



0000023104

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman
JIM IRVIN
Commissioner
WILLIAM A. MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner

Arizona Corporation Commission

DOCKETED

SEP 29 2003

DOCKETED BY [Signature]

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
DECISION NO. 66319
ORDER

Open Meeting
September 19, 2003
Phoenix, Arizona

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises,
the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. The Federal Telecommunications Act of 1996 ("1996 Act") added Section 271 to
the Communications Act of 1934. The purpose of Section 271 is to specify the conditions that
must be met in order for the Federal Communications Commission ("FCC") to allow a Bell
Operating Company ("BOC"), such as Qwest Corporation ("Qwest" or the "Company"), formerly
known as US WEST Communications, Inc. ("US WEST") to provide in-region interLATA
services. The conditions described in Section 271 are intended to determine the extent to which
local phone service is open to competition.

2. The FCC has emphasized the importance of several key components of any Section
271 application, including a determination of whether granting Section 271 approval is in the
Public Interest. The FCC has set forth specific criteria to be used in making a Public Interest
determination: 1) that the local market is open to competition, 2) identification of any unusual

1 circumstances in the local exchange and long distance markets that would make the BOC's entry
2 into the long distance market contrary to the Public Interest, and 3) assurance of future compliance
3 by the BOC. The first criteria requires that the BOC establish that one of two thresholds of
4 Section 271 have been met, either "Track A" or "Track B." These thresholds relate to the level of
5 competition in local markets.

6 3. On May 2, 2002, Staff docketed a Proposed Report on Public Interest and Track A,
7 and recommended that parties desiring to file comments on this report do so by May 16, 2002.
8 This Report is attached as Exhibit A. AT&T Communications of the Mountain States, Inc.
9 ("AT&T"); Cox Arizona Telcom, L.L.C. ("Cox"); Residential Utility Consumer Office
10 ("RUCO"), Time Warner Telecom of Arizona, LLC ("Time Warner"); Touch America, Inc.
11 ("Touch America"); and Qwest filed comments on or about, May 16, 2002. On August 19, 2003,
12 Staff filed its Supplemental Final Report on Public Interest and Track A. This Report is attached
13 as Exhibit B. AT&T, Cox, RUCO, and Qwest filed comments on August 29, 2003.

14 TRACK A

15 4. To secure Section 271 approval from the FCC, Qwest must first establish that one
16 of two thresholds in Section 271, referred to as "Track A" or "Track B", has been reached. Track
17 A is available when facilities-based competitors have entered local telecommunications markets in
18 the state. The Track A threshold set forth in Section 271(c)(1)(A) requires that Qwest has entered
19 into at least one interconnection agreement under which at least one facilities-based Competitive
20 Local Exchange Carrier ("CLEC") is providing local exchange service to both residential and
21 business customers.¹ A facilities-based provider is one that predominately uses its own facilities,
22 including Qwest's Unbundled Network Elements ("UNEs"), to provide local exchange service.²
23 Because of the presence of several facilities-based competitors in the local telecommunications
24 market in Arizona, Qwest must demonstrate that it meets the threshold requirements of Track A.

25 5. To comply with 47 USC §271(c)(1)(A), commonly referred to as "Track A," Qwest
26 bears the burden of establishing:

27
28 ¹ SBC - Texas at Paragraph 59.

² SBC - Kansas/Oklahoma Order at Paragraphs 40 and 41.

- 1 a. That the BOC has entered into one or more binding interconnection agreements
2 that have been approved by the state commission;³
- 3 b. That under such agreement(s), the BOC is providing access and interconnection
4 to one or more competing providers of telephone exchange service;⁴
- 5 c. That such competing provider(s) are commercial alternatives to the BOC, are
6 operational, and are providing telephone exchange service for a fee;⁵
- 7 d. That such competing providers are providing telephone exchange service to a
8 significant number, more than a *de minimis* number, of business and residential
9 subscribers;⁶ and
- 10 e. That such telephone exchange service consists of service provided either
11 exclusively over the competing providers' own facilities or predominately over
12 their own facilities in combination with the resale of the telecommunications
13 services of another carrier.⁷ For the purpose of item (e), "owned facilities" are
14 either the network facilities constructed by such competing providers or UNEs
15 that the competing providers have leased from the BOC.⁸

16 6. In its May 2002 Report, Staff discussed the competitor's positions on Qwest's
17 compliance with Track A. AT&T's position on Track A, as initially described in its May 18, 2001
18 affidavit, was that Qwest had not demonstrated compliance with Track A. AT&T stated that
19 Qwest has not proved that it complies with each Track A element in Arizona. AT&T argued that
20 none of the competitors which Qwest names in support of its "item (c) claim" can be considered a
21
22

23 ³ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To*
24 *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.

25 ⁵ *Id.*, ¶ 75; See also *Application of SBC Communications Inc., Pursuant to Section 271 of the Communications Act of*
26 *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.

27 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
28 *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.

1 *commercial alternative*⁹ to Qwest until those competitors have the ability to provide service on the
2 same level of quality as Qwest, and are able to handle commercial order volumes. The question is
3 whether or not Qwest's systems will allow for the seamless processing of orders from new entrants
4 in commercial volumes. According to AT&T, this has not been demonstrated.

5 7. AT&T also stated that Qwest's case is insufficient to establish its compliance with
6 "item (d)" above. AT&T disputed the accuracy of Qwest's estimated CLEC line count, as well as
7 Qwest's assertion that the number of business and residential customers served by CLECs in
8 Arizona is "significant." In addition, AT&T argued that Qwest has not demonstrated that those
9 business and residential customers are being served by new entrants either "exclusively" or
10 "predominantly" over the new entrants' own facilities.

11 8. In its May 2002 Report, Staff discussed Qwest's position on its Track A
12 compliance. Qwest stated in its April 17, 2001, affidavit that the four-part Track A requirements
13 are satisfied in Arizona.

14 9. Qwest stated that it meets the first subpart requirement of Track A because as of
15 February 28, 2001, it had entered into over 100 interconnection agreements between itself and
16 competitors in Arizona pursuant to Section 252 of the Act. Qwest has also filed a comprehensive
17 Statement of Generally Available Terms and Conditions ("SGAT") pursuant to 47 U.S.C. §252(f)
18 that contains terms, conditions, and prices applicable to the provision of all of the Checklist Items.

19 10. Qwest argued that it fulfills the second part of the FCC's analysis of Track A
20 requirements because it provides access and interconnection with unaffiliated competing providers
21 of telephone exchange service.

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

27
28

⁹ Emphasis in original.

1 12. Qwest stated that no party has challenged its compliance with the fourth element of
2 the FCC's Track A test, which requires that the competing providers offer telephone exchange
3 service "either exclusively over their own telephone exchange facilities or predominantly over
4 their own telephone exchange service facilities in combination with resale of the
5 telecommunications services of another carrier."¹⁰ Qwest stated that there is indisputable evidence
6 demonstrating CLEC activity in Arizona.

7 13. In its August 2003 Report, Staff discussed the competitor's comments on Staff's
8 May 2002 Report. AT&T opined that Qwest still did not meet Track A requirements since new
9 entrants only served a de minimus number of residential customers.

10 14. In its May 2002 Report, Staff concluded that Qwest complies with Track A
11 requirements of FCC Section 271, specifically: 47 U.S.C. §271(c)(1)(A). Affidavits, testimony
12 and briefs demonstrated that Qwest:

- 13 a) Has one or more binding agreements with CLECs that have been approved
14 under Section 272 of the Act.
- 15 b) Provides access and interconnection to unaffiliated competing providers of
16 telephone exchange service.
- 17 c) Competitors collectively provide telephone exchange service to residential and
18 business customers.
- 19 d) Competitors offer telephone exchange service either exclusively or
20 predominantly over their own telephone facilities, including UNEs which they
21 lease from Qwest in addition to resale.

22 15. The primary challenge by CLECs was with regard to Qwest's data, and the methods
23 for estimating CLEC customer and access lines served. To resolve this matter, Staff issued Data
24 Requests to Qwest and to CLECs on August 1, 2001. Data request responses showed:

- 25 a) Business access lines served by CLECs in Qwest's service territory in Arizona
26 amounted to 990,686. Thus, CLECs served 15% of total business access lines
27 at that time.

28

¹⁰ 47 U.S.C. §271(c)(1)(A).

- 1 b) The CLECs collectively served 72,122 residential access lines; Qwest served
2 2,026,205; total residential access lines served in Arizona was 2,098,327. Thus,
3 CLECs served 3% of total residential lines at that time.
- 4 c) Total (business plus residential) access lines served by CLECs amounted to
5 222,700; Qwest served a total of 2,866,313 access lines. Thus, CLECs served
6 7% of all access lines in Qwest's service territory in Arizona at that time.
- 7 d) At that time, eighteen CLECs actively served business customers, six served
8 residential customers.
- 9 e) Of the 18 CLECs serving business customer, 12 used their own facilities, at
10 least in part.
- 11 f) Nine CLECs served business customers through UNEs; three served residential
12 customers through UNEs.
- 13 g) Only four CLECs served business customers through resale; at the time of the
14 data request, there were a total of 254 CLEC resale business customers in
15 Arizona.
- 16 h) Only two CLECs served residential customers through resale; at the time of the
17 data request, there were 9,575 residential resale customers, almost all of which
18 were served by one CLEC.

19 16. Staff then compared Arizona results with the CLEC market share reported in other
20 states receiving Section 271 approval: Texas (estimated by the Department of Justice ("DOJ") at
21 8%), Oklahoma (estimated 5.5% to 9.0%), Kansas (9.0% to 12.6%), and New York (estimated (by
22 Qwest) at 8%). CLEC market share in Arizona is in the same general range as the above listed
23 states at the time of their Section 271 applications.

24 17. In its August 2003 Report, Staff cited the FCC report on Local Telephone
25 Competition dated June 12, 2003. Table Seven of that report shows that, nationwide, CLEC's
26 share of total switched access lines in June 2001 was 7%, with 17 states (of the 37 that reported
27 data) equal to, or less than the 7% reported for Arizona. As shown on Tables 6 and 7 of the FCC's
28 June 2003 report, by December 31, 2002, the CLEC share of switched access lines in Arizona had

1 risen to 12%. Finally, data listed in Tables 1 and 2 of the FCC's June 2002 report, when used in
2 combination, show that in June 2001, the national average of residential and small business access
3 lines served by CLECs was 3.4% of the total; a number very comparable to that in Arizona (for
4 residential only) at that time.¹¹

5 18. Requirements (a) and (b) are demonstrably satisfied by Staff's review of files to
6 confirm binding interconnection agreements, including those with unaffiliated competing carriers.
7 In addition, the Arizona market share data collected by Staff compares favorably to the market
8 shares of CLECs in other states at the BOC received 271 authorization in those states, satisfying
9 requirements (c) set forth in paragraph 14 above. With respect to subpart (d), there is no dispute
10 that there are several facilities-based CLECs providing local service in Arizona. Therefore, Staff's
11 recommendation that the Commission find that Qwest complies with Section 271 requirements as
12 they relate to Track A is reasonable and shall be adopted.

13 PUBLIC INTEREST

14 19. The FCC Orders granting Section 271 relief have outlined the following three step
15 analysis for the Public Interest requirement¹²: 1) determination that the local markets are open to
16 competition, 2) identification of any unusual circumstances in the local exchange and long distance
17 markets that would make the BOC's entry into the long distance market contrary to the Public
18 Interest, and 3) assurance of future compliance by the BOC.

19 20. While the "Public Interest" is not a specific Checklist Item with which a BOC must
20 comply, it is a showing that the BOC must satisfy prior to receiving approval of any Section 271
21 application.

22 21. In its May 2002 Report, Staff discussed the parties' positions on Qwest's
23 compliance with the Public Interest requirement.

24 22. AT&T raised the following three issues in its Comments:

25
26
27 ¹¹ This number is relevant since one or more CLECs claimed that the number of residential access lines served by
28 CLECs in Qwest's Arizona service area was "de minimus"; yet it was comparable to other states in which the FCC
had granted Qwest Section 271 approval.

¹² As described in Qwest Affidavit dated April 17, 2001.

- 1 a) Qwest has not opened its local markets to competition and has provided no
2 assurance that once its local markets are open to competition that they will
3 remain so.
- 4 b) Remonopolization will occur if Qwest is granted entry into the long distance
5 market now.
- 6 c) Structural separation of Qwest is the key to truly opening the local market in
7 Arizona to competition.

8 23. In its May 18, 2001, affidavit, AT&T stated that with regard to (a) opening its local
9 market to competition and (b) assuring that they remain open, Qwest's present showing does not
10 satisfy the Public Interest requirement. AT&T discussed two areas of barriers to entry: 1) UNE
11 prices, and 2) intrastate access charges. AT&T stated that denying new entrants the means to
12 compete via the ready availability of competitively priced UNEs while also allowing carrier access
13 charges to remain significantly above economic costs, has retarded, if not stopped altogether, the
14 promise of choice for average consumers.

15 24. AT&T also argued that Qwest has not cooperated in opening its local market to
16 competition as evidenced by Qwest's past violations of Section 271. AT&T's September 18,
17 2001, brief stated that the FCC found that Qwest provided in-region, interLATA service without
18 first demonstrating that its local markets were open to competition, without FCC approval, and in
19 violation of Section 271. In another proceeding, the FCC addressed US WEST's pre-merger
20 business arrangement wherein US WEST and Ameritech stated that they were providing their local
21 customers with a "one-stop shopping" opportunity that included interLATA services, without first
22 opening their local markets to competition.

23 25. AT&T stated that Qwest does not provide the same level of service to its wholesale
24 customers that it provides to its retail customers. AT&T further contended that Qwest has
25 provided no assurance that its local market, once opened to competition, will remain open if
26 granted Section 271 relief. Qwest has questioned both state and federal authority regarding
27 jurisdiction over any Performance Assurance Plan ("PAP"). Accordingly, AT&T stated that the
28 Commission should order that an effective, permanent PAP be approved and available for

1 integration into interconnection agreements before any Section 271 relief is granted to Qwest.
2 AT&T believes that "adequate assurances" that markets will remain open after a grant of Section
3 271 authority should not begin and end with a PAP. Instead, the Commission should look to a
4 combination of potential rights and remedies, including:

- 5 a) Automatic and self-executing penalties imposed by a PAP;
- 6 b) Private rights of action for violation of interconnection agreements, wholesale
7 service quality standards, state rules and regulations, and federal law; and
- 8 c) A wide spectrum of potential remedies, including fines payable to the state
9 general fund, penalties payable directly to a CLEC's end user customers,
10 recovery of actual and punitive damages; and imposition of other penalties and
11 assessments.

12 26. AT&T stated that Qwest must demonstrate full, irreversible, and measurable
13 compliance with its obligations before the Commission endorses the Qwest applications. AT&T
14 urged the Commission to order the structural separation of Qwest into distinct wholesale and retail
15 corporate subsidiaries, before granting Qwest Section 271 relief.

16 27. WorldCom argued that a significant barrier to entry into the local
17 telecommunications market exists if the CLECs cannot lease UNEs at prices based on forward-
18 looking economic costs. WorldCom suggested that a principled basis for the setting of UNE rates
19 is that such rates must be no higher than necessary to compensate the incumbent for the function it
20 is providing and earn a reasonable return on its investment.

21 28. WorldCom presented the Public Interest obligation set out by Texas in the SBC
22 Communications, Inc. ("SBC") Section 271 proceeding and states that in order to meet these
23 obligation, Qwest must:

- 24 a) Demonstrate in the collaborative process by its actions that its corporate
25 attitude has changed and that it will treat CLECs like its customers and
- 26 b) Establish better communication between its upper management,
27 including its policy group, and its account representatives.

28 29. WorldCom recommended the following legal obligations:

- 1 a) Establish an interdepartmental group whose responsibility is trouble-
2 shooting for CLECs engaged in interconnection, purchase of UNEs, and
3 resale;
- 4 b) Establish a system for providing financial or other incentives to Local
5 Service Center personnel based upon CLEC satisfaction;
- 6 c) Commit to resolving problem issues with CLECs in a manner that will
7 give CLECs a meaningful opportunity to compete. Qwest must
8 recognize that its wholesale customers are as important as retail
9 customers;
- 10 d) Establish that it is following all Commission orders referenced in this
11 recommendation and that it intends to follow future directives of this
12 Commission; and
- 13 e) Not be permitted to attempt to win back customers lost to competitors
14 when a CLEC customer inadvertently or mistakenly calls Qwest.

15 30. WorldCom suggested that Qwest's PAP should include performance indicator
16 definitions ("PIDs") that address special access in a manner similar to the PIDs that relate to the
17 provisioning of local wholesale services.

18 31. WorldCom argued for a structural separation between Qwest's retail and wholesale
19 operations to encourage competition. WorldCom also argued that the Commission should ensure
20 the following:

- 21 a) The terms and conditions for CLECs' access to UNEs and UNE combinations
22 permit economically viable access to those elements;
- 23 b) Operational support systems ("OSSs") are available to CLECs that are fully
24 functional, stress-tested, and integratable; and
- 25 c) That there exist self-executing and behavior-modifying remedies for violations
26 of the competitive "rules of engagement" established by this Commission.
27
28

1 32. In its September 18, 2001, brief WorldCom, like AT&T, rejected Qwest's
2 "underlying assumption" that completion of the Section 271 Checklist is all that is required to
3 meet the Public Interest.

4 33. WorldCom urged the Commission to implement an "anti-backsliding" PAP¹³ with
5 financial penalties at a level sufficient for Qwest to view them as real financial penalties. In
6 addition, WorldCom stated that the Commission should also institute expedited procedures to
7 handle complaints and conflicts.

8 34. WorldCom concluded by stating that Qwest has not met the Public Interest criteria.
9 Approval of its Section 271 application should be delayed until pricing, an accessible
10 telecommunications system, and a supportive regulatory climate are in effect.

11 35. Cox stated that as Qwest's own numbers attest, the CLEC penetration into the
12 Arizona telecommunications market is still minimal. Cox stated that Qwest's existing
13 "Competitive Response Program" Tariff (Section 5.2 of Qwest's Competitive Exchange and
14 Network Services Tariff) (hereafter referred to as its "WinBack Tariff") presents a factor that
15 seriously jeopardizes whether the Arizona telecommunications market, particularly the residential
16 market, will remain open to effective competition. Cox believed that given Qwest's enormous
17 market share – particularly for residential customers – Qwest does not need the WinBack Tariff to
18 be competitive in the market. It only needs the WinBack Tariff to be anti-competitive – that is, to
19 target the minute percentage of customers who have left Qwest. Cox recommended withholding
20 Section 271 approval in Arizona until Qwest withdraws its WinBack Tariff.¹⁴ Alternatively, the
21 Commission could require Qwest to divest itself of the WinBack Tariff for the near future.

22 36. The Association of Communications Enterprises ("ASCENT") maintained that
23 Qwest had not met its burden for demonstrating compliance with the Public Interest standard for
24 in-region interLATA market entry.¹⁵ ASCENT argued that CLEC parties have raised a continuing
25

26
27 ¹³ WorldCom Brief of September 18, 2001 pg. 30.

28 ¹⁴ 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.

¹⁵ Association Comments pg. 2.

1 series of problems and concerns over Qwest's provision of interconnection, services, and
2 support.¹⁶

3 37. ASCENT presented six issues for the Commission's consideration:

- 4 a) The 1996 Act mandates a broad Public Interest inquiry prior to grant of Section
5 271 authority.
- 6 b) Qwest's attempt to reduce the Public Interest standard to compliance with the
7 Competitive Checklist is contrary to FCC Rulings and such discussion is
8 irrelevant to this workshop.¹⁷
- 9 c) In a sleight of hand, Qwest emphasizes purported future benefits to the long
10 distance and local markets if Qwest is granted in-region interLATA authority
11 while ignoring the dearth of meaningful competition in local markets.¹⁸
- 12 d) Qwest's local competition statistics fail to demonstrate that Qwest is providing
13 nondiscriminatory access to resale, UNEs, advanced services, interconnection,
14 and operations support systems at parity.¹⁹
- 15 e) Qwest's testimony is devoid of any evidence demonstrating Qwest's
16 compliance with recent judicial and regulatory decisions on the resale of
17 advanced services and on the ability of CLECs to offer advanced services at
18 parity with Qwest.²⁰
- 19 f) The key conditions for competition are not yet in place in Arizona.

20 38. With respect to Issue 1, ASCENT pointed out that the Public Interest inquiry is not
21 to be "limited narrowly to assessing whether BOC entry would enhance competition in the long
22 distance market."²¹

23 39. With respect to Issue 2, ASCENT stated that a showing of checklist compliance is
24 insufficient to demonstrate that long distance entry is in the Public Interest. Also, Qwest's position
25

26 ¹⁶ ASCENT Comments, pg. 3.

27 ¹⁷ ASCENT Comments pgs. 8-10.

28 ¹⁸ ASCENT Comments, pgs. 10-12.

¹⁹ ASCENT Comments, pg. 13-15.

²⁰ ASCENT Comments, pg. 15-18.

²¹ ASCENT Comments, pg. 5.

1 of checklist compliance relies *almost exclusively* on the *future* rather than actual factual evidence
2 demonstrating that it presently complies with the statutory conditions for entry.

3 40. With respect to Issue 3, ASCENT stated that Qwest's alleged benefits of entry into
4 the long distance market are insufficient to prove that long distance entry by the BOC is in the
5 Public Interest.

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

10 42. With respect to Issue 5, ASCENT argued that Qwest's testimony fails to
11 demonstrate that it is providing, or is even capable of providing, line shared, line split, and DSL
12 capable loops at commercial volumes. Qwest also failed to show it had provided advanced
13 services on a resale basis.

14 43. With respect to Issue 6, ASCENT argued there are three main conditions for
15 competition – successful OSS test completion, a PAP, and cost-based pricing for UNEs and
16 interconnection. These conditions are not in place, much less functioning smoothly over a
17 sustained period of time.

18 44. ASCENT concluded that Qwest must support its application with evidence
19 demonstrating its *present* compliance with the statutory conditions for entry.

20 45. e.spire stated that it did not believe that the local telecommunications market in
21 Arizona is fully and irreversibly open to competition. Qwest had disrupted e.spire's business in
22 three primary areas. First, Qwest withheld millions of dollars of reciprocal compensation
23 payments owed to e.spire. Second, Qwest refused to convert special access circuits to enhanced
24 extended links, commonly referred to as EELs. And, third, Qwest failed to provision special
25 access circuits ordered by e.spire in a timely manner.

26 46. Sprint stated that Qwest's application for Section 271 approval is premature and not
27 in the Public Interest for four reasons:

28 a) Qwest faces no substantial, irreversible competition;

- b) Qwest's anticompetitive behavior would harm the markets in the future;
- c) Qwest promises of performance are not sufficient; and
- d) Permanent UNE and wholesale prices must first be established.

47. Sprint argued 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.

48. Sprint argued 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.

49. Sprint also stated that although Qwest has promised to enter into a PAP, there has been no Commission ruling regarding the proposal and therefore it is premature to determine if the application is in the Public Interest.

50. Finally, Sprint stated that Qwest 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.

51. Qwest argued that based on previous FCC rulings in other Section 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."²² It stated "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."²³ Therefore, Qwest argued that it is in compliance with the first criteria established by the FCC.

52. With respect to the second criteria, Qwest argued 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.²⁴

²² BANY- Order at ¶422; SBC-Texas Order at ¶416.

²³ Qwest Teitzel Testimony, pg. 38.

²⁴ BANY Order at ¶428; SBC-Texas Order at ¶419.

1 53. Qwest then addressed the final criteria and stated that the FCC has consistently
2 looked at three factors to provide assurance of future compliance:

- 3 a) An acceptable PAP²⁵,
- 4 b) The FCC's enforcement authority under Section 271(d)(6)²⁶, and
- 5 c) Liability risk through antitrust and other private causes of action if the BOC
6 performs in an unlawfully discriminatory manner.²⁷

7 54. Qwest stated that it has a PAP for Arizona. If at any time after the FCC approves a
8 Section 271 application, and it determines that a BOC has ceased to meet any of the conditions
9 required for such approval, Section 271(d)(6) provides the FCC enforcement remedies including
10 imposition of penalties, suspension or revocation of Section 271 approval, and an expedited
11 complaint process. Qwest stated that the FCC has also noted that the BOC risks liability through
12 antitrust and other private causes of action if it performs in an unlawfully discriminatory manner.²⁸
13 Qwest stated that all of these factors provide the Commission assurance of Qwest's future
14 compliance.

15 55. Qwest argued that its entry into the interLATA market would enable customers to
16 select another full service provider of local and long distance service. Qwest stated that this
17 additional level of service and choice is clearly in the Public Interest.

18 56. Qwest stated that it has opened its local exchange markets as required under Track
19 A to competition as evidenced by the presence of over 115 established interconnection agreements
20 in Arizona. These agreements, along with Qwest services available for resale at a discounted rate,
21 have allowed CLECs to enter the local markets in Arizona on a resale basis or as facilities-based
22 providers through interconnection and/or the purchase of UNEs.

23 57. Qwest responsive testimony rebutted the comments made by other parties in their
24 May 17 and 18, 2001, filings.

25
26
27 ²⁵ BANY Order at ¶429-¶430; SBC-Texas Order at ¶420-¶421.

28 ²⁶ BANY Order at ¶429-¶430; SBC-Texas Order at ¶421.

²⁷ *Id.*

²⁸ *Id.*

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

4 59. Qwest argued that while AT&T presented additional arguments, many of them are
5 beyond the scope of this proceeding. In addition, many of their arguments are for standards that
6 have not been required of other BOCs in states for which the FCC has granted petitions for
7 interLATA entry.

8 60. Regarding AT&T's complaint that Qwest has not opened its local markets to
9 competition, and has provided no assurances that local markets, once opened, will remain so,
10 Qwest stated that evidence has been presented to show that the local markets are open to
11 competition and will remain so.

12 61. Regarding AT&T's assertion that UNE prices preclude competitive entry, Qwest
13 stated that this is wrong. Qwest argued that it is a fact that CLECs are presently competing with
14 Qwest in Arizona via CLEC-owned facilities, resale and use of UNEs. Qwest believed that the
15 issue of UNE pricing is well beyond the scope of this proceeding.

16 62. Regarding the AT&T argument that Qwest's intrastate switched access prices must
17 be reduced to cost as a precondition to Qwest's reentry into the interLATA market, Qwest stated
18 that this issue is completely beyond the scope of the Public Interest criteria. Intrastate switched
19 access charges have not been ordered to be priced at cost in other states in which the BOC has
20 been granted interLATA relief.

21 63. Regarding the AT&T request for structural separation, Qwest argued that structural
22 separation has never been required as a precondition to entry into the interLATA market.

23 64. Qwest noted that WorldCom's complaints are similar to those of AT&T, e.spire,
24 and Cox concerning issues such as pricing of UNEs, pricing of switched access, alleged examples
25 of non-compliance with Section 271 guidelines, provisioning intervals for special access and UNE
26 services, and the need for structural separation of Qwest as a precondition to re-entry into the
27 interLATA market. Qwest did not reiterate its rebuttal of these arguments, but relied on its
28 previous rebuttal.

1 65. Qwest rebutted WorldCom's concerns that were not expressed by other carriers.

2 These included:

- 3 a) The state of wholesale service competition in Arizona,
- 4 b) The status of OSSs as a means of ensuring that local markets are open,
- 5 c) The suggestion that Qwest has "market power" to "control market prices" and
- 6 exercises market power through "control of local bottleneck facilities,"²⁹ and
- 7 d) That the Public Interest will be served if regulations are designed to "create
- 8 conditions where competition in local telecommunications markets can flourish,
- 9 and existing competition in the long distance markets is not diminished."³⁰

10 66. Qwest argued that its local markets are fully open. In addition, Qwest stated that it

11 has supplied extensive evidence in previous Arizona workshops demonstrating Qwest's

12 compliance with Section 271 Checklist requirements. Qwest stated that after the BOC has entered

13 the interLATA long distance market in other states, competition has intensified in both the local

14 and long distance markets, and consumers are the direct beneficiaries of that increased

15 competition.

16 67. WorldCom suggested that structural separation would lead to full deregulation of

17 Qwest's retail operations. Qwest argued that implicit in this WorldCom concept is that Qwest's

18 deregulated retail operation would be driven to quickly increase the basic residential service

19 recurring rates to cost-recovery levels, creating rate shock on Arizona consumers. Qwest stated

20 that the suggestion also ignores the regulatory constraints on Qwest's prices for the three year term

21 of the Arizona price plan as approved by the Commission in 2001.

22 68. Further, AT&T and WorldCom's recommendation would have the Commission use

23 the Public Interest inquiry as an opportunity to effect a corporate restructuring of Qwest. Qwest

24 stated that there is no provision of state or federal law that purportedly authorizes the Commission

25 to condition the grant of a federal Section 271 application on a forced corporate restructuring.³¹

26

27

28 ²⁹ Direct Testimony of Don Price, pg. 10.

³⁰ Direct Testimony of Don Price, pg. 9.

³¹ Qwest Brief of 9/19, pg. 52.

1 According to Qwest, structural separation would impose massive and unnecessary costs on
2 Arizona consumers.³² Qwest stated that *no* state has adopted structural separation.

3 69. Qwest stated that nothing in the Act requires a BOC to prove that CLECs have
4 entered the market in any significant number or achieved a particular level of market penetration.
5 Qwest also stated that once a BOC proves that it has complied with the Competitive Checklist, it is
6 “not require[d] . . . to make a substantial *additional* showing that its participation in the long
7 distance market will produce public interest benefits.”³³ However, Qwest argued that a significant
8 number of CLECs have entered the market and that Qwest’s entry into the long distance market
9 will produce the public interest benefits of increased customer choice and competition.

10 70. Qwest also stated that no intervenor has demonstrated that there are any “unusual
11 circumstances” that would make long distance entry contrary to the Public Interest.³⁴

12 71. Qwest addressed the AT&T and WorldCom suggestion that Qwest’s UNE prices³⁵
13 do not allow them to make enough of a profit in the residential market.³⁶ Qwest stated that the
14 FCC has clarified that CLEC profit margins are “not part of the Section 271 evaluation,”³⁷ and
15 that, in considering what “the Act” requires, CLEC profit margins with UNEs are “irrelevant.”³⁸
16 Qwest also stated that the FCC has never once reviewed a BOC’s access charges as part of a
17 Section 271 application, nor has it ever conditioned a BOC’s entry into the long distance market
18 on reforming access charges.

19 72. In response to Cox’s assertion that Qwest’s WinBack Tariff is an example of
20 “predatory pricing” that must be eliminated prior to approval of Qwest’s Section 271 application,³⁹
21 Qwest stated that it has succeeded in bringing back a small minority of its former customers under
22 the WinBack Tariff, but it would be gross exaggeration to suggest that this tariff has “eliminat[ed]
23 the ability of a CLEC to effectively compete.”⁴⁰ Qwest argued that this program is in no way an
24

25 ³² Qwest Brief of 9/19, pg. 60.

26 ³³ *Bell Atlantic New York Order* at ¶ 428 (emphasis in original).

27 ³⁴ Qwest Brief of September 19, pg. 38.

28 ³⁵ Qwest Brief of September 19, pg. 43.

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

³⁷ *Verizon Massachusetts Order* at ¶ 41.

³⁸ *SBC Kansas/Oklahoma Order* at ¶ 92.

³⁹ Cox Comments at 2:11-12.

⁴⁰ Cox Comments at 4:6-8.

1 example of predatory pricing, and it should have no bearing whatsoever on Qwest's showing that
2 its entry into the interLATA market in Arizona is squarely in the Public Interest.

3 73. Several parties filed comments on Staff's May 2002 Report on whether Qwest's
4 271 application was in the public interest.

5 74. AT&T stated that Staff's May 2002 Report failed to address either the price
6 squeeze issue, or the inadequate margins available through the purchase and sale of UNE-P.
7 AT&T stated that it believes that at a minimum, until such time as AT&T's price squeeze
8 arguments have been addressed, the Section 271 application should not be approved.

9 75. AT&T next stated that the May 2002 Report improperly ignored on-going bad acts
10 and anti-competitive behavior on the part of Qwest. AT&T provided several general comments,
11 but focused on the Minnesota AT&T UNE testing complaint, and the Washington network
12 interface device ("NID") padlocking episodes. It also cited the proceedings relating to unfiled
13 agreements in five states, the Securities and Exchange Commission ("SEC") investigation into
14 Qwest's accounting practices and the Attorney General's suit against Qwest in Arizona.

15 76. Building on the unfiled agreement complaint, AT&T referenced the independent
16 Arizona Staff investigation to analyze agreements Qwest has not filed with the Commission for
17 approval under Section 252(e) of the Act.

18 77. AT&T also took issue with Staff's conclusion that the working relationship
19 between Qwest and the CLECs is improving.

20 78. And finally, AT&T claimed that Staff did not adequately address AT&T's access
21 issue. This issue is one of high intrastate access charges and the effect of failing to reflect Qwest's
22 switch from access charges to forward-looking costs before Qwest obtains Section 271 relief.

23 79. Cox focused its comments on Staff's May 2002 Report on the WinBack Tariff. It
24 stated that in general, Cox supports Staff's concerns about Qwest's WinBack Tariff. However,
25 Cox believes Staff's proposal to remedy the anti-competitive effect of the WinBack Tariff is both
26 confusing and unnecessarily complicated.

27 80. Cox stated that the proposed modification set forth in the report is not clear. It
28 questions whether Qwest is supposed to delay its WinBack efforts for a particular customer until

1 after the customer has used the CLEC service for six months, or is Qwest simply to delay offering
2 a WinBack incentive under the Tariff until six months after Qwest receives its Section 271
3 approval. Cox submits that the most simple and most effective solution is to require Qwest to
4 withdraw its current WinBack Tariff. Qwest could submit a new WinBack Tariff when it is
5 appropriate to do so, and the Commission would be able to treat the Tariff filing as it would any
6 new Tariff filing.

7 81. Cox also submitted that Qwest should be required to withdraw its Local Service
8 Freeze Tariff as a condition of compliance with the Public Interest element, and states that this
9 condition would be consistent with Staff's recently-filed testimony in the Local Service Freeze
10 Tariff Docket (Docket No. T-01051B-02-0073).

11 82. RUCO's comments on Staff's May 2002 Report, as with Cox, requested
12 clarification regarding Qwest's WinBack Tariff. It claimed that Staff recommended the WinBack
13 Tariff be withdrawn until "actual competition reaches a level deemed appropriate by the
14 Commission, or to modify the Tariff as set forth herein". RUCO stated that it is unclear from these
15 paragraphs precisely what Staff was recommending concerning Qwest's WinBack Tariff. RUCO
16 also commented that Staff's final recommendation was not predicated on the results of the Section
17 252 Docket recently opened and pending before this Commission (Docket No. RT-00000F-02-
18 0271). RUCO stated that its final recommendation regarding Public Interest will be conditioned
19 on a finding by the Commission that Qwest did not engage in anti-competitive behavior in the
20 Section 252 Docket.

21 83. Time Warner stated that for purposes of this filing Time Warner joined in and
22 concurred with the comments filed by Cox on the May 2002 Report.

23 84. Touch America, which had not been a party to this proceeding prior to May 15,
24 2002, filed comments on that date on Staff's May 2002 Report. It noted that the Commission
25 report described two complaints filed by Touch America at the FCC against Qwest, alleging that
26 Qwest had violated Section 271 of the Telecom Act by continuing to offer in-region long distance
27 services under the name of "capacity IRUs" (Indefeasible Rights of Use) after merging with US
28 WEST.

1 85. Touch America commented that on May 2, 2002 AT&T filed a brief with the FCC
2 commenting upon a March 22, 2002 audit report by Arthur Anderson regarding Qwest's
3 compliance with FCC conditions. Touch America stated that AT&T's brief substantially
4 supported Touch America's claims in its two FCC complaints. Touch America stated that Qwest's
5 purported compliance in this document is essentially a set of promises by Qwest that it will open
6 the local exchange market to competition and treat competitors in a fair and even handed manner.
7 It raised the question as to whether or not Qwest can be trusted to keep those promises, and stated
8 that Touch America believes the answer is no. It based this observation on its experience in the
9 purchase of Qwest's long distance assets, and stated that Qwest never fully divested itself of its in-
10 region long distance customer base as it had promised to Touch America and the FCC.

11 86. Touch America stated that it was also then engaged in an arbitration and litigation
12 with Qwest in Federal District Court in Colorado regarding Qwest's billing practices and other
13 forms of anti-competitive behavior. It claimed that Qwest has over billed Touch America for
14 services purchased from Qwest since July 2000 when Touch America purchased Qwest's long
15 distance assets. It further cited a series of three investigations in which Touch America had no
16 involvement. Finally, Touch America requested that the Commission wait until September 2002
17 to judge Qwest's Section 271 application. Touch America expected the FCC to rule on its
18 capacity IRU complaint at that time, and stated that if Touch America prevailed it would confirm
19 that Qwest is not Section 271 compliant.

20 87. On May 16, 2002, Qwest filed comments on the Staff's May 2002 Report. Qwest
21 stated that the Staff report concluded that the Commission should find that Qwest has satisfied the
22 Public Interest requirements of Section 271, subject to certain conditions outlined by Staff. Qwest
23 further stated that although it agreed with virtually all of Staff's recommendations, it took
24 exception to Staff's suggestions that Qwest's WinBack Tariff was somehow improper, given
25 competitors relative market shares, and that Qwest's Section 271 application could not be in the
26 Public Interest unless Qwest suspended its WinBack program for six months after its application is
27 granted. Qwest stated that the FCC, in its order approving BellSouth's Section 271 applications
28 for Georgia and Louisiana, made it clear that WinBack programs were appropriate under the

1 FCC's rules, and did not present a concern under Section 271's Public Interest standard. Qwest
2 therefore sought modification of the May 2002 Report.

3 88. Qwest noted that the Commission had already considered Qwest's WinBack
4 Tariff's multiple times in separate tariff proceedings, and had failed to find those tariff's to be anti-
5 competitive and always approved them. It cited the 1999 AT&T objection to Qwest's WinBack
6 program, and the Commission approval of the tariff in spite of AT&T's argument. It stated that
7 since the Commission had already considered these concerns there is no reason to re-litigate them
8 now as a part of the Public Interest inquiry.

9 89. Qwest stated that far from being "anti-competitive" the WinBack program was
10 nothing more than recognition that competition exists in Qwest's marketplace. It further stated
11 that the FCC echoes this conclusion in the BellSouth Louisiana and Georgia Section 271 approval
12 order. Thus, Qwest requested that Staff reconsider and remove its proposal that Qwest should be
13 required to suspend its WinBack program for six months after its receipt of Section 271
14 authorization as a condition of the Commission's recommendation that Qwest's application is
15 consistent with the Public Interest.

16 90. On May 28, 2002, Qwest responded to Touch America's comments. Qwest stated
17 that Touch America demonstrated no basis for submitting these belated comments. While it
18 previously provided Staff with copies of the FCC complaints that are the focus of its comments,
19 Touch America had never entered any appearance in this longstanding Docket, nor filed any prior
20 explanation of why these FCC complaints were relevant to it.

21 91. Qwest stated that Touch America's comments added nothing to the complaints it
22 had already filed before the FCC and provided no basis for Staff to alter its conclusions. Further,
23 Qwest stated that Touch America's complaints before the FCC did not involve local competition
24 issues at all. Rather, they alleged that Qwest's in-region dark fiber and loop fiber capacity IRU
25 transactions amounted to the provision of in-region interLATA services in violation of Section
26 271, and violated the terms of the FCC's US WEST/Qwest merger order regarding divestiture of
27 such service.

28 92. Qwest further stated that the FCC had made it clear that disputes arising from BOC

1 merger orders that are currently being considered in its complaint dockets are best resolved in
2 those other pending dockets, not imported into the consideration of Section 271 applications.
3 Qwest stated that the FCC also expressly rejected the idea that the Section 271 process should
4 “resolve all complaints, regardless of whether they relate to local competition, as a precondition to
5 granting a Section 271 application.” Qwest believed that Touch America’s complaints have
6 demonstrated no relationship to such local competition issues and should not be considered in this
7 wholly separate Section 271 application proceeding. Qwest stated that the FCC is reviewing
8 matters related to the Qwest Touch America transactions to determine whether Qwest’s
9 interpretation of the FCC’s own orders and the provisions of Federal law are reasonable. Finally,
10 Qwest stated that Staff appropriately concluded that such questions are most appropriately
11 resolved by the FCC and Touch America has advanced no reasons why that conclusion was
12 incorrect.

13 93. AT&T, Cox, RUCO, and Qwest filed comments on Staff’s August 2003
14 Supplemental Report.

15 94. AT&T stated that Qwest continues to have problems complying with state and
16 federal laws, orders, and rules. It is not clear why the Settlement Agreement will change Qwest’s
17 unlawful behavior considering the fact that the force of law was not sufficient to effect a change in
18 Qwest’s behavior. AT&T also stated that Staff’s August 2003 Report glosses over the severity of
19 the findings that led to the adoption of the Settlement Agreement. AT&T discussed the July 2002
20 Workshop that was held to enable all parties to participate in discussing any issues that they feel
21 they were precluded from discussing due to unfiled agreements. AT&T speculated that the
22 Settlement Agreement was designed to address the issues in the July 2002 Workshop, since Staff’s
23 August 2003 Report does not mention this Workshop.

24 95. AT&T also mentioned that Qwest changed the DS-1 loop process for CLECs by
25 adding a new fee that made the process more cumbersome and lengthy.

26 96. Cox stated that the Commission should direct Qwest to withdraw its WinBack
27 Tariff and refile a new WinBack Tariff. This new tariff should then be processed and reviewed as
28 any other tariff filing.

1 97. RUCO urged the Commission to wait in making a Public Interest determination
2 until the Section 252(e) docket and the Section 271 sub-docket are resolved.

3 98. Qwest stated that its WinBack Tariff should not be restricted in any way.

4 **Discussion**

5 99. A number of issues were raised by the CLECs regarding Qwest's compliance with
6 the requirements of Public Interest. Below is Staff's discussion on the CLECs' issues.

7 ***WinBack Tariff – Cox Issue***

8 100. In its May 2002 Report, Staff stated that the WinBack Tariff has the potential to be
9 an anticompetitive program. The CLECs must incur considerable expense to win customers from
10 Qwest through various advertising and other incentive programs. However, as soon as the CLEC
11 wins the customer, Qwest has an easy way to identify and target these customers and can offer an
12 incentive to come back.

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

22 102. In its August 2003 Report, Staff recommends that in place of its initial
23 recommendation, Qwest should refile its WinBack Tariff, specifying that it (Qwest) will not
24 attempt to utilize the WinBack Tariff to win back a lost customer until a minimum of 90 days from
25 the date such customer left Qwest for another service provider.

26 103. With respect to Cox's comments on Staff's August 2003 Report, Staff disagrees
27 with Cox that Qwest's WinBack Tariff should be withdrawn. Staff believes that the 90 day
28

1 restriction on the tariff is sufficient to address concerns regarding anti-competitive activities and
2 the WinBack Tariff.

3 104. With respect to Qwest's comments on Staff's August 2003 Report, Staff disagrees
4 with Qwest that Qwest's WinBack Tariff should have no restrictions. The issue of Qwest's
5 WinBack Tariff is better addressed in a separate docket. A separate docket should be established
6 to examine the issues concerning Qwest's WinBack Tariff.

7 ***Reciprocal Compensation and Enhanced Extended Links (EELs) – e.spire Issue***

8 105. In its May 2002 Report, Staff stated that e.spire claimed that Qwest has disrupted its
9 business in three primary areas. First, Qwest has withheld millions of dollars of reciprocal
10 compensation payments owed to e.spire. Second, Qwest has refused to convert special access
11 circuits to enhanced extended links, commonly referred to as EELs. And third, Qwest has failed to
12 provision special access circuits ordered by e.spire in a timely manner. As a result of these issues,
13 e.spire stated that it has suffered monetary damages and has lost reputation and customers.

14 106. The concerns raised by e.spire have been addressed and resolved through
15 workshops on Checklist Items No. 1 (Interconnection/Collocation, Decision No. 64600), No. 2
16 (Access to UNEs, Decision No. 64630) and No. 13 (Reciprocal Compensation, Decision No.
17 63977). Furthermore, subsequent FCC actions and an Order of the D.C. Circuit Court have
18 provided additional direction for resolution of the issues.

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

24 108. On June 5, 2002, the Commission approved Qwest's PAP in Decision No. 64888.
25 Therefore, we agree with Staff that this issue is resolved.

26 ***Structural Separation – WorldCom and AT&T Issue***

27
28

1 109. In its May 2002 Report, Staff stated that both AT&T and WorldCom addressed the
2 issue that Qwest must be structurally separated to truly open the local market to competition in
3 Arizona.

4 110. AT&T stated that although only full structural separation of Qwest's wholesale and
5 retail arms would be sufficient to eliminate Qwest's incentives to capitalize on its bottleneck
6 facilities, structural separation should significantly reduce Qwest's incentives and ability to engage
7 in such anticompetitive conduct. That, in turn, will facilitate true competition in local exchange
8 markets of Arizona – for the benefit of competitors and consumers alike. AT&T urged the
9 Commission to order the structural separation of Qwest into distinct wholesale and retail corporate
10 subsidiaries, before granting Qwest Section 271 relief. WorldCom argued for a structural
11 separation between Qwest's retail and wholesale operations to encourage competition.

12 111. Staff stated that the concerns raised by AT&T and WorldCom had been thoroughly
13 addressed in Staff's Section 272 Report. We agree with Staff that the issue of structural separation
14 should be addressed elsewhere, not within the context of the Commission's consideration of
15 whether Qwest's 271 application is in the public interest.

16 ***OSS Test – ASCENT Issue***

17 112. In its May 2002 Report, Staff stated that ASCENT argued, among other things, that
18 OSS testing procedures had not been completed and final results had not been released. At the
19 time of ASCENT's filing, the OSS test had not yet been completed and therefore no final
20 conclusions had been drawn with respect to Qwest's performance. However, testing of Qwest's
21 OSS had been completed and the issue was no longer applicable by the time the May 2002 Report
22 was issued. Cap Gemini Ernest & Young (“CGE&Y”) issued its Final Report on Qwest's OSS on
23 March 29, 2002. Staff's final report and recommendation concurring with virtually all of
24 CGE&Y's conclusions concerning the OSS test was issued on May 1, 2002, as a supplement to the
25 Checklist Item No. 2 Interim Report.

26 113. After the August 2003 Report was issued, Staff's Report and Recommendations on
27 the test of Qwest's OSS was approved by the Commission on August 28, 2003, in Decision No.
28 66224. Therefore this issue is resolved.

1 ***Arizona Cost Docket, Access Reform and PAP – CLEC Issues***

2 114. All of the CLECs filing comments on Public Interest had concerns with three main
3 issues: the Arizona Cost Docket, Access Reform, and the PAP.

4 ***a. Arizona Cost Docket***

5 115. In its May 2002 Report, Staff stated that CLECs had concerns regarding Docket
6 No. T-00000A-00-0194, which was investigating Qwest's compliance with certain wholesale
7 pricing requirements for UNEs and resale discounts. The May 2002 Report did not so much
8 provide Staff's resolution to the issue as it provided details regarding the procedural schedule for
9 the matter since the matter was still pending.

10 116. By the time the August 2003 Report was issued, a decision had been made in the
11 Arizona Cost Docket (Decision No. 64922, June 12, 2002). Therefore, Staff considers this issue to
12 be resolved and did not address this issue again in its August 2003 Report.

13 ***b. Access Reform***

14 117. In its May 2002 Report, Staff stated that the Commission currently had a pending
15 docket (Docket No. T-00000D-00-0672) that was investigating the cost of telecommunications
16 access to determine if access charges currently in effect reflect cost of access. That Docket is still
17 pending.

18 ***c. PAP***

19 118. In its May 2002 Report, Staff recommended that the Commission condition
20 approval of Qwest's Section 271 application on final approval of a PAP. It also conditioned
21 approval on the Commission's ability to make changes to the PAP and to extend the PAP as
22 deemed appropriate by the Commission.

23 119. In its August 2003 Report, Staff states that the Commission approved a PAP which
24 complied with the aforementioned conditions on June 5, 2002, in Decision No. 64888. Therefore,
25 this issue is now resolved.

26 ***Local Service Freeze***

27 120. In its May 2002 Report, Staff stated that on December 13, 2001, Qwest notified the
28 Commission that it was to begin offering its business customers the option to freeze their local

1 service provider. It also indicated that it would make this service available to its residence
2 customers. The May 2002 Report mainly provided details regarding the procedural schedule for
3 the matter, since the matter was still pending, rather than Staff's resolution to the issue.

4 121. In its August 2003 Report, Staff states that on November 1, 2002, the Commission
5 issued Order No. 65349, which denied Qwest's request to approve its Local Service Freeze tariff.
6 Therefore, we agree with Staff that this issue is resolved.

7 ***SGAT and Checklist Items***

8 122. In its May 2002 Report, Staff recommended that the Commission condition
9 approval of Qwest's Section 271 application on Qwest's revision of the SGAT, making the
10 changes specified in Checklist Item reports and other reports. Staff also recommended that the
11 Commission condition approval of Qwest's Section 271 application on Final
12 Commission Orders finding that Qwest complies with all remaining Checklist Items and Section
13 271/272 requirements.

14 123. In its August 2003 Report, Staff states that Commission decisions have been issued
15 for all 14 Checklist Items. After the issuance of the August 2003 Report, Staff's Report and
16 Recommendations on Qwest's SGAT was approved by the Commission in Decision No. 66201,
17 dated August 25, 2003. Therefore, we agree with Staff that this issue is resolved.

18 **Other Issues Related to the Public Interest**

19 ***a. Comments of the Attorney General re: Public Interest, Convenience and***
20 ***Necessity***

21 124. In its May 2002 Report, Staff stated that on December 19, 2001, the Arizona
22 Attorney General ("AG") submitted comments pursuant to 47 U.S.C. §271(d)(3)(C),
23 recommending against the FCC granting approval of the Section 271 application of Qwest for the
24 provision of in-region InterLATA services, until Qwest has satisfied to the Commission that it has
25 resolved the serious consumer protection problems raised in these comments.

26 125. The Attorney General stated that in the last two years she had twice pursued
27 consumer fraud cases against Qwest. First, in March 2000, the Attorney General entered into a
28 consent judgment with Qwest based on allegations that Qwest had changed consumers long

1 distance carrier without their authorization (“slamming”). Second, in October 2001, the Attorney
2 General sued Qwest under the Arizona Consumer Fraud Act, A.R.S. §§ 44-1521-1534, alleging
3 that Qwest had repeatedly charged consumers for unauthorized services (“cramming”) and had
4 engaged in deceptive advertising. The Attorney General believed that these cases raise very
5 serious concerns about Qwest’s commitment to serving the public, and its willingness to compete
6 fairly by providing accurate information to consumers. Based on these concerns, the Attorney
7 General urged the Commission to withhold a favorable recommendation to the FCC until Qwest
8 had demonstrated that it has resolved its consumer protection problems and that it is willing and
9 able to conduct its business free of consumer fraud.

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

14 127. With regard to the October 2001 consumer fraud lawsuit against Qwest, the State
15 filed its First Amended Complaint in that lawsuit on November 7, 2001. Paragraph 6 of the
16 amended complaint summarized the State’s nine consumer fraud allegations. The First Amended
17 Complaint contained more than 100 separate allegations concerning the problems encountered by
18 specific Qwest customers. These allegations were taken from complaints filed with the Attorney
19 General or with the Commission.

20 128. In its August 2003 Report, Staff stated that on July 7, 2003, the Arizona AG
21 announced settlement of the Consumer Fraud Lawsuit. Therefore, the AG’s complaints have been
22 resolved, and should no longer affect consideration of Qwest’s Section 271 application.

23 ***b. Touch America Complaint Against Qwest***

24 129. In its May 2002 Report, Staff stated that on February 7, 2002, Touch America’s
25 outside attorney provided Commission Staff with a copy of a January 2002 complaint which it had
26 filed with the FCC against Qwest. This complaint requested a mandatory order directing Qwest to
27 cease and desist its marketing, provisioning and operations of “lit Capacity IRU’s” and the
28 marketing and provision of “dark fiber” facilities in the 14 western and mid-western states that

1 comprised the former operating territory of US WEST. Touch America also requested to recover
2 damages sustained by the Complainants as a result of Qwest's marketing, provisioning and
3 operating its lit Capacity IRU's in-region, and marketing and provisioning interLATA capable
4 dark fiber facilities in-region. The complaint stated that Qwest's marketing, provisioning and
5 operations of lit Capacity IRU's in-region and its marketing and provision of dark fiber facilities
6 in-region constitute, separately and collectively, violations of Section 271 of the Communications
7 Act and the Commission's decision in the *Qwest teaming order, in the matter of AT&T Corp. v.*
8 *Ameritech Corp. and Qwest Comms. Corp., memorandum opinion and order, 13 FCC Rcd (1998),*
9 *aff'd US West Communications Inc. v. FCC, 177 F.3e 1057(D.C. Cir. 1999).*

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

17 131. In its August 2003 Report, Staff states that on June 25, 2003, Qwest and Touch
18 America announced agreement on a settlement that canceled all claims between them. Therefore,
19 Touch America no longer has any claims against Qwest; with the aforementioned settlement, this
20 ceases to be an issue.

21 ***c. Motions to Supplement the Record***

22 132. On March 8, 2002, AT&T filed a motion for an order requiring Qwest to
23 supplement the record by filing with the Commission all interconnection agreements adopted by
24 negotiation or arbitration, which had not previously been filed with the Commission. Staff
25 requested that this issue be considered in a separate docket. As of the date of Staff's May 2002
26 Report, the case was still pending.

27 133. In its August 2003 Report, Staff states that on April 18, 2002, the Hearing Division
28 established a procedural schedule for reviewing unfiled agreements in a new Section 252(e)

1 Docket (Docket No. RT-00000F-02-0271). This Docket was established to determine which
2 interconnection agreements should have been filed and what penalties should be assessed for not
3 filing them.

4 134. On November 7, 2002, the Hearing Division opened a sub-docket to the Section
5 271 investigation (Docket No. T-00000A-97-238) concerning allegations that Qwest interfered
6 with the Section 271 regulatory process. This sub-docket was established to determine whether
7 Qwest had interfered with the regulatory process, and if so, the penalty for interfering with this
8 process.

9 135. On November 13, 2002, Staff petitioned the Commission to issue an order
10 directing Qwest to show cause (1) why its failure to implement the rates required by decision
11 64922 for six months is not unreasonable and (2) why its implementation of rates in other states
12 with pending Section 271 applications at the FCC ahead of Arizona is not unreasonable.⁴¹ This
13 Order, Decision No. 65450, was issued on December 12, 2002 (Docket No. T-01051B-02-0871).
14 Qwest was also ordered to show cause why it should not be held in contempt of a Commission
15 Order, and assessed fines for failure to implement the rates approved in the above decision within
16 a reasonable amount of time. Further, Qwest was ordered to show cause why it should not be held
17 in contempt of a Commission Order and assessed fines for deliberately delaying implementation of
18 the wholesale rate changes in Arizona until it had implemented the same changes in at least 10
19 other states in which it has Section 271 applications pending at the FCC.

20 136. On December 20, 2002, the Hearing Division issued a procedural order which
21 stated, among other things, that the November 7, 2002 Procedural Order shall be modified to
22 eliminate the finding that Phase A of the Section 252(e) proceeding conclude prior to the
23 conclusion of the Public Interest Inquiry in the Section 271 investigation. It further ordered that
24 the Commission defer determination of whether a final order in the Section 252(e) Docket is
25 required prior to making a final recommendation on the Public Interest portion of the Section 271
26 Docket, and that no determination either way is being made at this time.

27
28 ⁴¹ The Commission approved the wholesale rates established by Qwest as a part of the Phase II Rate Case (Docket No. T-01051 B-02-0073).

1 137. On June 27, 2003, Qwest and Staff filed a joint motion (which was subsequently
2 granted) to extend time for a procedural conference. They stated that the reason for this request
3 was that they were in the process of negotiating a settlement agreement that involved the Section
4 271 sub-docket. This negotiation also included the Section 252(e) Docket and the Show Cause
5 Order Docket.⁴²

6 138. These negotiations were conducted initially by Qwest and Commission Staff.
7 Later, the principles of settlement were discussed with the parties in a conference (call) on July 10,
8 2003, and a draft of a proposed settlement agreement was distributed on July 14, 2003. On July
9 15, 2003 all active parties to the enforcement dockets had an opportunity to present comments,
10 based on their review of the draft. RUCO, AT&T, MCI, Time Warner, and Mountain
11 Telecommunications, Inc. ("MTI") participated in the discussions. However, the Settlement
12 Agreement dated July 25, 2003, was signed only by the principals involved; Qwest and
13 Commission Staff.

14 139. This Settlement Agreement provides for a combination of six types of monetary
15 penalties, which, in aggregate, amount to just over \$20 million. It also includes a series of non-
16 monetary penalties as described therein. The Agreement also contains provisions to ensure
17 Qwest's ongoing compliance with Section 252(e) of the Federal Act, provisions to ensure that
18 Qwest does not interfere with the integrity of the Commission's regulatory processes in the future,
19 and provisions to ensure that Qwest implements future wholesale rate orders of the Commission.

20 140. With respect to the comments filed by AT&T in response to Staff's August 2003
21 Report, Staff believes that the Settlement Agreement will provide the necessary incentives to
22 change Qwest's unlawful behavior. Staff also clarifies that the issues in the July 2002 Workshop
23 will be heard by the Commission in a separate Open Meeting.

24 141. With respect to AT&T's comments on the new fee in the DS-1 loop process, Staff
25 understands that Qwest has since met with CLECs, has stopped charging this fee, and has reverted
26 to the old process.

27
28 ⁴² In May and June, 2002 the unfiled agreements issue arose, followed by the delay in implementing the June 12, 2002, rate case decision. These issues created sufficient delays on the Section 271 proceeding, that the parties, in an effort to resolve them all, entered into all inclusive settlement negotiations.

1 142. With respect to the comments filed by RUCO in response to Staff's August 2003
2 Report, Staff disagrees with RUCO that the Commission should wait in making a Public Interest
3 determination until the Section 252(e) docket and the Section 271 sub-docket are resolved. We
4 believe that the parties have had a full and fair opportunity to submit their comments on whether
5 Qwest's 271 application is in the public interest. After considering the issues raised and Staff's
6 findings on each of them, we agree with Staff that grant of Qwest's 271 application is in the public
7 interest.

8 143. Issues have also arisen recently concerning whether Qwest's application to offer
9 long-distance service in Arizona is in the public interest when the Company's temporary long-
10 distance affiliate, Qwest LD Corp. ("QLDC") does not have audited financial statements, and
11 Qwest Communications Corporation ("QCC"), Qwest's regular long-distance affiliate's financials
12 are in the process of being restated. While this lack of information precludes the Commission
13 from making findings with respect to QLDC's compliance with Section 272, the Commission will
14 still have an opportunity to address issues and concerns regarding QLDC through the context of its
15 pending CC&N application.

CONCLUSIONS OF LAW

17 1. 47 U.S.C. §271 contains the general terms and conditions for BOC entry into the
18 interLATA market.

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

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

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

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

1 subject of the application in order to verify the compliance of the BOC with the requirements of
2 Section 271.

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

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

- 8 a) Determination that the local markets are open to competition,
- 9 b) Identification of any unusual circumstances in the local exchange and long
10 distance markets that would make the BOC's entry into the long distance
11 market contrary to the Public Interest, and
- 12 c) Assurance of future compliance by the BOC.

13 8. As a result of the proceedings and record herein, the requirements set forth in
14 Paragraph 7 above have been met and Section 271 relief for Qwest is appropriate, as it relates to
15 the Public Interest.

16 ...
17 ...
18 ...
19 ...
20 ...
21 ...
22 ...
23 ...
24 ...
25 ...
26 ...
27 ...
28 ...

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDER

IT IS THEREFORE ORDERED that Qwest's Section 271 application to provide interLATA service in Arizona is in the Public Interest.

IT IS FURTHER ORDERED that Staff's recommendations contained in Findings of Fact Nos. 18, 102, 106, 107, 111, 113, 116, 119, 121, 123, 128, 131, and 142 are approved.

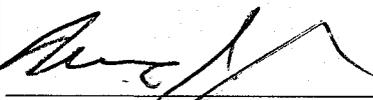
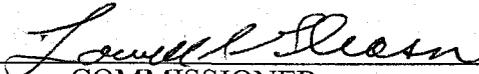
IT IS FURTHER ORDERED that QLDC may begin providing long distance service in Arizona when Qwest receives Section 271 approval from the FCC and QLDC's pending application is approved.

IT IS FURTHER ORDERED that the issue of Qwest's intrastate access charges, currently under review in Docket No. T-00000D-00-0672, shall be addressed on an expedited basis.

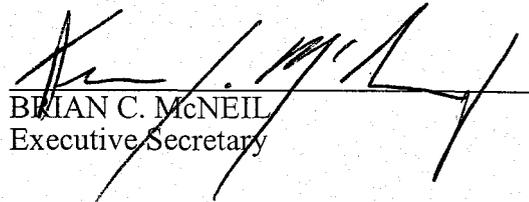
IT IS FURTHER ORDERED that a separate docket will be established to examine the issues concerning Qwest's WinBack Tariff.

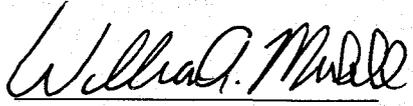
IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION

| | | |
|---|--|---|
|  |  |  |
| CHAIRMAN | COMMISSIONER | COMMISSIONER |
|  | |  |
| COMMISSIONER | | COMMISSIONER |

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto, set my hand and caused the official seal of this Commission to be affixed at the Capitol, in the City of Phoenix, this 29th day of September, 2003.


BRIAN C. McNEIL
Executive Secretary

DISSENT: 

DISSENT: _____

EGJ:MGK:MAS