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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996

Docket No. T-00000A-97-0238

NOTICE OF FILING

STAFF'S PROPOSED REPORT ON QWEST'S COMPLIANCE WITH PUBLIC INTEREST AND TRACK A

The Arizona Corporation Commission Staff ("Staff"), by its undersigned attorney, hereby files its Proposed Report on Qwest's Compliance with Public Interest and Track A. Staff recommends that parties desiring to file comments on this Report do so on or before May 16, 2002. Staff will then issue a Final Report which incorporates any comments received from parties or from members of the public at the public comment sessions. Staff further recommends that the Commission rule on Staff's Final Report at its last Open Meeting on Qwest's compliance with Section 271 requirements.

RESPECTFULLY SUBMITTED this 2nd day of May, 2002.

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IN THE MATTER OF QWEST CORPORATION'S SECTION 271 APPLICATION

ACC Docket No. T-00000A-97-0238

FINAL REPORT ON QWEST'S COMPLIANCE

With

PUBLIC INTEREST AND TRACK A

MAY 1, 2002

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I. FINDINGS OF FACT

A. PROCEDURAL HISTORY

1. On June 12, 2001, a Workshop on Public Interest and Track A took place at Qwest's facilities in Phoenix. Parties appearing at the Workshop included Qwest, AT&T, MCI WorldCom, Cox and the Residential Utility Commission Office ("RUCO"). Qwest relied upon its filed affidavit submitted on April 17, 2001. Cox, e.spire and MCI WorldCom filed their comments on May 17, 2001 while AT&T filed its comments on May 18, 2001. All parties filed comments on Public Interest; only AT&T filed comments on Track A. Qwest filed rebuttal testimony on May 29, 2001. Workshops on the subject of Public Interest and Track A were held by the multi-state group on June 6, 7 and 8 and by Colorado on June 25 and 27, 2001. Results of those workshops have been imported to the Arizona record, and are reflected in this report. The Association of Communications Enterprises ("ASCENT") filed comments on July 25, 2001. Public Interest briefs were filed on September 18, 2001 by AT&T, MCI WorldCom, Sprint, Cox and ASCENT. AT&T also addressed Track A in its September 18, 2001 brief. No other party commented on Track A in their September 18, 2002 briefs. Qwest filed its brief on Track A and Public Interest on September 19, 2001.

2. The Attorney General of the State of Arizona filed comments regarding Public Interest, Convenience and Necessity on December 19, 2001. Qwest responded to the Attorney General's comments regarding Public Interest on January 3, 2002. The Attorney General responded to Qwest's comments on January 14, 2002.

3. On February 7, 2002 Touch America provided ACC Staff in Arizona a copy of a January, 2002 complaint against Qwest which Touch America recently filed with the FCC alleging that Qwest is violating Section 271 by offering Lit capacity IRUs in the former U S West states. On February 13, 2002, Touch America provided ACC Staff with a copy of another complaint filed with the FCC on February 11, 2002 against Qwest, alleging that Qwest has failed to follow the terms and conditions of the divestiture and merger orders issued by the FCC when it approved the Qwest/U S West merger, and that Qwest failed to live up to terms of its agreement with Touch America.

4. Qwest filed a Statement of Supplemental Authority (Iowa) regarding Public Interest on February 22, 2002. AT&T filed an Offer of Supplemental Authority (Minnesota) regarding Public Interest on March 6, 2002, to which Qwest responded on March 18, 2002. AT&T filed a Motion to Require Qwest to Supplement the Record on March 8, 2002 requesting that the Commission order Qwest to file all (interconnection) agreements made by Qwest since the effective date of the Act. Although it did not file a formal brief, Eschelon stated, in a March 11, 2002 E-mail message, that it had no objection to AT&T's motion with respect to submission of Eschelon agreements with Qwest for Commission review. Qwest submitted another Statement of Supplemental Authority (Colorado) Regarding the Public

Interest on March 18, 2002. Also, Qwest filed its Opposition to AT&T's Motion to Require Qwest to Supplement the Record on March 18, 2002.

B. DISCUSSION

1. TRACK A

a. Federal Act Requirements

5. Section 271 of the Telecommunications Act of 1996 provides Bell Operating Companies two optional "tracks" for meeting the requirements for providing certain in-region InterLATA services: Track A or Track B.

6. Track A is the appropriate test when facilities based competitors have entered the local service market in a state. Specifically, 47 U.S.C. Section 271 (c)(1)(A) provides:

> : PRESENCE OF A FACILITIES-BASED COMPETITOR- A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

7. Track B is the appropriate test where competitors have not yet sought to provide local service in competition with the Regional Bell Operating Company. Specifically, 47 U.S.C. Section 271 (c)(1)(B) provides as follows:

> : FAILURE TO REQUEST ACCESS- A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell

operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

b. Background

8. To secure Section 271 approval from the FCC, Qwest must first establish that one of two thresholds in Section 271, referred to as "Track A" or "Track B", has been reached. As stated above, Track A is available when facilities-based competitors have entered local telecommunications markets in the state. The Track A threshold set forth in Section 271(c)(1)(A) requires that Qwest has entered into at least one interconnection agreement under which at least one facilities-based Competitive Local Exchange Carrier ("CLEC") is providing local exchange service to both residential and business customers[1]. A facilities-based provider is one that predominately uses its own facilities, including Qwest's UNE's or answer services, to provide local exchange service.[2]

9. As discussed later in this section, facilities based competitors have entered the local telecommunications market in Arizona. Therefore the balance of this section of this report -/focuses on Track A.

c. Competitors' Position

10. AT&T's position on Track A, as initially described in its May 18, 2001 affidavit, is that Qwest has not demonstrated compliance with Track A. To comply with 47 USC 271 (c)(1)(A), commonly referred to as "Track A," AT&T stated that the Bell Operating Company ("BOC") bears the burden of establishing:

a. That the BOC has entered into one or more binding interconnection agreements that have been approved by the state commission;[3]

b. That under such agreement(s), the BOC is providing access and interconnection to one or more competing providers of telephone exchange service;[4]

c. That such competing provider(s) are commercial alternatives to the BOC, are operational, and are providing telephone exchange service for a fee;[5]

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[1] SBC - Texas at paragraph 59.
[2] SBC - Kansas/Oklahoma Order at Paragraphs 40 and 41.
[3] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan,* CC Docket No. 97-137, FCC 97-298, Memorandum Opinion And Order (rel. August 19, 1997) (hereinafter "Ameritech Michigan Order"), ¶ 71.
[4] *Id.*, ¶74.

d. That such competing providers are providing telephone exchange service to a significant number, more than a *de minimis* number, of business and residential subscribers;[6]

e. That such telephone exchange service consists of service provided either exclusively over the competing providers' own facilities or predominately over their own facilities in combination with the resale of the telecommunications services of another carrier.[7] For the purpose of element (e), "owned facilities" are either the network facilities constructed by such competing providers or unbundled network elements ("UNEs") that the competing providers have leased from the BOC.[8]

11. AT&T stated that it is the BOC's burden to establish each Track A element for each state in which the BOC seeks approval to provide interLATA service and that Qwest's testimony simply does not satisfy Qwest's burden to establish the elements of Track A in Arizona. Qwest's testimony regarding element (c) is a claim but provides no actual evidence. AT&T states that Qwest overlooks element (d) altogether and makes no effort to show that competing providers are serving a significant number of residential and business customers in Arizona.[9] AT&T concludes that without further proof, Qwest's application must be denied for failure to prove its case under Track A.

12. AT&T alleged that the market data provided by Qwest's witness is already dated and does not account for the ongoing demise of new local market entrants. The fact remains that, at this time, Qwest's local market is far from being open to competition.

13. At the Workshop on June 12, 2001, AT&T stated that it does not agree with the four prong analysis that has been provided by Qwest as to what Track A requires. AT&T further pointed out that the FCC has indicated that the mere service or the mere indication that a competitor is serving business customers is insufficient to meet Track A requirements. The FCC has indicated, according to AT&T, that it is the burden of Qwest to establish that it is serving more than a "de minimus" number of customers, and stated that more than "de minimus" means a significant number. However, AT&T declined to quantify the meaning of more than "de minimus". AT&T further stated that Cox's witness did not know the number of business customers being served.

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[5] *Id.*, ¶ 75; *See also Application of SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Oklahoma,* CC Docket No. 97-121, FCC 97-228, Memorandum Opinion And Order (rel. June 26, 1997) (hereinafter "SBC Oklahoma Order"), ¶¶ 14, 17.

[6] *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* CC Docket No. 00-217, FCC 01-29, Memorandum Opinion And Order (rel. January 22, 2001) (hereinafter "SBC Kansas/Oklahoma Order"), ¶¶ 42, 44.

[7] 47 USC § 271 (c)(1)(A).

[8] Ameritech Michigan Order, ¶¶ 92, 101.

[9] *Id.*, Section "C. Residential and Business Subscribers," pp. 31-33.

14. AT&T's witness stated that the estimating procedures Qwest uses in Arizona are inconsistent with those used in other Qwest service areas, have inaccuracies in the numbers set forth therein and represent an unreliable way of estimating business customers. AT&T claims that the estimate of business customers provided by Qwest is "disjointed" with the interconnection agreements so that the parties don't know which interconnection agreement, and therefore which competitor, is serving the business customers that Qwest is estimating. Further, AT&T stated that this type of analysis does not satisfy Track A.

15. AT&T's witness also stated that it is Qwest's burden to establish Track A elements that meet Track A requirements and stated that AT&T believes that the Qwest witness testimony does not meet that burden. Further, it does not meet that burden with respect to identifying the number of business customers being served on a facilities-basis in Arizona. When questioned as to what level of number AT&T was seeking, the AT&T witness responded that it would be something more than a de minimus number, but that AT&T did not have a number in mind. The witness reiterated that it is Qwest's burden to establish that competitive providers provide facilities-based competition to business customers in Arizona in more than a de minimus number of business subscribers. AT&T's witness stated that Qwest had not established a number greater than "de minimus".

16. AT&T stated further that it is difficult to determine a reliable way of figuring out the number of business customers that are being served and a reliable way of identifying the competitor that is providing that service. The AT&T witness further stated that the FCC has not specified whether the number that represents more than a "de minimus" number of customers is either a percentage or a quantity. His recommendation would be that the ACC decide this on the basis of whatever it believes is more than a "de minimus" number of business customers being served.

17. Finally, AT&T stated that the numbers presented by the Qwest witness are unreliable and therefore do not establish the "de minimus" number standard. AT&T stated that the question of reliability or unreliability is based on the fact that the numbers in the text versus the numbers in the exhibit have some inconsistencies. With regard to Qwest's methodology for calculating customers and access lines, the AT&T witness stated that Qwest is not using the same methodology in Wyoming and North Dakota that it is using in Arizona, since the results in those other states of using this methodology would provide numbers which would not make sense.

18. AT&T argues that the Qwest testimony submitted by Mr. Teitzel fails to demonstrate compliance with either the requirement that there be commercial alternatives to the BOC or the requirement that competing providers are providing telephone exchange service to a significant number of customers in Arizona. AT&T makes the point that none of the competitors which Qwest names in support of its "item (c) claim[10]" can be considered a *commercial alternative*[11] to Qwest until those competitors have the ability to provide service on the same level of quality as Qwest, and are able to handle commercial order volumes.

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[10] See Finding of Fact 10 above.

[11] emphasis in original.

AT&T argues that such parity certainly does not yet exist and that the issue here is not the competence or lack of competence of the new entrants, but rather the absence of appropriate procedures and practices on the part of Qwest. The question is whether or not Qwest's systems will allow for the seamless processing of orders from new entrants in commercial volumes. That has not been demonstrated here.

19. Track A does not envision a grant of 271 authority to Qwest when the first CLEC begins its initial attempts to provide service. Competitors must be providing a true "commercial alternative". Again referring to the OSS systems, that will only occur when CLECs stand on a par with Qwest in the provisioning of service, and, most importantly, in the handling of orders.

20. Qwest's case is also insufficient to establish its compliance with "item (d)" above. Qwest's direct testimony, asserts first that there are "conservatively" over 214,000 access lines now served by CLECs in Arizona, and secondly that this total satisfies the "significant" threshold. [12] AT&T disputes the accuracy of Qwest's estimated CLEC line count, as well as Qwest's assertion that the number of business and residential customers served by CLECs in Arizona is "significant." In addition, Qwest has not demonstrated that those business and residential customers are being served by new entrants either "exclusively" or "predominantly" over the new entrants' own facilities.

21. The available data indicate that competitors are serving only a small number of the residential customers in Arizona. As for business customers, the available data are based on estimates generated by Qwest, and challenged by AT&T. Qwest admits that it has no knowledge of the number of CLEC-owned loops.[13] However, Qwest's estimate of CLEC-owned loops is premised on the false notion that a statistical link exists between the number of ported numbers and Qwest-provided unbundled loops, on the one hand, and CLEC-owned facilities. These estimates also purport to lend credence to Qwest's assertion that CLECs are serving this "significant" number of business and residential customers either "exclusively" or "predominantly" over their own facilities. The fact remains that there is no evidence on the record to support this assertion. AT&T therefore stands by its initial position that Qwest has failed to demonstrate that a "significant" number of customers are being served by CLECs in the state of Arizona either "exclusively" or "predominantly" over the CLECs' own facilities. Qwest has therefore failed to demonstrate compliance with Track A here in Arizona.

d. Qwest' Position [14]

22. Qwest stated in its April 17, 2001 affidavit that the four-part Track A requirements are satisfied in Arizona because: 1) Qwest has one or more binding agreements with CLECs which have been approved under Section 252 of the Act, 2) Qwest provides access and interconnection with unaffiliated competing providers of telephone exchange

[12] 7 Qwest 16, Teitzel Direct, at pp. 30-32.
[13] 7 Qwest 16, Teitzel Direct, at p. 31, lines 12-13.
[14] Affidavit of Mary Jane Rasher regarding Track A and Public Interest May 17, 2001.

service, 3) competitors provide telephone exchange service to residential and business subscribers in markets in Arizona, and 4) competing providers offer telephone exchange service either exclusively or predominantly over their own telephone services facilities (which includes UNEs) in combination with the resale of the telecommunications services of Qwest.

23. Qwest stated that it has met the first subpart requirement of Track A because as of February 28, 2001 it has entered into over 56 binding and approved wireless interconnection agreements and 41 resale-only interconnections between itself and competitors in Arizona pursuant to Section 252 of the Act. In addition, there are a total of 18 interconnection agreements with wireless, paging and Extended Area Service (EAS) providers in Arizona. Another 38 interconnection agreements (including wireline, resale, wireless, paging, and EAS agreements) were pending Commission approval as of the same date. Qwest also relies on its SGAT filed in Arizona to establish compliance with the Track A requirements.

24. Qwest has submitted a comprehensive Statement of Generally Available Terms and Conditions ("SGAT") pursuant to 47 U.S.C. § 252(f) that contains terms, conditions, and prices applicable to the provision of all aspects of interconnections, including all checklist items.[15] Finally, the Commission has also approved Qwest's terms of interconnection with CLECs, both in its cost docket review of Qwest's wholesale rates and in its review of interconnection agreements with CLECs, which contain the terms, conditions, and prices applicable to the provision of network interconnection, access to unbundled network elements, ancillary network services, and telecommunications services available for resale in Arizona.[16]

25. Qwest pointed out that in the Ameritech-Michigan decision, several parties argued that Ameritech's agreements did not satisfy Track A because not every checklist element was contained within each approved agreement. The FCC dismissed this argument and determined that Track A does not contain such a requirement.[17] As stated earlier, Qwest has submitted a comprehensive SGAT in Arizona that contains terms, conditions, and prices applicable to the provision of all of the checklist items.

26. Qwest argued that it fulfills the second part of the FCC's analysis of Track A requirements because it provides access and interconnection with unaffiliated competing providers of telephone exchange service. Of its Commission-approved interconnection agreements, 63 are with unaffiliated CLECs in the state of Arizona.

27. Qwest also stated that there were no disputes whether they have satisfied the second element of Track A. The FCC has determined that a CLEC qualifies as a "competing provider" so long as it provides service "'*somewhere in* the state'" —not

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[15] *Id.* at 10:9-13.

[16] *See* Teitzel Affidavit, 7 Qwest 16 at 10:13-18.

[17] Ameritech-Michigan Order at ¶72.

necessarily throughout the state as a whole.[18] The FCC has declared unequivocally that it "do[es] not read section 271(c)(1)(A) to require any specified level of geographic penetration by a competing provider."[19]

28. Nor must a CLEC gain any minimum market share before it may be deemed a "competing provider[]."[20] It is simply not a condition of finding Track A compliance that a certain level of competition exists in Arizona. The FCC has spoken plainly on this point as well: "We have never required, however, an applicant to demonstrate that it processes and provisions a substantial commercial volume of orders, or has achieved a *specific market share* in its service area, as a prerequisite for satisfying the competitive checklist."[21] As long as CLECs are "serving more than a *de minimus* number of end-users for a fee in their respective service areas," the FCC will "find that each of these carriers is an actual commercial alternative to the BOC" sufficient for the Track A requirement.[22]

29. Regarding the third requirement, Qwest stated that the CLECs have challenged Qwest's showing that Arizona CLECs provide services to more than a *de minimus* number of business customers in the state, while at the same time refusing to provide responses to Qwest's data request on this issue. The available evidence shows overwhelmingly that Qwest has satisfied this element of Track A.

30. The FCC has made clear that the relevant question is whether the CLECs in a state are collectively serving both residential and business customers, not whether any single carrier is serving both groups. So long as residential and business customers are being served in a state - by one CLEC or by some combination of CLECs - this requirement of Track A is satisfied. Qwest has submitted evidence demonstrating that individual CLECs are, in fact, simultaneously providing both business and residential services in Arizona.

31. Qwest stated that no party has challenged its compliance with the fourth element of the FCC's Track A test, which requires that the competing providers offer telephone exchange service "either exclusively over their own telephone exchange facilities

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18 *Ameritech Michigan Order* at ¶ 76 (quoting H.R. Rep. No. 104-204, at 77 (1995)) (emphasis added).

19 *Id.* at ¶ 76.

20 *Id.* at ¶ 77 (explaining that Congress considered and rejected language that would have imposed a "market share" requirement in section 271(c)(1)(A)); *see also* 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) ("*SBC Kansas/Oklahoma Order*").

21 SBC Kansas/Oklahoma Order at n.78 (emphasis added) (explaining that Congress considered and rejected language that would have imposed a "market share" requirement in section 271(c)(1)(A)). And in its most recent section 271 order, released just a few weeks ago, the FCC affirmed yet one more time that it "has never required . . . an applicant to demonstrate that it . . . has achieved a specific market share in its service area, as a prerequisite for satisfying the competitive checklist." 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, CC Docket No. 01-100, FCC 01-208 (rel. July 20, 2001) at App. D n.27 ("Verizon Connecticut Order").

22 *Ameritech Michigan Order* at ¶ 78. To be clear, no particular amount of competition is required to comply with Track A. *Bell Atlantic New York Order* at ¶ 427. However, in Arizona there are actually many CLECs providing service to more than a *de minimus* number of customers.

or predominantly over their own telephone exchange service facilities in combination with resale of the telecommunications services of another carrier."[23] The FCC has determined that this element of Track A is satisfied even if only one CLEC in a state is offering service exclusively or predominantly over its own facilities; it need not be the case that other CLECs (or all CLECs) use their own facilities as well.[24]

32. In Qwest's April 17, 2001 comments, it stated that the FCC found that Track A does not impose a geographic penetration or market share test.[25] Qwest stated that competing providers need only be in the market and operational.[26] In the Bell Atlantic-New York Order, the FCC specifically declined to require Bell Atlantic to demonstrate that all New York end users have a "realistic choice" between facilities-based local carriers.[27]

33. Qwest contended that there is evidence demonstrating CLEC activity in Arizona. For example, Qwest estimated that CLECs serve more than 214,000 residential and business access lines as follows:[28]

- Estimated Number of Residential Access Lines Served by CLECs - 37 ,000
- Estimated Percentage of CLEC Residential Access Lines Provided Over CLEC's Own Facilities/UNEs - 40%
- Estimated Percentage of CLEC Residential Access Lines Provided by Resale - 60%
- Estimated Number of Business Access Lines Served by CLECS - 1 78,000
- Estimated Percentage of CLEC Business Access Lines Provided Over CLEC's Own Facilities/UNEs - 85%
- Estimated Percentage of CLEC Business Access Lines Provided by Resale - 15 %

34. The preceding estimates are based on the information available to Qwest regarding competitive business activities in the state and are said by Qwest to be conservative. These lines represent local exchange voice grade service only and do not include any data lines.

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[23] 47 U.S.C. § 271(c)(1)(A).

[24] Ameritech Michigan Order at ¶ 104 (determining that because one CLEC was offering service exclusively over its own facilities, the BOC's interconnection agreement with that CLEC satisfied the statutory requirement and made it unnecessary to examine whether additional interconnection agreements with other CLECs also satisfied the requirement).

[25] Ameritech-Michigan Order at ¶76-¶77; BANY Order at ¶427; SBC-Texas Order at ¶419; SBC-Kansas/Oklahoma Order, n. 78.

[26] Ameritech-Michigan at ¶78.

[27] BANY Order, n. 1312.

[28] Data derived from CLEC access line information shown in Confidential Exhibit DLT-2.

35. Qwest estimates, as of February 28, 2001, that the CLECs have captured over 17% of the business access line market and nearly 7% of total access lines in Arizona.

36. Qwest states that they track and attempt to identify the reasons customers leave. In Arizona, Qwest had the following reported residential and business accounts and associated access lines that left Qwest during 2000 for competitive alternatives:

- Residential Accounts - 14,192
- Residential Access Lines - 17,246
- Business Accounts - 3,746
- Business Access Lines - 11,243

37. CLECs have challenged Qwest's showing that Arizona CLECs provide services to more than a *de minimus* number of business customers in the state, while at the same time refusing to provide responses to Qwest's data request on this issue.

38. The FCC has made it clear that the relevant question is whether the CLECs in a state are *collectively* serving both residential and business customers, not whether any single carrier is serving both groups.[29] Congress specifically amended the Act to "eliminat[e] the requirements that *one carrier* serve *both* residential and business customers, and allow[] instead, multiple carriers to serve such subscribers."[30] Therefore, so long as residential and business customers are being served in a state —by one CLEC or by some combination of CLECs —this requirement of Track A is satisfied.

39. CLECs are collectively providing telephone exchange service to residential and business subscribers in Arizona.[31] The intervenors conceded in the workshop that residential access lines were no longer at issue and that Qwest had fully met its burden in this regard.[32] The only remaining issue, therefore, was whether CLECs in Arizona were providing more than a *de minimus* number of business access lines, which they plainly are. Qwest states that it is therefore in compliance with the third element of 47 U.S.C. § 271(c)(1)(A).

40. The FCC has made clear that a CLEC's "'own telephone exchange service facilities'" include the UNEs it leases from the incumbent.[33] Moreover, the FCC has

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[29] *See Ameritech Michigan Order* at ¶ 82. *See also* 6/12/01 Tr. at 209:12 to 210:10 (explaining that it is not necessary under Track A to demonstrate that a single CLEC is serving both residential and business customers) (testimony of David L. Teitzel).

[30] *Id.* at ¶ 84 (emphases added).

[31] *See* Teitzel Affidavit, 7 Qwest 16 at Confidential Exhibit DLT-1C (summarizing the services being purchased from Qwest and offered by CLECs in Arizona as of 12/31/00); *id.* at 31:17 to 33:4.

[32] *See* 6/12/01 Tr. at 199:15-25 (acknowledging that the sufficiency of Qwest's showing regarding CLEC residential access lines in service in Arizona was no longer at issue) (statement of David Harmon).

[33] *Ameritech Michigan Order* at ¶ 99.

determined that this element of Track A is satisfied even if only one CLEC in a state is offering service exclusively or predominantly over its own facilities; it need not be the case that other CLECs (or all CLECs) use their own facilities as well.[34] No party has challenged Qwest's compliance with the fourth element of the FCC's Track A test.

41. More than one carrier in Arizona has leased unbundled loops from Qwest, which are deemed the CLECs' "own . . . facilities" under the FCC's rules. According to Qwest's most current data, there were 17,186 unbundled loops in service and 16 CLECs using unbundled loops in Arizona as of February 28, 2001.[35] These unbundled loop numbers greatly understate the amount of own-facilities competition in Arizona. The CLECs serve a significant number of customers by bypassing Qwest's network entirely, and Qwest is unable to measure exactly how many customers or access lines are being served in this fashion.

42. In order to estimate CLEC customers, Qwest offered the LIS trunk methodology that the FCC permitted SBC to use in Texas, Kansas, and Oklahoma. SBC assumed that CLECs serve 2.75 access lines through full facilities bypass for every interconnection (LIS) trunk they obtain.[36] Multiplying by 2.75 produces the estimate of CLEC full facilities bypass lines in service. Figure 1 presents the LIS trunk estimate of CLEC facilities-based lines in service:

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[34] *Id.* at ¶ 104 (determining that because one CLEC was offering service exclusively over its own facilities, the BOCs' interconnection agreement with that CLEC satisfied the statutory requirement and made it unnecessary to examine whether additional interconnection agreements with other CLECs also satisfied the requirement).

[35] *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3. *See also id.* at Confidential Exhibit DLT-1C (identifying the CLECs using unbundled loops in Arizona, as of 12/31/00).

[36] *See SBC Kansas/Oklahoma Order* at ¶ 42 & n.96; Affidavit of John S. Habeeb, *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 Texas,* CC Docket No. 00-4 (Jan. 10, 2000), App. A, Vol. A-1 as Tab 1, at ¶¶ 23-24 (brief in support of SBC). *See also* Teitzel Affidavit, 7 Qwest 16 at 30 n.69.

Figure 1
Estimated Competitive Facilities-Based Lines in Service
(as of 2/28/01) (LIS Trunk Method)

Interconnection (LIS) trunks in service[37]	132,105
SBC ratio of CLEC facilities bypass lines to LIS trunks in service	x 2.75
Estimated number of CLEC full facilities bypass lines[38]	363,289
UNE-Platform lines in service[39]	653
Estimated number of CLEC facilities-based access lines[40]	363,942[41]

43. Adding to this estimate (363,942) [42] the actual number of access lines CLECs in Arizona provide to customers via resale (49,401) [43] produces the estimate of 403,343[44] CLEC access lines in service.

44. E-911 listings for CLECs is an additional estimation method that has been presented to the Commission.[45] E-911 listings include stand-alone unbundled loops and CLEC full facilities bypass lines, but they do not account for UNE-P lines or resale lines provided to CLECs' customers. Based on the number of CLEC 911 listings in Arizona, this formula produces an even higher estimate of CLEC facilities-based access lines and reinforces the significance of CLECs' competitive presence in the state, as shown on Figure 2:

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37 *Id.* LIS trunks are used for CLEC full facilities bypass lines and stand-alone unbundled loops, but not for UNE-P loops or resale lines.

38 Results are rounded to the nearest whole number.

39 *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3.

40 Results are rounded to the nearest whole number.

41 A letter Qwest sent to this Commission on August 31, 2001, and subsequently served on all parties to these proceedings, presents the updated number of LIS trunks Qwest had provisioned to CLECs as of June 25, 2001 (160,574). Plugging this number into the LIS trunk formula indicates that the number of facilities-based access lines had grown to 441,579 in the intervening four months. *See* Letter of Afshin Mohebbi, President & COO, Qwest Corporation to the Arizona Corporation Commission, August 31, 2001, at n. 3 ("Mohebbi Letter").

42 Results are rounded to the nearest whole number.

43 *See* Teitzel Affidavit, 7 Qwest 16 at Confidential Exhibit DLT-2C.

44 Results are rounded to the nearest whole number.

45 *See* Mohebbi Letter at 1-2 & n.2. *See also SBC Texas Order* at ¶ 5 & n.7 (noting estimates of CLEC facilities-based access lines in the state derived from the number of E-911 listings); *SBC Kansas/Oklahoma Order* at n.96 (acknowledging use of the E-911 listings methodology).

Figure 2
Estimated Competitive Facilities-Based Lines in Service
(as of 6/30/01) (E-911 Listings Method)[46]

CLEC E-911 listings	457,111
UNE-Platform lines in service	16,041
Estimated number of CLEC facilities-based access lines	473,152

45. Adding the total number of access lines provided to CLECs' customers via resale (29,583) to the above estimate of CLEC facilities based access lines (473,152) provides an estimate of 502,735 total CLEC access lines in service.[47] Given these estimates of CLEC access lines in Arizona, it is undeniable that CLECs are serving large numbers of residential and business customers over their own facilities in this state. Accordingly, Qwest states that it has satisfied all four prongs of the Track A requirements in Arizona.

46. At the Workshop on June 12, 2001 Qwest reiterated its understanding that Track A has four components that are addressed in the Ameritech Michigan decision. It expressed the viewpoint that a Track A discussion would not be a very fruitful discussion in the Workshop. It further stated that in Arizona there should not be any type of credible contest over whether or not Track A has been established.

47. Qwest's witness reiterated that Qwest believes that Track A, especially in light of testimony provided by Cox witness in the workshop, is not an issue. Cox stated that its interest in Track A included Qwest's estimates of facilities-based competition and Qwest's estimating procedures. AT&T stated at the June 12 workshop that the question is the extent to which there exist competitors in Arizona who are either exclusively or predominantly providing telephone exchange service to business and residential customers. Since Cox was unable (or unwilling) to identify the number of business customers it serves, the only current source is Qwest's testimony in which the number of business customers was estimated.

48. Qwest also addressed AT&T's submission that the Qwest methods of estimation are not proper and should be questioned. The AT&T witness stated that Qwest has not used the same methods in Arizona that have been used before for other purposes in this state and that have been used in other states such as Wyoming and North Dakota. AT&T further contended that Qwest's direct testimony includes information about interconnection agreements and parties pursuant to those interconnection agreements, but offers no indication as to which particular interconnection agreement it is that meets the requirements of Track A. Qwest responded that there is testimony concerning a facility-based provider of business service in Arizona in Qwest's service territory. That provider is Cox, and the requirements for Track A indicate only that there must be at least one facilities-

[46] *See* Mohebbi Letter at 1-2 & n.2.
[47] *See* Mohebbi Letter at 1-2 & n.2.

based provider actually offering service in order to meet the requirements of Track A. Cox testified that it provides service exclusively over its own telephone exchange facilities to both residential and business customers. Qwest reiterated the other three FCC requirements and reasons for its claim that it satisfied these requirements, as described in its April 17, 2001 affidavit.

49. With regard to AT&T's comments on the four prong analysis, Qwest states that it is the FCC's four part test for Track A, not an invention of Qwest's witness.

50. Also at the June 12, 2001 workshop, Qwest's witness presented a brief overview of Track A requirements and discussed elements of his testimony that support those requirements. He stated that fundamental to Track A are several concepts. Number 1: are local markets open? Second: is meaningful competition present? Third: the overall question is: will markets remain open into the future? Qwest's position is that markets are open and that they are irreversibly open in the Arizona market. Competitors are actively offering a wide range of services ranging from dedicated services to local exchange services to long distance service.

51. Qwest's witness stated that Qwest has 63 interconnection agreements in place with unaffiliated CLEC's. The witness used as examples AT&T and TCG and MCI and WCom. AT&T merged with TCG in 1998. Prior to the merger, TCG was very active in Arizona serving large business customers. TCG has an interconnection agreement with Qwest. MCI merged with WCom in 1998. WCom also merged with Brooks Fiber. Brooks Fiber was a major competitor specifically in the Phoenix market serving large business customers. The witness also referenced other competitors including ELI, Cox Communications, e.spire, Sprint and others as cited in his testimony. He stated that Qwest tracks the number of unbundled loops that it has sold to CLECs. Qwest also knows how many lines it has resold to competitors and CLECs in Arizona for both residential and business customers. Qwest's witness stated that there are both residential and business customers and access lines being served by CLECs in Arizona, in more than a de minimus number. He stated that there are many thousands, as shown on his exhibit DLT-2, and concluded that it is clear from the evidence presented in his direct testimony and augmented in the workshop by additional evidence introduced by Cox that the Track A requirements are met in this state.

52. With respect to the issue of whether or not Qwest is serving business customers, Qwest's witness stated that its direct testimony on page 13 lists AT&T as a facilities based competitor to business customers; WorldCom is similarly listed on page 14 through 15; ELI is shown as providing business facility-based services to customers in Arizona, as are Cox and e.spire. These statements do not include the actual number of customers or access lines because Qwest does not have those numbers. For this reason Qwest wished to question the witnesses for the CLECs during the workshop. However Qwest stated that it does have an interconnection agreement with each of the carriers that it identified.

53. Qwest recommended that given the issue of business customers, or lack thereof, raised by AT&T that it would send data requests to AT&T, WorldCom and other parties in the docket addressing the same questions for business competition and submit those as late-filed exhibits. Staff concurred that that was a reasonable suggestion and indicated that Staff would also issue data requests to the various carriers that are parties to this proceeding, asking for similar information, and send out data requests to non-party CLEC providers also asking for this information. Staff would also intend to provide or incorporate the information it receives as part of the record in this workshop.

54. On September 18, 2001, Qwest filed a brief in support of its showing of Compliance with Track A Entry Requirements of 47 U.S.C. §271(c)(1)(A). It reiterated evidence or arguments contained in its April 17, 2001 affidavit and introduced in the June 12, 2001 workshop, but provided no new evidence or arguments.

e. **Offers of Supplemental Authority – Track A**

55. Qwest filed a Statement of Supplemental Authority (Colorado) on March 18, 2002. The Colorado Hearing Commissioner stated that the FCC had recently indicated that, in order to qualify for Track A, "A BOC must have interconnection agreements with one or more competing providers of telephone exchange service. . . to residential and business subscribers".[48] He acknowledged that Staff Volume 7 report and Qwest have addressed the Track A requirement along four major inquiries enumerated by the FCC in the Ameritech Michigan Order.[49]

56. The record demonstrates that Qwest has entered into a number of binding interconnection agreements under § 252 of the 1996 Telecommunications Act. No party has disputed the evidence submitted by Qwest with regard to the first prong of 47 U.S.C. § 271(c)(1)(A).

57. With respect to the second prong, access and interconnection to non-affiliated competitors, the Hearing Commissioner stated that satisfaction of this element of Track A does not impose geographic range, order volume number, or market share requirements.[50] Qwest presented evidence that it served an estimated 310,000 CLEC access lines as of March 2001.[51] No other parties contested the fact that Qwest is providing access and interconnection to unaffiliated competing providers of telephone exchange service. Qwest satisfies this prong of § 271(c)(1)(A).

58. The third element of the Track A test addresses whether CLECs collectively serve residential and business customers within the state.[52] Qwest has presented survey evidence that demonstrates that major competitive exchange carriers are providing facilities-based (including UNE-based) access to end-users, in some cases using a combination of their

[48] *SBC Arkansas/Missouri Order* at paragraph 117.
[49] Ameritech Michigan Order at paragraphs 62-104 (1997).
[50] *See Ameritech Michigan Order* at paragraph's 76-77.
[51] Qwest Track A/Public Interest Brief at 9.
[52] *Ameritech Michigan Order* at paragraph 82.

own facilities and UNE's leased from Qwest. There are also other facilities-based Competitive Exchange Carriers operating in Colorado such as XO Communications, Time Warner Telecom, Allegiance Telecom, and Eschelon Telecom. Qwest further submitted that as of July 9, 2001 there were 103,270 unbundled loops in Colorado served by 24 CLECs.[53] Qwest estimates that as of March, 2001, there were 78,941 residential facilities bypass lines and 128,570 business facilities bypass lines, a figure far below that which would result if the methodology that was used by SBC in Texas, Kansas and Oklahoma were employed.[54] This methodology, accepted by the FCC would result in an estimated total of 496,994 competitive bypass lines as compared to Qwest's methodology results of 207,511.

59. Finally Qwest presented its estimate of CLEC market share which it estimated to be 11.5% of all access lines in Colorado. Under the SBC methodology, this estimate would come to 19.2% and in states where FCC approval has been granted under the SBC methodology such as Kansas (at an estimated 9.0 to 12.6% at the time of § 271 approval) and Oklahoma (at an estimated 5.5 to 9.0% at the time of § 271 approval).[55] The Hearing Commissioner concluded that a sufficient number of residential and business customers are being served by CLEC's either through the use of their own facilities or in combination with UNEs to demonstrate that there is an actual commercial alternative in Colorado. Finally, he stated that Qwest has shown that facilities-based carriers serve more than a *de minimus* number of residential and business customers in Colorado.

60. The Hearing Commissioner concluded with a Commission Order which states that the Commission Staff Report Volume 7, along with this order, established that at this time Qwest does not meet the "Public Interest" requirements of 47 U.S.C. § 271(d)(3)(c). However, he stated that upon the filing of a Performance Assurance Plan acceptable to this Commission, Qwest will be conditionally compliant with the Public Interest Test. The Hearing Commissioner recommended that with a compliant Performance Assurance Plan, the Colorado Commission could certify compliance with the "Public Interest" Test to the Federal Communications Commission. He further stated that Commission Staff Report Volume 7, along with this order, establish that Qwest is conditionally compliant with § 272 and "Track A" 47 U.S.C. § 271(c)(1)(A). The Hearing Commissioner recommends that the Colorado Commission certify compliance with the same to the Federal Communications Commission.

f. <u>Staff Discussion and Recommendation</u>

61. Based on affidavits, workshop testimony and briefs filed by Qwest and CLECs, Staff concludes that Qwest complies with Track A requirements of FCC Section 271, specifically: 47 U.S.C. §271(c)(1)(A). Affidavits, testimony and briefs demonstrate that Qwest:

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[53] Qwest Track A/Public Interest Brief at 20.

[54] Qwest bumps up the number of bypassed business lines the original 10% "to compensate for similar undercounting." *Id.* at pp. 24-25, citing Kris Hudson, "AT&T counts cable phones: 20,000 signed up with broadband in 170 days of service" *Rocky Mountain News*, May 20, 2000 at 3b; . . . etc.

[55] *Id.*

a) Has one or more binding agreements with CLECs that have been approved under Section 272 of the Act.

b) Provides access and interconnection to unaffiliated competing providers of Telephone Exchange Service.

c) Competitors collectively provide Telephone exchange service to residential and business customers.

d) Competitors offer Telephone exchange service either exclusively or predominantly over their own Telephone facilities, including UNEs which they lease from Qwest in addition to resale.

62. The primary challenge by CLECs was with regard to Qwest's data, and the methods for estimating CLEC customer and access lines served. To resolve this matter, Staff issued Data Requests to Qwest and to CLECs on August 1, 2001. The relevant non-proprietary results compiled from the responses to Staff's Data Request are provided in the following paragraphs.

63. Data requests were submitted to 39 service providers. Responses were received from 32 service providers. Most responses included data through July 2001; five responses contained data for periods terminating before July 2001; one included data to March 2001; one to May, two to June and one to July, 2001. These nominal variances are not considered material.

64. Data request responses show:

1. Business access lines served by CLECs in Qwest's service territory in Arizona amount to 990,686. Thus CLECs serve 15% of total business access lines.

2. The CLECs collectively serve 72,122 residential access lines; Qwest serves 2,026,205; total residential access lines served in Arizona is 2,098,327. Thus CLECs serve 3% of total residential lines.

3. Total (business plus residential) access lines served by CLECs amounts to 222,700; Qwest serves a total of 2,866,313 access lines. Thus CLECs serve 7% of all access lines in Qwest's service territory in Arizona.

4. CLEC market share reported in Texas (estimated by DOJ at 8%), Oklahoma (estimated 5.5% to 9.0%), Kansas (9.0% to 12.6%), and New York (8% Qwest estimate) were in the same general range at the time of §271 applications in those states as CLEC current market share in Arizona. Thus, although the FCC has not quantified the level of CLEC competition necessary for Track A compliance, favorable decisions have been based on market penetration similar to that observed in Arizona.

5. Eighteen CLECs actively serve business customers, six serve residential customers.

6. Of the 18 CLECs serving business customer, 12 use their own facilities, at least in part.

7. Nine CLECs serve business customers through UNEs; three serve residential customers through UNEs.

8. Only four CLECs serve business customers through resale; there are a total of 254 CLEC resale business customers in Arizona.

9. Only two CLECs actively serve residential customers through resale; there are 9,575 residential resale customers, almost all of which are served by one CLEC.

65. Since the preceding data were provided by the CLECs, not by Qwest, the CLECs cannot hold them suspect. Thus, these data conclusively demonstrate that Qwest satisfies Track A requirements (c) and (d). Requirement (a) and (b) are demonstrably satisfied by Staff's review of files to confirm binding interconnection agreements, including those with unaffiliated competing carriers. Qwest also has a Statement of Generally Available Terms and Conditions on file in the State of Arizona which has been extensively addressed in the Section 271 Workshops.

66. As stated in paragraph 62, Staff concludes that Qwest complies with Track A requirements of Section 271, specifically: 47 U.S.C. §271(c)(1)(A), and recommends that the Commission find Qwest to be compliant with §271 requirements as they relate to Track A.

2. PUBLIC INTEREST

a. FCC Requirements

67. The FCC Orders granting 271 relief outlined the following three step analysis for the Public Interest requirement:[56]

- Determination that the local markets are open to competition.
- Identification of any unusual circumstances in the local exchange and long distance markets that would make the BOC's entry into the long distance market contrary to the Public Interest.
- Assurance of future compliance by the BOC.

[56] As described in Qwest Affidavit dated April 17, 2001.

b. **Background**

68. A number of States have received 271 approval. While the "Public Interest" is not a specific checklist item with which a BOC must comply it is a showing that the BOC must satisfy prior to receiving approval of any Section 271 application by the respective state commission, the FCC and DOJ. Positions taken by the varying States range from a very narrow perspective of public interest to one which weighs a number of factors resulting in a much broader view of the scope of the Public Interest assessment.

c. **Competitors' Position**

AT&T

69. AT&T Public Interest comments are organized into three issues:

I. Qwest has not opened its local markets to competition and has provided no assurance that once its local markets are open to competition that they will remain so.

II. Remonopolization will occur if Qwest is granted entry into the long distance market now.

III. Structural separation of Qwest is the key to truly opening the local market in Arizona to competition.

70. In its May 18, 2001 affidavit, AT&T stated that Qwest has not opened its local markets to competition within Arizona. Further, Qwest relies on a Performance Assurance Plan ("PAP") as the vehicle to assure that its local markets remain open to competition.[57] In both respects of (a) opening its local market to competition, and (b) assuring that they remain open, Qwest's present showing does not satisfy the pubic interest requirement.

71. Further, AT&T stated that checklist compliance alone does not establish that the local market is open to competition. AT&T quotes the FCC as follows:

> "In making our Public Interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the Public Interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the Public Interest requirement out of the statute, contrary to the plain language of the section 271, basic principles of statutory

[57] Teitzel Direct Testimony, p. 41.

construction, and sound public policy...[T]he text of the statute clearly establishes the Public Interest requirement as a separate, independent requirement for entry."[58]

72. The FCC has said that checklist compliance is a "strong indicator" that long distance entry is consistent with the Public Interest.[59] No such indication exists in the case of Qwest's local markets since no state commission has found Qwest to be in compliance with the checklist obligations. After identifying and weighing *all* the relevant factors pertinent to Qwest, this Commission should conclude that it would be inconsistent with the Public Interest for Qwest to enter the Arizona interLATA market at this time.

73. AT&T discusses two areas of barriers to entry: 1) UNE prices, and 2) Intrastate access charges

74. The FCC has identified various factors that are illustrative, but not exhaustive, of the factors to be considered in determining whether a BOC has opened its local markets to competition.[60] One such factor is whether all barriers to entry into the local telecommunications market have been eliminated.[61] A market is not open to competition when there exists a barrier to entering the market. Specifically, *denying* new entrants the means to compete via the ready availability of competitively priced Unbundled Network Elements ("UNEs") while also *allowing* carrier access charges to remain significantly above economic costs, has retarded, if not stopped altogether, the promise of choice for average consumers.

75. The Public Interest analysis, therefore, must consider whether approval of a section 271 application will foster competition in *all* relevant telecommunications markets.[62] Approval of a section 271 application for Qwest would not foster competition in its local residential markets because such approval would not remove the barriers to entering such markets as set forth below.

76. The pricing of UNEs in excess of economic cost creates a barrier for CLECs to enter Qwest's local residential market in Arizona. Qwest witness Mr. Teitzel stated that it has entered into interconnection agreements that provide for "cost-based pricing of access, interconnection, and unbundled network elements and for wholesale discounts to reflect

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[58] Ameritech Michigan Order, ¶ 389; *See also 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,* CC Docket No. 99-295, FCC 99-404, Memorandum Opinion And Order (rel. December 22, 1999) (hereinafter "BANY Order"), ¶ 423, "Nonetheless, the Public Interest analysis is an independent element of the statutory checklist and, under normal cannons of statutory construction, requires an independent determination."

[59] *BANY Order*, ¶ 422.

[60] *Ameritech Michigan Order*, ¶ 398.

[61] *See Ameritech Michigan Order*, ¶¶ 390, 396: *see also BANY Order*, ¶ 426.

[62] *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana,* CC Docket No. 98-121, FCC 98-271, Memorandum Opinion And Order (rel. October 13, 1998) (hereinafter "Second BellSouth Louisiana Order") ¶ 361.

avoided costs."[63] In fact, Qwest's pricing is far from cost-based and has been a primary factor in keeping its local, residential markets closed to competition.

77. UNE rates are so high when comparing cost to retail rates that CLECs cannot compete with Qwest for residential customers using the UNE-Platform ("UNE-P"). It is critical to keep in mind that UNE-P rates do not include the CLEC's internal business costs such as those attributable to billing or customer service, and the rates do not include any margin or profit for the CLEC.

78. AT&T argues that Qwest's intrastate access rates are well above cost and provide it with a subsidy to apply to other products and services. Qwest's entry into the interLATA long distance market is also inconsistent with Public Interest due to the significant price advantage that Qwest would enjoy over competitors. [64] AT&T provided detailed discussion in its comments of pricing examples to show the potential magnitude of the intrastate access costs on competition.

79. AT&T states the impact of this is as follows. Were Qwest to enter into the interLATA long distance market, Qwest would be able to bundle its local service with a long distance offering. Competitors, not afforded the same monopoly subsidization contained in intrastate switched access rates, will be squeezed out of the local market. Additionally, unless a serious and substantial change in the competitive local services landscape were to emerge quickly and irreversibly, Qwest will soon dominate and ultimately monopolize the adjacent, currently highly-competitive, long distance market as well. The forward-looking economic cost for Qwest to provide access to itself for intrastate long distance calls is substantially less than the price that Qwest charges IXCs for the same identical access.

80. Whether a BOC has cooperated in opening its local market to competition is another factor the FCC takes into account in determining whether the local market is in fact open to competition. [65] Thus, evidence that a BOC has engaged in either (1) disobeying federal or state telecommunications regulations or (2) a pattern of anti-competitive conduct, is sufficient to demonstrate that the BOC has not cooperated in opening its local market to competition. The evidence that Qwest has not cooperated in opening its local market to competition is particularly compelling because the evidence consists of *both* types of behavior.

81. Qwest has previously violated Section 271 and is likely to do so again. AT&T offered examples of Qwest Section 271 violations including:

- Without opening its local markets to competition and without even seeking FCC approval, Qwest entered the interLATA long distance market in violation of the statutory framework involved in this proceeding.

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[63] Teitzel Direct Testimony, p. 52, ls. 16-18. For clarification, carrier access charges are not included in the Interconnection Agreements nor are they "cost-based."
[64] Affidavit of Mary Jane Rasher, pgs 9-12.
[65] Affidavit of Mary Jane Rasher, pgs. 9-21.

- In another proceeding, the FCC found that the former U S WEST's "provision of non-local directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service as defined in section 271(a) of the Act."[66]

- In yet a third proceeding, the FCC addressed U S West's earlier business arrangement with Qwest, and Ameritech's similar arrangement with Qwest.[67] Under the business arrangement, U S West and Ameritech provided their local customers with a one-stop shopping opportunity that included interLATA services, without first opening their local markets to competition, without FCC approval, and in violation of Section 271.[68]

82. Qwest has a long history of maintaining its firm grip on its local markets through the use of anti-competitive behavior. From the very beginning in Arizona, U S WEST sent a clear message to new competitors that market entry would require expensive and extended litigation. U S WEST endeavored to oppose *every* new competitor's request for a certificate of convenience and necessity ("CC&N"). As a matter of course, U S WEST intervened in each of the CC&N proceedings, opposed each Commission decision to issue a CC&N and, after each certificate was issued, filed an application for rehearing arguing that the certificate should not have been issued.

83. When a new competitor succeeded in obtaining a CC&N from the Commission, it was promptly sued by U S WEST in Superior Court.

84. AT&T listed examples of anti-competitive behavior against AT&T, SunWest Communications, MCI Metro and Rhythms. These examples include:

- An AT&T complaint against Qwest filed with the Minnesota Public Utilities Commission on the subject of Qwest's violation of its interconnection agreement with AT&T as well as violations of state and federal law. More specifically, this example concerns the fact that AT&T has, to date, been unable to come to agreement with Qwest on a plan for the ordering and provisioning trial.

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[66] *See Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc.* for Forbearance, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (rel. Sept. 27, 1999), ¶¶ 2, 63.

[67] *AT&T Corporation, et. al. v. U S West Communications, Inc., and Qwest Corporation,* file No. E-98-42 (consolidated with File Nos. E-98-41 and E-98-43), FCC 98-242, Memorandum Opinion And Order (rel. to the public October 7, 1998) ¶ 52.

[68] *Id.*, see also *Id.* ¶44.

- In response to a complaint filed by AT&T against Qwest, the Washington Utilities and Transportation Commission on April 9, 2001, ordered Qwest to promptly provide AT&T with access to inside wiring in multiple dwelling units ("MDUs).[69]

- In an amended suit, SunWest asserts that Qwest continues to delay putting SunWest customers through to the network switch, and as a result, more and more of its customers are losing telephone service, or are forced to remain resale customers, which is a more profitable course for Qwest.

- MCI states that, in a ruling issued February 10, 1999, the Washington Utilities and Transportation Commission found that Qwest (U S WEST) had violated state laws and terms of its interconnection agreement by delaying MCI Metro from providing local phone service.[70]

- Rhythms Links, Inc. filed a complaint against Qwest with the Colorado Public Service Commission regarding Qwest's discriminatory practices in offering ADSL- capable loops and ISDN-capable loops to CLECs.[71]

85. In considering whether Qwest's local market is open to competition, one factor that the FCC and this Commission should consider is that a number of new market entrants have filed for bankruptcy. That a large and ever-growing number of new market entrants have found it impossible to compete in Qwest's local market is strong evidence that Qwest's local market is not open to competition. ICG Communications, Convergent Communications, Jato Communications, GST Telecommunications, e.spire, Pathnet, NorthPoint Communications, and REAnet are examples of CLECs and DLECs that have filed for bankruptcy in the last twelve months. The stocks of Rhythms NetConnections, Inc. and Covad Communications are trading at $0.23 and $0.97 after 52-week highs of $35.625 and $66 respectively.[72]

86. In stark contrast to Qwest's dominant position, the CLEC industry now faces significant obstacles in raising the capital necessary to compete broadly with Qwest and the

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[69] *Before the Washington Utilities and Transportation Commission*, Docket No. UT-003120, AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation, Second Supplemental Order Granting Motion to Amend Answer, Denying Emergency Relief and Denying Motion for Summary Determination. Issued April 9, 2001.

[70] *See Before the Washington Utilities and Transportation Commission,* MCIMetro Access Transmission, Inc. v. U S WEST Communications, Inc., Docket No. UT-971063, Commission Decision and Final Order, rel. February 10, 1999.

[71] *See Before the Public Utilities Commission For The State Of Colorado,* Rhythms Links Inc. (Complainant) v. U S West Communications, Inc. (Respondent), No. 99F-493T, October 7, 1999.

[72] CNBC online May 1, 2001.

other BOCs.[73] The "big three" IXCs, AT&T, MCIWorldCom, and Sprint, have collectively lost over $280B in market cap in the last year.

87. However, the point that cannot be ignored is the factor common to all of them - their dependence on Qwest for interconnection. The critical element is that Qwest does not provide the same level of service to its wholesale customers that it provides to its retail customers. The net effect of that anti-competitive and discriminatory behavior is that customers are unable to reap the competitive benefits envisioned by Congress and this Commission.

88. AT&T in its May 18, 2001 comments, further contended that Qwest has provided no assurance that its local market, once opened to competition, will remain open if granted 271 relief. Another factor the FCC considers under the Public Interest requirement is whether the Bell Operating Company has provided adequate assurance that its local markets will remain open to competition if the FCC grants 271 relief and allows the BOC to enter the interLATA market in its service region.[74] Mr. Teitzel's testimony indicates that Qwest will rely on a Performance Assurance Plan to demonstrate such assurance.[75]

89. Qwest has questioned both state and federal authority regarding jurisdiction over any PAP, claiming to each that such authority resided with the other. Before the New Mexico Public Regulations Commission, Qwest argued:

> "Furthermore, Qwest has resisted any efforts to make such a plan mandatory. Qwest informed the Executive Committee for the Regional Oversight Committee ("ROC") for the Operational Support Systems ("OSS") test effort currently underway, that "[A] performance assurance plan is not a 271 requirement, nor is it designed to prove 271 compliance. Instead, it is a voluntary undertaking (emphasis added), which creates future obligations with significant corresponding penalties. Qwest cannot allow (emphasis added) a voluntary undertaking of this magnitude to be subject to

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[73] In no market segment is this trend more apparent, or has the descent into free fall been sharper, than among "data LECs" that sought to provide competitive DSL services. These former "stock market darlings" are now on the verge of extinction. *See* P. Goodman, *Verizon Terminates Deal to Buy Stake in NorthPoint*, Washington Post, at E9 (Nov. 30, 2000). Indeed, Verizon terminated its plans to buy NorthPoint Communications Group, citing "the rapid decline of its would-be partner's business" - "an enterprise in need of huge flows of cash to build its network, yet losing customers." *Id.* As a result, NorthPoint is bankrupt. Analysts likewise have concluded that the data LECs are "unequipped to compete with the giants of the industry" - the incumbent local carriers - who "have clearly captured the upper hand in the battle to roll out DSL service." *See* J. Hall, *NorthPoint's Stock Plunges After Verizon Nixes Deal*, Reuters (Nov. 30, 2000) (quoting Michael Bowen).

[74] *In the Matter of 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, CC Docket No. 00-65, FCC00-238, Memorandum Opinion and Order, (rel. June 30, 2000) (hereinafter "SBC Texas Order"), ¶420; SBC Kansas/Oklahoma Order, ¶269.

[75] *See* Direct Testimony of David L. Teitzel, p.41.

modification through an informal ROC governance process where the lines are not clearly drawn between negotiations participants and decision makers."[76]

90. Accordingly, the Commission should order that an effective, permanent PAP be approved and available for integration into Interconnection Agreements ("ICAs") before any 271 relief is granted to Qwest.

91. AT&T stated that remonopolization will occur if Qwest enters the long distance market now. Qwest's approach to entering the long-distance market has been to wear down the resistance of the FCC and state regulators. Qwest has succeeded in preserving their monopoly position in their local markets by forestalling competition by every means available. Allowing Qwest into the long distance business prematurely can only make matters worse. Because it is far easier for Qwest to enter the long distance market than for CLECs to enter local markets, premature Qwest entry into the long distance arena will accelerate the remonopolization of the Arizona telecommunications market. It is not enough for Qwest to promise that it will fix its systems and processes. Qwest must demonstrate full, irreversible, and measurable compliance with its obligations *before* the Commission endorses the Qwest applications.

92. Finally, AT&T asserted that Qwest's structural separation is key to truly opening the local market to competition. Qwest's current stonewalling and anti-competitive actions are driven by its inherent conflict of interest. Qwest has two contradictory roles: (1) operator of the local telephone network that virtually all CLECs rely upon (in some form or fashion) to provide their local telephone service; and (2) the principal competitor of those same CLECs in the very same retail markets.

93. Qwest has both the ability and the willingness to discriminate in favor of its own retail services by charging competitors anti-competitive rates for access to those facilities and providing those facilities in a discriminatory fashion.[77]

94. Structural separation requires more than a mere accounting gimmick. Through a number of mechanisms, structural separation, properly done, would ensure that the newly separate affiliates are *functionally* separate, so that regulators, as well as competitors, can identify "the rates, terms, and conditions on which services will be available to all potential purchasers."[78] Such separate corporate affiliates would, for example, maintain separate books, records, and accounts from the wholesale arm, maintain

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[76] Letter from R. Steven Davis, Qwest, Senior Vice President, Policy and Law, to Bob Rowe, Allan Thomas, Marilyn Showalter, Stephen F. Mecham, Anne Boyle, Ray Gifford, and Ed Garvey, December 15, 2000, p. 2.

[77] See "In Re Applications of Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer Control of Corporation Holdings Commission Licenses and Lines," Memorandum Opinion and Order, CC Docket No. 98-141, FCC No. 99-279, (rel. October 8, 1999) ("Ameritech-SBC Merger Order"); see also Burns, et. al., Market Analyses of Public Utilities: The Now and Future Role of State Commissions, (National Regulatory Research Institute July, 1999 (describing how incumbent monopolists can use control of bottleneck facilities to give "preferential treatment [to] affiliates or discriminate against affiliates' competitors").

[78] Final Decision and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC.2d 384, ¶ 205 (1980) ("*Computer II*").

separate facilities, and deal at arms length, in writing, with the wholesale arm.[79] Thus, structural separation, while requiring corporate reorganization, would not require Qwest to divest economic ownership of any network facilities.

95. The Commission should demonstrate that it is serious about a competitive market by following the lead action taken in Pennsylvania, Florida, Illinois, Indiana, Minnesota, New Jersey, Tennessee and Virginia in considering some form of structural separation and associated code of conduct that would specify how Qwest would operate under such a separation.

96. Although only full economic separation of Qwest's wholesale and retail arms would be fully sufficient to eliminate Qwest's incentives to abuse its bottleneck facilities, structural separation should significantly reduce Qwest's incentives and ability to engage in such anticompetitive conduct. That, in turn, will facilitate true competition in local exchange markets of Arizona – for the benefit of competitors and consumers alike. AT&T urges the Commission to order the structural separation of Qwest into distinct wholesale and retail corporate subsidiaries, before granting Qwest 271 relief.

96. AT&T's witness at the June 12, 2001 public interest workshop reiterated briefly the direction that the Federal Act provides the FCC in assessing whether a 271 application would be consistent with public interest, convenience and necessity. The FCC interprets this to mean that Qwest must demonstrate that as local markets are open to competition, they will remain open if entry into the interLATA market is granted. While the FCC has stated it considers compliance with the 14-point competitive checklist to be a strong indicator that the application would be in the public interest, this is not the sole determinant. The AT&T witness further stated that the public interest standard must be addressed and satisfied independent of the 14-point checklist. The AT&T witness stated that she had outlined several relevant factors which should aid the FCC in determining where the local markets are open to competition and remain so, in her affidavit and would recap those here. Concerning barriers to entry, the AT&T witness stated that there are barriers the CLEC's encounter in attempting to enter Qwest's local markets in Arizona.

97. An example is Qwest's UNE-P prices. Specifically, a CLEC pays Qwest $26.18 for a UNE-P arrangement while a retail customer pays Qwest only $13.18 for a 1FR. Thus the wholesale CLEC charge is nearly twice Qwest's retail rate for its own customers. Non-recurring charges that a CLEC must pay Qwest in Arizona are $83.50, while Qwest's retail 1FR customers pay $46.50.

98. Qwest's high intrastate access charges in Arizona present another market entry barrier. Qwest's access rates are priced significantly above its cost, thereby providing a source of funding to allow it to subsidize its other services in a manner that stifles competition. Further, Qwest's intrastate access rate for a two-sided call in Arizona is 8.07¢

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[79] *Accord, CMRS Structural Separation Order* ¶ 38(1)-(3) (detailing separate affiliate requirements to be applied to LECs' commercial mobile radio services affiliates).

per minute. Using that intrastate surrogate as a cost figure, this 8.07¢ per minute is 733% above the cost of providing such access.

99. AT&T's witness stated that Qwest has a pattern of violations of federal and state regulations which the FCC will take into account. She cited the following instances of Qwest violating Section 271. First, Qwest offered a non-local directory assistance service to its in-region subscribers, which the FCC found in violation of Section 271 and ordered it to be discontinued. Second, Qwest had built and branded an in-region interLATA private-line service which it offered to 266 large business customers for eight months with associated revenues of $2.2 million. The FCC found that this service offering was not compliant with the Qwest/U.S.West merger conditions and was non-compliant with Section 271 requirements. Finally, Qwest petitioned the ACC to abolish the LATA boundaries in Arizona, which AT&T contended would be a violation of state regulations.

100. Another factor in the determination of Qwest's compliance with the Public Interest standard is Qwest's anti-competitive behavior. The witness recapped examples from her affidavit including examples from states in Qwest's local territory other than Arizona. These examples included Qwest's endeavor to oppose every new competitors request for a Certificate of Convenience and Necessity. Qwest did everything possible to delay the issuance of certificates and once certificates were issued promptly sued the CLEC in Superior Court. Appeals associated with this litigation are still pending. These Qwest lawsuits impose actual immeasurable cost on competitors, and go a long way in persuading potential entrants to avoid Arizona due to costs attributable to Qwest's anti-competitive behavior.

101. The AT&T witness stated that in March of 2001, AT&T filed a complaint with the Minnesota Public Utilities Commission regarding Qwest's violation of its interconnection agreement with AT&T. This was based on AT&T's intent to test its UNE-P platform ordering a provisioning system in Minnesota. Despite months of meetings between the parties, Qwest finally flatly refused to conduct the test trial. Qwest's refusal inhibited AT&T from competing effectively as well as denying the public benefits of competition, including lower prices and diversity of telecommunications services.

102. In a separate case in Washington State, Qwest refused AT&T access to inside wiring in multiple dwelling units. AT&T was forced to file a complaint with the Washington Utilities Transportation Commission (WUTC) in March of 2001. An April Order by the WUTC ordered Qwest to provide AT&T access to these buildings. AT&T's witness referenced a lawsuit in Colorado filed by SunWest Communications against Qwest. She reported that Qwest has settled that lawsuit although she was not informed of the terms of that settlement.

103. AT&T's witness cited a 1999 WUTC finding that Qwest had violated laws in terms of its interconnection agreements that resulted in delaying MCI Metro from entering that local marketplace. She also cited complaints filed by Rhythms alleging discriminatory practices in Qwest's offering of an ADSL and ISDN capable loop to CLECs. In the settlement of this, Qwest began providing CLECs with an ADSL and an ISDN capable loop,

the development of which took nearly a year and impeded Rhythms market entry throughout the Qwest region.

104. The AT&T witness cited the current and ongoing demise of the CLEC and DLEC industry, stating that Qwest has the incentive, the motivation and the wherewithal to drive their competitors out of business because CLECs and DLECs depend on Qwest for interconnection. She cited a recent advertising program which was directly aimed at gaining customers from competitors that it helped drive out of business. That coupled with the extremely low market penetration rate by Qwest competitors is proof that Qwest's local markets are not open. Further, she stated that the CLEC market penetration level is extremely low, especially in the residential market. Even using Qwest's own data, she stated that it is clear that this market is not open to competition. She challenged Qwest's data concerning customers and access lines served by CLECs on the basis that it does not take competitive failure and subsequent market exit into account.

105. The witness further stated that Qwest has done little to provide assurance that its local markets will remain open if granted 271 relief. It has not submitted a PAP for consideration in Arizona. Qwest has sponsored legislative efforts in several states, including Iowa, New Mexico and North Dakota urging those state commissions to rush through their reviews of Qwest's 271 process, yet these resolutions made no mention of assuring future compliance by Qwest in keeping the local markets open upon being granted 271 relief. She also stated that Qwest has refused attempts to make any PAP mandatory, and has no intention of coming forward with a meaningful PAP.

106. AT&T's witness stated that if Qwest were to be granted 271 relief before the local markets are open to competition, the result will be a re-monopolization of the telecommunications market in Arizona. She further stated that a re-monopolization effect is already happening in Texas, where SBC's pervasive control of the market only a few short months after receiving 271 relief has enabled the SBC to increase its consumer long distance prices by 1¢ to 2¢ a minute and its DSL prices by $10 a month. Qwest has an inherent conflict of interest in the two contradictory roles, that of operator of the local network that all CLECs rely upon in some fashion to provide their local service; and two, the principal competitor of those same CLECs in these very same retail markets. In order to avoid the creation of a monopoly market for Qwest and to relieve this inherent conflict of interest, AT&T's witness suggested that the Commission should order Qwest to separate its wholesale and retail units into separate entities before any recommendation of a 271 approval is given to the FCC.

107. AT&T's witness further stated that with respect to the structural separation they recommended, they also proposed that a code of conduct, similar to that established in Pennsylvania, be included in Arizona. This code of conduct would ensure that employees on the wholesale side would in no way share information between the wholesale and retail units so that the BOC would not have any advantage that any other CLEC would have in dealing with the wholesale operation.

108. The AT&T witness stated that in Minnesota, there is less disparity than there is in Arizona between the 1FR rate and the UNE-P rate. The 1FR rate is $14.75 and the UNE-P rate is $20.90 in Minnesota. The AT&T witness went on to say that she believes that AT&T and Sprint have discussed withdrawing their local services in some other states as a result of disparate pricing. AT&T's witness, in her affidavit, and in the workshop mentioned that UNE-P prices as well as the intrastate access costs are both serving as barriers to market entry for CLEC's in Arizona. WorldCom's witness, stated that given the UNE prices that exist today, he would think that WorldCom has no plans to be in the Arizona residential market in the foreseeable future. He stated that for interLATA services there is competition in Arizona. He further stated that he could not agree with Qwest's witness claim that competition in the interexchange market would increase upon Qwest 271 approval.

109. The AT&T witness stated that she was not aware of AT&T's market plans for Arizona, but would echo WorldCom's witness who testified that UNE-P prices and intrastate access costs are strong factors to keep AT&T from entering an otherwise attractive local market.

110. In its September 18, 2001 brief, AT&T argues that Qwest improperly downplays the substantial market power which Qwest has and its ability and incentive to use that market power to exclude competitors from the local exchange marketplace. Checklist compliance alone is not sufficient to satisfy the Public Interest requirement and in any event, Qwest has not demonstrated compliance with the 14 point checklist. Rather, the essence of the Public Interest inquiry is for the Commission to determine whether the BOC applicant's local markets are irreversibly open to competition.

111. AT&T states that numerous "relevant factors" confirm that local markets in Arizona are not by any means open to competition today, and—absentsignificant steps on the part of Qwest—will not be open to competition in the near future. As evidence, AT&T points out that Qwest's own data show that there is virtually no UNE-based competition for residential customers in Arizona. Qwest has blocked competitive entry using UNEs and UNE-P, and is forcing competitors to resort to the construction of separate facilities in order to enter the local market.

112. AT&T's September 18, 2001 brief built on the key points raised in its May 18, 2001 comments on six issues which they feel show that Qwest 271 approval is not in the Public Interest:

1. Qwest maintains monopoly power over residential service.

2. The evidence of insufficient margins demonstrates that Qwest's local residential markets are closed to competition.

3. Prospects for facilities-based and UNE-based residential competition are poor.

4. Qwest's proposed InterLATA market entry will not make that market more competitive.

5. Qwest has exhibited a constant and continuing pattern of anti-competitive behavior.

6. Qwest has not provided adequate assurances that its local markets, once opened to competition, will remain so.

113. AT&T states that the FCC has repeatedly declined to identify a minimum market share that CLECs must capture before a market is declared to be open. But the minimum market share need not be taken into account due to the fact that *no* CLECs today are able to mount any kind of meaningful competitive threat whatsoever to Qwest's monopoly control over residential local service in the state. Even the data presented during the June 12, 2001 workshop show that CLEC penetration in Arizona to date is minimal; in particular, facilities-based and UNE-based competition for residential service. Qwest has not provided any breakdown of this total between business and residential, and AT&T concludes that all unbundled loops are used by CLECs to provision business services.

114. The resale market for residential service is very similar. AT&T, in its September 18, 2001 brief, discusses specific numbers of CLEC residential lines and facilities based CLEC residential lines. The public versions of the brief have the numbers redacted but it is obvious that the AT&T point is that the numbers are very low. AT&T concludes this section by saying that each of the three available avenues to competitive entry—resale,UNE provisioning, and construction of facilities—si effectively blocked.

115. The evidence of insufficient margins demonstrates that Qwest's local residential markets are closed to competition.[80] In this section, AT&T discusses the costs of facilities from Qwest compared to Qwest's retail rates and the impact this has on competition; more specifically, whether, under prevailing UNE rates, competitive entry is economically viable. AT&T quotes the FCC in its *Ameritech Michigan 271 Order*, *supra*:

> "efficient competitive entry into the local market is vitally dependent upon appropriate pricing of the checklist items," (id., at para. 281), and so competitive pricing is obviously "a relevant concern in [the FCC's] Public Interest inquiry under section 271(d)(3)(C)."

116. That remains true whether or not a state commission has made a finding that UNE rates comply with TELRIC. Accordingly, where the evidence indicates that UNE rates, set at the upper boundary of TELRIC, preclude competitors from profitably using UNEs to enter the local market, that fact is clearly relevant to whether the local market is open. AT&T goes on to say that even this is overshadowed in Arizona where Qwest's UNEs are not priced according to TELRIC principles but instead, UNEs are priced considerably

[80] AT&T Brief of 9/18/01, Pg. 5.

above cost. The pricing of UNEs in excess of economic cost creates a clear barrier for CLEC entry into Qwest's local residential market in Arizona.

117. As demonstrated in Figure 3 below, UNE rates are so high in comparison to retail rates, that CLECs cannot compete with Qwest for residential customers using the UNE-Platform ("UNE-P"):

Figure 3
Pricing Matrix provided by AT&T[81]

Monthly Recurring Charges ("MRCs")		Non-Recurring Charges ("NRCs")	
UNE-P[82]	1FR	UNE-P	1FR
$26.18	$13.18	$83.50	$46.50

118. Not only are Qwest's monthly recurring charges ("MRCs") on the wholesale side are almost double Qwest's own retail rates for residential lines; but the wholesale non-recurring charges which CLECs must pay Qwest for UNE-P are approximately 80 percent higher than the non-recurring charges Qwest's retail customers pay. Regardless of a BOC's checklist, if CLECs cannot profitably enter local telephone markets, then those markets, as a practical matter, are not open to competition.

119. Prospects for facilities-based and UNE-based residential competition are poor.[83] Neither resale nor facilities-based competition is likely to provide a significant, viable source of competition for Qwest during any foreseeable timeframe. Resale is an inherently limited competitive vehicle, because the competitor cannot alter the nature of the service it is reselling, and thus cannot provide competitors with innovative or improved service. And in any case, resale is priced in a manner that precludes its use in all but the most selectively chosen circumstances.

120. The prospects for facilities-based competition are no brighter. In stark contrast to Qwest's dominant position, the CLEC industry now faces significant obstacles in raising the capital necessary to compete broadly with Qwest and the other BOCs. CLECs and DLECs are now suffering from the drought in the capital funding market and have either already succumbed to or are close to bankruptcy.[84] ICG Communications, Convergent Communications, Jato Communications, GST Telecommunications, e.spire, Pathnet, NorthPoint, PSINet, 360Networks, Inc., Winstar Communications, Inc., Teligent, REAnet, Rhythms NetConnections, Inc., and Covad Communications are all examples of CLECs and DLECs that have filed for bankruptcy in the last twelve months.

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[81] AT&T PI Brief of 9/18/01, Pg. 7.
[82] All UNE-P MRCs include analog loop, analog port, 750 minutes of local usage, and 400 minutes of shared transport.
[83] AT&T PI Brief of 9/18/01, pg 8.
[84] Recently Qwest found itself frozen out of the capital markets (ACC Staff note).

121. Even SBC Communications, itself a BOC, has found it impossible to break into Qwest's monopoly local markets. Under the terms of its acquisition of Ameritech, two years ago, SBC had agreed to enter thirty new markets throughout the United States. It has now closed most of its newly-opened regional sales offices, including (in the Qwest service territory) Denver, Minneapolis, and Seattle.

122. Qwest also maintains a "Competitive Response Program" which "provides incentives to former customers who have left Qwest for a local exchange competitor to consider returning once again to Qwest."[85] Qwest's Competitive Response Program calls into question the incentives which Qwest may have, now and in the future, to make the cutover process seamless to customers and competitors. The critical element relating to the prospects for competition is that Qwest does not provide the same level of service to its wholesale customers that it provides to its retail customers. The net effect of that anti-competitive and discriminatory behavior is that the prospects for facilities-based and UNE-based competition are poor.

123. Qwest's proposed interLATA market entry will not make that market more competitive.[86] Qwest's entry into the long distance market is entirely inconsistent with the public interest because Qwest's intrastate access rates, which are priced significantly above cost, provide it with a source to subsidize its other products and services. For an IXC to make money on a call, it must charge its own end user a minimum of 8.07 cents per minute, plus the IXC's own costs, including network costs, call set-up, and other costs and overhead. Essentially, however, 8.07 cents per minute (plus its own costs) represents a floor below which the IXC cannot price that call.[87]

124. On the other hand, Qwest's cost of providing itself access—asopposed to its price for providing access to IXCs—si only about one cent per conversation minute (using the FCC target rate as a surrogate for cost). Clearly, then, Qwest can price its own retail long distance service well below eight cents per minute and still make money.

125. Competition within the interLATA long distance market is strong today because incumbent monopoly local exchange carriers, including Qwest, have been excluded from that market. The excessive margins they derive from access are not a factor in the interLATA market because these ILECs are not able to compete head to head in that market. But were Qwest to enter the interLATA long distance market, it would be able to bundle its local service with a long distance offering.[88] Competitors, not afforded the same monopoly subsidization contained in intrastate switched access rates, will be squeezed out of *both* the local and long distance markets.

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[85] 7 Qwest 17, Teitzel Rebuttal, p. 9-11.
[86] AT&T PI Brief of 9/18/01, pg 13.
[87] AT&T PI Brief of 9/18/01, pg 15.
[88] As it did illegally in 1997 and 1998. See discussion in Section E of this brief, *infra*. See also *AT&T Corporation, et. al. v. U S West Communications, Inc., and Qwest Corporation,* file No. E-98-42 (consolidated with File Nos. E-98-41 and E-98-43), FCC 98-242, Memorandum Opinion And Order (rel. to the public October 7, 1998) para. 52.

126. Qwest has exhibited a constant and continuing pattern of anti-competitive behavior.[89] Another relevant factor which the FCC takes into account when examining whether a 271 application is in the Public Interest is whether the BOC has cooperated in opening its local market to competition, or whether it has engaged in tactics to stall or frustrate market entry. AT&T quotes the FCC directly in this regard:

> "Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anti-competitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority."[90]

127. Evidence that a BOC has either (1) disobeyed federal or state telecommunications regulations or (2) engaged in a pattern of anticompetitive conduct, is sufficient to demonstrate that the BOC has not cooperated in opening its local market to competition. Qwest violated section 271 as early as April, 1997. Without opening its local markets to competition and without even seeking FCC approval, Qwest entered the long distance market in violation of the statutory framework involved in these multi-state proceedings.

128. In another proceeding, the FCC found that the former USWest's "provision of non-local directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service as defined in section 271(a) of the Act."[91] Once again, Qwest provided in-region, interLATA service without first demonstrating that its local markets were open to competition, without FCC approval, and in violation of Section 271. In yet a third proceeding, the FCC addressed USWest's pre-merger business arrangement with Qwest, and Ameritech's similar arrangement with Qwest.[92] Under the business arrangement, US West and Ameritech provided their local customers with a "one-stop shopping" opportunity that included interLATA services, without first opening their local markets to competition.

129. Qwest's violations of Section 271 are ongoing. Through review of Qwest's April 16, 2001 Auditor's Report and the accompanying certification submitted to the FCC as

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[89] AT&T PI Brief of 9/18/01, pg 17.

[90] *Ameritech Michigan 271 Order*, para. 397.

[91] *See Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc.* for Forbearance, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (rel. Sept. 27, 1999), paras. 2, 63.

[92] *AT&T Corporation, et. al. v. U S West Communications, Inc., and Qwest Corporation,* file No. E-98-42 (consolidated with File Nos. E-98-41 and E-98-43), FCC 98-242, Memorandum Opinion And Order (rel. to the public October 7, 1998) para. 52.

required in the FCC's approval of the Qwest-US West merger, AT&T discovered Qwest's further violations of Section 271. The Auditor's Report finds that in-region private line services for 266 large business customers were "billed and branded as Qwest services". Revenues associated with these services from July 2000 through March 2001 exceeded $2.2 million.

130. Also related to Qwest's outright violations of Section 271 are Qwest's efforts in Arizona and other states to make an end run around the law and provide long distance service without opening its local market to competition and without FCC approval. Qwest sought to remove the LATA boundary within Arizona by asking this Commission to abolish the boundary. Qwest's plan was that once the LATA boundary was gone, Qwest could provide long distance service throughout the state because such service could not be characterized as "interLATA service" within the prohibitions of section 271. The FCC responded by threatening to initiate charges against US West (now Qwest) if it were to proceed with its plan.[93]

131. Finally, in its September 18, 2001 brief, AT&T charged that Qwest has not provided adequate assurances that its local markets, once opened to competition, will remain so.[94] Qwest witness Mr. Teitzel's testimony indicates that Qwest will rely on a PAP to demonstrate such assurance.[95] In fact, while the PAP was filed with the Arizona Commission last May, it has yet to be finalized. See June 12 Transcript, pp. 295-6. The PAP is currently the subject of a number of impasse issues which have been briefed and which are now before the Commission for resolution. At this point, it is certainly premature to characterize the PAP as providing any assurances that Qwest's markets, once open, will remain so. Qwest has also consistently and vigorously resisted any and all attempts to establish backsliding penalties in the various states.

132. Qwest has made a shell game of the question of state and federal authority over any PAP, claiming to state authorities that jurisdiction resides with the FCC, and claiming in front of the FCC that such authority resides with the states. AT&T believes that "adequate assurances" that markets will remain open after a grant of 271 authority should not begin and end with a PAP. Instead, the Commission should look to a combination of potential rights and remedies, including:

- Automatic and self-executing penalties imposed by a PAP;
- Private rights of action for violation of interconnection agreements, wholesale service quality standards, state rules and regulations, and federal law;
- A wide spectrum of potential remedies, including fines payable to the state general fund, penalties payable directly to a CLEC's end user customers,

[93] AT&T 2, Rasher Direct, exhibit 2.
[94] AT&T PI Brief of 9/18/01, pg 21.
[95] *See* 7 Qwest 16, Teitzel Direct, p.44.

recovery of actual and punitive damages; and imposition of other penalties and assessments.

133. AT&T also stated that consideration should also be given to the structural separation of Qwest's wholesale and retail operations, as defined in §272.

WorldCom

134. On May 17, 2001 WorldCom stated that regulation must be exercised in instances where one provider has market power and the market cannot "self regulate." Regulators should enact pro-competitive measures to encourage appropriate behavior and discourage anticompetitive behavior by Qwest. Such measures should seek both to neutralize the advantages that Qwest possesses in the local market by virtue of its market power, and to ensure that Qwest does not use that market power to monopolize downstream markets such as broadband and long distance. If Qwest were allowed to act on its normal incentive and exploit its market power, the competitive process would suffer irreversible damage. Such a result would not be in the public interest.

135. The Public Interest considerations that the Commission is making in this proceeding involve two different but related questions. One is whether the market for local telecommunications services has been sufficiently open to permit new entrants a meaningful opportunity to compete for both traditional voice services and emerging broadband offerings. The other is what the likely impact of Qwest's entry into a market for long distance telecommunications services that is already subject to robust competition.

136. States are uniquely positioned to consider Public Interest issues. State Commissions have grappled with difficult issues of importance to the consumers of Arizona. There are a number of reasons why the risk to the public interest is immeasurably greater if Qwest is permitted into the long distance market earlier rather than later. These include significant risk that Qwest could exercise its market power in such a way as to re-monopolize certain telecommunications markets.

137. WorldCom argues that the public interest requires that the Commission look not only at Qwest's prior actions, but also must make every effort to anticipate the impact of those actions in the future. Among those things WorldCom suggest needs to be considered is the difference in long distance and local exchange markets. Specifically, it is far easier for a provider of local services to garner long distance market share than for a provider of long distance services to capture local market share. Another is the financial position of the CLECs, many of whom are bankrupt. Another consideration is that the Commission cannot look to other RBOCs to provide local competition to Qwest. Finally, WorldCom states that Qwest pricing flexibility plans have had the result of effectively deregulating Qwest before any competitive alternatives in the market could act as a check on its market power.

138. A significant barrier to entry into the local telecommunications market exists absent the CLECs' ability to lease components of the incumbents' networks at prices based on forward-looking economic costs. Qwest has no incentive to price facilities in a manner

that would permit the CLEC to pose a real competitive threat to Qwest, particularly because Qwest knows full well that construction of a duplicative network is not a viable alternative to the CLEC. WorldCom suggests that a principle basis for the setting of UNE rates is that such rates must be no higher than necessary to compensate the incumbent for the function it is providing and earn a reasonable return on its investment. Anything above such a minimum price will frustrate Congress' intent by creating rather than removing a barrier to entry.

139. Allowing Qwest to act on this normal incentive and exploit its undeniable market power would cause irreversible damage to the competitive process to the detriment of Arizona consumers and to the Public Interest. Some examples of Qwest utilizing its monopoly power according to WorldCom include:

- Ignoring critical planning information provided by CLECs that Qwest itself has demanded that CLECs furnish to it.
- Unreasonable discrimination against other carriers by giving preference to its retail operations.
- Dictation of new processes and procedures to its carrier customers rather than consulting with them.
- Failure to recognize terms and conditions in existing interconnection agreements.

140. Even though many of the examples were ultimately resolved, the fact that Qwest took such positions required WorldCom and other CLECs to expend management and regulatory resources to achieve resolution.

141. WorldCom then presented the Public Interest obligation set out by Texas in the SWBT 271 proceeding and states that in order to meet these obligation, Qwest must:

- Demonstrate in the collaborative process by its actions that its corporate attitude has changed and that it will treat CLECs like its customers and not unilaterally change documents referenced in its SGAT and that its behavior does not reflect the statements of its attorney that it need not treat wholesale customers like retail customers;
- Establish better communication between its upper management, including its policy group, and its account representatives. The need for this is evidenced by the testimony of numerous CLECs about the lack of knowledge Qwest account teams have about Qwest "new" policies, the inability of account team representatives to adequately address CLEC problems and Qwest's habit of issuing product notifications that contradict interconnection agreements and even

provisions in Qwest's proposed SGAT. Only recently has Qwest agreed to communicate its legal obligations to all appropriate personnel so that account teams and other internal personnel know what Qwest is obligated to perform for wholesale customers under its SGAT.

142. WorldCom recommends the following legal obligations:

- Establish an interdepartmental group whose responsibility is trouble-shooting for CLECs engaged in interconnection, purchase of UNEs, and resale. This group should be headed by an executive of Qwest with the final decision making power;

- Establish a system for providing financial or other incentives to Local Service Center personnel based upon CLEC satisfaction;

- Commit to resolving problem issues with CLECs in a manner that will give CLECs a meaningful opportunity to compete. Qwest must recognize that its wholesale customers are as important as retail customers;

- Establish that it is following all Commission orders referenced in this recommendation and that it intends to follow future directives of this Commission;

- Not be permitted to attempt to "WinBack" customers lost to competitors when a CLEC customer inadvertently or mistakenly calls Qwest.

143. WorldCom goes on to suggest that Qwest's Performance Assurance Plan should include performance indicator definitions ("PIDs") that address special access in a manner similar to the PIDs that relate to the provisioning of local wholesale services. The plan should include penalties for failing to meet performance targets.

144. WorldCom argues for a structural separation between Qwest's retail and wholesale operations to encourage competition. WorldCom also argues that the Commission should ensure the following:

- The terms and conditions for CLECs' access to UNEs and UNE combinations permit economically viable access to those elements.

- Operational support systems (OSSs) are available to CLECs that are fully functional, stress-tested, and integratable.

- There exist self-executing and behavior-modifying remedies for violations of the competitive "rules of engagement" established by this Commission.

145. At the June 12, 2001 workshop, WorldCom's witness stated that the purpose of his comments was to get away from the specifics of the various checklist items and to discuss what might be called a big picture view of the Arizona telecommunications market or actually markets, plural, both present and future. The WorldCom witness stated that a brief look at the history of the prohibition for Arizona customers to select Qwest to carry their interLATA calls was a key aspect of the settlement of the DOJ anti-trust case against the old Bell system, which eliminated the incentive of the bottleneck local telecom service provider to discriminate in favor of itself in the provision of long-distance services. A result of that prohibition in the U.S. is that the U.S. now has the most dynamically competitive long-distance market in the world.

146. WorldCom's witness also disagreed with Qwest's claim that effective Qwest entry into the long-distance market will be positive for consumers. He stated that in the long-distance market there are at least three facilities-based carriers, and there is a vibrant resale market where resellers can leave one network provider for another. In the local market, on the other hand, there is limited facilities-based competition, and the only provider that can offer you a ubiquitous wholesale offering is Qwest. The WorldCom witness characterized the Qwest's witness as asking the Commission to believe that a market with multiple providers and aggressive wholesale competition is not fully competitive, whereas on the other hand he has concluded that a market with only one ubiquitous provider and very limited wholesale competition is somehow fully competitive.

147. The next point raised by the WorldCom witness concerned data which Qwest's witness provided as evidence that Qwest's local exchanges are open to competitors. He requested that the parties put the numbers aside and consider that every resold local service relies on Qwest as the underlying provider. Also, every service that a competitive carrier provides via unbundled loop relies on Qwest for the provisioning of that loop. Thus, Qwest still controls virtually the entire local telecommunications market in its service territory in Arizona. The numbers presented by Qwest's witness cannot change the fact that there is a huge barrier to entry in Arizona. UNE prices that this Commission has previously considered are the single most critical factor in whether CLECs can profitably serve the consumer market for local services. He stated that Qwest has the ability to control the price of inputs, unbundled network elements, and other facilities on which any CLEC seeking to enter the broad consumer market would have to rely.

148. WorldCom's witness also raised the issue of assurance of future compliance. He stated that it is a difficult and complex endeavor to assure that Qwest's behavior is compliant with the public interest. He further stated that the fiduciary obligation to its investors to maximize return on capital is an undeniable incentive for Qwest to utilize its bottleneck control of local communications facilities to its competitive advantage in any way it can. Relative to assurance of future compliance, WorldCom's witness stated that regulation will almost always be a step behind in trying to identify and punish anti-competitive behavior. Thus, he questioned the safeguards which Qwest has stated will be in place to assure it will not discriminate against other carriers once the carrot of long-distance entry has been eliminated. He referenced Qwest's citing of the Performance Assurance Plan,

FCC complaint process and other actions such as the possibility of anti-trust action. However, he stated that these safeguards will not provide a sufficient incentive to encourage good behavior by Qwest.

149. WorldCom's witness stated that the notion of implied causality between granting 271 relief and CLEC market share increase is unrealistic. He reiterated what he had provided in his testimony that the pricing of the UNE elements is basically the only way that most carriers can open a market on a broad basis. He stressed in his testimony the fact that UNE pricing was critical and made reference in his statement to the $18 loop. He referred to the disparity between the UNE-P combination in Arizona versus the retail rates as described by the AT&T witness, and stated that this disparity has a much bigger implication in terms of CLECs business plans than approval of Section 271 relief. By this he meant that if the Commission granted 271 relief, WorldCom would not be in Arizona trying to sell local services, for the reason that the pricing is inequitable. He referred to WorldCom's entering the local markets in Pennsylvania and Michigan, and stated that the principal reason was that they did not have the disparity in pricing that existed in Arizona.

150. With respect to Qwest's having an incentive to pursue a price squeeze, the WorldCom witness stated that Qwest would not even need an incentive, given the disparity that exists today in the intrastate switched access prices in order to engage in a price squeeze.

151. WorldCom submitted its September 18, 2001 brief of Public Interest issues in combination with a General Terms and Conditions brief. Like AT&T, WorldCom rejects Qwest's "underlying assumption" that completion of the 271 checklist is all that is required to meet the public interest criteria of 271.[96]

152. WorldCom begins its September 18, 2001 brief with a discussion of its interpretation of the 1996 Act as it pertains to Public Interest including stating that the central purpose of the 1996 Act is to promote competition in all telecommunications markets, including the local residential market.[97] WorldCom acknowledges the FCC has recently emphasized that total element long run incremental cost ("TELRIC") is not designed to guarantee a profit to any particular CLEC.[98] Also, the Act does not require any ILEC to lease network elements at below-cost rates in order to facilitate the entry of competitors. At the same time, the impact of proposed UNE rates on the prospects for competition is relevant to whether BOC entry into long-distance promotes the public interest when viewed as a whole.

153. While the effect of pricing rules on any particular potential competitor is irrelevant under section 271, the effect of pricing on competition in general relates directly to

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[96] WorldCom Brief of September 18,2001 pg 18.

[97] WorldCom Brief of September 18,2001 pg 18.

[98] See, In re Application of 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 ("Kansas-Oklahoma Order"), ¶92.

whether prices are cost-based and whether BOC provision of in-region long-distance service is in the public interest.

154. WorldCom emphasizes its willingness to serve local residential customers as reflected by the markets it has already entered. These markets include New York, Texas, Pennsylvania, Michigan, Illinois, and Georgia. In those states, rates are set at or close to TELRIC, and the respective BOCs have complied or are seeking to comply with the FCC's other market opening rules. Consumers have benefited from open local markets, but only in states where the pricing set for UNEs is cost-based, or at least permits significant entry while state commissions complete the work of bringing rates down to cost.

155. The Public Interest analysis is independent of the statutory checklist requiring an independent determination. Further, in recent comments before an American Bar Association antitrust enforcement panel, the Chair of the FCC signaled that he will not be as aggressive in enforcing the Public Interest standard.[99] Absent federal interest, this Commission must satisfy itself that Qwest's entry into the long distance market serves the public interest in Arizona.

156. Like AT&T, WorldCom argues that Qwest has not even met the 271 checklist requirements in Arizona or any other Qwest state.[100] The workshops examining each of the checklist requirements have not been completed in any state and WorldCom maintains it is premature to even consider the public interest requirement until the workshops on the checklist items have been concluded. Furthermore, the Arizona Commission should look not only at Qwest's prior actions, but must make every effort to anticipate the impact of those actions in the future.

157. As evidence of WorldCom's interest in profitability rather than any regulatory 271 approval, it points out that the first market entered was New York, a year before then-Bell Atlantic had approval for 271. WorldCom is also providing service in Texas, but only in Houston and Dallas, because it is not profitable in the rest of the state. WorldCom made it clear before 271 approvals were obtained in the states of Massachusetts, Oklahoma, and Kansas that it would not enter those states because it could not do so profitably. The company, however, is presently in Illinois (where no 271 application is pending), Michigan, Pennsylvania, and Georgia. In all these states, conditions and the prices of unbundled network elements allow WorldCom to make a profit.[101]

158. The pricing of UNEs is one of the most important tools available to regulators to open local markets for effective competitive entry. There is no simple answer to how this Commission can ensure that the prices for unbundled elements of Qwest's network have the intended pro-competitive effects. Cost proceedings in different states often result in different

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[99] See, Wall Street Journal, May 1, 2001, "Politics & Policy: Powell Quickly Marks Agency As His Own," by Yochi J. Dreazen.

[100] WorldCom Brief of September 18, 2001 pg. 21.

[101] See, Testimony of Don Price, pp. 35-36 submitted as 7 WorldCom 1 in workshop 7, Arizona 271 investigation.

recommendations due to the fact that numerous assumptions are required to estimate the "cost" of any network element. Each of the factors involved is open to interpretation.

159. For example, in the costing and pricing proceeding pending before this Commission, testimony has addressed, among other things, wholesale prices for unbundled network elements. To demonstrate how parties can differ in their costing and pricing, consider the table of proposed loop rates proposed by Qwest and the Arizona Commission Staff. As can be seen from Figure 4 below, the spread in rates illustrates the differences in "assumptions" that can be incorporated into cost models to yield prices considered advantageous by one entity or another:

Figure 4
Arizona Deaveraged Loop Proposal Comparison

	Qwest Proposal	Staff Proposal A[102]	Staff Proposal B[103]	Interim
Zone 1	$23.07	$ 9.35	$ 9.35	$18.96
Zone 2	$28.62	$14.57	$14.20	$34.94
Zone 3	$42.14	$43.80	$36.34	$56.53
Statewide Average		$13.22	$11.89	$21.98

160. Given such a wide range of price recommendations, WorldCom urges this Commission to remember that Congress' intent in allowing CLECs to lease components of the incumbents' networks at reasonable and cost-based rates was to remove the huge barrier to entry represented by the massive capital costs necessary to replicate the ILEC's networks.[104] Thus, a principled basis for the setting of UNE rates is that such rates must be no higher than necessary to compensate the incumbent for the function it is providing and earn a reasonable return on its investment.

161. The Commission should adopt regulations to provide incentives for Qwest to facilitate competition in Arizona where Qwest controls bottleneck facilities upon which its competitors must rely.[105] Since it is a for-profit entity, Qwest has both the incentive and the ability to exploit its control of these facilities in such a way that provides it with a competitive advantage over its competitors. Allowing Qwest to exploit its undeniable market

[102] Assumes no sale of rural exchanges by Qwest.
[103] Assumes sale of certain rural exchanges by Qwest.
[104] See, Testimony of Don Price, submitted as 7 WorldCom 1, pp. 35-36 in Workshop 7, Arizona 271 Investigation.
[105] WorldCom Brief of September 18, 2001 pg. 28.

power would cause irreversible damage to the competitive process to the detriment of Arizona consumers and to the public interest.

162. Implementation of a Performance Assurance Plan that protects the interest of the consumers, and re-visiting pricing issues to ensure that economic barriers are removed, would be two methods of promoting the transition

163. This Commission should not accept promises of future behavior, but should enact strict safeguards before recommending approval of Qwest's 271 application. WorldCom urges this Commission to implement an "anti-backsliding" Performance Assurance Plan.[106] WorldCom believes that a PAP should encourage Qwest to "do the right thing" relative to its wholesale customers. To be effective, such a plan must contain financial penalties at a level sufficient for Qwest to view them as real financial penalties. The Commission should also institute expedited procedures to handle complaints and conflicts. While other remedies such as complaint filings at the FCC and antitrust actions have been mentioned by Qwest's expert, Mr. Teitzel, [107] those remedies are expensive, often drawn out, and, in the case of the antitrust mechanism, prohibitively expensive.

164. The telecommunications industry is currently littered with bankrupt CLECs. Few of the CLECs would have the stamina, financially and otherwise, to endure a prolonged antitrust action or even a complaint filing at the FCC. Therefore, this Commission's actions in instituting a PAP containing meaningful, behavior modifying penalties for violations by Qwest are critical tools in keeping the competitive local market vital and viable.

165. WorldCom concludes by stating that Qwest has not met the public interest criteria. Approval of its 271 application should be delayed until pricing, an accessible telecommunications system, and a supportive regulatory climate are in effect.

Cox Arizona Telecom, L.L.C.

166. On May 17, 2001, Cox filed comments on the Public Interest requirement concerning Qwest's application for §271 relief in Arizona. Cox quoted that the FCC[108]views: "the Public Interest requirement as 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. . . . while no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that this market is open to competition".

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[106] WorldCom Brief of September 18, 2001 pg. 30.

[107] See, Transcript, Teitzel's Testimony, Page 255, Line 24 through Page 256, Line 12.

[108] In the matter of the application of Verizon New England, Inc., *et. al.* for Authorization to Provide In-region InterLATA Services in Massachusetts and Memorandum Opinion and Order, FCC 01-130, CC Docket No. 01-9 (April 16, 2001).

167. Cox further stated that as Qwest's own numbers attest, the CLEC penetration into the Arizona telecommunications market is still minimal. The minimal penetration indicates that any competition, particularly in the residential market, is tenuous and will be sensitive to any anti-competitive pressure. To the extent that inappropriate anti-competitive elements exist in Arizona, those elements should be eliminated to ensure that markets will remain open to competition.

168. Qwest's existing "competitive response program" tariff (Section 5.2 of Qwest's Competitive Exchange and Network Services Tariff) presents a factor that seriously jeopardizes whether the Arizona telecommunications market, particularly the residential market, will remain open to effective competition. Cox stated that this "WinBack Tariff" is expressly designed to recapture market share through predatory pricing. As long as the WinBack Tariff is in effect, the Public Interest is not served by granting Qwest's 271 application.

169. Given Qwest's enormous market share – particularly for residential – Qwest does not need the WinBack Tariff to be competitive in the market. It only needs the WinBack Tariff to be anti-competitive – that is, to target the minute percentage of customers who have left Qwest. By recapturing these customers, Qwest clearly has the ability to stymie what little competition there is in Arizona.

170. Cox illustrated the anti-competitive nature of the WinBack Tariff by referencing a mailer sent to former Qwest customers by Qwest in April 2001.[109] In the mailer, Qwest raises CLEC service performance as a reason to return. CLEC performance, unfortunately, often is dependent on Qwest's wholesale performance for the CLEC. A typical CLEC customer certainly may not understand a CLEC's dependency on Qwest to provide service. As Cox has explained in other workshops, Cox has experienced numerous problems with Qwest over the porting process. Cox further stated that once a customer transfers to a CLEC, anything Qwest does that adversely effects CLEC service to that customer directly harms the CLEC. Under the WinBack Tariff, Qwest is in a position to capitalize on such harm.

171. Cox further stated that in light of the WinBack Tariff, the Performance Assurance Plan may be rendered ineffective. Qwest may be willing to suffer a modest penalty for bad wholesale performance if it has the tools to aggressively seek to recapture the CLEC customer that is affected by Qwest's poor wholesale performance. Ultimately, such customer "recapture" eliminates the ability of a CLEC to effectively compete in the market and discourages CLEC investment and facilities in Arizona. As a result, the Arizona market is not irreversibly open to competition.

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[109] Cox questions how Qwest developed the mailing list for such a mailing. Obviously Qwest has the addresses of every Qwest customer that has ported its number from Qwest to another CLEC. How that information got from Qwest wholesale services to Qwest's retailing market is disconcerting.

172. Cox recommends withholding 271 approval in Arizona until Qwest withdraws its WinBack Tariff.[110] Until then, the public interest is not served because the nascent competition in Arizona can be quashed through a tariff scheme that basically allows predatory pricing by a monopolist.

173. In the June 12, 2001 Workshop, Cox Communications, Inc. again expressed the position that it has only one Public Interest issue. This issue relates to the Qwest "Win-Back" Tariff, comments on which were filed on May 17, 2001. Cox witness briefly reiterated the comments filed on May 17, 2001. He stated that Cox felt that it is quite unusual for Qwest, given the large amount of dominant market power that it has in the state, the sheer number of commercial and residential access lines, having well over 90% of the market in Arizona, to have something like this, a tariff they can utilize to essentially go to customers that they have lost to competition for the purpose of taking them back to maintain the kind of market dominance that they currently have. He further stated that, in time, when Qwest has approximately a 50% market share, it may be more appropriate for this type of tariff. However, at this point, with the market dominance of Qwest, Cox doesn't think it is in the public interest to grant 271 approval.

174. Cox's witness further stated that the CLEC's are completely dependent upon Qwest for their success as it relates to residential Number Portability. He used the example of Number Portability in terms of making the customer transfer from Qwest to a CLEC a seamless experience. To the extent that problems arise because of Qwest, he stated that it is the CLEC that looks bad. Further, he stated that to be a cause of the problem where the customers experience in terms of moving to a CLEC is bad, and then have the capability of going back to that customer and saying, "come back to us" "did you have a good experience?" "are you happy with Cox?" and the answer is it was a bad experience, the customer doesn't know that it was Qwest that caused the bad experience in the first place.

175. Cox recommended that Qwest offer to give up the WinBack Tariff in Arizona as part of its application for 271 approval; alternatively, the Commission could require Qwest to divest itself of the WinBack Tariff for the near future. Cox' witness stated that he believes that it is not in the public interest at this stage of infancy of competition in Arizona for Qwest to have this kind of additional tool to maintain its market power and its market share.

176. Cox acknowledged that it has a competitive response tariff in Arizona which is designed to win back customers who have left Cox and gone to another provider. The Cox witness also stated that its WinBack tariff is similar to the Qwest competitive response tariff.

177. On September 18, 2001, Cox filed a post-workshop brief on Public Interest. In this brief, it adopted its comments on Public Interest, filed on May 17, 2001, as its post-workshop brief.

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[110] At some point, when Qwest's market share dropped to something well below 95 to 98%, a Qwest WinBack Tariff might be acceptable. Cox does have a WinBack Tariff in Arizona but there is no chance of harm to competition as a result of that Tariff given Cox's market share.

Association of Communications Enterprises ("ASCENT")[111]

178. In its July 25, 2001 comments concerning Qwest's §271 application in Arizona, ASCENT points out that they present a somewhat different view than those parties that have participated in this docket to date, because of their representation of numerous smaller companies and individuals. ASCENT believes it is important that the Commission hear from smaller CLECs that do not have the resources to fully participate in the time consuming 271 workshops. ASCENT's comments are not significantly different than those in the Colorado 271 workshops (to which Qwest has already responded). ASCENT understands that substantial amounts of information already have been "imported" into the Arizona 271 workshops from Qwest 271 proceedings in other states. [112]

179. ASCENT maintains that Qwest has not met its burden for demonstrating compliance with the Public Interest standard for in-region interLATA market entry, nor its broader market opening obligations under section 271 of the Telecommunications Act of 1996.[113]

180. ASCENT submits that in order for the Commission to answer the pivotal question of whether Qwest has fully and irreversibly opened the Arizona local market, the Commission must consider Qwest's compliance record as well as the experience of Qwest's competitors, and the general availability of local competition in the State. ASCENT asks that the review be factually based rather than based on Qwest's promises of availability and compliance.[114]

181. To this point, ASCENT argues that there remains a dearth of evidence that CLECs are able to receive the non-discriminatory access to interconnection, unbundled network elements, wholesale services, and access to OSS in a manner that will allow them to provide *reliable* competitive local services to Arizona consumers. If anything, ASCENT argues that CLEC parties have raised a continuing series of problems and concerns over Qwest's provision of interconnection, services, and support. [115]

182. ASCENT presented six issues for the ACC consideration's:

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[111] ASCENT, formerly the Telecommunications Resellers Association, is the international trade organization representing the interests of advanced communications firms. ASCENT's more than 600 companies and individuals members provide voice and data services including Internet access, high-speed transport, local and long distance phone service, application services, and wireless products. Founded in 1992 and headquartered in Washington, D.C., ASCENT's mission is to open all communications markets to full and fair competition and to help member companies' design and implement successful business plans. ASCENT strives to assure that all service providers, particularly entrepreneurial firms, have the opportunity to compete in the communications arena and have access to critical business resources. Numerous ASCENT members are certificated to provide competitive telecommunications services in Arizona.

[112] Association Comments pg. 2.

[113] Association Comments pg. 2.

[114] Association Comments pg. 3.

[115] ASCENT Comments, pg 3.

- The Telecommunications Act mandates a broad Public Interest inquiry prior to grant of Section 271 authority.

- Qwest's attempt to reduce the Public Interest standard to compliance with the competitive checklist is contrary to FCC Rulings and such discussion is irrelevant to this workshop.[116]

- In a sleight of hand, Qwest emphasizes purported future benefits to the long distance and local markets if Qwest is granted in-region interLATA authority while ignoring the dearth of meaningful competition in local markets. [117]

- Qwest's local competition statistics fail to demonstrate that Qwest is providing nondiscriminatory access to resale, unbundled network elements, advanced services, interconnection, and operations support systems at parity.[118]

- Qwest's testimony is devoid of any evidence demonstrating Qwest's compliance with recent judicial and regulatory decisions on the resale of advanced services and on the ability of CLECs to offer advanced services at parity with Qwest.[119]

- The key conditions for competition are not yet in place in Arizona.

183. With respect to Issue 1, ASCENT points out factors that they believe the FCC has indicated may *not (emphasis in original)* be relied on by the RBOC as conclusive demonstration that the Public Interest standard has been met. For example, regulators cannot "conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition," because *"[s]uch an approach would effectively read the Public Interest requirement out of the statute*, contrary to the plain language of Section 271, basic principles of statutory construction, and sound public policy." Id. at para. 389 (emphasis added). Moreover, the Public Interest inquiry is not to be "limited narrowly to assessing whether BOC entry would enhance competition in the long distance market." Id. at para. 386"[120]

184. The Department of Justice ("DOJ") also views the broad Public Interest standard in the Telecommunications Act as an important component in the evaluation of a BOC's application for long distance approval, and has stressed the distinction between the minimum conditions set forth in Section 271's competitive checklist, and the broader Public

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[116] ASCENT Comments pgs 8-10.
[117] ASCENT Comments pgs 10-12.
[118] ASCENT Comments pg 13-15.
[119] ASCENT Comments pg 15-18.
[120] ASCENT Comments, pg 5.

Interest test.[121] The DOJ has not specified a precise standard to be used when making a Public Interest analysis. Rather, DOJ stresses the importance of "meaningful", "substantial," and "irreversible" competition.[122]

185. With respect to Issue 2, ASCENT states that Qwest's reasoning is circular and contrary to the statements cited in the ASCENT comments from the FCC's Michigan Order. Specifically, a showing of checklist compliance is insufficient to demonstrate that long distance entry is in the Public Interest. Also, Qwest's position of checklist compliance relies *almost exclusively* on the *future* rather than actual factual evidence demonstrating that it presently complies with the statutory conditions for entry. Qwest's wholesale customers continue to struggle with Qwest-imposed impediments to genuine market entry and a sustainable competitive counterbalance to Qwest's market dominance.

186. With respect to Issue 3, ASCENT states that Qwest's alleged benefits of entry into the long distance market are insufficient to prove that long distance entry by the BOC is in the public interest. Qwest's Arizona customers currently face a narrower range of local service options, particularly in less competitive areas, because Qwest's markets are not yet open to competitors. ASCENT takes exception to Qwest using the "cherry picking" argument in suggesting that competitors elect to serve only the most lucrative of subscribers. In ASCENT's view, premature long distance entry undoubtedly will result in Qwest capturing long distance market share, but it will eliminate Qwest's incentives to open the local market.

187. With respect to Issue 4, ASCENT argues that even assuming that Qwest's local competition statistics are accurate and current, such statistics prove nothing as to whether Qwest can, and does, provide adequate facilities, services, and capabilities to its competitors on a nondiscriminatory basis, at commercial volumes, and over a sustained period of time.

188. For example, Qwest data do not address the quality or timeliness of the services or facilities provided by Qwest in order for CLECs to gain access to loops or customer lines. Qwest's data does not mention how many of the reported loops were provisioned on time, or whether the quality of the loops was acceptable or at parity, or whether the pre-ordering and ordering systems and processes for those loops functioned properly or at parity; or whether maintenance and repair was performed by Qwest at parity. Without the completion of OSS testing and the receipt of final test results and recommendations, any Public Interest analysis performed is necessarily incomplete as there is no way to verify compliance.

189. With respect to Issue 5, ASCENT argues that Qwest's testimony fails to demonstrate that it is providing, or is even capable of providing, line shared, line split, and DSL capable loops at commercial volumes. Qwest also fails to show it has provided

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[121] ASCENT Comments pg 6.
[122] ASCENT Comments pg 7, referencing DOJ SBC Comments at pg 4.

advanced services on a resale basis. ASCENT argues that the FCC has made no distinction between advanced services and other telecommunications services.

190. With respect to Issue 6, ASCENT argues there are three main conditions for competition - successful OSS test completion, a Performance Assurance Plan, and cost-based pricing for unbundled network elements and interconnection. These conditions are not in place, much less functioning smoothly over a sustained period of time.

191. ASCENT concludes that Qwest must support its application with evidence demonstrating its *present* compliance with the statutory conditions for entry. Qwest has continued to rely on the *theoretical or promised availability [emphasis in original]* of interconnection, network elements, and services, as its "evidence" of compliance. The fact that competitors may be able to obtain UNEs, or collocations, or resold services, even if hypothetically under an ideal interconnection agreement, SGAT, or tariff, is not enough. Qwest must meet its burden to demonstrate that it has met its statutory obligations through factual evidence including the results of third party OSS testing and statistically measured sustained performance.[123]

e.spire[124]

193. e.spire completed construction of its original network serving Tucson's central business district in the first quarter of 1996 but did not roll out local switched services until the first quarter 1997. e.spire originally generated revenues by offering private line and data services to large businesses in the greater Tucson area and by offering alternatives to Qwest's local exchange service to major interexchange carriers. e.spire was the first facilities-based CLEC to offer local services to the Tucson business community.[125]

192. In its May 17, 2001 affidavit, e.spire describes its experience in attempting to enter the Arizona telecommunications market and some of the difficulties associated with that entry as a result of conduct on the part of Qwest, and the consequences suffered by e.spire and Arizona consumers as a result of that conduct.

193. e.spire does not believe that the local telecommunications market in Arizona is fully and irreversibly open to competition. Specifically in Arizona, the failures, financial distress or bankruptcies of competitive carriers, and comparative robust financial health of Qwest is a clear demonstration that the market is not open.

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[123] "We find that Bell Atlantic demonstrates that it is providing nondiscriminatory access to its OSS ordering functions for unbundled network elements (*i.e.*, UNE-loop and UNE-platform). We note that Bell Atlantic supports its application with Carrier-to-Carrier performance data, which aggregates UNE-loop and UNE-platform data, and the New York Commission based its initial comments on this aggregated data." *FCC BANY Order* at para. 164 [footnote omitted].

[124] Affidavit of David M. Kaufman Regarding the Public Interest standards May 17,2001.

[125] *Id* at 22.

194. Qwest has disrupted e.spire's business in three primary areas. First, Qwest has withheld millions of dollars of reciprocal compensation payments owed to e.spire. Second, Qwest has refused to convert special access circuits to enhanced extended links, commonly referred to as EELs. And, third, Qwest has failed to provision special access circuits ordered by e.spire in a timely manner.

195. Concerning reciprocal compensation, Qwest continues to refuse to compensate e.spire for delivering calls made by Qwest end users to e.spire customers at rates agreed to in the interconnection agreement entered into by the two companies (rates that were proposed by Qwest's predecessor, US WEST) and approved by this Commission.

196. e.spire next discusses the sub-issue of reciprocal compensation for ISP bound traffic. Arguing that its ISP-bound traffic is determined not to be subject to reciprocal compensation under 47 U.S.C. § 251(b), reciprocal compensation for such traffic may not be considered as part of the Section 271 competitive checklist. In that case, it may be appropriate for this Commission and the FCC to consider issues related to reciprocal compensation for the termination of ISP-bound traffic as part of the consideration of whether "the requested authorization [for interLATA entry] is consistent with the public interest, convenience, and necessity."

197. Qwest has rejected the vast majority of e.spire's orders requesting the conversion of special access circuits to EELs in Arizona. Qwest apparently believes that the FCC statements about co-mingling allow Qwest to charge e.spire for re-grooming and rolling DS-1 circuits from aggregated DS-3 circuits. e.spire believes that the Qwest position is without basis.

198. Concerning provisioning issues, as a wholesale customer of Qwest, e.spire purchases special access services that it then combines with other e.spire services and facilities in providing services to e.spire's end-user customers. As a result of delays, some lasting for many months, in the provisioning of those services by Qwest, e.spire has suffered monetary damages and has lost reputation and customers.

Sprint[126]

199. Sprint Corporation ("Sprint") provides local service to residential customers in the Phoenix area. It began offering its ION Service package in July, 2000, and recently announced that it is expanding this service to include a package called Sprint ION xtl consisting of unlimited local telephone service, enhanced features such as Caller ID and voice mail, high-speed Internet access and 200 minutes of domestic long distance for $99.99 per month[127].

200. Sprint also announced on April 4, 2001, that it is introducing enhanced Sprint ION in Phoenix, an offering that will give small businesses more flexibility in building

[126] Sprint Communications Company Brief , of 9/17/01 pgs 1-6.
[127] "Sprint Expands its Ion Service", *The Tribune Newspaper*, March 14, 2001, pages B1 and B2.

customized voice and data services.[128] In addition, Sprint announced that it is also offering Sprint Business DSL in Phoenix that is aimed at customers who don't need Sprint's voice offerings.

201. While at the time of Sprint's filing it was offering ION service, Staff would note that Sprint filed an application on October 29, 2001, to discontinue its ION services. The Commission approved this application on January 31, 2002, in Decision No. 64396.

202. Sprint states it its September 17, 2001 brief that Qwest's application for 271 approval is premature and not in the public interest for four reasons:

- Qwest faces no substantial, irreversible competition
- Qwest's anticompetitive behavior would harm the markets in the future
- Qwest promises of performance are not sufficient
- Permanent UNE and wholesale prices must first be established

203. Sprint argues that the FCC has confirmed that the Public Interest requirement is independent of the statutory 14 point checklist. Sprint suggests that the Public Interest inquiry is for the Commission to determine if Qwest's local markets are irreversibly open to competition.

204. Sprint argues that the markets are not open in Arizona in that residential competition is very limited. The Qwest data showing market penetration is said to be old and predates the recent CLEC and DLEC failures. On the subject of these failures, Sprint argues that these are not due merely to a market downturn and reduction in venture capital. BOC performance has "far surpassed" that of CLECs, DLECs and IXCs. Sprint argues that this is indicative of investor perception that the RBOC monopoly of local facilities gives them a solid competitive advantage. Sprint concludes that the DLEC and CLEC bankruptcies, the reduced IXC strength, and the fact that BOCs do not compete in each others territory bodes ill for local competition in Arizona.

205. Sprint states that even if competition were present, the Commission can have no confidence that Qwest will preserve that competition. BOC cooperation in opening local markets is a factor that the FCC takes into account whether local markets are open and will remain open.

206. Sprint argues that there is a wealth of evidence that Qwest has both 1) disobeyed federal and state telecommunications regulations, and 2) engaged in anticompetitive behavior. This evidence should make the Commission question whether local markets would remain open and whether Qwest would engage in anticompetitive behavior in the interLATA markets. Finally, if Qwest were allowed to enter the long

[128] www.x-changemag.com/hotnews/14h275636.html, April 12, 2001.

distance market, it would have even less incentive to provide IXCs with adequate access service.

207. Although Qwest has promised to enter into a Performance Assurance Plan, there has been no Commission ruling regarding the proposal and therefore it is premature to determine if the application is in the public interest.

208 Qwest's compliance with Public Interest requirements must be considered premature until final UNE and wholesale pricing is established. Further, even after such pricing is complete, switching cost hearings must be held.

d. **Qwest's Position**

209. In its April 17, 2001 Affidavit, Qwest stated that the FCC orders granting 271 relief outline the following three-step analysis for the Public Interest requirement:

- Determination that the local markets are open to competition
- Identification of any unusual circumstances in the local exchange and long distance markets that would make the BOC's entry into the long distance market contrary to the Public Interest
- Assurance of future compliance by the BOC.

210. Qwest argues that based on previous FCC rulings in other 271 applications, compliance with the competitive checklist, also known as the 14-point checklist "is, itself, a strong indicator that long distance is consistent with the Public Interest."[129] Qwest defers discussion of compliance with the competitive checklist items to their respective workshops. It states "Based on the record created from all the checklist workshops, Qwest has demonstrated that it is in compliance in Arizona with the competitive checklist as outlined in the Act."[130] Therefore, Qwest argues that it is in compliance with the first element.

211. Qwest next presents data that demonstrate that it has opened its local exchange markets to competitors in Arizona as intended by the Act. It states the following:

- Qwest has 56 Commission-approved wireline interconnection agreements and 41 resale-only interconnections between itself and its competitors in Arizona (as of February 28, 2001)[131]
- Qwest has 38 interconnection agreements pending Commission approval in Arizona (as of February 28, 2001)

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[129] BANY- Order at ¶422; SBC-Texas Order at ¶416.
[130] Qwest Teitzel testimony, pg 38.
[131] In addition, there are a total of 18 interconnection agreements with wireless, paging, and Extended Area Service ("EAS") providers in Arizona.

- Qwest has 65 competitors actively interconnecting with it in Arizona (as of December 31, 2000)

- Qwest has 37 competitors purchasing resold services using Commission-approved resale percentages in Arizona (as of February 28, 2001)

- Qwest estimates that 214,672 access lines are served by competitive providers and 165,271 access lines are served on a facilities basis in Arizona

- Qwest has 23 CLECs interconnected with itself via 132,105 local interconnection trunks in Arizona (as of February 28, 2001).

- Qwest exchanged 1,123,624,413 minutes of usage ("MOU") between itself and CLECs over their local interconnection trunks in Arizona in January, 2001.

- Qwest has provisioned 17,196 unbundled loops for 16 carriers in Arizona (as of February 28, 2001).

- There are 37 carriers actively reselling Qwest's services in Arizona (as of February 28, 2001). 27 carriers are reselling to residential customers and 20 carriers are reselling to business customers for a total of 40,727 local exchange service access lines resold in Arizona.

- Qwest has 455 completed collocation arrangements with 32 CLECs in Arizona (as of February 28, 2001). Eighty (80) out of 137 Arizona central offices have completed collocation arrangements.

- Qwest directories contain 105,373 white page directory listings provided on behalf of competitors in Arizona (as of February 28, 2001).

- 100% of Arizona's access lines have local number portability ("LNP") available and 330,541 telephone numbers in the state are "ported" to competitors enabling customers to leave Qwest and retain their telephone numbers (as of February 28, 2001).

- Qwest filed a Statement of Generally Available Terms ("SGAT") on February 5, 1999, as well as updates on October 29, 1999, April 10, 2000, July 21, 2000 and March 29, 2002, that establish that Qwest has a specific, concrete, and legal obligation to make the checklist items available upon request

208. Qwest then moves to element two (Unusual Circumstances) and argues that the FCC has consistently held 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.[132]

209. Qwest states that the FCC has identified factors raised by CLECs that do not warrant denial of the Public Interest standard as follows: 1) the low percentage of total access lines served by CLECs, 2) the concentration of competition in densely populated urban areas; 3) minimal competition for residential service; 4) modest facilities-based investment; and 5) prices for local exchange service at maximum permissible levels under the price caps.[133] Section 271 approval is conditioned "solely on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity to enter the market."[134]

210. Qwest then addresses element three which is assurance of future compliance, and states that the FCC has consistently looked at three factors to provide assurance of future compliance:

- An acceptable Performance Assurance Plan[135]
- The FCC's enforcement authority under Section 271(d)(6)[136]
- Liability risk through antitrust and other private causes of action if the BOC performs in an unlawfully discriminatory manner[137]

211. Qwest has a PAP for Arizona. Qwest, CLECs, and the ACC have been engaged since July, 2000, in a series of Performance Assurance Plan collaborative workshops in Arizona. Qwest has developed its plan by adopting and adapting the statistical testing and payment structure elements of the SBC plans that have been reviewed and approved by the FCC in SBC's 271 applications in Texas, Kansas, and Oklahoma.

212. Of the factors the FCC has considered for assurance of future compliance, the most significant factor, other than the PAP, is the FCC's enforcement authority under Section 271(d)(6).[138] If at any time after the FCC approves a 271 application, it determines that a BOC has ceased to meet any of the conditions required for such approval, Section 271(d)(6) provides the FCC enforcement remedies including imposition of penalties, suspension or revocation of 271 approval, and an expedited complaint process.

213. Qwest states that the FCC has noted that the BOC risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory

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[132] BANY Order at ¶428; SBC-Texas Order at ¶419.
[133] BANY Order at ¶426; SBC-Texas Order at ¶419.
[134] BANY Order at ¶427.
[135] BANY Order at ¶429-¶430; SBC-Texas Order at ¶420-¶421.
[136] BANY Order at ¶429-¶430; SBC-Texas Order at ¶421.
[137] *Id.*
[138] *Id.*

manner.[139] Qwest summarizes that these factors provide the ACC assurance of Qwest's future compliance.

214. Qwest argues that its entry into the interLATA market would enable customers to select another full service provider of local and long distance service. Qwest also points to its ability and willingness to provide one stop shopping to customers in exchanges competitors have deemed less attractive. Qwest states that this additional level of service and choice is clearly in the public interest.

215. Qwest argues that actual market experience in New York where Verizon has been permitted to provide interLATA long distance service demonstrates that competitive pressures increase consumers' benefits. For example, as a result of Verizon's entry into the interLATA long distance business a little more than a year ago, residential long distance prices have been reduced.

216. Qwest argues its entry into the interLATA market will benefit consumers in other ways. As an example, Qwest plans to make one-stop shopping available to all residential and business customers. Also, consumers in Arizona will ultimately benefit by having not only a choice of service providers but also more variety in packages from which to choose. Qwest's entry into the interLATA market will also serve the Public Interest by encouraging competition not only in the interLATA market, but the intraLATA market and the local exchange markets as well.

217. Qwest has opened its local exchange markets as required under Track A to competition as evidenced by the presence of over 115 established interconnection agreements in Arizona. These agreements, along with Qwest services available for resale at a discounted rate, have allowed CLECs to enter the local markets in Arizona on a resale basis or as facilities-based providers through interconnection and/or the purchase of unbundled network elements.

218. Qwest rebuttal testimony of Mr. David L. Teitzel dated May 29, 2001 provides direct rebuttal of the comments made by other parties in their May 17 and 18, 2001 filings. This section of the report is therefore organized accordingly. Specifically, Qwest provides rebuttals to comments filed by e.spire, AT&T/TCG and WorldCom.

219. In rebuttal to e.spire comments, Qwest states that the FCC has defined a three step process for determining if a Section 271 application is in the public interest.[140] These steps have been identified in Qwest's April 17, 2001 affidavit and were listed previously in this report.

220. Qwest states that the e.spire comments address none of these issues and that its comments were addressed during the workshops. Qwest then restates the position that Track A and Public Interest issues revolve around two primary considerations: 1) whether local

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[139] *Id.*

[140] BANY Order at ¶¶422-430; SBC-Texas Order at ¶¶416-421; and SBC-Kansas/Oklahoma Order at ¶¶266-285

exchange markets are fully open to competition and 2) whether those markets will remain fully open to allow the benefits of competition to flow to consumers.

221. Qwest argues on the first of these that markets are open. Qwest reiterates that Arizona CLECs serve over 214,000 access lines, representing nearly 7% of the Arizona local exchange access line base.[141] As of December 2000, a total of 65 interconnection agreements were in effect between Qwest and Arizona CLECs.

222. Qwest addresses the market share issue by saying that the FCC has specifically rejected a market share test as a criteria in determining whether a BOC meets Section 271 requirements.[142] Qwest points specifically to the FCC handling of this issue:

> "Given an affirmative showing that a market is open and the competitive checklist has been satisfied, low customer volumes in and of themselves do not undermine that showing. Factors beyond a BOC's control, such as individual CLEC entry strategies for instance, might explain a low residential customer base. We note that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here."[143]

223. Regarding the financial distress of the CLECs, Qwest points out that many of the CLECs mentioned by e.spire do not offer local exchange voice service. Further, some CLECs have reported positive financial results and that there are other factors involved in these firms financial difficulties unrelated to Qwest.

224. Qwest states that markets will remain open. Qwest points to the Performance Assurance Plan workshops, in the development of which e.spire has had an opportunity to participate. The workshops are designed to ensure Qwest's continued compliance with Section 271 guidelines. Finally, the FCC has found that its ongoing enforcement authority under Section 271(d)(6) and the risk of liability from antitrust or other private causes of action provide additional assurances of future compliance.

225. Regarding the e.spire comments on reciprocal compensation, special access circuit conversion and UNE provisioning intervals, Qwest states that these are issues for other workshops and not for the Public Interest and Track A workshop.

226. In rebuttal to AT&T/TCG comments, Qwest states that AT&T's merger with TCG provides it with direct access to the facilities-based local exchange and high capacity markets in Phoenix and other major urban centers. AT&T has stated that the merger will

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[141] By contrast, CLECs in Oklahoma may have captured as little as 5.5% of the total access lines in SWBT service territory. *See* SBC-Kansas/Oklahoma Order at ¶5. As stated in Qwest's testimony, Qwest has used a more conservative method to estimate access lines than SWBT did.
[142] BANY Order at ¶426: SBC-Texas Order at ¶419.
[143] SBC-Kansas/Oklahoma Order at ¶268.

enable it to sell all-in-one packages of local, long distance, and data communications to businesses.[144]

227. The merger also provided access to TCG's 300 route miles of fiber in Phoenix connecting between 120 and 150 single and multi-tenant buildings.[145] The vast majority of these buildings are located in Phoenix and Tempe. TCG's network is composed of 11 self-healing SONET (synchronous optical network) rings and is capable of providing facilities-based service to the majority of the Phoenix Metropolitan Statistical Area ("MSA") business-intensive localities.[146] TCG offers facilities-based service in the following communities: Downtown Phoenix, Phoenix Sky Harbor International Airport, Chandler, Mesa, Tempe, Paradise Valley, Scottsdale, Tolleson, and Glendale.

228. Qwest addresses four primary complaints from AT&T:

- Qwest has not demonstrated compliance with Track A guidelines
- Qwest has not opened its local markets to competition
- "Remonopolization" will occur if Qwest is granted reentry into the interLATA long distance market
- Structural separation of Qwest into distinct wholesale and retail entities must occur to open local markets in Arizona

229. Qwest states that AT&T presents an additional broad array of arguments, many of which are beyond the scope of this proceeding. In addition, many of their arguments concern standards AT&T suggests Qwest must meet that have not been required of other BOCs in states for which the FCC has granted petitions for interLATA entry.

230. Concerning the complaint that Qwest has not demonstrated compliance with Track A guidelines, Qwest argues that AT&T uses imprecise cites and that AT&T paraphrases excerpts from a variety of FCC orders and takes these references out of context. Qwest states that the Section 271 Track A requirements in the 1996 Act are clear, as are the FCC's interpretations of these requirements in the Verizon Massachusetts Order. Qwest has supplied ample evidence that they satisfy Track A requirements as outlined in Section 271 and the FCC's interpretations of that Section.

231. Qwest disagrees with certain items listed in AT&T's May 18, 2001 testimony, under issues 1 c and d. Regarding AT&T item c, each of the CLECs identified in Confidential Exhibit DLT-1 as having interconnection agreements in effect with Qwest are

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[144] "AT&T's Teleport Takeover OK'd," *Arizona Republic*, July 24, 1998.
[145] This information was obtained from various sources including the Internet, magazine and newspaper articles, and studies of the Phoenix and Tucson markets performed by Quality Strategies.
[146] *Id.*

commercial enterprises, are operational and are providing service for a fee. Regarding item d, Confidential Exhibit DLT-2 shows that, conservatively, over 214,000 access lines are now served by CLECs in Arizona, representing nearly 7% of the total number of access lines in service in the state.

232. Regarding the second AT&T complaint that Qwest has not opened its local markets to competition, and has provided no assurances that local markets, once opened, will remain so, Qwest states that this has been the subject of workshop discussion and that evidence has been presented to show that the local markets are open to competition and will remain so (see paragraph 229).

233. Regarding the AT&T complaint that Unbundled Network Element prices preclude competitive entry, Qwest states that this is wrong. Confidential Exhibit DLT-2 shows that 17,000 unbundled loops are currently in service in Arizona. Further, the AT&T complaint about Qwest's residential local exchange rates and UNE-P rates completely ignores cable telephony entry strategies employed by CLECs, such as Cox, in Arizona. This also ignores the fact that Qwest's retail residential services are fully available for resale at defined discounts in the state. It is a fact that CLECs are presently competing with Qwest in Arizona via CLEC-owned facilities, resale and use of UNEs. Further, the issue of UNE pricing is well beyond the scope of this proceeding.

234. Regarding the AT&T argument that Qwest's intrastate switched access prices must be reduced to cost as a precondition to Qwest's reentry into the interLATA market, this issue is completely beyond the scope of Track A and Public Interest guidelines. Intrastate switched access charges have not been ordered to be priced at cost in other states in which the BOC has been granted interLATA relief. This simply is not a precondition to approval of Section 271 applications and has nothing to do with the Public Interest requirements associated with interLATA market entry as outlined by the FCC. In addition, the AT&T argument ignores the ACC order regarding Qwest's Arizona rate case, which establishes specific pricing requirements around switched access and other Qwest services. The AT&T complaints transcend the scope of this proceeding and have little bearing as to the degree to which Track A and Public Interest requirements have been met in Arizona.

235. Regarding the AT&T request for structural separation, State commissions have recommended approval to the FCC, and the FCC has granted such approval, for SBC and Verizon to enter the interLATA markets in New York, Texas, Oklahoma, Kansas and Massachusetts. Structural separation has not been required as a precondition to entry into the interLATA market. Qwest states that the Pennsylvania PUC ordered a "functional", not "structural" separation of Verizon. The FCC has previously considered structural separation of Qwest as part of the Qwest/US West merger and dismissed the concept. Qwest arguments against separation are summarized below:

1) Structural separation is not necessary as a precondition to approval of Qwest's reentry into the interLATA long distance market. Extensive safeguards are in place to ensure that the local service market is open to competition.

2) Structural separation is not only unnecessary, it will reduce Qwest's efficiencies and increase its costs, which is ultimately bad for customers.

3) AT&T's proposed forced structural separation of Qwest's retail business away from its network and wholesale businesses is *not* competitively neutral.

236. In rebuttal to WorldCom';s Comments, Qwest states that, in Arizona, Phoenix FiberLink, SkyTel Communications, Compuserve, and ANS are also part of the MCI WorldCom family.[147] In Phoenix, WorldCom's network has been operational since 1995 when it initiated service to large end users and every major carrier in the central business district. Since then, the network has expanded to encompass a much broader geographic area and includes the installation of a central office switch in Phoenix that has allowed it to diversify its product offering with the rollout of local exchange services. Geographic areas covered by WorldCom fiber in the greater Phoenix area include: Downtown Phoenix, Camelback Road/Indian School road areas between Central Avenue and 46th Street, Lincoln Road, Phoenix Sky Harbor International Airport, Van Buren Street, and Tempe.[148]

237. WorldCom has also built a small fiber network (20-40 miles) in Phoenix's central business district to transmit voice and data traffic. WorldCom has not invested heavily in fiber facilities to serve end users in suburban Phoenix areas. It has limited the scope of its network to the city's downtown area and connected the buildings that house its largest long distance accounts to provide facilities-based high capacity service.[149]

238. Qwest notes that WorldCom complaints are similar to those of AT&T, e.spire and Cox concerning issues such as pricing of UNEs, pricing of switched access, alleged examples of non-compliance with Section 271 guidelines, provisioning intervals for special access and UNE services, and the need for structural separation of Qwest as a precondition to re-entry into the interLATA market. Qwest does not readdress these issues in their rebuttal section on WorldCom but refers the reader back to previous sections.

239. Qwest does rebut WorldCom concerns not expressed by other carriers. These include:

- The state of wholesale service competition in Arizona .
- The status of Operational Support Systems as a means of ensuring that local markets are open.

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[147] www.sec.gov/Archives/edgar/data/723527/0000931763-00-000735-index.html, April 13, 2001.
[148] *Id at 22.*
[149] *Id.*

- The suggestion that Qwest has "market power" to "control market prices" and exercises market power through "control of local bottleneck facilities."[150]

- That the public interest will be served if regulations are designed to "create conditions where competition in local telecommunications markets can flourish, and existing competition in the long distance markets is not diminished."[151]

240. Qwest addresses the last two of these WorldCom issues and also the need for structural separation of Qwest as a precondition to reentry into the interLATA market.[152]

241. Qwest states that WorldCom must be unfamiliar with the ACC order establishing pricing guidelines for Qwest's services in Arizona. Under these guidelines, for a three year period, Qwest's prices for "basic" services, such as local exchange services, are subject to Commission-mandated price caps.

242. Qwest's local markets are fully open. In addition, Qwest has supplied extensive evidence in previous Arizona workshops demonstrating Qwest's compliance with Section 271 checklist requirements.

243. Qwest states that evidence from states in which Section 271 FCC approval has been granted clearly shows that interLATA market entry by the BOC has the precise effect stated by WorldCom. Namely, encouraging competition in local and long distance markets to serve the public interest.

244. As evidence, Qwest draws from the May 21, 2001 FCC report on the status of competition. [153] The FCC highlights competitive dynamics in New York and Texas, states in which the BOC has been granted interLATA relief. Qwest points out the following three key conclusions from this report:

- CLECs captured 20% of the market in the State of New York – the most of any state. CLECs reported 2.8 million lines in New York, compared to 1.2 million lines the prior year – an increase of over 130%, from the time the FCC granted Verizon's long distance application in New York in December 1999 to December 2000.

- CLECs captured 12% of the market in Texas, gaining over half-a-million (644,980) end-user lines in the six months since the Commission authorized SBC's long distance application in Texas – an increase of over 60% in customer lines since June of 2000.

- CLEC market share in New York and Texas (the two states that had 271 approval during the reporting period ending in December 2000) are over 135% and 45%

[150] Direct testimony of Don Price, pg. 10.
[151] Direct testimony of Don Price, pg. 9.
[152] Rebuttal testimony of Teitzel pgs. 28-29.
[153] FCC- Local Telephone Competition: Status as of December 31, 2000.

higher than the national average, respectively.

245. Qwest asserts that competitive intensity in the local exchange markets in these states has heightened since the BOCs serving these states were granted interLATA relief. After the BOC enters the interLATA long distance market, competition intensifies in both the local and long distance markets, and consumers are the direct beneficiaries of that increased competition.

246. Qwest addresses a specific aspect of WorldCom's structural separation argument. Namely, the WorldCom suggestion that structural separation would lead to full deregulation of Qwest's retail operations. Qwest argues that implicit in the WorldCom concept is that Qwest's deregulated retail operation would be driven to quickly increase the basic residential service recurring rates to cost-recovery levels, creating rate shock on Arizona consumers. The suggestion also ignores the regulatory constraints on Qwest's prices for the three year term of the Arizona price plan as approved by the ACC in 2001.

247. Qwest started its discussion of Public Interest in the Workshop of June 12, 2001 by stating that the question before the group is if Qwest is granted the authority to reenter the interLATA market, will consumers benefit, will residential customers and business customers alike benefit? Qwest stated that the answer to that is yes. Qwest's witness reiterated the FCC's three-part analysis requirement concerning whether or not a BOC has indeed met the Public Interest standard. Since this has been stated on more than one occasion in this document, it will not be repeated here. The witness stated that for emphasis on the record, the FCC in the Bell Atlantic New York Order at paragraph 422 and also in the SBC Texas Order paragraph 416, found that the 14 point checklist compliance is in itself a strong indicator that long distance entry is consistent with the public interest.

248. Qwest's witness further stated that also in the Bell Atlantic New York Order, at paragraph 426, unusual circumstances do not warrant 271 denial. He stated that unusual circumstances would include things like low percentage of CLEC access lines, concentration of competition in densely populated areas, minimal competition for residential service, modest facility-based investment and prices for local exchange services that are at the maximum permissible levels. The witness quoted from the Bell Atlantic New York Order, paragraph 426, as follows: "We disagree with commenters arguments that the public interest would be disserved by granting Bell Atlantic's application because the local market in New York has not yet truly been opened to competition.

249. Commenters cite an array of evidence which, they argue, demonstrates that the local telecommunications market is not open and that competition has not sufficiently taken hold in New York. For example, commenters pointed to, 1), the low percentage of total access lines served by the Competitive LEC's; 2), the concentration of competition in New York City and other urban areas; 3), minimal competition for residential services; 4), modest facility-based investments; and 5), prices for local exchange services at the maximum permissible levels under the price caps.

250. Qwest's witness stated that with respect to future compliance and assurances that Qwest could provide the Arizona Commission, backsliding will not occur and one of the assurances would be in the form of the Performance Assurance Plan, or the PAP. Another important protection is that the 1996 Act itself provides enforcement authority, and Section 271(d)(6) defines that authority to include such things as financial penalties and potential suspension and up to revocation of a BOC's 271 privilege. The third protection would be antitrust liability.

251. Qwest's witness further stated that other important considerations around public interest are that Qwest's reentry into the interLATA market will stimulate competitive activity in both the local and long distance markets, and in the end this is good for consumers. This point is stated in the SBC Texas Order at paragraph 419 and cited in the Bell Atlantic New York Order at paragraph 428; which states as follows: "BOC entry into the long-distance market will benefit consumers in competition if their relevant local exchange market is open to competition consistent with the competitive checklist."

252. The May 8, 2001 Telecommunications Research Action Center (TRAC) study shows that New York customers are in fact, saving approximately $700 million in combined local and long-distance charges since Verizon entered the interLATA market in that state. There is also evidence that the CLEC market share for local exchange services has increased by over 130% in New York since Verizon was granted interLATA relief, and about 60% in Texas since that petition was granted. He further stated that allowing Qwest into the interLATA market will enable Qwest to provide single source benefits to customers, since they desire a single source service. Qwest's witness concluded by stating that consumers will realize benefits when Qwest enters the long-distance market; there will be expanded competition in the long-distance market, one more considerable competitor in that market. Expanded competition results in innovation, results in reduced prices and better prices for consumers. There will be enhanced focus in the competitive marketplace as the current competitors set value for market share going forward.

253. With regard to Cox's WinBack Tariff, Qwest's witness stated during the workshop that without divulging specific numbers, the number won back was far less than 10% during the year 2000.

254. In Qwest's September 19, 2001 brief, it stated that: "Qwest's entry into the interLATA market in Arizona is consistent with the Public Interest, convenience, and necessity." The public interest analysis should focus on whether the local market is open to competition and whether there is adequate assurance that the local market will remain open after the Section 271 application is granted. Qwest states that the FCC has repeatedly held that compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest and that the FCC has *never* rejected a Section 271 application on these grounds where the BOC has met the checklist requirements. There are three parts to the FCC's Section 271 public interest inquiry, as follows:

- First, is Qwest's application consistent with promoting competition in the local and long distance telecommunications markets?

- Second, the FCC looks for assurances that the market will stay open after Section 271 application is granted.

- Finally, the FCC considers whether there are any remaining "unusual circumstances" that would make entry contrary to the public interest.

255. Qwest's September 19, 2001 brief further stated that its application is consistent with promoting competition in both the local and long distance markets in Arizona.[154]

256. Qwest stated that nothing in the 1996 Act requires a BOC to prove that CLECs have entered the market in any significant number or achieved a particular level of market penetration. Qwest is not *required* to demonstrate that CLECs have actually entered its market in order to obtain Section 271 approval. Nevertheless, Qwest provides market penetration data as of February 28, 2001. As of this date, Qwest had entered into a total of 56 wireline interconnection agreements with CLECs in Arizona; 18 wireless, paging, and EAS interconnection agreements; and 41 additional resale interconnection agreements. As of that same date, there were 38 additional interconnection agreements pending.[155]

257. Under these agreements, Qwest had completed 455 CLEC collocations as of February 28, 2001,[156] and some 23 CLECs were using 132,105 local interconnection (LIS) trunks to interconnect with Qwest.[157] On this date, Qwest also was provisioning 17,186 stand alone unbundled loops, as well as 653 UNE-P lines, to 16 different Arizona CLECs.[158] CLECs are clearly using these interconnections and unbundled loops to provide services. In January 2001, a total of 1,123,624,413 minutes of use were exchanged between CLECs and Qwest in Arizona.[159]

258. Qwest then used the LIS-trunk method and calculations as presented in the same brief under their Track A discussion, to estimate CLEC lines at 363,289 and CLEC market share at 12.5 percent.[160] Qwest then compared estimated market share in other states where 271 approval was granted. Qwest states there has been significantly greater entry in Arizona than existed in Oklahoma (estimated 5.5 to 9.0 percent) and Kansas (estimated 9.0 to 12.6 percent) when SBC's application was granted.[161] CLEC market shares in Arizona

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154 Qwest Brief of 9/19, pg 29.

155 *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3. This figure includes pending wireline, resale, wireless, paging, and EAS interconnection agreements, as well as opt ins.

156 *Id.* at Exhibit DLT-3.

157 *See* Teitzel Affidavit, 7 Qwest 16 at Confidential Exhibit DLT-1C (as of 12/31/00).

158 *See* Teitzel Affidavit, 7 Qwest 16 at Confidential Exhibit DLT-1C (as of 12/31/00).

159 *Id. See also* Teitzel Affidavit, 7 Qwest 16 at 38:8-10.

160 Qwest Brief of 9/19, pg 35.

161 *See SBC Kansas/Oklahoma Order* at ¶¶ 4-5.

exceed the shares that existed in Texas (8.0 percent)[162]. Qwest then uses the E-911 listings method of estimating CLEC lines and market share to estimate market share at 14.8 percent.[163]

259. Finally, Qwest stated that other measures also confirm that retail customers in Arizona are moving to CLECs in ever-larger numbers. As of February 28, 2001, there were 105,373 CLEC white pages listings in Qwest directories in Arizona.[164] These figures, together with the preceding data, demonstrate that Qwest has opened the local market in Arizona.

260. 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."[165] 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."[166]

261. Independent studies confirm that the benefits to consumers are substantial. A May 2001 study by the TRAC demonstrates that New York consumers will save up to $284 million annually on long distance telephone service as a result of BOC entry into the interLATA market in that state.[167]

262. Permitting Qwest to enter long distance would increase customer choice and competition in the *local* market as well. [168] Experience has shown that a BOC's imminent entry into the long distance market acts as a catalyst for CLECs to accelerate entry into local exchange markets. IXCs, faced with the prospect of increased competition for their long distance customers, accelerate their local entry plans in a bid to retain those customers through bundled service packages.

263. Data recently released by the New York State Public Service Commission reveal that the number of local exchange lines served by CLECs more than doubled from 1999 to 2000 following the grant of Verizon's Section 271 application. Also, more CLEC access lines were dedicated to residential customers (52 percent) than to business customers (48 percent). Similarly impressive statistics have been reported for Texas, where: "CLECs have captured 12% of the market in Texas, gaining 644,980 end-user lines in the 6 months after the FCC granted SBC's Section 271 application."

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162 *See SBC Texas Order* at ¶ 5 & n.7.

163 Qwest Brief of 9/19, pg 36.

164 *See* Teitzel Affidavit, 7 Qwest 16 at Exhibit DLT-3.

165 *Bell Atlantic New York Order* at ¶ 428; *SBC Texas Order* at ¶ 419; *SBC Kansas/Oklahoma Order* at ¶ 268.

166 *Bell Atlantic New York Order* at ¶ 428 (emphasis in original).

167 *See TRAC Estimates New York Consumers Save Up to $700 Million a Year on Local and Long Distance Calling*, Telecommunications Research Action Center, May 8, 2001.

168 Qwest Brief of 9/19, pg 33.

264. Qwest further stated, in its September 19, 2001 brief, that it has provided adequate assurances that its local exchange market will remain open to competition after Section 271 approval. [169] The FCC has noted that, while it has "never required" a BOC to provide a performance assurance plan, if a BOC chooses to develop one, the plan will constitute "probative evidence" that the BOC will continue to meet its Section 271 obligations and that its long distance entry is consistent with the public interest.[170]

265. Qwest has developed a Performance Assurance Plan for Arizona. In addition, the most significant assurance of future compliance beyond Qwest's Plan is the FCC's enforcement authority under Section 271(d)(6).

266. Qwest then addresses the AT&T suggestion that Qwest cannot satisfy this prong of the public interest analysis because the PAP process has not yet been fully completed. Qwest states that the workshop process has given all of the parties potentially affected by the PAP the opportunity to raise their concerns in the collaborative performance assurance plan workshops.[171] Qwest has presented adequate assurance of future compliance, and this prong of the public-interest inquiry has been met.

267. Qwest also stated that no intervenor has demonstrated that there are any "unusual circumstances" that would make long distance entry contrary to the public interest.[172] The FCC may review for "unusual circumstances" but has *never* found such "unusual circumstances" to exist. The FCC has specifically identified some CLEC arguments that it will *not* count as unusual circumstances.[173] These include: 1) A low percentage of total access lines served by CLECs, 2) the concentration of competition in densely populated urban areas, 3) minimal competition for residential service, 4) modest facilities-based investment, and 5) prices for local exchange service at maximum permissible levels under the price caps.[174]

268. CLECs' complaints that they cannot realize a sufficient profit on their services are irrelevant, since "incumbent LECs are not required, pursuant to the requirements of Section 271, to guarantee competitors a certain profit margin."[175] Further "isolated instances" of service quality glitches or noncompliance do not affect the public interest inquiry.[176]

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[169] Qwest Brief of 9/19, pg 36.

[170] *Bell Atlantic New York Order* at ¶ 429 ("Although the Commission strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of Section 271 approval."); *SBC Texas Order* at ¶ 420.

[171] AT&T chose not to participate in PAP workshops.

[172] Qwest Brief of 9/19, pg 38.

[173] Emphasis in original.

[174] *See Bell Atlantic New York Order* at ¶ 426; *SBC Texas Order* at ¶ 419.

[175] *SBC Kansas/Oklahoma Order* at ¶ 65.

[176] *SBC Kansas/Oklahoma Order* at ¶ 281. *See also Bell Atlantic New York Order* at ¶ 50 (holding that "anecdotal" evidence of "isolated incidents" is insufficient to prove "that the BOC's policies, procedures, or capabilities preclude it from satisfying the requirements" of Section 271).

269. Qwest addresses the AT&T and WorldCom's suggestion that Qwest's UNE prices[177] do not allow them to make enough of a profit in the residential market.[178] Neither suggests that Qwest is charging anything for UNEs or retail services other than the prices that have been approved by the Commission in separate cost dockets. Nor do they suggest that Arizona has failed to follow the Telecommunications Act's pricing methodology for UNEs. Further, The FCC has clarified that CLEC profit margins are "not part of the Section 271 evaluation,"[179] and that, in considering what "the Act" requires, CLEC profit margins with UNEs are "irrelevant."[180]

270. AT&T alleges that Qwest's intrastate access charges[181] would give it such an advantage in the long distance market that Qwest's entry could not be in the public interest.[182] The FCC has never once reviewed a BOC's access charges as part of a Section 271 application, nor has it ever conditioned a BOC's entry into the long distance market on reforming access charges. AT&T states concerns that Qwest's Section 272 interLATA affiliate, Qwest Communications Corporation ("QCC"), will have some unfair advantage if access charges are not reduced. AT&T's concern is without merit. Under the Act, QCC must pay exactly the same access charges as any other interexchange carrier.[183]

271. Whether Qwest is in fact complying with the market-opening requirements of the Act will be determined on the basis of the factual record developed in the workshops devoted to checklist compliance.[184] Regarding specific complaints levied by AT&T and WorldCom, Qwest has settled most of the disputes cited, including those with SunWest and Rhythms (cited by AT&T and WorldCom) to the satisfaction of the complaining CLECs.

272. AT&T and WorldCom suggest that the Commission should take the public interest inquiry as an opportunity to effect a corporate restructuring of Qwest. Specifically, a corporate structure that would separate Qwest's retail and wholesale activities into two separate subsidiaries, and to establish a retail company with independent management that would interact with the wholesale company on [an] arm's length . . . basis."[185] Qwest stated that there is no provision of state or federal law that purportedly authorizes the Commission to condition the grant of a federal Section 271 application on a forced corporate

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[177] Qwest Brief of 9/19, pg 43.

[178] *See* Rasher Affidavit, 7 AT&T 2 at 7-9; Price Testimony, 7 WC 1 24:10-36:19.

[179] *Verizon Massachusetts Order* at ¶ 41.

[180] *SBC Kansas/Oklahoma Order* at ¶ 92.

[181] Qwest Brief of 9/19, pg 46.

[182] *See* Rasher Affidavit, 7 AT&T 2 at 9-12.

[183] *See* 47 U.S.C. § 272(e)(3). Section 272(e)(3) provides that a BOC "shall charge the affiliate . . . an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service." 47 U.S.C. § 272(e)(3). *See also* Rebuttal Affidavit of Marie E. Schwartz RE: 272, Qwest Corporation (May 29, 2001), *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 272 of the Telecommunications Act of 1996*, Docket No. T-00000B-97-238, 7 Qwest 2 at 21:17-19 ("The BOC [Qwest] charges the 272 Affiliate the same prices that the BOC would charge any other carrier and does charge its non 272 affiliates. Therefore, there is no issue of discrimination.").

[184] Qwest Brief of 9/19, pg 48.

[185] Rasher Affidavit, 7 AT&T 2 at 30-31, 38.

restructuring.[186] AT&T and WorldCom do not even try to show that there could be a state-law basis for imposing an involuntary structural separation on Qwest.[187] The Commission lacks the power and authority under Arizona law to compel structural separation. A separation would be costly and inefficient.

273. When Qwest and U S WEST merged, the FCC declined to impose any type of structural separation requirements. AT&T cites the FCC's old rules for BOC provision of cellular service[188] without revealing that these rules were relaxed over time and will sunset altogether in four months.[189] Finally, both AT&T and WorldCom refer to the Modification of Final Judgment ("MFJ") approving the *negotiated* consent decree divesting AT&T of the BOCs without ever bothering to explain what provision of law might give the Commission the same authority as an antitrust court.[190]

274. Structural separation would impose massive and unnecessary costs on Arizona consumers.[191] A forced corporate restructuring of Qwest would impose enormous administrative costs and efficiency losses that would ultimately be borne by the consumers of Qwest's services. Going forward, structural separation would also destroy Qwest's incentives to improve its network and deploy innovative new services making use of that network. Arizona consumers would suffer these costs needlessly. Qwest states that *no* state has adopted structural separation.

275. CLECs have suggested that granting Qwest's application would not be in the public interest because many CLECs have recently gone bankrupt or are having trouble in the capital markets.[192] ILECs are not required to guarantee competitors a certain profit margin,"[193] nor are they required to guarantee their competitors stable stock prices. The fact that CLECs may choose to scale back entry plans in light of their own financial troubles has no bearing on whether Qwest has taken actions within its power to open up its market. A number of factors explain the CLECs' troubles in the capital markets which have nothing to do with Qwest.

276. Further, since Section 271 authorization does not turn on competitor market shares, the fact that a CLEC might retreat from the market altogether in this economy changes nothing. Qwest quotes: "the Act provides for long distance entry even where there is no facilities-based competition" at all, underscoring "Congress' desire to condition approval solely on whether the applicant has opened the door for local entry through full

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186 Qwest Brief of 9/19, pg 52.

187 Qwest Brief of 9/19, pg 57.

188 *See* Rasher Affidavit, 7 AT&T 2 at 36, 38.

189 *See* Report and Order, *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 12 FCC Rcd 15668, ¶¶ 27-31 (1997); 47 C.F.R. § 20.20 (f).

190 *See* Rasher Affidavit, 7 AT&T 2 at 31; Price Testimony, 7 WC 1 at 62-64, 66-67 (citing *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983)).

191 Qwest Brief of 9/19, pg 60.

192 Qwest Brief of 9/19, pg 62.

193 *SBC Kansas/Oklahoma Order* at ¶ 65.

checklist compliance, not on whether competing LECs actually take advantage of the opportunity."[194]

277. Cox Arizona Telcom has charged that Qwest's Competitive Response Program is an example of "predatory pricing" that must be eliminated prior to approval of Qwest's Section 271 application.[195] The Competitive Response Program[196] is merely a standard incentive program designed to win back customers that have been wooed away from Qwest by CLECs. Qwest states that the very existence of the program is evidence that local exchange competition exists.[197] Further, all of the prices and other terms of the Competitive Response Program are contained in the Qwest tariff that has been reviewed and approved by this Commission.[198]

278. Qwest has succeeded in bringing back a small minority of its former customers under the Competitive Response Program, but it would be gross exaggeration to suggest that this tariff has "eliminat[ed] the ability of a CLEC to effectively compete."[199] Finally, Qwest notes that the Competitive Response Program is barely self-sufficient, meaning that revenues generated by returning customers merely recover any charges waived by Qwest and the costs of implementing the program.[200] This is in no way an example of predatory pricing, and it should have no bearing whatsoever on Qwest's showing that its entry into the interLATA market in Arizona is squarely in the public interest.

279. Qwest concludes its September 19, 2001 brief by addressing miscellaneous issues brought up by the CLECs. Qwest's provision of enhanced extended links and special access circuits, and Qwest's OSS are wholly unrelated to the public interest inquiry. As with the PAP, these basic checklist compliance and performance issues are the subjects of other workshops in this proceeding and should not be addressed here.[201]

e. <u>Staff Discussion</u>

280. A number of issues have been raised by the CLECs regarding Qwest's compliance with meeting the requirements of Public Interest. Below is Staff's discussion on the CLECs issues.

<u>Winback Tariff - Cox Issue</u>

281. The "Competitive Response Program" or "Winback Tariff" has the potential to be an anticompetitive program. The CLECs must incur considerable expense to win customers from Qwest through various advertising and other incentive programs. However,

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194 *Bell Atlantic New York Order* at ¶ 427.
195 Cox Comments at 2:11-12.
196 Qwest Brief of 9/19, pg 64.
197 *See generally* Teitzel Rebuttal, 7 Qwest 17 at 9:16 to 11:13.
198 *See* Qwest's Competitive Exchange and Network Services Tariff, Section 5.2.
199 Cox Comments at 4:6-8.
200 *See* Teitzel Rebuttal, 7 Qwest 17 at 10;13-16.
201 Qwest Brief of 9/19, pg 66.

as soon as the CLEC wins the customer, Qwest has an easy way to identify and target these customers and can offer an incentive to come back.

282. Further, as has been identified by Cox, the transition of the customer's service is often not trouble free. A customer that has experienced service problems with the transition and then is provided price incentives may find Qwest's offer to return difficult to refuse. The CLEC is put in the position of investing money in attracting and transitioning the customer, but then receives no revenue due to its inability to retain the customer for any length of time. The Winback Tariff allows Qwest to capitalize during the early stages of competition by marketing to known customers that have switched, and who have possibly experienced problems during the transition. The customer should be given an opportunity to fully experience the services of the new CLEC before being targeted to switch back to Qwest.

283. Staff is of the belief that early on in the development of competition, Qwest's "Winback Tariff" is anticompetitive. It is much easier for Qwest, with its current market share, to win back former customers with incentives before the customer has an opportunity to experience service from the CLEC for any length of time. Therefore, Staff recommends that Qwest file with the Commission a modified Winback Tariff within 30 days from the date of which the ACC approves Qwest's 271 application. The tariff should state that Qwest will delay its Winback efforts to new customers for a period of six months from the date Qwest receives FCC approval of its 271 application.

284. Staff believes that delaying Qwest's Winback Tariff will allow customers to fully experience service from CLECs before being marketed to switch back to Qwest service, should they so desire.

Reciprocal Compensation and Enhanced Extended Links (EELs) - e.spire Issue

285. e.spire claims that Qwest has disrupted its business in three primary areas. First, Qwest has withheld millions of dollars of reciprocal compensation payments owed to e.spire. Second, Qwest has refused to convert special access circuits to enhanced extended links, commonly referred to as EELs. And third, Qwest has failed to provision special access circuits ordered by e.spire in a timely manner. As a result of these issues, e.spire states that it has suffered monetary damages and has lost reputation and customers.

286. The concerns raised by e.spire have been addressed and resolved through workshops on Checklist Items No. 1 (Interconnection/Collocation, Decision No. 64600), No. 2 (Access to UNEs, Decision No. 64630) and No. 13 (Reciprocal Compensation, Decision No. 63977). Furthermore, subsequent FCC actions and an Order of the D.C. Circuit Court have provided additional direction for resolution of the issues. Additionally, e-spire's remedy at the time would have been to bring a complaint action against Qwest at the Commission to resolve the issue, but e-spire elected not to do so.

287. Staff is confident that the results of the open and collaborative workshops, the multitude of mutually agreed upon revisions to the SGAT, the PAP (upon its approval by the Commission) and the commercial results reported by Qwest over the last twelve months, address the concerns expressed by e.spire and, will prospectively, assure that the market remains open to competition.

Structural Separation - WorldCom and AT&T Issue

288. Both AT&T and WCom address the issue that Qwest must be structurally separated to truly open the local market to competition in Arizona.

289. AT&T states that although only full structural separation of Qwest's wholesale and retail arms would be sufficient to eliminate Qwest's incentives to capitalize on its bottleneck facilities, structural separation should significantly reduce Qwest's incentives and ability to engage in such anticompetitive conduct. That, in turn, will facilitate true competition in local exchange markets of Arizona – for the benefit of competitors and consumers alike. AT&T urges the Commission to order the structural separation of Qwest into distinct wholesale and retail corporate subsidiaries, before granting Qwest 271 relief.

290. WorldCom argues for a structural separation between Qwest's retail and wholesale operations to encourage competition.

291. The concerns raised by AT&T and WorldCom have been thoroughly addressed in Staff's 272 Report. Further, structural separation has never been required as a precondition to entry into the interLATA market. Therefore, Staff believes that the issue of structural separation should not be considered a Public Interest issue. Certainly the record in this proceeding does not support imposition of such a drastic measure at this time.

OSS Test - ASCENT Issue

292. ASCENT argues, among other things, that OSS testing procedures have not been completed and final results have not been released. At the time of ASCENT's filing, the OSS test had not yet been completed and therefore no final conclusions had been drawn with respect to Qwest's performance. However, since that time, the testing of Qwest's OSS has been completed and this issue is no longer applicable. Cap Gemini Ernest & Young issued its Final Report on Qwest's OSS on March 29, 2002 finding that Qwest provided nondiscriminatory access to UNEs to CLECs.. Staff's final report and recommendation concurring with virtually all of CGE&Y's conclusions concerning the OSS test was issued on May 1, 2002 as a supplement to the Checklist Item No. 2 Interim Report.

Arizona Cost Docket, Access Reform and Performance Assurance Plan (PAP) - CLEC Issues

293. All of the CLECs filing comments on Public Interest had concerns with the following issues.

Arizona Cost Docket

294. The Commission currently has a pending docket (T-00000A-00-0194) that is investigating Qwest's compliance with certain wholesale pricing requirements for unbundled network elements and resale discounts. As of the date of this report, a final decision in this case has yet to be adopted.

295. The Administrative Law Judge's (ALJs) initial recommended Opinion and Order (ROO) was issued on November 8, 2001. In the Exceptions to the ROO, the parties identified a number of issues that they believed had not been adequately addressed. As a result, the ALJ issued a Supplemental Recommended Opinion and Order (SROO) on March 8, 2002 to address those issues and to amend the original ROO.

296. In its April 11, 2002 Open Meeting, the Commission directed that the record in this matter be reopened, in order to put into evidence the year 2000 customer location and line count by location data. Qwest and the other parties were directed to work together to minimize disagreements or discrepancies concerning the data and its use in the HAI model.

297. On April 15, 2002, the ALJ issued a Procedural Order which sets forth the schedule for implementing the changes to the inputs to the HAI model proposed by Commissioner Spitzer and approved by the Commission. No later than May 1, 2002, Qwest is to provide to all parties the 2000 customer location and number of lines by location. No later than May 24, 2002, Qwest is to have the data formatted and run through the HAI model and provide the results to the parties and the Commission.

298. The subsequent procedural steps will be determined later, depending upon the ability of the parties to agree and reach resolution on the accuracy/validity of the 2000 data and their input into the HAI model.

Access Reform

299. The Commission currently has a pending docket (T-00000D-00-0672) that is investigating the cost of telecommunications access to determine if access charges currently in effect reflect cost of access.

300. On December 3, 2001, interested parties were ordered by the ALJ to provide written comment on issues/questions related to the cost of access (which were developed by the Utilities Division) no later than January 4, 2002. This date was later extended to January 22, 2002. As a result of its review or the written comments, Staff recommended that there be a generic proceeding rather than company specific proceedings to address the issue of the access charges; that the parties should have the opportunity to file direct, rebuttal and surrebuttal testimony before the hearing; that the Commission should address access charges for both rate of return companies (rural companies) and price cap companies in the proceeding and that the parties should be required to provide testimony on certain issues.

301. The parties were given until April 19, 2002 to respond to the Staff recommendation. A procedural conference scheduled for April 12, 2002 was continued indefinitely by the ALJ pending receipt of responses to Staff's recommended procedural schedule. Nine parties responded to Staff's recommendation, including: Tabletop Telecom, Sprint, Cox, The Arizona Local Exchange Carriers Association (ALECA), Qwest, AT&T, WorldCom, Eschelon and Citizens Telecom.

Performance Assurance Plan (PAP)

302. The Public Interest analysis should focus on whether the local market is open to competition and whether there is adequate assurance that the local market will remain open after Section 271 relief is granted. The Performance Assurance Plan provides adequate assurance that the local market will remain open after the Section 271 application is granted.

303. The Recommended Opinion and Order on the PAP was issued on April 4, 2002.

304. Under the PAP, Qwest's wholesale performance will be evaluated on a number of separate performance measures. Penalty payments will be made to CLECs, to cover administrative expenses in administering the PAP, and to further competition.

305. The PAP will be reviewed every six months by the Commission. Parties will have an opportunity to comment and mutual agreement to PAP changes will be sought. In the event that mutual agreement is not possible, the Commission will make the final decision.

306. An audit will also be conducted on the PAP after one year following implementation. A second audit will be conducted after 18 months following the first audit. These audits will review reporting and payment disagreements among the parties. Staff also supported Arizona's involvement in a multi-state audit effort. However, Staff recommended that the Commission reserve the right to pursue its own audit if it is in the public interest.

307. The PAP is an integral part of a Public Interest analysis. Therefore, Staff believes that the Public Interest is further served in conjunction with a strong PAP that ensures that the local market remains open once Section 271 approval is granted.

Local Service Freeze

308. On December 13, 2001, Qwest notified the Commission that it was to begin offering its business customers the option to freeze their local service provider. It also indicated that it would make this service available to its residence customers. On January 11, 2002, Cox filed an Application To The Commission To Issue An Order To Show Cause To Stay Implementation Of The Local Service Freeze (Docket No. T-01051B-02-0073). Qwest filed its initial response to the Cox application on January 18, 2002. Cox filed a reply to Qwest's response on January 22, 2002.Qwest filed a proposed tariff for the service with the Commission on January 28, 2002. The Commission suspended the filing and ordered that the matter be set for Hearing. The current procedural schedule requires that Qwest file

testimony by April 11, 2002, that Staff and Intervenors file testimony by May 13, 2002, that Qwest file rebuttal testimony by May 28, 2002 and that the hearing be held beginning June 17, 2002.

RECENT FILINGS

a. Comments of The Attorney General re: Public Interest, Convenience and Necessity

309. On December 19, 2001, the Arizona Attorney General ("AG") submitted comments pursuant to 47U.S.C. §271(d)(3)(C), recommending against the FCC granting approval of the Section 271 application of Qwest Corporation, Inc. for the provision of in-region InterLATA services, until Qwest has satisfied to the Commission that it has resolved the serious consumer protection problems raised in these comments.

310. The Attorney General stated that in the last 2 years she has twice pursued consumer fraud cases against Qwest. First, in April 2000, the Attorney General entered into a consent judgment with Qwest based on allegations that Qwest had changed consumers long distance carrier without their authorization ("slamming"). Second, in October 2001, the Attorney General sued Qwest under the Arizona Consumer Fraud Act, A.R.S. §§ 44-1521-1534, alleging that Qwest had repeatedly charged consumers for unauthorized services ("cramming") and had engaged in deceptive advertising. The Attorney General believes that these cases raise very serious concerns about Qwest's commitment to serving the public, and its willingness to compete fairly by providing accurate information to consumers. Based on these concerns, the Attorney General urged the Commission to withhold a favorable recommendation to the FCC until Qwest had demonstrated that it has resolved its consumer protection problems and that it is willing and able to conduct its business free of consumer fraud.

311. With regard to the March 29, 2000 consent judgment, the AG stated that while not admitting responsibility for its actions, Qwest undertook a number of substantive changes to its training, telemarketing, and billing procedures and agreed to pay $175,000 to the state as well as an additional $150,000 to designated educational projects.

312. The Attached March 29, 2000 consent judgment states:

> "Qwest also states that prior to September 1999, agents did not provide Letters of Agency (LOA) to Qwest as they were directed to do, but instead submitted service orders electronically to Qwest and were required to provide copies of the LOA's to Qwest upon Qwest's request to verify that the subscribers did indeed authorize a switch in their interstate and intrastate long distance service."

313. The AG acknowledges that in September 1999, Qwest began requiring all agents to submit LOA's to Qwest before a service order would be processed by Qwest. Since that time, Qwest has electronically scanned each LOA to ensure that it has such

documentation before processing a service order to switch a subscribers long distance service.

314. On October 15, 2001 the State again filed a consumer fraud lawsuit against Qwest, and on November 7, 2001, the State filed its First Amended Complaint in that lawsuit. Paragraph 6 of the amended complaint summarized the State's nine consumer fraud allegations. The First Amended Complaint contained more than 100 separate allegations concerning the problems encountered by specific Qwest customers. These allegations were taken from complaints filed with the Attorney General or with the Commission.

315. The Attorney General went on to state that the consumer fraud allegations in the State's lawsuit raised serious concerns regarding the public interest, convenience, and necessity. Despite the consumer fraud consent judgment in 2000, Qwest has continued to deceive and mislead its customers while frustrating their attempts to resolve their billing problems.

316. With respect to the November 7, 2001 First Amended Complaint, the AG stated that beginning in at least January 1999, and continuing through October 2001, Qwest engaged in practices in violation of A.R.S. §44-1521 *Et. Seq.,* which practices include, but are not limited to, a list of nine complaints. These complaints include cramming, misrepresenting services which result in unauthorized charges on consumer bills, failure to disclose certain types of charges or that it could not provide services contracted for material limitations to its services, engaging in false, deceptive and misleading advertising and setting up Customer Service Departments that willfully frustrate consumers attempts to resolve any of the matters set out in the preceding complaints.

317. To the best of ACC Staff's knowledge, the First Amended Complaint has been filed with, but not heard by the Superior Court of Pima County, Arizona.

b. Qwest's Response

318. On January 3, 2002 Qwest responded to the Attorney General's December 19, 2001 comments. With respect to the March 29, 2000 consent judgment, Qwest contended that this long settled complaint had to do with Qwest Communications International prior to the June 2000 merger with U S West. It further stated that the settlement concerned long distance marketing subcontractors, and that Qwest no longer offers long distance, since it is precluded from this until it receives §271 relief.

319. Further, Qwest stated that the complaint, currently under consideration by the Superior Court of Pima County, alleges conduct which is not related to whether the market is open or not, and therefore is not relevant to this proceeding. Qwest referenced FCC Section 271(d)(3)(C) concerning Public Interest, which focuses on the issue of whether or not the BOC has opened the market. The question was raised as to whether or not it would be appropriate to raise the issue here since it is being heard in a litigation in the Superior Court of Pima County, in addition to which the ACC has a pending rulemaking on subjects of slamming and other deceptive sales practices. Finally, Qwest stated that the marketing

practices basically ceased in September of 1999. On November 30, 2001, Qwest filed a motion to dismiss the current complaint.

320. On January 14, 2002 the Attorney General submitted a reply to Qwest Corporation's response to her comments on Public Interest, Convenience and Necessity. The Attorney General stated that Qwest's contention is that consumer fraud issues raised in the Attorney General's comments are irrelevant to Section 271 proceedings. The Attorney General further stated that Qwest takes great pains to distinguish "old" Qwest from "new" Qwest, local exchange markets from long distance markets, and hired outside telemarketers from employees, but fails to address the fundamental relevance of its marketing practices to consumer choice and business competition. The Attorney General further stated that Qwest represents to the Commission that the "Superior Court will explore and evaluate the merits" of the State's lawsuit and that the State's allegations are "hotly contested" in the Superior Court. Qwest has argued that the lawsuit should be dismissed, because some of the products and services that Qwest is marketing are subject to tariffs filed with the Commission and because the Commission is the appropriate agency to address the State's customer fraud issues, rather that the Superior Court. The Attorney General concluded that deceptive marketing practices undermine the value to consumers of competition and are unfair to competing carriers.

c. **Staff Discussion**

321. The first complaint raised by the AG resulted in a consent judgment in April 2000. While Qwest did not admit responsibility for its actions, it undertook a number of substantive changes to its training, telemarketing and billing procedures. It also paid $175,000 to the state and $150,000 to designated educational projects. Since this complaint resulted in a consent judgment, it is a closed issue. The second complaint has been filed with, but not yet heard by, the Superior Court of Pima County in Arizona. Therefore, the complaint must currently be viewed as unproven allegations. A Court of competent jurisdiction has made no final determinations as to the merits of these allegations. As such, Staff cannot conclude that this request is inconsistent with the public interest. However, Staff considers the allegations raised by the AG important enough to warrant the attention of the Commission as it considers its decision with whether or not granting Qwest 271 relief is in the public interest. The Commission has full latitude as to the weight it chooses to place on these allegations for this decision. Staff comments that, since they have not as yet been adjudicated, the AG complaints are currently only allegations.

d. **Touch America Complaint Against Qwest**

322. On February 7, 2002 Touch America's outside attorney provided ACC Staff with a copy of a January, 2002 Complaint which it had filed with the FCC against Qwest. This Complaint requested a mandatory order directing Qwest to cease and desist its marketing, provisioning and operations of "lit Capacity IRU's" and the marketing and provision of "dark fiber" facilities in the 14 western and mid-western states that comprised the former operating territory of U S West Communications. Touch America also requested

to recover damages sustained by the Complainants as a result of Qwest's marketing, provisioning and operating its lit Capacity IRU's in-region, and marketing and provisioning interLATA capable dark fiber facilities in-region. The Complaint stated that Qwest's marketing, provisioning and operations of lit Capacity IRU's in-region and its marketing and provision of dark fiber facilities in-region constitute, separately and collectively, violations of Section 271 of the Communications Act and the Commissions decision in the *Qwest teaming order, in the matter of AT&T Corp. v. Ameritech Corp. and Qwest Comms. Corp., memorandum opinion and order, 13 FCC Rcd (1998), aff'd U S West Communications Inc. v. FCC, 177 F.3e 1057(D.C. Cir. 1999).*

323. Touch America, Inc., a Montana corporation, is the telecommunications subsidiary of the Montana Power Company (Montana Power), also a Montana Corporation. Touch America is the owner and operator of a 22,000-mile state of the art, high speed, fiber optic network. Touch America Services, Inc. ("TAS") is a subsidiary of Touch America. TAS was incorporated on January 5, 2000 under the name TeleDistance, Inc. ("TeleDistance") and changed its name to TAS on June 23, 2000. TAS/TeleDistance was created by Qwest Communications International, Inc. to facilitate the divestiture of its interLATA long distance businesses in the 14 state former U S West service territory prior to its merger with U S West.

324. The Complaint states that to facilitate the divestiture, Qwest entered into a Stock Purchase Agreement ("SPA") with Touch America, by which Touch America purchased Qwest's in-region interLATA (and intraLATA) customer base and services as well as certain assets necessary to facilitate a transition of customers. The customers and customer accounts required to be divested to Touch America were independently identified by Qwest using a specified software-filtering program that identified each customer account to be divested. At no time prior to June 30, 2000, nor anytime thereafter, until it was discovered in the marketplace by Touch America representatives several months later, had Qwest disclosed to Touch America its intention after merger to market, provision and operate lit Capacity IRU's in-region, or to market or provide interLATA capable dark fiber facilities in-region. After the merger, Qwest continued to market and provide lit Capacity IRU's within its 14 state local exchange service territory, under the name "QWave". The complaint listed a number of such specific cases.

325. In addition to marketing and providing lit Capacity IRU's in-region, Qwest has used this scheme and device to reclaim customer accounts divested to Touch America in compliance with the Commission's merger and divestiture orders. The complaint cited a number of specific instances in which Qwest reclaimed accounts that had been transferred to Touch America.

326. When challenged, Qwest insisted that divesting these customers had been in error despite the fact that their transfer to Touch America was effected by Qwest itself through the creation and use of its own software filtering program by which the pre-merger transfer of these same customers was implemented.

327. On February 13, 2002, Touch America provided a copy of a second Complaint against Qwest to ACC Staff. This Complaint, filed with the FCC on February 11, 2002, requested that the Commission invoke and apply its policy of non-tolerance of "the circumvention of Section 271 by, . . . a partial divestiture of in-region interLATA assets." The complaint stated that from and after the merger was conceived, Qwest engaged in a concerted effort to minimize and avoid the restrictions and conditions that would result in the merged entity ceasing to provide interLATA services in compliance with Section 271 of the Act.

328. After Touch America purchased the in-region assets of Qwest, and despite its having merged with U S West, which had reportedly divested its in-region assets to Touch America, Qwest has continued to: (1) Provide 271 - prohibited in-region interLATA services; and (2) Maintain control over significant portions of its in-region assets, including customers it was required to divest to Touch America. In addition, the Complaint continues, Qwest has engaged, and continues to engage, in a series of actions, practices and activities that are designed to have and are having the effect of damaging Touch America and its ability to assume control over and exploit the in-region assets it purchased from Qwest.

e. **Qwest Response**

329. As of the date of this report ACC Staff has received no information concerning Qwest's response to the FCC concerning this Complaint.

f. **Staff Discussion**

330. While both of these Complaints have been filed with the FCC and not the ACC, Staff has been provided copies for its review. Both Complaints are currently pending with the FCC and no ruling has yet been rendered. Based on the information known to Staff today, Staff cannot conclude at this time that granting Qwest 271 relief is inconsistent with the public interest. However, the position of Staff could change based on conclusive FCC findings regarding these allegations. Staff believes these allegations, while unproven at this time, do raise concerns important enough to warrant the attention of the Commission. The Commission should be cognizant of these allegations as it considers public interest considerations regarding granting the 271 relief Qwest seeks, as it gives rise to possible bad acts or future bad acts that may occur. As referenced above, the Commission has the authority to weigh this information in any fashion it deems appropriate as it renders its decision. Staff comments that this Complaint has not yet been heard by the FCC; as such, the complaint consists only of allegations.

g. **Motions to Supplement the Record**

331. On March 8, 2002, AT&T filed a motion for an order requiring Qwest Corporation ("Qwest") to supplement the record. This motion stated that pursuant to Section 252(e) of the Telecommunications Act of 1996, all interconnection agreements adopted by negotiation or arbitration shall be submitted to the stated commission for approval. It further stated that the failure to file an agreement entered into between Qwest and another carrier,

whether voluntarily or through arbitration, is a violation of the Federal Act. On February 14, 2002, the Minnesota Department of Commerce filed a Complaint with the Minnesota Public Utilities Commission against Qwest Corporation alleging that it had entered into agreements with telecommunications carriers that it had not filed for approval with the Minnesota Public Utilities Commission pursuant to Section 252(e). Consequently, Qwest failed to make terms of these non-filed agreements available to other carriers pursuant to Section 251(i) of the Act.[202] Qwest answered the complaint, arguing that 1) the Scope of Section 252 filing requirements exceeds the Minnesota Commissions jurisdiction, and 2) if the agreements should have been filed with the Commission under Section 252 and were not, the agreements are void and unenforceable.[203]

332. The motion went on to state that the non-filed agreements related to provision of local exchange service by using interconnection services and network elements provided by Qwest. In its filing in Minnesota, Qwest redacted an attachment of its ICA with Eschelon which described how Qwest calculated local usage charges for Eschelon, arguing that the attachment is a trade secret, and that other CLECs definitely would have an interest in how Qwest calculates usage charges for Eschelon and may wish to calculate local usage charges the same way.

333. AT&T went on to state that it understood that Qwest has provided non-redacted copies of the subject agreements to the Minnesota Department of Commerce. It argues that Qwest should be ordered to file copies of the same agreements, or any other agreements that are related to the provision of interconnection services or network elements in Arizona that have not been filed with the Arizona Corporation Commission, whether or not the agreements have expired or have terminated for any reason.[204]

334. On March 11, 2002, Eschelon sent an informal E-mail message to the parties to the Arizona Section 271 proceedings stating that it has no objection to AT&T's motion with respect to submission of Eschelon agreements with Qwest for Commission review. As Eschelon's general counsel indicated at the Minnesota Hearing, Eschelon has asked Qwest for some time to bring such agreements to a state agency for review, although settlement agreements are typically confidential. Eschelon conjectured that the agreements in question had already been terminated and that one reason for Qwest terminating the agreements could be to prevent the PUC from making the terms of the Eschelon agreements available to other competitors. At the time of that comment, the Minnesota PUC had already suggested the possibility that Qwest make Eschelon terms available to other carriers. Eschelon agreed that the issue of whether any of the agreements are subject to filing under the Federal Act is a separate issue from the validity of the agreements. It further stated that the Federal Act

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[202] *In the matter of the complaint of the Minnesota Department of Commerce against Qwest Corporation,* Docket No. P-421/DI-01-814(MN PUC Feb 14, 2002) ("*Minnesota Complaint Case*").

[203] *Minnesota complaint case*, Qwest Corporation's verified answer to the complaint of the Minnesota Department of Commerce, at 8 ("*verified answer*").

[204] A recent article in the Minnesota Star Tribune stated that Qwest had terminated its six secret agreements with Eschelon Telecom. An Eschelon attorney alleged that the agreements were terminated so that other CLEC's could not take advantage of the terms of the agreements. "More secret deals suspected," Steve Alexander, Minnesota Star Tribune, March 6, 2002.

places the burden on Qwest to make terms of interconnection, if any, available to other CLECs, and therefore it is Qwest's responsibility to make that determination and file any such agreements pursuant to the Act.

335. On March 18, 2002, Qwest filed its opposition to the motion by AT&T for an order requiring Qwest to supplement the record. Qwest stated that AT&T had not presented any reason why a newly filed complaint filed against Qwest in Minnesota, one that Qwest vigorously disputes, should delay completion of Section 271 proceedings in Arizona. Qwest further stated that the complaint raises specific objections to specific decisions by Qwest and CLECs pursuant to Section 252 of the Telecommunications Act. It further stated that the complaint second-guesses line drawing as to which CLEC-agreements must be filed with and approved by the Minnesota PUC before they take effect, and which do not. Qwest strongly challenges the Minnesota complaint. It believes that it complied with all of its obligations under Section 252. Moreover, Qwest stated that AT&T's motion has been made moot by Qwest's submission to the Arizona Corporation Commission those agreements with CLECs that relate to Arizona. Qwest has submitted certain of the Arizona agreements publicly because it has obtained the consent of the contracting CLECs to do so. Qwest filed the remainder of the Arizona agreements under seal where it has not, as yet, obtained the contracting CLECs consent.

336. Qwest stated that the central issue posed by the Minnesota Complaint is which ILEC-CLEC agreements constitute interconnection agreements that must be filed with the Commission under the Telecommunications Act, and which do not. Qwest further stated that this is not an obvious matter and Qwest takes strong exception to AT&T's mischaracterization of its contracts with CLECs and its pejorative implications of "secret agreements".[205] As an AT&T lawyer stated in a hearing before the Minnesota Public Utilities Commission, AT&T has the sole authority to determine that a settlement with AT&T did not need to be filed with the Commission. The Minnesota DOC itself acknowledges that not all ILEC-CLEC agreements must be subjected to the regulatory processes of public filing and state commission review before taking effect.

337. The Minnesota Complaint alleged that Qwest was required by Sections 251 and 252 of the Act to file and obtain the Minnesota Commission's approval of four categories of provisions contained in agreements between Qwest and certain CLECs. The first category of provisions defined business-to-business administrative procedures at a granular level. The second category of provisions challenged in the Minnesota complaint related to agreements settling historical disputes, *i.e.*, provisions of agreements that settled ongoing disputes or litigation between the parties. The third category related to agreements on matters falling outside the scope of Sections 251 and 252. Finally Qwest stated that in at least one instance, the Minnesota complaint raises provisions where Qwest is simply stating it will comply with the Minnesota Commission's orders pending further proceedings. AT&T, based solely on the Minnesota complaint, concludes generally that Qwest unlawfully discriminated against

[205] Indeed AT&T's position is the height of irony, as it has vigorously defended its own right to define what types of agreements must be filed under the Act.

other CLEC's when it entered into these agreements with some CLECs and did not file them with, or seek approval from, the Minnesota Commission. In reality, Qwest stated that it has provided all CLECs, in Arizona and elsewhere, with the same basic rates, terms and conditions of interconnection, as required by Section 251.

338. The Minnesota Complaint presents important and novel issues of law for Arizona and all other states. An overbroad reading of Section 252 means that ILECs and CLECs would have to file many agreements between them for which the Telecommunications Act did not actually intend or to require state approval. Such a result would unnecessarily burden all Utility Commissions with added time consuming review proceedings, and delay the point on such agreements could take effect. Such micro-regulation is the antithesis of the Act's intent. Second, an overbroad interpretation of Section 252 would be contrary to the Telecommunications Act's goal of encouraging ILECs and CLECs to work out their arrangements through private negotiations, subject only to approval requirements for those contract provisions that are truly within the scope of Sections 251 and 252. Finally, Qwest stated that it takes its obligations under the Act very seriously. Qwest is always willing to enter into good-faith negotiations with CLECs on business issues of interest and concern to them, and to negotiate with and accommodate the concerns of the full range of its wholesale customers, large and small. Like most businesses, CLECs, including AT&T, often prefer to keep business terms confidential, and Qwest respects the proprietary information of its customers.

339. On March 21, 2002, AT&T replied to Qwest's opposition to AT&T's motion to require Qwest to supplement the record. AT&T stated that all of Qwest's arguments in opposition to AT&T's motion are without merit. It stated that the issue is: "Is Qwest's failure to file interconnection agreements with the Commission within the scope of the public interest analysis in the proceeding?". AT&T argues that it is imperative to review the contents of the agreements, as the contents leave no question that Qwest was willing to enter into agreements with CLECs that were not offered to other CLECs. AT&T cited the instance in which one CLEC obtained interconnection services and network elements that they were arguably entitled to by law, in exchange for an agreement not to participate in and oppose Qwest's Section 271 applications.[206] It quoted from this letter as follows: "During the development of the plan, and thereafter, if an agreed plan is in place by April 30, 2001 Eschelon agrees not to oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues assuring out of the parties interconnection agreements."

340. AT&T stated that all interconnection agreements adopted by negotiation or arbitration shall be submitted to the state commission for approval. Although Section 251 permits the Incumbent Local Exchange Carrier and another carrier to voluntarily negotiate without regard to the requirements of Section 251(b) and (c), Section 252(a) makes it clear that the agreement must be filed with the state commission under Subsection (e). AT&T

[206] AT&T quoted letter dated November 15, 2000 from the Executive Vice President Wholesale Markets, Qwest to the President and COO, Eschelon Telecom, Inc. entitled CONFIDENTIAL AGREEMENT.

stated that Qwest believes it alone should make the determination whether a contract must be filed with the Commission, based on how it categorizes the agreement. AT&T further contends that Qwest's position does not have identifiable legal standards, although the Act does. AT&T also states that although Qwest argues that it has submitted the contracts to the Staff or Commission, AT&T is not aware that all agreements have been filed for approval by the Commission or that the terms are available to other carriers. AT&T expressed concern that Qwest's argument that whether the agreements must be filed with the Commission or not raises complex issues that do not belong in this proceeding. AT&T, on the other hand, believes that it is appropriate to review Qwest's compliance with the Act within the scope of this proceeding, since the FCC has made it clear that, as part of its public interest analysis, it would be interested in whether the Bell Operating Company has failed to comply with state or federal regulations.

341. AT&T stated that Qwest wishes to characterize the contracts as "business-to-business administrative procedures at a granular level, agreements settling historical disputes, agreements falling outside the scope of Sections 251 and 252 and finally, provisions related to compliance with Minnesota orders. AT&T went on to cite seven provisions of Eschelon agreements with Qwest and four provisions of Covad agreements with Qwest which should have been reviewed and approved by the Commission (in Minnesota) and which may contain terms and conditions not otherwise available to other CLECs. It translated these alleged discriminatory terms into considerations for the state of Arizona since AT&T is not providing UNE-P business service in Arizona. Therefore, AT&T stated that it is asking the Commission to review and determine whether these agreements should have been, and should be, filed with the Commission and be made available to other CLECs.

342. On April 2, 2002, Staff filed a response to AT&T's motion to require Qwest to supplement the record. Staff stated that it opposes AT&T's motion at this time because it believes that such action is premature, and that the issue raised would be better addressed through a separate process or proceeding. Staff stated that it agrees with AT&T that all interconnection agreements adopted by negotiation or arbitration must be submitted to the state commission for approval pursuant to Section 252(e) of the 1996 Act. Staff also agrees that to the extent that certain agreements were misclassified so as not to be subject to the requirements of Section 272(e), whether intentionally or unintentionally, raises serious concerns with regard to Qwest's compliance with the 1996 Act and whether CLECs in Arizona are obtaining non-discriminatory treatment and a level competitive playing field. Staff stated that it also agrees with AT&T that any party is free to raise, and the Commission/or FCC may consider in the Public Interest phase of this proceeding, any ultimate determination that Qwest violated Section 252(e) of the 1996 Act in not filing some of these agreements with it.

343. However, Staff stated that it believes it is premature to reopen and supplement the record with the various agreements that are at issue here. Staff believes that rather than use the 271 proceeding to conduct an underlying review of the agreements at issue, and determine whether Qwest violated Section 271, the agreements should be reviewed in a separate proceeding or through a separate process. Staff concluded that if it is ultimately

found that Qwest has violated provisions of the 1996 Act in not filing the agreements with the ACC the parties would be free at that time to pursue their right to raise this issue in any relevant proceeding before this Commission and/or the FCC.

h. Offers of Supplemental Authority – Public Interest

344. On February 22, 2002 Qwest submitted a statement of supplemental authority in connection with the Commissions' consideration of whether Qwest's Section 271 application is consistent with the public interest, convenience and necessity, as required by 47 U.S.C. §272(d)(3)(C). Qwest stated that in a conditional statement regarding the Public Interest and Track A, issued on January 25, 2002, the Utilities Board of the State of Iowa declared that it was "Prepared to indicate at this time its conclusion that Qwest has conditionally satisfied the . . . public interest issues."[207] In so doing, the utilities board stated explicitly that neither the PAP nor OSS Testing was "an issue for the public interest inquiry" and that both of these subjects would be addressed in separate reviews or statements.[208] Qwest further stated that the record on the public interest is not complete in the state of Arizona, and that in consideration of the decision of the Iowa Commission concerning the public interest test, respectfully requested the Commission to make its public interest determination expeditiously and find that, subject to completion of the remaining proceedings, Qwest's application is consistent with the public interest, convenience, and necessity.

345. Staff's review of the Iowa Commission Order verified that the Commission had indeed stated that: "Qwest has conditionally satisfied the Track A issues discussed in the September 24, 2001 report and the Public Interest issues addressed in the October 22, 2001 report from the Liberty Consulting Group". The Commissions' January 25, 2001 conditional statement regarding Public Interest and Track A considered only the Track A issues and the Public Interest issues filed in the aforementioned reports. With respect to Public Interest, the Liberty report dated October 22, 2001 discussed 11 issues that were raised by workshop participants in an attempt to show 271 approval for Qwest is not in the public interest. With respect to Issue No. 1, UNE prices, the board stated that it agreed with Liberty's conclusion that according to previous FCC orders, the issue of whether UNE prices are too high for CLECs to make a profit is not relevant to the Public Interest inquiry. Therefore, the board made no determination on this issue.

346. Issue No. 2, intrastate access charges, expanded into a discussion of access reform as a condition for approval of a 271 application. In its report, Liberty concluded that the individual states should investigate further, the implication being that 271 approval may need to be delayed until the completion of access charge reform. The board stated that it does not agree that a delay in implementing access charge reform precludes a finding that Qwest's 271 approval is in the public interest. Clearly the FCC has indicated otherwise.

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[207] Conditional statement regarding Public Interest and Track (Jan. 25, 2002), *in re: U S West Communications, Inc. n/k/a/Corporation* Docket No. INU-00-2, SBU-00-11 at 35 (attached).
[208] *Id.* at 20, 34.

347. The third issue encompassed the subject of the Performance Assurance Plan. Although AT&T, Sprint, and ASCENT identified the need for a Performance Assurance Plan as relevant to the Public Interest inquiry, Liberty noted that Qwest's Performance Assurance Plan would be fully addressed in Liberty's PAP report. The board agreed that a Performance Assurance Plan is not an issue for the Public Interest Inquiry.

348. The fourth issue addressed the subject of lack of competition. Arguments calling for market share tests and noting the financial difficulties of CLECs were put forth by the Office of the Consumer Advocate (OCA), AT&T, ASCENT and Sprint. Qwest stated that the intervenors attempt to reintroduce market share tests into the Public Interest inquiry and ignore previous FCC orders. For example, in the SBC Kansas/Oklahoma order, the FCC noted that "Congress specifically declined to adopt a market share or other similar test for BOC entry into long-distance, and we have no intention of establishing one here."[209] Liberty Consultants noted that in the discussion of Track A requirements, there is no explicit or implied minimum market penetration test required for 271 approval. The Board agrees with Liberty's conclusion that the level of CLEC market penetration is not relevant to the Public Interest inquiry.

349. Issue No. 5 addressed prior Qwest conduct. In this issue, AT&T asserted that Qwest has disobeyed Federal or State Telecommunications Regulations and engaged in a pattern of anti-competitive conduct. Liberty separated the cases cited by AT&T into two categories: (1) those relating to pre-271 approval limits on in-region, interLATA service and (2) those relating to Qwest's obligations to provide wholesale services to CLECs. Regarding the first category, Liberty noted that it previously addressed the same issue in its Group Five Report under Section 272 requirements.[210] Considering the second category of cases cited by AT&T, Liberty noted that several of them represented good faith disputes that Liberty addressed in previous reports. Several of the other cases involved allegations of a complaint by a third party in a non-participating workshop state. AT&T's position allows no middle ground for dealing with past infractions. It assumes that if some infraction occurred in the past, it will absolutely occur in the future. Following this logic, 271 approval can never be in the Public Interest. The board agreed with Liberty's ruling that none of Qwest's past actions, as noted in this record, should be considered predictive of future behavior or contrary to the Public Interest.

350. Issue No. 6 concerned structural separation. Both AT&T and Sprint argued that a structural separation of Qwest is in the public interest. Both companies want to see Qwest's retail and wholesale operations separated at least to the extent of the Verizon separation ordered by the Pennsylvania Commission. Liberty phrased the question at hand as "whether in the absence of structural separation, Qwest's 271 approval would meet the public interest." The FCC has answered this question by not once requiring structural separation as a prerequisite of a 271 approval.[211] The board agreed with Liberty's conclusion

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[209] SBC Kansas/Oklahoma Order at paragraph 268.

[210] General Terms and Conditions, Section 272 & Track A Report, issued September 24, 2001, pages 49–50.

[211] Further ACC staff notes that the Pennsylvania proposal has subsequently been modified to call for functional separation as compared to structural separation.

that the public interest can be met without a structural separation of Qwest's retail and wholesale operations.

351. Issue 7 addressed sustained checklist compliance. ASCENT argued that there are only speculative assurances that markets will remain open after Qwest receives 271 approval. Liberty ruled that there is no FCC precedent for setting a minimum period of time during which the BOC must demonstrate checklist compliance before being granted 271 approval. Liberty noted that ASCENT's concerns would best be addressed through a sound Performance Assurance Plan. Since ASCENT did not file post-report comments on this issue the issue should be considered closed. The board adopted Liberty's resolution and considers the issue closed.

352. Issue 8 addressed the subject of inducing competition. Qwest argued that local competition could increase once it received 271 approval. This is what happened in New York after Verizon received 271 approval; the following year CLEC access lines increased by 130%. The OCA argued that Qwest made no effort to test the theory in any other state where 271 authority was granted and that allowing Qwest to enter the interLATA market before sustainable entry has occurred would raise, rather than lower, entry barriers. In order to overcome entry barriers, the OCA argued that CLECs should be able to offer something that Qwest cannot offer. Currently, only CLECs may offer bundled local and long distance services which allows CLECs the means to establish a sustainable foothold in the local exchange market. Allowing Qwest to bundle local and long distance would eliminate the CLEC advantage, which is not in the Public Interest. Liberty noted that Qwest cannot be precluded from bundling just because bundling might deter CLEC local market entry. The board noted that OCA did not file post-report comments specifically addressing this issue, therefore agreed with Liberty's comments and considers the issue closed.

353. Issue No. 9 addresses advanced services resale. The board stated that it does not consider this to be a Public Interest issue; it is a checklist item 14 resale issue and therefore did not address it in the Public Interest inquiry.

354. Issue No. 10 addresses OSS Testing. The board did not find OSS Testing to be an issue for the Public Interest inquiry and will consider OSS testing in a separate review.

355. Issue No. 11 addresses change management. Sprint stated that there are unresolved issues surrounding Qwest's Change Management Processes (CMP), arguing that a public interest finding in favor of Qwest cannot be made until these issues have been resolved. The board noted that change management is an issue relating to General Terms and Conditions, which in turn relates to a broad range of checklist items. Therefore, it is not an issue for the Public Interest inquiry. The board will address change management in a separate statement with other General Terms and Conditions issues. The board concluded by stating that: "It is prepared to indicate at this time its conclusion that Qwest has conditionally satisfied the Track A issues discussed in the September 24, 2001 report and the Public Interest issues addressed in the October 22, 2001 report from Liberty Consulting Group."

356. On March 6, 2002 AT&T submitted a offer of supplemental authority in connection with the public interest portion of Qwest's application for § 271 authority. AT&T stated that it has demonstrated that Qwest has engaged in a variety of strategies, and utilized numerous ploys, to frustrate its competitors. It attached a recommended decision of an Administrative Law Judge for the Minnesota Public Utilities Commission. AT&T stated that this recommended decision was handed down February 22, 2002 in connection with a complaint initiated by AT&T against Qwest for *inter alia,* violation of the interconnection agreement between the parties, and a failure by Qwest to provide adequate systems testing in accordance with the terms and conditions of that interconnection agreement. AT&T stated that the recommended decision included the following: That Qwest committed a knowing, intentional and material violation of its obligation to engage in cooperative testing under Section 14.1 of the Interconnection Agreement by its refusal to conduct AT&T's UNE-P test from September 14, 2000 to May 11, 2001; Qwest failed to act in good faith and committed knowing and intentional and material violations of its obligations to act in good faith under the Interconnection Agreement, and under Section 251(c)(1) of the Act.

357. AT&T stated that the recommended decision emphasized that Qwest violations were continuous and ongoing; and that the ALJ found that the violations were knowing and intentional. AT&T further stated that the ALJ also found that during the course of the proceedings on the complaint, Qwest deliberately fabricated evidence in an attempt to assert that AT&T did not intend to enter the local exchange market in Minnesota. AT&T concluded that this behavior by Qwest is predictive of future behavior, and that current safeguards do not protect competitors or the public from this course of behavior.

358. On March 18, 2002, Qwest filed a response to AT&T's March 6, 2002 offer of supplemental authority regarding public interest. Qwest stated that AT&T's offer is essentially a rehashing of a systems testing dispute that AT&T has already raised in both Checklist Item 2 and Public Interest workshops in Arizona. Qwest further stated that in response to AT&T's concerns about comprehensive production testing, and in compliance with Staff's recommendation that the parties agree upon appropriate SGAT language on this subject, Qwest added a provision to its Arizona SGAT specifically designed to prevent such a dispute from ever arising in this state.[212] Further, Qwest stated that since the parties have already briefed this issue in full before the Commission and since both the facilitator of the multi-state proceeding and a number of State Commissions have already resolved this issue in Qwest's favor, Qwest urges the Commission to dismiss AT&T's Supplemental Filing and proceed to find that Qwest has complied with the requirements of Checklist Item 2. The Commission should likewise reject AT&T's last ditch effort to turn the Minnesota testing dispute into a Public Interest issue.[213]

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[212] See final interim report on Qwest's compliance with Checklist Item 2; access to Unbundled Network Elements (UNEs), *In The Matter of Qwest Corporation's Section 271 application* Docket No. T-00000A-97-0238 (December 24, 2001) ("Staff's Final Interim Report") at 52-53.

[213] The FCC has made clear that a party cannot use the Public Interest Analysis to seek additional Checklist Item Terms and Conditions that are unavailable under the relevant Checklist Items themselves. See memorandum Opinion and Order, *application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon*

359. Qwest objected to AT&T's request for testing on the grounds that (a) the requested testing was duplicative of the OSS testing already underway (with respect to Arizona, the OSS testing conducted by Hewlett-Packard (HP) and Cap Gemini Ernst & Young (CGE&Y)), (b) the requested testing was unnecessary in light of other testing provided for the SGAT, and (c) since AT&T had no plans to enter the local market through substantial use of Qwest's unbundled loops, it had no reason to request testing other than to delay Qwest's application.

360. The facilitator of the multi-state proceeding said "AT&T failed to demonstrate the need for such testing now, given the pendancy of the comprehensive ROC OSS testing, with which AT&T's proposed testing could interfere."[214]

361. Qwest stated that although it had objected to the specific OSS testing that AT&T wanted to include, Qwest has always been willing to adopt SGAT language clarifying when CLECs can obtain individualized testing in order to prevent these kinds of disputes in the future. Accordingly, Qwest included relevant language in Section 12.2.9.8 of its Arizona SGAT. This language was originally proposed by the multi-state facilitator who determined that the proposed language "should preclude any such dispute in the future".[215] AT&T has now asked Qwest to remove this language from its SGAT in Arizona and Qwest is in the process of complying with this request.

362. Qwest further stated that specifically acknowledging AT&T's recent proffer of the Minnesota ALJ's Interim Order, the Chairman of the Colorado PUC declared that this example, together with the rest of AT&T's evidence of alleged misconduct, failed to demonstrate "any 'pattern' of anti-competitive behavior in Colorado that is foreseeable to take place in the future or implicate welfare enhancement". Further, Qwest stated that the findings of the multi-state facilitator and the chairman of the Colorado PUC do not merely cast doubt upon the statements and AT&T's submission about Qwest's conduct; they expressly and correctly refute them. Qwest asks the Arizona Commission to rule accordingly. Qwest also cited the fact that the OSS testing has now been conducted in the ROC states as well as in Arizona. The results show that the Minnesota UNE-P test did not find anything that was not also found in the Arizona OSS Test and the ROC OSS test, or that necessitated any changes in Qwest's OSS at all.

363. Finally, Qwest noted that none of the events at issue occurred in Arizona, and AT&T has never asked Qwest to conduct the same testing in Arizona that it demanded in Minnesota. Also, AT&T has not tried to tie its Minnesota Allegations to any conduct in Arizona. Since Qwest has provisioned 20,334 UNE-P loops in Arizona, as well as 27,388 additional stand-alone unbundled loops, as of December 31, 2001, evidencing that Qwest's

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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, CC Docket No. 01-324, FCC 02-63 (Rel. Feb. 22, 2002) paragraph 102.

[214] Multi-state facilitators UNE report at 6.

[215] 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 (October 22, 2001) (Multi-state facilitators Public Interest Report), at 9.

systems in the state are functioning properly, AT&T's allegation thus says nothing about whether granting Qwest's interLATA application in Arizona would serve the public interest.

364. On March 18, 2002 Qwest filed a statement of supplemental authority regarding the Public Interest, Track A, and Section 272 matters recently issued by the Chairman of the Colorado Public Utilities Commission, who is the Hearing Commissioner overseeing Qwest's Section 271 Docket for the State of Colorado. The Hearing Commissioner found that "there are no unusual circumstances that would make [Qwest's] interLATA entry contrary to the public interest" and that, once Qwest files an acceptable Performance Assurance Plan, the Colorado Commission should issue a recommendation that Qwest's Section 271 application for the state meets the Public Interest standard of Section 271(d)(3)(c). Many of the issues raised in Colorado are identical to those being considered in this Section 271 proceeding for Arizona, so Qwest suggests that the Commission may wish to take note of the Colorado Chairman's resolution of those issues.

365. The Hearing Commissioner concluded that there are undeniable consumer and producer welfare benefits from Qwest's entry into interLATA markets. On this basis, the Public Interest test is met. AT&T, WorldCom, Covad, the Association of Communications Enterprises and the public have raised a number of additional issues under the rubric of the Public Interest. In many instances, Qwest has addressed these issues and has met its burden of proof that there are no unusual circumstances that would make interLATA entry contrary to the public interest. The Hearing Commissioner stated that otherwise, I concur with the multistate facilitators analysis of the burden of proof in this instance: "We would not accept a rule that upon allegations by a third party, Qwest must bear the burden of disproving them in order to demonstrate that the public interest would be served by granting it 271 authority."[216]

366. AT&T argued that there is no meaningful competition for residential customers anywhere in Colorado.[217] The FCC recently has addressed a similar complaint by Sprint in the Verizon Rhode Island Order. The FCC declined to "consider the market share of each entry strategy for each type of service" under its Public Interest analysis.[218] The Hearing Commissioner stated that he failed to see the consumer welfare benefits to forestalling Qwest entry into the interLATA markets because of less-than-robust competition for residential consumers.

367. AT&T objected to the use of UNE prices in excess of economic cost in Colorado, which "creates a clear barrier for a CLEC entry into the Qwest's local residential market in this state", particularly when a competitor tries to access an end-user through UNE-P.[219] Qwest argued that the FCC has deemed a similar argument as "irrelevant" in the SBC Kansas/Oklahoma Order, because the "Incumbent LEC's are not required, pursuant to

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[216] The Liberty Consulting Group, Public Interest Report at 2 (October 22, 2001) (Multistate Public Interest Report).
[217] Brief of AT&T regarding Public Interest at 3.
[218] Id.
[219] Brief of AT&T regarding Public Interest at 6.

the requirements of Section 271, to guarantee competitors a certain profit margin."[220] The Hearing Commissioner stated that he did not discount the possibility of a price squeeze occurring in the residential market, given the Colorado retail rate structure. In isolation, UNE-P rates for basic local residential service leave scant room for profit, under any party's version of rates from 99A-577T. For purposes of this hypothetical discussion, the Hearing Commissioner stated that he would stipulate to the possibility, in certain instances, of a price squeeze against CLEC's in the basic local residential market. Even if true, he stated that he did not believe that it would countervail the public interest by Qwest entering the interLATA market. He cautioned that too much attention to price squeeze allegations can quickly degrade into a competitor profit protection scheme, as opposed to a consumer welfare enhancement. He stated that because there are other modes of residential market entry, because consumer welfare is not harmed even in the event of a price squeeze, and because CLECs have not quantified with any precision the extent and harm from an alleged price squeeze, the Public Interest test is still met.

368. With respect to prior Qwest conduct, AT&T presented examples drawn from FCC proceedings and other instances of alleged misconduct, maintaining that anti-competitive and discriminatory behavior on the part of Qwest not only has hindered competition in the local market in the past, but mitigates the prospects for facilities-based and UNE-based competition in the future.[221] As stated earlier, AT&T proffered a supplemental authority regarding Public Interest on March 6, 2002, detailing a Minnesota PUC Administrative Law Judge findings on breaches of interconnection obligations. Covad submits that "Qwest's poor wholesale performance, and its aggressively anti-competitive conduct, has contributed greatly to the near extinction of all of Qwest's DLEC competitors."[222]

369. Qwest responded by stating that it has settled almost all of its Colorado-specific disputes with complaining CLECs, which is, at a minimum, merely an indication that the "Section 271 carriers having the effect Congress intended".[223]

370. The Hearing Commissioner stated that future transgressions, if there are any, will be adequately addressed by the PAP or through more traditional complaint procedures. He further stated that the Public Interest Inquiry is not a catch-all; rather, it is a prospective test. The record is devoid of any "pattern" of anti-competitive behavior in Colorado that is foreseeable to take place in the future or implicate welfare enhancement. He further stated that Qwest's wholesale performance has improved considerably over the 2½ year course of the § 271 Docket, and to penalize Qwest now for its otherwise-penalized behavior would be both arbitrary and duplicative.

371. AT&T argued that Qwest's intrastate access rates are priced significantly above cost, while the FCC has established a cost based target. AT&T further stated that

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[220] Id. at paragraph 65.
[221] Brief of AT&T regarding Public Interest at pages 8-12, and 16-21.
[222] Covad Communication Company's brief on Public Interest at 10.
[223] Qwest Track A/Public Interest Brief at 47.

even with the imputation of these access rates to Qwest retail revenues, Qwest will be able to subsidize its other products and services to the detriment of competitors in the interexchange market.[224] Qwest responded that its § 272 affiliate pays the same access rates as Qwest charges to competitors, which should be sufficient.[225]

372. It may be true that the access charges paid by Qwest's § 272 affiliate ultimately benefit the corporate structure to which the affiliate belongs, but controls are in place to ensure that Qwest does not engage in predatory pricing. The Hearing Commissioner stated that once the Commission is free of the § 271 process it will aggressively take up the Intercarrier Compensation Reform Docket.

373. AT&T advocates structural separation of Qwest's wholesale and retail operations because it sees a clear conflict of interest between its relationship with its retail customers and its relationship with its wholesale customers.[226] The Hearing Commissioner stated that structural separation is not and has never been required by the FCC for a grant of § 271 authority, therefore the Colorado Commission will not require it.

374. The Hearing Commissioner commented that structural separation would entail dividing Qwest into a wholesale firm that would remain regulated under traditional administrate regulatory modes, and creating a retail firm for Qwest that would compete on the retail level with other CLECs at arms-length parity from the wholesale firm. He concluded this issue by stating that before a case for structural separation could be made, a party would have to establish that the firm had market power, the benefits of separation would have to exceed the costs, and other remedies would have to be proven inferior to separation.

375. The Hearing Commissioner stated that AT&T and WorldCom take it as a given that the relevant market for evaluation of Qwest's market power is its control over the historically regulated, legacy monopoly Public Switched Telephone Network (PSTN). He stated that it is by no means clear that this is indeed the relevant market, and that there is no evidence in the record that the Public Switched Telephone Network is the relevant market. Further, he stated that there had been no attempt to define the relevant market in this proceeding; no consideration of substitutes for the PSTN, such as cable telephony, wireless or other potential platforms that could timely enter the market in the short run. He concluded that only if Qwest has market power in the relevant market, which has to be established, would structural separation be warranted.

376. With respect to the costs and benefits of separation, the Hearing Commissioner stated that economies of scale inherent in Qwest's integrated corporate structure would be torn apart, and new costs would be created that would then be internalized by the separate entities. Those costs would then be passed along to consumers and CLECs in

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[224] Brief of AT&T regarding Public Interest at pages 12-15.
[225] Qwest Track A Public Interest Brief at pages 44-46.
[226] Brief of AT&T regarding Public Interest at 25.

the form of higher rates and inflated UNE prices.[227] He added that two final costs, administrative and error costs, would need to be dealt with in a record to establish structural separation. He observed that it is not clear that administrative costs of structural separation would be any less than current costs; and raised the issue that the foregoing Section 271 issues such as audits, allegations, counter-allegations and struggles could be magnified considerably. With respect to error costs, he pointed out that predictive judgments can be notoriously wrong and that the welfare effects of restructuring an industry can be enormous.

377. The Hearing Commissioner concluded that structural separation is, without a drastic showing of necessity that is entirely absent in this record, an affront to welfare maximization and the nature of a firm.[228] He then stated that structural separation cannot even begin to be considered in this record.

D. VERIFICATION OF COMPLIANCE

378. The FCC Orders granting §271 relief have outlined a three step analysis for the Public Interest requirement:

- Determination that the local markets are open to competition.
- Identification of any unusual circumstances in the local exchange and long distance markets that would make the BOC's entry into the long distance market contrary to the Public Interest.
- Assurance of future compliance by the BOC.

379. Market penetration data presented by Qwest, and confirming data provided by Staff set forth below (based on responses to Data Requests issued by Staff to Qwest and CLECs), alongwith 1) the comprehensive changes instituted by Qwest as a result of the Commission's 271 OSS test and the positive findings of Staff's Test Administrator and 2) the Commission's Checklist compliance Orders all suggest that the Arizona local service market is open to competition.

- CLECs serve 15% of total business access lines.
- CLECs serve 3% of total residential access lines.
- CLECs serve 7% of all access lines in Qwest's Arizona service territory.

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[227] The Eastern Management Group established that the new cost created by these "diseconomies of scale" would add 4% to the overall cost of running the business, which would add $5 to $10 per month to each consumers phone bill.

[228] "A totally unbundled World. . . is a world on which competitors would have little, if anything, to compete about." *AT&T v. Iowa Utilities bd.*, 119 S. Ct. 721, 754 (1999) (Breyer, J., concurring in part and descending in part).

380. Qwest has provided adequate assurances that the market will remain open in Arizona after §271 relief is granted. Principal among these assurances is the Performance Assurance Plan developed for Arizona. The FCC has said that such a plan will constitute "probative evidence" that the BOC will continue to meet its §271 obligations and that its long distance entry is consistent with the Public Interest.[229] Beyond the PAP, the FCC has found that its ongoing enforcement authority under Section 271(d)(6) and the risk of liability from antitrust or other private causes of action provide additional assurances of future compliance.

381. Staff is unaware of any unusual circumstances in the local exchange or long distance markets that would make the BOCs entry into the long distance market contrary to the Public Interest. Qwest cited the possible range of unusual circumstances, including: low percentage of CLEC access lines, concentration of competition in densely populated areas, minimal competition for residential service, modest facility-based investment and prices for local exchange services that are at maximum permissible levels. Each of the preceding issues has been addressed in the affidavits, workshop testimony and briefs filed by the parties, and reported on herein. Each has been satisfactorily resolved. Staff recommends that none of the referenced "unusual circumstances" be considered as impediments to a finding that Qwest's §271 relief would be in the Public Interest.

382. Staff believes that there are three additional issues which should be considered by the Commission in its assessment of Qwest's §271 application, relative to Public Interest, as reported herein:

- The Attorney General filed comments recommending against a finding that §271 relief for Qwest would be in the Public Interest. As stated earlier, the first complaint has been resolved; the second complaint is still pending; and must be considered as only allegations.

- AT&T filed a motion for an order requiring Qwest to supplement the record by filing with the Commission all interconnection agreements adopted by negotiation or arbitration, which had not previously been filed with the ACC. AT&T stated that failure to file is a violation of the Federal Act. AT&T's action was based on a complaint filed by the Minnesota Department of Commerce with the Minnesota Public Utilities Commission against Qwest. As Staff mentioned earlier, this complaint has not yet been heard by the Commission, so should be considered allegations only at this time. In the meantime, Staff has requested that the issue be considered in a separate proceeding.

- The attorney for Touch America provided Staff with copies of two Complaints filed with the FCC against Qwest, concerning Qwest's alleged failure to adhere to terms of agreements between Qwest and Touch America. As stated earlier, Staff believes that these allegations, which have not been heard by the

[229] Bell Atlantic New York Order at ¶ 429; SBC Texas Order at ¶ 420.

FCC, are important enough to warrant Commission attention. However, Staff repeats that they are allegations only and a decision by the FCC has yet to be rendered.

383. The preceding issues suggest that although Qwest technically satisfies the Public Interest requirements established by the FCC, there are qualitative issues to be considered by the Commission. None of the concerns raised in the preceding paragraph are absolute; but they should be factored into the Commission's consideration of Qwest's basic business practices and whether §271 relief would be in the Public Interest.

384. On the positive side of the assessment, in Staff's opinion, Qwest has made comprehensive OSS and process enhancements to the benefit of the CLECs during the OSS Test. Collectively, resolution of problems encountered at the inception of the program and incorporation of wide-ranging improvements during the course of the three-year program have transformed Qwest's processes from many that were problematic and were inadequate for Section 271 compliance, into a consistent set of processes which fulfill criteria for Section 271 relief.

385. In addition to enhancements that have been demonstrated through quantitative measures, significant qualitative changes have been realized as well. Staff perceived Qwest's relationship with the CLECs at the outset of the OSS test as unresponsive, with decisions being made unilaterally by Qwest, and CLEC interests marginalized. Now, as demonstrated through the Relationship Management Evaluation, Qwest works well with CLECs and is responsive to their needs.

386. In addition, during the three year period of the OSS Test, Qwest has significantly improved wholesale service, which enables the CLECs to improve service to their retail customers. Further, as described in this report and in Staff's Final OSS Test report, Qwest has also, during this period: 1) improved service to its retail customers, and 2) improved its dealings with its retail customers.

387. Thus, on the one hand, Qwest's performance has greatly improved in recent years, in particular within the last 12 months; and most complaints are against predecessor operations and/or prior time periods. On the other hand, some allegations are reasonably current, and should be considered as a counterbalance to recent positive results.

388. Finally, Staff recommends that the Commission conditionally approve §271 relief for Qwest, as it relates to Public Interest. Approval should also be conditioned on the following:

- A final Commission order approving Qwest's PAP.
- Qwest's agreement to make any modifications to the PAP as are deemed necessary and appropriate by the Commission, after a proceeding where all parties have the opportunity to be heard.

- Qwest's agreement to extend the PAP beyond its initial three year term, should the Commission so order.

- Qwest's agreement to withdraw its "WinBack Tariff" until actual competition reaches a level deemed appropriate by the Commission or to modify the Tariff as set forth herein.

- Qwest's revision of the SGAT, making language changes specified in Checklist Item reports and other reports, approval of which was conditioned on the changes.

- Final Commission Orders finding that Qwest complies with all remaining Checklist Items and Section 271/272 requirements

389. The emphasis placed on the PAP in the above conditions is based on the FCC's and ACC's concern for assurance of future §271 compliance. As Qwest stated in its September 19, 2001 brief: ". . . the Public Interest analysis should focus on whether the local market is open to competition and whether there is adequate assurance that the local market will remain open after the Section 271 application is granted." The emphasis placed on SGAT changes is based on the fact that the SGAT describes a generic interconnection agreement, and is the controlling document in the event of a dispute between a CLEC and Qwest. The inclusion of the "WinBack" condition is based on Qwest's current market power and its current influence on the ability of a CLEC to provide satisfactory service to its retail customers.

II. CONCLUSIONS OF LAW

1. 47 U.S.C. Section 271 contains the general terms and conditions for BOC entry into the interLATA market.

2. Qwest is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282 and the Arizona Commission has jurisdiction over Qwest.

3. Qwest is a Bell Operating Company as defined in 47 U.S.C. Section 153 and currently may only provide interLATA service originating in any of its in-region States (as defined in subsection (I)) if the FCC approves the application under 47 U.S.C. Section 271(d)(3).

4. The Arizona Commission is a "State Commission" as that term is defined in 47 U.S.C. Section 153(41).

5. Pursuant to 47 U.S.C. Section 271(d)(2)(B), before making any determination under this subsection, the FCC is required to consult with the State Commission of any State

that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of Section 271.

6. In order to obtain Section 271 authorization, Qwest must, inter alia, meet the requirements of Section 271(c)(2)(B), the Competitive Checklist, and there must be a finding that Qwest's provision of interLATA service is in the public interest.

7. FCC Orders granting 271 relief set forth the following criteria for a determination that a BOC's provision of interLATA service is in the public interest:

a. Determination that the local markets are open to competition

b. Identification of any unusual circumstances in the local exchange and long distance markets that would make the BOC's entry into the long distance market contrary to the Public Interest

c. Assurance of future compliance by the BOC

8. As a result of the proceedings and record herein, and subject to the conditions contained in Finding of Fact 388 having been met, Staff recommends that the Commission conditionally approve Section 271 relief for Qwest, as it relates to the Public Interest.