

**PUBLIC SERVICE COMMISSION
STATE OF MONTANA**

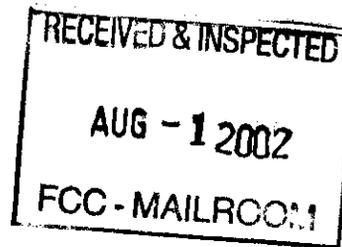


Gary Feland, Chairman
Jay Stovall, Vice-Chairman
Bob Anderson, Commissioner
Matt Bralnard, Commissioner
Bob Rowe, Commissioner

1701 Prospect Avenue
PO Box 202601
Helena, MT 59620-2601
Voice: 406.444.6199
Fax #: 406.444.7618
<http://www.psc.state.mt.us>
E-Mail: psc@state.mt.us

July 31, 2002

Marlene Dortch
Secretary
Federal Communications Commission
455 12th Street, SW Portals II Building
Washington DC 20544



**Re: WC Docket No. 02-189
In the Matter of the Application of Qwest Communications International, Inc. for
Authorization Under Section 271 of the Communications Act to Provide In-Region
InterLATA Service in the State of Montana**

Dear Secretary Dortch:

Enclosed please find the Montana Public Service Commission's Comments regarding Qwest's Montana Compliance with Section 271 of the Telecommunications Act of 1996.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Feland".
Gary Feland, Chairman

GF:MT:rs

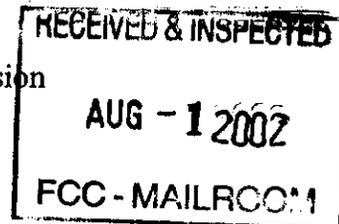
cc: Janice Myles, Wireline Competition Bureau (w/15 copies)
Qualex International (w/one copy)

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Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)
)
Application of Qwest Corporation)
Pursuant to Section 271 of the)
Telecommunications Act of 1996)
To Provide In-Region, InterLATA Services)
In Montana, Utah, Washington and Wyoming)

WC Docket No. 02-189

**EVALUATION OF
THE MONTANA PUBLIC SERVICE COMMISSION**

Gary Feland
Chairman

Jay Stovall
Vice Chairman

Bob Anderson
Commissioner

Matt Brainard
Commissioner

Bob Rowe
Commissioner

August 1, 2002

squeeze, based upon evidence presented by parties in the 271 proceeding, that involves Qwest's Montana toll markets. To mitigate the price squeeze (explained in detail later in this report), Qwest must file on or before October 1, 2002, a full revenue requirements and rate design case with the Montana PSC. A second condition regards an emerging service item involving reverse line sharing. To satisfy that condition, Qwest must comply with the Montana PSC's decision and offer reverse line sharing.

The Commission notes that the statutory deadline for the FCC to act on Qwest's application is October 10, 2002. In the event that Qwest does not comply with the above noted conditions the Montana PSC recommends Qwest's application be denied. If Qwest complies with the Commission's decisions on or before October 1, 2002, the Commission recommends that Qwest's application be approved.

C. Procedural History

The Montana Commission has worked to establish a record upon which the FCC may draw in making its decision on whether Qwest should be allowed to offer interLATA long distance telecommunications service in the Montana market. The "271 case"² was initiated in Montana when Qwest filed its "Section 271 Application and Motion for Procedure to Manage the Section 271 Process" on May 12, 2000.

The Commission opened the 271 docket to consider Qwest's request to offer interLATA long distance in Montana. Within the docket, the Commission conducted a comprehensive investigation of Qwest's compliance with the statutory requirements enumerated in Sections 271(c), 271(d) and 272 of the Act.

² Docket Number D2000.5.70, also referred to in this report as the 271 proceeding or the 271 docket.

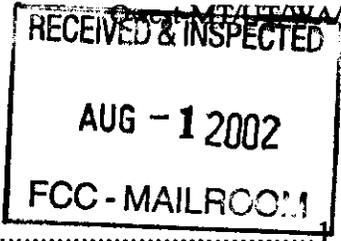


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solicited and considered comments on it from interested parties before issuing the Commission's final QPAP Report recommending modifications to Qwest's proposed QPAP to meet Montana's needs.

The final elements of the 271 process that were addressed by the Montana PSC were the public interest report and a final omnibus report that wrapped up all pending issues at the end of the 271 process.

D. Rate Issues

The Montana Commission conditioned its favorable recommendation on Qwest's application for 271 approval on the conditions summarized in the public interest section of this report. Some of those conditions, such as the costing and price squeeze concern, present unusual circumstances for Montana that need resolution before 271 approval. Specific rate-related issues include:

- 1) A wholesale cost docket was initiated on July 24, 2000 that resulted in a stipulated settlement between the parties on October 12, 2001.⁴ The Commission's *Final Order On Stipulation* conditionally approved this stipulated settlement: "The Commission conditions its approval because this docket is related to Docket No. D2000.5.70, the Qwest Montana section 271 proceeding. Costing and pricing issues that arise in the 271 proceeding are not necessarily resolved by this Stipulation. Qwest concurs that the Stipulation is not all-inclusive and that other costing and pricing issues will remain if the Stipulation is approved." Response to PSC Data Request 13-264(e)." Consistent with this conditional approval, in its *Final*

⁴ See Order No. 6260b of the Montana PSC in Docket No. D2000.6.89, October 12, 2001.

I. INTRODUCTION & BACKGROUND

A. Legal Framework

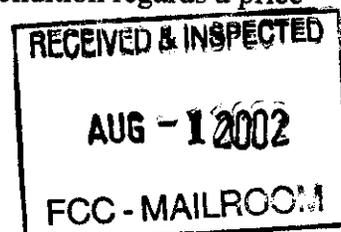
The Federal Communications Commission (“FCC”) must consult with the Montana Public Service Commission (“Montana PSC” or “the Commission”) before making a decision under 47 U.S.C. § 271 to grant Qwest permission to offer certain in-region interLATA services in Montana. The subject of that consultation is verification of Qwest’s compliance with subsection (c) of Section 271 of the Telecommunications Act of 1996. Subsection (c) includes a list of fourteen items known as the “competitive checklist.” In addition, the FCC must consider whether granting Qwest’s request is “consistent with the public interest, convenience, and necessity.”¹

B. Executive Summary

On July 12, 2002, Qwest Communications International (“Qwest”) applied to the FCC for authorization to provide in-region, interLATA service in the state of Montana. Qwest’s application is governed by § 271 of the Communications Act of 1934, as amended, 47 U.S.C. § 271 (the Act). In a public notice issued on July 12, 2002, the FCC requested comment on this application. This is a consultation report to the FCC under 47 U.S.C. § 271 in relation to that application. The report is filed by the Montana PSC.

In this report, the Commission verifies Qwest’s compliance with certain requirements of 47 U.S.C. § 271(c) and recommends that Qwest’s application be approved subject to Qwest’s compliance with Commission decisions in the public interest section of this report. In the public interest section, the Montana Commission explains why it conditioned its approval of Qwest’s application on compliance with certain requirements. The first condition regards a price

¹ 47 U.S.C. § 271(d)(3)(C).



Fundamentally, the Commission's approach to Qwest's application is based on a desire to ensure that Qwest does not engage in behavior that will deter competition within Montana.

B. Applicable Law

Evaluation of the public interest standard in the context of § 271 has produced varying legal standards. The Montana Commission has reviewed the arguments of the state commissions and the FCC and applies the following public interest legal framework to this recommendation.

The public interest analysis is best advanced by the state commission, since the state commission is in a position to know the public interest of its citizens. Public interest means the interests of the retail and wholesale consumers in the state in which long distance entry is being sought, not what is in the interests of a particular party or group of individuals.⁷ Public interest in this application means in the interest of Montana retail and wholesale consumers.

Other states have applied the FCC's three-part test to determine whether the public interest standard has been met.⁸ The three-part test contains the following elements.

First, the FCC determines whether granting the RBOC's application "is consistent with promoting competition in the local and long distance telecommunications markets."⁹ In assessing whether the application would promote competition, the FCC gives substantial deference to the RBOC's compliance with the fourteen-point checklist. If the local market is

⁷ See, Report of State Corporation Commission of the State of Kansas, CC Docket No. 00-217, and page 36.

⁸ Kansas/Oklahoma Order at ¶ 267; see also ¶¶ 281-82; see also Utah Order Docket No. 00-049-08, page 3, Report on the Public Interest, issued February 20, 2002; see also Findings and Recommendation Report of Oregon Commission issued June 3, 2002, in UM 823, page 39.

⁹ Memorandum Opinion and Order, Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, 16 FCC Rcd 6237 ¶ 268 (2001) ("SBC Kansas/Oklahoma Order").

On May 23, 2000, the Montana PSC issued a Notice of Opportunity to Participate and Notice of Commission Action, specifying that the Montana Commission would join with other of Qwest's states in a multi-state effort to develop a factual record and to consider aspects of Section 271 through collaborative workshops. Three separate multi-state endeavors ensued in the 271 proceeding in the Qwest region. In one endeavor 13 states focused on testing Qwest's operations support systems (OSS) by independent entities. An already existing committee, the Regional Oversight Committee (ROC), comprised of members of the Qwest service states, contracted with MTG Consulting to manage the OSS process.

In a second multi-state endeavor, seven states retained an outside facilitator, John Antonuk of Liberty Consulting Group, to conduct workshops designed to establish a record to be filed in each state.³ At the completion of each workshop, the Facilitator submitted to the Commission a report on the issues of the workshop and made recommendations for resolution of unresolved issues. Within each workshop, testimony and evidence was submitted by the parties. Upon issuance of the Facilitator's Report, parties were allowed to respond to the recommended findings, and after the initial comment period the Commission entered a preliminary report on the issues addressed. Comments were taken on the preliminary report, after which the Commission issued a final report. In addition to the workshops, on January 9, 2002, Montana held a CLEC forum to address Montana specific issues that may not have been addressed in the workshops.

A third multi-state collaborative process examined Qwest's performance assurance plan (QPAP). Nine states, including Montana, participated in that process, which was also facilitated by John Antonuk. Subsequent to receiving Antonuk's Report on the QPAP, the Montana PSC

³ Referred to in this Report as Antonuk or the Facilitator.

C. Montana Findings

The issues included in the Commission's *Final Report on Qwest's Compliance With The Public Interest* include the nine raised in the multi-state proceeding and additional issues raised in the Montana proceeding. In its final reports on the 14-point checklist, the Commission set forth conditions on its recommended approval of Qwest's 271 entry bid. Other concerns relating to Qwest's conduct are noted but were not sufficiently timely to rise to the level of a condition of approval.

In its final reports the Commission conditions its eventual 271 recommendation to the FCC on Qwest's implementation of certain practices. One condition requires Qwest to untie its DSL offering from its offerings of resale, loop UNEs or UNE-Ps to provide reverse line sharing. Qwest agreed to untie DSL and UNE-P, but declined otherwise to comply with the Commission's final line sharing report. The Commission finds that to the extent Qwest continues to decline to provide for reverse line sharing, Qwest's 271 entry bid is not in the public interest.¹¹

Second, the Commission's *Performance Assurance Plan (PAP) Final Report* of April 19, 2002 requires Qwest to file a compliant PAP. In a subsequent filing of April 30, 2002 Qwest declines to comply with the Commission's *QPAP Final Report*. After a series of compliance efforts, the Commission acted on Qwest's revisions to its June 18th QPAP compliance filing on July 2, 2002. The Commission finds that Qwest's QPAP is compliant. A copy of the approved QPAP is appended to Qwest's July 3, 2002 SGAT.

¹¹ See Qwest's March 21, 2002 notice updating its SGAT (page 4).

Report On Qwest's Compliance With The Public Interest the Commission conditioned its endorsement of Qwest's 271 interLATA entry bid on Qwest's filing of a sequel cost docket. Qwest filed a sequel cost docket (D2002.7.87) on July 8, 2002 to address remaining costing issues. Qwest also bases certain of its rates in Montana on a benchmarking mechanism using Colorado rates as a guide.⁵

- 2) In its *Final Report On Qwest's Compliance With The Public Interest* the Commission found an unusual circumstance involving a price squeeze. The unusual circumstance involves Qwest's pricing of retail toll service relative to Qwest's intrastate carrier access charge rates.⁶

II. THE PUBLIC INTEREST

A. Overarching Consideration

As a matter of satisfying the public interest it is the Commission's finding that Qwest has not satisfied, but it still has the opportunity to satisfy, two remaining conditions upon which the Commission's approval depends. If not addressed, the price squeeze will disable competitors attempting to compete with Qwest in both toll and local markets in Montana. Absent Qwest's agreement to provide for reverse line sharing, it retains an advantage that inhibits competition.

⁵ Qwest filed its most recent SGAT on July 3, 2002. The SGAT rates are in effect as of July 11, 2002. The SGAT rates include benchmarked rates. The FCC's standard of approval regarding benchmarking is unclear. See, Georgia and Louisiana Order, CC Docket No. 02-35, Released May 15, 2002, paragraphs 23-25, pages 16-17.

⁶ With respect to Qwest's retail rates, the last rate design case was filed in 1996 in D96.12.220. In addition, the last full revenue requirements and rate design case that Qwest filed in Montana was initiated in 1990 in D90.12.86. On March 20, 1997 the Commission issued its Arbitration Decision and Order in the matter of AT&T's petition for arbitration with U S West (Order 5961b, Docket 96.11.200).

approval.¹⁴ This second price squeeze confers on Qwest a clear advantage in its competition with CLECs that seek to compete with Qwest in the provision of both toll and local services. Mitigation can be achieved by way of a revenue requirement and rate design case – one of the conditions upon which this Commission approves of Qwest’s interLATA entry bid.

The date by which this Commission’s consultative report is due (August 1, 2002) and the date (October 1, 2002) by which Qwest will indicate its intent to comply with this Commission’s condition affords the FCC an opportunity to consider this Commission’s price squeeze concern.

Aside from the above noted conditions, the Commission’s *Final Report on the Public Interest* also expresses concern, but does not propose conditions, over certain other practices and behavior.¹⁵ Because of its recent emergence, the Commission could not previously address Qwest’s alleged illegal efforts to re-capture customers that CLECs captured from Qwest.¹⁶ As background, in comments on the Commission’s preliminary public interest report, AT&T expresses concern about Qwest’s pricing of wholesale components. AT&T asserts that it is important to control an ILEC’s ability to discount the retail services, which are composed of those wholesale components.¹⁷ The Commission is seeking penalties in District Court for the illegal manner by which Qwest re-captured customers, by way of “win-back” discounts. The Commission also has concerns about how such efforts may stifle competitive efforts by an infant CLEC industry otherwise bent on competing with Qwest.

¹⁴ In the Final Report see B. Intrastate Access Charges (pages 28-29).

¹⁵ See Final Report at page 49.

¹⁶ Qwest offered “win-back” discounts in Montana to re-capture lost customers. There was no Commission approved tariff for the win-back offering. Qwest has discontinued win-back in Montana.

¹⁷ In discovery, AT&T inquires about Qwest’s win-back efforts (see responses numbered 138, 139 and 140 and, ATT – 15-30).

competitive, as measured by the checklist, then the RBOC's entry into the long distance market should benefit consumers. The second requirement is tangible evidence that the RBOC will not act to close the market to competition after it is authorized to offer long distance service. This requirement is met when a post-entry performance assurance plan has been put in place. The third requirement of the public interest element is the presence of any "unusual circumstances" that would make the RBOC's presence in the long distance market contrary to the public interest.¹⁰

The Montana Commission applies the FCC's three-part test regarding whether the public interest requirement has met. Using these guidelines, the public interest in Montana will be served upon Qwest's mitigation of the above noted price squeeze. Mitigation requires Qwest to initiate a full revenue requirements and rate design case by October 1, 2002, and to comply with Commission direction on reverse line sharing. When Qwest complies with the Commission's direction regarding those two issues, approval of the application will be in the public interest. Without Qwest's compliance in both of those areas, approval of Qwest's application will not be in the public interest. As discussed below, sufficient unusual circumstances exist in Montana to make the recommendation of 271 entry by Qwest unacceptable without first initiating a process that serves to mitigate the above noted price squeeze. Qwest's filing of a full revenue requirements and rate design case, the scope of which will be defined by the Montana Public Service Commission, on or before October 1, 2002 will satisfy the Commission's concern to initiate mitigation measures.

¹⁰Id. at footnote 8.

As for the requirement that there be one or more unaffiliated competing providers of telephone exchange service to residential and business customers, carriers serve both residential and business customers by means of resale, leased UNEs and by means of facility bypass. This is not to say that service is ubiquitously provided by CLECs across Qwest's service area, but that is not a 271 Track A requirement. Also, although CLECs have not garnered much of a share of Qwest's market, there is no market share test in either § 271(c)(1)(A) or by the FCC. In summary, Qwest now has more than one hundred interconnection agreements in Montana; survey results indicate a huge difference between the number of interconnection agreements on file with the Commission and the number of actual active competitors.²⁰ Nevertheless, even a minimal number of active competitors appears to satisfy Track A's requirements.

Conclusion: The Commission finds Qwest satisfies the Track A requirement of the Act.

IV. CHECKLIST COMPLIANCE

Checklist-related commercial performance results for Montana. The Montana PSC concluded that Qwest's recent actual Montana commercial performance data is persuasive evidence that, with a few exceptions, Qwest generally provides the items required by Section 271's 14-point checklist to CLECs in a manner that meets the parity or benchmark standards established by the ROC-OSS collaborative process.²¹ The instances where Qwest's data show either statistically significant disparate retail versus wholesale results or a failure to meet the

²⁰ Page 27 of the Final Report on Track A.

²¹ See Commission's *Report Regarding Qwest's Operation Support Systems, Qwest's Change Management Process, an Unresolved Resale Billing Issue, and Issues Remaining From Previous Reports*, July 9, 2002, and the *Report Regarding Qwest's Montana Commercial Performance Results, Items Related to Checklist Item #11 – Local Number Portability, and Procedure*, March 29, 2002.

Third, the Commission conditions its recommended approval on whether Qwest initiates a sequel to the D2000.6.89 cost docket. Qwest complied with this condition when it filed on July 8, 2002 its Docket 2002.7.87 sequel wholesale cost docket.

Finally, and as discussed in its July 8, 2002 *Final Report on the Public Interest*, the Commission conditions its approval of Qwest's 271 entry request upon Qwest's filing by October 1, 2002 a revenue requirement and rate design case. This condition stems from a price squeeze concern that involves Qwest's retail toll and carrier access charge prices. The relation of Qwest's Montana retail toll rates and its carrier access charge rates in the face of CLECs attempting to enter both the Montana toll and local markets makes for an unusual circumstance that will impede competition. This price squeeze can and must be mitigated. Efforts to do so must be initiated before Qwest is allowed 271 entry.

There are two price squeeze discussions in the Commission's *Final Report on the Public Interest*. The first involves the relation of wholesale loop UNE rates and retail basic exchange service rates and is not the price squeeze upon which the Commission conditions its approval of Qwest's 271 entry bid.¹² The Commission notes, however, that while a large part of Qwest's July 12, 2002 Brief appears focused on this first price squeeze discussion Qwest makes a disingenuous link when it concludes by disagreeing with the Commission's second, retail toll versus carrier access charge, price squeeze concern.¹³ It is this second price squeeze concern, not the first, upon which the Commission conditions its approval of Qwest's 271 entry

¹² See Final Report at pages 8 – 16.

¹³ Compare pages 189 to 191 of Qwest's Brief at pages 189 up to the first full paragraph on page 191 with the first full paragraph that begins on page 191.

The Commission's *Final Report on the Public Interest* also inquires into Touch America's complaint with the FCC.¹⁸ Until the FCC acts on Touch America's complaint, it is unclear whether Qwest must offer associated services for resale, or even if such service offerings are required by the Act.

Conclusion: The Commission supports Qwest's 271 entry bid if Qwest complies with the above conditions.

III. COMPLIANCE WITH TRACK A [§ 271(c)(1)(A)]

An initial section 271 requirement is evidence of competition. To satisfy this requirement Qwest chose to file under Track A. This requirement was one of the multi-state workshop topics addressed by the Facilitator.

To assess Track A compliance, the Commission initiated a separate Montana proceeding to provide an alternative source of market share data. The Commission's separate proceeding, D2001.8.103, stems from Qwest's argument that a survey of market share data is necessary to address Track A or public interest issues raised by the seven states participating in the multi-state 271 process. The Commission's "Notice and Investigation" of August 2, 2001 and the Protective Order of September 13, 2001 in this separate proceeding classified the market share data submitted by the parties confidential unless that information is aggregated across all companies, in which case it would not be covered by the Protective Order. A summary of the aggregate data is appended to the Commission's December 20, 2001 Final Report on Track A.¹⁹

¹⁸ See pages 46-47.

¹⁹ See the Commission's *Final Report On Qwest's Compliance With The Track A Requirements of Section 271*, available at: http://www.libertyconsultinggroup.com/workshop_number_3.htm.