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
. . . . .	)	Docket No. UT-003040
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.	)	

QWEST'S REPLY 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

In its opening brief and workshop testimony, Qwest Corporation ("Qwest") demonstrated that it is in compliance with the Track A entry requirements in Washington, and — assuming the Washington Utilities and Transportation Commission finds in other workshops that Qwest has complied with the competitive checklist and adopted an adequate post-entry performance assurance plan — that its entry into the long distance market would serve the public interest. In demonstrating its compliance with the Track A requirements, Qwest has shown 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. In demonstrating its satisfaction of the public interest test, Qwest has shown 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.[1] In both cases, Qwest has made precisely the type of showing that the Federal Communications Commission ("FCC") has required in its recent orders granting BOC applications for interLATA authority.

The intervenors in this proceeding offer no credible challenge to the accuracy of the competition estimates that Qwest presented. Instead, they seek to distract this Commission from those data by attempting to muddy the distinction between the Track A and the public interest requirements and by suggesting all sorts of additional criteria found nowhere in the Telecommunications Act of 1996 (the "Act"), including criteria that the FCC has specifically rejected multiple times. Because they cannot offer any meaningful challenge to Qwest's

[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).

showing of competition in Washington, the intervenors resort to CLEC market share and geographic scope tests that the FCC has made clear have no place in the Track A or public interest inquiries. And whereas the FCC's recent section 271 orders are careful to distinguish those factors that are in a BOC's control from those that are not, especially in smaller markets like those found outside Washington's urban centers, the intervenors ignore those orders outright, blaming Qwest for *the CLECs' own business decisions* to focus on business customers and larger markets, or to change their strategies in light of their capital market troubles. Finally, in defiance of the FCC's recent orders, the intervenors treat the public interest test as a free-for-all and an excuse to ask for all sorts of regulatory goodies - such as state retail pricing changes, access charge reform, and structural separation - that are wholly beyond the scope of section 271.

Qwest respectfully submits this reply to refocus the inquiry from the intervenors' wish lists to the standards that the FCC has articulated.

I. QWEST'S MARKET DATA SHOW THAT QWEST HAS MET ALL THE REQUIREMENTS OF TRACK A

The Track A provision, 47 U.S.C. § 271(c)(1)(A), as interpreted by the FCC, requires Qwest to demonstrate four things: (1) that it has one or more binding agreements with CLECs that have been approved under section 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 for a fee to residential and business subscribers; and (4) that these competing providers offer service either exclusively or predominantly over their own facilities (which, for this purpose, include the UNEs they lease from Qwest) in combination with resale.[2] Qwest's opening brief lays out the extensive record evidence demonstrating that Qwest has met these requirements. This Commission has approved some 81

wireline interconnection agreements in Washington,[3] and CLECs are leasing tens of thousands of unbundled loops in the state.[4] Additionally, Qwest estimates that CLECs are providing between 101,000 to 412,000[5] facilities-based access lines in Washington. While Qwest has no way of knowing for certain which unbundled loops and bypass lines are serving residential customers and which are serving business customers (in part because many CLECs, including AT&T, have conspicuously refused to respond to Qwest's discovery requests), Qwest's survey of the CLECs' publicly reported activities provides strong qualitative evidence that these competitors are targeting both residential and business customers in Washington.[6]

Only two of the four intervenors filing briefs in this proceeding — AT&T and the Public Counsel Section of the Washington State Attorney General's Office ("Public Counsel") — attacked Qwest's estimation of the numbers of access lines provided through full facilities bypass in Washington. AT&T and Public Counsel mount unpersuasive challenges. Joined by intervenors WorldCom and Covad Communications Company, they also continue to rehash issues that the FCC has already rejected as irrelevant to both the section 271 Track A and public

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2 *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 ¶¶ 62-104 (1997) ("*Ameritech Michigan Order*").

3 *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.

4 *See* Confidential Exhibit 1058C (reporting that Qwest had provisioned 58,782 unbundled loops as of March 2001).

5 *See* 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), *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. UT-003022 at 20 ("Qwest Br.") (providing the ported-number estimate of CLEC facilities bypass access lines (101,277) (derived by adding the ported-number estimate of facilities bypass lines and the actual number of stand-alone unbundled loops provided to CLECs) and the LIS trunk estimate (412,079)).

6 *Id*. at 7-14. The FCC has made clear, in any event, that "if all other requirements of section 271 have been satisfied, it does not appear to be consistent with Congressional intent to exclude a BOC from the in-region, interLATA market solely because the competitors' service to residential customers is wholly through resale." 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*, 16 FCC Rcd 6237 ¶ 43 & n.101 (rel. Jan. 22, 2001) (quotation marks omitted) ("*SBC Kansas/Oklahoma Order*").

interest inquiry. Most telling perhaps is that not one of the parties *specifically* challenges Qwest's compliance with a single prong of the Track A test. As discussed below, the intervenors' well-worn and misdirected arguments therefore fail to overcome Qwest's showing that it has met all the requirements of Track A.

A. No Intervenor Has Mounted a Credible Challenge to the Accuracy of Qwest's Market Data.

AT&T's efforts to discredit Qwest's estimation methodology fall flat.[7] AT&T faults Qwest for "postulat[ing] the existence of a statistical link between cumulative ported telephone numbers and Qwest-provided UNEs on the one hand, and CLEC facilities-based lines in service on the other."[8] Qwest has provided a clear and undeniable nexus. CLECs port telephone numbers in only two instances: (1) to serve customers using stand-alone unbundled loops (which do not include UNE-P) connected directly to the CLECs' switches, and (2) to serve customers exclusively over the CLECs' own facilities. Removing the ported numbers attributable to CLEC stand-alone unbundled loops necessarily leaves the quantity attributable to CLEC full facilities bypass.[9]

AT&T gives no explanation at all why ported numbers and CLEC access lines would *not* be related. AT&T's further accusation that Qwest has created an "air of mystery and obfuscation" by phrasing its calculation slightly differently in another state workshop is frivolous.[10] Expressed algebraically, formulation one is $\frac{N-2U}{2}$, while formulation two is $\frac{N}{2}-U$, where N is ported numbers and U is stand-alone unbundled loops. Both are

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7 *See* Brief of AT&T Regarding Public Interest (Proprietary Version), *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, at 3-6 ("AT&T Br.").

8 *Id*. at 4.

9 *See* Qwest Br. at 17-18.

arithmetically equivalent, as AT&T concedes.[11] And Qwest slightly modified its methodology in Colorado only because of circumstances and reliable market information unique to Colorado; the validity of that variation has absolutely no bearing on Qwest's market estimates in Washington, nor on any other aspect of the Track A and public interest inquiry in this state. If AT&T objects so strongly to Qwest's conservative ported number estimation methodology, it should consider that Qwest has also offered a second set of estimates derived from the same LIS trunk methodology that SBC used in Kansas and Oklahoma, as well as in Texas.[12] In none of those cases did the FCC find fault with the applicant's methodology or refuse to recognize that the applicants had met their burdens of proof.

Public Counsel also attempts to cast doubt on Qwest's market data and to impugn the credibility of Qwest's witness, David L. Teitzel. Specifically, Public Counsel criticizes Qwest for using estimates of the numbers of CLEC residential and business access lines and of other competition data, rather than actual numbers.[13] As Qwest's testimony and all prior FCC section 271 orders illustrate, this charge is utterly meritless. First, the only method of competition for which Qwest presents estimates, as opposed to actual numbers, is CLEC full facility bypass lines. Qwest presented actual, undisputed numbers regarding the number of unbundled loops in service, the number of resold lines in service, the number of UNE-P lines in service, the number of Qwest's access lines in service, the number of ported numbers in service, and the number of

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10 AT&T Brief at 5.

11 *Id.*

12 *See SBC Kansas/Oklahoma Order* at ¶ 42 & n.96; Affidavit of John S. Habeeb, *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 Texas,* CC Docket No. 00-4 (Jan. 10, 2000*)*, App. A, Vol. A-1 as Tab 1, at ¶¶ 23-24 ("Habeeb Affidavit") (brief in support of SBC). *See also* Teitzel Direct, Exhibit 1055T at 35:7-10 & n.87; Qwest Br. at 19-20.

13 *See* Public Counsel Brief on Public Interest, *In the Matter of the Investigation of U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. UT-003022, at 10-11 ("Public Counsel Br.") (charging that Qwest relies on "mere allegations or unsubstantiated speculation").

LIS trunks in service.[14] Second, while Public Counsel's observation that Qwest must estimate CLEC full facility bypass lines is factually correct, it is ultimately without significance. Not only is there nothing wrong with using estimates of market data in section 271 applications, but, in fact, every section 271 application granted by the FCC so far has relied on market estimates, with the FCC's approval.[15]

In truth, Qwest has no choice but to rely on estimates of CLEC market data because the CLECs are the only parties that know for certain what full facilities bypass networks they have developed. Qwest can serve data requests only on the handful of CLECs that have intervened as parties to the section 271 docket in Washington, and even those CLECs often refuse to cooperate. Even if answers are given, they are often incomplete. Herein lies the irony of the intervenors' position: despite AT&T counsel Gary Witt's admission during the workshop that "the best evidence of what CLECs are doing … on a facilities basis is their own information and not something that Qwest would have,"[16] AT&T persists to this day in refusing to answer Qwest's data request responses,[17] while simultaneously criticizing Qwest's good-faith estimates.

Qwest is clearly dependent on the Commission for help in this respect. As Qwest affirmed in the workshop, Qwest very much "want[s] the actual numbers to be able to present to

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14 *See* Confidential Exhibit 1058C; Exhibit 1059.

15 *See, e.g.*, 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 ¶ 225 ("*Verizon Massachusetts Order*") (noting that AT&T and WorldCom had "challenged some of Verizon's estimates of the number of residential customers served over competitors' own facilities"); *SBC Kansas/Oklahoma Order* at ¶¶ 42-44 (discussing complaints about SWBT's estimation methodology).

16 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 4941:17-25.

17 *See* AT&T Brief at 5 (stating that AT&T had "resisted providing this information to Qwest because of the sensitive, proprietary nature of that information," but that it would release such data to the Commission if its Motion for Extraordinary Protective Order were granted).

the Washington Commission."[18] The Commission may serve data requests on *all* CLECs in the state, not just on the parties to this proceeding. In fact, the Commission's own order requires CLECs to provide the information requested, but the majority of CLECs have apparently disregarded this order.[19] If and when additional and more comprehensive data become available, Qwest urges the Commission to consider it in its review of Qwest's compliance with Track A and with the public interest test of section 271.

B. The Intervenors' Specific Complaints About Local Competition in Washington Are Groundless.

No intervenor disputes that Qwest has met the first two prongs of Track A, and their implied challenges to Qwest's compliance with the remaining two prongs employ arguments the FCC has specifically rejected. Both AT&T and Public Counsel suggest that CLEC residential market shares are not high enough to warrant approval of Qwest's section 271 application.[20] But the FCC has made unmistakably clear that there is no market share test,[21] and that all that is required is that at least one CLEC be "serving more than a *de minimis* number of end-users for a fee in their respective service areas."[22] Clearly, 58,782 unbundled loops in the State of Washington, and an estimated 101,000 to 412,000 facilities-based access lines, far exceed a *de minimis* standard.[23] The same is true of the estimated 6,699 full facilities bypass residential

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18 7/16/01 Tr. at 4942:19-22.

19 *See* Order Adopting Supplemental Interpretive and Policy Statement on Process and Evidentiary Requirements, *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-970300 at App. B (March 15, 2000).

20 *See* AT&T Br. at 3-4; Public Counsel Br. at 9-11.

21 *See, e.g., Ameritech Michigan Order* at ¶ 77 (noting that Congress considered and rejected language that would have imposed a "market share" requirement).

22 *Id*. at ¶ 78.

23 *See supra* text accompanying notes 4, 5.

lines and actual 11,646 additional residential resale lines provided by CLECs exclusively to residential customers in Washington.[24]

The intervenors' complaint that the number of residential lines provided is too low,[25] or that too much of the residential competition in Washington is conducted via resale,[26] is not grounds for finding that Qwest's section 271 application is not in the public interest. As the FCC has recognized, CLECs' own decisions to target more lucrative business customers over residential ones cannot be held against the BOC: "Factors beyond a BOC's control, such as individual CLEC entry strategies, for instance, might explain a low residential customer base."[27] Qwest believes this to be the case in Washington as well. The FCC has also emphasized that, "if all other requirements of section 271 have been satisfied, it does not appear to be consistent with congressional intent to exclude a BOC from the in-region, interLATA market solely because" of a complete lack of facilities-based residential competition.[28]

Likewise, Public Counsel's suggestion that CLECs have focused their attentions primarily on the largest communities in Washington is beside the point.[29] Nothing in the Act itself or in the FCC's section 271 orders requires Qwest to offer evidence of the "geographic distribution of the competition it faces."[30] In fact, the FCC has stated unequivocally that it

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24 *See* Confidential Exhibit 1058C.

25 *See* AT&T Br. at 3-4; Public Counsel Br. at 9-11 (claiming that there is only "'token' competition" in the residential market).

26 *See* Public Counsel Br. at 9-10.

27 *SBC Kansas/Oklahoma Order* at ¶ 268; *see also Bell Atlantic New York Order* at ¶ 426; 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 ¶ 419 (2000) ("*SBC Texas Order*") (rejecting the argument that the local market was not truly open and that competition had not sufficiently taken hold because there was only "minimal competition for residential services").

28 *See Kansas Oklahoma Order* at ¶ 43 & n.101; *SBC Texas Order* at ¶ 419; *Bell Atlantic New York Order* at ¶ 426 (stating that "minimal competition for residential services" is not evidence that "competition has not sufficiently taken hold"). *See also supra* note 6 and accompanying text; *infra* notes 51-54 and accompanying text.

29 *See* Public Counsel Br. at 12.

30 *Id*.

"do[es] not read section 271(c)(1)(A) to require any specified level of geographic penetration by a competing provider," and that a CLEC need only be providing service "*somewhere in the state*" to count for purposes of Track A.[31] The FCC also recognized that "competition may be slender as a percentage of access lines controlled by [the BOC], particularly outside of urban areas."[32] In fact, the FCC has specifically stated that the fact that competition is concentrated in urban areas is not an indication that the market is not open or that competition has not sufficiently taken hold.[33] Consequently, AT&T, Public Counsel, and the other intervenors have failed to raise a single challenge sufficient to rebut Qwest's compliance with Track A.

II. THE INTERVENORS HAVE NOT REBUTTED QWEST'S SHOWING THAT ITS ENTRY INTO THE INTERLATA MARKET IN WASHINGTON WOULD BE CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY

The FCC has recognized that its discretion under 47 U.S.C. § 271(d)(3)(C) to ensure that a BOC's entry into the long distance market is "consistent with the public interest, convenience, and necessity"[34] is subject to limits and standards. Accordingly, the FCC has established guidelines for how this test should be applied. The public interest inquiry is not an opportunity for CLECs to raise every possible complaint they can think of — no matter how irrelevant to the section 271 process or how beyond the BOC's control — as a barrier to section 271 approval. Nor is it a far more challenging hurdle for the BOCs, as erroneously suggested by Public Counsel and Covad in their discussion of dated and nonbinding Department of Justice

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31 *Ameritech Michigan Order* at ¶ 76 (emphasis in original). *See also Bell Atlantic New York Order* at ¶ 426; *SBC Texas Order* at ¶ 419 (rejecting the argument that the local market was not truly open and that competition had not sufficiently taken hold due to "the concentration of competition in . . . urban areas.").

32 *Bell Atlantic New York Order* at ¶ 426 & n.1308.

33 *Id.*; *SBC Texas Order* at ¶ 419.

34 47 U.S.C. § 271(c)(3)(C).

observations .[35]

In the words of the FCC, the public interest test 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."[36] The FCC will consider whether granting the section 271 application "is consistent with promoting competition in the local and long distance telecommunications markets," and whether there are adequate assurances that the applicant "would continue to satisfy the requirements of section 271 after entering the long distance market."[37] But "compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest."[38] If the BOC is in compliance with the checklist, and if it has adopted an adequate post-entry performance assurance plan, then only "unusual circumstances" could justify denying the BOC's section 271 application — circumstances that the FCC has *never* found to exist.[39]

Qwest has never suggested, as the intervenors imply,[40] that the public interest test encompasses nothing beyond checklist compliance. 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 CLEC

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35 *See* Public Counsel Br. at 6-7; Post-Workshop Brief of Covad Communications Company on Disputed Loops, Line Splitting, Emerging Services and Public Interest Issues, *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 at 59 ("Covad Br."). *See also infra* at text accompanying notes 48-49.

36 *Bell Atlantic New York Order* at ¶ 423 (emphasis added).

37 *SBC Kansas/Oklahoma Order* at ¶¶ 268, 269.

38 Bell Atlantic New York Order at ¶ 422. See also 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 Docket No. 01-208 (rel. July 20, 2001) at App. D, ¶ 71 ("Verizon Connecticut Order").

39 *Bell Atlantic New York Order* at ¶ 423.

wish list of regulatory obligations on Qwest, or that it authorizes a standardless gut call on whether entry is justified.

In addition, Congress has 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's 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."[41] 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.[42]

Independent studies continue to confirm that those 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 $700 million annually on long distance and local telephone service as a result of BOC entry into the interLATA market in that state.[43] Furthermore, data 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

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40 *See, e.g.*, Covad Br. at 57-58

41 *Bell Atlantic New York Order* at ¶ 427.

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

New York PSC began collecting these statistics, more CLEC access lines were dedicated to residential customers (52 percent) than to business customers (48 percent).[44]

If this Commission and the FCC were to adopt the expansive version of the public interest test urged by the intervenors, consumers in Washington would be denied the competitive benefits associated with Qwest's entry into the interLATA market as contemplated by the Act. FCC Chairman Powell has recognized that many CLECs will never concede that the conditions for section 271 approval have been satisfied: "There will never be a 271 [application], I will submit to you, to which there will not be a community of competitive entrants and/or IXCs like AT&T who will not scream that it was premature. Why? Because as far as they're concerned entry will never be right."[45] Fortunately for consumers, however, Congress has set forth the specific conditions under which BOCs are to be permitted to enter the inter-LATA long distance market. In its extensive testimony and in its opening brief, Qwest has proven that its entry into the long distance market is consistent with the public interest, convenience, and necessity.

A. The Intervenors Have Offered No Legally Relevant Evidence Rebutting Qwest's Demonstration That Its Markets in Washington Are Presently Open to Competition.

Although the FCC has expressly ruled that no such showing is necessary,[46] Qwest's opening brief demonstrated that, not only has Qwest opened the door to its local markets in Washington, but competitors have actually walked through that door and are serving significant numbers of customers. The intervenors make two arguments in response: first, that the level of CLEC entry (either in the market as a whole or in certain segments of that market) is somehow

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43 *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, *available at* http://trac.policy.net/proactive/newsroom/release.vtml?id=18740.

44 *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.

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

not high enough, and, second, that the CLECs (and DLECs) who have entered should be discounted because they are having troubles of their own in the capital markets. Both arguments are irrelevant as a matter of law.

1. The intervenors' attempts to reintroduce market share tests into the public interest inquiry ignore the FCC's section 271 orders.

Ignoring virtually every FCC section 271 order after 1997, both AT&T and Public Counsel attempt to smuggle some kind of market share test into the public interest inquiry. AT&T, even while conceding that "the FCC has repeatedly declined to identify a minimum market share that CLECs must capture before the commission will declare a market to be open," argues in the next breath that CLECs' residential market shares in Washington are too low.[47] Public Counsel contends that the appropriate standard is whether there is "*substantial* competition that goes beyond the 14-point checklist threshold."[48] This argument, based on non-authoritative Department of Justice comments filed in 1997,[49] similarly ignores established FCC guidelines for section 271 compliance.

The intervenors offer these market share tests in direct defiance of the FCC's recent section 271 orders. The *SBC Kansas/Oklahoma Order*'s public interest discussion stated in no uncertain terms that "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."[50] The *Order* further states, "Given an affirmative showing that a market is open and the competitive checklist has been satisfied, low customer volumes in and of themselves do not undermine that

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46 *See Bell Atlantic New York Order* at ¶ 427.

47 AT&T Br. at 3-4.

48 Public Counsel Br. at 5-6 (emphasis added).

49 *Id*.; Covad Brief at 59.

50 *SBC Kansas/Oklahoma Order* at ¶ 268.

showing."[51] The *Bell Atlantic New York Order* contains an even stronger statement about the irrelevance of CLEC market shares:

> 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 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.[52]

And in its most recent section 271 order, released just a few weeks ago, the FCC affirmed yet one more time that it "has never required . . . an applicant to demonstrate that it . . . has achieved a specific market share in its service area, as a prerequisite for satisfying the competitive checklist."[53]

The intervenors are forced to concede that the FCC has specifically rejected the market share tests that they are proposing. As noted above, AT&T concedes that "the FCC has repeatedly declined to identify a minimum market share that CLECs must capture before the commission will declare a market to be open."[54] Similarly, Public Counsel acknowledges that the FCC has not adopted a "'bright line' test for CLEC market share … in considering [a] §271 application."[55] In fact, Public Counsel candidly admits that it is really just hoping that this Commission will ignore the FCC's guidelines and "adopt a standard specific to Washington State."[56]

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51 *Id.*

52 *Bell Atlantic New York Order* at ¶ 427 (emphases added).

53 *Verizon Connecticut Order* at App. D n.27.

54 AT&T Br. at 3.

55 Public Counsel Br. at 12.

56 *Id.*

Additionally, nothing the intervenors cite supports the novel market share standard they would have this Commission impose. AT&T selectively edits a passage of the *Ameritech Michigan Order* to suggest that the FCC requires a BOC to demonstrate that "new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business), through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large)."[57] But AT&T misleadingly omits the next two sentences of the paragraph, which make clear that this is not a *required* showing :

> We emphasize, however, that we do not construe the 1996 Act to require that a BOC lose a specific percentage of its market share, or that there be competitive entry in different regions, at different scales, or through different arrangements, before we would conclude that BOC entry is consistent with the public interest. Rather we believe that data on the nature and extent of actual local competition… are relevant, but not decisive, to our public interest inquiry.[58]

By its omission, AT&T proffers the FCC's decision for the precise opposite of what it actually says.

Public Counsel, by contrast, attempts to reintroduce market share, geographic penetration, and other related tests, not with reference to any FCC order, but by quoting comments of the Department of Justice filed with the FCC in 1997 that are at odds with all recent FCC decisions.[59] The positions of the Department of Justice are simply not controlling in

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57 AT&T Br. at 8 (quoting *Ameritech Michigan Order* at ¶ 391).

58 *Ameritech Michigan Order* at ¶ 391.

59 *See* Public Counsel Br. at 5-7 (quoting Evaluation of the United States Department of Justice, Federal Communications Commission, *In re Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma*, CC Docket No. 97-121, 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

this context. As the D.C. Circuit has held, "[i]nterpreting the Telecommunications Act is the FCC's job, not the Justice Department's, a proposition recognized by both Congress and the Department."[60] Furthermore, "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.'"[61] The Act itself states that "the Attorney General's evaluation . . . shall not have any preclusive effect on any Commission decision."[62] Consequently, where the Justice Department's interpretation of the Act conflicts with the FCC's — as it does here in suggesting that a market share test is relevant to section 271 approval — that interpretation will not control. This resolution is demonstrated by the last four years of FCC orders, which declare unequivocally that there is no market share test or geographic penetration test. Public Counsel's reliance on the Justice Department's remarks is therefore unavailing.

2. CLECs' own difficulties in the capital markets are irrelevant to whether Qwest has taken all actions within its control to open its markets.

AT&T and Covad argue that CLECs' recent financial troubles may lead them to scale back their entry plans in Washington, possibly leading to a future decline in CLEC market shares.[63] First, the data do not appear to bear this out: as noted by Mark N. Cooper, a witness for Public Counsel, Washington CLECs such as XO Washington and Allegiance Telecom had banner first quarters in 2001, with significant increases in revenues over both the preceding quarter and the first quarter of 2000.[64] The present financial market notwithstanding,

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Kansas/Oklahoma application the FCC granted in 2001. *See also* Covad Br. at 59 (also citing the DOJ comments to argue for a far more expansive public interest test).

60 *AT&T v. FCC*, 220 F.3d 607, 625 (D.C. Cir. 2000).

61 *Id.* at 627 (quoting 47 U.S.C. § 271(d)(2)(A)).

62 47 U.S.C. § 271(d)(2)(A).

63 *See* AT&T Br. at 10-11 (noting recent CLEC bankruptcies); Covad Br. at 63-65 (summarizing DLEC failures).

64 *See* 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*

competition in Washington is continuing to increase. But even if it were not, a decline in CLEC market shares would be irrelevant, since (as just described) there are no CLEC market share tests in section 271.

CLEC business failures, or CLECs' decisions to change entry strategies in light of changing market conditions, say nothing at all about whether a BOC has taken those actions in its control to open its markets, justifying 271 relief. The FCC has made it clear that, although section 271 compliance requires applicants to open their markets to competitors, "incumbent LECs are *not* required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin."[65] If CLECs choose not to enter a given market, or choose to depart from a market,[66] that is the CLEC's own business choice. As the FCC has recognized, "[f]actors beyond a BOC's control, such as individual CLEC entry strategies, for instance, might explain a low residential customer base,"[67] a low number of competitors in a given market, or even a CLEC exodus from that market.

The truth is that there are a number of factors that 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 the intervenors believe that Qwest has played a role in their troubles by (in their view) failing to open its markets, the proper forum for airing those beliefs was the series of workshops evaluating Qwest's compliance with the competitive checklist, or in an appropriate docket before this

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with § 271(c) of the Telecommunications Act of 1996, Docket No. UT-003022 ("Cooper Testimony"), Exhibit 1070T at 39.

65 *SBC Kansas/Oklahoma Order* at ¶ 65 (emphasis added).

66 *See* AT&T Br. at 11 (noting the closure of SBC's regional sales office in Seattle).

Commission. The financial health of the capital markets and of the CLECs in general should not be allowed to introduce itself into the public interest test.

B. Qwest Has Provided Adequate Assurances That Its Markets Will Remain Open to Competition After Section 271 Approval Is Granted.

The second part of the FCC's section 271 public interest inquiry concerns assurances of future compliance. If a BOC chooses to develop a performance assurance plan (with respect to Qwest, a "QPAP"), the plan will constitute "probative evidence" that the BOC will continue to satisfy its section 271 obligations even *after* its application has been granted.[68] Qwest has proposed a QPAP that fully satisfies the FCC's guidelines and that will prevent "backsliding."

AT&T and Public Counsel argue that Qwest has not adequately satisfied this prong of the public interest analysis either because the QPAP process has not yet been fully completed or because of specific problems with the provisions of the QPAP.[69] These arguments have no foundation. First, the intervenors' speculation that the ongoing QPAP process will somehow fail to address the concerns of either the State of Washington or the CLECs is entirely groundless. The QPAP process has involved a fully collaborative effort in which the State of Washington and CLECs potentially affected by the QPAP have had the opportunity to make their voices heard. All interested parties, including state commission staffs, were invited to discuss QPAP issues in depth in the post-entry Performance Assurance Plan (PEPP) workshops directed by the ROC, and Qwest subsequently modified the QPAP in response to the parties' concerns. As noted in Qwest's brief, the QPAP has also been the focus of two weeks of hearings before the Seven-State Facilitator, John Antonuk.[70] All parties again were able to cross-examine Qwest

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67 *SBC Kansas/Oklahoma Order* at ¶ 268; *Verizon Massachusetts Order* at ¶ 235.

68 *Bell Atlantic New York Order* at ¶ 429.

69 *See* AT&T Br. at 21-25; Public Counsel Br. at 14-16. Oddly enough, most of AT&T's allegations involve unrelated proceedings in Iowa, New Mexico, and Minnesota — not Washington. *See* AT&T Br. at 23-24.

70 *See* Qwest Br. at 29.

witnesses about the provisions and details of the QPAP, and they are now preparing briefs for the Facilitator's review. From the facts developed in these processes, the Facilitator will issue a recommendation on October 15. At that time, this Commission will have the opportunity to offer its opinion on whether the QPAP adequately addresses the concerns of Washington and the CLECs and whether it satisfies the FCC's performance assurance plan guidelines. There is simply no reason to duplicate that inquiry here.

In any event, the QPAP will not be the only mechanism that prevents "backsliding." The most significant assurance of future compliance other than the QPAP is the FCC's enforcement authority under section 271(d)(6).[71] If the FCC determines that a BOC has failed to meet the conditions required for section 271 approval, section 271(d)(6) allows the FCC to impose penalties, suspend or revoke section 271 approval, and permit an expedited complaint process.

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 and contrary to the public interest.[72] As Qwest noted in its opening brief in this proceeding, the FCC has adopted a strong presumption that the public interest test is satisfied if a BOC has complied with the checklist, and the FCC has *never* found any "unusual circumstances" capable of overcoming that presumption to exist.

The FCC has already held that most of the putative "unusual circumstances" the intervenors proffer — low CLEC market shares, low levels of residential competition, and a high concentration of competition in urban areas — do *not* to constitute legitimate reasons for

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

72 *See Bell Atlantic New York Order* at ¶ 423; *see also Verizon Massachusetts Order* at ¶ 233.

rejecting a section 271 application.[73] The remainder are either wholly irrelevant to the section 271 process (e.g., concerns related to UNE and retail pricing, intrastate access charges, and structural separation) or are better considered in other workshops. Qwest addresses each of these in turn.

1. *UNE and retail pricing*. Though the FCC has twice rejected any suggestion that UNE prices must guarantee CLECs a profit margin,[74] AT&T, Public Counsel, WorldCom, and Covad all continue to argue that Qwest's UNE rates are too high and that the rates must be reduced before Qwest can be allowed to enter the interLATA market.[75] The FCC has made it perfectly 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*.[76] As the FCC has emphasized:

> Parties also assert that the Oklahoma promotional UNE rates are so high that no 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.[77]

The FCC has 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

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73 *See Bell Atlantic New York Order* at ¶ 426; *SBC Texas Order* at ¶ 419.

74 *See SBC Kansas/Oklahoma Order* at ¶ 65, 92; *Verizon Massachusetts Order* at ¶ 41.

75 *See* AT&T Br. at 6-9; Public Counsel Br. at 17-18; WorldCom's Brief Addressing Loops, NIDS, Line Splitting, Emerging Services, Public Interest, Section 272 and General Terms and Conditions, *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, at 19-25 ("WorldCom Br."); Covad Br. at 66-67.

76 *Verizon Massachusetts Order* at ¶ 41.

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

part of section 271.[78] Also, the very language of the cited paragraphs of the *Verizon Massachusetts Order* and the *SBC Kansas/Oklahoma Order* make clear that the issue of CLEC profit margins with UNEs has no place in any part of these determinations under section 271 or other provisions the Act.[79] 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 and WorldCom also argue that Qwest's intrastate access charges must be reduced before section 271 approval can be granted.[80] As with UNE rates, the FCC has never reviewed a BOC's intrastate access charges as part of the section 271 public interest test, and it has never conditioned a BOC's entry into the interLATA market on lowering those charges.[81] Indeed, since intrastate access charges are the province of the individual states, the FCC would have no jurisdiction to address this subject in a section 271 order even if it were so inclined.

AT&T attempts to argue that Qwest will have an unfair advantage if it enters the long distance market because "Qwest's *cost* of providing *itself* access — as opposed to its *price* for providing access to IXCs — is only about one cent per conversation minute . . . ."[82] This argument simply ignores the plain language of the Federal Telecommunications Act: As Qwest explained in its opening brief, section 272 requires Qwest's section 272 interLATA affiliate (Qwest Communications Corporation) to pay *exactly* the same interstate and intrastate access

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78 *See SBC Kansas/Oklahoma Order* at ¶ 281.

79 *See Verizon Massachusetts Order* at ¶ 41 (affirming that CLEC profit margins with UNEs are "not part of the section 271 evaluation"); *SBC Kansas/Oklahoma Order* at ¶ 92 (discussing what "the Act" requires in its holding that arguments about CLEC profit margins with UNEs are "irrelevant." The terms "section 271 evaluation" and "the Act" clearly encompass all facets of this proceeding.

80 *See* AT&T Br. at 13-16; WorldCom Br. at 25-26.

81 *See* Rebuttal Affidavit of David L. Teitzel on Behalf of Qwest Corporation Re: Public Interest and Track A (June 21, 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 Rebuttal"), Exhibit 1063 T at 7:4-11.

82 AT&T Br. at 15 (emphases in original).

charges as any other interexchange carrier,[83] and Qwest has demonstrated its commitment to comply with that provision.[84] As Qwest also explained in its opening brief, the FCC has considered and dismissed the purported concerns of AT&T and WorldCom about BOCs' gaining an unfair advantage, improperly allocating costs, or engaging in possible predatory pricing, because the separation and non-discriminatory safeguards of section 272 adequately address these concerns.[85] Therefore, no unfair advantage exists. AT&T's complaints about Qwest's access charges are wrong and, in any event, irrelevant to the FCC's public interest test.

3. *Structural separation*. AT&T and WorldCom continue to argue that Washington should consider the structural separation of Qwest's wholesale and retail operations.[86] Not only is the issue of structural separation well beyond the scope of this proceeding,[87] but, as Qwest detailed in its opening brief, there is no basis whatsoever in federal law or the laws of Washington for imposing involuntary structural separation on Qwest, and such a remedy would run counter to both Congress's intent and instructions in the 1996 Act and the FCC's decisions interpreting the Act.[88] Critically, neither AT&T nor WorldCom points to a single authority finding that the FCC or the State of Washington has authority to impose structural separation as part of a section 271 proceeding, and there simply is none.

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83 *See* 47 U.S.C. § 272(e)(3).

84 *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 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).

85 *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").

86 *See* AT&T Br. at 25; WorldCom Br. at 35-41.

87 *See* Teitzel Rebuttal, Exhibit 1063T at 9:21 to 10:10.

88 *See* Qwest Br. at 37-44.

In fact, as discussed in Qwest's opening brief,[89] not one state — nor the FCC — has adopted the heavy-handed remedy AT&T and WorldCom are proposing. For example, the Virginia State Corporation Commission recently dismissed a petition by AT&T which called for the structural separation of Verizon.[90] In dismissing the petition, the Commission cited a clear lack of state or federal authority on its part to order structural separation.[91]

4. *Other miscellaneous issues*. Finally, the parties broach a number of other issues — for example, operations support system ("OSS") testing procedures,[92] DSL and advanced services,[93] specific terms of interconnection and access,[94] and examples of alleged anticompetitive behavior by Qwest[95] — that are wholly unrelated to the public interest inquiry. As with the QPAP, the basic interconnection performance issues have been considered in other workshops in this proceeding. This accords with the FCC's section 271 orders, which demonstrate that these particular interconnection disputes are to be addressed not in the public interest inquiry, but in connection with the specific checklist items to which they relate.[96] Therefore, it would be inappropriate and inefficient to import a duplicate layer of review into the

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89 *Id*.. 44-45.

90 See Order Granting Motion to Dismiss, Joint Petition of Cavalier Telephone L.L.C., Network Access Solutions, LLC, Covad Communications Company, and AT&T Communications of Virginia, Inc. for Structural Separation of Verizon Virginia Inc. and Verizon South, Inc., Commonwealth of Virginia State Corporation, Commission Case No. PUC 010096, (issued June 26, 2001).

91 *Id*. at 4-5. Specifically, the Virginia Commission found that the Act contains "no grant of authority . . . to order structural separation." *Id*. at 5. The Commission also cited the pending dockets before it, including the third party testing of Verizon's OSS systems and its on-going monitoring of the state of competition in Virginia, as the more appropriate method of encouraging competition in the local market. *Id*. at 5.

92 *See* Public Counsel Br. at 17.

93 AT&T Br. at 10-12; Covad Br. at 60-63.

94 *See* AT&T Br. at 20-21; WorldCom Br. at 30-34 (complaining about the terms and provisioning intervals for special access).

95 *See* AT&T Br. at 16-21; WorldCom Br. at 26-28; Public Counsel Br. at 19-26.

96 *See, e.g*., *Verizon Connecticut Order* at ¶¶ 53-56 (conducting an extensive review of Verizon's OSS as a part of checklist item 2 compliance); *Verizon Massachusetts Order* at ¶¶ 43 ff. (same); *Verizon Connecticut Order* at ¶¶ 27 ff. (considering the availability of DLS services for resale within a review of checklist item 14); *Verizon Massachusetts Order* at ¶¶ 217-21 (same); *SBC Kansas/Oklahoma Order* at ¶¶ 182 ff. (assessing Qwest's provisioning of unbundled loops for DSL services in the context of checklist item 14).

public interest inquiry. Furthermore, nearly all of the unrelated disputes chronicled by the intervenors have been resolved to the parties' satisfaction (as discussed in detail in Qwest's opening brief[97]), and they are irrelevant to Qwest's present compliance with the requirements of section 271.

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 14th day of September, 2001.

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97 *See* Qwest Br. at 35-37.

98 *See, e.g., Verizon Connecticut Order* at ¶¶ 53-56 (conducting an extensive review of Verizon's OSS as a part of checklist item 2 compliance); *Verizon Massachusetts Order* at ¶¶ 43 ff. (same); *Verizon Connecticut Order* at ¶¶ 27 ff. (considering the availability of DLS services for resale within a review of checklist item 14); *Verizon Massachusetts Order* at ¶¶ 217-21 (same); *SBC Kansas/Oklahoma Order* at ¶¶ 182 ff. (assessing Qwest's provisioning of unbundled loops for DSL services in the context of checklist item 14).