BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH §271(C) OF THE TELECOMMUNICATIONS ACT OF 1996.	)))))	DOCKET NO. UT-003022

QWEST CORPORATION'S SUPPLEMENTAL POST-HEARING BRIEF ON PUBLIC INTEREST ISSUES

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TABLE OF CONTENTS

Qwest Corporation ("Qwest") submits this brief to demonstrate, following the supplemental hearing on the matter, that its application to provide interLATA service in Washington "is consistent with the public interest, convenience, and necessity," as required by 47 U.S.C. § 271(d)(3)(C).

INTRODUCTION

As Qwest has previously demonstrated,[1] the Federal Communications Commission ("FCC") has established a three-part standard for the public interest inquiry: (1) whether the application promotes competition in the local and long distance markets[2]; (2) whether there are adequate assurances that the local market will remain open after entry,[3] *e.g.*, pursuant to a performance assurance plan that lies within the FCC's "zone of reasonableness"[4]; and (3) whether there are any "unusual circumstances" in the state that would make BOC entry contrary to the public interest notwithstanding compliance with the competitive checklist.[5] The FCC has

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[1] See Qwest's Brief in Support of Its Showing of Compliance with the Track A Entry Requirements of 47 U.S.C. § 271(c)(1)(A) and the Public Interest Test of 47 U.S.C. § 271(d)(3)(C), In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996 (Sep. 7, 2001) at 26-28 ("Qwest's Opening Br."); Qwest's Reply Brief in Support of Its Showing of Compliance with the Track A Entry Requirements of 47 U.S.C. § 271(c)(1)(A) and the Public Interest Test of 47 U.S.C. § 271(d)(3)(C), In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996 (Sep. 14, 2001) at 11-14 ("Qwest's Reply Br.").

[2] See Memorandum Opinion and Order, Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, 16 FCC Rcd 6237 ¶ 268 (2001), modified, Sprint Communications Co. v. FCC, 274 F.3d 549 (D.C. Cir. 2001) ("SBC Kansas/Oklahoma Order"). See also Memorandum Opinion and Order, Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York, 15 FCC Rcd 3953 ¶ 427 (1999), aff'd sub nom. AT&T Corp. v. FCC, 220 F.3d 607 (D.C. Cir. 2000) ("Bell Atlantic New York Order"); Memorandum Opinion and Order, Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas, 15 FCC Rcd 18354 ¶ 416 (2000) ("SBC Texas Order").

[3] Bell Atlantic New York Order ¶¶ 422-23; SBC Texas Order ¶¶ 416-17.

[4] Bell Atlantic New York Order ¶ 433.

[5] SBC Kansas/Oklahoma Order ¶ 267. See also Bell Atlantic New York Order ¶ 423; Memorandum Opinion and Order, Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts, 16 FCC Rcd 8988 ¶ 233 (2001) ("Verizon Massachusetts Order").

repeatedly held that "compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest."[6] The public interest inquiry is thus simply "an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected."[7]

This Commission has now held two separate hearings on the public interest standard. During the initial proceeding a year ago, Qwest witness David L. Teitzel filed extensive testimony on the public interest in support of Qwest's entry into the interLATA market.[8] The Washington State Attorney General's Office, AT&T, WorldCom, XO Washington, Inc., and Electric Lightwave, Inc., also filed testimony and participated in those proceedings.[9] As Qwest demonstrated in its post-hearing briefs, the record of that proceeding demonstrated that competition is thriving in Washington and that Qwest's entry into the long distance market would benefit Washington consumers, given the absence of any "unusual circumstances."[10]

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[6] Bell Atlantic New York Order ¶ 422. See also SBC Kansas/Oklahoma Order ¶ 268 (reaffirming that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist"); Workshop 4, Par 2 Findings and Recommendation Report of the Commission and Procedural Ruling, In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996, Public Utility Comm'n of Oregon (June 3, 2002) at 43 ("Oregon Report") ("[S]atisfaction of the fourteen-point checklist is the most basic component of meeting the public interest standard.").

[7] Memorandum Opinion and Order, Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Vermont, 17 FCC Rcd 7625 at App. D ¶ 71 (2002) ("Verizon Vermont Order"); Memorandum Opinion and Order, Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana, CC Docket No. 02-35, FCC 02-147 at App. D ¶ 71 (rel. May 15, 2002) ("BellSouth Georgia/Louisiana Order") (same).

[8] See Direct Testimony of David L. Teitzel on Behalf of Qwest Corporation Re: Public Interest and Track A (May 16, 2001) ("Teitzel Direct") Exhibit 1055T; Rebuttal Affidavit of David L. Teitzel on Behalf of Qwest Corporation Re: Public Interest and Track A (June 21, 2001) ("Teitzel Rebuttal"), Exhibit 1063T.

[9] The Commission held a hearing on this issue in July 2001.

[10] See generally Qwest's Opening Br.; Qwest's Reply Br.

In March 2002, the Commission issued an order addressing the public interest. The Commission did not accept or reject Qwest's showing, but decided to "defer consideration of the public interest issue" and allowed the parties a further opportunity to submit additional testimony or comments.[11] The Commission made clear, however, that the parties could only raise public interest issues in this supplemental public interest proceeding that they could not have raised previously, and that the Commission "did not intend to reopen the record to allow parties to file new testimony and exhibits repeating the same information."[12] Accordingly, this "proceeding is limited to the issues of unusual circumstances that came up after the July workshop."[13]

The only parties that have submitted testimony or comments in this supplemental proceeding are the Public Counsel section of the Washington State Attorney General's Office ("Public Counsel") and AT&T.[14] None of their filings rebuts Qwest's prior demonstration that Qwest's application will promote competition in the local and long distance markets in Washington, and that there are no "unusual circumstances" in Washington.

While we address this supplemental testimony below, it is important to note at the outset that circumstances must truly be "unusual" in order to rebut the strong presumption in favor of interLATA entry once a BOC has provided the requisite assurance that its local markets are and will remain open to competition. The FCC has made clear, for example, that parties may not use the public interest inquiry to exact additional terms and conditions unavailable under the checklist

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[11] See Twenty-eighth Supplemental Order, Commission Order Addressing Workshop Four Issues: Checklist Item No. 4 (Loops), Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272 (Mar. 12, 2002) ¶ 129 ("Twenty-eighth Supplemental Order").

[12] Id. ¶ 133.

[13] Hearing Transcript, In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996 (May 13, 2002) at 7703:18-20 ("5/13/02 Tr.").

[14] See Comments of Public Counsel on the Public Interest and Request for Additional Investigations (Apr. 19, 2002) ("Public Counsel's Comments"), Exhibit 1625; Supplemental Affidavit of Diane F. Roth on Behalf of AT&T

items themselves, simply by repackaging the issue as an "unusual circumstance."[15] In other words, the public interest inquiry cannot be used to impose an unrestricted wish list of regulatory obligations on Qwest, or to authorize a standardless query on whether entry is justified. As the Chairman of the Colorado PUC put it, the public interest test "is not the *'et cetera'* at the end of the 14-point checklist."[16] Moreover, it is not sufficient merely to allege an assortment of "unusual circumstances" unsupported by any factual proof, and then to defer action until the BOC *disproves* all of these allegations. The Multistate Facilitator and a number of state commissions, state commission staffs, and hearing commissioners have agreed that the opponents of a section 271 application bear the burden of proving the existence of unusual circumstances.[17] As we now show, Qwest's opponents have failed to satisfy that burden in Washington.

Regarding Public Interest (Apr. 19, 2002) ("Roth Supp. Aff."), Exhibit 1604-T; See Surrebuttal Affidavit of Diane F. Roth on Behalf of AT&T Regarding Public Interest (May 8, 2002) ("Roth Surrebuttal Aff."), Exhibit 1649.

[15] See Verizon Vermont Order ¶ 61 (affirming that the FCC "may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B)" as part of the public interest analysis); Memorandum Opinion and Order, Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island, 17 FCC Rcd 3300 (2002) at ¶ 102 (same) ("Verizon Rhode Island Order").

[16] Order on Staff Volume VII Regarding Section 272, the Public Interest, and Track A, In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996, Colorado Public Utilities Comm'n, Docket No. 97I-198T, Decision No. R02-318-I, at 22 (Mar. 15, 2002) ("Colorado Order").

[17] See Liberty Consulting Group, Public Interest Report, In the Matter of the Investigation into Qwest Corporation's Compliance with § 271 of the Telecommunications Act of 1996, Seven State Collaborative Section 271 Workshops (Oct. 22, 2001) at 2 ("Multistate Facilitator's Public Interest Report"); Colorado Order at 29-30; Conditional Statement Regarding Public Interest and Track A, Iowa Dept. of Commerce Utilities Board, In Re: U S WEST Communications, Inc. n/k/a Qwest Corporation, Docket Nos. INU-00-2 SPU-00-11, at 13 (January 25, 2002) ("Iowa Report") (affirming the Facilitator's analysis of the burden of proof); Report on the Public Interest, Public Service Commission of Utah, In the Matter of the Application of QWEST CORPORATION, fka US WEST Communications, Inc., for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B), Docket No. 00-049-08, at 6 (Feb. 20, 2002) (concluding that "parties asserting that unusual circumstances exist bear the burden of proof"); First Order on Group 5A Issues, In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of Its Statement of Generally Available Terms, Docket No. 70000-TA0059, Wyoming Public Service Comm'n, at 7 (Jan. 30, 2001) ("Qwest does not, in our opinion, have the burden of raising and disproving every possible problem imaginable. Their burden is to provide the demonstrations required by the federal Act, but they need only to rebut any allegations by others as to special problems or circumstances which might warrant not granting the recommendation sought by Qwest here.") ("Wyoming Order") .

ARGUMENT

A. AT&T's Attempt to Rebut Qwest's Demonstration that its Application is Consistent with Promoting Competition in Long Distance Markets in Washington is Both Irrelevant and Unfounded

As noted above, the first prong of the public interest inquiry requires a BOC to demonstrate that its application "is consistent with promoting competition in the local and long distance telecommunications markets."[18] Qwest presented evidence in the initial public interest proceeding demonstrating that its section 271 application for Washington satisfied this aspect of the FCC's inquiry.[19]

Neither Public Counsel nor any party other than AT&T now challenges Qwest's showing on this point. Indeed, Public Counsel noted during the hearing that it "has not taken the position in this proceeding that Qwest's entry into the long distance market would be harmful to consumers . . . ."[20] AT&T, however, argues that Qwest's entry into the long distance market as a new competitor will not promote competition in that market. For this counterintuitive assertion, it cites a recent white paper by Dr. Lee L. Selwyn.[21] That paper is designed to rebut a recent study by Dr. Jerry Hausman of MIT, which Qwest had actually never introduced into the record of this case.[22]

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18 SBC Kansas/Oklahoma Order ¶ 268.

19 See Teitzel Direct at 51-65.

20 5/13/02 Tr. at 7713:12-15.

21 See Lee L. Selwyn, BOC Long Distance Entry Does Not Benefit Consumers (Mar. 2002), Exhibit H to the Roth Supp. Aff., at 1 ("Selwyn Paper"), Exhibit 1648.

22 As Ms. Roth acknowledged in her affidavit, Qwest submitted the study as evidence "in favor of its 271 application in other states." Roth Supp. Aff. at 9 (emphasis added). Mr. Teitzel later attached the study to his supplemental rebuttal affidavit. See Jerry A. Hausman, Gregory K. Leonard, J. Gregory Sidak, The Consumer-Welfare Benefits from Bell Company Entry into Long-Distance Telecommunications: Empirical Evidence from New York and Texas, available at http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID289851_code011106140.pdf?abstractid=289851 (Jan. 9, 2002) ("Hausman Study"), Exhibit 1656.

The Hausman study simply reinforces the unsurprising conclusions of other evidence in the record[23] that consumers are likely to benefit from lower long distance rates when a BOC enters the market and seeks to win market share by offering attractive prices. Dr. Hausman compared the state of competition in the long distance markets in New York and Texas after section 271 relief with that in two states that had not received section 271 relief, Pennsylvania and California, over the same period. He concluded that there is "statistically significant evidence that BOC entry enabled the average customer to reap a 9-percent savings on her monthly interLATA bill in New York and a 23-percent savings in Texas."[24] Applied to Washington, Dr. Hausman's formula predicts that Washington consumers would save as much as $147 million a year if Qwest enters the interLATA market. As Qwest has pointed out, "[t]he average Washington residential customer would save at least $73 per year in local and long distance charges, while the average small business customer will save more than $50 per year."[25]

Dr. Selwyn is clearly swimming upstream. The FCC presumes that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist."[26] For this reason, once a BOC proves that it has complied with the competitive checklist, it is "not require[d] . . . to make a substantial *additional* showing that its participation in the long distance market will produce public interest benefits."[27] The FCC takes that as given: "As a general matter, we believe that

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[23] See note 27 infra.

[24] Hausman Study at 3.

[25] Qwest Corporation's Supplemental Rebuttal Affidavit of David L. Teitzel on Public Interest Issues (May 1, 2002) at 23 ("Teitzel Supp. Aff."), Exhibit 1655.

[26] Bell Atlantic New York Order ¶ 428; SBC Texas Order ¶ 419; SBC Kansas/Oklahoma Order ¶ 268.

[27] Bell Atlantic New York Order ¶ 428 (emphasis in original); see also id. ¶ 427 (noting Congress' desire to condition section 271 approval solely on whether the applicant has opened its local market to competition). Although it was under no obligation to do so, Qwest nevertheless presented evidence during the initial public interest proceeding showing that its entry into the long distance market in Washington will provide substantial benefits to

additional competition in telecommunications markets will enhance the public interest."[28] The D.C. Circuit has also recognized the benefits of a BOC's entry into the long distance market.[29]

But Dr. Selwyn's specific criticisms of the Hausman study are simply incorrect in any event. Dr. Selwyn does not demonstrate that he has any formal training in econometrics. Nor did he attempt to rerun the Hausman model to verify its accuracy. And contrary to Dr. Selwyn's suggestions,[30] a trained econometrician can run the model upon which "Dr. Hausman based his report, using standard econometric software (*e.g.*, SAS), and obtain the same results."[31] Indeed, the "study uses exactly the same data source that AT&T has used in its own economic studies in the past."[32] Nor was Dr. Hausman's choice of control states (Pennsylvania for New York, and California for Texas) "entirely arbitrary."[33] The study makes clear that the control states were chosen based on their similarity in size, geography, and number and size of LATAs to the test state as well as the commonality of the BOC (*i.e.*, New York and Pennsylvania are served by Verizon, while Texas and California are served by SBC).[34]

Finally, Dr. Selwyn's charge that any decreases in long distance rates in New York and Texas during the time period covered by Dr. Hausman's study are the result of access charge

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consumers, by increasing competition in the long-distance market. See Teitzel Direct at 54-57. This included support by the Grant County Economic Development Council and a study from the Telecommunications Research and Action Center, a consumer interest group that compiles information about long distance competitors and their pricing practices, finding that New York consumers have realized savings of up to $700 million in combined local service and long distance charges annually as a result of Verizon's entry into the long distance market in that state. Id.

28 Bell Atlantic New York Order ¶ 428.

29 See AT&T Corp. v. FCC, 220 F.3d 607, 632-33 (D.C. Cir. 2000).

30 See Selwyn Paper at 1-2, 5.

31 See Teitzel Supp. Aff. at 23.

32 Id. Dr. Hausman's study is based on a random survey of telephone bills collected by PNR and Associates, a research firm that has been collecting this data for approximately 10 years, and this data is publicly available. Id.

33 Selwyn Paper at 11.

34 Hausman Study at 5.

reductions and not the BOC's entry into the market[35] ignores what the study actually says. All of the states involved in Dr. Hausman's study were affected equally by any FCC reductions in *inter*state access charges. As Dr. Hausman points out, even accounting for such reductions, long distances prices in New York still fell relative to Pennsylvania 9-14% and 19-24% in Texas relative to California.[36] Although Dr. Selwyn also speculates that reductions in *intra*state access charges may have caused some portion of these reductions, he fails to provide any analysis of any intrastate access charge reductions in any of the four states. Significantly, for example, there were none in New York during the relevant period.[37]

Ultimately, AT&T's argument boils down to a claim that the long distance market is already competitive enough and that more competition in that market will not benefit consumers.[38] As noted above, this argument runs counter to the basic structure of the 1996 Act, which was designed to "open[] *all* telecommunications markets to competition."[39] Recent events in Washington only underscore the wisdom of that policy judgment. In early 2002, the three largest long distance carriers (AT&T, WorldCom, and Sprint) announced lockstep price hikes for Washington consumers.[40] For example, AT&T's twenty-three million basic residential customers will now pay 35 cents a minute — 17% more — for daytime calling.[41] AT&T's evening rates have similarly been increased, from 25 to 29.5 cents a minute.[42] It strains the outer bounds of

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35 Selwyn Paper at 15-16.

36 Hausman Study at 8-9.

37 See Changes in Intrastate Access Charges by State (1999-2001), available at http://www.nrri.ohio-state.edu/programs/telcom/pdf/Change_inintralata_access_charg.pdf.

38 Roth Supp. Aff. at 11.

39 Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (emphasis added).

40 See AT&T Increases Universal Service Fee Because of 'Lag' Problem, Communications Daily, Jan. 3, 2002, Vol. 22, No. 2 ("AT&T Increases Fee").

41 See AT&T Increases Fee.

42 Id.

credibility to deny that Qwest's entry into this market will promote competition for the benefit of consumers.

B. Neither the Public Counsel Nor AT&T Has Demonstrated That There Are Any "Unusual Circumstances" That Would Make Qwest's Entry Into the Long-Distance Market Contrary to the Public Interest

Public Counsel raises two alleged "unusual circumstances" that it claims warrants consideration by the Commission. AT&T also raises three others that clearly have no bearing on this proceeding.

1. Touch America

The Public Counsel notes (as does AT&T) that Touch America has filed two complaints against Qwest with the FCC, and urges the Commission to conduct its own investigation into those same issues.[43] However, Touch America's as-yet-unadjudicated complaints do not involve local competition issues at all. They involve the scope of the FCC's Qwest-U S WEST merger approval order and related federal law questions already appropriately before the FCC.

Touch America alleges that Qwest's in-region dark fiber and lit fiber IRU transactions (1) amount to the provision of in-region interLATA services in violation of section 271, and (2) violate the terms of the FCC's U S WEST-Qwest merger orders regarding divestiture of such services. The FCC has made clear that disputes arising from BOC merger orders that are currently being considered in its complaint dockets are best resolved in those other pending dockets, not imported into the consideration of section 271 applications.[44] In its most recent section 271 order, the FCC also expressly rejected the idea that the section 271 process should "resolve all

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[43] See Public Counsel's Comments at 2-3; see also Roth Supp. Aff. at 7.

[44] See Memorandum Opinion and Order, Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut, 16 FCC Rcd 14147 ¶ 79 (2001) (noting that concerns with "Verizon's compliance with the conditions of the Bell Atlantic/GTE merger . . . [should] be appropriately addressed in the Commission's" merger audit proceedings, not the public interest inquiry).

complaints, *regardless of whether they relate to local competition*, as a precondition to granting a section 271 application."[45] And it again refused to address issues in a section 271 docket that are related to "open issues before [the] Commission" in another proceeding.[46] The Staff of the Arizona Commission recently found in its Report on the public interest that, because "[b]oth [Touch America] Complaints are currently pending with the FCC and no ruling has yet been rendered," it "[could not] conclude at this time that granting Qwest 271 relief is inconsistent with the public interest."[47] The Montana and New Mexico Commissions have reached similar conclusions.[48]

In any event, Touch America's complaints are without merit. As Qwest has demonstrated to the FCC, the FCC previously approved the type of Qwest transactions at issue, in light of Qwest's formal Divestiture Compliance Report detailing the aspects of its plans for complying with section 271 prior to the merger. That report specifically stated that Qwest was not planning to unwind any pre-existing sales of IRUs "both for the conveyance of dark fiber and for the conveyance of lit fiber capacity," and that it "intend[ed] to continue selling similar telecommunications facilities in the future."[49] As the FCC subsequently concluded: "Based upon

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[45] See Memorandum Opinion and Order, In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, FCC 02-147, CC Docket No. 02-35, ¶ 305 (rel. May 15, 2002) ("BellSouth Georgia/Louisiana Order") (emphasis added).

[46] Id. ¶ 208.

[47] Arizona Staff Report ¶ 330.

[48] See Preliminary Report on Qwest's Compliance with the Public Interest, In the Matter of the Investigation into Qwest's Corporation's Compliance with Section 271 of the Telecommunications Act of 1996, Montana Public Service Comm'n, Docket No. D2005.70, at 25 (Feb. 14, 2002) (finding that "the FCC is the proper regulatory agency to decide the complaint and the complaint's significance vis-à-vis Qwest's expected 271 bid"); Order, In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process, New Mexico Public Regulation Comm'n, Utility Case No. 3269 (Apr. 16, 2002) at 8-9 (rejecting New Mexico Attorney General's request to address Touch America's complaints in public interest proceeding).

[49] Divestiture Compliance Report, Qwest Communications International Inc. and U S WEST, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, FCC CC Docket No. 99-272, at 28-30 (filed Apr. 14, 2000).

the description of the customers, services and assets being transferred to Touch America," the "proposed divestiture . . . will ensure that Qwest will not provide prohibited in-region interLATA services."[50] Qwest has also demonstrated to the FCC, in response to Touch America's complaints, that the sale of IRUs constitutes the conveyance of network facilities, not the provisioning of "telecommunications services." As the FCC has held, "the one-time transfer of ownership and control of an interLATA network is not an interLATA service, which means it falls entirely outside the section 271/272 framework that governs interLATA services."[51] The FCC is reviewing these matters to determine whether Qwest's interpretation of the FCC's own orders, and the provisions of federal law, are reasonable. As noted above, it is wholly inappropriate to smuggle these issues into a section 271 proceeding.

2. Unfiled Agreements

The Public Counsel and AT&T have also cited a pending complaint filed by the Minnesota Department of Commerce ("Minnesota DOC") with the Minnesota Commission alleging that Qwest and several CLECs entered into agreements settling wholesale service disputes which, in the Minnesota DOC's view, should have been filed with the Minnesota Commission pursuant to 47 U.S.C. § 252(a).[52] Public Counsel and AT&T urge the Commission to conduct an investigation into the possibility that Qwest has similar agreements in Washington and delay a decision in this docket until that investigation is complete.[53] As noted at the hearing, AT&T's supplemental

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[50] Memorandum Opinion and Order, Qwest Communications International Inc. and U S WEST, Inc., 15 FCC Rcd 11909 ¶¶ 5, 13 (2000).

[51] See, e.g., Second Order on Reconsideration, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 12 FCC Rcd 8653 ¶ 54 n.110 (1997).

[52] See Public Counsel's Comments at 3-5; Roth's Supp. Aff. at 3-4.

[53] See Public Counsel's Comments at 5; Roth's Supp. Aff. at 4. In support of his request for an investigation of this issue, Public Counsel notes that "a similar concern" arose during the Commission's review of the U S WEST-Qwest merger. See Public Counsel's Comments at 4-5. That dispute, however, involved a question of whether or not an agreement between AT&T and U S WEST/Qwest could be marked as confidential under state law. See Eighth Supplemental Order Denying Petitions for Leave to Withdraw; Denying Confidential Status to Bench Request

testimony on this point amounts simply to "bringing us information about what's going on in the Minnesota Commission . . . ."[54] AT&T did not introduce any facts on the matter and did not make any attempt to explain why Qwest was required to file the Minnesota agreements under section 252 of the Act, much less how any such requirement is relevant to section 271. Indeed, AT&T's witness has not even reviewed Qwest's unfiled Minnesota agreement or attempted to determine whether section 252(a) of the 1996 Act actually requires filing of it.[55]

AT&T's only real complaint about these Minnesota agreements is that they were not filed.[56] But the issue of whether or not Qwest was obligated to file the agreements is solely a question of whether Qwest has properly interpreted section 252. The relevant portion of section 252 provides only limited guidance on which types of intercarrier agreements must be filed, and the precise contours of the state filing obligation are a matter of good-faith legal dispute. The FCC has repeatedly made clear that a section 271 docket is not the proper place to resolve this kind of dispute or ambiguity concerning the precise scope of a BOC's section 251 and 252 obligations:

> As the Commission stated in the *SWBT Texas Order*, despite the comprehensiveness of our local competition rules, there will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors — disputes that our rules have not yet addressed and that do not involve *per se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally

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Response and Providing Notice, In re Application of U S WEST, Inc. and Qwest Communications International, Inc., Docket No. UT-991358 (June 19, 2000). It did not concern Qwest's filing obligations under section 252.

[54] 5/13/02 Tr. at 7670:2-5.

[55] Id. at 7648:10-14, 7646:16-7647:16.

[56] While AT&T also raised concerns regarding the possibility that these agreements included a commitment not to oppose Qwest's section 271 applications, Ms. Roth admitted under questioning AT&T itself actually entered into a similar agreement concerning U S WEST's merger with Qwest, id. at 7661:1-7662:8, and that doing so here was not itself a problem. Id. at 7663:8-22.

> required to resolve all such disputes as a precondition to granting a section 271 application. . . . [Section 271 proceedings] are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability. . . . [F]ew of the substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing; they rely for their content on the Commission's rules.[57]

In its most recent section 271 order, the FCC reiterated this policy in a strikingly similar context. It rejected a challenge to BellSouth's checklist showing because the BellSouth policy at issue had been rescinded,[58] because the FCC refused to use the section 271 process "to settle new and unresolved disputes about the precise content of an incumbent LEC's obligations to its competitors,"[59] and because the issue concerns "open issues before [the] Commission" in another proceeding and that, given the "specialized nature of the section 271 process," such issues are better addressed in other proceedings.[60] All three of these same policy judgments are applicable here, and compel the same result.[61]

Qwest has petitioned the FCC for a declaratory ruling settling this ambiguity,[62] which the FCC has set for comment and agreed to resolve. While the FCC's decision is pending, Qwest has voluntarily committed to file with the Commission all future contracts, agreements, and letters of understanding with CLECs that create obligations to meet the requirements of sections 251(b) or

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57 SBC Kansas/Oklahoma Order ¶ 19 (footnotes omitted). See also SBC Texas Order ¶¶ 23-27.

58 BellSouth Georgia/Louisiana Order ¶ 208.

59 Id. (citing SBC Kansas/Oklahoma Order ¶ 19).

60 Id.

61 See also SBC Kansas/Oklahoma Order ¶ 267; Facilitator's Public Interest Report at 9 (finding that "the public-interest standard" is not "a punitive one, but rather a forward looking, or predictive one."); Oregon Report at 46 (quoting Multistate Facilitator); Colorado Order at 44-45 (finding that "[t]he public interest test is prospective in nature . . . .").

62 See Petition for Declaratory Ruling of Qwest Communications International Inc., In the Matter of Qwest Communications International, Inc., Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1), FCC, WC Docket 02-89, filed Apr. 23, 2002, Exhibit 1567.

(c).[63] Qwest is also forming a committee of senior managers (at the Executive Director level and above) from its Legal Affairs, Public Policy, Wholesale Business Development, Wholesale Service Delivery, and Network divisions to review all such future agreements involving Qwest's in-region wholesale activities and ensure that Qwest complies with both the above commitment and any ruling the FCC issues on Qwest's petition.[64] In light of all of these undertakings, and the limited scope of the section 271 process as outlined by the FCC, this dispute is irrelevant here.[65]

3. AT&T's Other Complaints

AT&T's remaining new issues consist of two complaints filed by AT&T itself — one of which AT&T admits is unrelated to Washington, and the other of which it filed only two weeks after the Commission's order establishing this supplemental proceeding — and an *internal* Qwest email discussing Covad's decision to declare bankruptcy.

a) UNE-P Testing

AT&T claims that a recent systems testing dispute between AT&T and Qwest in Minnesota is somehow relevant to this inquiry because it is evidence of "pattern of anti-competitive behavior."[66] This dispute arose from an AT&T request to perform extensive systems testing on one thousand UNE-P lines in that state.[67] This is not a new issue at all: AT&T already

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[63] See Letter from Mr. R. Steven Davis, Sr. Vice President, Policy and Law, Qwest Corporation, to Ms. Carole Washburn, Executive Secretary, Washington Utilities and Transportation Commission (May 9, 2002), Exhibit 1658.

[64] See 5/13/02 Tr. at 7611:10-7612:3.

[65] Finally, AT&T has filed motions in nine of Qwest's in-region states requesting the re-opening of their section 271 proceedings seeking to delay the section 271 proceedings in those states pending an undefined investigation into this matter. All five of the nine states to have addressed AT&T's motion — Colorado, Nebraska, North Dakota, Montana, and Wyoming — have now ruled on and denied the motion either in written orders, see, e.g., Notice of Commission Action, In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996, Montana Public Service Comm'n, Docket No. D2000.5.70 (June 3, 2002), or orally.

[66] See Roth Supp. Aff. at 4-7.

[67] See Order Granting Temporary Relief and Notice and Order for Hearing, In the Matter of the Complaint of AT&T Communications of the Midwest, Inc., against Qwest Corp., Docket No. P-421/C-01-391 (Apr. 30, 2001), Exhibit A to Roth Supp. Aff.

raised it in the previous public interest hearing a year ago.[68] It also does not concern any complaint or dispute in Washington: AT&T admits that it has never asked Qwest to conduct such testing in Washington.[69] AT&T has nevertheless already pursued the issues raised in the Minnesota dispute, not just here in the public interest docket, but also in both the checklist item 2 and general terms and conditions dockets in this state.[70] AT&T requested SGAT language in Washington entitling it to such testing in the checklist item 2 docket, Qwest opposed it, and the Commission currently has the matter under consideration.[71] The FCC has made it clear that section 271 does not permit the public interest inquiry to give the parties a second chance to relitigate the checklist requirements:

> [S]ection 271(d)(4) of the Act states in full that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." Accordingly, although the Commission must make a separate determination that approval of a section 271 application is "consistent with the public, interest, convenience, and necessity," *it*

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68 See, e.g., Affidavit of Mary Jane Rasher, In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996 (June 7, 2001) ("Rasher Aff.") at 16; Brief of AT&T Regarding Public Interest, In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996 (Sept. 6, 2001) at 20.

69 5/13/02 Tr. at 7670:22-7671:5.

70 See 5/13/02 Tr. at 7631:17-7632:7.

71 See Thirteenth Supplemental Order, Initial Order (Workshop Three): Checklist Item No. 2, 5, and 6, In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996 (July 24, 2001) ("Initial Workshop Three Order") at 8-9 (summarizing AT&T's position and its request for specific language); Twenty-Fourth Supplemental Order, Commission Order Addressing Workshop Three Issues: Checklist Items Nos. 2, 5, and 6, In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996 (December 2001), at 3 (adopting this conclusion of the Initial Workshop Three Order without modification).

In response to AT&T's concerns about comprehensive production testing, Qwest added a provision originally proposed by the Multistate Facilitator to section 12.2.9.8 of the Washington SGAT specifically designed to prevent such a dispute from ever arising in this state. See Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services Provided by Qwest Corporation in the State of Washington, Third Revision (Jan. 29, 2002), § 12.2.9.8. The Facilitator suggested that his proposal "should preclude such a dispute in the future." Multistate Facilitator's Public Interest Report at 9; see also 5/13/02 Tr. at 7640:23-7641:2. Qwest later removed this provision from the SGAT at the request of the parties. See Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services Provided by Qwest Corporation in the State of Washington, Fourth Revision (April 5, 2002). In the Fourth Revision (as well as the Fifth Revision, filed on April 19, 2002), § 12.2.9.8 simply says "Reserved for Future Use."

> *may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B).*[72]

For this reason, the Oregon Commission has also rejected AT&T's attempt to bring this testing dispute into the public interest inquiry, noting that it had "previously addressed the scope of SGAT-required testing" in the checklist item 2 proceeding in that state.[73]

The only new elements of this dispute that AT&T can point to are recent decisions by the Minnesota ALJ and the Minnesota Commission in the same docket. In fact, the Staff of the Minnesota PUC disagreed with the ALJ's findings of misconduct in their entirety, and recommended that the PUC "[f]ind that Qwest did not act in bad faith as alleged by AT&T and dismiss the complaint."[74] As Ms. Roth herself acknowledged in the hearing,[75] the Staff's recommendation demonstrates that reasonable minds can differ about the conduct of Qwest and AT&T during the course of this dispute. Moreover, while the full Commission affirmed the finding of liability, it reduced the overall level of the fines that the ALJ recommended, and a majority of Commissioners agreed that AT&T never established that Qwest's conduct harmed CLECs, or AT&T and its putative local entry plans, in any way.[76]

AT&T's attempt to smuggle the Minnesota testing dispute into the public interest inquiry has been repeatedly rejected in other section 271 proceedings. The Multistate Facilitator, for example, found that the Minnesota dispute "do[es] not provide substantial evidence of a

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72 Verizon Rhode Island Order ¶ 102 (emphasis added) (footnotes omitted).

73 Oregon Report at 44 n.140.

74 Minnesota Public Utilities Commission Staff Briefing Papers (April 4, 2002), at 15.

75 See 5/13/02 Tr. at 7634:23-7635:5.

76 See Hearing Transcript, In the Matter of the Complaint of AT&T Communications of the Midwest, Inc., Against Qwest Corporation, Docket No. P-421/C-01-391 (May 14, 2002), at 20:15-18 (statement of Commissioner Koppendrayer) ("When elephants dance[], only the grass suffers. In this case, even the grass didn't suffer. It was two elephants kicking up a lot of dust. The dust has settled, and you wasted a lot of money."); see also id. at 35:4-17 (statement of Commissioner Garvey); 37:11-15 (statement of Commissioner Reha).

predictive, patterned refusal or inability of Qwest to comply with its wholesale service obligations," and does not constitute "the kind of unique circumstances that the FCC believes it takes to support a finding that Qwest's entry into the in-region, interLATA market would contravene the public interest."[77] Likewise, the Chairman of the Colorado PUC specifically considered the Minnesota ALJ's decision[78] and declared that this dispute, together with the rest of AT&T's evidence of alleged misconduct, failed to demonstrate "any 'pattern' of anticompetitive behavior in Colorado that is foreseeable to take place in the future or implicate welfare enhancement."[79] Indeed, the Chairman went on to say that AT&T's efforts merely "highlight[] the heightened expectations that parties have in a public interest inquiry to sling as much as they can on the wall to see what will stick."[80] Idaho, Iowa, and Wyoming have also found the Minnesota UNE testing complaint to be irrelevant to their public interest inquiries,[81] and Qwest respectfully asks this Commission to do the same.

b) Local Service Freezes

AT&T also claims that a recent complaint filed by AT&T about Qwest's implementation of the local service freeze required by Washington state law[82] is somehow relevant to this inquiry,

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77 Multistate Facilitator's Public Interest Report at 9.

78 Colorado Order at 43.

79 Id. at 45.

80 Id. at 44.

81 See, e.g., Commission Decision on Qwest Corporation's Compliance with Section 271 Public Interest and Track A Requirements and Section 272 Standards, In the Matter of U S West Communications, Inc.'s Motion for an Alternative Procedure To Manage Its Section 271 Application, Case No. USW-T-00-3 (April 19, 2002), at 10 (finding that the Minnesota testing dispute (and other public interest issues) had been "properly addressed in the Facilitator's Report") (Idaho); Iowa Report at 27 (finding that "none of Qwest's past actions, as noted in this record [including the Minnesota testing dispute], should be considered predictive of future behavior or contrary to the public interest") (Iowa); First Order on Group 5A Issues, In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of Its Statement of Generally Available Terms, Docket No. 70000-TA-00-599 (Jan. 30, 2001), at 7 (stating that, contingent upon certain QPAP revisions and completion of the OSS test, the Commission "agree[s] with the comments of the Consultant in the Workshop Report that Qwest has satisfied the generalized public interest requirement of the federal Act") (Wyoming).

82 See WAC 480-120-139

and demands that "no finding on public interest be made until after that complaint proceeding is concluded."[83] Indulging AT&T's request for delay of the section 271 process based solely on the existence of a complaint *filed by AT&T after this proceeding was opened* would create improper incentives for Qwest's opponents to manufacture "unusual circumstances" by filing meritless complaints and then demanding that the Commission delay its section 271 recommendation until those complaints are resolved.[84]

AT&T's demand also runs contrary to the FCC's clear guidance on this issue: In its most recent section 271 order the FCC rejected a CLEC's claim that BellSouth's section 271 applications for Georgia and Louisiana were not in the public interest because of that BOC's use of local service freezes, holding that the CLEC had "not provided sufficient evidence to support its allegation that BellSouth uses its local service freeze in a discriminatory manner."[85] Similarly, in this proceeding AT&T has merely pointed to the existence of its complaint and has made little attempt to explain how Qwest's implementation of the freezes is contrary to the Washington law — which, after all, *requires* such freezes. In any event, Qwest strongly denies AT&T's allegations in this matter[86] and, as AT&T has admitted,[87] this Commission will have every opportunity to review AT&T's allegations in its separate proceeding on this matter (WUTC Docket No. UT-020388). The Commission can thus assure itself that the local service freezes have been and will be implemented in a way that protects the interests of Washington consumers.

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83 Roth Supp. Aff. at 8.

84 In fact, AT&T filed its complaint on March 29, 2002, see Roth Supp. Aff. at 8, only 17 days after the Commission released its decision granting the parties the opportunity to raise any "new information" on the public interest inquiry in this supplemental proceeding. See Twenty-Eighth Supplemental Order ¶ 133.

85 See BellSouth Georgia/Louisiana Order ¶ 304.

86 See Qwest Corporation's Answer to Complaint, AT&T Broadband Phone of Washington, LLC v. Qwest Corporation (Apr. 11, 2002).

87 Roth Supp. Aff. at 8.

c) Qwest's Internal E-mail Concerning Covad

Finally, AT&T argues that an internal Qwest e-mail gloating over Covad's decision to file for Chapter 11 bankruptcy protection is somehow evidence of a Qwest effort to destroy its competitors.[88] However, the e-mail was sent only to Qwest employees, and *not* to any customers, financial analysts, venture capitalists, or any other person or entity who might be prejudiced by the news or Qwest's reaction, and it did not mention any act or omission on behalf of Qwest that would have caused Covad's problems. Indeed, the administrative law judge in Oregon noted that, "if this is an internal document . . . I don't consider it problematic with respect to Qwest's outside behavior . . . ,"[89] and the Oregon Commission did not accept AT&T's claim that this e-mail is relevant to the public interest inquiry in its recent report on section 271 issues.[90] In any event, the Qwest employee that drafted and sent the e-mail had no authority to establish Qwest policy, and, as AT&T concedes,[91] was reprimanded for sending the e-mail because her comments violated Qwest's policies.

CONCLUSION

For all the reasons discussed here and in Qwest's prior briefs on this matter, Qwest respectfully asks the Washington Utilities and Transportation Commission to find that Qwest has satisfied all the requirements of 47 U.S.C. § 271(d)(3)(C).

DATED this 7th day of June, 2002.

Qwest Corporation

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88 See Roth Supp. Aff. at 8-9.

89 Transcript, In the Matter of the Investigation into Qwest Corporation's Compliance with § 271(c) of the Telecommunications Act of 1996 (Org. P.U.C., Sep. 10, 2001) at 152:12-18.

90 See Oregon Report at 43, 45-46.

91 See Roth Supp. Aff. at 9 n.5.

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