

**BEFORE THE**

**WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION**

**IN THE MATTER OF THE  
INVESTIGATION INTO QWEST  
CORPORATION'S COMPLIANCE  
WITH SECTION 271 OF THE  
TELECOMMUNICATIONS ACT OF  
1996**

**DOCKET NOS. UT-003022  
UT-003040**

**JUNE 2002 BRIEF OF PUBLIC  
COUNSEL ON THE PUBLIC  
INTEREST**

**I. INTRODUCTION**

1. On May 13<sup>th</sup>, 2002 the Washington Utilities and Transportation Commission ("Commission") held an additional day of hearings to address public interest issues that had arisen since the fourth workshop held during the summer of 2001. Public Counsel files this Brief to address the issues that have arisen since that time and to supplement our comments filed on April 19, 2002. Public Counsel maintains that Qwest's §271 application is not yet in the public interest.

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

2. On September 7, 2001 Qwest filed *Qwest's Brief in Support of Its Showing of Compliance With The Track A Entry Requirements of 47 U.S.C. §271(c)(1)(A) and With The Public Interest Test of 47 U.S.C. §271(d)(3)(C)* ("Qwest Brief") and asserted that the company's application was in the public interest at that time. The Commission rejected that assertion and held that it would be premature to enter a public interest finding at that time due to the number of important issues that remained outstanding. *20<sup>th</sup> Supplemental Order*, at para. 475. This is still true today.
3. The final report on Qwest's OSS performance has been received, but has not yet been approved by the Commission as meeting the needs of competitors operating in Washington. The

SGAT has not been finalized, including language on change management, and the QPAP. The question of Cost-based UNE pricing is also outstanding.

4. As noted in *Public Counsel's Response to Qwest's QPAP Compliance Filing* filed on June 3<sup>rd</sup>, 2002, Qwest has not yet accepted the conditions set forth in the Commission's 30<sup>th</sup> and 33<sup>rd</sup> Supplemental Orders and instead has, in the guise of a compliance filing, sought to modify the Commission's orders.

5. It is reasonable to foresee that these issues may well be resolved soon. Resolution however, is entirely contingent upon Qwest's acceptance of the language this Commission has ordered and it is not yet clear whether Qwest intends to accept the language required by the Commission or intends to proceed to seeking Federal Communication Commission ("FCC") approval of their §271 application without the approval of the WUTC. There also remains the question of whether "unusual circumstances" exist which would weigh against a finding that Qwest's application is in the public interest and whether the Commission wishes to use the QPAP over 90 days to evaluate whether Qwest has fully and irrevocably opened its local markets to competition.

**III. THE COMMISSION SHOULD INVESTIGATE ALL ALLEGATIONS OF ANTI-COMPETITIVE CONDUCT AFFECTING ACCESS TO QWEST'S LOCAL MARKETS PRIOR TO MAKING A PUBLIC INTEREST FINDING**

**A. The Commission Should Investigate The Secret Agreements Prior To Making A Public Interest Finding.**

6. Qwest has continued to maintain that no "unusual circumstances" exist which would weigh against a public interest finding by this commission. *Qwest Brief* at p. 30 and *Trans.* at 7599. Public Counsel detailed a number of examples of such "unusual circumstances" in its initial brief on the public interest last summer. *Public Counsel Brief On Public Interest* filed September 7, 2001 at paras. 51-65. Since that time additional questions have arisen regarding Qwest's conduct in opening its local markets to competition. As a result of the allegations that have been made over the last few months that Qwest has violated federal law some state utility commissions have launched formal and informal investigations. Public Counsel identified

additional allegations related to possible anti-competitive conduct in Washington including possible violations of state and federal law in its *Comments of Public Counsel on the Public Interest and Request for Additional Investigations* filed on April 19, 2002.

7. Most recently, the Iowa Department of Commerce Utility Board has entered an order finding that secret agreements under examination were indeed interconnection agreements within the scope of 47 U.S.C. §251(c) and §252(a) through (i) and that Qwest violated the Iowa Board's rules by failing to file them. *In Re: AT&T Corporation v. Qwest Corporation*, Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunities to Request Hearing, Docket No. FCU-02-2 issued on May 29, 2002.

8. This Commission should exercise its authority to determine which of the secret agreements should have been filed in the past, and which should be filed in the future. If the Commission determines that agreements should have been filed in the past it should also determine whether the failure to file the agreements was for the express purpose of inhibiting competition. Qwest counsel Lundy stated to this Commission that there is no legal standard for determining what constitutes a "term or condition" of an interconnection agreement that must be filed. *Trans.* at 7602. Through the Telecommunications Act of 1996 Congress imposed special obligations upon incumbent local exchange companies and vested in state utility commissions the authority to enforce these provisions of federal law. The Act itself provides the framework for analysis. See 47 U.S.C. §251 and §252. The Commission should exercise the authority granted to it by Congress and determine whether the secret agreements Qwest entered into with its competitors should have been filed, and whether they were not filed in order to inhibit competition from other competitors.<sup>1</sup> *Exhibits* 1626 to 1633 and 1635-C (Qwest's response to Public Counsel data requests and WUTC Bench request No. 46).

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<sup>1</sup> Qwest has asserted that its subsequent remedial actions will prevent violation of federal law. *Trans.* at 7609-7613. Even if assumed to be true, this fails to address the question of past violations of federal law as well as the aggregate negative impact on the development of competition in Washington.

9. Public Counsel recommends that the Commission initiate an independent investigation into Qwest's secret agreements and defer a public interest determination until such an investigation is complete. To do otherwise would create a risk of irrevocable harm to the development of competition in Washington State.

**B. The Commission Should Investigate Whether Qwest Is Currently Providing Inter-LATA Long Distance Services Under The Guise Of IRU Agreements.**

10. As noted in Public Counsel's previously filed comments, it has been alleged that Qwest is violating the interLATA restrictions of §271 prior to receiving authorization from the FCC to provide in-region long distance services. *Comments of Public Counsel* at pp. 2-3. Public Counsel believes that any evidence that Qwest is violating the same section of the act that it seeks to take advantage of in this proceeding should be deeply disturbing to the Commission. Such allegations should be fully investigated by the Commission prior to making any determination regarding Qwest's application.

11. Qwest witness Teitzel acknowledged that Qwest's IRUs are not only the subject of an FCC complaint by Touch America, but are also the subject of a formal investigation by the Securities and Exchange Commission regarding possible accounting irregularities. *Trans.* at 7693-7694. The issues identified by the Touch America complaint cited to the Commission's attention in Public Counsel's previously filed comments of April 19, 2002, as well as Qwest's response to data requests now admitted as Exhibits 1625 and 1634, makes it clear that Qwest has entered into IRU agreements with Washington state specific elements to them. Further, that at least two of the other parties to the IRU agreements are not telecommunications or internet service providers with whom network "capacity swaps" would traditionally be exchanged. This clearly raises the legal and factual questions of whether Qwest is utilizing IRU agreements to provide functionality indistinguishable from the provision of interLATA telecommunications services in-region, which it is currently forbidden from doing under section 271 of the Act. If this is in fact the case, then the Commission should determine whether such IRU agreements are,

in fact, the provision of interLATA long distance services originating or terminating in Washington State in violation of §271 of the Act.

12. Public Counsel recommends that the Commission initiate an independent investigation and determine whether Qwest's use of IRU agreements violates §271 and defer a public interest determination until such an investigation is complete. To do otherwise would create an unreasonable risk of allowing Qwest to benefit from the provisions of §271 at the same time it has been violating §271.

**IV. NINETY DAYS OF DEMONSTRATED PRO-COMPETITIVE CONDUCT IS THE BEST ASSURANCE LOCAL MARKETS ARE OPEN TO COMPETITION**

13. As recommended by Dr. Mark Cooper in testimony filed last summer, 90 days of compliance with the QPAP this Commission eventually approves, without statistically significant non-compliance, will be the strong evidence that Qwest has indeed fully, and irrevocably opened its local markets to competition. *Direct Testimony of Dr. Mark Cooper* at p. 30.

14. Assuming that Qwest accepts the requirements of the 30<sup>th</sup> and the 33<sup>rd</sup> Supplemental Orders and files with the commission a QPAP it can then approve, this will be the best “yard stick” available to the Commission to judge Qwest's conduct as a wholesale supplier of access to its network. Public Counsel has repeatedly invited Qwest to demonstrate 90 days of compliance, whether through the on-going “mock reporting” or on a going-forward basis. These 90 days of compliance without significant penalties would be unmistakable evidence that Qwest was opening its local markets to competition. This would also provide the opportunity for Public Counsel to support Qwest's application.

15. This Commission is well apprised of the volume of work and expense dedicated by Qwest, its competitors, state commissions, and other parties to the development of Qwest's OSS and QPAP. Such efforts need not be recited here. These efforts should be capitalized upon by this Commission, not only for the purposes to which they were directed, but also for purposes of

evaluating the public interest. Qwest's actual performance is the best measure of whether Qwest's §271 application is in the public interest.

## V. CONCLUSION

16. To date Public Counsel has directed the Commission's attention to a number of matters that raise disturbing questions regarding the scope of Qwest's alleged anti-competitive conduct. We continue to encourage the Commission to further investigate the outstanding allegations which are before the Commission, including the initial evidence presented by Public Counsel and others regarding these allegations. Ultimately, this Commission must decide whether Qwest's application is in the public interest.
17. It is Public Counsel's position that a pattern of anti-competitive conduct weighs against such a finding. Weighing in favor of Qwest's application would be any conclusions that the allegations made are un-founded and that Qwest was able to demonstrate through 90 days of acceptable performance as measured by the QPAP that it was acting in a pro-competitive manner. Without such findings by the Commission there is significant risk that Qwest's entry into the inter-LATA long distance market would be pre-mature. As a direct result of premature entry, Qwest could solidify its monopolistic market position in the residential and small business markets. This outcome would significantly diminish the prospects for future competition and effective choices for Washington's residential and small business consumers currently being served by Qwest. *Cooper* at pp.26-27.
18. A strong, and effective QPAP, as ordered by this Commission in its 30<sup>th</sup> and 33<sup>rd</sup> Supplemental Orders is also vital to the further development of a competitive market in Washington state. The weaker version proposed by Qwest in its recent compliance filing is not acceptable.
19. For the reasons stated above, Public Counsel respectfully requests that the Commission investigate the allegations regarding secret agreements and IRU agreements prior to reaching a public interest conclusion. Additionally, the Commission should require Qwest to demonstrate

ninety days of compliance with the terms of the QPAP ordered by the Commission, without statistically significant penalties, prior to considering a public interest finding. Until then, Qwest's §271 application should not receive this Commission's approval or the Commission's positive recommendation to the FCC. Until then, Public Counsel **cannot** support Qwest's §271 application as in the public interest.

RESPECTIFULLY SUBMITTED this 6th day of June, 2002.

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