- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of QWEST CORPORATION, fka US WEST Communications, Inc., for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)	))))	DOCKET NO. 00-049-08 REPORT ON THE PUBLIC INTEREST

ISSUED: February 20, 2002

By The Commission

INTRODUCTION

The Public Service Commission of Utah ("Commission") is participating in a multistate collaborative section 271 proceeding ("Multistate Proceeding") with the state commissions of Idaho, Iowa, Montana, New Mexico, North Dakota, and Wyoming. The purpose of the Multistate Proceeding is to develop a record that the Commission can use to make a recommendation to the Federal Communications Commission ("FCC") regarding the compliance of Qwest Corporation ("Qwest") with the requirements of 47 U.S.C. § 271. As a precondition to providing in-region InterLATA service in Utah, Qwest must demonstrate that approval of its section 271 application is "consistent with the public interest, convenience, and necessity," as required by 47 U.S.C. § 271(d)(3)(C) (known as the "public interest requirement"). Now at issue before this Commission is whether to recommend to the FCC that approval of Qwest's section 271 application is consistent with the public interest, convenience, and necessity.

Sessions 7 and 8 of Technical Workshop 3 on June 6, 7, and 28, 2001, addressed Qwest's satisfaction of the public interest standard. Qwest submitted direct and rebuttal testimony, as well as opening and reply briefs, to state its case that its entry into the InterLATA market in Utah would be consistent with the public interest, convenience, and necessity. Among the other parties participating in this Multistate Proceeding, AT&T, Sprint, e.spire, the Iowa Office of Consumer Advocate ("Iowa OCA"), the New Mexico Regulation Commission Advocacy Staff ("New Mexico Staff"), the Wyoming Consumer Advocate Staff ("Wyoming CAS"), and the Association of Communications Enterprises ("ASCENT") directly addressed the public interest test.[(1)]

The Commission issues this report not to suggest that the process of reviewing the merits of Qwest 271 entry has reached a conclusion, but rather as a response to the Staff Report concerning the Workshops focused on this issue. Having reviewed the Staff's Report, the Staff's Erratum Comments to the Report, the comments of the parties in response to the Staff's Report, and the record of the public interest portion of Workshop 3, the Commission now makes the following specific findings of fact and conclusions.

FINDINGS OF FACT

A. The FCC's Public Interest Analysis

Under the Telecommunications Act of 1996 (the "Act"), a Regional Bell Operating Company ("RBOC") applying for section 271 authority must demonstrate that "the requested authorization is consistent with the public interest, convenience, and necessity."[(2)] Congress has assigned the FCC the responsibility of defining this standard and determining whether it has been satisfied.[(3)]

The FCC has established that the public interest inquiry has three basic parts. First, the FCC determines whether granting the RBOC's application "is consistent with promoting competition in the local and long distance telecommunications markets."[(4)] In so doing, the FCC has in the past given substantial weight to Congress's

presumption that if the RBOC has fully complied with the 14 point competitive checklist established by the 1996 Federal Act, then the local market is open to competition. If the local market is viewed to be competitive then long distance entry should benefit consumers.(5) Second, there must be some tangible evidence that the RBOC will not take actions that would close the market after section 271 authority is granted. Hence the need for a post-entry performance assurance plan (PPAP), or some other enforcement tools to be certain the RBOC will "continue to satisfy the requirements of section 271 after entering the long distance market."(6) Third, if these two elements (the checklist and the PPAP) have been satisfied, the FCC then considers whether there are any remaining "*unusual circumstances* that would make the proposed entry contrary to the public interest".(7)

B. The Multistate Proceeding and the Staff's General Findings

Qwest's testimony for the most part assumed checklist compliance and that its proposed post-entry performance assurance plan would be approved. Therefore Qwest primarily focused on trying to show that there were no "unusual circumstances" in the participating states that would overcome the "strong indica[tion]" that entry would be in the public interest if checklist compliance is shown, and that the "probative evidence" is that those markets will stay open after entry if Qwest submits an acceptable PPAP.(8)

Many of the CLECs and other parties to this proceeding suggested other issues (i.e., unusual circumstances) in addition to the two key issues (checklist compliance and an acceptable PPAP) listed above to the Commission for its use in deciding the public interest standard. To the extent that these issues are present in Utah and they remain either un-addressed or unresolved through the workshop process we encourage the parties to bring them before the Commission in State-specific hearings to evaluate their merit in the context of Utah's markets.

We note that many parties in effect advocated a market share test. There is an obvious conflict between a market share test and Congress's explicit Track A and Track approaches to showing that an RBOC has opened its markets to competition. Since the dual Track A and Track B approaches explicitly allow for entry when no competitor is present it is difficult to see how a market share test can be reconciled with the 1996 Act. The analogy used in the Staff Report (and elsewhere) is that the door only has to be unlocked, not that CLECs must be in the room.(9) While that sentiment may be consistent with some narrow interpretation of the law, it is also clear that the intent of the Federal Act, and the relevant State law, is that competition should actually develop. Therefore, a more accurate analogy ought to be that the door is wide open. So while we recognize that the "Track A and B construct established by the Congress clearly implies that the more precisely defined requirements of section 271 can be met in an empty room. . . ."(10), we also recognize that if markets are actually open then some specific policy, practice or activity must be functioning as a barrier-to-entry if significant competition is not present. To the extent that the policy, practice or activity that may be stifling competition is not within Qwest's control then no significance should be attached to the fact that competition has not developed to the extent contemplated by Congress and the State legislature. Given the lack of Utah specific evidence we cannot at this time make a finding as to whether or not such factors are or are not within Qwest's control. Further, Qwest has not yet demonstrated that it meets the 14 point checklist. We also point out that an acceptable PPAP has not been adopted in Utah. Hence the idea that satisfying the 14 point checklist and proposing a sufficient PPAP would substantially meet the public interest standard is currently only of theoretical interest.

The Staff correctly stated that parties asserting that unusual circumstances exist bear the burden of proof:

Given the FCC's conclusion that checklist compliance is a strong indicator of the satisfaction of the public interest test . . . it is appropriate to ask those who make public interest assertions to demonstrate the existence of the facts necessary to support their claimed reasons why the public interest would not be served by granting Qwest 271 authority. If nothing else, a simple reliance on the need for order compels the conclusion that those who make specific allegations should be required to prove them.

Thus, while Qwest must bear the burden of proving checklist compliance and the satisfaction of Track A and B requirements generally, 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.(11)

We disagree with AT&T's charge that asking the opposing parties to prove the existence of unusual circumstances -- as opposed to forcing Qwest to prove their nonexistence -- in any way "read[s] the public interest requirement out of the statute."(12) To the contrary, placing this burden of proof on the opposing parties clearly acknowledges the additional inquiry required under the public interest test.

C. Specific Issues Raised by the Parties

We address in turn each of the public interest arguments raised by the CLECs and state commissions' staffs:

1. UNE Prices

AT&T (joined by Sprint and ASCENT) argued that Qwest's wholesale UNE prices do not allow competitors to make enough of a profit in the residential market, thereby precluding a finding that Qwest's retail markets are open to competition and that its entry into the InterLATA market would be consistent with the public interest.(13)

The Staff Report concluded that AT&T's analysis -- a comparison of basic 1FR rates and UNE-Platform prices -- was of inconsequential value in assessing the state of local markets in Qwest's local exchange service areas."(14) The Staff observed four shortcomings in AT&T's evidence:

First, it did not recognize that local rates consist of much more than the basic monthly charge for service. Vertical features and intrastate toll revenues must be considered. . . . Second, AT&T's analysis did not consider the existence of resale as an option for certain service classes that do not lend themselves to economical competition through the use of UNEs. Third, AT&T did not provide any evidence of business rates; it did not even provide its simple comparison of basic rates for such service. Fourth, AT&T did not address the issue of what "subsidies" might be available to it in the event that it should serve qualifying residential lines through facilities-based competition.(15)

However, Utah's Price Index and Price Floor legislation raise troubling questions with respect to Qwest's and Staff's arguments. Qwest has maintained before this Commission that the only revenues that should be considered when implementing Utah's price index and price floor legislation with respect to residential service are the revenues associated with basic service. Qwest has always argued that each element and service must be self-supporting, or it must not be subject to the price index.

The issue of what constitutes proper UNE prices is currently before the Commission in Docket Numbers 00-049-105 and 01-049-85. While the Commission understands the arguments of the parties, we anticipate setting cost-based prices based on the records available in these dockets. We anticipate that this will be an on-going process. Therefore the arguments on the appropriateness of any given UNE price should be addressed in the relevant (pricing) docket.

Further, the issue of what the actual prices are should be settled before the Commission can determine the merits of the general allegation that the prices preclude the development of competition. We anticipate issuing another Order with respect to UNE prices in the near future, and have recently issued an Order with respect to collocation prices. When these Orders are final and implemented (i.e., no longer being contested) the Commission will be able to evaluate the merits of the arguments raised in conjunction with these prices.

2. Intrastate Access Charges

AT&T alleged at the workshops that Qwest's intrastate access charges "provide it with a source to subsidize its other products and services" to the detriment of its competitors.(16) AT&T's argument was directed primarily to the question of competition in the *long-distance* market.(17) AT&T suggested that these access charges would enable a post-271 Qwest to charge lower *long-distance* prices than its interexchange-carrier competitors. Qwest maintained that section 272(e)(3) of the Telecommunications Act, which requires Qwest to charge its own long-distance 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 . . . ."(18) showed that the argument was unimportant. However, given that Qwest is paying itself when it charges an affiliate it is reasonable to assume that strategic pricing could have an effect on the

developing marketplace. Again we must find the record insufficient on this point and direct the parties to prepare to present Utah specific evidence before the Commission.

Congress's attempted solution to the possibility of improper cross-subsidization from above-cost access charges was not, as AT&T suggests, to deny the possibility of section 271 relief. Instead, the FCC has acknowledged that "Congress . . . enacted Section 272, which requires an RBOC competing in the in-region long-distance market to create a separate long-distance affiliate and to recover access charges from that affiliate on the same basis on which it recovers such charges from unaffiliated carriers."(19)

The FCC has found that the section 272 safeguards and imputation requirements are generally adequate to protect against the types of price squeezes and cross-subsidies that AT&T hypothesizes:

Contrary to the concerns of some parties, [preserving above-cost access charges] should not allow incumbent LECs that provide in-region long distance service to engage in "price squeezes" or other anticompetitive practices, either by allowing their long-distance affiliates to obtain access service below tariffed access charges or by impairing competition in the long-distance market by raising access charges across the board and simultaneously lowering the retail rates of its affiliate's long-distance services to below cost. Incumbent LECs seeking to provide interLATA services through an affiliate must adhere to certain structural separation and nondiscrimination requirements. For example, Congress anticipated that some Bell Operating Companies ("BOCs") would obtain authorization under 47 U.S.C. 271 to originate in-region long distance services before the completion of access charge reform (which includes reform not just of charges for the special access services at issue here, but also of charges for ordinary switched access as well). Congress therefore enacted Section 272, which requires a BOC competing in the in-region long distance market to create a separate long distance affiliate and to recover access charges from that affiliate on the same basis on which it recovers such charges from unaffiliated carriers.

As we have consistently determined, those structural and non-discrimination requirements provide adequate safeguards against any effort by an incumbent to obtain an unfair competitive advantage in the long-distance market by discriminating against unaffiliated IXCs or by improperly allocating costs or assets between itself and its long-distance affiliate. Indeed, those "separation requirements have been in place for over ten years, and independent (non-BOC) incumbent LECs have been providing in-region interexchange services on a separated basis with no substantiated complaints of a price squeeze."(20)

Given that one of the items examined in this proceeding is the adequacy of the affiliate Qwest has set up, and that this issue has been raised in multiple Dockets before this Commission, we express the general opinion that the affiliate route is sufficient, but that we also require sufficient proof at this point in the process to determine if the affiliate can function as required by law.

3. Post-Entry Performance Assurance Plan

A number of parties expressed concerns in their public interest arguments regarding the need for a sound post-entry performance assurance plan (PPAP). Currently parties are attempting to negotiate a mutually acceptable PPAP. A viable PPAP must be in place to satisfy the public interest requirement.

4. Level of Competition

A number of parties to this proceeding argued that Qwest must demonstrate a particular level of competition in a given state in order to prove that its entry into the InterLATA market is consistent with the public interest. As examples, the Utah Staff cited the New Mexico Staff's demand for evidence of "sizeable amounts" of competition,(21) and the Iowa OCA's insistence on proof of "greater and 'sustainable' entry by CLECs."(22) AT&T likewise argued at the workshop that CLEC residential market shares in the seven states were too low.(23)

The FCC has held that a specific market share test is generally not part of the public interest inquiry. Moreover, to the extent CLEC market share is relevant the Commission's recent Fourth Annual Report to the Governor, Legislature, the Public Utilities and Technology Interim Committee, and the Information Technology Commission (the Commission's

Report) concluded that CLECs serve approximately 32 percent of the business lines and 6 percent of the residential lines in Qwest's service territory, for an overall market share of just under 16 percent. Therefore Utah has more competition than some other states that have been approved by the FCC. For example, the market share calculations for Oklahoma were estimated at 5.5 to 9.0 percent, and for Kansas they were 9.0 to 12.6 percent when SBC's application was granted.[(24)] In order for this argument against entry to carry the day, opponents must make a showing as to what special circumstances exist that would suggest that a 16 percent market share is insufficient.

5. Prior Qwest Conduct

AT&T asserted that a "pattern of past and continuing Qwest conduct" violated both pre-application limits on Qwest's provision of in-region, InterLATA services and Qwest's section 251 and 252 obligations to provide wholesale services to CLECs.[(25)] The Staff (in their Report) asserts that they "[did] not believe that the nature of those violations should be predictive of Qwest conduct after 271 approval may be granted."[(26)] However, as AT&T points out Qwest has maintained that it was always in compliance; therefore, Qwest's past behavior may well be instructive of its future behavior. What the record lacks is any Utah specific evidence or any aggregate level evidence. Therefore parties wishing to pursue this argument must present Utah specific evidence before the Commission.

Similarly the Commission requires Utah specific examples or evidence with respect to Qwest's behavior regarding wholesale services to CLECs. Specifically, we agree with the Staff's conclusions: (1) that AT&T's allegations of interconnection and testing violations by Qwest in Minnesota "remain[] the subject of a good-faith dispute in [the] workshops," as well as a recommendation from the Staff meant to prevent such disputes in the future;[(27)] (2) that AT&T's claim that Qwest has refused access to NIDs and inside wiring in multi-tenant buildings in Washington is a sub-loop issue already resolved in the Staff's earlier Report on Emerging Services;[(28)] and (3) that AT&T's charges regarding Sun West (in Colorado), MCI Metro (Washington), and Rhythms (specifically, in Colorado) provide interesting but insufficient evidence for the Utah Docket.[(29)]

6. Structural Separation

AT&T and Sprint suggested that the participating state commissions should take the public interest inquiry as an opportunity to divide Qwest into structurally separate wholesale and retail companies.[(30)] First, it is clear that the question at hand is not simply, as AT&T asserted, whether structural separation is permissible or a good idea; rather, "the question is whether, in the absence of structural separation, Qwest's 271 approval would meet the public interest test."[(31)]

The FCC has now approved section 271 applications for several different states. To date the FCC has not yet required the applicant to undergo the corporate restructuring that AT&T and Sprint are proposing as a condition for InterLATA entry. The issue of structural separation is one that Congress and the Utah Legislature could address.

7. Sustained Checklist Compliance

ASCENT argued in its comments that Qwest must demonstrate "a record of sustained compliance" with its market-opening obligations in order to satisfy the public interest standard.[(32)] First, as explained above, Qwest has *a priori* no obligation to demonstrate a specific minimum level of competition in the local market to receive section 271 authorization; and second, the FCC has not yet required a minimum period of time across which Qwest should have to demonstrate checklist compliance. ASCENT's proposal neglects the potential role of an adequate post-entry performance assurance plan (PPAP) to provide both an incentive for, and measurement of, Qwest's compliance with its market opening obligations: It is likely that a sound PPAP, as opposed to a history of compliance, will result in continued future compliance.

8. Inducing Competition

AT&T argued that allowing Qwest to enter the InterLATA market would stifle competition in the local market.[(33)] The Commission disagrees. If entry is preceded by full checklist compliance, and if an acceptable PPAP is in place, opening

the in-region, InterLATA market to Qwest may have the effect of inducing other carriers in that market to accelerate their efforts to enter the local exchange market. Absent either of these pre-conditions we find that the likely outcome of "premature" entry would be an increase in the expected market share and market power of Qwest. Hence the vital need to facilitate full checklist compliance, and develop an acceptable and adequate PPAP.

We also reject the suggestion that only CLECs should have the ability to bundle different types of services.(34) The parties are correct that granting Qwest's application will allow it to offer bundles of long distance and local service to consumers, but that "is the evident result that the Act itself anticipates."(35)

9. Other Issues

The Staff properly declined to discuss a number of miscellaneous issues raised by the interveners, including the OSS test, DSL and advanced services, and change management, all of which are being addressed in other workshops and other Commission orders. We agree with the Staff that we should avoid imposing a duplicative level of review within the public interest inquiry.

CONCLUSIONS

1. As explained above we find the record insufficient to support a finding that Qwest's entry into the InterLATA market in Utah passes the public interest test. Specifically we conclude that we need further evidence with respect to:

A. Whether there are any specific Qwest practices, policies, or activities that are artificially restricting the growth of competition within the Utah telecommunication marketplace.

B. Whether the current level of intrastate access charges in Utah contributes to a situation that allows cross subsidization within Qwest's corporate framework.

2. The Commission also concludes that Unbundled Network Element and Collocation prices should be final and implemented before the Commission determines whether Qwest's entry into the InterLATA meets the public interest test.

REQUIRED ACTIONS

1. An acceptable PPAP must be in place to fulfill the public interest requirement.

2. Qwest and other parties to this Docket should prepare to address the points noted above before the Utah Commission.

SUMMARY

We find that approval of Qwest's section 271 application, at the current time, would not be consistent with the public interest, convenience, and necessity, as required by 47 U.S.C. § 271(d)(3)(C). Qwest has yet to demonstrate compliance with the 14 point checklist, and an acceptable PPAP has not been adopted in Utah. Further, questions have been raised by some of the parties to this Docket that may require further evidence.

DATED at Salt Lake City, Utah this 20th day of February 2002.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard,

Commission Secretary

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[1] AT&T addressed the public interest in the affidavit of Mary Jane Rasher and in its opening and reply briefs; the Iowa OCA submitted the filed testimony of Dr. David S. Habr, as well as opening and reply briefs; e.spire filed the affidavit of David M. Kaufman; and Sprint, the New Mexico Staff, the Wyoming CAS, and ASCENT all filed opening briefs concerning the public interest.

[2] 47 U.S.C. § 271(d)(3)(C).

[3] *See* 47 U.S.C. § 271(d)(3); *See* Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543 ¶ 383 (1997) ("*Ameritech Michigan Order*") (while the FCC will consider the Department of Justice's proposed public interest standard, "section 271 ultimately obligates *the Commission* [the FCC] to decide which factors are relevant to our public interest inquiry, how to balance these factors, and whether BOC entry into a particular in-region, InterLATA market is consistent with the public interest") (emphasis added).

[4] 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*").

[5] *Id*. (reaffirming that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist").

[6] *Id.* at ¶ 269.

[7] *Id.* at ¶ 267 (emphasis added); *see also id.* At ¶¶ 281-82.

[8] *Bell Atlantic New York Order* at ¶¶ 423, 429.

[9] *Id*.

[10] *Id*.

[11] *Id*. at 2.

[12] Comments of AT&T in Response to the Facilitator's Report on Public Interest (Nov. 1, 2001) at 2 ("AT&T Comments").

[13] *Id.* at 3-6; AT&T Br. at 6-7; Sprint Communications Company L.P.'s Brief Regarding Track A and Public Interest (July 25, 2001) at 4 ("Sprint Br."); Comments of the Association of Communications Enterprises Regarding Qwest Corporation Compliance with the Public Interest Requirements of Section 271 of the Telecommunications Act (July 25, 2001) at 21 ("ASCENT Comments").

[14] Staff's Report at 5-6.

[15] *Id.*

[16] AT&T Br. at 12.

[17] *See* AT&T Br. at 13 (asserting that Qwest's access charges established "ten cents per minute (plus [the IXC's] own costs)" as "a floor below which the IXC cannot price" its long distance calls, while "Qwest can price its own retail long distance service well below ten cents per minute and still make money"); AT&T Reply Br. at 12 (describing the problem as "Qwest's margins from its intrastate long distance business will be

substantially greater than those of its competitors"); Rasher Affidavit at 13 ("If Qwest were to enter the InterLATA market, there would be nothing to keep Qwest from pricing its InterLATA long distance service at 10¢ a minute for its retail customers. . . . Since IXCs would have to pay Qwest 9.8¢ per minute for access, it [*sic*] would not be able to price compete with Qwest. Thus, without intrastate access reform, Qwest's entrance into the InterLATA log distance market would afford Qwest a huge anti-competitive price advantage.").

[18] 47 U.S.C. § 272(e)(3).

[19] *Id.*

[20] *Id.* at ¶¶ 19- 20 (quoting First Report & Order, *Access Charge Reform*, 12 FCC Rcd 15,982 ¶ 297 (1997)). *See also* First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd. 21,905 ¶ 258 (1996) (rejecting assertion that FCC should impose additional requirements concerning possible predatory pricing other than section 272's separation and nondiscrimination provisions because "adequate mechanisms are available to address this potential problem").

[21] *Id.* (citing the New Mexico Advocacy Staff Initial Public Interest Br. at 6).

[22] *Id*. (referring to the Iowa OCA Br.)

[23] AT&T Br. at 3.

[24] *See SBC Kansas/Oklahoma Order* at ¶¶ 4-5.

[25] AT&T Comments at 10-14.

[26] *Id.*

[27] *Id*.

[28] *Id*. (citing Staff's Report on Emerging Services, at 30).

[29] *Id*.

[30] *See, e.g.*, AT&T Comments at 14-17.

[31] Staff's Report at 10.

[32] ASCENT Comments at 4-5.

[33] *See* Iowa OCA Br. at 22; AT&T Comments at 16-17.

[34] *See* Iowa OCA Br. at 22; AT&T Comments at 16-17 (suggesting that "one-stop shopping" offered by SBC in Texas has harmed the local services market).

[35] Staff's Report at 12.