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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

QWEST CORPORATION'S RESPONSE TO THE ATTORNEY GENERAL'S OUT-OF-TIME COMMENTS REGARDING THE PUBLIC INTEREST TEST

Qwest Corporation ("Qwest"), through undersigned counsel, hereby responds to the "Comments of the Attorney General Re: Public Interest, Convenience, and Necessity" filed on December 19, 2001, three months after the close of briefing. The comments repeat the Attorney General's *unproven and unadjudicated* allegations in two judicial complaints: a long-settled complaint concerning conduct by the old Qwest Communications International ("QCI") in connection with its 1997-1999 marketing of long-distance services prior to its June 2000 merger with local exchange carrier U S WEST, and a pending complaint in Pima County Superior Court focused on alleged conduct that has nothing to do with the issue of whether local markets have been opened to competition.

Qwest vigorously disputes these allegations, and the Superior Court is currently considering Qwest's motion to dismiss the Attorney General's pending complaint. But in any event, these allegations have no place at all in the present proceeding. The Federal

Communications Commission ("FCC") has made clear that the section 271(d)(3)(C) public interest inquiry is about whether the BOC has opened the local exchange market to competition, and whether there is anything about that market that would make the BOC's entry into the interLATA market contrary to the public interest. Allegations concerning the old non-BOC QCI's long-distance marketing or Qwest's retail customer service practices are simply irrelevant to the FCC's standard. In addition, it would be inappropriate to decide these issues indirectly in this docket based on nothing more than complaint allegations when the issues are currently being considered directly and in full in two other proceedings — the Superior Court litigation and this Commission's pending rulemaking on slamming and deceptive sales practices. Qwest therefore respectfully asks the Commission to decline the Attorney General's request for a negative public interest recommendation on Qwest's section 271 application.

As an initial matter, Qwest notes that the Commission's deadline for submitting briefs on the public interest test was September 19, 2001. *See* June 12, 2000 Procedural Order, Docket No. T-00000A-97-0238. The Attorney General did not submit any brief then, nor did she raise these issues or otherwise participate in the public interest workshop that concluded on June 12, 2001. The Attorney General's extreme delay in raising these issues and lack of any proffered justification for filing so far out-of-time is reason alone for the Commission to dismiss her comments.

I. The Concerns Raised by the Attorney General Are Unrelated to the FCC's Legal Standard for Determining Whether Qwest's Section 271 Application Is Consistent with the Public Interest.

The FCC has set forth definitive standards for determining whether a BOC's section 271 application "is consistent with the public interest, convenience and

necessity," 47 U.S.C. § 271(d)(3)(C), and this Commission is obligated to adhere to those standards.[1] The FCC has repeatedly made clear that the focus of the public interest test is competition in the local exchange market. The FCC has held that the public interest inquiry "should focus on the status of market-opening measures in the relevant local exchange market"[2] and that the public interest is satisfied when "barriers to competitive entry in the local markets have been removed and the local exchange markets . . . are open to competition."[3] The public interest inquiry is simply "an opportunity to review the circumstances presented by the applications to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, *as required by the competitive checklist*" — which itself pertains only to the local exchange

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[1] Congress has made it clear that the public interest test is a *federal* standard, and that the FCC is the authoritative interpreter of that standard. While the Act provides for a consultative role for state commissions on most aspects of a BOC's federal section 271 application, it pointedly omits any such a role with respect to the public interest standard. The Act directs the FCC to "consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company *with the requirements of subsection (c)*" of section 271. 47 U.S.C. § 271(d)(2)(B) (emphasis added). Subsection (c) outlines the general requirements concerning the presence of competitors in the state (known as the Track A and Track B requirements), as well as the specific access and interconnection requirements of the fourteen-item competitive checklist. *See* 47 U.S.C. § 271(c). The public interest test, however, is not a part of section 271(c).

[2] 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 ¶ 385 (1997) ("*Ameritech Michigan Order*").

[3] Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, FCC 01-269 (rel. Sep. 19, 2001) at ¶ 125 ("*Verizon Pennsylvania Order*"); Memorandum Opinion and Order, *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100, FCC 01-208 (rel. July 20, 2001) at ¶ 125 ("*Verizon Connecticut Order*"). *See also* Memorandum Opinion and Order, *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, FCC 01-338 (rel. Nov. 16, 2001) ¶ 125 ("*SBC Arkansas/Missouri Order*") ("We conclude that approval of this joint application is consistent with the public interest. From our extensive review of the competitive checklist, which embodies the critical elements of market entry under the Act, we find that barriers to entry in the local exchange markets in Arkansas and Missouri have been removed and the local exchange markets in each state today are open to competition").

market.[4] While the public interest inquiry does include an analysis of the effect of BOC entry on competition in the long distance markets,[5] even this analysis is framed in terms of competitive conditions in the wireline local exchange market: the FCC has held that it will assume "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]

The two sources of allegations on which the Attorney General relies — the April 2000 consent judgment and the Attorney General's October 2001 complaint — have nothing to do with Qwest's conduct vis-à-vis its competitors in the local exchange market. Indeed, the April 2000 consent judgment deals with conduct by independent contractors of the old QCI in 1997 to 1999, *before* QCI's merger with U S WEST *and before it was active in the Arizona local exchange market at all.* Moreover, the marketing activities discussed in the consent judgment are alleged by the State to have *ceased* in September 1999, *see* Consent Judgment at ¶ 3, and most of the judgment is devoted to a rigorous compliance program designed to ensure they would not be repeated.

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[4] *SBC Arkansas/Missouri Order* at ¶ 124 (emphasis added); 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 ¶ 267 (2001) ("*SBC Kansas/Oklahoma Order*") (emphasis added); Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 ¶ 233 (2001) ("*Verizon Massachusetts Order*") (emphasis added); Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 423 (1999) ("*Bell Atlantic New York Order*") (emphasis added).

[5] *See Ameritech Michigan Order* at ¶ 385.

[6] *SBC Arkansas/Missouri Order* at ¶ 126; *Verizon Massachusetts Order* at ¶ 234; Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to*

See id. at ¶¶ 6-21.[7] The Attorney General does not claim that the long-distance marketing practices alleged in the consent judgment have continued, nor does she explain how those allegations prove anything about Qwest's current conduct in the local exchange market.

The State's October 2001 lawsuit similarly has nothing to do with Qwest's conduct vis-à-vis its competitors in the wireline local exchange market, and hence no relevance at all to the Commission's public interest inquiry. Moreover, *none* of the complaint's grab-bag of allegations concerning Qwest's retail customer-service practices or its wireless, Choice TV and Online, DSL, and retail installation services is anything more than an unproven allegation at this point. There have been no court findings on these allegations of any kind. On November 30, 2001, Qwest filed a motion to dismiss which it hopes will quickly put an end to the State's complaint.

II. The Concerns Raised by the Attorney General Are Being Fully Considered in Separate Proceedings, and There Is No Reason to Decide Them Here Based on Nothing More than Litigation Allegations.

The allegations of consumer fraud being raised by the Attorney General are already being considered in other proceedings, and they should not be forced into the public interest inquiry. The FCC has repeatedly rejected attempts to use the public interest inquiry (and the section 271 application process more generally) as a way of prejudging issues that are being directly and more fully considered in other state and federal proceedings.[8] The Superior Court will explore and evaluate the merits of the

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Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas, 15 FCC Rcd 18,354 ¶ 419 (2000) ("*SBC Texas Order*"); *Bell Atlantic New York Order* at ¶ 428.

[7] The consent judgment by its terms was for settlement purposes only, and Qwest did not admit to any of the allegations by the State. *See* Consent Judgement at ¶ 5.

[8] *See SBC Arkansas/Missouri Order* at ¶ 134 ("we reject AT&T's suggestion that the public interest is not met because SWBT has challenged the procedures for modifying the Texas performance remedy plan . . . . Given that these issues are under review by the Texas Commission, we do not conclude that the

allegations in the Attorney General's October 2001 consumer fraud complaint, and there is no reason to prejudge that consideration here. And certainly there is no reason for the Commission to rule on the basis of litigation allegations that are still unproven, hotly contested, and the subject of a pending motion to dismiss.

To the extent the Commission is (legitimately) concerned about carrier marketing practices, it already has an open rulemaking docket addressing slamming and other deceptive practices where these issues can be considered directly and on a complete record.[9] The Commission Staff has proposed the Consumer Protections for Unauthorized Carrier Changes and Unauthorized Carrier Charges rules to provide a framework for consumer protections in a competitive market with guidelines for authorized carrier changes and charges. The proposed rules address the specific concerns raised by the Attorney General in both the 2000 consent judgment (alleged slamming) and the October 2001 complaint (alleged cramming), and are designed to ensure that Qwest and other carriers refrain from unacceptable business practices such as slamming and cramming. Therefore, the proposed rulemaking docket, or the pending judicial proceeding, is the appropriate forum for the Attorney General to address her consumer protection concerns.

Arkansas and Missouri plans are insufficient"); *Bell Atlantic New York Order* at ¶ 438 ("While commenters raise concerns about the details of a handful of specific metrics, we note that many of these issues are currently being considered in the ongoing Carrier-to-Carrier proceeding in New York"); *Verizon Connecticut Order* at ¶ 79 (in addressing allegations regarding Verizon's compliance with the conditions of the Bell Atlantic/GTE merger regarding its Genuity spin-off, the FCC stated "Although we are concerned about the results of the Genuity audit, we believe that these issues will be appropriately addressed in the Commission's detailed review of the audit findings"); *SBC Kansas/Oklahoma Order* at ¶ 281, fn 858 (noting that while "two commenters argue that a "fresh look" policy . . . should be implemented in Kansas and Oklahoma . . . . We find, as we have in prior orders, that this issue is best addressed in the context of a pending Petition for Declaratory Ruling regarding our "fresh look" policy, and we decline to resolve the issue here"); *SBC Arkansas/Missouri Order* at ¶ 135, fn 427 ("we do not believe that section 271 review is the appropriate forum for these issues [referring to McLeod's allegations that the Missouri municipalities franchise requirements are "onerous" and that SWBT as the incumbent receives preferential treatment] . . . McLeod may petition this Commission for preemption under section 253(c) of the Act").

[9] *See* Docket No. RT 00000J-99-0034.

CONCLUSION

The Attorney General's allegations are merely that — unproven allegations. They are irrelevant to the public interest inquiry as a matter of law. The concerns they address are being considered directly and fully in other proceedings, and there is no reason to prejudge or short-circuit those proceedings here. Therefore, Qwest respectfully requests that the Attorney General's untimely comments be rejected.

Respectfully submitted this 3rd day of January, 2002.

RESPECTFULLY SUBMITTED,

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