

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Montana, Utah, Washington, and Wyoming)	WC Docket No. 02-189
)	
)	

July 26, 2002

**COMMENTS OF THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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Chairwoman

Richard Hemstad,
Commissioner

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I. EXECUTIVE SUMMARY

The Washington Utilities and Transportation Commission (WUTC) recommends that the Federal Communications Commission (Commission) grant the application of Qwest Communications International, Inc. (Qwest)¹ for authority under section 271 of the Telecommunications Act of 1996 (the Act),² to provide in-region, interLATA services in the state of Washington. Our comments culminate a two and one-half year process to ensure that Qwest has fairly opened up its network to use by competitors and would-be competitors in the local exchange market in Washington State. The extensive record of our proceedings, which Qwest has included in its application, should provide this Commission much of the information it needs to evaluate Qwest's application, and to determine, as we have, that Qwest's local exchange market is fully open to competition and that Qwest has satisfied the requirements of section 271 of the Act.

Section II of these comments summarizes the collaborative and adjudicative processes by which the WUTC evaluated Qwest's compliance with the section 271 requirements. An administrative law judge and the three WUTC commissioners held over 45 days of workshops and hearings, heard extensive testimony, admitted over 1800 exhibits, and allowed the parties to file numerous briefs and comments, and to present argument concerning Qwest's compliance. The WUTC fully addressed the issues, entering over 40 orders, including orders on reconsideration, over the course of the proceeding.

¹ When the WUTC began its proceeding to consider compliance with the requirements of section 271, the Bell operating company, or BOC, in Washington state was U S WEST Communications, Inc. (U S WEST). After the proceeding began, U S WEST merged with Qwest and has become known as Qwest Corporation. For consistency and ease of reference we will refer to the BOC as Qwest in these comments.

² Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

In Section III of our comments, we summarize our findings that Qwest has met the requirements of section 271(c)(1)(A), or Track A, and has demonstrated the presence of facilities-based competition in the local exchange market in Washington State.

In Section IV of our comments, we summarize our findings that Qwest has satisfied the 14-point competitive checklist in section 271(c)(2)(B). Included in that discussion is our review of KPMG Consulting’s (KPMG) final report on the third-party OSS testing process and Qwest’s change management process. We find that Qwest performed satisfactorily in the third-party OSS testing and that Qwest has an adequate change management process, sufficient to allow Qwest to “communicate with competing carriers regarding the performance of, and changes in, the BOC’s OSS.”³

Section V of our comments summarizes our conclusions that Qwest has satisfied the requirement of section 271(d)(2)(B), allowing us to make a predictive judgment that Qwest will comply with the requirements of section 272 if this Commission grants Qwest’s application for section 271 authority.

Finally, Section VI of our comments addresses the public interest requirement in section 271(d)(3)(C) of the Act. Using the guidelines provided by the Commission, we recommend that the Commission find that an application by Qwest for in-region, interLATA service in Washington State is in the public interest. Qwest has opened its local exchange market to competition, has developed a performance assurance plan that will provide reasonable assurance

³ *In the Matter of Application by Verizon New Jersey 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 New Jersey*, Memorandum Opinion and Order, WC Docket No. 02-67, FCC 02-189, App. C, ¶41 (rel. June 24, 2002) (*Verizon New Jersey Order*).

that Qwest will continue to abide by the requirements of section 271, and that there are no unusual circumstances that would “frustrate the congressional intent that markets be open.”⁴

We recommend that this Commission permit Qwest to enter the interLATA market in Washington State, and allow consumers in Washington to experience the “benefits that flow from competition in telecommunications markets.”⁵

II. PROCEDURAL HISTORY BEFORE WUTC

The Washington Utilities and Transportation Commission (WUTC) is an agency of the State of Washington, composed of three member commissioners appointed by the governor. The WUTC has statutory authority to regulate the rates and conditions of service of telecommunications companies operating within the state. Pursuant to section 271(d)(2)(B) of the Act, and the Commission’s recommendations that states engage in “an exhaustive and rigorous investigation into the BOC’s compliance with the checklist,”⁶ the WUTC has completed a two and one-half year long adjudicative process to verify whether Qwest has complied with the requirements of section 271 of the Act.

In March 2000, the WUTC opened Docket No. UT-003022 to address Qwest’s compliance with the requirements of section 271, and Docket No. UT-003040 to address the WUTC’s review of Qwest’s SGAT. The WUTC subsequently consolidated the two dockets. The WUTC invited the participation of all interested persons in the consolidated proceeding, sending notices to all persons and companies included on the WUTC’s telecommunications

⁴ *Id.*, ¶71.

⁵ *Id.*, ¶70.

⁶ *In the Matter of Application of 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*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, ¶51 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

industry and counsel lists. A list of participating companies and entities is included as Appendix 1 to these comments.

From June 2000 through August 2001, the WUTC held four workshops, presided over by an administrative law judge, addressing the 14 competitive checklist items and provisions of the SGAT addressing checklist issues, as well as the Track A, section 272, and public interest requirements of section 271. The parties to the WUTC consolidated proceeding were simultaneously engaged in collaborative workshops in many other states in Qwest's operating territory. Many of the discussions and agreements reached in other state workshops were helpful in resolving disputes before the WUTC and were incorporated into the record in our consolidated proceeding. Qwest's Performance Assurance Plan (QPAP) was initially addressed in hearings in the Multi-state Proceeding.⁷

The WUTC held hearings in December 2001, and in April, May, and June 2002, presided over by an administrative law judge and the three Commissioners, to address contested issues concerning the QPAP, Qwest's commercial performance data, verification of that data, Qwest's change management process, the public interest requirement, and KPMG's final report on the third-party OSS test. During the hearings in April, May, and June 2002, the parties presented argument to the WUTC concerning whether Qwest's SGAT and QPAP complied with WUTC orders.

⁷ Seven states--Iowa, Utah, North Dakota, Wyoming, Montana, Idaho, and New Mexico—have held a joint proceeding, known as the Multi-state Proceeding, similar to the section 271 proceeding in Washington state to evaluate Qwest's SGAT and Qwest's compliance with section 271 of the Act. Washington state elected to participate in the Multi-state Proceeding to consider Qwest's QPAP, and to treat the Multi-state facilitator's report on the QPAP hearings as an initial order. *See 30th Supplemental Order*, ¶12 (Qwest Application, App. C, Vol. 1, Tab 13).

In addition to the adjudicative process, in September 1999, Qwest and the Regional Oversight Committee (ROC),⁸ of which the WUTC is a member, agreed to pursue a regional approach for OSS third-party testing. Among other vendors, the ROC hired KPMG as the administrator for the OSS test. Testing began in April 2001, and KPMG issued its final report on May 29, 2002.

In advance of each workshop or hearing, Qwest would file testimony and evidence supporting its assertion of compliance with specific section 271 requirements, and interested parties would file responsive testimony and evidence. Qwest had the opportunity to file rebuttal testimony and evidence. An administrative law judge presided over the workshops and hearings, which were fully transcribed. Witnesses were sworn and cross-examined. When discussing SGAT provisions, the parties engaged in collaborative discussions to arrive at consensus SGAT language.

Following each workshop or hearing, the parties filed comments or briefs on disputed issues. The administrative law judge entered initial orders with recommended decisions for each contested issue addressed in the workshop. The parties presented oral argument before the WUTC on any issues they continued to dispute after the initial order was entered. The WUTC issued final orders on these contested issues. When the commissioners presided over hearings, the WUTC entered final orders following the hearing. Several parties subsequently petitioned for reconsideration of various topics addressed in final orders, and the WUTC has issued orders on reconsideration on those issues. To assist the Commission in its evaluation of Qwest's application, we have attached to our comments a table, Table 1, which identifies the relevant

⁸ The Regional Oversight Committee, or ROC, is composed of representatives of the regulatory commissions in the states in which Qwest provides local exchange service.

WUTC orders and portions of the orders addressing each requirement of section 271. Qwest has included these initial and final orders in Appendix C to its application.

The WUTC has engaged in an extensive and thorough investigation of Qwest's compliance with the requirements of section 271. Overall, we have held 45 days of workshops and hearings and numerous prehearing conferences in the consolidated section 271/SGAT proceeding, which are reported in 59 volumes of transcripts. We have admitted approximately 1800 exhibits into evidence and entered over 40 orders over the course of the proceeding. Our consolidated section 271/SGAT proceeding has resulted in an extensive and detailed SGAT primarily developed through collaborative discussions between the parties, as well as a performance assurance plan designed to ensure that Qwest will continue to adhere to the requirements of section 271 if the Commission grants Qwest section 271 authority. The record of our proceeding fully supports our recommendation that the Commission grant Qwest's application for section 271 authority in Washington State.

III. SECTION 271(c)(1)(A) – Track A Requirements

As a result of testimony and evidence presented in the fourth workshop, we found that Qwest had demonstrated the presence of facilities-based competition in the local exchange market in Washington under section 271(c)(1)(A), or Track A.⁹ Qwest reported that as of March 2001, it had entered into 81 binding and approved interconnection agreements with CLECs in Washington, had leased 58,782 unbundled loops to CLECs, and estimated that CLECs provided 66,987 access lines to customers through their own facilities and 66,265 access lines through resale.¹⁰ AT&T objected to the methodology Qwest used to develop its Track A data. No other party, however, contested whether Qwest demonstrated compliance with the Track A

⁹ 20th Supplemental Order, ¶490 (Qwest Application, App. C, Vol. 1, Tab 7).

requirements.¹¹ In Appendix A to the *39th Supplemental Order*, we reported the number of aggregated CLEC customer accounts and access lines in Washington State at the end of 2001, finding that the data also supports a finding that Qwest has met the Track A requirement.¹²

In its application, Qwest has updated its market share data to reflect the number of lines as of April 30, 2002, using data garnered from E911 records and extrapolating using the number of local interconnection trunks in service.¹³ Qwest's updated market share numbers are higher than the numbers that Qwest provided in its original testimony before the WUTC, and the numbers we identified in Appendix A to the *39th Supplemental Order*. Because we have found that a lower number of CLEC unbundled loops and access lines satisfies the Track A requirements, Qwest's updated market share data does not change our conclusion that Qwest meets the requirements of Track A.

IV. SECTION 271(c)(2)(B) – The Competitive Checklist

The WUTC addressed Qwest's compliance with the fourteen competitive checklist items identified in section 271(c)(2)(B) through a series of four workshops, as described above in section II of these comments. During the first workshop, all parties agreed that Qwest had complied with the requirements of Checklist Item Nos. 7 (911 and E911 Services, Directory Assistance, and Operator Services), 8 (White Pages Directory Listings), 9 (Numbering Administration), and 12 (Dialing Parity).¹⁴ We concurred with the parties' assessments and will

¹⁰ *Id.*, ¶484.

¹¹ *Id.*, ¶491.

¹² *39th Supplemental Order*, ¶¶258-59 (Qwest Application, App. C, Vol. 1, Tab 20).

¹³ *See* Teitzel Declaration, ¶¶33-39 (Qwest Application, App. A, Tab 5).

¹⁴ *Revised Initial Order*, ¶¶55-57, 74, 82-83, 108-109, 124-27, 158. *See* Qwest Application, App. C, Vol. 1, Tab. 1.

not address these checklist items further in our comments.¹⁵ We discuss the remaining checklist items below, following our discussion of Qwest's performance data below.

A. Performance Data

The performance measures Qwest uses to report its monthly commercial performance in the states in its operating territory were collaboratively developed by the ROC Technical Advisory Group (TAG) to be used in the third-party testing of Qwest's OSS.¹⁶ The performance measures, or performance indicator definitions (PIDs), are included as Exhibit B to the SGAT, and are subject to continuing review and modification.¹⁷

In hearings held on April 22-26, 2002, Qwest presented aggregated commercial performance data for Washington and its fourteen-state region from February 2002 to March 2002.¹⁸ In hearings held in June, 2002, Qwest provided its commercial performance data for the month of April 2002.¹⁹ AT&T, WorldCom, and Covad argued that Qwest failed to meet the parity or benchmark standards for several performance measures, but primarily contested the validity of Qwest's reported data, citing to the data reconciliation efforts of Liberty Consulting Group (Liberty) and findings by KPMG during the OSS testing process.

In our 39th *Supplemental Order*, we observed that Liberty and KPMG identified problems with human errors by Qwest personnel in processing orders that could have an effect on accurate reporting of PID results, in particular the results for OP-4, OP-3, and OP-6, which measure, respectively, installation intervals, installation commitments met, and delayed days for non-

¹⁵ *Commission Order Addressing Workshop One Issues: Checklist Items No. 3, 7, 8, 9, 10, 12, and 13 (Final Workshop One Order)*, ¶¶75-77, 80 (Qwest Application, App. C, Vol. 1, Tab. 4).

¹⁶ The Technical Advisory Group, or ROC TAG, is composed of state commission staff, and representatives of Qwest, CLECs, and other industry participants.

¹⁷ 39th *Supplemental Order*, ¶30 (Qwest Application, App. C, Vol. 1, Tab. 20).

¹⁸ See Exhibits 1320 and 1355 (Qwest Application, App. K, Vol. 1, Tabs 1379 and 1498).

¹⁹ See Qwest Application, App. K, Vol. 1, Tab 1753.

facility reasons.²⁰ Due to Qwest's efforts to address the issue of human errors, and the prospect of a collaborative long-term PID administration process, we found Qwest's commercial performance data to be sufficiently accurate and reliable, but recommend that the Commission give lesser weight to performance data for OP-4.²¹ The Department of Justice, in its evaluation of Qwest's section 271 application for the states of Colorado, Idaho, Iowa, Nebraska, and North Dakota, also expresses concern over Qwest's manual handling of orders, but finds that Qwest is taking efforts to address the issue.²²

During the April 2002 hearings and in post-hearing briefs, AT&T, WorldCom, and Covad asserted that Qwest had failed to meet performance standards for Checklist Item Nos. 2 (Access to UNEs), 11 (Number Portability), and 14 (Resale). In our 39th *Supplemental Order*, we identified several instances where Qwest had not met the performance standards, e.g., PO-2B-2 (flow-through rate for eligible LSRs for POTS resale and UNE-P POTS), MR-7 (repeat trouble rates for UNE-P when dispatched outside of an MSA or when there is no dispatch), and maintenance and repair standards for line sharing and DS-1 capable loops.²³ After reviewing the circumstances surrounding Qwest's failure to meet the standards, we determined that Qwest's limited failures to meet performance standards were not sufficient to find that Qwest did not comply with the requirements of Checklist Items No. 2, 11, and 14.²⁴

Qwest's June 2002 commercial performance data included in Appendix D to its application are not materially different from the data reported for April 2002. The new data do

²⁰ 39th *Supplemental Order*, ¶¶54-59 (Qwest Application, App. C, Vol. 1, Tab. 20).

²¹ *Id.*, ¶58.

²² *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Nebraska, and North Dakota*, WC Docket No. 02-148, Evaluation of the United States Department of Justice, at 16-22 (July 23, 2002) (*Qwest I DOJ Evaluation*).

²³ *Id.*, ¶¶84-97.

not change our conclusion that Qwest has demonstrated through its commercial performance that it is providing functions and services to CLECs in compliance with the requirements of the 14 competitive checklist items.

B. Checklist Item No. 1 – Interconnection and Collocation

After an extensive evaluation, we found that Qwest has met the requirements of Checklist Item No. 1, and provides “interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)” of the Act. *47 U.S.C. §271(c)(2)(B)(i)*. The parties discussed the issues at length during the second workshop, resolved many issues during the workshop, and submitted post-workshop briefs and presented arguments to the WUTC concerning disputed issues. The WUTC evaluated the parties’ positions in two initial orders and one final order, reevaluated certain issues in an order on reconsideration, and addressed in several orders whether Qwest’s SGAT complies with WUTC orders. *See* Table 1. Nothing in Qwest’s application causes us to change our recommendation.

The WUTC has adopted rules governing the provisioning of collocation, including provisioning intervals and payments for failure to meet the established intervals. *See Washington Administrative Code § 480-120-560.*²⁵ The WUTC has required Qwest to make its SGAT and QPAP consistent with these rules.²⁶

The primary issues in dispute concerning the checklist item were (1) whether CLECs using Qwest facilities for both interconnection and private line/special access service may pay a proportional rate based on the relative use of the facility for the two purposes; and (2) selection of a CLEC’s point of interconnection (POI) and the interconnection arrangements that may be

²⁴ *Id.*

²⁵ A copy of the rules is included with these comments as Appendix 2.

used. The WUTC has required Qwest to modify its SGAT to apply proportional rates to CLECs using intrastate facilities for both interconnection and special access, but has not applied this requirement to interstate facilities subject to a Commission tariff.²⁷ The WUTC has allowed Qwest to require that CLECs establish one POI in Qwest's territory, but has required Qwest to allow CLECs to interconnect using entrance facilities, direct trunked transport, mid-span meets, and other technically feasible methods, and to allow CLECs to interconnect at a Qwest tandem switch.²⁸

C. Checklist Item No. 2 – Unbundled Network Elements

Qwest has satisfied the requirements of Checklist Item No. 2 to provide “nondiscriminatory access to UNEs in accordance with the requirements of sections 251(c)(3) and 252(d)(1).” *47 U.S.C. §271(c)(2)(B)(ii)*. We evaluated Qwest's compliance with the requirements of Checklist Item No. 2 in the third workshop, as well as in hearings held in April and June 2002 addressing Qwest's commercial performance data, change management process, and KPMG's Final OSS Test Report.

The parties discussed the issues at length during the third workshop and the hearings, resolved several issues during the workshop, and submitted post-workshop briefs and presented arguments to the WUTC concerning disputed issues. The WUTC evaluated the parties' positions in two initial orders and two final orders, reevaluated certain issues in an order on reconsideration, and addressed in the final compliance order whether Qwest's SGAT provisions

²⁶ *30th Supplemental Order*, ¶¶93; *33rd Supplemental Order*, ¶¶25-28 (Qwest Application, App. C, Vol. 1, Tabs 13, 15).

²⁷ *26th Supplemental Order*, ¶¶6-16; *34th Supplemental Order*, ¶¶19-22 (Qwest Application, App. C, Vol. 1, Tabs 11, 16).

²⁸ *Initial Order Finding Noncompliance in the Areas of Interconnection, Number Portability and Resale (February 23, 2001 Initial Order)*, ¶¶365 (a) and (g); *34th Supplemental Order*, ¶¶12-18 (Qwest Application, App. C, Vol. 1, Tabs 2, 16).

addressing access to UNEs complies with WUTC orders. *See* Table 1. Nothing in Qwest's application causes us to change our recommendation. Disputed issues raised during the third workshop, and concerning KPMG's Final OSS Test Report and Qwest's change management process are discussed separately below.

1. Workshop Three - Access to UNEs and UNE Combinations

The parties disputed several issues during the third workshop. First, AT&T, WorldCom, XO, ELI, and ATG asserted that Qwest is obligated to build network elements on a nondiscriminatory basis for CLECs, i.e., under the same terms and conditions that Qwest build facilities for other customers. The WUTC required Qwest to construct new facilities for CLECs in areas served by Qwest when facilities have been exhausted, and in areas outside of Qwest's serving territory, upon the same terms and conditions that Qwest would construct similar facilities for its own customers.²⁹

Second, several CLECs disputed a prohibition in Qwest's SGAT, section 9.23.3.7.1., against using combinations of unbundled loop and unbundled interoffice transport alternatives, also known as Enhanced Extended Loops, or EELs, unless the CLEC demonstrated that the combination is used to provide a significant amount of local exchange traffic to a particular end use customer. We initially prohibited Qwest from applying local use restrictions to EELs, then allowed the application to EELs, although we disagree that elements should be defined and priced based on how they are used.³⁰

²⁹ *13th Supplemental Order*, ¶¶80; *24th Supplemental Order*, ¶¶10-19; *34th Supplemental Order*, ¶¶28-38 (Qwest Application, App. C, Vol. 1, Tabs 5, 9, 16).

³⁰ *13th Supplemental Order*, ¶¶94-103; *24th Supplemental Order*, ¶¶20-28; *31st Supplemental Order*, ¶¶7-19 (Qwest Application, App. C, Vol. 1, Tabs 5, 9, 14).

2. Access to Operational Support Systems (OSS) – Third Party Testing

During the hearings held on June 5-7, 2002, the WUTC addressed the results of the ROC third-party OSS test. Representatives from MTG Consulting, KPMG, and Hewlett Packard provided testimony concerning the testing process, and KPMG offered its Qwest Communications OSS Evaluation Final Report (Final OSS Test Report). Qwest, AT&T, WorldCom, and Covad also provided testimony and filed briefs concerning the test results.

Based on KPMG's determination that Qwest did not satisfy certain test criteria, or was unable to determine whether Qwest had satisfied the criteria, AT&T, WorldCom, and Covad asserted that Qwest has not met the requirements of Checklist Item No. 2. We reviewed in detail the results of each test criteria for which KPMG determined that Qwest did not satisfy the criteria, or was unable to determine whether Qwest had satisfied the criteria, and found that none of the test results provide a sufficient basis to find Qwest out of compliance with the requirements of Checklist Item No. 2. The 39th *Supplemental Order* discusses in detail our findings and conclusions concerning KPMG's Final OSS Test Report. *See* Table 1.

The Department of Justice raises a concern that Qwest's application does not satisfy the requirement of electronic auditability, but notes that Qwest has taken recent actions to address the deficiency.³¹ KPMG could not determine whether the OSS system produced correct bills because of bill creation, or because of post-billing quality assurance processes.³²

3. Change Management Process

Qwest and a number of CLECs have participated in an extensive collaborative effort to redesign Qwest's change management process (CMP). The participants have developed a

³¹ *Qwest I DOJ Evaluation at 23-25.*

³² KPMG Final OSS Test Report at 459-61 (Qwest Application, App. F, Vol. 1, Tab 3).

thorough and detailed CMP that we believe will create a more structured, and hopefully less contentious, business environment for Qwest and the CLECs.

When KPMG concluded the OSS test in late May 2002, the parties had not yet completed documenting all of the components of the redesigned CMP, and KPMG was not able to determine whether Qwest had satisfied 7 out of 18 test criteria concerning the redesigned CMP.³³ In addition, KPMG found that Qwest had not satisfied two test criteria relating to Qwest's OSS interfaces, in particular Qwest's stand-alone test environment, which is a requirement for determining whether a BOC has an adequate CMP.³⁴

By the time we entered our final order in the consolidated proceeding, the parties had completed the redesign process and a complete CMP document was available for review. Because the redesign process was completed, Qwest had sufficiently adhered to the redesigned process, and Qwest had satisfactorily addressed issues concerning its stand-alone test environment, we found that Qwest had demonstrated that it had in place an adequate CMP.³⁵ The Department of Justice also has found that Qwest's CMP satisfies this Commission's requirements, including the stand-alone test environment.³⁶

4. Pricing of Network Elements

Section 251(c)(3) of the Act requires that BOCs must provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory." 47 U.S.C. §251(c)(3). Pursuant to section 252(d)(1) of the Act and the Commission's total element long run incremental cost, or TELRIC, principles, the WUTC has established costs and rates for UNEs and element

³³ KPMG Final OSS Test Report at 51-52 (Qwest Application, App. F, Vol. 1, Tab 3).

³⁴ *Id.*, at 580-81.

³⁵ 39th Supplemental Order, ¶¶204-211, 232-33 (Qwest Application, App. C, Vol. 1, Tab 20).

combinations offered by Qwest through its generic costing and pricing proceedings. The WUTC's review of UNE rates is ongoing, demonstrated by the recent initiation of a new generic proceeding to revisit UNE loop and switching rates for Qwest and Verizon and to reexamine the current deaveraged zone rate structure.³⁷

In November 1996, the WUTC initiated its Generic Costing and Pricing Proceeding in Dockets No. UT-960369, 960370, and 960371 (UT-960369), to consider cost and pricing issues that arose during the arbitration process and to address the Commission's obligations under the Act to establish rates for UNEs, interconnection, transport and termination and wholesale services.³⁸ In Phase I of the consolidated proceeding, the WUTC established a cost methodology and direct cost of many UNEs, and established wholesale discounts for the resale of retail services.³⁹ In Phase II of the proceeding, the WUTC determined the mark-up to be applied to the direct cost of UNEs, and addressed nonrecurring rates, collocation, and the recovery of operations support system (OSS) transition costs, among other matters.⁴⁰ In Phase III of the proceeding, the Commission addressed the deaveraging of unbundled loop rates.⁴¹

The WUTC opened a second costing and pricing proceeding in Docket No. UT-003013 on February 17, 2000, to address issues arising out of Docket No. UT-960369. In Part A of Docket No. UT-003013, the WUTC has resolved issues relating to the costing and pricing of line

³⁶ *Qwest I DOJ Evaluation at 25-31.*

³⁷ *In the Matter of the Review of Unbundled Loop and Switching Rates and Review of the Deaveraged Zone Rate and Structure*, Notice of Prehearing Conference, WUTC Docket No. UT-023003, (Feb. 12, 2002), attached as Appendix 3 to these Comments.

³⁸ *Commission Order Instituting Investigations* (Qwest Application, App. C, Vol. 2, Tab 1).

³⁹ *Eighth Supplemental Order – Interim Order Establishing Costs for Determining Prices in Phase II; and Notice of Prehearing* (Qwest Application, App. C, Vol. 2, Tab 2).

⁴⁰ *Seventeenth Supplemental Order, Interim Order Determining Prices, Notice of Prehearing Conference* (Qwest Application, App. C, Vol. 2, Tab 4).

⁴¹ *Twenty-fourth Supplemental Order, Order Rejecting Tariffs, Authorizing Refiling* (Qwest Application, App. C, Vol. 2, Tab 6).

sharing, unbundled access to OSS, and collocation.⁴² In Part B, the WUTC resolved issues relating to nonrecurring and recurring rates for UNEs, and addressed issues relating to reciprocal compensation, line splitting, line sharing, and OSS cost recovery and loop conditioning.⁴³ In Part C, the parties agreed upon costs and rates for microwave collocation entrance facilities. The parties are currently preparing briefs on Part D issues, and the WUTC will hold hearings in Part E to address unresolved issues arising from the Part B Order and updated OSS transition costs.⁴⁴

Exhibit A to Qwest's SGAT contains Qwest's recurring and nonrecurring charges for UNEs and services in Washington state.⁴⁵ On June 26, 2002, the WUTC allowed Qwest to reduce its rates for certain UNEs.⁴⁶ Qwest's Exhibit A, dated July 2, 2002, specifically notes that the WUTC has approved many of these charges, while certain rates are still under review in the WUTC's generic proceedings, Docket No. UT-003103 and Docket No. UT-023003. Understanding that not all of the rate elements have been approved in the WUTC's costing and pricing proceedings, the WUTC entered its 41st and 42nd *Supplemental Orders* clarifying that the WUTC will allow Exhibit A to become effective as a part of the SGAT, but has not approved every rate and charge listed in Exhibit A.⁴⁷ Once those rates are approved or modified by the WUTC, we expect that Qwest will modify Exhibit A to the SGAT accordingly.

⁴² *Thirteenth Supplemental Order, Part A Order Determining Prices for Line Sharing, Operations Support System, and Collocation* (Qwest Application, App. C, Vol. 2, Tab 8).

⁴³ *Thirty-Second Supplemental Order, Part B Order* (Qwest Application, App. C, Vol. 2, Tab 9).

⁴⁴ *Id.*, ¶4.

⁴⁵ See Qwest Application, Appendix B, Washington SGAT, Tab 2.

⁴⁶ *39th Supplemental Order*, ¶327 (Qwest Application, App. C, Vol. 1, Tab 20). The Department of Justice has raised concerns about Qwest's method of benchmarking UNE rates to those developed in Colorado. See *Qwest 1 DOJ Evaluation at 31-32*.

⁴⁷ See *41st Supplemental Order* and *42nd Supplemental Order*, attached to these comments as Appendices 5 and 6, respectively.]

D. Checklist Item No. 3 – Poles, Ducts, Conduit, and Rights-of-Way

Qwest has met the requirements of Checklist Item No. 3, and provides “nondiscriminatory access to the poles, ducts, conduits and rights-of-way that it owns or controls at just and reasonable rates in accordance with the requirements of section 224.” *47 U.S.C. §271(c)(2)(B)(iii)*. The parties discussed the issues at length during the first workshop, resolved many issues, and submitted post-workshop briefs and comments, and presented arguments to the WUTC concerning disputed issues. The WUTC evaluated the parties’ positions in an initial and a final order, and addressed in several orders whether Qwest’s SGAT provisions addressing access to poles, ducts, conduit, and right-of-way complies with WUTC orders. *See* Table 1. Nothing in Qwest’s application causes us to change our recommendation.

Qwest and the CLECs disagreed on the appropriate interval by which Qwest must respond to requests for access, in particular the time to respond to requests for access to a large number of poles, ducts, or right-of way. The WUTC required Qwest to modify its SGAT to include a 45-day interval to respond to requests for access, regardless of the size of the request.⁴⁸

The primary contested issue, an issue over which the parties remained at impasse until the end of the consolidated proceeding, concerned CLEC access, and the terms and conditions of access, to right-of-way agreements that Qwest had entered into with private building and property owners. The WUTC initially determined that Qwest’s SGAT provisions placed unreasonable and significant burdens on CLECs in obtaining access to the agreements, ordered Qwest to eliminate the terms from the SGAT, and required the parties to continue their

⁴⁸ *Revised Initial Order*, ¶¶47-60; *Workshop One Final Order*, ¶¶21-34 (Qwest Application, App. C, Vol. 1, Tabs 1, 4).

negotiations.⁴⁹ In December 2001, Qwest amended its SGAT to include language on the issue ordered during the Multi-state Proceeding. AT&T opposed the language and proposed alternate language. After reviewing the parties' additional arguments and proposed SGAT language, the WUTC ordered Qwest to include some of AT&T's proposed language to resolve the issue of CLEC access to right-of-way agreements and the terms and conditions for access to the agreements, and required Qwest to modify SGAT section 10.8.2.27.4 as filed in the Utah SGAT.⁵⁰ Our decision requires Qwest to provide copies of all agreements to CLECs upon request for the purpose of determining whether Qwest has ownership or control over the duct, conduit, or right-of-way, and places certain limitation on CLEC use of the agreements.⁵¹

E. Checklist Item No. 4 – Unbundled Local Loops

Qwest has met the requirements of Checklist Item No. 4, and provides “local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.” *47 U.S.C. §271(c)(2)(B)(iv)*. The WUTC addressed Qwest’s provisioning of unbundled local loops during the fourth workshop. During that workshop, the WUTC also considered how Qwest provides access to several additional UNEs, i.e., access to dark fiber, network interface devices, or NIDs, packet switching, and unbundled subloops, and how it provisions emerging telecommunications services, i.e., line sharing and loop splitting services. The parties discussed a great number of issues during the workshop, resolved many issues, and submitted post-workshop briefs and comments and presented arguments to the WUTC concerning disputed issues. The WUTC evaluated the parties’ positions in an initial and a final

⁴⁹ *Revised Initial Order*, ¶¶39-46; *Workshop One Final Order*, ¶¶9-20 (Qwest Application, App. C, Vol. 1, Tabs 1, 4).

⁵⁰ *34th Supplemental Order*, ¶¶40-45; *37th Supplemental Order*, ¶¶82-84 (Qwest Application, App. C, Vol. 1, Tabs 16, 18).

⁵¹ *See* SGAT section 10.8.2.27 (Qwest Application, App. B, Washington SGAT, Tab 1).

order, reevaluated certain issues in an order on reconsideration, and addressed in several orders whether Qwest's SGAT provisions addressing provisioning of loops and emerging services comply with WUTC orders. *See* Table 1. Nothing in Qwest's application causes us to change our recommendation.

During the fourth workshop, the parties raised two issues that related to issues discussed during the third workshop: Qwest's obligation to build high capacity loop facilities for CLECs, and the application of local usage restrictions to unbundled dark fiber. The WUTC resolved these issues consistent with the discussion above in Section IV.C.1 of these comments, requiring Qwest to build high-capacity loop facilities for CLECs under the same terms and conditions that Qwest builds facilities for other customers, and allowing Qwest to apply local usage restrictions to dark fiber facilities used as EELs.⁵²

The parties also disputed at length SGAT language concerning Qwest's obligation to provide access to loop qualification tools, and the process CLECs must use to order subloop elements. After several rounds of pleadings and orders, the WUTC directed Qwest to modify its SGAT language, consistent with paragraphs 430 and 431 of the *UNE Remand Order*,⁵³ to allow CLECs access to all back office information pertaining to loop qualification accessible to any Qwest personnel, within the same time intervals Qwest provides the information to its own retail personnel.⁵⁴ The WUTC also required Qwest to allow CLECs to audit Qwest's loop qualification tools to ensure that Qwest provides CLECs the same tools available to its own

⁵² 28th Supplemental Order, ¶¶17-22, 51-54; 31st Supplemental Order, ¶¶29 (Qwest Application, App. C, Vol. 1, Tabs 12, 14).

⁵³ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, CC Docket No. 96-98 (rel. Nov. 5, 1999) (*UNE Remand Order*).

⁵⁴ 34th Supplemental Order, ¶¶47-74 (Qwest Application, App. C, Vol. 1, Tab 16).

personnel.⁵⁵ AT&T contested Qwest’s SGAT language requiring CLECs to order subloop elements using the local service request, or LSR, process. The WUTC allowed Qwest to retain its SGAT language, noting the importance of uniformity for Qwest’s ordering processes, but required Qwest to automate the subloop unbundling process.⁵⁶

F. Checklist Item No. 5 – Unbundled Local Transport

Qwest has met the requirements of Checklist Item No. 5, and provides “local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.” *47 U.S.C. §271(c)(2)(B)(v)*. The parties discussed the checklist item during the third workshop, resolved several issues, and submitted post-workshop briefs presenting two issues to the WUTC for resolution.

CLECs participating in the workshop objected to a provision in Qwest’s SGAT creating two rate elements for dedicated transport, Unbundled Dedicated Interoffice Transport (UDIT) and Extended Unbundled Dedicated Interoffice Transport (EUDIT), and to Qwest’s decision to not provide electronics at the CLEC end of unbundled transport. In a recommended decision, the administrative law judge found that there was little difference between the two forms of transport and directed Qwest to eliminate the distinction between UDIT and EUDIT, and to provide electronics for UDIT at the CLEC wire center if requested by the CLEC.⁵⁷ The WUTC adopted the proposed resolution in a final order.⁵⁸ Nothing in Qwest’s application causes us to change our recommendation.

⁵⁵ *31st Supplemental Order*, ¶¶20-28 (Qwest Application, App. C, Vol. 1, Tab 14).

⁵⁶ *28th Supplemental Order*, ¶¶100-103; *31st Supplemental Order*, ¶¶39-42 (Qwest Application, App. C, Vol. 1, Tabs 12, 14).

⁵⁷ *13th Supplemental Order*, ¶¶125-57 (Qwest Application, App. C, Vol. 1, Tab 5). Pricing issues were addressed in the costing and pricing proceeding, Docket No. UT-003013.

⁵⁸ *24th Supplemental Order*, ¶9 (Qwest Application, App. C, Vol. 1, Tab 9).

G. Checklist Item No. 6 – Unbundled Switching

Qwest has met the requirements of Checklist Item No. 6, and provides “local switching unbundled from transport, local loop transmission or other services.” *47 U.S.C. §271(c)(2)(B)(vi)*. The parties discussed the checklist item during the third workshop, resolved several issues, and submitted post-workshop briefs presenting several issues to the WUTC for resolution.

In a recommended decision, the administrative law judge determined that CLECs did not present sufficient evidence to demonstrate that Qwest must offer its Advanced Intelligent Network (AIN) software services as a UNE.⁵⁹ The administrative law judge also required Qwest to provide unbundled switching in Density Zone 1 when EELs are not available as an alternative, and resolved questions concerning how to calculate the number of subscriber lines for determining whether unbundled switching should be treated, and priced, as a UNE.⁶⁰ The WUTC adopted the proposed resolution in a final order.⁶¹ Nothing in Qwest’s application causes us to change our recommendation.

H. Checklist Item No. 10 – Databases and Associated Signaling

Qwest has met the requirements of Checklist Item No. 10, and provides “nondiscriminatory access to databases and associated signaling necessary for call routing and completion.” *47 U.S.C. §271(c)(2)(B)(x)*. The parties discussed the checklist item during the first workshop, resolved several issues, and submitted post-workshop briefs and presented arguments to the WUTC concerning a single disputed issue. WorldCom argued, and Qwest disagreed, that section 251(c)(3) of the Act requires Qwest to provide access to the entire inter-

⁵⁹ *13th Supplemental Order*, ¶¶158-76 (Qwest Application, App. C, Vol. 1, Tab 5).

⁶⁰ *Id.*, ¶¶177-200.

⁶¹ *24th Supplemental Order*, ¶9 (Qwest Application, App. C, Vol. 1, Tab 9).

network calling name (ICNAM) database, rather than providing access on a per-query basis. The WUTC evaluated the parties' positions in an initial and a final order, determining that Commission orders required access to call-related databases only at the signaling transfer point, i.e., on a per-query basis.⁶² We affirmed this decision in an order on reconsideration.⁶³ See Table 1. Nothing in Qwest's application causes us to change our recommendation.

I. Checklist Item No. 11 – Number Portability

Qwest has met the requirements of Checklist Item No. 11, and provides number portability pursuant to the Commission's regulations. See 47 U.S.C. §271(c)(2)(B)(xi). Qwest's commercial performance data support this recommendation.⁶⁴ The parties discussed the issues at length during the second workshop, resolved many issues, and submitted post-workshop briefs and presented arguments to the WUTC concerning disputed issues. The WUTC evaluated the parties' positions in an initial and a final order, and addressed in the final compliance order whether Qwest's SGAT provisions addressing number portability comply with WUTC orders. See Table 1. Nothing in Qwest's application causes us to change our recommendation.

During the workshop, AT&T and WorldCom expressed concern that Qwest's poor coordination of loop cutovers had resulted in disconnection of customers' service. The WUTC required Qwest to modify its SGAT to require Qwest to wait until 11:59 p.m. of the day following the scheduled due-date to port a number before disconnecting the porting customer's previous service, and to eliminate inconsistencies in SGAT language.⁶⁵

⁶² *Revised Initial Order*, ¶¶146-62; *Workshop One Final Order*, ¶8 (Qwest Application, App. C, Vol. 1, Tabs 1, 4).

⁶³ *25th Supplemental Order*, ¶¶146-62 (Qwest Application, App. C, Vol. 1, Tab 10).

⁶⁴ See Qwest Application, App. D, Tab 32 at 269-70.

⁶⁵ *February 23, 2001 Initial Order*, ¶¶210-16; *34th Supplemental Order*, ¶¶105-6 (Qwest Application, App. C, Vol. 1, Tabs 2, 16).

J. Checklist Item No. 13 – Reciprocal Compensation

Qwest has met the requirements of Checklist Item No. 13, and provides “reciprocal compensation arrangements in accordance with the requirements of 252(d)(2).” *47 U.S.C. §271(c)(2)(B)(xiii)*. The parties discussed the issues at length during the first workshop, resolved several issues, and submitted post-workshop briefs and presented arguments to the WUTC concerning disputed issues. The WUTC evaluated the parties’ positions in an initial and a final order, and reevaluated certain issues in an order on reconsideration. *See* Table 1. Nothing in Qwest’s application causes us to change our recommendation.

One of the disputed issues involving this checklist item concerned compensation for traffic bound for Internet Service Providers (ISPs). After the Commission issued its *ISP Order on Remand*,⁶⁶ the WUTC approved Qwest’s proposed SGAT language concerning compensation for ISP-bound traffic.⁶⁷ After the Ninth Circuit Court of Appeals entered a decision in *U S WEST Communications, Inc. v. WUTC*, 255 F.3d 990(9th Cir. 2001), concerning whether a CLEC switch must be treated as a tandem, the WUTC ordered Qwest to modify SGAT sections defining a tandem switch and establishing terms and conditions for compensation at the tandem switching rate.⁶⁸

The WUTC rejected AT&T’s requests for compensation for transport between Qwest’s host and remote switches, and for Qwest to compensate CLECs for a proportional share of the

⁶⁶ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 96-98, CC Docket No. 99-68, FCC 01-131 (rel. April 27, 2001) (*ISP Order on Remand*).

⁶⁷ *25th Supplemental Order*, ¶¶6-11 (Qwest Application, App. C, Vol. 1, Tab 10).

⁶⁸ *Id.*, ¶¶15-19.

costs of facilities used for interconnection.⁶⁹ As discussed above in Section IV.B. concerning Checklist Item No. 1, we have required Qwest to price proportionally intrastate facilities used for both interconnection and special access.

K. Checklist Item No. 14 – Resale

Qwest has met the requirements of Checklist Item No. 14, and provides telecommunications services for resale in accordance with the requirements of section 251(c)(4) and 252(d)(3). *See 47 U.S.C. §271(c)(2)(B)(xiv)*. Qwest's commercial performance data support this recommendation.⁷⁰ The parties discussed the issues at length during the second workshop, resolved many issues, and submitted post-workshop briefs and presented arguments to the WUTC concerning disputed issues. The WUTC evaluated the parties' positions in an initial and a final order, and reevaluated certain issues in an order on reconsideration. *See Table 1*. Nothing in Qwest's application causes us to change our recommendation.

During the workshop, the participating CLECs asserted that Qwest should modify its SGAT to prohibit Qwest employees from marketing services to CLEC customers who call Qwest by mistake. MetroNet also asserted that Qwest imposed unreasonable restrictions on providing resale services by failing to provide a tariff containing standard pricing for its Centrex Prime product, and failing to provide per-location pricing of Centrex features and bundled products. The WUTC required Qwest to modify the SGAT to provide guidance to Qwest employees when handling misdirected calls.⁷¹ The WUTC also required Qwest to publish in a tariff, or in the SGAT, its standard pricing for Centrex Prime, and allowed Qwest to retain per-location pricing

⁶⁹ *Revised Initial Order*, ¶¶220-230, 259-268; *25th Supplemental Order*, ¶¶20-25 (Qwest Application, App. C, Vol. 1, Tabs 1, 10).

⁷⁰ *See Qwest Application*, App. D, Tab 32.

⁷¹ *February 23, 2001 Initial Order*, ¶¶266-68; *15th Supplemental Order*, ¶¶93-96 (Qwest Application, App. C, Vol. 1, Tabs 2, 6).

for Centrex features.⁷² The WUTC directed the staff to initiate an investigation into Qwest’s rebate program for Centrex services.⁷³ As a result of the investigation, Qwest filed a contract amendment with the WUTC on June 6, 2001, memorializing Qwest’s customer credit program, and making the program available to all resale customers.⁷⁴

V. SECTION 272

Section 272 of the Act imposes substantial structural and nonstructural safeguards “to ensure that competitors of the BOCs [in the long distance market] will have nondiscriminatory access to essential inputs on terms that do not favor the BOC’s affiliate.”⁷⁵ The Commission, and states providing consultation pursuant to section 271(d)(2)(B), must make “a predictive judgment regarding the future behavior of the BOC.”⁷⁶ Based on our evaluation of Qwest’s efforts to comply with the requirements of section 272, we make such a predictive judgment, and find that Qwest has satisfied the requirement in section 271(d)(3)(B) that it will carry out a grant of section 271 authority in accordance with the requirements of section 272.

The parties discussed the issues at length during the fourth workshop, and submitted post-workshop briefs and presented arguments to the WUTC concerning disputed issues. The WUTC evaluated the parties’ positions in an initial order, a final order, an order on reconsideration, and two orders concerning whether Qwest complied with prior WUTC orders. *See* Table 1. Nothing in Qwest’s application causes us to change our recommendation.

⁷² *February 23, 2001 Initial Order*, ¶¶271-80; *15th Supplemental Order*, ¶¶97-104 (Qwest Application, App. C, Vol. 1, Tabs 2, 6).

⁷³ *15th Supplemental Order*, ¶104 (Qwest Application, App. C, Vol. 1, Tab 6).

⁷⁴ *34th Supplemental Order*, ¶110 (Qwest Application, App. C, Vol. 1, Tab 16).

⁷⁵ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, CC Docket No. 97-137, FCC 97-298, ¶346 (rel. Aug. 19, 1997).

⁷⁶ *Id.*, ¶347.

The administrative law judge recommended that the WUTC find Qwest out of compliance with section 272 unless Qwest provided additional evidence, following testing by an independent third party, that Qwest's transactions with its section 272 affiliates comply with the Commission's rules, that Qwest expand the description of services rendered on its web site, and that Qwest remove certain provisions from a confidentiality agreement.⁷⁷ The WUTC adopted these recommendations and after reviewing Qwest's efforts to correct the deficiencies, found that Qwest had satisfied the requirements of section 272.⁷⁸

The last remaining issue concerning Qwest's compliance with section 272 was raised in AT&T's petition for reconsideration of the 28th *Supplemental Order*. AT&T contested whether Qwest had a sufficient process in place pursuant to section 272(e)(1) to provide data concerning its actual service intervals for providing exchange access to itself and its affiliates, and to competing carriers. The WUTC required Qwest to demonstrate that it would be able to comply with the requirements section 271(e)(1) by identifying the service intervals, how the intervals will be calculated and measured, and how Qwest would disaggregate its data to distinguish between service to its affiliates and to competing carriers.⁷⁹ Qwest satisfied this requirement in a filing with the WUTC on June 11, 2002.⁸⁰

VI. THE PUBLIC INTEREST

Section 271(d)(3)(C) of the Act requires that an application for section 271 authority may only be granted if "the requested authorization is consistent with the public interest, convenience and necessity." The WUTC began the evaluation of the public interest requirement during the

⁷⁷ 20th *Supplemental Order*, ¶¶503-511 (Qwest Application, App. C, Vol. 1, Tab 7).

⁷⁸ 28th *Supplemental Order*, ¶¶134-58; 34th *Supplemental Order*, ¶¶113-18 (Qwest Application, App. C, Vol. 1, Tabs 12, 16).

⁷⁹ 31st *Supplemental Order*, ¶¶50-51; 34th *Supplemental Order*, ¶¶119-27 (Qwest Application, App. C, Vol. 1, Tabs 14, 16).

fourth workshop and addressed the matter further during hearings held on May 13 and 14, 2002.

Consistent with the Commission’s evaluation of the public interest requirement, the WUTC considered whether the local exchange market in Washington is open to competition, whether there is adequate assurance that the local market will remain open to competition after a section 271 application is granted, and whether any “other relevant factors exist that would frustrate the congressional intent that markets be open.”⁸¹ In our *39th Supplemental Order*, we determined that an application by Qwest for in-region, interLATA service in Washington state would be in the public interest. Nothing in Qwest’s application, or in arguments presented in the petition for reconsideration of the *39th Supplemental Order*, cause us to change this recommendation.⁸²

A. Conditions in the Local Exchange Market

The Commission has stated that the basis for determining whether a BOC has opened its local exchange market to competition is whether it has fully satisfied the fourteen-point competitive checklist, not whether competing carriers have actually taken advantage of the opportunity to enter the market.⁸³ Based on this premise, the WUTC evaluated all of the arguments and evidence presented by the parties and determined that the local exchange market in Washington is fully open to competition.⁸⁴ Qwest has demonstrated compliance with the 14-point competitive checklist, developed an extensive SGAT through collaborative workshops, and recently lowered certain UNE rates.⁸⁵

⁸⁰ *37th Supplemental Order*, ¶¶93-95 (Qwest Application, App. C, Vol. 1, Tab 18).

⁸¹ *Bell Atlantic New York Order*, ¶423; *Verizon New Jersey Order*, App. C, ¶71.

⁸² See *40th Supplemental Order*, attached as Appendix 4 to these comments.

⁸³ *Bell Atlantic New York Order*, ¶427.

⁸⁴ *39th Supplemental Order*, ¶259 (Qwest Application, App. C, Vol. 1, Tab 20).

⁸⁵ *Id.*, ¶¶257, 259.

B. Performance Assurance Plan

The second prong of the public interest requirement requires that there is adequate assurance that the local market will remain open to competition after a section 271 application is granted. After collaborative efforts to develop a performance assurance plan failed, the WUTC chose to participate in the efforts of the Multi-state Proceeding to review Qwest's Performance Assurance Plan, or QPAP. Following hearings in the Multi-state Proceeding in August 2001, and issuance of a report on the QPAP by the facilitator for the Multi-state Proceeding, the WUTC held hearings and entered a final order. The WUTC addressed Qwest's QPAP further in an order on reconsideration and in several orders addressing whether the QPAP complies with WUTC orders. *See* Table 1. We approved Qwest's QPAP on July 1, 2002, finding that it will provide adequate assurance that the local market in Washington State will remain open to competition if the Commission grants Qwest authority under section 271.⁸⁶

The Washington QPAP, included as Exhibit K to Qwest's SGAT, provides self-executing remedies for CLECs should Qwest fail to meet certain performance standards.⁸⁷ These standards, or PIDs, were collaboratively developed through the ROC OSS process. The QPAP contains a number of provisions that will ensure that Qwest continues to adhere to the requirements of section 271.

- Payments to CLECs will escalate for up to six months for consecutive months of non-conforming performance, and will remain at the six-month escalated level until Qwest meets its performance standards.⁸⁸

⁸⁶ 39th Supplemental Order, ¶¶270, 390 (Qwest Application, App. C, Vol. 1, Tab 20).

⁸⁷ *See* Qwest Application, App. B, Washington SGAT, Tab 12.

⁸⁸ *Id.*, section 6.2, Tables 2 and 2A.

- There is no cap on payments resulting from the deviation between actual performance and the performance standard in order to encourage Qwest to minimize any disparity in providing services between itself and competitors.⁸⁹
- Qwest will make Tier 2 payments, or payments to the state, for every month that it fails to meet certain performance standards.⁹⁰
- Although the QPAP requires that a CLEC elect either the QPAP or remedies in its interconnection agreement, the QPAP does not limit either non-contractual legal or non-contractual regulatory remedies that may be available to a CLEC. The QPAP also does not prohibit a CLEC from seeking other remedies for areas of performance not covered in the QPAP.⁹¹
- The QPAP includes performance measures addressing whether orders that are designed to flow-through Qwest’s interfaces actually flow through (PO-2B), and line sharing, and will be amended to include other performance measures approved by the ROC.⁹²

AT&T will likely assert that the QPAP is flawed due to Qwest’s ability under the QPAP to contest any modifications to the QPAP following a six-month review. We approved Qwest’s language allowing Qwest to seek judicial review of any WUTC decision to modify the QPAP, finding that, without the language, a court might conclude that Qwest had waived its right to challenge the WUTC’s jurisdiction to modify the QPAP.⁹³ We do not believe that this language

⁸⁹ *33rd Supplemental Order*, ¶¶15-19 (Qwest Application, App. C, Vol. 1, Tab 15).

⁹⁰ *See* Qwest Application, App. B, Washington SGAT, Tab 12, section 7.1.

⁹¹ *Id.*, section 13.6.

⁹² *30th Supplemental Order*, ¶¶120-24; *33rd Supplemental Order*, ¶¶36-39; *37th Supplemental Order*, ¶¶38-40 (Qwest Application, App. C, Vol. 1, Tabs 13, 15, 18).

⁹³ *39th Supplemental Order*, ¶¶15-19 (Qwest Application, App. C, Vol. 1, Tab 20).

causes the QPAP to be fatally flawed, but merely recognizes Qwest’s right to challenge the WUTC’s jurisdiction to modify the QPAP.

C. Unusual Circumstances

The final prong of the public interest requirement focuses on whether any “relevant factors exist that would frustrate the congressional intent that markets be open.”⁹⁴ AT&T, WorldCom, Covad, and Public Counsel presented during the fourth workshop and the hearings on May 13 and 14, 2002, a number of issues they characterized as unusual circumstances that weighed against a finding that an application by Qwest would be in the public interest. The parties identified a number of complaints against Qwest filed with the Commission, the WUTC, and other state commissions, as well as decisions reached by those entities, asserting that Qwest has engaged in a pattern of anti-competitive conduct and has violated state and federal law. The parties asked the WUTC to defer any decision on the public interest requirement until all pending investigations were complete. We rejected this request, and found no pattern of anti-competitive conduct.⁹⁵

The crux of AT&T’s complaints about Qwest’s application, however, concerns agreements that Qwest entered into with various CLECs, ostensibly to resolve billing disputes and other disagreements between the parties. AT&T asserts that because Qwest never filed these agreements with state commissions, Qwest violated the terms of section 252(e), and has provided discriminatory service at discriminatory rates contrary to sections 251(c)(3) and 252(d)(1) and (2) of the Act, because other competing carriers were denied access to the same terms and conditions as the carriers that were parties to the agreements.

⁹⁴ *Verizon New Jersey Order*, App. C, ¶71.

⁹⁵ *39th Supplemental Order*, ¶¶271-315 (Qwest Application, App. C, Vol. 1, Tab 20).

Contrary to AT&T's assertions, the WUTC has not initiated an investigation into the unfiled agreements. Public Counsel requested copies of the agreements revealed during the Minnesota proceeding. After Qwest inadvertently sent copies of these agreements to the WUTC, the WUTC requested that Qwest provide copies of all agreements not filed with the WUTC. Qwest has continued to file these agreements with the WUTC. No party, including Public Counsel, has filed a complaint with the WUTC concerning these agreements, but AT&T and Public Counsel asked that the WUTC initiate an investigation, and defer any decision on the public interest requirement until after the investigation is complete.⁹⁶ As we stated in the 39th *Supplemental Order*:⁹⁷

There will always be complaints about Qwest's behavior, competitive or anti-competitive, and this Commission has resolved and will continue to resolve those complaints. The issue here is whether there is anything that is sufficient to delay or give pause to our review of an application by Qwest under section 271. We do not find the evidence presented by the parties, individually or collectively, sufficiently unusual or disturbing to preclude a finding that an application would be in the public interest. We are not saying this Commission should not evaluate complaints filed by the parties or independently investigate particular matters, and if appropriate, order sanctions. We simply do not find that such matters should weigh against a public interest finding.

In addition, in rejecting AT&T's petition for reconsideration, we stated that:⁹⁸

[T]he focus of our inquiry in this proceeding is whether Qwest has taken the necessary steps to open its local exchange market to competition. We have found that Qwest has opened its market to competition. We are not persuaded, after considering the allegations of the parties, that the unfiled agreements or ongoing investigations have affected whether the local market is open to competition. If Qwest does discriminate against CLECs in the future, that treatment will come to light through the QPAP and could allow the FCC to withdraw any 271 authority granted to Qwest. That possibility should be sufficient to deter any discriminatory behavior by Qwest.

⁹⁶ In their petition for reconsideration, AT&T and Covad assert that the parties did not have access to all of these agreements and could not, therefore, file a complaint. Contrary to AT&T's and Covad's assertion, the parties have had access to several of the agreements which were made public in Minnesota, and could have brought a complaint in Washington.

⁹⁷ *Id.*, ¶331.

⁹⁸ 40th *Supplemental Order*, ¶9, attached as Appendix 4 to these comments.

We note that the Department of Justice has filed comments with the Commission concerning the issue of the unfiled agreements that are consistent with our determination.⁹⁹

Finally, the parties also complain of excessive UNE rates and the potential for a price squeeze due to the level of access charges. The WUTC's recent order in Part B of Docket No. UT-003013 and Qwest's action in voluntarily reducing certain UNE rates has mitigated any argument that UNE rates are excessive. In addition, no party has filed a formal complaint with the WUTC alleging that Qwest's access charges are excessive. The level of UNE rates and access charges in Washington does not weigh against a finding that an application by Qwest is in the public interest.¹⁰⁰

VII. CONCLUSION

For the reasons set forth above, and pursuant to its authority under section 271(d)(2)(B) of the Act, the Washington Utilities and Transportation Commission recommends that the Commission approve Qwest's application to offer in-region, interLATA service in the state of Washington.

DATED at Olympia, Washington and effective this 26th day of July, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

⁹⁹ *Qwest 1 DOJ Evaluation at 3.*

¹⁰⁰ *39th Supplemental Order, ¶¶322-29 (Qwest Application, App. C, Vol. 1, Tab 20).*