

## I. INTRODUCTION

1. On September 7, 2001 Qwest filed *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 With The Public Interest Test of 47 U.S.C. §271(d)(3)(C)* ("Qwest Brief") with the Washington Utilities and Transportation Commission ("Commission"). Public Counsel files this Reply in response to four of the assertions made by Qwest. Public Counsel maintains that Qwest's §271 application is not in the public interest at this time.

## II. QWEST'S ENTRY INTO THE INTERLATA MARKET IN WASHINGTON IS NOT YET IN THE PUBLIC INTEREST

2. Qwest claims that its application is consistent with the public interest. *Qwest Brief* at 29. As discussed in *Public Counsel's Brief on Public Interest* ("Public Counsel Brief") this is not yet true. For the reasons cited in Public Counsel's Brief filed on September, 7, 2001, this Commission's application of the relevant Federal Communications Commission ("FCC") and Department of Justice ("DOJ") analytical frameworks leads to the conclusion that Qwest's request for a finding from the Commission that its §271 application is in the public interest is premature at this time.

## III. THE COMMISSION SHOULD REJECT QWEST'S "OPEN DOOR" ARGUMENT

3. Qwest's brief asserts that "CLECs are in fact walking through Qwest's open door and requesting (and receiving) interconnection." *Qwest Brief* at 23. Qwest appears to relentlessly adhere to the mistaken assumption that competitive "presence" equates to actual competition. This Commission rejected that notion unequivocally, as discussed in Public Counsel's Brief. *Seventh Supplemental Order from In the Matter of the Petition of Qwest Corporation for Competitive Classification of Business Services in Specified Wirecenters*, WUTC Docket No. UT-000883 (December 18, 2000) ("Comp. Class. Order") at 66. Interconnection alone does not equal competition.

4. Does Qwest have interconnection agreements with competitors? Yes. Are competitors serving select geographic and economic markets? Yes. Is there meaningful competition in all of Qwest's local markets? No. The record now before the Commission is clear that Qwest faces, by its own calculation, 1 percent competition in the residential market. Further, less than half of that 1 percent is capable of providing a price constraining influence on Qwest through facilities-based competition. *Public Counsel Brief* at para. 27. This strong, probative evidence of token competition in the residential market indicates that Qwest has not yet fully and irrevocably opened its local markets to competition. When Qwest takes those steps necessary to irrevocably open all its local markets to competition then Qwest's residential customers will have competitive choices, and hopefully, lower priced options.

#### IV. THE QPAP IS NOT YET COMPLETE

5. Qwest claims to have developed a "robust" performance assurance plan ("QPAP") for Washington. *Qwest Brief* at 29. Whether the QPAP is "robust" enough to meet this Commission's concerns has yet to be determined. Qwest's Brief itself acknowledges that the multistate review process is still incomplete. *Id.* It is Public Counsel's position that until this Commission adopts a QPAP that has meaningful Tier 1 and Tier 2 penalties that serve to compensate competitors and deter future anti-competitive conduct by Qwest's its §271 application cannot be determined to be in the public interest. Further, Public Counsel believes the Commission's best means for making a "real world" determination regarding both the effectiveness of the QPAP and Qwest's commitment as a pro-competitive wholesale provider is to require ninety days of actual performance without statistically significant penalties under the QPAP prior to approving Qwest's §271 application to the FCC. *Public Counsel's Brief* at paras. 42-45.

#### V. "UNUSUAL CIRCUMSTANCES" ABOUND

6. Qwest claims that no "unusual circumstances" exist which make its entry into the interLATA long distance market contrary to the public interest. *Qwest Brief* at 30. Public

Counsel has detailed a number of such circumstances, as have the competitive local exchange companies ("CLECs") participating in this docket. *Public Counsel Brief* at paras. 51-65. And yet, despite Qwest's desire to achieve entry into the interLATA long distance markets, new "unusual circumstances" continue to appear.

**A. Qwest's Record of Anti-competitive Business Practices is Clear, Present, And On-Going.**

7. Public Counsel has detailed a number of cases where Qwest's anti-competitive conduct brought them before this Commission, the FCC, and the courts. *Id.* Equally disturbing, is Qwest's continuing misconduct even in the face of the scrutiny it knew it would face during the review of its §271 application.

8. On September 12, 2001 the Commission announced fines it was levying against Qwest for failure to comply with the Commission's rules regarding rate quotes to customers making collect calls from pay phones. *WUTC v. Qwest Corporation, Docket No. UT-990043, Commission Order Accepting Settlement* (September 12, 2001). It is important to note that these fines are the result of an investigation by Commission Staff into Qwest's business practices regarding collect calls from pay phones. This was not a case of self-reporting or some other circumstance that might mitigate in the company's favor.

9. It is up to the Commission to determine whether this pattern of anti-consumer and anti-competitive business practices constitutes "unusual circumstances" that weigh against a finding that Qwest's §271 application is in the public interest. Public Counsel believes that these examples are further evidence that weigh against a finding that Qwest's application is in the public interest at this time.

**B. The FCC Has Not Yet Seen The Full Range of "Unusual Circumstances" that Qwest Presents.**

10. Qwest identifies five areas that the FCC has found not to constitute "unusual circumstances" under that section of the act. *Qwest Brief* at 30. Public Counsel would note for the Commission that of the five areas identified by Qwest, none of them are cited by Public

Counsel as an "unusual circumstance." Rather, what Public Counsel has identified as "unusual circumstances" are those cases brought before the Commission, the FCC, and the courts where Qwest engaged in anti-competitive business practices to protect its local markets from entry by competitors or where Qwest engaged in business practices abusive to its customers. Qwest's history of illegal and anti-competitive conduct both pre-merger with US West, and post-merger are just such "unusual circumstances" that weigh against a finding that Qwest's application is in the public interest.

11. Qwest also claims that "'isolated instances' of service quality glitches or non-compliance do not affect the public interest inquiry." *Qwest Brief* at 31. This might well be true if such instances were in fact isolated. They are not. Qwest's history of poor service quality in Washington is well known and the examples are legion. *Public Counsel Brief* at paras. 52-55. This Wednesday's fine for failure to provide payphone rate quotes is but the latest example of Qwest providing not only poor service, but in fact failing to comply with the Commission's own rules. These examples are neither isolated or random, but are continuous and on-going, and give rise to serious concern. Public Counsel encourages the Commission to review Qwest's on-going failure to meet its commitments from the Qwest-US West merger case. *Public Counsel Brief* at paras. 52-55 and *Ninth Supplemental Order Approving and Adopting Settlement Agreement and Granting Application, In Re Application of U S West, Inc. and Qwest Communications International, Inc. for an Order disclaiming Jurisdiction, or in the Alternative, Approving the U S West, Inc. -- Qwest Communications International, Inc. Merger*, WUTC Docket No. UT-991358 (June 19, 2000) ("Merger Order"). Such a review is instructive not only in the view it provides of Qwest's apparent inability to meet its commitments, but it also provides a preview of events likely to occur when this Commission has to enforce the QPAP.

**C. Qwest's Settlement of Cases Does Not Absolve The Company's Misconduct.**

12. Qwest states that it "has settled most of the disputes cited [by AT&T and WorldCom], including SunWest and Rhythms, to the satisfaction of the complaining CLECs." *Qwest Brief* at

36. Qwest does not assert that the complaints identified were unfounded, or that they were without merit. Qwest simply states that it has settled many of them. Settling disputes regarding its business practices is a far cry from not engaging in such anti-competitive conduct in the first place. Settlements and fines indeed are viewed by some companies as a cost of doing business.

13. The question this Commission must answer is not whether Qwest is capable of settling the claims brought against it, it clearly can do so. The true question raised by Qwest's brief is why Qwest's business practices lead to such claims in the first place.

## VI. CONCLUSION

14. For the reasons stated above, Public Counsel respectfully requests that the Commission find that Qwest's application to enter the interLATA long distance market in Washington is not in the public interest at this time. At such time as Qwest is able to demonstrate ninety days of compliance with the terms of the QPAP (the Commission will eventually adopt) without generating statistically significant penalties the Commission should invite Qwest to present the question of the public interest for re-examination at that time. Until then, Qwest's §271 application should not receive this Commission's approval or the Commission's positive recommendation to the FCC.

RESPECTIFULLY SUBMITTED this \_\_\_\_ day of September, 2001.

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