BEFORE THE WASHINGTON UTILITIES AND TRANSPORTION COMMISSION

IN THE MATTER OF THE MERGER OF THE PARENT CORPORATIONS OF QWEST COMMUNICATIONS CORPORATION, LCI INTERNATIONAL TELECOM CORP., USLD COMMUNICATIONS, INC. AND U S WEST COMMUNICATIONS, INC.	))))))))))	DOCKET NO. UT-991358

DIRECT TESTIMONY OF CHARLES L. WARD ON BEHALF OF AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.

February 1, 2000

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OVERVIEW AND BACKGROUND

Q: PLEASE STATE YOUR NAME AND POSITION.

A: My name is Charles L. Ward and my business address is 1875 Lawrence Street, Denver, Colorado, 80202.

Q: PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND.

A: I received a Bachelor of Science degree from Pennsylvania State University and a Masters in Business Administration from Southern Illinois University. I have also attended various technical and managerial training courses and have attended executive training programs at Duke University and Cornell University.

Q: PLEASE STATE YOUR RESPONSIBILITIES AT AT&T.

A: I am employed by AT&T in the capacity of Government Affairs Vice President with responsibilities for regulatory and legislative matters in seven western states. I began my career in telecommunications with Southwestern Bell Telephone Co. in St. Louis, Missouri, in 1974. I held a variety of positions in the network organization including network design and administration, network planning and operator services. This included positions both in line operations and headquarters staff. In 1983, I transferred to AT&T as the regulatory affairs manager for the State of Missouri. Since then, I have held positions of increasing responsibility in the government affairs area, dealing with such issues as access charges and the regulation of AT&T's service offerings at both the federal and state level. I assumed my current position in March of 1996.

Q: PLEASE BRIEFLY DESCRIBE U S WEST AND QWEST AND THEIR PROPOSED MERGER.

A: U S WEST Communications, Inc. ("U S WEST") is the largest incumbent local exchange company ("ILEC") in the state, providing both local and intraLATA long distance services. U S WEST is a wholly owned subsidiary of U S WEST, Inc., which proposes to

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merge with Qwest Inc. Qwest Inc. and its subsidiaries (collectively "Qwest") provide primarily long distance services, and Qwest has constructed an extensive fiber-optic network in this state, throughout the U S WEST region, and across the county to enable it to provide these services.

U S WEST, Inc. and Qwest Inc. propose to merge into a single company. Qwest Inc. will acquire the stock of U S WEST, Inc., and U S WEST will be a wholly owned subsidiary of Qwest Inc. The merged company "will have the exclusive power and final authority" over the company as a whole, including "material acquisitions and dispositions, the allocation of capital resources, termination of certain senior executive officers and the setting of general corporate strategy."[1]

Q: IS THIS THE FIRST TIME U S WEST AND QWEST HAVE SOUGHT TO COMBINE THEIR SERVICE OFFERINGS?

A: No, it is not. Not long after the passage of the Telecommunications Act of 1996 ("Act"), U S WEST and Qwest entered into a joint marketing arrangement in which U S WEST offered to bundle Qwest interLATA long distance with U S WEST's local exchange services. AT&T, the Commission, and other interested parties challenged this arrangement as a violation of the Act, which prohibits U S WEST from offering interLATA long distance services until it has irreversibly opened its local exchange markets to competition. The federal district court in Seattle enjoined the companies from offering this bundled service pending review by the FCC.[2] The FCC concluded that the arrangement was unlawful,[3] and the court of appeals recently upheld the FCC's decision.[4]

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[1] See, e.g., In re Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Networks, Inc., and U S WEST Communications, Inc., Washington Utils. & Transp. Comm'n, Docket No. UT-991358, Joint Application for Merger of Qwest Communications, International, Inc. (Aug. 31, 1999).
[2] Memorandum Opinion and Order, In the Matter of AT&T Corp. et al v. Ameritech Corp. et al., File Nos. E-98-41, E-98-42, and E-98-43, 1998 FCC LEXIS 5192 (Sept. 28, 1998), aff'd sub nom. U S WEST v. FCC, 177 F.3d 1057 (D.C. Cir. 1999).
[3] Id.
[4] U S WEST v. FCC, 177 F.3d 1057 (D.C. Cir. 1999).

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Q: HAVE U S WEST AND QWEST SOUGHT APPROVAL OF THE PROPOSED MERGER IN ALL STATES IN THE U S WEST REGION?

A: No, they have not. Qwest Inc. and U S WEST, Inc. (collectively "Applicants"), contend that states lack jurisdiction to review mergers between corporate parents of regulated companies. Indeed, Applicants have asserted that this Commission lacks authority to review the proposed merger, and the Applicants seek approval of the merger only if the Commission rejects that argument.

Q: HAS THE APPLICANTS' POSITION IMPACTED THE PROCEEDINGS BEFORE THE COMMISSION?

A: It certainly has. The Applicants have repeatedly attempted to constrain state commission inquiry, seeking to exclude any consideration of the impact of the proposed merger on competition in the local exchange market or the service quality provided by U S WEST to retail and wholesale customers currently and following the proposed merger. The Applicants have also objected to the participation of AT&T and every other interested party other than those required by statute to be parties. The Applicants have continued to litigate these issues by refusing to provide responses to data requests that seek information on any issue that the Applicants believe should not be addressed and by requesting that AT&T and other non-statutory parties be barred from access to information that the Applicants unilaterally determine is highly confidential.

Q: WHAT IMPACT HAS THE APPLICANTS' CONDUCT OF THIS PROCEEDING HAD ON AT&T'S ABILITY TO PARTICIPATE EFFECTIVELY?

A: The Applicants' tactics have severely burdened the ability of AT&T and other parties to participate meaningfully in this proceeding. The proposed merger promises to have a substantial impact on U S WEST's provisioning of service in this state. U S WEST repeatedly has denied or delayed service orders based on a claimed lack of facilities and has strenuously litigated virtually every legal and factual issue possible with respect to its obligations under the Act and the FCC rules implementing the Act. The proposed merger

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would change the entity that determines the level of network investment and the company's position on regulatory issues. The Applicants, both in their application and in statements made by Qwest CEO Joseph Nacchio and U S WEST, Inc. Chairman Solomon Trujillo, have promised increased investment in local exchange facilities and less hostility on competition issues as a result of the proposed merger.[5]

The Applicants' actions, however, speak much more loudly than their words. The Applicants in their responses to some of AT&T's data requests have retreated from any representation that the merged company will increase local exchange network investment or alter its antipathy to competition, claiming that Mr. Nacchio's comments were mischaracterized and that the company has not made any such decisions yet.[6] The merged company, however, *has* made decisions to make substantial investments in advanced services, both inside and outside of the U S WEST region. The Applicants, therefore, are willing to promise that the proposed merger will result in the increased availability of lightly regulated or unregulated and highly profitable services, but refuse to undertake any improvements in regulated local exchange services that even Mr. Trujillo has recognized are renowned for their inadequacy. If the Applicants' prosecution of this proceeding is any indication, moreover, the company's attitude to competition and its obligations under the Act will be even more hostile as a result of the merger, if that is possible.

DO THE APPLICANTS' RESPONSES TO AT&T'S WRITTEN DISCOVERY PROVIDE ANY ADDITIONAL INDICATION OF THE NEGATIVE IMPACT OF THE PROPOSED MERGER?

A: Yes. When the Applicants were asked in written discovery to provide information concerning the impact of the proposed merger (or the planned activities of the merged company, if any) with respect to such vital issues as compliance with sections 251 and 252 of

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[5] See Qwest, U S WEST shareholders overwhelmingly approve merger, Denver AP (November 3, 1999).
[6] Qwest/U S WEST Response to AT&T et al. Data Requests, Washington Utilities and Transportation Commission Docket No. UT-991358, Response to Request Nos. 01-020, 01-4s1, 01-05s1 (October 27, 1999).

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Act, divestiture of interLATA services, service quality, access charges, affiliated interests and sale of rural exchanges, the response was a deafening silence. In their initial response to almost half of these requests, the Applicants stated they have not made any decisions as to how these and other matters will be addressed after the merger.[7] The Applicants provided such answers as "no decisions have been made with respect to how the combined company will address specific operational issues," or "no decisions have been made with respect to positions the combined company will take on specific regulatory or legal issues after the merger has been completed." Even when AT&T successfully sought to compel the Applicants to supplement their responses with more direct answers regarding the impact of the proposed merger on these issues, the answers were, in many instances, either substantively the same (i.e., no plans or no decisions) or the Applicants offered up the classic non-answer: the merged company would comply with all applicable laws and/or all interconnection agreements after consummation of the merger.[8] This repeated effort to put off confronting the vital questions regarding the merger is a powerful indication that matters central to the public interest, such as local competition and investment in the local exchange network, will not improve after consummation of the merger. Moreover, given their systematic failure to provide information regarding the impact of the proposed merger or how the merged company intends to behave, the Applicants have signaled to the Commission that they wish to be left to their own devices. Given their past practices, the Applicants should not and cannot be trusted on their own to act in a manner that will promote public interest.

Q: HOW DOES THE PROPOSED MERGER AFFECT THE PUBLIC INTEREST?

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[7] Qwest/U S WEST Response to AT&T Data Requests, Washington Utilities and Transportation Commission, Docket No. 99-1358, ("Data Requests"); Response to Data Requests No. 01-008, 013, 015, 018, 020, 024, 025, 027, 032, 033, 035, 037, 039, 043, 046, 047, 048, 049, 050, 054, 056, 058, 059, 060, 062, 064, 065, 066, 068, 071, 072, 075, 076, 077, 080, 081, 082, 083, 087,088, 089, 090, 091, 094, 095, 096, 097, 098, 101 and 102.

[8] See, e.g., response to Request No. 01-008S, 013S, 032S, 035S, 037S, 039S, 043S, 049S, 054S, 056S, 062S, 064S, 068S, 075S, 076S, 080S, 081S, 082S, 085S, 087S, 088S, 095S, 096S, 097S and 098S.

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A: The proposed merger has potential detrimental effects on the public interest, as illustrated by my testimony on various aspects of the merger.

The Commission should reject Applicants' contention that the merger of the parent companies has no effect on the operations of the local operating companies, or the public interest. As the FCC recently noted in the merger of SBC and Ameritech, "when two holding companies with distinct policies merge and adopt one common set of policies, the decisions made by the operating companies of the acquired holding company will become more closely correlated with the decisions made by the operating companies of the acquiring holding company."[9] In this proceeding, a company that has little to no experience in providing local exchange services is acquiring a Regional Holding Company; and there is even greater cause for concern because Applicants have either not determined, or been unwilling to provide critical details regarding how the two companies will combine their operations post-merger.

U S WEST or Qwest exhibit little concern in their joint application for ensuring that the merger results in benefits to the public interest or consumer and producer welfare, and therefore fail to demonstrate that the merger is consistent with the public interest.[10] For example, the Applicants do not make promises to focus on increasing local network investment and provision of local exchange service, or on creating a more favorable environment for the development of competition; i.e., by complying with the Act and FCC Orders or reducing access rates. Not only does the Joint Application fail to prove that the proposed merger is consistent with the public interest, but the Applicants' cavalier disregard

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[9] See In re Application of SBC and Ameritech, FCC 99-279, CC Docket No. 98-141, Report and Order (October 8, 1999), at ¶ 118.
[10] See Rev. Code Wash. § 80.01.040(3).

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for these various issues suggests that the proposed merger could instead result in significant harms to consumers and the public interest such as reduced quality and quantity of basic local exchange and exchange access services; diminished competition; increased access rates; and increased costs of local and long distance service. These are just a few of the potential losses resulting from the proposed merger.

Specifically, the Joint Application notes that the merged Qwest/USWC will focus investment on providing advanced services; but does not discuss how the merged company will provide local exchange services.[11] As I discuss in my testimony on U S WEST's current poor service quality, the Applicants do not indicate with any sufficiency or detail how they will ensure that the merged company will invest in the network infrastructure to provide basic local exchange services. To the contrary, all suggestions by the Applicants currently point toward a lack of focus on local exchange services. Thus, a potential outcome of the merger is decreased investment in local exchange services, and correspondingly, a reduction in the provision of such services,[12] not to mention in their quality. The Commission should review this issue in order to ensure that the provision of basic local services will not be reduced by the merged company in its zealous effort to provide advanced services.

Further, as other parts of my testimony detail, the proposed merger poses a substantial threat to the state of local competition and, consequently, for the quality, innovation and

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[11] See Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., and U S WEST Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-991358, Verified Joint Application (August 31, 1999) at 2 ("merger will bring together Qwest Inc.'s advanced network providing broadband Internet communications with U S WEST's innovative local service offerings, and leadership in providing high speed internet access through digital subscriber line").

[12] My testimony on U S WEST's current service quality already details how various consumers in U S WEST's territory have had to wait significant periods in order to receive basic local exchange service. See Direct Testimony of Charles Ward at 35-52.

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prices of local exchange services for consumers. The Applicants fail to provide enough facts and assurances that the merged company will behave in a competitively neutral manner.[13] If the merged company continues U S WEST's prevailing pattern of failing to negotiate in good faith or provide nondiscriminatory access to competitors, local competition will decrease, and the Applicants will ultimately have no competitors and no incentive to act efficiently. As discussed above, in the absence of local competition, the merged company will have no reason to recognize efficiencies of scale or scope, and may instead, provide inefficient, and more costly local exchange services. In the long run, a decrease of local competition results in significant harm to consumers and is clearly inconsistent with the public interest and the Commission's goals of promoting local competition.

Moreover, the proposed merger potentially raises the costs of access charges[14] for interexchange carriers and other CLECs, and therefore, the long distance prices for consumers. I note in my testimony on access charges that the Joint Applicants flatly state in response to a discovery request that "no decisions have been made regarding targeting specific services [including access charges] for price reductions as a result of the merger."[15] There is a real danger that the merger will harm the public interest, because once U S WEST and Qwest merge, U S WEST could raise its access charges to all carriers, including its own affiliate. While U S WEST's increasing of access rates to its own affiliates would result only

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[13] Direct Testimony of Charles Ward at 10 (discussing U S WEST's failure to comply with Sections 251 and 252, and the merged company's obligations under Section 271).
[14] AT&T recognizes that the Commission has already considered the prices of terminating access charges, but submits that the prices of originating access charges should be reduced to cost within the context of this proceeding.
[15] Qwest and U S WEST Responses to AT&T Data Requests, Washington Utilities and Transportation Commission, Docket NO. UT-9901358, Response No. 01-027(October 27, 1999).

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in an intracompany shifting of costs and intracompany transfer of wealth from one affiliate to another, the increase of access charges to all other carriers would result in a real cost and "price squeeze."[16] Ultimately, competitors may need to raise prices to avoid losing customers, or in the alternative, may lose profits and potentially be driven out of business. Under a scheme in which the merged incumbent company raises access charges, competitors may not find it profitable in the long run to continue to provide service. Consumers then will have less choices for services, and the merged company will also have no incentive to keep its prices competitive or cost-based. Thus, the potential long-run effect of the proposed merger is that there is less local and long distance competition, and that prices for both types of services will increase, which adversely affects the public interest.

Q: WHAT SHOULD THE COMMISSION DO TO ENSURE THAT THE PROPOSED MERGER IS CONSISTENT WITH THE PUBLIC INTEREST?

A: The Commission should impose the conditions on the proposed merger that I discuss in my testimony, in order to prevent the loss of competition, and the detrimental effects to consumers and the public interest.

The Commission can and should take the Applicants at both their words and their actions. In light of their unwillingness to stand by, much less support, their promises of increased service quality and greater acceptance of competition, the Commission should hold the Applicants to these representations by adopting enforceable conditions on any approval of the proposed merger. These conditions should detail the actions to be taken, and the level of performance to be achieved, by the merged company and its affiliates and should establish meaningful and effective remedies for noncompliance with these requirements.

[16] I discuss this in greater detail in my testimony at 52-60.

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Q: HAVE YOU REVIEWED CONDITIONS PROPOSED BY OTHER INTERVENORS?

A. Yes. I am aware that several CLECs are submitting a list of proposed conditions with their testimonies. Although the conditions overlap in some ways with the conditions I propose in this testimony, AT&T's conditions encompass a broader scope of issues and are more stringent in areas such as service quality. AT&T would prefer that the Commission adopt our broader conditions, but we do support the proposals made by the CLECs as well.

Q: PLEASE SUMMARIZE YOUR RECOMMENDATIONS ON THE ISSUES THE COMMISSION SHOULD CONSIDER AND THE CONDITIONS THE COMMISSION SHOULD ADOPT IN ORDER TO MAXIMIZE CUSTOMER WELFARE

A: My testimony addresses 6 substantive areas, and I have devoted a section to each area. At the end of each section, I discuss conditions the Commission should adopt, and a complete list of those recommended conditions is attached as Exhibit A. The sections are as follows:

Section 251/252 Compliance. U S WEST has consistently failed to meet its obligations under the Act and prevented AT&T and other new entrants from bringing the benefits of an effectively competitive marketplace to consumers. The proposed merger threatens to continue or exacerbate U S WEST's noncompliance, providing U S WEST with added incentives to favor its affiliates and itself at the expense of legitimate competitors. The Commission should adopt conditions that will require U S WEST immediately and demonstrably to meet its obligations under Sections 251 and 252 of the Act.

Divestiture of InterLATA Services. Qwest has promised to divest the interLATA services it currently provides in U S WEST's region, but has failed to provide any detailed plan for such divestiture, including whether and how the merged company will use, maintain, and finance the facilities used to provide those services. The Commission, therefore, should require that the Applicants submit such a plan for Commission approval of the divestiture of interLATA and other competitive services (included intraLATA toll, DSL, and data services)

that ensures that (1) the plan fully complies with Section 271 and 272 of the Act; (2) competitors will have access to any such facilities used to provide local exchange service under Section 251 and 252 of the Act; and (3) revenues from captive ratepayers will not be used to recover the costs of these facilities, and that facilities required by other carriers will not be hoarded by the merged company, effectively pre financing U S WEST's entry into interLATA markets.

Service Quality. The quality of service U S WEST provides to its retail and wholesale customers is inadequate and is not in the public interest. The Commission must ensure that the Applicants do not build their advanced services business at the expense of U S WEST's captive ratepayers. The Commission, therefore, should adopt conditions that will ensure that U S WEST's retail and wholesale services are immediately raised to an acceptable level. The Applicants should commit to raising the level of local exchange network investment that will enable U S WEST to meet clear performance measure benchmarks for retail and wholesale services. The Applicants should adopt the 27 Service Quality Measurements developed by the Local Competition Users Group, which require monthly reporting, and also commit to self-executing performance penalties.

Access Charges. The proposed merger would join the ILEC serving the vast majority of customers in 14 states and the fourth largest interexchange carrier in the country. The merged company thus will be uniquely positioned to take advantage of inflated access charges, which remain a fixed cost to AT&T and other unaffiliated IXCs, but would merely be an intercompany shift in revenue for the merged company. The Commission, therefore, should adopt conditions to minimize that anticompetitive opportunity, including reducing originating access charges to cost or at least to a level that reflects the savings resulting in the merger.

Affiliated Interests. The proposed merger would result in the creation of many new affiliated interest relationships between U S WEST and current Qwest entities with the

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corresponding threat that the merged company will abuse those relationships to the detriment of consumers and competitors. The Commission, therefore, should adopt conditions sufficient to minimize such opportunities, including detailed disclosure regarding terms and conditions of transactions between the various affiliates and Commission approval of plans for how the merged company will monitor and disclose future transactions.

Sale of Rural Exchanges. U S WEST has sold and continues to sell exchanges in less densely populated areas of its 14 state region, but U S WEST has produced no evidence that ratepayers benefit from those sales, either directly through investment of the proceeds in local exchange network facilities or indirectly through lower rates. The Commission, therefore, should adopt conditions that limit U S WEST's ability to sell additional exchanges to finance the provisioning of advanced services by the merged company and its affiliates without increasing investment in local services or lowering charges for retail and wholesale customers.

SECTION 251 AND 252

Q: WHY SHOULD THE COMMISSION REVIEW U S WEST'S COMPLIANCE WITH SECTION 251 AND 252 OF THE 1996 ACT?

A: Section 251 of the Act requires ILECs to open their local exchange facilities and networks to competitors by providing interconnection, unbundled network elements ("UNEs"), and services for resale to requesting carriers on a nondiscriminatory basis; and Section 252 governs the process of negotiation and arbitration of interconnection agreements. Although U S WEST is the regulated entity required to comply with these provisions, U S WEST is owned and controlled by U S WEST, Inc., which establishes corporate policy – including the interpretation of U S WEST's legal obligations – and determines the amount of investment in U S WEST network facilities – including facilities needed by competitors. Through the proposed merger, Qwest seeks to replace U S WEST, Inc., as the entity that owns and controls U S WEST. That change in ownership will or could substantially impact

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the extent to which U S WEST complies with Sections 251 and 252.

Joint Applicants represent that the proposed merger will enhance competition, but they are remarkably silent with respect to competition in local exchange markets as opposed to markets for advanced services. The only assurance the Joint Applicants provide is the blanket statement that the merged company will have increased incentives to obtain Section 271 approval after the merger. Qwest CEO Joseph Nacchio elaborated on that promise somewhat in a September 1999 speech to the Regional Oversight Committee ("ROC"), promising that the merged company would be "less hostile" to competition. Quite troubling, however, is the fact that the Joint Applicants, in their responses to data requests have distanced themselves from any such assurances, claiming that Mr. Nacchio's remarks were mischaracterized and that the companies have made no decisions on legal or policy issues regarding the proposed merger.[17]

The Commission should find such representations chilling, not reassuring. To date, U S WEST has failed to provide nondiscriminatory access to, and interconnection with, its network, and has attempted to thwart the development of effective local exchange competition at every opportunity. Further, Qwest was recently fined by the FCC for $2.1 million for its slamming practices, indicating that Qwest is hardly a model carrier in compliance with federal and state requirements.[18] Even if the proposed merger does nothing more than maintain the status quo, it would not be in the public interest. More ominously, however, the Joint Applicants' strong commitment to deployment of advanced services and corresponding lack of commitment to improving or even maintaining investment for local exchange facilities and services threatens substantial additional harm not only to competitors seeking interconnection, UNEs, and services to resell, but to consumers. The Commission,

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[17] Qwest/U S WEST Response to AT&T Data Requests, Washington Utilities and Transportation Commission Docket No. UT-991358, Response to Request No. 01-050(October 27, 1999).
[18] See In the Matter of Qwest International, Inc., Notice of Apparent Liability for Forfeiture, FCC 99-299, File No. ENF-99-11 (October 19, 1999).

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therefore, should condition its approval of the proposed merger on enforceable undertakings that the merged company will fully comply with the Act and with this state's pro-competition policies and directives. Imposing such a condition will protect customers from negative impacts of the merger that would result if the Applicants do not comply with section 251 and 252 of the 1996 Act.

Q: IN WHAT WAYS HAS U S WEST FAILED TO COMPLY WITH SECTION 251 REQUIREMENTS?

A: AT&T has experienced U S WEST's failure to comply with almost every requirement of Section 251 and 252. Specifically, U S WEST has resisted its obligation to negotiate interconnection agreements in good faith with CLECs, and refused to provide various UNEs or to pay adequate reciprocal compensation. In addition, where U S WEST does provide UNEs or interconnection, U S WEST appears to discriminate against CLECs in its provision or access to such UNEs, including operational support systems ("OSS") or local number portability ("LNP"). U S WEST has also failed to provide to AT&T collocation on just, reasonable, and nondiscriminatory rates and terms. U S WEST's actions with respect to its Section 251 and 252 obligations is best characterized as entirely obstructionist, at least until those obligations are solidified by courts—even the highest court in the land—and U S WEST told that the obligations in the Act really do apply to it.

Q: PLEASE DESCRIBE IN MORE DETAIL U S WEST'S FAILURE TO NEGOTIATE INTERCONNECTION AGREEMENTS IN COMPLIANCE WITH THE ACT.

A: AT&T has found that U S WEST has delayed and obstructed it from obtaining interconnection agreements in every way possible. In each of the 14 states in U S WEST's region, AT&T has had to resort to arbitration, which U S WEST has then appealed. In this state, for example, U S WEST arbitrated a total of 13 interconnection agreements, and

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appealed 8 of those decisions to federal district court.[19] Further, in every state, U S WEST has argued in arbitration proceedings that there was no need to file detailed interconnection agreements, but as problems have arisen, U S WEST has continued to refuse to resolve issues or problems in a cooperative manner.

The following are some of the various ways in which U S WEST has failed to negotiate interconnection agreements in good faith, whether through obstruction, delay, or refusal to honor the terms of such agreements:

- ♦ A pattern of U S WEST's negotiating tactics has been to delay negotiations, fail to participate in implementation meetings, send personnel to negotiation meetings who have neither knowledge nor authority to make decisions on behalf of U S WEST, and reverse its negotiating positions with AT&T. This behavior has hindered AT&T in some states, and delayed it in others from implementing AT&T Digital Link ("ADL"), and is reflective of U S WEST's general negotiating style.
- ♦ U S WEST has refused to recognize a carrier's Section 252(i) opt-in and pick and choose rights in violation of the Act, the FCC's requirements, and the Supreme Court's decision.[20] Rather, U S WEST has asserted that a carrier may opt into the provisions of another agreement only if that agreement is approved pursuant to a negotiation or arbitration, and only within the first 6 months after the agreement was approved by the state commission.[21]

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[19] See State of Washington Report to U S WEST Region Oversight Committee, State Issues Update (April 6, 1999).

[20] See AT&T Corp. et al. v. Iowa Utilities Board et al., 525 U.S. 366 (January 25, 1999) (holding that FCC reasonably interpreted that carriers may "pick and choose" terms of interconnection agreements pursuant to Section 252(i)); See Petition of Advanced Telcom Group, Inc., for Enforcement of its Interconnection Agreement with U S WEST Communications, Inc., and Motion for Summary Determination, Washington Utilities and Transportation Commission, Docket No. UT-993003 (November 15, 1999) (filed alleging that U S WEST will not allow carrier to pick and choose pursuant to Section 252(I)).

[21] NEXTLINK v. U S WEST, Washington Utilities and Transportation Commission, Docket NO. UT-990340, Commission Order Adopting Recommended Decision in Part and Modifying Recommended Decision in Part (September 9, 1999) (U S WEST stated on the record that this was its position on Section 252(i)). Recently, U S

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♦ Despite years of negotiations with AT&T and other CLECs, U S WEST has failed to provide nondiscriminatory access to its OSS, and delayed implementation of OSS interfaces and implementation of computer to computer electronic data interchange interfaces ("EDI") with real-time flow-through capabilities that are critical to permit nondiscriminatory access.

♦ Finally, U S WEST refuses to pay reciprocal compensation for traffic that CLECs terminate to Internet Service Providers ("ISPs"), in violation of contractual obligations, state commission policy, and the nondiscrimination requirements of the 1996 Act and state laws.[22] Instead, U S WEST has compelled carriers seeking such compensation either repeatedly to arbitrate that issue or to file complaints to enforce existing interconnection agreements.[23]

WEST has noted in discovery responses in Montana that it has revised its pick and choose guidelines. These updated pick and choose guidelines, however, continue to significantly restrict the ability of a carrier to opt-in pursuant to Section 252(i), requiring that the carrier choose either the entire agreement, or "all of the rates, terms, and conditions associated with interconnection and reciprocal compensation, unbundled network elements, or services." U S WEST Discovery Response to AT&T Data Request No. 01-046S1, Montana Public Service Commission Docket No. D.99.8.200 (Jan. 12, 2000).

[22] This Commission has concluded in various orders that reciprocal compensation should be paid for the termination of ISP traffic. See, e.g. In the Matter of Pricing Proceeding for Unbundled Elements, Transport and Termination, and Resale, Washington Utilities and Transportation Commission, Docket No. 96039, 17th Supplemental Order (September 23, 1999).

[23] U S WEST has continued to refuse to pay such compensation for ISP traffic to CLECs, despite the FCC's declaratory ruling in February 1999 holding that state commissions retain full authority to interpret interconnection agreements and to establish rules for intercarrier compensation for ISP traffic, and various state commissions rulings that reciprocal compensation should apply to calls to ISPs. See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Dock et No. 99-68, FCC 99-38, (Rel. February 26, 1999) ("FCC Declaratory Ruling"). The Washington state, Nevada, and Oregon commissions in particular have found that it is appropriate to continue reciprocal compensation payment for calls to ISPs. WorldCom Inc. v. GTE Northwest, Washington Utilities and Transportation Commission (May 12, 1999) ("Washington MCIW Order"); Arbitrator's Report and Decision, In re Petition for Arbitration of Electric Lightwave, Inc., and GTE Northwest, Inc., Washington Utilities and Transportation Commission (Mar. 22, 1999) ("Washington ELI Order"); In re Petition of Pac-West Telecomm, Nevada Public Utilities Commission, No. 98-10015 (April 12, 1999); In re Complaints of ICG Telecom Group, et al., Nos. 97-1557-TP-CSS et al., Entry on Rehearing, Ohio Public Utilities Commission (May 5, 1999); In re Petition of Electric Lightwave, Oregon Public Utilities Commission, Order No. 99-218 (March 17, 1999).

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- ♦ Most recently, after initially raising the idea and reaching an agreement in principle U S WEST, without explanation, unilaterally reneged on an understanding to pursue a consolidated 14-state negotiation and arbitration for the next generation interconnection agreement with AT&T.

As these non-exhaustive examples illustrate, U S WEST's failure to negotiate in good faith with CLECs is an ongoing problem. The Joint Applicants' promise to maintain the status quo thus effectively is a representation that U S WEST's persistent and pervasive anticompetitive negotiating and implementation behavior will continue under Qwest's ownership and management.

Q: HOW HAS U S WEST FAILED TO PROVIDE NONDISCRIMINATORY ACCESS TO VARIOUS UNES, IN VIOLATION OF THE ACT?

A: U S WEST has used its bottleneck control over local exchange and exchange access services and facilities to favor itself and its affiliates, and has raised various barriers or restrictions on such access for CLECs, in violation of the Act. Specifically, U S WEST has failed to provide certain UNEs such as number portability and OSS on nondiscriminatory and reasonable rates, terms and conditions. U S WEST's behavior is troubling and indicative of the anticompetitive stance it will continue to take after the merger. For example:

- ♦ In flagrant disregard of federal and state requirements, U S WEST has consistently imposed discriminatory requirements on CLECs' access to UNEs, by requiring CLECs who desire UNEs to collocate in U S WEST central offices and access those UNEs through a "Single Point of Termination" ("SPOT") frame or Interconnection Distribution Frame (ICDF)." State commissions have repeatedly rejected the imposition of the SPOT Frame or ICDF as discriminatory because U S WEST does not access its own network elements through such frames, which unnecessarily add additional points of network failure and improperly increase CLEC costs and reduce the quality of

UNEs. This Commission further prevented U S WEST from charging for SPOT frames until it could demonstrate and substantiate the costs behind such charges, and noted that the FCC has concluded that "[i]ncumbent LECs may not require competitors to use an intermediate interconnection arrangement in lieu of direct connection to the incumbent's network if technically feasible, because such intermediate points of interconnection simply increase collocation costs without a concomitant benefit to incumbents."[24]

- In addition, U S WEST initially agreed with AT&T that it would provision services such as number portability or unbundled loops, outside of normal business hours in order to allow AT&T's customers to be able to conduct business with minimal interference. In June 1998, however, U S WEST unilaterally reversed its position, and refused to perform customer transfers outside of normal business hours without amending interconnection agreements to impose a substantial new charge for out-of-hours provisioning. This action caused AT&T to lose some customers and to engage in more than a year of negotiations on this specific discriminatory treatment. Currently, U S WEST continues to fail to allow out of hour transfers to occur other than through a trial which U S WEST can terminate unilaterally at any time.
- U S WEST also flatly refuses to comply with, and has since 1996, the Supreme Court's and FCC's requirement that ILECs provide CLECs UNEs

[24] The Commission specifically noted that "the assumption that all existing U S WEST facilities are congested strikes us an example of an ILEC using the cost and provisioning process to create a barrier to entry." See In the Matter of Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale, DOCKET NO. UT-960369, UT-960370, 17th Supplemental Order, Interim Order Determining Prices (September 23, 1999), citing In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 99- 048; CC Docket No. 98-147, First Report And Order And Further Notice of Proposed Rulemaking (Released: March 31, 1999) at ¶42.

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that are currently combined in their network.[25] U S WEST further has refused to modify existing interconnection agreements or to provide a detailed Statement of Generally Available Terms ("SGAT") showing the terms and conditions under which U S WEST will provide access to UNEs in existing combinations, which allows U S WEST to retain control over when and how it decides to provide such access, and to discriminate among carriers.

- U S WEST fails to provide basic UNEs such as unbundled loops that are equal in quality to that which it provides itself; has made the provisioning of such loops difficult and time consuming with some trunk orders taking as long as 408 days to provision; and has required collocation of CLECs requesting access to UNEs, all in violation of the FCC's requirements.[26]
- U S WEST has also failed to provide CLECs nondiscriminatory access to certain facilities and services, such as IDLC, and advanced services. Without necessary conditions imposed, the proposed merger would further restrict competing carriers from being able to provide these services, and would allow the merged company to discriminate and gain a stronger foothold over its monopoly local markets by providing these advanced services.
- In addition, U S WEST's OSS functions are inferior to the functions that U S WEST provides to its own retail operations. Based on U S WEST's own data for January and February 1999, it took CLECs approximately 800% longer than U S WEST's retail representatives to receive responses to, and

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[25] See AT&T Corp. et al. v. Iowa Utilities Board et al., 525 U.S. 366 (January 25, 1999); Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325, CC Docket No. 96-98, First Report and Order ("FCC Local Competition First Report and Order") (August 8, 1996) at ¶¶ 292-294.

[26] See Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, FCC 98-271, CC Docket No. 98-121 (October 13, 1998) at ¶ 164 ("*BellSouth Louisiana II*"). .

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complete, four pre-order transactions.

- Finally, U S WEST has refused to share valuable information regarding traffic on its network with AT&T, despite its agreement with AT&T to do so. AT&T has asked U S WEST for information regarding "hot spots" on U S WEST's network, so that AT&T may plan its service to its customers accordingly, but U S WEST refuses to share this network information. As a result, AT&T has experienced significant call blocking problems on U S WEST's facilities because some of the switches are near capacity and incapable of handling additional volumes or services. This Commission has specifically found that U S WEST has failed to forecast demand on its facilities, and failed to provide services pursuant to terms of an interconnection agreement.[27]
- These examples of U S WEST's failure to provide nondiscriminatory access to these UNEs are not isolated or unusual instances. The proposed merger cannot be in the public interest if it does not result in improvement in access to U S WEST's UNEs.

Q: HAS U S WEST COMPLIED WITH COLLOCATION REQUIREMENTS OF SECTION 251?

A: No, U S WEST has been just as incapable of complying with the collocation requirements of the Act and the FCC's collocation requirements in its March 31, 1999 Advanced Services Order.[28] As of this date, U S WEST has refused, among other things, to allow the collocation of Remote Switching Units ("RSUs") and other type of equipment that

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[27] See MCI Metro Access Transmission Services v. U S WEST, Docket UT 97-1063, Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order in Part, and Affirming, in Part (February 10, 1999) (finding among other things that U S WEST violated state law and the terms of an interconnection agreement with MCI Metro; that U S WEST failed to use best efforts to cooperate and provide services; and failed to reasonably forecast demand and provide facilities in response to MCImetro's service requests).

[28] Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 99-48, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking (March 31, 1999) ("Advanced Services Order").

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can be used for both interconnection and other purposes; to offer collocation in all premises; to allow nondiscriminatory entrance facilities for CLEC fiber; to offer shared collocation; and to allow CLECs to cross connect between each other – all in violation of the FCC's requirements.

Further, U S WEST has failed to comply with state commission orders. In September 1998, the Commission ordered U S WEST to reclaim space in central offices by removing obsolete and unused equipment so that competitors could use that space to collocate.[29] Yet, to date, U S WEST has failed to provide adequate collocation for competitors in the remaining central office affected by the order, claiming that there is insufficient power and that additional power will not be available until the end of this year.

Q: WHAT IS THE PROPOSED MERGER'S POTENTIAL IMPACT ON THE PUBLIC INTEREST, COMPETITION AND CUSTOMERS?

A: The proposed merger, as presented, will not be in the public interest. As illustrated, U S WEST favors its affiliates and discriminates against other carriers, by refusing to provide certain UNEs, delaying firm order confirmation dates and claiming space and other central office limitations for requested collocation needed by a competing carrier. If this situation is not remedied by the proposed merger, the merger is not in the public interest and will deny customers of the benefits of competitive service alternatives.

The Applicants fail to demonstrate in any detailed way how the merged company will honor its sections 251 and 252 obligations. Following the merger, U S WEST loses a potential competitor in Qwest, gains local and long-distance affiliates, and strengthens its local monopoly position. Thus, U S WEST will have incentives and increased opportunities after the merger to discriminate against its competitors by providing itself and its affiliates

[29] See In re MFS Communications Company, Inc. Petition for Arbitration of the Interconnection Rates, Terms and Conditions with US WEST Communications, Inc., TCG Seattle Petition For Arbitration, and Interconnection Agreement between Electric Lightwave, Inc. and US WEST Communications, Inc., Washington Utilities and Transportation Commission Decision and Final Order, Docket Nos. UT-960323, UT-960326, and UT-960337 (September 11, 1998).

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with more favorable terms and conditions for various UNEs, interconnection, and resale services, and by refusing to share network and facilities information with its wholesale customers/competitors. The utter lack of regard U S WEST has exhibited in complying with Section 251 indicates that competition would be further stifled by the proposed merger.

Moreover, U S WEST's brazen disregard for contractual and legal obligations shows that U S WEST cannot be trusted to honor its stated promises. Based on the available evidence, there would be sufficient cause to be wary even if the Joint Applicants had offered guarantees in their Application that they would comply with contractual, federal, and state requirements after the merger.[30] Having deliberately refused even to offer any such guarantees, the Commission must ensure that customers will benefit from this merger and condition its approval of the proposed merger on conditions that will ensure that the merged company not only fully complies with its obligations under Sections 251 and 252, but takes all additional actions necessary to fully open U S WEST's local exchange markets to effective competition.

Q: WHAT CONDITIONS SHOULD THE COMMISSION REQUIRE ON THE MERGED COMPANY WITH REGARD TO SECTION 251 INTERCONNECTION REQUIREMENTS?

A: As a condition of approving the merger, the Commission should impose conditions on the Applicants in order to ensure that the merged company will not continue to take advantage of U S WEST's bottleneck control over local exchange services and facilities, and to ensure that the merger actually produces some public interest and customer benefits. Specifically with respect to U S WEST's obligation to negotiate access to, and interconnection with, its network, the Commission should require that, prior to closure of the proposed merger, U S WEST either demonstrate compliance, or agree to detailed plans with

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[30] Applicants, however, refused or objected to questions concerning the merged company's plans and procedures for complying with interconnection obligations, or generally noted that the merged company would comply with the law. See Qwest/USWC discovery responses to AT&T, et al., Washington Utilities and Transportation Commission, Docket UT-991358, Response Nos. 01-070s1, 01-047-050.

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enforceable penalties for noncompliance, with the following requirements:

- ♦ Qwest/USWC must negotiate in good faith with CLECs and must allow CLECs to negotiate, if they wish, an interconnection and/or resale agreement covering the provision of interconnection, services, and/or UNEs in one or more Qwest/USWC states;
- ♦ Most-favored nations provisions that provide for "pick-and-choose" options under Section 252(i), such that any CLEC may obtain any or all of the terms and conditions that the Joint Applicants have entered into in a past, present or future interconnection agreement (including pre-1996) in-region or out-of-region, whether entered into by negotiation, mediation, arbitration or other state ruling;[31] and requiring that any or all terms and conditions from any Qwest/USWC agreements be available to a carrier upon request, and thereafter subject to regulatory approvals, as necessary, pursuant to Sections 251 and 252 of the Act;
- ♦ Requiring that Qwest/U S WEST comply with reciprocal compensation obligations, including the payment for traffic bound for ISPs.

U S WEST could demonstrate that it has complied with these conditions by showing that it has interconnections agreements with CLECs reflecting compliance with these conditions, posting all available interconnection agreements it has with all carriers in all states on its website, and by paying reciprocal compensation to CLECs that terminate ISP traffic. The alternative would be for the Commission to order U S WEST to comply with these subject to substantial Commission sanction for noncompliance. This is not a comprehensive list, but comprises some of the areas of greatest abuse by U S WEST thus far. These conditions would minimize the merged company's ability to abuse its local monopoly

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[31] See In re Application of SBC and Ameritech, FCC 99-279, CC Docket No. 98-141, Report and Order (October 8, 1999), SBC-Ameritech Merger Conditions 42-43, Appendix C.

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power and to discriminate against CLECs in favor of itself and its affiliates, as well as assist the Commission to reduce the inconsistency and unnecessary delay that has thus far characterized U S WEST's interconnection negotiations.

Q: HOW CAN THE COMMISSION ENSURE THAT THE MERGED COMPANY WILL PROVIDE UNES CONSISTENT WITH FEDERAL AND STATE REQUIREMENTS?

A: Nondiscriminatory access to UNEs is an essential component for developing competitive service alternatives for customers and for ensuring that the proposed merger is in the public interest. The Commission, therefore, should adopt conditions that will minimize the merged company's ability to provide UNEs on more favorable terms and conditions to itself and its affiliates than to competitors. Specifically, the Commission should require that, prior to closing the proposed merger, U S WEST demonstrate compliance with, or be subject to enforceable penalties for failure to comply with a Commission-approved plan to implement, the following conditions:

- ♦ Provision UNEs in full compliance with the FCC's UNE Remand Order[32] and all other applicable FCC and state commission orders, including but not limited to access to UNEs without any requirement for use of the ICDF or SPOT frame to access UNEs or UNE combinations;
- ♦ As discussed elsewhere in this testimony, committing to network infrastructure investment sufficient to enable competitors to obtain UNEs and related U S WEST facilities within a time frame that will enable them to provide service to end-user customers within the same time frame that U S WEST is able to provide the same or comparable service to those same customers;

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[32] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 99-238, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (November 5, 1999) ("FCC UNE Remand Order").

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- File an SGAT detailing which UNE combinations will be available; and/or negotiate within a reasonable time period amendments to existing interconnection agreements to incorporate a UNE platform without restrictions, with a posting and affirmation of availability to any requesting carrier of all rates, terms, and conditions of UNE platform options on a U S WEST website accessible by all competitors;
- Provide any requesting carrier with any method of obtaining interconnection or access to UNEs at a particular premises or point previously provided on **any** ILEC's network, since such method is presumptively "technically feasible" in substantially similar network premises or points.[33]

Q: WHAT SORT OF CONDITIONS SHOULD THE COMMISSION IMPOSE WITH REGARD TO OSS? WITHOUT OSS, THE DEVELOPMENT OF COMPETITIVE SERVICE ALTERNATIVES TO BENEFIT CUSTOMERS WILL BE STYMIED.

A: As evidenced by U S WEST's current failure to implement nondiscriminatory access to its OSS within the last three years, the Commission should ensure its ability – and the ability of other interested parties – to monitor and expeditiously implement uniform OSS interfaces for carriers purchasing facilities and services from U S WEST. The enforceability of such conditions is particularly important in light of recent reports that SBC-Ameritech has attempted to alter certain post-merger conditions it had agreed upon with the Illinois Commission.[34] The Commission, therefore, should require that the Applicants file and obtain Commission approval of a detailed plan – including specific deadlines – for deployment of

[33] See 47 C.F.R. § 51.321(c) ("previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point on an incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points"); see also Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 99-48, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking (March 31, 1999) ("Advanced Services Order").
[34] ICC Already Questioning SBC's Course, Merged Phone Giant Prodded on Promises, Chicago Tribune (November 5, 1999).

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uniform OSS interfaces that are consistent with all industry standards (including OBF guidelines). The plan should include penalties for noncompliance, as well as satisfy the following requirements:

- ♦ OSS flow-through functionality must be available for all UNEs and UNE combinations, interconnection, and all resold services. This would include direct pre-order and order electronic access to loop information databases; changes to computer support systems so UNE unbundling may be implemented fully; and automation of manual processes and until process are fully automated, access to manual systems will be provided at 25% discount.
- ♦ U S WEST must use an independent, third-party test to verify that U S WEST's OSS interfaces are able to handle the reasonable anticipated demands for OSS functionalities for interconnection, UNEs (both individually and in existing combinations), and services for resale. AT&T also recommends that U S WEST commit to fully funding an independent third-party test of access to its OSS in Washington, in the event the Regional Oversight Committee third-party test does not address relevant issues. Specifically, the merged company should fully fund a third-party OSS test that tests all Utah specific requirements and that includes elements that are in the third party OSS test undertaken by the New York Commission with regard to Bell Atlantic-NY's OSS systems. CLECs and the Commission also must have meaningful opportunities to participate in a collaborative process with U S WEST to make necessary upgrades or revisions to the current U S WEST OSS in order to bring them fully into compliance with federal and state guidelines.
- ♦ U S WEST's recovery of costs for OSS development, implementation, and use must be in compliance with competitively neutral cost-recovery principles, as

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set forth in the FCC's Third Report and Order on Telephone Number Portability.[35]

- Failure to meet performance standards and benchmarks with OSS will result in self-executing remedies and penalties to be paid by U S WEST to affected CLECs.

Q: ARE THERE ANY SORTS OF CONDITIONS THAT THE COMMISSION CAN IMPOSE TO ENSURE THAT THE MERGED COMPANY WILL PROVIDE COLLOCATION THAT CLECS REQUIRE IN ORDER TO PROVIDE COMPETITIVE SERVICES REQUIRED BY THE ACT?

A: The Commission must also impose stringent conditions on the Applicants so that the merged company cannot take advantage of its combined market power to impede CLECs from collocating in U S WEST central offices. Specifically, the Commission should require Qwest and U S WEST to commit to complying with the FCC's March 31 Advanced Services Order and, among other things:

- to meet certain and reasonable intervals for collocation;
- to permit the collocation of any type of equipment used or useful for interconnection or access to unbundled network elements;
- to permit collocation in all U S WEST "premises," including the "LEC central offices, serving wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that houses LEC network facilities;"[36]
- to provide cageless (without minimum areas) and shared collocation options;
- to allow CLECs to tour space if U S WEST claims no space is available;
- to provide nondiscriminatory entrance facilities for CLEC fiber;
- to sublet space to CLECs in U S WEST's collocation areas;

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[35] Telephone Number Portability, Third Report and Order, 13 FCC Rcd 11701 (1998).
[36] FCC Local Competition First Report and Order ¶ 573; see 47 C.F.R. § 51.5.

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- to allow CLECs to cross connect between each other;
- to discontinue the unnecessary practice of requiring mandatory ICDF or SPOT frames;
- to file tariffs or an SGAT that specifies all rates, terms, and conditions for collocation that are consistent with and in compliance with the FCC's and Commission's requirements;
- to report compliance with collocation under the performance measures (discussed elsewhere in this testimony) that the Commission should adopt.
- to agree to the payment of liquidated damages in the amount of a failure to meet committed-to intervals and performance measures.

Q: WHAT OTHER CONDITIONS SHOULD THE COMMISSION IMPOSE SPECIFICALLY IN ORDER TO ENSURE THAT COMPETITION DEVELOPS?

A: U S WEST's failure to provide CLECs with nondiscriminatory access to advanced services and facilities and services such as IDLC, and network and other information that its affiliates might have, impedes these carriers from competing with U S WEST. The proposed merger should be conditioned in order to require merged company to provide carriers with nondiscriminatory access to these services, facilities, and information.

Thus, the Commission should impose conditions to require U S WEST to provide CLECs with nondiscriminatory access to IDLC loops in the same manner that U S WEST provides such network elements to its affiliates, and by ensuring that its OSS functions provide for such access.

The Applicants should also commit to providing CLECs with access to DSL-facilities, multi-host DSLAMs, and full access to the data reflecting U S WEST's existing loop makeup databases. Moreover, U S WEST should develop its OSS so that flow-through for all UNEs and services such as DSL are available, and should ensure that the OSS allows the ordering and provisioning of DSL-capable facilities under the same terms and conditions

as the merged company will provide itself and its affiliates.

In addition, because an inevitable result of the merger is diminished information available with regard to the practices and procedures for the two companies, the Commission should require that U S WEST/Qwest agree to submit a plan prior to closing that would incorporate the "best practices" of the combined companies with regard to, among other things, interconnection procedures, negotiations, and agreements; how the merged company will administer and facilitate OSS for its CLEC customers including what third party test plans the merged company will use; how the merged company will provide access to XDSL services; and how the merged company will meet and implement performance measurements.[37] Any best practices that the combined company fails to meet should be subject to additional and substantial performance remedies or penalties.

SECTION 271 COMPLIANCE

Q: WHY SHOULD THIS COMMISSION CONSIDER COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT IN THIS PROCEEDING?

A: The Applicants specifically reference Section 271 compliance in their application, and whether and how the proposed merger and resulting companies compliance or lack thereof with Section 271 will directly and materially impact the ratepayers of this state. Section 271 governs the provisioning of interLATA services by U S WEST and other Bell Operating Companies ("BOCs") and authorizes the FCC to determine the timing of and extent to which the BOCs may provide such services. The proposed merger between Qwest and U S WEST implicates this section because Qwest provides interLATA services, but U S WEST has not been authorized to provide such services anywhere within its 14 state region. Qwest, therefore, must discontinue providing interLATA services before merging with U S WEST. Qwest agrees that it must divest at least some of its interLATA services, but its proposed

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[37] Subsequently, the merged company should submit annual reports detailing the best practices for a period of 5 years after the closing of the merger.

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compliance with this requirement raises substantial concerns that the Commission needs to address in this proceeding, including how facilities Qwest currently uses to provide interLATA services will be used (if at all), whether competitors will have access to those facilities, and whether captive U S WEST ratepayers will be required to pay for those facilities.

Q: WHAT INTERLATA SERVICES DOES QWEST PROVIDE IN THE U S WEST 14-STATE REGION?

A: Qwest provides a variety of interLATA services in U S WEST's territory, including carrier-to-carrier services and carrier-to-end-user services. The Application does not describe where Qwest provides these services, but Qwest's North American network runs throughout U S WEST service areas, reaching Seattle[38] and other cities such as Portland,[39] Denver,[40] Salt Lake City,[41] Des Moines and Minneapolis.[42] In Washington, for example, Qwest has 198,000 residential customers and 3,000 business customers;[43] in Colorado, Qwest provides long distance and operator services to more than 16,000 residential customers and nearly 6,500 business customers; while in Minnesota Qwest provides service to 114,000 residential customers and 5,300 business customers.[44] Qwest also provides substantial services to other

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[38] In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and U S WEST, Communications, Inc., Wash. Public Utils. & Transp. Comm'n, Docket No. UT-991358, Direct Testimony of Paul F. Gallant, dated Aug. 31, 1999 ("Washington Testimony").
[39] Id.
[40] In the Matter of the Application of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc. and U S WEST, Communications, Inc., for Approval of the Merger of their Parent Corporations, Qwest Communications International Inc. and U S WEST, Inc., Docket No. 99A-407T, Direct Testimony of Paul F. Gallant, dated Aug. 19, 1999 ("Colorado Testimony").
[41] In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp. and U S WEST Communications, Inc., Docket No. 99-049-41, Direct Testimony of Paul F. Gallant, dated Aug. 19, 1999 ("Utah Testimony").
[42] In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and U S WEST, Communications, Inc., Docket No. PA-99-1192, Direct Testimony of Paul F. Gallant, dated Aug. 14, 1999 ("Minnesota Testimony").
[43] Colorado Testimony at 3, lines 17 through 19.
[44] Minnesota testimony at 3, ¶ 7.

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carriers, including, for example, acting as the primary long-haul backbone provider for competing local exchange companies such as Electric Lightwave, Inc.

Q: HOW DOES QWEST PLAN TO DIVEST ITS INTERLATA SERVICES?

A: Qwest has yet to provide any detailed plan of how it will divest its interLATA services. While acknowledging that Qwest must divest such services, the Application states only that Qwest "is in the process of identifying affected services."[45] The Applicants not only do not identify any affected services or the number of subscribers, but they provide no guidance on the criteria they are using to "identify" services for divestiture. The Applicants merely assert, without more, that the required divestiture will occur.

The Applicants filed a supplemental divestiture plan with the FCC as part of their reply comments,[46] which they have provided to Washington as a "Supplement" to the Application.[47] This plan, too, however, fails to provide the level of detail required to ensure compliance. The plan still does not provide a list of specific services that Qwest will divest, nor does it provide a timeline for achieving divestiture. It does not even indicate whether Qwest has targeted potential buyers. More problematic, Qwest's divestiture plan indicates that the merged company will retain Qwest's facilities but will not use them to provide interLATA services.[48] There is no explanation of how the merged company *will* use those facilities, which affiliate will be responsible for those facilities, or how the costs of the facilities will be recovered if they are not used to provide service.

Q: WHY IS THAT PROBLEMATIC?

A: Two options result from Qwest's implementation of its plan to divest only its

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[45] The statement appears as a footnote to every application.

[46] In the Matter of Merger of Qwest Communications International Inc. and U S WEST, Inc., CC Docket No. 99-272, Response to Comments on Applications for Transfer of Control, Attachment C at 29 (Oct. 1999) (FCC Response).

[47] In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., and U S WEST Communications, Inc., Wash. Utils. & Transp. Comm'n, Docket No. UT-991358, Supplement to Joint Application (Nov. 8, 1999).

[48] FCC Response at 29.

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interLATA services while maintaining the facilities used to provide those services: Qwest either will use those facilities to provide other services, or will leave the facilities unused until the merged company has obtained authority to offer interLATA services. The Application does not address either option. The Applicants have not revealed – to the Commission, the FCC, or the general public – whether Qwest's facilities will be used following divestiture of interLATA services and, if so, who will use the facilities, how they will fund services, which services they will provide, or whether they will make services available to competitors and on what terms and conditions. Indeed, the Applicants have affirmatively refused to provide this information, simply referring to the FCC divestiture plan in response to AT&T's data requests.[49] The Commission cannot accept such a response consistent with its responsibilities to protect the public interest.

The merged company's use of Qwest facilities to provide services other than interLATA services would present significant issues for Commission resolution regardless of that use. If, for example, U S WEST uses the facilities to provide local exchange service, the Commission needs to ensure that they are made available to competitors under Section 251 and 252 of the Act. Even if the merged company itself or other subsidiaries intend to use the facilities to provide local exchange service, the Commission should require that those facilities be available to competitors just as if they were used by U S WEST to provide local service. The Commission should not allow U S WEST to avoid its responsibilities as an incumbent local exchange company under the Act and state law by using an unregulated affiliate to provide facilities and services U S WEST seeks to withhold from Commission oversight or use by competitors. U S WEST's recent unsuccessful attempts to have its affiliate, U S WEST !nterprise, authorized to provide local exchange service in U S WEST's

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[49] Supplemental Responses to AT&T Data Requests, In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp. and U S WEST Communications, Inc., Wash. Utils. & Transp. Comm'n, Docket No. UT-991358, Response to Request No. 01-052 (Oct. 28, 1999).

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service territories raised these same issues. U S WEST should not be able to accomplish by stealth through the proposed merger what it was unable to do in the light of public scrutiny.

A decision by the merged company not to use some or all of the Qwest facilities until U S WEST is authorized to provide interLATA service would raise equally troubling issues for the Commission. The merged company will have to recover the costs incurred to obtain and install these facilities, as well as ongoing costs to maintain them. If the facilities are not generating revenues by providing service, the merged company will have to use revenues from other sources. The Commission must ensure that such sources do not include revenues from captive intrastate ratepayers. Most obviously, the costs of these assets must be excluded from U S WEST's rate base, but the Commission also must prohibit the merged company from indirectly recovering these unused interLATA facility costs by using capital that should be invested in basic local exchange service. U S WEST should not be able to pre-finance its entry into interLATA markets by diverting revenues and investment from its monopoly local markets.

In addition, U S WEST should not be allowed to hold facilities and allow them to remain idle if this would leave other carriers and customers without necessary facilities. Requesting carriers and local end user customers frequently are unable to obtain adequate service from U S WEST due to lack of facilities. The Commission must ensure that U S WEST fulfills its obligations as an incumbent provider rather than using its facilities for other purposes.

Q: WHY SHOULDN'T THE COMMISSION RELY ON THE APPLICANTS' REPRESENTATIONS THAT THE MERGED COMPANY WILL COMPLY WITH SECTION 271?

A: Both U S WEST and Qwest have demonstrated a cavalier attitude to the requirements of the Act in general and Section 271 in particular, of which the Application and Qwest's divestiture plan are the latest examples. For example, the FCC has determined that Internet

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traffic is interstate, but Qwest does not intend to divest of all its Internet services.[50] Instead, Qwest argues that there are "questions" about the status of some Internet offerings, and Qwest will divest of those offerings post-merger if the ultimate resolution of these questions requires such action.[51]

In addition, Qwest's plan also allows it to continue providing unspecified "customer service support" under contracts with new buyers, without any interLATA restriction.[52] Qwest again recognizes that its position is legally tenuous but refuses to simply agree to full divestiture.[53] Rather, Qwest contends that its incomplete divestiture plan satisfies the law because out-of-region affiliates can offer questionable services, without any recognition of the impossibility of an out-of-region affiliate providing interLATA services to in-region customers.[54] The proposed divestiture plan only highlights concerns that the merged company will distort, ignore, and if possible evade, the law, rather than comply with it.

This less than deferential approach to legal requirements is a hallmark of both Qwest and U S WEST, which have an established track record of attempting to circumvent or violate provisions of Section 271. For example, U S WEST and Qwest participated in a joint marketing arrangement of Qwest's interLATA services. The FCC rejected the arrangement and held that U S WEST was providing interLATA services in violation of Section 271(a),[55] concluding that the arrangement would eliminate incentives for U S WEST to open its markets and obtain Section 271 approval.[56] U S WEST and Qwest appealed to the D.C. Circuit, which affirmed the FCC's decision,[57] holding that the FCC's broad interpretation of

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[50] FCC Response at 35-36.
[51] Id. at 36.
[52] Id. at 32-33.
[53] Id. at 33.
[54] Id.
[55] Memorandum Opinion and Order, In the Matter of AT&T Corp. et al v. Ameritech Corp. et al., File Nos. E-98-41, E-98-42, and E-98-43, 1998 FCC LEXIS 5192 (Sept. 28, 1998), aff'd sub nom. U S WEST v. FCC, 177 F.3d 1057 (D.C. Cir. 1999).
[56] Id. at ¶ 39.
[57] U S WEST v. FCC, 177 F.3d at 1060.

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Section 271 was correct because there needed to be "powerful incentives" to open local markets.[58] Qwest also violated Section 271 in a separate joint marketing agreement with another RBOC, Ameritech, which the FCC also struck down with the support of the appellate court.[59]

U S WEST has taken a narrow approach on the interLATA issue in other settings as well. It attempted to eliminate recognized LATA boundaries in Arizona (twice) and Minnesota, so it could provide services throughout the state. The FCC rejected the attempts and ruled that U S WEST could not provide service across current interLATA boundaries.[60] In response to an AT&T data request, Qwest acknowledged that it has taken a position contrary to U S WEST on this issue but stated that the merged company had not determined which position it would take following the proposed merger.[61] Such persistent determination to pursue their own interpretation of Section 271, without regard for FCC decisions, should stand as a warning to the Commission that the Applicants' promises of compliance with Section 271 are meaningless.

Q: WHAT SHOULD THE COMMISSION DO TO ENSURE THAT THE MERGED COMPANY COMPLIES WITH SECTION 271?

A: The Commission should condition its approval of the proposed merger on specific actions required by Section 271 and related state and federal law to protect the public interest.

First, the Commission should condition its approval of the proposed merger on its review and approval of a detailed divestiture plan for all interLATA services that Qwest currently provides in this state. The plan specifically must identify:

(a) the precise services being divested, the actual or potential replacement service

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[58] Id.
[59] Id.
[60] In the Matter of Petition for Declaration Ruling Regarding U S WEST Petitions to Consolidate LATAs in Minnesota and Arizona, FCC Docket Number NSD-L-97-6 (April 21, 1997).
[61] Data Requests, Response to Request No. 01-058.

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providers, and timetable for transition;

(b) how the facilities used to provide these services will be retained and used by the merged company, including specific accounting data sufficient to prove that revenues from captive intrastate ratepayers will not be used to recover the costs of these facilities and that facilities required by other carriers will not be hoarded by the merged company; and

(c) all facilities located in the state that the merged company or any of its affiliates will use to provide other services, the entity that will use those facilities, and services to be provided.

Second, the Commission should require that any Qwest facilities used to provide local exchange service within U S WEST service territories in this state be available to requesting carriers according to the same rates, terms, and conditions that U S WEST facilities are available pursuant to the requirements of Sections 251 and 252 of the Act.

Finally, the Commission should establish safeguards to ensure that captive ratepayers and competitors do not fund U S WEST's preparations for entry into interLATA markets, and that the merged company will be able to provide necessary telecommunications facilities for both access and local service in U S WEST's serving territories.

SERVICE QUALITY

Q: WHY SHOULD THE COMMISSION REVIEW THE APPLICANTS' SERVICE QUALITY IN CONSIDERING THE PROPOSED MERGER AND THE RESULTING IMPACTS ON WHOLESALE AND RETAIL CUSTOMERS?

A: Telecommunications carriers are required to provide reasonable and adequate service quality;[62] and under the 1996 Act, an ILEC like U S WEST must not discriminate against its wholesale customers in the level of services it provides them compared to the service it provides its retail customers, affiliates, or any other parties.[63] Both Qwest and U S WEST

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[62] Rev. Code Wash. § 80.36.080.
[63] See, e.g., 47 U.S.C. § 251(c)(4).

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have recognized that service quality is an aspect of merger review by claiming in their application that the post-merger companies will be improving or, at the least, maintaining their service quality.

Because the proposed merger will reorganize the way the respective companies operate and will replace U S WEST with Qwest as the controlling entity, it has the potential to dramatically impact service quality in one way or another. [64]

The Assistant Director of Telecommunications at this Commission in fact recognized that, "service quality is in large measure a function of decisions about investment and staffing that are made in the Company at the highest levels."[65] Given that Qwest has little experience in providing local exchange service, and that U S WEST's current level of service quality is among the worst in the country, the customers of the Joint Applicants—and of U S WEST in particular—may be greatly affected by the merger. Thus, service quality is an important aspect of the merger review, and the Commission must carefully scrutinize any assurances the Applicants make regarding service quality and should impose conditions in order to ensure that service quality is improved, and that the merged company won't degrade the level of service it offers to customers in violation of federal and state law.

Q: WHAT PROMISES HAVE THE APPLICANTS MADE WITH REGARD TO SERVICE QUALITY?

A: Unfortunately, the Applicants make little or no promises to improve U S WEST's or Qwest's service quality, but note only that the merger "will cause no adverse impact upon the

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[64] The Illinois Commission similarly recognized in the SBC-Ameritech merger, that the "proposed reorganization will require substantially greater resources to manage and integrate all areas of operation than either [company] alone has experienced in past acquisitions." Joint Application for Approval of the Reorganization of SBC and Ameritech, Illinois Commerce Commission ("ICC SBC-Ameritech Order") (September 23, 1999) at 22.

[65] See Washington Utilities and Transportation Commission v. U S WEST Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-97-0766, Tenth Supplemental Order (January 16, 1998) at 27.

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continuity and quality of service provided to U S WEST's . . . customers."[66] There is an overwhelming amount of evidence that the current level of U S WEST's service quality is wholly inadequate, and thus such promises mean very little.

U S WEST's potential merger partner, Qwest, has publicly recognized that U S WEST's service quality is poor. For example, Chairman Nacchio of Qwest has stated that "his company is well aware of the service problems U S WEST has had," and has noted that "[a]ny time people are unhappy with the service level provided by your future partner, you've got to be concerned."[67] In addressing this concern, Chairman Nacchio has made general statements that the merged company will invest $5.3 billion in service development, but has not explained exactly where or how this money will be invested or how it compares to existing levels or uses of investment.

In fact, in response to AT&T's discovery requests, the Joint Applicants have refused to answer with any specifics exactly how the merged company will invest this money in service development, and Applicants note that the statement by Mr. Nacchio has been mischaracterized, that "detailed budget planning has not yet started," and further that no decisions have been made "with respect to how the combined company will address specific operational issues, nor have any decisions been made regarding construction and provisioning of facilities or 'improvements to services' post-merger."[68] Thus, despite U S WEST's record of bad service quality, the Applicants have not discussed in any detail or proven how the proposed merger will improve, or at the very least, not have adverse impact on, the quality of service provided to customers. Indeed, because the current level of service quality by U S WEST is so sorely deficient, any promises by Applicants to maintain the status quo are

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[66] See, e.g., Joint Notice of Proposed Merger of Qwest, Inc., and U S WEST, Inc., Washington Utilities and Transportation Commission, (August 31, 1999) at 11-12 .
[67] Qwest, U S WEST shareholders overwhelmingly approve merger, Denver AP (November 3, 1999).
[68] See U S WEST/Qwest Response No. 01-024 to Discovery Requests of AT&T, NEXTLINK, and Advanced Telecom Group, Washington Utilities and Transportation Commission, Docket UT 991358 (October 27, 1999).

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not reassuring. To the contrary, Applicants' consistent statements focus on providing advanced and out-of-region services. Such statements demonstrate that the merged company may concentrate investment in advanced services and neglect the provision of basic local services.

Q: HOW DO YOU DETERMINE THAT U S WEST HAS POOR SERVICE QUALITY?

A: U S WEST provides service to both retail and wholesale customers. Customer complaints, commission investigations, and AT&T's own experience suggest that U S WEST's quality of service is bad. The level of customer dissatisfaction is so high that U S WEST itself cannot ignore this fact. U S WEST has reported to the FCC in ARMIS Report 43-05 that it received 361 complaints in the state of Washington from business users in 1998, and 1776 complaints from residential users in 1998.

MCI in fact recently noted in presenting testimony to the Arizona Commission in its service quality investigation of U S WEST that, even though U S WEST has only 11 percent of the access lines, 39 percent of all of the complaints across the country were filed within the U S WEST territory.[69] Sprint similarly noted at that Service Quality Forum that U S WEST ranks "last or second to last compared to the other RBOCs, Sprint, local, and GTE in all measures," and that U S WEST's performance in September 1999, was worse than January 1999, and also worse than July 1999 for measures of timely firm order commitments, meeting customer desired due dates, and meeting dates of commitments.[70]

The service U S WEST provides its wholesale customers is as poor, if not worse than, the service it provides its retail customers. AT&T monitors the performance of Regional Bell Operating Companies ("RBOCs"), and its internal survey shows that U S WEST's service quality has been steadily declining so that it is now last or second to last among all the

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[69] Testimony of MCI WorldCom at Wholesale Service Quality Forum, Arizona Commission (October 28, 1999), at 74-75.
[70] Testimony of Sprint, Wholesale Service Quality Forum, Arizona Commission (October 28, 1999).

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RBOCs in meeting direct measures of quality ("DMOQ").[71] As just one example, on average across U S WEST's fourteen state region, U S WEST's percentage for meeting the customer's desired due date in provisioning DS1 service has fallen to 59.31% in 1999, from 75.14% in 1995. By contrast, at least three other RBOCs have achieved at least 90% compliance with these measures of quality.

As I will discuss in greater detail, U S WEST also appears to provide discriminatory service in favor of its affiliates and end-user customers and against its wholesale customers. A carrier at the Service Quality Forum in Arizona recently recounted one telling statistic indicating the level of U S WEST's discrimination against its wholesale customers: U S WEST's own ARMIS data reflect that while U S WEST misses only 2 percent of its own retail appointment dates, it misses from 20 to 40 percent of CLEC appointment dates.[72]

Q: WHAT ARE SOME EXAMPLES OF U S WEST'S CURRENT POOR SERVICE QUALITY TO ITS CUSTOMERS?

A: AT&T has experienced exceedingly poor service quality with U S WEST's access services. In fact, AT&T has experienced such problems with U S WEST's inadequate access services that it filed complaints in August of this year against U S WEST in various states, including Arizona, Colorado, Minnesota, New Mexico, and this state.[73] For example, U S WEST has failed to provide necessary facilities for access services; failed to provision these facilities in a timely manner in violation of service quality measures; and favored itself, its affiliates, and its own customers and certain communities in determining where to provision these facilities.[74] By these failures, U S WEST has effectively prevented AT&T

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[71] See AT&T v. U S WEST Communications, Inc., Complaint and Request for Expedited Treatment regarding U S WEST's Provisioning of Access Services, Washington Utilities and Transportation Commission and Colorado Public Utilities Commission, Docket No. UT-991297 (filed August 18, 1999) ("Washington Access Complaint") at 6.
[72] See Testimony of OnePoint, Wholesale Service Quality Forum, Arizona Commission (October 28, 1999) at 88.
[73] See, e.g., Washington Access Complaint.
[74] See Washington Access Complaint.

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from being able to provide interexchange services to requesting customers, and prevented other kinds of competition from developing. All five of those complaints are currently pending.

Moreover, in some cases, U S WEST refuses to provide services to AT&T at all. U S WEST has more than 500 held orders for AT&T throughout the 14-state region. In this state, as of filing of the access complaint in August 1999, U S WEST has held at least 70 orders for AT&T. A "held order" means that U S WEST is holding the order and will not commit to a "customer desired due date," usually based on lack of available facilities.[75] Some of these orders have been outstanding for as long as 210 to 409 days.[76] A recent report on service quality issued by the Commission shows that U S WEST has the worst rates among the incumbent local carriers. U S WEST held 6.7% of its primary exchange orders in September 1999, compared to Century Tel's 4.0% for that month.[77]

AT&T is not the only one who has experienced difficulty in obtaining loops and has had orders held by U S WEST: Among others, Covad noted at the Arizona Service Quality Forum that it takes more than 25 business days to get a loop from U S WEST 13.2 percent of the time, and that, regionwide, 40 percent of Covad's loop orders are held by U S WEST.[78] Similarly, GST testified recently that it "ordered a T-1 to provide service to one of our customers from U S WEST on March 1st of this year," and the "firm order commitment date that U S WEST provided GST was altered five times during the period from our initial order to the time the service actually got turned up."[79] Finally, MCI noted that in its experience, 35 to 40 percent of all U S WEST orders were not provisioned on time and that there are a series

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[75] See Washington Access Complaint at 11
[76] See, e.g. Washington Access Complaint at 11.
[77] See Local Telephone Service Quality Report, Washington Utilities and Transportation Commission: http://www.wutc.wa.gov/webdocs.nsf/0492664a7ba7ed8b88256406006bf2ca/1620e4a64b072a818825680100788d78?OpenDocument
[78] Testimony of Covad, Service Quality Forum, Arizona Commission (October 28, 1999) at 25-26. See also Testimony of e.spire Communications, Service Quality Forum, at 60.
[79] Testimony of GST, Wholesale Service Quality Forum, Arizona Commission (October 28, 1999) at 67.

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of problems occurring with 35 to 40 percent of the orders getting held.[80]

In one egregious case, AT&T needed to obtain from U S WEST exchange access services for one of AT&T's customers that planned to open a hotel, only to be told byU S WEST that the necessary facilities were not available. It was only after AT&T contacted the state Commission in order to resolve this issue that U S WEST began grooming the network to provision the requested facilities. In this instance, it was clear that the facilities were actually available, but that U S WEST simply refused to make them available to AT&T, as required by law.

Another example of U S WEST's inadequate service to its wholesale customers can be found in its steadfast refusal to provide local number portability ("LNP") in compliance with federal guidelines. As I discuss elsewhere in my testimony, U S WEST's failure to port AT&T's customers' numbers properly has resulted in a number of dissatisfied customers. In addition, U S WEST has refused, in direct violation of industry guidelines, to port numbers to a CLEC where the CLEC has not established a Location Routing Number ("LRN") in each rate center.[81] U S WEST's requirement would force AT&T to obtain a central office code in each rate center – a policy that is completely unsupported by industry guidelines and that would unnecessarily exacerbate number exhaust.[82] U S WEST recently agreed to move toward compliance with industry guidelines by providing alternatives in some locations, but details regarding how and when implementation will take place remain unclear.[83]

Other carriers have also experienced LNP problems with U S WEST. ELI

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[80] Testimony of MCI WorldCom, Wholesale Service Quality Forum, Arizona Commission (October 28, 1999) at 75.

[81] Id.

[82] INC Industry Guidelines, Location Routing Number Assignment Practices.

[83] See In the Matter of U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996, Arizona Corporation Commission, Docket No. T-00000B-97-0238, U S WEST's Supplemental Filing re Location Routing Number (LRN) Issues (filed Jan. 18, 2000) (the filing explains U S WEST's new LRN policy and includes the actual policy as an attachment). The policy gives U S WEST at least 60 days to comply with CLEC requests and also says compliance may require even more time.

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specifically noted that the one of the largest problems that it has in this area is that U S WEST has failed to implement LNP on NXX codes in a timely manner and "if it's not done accurately, then . . .[a] customer who has then been ported can't get calls from U S WEST customers or customers from other switches; the only calls they can get are calls from customers on Electric Lightwave switched directly to them."[84] Unfortunately, as shown, such problems have been too common.

Q: WHAT IS AN EXAMPLE OF U S WEST'S DISCRIMINATORY CONDUCT IN PROVIDING SERVICE TO WHOLESALE CUSTOMERS?

A: U S WEST's poor service to its wholesale customers could be resolved, yet U S WEST stubbornly refuses to address these problems. U S WEST's negligence is discriminatory and there is no reason to believe, based on the available evidence, that such discrimination would not continue in the future with a merged U S WEST and Qwest.

For instance, U S WEST has discriminated against other carriers by responding to maintenance and repair requests from its affiliates before responding to such requests from those of its competitors. By doing so, U S WEST places its wholesale customers at a competitive disadvantage.

Also, as described in greater detail in other parts of this testimony, U S WEST has refused to share valuable information regarding traffic on its network with AT&T, despite its agreement with AT&T to do so.[85] As a result, AT&T has experienced significant call blocking problems on U S WEST's facilities because some of the switches are near capacity and incapable of handling additional volumes or services. Thus, U S WEST's affiliates have

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[84] ELI Testimony, Wholesale Service Quality Forum, Arizona Commission (October 28, 1999) at 46-47.
[85] U S WEST has refused to share traffic information with other carriers as well, in violation of interconnection agreements. See MCI Metro Access Transmission Services v. U S WEST, Docket UT 97-1063, Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order in Part, and Affirming, in Part (February 10, 1999) (finding among other things that U S WEST violated state law and the terms of an interconnection agreement with MCI Metro; that U S WEST failed to use best efforts to cooperate and provide services; and failed to reasonably forecast demand and provide facilities in response to MCImetro's service requests).

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access to valuable information regarding which U S WEST facilities are at or near capacity, which allows its affiliates to build and provide services for targeted customers, while AT&T and other competitors have no access to such information.

Indeed, U S WEST's failure to provide nondiscriminatory service to its wholesale customers is indicative of its generally anticompetitive behavior. While federal and state requirements such as Section 271 may provide great incentives for pre-merger U S WEST to behave in a competitively neutral manner, this intended result has not occurred with U S WEST, and once U S WEST merges with Qwest, it may, depending on conditions imposed, have even less much incentive to comply with the Act. Further, the loss of Qwest as a potential competitor to U S WEST and the strengthening of U S WEST's local market position will provide the merged company with even more opportunity to discriminate against its wholesale customers and favor its affiliates.

Q: HAVE COMMISSIONS TAKEN ACTION AGAINST U S WEST FOR ITS UNREASONABLE SERVICE QUALITY?

A: Yes. Various state commissions across U S WEST's 14 state region, including this Commission, and those of Colorado, Arizona, New Mexico, and Oregon, have either investigated, fined, or sanctioned U S WEST for its poor service quality and failure to invest in its incumbent networks.[86] This Commission has investigated U S WEST's service quality on several occasions, and is well aware of U S WEST's "inability to meet its basic service obligations."[87] Specifically, the Commission found in 1996 that "USWC is providing service

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[86] See e.g., Matter of the Petition of Pacific Northwest Bell Telephone Company dba U S WEST Communications, Inc., to Price List Telecommunications Services Other than Essential Local Exchange Services, Disposition: Stipulation Terminating Alternative Form of Regulation (AFOR)Adopted, Oregon Public Utility Commission, Docket No. UT 80, Order No. 96-107 (rel. April 24, 1999) ("Oregon Alternative Regulation Termination Order"); State of Washington Report to U S WEST Region Oversight Committee, State Issues Update (April 6, 1999) ("There have been periodic dramatic increases in subscriber complaints during 1998"); Matter of the Application of U S WEST Communications, Inc., for an Increase in Revenues, Oregon State Commission Docket No. UT 125, Order No. 97-171 (The Oregon state commission reduced downward U S WEST's revenue requirement for poor service).

[87] Washington Utilities and Transportation Commission v. U S WEST Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-950200, Fifteenth Supplemental Order and Commission Decision and Order Rejecting Tariff Revisions; Requiring Refiling (Served April 11, 1996) at 11;

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that is substantially worse than that which the Company provided only a few years earlier;" and that customers repeatedly complained about the inability to get timely (or any) installation of service and delays in getting service restored following an outage.[88] Moreover, the Commission has noted a disturbing trend since 1991 in service quality degradation and concluded that "USWC has failed to meet its minimum service quality obligations, failed in dramatic and painful ways for all classes of its customers, and failed increasingly, year after year."[89]

Further, the Colorado commission has opened its second service quality investigation of USWC in five years. The last investigation in 1994 led to a settlement that resulted in $5.3 million in reparations against the company for Commission rule violations from 1993 to 1995.[90] In addition, the Oregon commission terminated USWC's alternative regulation plan because USWC was in violation of the service quality standards adopted in the alternative regulation plan.[91] The Oregon Public Utility Commission also opened an investigation this year into USWC's failure to properly budget for network construction and USWC's failure even to complete those projects that it reported to the Oregon commission.[92] Recently, the

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See also Washington Utilities and Transportation Commission v. U S WEST Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-97-0766, Tenth Supplemental Order (January 16, 1998) (finding that U S WEST's "quality of service is still many times poorer by pertinent measures than service the Company provided in 1991;" and recommending various improvements to U S WEST's measures of service quality).

[88] Washington Utilities and Transportation Commission v. U S WEST Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-950200, Fifteenth Supplemental Order and Commission Decision and Order Rejecting Tariff Revisions; Requiring Refiling (Served April 11, 1996) at 11 and 15.

[89] Id. at 17.

[90] PAC Orders U S WEST to Refund Approximately $129 Million to Customers, Colorado PUC News Release, Jan. 7, 2000.

[91] See Oregon Alternative Regulation Termination Order, Oregon Public Utility Commission, Docket UT 80, Order No. 96-107 (April 24, 1996). In fact, USWC was so delinquent in providing basic telephone services to consumers that the Oregon commission was compelled to require USWC to establish a "cellular loaner" program in order to ensure that citizens could get service prior to receiving wireline service from USWC. Id.

[92] Investigation into U S WEST Communications, Inc.'s Construction Budgets, Order, Oregon Public Utility Commission, UM 930 (rel. April ,7, 1999) ("Staff noted that at least $4 million worth of projects had been left undone. Had the projects been completed, Staff believes that the service problems reported by customers along the route between Pendleton and Baker City and in Oakridge would not have occurred.").

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New Mexico Public Regulation Commission opened an investigation to determine whether to fine U S WEST or revoke its Certificate of Authority due to concerns that U S WEST had not adequately invested in the state; and issued an Order to Show Cause after receiving more than 1500 customer complaints regarding U S WEST service.[93] Most recently, the Arizona Commission initiated a series of forums investigating U S WEST's service quality because of U S WEST's steadily declining quality of service.[94]

Despite all these Commission actions, U S WEST has not improved its ability to provide even decent or reasonable service to its customers and service quality problems persist. From all Applicants' vague representations, there is no reason to believe that the proposed merger would improve this level of service, and in fact, every reason to believe that U S WEST would continue to degrade service quality, especially to wholesale customers.

Q: WHY IS U S WEST'S SERVICE QUALITY SO TERRIBLE?

A: Part of the reason for U S WEST's poor service quality may be that USWC has consistently failed to adequately invest in its network over an extended period of time. Since the passage of the 1996 Act and federal and state efforts to introduce competition, U S WEST appears to have selectively under-invested in the facilities necessary for new entrants to compete with U S WEST. Indeed, states are well aware of U S WEST's failure to invest in its basic infrastructure to provide local service. The Iowa Office of Consumer Advocates noted that the root of the problem is evinced by data that U S WEST has spent the same amount of money in its network since 1995 despite increased customer demand for new

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[93] See Matter of the Commission's Order to Show Cause Why U S WEST Communications Inc's Certificate of Public Convenience and Necessity Should not be Revoked, Modified, or Amended, New Mexico Public Regulation Commission, Utility Case No. 3147 (Oct. 5, 1999).

[94] The Arizona Corporation Commission has scheduled a series of U S WEST Service Quality Public Comment Meetings through Arizona, "to provide an opportunity for U S WEST customers to inform the Commission of service quality problems they may be experiencing. See Arizona Corporation Commission to Hold U S WEST Service Quality Forum, Arizona Commission News Release (August 25, 1999), ACC sets U S WEST Service Quality Public Comment Meetings, Arizona Commission News Release (October 13, 1999).

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lines.[95] In Colorado, Dian Callaghan of the Colorado Office of Consumer Counsel noted that "While the demands on the network have been increasing, the investment has been decreasing."[96] As a result, consumer complaints and "held orders" have skyrocketed, and the Colorado Commission data shows that "the number of people waiting more than thirty days for a telephone has risen sharply over the last year, with 1,400 Coloradans waiting one month or longer for a phone line in March alone."[97]

The Oregon Commission has also noted in an investigation of the Roseburg area, that U S WEST "has failed to upgrade the Roseburg analog switch or replace it with a new switch with greater capacity," and that as a result, during the height of the problems in Roseburg, there were "more than 60 complaints a day from customers frequently unable to make or receive phone calls."[98] The FCC further noticed that U S WEST may be failing to perform general network upgrades on an ongoing basis.[99]

U S WEST's failure to invest may not be purely accidental or random. In fact, as discussed before, U S WEST's failure to build adequate and reasonable facilities allows U S WEST to discriminate unfairly among classes of customers. U S WEST may, for example, decide unilaterally to replace or augment inadequate and inefficient facilities to serve its own retail customers, but may refuse to provide or build out adequate facilities when a wholesale customer such as AT&T requests services or facilities in a certain area.

In addition, U S WEST has primarily been focused on investing in high-speed Digital

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[95] See Bells are Ringing, Westword (August 12, 1999), http://www.westword.com/1999/081299/features1-1.html.
[96] Id.
[97] Id.
[98] See, e.g., In the Matter of the Investigation of the Telecommunications Services Provided By U S WEST Communications, Inc. to Mercy Medical Center, Roseburg, Oregon, and the Status of its 1AESS Switches Operating in Oregon, Order, UM 928, Oregon Public Utility Commission (June 28, 1999); "Expedited Complaint Process Ends in Roseburg," News Release, Oregon Public Utility Commission (rel. September 24, 1999).
[99] See In the Matter of Long-Term Number Portability Tariff Filings of U S WEST Communications, Inc., Memorandum Opinion and Order, CC Docket No. 99-35, FCC 99-169 (July 9, 1999) at ¶ 19.

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Subscriber Line ("DSL") services, as noted accurately by a staff person at this Commission who was quoted in a newspaper article recently as stating that U S WEST has been spending much more on DSL and Internet-related services than basic phone service.[100] A U S WEST official, in fact, agreed at the Arizona Service Quality Forum that many of the comments made about U S WEST's service quality were legitimate.[101] He proceeded to note that the company has invested in DSL, but neglected to mention exactly what other network infrastructure investments U S WEST had made. The U S WEST official also conceded that "making customer due dates is going to be a difficult if not impossible task for us," and that it does not have the available systems and people to make these commitments.[102]

Q: WHAT ARE THE IMPLICATIONS OF THE PROPOSED MERGER ON SERVICE QUALITY FOR QWEST'S AND U S WEST'S CUSTOMERS?

A: As noted before, there is nothing in the Qwest and U S WEST Application that explains how service to customers would improve, and the Joint Applicants have failed to respond to AT&T's discovery requests on this issue.

While failing to address how Applicants might improve the poor quality of service they currently provide, the Applicants instead focus on anticipated benefits in the form of "great ability and incentive to accelerate local broadband connectivity for consumers."[103] Such statements indicate that U S WEST and Qwest will not focus on improving the provisioning of basic telephone service to retail customers and essential facilities to wholesale customers. Such statements indicate instead that the merged company would focus

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[100] See Bells are Ringing, Westword (August 12, 1999) (quoting Washington Commission staff person as stating that U S WEST diverted money into DSL services in order to make it more attractive to acquiring companies like Qwest).
[101] Testimony of U S WEST, Wholesale Service Quality Forum, Arizona Commission (October 28, 1999) at 114.
[102] Testimony of U S WEST, Wholesale Service Quality Forum, Arizona Commission (October 28, 1999) at 115-116.
[103] See, e.g., In re Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Networks, Inc., and U S WEST Communications, Inc., Washington Utils. & Transp. Comm'n, Docket No. UT-991358, Joint Application for Merger of Qwest Communications, International, Inc. (Aug. 31, 1999) at 12.

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on shifting investment away from essential local services and facilities and directing that investment toward data services.

Moreover, as discussed, the available evidence suggests that U S WEST's service quality would not improve upon the merger. As shown by the various customer and carrier complaints and state commission investigations of U S WEST's service, U S WEST has demonstrated a consistent record of terrible service quality, and of discriminating in favor of its affiliates and end-user customers. Such a poor record of service quality does not inspire confidence that things will magically change after the proposed merger. If anything, the opportunities to divert capital necessary to improve communications service capabilities would increase.

Q: HOW CAN THE COMMISSION ENSURE THAT THE PROPOSED MERGER WILL IMPROVE, AND NOT FURTHER NEGATIVELY IMPACT SERVICE QUALITY?

A: In order to prevent U S WEST and Qwest from further eroding the development of competition by providing poor service, the Commission should adopt performance measures and remedies that the merged company should meet prior to approval of this merger. This approach has been developed and used in other regulatory proceedings, including other merger proceedings at both the federal and state levels.

Q: WHAT SORTS OF SERVICE QUALITY CONDITIONS/PERFORMANCE MEASURES SHOULD BE IMPOSED ON THE MERGED COMPANY?

A: First, the Commission should impose detailed service quality reporting requirements and substantial remedies on the merged company prior to the merger closing date for the combined service territory. Specifically, the Commission should require that the merged company agree to comply with a comprehensive set of performance measures, standards, and remedies for carrier-to-carrier performance. This Commission currently does not have the power to require U S WEST to pay such penalties to injured carriers but this proceeding presents the right opportunity for the Commission to ensure that the merged company

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complies with service quality standards. Specifically, the Commission should, as various commissions have in other merger proceedings, require the merger applicants to commit to penalties payable to harmed competitors and customers in order to ensure that the merger does not further harm the public interest.[104]

Thus, in the interim before the Commission adopts final rules in Docket No. 990261 that are not appealable, AT&T recommends that the set of measures be based on the Service Quality Measurements that the Local Competition Users Group ("LCUG") developed, with penalty plans based on what AT&T proposed in New York for Bell Atlantic-NYNEX.[105] Imposing a comprehensive set of measurements and penalties should preserve the Commission's ability to monitor U S WEST's poor service quality and to provide incentives for the merged company to remedy the inadequate and inefficient facilities that U S WEST currently owns:

This Commission should require the merged company to measure and report the parity of its performance to itself, its own affiliates, and end-user customers, and its performance of service to wholesale customers; and in areas where it not possible to measure parity of performance between the two groups, to measure and report its service in various categories against a benchmark. The measurement of parity shall be based on a statistical model acceptable to wholesale customers, and results should be collected for the ILEC's retail and wholesale performance. Performance measurements reporting should be disaggregated to ensure that parity comparisons are meaningful.

- ♦ These performance measures and benchmarks should be reported monthly and should include the 27 service quality measurements developed in the LCUG

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[104] See, e.g, SBC Communications, Inc., Ameritech Corporation, Joint Application for Approval of the Reorganization of Illinois Bell Telephone Company dba Ameritech Illinois and the Reorganization of Ameritech Illinois Metro, Inc., in accordance with Section 7-204, Illinois Commerce Commission, 98-0555 (September 23, 1999) (imposing such conditions on the merger between SBC and Ameritech).

[105] See Local Competition Users Group ("LCUG") Service Quality Measurements (SQMs), developed by AT&T, Sprint, MCI, LCI, WorldCom (August 28, 1998).

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Report on Service Quality Measurements. See Exhibit B. The categories of measurements include, ordering and provisioning, maintenance and repair, billing, operator services, network performance, among others, and contain subcategories within each category.

- The ILEC must report separately for each measure, and provide comparisons of its own retail results against results for each wholesale customer, and such detailed results should be provided only to the wholesale customer, unless written permission is provided otherwise. In addition, the ILEC must report its performance for each category for: (1) its own retail customers; (2) any of its affiliates that provide local service; (3) wholesale customers in the aggregate; and as noted, (4) the individual wholesale customer (receiving its own report).
- Reports must be provided to wholesale customers by the 5th day following the close of calendar report month, or by alternative schedule, if mutually agreed to between parties.
- This performance information should also be filed with the Commission in monthly reports and posted on the merged company's website within 5 days after the end of the month covered by the report. All wholesale customer-specific data, including the Joint Applicants' performance with regard to a specific carrier, shall be made available to the relevant carrier only, and, pursuant to protective agreements, to the Commission and on the company's website for review by other state commissions. Failure to submit the monthly report should result in penalties of $5,000 per day past due; and $1,000 per day in the case of incomplete reports for each missing performance result.
- AT&T also supports a set of self-executing performance remedies that require the merged company to make payments to wholesale customers and/or the

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affected customers in the event of failure to meet these measures. AT&T recommends that remedies/penalties be imposed on two tiers: (1) the first tier should address consequences for non-compliant service to an individual carrier;[106]

and (2) the second tier should address the consequences for non-compliant performance to the wholesale purchaser industry, as a whole.[107] Further, Tier I provides a form of non-exclusive liquidated damages payable to individual wholesale customers, and Tier II imposes regulatory fines to be paid to a public fund that are necessary when an ILEC's performance affects the competitive market, and consumers as a whole. See Exhibit C.

Moreover, as I also describe elsewhere, U S WEST/Qwest should agree to submit a plan that would incorporate the "best practices" of measurements, standards, and remedies of the combined companies; and the merged company should submit annual reports detailing the best practices for a period of 5 years after the closing of the merger. Any best practices that the combined company fails to meet should be subject to additional and substantial performance remedies or penalties. Finally, the Commission should also adopt the terms of the proposed settlement concerning service quality in Iowa, which the Applicants agreed to with the Iowa Office of Consumer Advocate ("OCA").[108] *See* Exhibit D. The terms of the

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[106] A Tier I remedy should be paid to an affected wholesale purchaser whenever any performance result shows that support delivered by the merged company to an individual wholesale purchaser fails to meet or exceed the applicable performance standard. An individual wholesale customer may pursue actual damages in addition to these remedies. In order to establish Tier I remedies, there must be a definition for when performance for a particular period "passes" or "fails," and if it failed, whether additional consequences are warranted. Defining "pass/fail" rules requires that the measurements be mapped into either of 2 categories: (1) those for which the performance standard is at parity with analogous incumbent LEC performance results; and (2) those for which the performance standard is an absolute level of required performance (otherwise known as a benchmark). When parity is the standard, statistical procedures are necessary to determine compliance. Specifically, a modified z-statistic is used to determine whether a performance is compliant with the parity standard.

[107] Tier II consequences will ensure that the merged company provides performance that complies with statutory obligations. Tier II remedies should be determined using the aggregate data for all wholesale customers within a particular measurement result and disaggregation. The same business rules should apply under Tier II to the aggregate (or pooled) data of the individual wholesale customers as are used for the individual wholesale customer data under Tier I, except that a 5% Type I error rate is used.

[108] In re Qwest Communications, International, Inc., and U S WEST, Inc., State of Iowa, Department of Commerce Before the Iowa Utilities Board, Docket No. SPU-99-27, Settlement Agreement and Joint Motion for

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proposed settlement concerning measurements and remedies of the merged company's service quality –trouble reports, primary line connections, and held orders-- should be incorporated in Washington, because the Applicants already have agreed to such proposals in Iowa, and are apparently willing to implement these terms.

Q: WHAT OTHER MEASURES AND REMEDIES SHOULD THE COMMISSION IMPOSE TO ADDRESS U S WEST'S FAILURE TO INVEST IN LOCAL NETWORKS?

A: Because U S WEST has systematically failed to invest in its local network infrastructure, the Commission must impose conditions that will require the merged company to invest in the local network. The Commission should first of all require U S WEST and Qwest to submit a plan detailing its $5.3 billion investment in local network infrastructure, including: (1) where the merged company will receive the funds to invest this money; (2) where the merged company plans to invest this money; (3) how it compares to existing investment levels; (4) over what period of time the merged company plans to invest it; and (5) exactly what sorts of technological and network investments the merged company plans to make. The Commission should also require a similar report from U S WEST currently, in its efforts to invest $4 billion in its network this year.

After review of these plans, the Commission will be able to determine whether these amounts are adequate, when they should be directed and how they compare to existing levels of investments. This investment information then should be reported annually to the Commission. The Illinois Commission recently in the SBC-Ameritech merger required the merged company to issue annual reports detailing the exact areas (geographical and technological) of investment for five years of the investment period.[109] Similarly, this

Approval Thereof (January 28, 2000).

[109] SBC Communications, Inc., Ameritech Corporation, Joint Application for Approval of the Reorganization of Illinois Bell Telephone Company dba Ameritech Illinois and the Reorganization of Ameritech Illinois Metro, Inc., in accordance with Section 7-204, Illinois Commerce Commission, 98-0555 (September 23, 1999) ("SBC-Ameritech Order"), at 21-22 (noting that the Commission was "not persuaded by the Joint Applicants' suggestion that marketplace incentives provide them with sufficient motivation to ensure that Ameritech Illinois' network investment will be adequate following the merger" and that the annual report's purpose is "to allow the

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Commission should require such annual reports to be prepared and certified to be true by the Joint Applicants; and to be examined and audited by the Commission with the assistance of an independent third party selected by the Commission and paid for by the Joint Applicants.

Q: WILL THESE CONDITIONS ENSURE THAT SERVICE QUALITY WILL IMPROVE?

A: These conditions are not an absolute guarantee against the continuing degradation of service quality to U S WEST's and Qwest's customers. However, without these conditions, the Commission can not adequately monitor and provide incentives for the merged company to provide reasonable service to its customers. As noted, the Applicants have provided little detail on how the merged company would continue operations and how the merged company will ensure that it provides reasonable service quality. The merger also eliminates a potential competitor in the intraLATA and interLATA markets, and thus, these conditions are critical for providing at least some safeguard against the merged company's anti-competitive incentives and behavior as exemplified by its deliberately bad service quality to wholesale customers like AT&T.

ACCESS CHARGES

Q: WHY SHOULD THE COMMISSION BE CONCERNED WITH ACCESS CHARGE LEVELS DURING THESE PROCEEDINGS?

A: The Commission should be concerned because the proposed merger may exacerbate a "price squeeze" that could drive competitive options from the market and reduce affordable options for state consumers. U S WEST and Qwest have not provided any information regarding whether they will lower originating access charges for competitors (or even keep them at existing levels) after the merger. The merger application says the transaction will "produce economies of scope and scale"[110] but says nothing about whether the increased

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Commission to determine whether and how the network investment is made, whether the network investment serves to maintain the quality of [the] network, and whether the network investments are in the interests of all of [the company's] customer classes.")

[110] See, e.g., Washington Application at 11.

productivity and increased assets will translate into reduced access charges for competitors. Public statements are similarly devoid of concrete assurances that the new company will not leverage its position to discriminate against competition. In fact, when faced squarely with the question in data requests, the companies say that in Washington "U S WEST has *no plans* to reduce access charges as a result of the merger with Qwest."[111]

The Commission is obligated to protect the public interest by looking beyond U S WEST's and Qwest's empty statements. Decisions regarding how the company will prevent discrimination and maintain options for consumers cannot wait until after the merger is complete. Because U S WEST and Qwest have not made these crucial decisions, the Commission must step in and require assurances that the merged company will not drive out competition or increase the costs of its competitors to the detriment of consumers.

Q: PLEASE EXPLAIN THE "PRICE SQUEEZE" AND HOW IT OCCURS

A: Section 251 of the Telecommunications Act requires incumbent local exchange carriers like U S WEST to provide long distance carriers with access for initiating and terminating calls, and U S WEST must do so at a reasonable cost. Long distance providers are dependent on the monopoly supplier for access, and these expenses are typically the largest single cost when providing long distance service.

If U S WEST sets access charges at the same level that it costs U S WEST to provide the access, the playing field is level for competition. But if U S WEST charges <u>more</u> to provide access (as it does today), U S WEST will have lower overall expenses than its competitors. When U S WEST charges above cost levels for access, it does not need to recoup the cost of providing access. U S WEST can then offer lower long distance rates to consumers while maintaining the same profit margin. Competitors, on the other hand, face a no-win situation when competing with U S WEST: risk losing customers by raising prices to

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[111] Data Requests, Response to Request No. 01-027.

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recoup the high access charges, or lower prices to compete with U S WEST but eliminate profits. In short, access charges are a real, out-of-pocket, unavoidable cost to long distance providers other than U S WEST, but represent a fictitious cost to U S WEST, even if there is imputation.

Q: HOW DOES A PRICE SQUEEZE HARM CONSUMERS OF THE STATE?

A: Competition suffers when an incumbent carrier uses access charges to discriminate against other carriers. Long distance providers faced with the choice of raising consumer rates or losing revenue cannot compete and may stop providing service. Consumers, in turn, have fewer options for services and service providers. In the long run, consumers also would face higher rates, because the incumbent carrier can raise rates after driving out the competition. Moreover, the competitive advantage that U S WEST confers upon itself has nothing to do with any inherent efficiencies and thus serves merely to distort competition.

Q: COULD THE MERGER LEAD TO A PRICE SQUEEZE AND REDUCED OPTIONS FOR STATE CONSUMERS?

A: Yes. Qwest's affiliates provide intraLATA (as well as interLATA) long-distance service throughout U S WEST's region, including Washington.[112] Right now, those affiliates must pay access charges to U S WEST. After the proposed merger, the affiliates will continue to pay access charges on intraLATA traffic, but the effect will be different. Rather than paying to a competitor, Qwest will pay the access charge to its own affiliate—U S WEST. The access charges will simply be an intracompany transfer, and the merged company will actually save money.[113]

In addition, potential exists for more price squeezes. Qwest has facilities in place that

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[112] See, e.g., In the Matter of Merger of Qwest Communications International Inc. and U S WEST, Inc., CC Docket No. 99-272, Response to Comments on Applications for Transfer of Control at 20 (FCC Oct. 18, 1999); Washington Application at 3.

[113] The FCC recently described the price squeeze problem in the SBC/Ameritech merger. In re Applications of Ameritech Corp. and SBC Communications Inc., CC Docket No. 98-141, Memorandum Opinion and Order at 107-108 (FCC Oct. 8, 1999).

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could allow the merged company to provide more long distance services.[114] Those expanded services also would not bear the cost of access charges in the U S WEST region. Savings again would increase, and access charges should drop.

Qwest and U S WEST also have said they intend to move quickly to obtain Section 271 approval to provide interLATA services in the U S WEST region.[115] If that approval occurs, the potential for a price squeeze expands accordingly. The merged company would compete at all levels of the long distance market. If the company did not price access charges at cost, then it could capitalize on that revenue by lowering retail costs to the point that no one could compete in the long distance market. Consumers would be left with no choices and higher rates in the long run and anti-competitive market distortions in the short run.

Q: DOESN'T THE SAME ISSUE ARISE WITH REGARD TO LOCAL INTERCONNECTION AND UNBUNDLED ELEMENT CHARGES?

A: Yes. It could, although such charges at least are supposed to be set at levels reflecting the underlying economic costs. To the extent that is not the case, the same kind of price squeeze could exist.

Q: IS THERE REASON TO BELIEVE THE MERGED COMPANY WOULD LEVERAGE ITS POSITION TO DISCRIMINATE AGAINST COMPETITORS?

A: Recognizing that the Commission has already considered the reasonableness of terminating access charges, AT&T submits that U S WEST should at least commit to providing originating access charges at cost-based levels in order to prevent an effective price squeeze on competitors. U S WEST and Qwest have not provided assurances that they will provide originating access to competitors at cost-based levels. The only statement available is the response to a data request, in which the companies say they have no plans to lower charges.[116] This response alone is enough to raise concerns, because it should not be so

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[114] See, e.g., Washington Application at 4 (discussing Qwest's network).
[115] Id. at 12-13.
[116] Data Requests, Response No. 01-027.

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difficult for two merging companies to recognize that a failure to lower access charges would treat competitors unfairly.

Past behavior by U S WEST indicates there is even more reason to believe the merged company will discriminate with its access charges. For example, a recent audit report issued by the FCC shows U S WEST grossly overstated its plant, which means its rate base was inflated in every state.[117] If its rate base was overstated, then U S WEST's revenue requirements also were overstated, because the company did not need that much revenue to cover its expenses. The end result was that U S WEST set rates—including access charges—too high. In addition, rate cases are pending in Arizona and New Mexico regarding U S WEST's rates.[118]

Without any statements in the merger application or data request responses to contradict U S WEST's past behavior, there is absolutely no reason to believe the merged company will lower access charges on its own and every reason to believe that it won't.

Q: WHAT SHOULD THE COMMISSION DO TO PRESERVE COMPETITIVE CHOICES FOR STATE CONSUMERS?

A: The Commission's obligation to protect the public interest requires that it prevent the new company from leveraging access charges or any other charges on competitors to stifle competition and reduce affordable options for consumers. The only way to do so is to require affirmative commitments from U S WEST and Qwest now, rather than wait until the merger closes and hope the merged entity does not engage in a price squeeze.

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[117] See Audit of the Continuing Property Records of U S WEST Telephone Operating Companies, DA 99-2282, Revised Audit Report Pursuant to Public Notice at ¶ 42 (Oct. 22, 1999).

[118] In the Matter of the Application of U S WEST Communications, Inc. A Colorado Corporation, for a Hearing to Determine the Earnings of the Company, the Fair Value of the Company for Ratemaking Purposes, to Fix a Just and Reasonable Rate of Return thereon and to Approve Rate Schedules Designed to develop Such Return, Arizona Corporation Commission Docket No. T-01051B-99-105 (Filed Jan. 8, 1999); In the Matter of an Investigation into the Rates and Service of U S WEST Communications, Inc., New Mexico Public Regulation Commission Utility Case No. 3008 (Filed Sept. 17, 1999).

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Q: WHAT CONDITIONS SHOULD THE COMMISSION PLACE ON THE MERGER?

A: The Commission should require the merged company to lower originating access charges to cost-based levels, at least in those markets where it is offering competitive retail service (i.e., intraLATA initially and interLATA upon a grant of 271 relief). Those levels also should reflect both U S WEST's overstated plant and the new savings the merged company will realize, including any cost reductions caused by the sale of local exchanges. This is the only way to prevent a squeeze that would reduce competition and raise rates in the long run.

AFFILIATE TRANSACTIONS

Q: WHY SHOULD THE COMMISSION BE CONCERNED IN THIS PROCEEDING WITH TRANSACTIONS BETWEEN QWEST AND U S WEST AFFILIATES?

A: The proposed merger between U S WEST and Qwest will bring together several affiliates that provide a variety of services both inside and outside U S WEST's region. Thus, there is the potential for discrimination against competitors or the diversion of funds from local exchange service to subsidize services provided by other affiliates. Both cross-subsidization and diminished competition would harm the state's local consumers by reducing service quality and by reducing the number of competitive options available.

Despite the complexity of the services offered and the number of affiliates involved, the merger application filed by U S WEST and Qwest makes only cryptic statements addressing these issues, such as "[t]he direct and indirect wholly-owned subsidiaries of Qwest Inc. and U S WEST, Inc. that hold operating certificates or other authorizations will survive as direct or indirect wholly-owned subsidiaries of the post-merger Qwest,"[119] and that customers "will continue to be served and billed pursuant to existing tariffs and operating authorities."[120] These statements fail to provide a meaningful explanation of post-merger

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[119] See, e.g., Washington Application at 6.
[120] Id. at 9.

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relationships between affiliates. This Commission's obligation to protect the public interest means it must require detailed explanations and firm commitments before the merger is completed and the relationships become too difficult to track.

Q: EXPLAIN THE RISKS POSED TO CONSUMERS AND COMPETITORS BY POST-MERGER AFFILIATE RELATIONSHIPS

A: First, Qwest's affiliates offer numerous services both inside and outside the U S WEST region, and the companies have said they intend to expand services. Therefore, the merged company will have significant opportunities to cross-subsidize those additional services through revenues obtained from U S WEST's basic local services. U S WEST and Qwest essentially could fund their expansion plans on the backs of this state's captive ratepayers.

In addition, as the monopoly provider of service, U S WEST has great opportunity to discriminate against its rivals by providing itself with more favorable terms and conditions for services. A merged U S WEST and Qwest will have even more ability to discriminate. The addition of Qwest's facilities will give the new company an even more dominant position from which to discriminate against rivals through favorable treatment to itself and its affiliates unless monitored by the Commission.

Q: IS THERE REASON TO BELIEVE THESE RISKS WOULD MATERIALIZE?

A: U S WEST and Qwest have said and done nothing to indicate that they will prevent cross-subsidization and discrimination. As I described earlier, the merger application stresses expansion without explaining how affiliates will do business. Data request responses show a similar lack of concern. U S WEST and Qwest failed to respond to a direct question regarding whether affiliates receive services on the same terms as other competitors.[121] The companies only say they expect "no changes" in affiliate transactions and make the odd statement that "[t]o the extent that existing Qwest subsidiaries purchase services . . . an

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[121] Data Requests, Response No. 01-007.

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affiliate relationship would then be created."[122] U S WEST does say that it currently complies with FCC rules when dealing with its affiliates, but says the companies have made "no decision" regarding future affiliate relationships.[123] When it comes to monitoring and reporting affiliate transactions, the companies say they have not made any decisions.[124]

This absence of information raises serious concerns. At the very least, a complex merger with multiple affiliates creates the potential to confuse customers, competitors, and the Commission if the company does not have plans in place to coordinate and track the various affiliates' dealings.

Past behavior by the parties provides little reassurance. U S WEST and Qwest violated federal law by joint marketing interLATA services of a Qwest affiliate.[125] Yet U S WEST and Qwest will not even promise to comply with court decisions regarding affiliate marketing. The companies responded to data requests by saying "no policy decisions have been reached on joint marketing of services."[126] Such responses undermine claims that the merged company is committed to protecting consumers.

Q: WHAT SHOULD THE COMMISSION DO TO PROTECT THE PUBLIC INTEREST FROM POTENTIAL CROSS-SUBSIDIZATION AND DISCRIMINATION?

A: The Commission can fulfill its obligation to protect the public interest only by placing conditions on the merger before it is completed. If U S WEST and Qwest are unwilling, or unable, to make decisions that would guard against siphoning of resources or discrimination against competition, then the Commission must require affirmative commitments.

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[122] Id. at Response No. 01-007(a).
[123] Id. at Response to Request No. 01 008; Supplemental Data Responses, Response to Request No. 01-008.
[124] Id. at Response No. 01-102.
[125] Memorandum Opinion and Order, In the Matter of AT&T Corp. et al v. Ameritech Corp. et al., File Nos. E-98-41, E-98-42, and E-98-43, 1998 FCC LEXIS 5192 (Sept. 28, 1998), aff'd sub nom. U S WEST v. FCC, 177 F.3d 1057 (D.C. Cir. 1999). Qwest also violated Section 271(a) by joint marketing with Ameritech, another incumbent local exchange carrier.
[126] Data Requests, Response No. 01-059.

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Q: WHAT KIND OF CONDITIONS SHOULD THE COMMISSION IMPOSE REGARDING AFFILIATE TRANSACTIONS?

A: First, the Commission should require detailed disclosure regarding terms and conditions of transactions between the various affiliates of U S WEST and Qwest, as well as plans of how the merged company will monitor and disclose future transactions. The Commission should require that disclosure and plans be provided before the Commission approves the merger.

Second, U S WEST and Qwest should make an affirmative commitment to comply with orders regarding joint marketing of services and other affiliate transactions. The Commission and the public cannot afford to allow the companies to wait and see before agreeing to comply.

Finally, the Commission should require the merged company to structurally separate its wholesale and retail activities into separate operations.[127] The merged company's retail operations would obtain any and all services from the wholesale operations through tariffs or publicly filed contracts and on the same basis, using the same systems, as other CLECs may obtain services and products from the wholesale operation. This will prevent the merged company from exploiting its monopoly revenue in local services to subsidize other affiliate's offerings. Both in-region competition and service quality will be preserved. In addition, strict separation will allow the Commission a transparent means to monitor and enforce the merged company's compliance with affiliate transaction rules.

RURAL EXCHANGES

Q: WHY SHOULD THE COMMISSION BE CONCERNED WITH THE SALE OF RURAL EXCHANGES DURING THESE PROCEEDINGS?

A: The Commission should be concerned because the proposed merger will affect how

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[127] Some states already have taken this step in transactions. See, e.g., Joint Petition of Senators Fumo, Madigan, and White, The Pennsylvania Cable & Telecommunications Assn., and Seven Competitive Local Exchange Carriers for Adoption of Partial Settlement Resolving Pending Telecommunications Issues, Joint Motion of Chairman Quain and Commissioners Rolka, Brownwell & Wilson, P-00991648, Pennsylvania Public Utility Commission (Aug. 26, 1999).

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and where U S WEST will provide service throughout the state. Nonetheless, U S WEST and Qwest have failed to provide any information on their combined policy regarding basic local service for rural areas. Furthermore, based on past practices, as well as current statements, the Commission should be concerned with the merged company's plans to continue to divest itself of rural exchanges.

Not surprisingly, the merger application filed in Washington does not indicate any commitment to investing in rural exchanges. The application instead contains an empty statement that the merged company will remain committed to all customers.[128] Yet the document does not include concrete plans for improving, or maintaining, basic local services in rural areas or even retaining ownership of those exchanges for the foreseeable future.

AT&T requested such information in its data requests. U S WEST's and Qwest's responses to those data requests raise serious concerns. The two companies simply object to questions regarding post-merger exchange sales and say they have not discussed the issue.[129] Supplemental data request responses in Washington are even less clear. The companies say they "will continue to evaluate how sales or purchases of access lines could further the best interests of the company and its customers."[130] In response to data requests addressing investment in local exchanges, the companies again refuse to respond,[131] say "the budget for the new combined company has not yet been determined,"[132] and refer to investment plans in areas other than local service."[133] The Commission's obligation to ensure that the proposed merger is consistent with the public interest requires that the Commission not accept "we don't know" for an answer. If the Applicants will not commit to quality service in, rather than sale of, rural exchanges, the Commission must require them to do so.

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[128] See, e.g., Washington Application at 12.
[129] Data Requests, Response No. 01-097.
[130] Supplemental Data Responses, Response to Request No. 01-097.
[131] Id. at Response No. 01-024.
[132] Id. at Response No. 01-021.
[133] Id. at Response No. 01-005.

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Q: HOW DO SALES OF RURAL EXCHANGES AFFECT SERVICES FOR RURAL CONSUMERS?

A: U S WEST has always claimed that rural exchanges are high-cost exchanges. Assuming the truth of that claim for the sake of argument, U S WEST recovers those high costs through averaged rates charged to all customers. When U S WEST sells a rural exchange, it receives an infusion of money and eliminates a high-cost investment. Unless U S WEST's rates will go down to reflect these savings, the company should increase its investment in basic local services in its remaining service areas. Ratepayers should either see their bills drop or see improved service.

The same analysis applies to access charges and UNE rates assessed for wholesale customers. As U S WEST's costs decrease due to exchange sales, access and UNE rates also should be reduced to reflect the ridding of higher costs. However, U S WEST has not sought to re-rate their wholesale costs following previous sales of high-cost rural exchanges.

Q: HAS THIS RE-INVESTMENT OCCURRED WHEN U S WEST HAS SOLD EXCHANGES?

A: No. There is no demonstrable evidence that U S WEST has increased its investment in basic local services for rural exchanges in this state. The non-profit group Frontiers of Freedom estimates that U S WEST has sold nearly 600 rural exchanges in its fourteen-state region since 1994, affecting one million rural customers.[134] For example, U S WEST has sold at least 25 exchanges in Washington, 71 exchanges in Minnesota, and 60 in Colorado.[135] The proposed merger has not slowed U S WEST's sales. U S WEST recently applied for approval to sell 10,000 lines in the rural community of Clarkston, Washington,[136]and 11 exchanges in Utah.[137]

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[134] Frontiers of Freedom, US West Hides Behind Rural Consumers While Ditching Them as Fast as It Can (Aug. 6 1999).
[135] Id.
[136] In the Matter of the Joint Application of U S WEST Communications, Inc., and Citizens Telecommunications Company of Idaho for Transfer of Property, Washington Utilities and Transportation Commission, Docket No. 99-1582, Joint Application (October 19, 1999).
[137] In the Matter of the Joint Application of U S WEST Communications, Inc., All-West Communications, Inc., Carbon/Emery Telecom, Inc., Central Utah Telephone, Inc., Huntsville Telecom, Inc., Manti Telephone Co.,

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Logically, those sales would result in savings that should be returned to consumers. However, U S WEST has produced no evidence to demonstrate that any cost savings are used to benefit local exchange customers, nor has U S WEST responded to data requests regarding its exchange sales and investments. In fact, U S WEST's investment in Washington has been frozen at about $300 million per year despite hundreds of thousands of new residents.[138] A recent article in the Westword newspaper cites Glenn Blackmon as saying U S WEST has diverted savings into high-tech services rather than the local network.[139] Blackmon says U S WEST was "focused on things that look good from the outside, with curb appeal" rather than basic services.[140] In another recent example, the 10th Circuit noted that U S WEST has chosen to sell exchanges in Wyoming rather than invest in infrastructure.[141] And in New Mexico, U S WEST is forcing some rural residents to pay for expansion of the network before providing local service.[142] As the Colorado Office of Consumer Counsel told the newspaper, "Their [U S WEST's] focus is on the bells and whistles, not basic service."[143] U S WEST thus apparently uses cost savings to invest in services other than local exchange services and in areas other than Washington.

Q: HOW WILL THE MERGER AFFECT THE SALE OF RURAL EXCHANGES AND INVESTMENT IN BASIC LOCAL SERVICE FOR RURAL AREAS?

A: We have no information about how the merged company will treat rural consumers. In responses to data requests, U S WEST and Qwest just say they have not discussed their policy on sales of exchanges.[144] The Commission is left with a merger application that claims

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Skyline Telecom and UBET, Inc. for Approval of Purchase and Sale of the Various Exchanges and Associated Matters, Utah Public Service Commission, Docket No. 99-049-___, Joint Application (filed Dec. 22, 1999).

[138] See www.westword.com/1999/081299/feature1-1.html.

[139] Id.

[140] Id.

[141] RT Communications, Inc. v. Federal Communications Comm'n, ___ F.3d ___, 2000 WL 20712, *1 (10th Cir. Jan. 13, 2000).

[142] Id.

[143] Id.

[144] Data Requests, Response No. 01-097.

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it will benefit the public yet provides no information on how the new company will treat a number of the state's consumers. Moreover, the statements of the companies concerning their desire to focus on advanced broadband services raise questions as to whether they will fund those efforts through sales of rural exchanges.[145]

In any event, the two companies have had no trouble making decisions regarding services that would benefit them. They recently unveiled plans to offer a pack of data and voice services to businesses in Sacramento, California.[146] News reports say the Sacramento offering is the first of twenty-five markets the new company will target outside U S WEST's region, with more announcements expected in January.[147] The available evidence uniformly demonstrates that the combined company may direct investment primarily to profitable ventures outside the region rather than to improving local exchange service within it.

Q: HOW CAN THE COMMISSION PROTECT RURAL CUSTOMERS?

A: The Commission should take steps to ensure that the merged company makes an enforceable commitment to invest resources in rural areas sufficient to provide local exchange service at acceptable levels of quality. Conditioning approval of the merger on such a commitment is the best way to protect rural consumers.

Q: WHAT KIND OF CONDITIONS SHOULD THE COMMISSION IMPOSE ON THE MERGER?

A: First, the Commission should place a moratorium on sales of local exchanges for a minimum of three years following the close of the transaction. A moratorium, coupled with the service conditions discussed at pages 35-52, would provide some assurance that the merged company will invest in rural exchanges or at least maintain the status quo. The condition would prevent the merged company from reaping savings from high-cost sales

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[145] See, e.g., Washington Application at 2, 9, 11-13.
[146] Associated Press, Qwest, U S WEST Shareholders Overwhelmingly Approve Merger (Nov. 2, 1999).
[147] Id.

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before it decides whether to share those savings with consumers.

Second, and as a companion condition, the Commission should require the merged company to improve service quality in the rural exchanges before making additional sales. The Commission, therefore, should create a checklist of service quality and price cap conditions that the merged company must meet before selling an exchange. This would ensure that U S WEST had improved quality and offered reasonable rates before reducing its costs by selling the exchange. I have discussed service quality standards in more detail in other portions of my testimony and those standards must be met before additional sales of rural exchanges go forward.

At the very least, the Commission should block U S WEST from marketing rural exchanges while the merger is pending. This will prevent U S WEST from dumping high-cost areas to free up money just in time for the merger to close. Otherwise, the merged company could fund proposed offerings such as the one in Sacramento by subsidizing the project with money from sales of rural exchanges in U S WEST's region.

Q: DOES THIS CONCLUDE YOUR TESTIMONY?

A: Yes, it does, although AT&T reserves the right to supplement this testimony if AT&T is able to obtain further discovery.

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