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

APR 16 2003

In the Matter of	)	
	)	
Application by Qwest Communications	)	
International, Inc. for Authorization To	)	WC Docket No. 03-11
Provide In-Region, InterLATA Services in	)	
New Mexico, Oregon and South Dakota	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 2003 **Released:** April 15, 2003

By the Commission: Commissioner Copps concurring and issuing a statement; Commissioner Martin approving in part, concurring in part, and issuing a statement; Commissioner Adelstein issuing a statement.

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I. INTRODUCTION

1. On January 15, 2003, Qwest Communications International, Inc. filed this multi-state application on behalf of itself and its subsidiaries, Qwest Corporation and Qwest LD Corporation and Qwest Communications Corporation (collectively "Qwest") pursuant to section 271 of the Communications Act of 1934, as amended,[1] for authority to provide in-region, interLATA service in New Mexico, Oregon and South Dakota.[2] In this Order, we grant Qwest's

[1] We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as "the Communications Act" or "the Act." *See* 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as "the 1996 Act." *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] *See Application by Qwest Communications International Inc. for Authority to Provide In-Region, InterLATA Services in New Mexico, Oregon, and South Dakota*, WC Docket No. 03-11 (filed Jan. 15, 2003) (Qwest Application).

application for these three states based on our conclusion that Qwest has taken the statutorily required steps to open its local exchange markets in these states to competition.

2. Approval of this application would not have been possible without the extraordinary dedication displayed by the New Mexico Public Regulation Commission ("New Mexico Commission"), the Public Utility Commission of Oregon, ("Oregon Commission"), and the South Dakota Public Utilities Commission ("South Dakota Commission"), (collectively "state commissions" or "commissions of the three application states"). We recognize their outstanding commitment to the section 271 process and commend their hard work in bringing the benefits of competition to consumers in their states.

3. In ruling on Qwest's application, we wish to acknowledge the tremendous efforts of the New Mexico, Oregon and South Dakota Commissions, that were instrumental in Qwest's implementation of the requirements of section 271. These states, as well as others in the Qwest region, also undertook unprecedented steps to pool resources and work collaboratively in addressing section 271 issues. In particular, the Regional Oversight Committee ("ROC"), a group of state regulatory commissions in the Qwest region, including the three states covered by this application, worked together on the design and execution of regional operations support systems ("OSS") testing. In addition, the New Mexico Commission worked with a number of other states in the Multistate Collaborative Process ("MCP") to address other section 271 issues.[3] Moreover, in a number of instances, regulators in these states have been able to build on the work done by their fellow commissioners in other states to address issues such as pricing, for example, in an efficient manner through individual state proceedings. As the Commission has repeatedly recognized, state proceedings demonstrating a commitment to advancing the pro-competitive purposes of the 1996 Act serve a vitally important role in section 271 proceedings.[4]

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[3] The New Mexico Commission joined the six state commissions involved in the MCP (Idaho, Iowa, Montana, North Dakota, Utah, and Wyoming) after the workshops had begun, but competitive LECs in New Mexico were given the opportunity to raise issues related to the first workshop. *See* New Mexico Commission Comments at 6; Qwest Application App. A Tab 1, Declaration of John Badal, paras. 8, 29 (Qwest Badal Decl.); *see also Application of Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd 26303, 26310, para. 14 (*Qwest 9-State Order*) (describing the Multistate Collaborative Process).

[4] *See 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, Memorandum Opinion and Order, 16 FCC Record 17419, 17421, para. 3 (2001) (*Verizon Pennsylvania Order*) *appeal pending*, Z-Tel Communications *v. FCC*, No. 01-1461 (D.C. Cir. filed Oct. 17, 2001); *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, Memorandum Opinion and Order, 16 FCC Rcd 14147, 14149, para. 3 (2001) (*Verizon Connecticut 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*, CC Docket No. 01-9, Memorandum Opinion and Order, 16 FCC Rcd 8988, 8990, para. 2 (2001) (*Verizon Massachusetts Order*) *aff'd sub nom. WorldCom, Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002).

4. The outstanding work of the state commissions in conjunction with Qwest's extensive efforts to open its local exchange network to competition has resulted in competitive entry in each of the application states. Qwest estimates that, as of October 31, 2002, competitive LECs serve approximately 2.9 percent of all lines in New Mexico, including 6163 UNE-loops and 5197 UNE-platform lines.[5] Qwest estimates that, as of October 31, 2002, competitive LECs serve approximately 21.3 percent of all lines in Oregon, including about 52,610 UNE-loops and 50,100 UNE-platform lines.[6] In South Dakota, Qwest estimates that, as of October 31, 2002, competitive LECs serve approximately 29.4 percent of all lines, including 5935 UNE-loops and 16,216 UNE-platform lines.[7]

5. We are confident that the hard work of the state commissions in conjunction with Qwest to ensure that the local exchange markets in New Mexico, Oregon and South Dakota are open to competition will benefit consumers by making increased competition in all telecommunications service markets possible in these states. We are also confident that the state commissions, as they address allegations of past violations of the statute and consider any future problems that may develop, will continue to ensure that Qwest meets its statutory obligations.

II. BACKGROUND

6. In the 1996 amendments to the Communications Act, Congress required that the Bell Operating Companies ("BOCs") demonstrate compliance with certain market-opening requirements contained in section 271 of the Act before providing in-region, interLATA long distance service. Under section 271, Congress requires that the Commission review BOC applications to provide such service in consultation with the affected state and the Attorney General.[8]

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[5] Qwest Application, App. A, Tab 4, Declaration of David L. Teitzel (Qwest Teitzel Decl.) at paras. 55, 63.

[6] *Id.*

[7] *Id.*

[8] The Commission has summarized the relevant statutory framework in prior orders. *See, e.g., Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001); *Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18359-61, paras. 8-11 (2000) (*SWBT Texas 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*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3961-63, paras. 17-20 (1999) (*Bell Atlantic New York Order*), *aff'd, AT&T Corp v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

7. *New Mexico.* The New Mexico Commission independently reviewed the record developed in the MCP; conducted state-specific pricing procedures to establish initial rates for unbundled network elements ("UNEs") and interconnection, and recently modified and approved Qwest's proposed adjustment of core UNE rates using the new Colorado rates as benchmarks; and reviewed, modified, and adopted the Qwest Performance Assurance Plan ("QPAP").[9] The New Mexico Commission recommended that the Commission approve Qwest's application subject to the Commission's determination that Qwest satisfied Track A in New Mexico.[10]

8. *Oregon.* The Oregon Commission conducted a series of workshops open to all participants and issued reports addressing and resolving checklist criteria and issues related to Qwest's compliance with the checklist items. The Oregon Commission also adopted the QPAP, held UNE pricing proceedings to establish initial rates, and subsequently accepted adjusted rates based on the new Colorado rates as benchmarks.[11] The Oregon Commission recommended that the Commission approve Qwest's application to provide in-region, interLATA service.[12]

9. *South Dakota.* The South Dakota Commission implemented procedures allowing for resolution of disputed issues and participated in the ROC collaborative development of performance measurements and standards.[13] The South Dakota Commission participated in the development of the QPAP. Although the South Dakota Commission initially declined to accept some features of Qwest's proposed South Dakota QPAP,[14] it subsequently found Qwest's application to be in the public interest.[15] The South Dakota Commission found that Qwest has met the 14-point checklist and the Track A requirements.[16]

10. The Department of Justice recommends approval of this application, subject to the Commission satisfying itself regarding Qwest's compliance with Track A in New Mexico.[17] Additionally, the Department of Justice finds that facilities-based entry is available to

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[9] New Mexico Commission Comments at 1-2, 7-8, 37-44.

[10] *Id.* at 2-4.

[11] Oregon Commission Comments at 3, 8-9, 13-14; Qwest Application App. A, Tab 28, Declaration of Jerrold L. Thompson paras. 7-28 (Qwest Thompson Oregon Decl.).

[12] Oregon Commission Comments at 19.

[13] South Dakota Commission Comments at 1-8.

[14] *Id.* at 4, 9-11; *see also* section VI.A. (Public Interest) below.

[15] South Dakota Commission Reply at 4.

[16] South Dakota Commission Comments at 16.

[17] Department of Justice Evaluation at 8-9, 11-12. The Department of Justice said that Qwest should clarify its position concerning several OSS complaints of WorldCom and that the Commission should carefully review that response. Department of Justice Evaluation at 8 n.32.

competitors in South Dakota, and that there are not any material obstacles to entry in New Mexico or Oregon.[18]

A. Focus on Primary Issues in Dispute

11. As in recent section 271 orders, we will not repeat here the analytical framework and particular legal showing required to establish compliance with every checklist item.[19] Rather, we rely on the legal and analytical precedent established in prior section 271 orders, and we attach comprehensive appendices containing the statutory framework for evaluating section 271 applications and performance data relevant to this application.[20] Our conclusions in this Order are based on performance data as reported in monthly performance reports reflecting service in the most recent months before filing, September 2002 through January 2003.

12. We begin our analysis of Qwest's application with the threshold question of whether it qualifies for consideration under section 271(c)(1)(A) (Track A). We then discuss checklist item two (unbundled network elements, or UNEs).[21] Next, we address Qwest's

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[18] *Id.* at 8 ("Regarding competition for residential customers, the Department finds that the facilities-based mode of entry is open in South Dakota. Although in New Mexico and Oregon there is less entry to serve residential customers via facilities (including UNE-loops), the Department does not believe there are any material obstacles to such entry in those states created by Qwest.").

[19] *See Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long* Distance), *NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, Memorandum Opinion and Order, 17 FCC Rcd 3300, Apps. B, C, and D (2002) (*Verizon Rhode Island 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, Memorandum Opinion and Order, 16 FCC Rcd 20719, Apps. B, C, and D (2001) (*SBC Arkansas/Missouri Order*); *Verizon Pennsylvania Order*, 16 FCC Rcd 17419, Apps. B and C (2001); *see also* Appendix F (Statutory Requirements).

[20] *See generally* Appendices B (Colorado Performance Data), C (New Mexico Performance Data), D (Oregon Performance Data), E (South Dakota Performance Data) and Appendix F.

[21] We note that, last year, the United States Court of Appeals for the District of Columbia Circuit addressed two relevant Commission decisions, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*) and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Doc. No. 98-147 and Fourth Report and Order in CC Doc. No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*). *USTA v. FCC*, 290 F.3d 415 (D. C. Cir. 2002). The court's decision addressed both our UNE rules and our line sharing rules. On February 20, 2003, the Commission took action to revise its rules concerning incumbent LECs' obligations to make available elements of their networks on an unbundled basis to requesting carriers. *FCC Adopts New Rules For Network Unbundling Obligations Of Incumbent Local Phone Carriers, News Release*, (rel. Feb. 20, 2003) (announcing adoption of an Order on Remand and Further Notice of Proposed Rulemaking in CC Docket No. 01-338, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*) (*Triennial Review News Release*). We note, however, that in determining whether a BOC applicant has satisfied the requirements of section 271, the Commission evaluates an applicant's compliance with (continued....)

compliance with other checklist items: one (interconnection), four (unbundled local loops), five (transport), and seven (E911/Operator Services/Directory Assistance) (OS/DA). The remaining checklist items are discussed briefly, as the Commission found no significant patterns of performance problems with regard to these checklist items, and they received little to no attention from commenting parties. Finally, we discuss whether Qwest's requested authorization to provide in-region, long distance will be carried out in accordance with the requirements of section 272 and whether such authorization is consistent with the public interest.

III. PRIMARY ISSUES IN DISPUTE

A. Compliance With Section 271(c)(1)(A)

13. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, the BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or section 271(c)(1)(B) (Track B).[22] To meet the requirements of Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."[23] In addition, the Act states that "such telephone exchange service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[24] The Commission has concluded that section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers,[25] and that unbundled network elements are a competing provider's "own telephone exchange service facilities" for purposes of section 271(c)(1)(A).[26] Furthermore, the Commission has held that a BOC must show that at least one "competing provider" constitutes "an actual commercial alternative to the BOC,"[27] which a BOC can do by demonstrating that the

(Continued from previous page)
the competitive checklist as developed in the Commission's competition rules and orders in effect at the time the application was filed. *See SWBT Texas Order*, 15 FCC Rcd at 18367-68, para. 28 (2000).

[22] 47 U.S.C. § 271(c)(1); Appendix F at paras. 15-16.

[23] *Id.*

[24] 47 U.S.C. § 271(c)(1)(A).

[25] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20585, para. 85 (1997) (*Ameritech Michigan Order*); *see also Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20633-35, paras. 46-48 (1998) (*BellSouth Second Louisiana Order*).

[26] *Ameritech Michigan Order*, 12 FCC Rcd at 20598, para. 101.

[27] *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8695, para. 14 (1997) (*SWBT Oklahoma Order*).

provider serves "more than a *de minimis* number" of subscribers.[28] Finally, the Commission has held that Track A does not require any particular level of market penetration, and the D.C. Circuit has affirmed that the Act "imposes no volume requirements for satisfaction of Track A."[29]

14. We conclude that Qwest satisfies the requirements of Track A in New Mexico, South Dakota, and Oregon. The New Mexico Commission found that Qwest complied with Track A for business subscribers, but deferred the issue of Qwest's compliance with Track A for New Mexico residential consumers to the FCC.[30] The South Dakota and Oregon Commissions found that Qwest satisfies the requirements of Track A in these states.[31] Qwest relies on interconnection agreements with AT&T Broadband Phone of Oregon, AT&T Corp. (fka TCG-Oregon), Black Hills FiberCom, Brooks Fiber of New Mexico, Cricket Communications, Eastern Oregon Telecom, McLeodUSA, Northern Valley Communications, and Time Warner Telecom of New Mexico in support of its Track A showing for these three states.[32] These interconnection agreements are "binding agreements that have been approved under section 252 specifying the

[28] *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6257, para. 42; *see also Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 78.

[29] *Sprint v. FCC*, 274 F.3d at 553-54; *see also SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) ("Track A does not indicate just how much competition a provider must offer in either the business or residential markets before it is deemed a 'competing' provider.") (*SBC v. FCC*).

[30] Qwest Application App. C, Vol. 1, Tab 19, New Mexico PRC Final Order Regarding Compliance with Outstanding 271 Requirements: SGAT Compliance, Track A, and Public Interest (Qwest New Mexico Commission Final Order) at 46-47, 66, paras. 119-120, 156. The Department of Justice also defers to the Commission's expert judgment in deciding whether Qwest complies with the statute. Department of Justice Evaluation at 10. We reject Touch America's contention that the New Mexico Commission and Department of Justice erred in deferring this issue to this Commission. Touch America Reply at 5. Neither entity is required by the statute to make a Track A finding. Similarly, we reject AT&T's characterization of the Department of Justice Evaluation as suggesting that it would be arbitrary for the Commission to base Track A compliance on a broadband Personal Communications Service (PCS) provider. AT&T Reply at 11-12. The Department of Justice states that the Commission's conclusion on this specialized issue of statutory construction as applied to the record in any particular state, cannot be viewed as predictive of how the Department of Justice might analyze a telecommunications market or determine the market participants in an antitrust matter. The Department of Justice notes that the New Mexico Commission "found 'significant problems' in Qwest's survey methodology yet added that it is difficult to believe that [Leap] is serving in excess of 40,000 New Mexicans without a significant number of those customers engaging in some form of wireline substitution." Department of Justice Evaluation at 9. The Department of Justice did not offer its own opinion of Qwest's survey.

[31] Qwest Teitzel. Decl. at paras. 16-20; Oregon Commission Comments at 9; South Dakota Commission Comments at 4; Qwest Application App. C, Vol. 1, Tab 13, Oregon PUC Workshop 4, Part 2, Findings and Recommendation Report of the Commission and Procedural Ruling (Qwest Oregon PUC Workshop 4 Findings and Recommendation Report) at 38-39; Qwest Application App C, Vol. 1, Tab 6, South Dakota Order Regarding General Terms and Conditions and Track A at 5-7.

[32] Qwest Application, Attach. 5, App. L, Interconnection Agreements – New Mexico.

terms and conditions under which [Qwest] is providing access and interconnection to its network facilities" as required under section 271(c)(1)(A).[33]

15. In New Mexico, we find that Brooks Fiber of New Mexico, McLeodUSA and Time Warner Telecom of New Mexico each serve more than a *de minimis* number of business end users predominantly over their own facilities and represent "actual commercial alternatives" to Qwest.[34] Specifically, Brooks Fiber provides telephone exchange service to business subscribers predominantly through its own facilities and UNE-loops. McLeodUSA provides telephone exchange service to business subscribers predominantly through UNE-loops and UNE platform. Time Warner Telecom of New Mexico provides telephone exchange service to business subscribers predominantly through its own facilities.[35] As we explain further below, we find that Cricket Communications, a PCS provider, serves more than a *de minimis* number of residential users over its own facilities and, for purposes of section 271 compliance, represents an actual commercial alternative to Qwest for residential telephone exchange services.[36] We note that our consideration of Cricket Communications for Track A compliance does not mean that *all* Qwest residential telephone exchange service customers in New Mexico view the Cricket Communications service as a commercial alternative to Qwest's telephone exchange service. Our consideration is limited to the purpose of determining section 271 compliance in this particular application.

16. In Oregon, we find that AT&T Broadband Phone of Oregon, AT&T Corp. (fka TCG-Oregon) and Eastern Oregon Telecom serve more than a *de minimis* number of end users predominantly over their own facilities and represent "actual commercial alternatives" to Qwest.[37] AT&T Broadband Phone of Oregon provides telephone exchange service to residential subscribers predominantly through its own facilities. AT&T Corp. (fka TCG-Oregon) provides service to business subscribers predominantly through UNE platform and UNE-loops. Finally,

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[33] 47 U.S.C. § 271(c)(1)(A).

[34] Qwest Teitzel Decl. at paras. 33-35, 52-55; Qwest Teitzel Decl., Ex. NM-1 (*citing confidential information*); Qwest Teitzel Decl., Ex. NM-4 at 2-3, 6- 8, 15-18.

[35] *Id.* Qwest estimates that competing LECs now serve at least 3.9 percent of access lines in New Mexico. Qwest Teitzel Decl., para. 72.

[36] Because we conclude that Qwest has satisfied Track A through its showing for Cricket Communications, we need not determine whether the other competitive carriers providing residential services Qwest cites serve more than a *de minimis* number of residential subscribers for the purposes of Track A. *See* Department of Justice Evaluation at 9-10; AT&T Comments at 11-15; New Mexico Commission Comments at 19-23; WorldCom Comments at 2-4; Touch America Reply at 3-4 (disputing Qwest's showing of residential resale service and at least one carrier that provides facilities-based service to business customers and resale service to residential customers); Letter from Christopher T. Shenk, Sidley Austin Brown and Wood, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 (filed March 20 2003) at 4-6 (AT&T Mar. 20 *Ex Parte* Letter).

[37] Qwest Teitzel Decl. at paras. 33-35; Qwest Teitzel Decl., Ex. OR-1 (*citing confidential information*); Qwest Teitzel Decl., Ex. OR-4 at 1-4, 27-28.

Eastern Oregon Telecom provides telephone exchange service to residential and business subscribers predominantly through UNE-loops.[38]

17. In South Dakota, we find that Blackhills FiberCom, McLeodUSA, and Northern Valley Communications each serve more than a *de minimis* number of end users predominantly over their own facilities and represent "actual commercial alternatives" to Qwest.[39] Blackhills FiberCom and Northern Valley Communications provide telephone exchange service to residential and business subscribers predominantly through their own facilities. McLeodUSA provides telephone exchange service to residential and business subscribers predominantly through UNE platform and UNE-loops.[40]

1. Broadband PCS Constitutes Telephone Exchange Service For Purposes of Section 271(c)(1)(A)

18. The Commission has previously determined that broadband PCS[41] satisfies the statutory definition of "telephone exchange service" for purposes of section 271(c)(1)(A), and that broadband PCS may form the basis of a Track A finding.[42] In the *BellSouth Second Louisiana Order*, the Commission found that the broadband PCS service at issue there constitutes a telephone exchange service for purposes of Track A, notwithstanding the different technical configuration, service characteristics, and service charges of broadband PCS and wireline service.[43] Similarly, here we find that Cricket Communications' residential broadband PCS offering in New Mexico also is a "telephone exchange service" for purposes of Track A.[44] The Commission recognized in 1998 that broadband PCS services provide both advantages and disadvantages to wireline telephone services. For instance, broadband PCS consumers may be

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[38] *Id.* Qwest estimates that competing LECs now serve approximately 21.3 percent of the access lines in Oregon. Qwest Teitzel Decl., para. 72.

[39] Qwest Teitzel Decl. at paras. 33-35; Qwest Teitzel Decl., Ex. SD-1 (*citing confidential information*); Qwest Teitzel Decl., Ex. SD-4 at 1-16.

[40] *Id.* Qwest estimates that competing LECs now serve approximately 29.4 percent of the access lines in South Dakota. Qwest Teitzel Decl., para. 72.

[41] Broadband PCS refers to mobile telephony service authorized in the 1850-1910 and 1930-1990 MHz bands. 47 C.F.R. § 24.200.

[42] *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20606, 20622-23, paras. 11, 29-30. We reject AT&T's argument that it would arbitrary and unlawful for the Commission to find Track A compliance based on Cricket Wireless Service. AT&T Mar. 20 *Ex Parte* Letter at 4. As AT&T points out, the Act precludes applicants from relying only on cellular wireless. In the *BellSouth Second Louisiana Order*, the Commission concluded that broadband PCS qualifies as a telephone exchange service for purposes of Track A; otherwise Congress would not have needed to create 'carve-out' language for cellular providers. *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20622, para. 29.

[43] *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20622, para. 29.

[44] *Id.* at 20622-23, paras. 29-30.

willing to pay a premium for broadband PCS in light of the benefits of mobility.[45] Here, we reject commenters' arguments that the disadvantages of broadband PCS service relative to traditional wireline service should cause us to exclude consideration of broadband PCS as a telephone exchange service for purposes of section 271(c)(1)(A) compliance.[46] The limitations listed by commenters are not new limitations to broadband PCS and were features of the BellSouth broadband PCS service that the Commission concluded in 1998 constituted a telephone exchange service for purposes of section 271(c)(1)(A).[47] As in the *BellSouth Second Louisiana Order*, while there are certain technical and functional differences between broadband PCS and wireline exchange service, we conclude, based on the current record, that these differences are not sufficient to prevent Cricket's broadband PCS offering from fitting within the definition of telephone exchange service for purposes of section 271. Nor do we see any other reason to reconsider the Commission's prior finding that Track A compliance can be based on a broadband PCS provider.

19. In the *BellSouth Second Louisiana Order*, the Commission determined that to satisfy Track A, a BOC must show that consumers are using broadband PCS in lieu of, and not as a supplement to, their wireline telephone service.[48] The Commission found that relevant evidence could include studies identifying customers that use broadband PCS in lieu of wireline service, as well as marketing efforts by broadband PCS providers designed to induce replacement of wireline service with broadband PCS services.[49] The Commission noted that the persuasive value of any study would depend upon the quality of the study and statistical methodology used in the study.[50] The Commission also indicated that a survey used for this

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[45] *Id.* at 20624, para. 32.

[46] AT&T Comments at 16-18; AT&T Reply at 6; WorldCom Reply at 17; AT&T Mar. 20 *Ex Parte* Letter at 4. We reject AT&T's contention that two services cannot be considered economically meaningful substitutes if there are substantial quality differences between the services. AT&T Reply at 6-7. A service can be described as a bundle of characteristics of which the quality of the service can be one component. In this situation, the price that the consumer is willing to pay for the service will be affected by the quality of the services, as well as other factors. *See generally* Jean Tirole, *Theory of Industrial Organization,*(1992), Chapter 2; B. Curtis Eaton and Richard G. Lipsey, "Product Differentiation," *Handbook of Industrial Organization,* Vol. 1 ed. R. Schmalensee and R.D. Willig, (1990). We reject AT&T's allegation that Leap Wireless does not plan to upgrade its network to Phase II-type E911 service. Leap Wireless' quarterly implementation report indicates that, although Leap is depending upon third party providers to implement aspects of its E911 solution, Leap has installed all necessary upgrades to all of its switches and its switch equipment is ready to support Phase II service. AT&T Comments at 16; Letter from Glenn Umetsu, Senior Vice President – Engineering and Operations, Leap Wireless, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission at 2 (filed February 3, 2003).

[47] *See BellSouth Second Louisiana Order*, 13 FCC Rcd at 20621-24, paras. 28-32.

[48] *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20623-24, paras. 31-32. The Commission recognized that it may be difficult to determine whether a customer subscribes to PCS as a complement to a wireline service or in place of a second line. *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20623, para. 31 n.71.

[49] *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20623-24, paras. 31-32.

purpose should include a question to determine whether the respondent subscribes to a wireline service or should otherwise verify that the subscriber does not have a wireline service.[51]

2. Qwest's Broadband PCS Evidence

20. We find that the evidence submitted by Qwest adequately demonstrates that more than a *de minimis* number of Cricket customers use their service in lieu of wireline telephone service. The record shows that Cricket's marketing efforts stress that its product is a substitute for residential local telephone service. Further, we find that Qwest's survey also demonstrates that Cricket customers use Cricket service in lieu of wireline telephone service. Qwest's evidence is based on a large, random sample in which a proportion of the respondents indicated that they do not have wireline local telephone service in their homes. We find that the number of survey respondents who indicate that they do not have such service is sufficient by itself to demonstrate that Cricket service is a commercial alternative to Qwest customers and that it serves more than a *de minimis* number of consumers.[52]

21. Qwest's Track A showing relies upon examples of Cricket's marketing strategy,[53] a description of similarities between Cricket's broadband PCS service and traditional wireline service, and a survey of Cricket's customers in New Mexico.[54] Cricket Communications is a

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[50] *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20624, para. 32. AT&T is incorrect in its assertion that the Commission indicated in the *BellSouth Second Louisiana Order* that a wireless service can be considered a commercial alternative to wireline local telephone service only if there is established a cross-elasticity of demand between the two services. *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20625, para. 33.

[51] *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20627-28, para. 39.

[52] *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20625-28, paras. 35-39. Thus, we do not need a confidence interval for this question to estimate the number of customers from the population of Cricket customers in New Mexico that do not have a local wireline telephone service. Further, the New Mexico Commission record indicates that the New Mexico Commission witness did not find fault with selection of the sample, the survey size, or the reported confidence intervals. Qwest Application, App. K, Record of New Mexico 271 Proceeding, Vol. 1, Tab. 1276, Staff Exh. 2 - Testimony of Michael S. Ripperger (*Ripperger Testimony*) at 23-24.

[53] The Commission has recognized in other contexts increased substitution between wireless mobile telephony and local telephony service, and that some broadband PCS carriers, and in particular Cricket Communications, have purposefully designed their service packages to compete directly with wireline local telephone services. *See In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (rel. Dec. 13, 2002), para. 21; Federal Communications Commission, Seventh Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services at 32-36 (*Seventh CMRS Competition Report*); Federal Communications Commission, Sixth Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services at 32-34 (*Sixth CMRS Competition Report*). We note that Leap Wireless, Cricket Communications' parent, reports that it has succeeded as a landline substitute, as 26 percent of its customers do not subscribe to any traditional landline phone service at home, and its customers use approximately 1,200 minutes per month, more than triple the industry average for PCS and cellular customers. Letter from Laurie Itkin, Director – Government Affairs, Leap Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-166 at 2 (filed February 25, 2003).

[54] Qwest Teitzel Decl. at paras. 40-51; Qwest Reply at 7-8.

facilities-based broadband PCS provider operating in Albuquerque and Santa Fe.[55] As noted in Leap Wireless' press releases and filings to this Commission, Leap Wireless markets its Cricket service as a "landline replacement."[56] As with residential wireline service, subscribers to Cricket: pay a flat monthly fee for unlimited local calling from its service area in Albuquerque and Santa Fe and for unlimited incoming calls; pay additional per-minute charges for outgoing long distance calls; and may subscribe to vertical features for an additional monthly charge.[57] We note that television spot ads encourage consumers to replace their home phones with Cricket service and that the home web-page for Cricket directly markets this service as a substitute for residential local telephone service with a large print header inviting subscribers to "Get this home phone free."[58] We find that, consistent with the *BellSouth Second Louisiana Order*, this evidence is persuasive in demonstrating that broadband PCS is being used to replace wireline service in New Mexico.[59]

22. In addition to Cricket's marketing materials, Qwest submits the results of a large, random telephone survey of Cricket subscribers in New Mexico conducted by FrederickPolls.[60] We find the survey responses to the direct question of whether the subscriber has wireline telephone exchange service in his or her home sufficient to establish that Cricket is a commercial alternative to Qwest for purposes of Track A compliance and that more than a *de minimis* number of consumers use Cricket service in lieu of local wireline telephone service in New Mexico.

23. Consistent with the framework established in the *BellSouth Second Louisiana Order*, the survey asks directly whether Cricket billpayers have a wireline phone service in their home.[61] Specifically, the survey consisted of two telephone interviews. During the first

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[55] Qwest Teitzel Dec., para. 36.

[56] Qwest Reply at 8; Leap Wireless Press Release, "Leap Reports Results for Third Fiscal Quarter of 2002," November 13, 2002; Leap Wireless Press Release, "Leaping over Landline: Leap Leads Wireline Displacement Trend," June 24, 2002.

[57] Qwest Teitzel Decl., para. 49; http://www.cricketcommunications.com (visited Feb. 27, 2002).

[58] Qwest Reply at 9; Qwest Reply, Tab 1, Gary L. Noble Declaration, Attach. (*Qwest Noble Decl.*); http://www.cricketcommunications.com (visited Feb. 27, 2002).

[59] *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20623-24, para. 31.

[60] Qwest Teitzel Decl., Exh. NM-5, Corrected Direct Testimony of Keith Frederick at 9-10 (*Qwest Frederick Testimony*). In particular, FrederickPolls randomly selected 9,126 telephone numbers from a pool of 110,000 telephone numbers assigned to Cricket in New Mexico. Surveys were completed with 1,941 billpayers in the first interview, and 1,296 billpayers in the follow-up second interview. The survey sought to measure four types of replacement as a result of subscribing to Cricket: (1) an existing Qwest customer terminates all wireline service; (2) a potential Qwest consumer that does not sign up for Qwest; (3) an existing Qwest customer terminates a second or additional line, and (4) an existing Qwest consumer purchases Cricket service instead of a second or additional residential line. Qwest Frederick Testimony at 9-10, 14-15, 20-21.

[61] While the Commission found in the *BellSouth Second Louisiana Order*, that the persuasive value of any study of broadband PCS and wireline service competition would depend upon the quality of the survey and statistical (continued....)

interview, respondents were asked numerous questions about their use of the Cricket service and traditional wireline phone service.[62] For the second interview, FrederickPolls attempted to recontact all of the respondents to the first interview to ask a single follow-up question, "Do you have wireline local telephone service in your home?"[63] This is the question that the Commission said should be asked in any attempt to establish substitution of local wireline service with broadband PCS service in the *BellSouth Second Louisiana Order*.[64]

24. The FrederickPolls survey is based on a randomly-selected sample of Cricket subscribers in New Mexico.[65] We rely upon Qwest's showing that 690 of the 1,296 re-contacted respondents indicated that they did not have wireline local telephone service in their home.[66] We conclude this is sufficient to establish that Cricket is a commercial alternative to Qwest and that more than a *de minimis* number of Cricket customers use Cricket in lieu of local wireline telephone service in New Mexico for purposes of Track A compliance.[67]

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methodology used in the study, it determined that the most persuasive evidence concerning competition between broadband PCS and wireline local telephone service is evidence that customers are actually subscribing to broadband PCS in lieu of wireline service. *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20624, para. 32.

[62] Qwest Teitzel Decl., Exh. NM-5, Attach.

[63] The New Mexico Commission concluded that long-term substitution between Qwest and Cricket could not be established because less than three months passed between the first and second interviews. New Mexico Commission Comments at 28. *See also* AT&T Comments at 21. However, this Commission has not found that survey respondents must answer this type of survey repeatedly or with at least a 3-month hiatus in order to establish long-term substitution. *See BellSouth Second Louisiana Order*, 13 FCC Rcd at 20628, para. 39.

[64] The Commission found, "in order to be persuasive, a survey such as this should also include a question asking whether the respondent subscribes to wireline local exchange service or otherwise verify that the subscriber does not have wireline local exchange service." *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20628, para. 39.

[65] Qwest Teitzel Decl., para. 41; Qwest Teitzel Decl., Exh. NM-6, Rebuttal Testimony of Keith Frederick at 19-20 (*Qwest Frederick Rebuttal Testimony*); Ripperger Testimony at 23. The Commission has recognized that the randomness of any survey will be affected to some extent by the unwillingness of some parties to participate. *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20627, para. 37 n.86.

[66] Qwest Frederick Rebuttal Testimony at 17; Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 Attach. (filed February 13A 2003) (Qwest Feb. 13A *Ex Parte* Letter).

[67] *Id.* We do not need a confidence interval for this question to estimate the number of customers from the population of Cricket customers in New Mexico that do not have a local wireline telephone service, as the number of survey respondents who indicate that they do not have a wireline local telephone service alone is sufficient to demonstrate that the Cricket service is a commercial alternative to Qwest customers and that it serves more than a *de minimis* number of consumers. Further, the New Mexico Commission record indicates that the New Mexico Commission witness did not find fault with selection of the sample, the survey size, or the reported confidence intervals. *See*, Ripperger Testimony at 23-24. We reject the commenters' suggestions that Cricket's future is somewhat uncertain because it has recently been delisted from NASDAQ as there are no indications that Cricket is no longer operating in the market. *See* Qwest Reply at 17; AT&T Comments at 15-16; WorldCom Reply at 17.

25. Commenters' primary criticisms of the survey are as follows: (1) the wording of the questions is such that it is unclear whether the respondents answered as to their actual behavior;[68] (2) there are inconsistent responses to a number of the survey questions;[69] (3) there was no survey pre-test of the questions to ensure that respondents understood the questions and terms used;[70] (4) the follow-up telephone interview affects the randomness of the study;[71] (5) there is no statistical analysis of the survey;[72] and (6) Cricket targets a particular consumer group and is only available in a limited geographic market.[73] We address each of these criticisms in turn.

26. We recognize that the hypothetical wording of the survey questions in the *first* interview hampers our ability to interpret the results of these survey questions and may explain the seemingly inconsistent responses to some of these questions.[74] We find, however, that the follow-up question posed during the second interview session, "Do you have wireline local telephone service in your home?" is a direct, non-hypothetical question.[75] Indeed, the follow-up question is precisely what the Commission suggested would be probative in the *BellSouth Second Louisiana Order*.[76] We find that the response to this particular question is relevant to the issue of whether Cricket is a commercial alternative to Qwest's service and the number of negative responses to this question is relevant to our determination of whether more than a *de*

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[68] AT&T Comments at 19-21; New Mexico Commission Comments at 26-27; WorldCom Comments at 5-6; AT&T Reply at 7-9; Touch America Reply at 5; WorldCom Reply at 16-17; AT&T Mar. 20 *Ex Parte* Letter at 2-3. We reject AT&T's argument that respondents from the first interview should be removed from the second interview pool if a person was confused about the term wireline during the second interview because our determination is based on the second interview and the term wireline was defined during this interview if the respondent was confused about the term. Qwest Frederick Testimony at 11-12.

[69] New Mexico Commission Comments at 26; AT&T Comments at 21-22; WorldCom Comments at 5-6; AT&T Reply at 8-9; AT&T Mar. 20 *Ex Parte* Letter at 1-2.

[70] New Mexico Commission Comments at 27; AT&T Comments at 19; WorldCom Comments at 6; AT&T Reply at 7.

[71] New Mexico Commission Comments at 28. We reject WorldCom's criticism that the survey was small because the opposing testimonies heard during the New Mexico Commission proceeding indicate that the survey was based on a large sample. WorldCom Comments at 6; Ripperger Testimony at 23.

[72] AT&T Reply at 10-11.

[73] AT&T Comments at 7; AT&T Reply at 2, 6, 9-10.

[74] AT&T Reply at 8-9.

[75] The survey defined wireline local telephone service as, "local telephone service that is provided to your home by a wire telephone line. A cordless telephone that can only be used around the house also counts as wireline." Qwest Frederick Testimony, Attach.

[76] *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20628, para. 39.

minimis number of consumers use this service in lieu of Qwest's residential service for purposes of Track A compliance.[77]

27. We reject AT&T's argument that the survey did not establish actual replacement of wireless for wireline service because some Cricket subscribers may not have had Qwest service either because they had not yet established permanent residence or because they are teenagers or young adults.[78] AT&T offers no evidence that Cricket subscribers would forego any telephone exchange service if they did not have Cricket service. In addition, there is no evidence that the respondents can be characterized as young adults, college students, or individuals with credit problems.[79] Fifty-one percent of the respondents placed themselves in the wide age category of 18 to 29 years of age, and more than 45 percent of the respondents put themselves into one of the age categories for 30 years old or older.[80]

28. Although we agree with the New Mexico Commission that Qwest should have pre-tested the survey questions to ensure respondents understood the questions,[81] we find that the follow-up question is straightforward and thus reliable. Furthermore, we reject the criticism that respondents did not understand that the term "wireline" referred to traditional local telephone service.[82] The words "phone service" or "telephone lines" immediately precede or follow the term wireline in all of the questions. There is no reason to believe that the respondents, who are consumers of wireless phone service, are incapable of understanding the difference between wireless phone service, wireline phone service, and a cordless wireline phone. Moreover, the

[77] AT&T argues that the survey does not provide direct evidence that consumers are using Cricket as a replacement to Qwest wireline service or that Cricket customers cancelled their Qwest service. AT&T Comments at 20-21; AT&T Reply at 9; AT&T Apr. 10 *Ex Parte* Letter at 3-4. In the *BellSouth Second Louisiana Order*, the Commission found that "the most persuasive evidence concerning competition between PCS and wireline local telephone service is evidence that customers are actually subscribing to PCS in lieu of wireline service." The fact that a number of respondents answered "no" to the question, "Do you have wireline local telephone service in your home?" is sufficient evidence that some customers use the Cricket service in lieu of wireline local telephone service and are not using the Cricket service merely to complement wireline local telephone service. *BellSouth Second Louisiana Order*, 13 FCC Rcd at 20623-24, 20627-28, paras. 31-32, 39. *See also* Ripperger Testimony before the New Mexico Commission. Ripperger, the Telecommunications Bureau Chief for the New Mexico Commission, testified during the New Mexico Commission proceeding that the purpose of this question was to determine whether the Cricket service is a substitute and not a complement for local wireline service. Ripperger Testimony at 41-42.

[78] AT&T Reply at 9-10.

[79] Qwest Teitzel Decl., Exh. NM-5, Attach. There is no question that would identify the respondents as college students or as individuals with credit problems. *Id.*

[80] Qwest Feb. 13A *Ex Parte* Letter, Attach. The remaining 4 percent of the respondents refused to give their age.

[81] New Mexico Commission Comments at 26-27.

[82] Id. at 26-28; AT&T Comments at 20; WorldCom Comments at 6.

term "wireline" was defined for any respondents that requested a definition during the follow-up telephone interview.[83]

29. We reject the commenters' argument that the follow-up telephone interview affects the randomness of the sample. The respondents to the first telephone interview were randomly selected from the block of numbers assigned to Cricket, and FrederickPolls in its follow-up interview attempted to interview only those respondents that participated in the first telephone interview.[84] This method does not necessarily affect the randomness of the survey since this same methodology is used to track group of individuals over time in longitudinal or panel data studies.[85]

30. We similarly reject AT&T's contention that there is no statistical analysis in the study data.[86] The materials submitted by Qwest include estimates of statistical significance for a number of the survey responses.[87] Moreover, as noted above, there is no need to extrapolate from the survey results to the larger population of Cricket customers; we find that the survey results from the second interview themselves establish a sufficient number of individuals to satisfy Track A requirements. In this respect, the survey conducted by FrederickPolls is significantly different than the survey proffered by BellSouth in the *Louisiana II* proceeding. As noted above the absence of a confidence level for the survey question on whether the respondent has a residential wireline telephone does not alter our conclusion that Qwest has shown that Cricket provides a competitive alternative in the residential market. Although a confidence level would enable us to extrapolate from the survey results to estimate the total number of Cricket customers in New Mexico that do not have local wireline telephone service, this level of analysis is not necessary to show Track A compliance because the actual results of the survey indicate that more than a *de minimis* number of customers use Cricket in lieu of local wireline telephone service.

31. Finally, we disagree with AT&T's argument that Qwest cannot satisfy the requirements of Track A with a broadband PCS service because it is available only in a limited

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[83] Wireline local telephone service was defined as, "local telephone service that is provided to your home by a wire telephone line. A cordless telephone that can only be used around the house also counts as wireline." Qwest Frederick Testimony, Attach.; Qwest New Mexico Commission Final Order at 64, para. 153. Similarly, we agree with the New Mexico Commission that Qwest has shown that respondents are likely to be residential customers because each relevant question refers to the respondent's home.

[84] New Mexico Commission Comments at 28; AT&T Comments at 21.

[85] *See generally* Raymond J. Jenson, *Statistical Survey Techniques*, 1978 at 413-417.

[86] AT&T Reply at 10-11.

[87] The New Mexico Commission record indicates that much of the New Mexico Commission record focused on the survey design, particularly the phrasing of the questions rather than the statistical analysis of the data. *See, e.g.*, Qwest New Mexico Commission Final Order at 60-67, paras. 149-157. The New Mexico Commission record also indicates that the New Mexico Commission's witness did not find fault with the selection of the sample, the survey size, and the reported confidence intervals. Ripperger Testimony at 24-46.

geographic market.[88] Our consideration of Cricket Communications for Track A compliance is not a conclusion that *all* Qwest residential telephone exchange service consumers in New Mexico view Cricket service as a commercial alternative to Qwest's telephone exchange service.[89] Instead, our analysis considers only whether Cricket is a commercial alternative to Qwest's residential service for some consumers and whether more than a *de minimis* number of consumers use Cricket service in lieu of Qwest's residential service. The Commission has never required a qualifying carrier for our Track A analysis to be widely available within a state.[90] In fact, many qualifying carriers that we have relied upon in prior section 271 approvals have not been widely available in a state. We note, however, that Cricket operates in the cities of Albuquerque and Santa Fe, which are major population centers in New Mexico; and 28 percent of the New Mexico population live within these cities' limits.[91] Furthermore, we reject commenters' unsubstantiated contention that Cricket cannot be a commercial alternative for Qwest's wireline service because Cricket targets a niche population.[92] The Commission has never found that for a competitor to be considered a commercial alternative it must be viewed as an alternative by the "vast majority of customers."[93] Therefore, based on the entirety of the record in this proceeding, we find that Cricket is an actual commercial alternative to Qwest's residential telephone service in New Mexico, and that Cricket provides service to more than a *de minimis* number of residential subscribers in New Mexico for purposes of establishing Track A compliance under section 271.[94] We note that our consideration of Cricket Communications for Track A compliance is not a consideration of whether *all* New Mexico Bell residential telephone exchange service consumers view the Cricket service as a commercial alternative to Qwest's telephone exchange service. Our consideration is limited for the purposes of section 271 compliance.

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[88] AT&T Comments at 7; AT&T Reply at 6.

[89] Our conclusion that Cricket Communications serves more than a *de minimis* number of customers and is an actual commercial alternative to Qwest for some residential telephone exchange subscribers is sufficient for assessing compliance with section 271.

[90] Qwest Reply at 15. *See, e.g., Ameritech Michigan Order*, 12 FCC Rcd at 20584-85, paras. 76-77.

[91] U.S Census Bureau, American Factfinder, 2000 Census, Geographic Comparison Table for New Mexico. http://www.factfinder.census.gov (Feb. 27, 2002).

[92] AT&T Comments at 16; AT&T Reply at 9-10; WorldCom Reply at 18.

[93] AT&T Comments at 16.

[94] We reject WorldCom's contention that Cricket cannot be considered an actual provider of services because Leap Wireless, its parent, has been delisted from NASDAQ. AT&T Reply at 6; WorldCom Reply at 17-18. There is no evidence that Cricket has ceased accepting subscribers to its service. Leap Wireless announced in August 2002 that it was in restructuring discussions with creditors. On April 13, 2003, Leap, Cricket and substantially all of their subsidiaries filed petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code. *See* http://www.leapwireless.com/gindex.html. Leap stated in a press release on April 14th that while the company is reorganizing, daily operations at the company will continue, Cricket stores will remain open, and network service will not be interrupted. Leap stated that it did not expect any organizational changes or reduction in force as a result of its filing for reorganization.

3. Other Issues

32. Finally, we reject the argument put forth by AT&T, Sprint and WorldCom that Qwest should fail Track A in either Oregon or New Mexico because only a small percentage of access lines are currently served by competing LECs.[95] As we have noted in previous section 271 orders, Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance.[96] And, as stated above, we find that there is an actual commercial alternative in each of the three states serving more than a *de minimis* number of customers.

B. Checklist Item 2 –Unbundled Network Elements

33. Checklist item 2 of section 271 states that a BOC must provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of the Act."[97] Based on the evidence in the record, we conclude, as did the state commissions, that Qwest has satisfied the requirements of checklist item 2.

34. In this section, we address aspects of this checklist item that raised significant issues concerning whether Qwest's performance demonstrates compliance with the Act: (1) Operations Support Systems (OSS); (2) provisioning of UNE combinations; and (3) UNE pricing. Aside from OSS, UNEs that Qwest must make available under section 251(c)(3) are listed as separate items on the competitive checklist, and are addressed below under other checklist items, as are any provisioning issues that may be in dispute.[98]

1. Operations Support Systems

35. Under checklist item 2, a BOC must demonstrate that it provides nondiscriminatory access to the five OSS functions: (1) pre-ordering; (2) ordering; (3) provisioning; (4) maintenance and repair; and (5) billing.[99] In addition, a BOC must show that it provides nondiscriminatory access to UNEs and that it has an adequate change management process in place to accommodate changes made to its systems.[100] Based on the evidence in the

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[95] AT&T Comments at 6; Sprint Comments at 9; WorldCom Comments at 1-2. Sprint contests the number of lines that Qwest attributes to it. Sprint Comments at 10-11. Our Track A analysis does not rely on the lines Qwest attributes to Sprint.

[96] *See, e.g., Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77; *Sprint v. FCC*, 274 F.3d at 553-54.

[97] 47 U.S.C. § 271(c)(2)(B)(ii).

[98] 47 U.S.C. § 271(c)(2)(B). For example, unbundled loops, transport and switching are listed separately as checklist items 4, 5, and 6.

[99] *See Qwest 9-State Order*, 17 FCC Rcd at 26320, para. 34 (2002); *Bell Atlantic New York Order*, 15 FCC Rcd at 3989, para. 82. The Commission has defined OSS as the various systems, databases, and personnel used by incumbent LECs to provide services to their customers. *See SWBT Texas Order*, 15 FCC Rcd at18396-97, para. 92.

[100] *See Qwest 9-State Order*, 17 FCC Rcd at 26320, para. 34 (2002); *Bell Atlantic New York Order*, 15 FCC Rcd at 3999, para. 102 and n.277 (citations omitted).

record, we find, as did the state commissions, that Qwest provides nondiscriminatory access to its OSS in the application states.[101] Consistent with prior Commission orders, we do not address each OSS element in detail where our review of the record satisfies us there is little or no dispute that Qwest meets the nondiscrimination requirements.[102] First, we discuss the relevance of Qwest's regionwide OSS. Second, we focus our discussion on those issues in controversy, which in this instance primarily involve certain elements of Qwest's pre-ordering, ordering, maintenance and repair, wholesale billing, and change management practices.

a. Relevance of Qwest's Regionwide OSS

36. Consistent with our precedent, Qwest relies in this application on evidence concerning its regionwide OSS.[103] Specifically, Qwest asserts that its OSS in the three application states is the same as its OSS in the entire 13-state region that participated in the ROC test. The 13 participating states in Qwest's local service region initiated a collaborative process to design an overall plan for ensuring that Qwest's OSS and related databases and personnel are available to competing LECs in an open and nondiscriminatory manner.[104] As discussed in the *Qwest 9-State Order*, to support its claim that its OSS is the same across all states, Qwest relies on the comprehensive KPMG test.[105] KPMG, in addition to administering the overall test, performed a regional differences assessment (RDA), which showed that Qwest's ordering, provisioning, maintenance and repair, and competing LEC relationship management and infrastructure are materially consistent across the region.[106]

37. Where Qwest provides evidence that a particular system that was reviewed and approved in one of the nine states where Qwest received section 271 approval is also used in the

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[101] *See* New Mexico Commission Comments at 35; Oregon Commission Comments at 11; South Dakota Commission Comments at 4. Furthermore, in its Evaluation, the Department of Justice concludes that Qwest does not create any material obstacles to competitive entry serving business or residential customers in the application states. Department of Justice Evaluation at 8. However, we also note that in its Evaluation, the Department of Justice mentioned allegations made by WorldCom that do not directly contradict evidence on which the Commission relied in approving Qwest's prior application, but do implicate some of the additional assurances that Qwest had made in support of its prior application. Department of Justice Evaluation at 8 n.32. The Department of Justice noted that Qwest should clarify several of its positions and the Commission should review Qwest's responses. Department of Justice Evaluation at 8 n.32. *See* III.B.1.b., para. 39 and III.B.1.f. para. 60-61 below.

[102] *See Verizon Connecticut Order*, 16 FCC Rcd at 14151, para. 9. We note that the City of Portland asserts that Qwest's refusal to interconnect with the City of Portland, despite its existing approved interconnection agreement with Qwest, is in violation of checklist items 1, 2, 4, and 5. *See* City of Portland Comments at 4-7. This issue is discussed fully below under Checklist Item 1 – Interconnection.

[103] *See Qwest 9-State Order*, 17 FCC Rcd at 26321, para. 35 (2002).

[104] Qwest Notarianni/Doherty Decl., para. 19.

[105] *See Qwest 9-State Order*, 17 FCC Rcd at 26321, para. 36 (2002).

[106] *Id.*