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4 **BEFORE THE**
5 **WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION**

6 **IN THE MATTER OF THE**
7 **INVESTIGATION INTO QWEST**
8 **CORPORATION'S COMPLIANCE**
9 **WITH SECTION 271 OF THE**
10 **TELECOMMUNICATIONS ACT OF**
11 **1996**

DOCKET NO. UT-003022

COMMENTS OF PUBLIC COUNSEL
ON THE PUBLIC INTEREST AND
REQUEST FOR ADDITIONAL
INVESTIGATIONS

12 **I. INTRODUCTION**

13 Pursuant to the terms of the 28th and 29th Supplemental Orders the Public Counsel section
14 of the Washington state Attorney General's Office (Public Counsel) submits the following
15 comments regarding the Washington Utilities and Transportation Commission's (Commission)
16 public interest inquiry in this docket and requests admission of new evidence¹ and additional
17 investigation by the Commission. See 28th Supp. Order at para. 133. All parties to this
18 proceeding, including Qwest, have recognized the Federal Communication's Commission's
19 (FCC) interest in unusual circumstances that may weigh against a public interest finding.
20 Federal Communications Commission, *Memorandum Opinion and Order In the Matter of*
21 *Application by Ameritech Michigan to Section 271 of the Telecommunications Act of 1934, as*
22 *amended, to Provide In-Region, InterLATA Service in Michigan*, CC Docket 97-137, August 19,
23 1997 at 397 ("FCC Michigan"). See also Tr. at 4835.

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25 ¹ Public Counsel requests the admission of Qwest's responses to Public Counsel data requests 43 through 51 and data request 53. Public Counsel assumes that Qwest's response to public counsel data request 52 is identical to its response to Bench Request 46 and is therefore already in the record. All data requests are attached as appendices A through K.

1 Public Counsel believes evidence relevant to the public interest inquiry which may
2 constitute “unusual circumstances” has come to light since last summer’s hearings and deserves
3 additional investigation by this Commission prior to its determining whether Qwest’s application
4 to enter the interLATA market is in the public interest. The two areas of inquiry are Qwest’s
5 alleged use of Lit Capacity Indefeasible Right of Use (IRU) agreements to circumvent the
6 interLATA restrictions of the Telecommunications Act of 1996 (Act); and the allegation that
7 Qwest has entered into agreements with competitors that properly should have been filed as
8 interconnection agreement amendments, and thus be made available to all competitive local
9 exchange companies (CLECs).² Public Counsel believes both sets of issues are relevant to the
10 public interest inquiry as they bear on the question of whether Qwest has engaged in a pattern of
11 anti-competitive conduct which may include multiple violations of state and federal law. For
12 this reason Public Counsel respectfully requests that the Commission investigate these issues and
13 make a determination on them prior to reaching its conclusion as to whether Qwest’s application
14 to enter the long distance business is in the public interest.

16 **II. Does Qwest’s use of “Lit Capacity IRU” agreements violate federal law?**

17 On February 5, 2002 Touch America filed a complaint with the FCC alleging that Qwest
18 was violating §271 of the Act by continuing to offer in-region, interLATA services under the
19 label of “Lit Capacity IRUs.”³ As the Commission may recall, Touch America is the company
20 that purchased Qwest’s in-region long distance business pursuant to the divestiture requirements
21 of the U.S. West-Qwest merger. Touch America has also filed a second complaint with the FCC
22 alleging that Qwest has failed to abide by the terms of the divestiture and merger orders entered
23 by the FCC at that time.

24 ² Qwest maintains that IRU contracts are a transfer of a right of use over their network facilities to a third
25 party via contract and do not constitute a telecommunications service subject to the interLATA limitations of the
Ace. See Appendix I (Qwest’s Answer to Touch America’s FCC Complaint, File No. EB-02-MD-003).

³ “General Limitation. – A Bell operating company, nor any affiliate of a Bell operating company, may
provide interLATA services except as provided in this section.” 47 USC §271(a).

1 On February 8, 2002 Public Counsel issued to Qwest data requests 43 through 51 and
2 received responses on March 5, 2002. Based upon review of those responses Public Counsel
3 issued an additional data request to Qwest, DR 53 on March 12, 2002. A response was received
4 on March 28, 2002. Copies of Qwest's responses are attached as Appendixes A through I and K.

5 In response to PC DR 43 Qwest identified 22 parties with IRU agreements touching on
6 Washington state. In response to PC DR 53 Qwest identified 16 of the 22 it believed were
7 telecommunications providers, with 10 of the 16 being registered to operate as
8 telecommunications carriers with the WUTC. Four of the remaining six parties Qwest has IRU
9 agreements affecting Washington state appear to be internet service providers (ISPs), leaving
10 two parties whose status is unknown.

11 Public Counsel is concerned that some of these agreements may constitute the provision
12 of a telecommunications service in violation of §271(a) of the Act. If in fact Qwest is continuing
13 to provide interLATA telecommunications services in-region the mere labeling of the service as
14 an "IRU" and characterizing it as a lease of network capacity would not change the essential
15 nature of the service being provided. Public Counsel believes there exists prima facie evidence
16 justifying a Commission investigation of these facts to determine whether Qwest is violating 47
17 USC §271(a) of the Act at the same time that it seeks the benefits of 47 USC §271(b)(1) of the
18 Act in this docket.⁴

20 **III. Has Qwest violated federal law by entering into secret agreements with CLECs?**

21 On February 2, 2002 the Minnesota Department of Commerce filed a complaint with the
22 Minnesota Public Utilities Commission (MPUC) alleging that Qwest Corporation violated state
23 and federal law by entering into secret agreements with competitors. The Minnesota complaint
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⁴ Qwest's accounting treatment of its IRU agreements is currently the subject of a formal Securities and Exchange Commission investigation.

1 alleges that the secret agreements modify approved agreements between Qwest and CLECs and
2 were not filed with the MPUC for approval according to federal and state law.

3 47 USC §252(e)(1) requires state commission approval of any interconnection
4 agreement.⁵ Secret agreements which resulted from negotiations and relate to the terms or
5 conditions under which interconnection, services, or network elements are made available would
6 appear to raise a prima facie question of the applicability of this provision of the Act, regardless
7 of the parties desire to keep them secret or the root cause for the negotiations that took place
8 between Qwest and the CLEC. 47 USC §252(i) arguably requires some or all of the provisions
9 of the un-filed agreements which relate to interconnection, service, or network elements be
10 available for adoption by other CLECs.⁶

11 On February 8th Public Counsel issued Data Request 52 which requested:
12 Please produce a list of and copies of every written contract, agreement, or letter of
13 understanding between Qwest and a competitive local exchange carrier (CLEC) operating
14 in Washington state which was entered into by Qwest since January 1, 2000, but not
including any such agreement filed with the Washington Utilities and Transportation
Commission.⁷

15 Public Counsel received on March 8th, 2002 the following response:

16 Qwest is attaching the agreements that are the subject of the Minnesota Commission
17 proceeding, Docket No. P-421/C-02-197, and that involve CLECs operating in the State
18 of Washington. Qwest is also reviewing its files for other agreements with CLECs
operating in Washington that have not been filed with the Washington Commission, and
Qwest will supplement the record accordingly.
See Appendix J.⁸

19 The Commission may recall from its review of the US West-Qwest merger that a similar
20 concern arose surrounding the sudden withdrawal of a number of CLECs participating in that

21 ⁵“(e) Approval by State Commission –

22 (1) Approval Required. – Any interconnection agreement adopted by negotiation or arbitration
shall be submitted for approval to the State commission. A State commission to which an agreement is submitted
shall approve or reject the agreement, with written findings as to any deficiencies.” 47 USC §252(e)(1)

23 ⁶“Availability to Other Telecommunications Carriers. – A local exchange carrier shall make available any
24 interconnection, service, or network element provided under an agreement approved under this section to which it is
a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in
the agreement.” 47 USC §252(i).

25 ⁷ On March 28th, 2002 the Commission issued Bench Request No. 46, identical to Public Counsel Data
Request 52.

⁸ It should be noted that Public Counsel has not received an amended response from Qwest as of the
drafting of these comments, but that local counsel for Qwest has indicated that additional confidential agreements
will be available soon.

1 docket. *In Re Application of U.S. West Inc. and Qwest Communications International, Inc.*,
2 Eighth Supplemental Order Denying Petitions for Leave to Withdraw; Denying Confidential
3 Status to Bench Request Response and Providing Notice, June 19, 2000, Docket UT-991358.

4 Public Counsel is concerned that in light of the companies' conduct in the merger docket
5 and the allegations raised in Minnesota there exists a prima facie question of whether Qwest has,
6 through use of secret settlements and other confidential agreements, violated the requirements of
7 47 USC §252(i). Permitting Qwest and select CLECs to enter into secret agreements which limit
8 the ability of other CLECs to obtain interconnection, services, and network elements at the same
9 terms and conditions would be contrary to both the requirements of §252(i) and the intent of
10 Congress to foster a competitively neutral telecommunications market. If the Commission
11 determines that such secret agreements exist in Washington and should properly be filed and
12 made available to all competitors, then this would be further evidence of Qwest's violation of
13 law as well as evidence of additional anti-competitive conduct.⁹ Such a finding by the
14 Commission would weigh against a public interest finding in this docket.

15 16 **IV. Conclusion**

17 For the foregoing reasons Public Counsel believes that the Commission should order its
18 staff to initiate formal investigations into these two areas of concern and make a determination of
19 whether Qwest has violated federal and state law prior to entering a finding regarding the public
20 interest in this docket. If the Commission makes a finding that one or both of these issues is not
21 relevant to the public interest inquiry in this docket, Public Counsel would continue to urge the
22 Commission to initiate investigations into these matters as they bear directly on the issue of
23 whether Qwest has engaged in a pattern of anti-competitive conduct.

24 Public Counsel also requests the admission as exhibits of Appendices A through I and K.
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⁹ See *WUTC v. Qwest Corporation*, Fifth Supplemental Order Approving and Adopting Settlement Agreement, March 21, 2002, Docket No. UT-011329 (Centrex Customer Loyalty Program).

1 DATED this 19th day of April, 2002.

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