheless, the evidence presented in the Washington workshop *does* establish that CLECs are in fact walking through Qwest's open door and requesting (and receiving) interconnection. As of March 31, 2001, Qwest had entered into a total of 81 wireline interconnection agreements (including opt-ins) with CLECs in the state; 59 wireless, paging, and EAS interconnection agreements; and 33 additional resale interconnection agreements (for a total of 140 approved interconnection agreements).[127] And as of that same date, there were also 33 additional interconnection agreements pending between Qwest and CLECs in Washington.[128] All in all, Qwest is actively interconnecting with at least **[CONFIDENTIAL DATA BEGINS: XX CONFIDENTIAL DATA ENDS]** CLECs.[129]

Under these agreements, Qwest had completed 434 CLEC collocations as of March 31, 2001,[130] and some 29 CLECs were using 149,847 local interconnection trunks to interconnect with Qwest.[131] As of this date, Qwest also had provisioned 34,290 stand alone unbundled loops, as well as an additional 24,492 UNE-P lines, to 21 different Washington CLECs.[132] And the CLECs are clearly using these interconnections and unbundled loops to provide services. In March 2001, a total of 1,228,425,986 minutes of use were exchanged between CLECs and Qwest in Washington.[133]

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[126] Bell Atlantic New York Order at ¶ 427 (footnotes omitted).

[127] See Exhibit 1059.

[128] Id. This figure includes pending wireline, resale, wireless, paging, and EAS interconnection agreements, as well as opt ins.

[129] See Confidential Exhibit 1056C (as of 6/29/01).

[130] See Exhibit 1059 (as of 3/31/01).

[131] Id.

[132] Id. See also Confidential Exhibit 1064C.

[133] See Exhibit 1059.

Moreover, CLECs are using their interconnection with Qwest to serve an increasingly large customer base. Adding Qwest's actual counts of unbundled loops provided and resold lines to its conservative estimate (based on ported numbers) of CLEC full facilities bypass lines suggests that CLECs were providing 192,034 residential and business access lines in Washington as of March 2001, representing at least 7.2 percent of the total access lines in Qwest's service territory:

CLEC Market Share Estimates (as of March 2001): Ported Number Method

Estimated CLEC full facilities bypass lines using ported number methodology[134]	66,987
Unbundled loops in service[135]	58,782
Resold access lines[136]	66,265
Total CLEC access lines in Qwest territory (UNE, resale, CLEC-owned)	192,034
Total Qwest and CLEC access lines in Qwest territory	2,673,375
% CLEC access lines	7.2%

Using the LIS-trunk method to estimate CLECs' full facilities bypass lines that the FCC allowed in the *SBC Texas* and *SBC Kansas/Oklahoma* decisions (and again adding actual counts of UNE loops and resold lines) yields even higher CLEC market shares:

[134] See supra "Estimated Competitive Bypass Lines in Service (as of March 2001) (Ported Number Method)," chart and text accompanying note 106.

[135] See Confidential Exhibit 1058C.

[136] Id.

CLEC Market Share Estimates (as of March 2001): LIS Trunk Method

Estimated number of CLEC facilities-based lines using LIS trunk methodology (Number of LIS trunks x 2.75)[137]	412,079
UNE-Platform loops in service[138]	24,492
Resold access lines[139]	66,265
Total CLEC access lines in Qwest territory (UNE, resale, CLEC-owned)	502,836
Total CLEC + Qwest access lines in Qwest territory	2,984,177
% CLEC access lines	16.9%

Since they were calculated using the same methodology, these latter numbers can be compared to the market shares that existed in Texas, Kansas, and Oklahoma when the FCC granted SBC's section 271 applications for those states. It is clear that there has been significantly greater entry in Washington than existed in Oklahoma (estimated 5.5 to 9.0 percent) and Kansas (estimated 9.0 to 12.6 percent) when SBC's application was granted.[140] Indeed CLEC market shares in Washington substantially exceed the shares that existed in Texas (8.0 percent)[141] — even though Washington is a far smaller state with only 28 percent of the population of Texas.[142]

Finally, other measures also confirm that retail customers in Washington are moving to CLECs in ever-larger numbers. As of March 31, 2001, there were 87,322 CLEC residential white pages listings in Qwest directories in Washington.[143] As David L. Teitzel noted in his testimony in this proceeding, Qwest's records show that it lost significant numbers of residential and business accounts and corresponding access lines to CLECs during the year 2000 alone:

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137 See supra, "Comparison of Ported Number/LIS Trunk Estimation Methods (Expressed as a Percent) (as of March 2001)," line 1 of chart accompanying note 112. LIS trunks are used for CLEC full facilities bypass lines and stand-alone unbundled loops, but not for UNE-P loops or resale lines.

138 See Confidential Exhibit 1058C.

139 Id.

140 See SBC Kansas/Oklahoma Order at ¶¶ 4-5.

141 See SBC Texas Order at ¶ 5 & n.7.

142 As of April 2000, the total population of Washington was 5,894,121, versus 20,851,820 for Texas. See United States Census Bureau, "Ranking Tables for States: Population in 2000 and Population Change from 1990 to 2000 (PHC-T-2)," available at www.census.gov/population/cen2000/tab02.pdf.

143 See Exhibit 1059.

- Residential Accounts 30,264
- Residential Access Lines 30,710
- Business Accounts 7,184
- Business Access Lines 21,825[144]

These figures, together with the preceding data, demonstrate clearly that not only has Qwest opened the local market in Washington, but that competition is robust.

2. The Long Distance Market. Just as the FCC (following Congress's intent) presumes that the local market is open if the BOC has complied with the competitive checklist, it also presumes that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist."[145] Once a BOC proves that it has complied with the competitive checklist, it is "not require[d] . . . to make a substantial *additional* showing that its participation in the long distance market will produce public interest benefits."[146] The FCC takes that as given: "As a general matter, we believe that additional competition in telecommunications markets will enhance the public interest."[147]

Congress has also recognized the benefits to consumers of having BOCs enter the long distance market once their local markets are open, and the FCC has noted "Congress' desire to condition approval solely on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the

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[144] See Teitzel Direct, Exhibit 1055T at 37:3-6.

[145] Bell Atlantic New York Order at ¶ 428; SBC Texas Order at ¶ 419; SBC Kansas/Oklahoma Order at ¶ 268.

[146] Bell Atlantic New York Order at ¶ 428 (emphasis in original).

[147] Id. In direct contradiction to the FCC's procompetitive stance, AT&T argues that allowing Qwest to offer one-stop shopping, or packaged local and interLATA service, will result in a new Qwest monopoly. See Affidavit of Mary Jane Rasher on Behalf of AT&T Regarding Public Interest (June 7, 2001), In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996, Docket No. UT-003022 ("Rasher Affidavit"), Exhibit 1075T at 12-13, 27-28. The FCC has specifically rejected this argument. See Bell Atlantic New York Order at ¶ 428 (finding that BOC bundling of local and interLATA services presents no concerns when the BOC is in compliance with the competitive checklist, and finding that the BOC's entry into long distance promotes consumers' interests). Ms. Rasher's suggestion that consumers should be denied the benefits of increased interLATA competition simply to give CLECs an artificial competitive advantage over Qwest is entirely alien to Congress's design.

opportunity" in such numbers as to make long distance entry somehow justified.[148] The D.C. Circuit has likewise cautioned against misreading section 271 to impose unnecessary bars against BOC entry:

> The Commission must be equally careful to ensure . . . that BOCs that satisfy the statute's requirements are not barred from long distance markets. Setting the bar for statutory compliance too high would inflict two quite serious harms . . . . First it would dampen every BOC's incentive to cooperate closely with state regulators to open its local markets to full competition . . . Second, setting the bar too high would simultaneously deprive the ultimate beneficiaries of the 1996 Act — American consumers — of a valuable source of price-reducing competition in the long distance market.[149]

Independent studies continue to confirm that the benefits to consumers are substantial. A May 2001 study by the Telecommunications Research Action Center ("TRAC") demonstrates that New York consumers will save up to $284 million annually on long distance telephone service as a result of BOC entry into the interLATA market in that state.[150] There is every reason to think customers in Washington would realize analogous savings if Qwest were allowed to compete.

Permitting Qwest to enter long distance would increase customer choice and competition in the *local* market as well. To date, and through no fault of Qwest's,[151] CLECs have largely targeted the most lucrative business and urban customers in Washington. But experience has shown that a BOC's imminent entry into the long distance market acts as a catalyst for CLECs to accelerate entry into local exchange markets. In particular, IXCs faced with the prospect of increased competition for their core long distance customers accelerate their local entry plans in a bid to retain those customers through bundled service packages. The data from New York bear this out. CLECs put their local entry plans into gear only once it became clear that Verizon's section 271 application would succeed. In the News Release announcing the FCC report entitled

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[148] Bell Atlantic New York Order at ¶ 427.

[149] AT&T Corp. v. FCC, 220 F.3d 607, 632-33 (D.C. Cir. 2000) (quotation marks omitted).

[150] See TRAC Estimates New York Consumers Save Up to $700 Million a Year on Local and Long Distance Calling, Telecommunications Research Action Center, May 8, 2001.

[151] See Bell Atlantic New York Order at ¶ 427 (refusing to link the "market facts" of "limited competition outside of Manhattan" to "any sin of omission or commission by" the BOC); SBC Kansas/Oklahoma Order at ¶ 268 (acknowledging that limited entry in smaller markets may be due to "[f]actors beyond a BOC's control, such as individual CLEC entry strategies").

Local Telephone Competition: Status as of December 31, 2000, released May 21, 2001, the FCC concluded:

> CLECs captured 20% of the market in the State of New York — the most of any state. CLECs reported 2.8 million lines in New York, compared to 1.2 million lines the prior year — an increase of over 130% from the time the FCC granted Verizon's long distance application in New York in December 1999 to December 2000.[152]

Furthermore, data recently released by the New York State Public Service Commission reveal that the number of local exchange lines served by CLECs more than doubled from 1999 to 2000 (from 9.8 to 20.9 percent) following the grant of Verizon's section 271 application; and, for the first time since the New York PSC began collecting these statistics, more CLEC access lines were dedicated to residential customers (52 percent) than to business customers (48 percent).[153] In total, New York consumers will save an estimated $700 million annually on long distance and local telephone service.[154] Similarly impressive statistics have been reported for Texas, where "CLECs [have] captured 12% of the market in Texas, gaining … 644,980 end-user lines in the [6] months since the [FCC granted] SBC's section 271 application in Texas — an increase of over 60% in customer lines since June 2000."[155] Permitting Qwest to enter the interLATA market will have a similar effect in Washington, enabling customers to obtain expanded benefits of local competition.

B. Qwest Has Provided Adequate Assurances That Its Local Exchange Market Will Remain Open to Competition After Section 271 Approval.

The FCC's public interest analysis also considers whether the BOC has provided assurance that it will continue to satisfy the requirements of section 271 after entering the long distance market.[156] The FCC has consistently noted that, while it has "never required" a BOC to provide a Performance Assurance Plan (with respect to Qwest, the "QPAP"), if a BOC chooses to develop one, the plan will constitute "probative evidence" that the BOC will continue to meet its section 271 obligations and that its long distance entry is consistent with the public interest.[157]

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[152] News, Federal Communications Commission Releases Latest Data on Local Telephone Competition, Federal Communications Commission, May 21, 2001, at 1.

[153] See 2000 Competitive Analysis: Analysis of Local Exchange Service Competition in New York State, New York State Public Service Commission, December 31, 2000, at 3, 4.

[154] See News, Federal Communications Commission Releases Latest Data on Local Telephone Competition, Federal Communications Commission, May 21, 2001, at 1.

[155] Id.

[156] See Bell Atlantic New York Order at ¶¶ 422-23; SBC Texas Order at ¶¶ 416-17.

[157] Bell Atlantic New York Order at ¶ 429 ("Although the Commission strongly encourages state performance

Qwest has developed a robust QPAP for Washington that, among other things, provides rigorous performance measurements, a sound statistical methodology, and self-executing payments to CLECs and to the state. Qwest worked with a number of parties to create the QPAP in a series of Post Entry Performance Plan collaborative workshops being held under the auspices of the Regional Oversight Committee ("ROC"). CLECs, state commission staffs, and other interested parties participated in these workshops, and as a result of agreements reached in the collaborative, Qwest modified its plan to make it even more robust. Additionally, the QPAP was recently the subject of two-weeks of hearings presided over by the Multi-State Facilitator, Mr. John Antonuk. Parties from Washington, including state commission staff, Public Counsel, and CLECs actively participated in these proceeding and cross-examined Qwest witnesses about the features of the QPAP. The parties are now preparing post-hearing briefs and Mr. Antonuk is expected to issue a recommendation on the QPAP on October 15.

The QPAP will not be the only safeguard against backsliding. The most significant assurance of future compliance beyond the QPAP is the FCC's enforcement authority under section 271(d)(6).[158] If at any time after the FCC approves a 271 application, it determines that a BOC has ceased to meet any of the conditions required for such approval, section 271(d)(6) provides the FCC enforcement remedies, including imposition of penalties, suspension or revocation of 271 approval, and an expedited complaint process. Thus, there is more than adequate assurance of continuing compliance.

AT&T and Mark N. Cooper, witness for the Washington State Attorney General's Office, suggest that Qwest cannot satisfy this prong of the public interest analysis because the QPAP process has not yet been fully completed.[159] The contention that the QPAP process underway will somehow fail to address the concerns of either the State or the CLECs is groundless. That process has given all of the parties potentially affected by the QPAP, including the CLECs, the

monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval."); SBC Texas Order at ¶ 420.

158 See 47 U.S.C. § 271(d)(6). See also Bell Atlantic New York Order at ¶ 429.

159 See Rasher Affidavit, Exhibit 1075T at 23-27; Direct Testimony of Mark N. Cooper on Behalf of the Public Counsel Section of the Washington State Attorney General's Office, In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996, Docket No. UT-003022 ("Cooper Testimony"), Exhibit 1070T at 30-31.

opportunity to raise their concerns and to cross-examine witnesses in the ROC workshops and Multi-State QPAP proceedings. There is simply no reason to duplicate that inquiry here. In fact, WorldCom acknowledges that the "Commission is participating in the ROC collaborative's consideration of Qwest's proposed 'anti-backsliding' performance assurance plan and will be addressing the results of the ROCs work *in a later phase of this proceeding*."[160] Qwest has presented adequate assurance of future compliance, and this prong of the public-interest inquiry has been met.

C. No Intervenor Has Demonstrated That There Are Any "Unusual Circumstances" That Would Make Long Distance Entry Contrary to the Public Interest.

The final piece of the public interest inquiry involves a determination that there are no "unusual circumstances" that would make section 271 approval inappropriate.[161] The FCC has stated that it "may review the local and long distance markets" in a state "to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of [the BOC's] application."[162] Given the FCC's strong presumption that entry is in the public interest if the BOC has complied with the checklist, it has *never* found such "unusual circumstances" to exist.

The FCC has identified issues that it will *not* count as "unusual circumstances." These include: (1) the low percentage of total access lines served by CLECs, (2) the concentration of competition in densely populated urban areas, (3) minimal competition for residential service, (4) modest facilities-based investment, and (5) prices for local exchange service at maximum permissible levels under the price caps.[163] The FCC has determined that such factors do not result from a "sin of omission or commission" on the part of the BOC and have no place in the public interest test.[164] If the BOC has complied with the competitive checklist, it should not be punished because "[f]actors beyond [its] control, such as individual competitive LEC entry strategies,"

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[160] Direct Testimony of Don Price Re: Public Interest, WorldCom, Inc. (June 25, 2001), In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996, Docket No. UT-003022 ("Price Testimony"), Exhibit 1090T at 74:9-12 (emphasis added).

[161] See Bell Atlantic New York Order at ¶ 423; Verizon Massachusetts Order at ¶ 233.

[162] Id.

[163] See Bell Atlantic New York Order at ¶ 426; SBC Texas Order at ¶ 419.

[164] Bell Atlantic New York Order at ¶ 427.

result in low CLEC customer volumes.[165] CLECs' complaints that they cannot realize a sufficient profit on their services are likewise irrelevant, since "incumbent LECs are not required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin."[166] Finally, "isolated instances" of service quality glitches or noncompliance do not affect the public interest inquiry.[167]

The CLECs participating in this proceeding make no pretense of following the FCC's section 271 orders. Indeed, WorldCom counsels outright defiance of the FCC, "urging" the Commission *not* to "limit its deliberations to those elements considered in the FCC's public interest reviews."[168] And Mr. Cooper skips over recent FCC orders in favor of a non-authoritative set of comments filed by the Department of Justice in 1997.[169] Mr. Cooper ignores the fact that Congress gave the task of interpreting the public interest standard to the FCC, not to the Department of Justice, and expressly provided that views of that Department on a section 271 application "shall not have any preclusive effect on any [Federal Communications] Commission decision."[170]

Instead, the CLECs participating in this workshop have presented a random grab-bag of complaints, most of which have nothing to do with section 271 at all, and many of which the FCC has already expressly held to be irrelevant to a section 271 application. None of these constitutes the "unusual circumstances" that could overcome the strong presumption that

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[165] Verizon Massachusetts Order at ¶ 235; SBC Kansas/Oklahoma Order at ¶ 268.

[166] SBC Kansas/Oklahoma Order at ¶ 65.

[167] Id. at ¶ 281. See also Bell Atlantic New York Order at ¶ 50 (holding that "anecdotal" evidence of "isolated incidents" is insufficient to prove "that the BOC's policies, procedures, or capabilities preclude it from satisfying the requirements" of section 271).

[168] Price Testimony, Exhibit 1090T at 13:4-5.

[169] See Cooper Testimony, Exhibit 1070T at 6-8 (quoting Evaluation of the United States Department of Justice, Federal Communications Commission, in re Application of SBC Communications, Inc. et al. for Provision of In-Region InterLATA Services in Oklahoma, CC Docket No. 97-121, filed May 16, 1997). These DOJ comments were filed on a very early application for relief that SBC filed in 1997 for Oklahoma, not the joint Kansas/Oklahoma application the FCC granted in 2001. In fact, Mr. Cooper admits that the citations in his testimony ignore all FCC decisions of the last four years and refer only to the 1997 FCC section 271 orders for Oklahoma and Ameritech Michigan. See Transcript of Workshop Proceedings, In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with Section 271(c) of the Telecommunications Act of 1996, Docket No. UT-003022, July 17, 2001 ("7/17/01 Tr."), at 5035:15-21 (testimony of Mark N. Cooper).

[170] 47 U.S.C. § 271(d)(2)(A). Similarly, the D.C. Circuit has held that "[i]nterpreting the Telecommunications Act is the FCC's job, not the Justice Department's, a proposition recognized by both Congress and the Department." AT&T Corp. v. FCC, 220 F.3d 607, 625 (D.C. Cir. 2000). According to the D.C. Circuit, "Congress required only that the FCC give the Department's evaluation [of a section 271 application] 'substantial weight,' admonishing that the evaluation should not have 'preclusive effect.'" Id. at 627 (quoting 47 U.S.C. § 271(d)(2)(A)).

Qwest's checklist compliance makes its entry into long distance consistent with the public interest.

1. ***UNE and retail pricing.*** AT&T and WorldCom both suggest that Qwest's UNE prices do not allow them to make enough of a profit in the residential market.[171] For example, AT&T argues that, because "UNE rates are so high when comparing cost to retail rates . . . CLECs cannot compete with Qwest for residential customers using the UNE-Platform."[172] Notably, neither of these CLECs suggests that Qwest is charging anything for UNEs or retail services other than the prices that have been approved by the Commission in separate cost dockets. Nor do they suggest that Washington has failed to follow the Telecommunications Act's pricing methodology for UNEs. Any such argument would be beyond the scope of this proceeding.

If Qwest is charging UNE prices that the Commission has found to comply with the Act, and if those Act-determined prices do not enable the CLECs to achieve the profit margins they wish in light of Qwest's state-set retail prices, that is not Qwest's fault: "[I]ncumbent LECs are not required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin."[173] In the *Verizon Massachusetts Order*, the FCC made clear that whether UNE rates provide CLECs a sufficient profit margin to make UNEs an attractive entry strategy "is not part of the section 271 evaluation" at all.[174] Thus, the FCC had specifically rejected AT&T's and WorldCom's argument *twice* prior to this proceeding, and for them to continue presenting it in direct defiance of the FCC's explicit orders borders on the irresponsible. The only relevant question is whether the BOC's UNE prices follow the Act's specified cost-based methodology, a question for another docket. "The Act requires that we review whether the rates are cost-based, not whether a competitor can make a profit by entering the market."[175] The FCC further noted that this type of argument would draw the FCC well beyond its jurisdiction and the appropriate scope of a section 271 proceeding:

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[171] See Rasher Affidavit, Exhibit 1075T at 5-7; Price Testimony, Exhibit 1090T at 24-35.
[172] Rasher Affidavit, Exhibit 1075T at 5.
[173] SBC Kansas/Oklahoma Order at ¶ 65.
[174] Verizon Massachusetts Order at ¶ 41.
[175] Id.

> Conducting a profitability analysis would require us to consider the level of a state's retail rates, because such an analysis requires a comparison between the UNE rates and the state's retail rates. Retail rate levels, however, are within the state's jurisdictional authority, not the Commission's. Conducting such an analysis would further require a determination of what a "sufficient profit margin" is. We are hesitant to engage in such a determination.[176]

Similarly, in the *Kansas/Oklahoma Order*, the FCC held as follows:

> Parties also assert that the Oklahoma promotional UNE rates are so high that no
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> competitive LEC could afford to use the UNE platform to offer local residential service on a statewide basis. *Such an argument is irrelevant.* The Act requires that we review whether the rates are cost-based, not whether a competitor can make a profit by entering the market. Were we to focus on profitability, we would have to consider the level of a state's retail rates, something which is within the state's jurisdictional authority, not the Commission's.[177]

The FCC specifically declined to consider this argument in the context of the public interest inquiry, suggesting that it is no more appropriate to consider the argument here than in any other part of section 271.[178] Now that the FCC has rejected it multiple times, the intervenors have no basis for raising this issue once again.

2. *Intrastate access charges.* AT&T also alleges that Qwest's intrastate access charges would give it such an advantage in the long distance market that Qwest's entry could not be in the public interest.[179] First and foremost, the FCC has never once reviewed a BOC's access charges as part of a section 271 application, nor has it ever conditioned a BOC's entry into the long distance market on reforming access charges. Moreover, FCC review of state-approved intrastate access charges would present the very same jurisdictional concerns as would reviewing state-approved retail rates, as just discussed. AT&T's concern that Qwest's

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[176] Id. (footnotes omitted).

[177] SBC Kansas/Oklahoma Order at ¶ 92 (citations omitted) (emphasis added). See also Verizon Massachusetts Order at ¶ 41.

[178] See SBC Kansas/Oklahoma Order at ¶ 281. See also id. at ¶ 92 ("The Act requires that we review whether the rates are cost-based, not whether a competitor can make a profit by entering the market. Were we to focus on profitability, we would have to consider the level of a state's retail rates, something which is within the state's jurisdictional authority, not the Commission's.").

In defending the SBC Kansas/Oklahoma Order to the D.C. Circuit, the FCC noted that AT&T's argument boils down to a claim "that the FCC should not allow a BOC to enter the long distance market unless the BOC has adopted UNE rates that guarantee a certain level of competitive entry in the local exchange market. When some of the appellants made a similar argument to Congress, both the House and the Senate specifically declined to incorporate this sort of 'market share' test into section 271. Appellants cannot now win through litigation what they could not obtain through legislation." Brief for Appellee, Sprint Communications Co. v. FCC, No. 01-1076 at 32 (D.C. Cir. filed June 14, 2001).

[179] See Rasher Affidavit, Exhibit 1075T at 8-12.

section 272 interLATA affiliate, Qwest Communications Corporation ("QCC"), will have some unfair advantage if access charges are not reduced is without merit. AT&T's argument ignores that, by the very terms of the Telecommunications Act of 1996, QCC must pay exactly the same access charges as any other interexchange carrier.[180] Therefore, QCC will not obtain any unfair advantage. The FCC has concurred and determined that the separation and nondiscrimination provisions of section 272 provide adequate safeguards against an effort by an ILEC to obtain an unfair competitive advantage by discriminating against unaffiliated IXCs, either by allowing their long distance affiliates to obtain access service below tariffed access charges or by impairing competition in the long distance market by raising access charges across the board and simultaneously lowering the retail rates of its affiliate's long distance service to below cost.[181] Specifically, the FCC held:

> Contrary to the concerns of some parties, the temporary constraint at issue here should not allow incumbent LECs that provide in-region long distance service to engage in "price squeezes" or other anticompetitive practices, either by allowing their long-distance affiliates to obtain access service below tariffed access charges or by impairing competition in the long-distance market by raising access charges across the board and simultaneously lowering the retail rates of its affiliate's long-distance services to below cost. Incumbent LECs seeking to provide interLATA services through an affiliate must adhere to certain structural separation and nondiscrimination requirements. For example, Congress anticipated that some Bell Operating Companies ("BOCs") would obtain authorization under 47 U.S.C. § 271 to originate in-region long distance services before the completion of access charge reform (which includes reform not just of charges for the special access services at issue here, but also of charges for ordinary switched access as well). Congress therefore enacted Section 272, which requires a BOC competing in the in-region long distance market to create a separate long distance affiliate and to recover

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[180] See 47 U.S.C. § 272(e)(3). Section 272(e)(3) provides that a BOC "shall charge the affiliate . . . an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service." 47 U.S.C. § 272(e)(3). See also Rebuttal Testimony of Marie E. Schwartz on Behalf of Qwest Corporation Regarding 272 Issues (June 21, 2001), In the Matter of the Investigation into Qwest Corporation's Compliance with Section 272 of the Telecommunications Act of 1996, Docket No. UT-003022, 1139T at 29:12-14 ("The BOC [Qwest] charges the 272 Affiliate the same prices that the BOC would charge any other carrier and does charge its non 272 affiliates. Therefore, there is no issue of discrimination."); 7/17/01 Tr. at 5139:5-10 ("[A]ny service that would be provided to QCC in-region once they have interLATA authority would have to be provided through the carrier account team under the same rates, terms, and conditions, any tariff services, any non-tariff services, that's correct.") (testimony of Marie E. Schwartz).

[181] See Supplemental Order Clarification, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 9587 ¶¶ 19-20 (2000); see also First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, 11 FCC Rcd. 21,905 ¶ 258 (1996) (rejecting assertion that FCC should impose additional requirements concerning possible predatory pricing other than section 272's separation and nondiscrimination provisions because "adequate mechanisms are available to address this potential problem").

> access charges from that affiliate on the same basis on which it recovers such charges from unaffiliated carriers.
>
> As we have consistently determined, those structural and non-discrimination requirements provide adequate safeguards against any effort by an incumbent to obtain an unfair competitive advantage in the long-distance market by discriminating against unaffiliated IXCs or by improperly allocating costs or assets between itself and its long-distance affiliate.[182]

The FCC has plainly heard the CLECs' concerns in this area and rejected their proposed remedies.

Testimony and documentary evidence presented in the Washington workshop establish that Qwest is fully prepared to comply with the structural and nondiscriminatory requirements of 272 and to treat QCC like any other long distance carrier.[183] The FCC has specifically rejected CLECs' requests. Since the requirements of section 272 require Qwest's 272 affiliate to be billed for, and to pay, the same access charges as any other long distance carrier, and since Qwest has confirmed that it will abide by these requirements, there is no need to stretch the public interest inquiry to reach this issue.

3. ***Qwest's alleged anti-competitive behavior.*** AT&T and WorldCom also proffer a disjointed series of federal and state complaint proceedings — many of which do not even involve events in Washington[184] — in the hopes of creating the impression that Qwest is somehow a compulsive bad actor that the Commission may *never* find to be in compliance with section 271.[185] The CLECs are throwing dust. Whether Qwest is in fact complying with the market-opening requirements of the Act will be determined on the basis of the factual record developed in the workshops devoted to checklist compliance, not on the basis of hyperbolic assertions regarding some alleged "monopoly mindset."[186] Moreover, there is less to AT&T's

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182 Id. (citations omitted).

183 See, e.g., Supplemental Direct Testimony of Marie E. Schwartz on Behalf of Qwest Corporation Regarding 272 Issues (May 16, 2001), In the Matter of the Investigation into Qwest Corporation's Compliance with Section 272 of the Telecommunications Act of 1996, Docket No. UT-003022, Exhibit 1125T at 32:15-16 ("The BOC [Qwest] is committed to providing its services to the 272 Affiliate on a nondiscriminatory basis."); "Qwest Communications Corporation Section 272 Affiliation Transactions," Exhibit 1123 ("Qwest Corporation will comply with each of the requirements of Section 272, as well as all of the related regulations promulgated by the FCC.").

184 See, e.g., Rasher Affidavit, Exhibit 1075T at 18-19; Price Testimony, Exhibit 1090T at 39-45; 7/17/01 Tr. at 5051:20 to 5053:4 (testimony of AT&T witness Diane Roth).

185 See Rasher Affidavit, Exhibit 1075T at 11-19; Price Testimony, Exhibit 1090T at 36-47.

186 Price Testimony, Exhibit 1090T at 36-37. AT&T concedes that "the specifics of Qwest's anti-competitive behavior . . . are being discussed at length in the checklist workshops, so I will not go into the details here." Rasher

and WorldCom's lists than meets the eye: Qwest has settled most of the disputes cited, including SunWest and Rhythms, to the satisfaction of the complaining CLECs. WorldCom admits that "many of the examples" it cites of Qwest's supposed "continuing monopoly mindset" in fact "were ultimately resolved."[187]

Nor do the various FCC proceedings AT&T cites prove anything.[188] Each of the three FCC cases cited by AT&T involved a good-faith view by U S WEST (and, in two cases, by Ameritech as well) that an offering did not involve it in the provision of interLATA service.[189] None of these cases involved anything more than a dispute about the scope of the term "provide" as used in section 271 — which the D.C. Circuit recognized in the Buyer's Advantage case has no plain meaning in this context,[190] and which the FCC interpreted not to mean the same thing as used in section 275, and upon which the BOCs had relied.[191] Whatever the merits of these past statutory disputes, they have no relevance today. As AT&T acknowledges,[192] the primary concern with a BOC offering an interLATA service prematurely is that it may blunt the BOC's incentives to go through the work of opening its markets and demonstrating compliance in a full section 271 proceeding. The only reason the Washington workshop process is occurring, of course, is that Qwest is in fact committed to pursuing the full section 271 process. The FCC has

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Affidavit, Exhibit 1075T at 14.

187 Price Testimony, Exhibit 1090T at 38:11-22.

188 See Rasher Affidavit, Exhibit 1075T at 11-14.

189 The Buyer's Advantage case, for example, involved whether the prohibition in section 271 against "provid[ing]" interLATA services could be read to extend to programs by U S WEST and Ameritech in which those BOCs marketed (but did not transmit) an independent third party provider's interexchange service. On review, the D.C. Circuit upheld the FCC's "case-by-case judgment[]" that it could be so read as reasonable (and therefore entitled to judicial deference). U S WEST Communications, Inc. v. FCC, 177 F.3d 1057, 1061 (D.C. Cir. 1999), cert. denied, 528 U.S. 1188 (2000).

The calling card programs developed by U S WEST and Ameritech involved similar analyses of whether these BOCs would be deemed to be "provid[ing]" interLATA service by marketing a calling card for use with an independent third party provider's interexchange service. See Memorandum Opinion and Order, AT&T Corp., v. U S West Communications, Inc., File No. E-97-28 et al., DA 01-418 (Chief, Enforcement Bureau, rel. Feb. 16, 2001).

Finally, U S WEST's National Directory Assistance program involved the question whether providing nonlocal directory assistance from an out-of-region data base — which would have been permissible under section 271(g)(4) had the data base been owned by U S WEST itself — so qualified where the data base was owned by a third party. See Memorandum Opinion and Order, Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, 14 FCC Rcd 21,086 (1999) ("DA Order"). The FCC has specifically rejected AT&T's argument that the BOCs' provision of national directory assistance services should cause them to fail the public interest test. See Bell Atlantic New York Order at ¶ 445. Qwest was allowed to provide non-local directory assistance in-region where Qwest owned the database. The only reason that the FCC disallowed Qwest's provision of non-local directory assistance out-of-region was because Qwest did not actually own the out-of-region database. See DA Order.

190 See 177 F.3d at 1058 ("The statutory term 'provide' appears to us somewhat ambiguous in the present context.").

191 Id. at 1060-61.

192 See Rasher Affidavit, Exhibit 1075T at 12.

specifically recognized that the post-merger Qwest has "a greater incentive than the pre-merger U S West to satisfy section 251 so that it can comply with section 271 and re-enter the in-region long distance market and serve Qwest's national corporate customers that require service in the U S West region."[193] Whether Qwest has sufficiently opened its markets today to competition will be determined on the record developed in the checklist compliance workshops, not by reference to past cases.[194]

4. *Structural Separation.* AT&T and WorldCom suggest that the Commission should take the public interest inquiry as an opportunity to effect a massive corporate restructuring of Qwest, akin (by their own characterizations) to the 1984 break-up of AT&T.[195] They specifically ask the Commission to order Qwest to "establish[] a corporate structure that would separate Qwest's retail and wholesale activities into two separate subsidiaries" and "to establish a retail company with independent management that would interact with the wholesale company on [an] arm's length basis."[196] While AT&T and WorldCom do not delineate the precise bounds of the Commission remedy they are seeking, this structural separation would presumably be limited to Qwest's network and operations in Washington.

AT&T and WorldCom never *once* identify the provision of state or federal law that purportedly authorizes the Commission to condition the grant of a federal section 271 application on a forced corporate restructuring. Simply put, there is none. Nothing in section 271 or any other section of the federal Telecommunications Act authorizes state commissions to invent new structural separation requirements beyond the short list of separate affiliate obligations Congress

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[193] Memorandum Opinion and Order, Qwest Communications International Inc. and U S West, Inc. Application for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, 15 FCC Rcd 5376 ¶ 2 (2000) ("Qwest Merger Order").

[194] Ms. Rasher also alleges that reviews of Qwest's April 16, 2001, Auditor's Report and merger approval certification filed with the FCC on the same day demonstrate that Qwest violated section 271 "[t]hrough its branding of in-region interLATA transport services as its own." Rasher Affidavit, Exhibit 1075T at 13. This matter is currently under review by the FCC, which is the appropriate forum for resolving any issue relating to the audit, and not a section 271 proceeding. See Verizon Connecticut Order at ¶ 79 (noting that "Verizon's compliance with the conditions of the Bell Atlantic/GTE merger … [would] be appropriately addressed in the Commission's detailed review of the audit findings").

In any event, AT&T is grasping at straws: This matter involved a simple billing error, not a violation of section 271. As Qwest has stated to the FCC, the error involved services provisioned by Touch America (not Qwest). The services were erroneously billed in the name of Qwest. Qwest did not provision the services, did not market them or obtain any material benefits associated with packaging them with local service, did not hold itself out as the provider of them, and did not perform any other functions of an interexchange carrier.

[195] See Rasher Affidavit, Exhibit 1075T at 30, 39; Price Testimony, Exhibit 1090T at 66.

[196] Rasher Affidavit, Exhibit 1075T at 30-31.

enumerated, and no FCC order has ever required involuntary corporate restructuring as a condition of section 271 authorization. No such authority is found in Washington law either. Involuntary structural separation would force Washington consumers to bear the costs of a duplicative corporate structure, wasteful administrative overhead, and an inefficient division of Qwest's integrated multistate operations into insular Washington-specific retail and wholesale entities. In fact, no state anywhere has found AT&T's proposal for structural separation to be worth the massive costs it imposes, and every state commission to consider this proposal has rejected it.

a. The Commission has no authority under federal law to impose involuntary structural separation as a precondition to granting a section 271 application.

Neither AT&T nor WorldCom can point to any provision of section 271 that authorizes structural separation, nor can they point to any FCC section 271 order that has even *hinted* that such far-reaching authority might lurk somewhere within the until-now unassuming public interest inquiry. Congress enumerated two, and only two, separate entity requirements in Title II of the 1996 Act: the interLATA services and manufacturing affiliate requirement of 47 U.S.C. § 272, and the electronic publishing affiliate rules of 47 U.S.C. § 274, which have since sunset.[197] Congress made compliance with the section 272 rules an express condition of section 271 relief.[198] These provisions "evidence[] Congress' considered judgment as to when" a BOC must "provide telecommunications services through an affiliate."[199] Given Congress's specificity regarding the limited separate affiliate requirements of section 272 and its express incorporation of those requirements in section 271(d)(3)(***B***), it strains credulity to suggest that an *even broader* authority to order separation for *all* local exchange services is hidden somewhere in section 271(d)(3)(***C***)'s public interest test.

Nor does any other section of the Act contain the authority AT&T and WorldCom are positing. The entire premise of section 251 is that the same ILEC corporate entity will be

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[197] See 47 U.S.C. § 274(g)(2).

[198] See 47 U.S.C. § 271(d)(3)(B).

[199] Association of Communications Enters. v. FCC, 235 F.3d 662, 667 (D.C. Cir. 2001). In Association of Communications Enters., the D.C. Circuit held that the Act's express provisions regarding separate affiliates were exclusive, such that the FCC was barred from authorizing the creation of additional kinds of less-regulated affiliates. Id. at 667-68.

providing both wholesale and retail local service. Section 251(c)(4), for example, requires "each incumbent local exchange carrier . . . to offer for resale at wholesale rates any telecommunications service that *the carrier* provides at retail to subscribers who are not telecommunications carriers."[200] "The carrier" that provides services "at retail" is the same one that offers its services "at wholesale rates" to be resold. Section 251(c)(3) requires this same entity to provide unbundled network elements at wholesale.[201] Congress clearly expected that the ILEC's retail and wholesale entities would be one and the same, which is why the idea of structural separation for local services never appears once in Congress's detailed regulatory scheme — or in the FCC's thousands of pages of orders implementing that scheme.

What few citations to federal authority AT&T and WorldCom do provide are at best irrelevant and worst disingenuous. AT&T relies almost exclusively on the fact that the FCC permitted SBC and Ameritech, and Bell Atlantic and GTE, to provide advanced services through a separate affiliate after their respective mergers.[202] What AT&T neglects to tell the Commission, however, is that the merging parties' separate affiliate commitments were *entirely voluntary*, and that the FCC allowed the parties to create these advanced service affiliates *in exchange for exempting the affiliates from section 251(c) altogether*.[203] The FCC agreed that SBC and Verizon could dismantle the affiliates (and again provide DSL through their ILECs) if a court ever found that the affiliates would still be subject to section 251(c) notwithstanding their separation.[204] (In fact, now that the D.C. Circuit *has* so ruled,[205] SBC and Verizon are in fact dissolving these separate affiliates with the FCC's blessing.[206]) Finally, as AT&T is forced to concede,[207] these

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200 47 U.S.C. § 251(c)(4)(A) (emphasis added).

201 See 47 U.S.C. § 251(c)(3).

202 See Rasher Affidavit, Exhibit 1075T at 32-33.

203 See Memorandum Opinion and Order, Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, 15 FCC Rcd 14032, 14143 ¶ 274 (2000) ("Verizon Merger Order"); Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, 14 FCC Rcd 14712, 14893-94 ¶ 445 (1999) ("SBC Merger Order").

204 See Verizon Merger Order at ¶¶ 265, 267; SBC Merger Order at ¶ 445.

205 See Association of Communications Enters., 235 F.3d at 668.

206 See, e.g., Order, Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, CC Dkt. No. 98-184, DA 01-1717 (rel. July 19, 2001) ¶ 2 (2001 WL 816590) (approving of Verizon's plans to reintegrate its separate advanced services affiliate into the ILEC corporation following the ASCENT decision, as originally contemplated in the Verizon Merger Order).

merger orders never suggested that structural separation made sense for basic local exchange service, or any service other than DSL; on the contrary, the *SBC Merger Order* expressly refused to adopt a "structural solution that isolates the BOCs from control of the local loops."[208]

In short, the orders on which AT&T bases its entire argument never suggested that an ILEC could be forced to accept structural separation over its objections, or that separation could be applied to all local exchange services, or that it would be appropriate to impose structural separation *on top of*, rather than *instead of*, the market-opening requirements of sections 251 and 271. Indeed, the FCC went out of its way in these orders to explain that these separate affiliate commitments, like the merging parties' other voluntary commitments, were not based in the requirements of the Act at all:

> Nor are the conditions that we adopt today intended to be considered as an interpretation of sections of the Communications Act, especially sections 251, 252, 271 and 272, or the Commission's rules, or any other federal statute. . . . All of the conditions that we adopt today are merger-specific and not determinative of the obligations imposed by the Act or our rules.[209]

For that reason, when Qwest and U S WEST merged, the FCC (as AT&T conceded during the workshop[210]) expressly *declined* to impose any type of structural separation requirements:

> Unlike the instant merger, we found that the SBC/Ameritech transaction raised substantial public interest harms and would significantly decrease the potential for competition in local telecommunications markets; increase incentives to discriminate; and frustrate the Commission benchmarking efforts. We find that the instant merger raises no such concerns. Absent these public interest harms, we will not impose conditions or require separate subsidiaries as the commenters have suggested.[211]

The FCC's merger orders thus do not support AT&T's arguments.

AT&T's and WorldCom's other citations are no more relevant and no less suspect. For example, both carriers proffer the FCC's endorsement of structural separation for BOC information services in the *Computer II Order*[212] without ever mentioning that the FCC

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207 See Rasher Affidavit, Exhibit 1075T at 32 (conceding that "the FCC refrained from requiring a structural separation for the merged companies' wholesale and retail basic exchange operations").

208 SBC Merger Order at ¶ 515.

209 Verizon Merger Order at ¶ 253; SBC Merger Order at ¶ 357.

210 See 7/17/01 Tr. at 5070:1-9.

211 Qwest Merger Order at ¶ 46 n.135 (2000).

212 See Rasher Affidavit, Exhibit 1075T at 36-37 & nn.68, 70 (citing Final Decision and Order, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980)

repudiated that holding and abandoned structural separation after six years of experience with it.[213]

Similarly, AT&T cites the FCC's old rules for BOC provision of cellular service[214] without ever revealing that these rules were relaxed over time and will sunset altogether in four months.[215] Finally, both AT&T and WorldCom refer to the Modification of Final Judgment ("MFJ") approving the *negotiated* consent decree divesting AT&T of the BOCs without ever bothering to explain what provision of law might give the Commission the same authority as an antitrust court.[216]

b. The Commission has no authority under Washington law to impose structural separation on Qwest.

AT&T and WorldCom do not even try to show that there could be a state-law basis for imposing an involuntary structural separation on Qwest, nor could they. The Commission lacks authority to order structural separation. Under Washington law, the Commission "must act within its statutory authority, and its acts cannot be arbitrary or capricious."[217] As this principle has long been understood in Washington, "a public service commission . . . is an administrative agency created by statute and as such has no inherent powers, but only such as have been

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("Computer II Order")); see also Price Testimony, Exhibit 1090T at 67-68.

[213] In its 1986 Computer III Order,

> the Commission determined that the benefits of structural separation were outweighed by the costs, and that nonstructural safeguards could protect competi[tors] from improper cost allocation and discrimination by the BOCs while avoiding the inefficiencies associated with structural separation. The Commission concluded that the advent of more flexible, competition-oriented regulation would permit the BOCs to provide enhanced services integrated with their basic network facilities.

Further Notice of Proposed Rulemaking, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 13 FCC Rcd 6040 ¶ 10 (1998) ("Computer III Further Remand"); see also Report and Order, Amendment of Section 64..702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, 1007-10 ¶¶ 89-94 (1986) ("Computer III Order"). The Computer III Order was reviewed by the Ninth Circuit and remanded to the FCC for a more complete administrative record; however, the court never disputed the FCC's premise that structural separation imposes significant administrative costs and efficiency losses that are unnecessary with adequate nonstructural regulation. See California v. FCC, 905 F.2d 1217 (9th Cir. 1990). Two of the FCC's remand orders were subsequently remanded for further consideration of the non-structural safeguards the FCC had adopted in place of structural separation. See California v. FCC, 4 F.3d 1505 (9th Cir. 1993); California v. FCC, 39 F.3d 919 (9th Cir. 1994). The FCC has since tentatively concluded that the adoption of the market opening provisions of section 251 of the Telecommunications Act have made the question of non-structural safeguards for information services largely moot. See Computer III Further Remand at ¶ 34.

[214] See Rasher Affidavit, Exhibit 1075T at 36, 39.

[215] See Report and Order, Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, 12 FCC Rcd 15668 ¶¶ 27-31 (1997); 47 C.F.R. § 20.20 (f).

[216] See Rasher Affidavit, Exhibit 1075T at 31; Price Testimony, Exhibit 1090T at 64-67, 69-70 (citing United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983)).

[217] Jewell v. Washington Util. & Transp. Comm'n, 585 P.2d 1167, 1169 (Wash. 1978) (citation omitted).

expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted."[218] "If an enabling statute does not authorize either expressly or by necessary implication a particular regulation, that regulation must be declared invalid despite its practical necessity or appropriateness."[219]

Washington's statutes do not provide the Commission with authority to force structural separation on Qwest.[220] "All of the provisions of the public utilities statutes must be construed together to accomplish the purpose of assuring the public of adequate service at fair and reasonable rates."[221] When so construed, understanding "the legislative intent [is] rather simple. The public interest . . . requires prompt, expeditious and efficient service. Quid pro quo, the company is entitled to rates which are fair, just, reasonable and sufficient to allow it to render such services."[222] The Commission oversees that bargain,[223] but, because its authority is limited, can do no more. It cannot, for instance, "impose a charge on all [telephone] access lines, assess the charge against . . . LECs[] and then distribute the funds to other LECs that incur losses through the conversion to" a state-mandated service.[224] As the court recognized, the Commission's authority to set just and reasonable rates "does not confer power on the Commission, either expressly or impliedly, to impose its own charge on the company or ratepayers."[225] Similarly, the Commission has been found to lack authority to grant one LEC the exclusive rights to provide service within an exchange.[226] Certainly, without a specific statutory mandate to order so massive and market-altering an undertaking, the Commission lacks the authority to require structural separation as well. As we now show, that is particularly so where, as in the case of structural separation, such an obligation would impose huge costs on Qwest and, in turn, on its customers, thereby denying them what the statute commands: "reasonable prices" and "efficient service."

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218 Washington ex rel. Pub. Util. Dist. No. 1 v. Department of Pub. Serv., 150 P.2d 709, 712 (Wash. 1944).

219 Washington Indep. Tel. Ass'n v. TRACER, 880 P.2d 50, 55 (Wash. App. 1994).

220 *See* Wash. Rev. Code §§ 80.01.010 et seq.; 80.36.005 et seq.

221 *U S WEST Communications, Inc. v. Washington Util. & Transp. Comm'n*, 949 P.2d 1337, 1359 (Wash. 1998).

222 TRACER, 880 P.2d at 55 (internal quotations omitted).

223 *See* U S WEST, 949 P.2d at 1361.

224 TRACER, 880 P.2d at 56-57.

225 Id. at 57.

226 *See* In re Consolidated Cases, 869 P.2d 1045, 1049-51 (Wash. 1994).

c. Structural separation would impose massive and unnecessary costs on Washington consumers.

A forced corporate restructuring of Qwest would impose enormous administrative costs and efficiency losses that would ultimately be borne by the consumers of Qwest's services. The proposal advanced by AT&T and WorldCom would require Qwest to build a new corporate organization, keep extra sets of books, hire new staff, and purchase additional facilities just to interconnect with its own network – and yet this massive investment in overhead would not yield a single improvement in service or enable a single additional customer in Washington to obtain service. Going forward, structural separation would also destroy Qwest's incentives to improve its network and deploy innovative new services making use of that network. As the FCC has recognized, it is ultimately consumers who suffer as a result of structural separation's dampening effect on innovation:

> Experience with the [*Computer II*] structural separation requirements . . . has demonstrated that those requirements hinder the introduction of enhanced services that could benefit the public by being widely and efficiently available through the BOC's local exchanges. Structural separation imposes opportunity costs by discouraging the BOCs from designing innovative enhanced services that utilize the resources of the public switched network. Such innovation losses, resulting from the physical, technical, and organizational constraints imposed by the structural separation requirements, directly harm the public, which does not realize the benefits of new offerings.[227]

Structural separation would also prevent Qwest from being able to respond quickly and flexibly to changing market conditions to provide the services consumers want.

Worst of all, consumers would suffer these costs needlessly. The Commission will determine in other workshops whether Qwest has fully complied with section 251 and the competitive checklist and adopted an adequate performance assurance plan. By trying to insert the concept of structural separation into the public interest test, AT&T and WorldCom are suggesting that, even if the Commission finds in those other workshops that Qwest is in full

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[227] Computer III Order at ¶ 89. The FCC went on:

We further recognize that structural separation imposes direct costs on the BOCs from the duplication of facilities and personnel, the limitations on joint marketing, and the inability to take advantage of scope economies . . . . These are indications of more fundamental costs of structural separation – namely, that the BOCs are unable to organize their operations in the manner best suited to the markets and customers they serve. The net result of these costs in delayed services and innovation, in direct duplicative costs, and in organizational inflexibility, is that structural separation prevents consumers from obtaining services and service combinations that they desire.

Id. at ¶ 91.

compliance with every requirement of section 251 and 271, the company should *still* be forced to undertake a radical corporate restructuring just for good measure. This belt-and-suspenders approach serves no purpose at all. As detailed above, neither Congress nor the FCC has ever required involuntary structural separation *on top of* comprehensive nonstructural regulation; to the extent the FCC has ever considered structural separation under the Telecommunications Act (in the advanced services context), it was to apply *in place of* regulation under section 251. The massive costs of structural separation more than outweigh any redundant safeguards it might offer.

Given the enormous costs and consumer welfare losses structural separation would involve — as well as the absence of any legal basis for ordering it — it is hardly surprising that *no* state to consider structural separation has adopted it. Maryland, Virginia, Illinois, and Pennsylvania have already rejected AT&T's proposals.[228] In dismissing an AT&T petition to break up Verizon's Virginia operations, for example, the State Corporation Commission found that the federal Telecommunications Act contains "no grant of authority … to order structural separation," and that requiring structural separation would impair Verizon's property rights under its operating certificates.[229] The SCC also found structural separation unnecessary in light of the agency's pending reviews in other dockets of Verizon's OSS systems and the general state of competition in Virginia.[230] AT&T and WorldCom concede, as they must, that their structural

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[228] See, e.g., Order Granting Motion to Dismiss, Joint Petition of Cavalier Telephone, L.L.C., Network Access Solutions, L.L.C., Covad Communications Co. and AT&T Communications of Virginia, Inc. for Structural Separation of Verizon Virginia Inc. and Verizon South, Inc., Case No. PUC010096 (June 26, 2001) ("Virginia Order"); Greg Edwards, "Rivals' Request That Verizon Be Dismantled Is Dismissed," Richmond Times-Dispatch, June 28, 2001, at B15 (discussing Maryland and Virginia decisions); Wayne Kawamoto, "Structural Separation Sunk by Illinois Legislature," CLEC-Planet, June 8, 2001.

While the Pennsylvania PUC initially ordered full structural separation of Verizon's operations in that state, it ultimately reversed course and rejected AT&T's proposal. See Opinion and Order, Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations, Docket No. M-00001353, Mar. 22, 2001; Joint Petition of Nextlink Pennsylvania, Inc., Opinion and Order, Docket No. P-00991648 (Sept. 30, 1999), aff'd, Bell Atl.-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n, 763 A.2d 440 (Pa. Commw. Ct. 2001). The PUC did adopt a code of conduct for Verizon's wholesale and retail operations, but this was based on a Pennsylvania statute expressly granting such authority, as AT&T conceded at the Workshop. See 7/17/01 Tr. at 5069:7-17 (testimony of Diane Roth); 66 Pa. Cons. Stat. § 3005(h) (authorizing state PUC to require that "competitive service be provided through a subsidiary which is fully separated from the local exchange telecommunications company"). There is, however, no equivalent statute in Washington.

[229] Virginia Order at 5.

[230] Id.

separation proposal has not yet found a taker anywhere in the country.[231] Accordingly, this Commission should also decline to give any credence to AT&T and WorldCom's proposal.

5. ***CLEC failures.*** AT&T, WorldCom, and Mark N. Cooper (witness for the Washington State Attorney General's Office) all suggest that granting Qwest's application would not be in the public interest because many CLECs have recently gone bankrupt or are having trouble in the capital markets, threatening their entry plans.[232] But just as "incumbent LECs are not required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin,"[233] nor are they required to guarantee their competitors stable stock prices in the face of a general NASDAQ rout. The fact that CLECs may choose to scale back entry plans in light of their own financial troubles has no bearing on whether Qwest has taken those actions within its power to open up its market; as the FCC has recognized, "individual CLEC entry strategies" are "beyond a BOC's control."[234]

The truth is that a number of factors explain the CLECs' troubles in the capital markets, over which Qwest has no control, including: misdirected or insufficiently focused business plans, an overall economic slowdown (which leads to the drying up of funding sources and higher lending costs), inexperienced management, too many competitors with the same business plan vying for the same market segment, and unmanaged growth. If CLECs believe that Qwest has played a role in their troubles by (in their view) failing to open its markets, those beliefs will be tested directly in the workshops evaluating Qwest's compliance with the competitive checklist. The financial health of the capital markets and of the CLECs in general should not be allowed to insinuate itself into the public interest test.

And since section 271 authorization does *not* turn on competitor market shares, as explained above,[235] the fact that a CLEC might retreat from the market altogether in this economy changes nothing. Indeed, "the Act provides for long distance entry even where there is no facilities-based competition" *at all*, underscoring "Congress' desire to condition approval solely

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[231] See 7/17/01 Tr. at 5069:1-6.

[232] See Rasher Affidavit, Exhibit 1075T at 20-23; Price Testimony, Exhibit 1090T at 19:3 to 20:12; Cooper Testimony, Exhibit 1070T at 38-40.

[233] SBC Kansas/Oklahoma Order at ¶ 65.

[234] Id. at ¶ 268.

[235] See supra Section I.B, text accompanying notes 18-22.

on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity."[236]

AT&T's suggestion that Qwest is somehow responsible for the CLECs' swoon in the stock markets is not credible. As FCC Chairman Michael Powell recently stated, the CLECs have nobody to blame for their problems but the capital markets and their own business plans:

> [T]he capital markets deserve a lot of culpability. I think high-yield money went chasing unsound business fundamentals. I've talked to a lot of CEOs who knew what they were about to do was not the right thing to do and they had to do it anyway. They had to grow too fast. They had to get too many markets. Their networks weren't ready for it. They knew it. But the high-yield capital market demanded that they do it. I think that's the central problem, but other things happened, too. I think that a lot of competitive companies entered the market on really inefficient and short-term business models. The other thing was regulatory arbitrage, cream-skimming, reciprocal compensation, arbitrage between different compensation mechanisms.[237]

If AT&T believes that Qwest has failed to open its markets to their detriment, those beliefs will be tested in the separate workshops assessing Qwest's compliance with the competitive checklist. There is nothing more to add here. The public interest test is not an inquiry into whether CLECs somehow deserve to be protected from BOC competition simply because of their own financial difficulties.

6. ***Other miscellaneous issues.*** Finally, the CLECs broach a number of other issues — for example, Qwest's provision of enhanced extended links,[238] specific sections of Qwest's Statement of Generally Available Terms,[239] and operations support system ("OSS") testing procedures,[240] CLEC access to wiring in multiple dwelling units, provisioning intervals, and DSL and advanced services — that are wholly unrelated to the public interest inquiry. As with the QPAP, these basic checklist compliance and performance issues are the subject of other

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[236] Bell Atlantic New York Order at ¶ 427.

[237] "Powell Blames CLEC Money Woes on Lenders, Bad Business Plans," Communications Daily, May 23, 2001, Vol. 21, No. 100 (2001 WL 5053249).

[238] See Workshop 3 Response Testimony of Timothy H. Peters on Behalf of Electric Lightwave, Inc., In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996, Docket No. UT-003022 ("Peters Testimony") (Feb. 12, 2001), Exhibit 975T at 7-12; Workshop 3 Response Testimony of Rex Knowles on Behalf of XO Washington, In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996, Docket No. UT-003022 (Feb. 12, 2001), Exhibit 880T at 2.

[239] See Peters Testimony, Exhibit 975T at 13-20.

[240] See Price Testimony, Exhibit 1090T at 73:18-19.

workshops in this proceeding and should not be addressed here. Additionally, OSS issues are properly raised and resolved in the ROC OSS testing process and should not be raised in this public interest workshop. WorldCom's witness in fact conceded that this was not an appropriate forum for considering Qwest's OSS,[241] and the same is true for the other aspects of interconnection the CLECs raise. The FCC's section 271 orders have addressed these types of particular interconnection disputes, not in the public interest inquiry, but in connection with the specific checklist items to which they relate.[242] It would be inappropriate and inefficient to import a duplicate layer of review into the public interest inquiry.

CONCLUSION

For all the foregoing reasons, Qwest respectfully asks the Washington Utilities and Transportation Commission to find that Qwest has satisfied all the requirements of 47 U.S.C. § 271(c)(1)(A) and 47 U.S.C. § 271(d)(3)(C).

RESPECTFULLY SUBMITTED this 7th day of September, 2001.

Respectfully submitted,

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[241] Id. at 74:5-6 ("I do not mean to suggest that this proceeding is the place to consider issues related to Qwest's OSS").

[242] See, e.g., SBC Kansas/Oklahoma Order at ¶¶ 105-06 (discussing Southwestern Bell's change management plan in the context of checklist item 2); SBC Texas Order at ¶ 330 (addressing availability of DSL services to non-voice customers in context of checklist item 4).