

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

In the Matter of
Qwest Communications International Inc.
and US WEST, Inc.
Applications for Transfer of Control of
Domestic and International Sections 214 and
310 Authorizations and Application to
Transfer Control of a Submarine Cable
Landing License
CC Docket No. 99-272

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 2000

Released: March 10, 2000

By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part, and
issuing a statement.

TABLE OF CONTENTS

Table with 2 columns: Section/Paragraph and Paragraph. Includes sections like INTRODUCTION AND SUMMARY, PUBLIC INTEREST FRAMEWORK, ANALYSIS OF PUBLIC INTEREST HARMS, and Qwest's Affiliation with Advanced Radio Telecom Corporation.

2.	BellSouth’s Interest in Qwest	38
F.	Public Interest Effects Due to Vertical Aspects of the Merger.....	40
G.	International Services	47
H.	Submarine Cable Landing License	52
IV.	MERGER-SPECIFIC PUBLIC INTEREST BENEFITS	56
V.	OTHER ISSUES.....	63
VI.	ORDERING CLAUSES	64

APPENDIX A – LIST OF COMMENTERS

I. INTRODUCTION AND SUMMARY

1. In this Order, we consider the applications filed by Qwest Communications International Inc. (Qwest) and US WEST, Inc. (US WEST), pursuant to sections 214 and 310 of the Communications Act of 1934, as amended (the Act), to transfer control of licenses and lines.¹ Before we can grant their applications, Qwest and US WEST (the Applicants) must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity.² In addition to these applications, the Applicants submitted a divestiture plan representing their commitment to comply with section 271 of the Act, which would require Qwest, on or before the date of merger, to cease providing interLATA services within the US WEST region until such time as the Commission finds that the merged entity has complied with section 271.³

¹ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from US WEST, Inc., Transferor, to Qwest Communications International Inc., Transferee*, CC Docket No. 99-272, filed August 19, 1999 (Applications). 47 U.S.C. §§ 214, 310. The section 310 applications are filed pursuant to 47 C.F.R. §§ 5.5, 5.55, 22.137, 24.439(b)(2), 90.153, 101.53. The section 214 applications are filed pursuant to 47 C.F.R. §§ 63.01, 63.18(e)(3). Applications at 1 n. 3.

² See 47 U.S.C. §§ 214(a), 310(d). See also *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14716, at para. 1 (1999) (*SBC/Ameritech Order*); *In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18026-27, 18030-32 at paras. 1, 8-10 (1998) (*WorldCom/MCI Order*); *In the Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation, and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987, 20000-04 at paras. 2, 29-32 (1997) (*Bell Atlantic/NYNEX*).

³ 47 U.S.C. § 271. Section 271(a) states that “[n]either a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.” There are several exceptions to this prohibition. Section 271(b)(1) allows a Bell Operating Company to “provide interLATA services originating in any of its in-region States . . . if the Commission approves the application of such company (continued....)

2. We conclude that approval of the applications to transfer control of Commission licenses and lines from US WEST to Qwest would serve the public interest, *provided that* the Applicants' proposed divestiture results in a merger that complies with section 271. We identify two merger-specific public interest benefits. First, the merger creates powerful new incentives for US WEST to honor the obligations set forth in section 251 of the Communications Act, including interconnection obligations with local competitors and the additional obligations of incumbent local exchange carriers (incumbent LECs) to provide access to unbundled network elements, resale of telecommunications services and collocation.⁴ The merged entity will have a greater incentive than the pre-merger US WEST to satisfy section 251 so that it can comply with section 271 and re-enter the in-region long distance market and serve Qwest's national corporate customers that require services in the US WEST region. Second, we believe the merger will serve the public interest by promoting the goals of section 706 in the 1996 Act, to encourage the deployment of advanced telecommunications services.⁵

3. We find that, in order to comply with section 271, the Applicants must completely divest Qwest's interLATA business originating in the US WEST region prior to closing the merger.⁶ We require that prior to closing the merger, the Applicants must submit a full report identifying the buyer⁷ of the divested businesses; details on any and all activities provided by the merged entity on behalf of the buyer; the term sheets; and the contract of sale, including any agreements related to the support services. We specifically note that Applicants must also provide information about any relationship between the Applicants and the buyer of the divested assets that do not involve the provision of support services, including but not limited to any joint or cooperative marketing or sourcing arrangements.⁸ A senior Qwest executive must certify under oath that the information in the divestiture report is true and accurate.⁹ We will then place

(Continued from previous page) _____

for such State under subsection (d)(3)." 47 U.S.C. 271(b)(1). To date US WEST has not obtained such authority in any of its in-region states.

⁴ 47 U.S.C. § 251.

⁵ See Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

⁶ These divestitures include Qwest's in-region interLATA customers, as well as any ownership interest above the 10 percent equity interest permitted by section 3 of the Act that the Applicants may have in any other company providing interLATA service within the US WEST region, including, but not limited to, Advanced Radio Telecom Corporation and Apex Global Internet Services, Inc.

⁷ The divested businesses may be sold to more than one buyer. However in this Order, we generally refer to a single "buyer."

⁸ We also request information about on-going business concerns that may not involve the buyer *per se* but may raise section 271 issues, including but not limited to the Applicants' post-divestiture use of in-region Internet backbone. See, e.g., MCI Worldcom Comments at 3, 6-7; Allegiance Reply Comments at 5.

⁹ We expect the Applicants to be both truthful and forthcoming in responding to any Commission request for information deemed necessary to review the divestiture plan. See 47 C.F.R. § 1.17 requiring truthful written statements and responses to Commission inquiries and correspondence ("No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other (continued....)

the report on public notice and invite all interested parties to comment. The divestiture report must be complete and all relevant information we request herein regarding the divestiture must be submitted before the notice and comment period may begin. The Commission shall review the submissions and comments and, no later than 45 days after the public comment period closes, issue an order stating whether the proposed divestiture and associated business relationships with the buyer results in a merger that complies with section 271.¹⁰ Therefore, the licenses and lines will not be transferred until the full Commission determines that the divestiture would result in a merger that satisfies section 271 and until any such divestiture has been consummated.

A. Background

4. Qwest and US WEST executed an “Agreement and Plan of Merger” on July 18, 1999, pursuant to which US WEST would merge with and into Qwest.¹¹ On August 19, 1999, the Applicants filed applications with the Commission for the transfer of control of certain licenses affected by the proposed merger of the two companies (Applications).¹² US WEST holds section 310 radio authorizations and section 214 authorizations.¹³ US WEST also holds a submarine cable landing license pursuant to sections 34 through 39 of the Submarine Cable Act.¹⁴

5. Qwest is a Delaware corporation with its principal place of business in Denver, Colorado. Qwest operates as a non-dominant carrier providing interstate and international telecommunications services pursuant to authority granted under section 214 of the Act. More specifically, Qwest provides facilities-based multimedia communications services, including

(Continued from previous page) _____

written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.”).

¹⁰ If we find that the report is not complete, we shall extend the 45 day review period by the number of days it takes the Applicants to provide complete and relevant information.

¹¹ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from US WEST, Inc., Transferor, to Qwest Communications International Inc., Transferee*, CC Docket No. 99-272, filed August 19, 1999 (Applications). The Applications include FCC Forms 603, 703, and 159, as well as separate applications for authority to transfer authorizations pursuant to Section 214 of the Communications Act, as amended, 47 U.S.C. § 214, and Section 63.18 of the Commission’s Rules, 47 C.F.R. § 63.18. Each of the Applications includes a description of the transaction and exhibits listing the authorizations to be assigned or transferred. Unless otherwise indicated, citations herein to the Applications will include those statements filed with the Applications pursuant to Section 214 and Part 63.

¹² Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the Applicants were required to file a pre-merger notification with the Department of Justice Antitrust Division and the Federal Trade Commission. The Department of Justice determined it would not challenge the proposed merger. *See* Letter from Peter A. Rohrbach, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC, Jan. 19, 1999.

¹³ US WEST’s section 310 radio licenses include microwave, rural radio, PCS, business radio, telephone maintenance radio, experimental, and local multipoint distribution service radio licenses. Applications at 7.

¹⁴ An Act related to the Landing and Operating of Submarine Cables in the United States, codified at 47 U.S.C. §§ 34-39.

bulk private line services to other communications providers, including Internet service providers and other data service companies. Qwest also provides Internet Protocol-enabled services such as Internet access, collocation and remote access, as well as a full range of retail voice, data, video and related services. Qwest also operates a construction services business that, among other things, built the Qwest Network, a nationwide interexchange fiber optic network.¹⁵

6. US WEST is a Delaware corporation with its principal place of business in Denver, Colorado. US WEST, one of the original Regional Bell Operating Companies (BOCs) created under the Modification of Final Judgment (MFJ),¹⁶ provides through subsidiaries communications services to approximately 25 million customers within 14 western and midwestern states (the US WEST region).¹⁷ The company's primary products and services include local telephone services; toll telephone services within LATAs; operator services; enhanced services; high-speed data networking, including Internet access and xDSL services, broadband PCS; print and electronic directories; and video services in limited markets.

7. Through its subsidiaries US WEST provides interstate and international telecommunications services pursuant to authority under section 214 of the Act. Because of the restriction in section 271, the US WEST units may not provide in-region interLATA services until the Commission determines that US WEST has satisfied the requirements of section 271.

8. On September 1, 1999, the Common Carrier Bureau released a Public Notice seeking comment on the Applications.¹⁸ Several parties filed comments and petitions to deny.¹⁹ On October 18, 1999, several parties, including the Applicants, filed reply comments. As part of their reply comments, the Applicants filed a divestiture plan. Given its importance, the Bureau issued a Public Notice seeking comment on this plan.²⁰ Four parties submitted comments in response to this Public Notice.²¹ On November 3, 1999, Commission staff requested additional

¹⁵ Applications at 5 - 6.

¹⁶ *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982) *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Western Elec.*, Civ. Action No. 82-0192 (D.D.C. Apr. 11, 1996) (terminating the MFJ as of Feb. 8, 1996).

¹⁷ The fourteen states are Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

¹⁸ *See Qwest Communications International Inc. and US West, Inc. seek FCC Consent for a Proposed Transfer of Control*, CC Docket No. 99-272, Public Notice (rel. Sep. 1, 1999).

¹⁹ *See Appendix* for a complete list of commenters.

²⁰ *See Pleading Cycle Established for Comments on Qwest Communications International, Inc. and US West, Inc.'s Proposed Divestiture Plans*, CC Docket No. 99-272, DA 99-2228 Public Notice (rel. Oct. 19, 1999).

²¹ Allegiance Comments, Oct. 26, 1999 (Allegiance Divestiture Plan Comments); AT&T Further Comments, Oct. 26, 1999 (AT&T Divestiture Plan Comments); Comments of McLeod, Oct. 26, 1999 (McLeod Divestiture Plan Comments); MCI Worldcom, Inc.'s Comments Regarding the Qwest/US WEST Proposed Divestiture Plan, Oct. 26, 1999 (MCI Worldcom Divestiture Comments).

information from the Applicants to address deficiencies in the Application.²² The record was completed on November 24, 1999, when Qwest and US WEST separately submitted their responses to the staff's information request pursuant to a protective order.²³

II. PUBLIC INTEREST FRAMEWORK

9. Before the Commission can approve the transfer of control of licenses and lines in connection with a proposed merger, sections 214(a) and 310(d) of the Act require the Commission to find that the proposed transfers serve the public interest.²⁴ The Communications Act's public interest standard requires us to weigh potential public interest harms and benefits, including possible competitive effects of the proposed transfers and the effect of the merger on the broader aims of the Communications Act and federal communications policy.²⁵ These aims include, among other things, implementing Congress' pro-competitive, de-regulatory national policy framework designed to open all communications markets to competition and accelerating private sector deployment of advanced services.²⁶ Applicants bear the burden of proving, by a preponderance of the evidence, that the transaction, on balance, serves the public interest.²⁷

²² See Request for Information and Documents, Nov. 3, 1999). Staff made the request to correct deficiencies it discovered in the Applications. Commenters also argued that the deficiencies resulted in the Applicants' failure to meet their burden of proof. Covad Comment at 1-9; McLeod Petition to Deny at 4-10. See also AT&T Comments at 4-15; Reply Comments of NextLink Communications, Inc., Advanced Telcom Group, Inc., GST Telecom, Inc., and Firstworld Communications, Inc., Oct. 18 (NextLink Joint Reply Comments) at 3. On November 17, 1999, the Common Carrier Bureau adopted a protective order to afford adequate protection to any confidential or proprietary documents submitted by Qwest and US WEST. *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from US WEST, Inc., Transferor, to Qwest Communications International Inc., Transferee*, CC Docket No. 99-272, Order Adopting Protective Order, DA 99-2546 (Nov. 17, 1999) (Protective Order).

²³ In response to staff requests, the Applicants filed additional information on November 24, 1999, December 22, 1999, and on February 10, 2000. Letter from Dan L. Poole, Counsel for US WEST, to Magalie Roman Salas, Secretary, FCC, Dec. 22, 1999; Qwest Communications International, Inc., Response to Staff Request for Information and Documents, redacted version, CC Docket No. 99-272, (Nov. 24, 1999) (Qwest Response to Staff) at 7; and Letter from Eric DeSilva, Wiley, Rein and Fielding, to Margaret Egler, Common Carrier Bureau, Feb. 10, 2000; see also Protective Order.

²⁴ 47 U.S.C. §§ 214(a), 310(d); see also *WorldCom/MCI Order*, 13 FCC Rcd at 18,030-35 paras. 8-14 (1998). As we have noted in other mergers, the Commission may attach conditions to the transfer of authorizations or licenses to ensure the transaction serves the public interest.

²⁵ See 47 U.S.C. §§ 214(c), 303(r), *WorldCom-MCI Order*, 13 FCC Rcd at 18,030-31 para. 9.

²⁶ See, e.g., *WorldCom/MCI Order*, 13 FCC Rcd at 18,030-31, para. 9; 47 U.S.C. §§ 254, 259, 332(c)(7); Preamble to Pub.L. No. 104-104, 110 Stat. 56 (1996).

²⁷ *WorldCom-MCI Order* 13 FCC Rcd at 18,031 para. 10; *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3169-70, para. 15 (Feb. 18, 1999) (*AT&T/TCI Order*).

10. To determine whether a license transfer serves the public interest, the Commission follows a four-part process. We ask: (1) whether the merger would violate the Communications Act; (2) whether the merger would violate Commission rules; (3) whether the merger would frustrate the Commission's ability to enforce the Communications Act or substantially impair its efforts to achieve the goals of the Act; and (4) whether affirmative public interest benefits would be realized that would not result but for the merger.²⁸

III. ANALYSIS OF PUBLIC INTEREST HARMS

A. Section 271

11. As an initial matter, we first consider whether this proposed transaction would result in a violation of the Communications Act. Qwest, which currently provides interLATA services within the US WEST 14-state region, would become an affiliate of a BOC²⁹ as a result of the merger. Thus, unless Qwest ceases provisioning such services, consummation of the merger would violate section 271(a) restrictions which prohibit BOCs or their affiliates from providing interLATA services originating in the BOC's operating region, absent the Commission's approval.³⁰

12. In light of the prohibition in section 271(a), the Application stated that "Qwest will discontinue providing prohibited interLATA services in US WEST's 14-state region as of the merger closing."³¹ Several commenters argued, however, that the Commission lacked sufficient information on which to determine whether the merged company would comply with section 271(a).³² In response, the Applicants submitted a divestiture plan, outlining their plans for avoiding a violation of section 271(a).³³

13. The seminal order interpreting what it means to "provide" interLATA services for purposes of section 271 is *AT&T v. Ameritech*, which was affirmed by the Court of Appeals in

²⁸ *SBC/Ameritech Order*, 14 FCC Rcd at 14737, para. 48.

²⁹ Through section 271, Congress made the BOCs' authority to provide in-region interLATA services contingent upon the BOC opening its local markets to competition by, for example, "providing access and interconnection" to local competitors. *See US WEST v. FCC*, 177 F.3d 1057, 1060 (D.C. Cir. 1999), *cert. denied*, No. 99-869 (Feb. 28, 2000).

³⁰ 47 U.S.C. § 271(a). Section 271(b)(3) allows a BOC or any of its affiliates to "provide incidental interLATA services (as defined in subsection (g))." 47 U.S.C. § 271(b)(3). Section 271(f) provides an exception for previously authorized activities. *See* 47 U.S.C. § 271(f). *See also*, MCI WorldCom Comments at 5.

³¹ Applicants' Reply Comments at 30; Applications at 11, 13-14.

³² *See, e.g.*, Covad Comments at 1-9; MCI WorldCom, Comments at 3-6; McLeod Petition to Deny at 33-40.

³³ *See* Applicants' Reply Comments, Appendix C (Divestiture Plan).

US WEST v. FCC.³⁴ In that case, AT&T challenged agreements between Qwest and US WEST, and Qwest and Ameritech.³⁵ Pursuant to these agreements, US WEST and Ameritech agreed to provide certain services to Qwest, including marketing of Qwest's interLATA telecommunications services to US WEST's and Ameritech's presubscribed local and intraLATA toll customers.³⁶ The Commission determined that this arrangement constituted provision of interLATA service by US WEST and Ameritech because the package permitted the BOCs a premature entry into the long distance market by allowing them to accumulate an entrenched base of full-service customers before receiving section 271 authority, thereby undermining the incentive Congress created in section 271.³⁷ The Commission was particularly concerned that the BOCs' involvement in the long distance market would enable them to obtain competitive advantages, thereby reducing their incentive to open their local markets to competition.³⁸ In examining whether the BOCs' involvement reduced their market-opening incentives, we did not focus on any one particular activity but balanced several factors including the nature and extent of the business relationships at issue.³⁹ We determined that the appropriate review was to look at the "totality of [the BOC's] involvement," rather than any one activity.⁴⁰ In affirming the Commission's order, the Court of Appeals for the District of Columbia Circuit that the FCC's reading of 'provide' to include the BOCs' actions . . . appears clearly reasonable in the specific context of § 271."⁴¹

B. The Divestiture Plan

14. We now consider the Applicants' divestiture plan in light of *AT&T v. Ameritech*. The Applicants maintain that the divestiture plan has "two over-arching principles:

³⁴ *In the Matter of AT&T Corporation, et al., v. Ameritech Corporation and Qwest Communications Corporation; AT&T Corporation, et al., v. US WEST Communications and Qwest Communications Corporation; McLeodUSA Telecommunications Services, Inc v. US WEST, Inc.*, 13 FCC Rcd 21438 (1998) (*AT&T v. Ameritech*) *aff'd sub nom. U.S. WEST v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999), *cert. denied*, (Feb. 28, 2000) (No. 99-869). The Common Carrier Bureau applied the standard articulated by the Commission in *AT&T v. Ameritech* in a different factual setting, *AT&T v. BellSouth*, and concluded that BellSouth's offering of a pre-paid calling card did not violate section 271. See *AT&T Corp., v. BellSouth Corporation, and its carrier subsidiaries and affiliates, including (but not limited to) BellSouth Long Distance, Inc., and BellSouth Telecommunications, Inc.*, 14 FCC Rcd 8515, at 8526, para. 21, 22 File No. EAD-99-001, (rel. Mar. 30, 1999) (Com.Car.Bur.1999), *application for review pending*.

³⁵ *AT&T v. Ameritech*, 13 FCC Rcd at 21465, para. 37.

³⁶ *Id.* at 21466, 21474, para. 38, 50.

³⁷ *Id.* at 21475, 21467, para. 40, 51.

³⁸ *Id.* at 21467, para. 40.

³⁹ *Id.* at 21465-66, para. 37

⁴⁰ *Id.*

⁴¹ *U.S. WEST v. FCC*, 177 F.3d at 1060, *cert. denied*, No. 99-869 (Feb. 28, 2000).

(1) to minimize the impact of divestiture on customers, with a seamless transition and no increase in rates, and (2) to comply fully with section 271.”⁴² We note that in this case, “to comply fully with section 271” the Applicants propose to identify all in-region customers that utilize interLATA services and transfer all such customers to an unaffiliated third party buyer before the merger closes. Qwest’s plan reflects its understanding that, in order to fully comply with section 271, the buyer must be independent of Qwest, and that the divestiture of customers must be final and irrevocable, i.e., Qwest will have no preferential right to reacquire the customers it divests.⁴³ The Applicants state that they are seeking but have not yet found a buyer for the businesses Qwest must divest to comply with section 271 restrictions.

15. The divestiture plan states that, upon consummation of the merger, the merged company will cease providing all interLATA services originating in the US WEST region, but will keep the facilities associated with such services.⁴⁴ Specifically, the merged entity will discontinue the following services: (1) interLATA switched long distance service originating in the US WEST region; (2) interLATA 800 services terminating in the US WEST region; (3) interLATA private line voice and data services originating or terminating in the US WEST region that cross LATA boundaries; (4) in-region interLATA calling card, prepaid phone card, and operator-assisted services; and (5) the in-region interLATA transmission component of dial-up and dedicated Internet access services and Internet-based hosting services.⁴⁵ The Applicants claim that “[t]he Buyer will be required to provision any Qwest-prohibited interLATA circuits over a transmission network that it owns or controls.”⁴⁶ The Applicants also claim that Qwest will not provide wholesale transmission service.

16. However, the divestiture plan does offer the buyer the option of contracting with the Applicants for the provision of all or some of the following:

- leased ports on Qwest’s data and voice switches;
- billing and collection services;
- customer care services, including designating a Qwest customer service representative as the point of contact for billing, payment and information requests or as the buyer’s agent

⁴² Applicants' Reply Comments at 31.

⁴³ Divestiture Plan at 1. McLeod states it received a letter from a Qwest attorney asserting, to the contrary, that Qwest had no plans to transfer its retail customers. McLeod Petition to Deny at 35. Qwest responded that the letter was written at a time of “significant uncertainty regarding the Qwest divestiture plan, and certain statements in the letter are not correct.” Applicants’ Reply Comments at 37. As we point out in this Order, all uncertainty regarding divestiture--such as which customers will be transferred, and to whom--must be resolved before Applicants may consummate the merger.

⁴⁴ Divestiture Plan at 1.

⁴⁵ Applicants' Reply Comments at 32-33; *see also* Divestiture Plan.

⁴⁶ Divestiture Plan at 5.

- to arrange local access or other back-office activities;
- monitoring, trouble-shooting and repair activities;
- marketing services for calling cards as an agent of the buyer; and
- in-region information services that do not incorporate an interLATA telecommunications transmission component.⁴⁷

17. We note that Applicants state these support functions will be offered “especially where doing so will minimize impact on customers,”⁴⁸ and that “[b]uyer will contract for such support activities to the extent that they permit [b]uyer to offer customers better service quality more efficiently and at lower price.”⁴⁹ The Applicants also believe that “such functions may reduce the impact of divestiture on customers . . . or reduce Buyer’s costs.”⁵⁰ Therefore, we note that Applicants have represented that these customer support services are being offered for the benefit of the customers and buyer: “[i]f by providing these support functions Qwest can contribute to limiting the impact on customers of the assignment to a new carrier, the public interest is clearly served.”⁵¹ The divestiture plan as filed, however, makes no reference to a co-marketing agreement.

18. Reviewing the Applicants’ divestiture plan, we find the plan to be both extremely vague and excessively broad. In light of Commission findings in *AT&T v. Ameritech* we are unable to determine if the divestiture plan would result in a merger that complies with section 271. For example, if the Applicants provide to a buyer all the services that are listed in the plan, we find that the resulting divestiture is likely to result in a merger that violates section 271. In this regard, we reject the Applicants’ repeated assertion that the “provision” of interLATA telecommunications is service limited to the transmission of information for purposes of section 271.⁵² We explicitly rejected this notion in *AT&T v. Ameritech*.⁵³ Rather, we stated that, in determining whether a BOC is providing interLATA service within the meaning of section 271, “we will balance several factors including, but not limited to, whether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long

⁴⁷ *Id.* at 2-15.

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 11.

⁵² See *AT&T Divestiture Plan Comments* at 2; *Divestiture Plan* at 6 n. 5, 7-9, 11; see also, *US WEST v. FCC*, *supra*, 177 F.3d at 1060, *cert. denied*, No. 99-869 (Feb. 28, 2000) (“FCC’s reading of ‘provide’ . . . [in *AT&T v. Ameritech Order*] appears clearly reasonable in the specific context of § 271”).

⁵³ *AT&T v. Ameritech Order* 13 FCC Rcd at 21464-466, paras. 34-37. See *AT&T Divestiture Plan Comments* at 2-3.

distance component in a combined service offering, whether the BOC is effectively holding itself out as a provider of long distance service, and whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public.”⁵⁴ When making that evaluation we will look at the “totality of [the BOC’s] involvement,” rather than any one activity.⁵⁵ Therefore, if the Applicants provide all of the services listed in their divestiture plan to the buyer of the divested services, it is highly likely that the totality of the Applicants’ involvement would constitute the provisioning of interLATA service, in violation of section 271.⁵⁶

19. If, on the other hand, the Applicants actually provide no continuing support services to the buyer, or if the Applicants provide the buyer only billing and collection services, and no other services, then the divestiture would probably result in a merger that complies with section 271.⁵⁷ If the merged company were to provide other types of services, however, such as receiving and placing orders for the buyer’s customers,⁵⁸ assisting in “provisioning” activities, and acting in certain instances as an “agent” to the buyer, the likelihood would increase that the merger would violate section 271.⁵⁹ A joint or cooperative marketing or sourcing agreement between the Applicants and the buyer would lead to even greater scrutiny. Indeed, the greater the Applicants’ involvement in the buyer’s interLATA business beyond billing and collection, the greater scrutiny we must give the divestiture.⁶⁰ The risk that the divestiture, in practice, fails to result in a merger that fully complies with section 271 is entirely within the control of the Applicants.

⁵⁴ *AT&T v. Ameritech Order* 13 FCC Rcd at 21465-66, para 37. For example, one commenter points out that Qwest must not be perceived as offering “one-stop shopping” to customers. *AT&T Divestiture Plan Comments* at 5.

⁵⁵ *AT&T v. Ameritech Order* 13 FCC Rcd at 21466, para. 37; *McLeod Divestiture Plan Comments* at 8.

⁵⁶ *US WEST v. FCC, supra*, 177 F.3d at 1060.

⁵⁷ *AT&T v. Ameritech Order*, 13 FCC Rcd at 21465-66, para. 37; *AT&T Divestiture Plan Comments* at 3-6; *NextLink Joint Reply Comments* at 17 (calling for “full divestiture of interLATA services.”).

⁵⁸ Although Qwest attempts to make this transition process “seamless” for the in-region customers, we note that Qwest must not represent itself to former in-region customers such that those customers perceive Qwest as its continued long distance provider. *See MCI WorldCom Divestiture Plan Comments* at 4; *AT&T Divestiture Plan Comments* at 5-6.

⁵⁹ *See US WEST v. FCC, supra*, 177 F.3d at 1060; *see also*, *McLeod Divestiture Plan Comments* at 8 – 16 (stating that the Commission should require full compliance with section 271 and review the totality of the circumstances as a precondition for granting the proposed merger); *MCI WorldCom Divestiture Plan Comments* at 1 – 6 (stating that the Commission should require more information on the divestiture, particularly regarding the provisioning of leased switch ports, customer care and interLATA information services, before approving the proposed merger).

⁶⁰ *AT&T v. Ameritech*, 13 FCC Rcd at 21465-66, para. 35-37.

C. Requirement of Additional Information

20. On February 11, 2000, representatives of McLeod met with Commission staff to discuss conversations that took place on February 9, 2000, between Qwest and McLeod employees regarding divestiture of Qwest's in-region interLATA assets. McLeod also submitted to the Commission sworn affidavits from two McLeod employees describing conversations with Qwest executives "that disclosed Qwest's desire to sell the 271-implicated assets to a friendly buyer so the assets could be reacquired in the future."⁶¹ Specifically, McLeod alleges that Mr. James Shearburn, Qwest's Regional Vice President for Wholesale Services, stated that McLeod "would be perfect" to purchase the Qwest divestiture assets except that Qwest intended to sell the divestiture assets to "a friend" so that Qwest could buy them back later.⁶² McLeod argues that there is probable cause to suspect that Qwest intends to "park the assets for later reacquisition"⁶³ and to "require"⁶⁴ the buyer to purchase customer support functions. We regard such allegations as very serious. Any expressed or implicit intent to park the Qwest in-region interLATA assets, or force the buyer to purchase any customer support services, would clearly contradict material representations in the Applicants' divestiture plan and other filings. For example, the Applicants' divestiture plan states "the divestiture of services will be final and irrevocable, with no right for Qwest to reacquire the customers at a later point;"⁶⁵ and that "[b]uyer will be independent of Qwest."⁶⁶

21. Although the allegations raise the very serious possibility that Qwest has misrepresented its intentions with regard to its divestiture, we find that Qwest satisfactorily responds to these allegations in the affidavits of two senior executives and Shearburn himself.⁶⁷ We find it credible that Shearburn was merely speculating without "personal knowledge of the divestiture process."⁶⁸ In reaching this conclusion, we take into account the sworn statement of Shearburn's superior, Qwest's Senior Vice President for Wholesale Markets, Greg Casey, who

⁶¹ Letter from Philip L. Verveer, Counsel for McLeod, to Magalie Roman Salas, Secretary, FCC, February 14, 2000 (McLeod Feb. 14 *Ex Parte*) at 1.

⁶² McLeod Feb. 14 *Ex Parte* Cate Affidavit at para. 4 – 5.

⁶³ McLeod Feb. 14 *Ex Parte* at 2.

⁶⁴ McLeod Feb. 14 *Ex Parte* Fisher Affidavit, para. 3.

⁶⁵ Divestiture Plan at 1.

⁶⁶ *Id.* at 1.

⁶⁷ See Letter from R. Steven Davis, Senior Vice President, Government Affairs and Senior Associate General Counsel, Qwest, to Magalie Roman Salas, Secretary, FCC, Feb. 17, 2000 (Qwest Feb. 17 *Ex Parte*); Qwest Feb. 17 *Ex Parte* Casey Affidavit, para. 10; Qwest Feb. 17 *Ex Parte* Weisberg Affidavit para. 5-6; Qwest Feb. 17 *Ex Parte* Shearburn Affidavit para. 1-6.

⁶⁸ Shearburn states in his affidavit that he has no responsibility for Qwest's divestiture of its interLATA business in the US WEST region, nor does he have knowledge of the divestiture plans or the proposed relationship with any potential or actual buyer. Qwest Feb. 17 *Ex Parte* Shearburn Affidavit para. 1, 5-6.

points out that his subordinate, Shearburn, had no involvement or responsibility for any aspect of the divestiture process.⁶⁹ We also find credible the sworn statements of the Qwest executive managing the divestiture process, Senior Vice President for Corporate Development, Marc B. Weisberg, in which he says that any comments made by Shearburn to the McLeod employee during the telephone conversation were “uninformed and unauthorized.”⁷⁰ Finally we find that Qwest has satisfactorily rebutted the parking allegation by affirming that Qwest intends to make the divestiture ‘final and irrevocable, with no right for Qwest to reacquire the services or customers at any point.’⁷¹

22. Raising another concern, Blake Fisher, McLeod’s Group Vice President, alleges that Greg Casey, Qwest’s Senior Vice President, Wholesale Markets, stated Qwest intends to “require”⁷² the buyer to purchase customer support functions, and ‘enter into certain co-marketing and co-sourcing arrangements.’⁷³ Staff recognized that these allegations regarding support functions, joint marketing and co-sourcing required further investigation and analysis. Therefore we considered whether the specific allegations raised substantial and material questions of fact that warrant a hearing.⁷⁴ The Court of Appeals for the District of Columbia has recognized that hearings are costly and time-consuming procedures and that if the Commission can resolve allegations that do not amount to substantial and material questions of fact by simply requesting more information, then it should do so.⁷⁵ Therefore, staff requested, and Qwest made available at counsel’s office, a discrete set of documents related to the divestiture sale

⁶⁹ Qwest Feb. 17 *Ex Parte* Casey Affidavit para. 10.

⁷⁰ Qwest Feb. 17 *Ex Parte* Weisberg Affidavit, para. 5.

⁷¹ Qwest Feb. 17 *Ex Parte* at 2, Qwest Feb. 17 *Ex Parte* Weisberg Affidavit, para. 6.

⁷² McLeod Feb. 14 *Ex Parte* Fisher Affidavit, para. 3.

⁷³ McLeod Feb. 14 *Ex Parte* Fisher Affidavit, para. 3-5.

⁷⁴ Under the Communications Act, the Commission is required to hold an evidentiary hearing on transfer of control applications in certain circumstances. Parties challenging an application to transfer control by means of a petition to deny under section 309(d) must satisfy a two-step test. First, the petition to deny must set forth “specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with [the public interest].” Second, the petition must present a “substantial and material question of fact.” If the Commission concludes that the protesting party has met both prongs of the test, or if it cannot find that grant of the application would be consistent with the public interest, the Commission must formally designate the application for a hearing in accordance with section 309(e). However, as we explain, while McLeod has raised “specific allegations of fact” we do not find that these allegations raise “substantial and material questions of fact” that warrant a hearing. See *Bilingual Bicultural Coalition On Mass Media, Inc., v. Federal Communications Commission*, 595 F.2d 621 (1977) (Bilingual Bicultural Coalition).

⁷⁵ *Bilingual Bicultural Coalition, supra*, 595 F.2d at 630 n. 34 (“When the FCC concludes from the initial pleadings that a factual uncertainty prevents summary renewal of a license, . . . it generally attempts to resolve the factual uncertainty by requesting further information, rather than by designating the application for an immediate renewal hearing.”).

solicitation process.⁷⁶ After reviewing the documents on February 24, staff determined that information existed generally supporting McLeod's allegation that Qwest expected the buyer to participate in co-marketing.⁷⁷

23. We will not conclude that the divestiture results in a merger that would comply with section 271 without first carefully evaluating the details of the actual divestiture, and permitting the public the opportunity for notice and comment. As we have stated, the proposed merger of US WEST and Qwest cannot legally proceed until we are assured that the divestiture will result in a merger that will not violate section 271. Indeed, a divestiture arrangement that includes a joint or cooperative marketing or sourcing agreement, coupled with in-region customer support services and out-of-region long distance prior to receiving Commission authorization would mitigate the strong post-merger incentives to earn section 271 authorization.⁷⁸ We would also view any tacit or implicit side agreements, or forced sale of customer support services, as contrary to Applicants' representations that the services are options that the buyer "may enter into" through "arm's length" contracts, when necessary to serve the public interest.⁷⁹

24. As commenters point out, all ambiguity surrounding Qwest's provision of interLATA services must be resolved prior to the merger closing.⁸⁰ Therefore, we grant this merger to the extent described herein subject to our finding, after review of the information requested in this Order, that the divestiture would result in a merger that complies with section 271. It is therefore in the interest of the Applicants to structure an irrevocable divestiture of the

⁷⁶ Letter from Linda L. Oliver, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC, Feb. 25, 2000; *see also* Letter from Linda L. Oliver, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC, March 1, 2000.

⁷⁷ McLeod also reviewed the relevant confidential documents pursuant to the Protective Order issued in this proceeding. On March 6, 2000, McLeod filed an *ex parte* commenting on information contained in the Qwest confidential documents. Letter from Thomas Jones, Counsel for McLeod, to Magalie Roman Salas, Secretary, FCC, Mar. 6, 2000 (McLeod March 6 *Ex Parte*).

⁷⁸ *See* AT&T Divestiture Plan Comments at 6. *US WEST v. FCC*, *supra*, 177 F.3d at 1060 ("There appears to have been specific congressional concern over the impact of jointly marketed local and long distance services.").

⁷⁹ *See, e.g.*, Divestiture Plan at 6, 8, 11; *AT&T v. Ameritech* 13 FCC Rcd at 21465 para. 37.

⁸⁰ *See* McLeod Feb. 16 *Ex Parte* at 2; MCI WorldCom points out that the Applicants "speak only of their anticipated divestiture of in-region interLATA retail customers" but does not address wholesale services. MCI WorldCom Comments at 7; MCI WorldCom Divestiture Plan Comments at 5. We would not tolerate the circumvention of section 271 by, for example, the partial divestiture of in-region interLATA services. Moreover, Allegiance also points out that Qwest fails to specify in the divestiture plan the particular types of interLATA traffic and services that Qwest plans to continue to carry over its network in US WEST's region post merger. Allegiance Divestiture Plan Comments at 2, 4-5. We also require an explanation as to which assets and employees, if any, will accompany the divestiture sale. Another issue Applicants must address is whether permission from current customers would be required prior to assigning contracts to the buyer of the divested businesses. *See also*, NextLink Joint Comments at 16; Pathfinder Reply Comments at 3.

in-region interLATA assets, with minimal or no support functions. We reserve the right to revisit our entire review of the merger if we find that the divestiture, the customer support services agreement, or any other on-going post-divestiture relationship between the buyer and the applicants, would not result in a merger that complies with section 271.

25. For this reason, prior to the transfer of any licenses and lines associated with the merger, the Applicants must submit a full report to the Commission identifying the buyer of the divested businesses, the terms of the divestiture sale,⁸¹ the customer support and other functions to be provided by the Applicants, as well as the term sheets and the contracts themselves.⁸² In addition to information on the divestiture, we expect the Applicants to be forthcoming and provide information on *any* business arrangement, beyond customer support, that would implicate a section 271 issue, such as joint or cooperative marketing or sourcing with the buyer. For example, we expect the Applicants to provide a complete explanation as to whether or how the merged company will continue to operate its Internet backbone network without originating any Internet traffic in the 14-state US WEST region.⁸³ We also expect the divestiture report to include information concerning Qwest's affiliation with Advanced Radio Telecom Corporation (ART),⁸⁴ Apex Global Internet Services, Inc. (AGIS),⁸⁵ and any other relevant affiliate. Moreover, with respect to leasing of voice and data ports, we expect Qwest to make clear whether the traffic being transported by US WEST would cross LATA boundaries.⁸⁶

26. This submission shall be placed on public notice for comment from all interested parties only after a senior Qwest executive certifies under oath that the information in the filed divestiture report is true and accurate.⁸⁷ The Commission shall review the submissions and comments and, no later than 45 days after the public comment period closes, issue an order stating whether the proposed divestiture would result in a merger that complies with section 271. This period may be extended if the report is inaccurate, incomplete or additional relevant

⁸¹ The AT&T Comments at 11-15, provide examples of the kinds of terms that may be included in such a divestiture sale.

⁸² By "contracts" we also include any term sheets associated with any agreements between the Applicants, the buyer and any other carrier.

⁸³ We also expect an explanation as to how the merged company will dispose of Internet addresses and web-hosting servers for their Internet customers. See Allegiance Comments at 6-8; AT&T Comments at 11; AT&T Divestiture Plan Comments at 6. Letter from Gary D. Slaiman, Esq., Counsel for CERB, to Magalie Roman Salas, Secretary, FCC, Jan. 3, 1999 (CERB Jan. 3 *Ex Parte*) at 2; MCI WorldCom Comments at 2, 6-7; MCI WorldCom Divestiture Plan Comments at 5.

⁸⁴ See Section III.E.1, *infra*.

⁸⁵ AGIS is a facilities-based provider of domestic and international high-speed, high capacity Internet and data communications. Qwest Response to Staff at 19.

⁸⁶ See AT&T Divestiture Plan Comments at 3 n. 8; MCI WorldCom Divestiture Plan Comments at 3.

⁸⁷ See note 9, *supra*. 47 C.F.R. § 1.17, requiring truthful written statements and responses to Commission inquiries and correspondence.

information is necessary to complete our review.⁸⁸

27. Compliance with section 271 is critically important and any failure of the Applicants to ensure compliance would seriously undermine the intent of Congress to promote competition in the telecommunications industry. To determine whether the proposed merger and divestiture sale would result in a violation of section 271 and, after the consummation of any merger, to provide assurances to the public and the Commission regarding the divestiture's compliance with section 271 on a going-forward basis, we require the following: first, we require that each year, a senior Qwest executive certify under oath that *all* of Qwest's activities, both those involving the buyer, and those excluding the buyer, are consistent with its representations to the Commission in this proceeding and that its on-going business continues to comply with section 271.⁸⁹ Second, we require the merged entity to hire an independent auditor approved by the Chief of the Common Carrier Bureau.⁹⁰ The independent auditor shall have full access to business operations and records of both buyer and the merged entity.⁹¹ Pursuant to its obligations as the designated auditor, the independent auditor shall immediately report any information that may suggest a section 271 violation to the Chief of the Common Carrier Bureau and any corrective action taken.⁹² The auditor also shall perform an annual examination engagement regarding the merged company's *on-going* compliance with section 271, by evaluating the relationship between the merged entity and buyer.⁹³ The independent auditor shall issue a positive opinion (with exceptions noted) in its publicly available reports so that the Commission will obtain reasonable assurances regarding the merged entity's on-going compliance with section 271.⁹⁴ Finally, we require the independent auditor to provide the Commission with its preliminary audit program before the engagement, as well as access to its

⁸⁸ If we find that the report is not complete, we shall extend the 45 day review period by the number of days it takes the Applicants to provide complete and relevant information

⁸⁹ *Id.*

⁹⁰ See Letter from A. Richard Metzger, Jr. and Michael B. Hazzard, Counsel to Allegiance, to Magalie Roman Salas, Secretary, FCC, Jan. 18, 2000, at 4 (Allegiance Jan. 18 *Ex Parte*). The independent audit must be supervised by persons licensed to provide public accounting services. In addition, the independent auditor must comply with the relevant standards of the American Institute of Certified Public Accountants. See American Inst. of Certified Pub. Accountants, Attestation Standards, AT § 100; American Inst. of Certified Pub. Accountants, Compliance Attestation, AT § 500. For further discussion of these types of audits, see also *SBC/Ameritech Order* at paras. 410-12, 503-07.

⁹¹ The independent auditor shall promptly notify the Chief of the Common Carrier Bureau should either company deny the auditor access to any requested information, including any document or record.

⁹² AICPA standards recognize occasions in which an independent auditor has a duty to notify others, including regulatory agencies, of problems uncovered during an audit. See American Inst. Of Certified Pub. Accountants, *Illegal Acts By Clients*, AU § 317.23-.24.

⁹³ Commenters have pointed out the need for a third-party auditor to evaluate Qwest's divestiture efforts. See, e.g., *Allegiance Divestiture Plan Comments* at 5-6.

⁹⁴ See American Inst. of Certified Pub. Accountants, *Attestation Engagements*, AT § 100.55 (addressing standards of reporting for examination engagements).

working papers after the engagement in order to facilitate our oversight of the merged entity's compliance.⁹⁵

D. Compliance with the Commission's Rules

28. In addition to considering whether the proposed merger would result in a violation of the Communications Act, we must examine whether the merger would result in the violation of any Commission rule. We find that the merger of US WEST and Qwest does not violate any Commission rule. TSR Wireless, LLC (TSR) claims in its Petition to Deny that US WEST has repeatedly violated Commission rules by charging TSR, a provider of paging services, for the cost of US WEST's transmission facilities used on a dedicated basis to deliver local telecommunications traffic that originates on the LEC's network, to paging services providers.⁹⁶ TSR argues that the merger would be contrary to the public interest based upon this and other conduct.⁹⁷ We agree with TSR that the Commission possesses "broad discretion to review a variety of factors in making a public interest determination with respect to a transfer

⁹⁵ As we pointed out in *SBC/Ameritech*, we view audits as a cost-effective tool to supplement the Commission's investigative authority and we have extensive experience with this method for ensuring compliance with our rules. See *SBC/Ameritech Order*, 14 FCC Rcd at 14918-20, para. 503-05; see also 47 U.S.C. § 218 ("The Commission may inquire into the management of the business of all carriers subject to this Act . . . [and] may obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created."); § 220(c) (providing that the "Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits . . ."). See also *Separation of Costs of Regulated Telephone Services from Costs of Nonregulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, paras. 243-73 (1987) (*Joint Cost Order*), modified on recon., 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), further recon., 3 FCC Rcd 6701 (1988), *aff'd sub nom.*, *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990). See also 47 U.S.C. § 220(c) (providing that the "Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits); see also 47 C.F.R. § 64.904 (requiring independent audits of cost allocation procedures); § 69.621 (establishing an independent audit requirement regarding certain universal service rules). Moreover, the Commission has additional experience with independent evaluations of structural, transactional and nondiscrimination requirements pursuant to the provisions of section 274. See 47 U.S.C. § 274(b)(8); *Accounting Safeguards Order*, 11 FCC Rcd at 17640-43, paras. 220-26. We also note that the independent audit requirement in the 1996 Act indicates that independent audits are useful tools for evaluating compliance with structural, transactional and nondiscrimination requirements. 47 U.S.C. § 272(d). *Accounting Safeguards Order*, 11 FCC Rcd at 17623-32, paras. 184-205; 47 C.F.R. § 53.209. An independent auditor's report does not, of course, constitute a legal determination regarding the company's compliance. *SBC/Ameritech Order* at para. 411 n. 770 (citing American Inst. of Certified Pub. Accountants, Compliance Attestation, AT § 500.03); see also American Inst. of Certified Pub. Accountants, Illegal Acts by Clients, AU § 317.03. 47 U.S.C. § 272(d). *Accounting Safeguards Order*, 11 FCC Rcd at 17623-32, paras. 184-205; 47 C.F.R. § 53.209. The independent auditor's report does not, of course, constitute a legal determination regarding the company's compliance; see also American Inst. of Certified Pub. Accountants, Illegal Acts by Clients, AU § 317.03.

⁹⁶ See *TSR Wireless LLC Petition to Deny* at 10-11. TSR also points out that such practices violate the Commission's rules on interconnection obligations.

⁹⁷ *Id.*, citing, *Bell Atlantic/NYNEX Order*, 12 FCC Rcd 19985, 20003, para. 32.

application.”⁹⁸ We also note that TSR acknowledges in its petition that it has filed both an informal and a formal complaint with the Commission on this matter.⁹⁹ The merger, itself, will not result in a per se violation of any Commission rule. Therefore, we find that the conduct at issue here is not the type created or exacerbated by the merger, and is best left to be considered in the appropriate enforcement forum.¹⁰⁰

29. Finally, both McLeod and Allegiance note concern about the relationship between the merged company and their affiliates and subsidiaries, and the applicability of the Commission’s rules to these entities.¹⁰¹ We note that the merged entity, and its affiliates and subsidiaries, will be subject to the Commission’s rules and any misconduct discovered by competitors should be brought to the attention of the Commission’s Enforcement Bureau or the appropriate state commission.

E. Public Interest Effects Due to Horizontal Aspects of the Merger

30. Next we examine whether the merger of Qwest and US WEST would frustrate the most significant goals of the Communications Act, such as promoting competition and lessening regulation.¹⁰² US WEST provides local, intraLATA toll and xDSL services. Qwest, in contrast, is primarily a provider of interexchange services. It also currently provides xDSL services within the US WEST region as a reseller of Covad and Rhythms’ xDSL services.¹⁰³ Finally, Qwest also owns a 19 percent interest in Advanced Radio Telecommunications (ART), a certified competitive LEC that currently serves customers in certain US WEST states –

⁹⁸ TSR Petition to Deny at 7; *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc., Transferee*, CC Docket No. 98-25, 13 FCC Rcd 221292, 21305, para. 26 (*SNET/SBC Order*).

⁹⁹ Enforcement Bureau File No. E-98-13.

¹⁰⁰ Allegiance requests more information to determine whether the proposed transaction is consistent with the Commission’s affiliate transaction rules. Allegiance Comments at 6, 8. We agree with Allegiance that US WEST and Qwest must provide more information and “describe the relationship and anticipated transactions between” indirect wholly-owned subsidiaries of Qwest and US WEST that will exist post-merger. We require such information as part of Applicants’ divestiture report filing.

¹⁰¹ McLeod Petition to Deny at 15–21; Allegiance Comments at 8–9.

¹⁰² *SNET/SBC Order*, 13 FCC Rcd 21292, at para. 15.

¹⁰³ Qwest states that it “owns a small equity interest (less than five percent) in Covad and in Rhythms NetConnections, both of which are providers of competitive facilities-based DSL services in a number of cities across the country.” Qwest Response to Staff at 17. Qwest also holds a five percent equity interest in CAIS Internet, Inc., a less than five percent interest in Primus Telecommunications Group, Incorporated, and a 20.4 percent interest in Apex Global Internet Services, Inc. *Id.* at 18 - 19. Qwest also states that its Centrex resale customers in Oregon and Washington have been “shifted” to other service providers. *Id.* at 13.

specifically, Arizona, Oregon and Washington.¹⁰⁴

31. Certain commenters claim that the merger will have adverse competitive effects by: first, eliminating horizontal competition between Qwest, acting as a competitive LEC, and US WEST, acting as an incumbent LEC, in certain parts of the US WEST territory;¹⁰⁵ and second, by reducing the incentive of ART, a firm in which Qwest holds a minority interest, to compete against US WEST.¹⁰⁶ For the reasons given below, we are not persuaded that the merger will result in substantial adverse horizontal effects on local competition in the US WEST region, and more importantly, we find that any such anticompetitive effect is outweighed by the likely benefits arising from the merger.

32. In response to the allegation that the merger will eliminate Qwest as a competitor in the provision of xDSL services in the US WEST region, the Applicants state that Qwest only provides such services on a resale basis, and that it purchases such services from Covad or Rhythms.¹⁰⁷ Based on the record, it appears that Qwest's entry into the xDSL market in the US WEST region has been relatively limited to date and that Qwest has not made any significant investments in such entry, and that other firms could enter easily in this manner if market conditions warrant. These facts suggest that Qwest has made little commitment to enter this market. Nevertheless, the merger will, in fact, result in the combining of an actual local entrant with the incumbent LEC, and we stress that the loss of such competition is of significant concern to the Commission. Based on the facts of this case, however, we find that the potential costs associated with the loss of Qwest, as a resale provider of xDSL service, are outweighed by the potential benefits of the merger.

33. We are also not persuaded that we should deny the applications based on allegations that Qwest was preparing to enter the US WEST region to compete as a local services provider and that the merger thus eliminates a potential competitor in the US WEST market.¹⁰⁸

¹⁰⁴ See McLeod Petition to Deny at 16; Qwest Response to Staff, Nov. 24, 1999, at 7-11. See also, discussion of Advanced Radio Telecom, Section III.E.1, *infra*.

¹⁰⁵ Covad Comments at 9-16; McLeod Petition to Deny at 10-21.

¹⁰⁶ McLeod Petition to Deny at 7, 16.

¹⁰⁷ Applicants' Response to Comments Declaration of Dennis W. Carlton and Hal S. Sider at 16 (Applicants' Response to Comments Carlton and Sider Declaration). The Applicants point out that Qwest offers xDSL service in major cities in the US WEST region and that there are several providers of xDSL services, including Covad, Rhythms, Northpoint and JATO, as well as many resellers of these services within the US WEST region. Applicants state that "[e]ach of the five major cities in US WEST's territory is served by 4 or more facilities-based DSL providers (including US WEST) and 9 or more resellers." *Id.* (citing <http://www.covad.com>; <http://www.jato.com>; <http://www.northpoint.net>; <http://www.rhythms.net>; <http://www.uswest.com>). Generally speaking we believe the presence of several suppliers and resellers of any given service suggests that a merger of one of those resellers with a supplier would not adversely impact consumers.

¹⁰⁸ See, e.g., NextLink Joint Comments at 5; Next Joint Reply Comments at 2; McLeod Petition to Deny at 6. The Applicants acknowledge that Qwest had taken steps to construct facilities in Seattle, Washington prior to the announcement of the merger. Qwest Response to Staff at 6, 16 - 17.

There is no persuasive evidence on the record that Qwest was preparing to compete broadly in the US WEST region for the provision of residential and business services. Moreover, there is no evidence in the record that suggests that Qwest possesses any unique assets or capabilities that would make it one of a limited number of most significant market participants.

1. Qwest's Affiliation with Advanced Radio Telecom Corporation

34. In its Petition to Deny, McLeod points out that Qwest has a 19 percent equity interest in ART, which is a certified competitive LEC in most of US WEST's service territory, and which currently serves customers in Arizona, Oregon, and Washington.¹⁰⁹ McLeod expresses concern that the merged company will have the incentive and ability to favor ART and to disadvantage other customer-competitors, such as McLeod.¹¹⁰

35. We recognize that ART is an affiliate of Qwest as that term is defined in the Act. We also recognize the geographic overlap of ART's 38 GHz spectrum licenses territories and the US WEST local wireline services territories. ART provides various telecommunications services, including interLATA service, to approximately 300 customers in the US WEST region.¹¹¹ Because ART provides interLATA service within the US WEST region, the Applicants, as part of the divestiture plan, must either: (1) terminate Qwest's affiliation with ART; or (2) ART must discontinue providing interLATA services in the US WEST region, if the merged company is to avoid violating section 271.¹¹² With either option, we require that in the divestiture plan filing, the Applicants shall include the details about the manner in which section 271 compliance has been achieved, whether through reduction of Qwest's interest in ART or through discontinuation of ART's interLATA service within the US WEST region, including a full explanation of why the option chosen complies with section 271. The information so required shall include at a minimum the same type of information described in Section III.C, above.

36. Provided the Applicants and ART comply with section 271 upon the closing of the merger, we find that the potential for competitive harm arising from Qwest's investment in ART is not so great as to outweigh the potential benefits of the proposed merger. We believe that any incentive Qwest might have to discriminate in favor of ART would be tempered by the consequences that Qwest would incur from any violations of law if it so discriminated. We note now that we will be vigilant in our enforcement actions should there be cause to believe any discrimination has occurred.

¹⁰⁹ McLeod Petition to Deny at 16. ART provides its services predominantly over 38 GHz wireless facilities.

¹¹⁰ Qwest confirms that on September 9, 1999, Qwest invested \$90 million in ART for an approximately 19 percent stake in the company Qwest has a limited option to buy additional shares in order to maintain its equity percentage in ART. Qwest Response to Staff at 10.

¹¹¹ Letter from Eric DeSilva, Wiley, Rein and Fielding, to Margaret Egler, Common Carrier Bureau, Feb. 10, 2000.

¹¹² By "discontinue the affiliation" we mean that if ART continues to provide interLATA services after the merger, Qwest must reduce its equity interest in ART to ten percent or less. See 47 U.S.C. § 153(1).

37. Moreover, we believe McLeod's concerns are balanced by several mitigating factors. First, the Commission's rules do not prohibit an incumbent LEC from holding 38 GHz licenses within its local exchange area, due principally to the nature of the spectrum and the wide range of actual and potential competitors.¹¹³ Specifically, there would remain at least several alternative licensees with substantial spectrum holdings in US WEST's territories capable of providing LEC services over wireless facilities. These include, without limitation, licensees in the CMRS, 24 GHz, 28 GHz, and 38 GHz bands. Also, fiber-based competitive LECs remain viable alternatives for many consumers in the areas served by ART. Second, we recognize that Qwest, through its subsidiary U.S. Telesource, holds but a minority interest in ART. Finally, it appears that ART has narrowed its business focus relative to earlier goals, given its current focus on Internet access and related services.¹¹⁴ This narrowed focus on businesses that are highly competitive within the US WEST region further reduces our concern about the competitive impact of the merger.¹¹⁵ Therefore, we do not find the relationship between Qwest and ART to raise such potential social costs as to justify delaying or rejecting the merger of Qwest and US WEST.

2. BellSouth's Interest in Qwest

38. Allegiance alleges that BellSouth holds an option to purchase up to 20 percent of the outstanding shares of Qwest, even if Qwest were to acquire US WEST.¹¹⁶ Based on this allegation, Allegiance argues that the Commission should review this merger as if it were a merger of two BOCs.¹¹⁷ We disagree with both Allegiance's factual allegations and its legal arguments.

39. Based on the record before us, we find that BellSouth currently holds a ten percent equity interest in Qwest and, contrary to Allegiance's claims, it does not possess an option to increase its ownership to 20 percent.¹¹⁸ According to the Applicants, Allegiance may

¹¹³ *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Report and Order and Second Notice of Proposed Rulemaking*, FCC 97-391, 12 FCC Rcd 18600, 18617-18628 (rel. Nov. 3, 1997), *aff'd on recon.*, *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183 (rel. Jul. 29, 1999).

¹¹⁴ Qwest Response to Staff at 11.

¹¹⁵ *Id* at 10. Compare with *Third Annual CMRS Competition Report* (rel. Jun. 11, 1998) at F-17, reporting that ART's strategy is to serve CAPs, competitive LECs, LECs, ISPs, CMRS and to provide 'last mile' connectivity for voice, data and video traffic.

¹¹⁶ Allegiance Comments at 3; *see also* NextLink Joint Reply Comments at 3.

¹¹⁷ Allegiance Comments at 3-5. Allegiance also points to the existence of the Qwest – BellSouth "strategic alliance."

¹¹⁸ Applicants' Response to Comments at 10.

have mistaken the strategic relationship's existing terms with a defunct standstill provision.¹¹⁹ The Applicants state that, in fact, BellSouth's interest in the combined company will be no more than five percent because the merger will dilute BellSouth's interest.¹²⁰ Moreover, the Applicants expressly state "BellSouth does not have any right to purchase shares from Qwest, nor does Qwest have any obligation to sell BellSouth additional shares."¹²¹ Our finding in this regard is based on the Applicants' representation in the record. While we recognize that equity interests in actual or potential competitors may raise competitive concerns,¹²² we find the relatively low percentage interest involved here does not pose such a substantial competitive risk as to outweigh the benefits of the merger.

F. Public Interest Effects Due to Vertical Aspects of the Merger

40. We next consider whether the merger increases the incentive or ability of the merged entity to discriminate against rivals. McLeod suggests that, like the SBC/Ameritech merger, the merger of US WEST and Qwest would increase the incentive and ability of the merged company to discriminate against competitors. More specifically, McLeod argues that merging US WEST into Qwest increases Qwest's incentive to discriminate against long-distance rivals and gives it the ability to degrade the quality of access provided for calls by Qwest's competitors that terminate in US WEST's service territory. McLeod further argues that "US WEST will be able to capture a greater proportion of the benefits of discriminating against competitive LECs *entering* [the US WEST region]."¹²³ McLeod argues that such discrimination would harm the entering competitive LECs' "ability to compete with Qwest's high-speed local access and Internet access operations outside of the US West region."¹²⁴

41. We disagree with McLeod's argument that the merger raises the same competitive concerns raised in *SBC/Ameritech*. To the contrary, we find the facts of this case are clearly distinguishable from those in *SBC/Ameritech*. In *SBC/Ameritech*, we found that the merger of the two BOCs, by increasing the geographic size of the merged entity's local service area, increased the incentive of the merged company to discriminate against competitors in the provision of advanced services, interexchange services and local services. Here, in contrast, because the merger of Qwest and US WEST will not result in a larger footprint for the

¹¹⁹ Applicants' Response to Comments at 10. The Applicants state that the standstill provision, which is no longer in effect, limited BellSouth's ability to acquire more than 20 percent of Qwest without Qwest board approval.

¹²⁰ Applicants' Response to Comments at 10-11. Qwest Response to Staff at 19.

¹²¹ Applicants' Response to Comments at 11 n. 18.

¹²² See, e.g., Robert J. Reynolds and Bruce R. Supp, *The Competitive Effects of Partial Equity Interest and Joint Ventures*, 4 Int'l J. Indus. Org 141 (1986).

¹²³ Letter from Randall Rings, Vice President and General Counsel, McLeod, to Magalie Roman Salas, Secretary, FCC, Nov. 12, 1999 (McLeod Nov. 12 *Ex Parte*) at 3.

¹²⁴ *Id.* See also Applicants' Nov. 30 *Ex Parte* at 4.

incumbent LEC, the merged entity does not face the same increased incentives to discriminate.

42. We agree with McLeod's argument that, by combining US WEST incumbent LEC business and Qwest's competitive LEC and interexchange businesses, the merged entity will have an increased incentive to discriminate against competitive LECs currently competing or *entering* the US WEST region and against competing interexchange carriers.¹²⁵ With respect to possible discrimination against competing interexchange carriers, we note that the 1996 Act permits BOCs to offer out-of-region interLATA services after the date of enactment. Moreover, a BOC may construct the facilities itself, purchase portions of the necessary facilities from third parties under an asset acquisition, or acquire a company that possesses such facilities. An incumbent LEC offering out-of-region interexchange, would have the same incentive to degrade the quality of terminating access it provides to competing interexchange carriers whether the incumbent LEC is providing out-of-region service over facilities it constructed or that it purchased from another carrier. With respect to discrimination against competitive LECs, we note that the creation of a separate subsidiary for advanced services would ameliorate any such problem by making it easier to identify discrimination.¹²⁶ Even without a separate subsidiary, however, we do not find that these potential discrimination issues justify a denial of the application because, as discussed below, the likely benefits arising from the merger outweigh the likely costs.

43. McLeod also argues that the merger would increase the merged firm's incentive and ability to circumvent regulation by diverting resources from its regulated local phone services divisions to Qwest's unregulated advanced services divisions.¹²⁷ More specifically, McLeod argues that, at least temporarily, regulators may have difficulty evaluating synergies arising from the merger, with the result that US WEST may be able to allocate a disproportionate proportion of its total costs to regulated activities. McLeod further argues that the merger increases the merged entity's incentive to engage in such cost shifting by making more "Qwest-like projects" available.¹²⁸

44. We again note that the 1996 Act expanded the range of permissible activities in which BOCs could engage, including the provision of out-of-region services. While any

¹²⁵ McLeod Petition to Deny at 10-13, 15-16. McLeod Nov. 12 *Ex Parte* at 3. Other commenters make similar arguments. *See, e.g.*, Pathfinder Communications Reply Comments at 2-3. McLeod further argues that such discrimination against competitive LECs would harm their ability to compete with Qwest's high-speed local access and Internet access operations outside of the US WEST region." *See* McLeod Nov. 12 *Ex Parte* at 3; Applicants' Nov. 30 *Ex Parte* at 4

¹²⁶ *See* Rhythms Comments at 10-12.

¹²⁷ McLeod Petition to Deny at 11; Letter from Philip L. Verveer, *et. al.*, Counsel for McLeod, to Magalie Roman Salas, Secretary, FCC, Jan. 13, 2000, Bridger M. Mitchell, Report on Some Anticompetitive Aspects of the Proposed Merger of Qwest and US WEST, (McLeod Jan. 13 *Ex Parte* Mitchell Report) at 3.

¹²⁸ McLeod Petition to Deny at 18-28. McLeod also fears the new entity would be able to divert high-volume customers to the affiliated competitive LEC, which would become the provider of new innovative local services while degrading only residential users and other competitive LECs.

improper shifting of costs from unregulated services to regulated services would concern us, we do not find the problem to be as severe as McLeod suggests. Regulated firms in general, and incumbent LECs in particular, have long had such incentives. The Commission and state PUCs have developed various safeguards to prevent such cost misallocations, including the introduction of price caps and other incentive-based regulation and the development of various accounting safeguards, including the Part 64 rules.¹²⁹ These various safeguards should significantly reduce this problem of improper cost shifting. Thus, because the proposed merger will not significantly increase any public interest harms associated with an activity that the 1996 Act specifically permits, we find that this argument does not outweigh our basis for granting the license transfers nor does it require the imposition of performance conditions.¹³⁰

45. McLeod also argues that, after the merger, US WEST will be able to use Qwest and its affiliates as competitive LECs “to attempt to avoid the [incumbent] LEC obligations under section 251(c)(4) of the Act to offer for resale, at wholesale rates, any services the [incumbent] LEC offers at retail.”¹³¹ We disagree with McLeod. Such an affiliate of US WEST would be considered a “successor or assign” of US WEST for the purposes of the obligations imposed by section 251(c)(4).¹³² Therefore, the competitive LEC hypothesized by McLeod would be treated as an incumbent LEC under section 251(c)(4).¹³³

46. Finally, we reject McLeod’s request that we impose various conditions on the merged firm in connection with the approval of the transfer of licenses and authorizations.¹³⁴ We will condition our approval of a transfer of licenses or authorizations only if such conditions are necessary to ensure that the transfer serves the public interest.¹³⁵ Because we find that, on

¹²⁹ See, *In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, Second Report and Order, CC Docket No. 96-149, and Third Report and Order in CC Docket No. 96-61/CC Docket No. 96-149, and Policy and Rules Concerning the Interstate, Interexchange Marketplace. CC Docket No. 96-61, FCC 97-142 (rel. Apr. 18, 1997), 12 FCC Rcd 15756, 15875, para. 209 (*LEC Regulatory Treatment Order*); Letter from Genevieve Morelli, Sr. VP Government Affairs and Senior Associate General Counsel for US WEST, and Daniel L. Poole, Associate General Counsel for US WEST, to Magalie Roman Salas, Secretary, FCC, Nov. 30, 1999, at 7.

¹³⁰ See Letter from Michael B. Hazzard, Counsel for Allegiance, to Magalie Roman Salas, Secretary, FCC, Dec. 3, 1999; Allegiance Jan. 18 *Ex Parte* at 1-2, 5-7

¹³¹ McLeod Petition to Deny at 21-27. McLeod argues that the “combined entity will have the ability to divert favored, high-volume customers to the affiliated [competitive] LEC, which can become the provider of new, innovative services, while the [incumbent] LEC’s traditional local services are degraded and serve only residential users and other [competitive] LECs.”

¹³² See *SBC/Ameritech Order* 14 FCC Rcd at 14895, para. 448.

¹³³ See also 47 C.F.R. § 251(h)(1).

¹³⁴ See, e.g., McLeod Petition to Deny at 40-46.

¹³⁵ Unlike the instant merger, we found that the SBC/Ameritech transaction raised substantial public interest harms and would significantly decrease the potential for competition in local telecommunications markets; increase incentives to discriminate; and frustrate Commission benchmarking efforts. We find that the instant (continued....)

balance the likely public benefits of this merger exceed the likely public costs, we find it both unnecessary and inappropriate to impose the requested conditions.

G. International Services

47. There is no allegation or evidence in the record to demonstrate that the proposed merger would affect competition adversely in any input market that is essential for the provision of international services, including the market for international transport services.¹³⁶ Through their subsidiaries, Qwest and US WEST have previously received authority under section 214 to operate as facilities-based and resale carriers for the provision of international basic switched, private line, data, television and business services between the United States and various international points. We find no basis in this record to conclude that the proposed merger would have anti-competitive effects in any U.S. international service market.

48. Our conclusion includes our consideration of whether, as a result of Qwest's acquisition of US WEST (and its operating subsidiaries), US WEST would become affiliated with a foreign carrier that has market power on the foreign end of a U.S. international route that US WEST is authorized to serve. We also consider whether, as a result of its acquisition of US WEST, Qwest would become affiliated with a foreign carrier that has market power on the foreign end of an U.S. international route that Qwest is authorized to serve. As the Commission has observed in the *Foreign Participation Order*, the exercise of foreign market power in the U.S. market could harm U.S. consumers through increases in prices, decreases in quality, or a reduction in alternatives in end user markets.¹³⁷ Generally, the risk occurs when a U.S. carrier is affiliated with a foreign carrier that has sufficient market power on the foreign end of a route to affect competition adversely in the U.S. market.¹³⁸ In circumstances in which an authorized U.S. carrier acquires an affiliation with a foreign carrier that has market power on the foreign end on an authorized route, the Commission may classify the U.S. carrier as "dominant" in its provision

(Continued from previous page) _____

merger raises no such concerns. Absent these public interest harms, we will not impose conditions or require separate subsidiaries as the commenters have suggested. We are confident that Commission orders and enforcement mechanisms, coupled with the merger-specific 271 incentives, are sufficient to address the broad range of service quality concerns raised by the commenters.

¹³⁶ US WEST does not have any international cable capacity and has not invested in any future cable capacity. As of 1998, Qwest had 1% of the total available cable capacity. See *International Bureau Report: 1998 Section 43.82 Circuit Status Data*, Report No. IN 99-36 at p. 33 (rel. Dec. 17, 1999) (*Circuit Status Report*). Qwest is a licensee in a recently authorized undersea cable system known as the Japan-U.S. Cable Network. See *AT&T Corp., et. al.*, File No. SCL-LIC-19981117-00025, FCC 99-167 (rel. Jul. 9, 1999). (*Japan-U.S. Order*). Qwest has the following interest in that cable system: a 4.48598% capacity allocation. This interest accounts for 0.39% of the Pacific region's available cable capacity in 2000. See *Circuit Status Report* at 34.

¹³⁷ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891, 23935 para. 97, recon. pending (*Foreign Participation Order*).

¹³⁸ *Foreign Participation Order*, 12 FCC Rcd at 23954, para. 147. Section 63.09(e) of the rules, 47 C.F.R. §63.09(e) (as amended 1999), provides in relevant part that "[t]wo entities are affiliated with each other if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one."

of international service on the newly affiliated route.¹³⁹ In certain limited circumstances, the Commission may also impose other safeguards on the U.S. carriers' provision of service on the route, or prohibit the carrier from operating on that route, if the affiliation raises a concern contrary to the public interest or Commission policies.¹⁴⁰

49. Qwest certifies, pursuant to section 63.18 of the Commission's rules,¹⁴¹ that it is affiliated, within the applicable definition in part 63, with carriers authorized to provide international telecommunications in Belgium, France, Germany, the Netherlands, Switzerland, and the United Kingdom.¹⁴² US WEST has no foreign carrier affiliations.

50. Qwest also certifies that none of its affiliates has sufficient market power in any foreign market to affect competition adversely in the U.S. market. We note that, because Qwest's foreign carrier affiliates operate or will operate in W.T.O. member countries,¹⁴³ Qwest is entitled to a presumption that its foreign carrier affiliations do not raise competition concerns. There is nothing in the record to suggest that this presumption should be rebutted here.

51. We therefore conclude the proposed merger would not result in either Qwest or US WEST acquiring an affiliation with a foreign carrier that has market power on the foreign end of routes that either carrier is authorized to serve. This finding supports our conclusion that the merger would not have anti-competitive effects in any U.S. international market and would serve the public interest, convenience, and necessity. In addition, pursuant to section 63.10(a)(3) of the Commission rules, we grant Qwest's request to be regulated as non-dominant on all U.S. international routes.¹⁴⁴

¹³⁹ See 47 C.F.R. § 63.18(e)(3) & (m) (as amended 1999) (stating that any transferee that is affiliated with a foreign carrier and that desires to be regulated as non-dominant for the provision of particular international services to that country should provide information in its transfer of control application to demonstrate that it qualifies for non-dominant classification pursuant to section 63.10). See also 47 C.F.R. § 63.11(e)(1) (stating that the Commission may, in the case of a notification of foreign carrier affiliation filed under this section, impose dominant carrier regulation on the authorized carrier for the affiliated route).

¹⁴⁰ See *Foreign Participation Order*, 12 FCC Rcd at 23913-15, 23945, paras. 50-53, 128. The Commission may take such action in the context of a section 214 application, including an application to transfer control of a section 214 authorization, or in the context of those notifications of foreign carrier affiliations filed pursuant to Section 63.11(a). See 47 C.F.R. § 63.11(a) & (e)(2) (as amended 1999). See also *Foreign Participation Order*, 12 FCC Rcd at 24036, para. 333.

¹⁴¹ See 47 C.F.R. § 63.18(h).

¹⁴² See Applications at Tab 3.

¹⁴³ See *Foreign Participation Order*, 12 FCC Rcd at 23913, 23914-42, paras. 50, 113, 116

¹⁴⁴ 47 C.F.R. § 63.10(a)(1), (3) (providing that a U.S. carrier that is not affiliated with a dominant foreign carrier in a particular country shall presumptively be classified as non-dominant).

H. Submarine Cable Landing License

52. Qwest seeks authority to transfer control of the submarine cable landing license held by its wholly-owned subsidiary, Qwest Communications Corporation (QCC) in connection with the proposed merger.¹⁴⁵ QCC holds a license to land and operate the Japan-U.S. Cable Network.¹⁴⁶ According to their application, neither Qwest nor US WEST directly or indirectly holds or controls any other undersea cable landing licenses.¹⁴⁷

53. In the *Foreign Participation Order*, the Commission concluded that it would no longer require applicants from WTO Members countries to demonstrate that their markets offer effective competitive opportunities to obtain section 214 authority to serve those countries, or a cable landing license to land or operate a cable in those countries.¹⁴⁸ The Commission determined that it would analyze foreign affiliation in the context of an application for a cable landing license in the same manner it evaluated section 214 authorizations.¹⁴⁹ To that end, the Commission concluded that, where the applicant is a foreign carrier or is affiliated with a foreign carrier in a WTO Member country that has market power on the foreign end, the application is evaluated under a strong presumption that it should be granted.¹⁵⁰

54. In seeking authority to transfer control of a cable landing license, a carrier must comply with criteria similar to what is required of a carrier seeking section 214 authorization. Specifically, pursuant to sections 1.767 and 63.18 of the Commission's rules, the carrier must certify whether it is affiliated with a foreign carrier and provide information as to whether the foreign carrier has market power.¹⁵¹

55. Because we have determined that the proposed merger will not result in Qwest acquiring an affiliation with a foreign carrier that has market power on the foreign end of the cable for which Qwest holds a license, and because Qwest's foreign carrier affiliates operate or will operate in WTO member countries, we conclude that the transfer of control of the submarine cable landing license from QCC to Qwest is consistent with our rules and with the Cable

¹⁴⁵ See Applications at Tab 3. The Applicants seek approval pursuant to the Cable Landing License Act, 47 C.F.R. §§ 34-39 (*Cable Landing Licensing Act*), Executive Order No. 10530, May 10, 1954, Exec. Order No. 10520, *reprinted as amended in* 3 U.S.C.A. § 30 app. At 459-60 (1994), and Section 1.767 of the Commission's Rules, 47 C.F.R. § 1.767.

¹⁴⁶ See Applications at Tab 3. See generally, *Japan-U.S. Order*.

¹⁴⁷ See Applications at Tab 3.

¹⁴⁸ See *Foreign Participation Order*, 12 FCC Rcd at 23933-35, paras. 93-96.

¹⁴⁹ *Id.* at 23934, para. 93.

¹⁵⁰ *Id.* at 23932-35, paras. 87-96.

¹⁵¹ See Applications at Tab 3

Landing License Act.¹⁵²

IV. MERGER-SPECIFIC PUBLIC INTEREST BENEFITS

56. The final step in our traditional license transfer review is to determine whether affirmative public interest benefits are likely to be realized as a result of the merger that would not be achieved but for the merger. We find that the merger creates new incentives to increase local exchange competition in the US WEST region by providing the merged company with a stronger incentive to satisfy section 271 obligations earlier than US WEST would absent the merger. Qwest has volunteered to irrevocably divest each of its in-region interLATA services creating what the Applicants describe as a “doughnut-shaped footprint” covering the US WEST 14-state region in Qwest’s national services market.¹⁵³ Qwest, as a long distance provider, owns a substantial nation-wide network connecting the 150 metropolitan areas that originate more than 95 percent of all telephone calls made in the United States.¹⁵⁴ Similarly, Qwest owns a substantial Internet backbone that the company would be unable to use for in-region Internet-related offerings.

57. Qwest has strong business incentives to make full use of its long distance network and Internet backbone by providing service throughout the country to its clients that conduct business nationwide. In order to do so, however, Qwest would need the authorization of the Commission and states after it satisfies its section 271 obligations. Thus, in order to be more competitive in its out-of-region long distance service, and obtain maximum growth in its out-of-region business, Qwest will need to affirmatively pursue the legal ability to offer in-region long distance.¹⁵⁵ We will, however, review the divestiture report to determine if the merged entity intends to co-market its out-of region interLATA service with its buyer’s in-region interLATA service, and to determine if the divestiture in any way diminishes the Applicants’ incentive to pursue section 271 authority. If so, this could affect the merged entity’s incentive to use both its national network and to obtain section 271 authority. Therefore, we may need to revisit our findings here once the divestiture report is filed.

58. Some commenters argue that US WEST has failed to comply with its section 251 obligations and that on this basis the Commission should reject or condition the merger.¹⁵⁶ For

¹⁵² Pursuant to the Cable Landing License Act, the Department of State, after coordinating with the National Telecommunications and Information Administration and the Department of Defense, approved the transfer of control. *See* Letter from Geoffrey Chapman, U.S. Coordinator, Office of International Communications and Information Policy, U.S. Department of State, to Donald Abelson, Chief, International Bureau, FCC, Dec. 15, 1999.

¹⁵³ Applicants’ Response to Comments at 18.

¹⁵⁴ Applicants’ Response to Comments Declaration of Bruce M. Owen (Applicants’ Response to Comments Owen Declaration) at 9.

¹⁵⁵ *See, e.g.*, Applicants’ Response to Comments Owen Declaration at 2-3.

¹⁵⁶ McLeod Petition to Deny at 14-15; McLeod Jan. 13 *Ex Parte* at 1-8.

example, Covad charges that US WEST's conduct with regard to its section 251 obligations amounts to a barrier to competition.¹⁵⁷ Most of these comments claim, in general, that US WEST has a long history of providing poor service to competitive LECs and that the merger would increase the opportunities to violate section 251.¹⁵⁸ These parties argue that the merger should be denied or conditioned as necessary to serve the public interest.¹⁵⁹ Moreover, TSR Wireless LLC argues the Applications should be denied because US WEST has failed to honor its interconnection obligations.¹⁶⁰

59. We find that these complaints are serious and relevant to our merger analysis. However, we are not persuaded that the merger would *increase* US WEST's incentive or ability to provide poorer performance to competitive LECs.¹⁶¹ Moreover, as the Applicants correctly point out, the merger neither creates nor exacerbates issues regarding US WEST's qualifications and performance.¹⁶² McLeod argues that the benefits US WEST would gain from obtaining section 271 approval to carry interLATA traffic originating in region is "less substantial than the cost it would occur from losing local market share if its local market were fully open to competition."¹⁶³ Regardless of whether the assertion is true, we believe US WEST's incentives to comply with section 271 *increase* after Qwest acquires it.¹⁶⁴ As the merged entity seeks to

¹⁵⁷ See Covad Comments at 16; *see also* McLeod Petition to Deny at 13; McLeod Nov. 12 *Ex Parte* at 3.

¹⁵⁸ *See, e.g.*, McLeod Jan. 13 *Ex Parte* at 8-9

¹⁵⁹ *See, e.g.*, McLeod Petition to Deny at 40-46.

¹⁶⁰ TSR Wireless Petition at 7, 13. Similarly, Black Hills FiberCom asks that we withhold action on the proposed merger until the Commission resolves an interconnection complaint it has filed. Black Hills FiberCom Comments at 1.

¹⁶¹ McLeod Petition to Deny at 11-15; NextLink Joint Comments at 5-15.

¹⁶² *See, e.g.*, Applicants' Response to Comments at 23-29.

¹⁶³ *See* McLeod Petition to Deny at 29; McLeod Jan. 13 *Ex Parte* Mitchell Report at 11-12; McLeod Feb. 14 *Ex Parte* at 2.

¹⁶⁴ We also disagree with McLeod and NextLink's argument that the merged company will divert resources to out-of-region projects without regard to in-region service quality. McLeod Petition to Deny at 28, 42; NextLink Joint Comments at 5-14. We note that the state commissions in the US WEST region are vigorously reviewing US WEST's service quality and investments. The merger will do nothing to impair the state's ability to address these concerns. Moreover, as we discussed above, section 271 will provide the merged company with positive incentives to *improve* in-region services, eliminate discrimination and honor interconnection agreements with competitors. Furthermore, we agree with the Applicants that state price cap regulation mitigates concern about increased rates. *See* Applicants' Nov. 30 *Ex Parte* at 3. We also note that Mr. Alan R. Nevers' concern, that stock dividend payments will drop after the merger, is inapplicable here. *See* Alan R. Nevers Comments. The Applicants argue that, if dividends are reduced after the merger, more rather than less funds will be available for investment both in-region and out-of-region services and that the combined entity's increased incentive to satisfy section 271 will increase its focus to increase in-region investment. Applicants' Response to Comments Owen Declaration at 5. In any case, we find no basis to conclude that the merged company will permit the deterioration of its facilities, or that Qwest will detrimentally use US WEST resources to cross-subsidize Qwest's out-of-region undertakings.

obtain section 271 authority, entry into the markets by local competitors will follow and accelerate. Furthermore, we believe these improvements will result in increased competitive entry and therefore more choices and improved service quality for the end consumers. Finally, we point out that since these applications were filed, the Commission has issued orders addressing some of the commenters' general concerns.¹⁶⁵

60. We find that another important public interest benefit of the merger is that it promotes the goals of the 1996 Act, articulated in section 706, to “encourage the deployment on a reasonable and timely basis . . . advanced telecommunications capability to all Americans.”¹⁶⁶ We agree with the Applicants that the merger will permit expedited and broad deployment of advanced services by combining the companies' assets and unique areas of expertise.¹⁶⁷ US WEST, for example, is among the top suppliers of digital subscriber line (xDSL) service.¹⁶⁸ US WEST claims to have deployed 550 data switches and to have rolled out xDSL in 40 in-region cities, serving nearly 40 percent of the nation's xDSL customers.¹⁶⁹ Yet US WEST owns no long-haul network to provide a broader range of advanced services.¹⁷⁰ Qwest, on the other hand, owns an 18,500 mile, high-capacity fiber optic network domestically, as well as networks

¹⁶⁵ For example, Covad argues that US WEST “remains a monopoly” in its territory and substantial barriers to entry remain, particularly for providers of advanced services, who lack access to the local loop, remote terminals and line sharing. Covad Comments at 8-10. Other commenters share these concerns. See NextLink Joint Reply Comments at 2; Rhythms Comments at 4-6. We note that many of these concerns have been addressed during the pendency of the applications considered in this Order. See *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, ___ FCC Rcd ___, FCC 99-238, (rel. Nov. 5, 1999) recon. pending *United Telecom Association v. F.C.C.*, No. 00-1015 et. al. (D.C. Cir. filed Jan. 19, 2000) (*UNE Remand Order*) and *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order, and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Fourth Report and Order*, ___ FCC Rcd ___, FCC 99-355 (rel. Dec. 9, 1999) recon. pending, *United States Telecom Association, et. al. v. F.C.C.*, No. 00-1012, et. al. (D.C. Cir. filed Jan. 18, 2000) (*Line Sharing Order*). Both the *UNE Remand Order* and the *Line Sharing Order* answer, through the rule-making process, many of the concerns raised by Covad, Rhythms and other commenters. The *UNE Remand Order* requires incumbent LECs to make available to competing carriers access to unbundled loops, remote terminals and sub-loop elements. The *Line Sharing Order* requires incumbent LECs to unbundle the high frequency portion of the local loop spectrum and make it available to competing carriers.

¹⁶⁶ Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

¹⁶⁷ Consequently, we disagree with Rhythms' assertion that the proposed transfer threatens the provision of advanced services. Rhythms Comments at 3 – 6.

¹⁶⁸ For purposes of this Order, we use the term “advanced services” to mean high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications. Today's wireline broadband services include services that use digital subscriber line technology (commonly referred to as xDSL).

¹⁶⁹ Applications at page 15-16.

¹⁷⁰ Applicants' Response to Comments at 14.

deploying high capacity local fiber optic networks in Mexico and in 19 European cities.¹⁷¹ We believe combining US WEST's expertise in providing xDSL to the local loop with Qwest's high speed, high-capacity network will expedite deployment of advanced services and on a broader basis than US WEST could have offered alone.¹⁷²

61. Commenters have asked that we impose conditions on the parties, such as the creation of a separate subsidiary,¹⁷³ improvements to US WEST's operational support systems¹⁷⁴ and others.¹⁷⁵ Many of the parties point to our recent *SBC/Ameritech Order* as a basis for such conditions. This reliance is misplaced. In *SBC/Ameritech*, we found that the public interest harms associated with the merger as proposed by the applicants in that proceeding outweighed the public interest benefits.¹⁷⁶ The addition of the voluntary conditions to applicants' proposal in *SBC/Ameritech*, however, changed the public interest balance and we then found that, "assuming the Applicants' ongoing compliance with the conditions . . . the proposed transfer of licenses and lines . . . serve[d] the public interest."¹⁷⁷

62. In reviewing the Qwest/US WEST Applications, we find that the Applicants have met their burden of proof and that, on balance, the public interest benefits of the Applicants' proposal as filed and supplemented, outweigh any public interest harms, provided the Applicants' divestiture results in a merger that complies with section 271. Therefore, there is no need to adopt conditions to change the balance. Given these findings, we decline to consider conditions of the sort involved in the *SBC/Ameritech* matter.

V. OTHER ISSUES

63. We find that complaints such as those regarding service to consumers and vendors are serious and relevant to our merger analysis, but in this instance should be referred to the proper enforcement forum.¹⁷⁸ We believe the net effect of the merger of Qwest and US

¹⁷¹ Applicants' Response to Comments Carlton and Sider Declaration at 9.

¹⁷² Applicants' Response to Comments at 13-14.

¹⁷³ Covad Comments at 24; Rhythms Comments at 10; NextLink Joint Comments at 18; McLeod Jan. 13 *Ex Parte* at 10.

¹⁷⁴ Covad Comments at 25; NextLink Joint Comments at 21-23.

¹⁷⁵ See, e.g., Covad Comments at 23-26; Rhythms Comments at 6-13; NextLink Joint Comments at 15 - 31; Allegiance Comments at 9-13; McLeod Petition to Deny at 40-46; New Mexico Rural Development Response Council Comments at 2; TSR Wireless Petition to Deny at 13; Coalition to Ensure Responsible Billing Comments (CERB Comments) at 10; Pathfinder Reply Comments at 3; Letter from Priscilla Hill-Ardoin, Senior VP, SBC, to Magalie Roman Salas, Secretary, FCC, Feb. 1, 2000.

¹⁷⁶ *SBC/Ameritech Order* 14 FCC Rcd at 14716, para. 2-3.

¹⁷⁷ *Id.*

¹⁷⁸ For example, the New Mexico Rural Development Response Council argues that US WEST's record of service to rural New Mexico has failed to meet its contractual commitments and asks the Commission to impose (continued....)

WEST will be increased competition for customers, which will result in lower prices, innovative services, and improved service quality for those customers. Moreover, as the Applicants correctly point out, rejection of this merger by the Commission would not solve the alleged deficiencies of service quality because the merger neither creates nor exacerbates issues regarding US WEST's qualifications and performance.¹⁷⁹

VI. ORDERING CLAUSES

64. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 303(r), 309, 310(b) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(b), 310(b), 310(d), that the Applications filed by Qwest Communications International Inc. and US WEST, Inc. in the above-captioned proceeding ARE GRANTED, to the extent set forth herein, provided that the merger may not be consummated until after issuance by the Commission of a subsequent order stating that the proposed divestiture results in a merger that complies with section 271.

65. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), and subject to Paragraphs 67 through 71 below, that the above grant shall include authority for Qwest Communications International to acquire control of:

- a) any Title III authorization issued to US WEST, Inc.'s subsidiaries and affiliates during the Commission's consideration of the transfer of control applications and the period required for consummation of the transaction following approval;
- b) Title III construction permits held by licensees involved in this transfer that mature into licenses after closing and that may have been omitted from the transfer of control applications;

(Continued from previous page) _____
conditions on the merger to obtain "teleinfrastructure improvements" in rural New Mexico. *See* New Mexico Rural Development Response Council's Comments. We would expect to see improvements in US WEST's service to the vendors and end-user customers in rural New Mexico as it faces competition from other providers. In addition, CERB states that because US WEST bundles its services and employs its local telephone bill as a bottleneck, the merger increases the incentive to discriminate against third-party vendors through the US WEST billing program; and that US WEST has made exceptions from its bill segregation program to third-party vendors only where US WEST itself owns an interest in the product in question. CERB Comments at 4-5; Letter from Kristine DeBry, Esq., Counsel for CERB, to Magalie Roman Salas, Secretary, FCC, Nov. 8, 1999; Letter of Gary D. Slaiman, Esq., Counsel for CERB, to Magalie Roman Salas, Secretary, FCC, Jan. 3, 2000. Also, the US West Retiree Association opposes this transaction on grounds that the combination would impact retiree pension plans and healthcare benefits plans. However, we consider these pension and labor concerns to be inappropriate for our review in this proceeding. *See* Letter from John W. Mooty, on behalf of the US West Retiree Association, Sept. 23, 1999. We also decline to review the unsubstantiated allegations made against Qwest concerning discrimination against minorities and fraudulent filings before the Securities and Exchange Commission. Joseph D. Jones Comments at 1.

¹⁷⁹ *See, e.g.*, Applicants' Response to Comments at 24-29.

- c) Title III applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control; and
- d) domestic and international section 214 authorizations held directly or indirectly by US WEST or its subsidiaries.

66. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, 310(b) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the "Petitions to Deny" filed by McLeodUSA Telecommunications Services, Inc., and TSR Wireless LLC ARE DENIED to the extent set forth herein.

67. IT IS FURTHER ORDERED that the Applicants must divest all in-region interLATA businesses prior to consummating the transfer of licenses and lines. Divestiture must be complete prior to the merger closing.

68. IT IS FURTHER ORDERED that Applicants must submit, before the merger may close, a full report to the Commission explaining why the merger would not result in a violation of section 271. If Applicants intend to accomplish this by divesting certain businesses, they must submit information described in this Order, detailing any and all activities provided by the merged entity on behalf of the buyer. Applicants must also identify and explain:

- a) each buyer of the divested services;
- b) all relevant information regarding the divestiture sale, including the terms of the divestiture sale;
- c) the customer support functions to be provided by the Applicants, as well as the contracts themselves;¹⁸⁰
- d) any business relationship *with the buyer* that does not involve customer support including but not limited to joint marketing or co-sourcing; and
- e) any *on-going* Qwest or US WEST business that would implicate a section 271 issue, including but not limited to information on whether the merged company operates its Internet backbone network without originating traffic in the US WEST region, and the merged entity's affiliation with Advanced Radio Telecom Corporation, Apex Global Internet Services, Inc., and any other relevant affiliate.

69. IT IS FURTHER ORDERED that upon certification by the Applicants that the filed divestiture report is complete and accurate, we will place the report on public notice and invite all interested parties to comment. No later than 45 days after the public comment period

¹⁸⁰ By "contracts" we also include any term sheets associated with any agreements between the Applicants, the buyer and any other carrier.

closes, the Commission shall issue a subsequent order stating whether the Applicants' divestiture would result in a merger that complies with section 271.¹⁸¹ The Applicants may not execute the proposed transfer of licenses and lines until the full Commission determines that the merged company will be in compliance with section 271.

70. IT IS FURTHER ORDERED that in the event by subsequent order we permit the merger to proceed, a senior Qwest executive shall certify under oath, annually, that Qwest's activities on behalf of the buyer are consistent with its representations to the Commission in this proceeding and that it continues to comply with section 271.

71. IT IS FURTHER ORDERED, that in the event by subsequent order we permit the merger to proceed, that the Applicants will be required to hire an independent auditor, acceptable to the Chief of the Common Carrier Bureau, to perform an annual examination engagement regarding the merged company's *on-going* compliance with section 271. Additionally, the independent auditor must immediately report any information that may suggest a section 271 violation, as well as any corrective action taken, to the Chief of the Common Carrier Bureau. The independent auditor shall have full access to business operations and records of both buyer and the merged entity, and shall notify the Bureau immediately if such access is denied. The independent auditor shall submit a positive opinion (with exceptions noted) in its annual report to the Chief of the Common Carrier Bureau each year on the anniversary of this Order until the merged company receives section 271 authorizations for all states in which it is a Bell Operating Company.

72. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release in accordance with 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁸¹ If we find that the report is not complete, we shall extend the 45 day review period by the number of days it takes the Applicants to provide complete and relevant information.

APPENDIX A**Petitions to Deny**

1. McLeodUSA Telecommunications Services, Inc.
2. TRS Wireless LLC

Comments

1. Allegiance Telecom, Inc.
2. AT&T Corp.
3. Black Hills FiberCom
4. Coalition to Ensure Responsible Billing
5. Covad Communications Company
6. Joseph D. Jones
7. MCI Worldcom, Inc.
8. New Mexico Rural Development Response Council
9. Nextlink Communications, Inc. (with Advanced Telcom Group, Inc.,
GST Telecommunications, Inc., Firstworld Communications, Inc.) (Joint Commenters)
10. Rhythms Netconnections, Inc.
11. John W. Mooty, US WEST Retiree Association
12. Alan R. Nevers

Reply Comments

1. Pathfinder Communications, Inc.
2. MCI Worldcom, Inc.
3. Qwest Communications International, Inc.
4. TRS Wireless LLC
5. Nextlink Communications, Inc. (with Advanced Telcom Group, Inc.,
GST Telecommunications, Inc., Firstworld Communications, Inc.) (Joint Commenters)

Comments on the Divestiture Plan

1. Allegiance Telecom, Inc.
2. AT&T Corp.
3. McLeodUSA Telecommunications Services, Inc.
4. MCI Worldcom, Inc.

**CONCURRING AND DISSENTING STATEMENT
OF COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: Qwest Communications International Inc. and US WEST, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, CC Docket No. 99-272.

I concur in the Commission's decision conditionally to approve Qwest and US WEST's application to transfer control of certain lines and licenses in connection with the parties' planned merger transaction. I agree that our final approval of this transfer application will turn on whether the parties have demonstrated that they will be in compliance with section 271 of the Telecommunications Act of 1996 when this transaction is complete. As I have made clear previously, however, I disagree with the wide-ranging, quasi-antitrust analysis the Commission applies to determine whether a license transfer is in the "public interest," and I do not join in those portions of this Order that follow this approach.

It is appropriate to condition approval of this license transfer application on section 271 compliance. A company may transfer lines or licenses to another company only upon a determination by this Commission that such transfers are consistent with the "public interest." See 47 U.S.C. § 214, 310(d). In my view, the inquiry the Commission conducts pursuant to these statutory provisions should be transparent, straightforward, and predictable. A chief consideration should be whether the transfer would result in a violation of the statute or of the Commission's rules. In addition, the focus should be on whether the *specific transfers* in question – as opposed to the *merger in general* – would serve the public interest.

The proposed license transfers raise the prospect of statutory violations. Qwest currently provides interLATA services in US WEST's in-region states. Because section 271 prohibits US WEST and its affiliates from providing in-region interLATA services until the requirements of section 271 have been met, completion of the merger – as matters now stand – would place the new company in violation of the statute. It is therefore necessary for Qwest to cease providing interLATA services originating in US WEST's in-region states before the merger transaction is finalized.

At this point, based on the information the parties have provided to the Commission, it is not possible to determine whether the ultimate divestiture will comply with section 271. Among other things, it is necessary to consider the extent to which the merged company will provide the buyer with support services and whether it will attempt jointly to market services with the buyer. I therefore agree with Commission that approval of this license transfer application must be conditioned on a review of the terms of the actual divestiture agreement to an actual buyer.

Other aspects of the Commission's "public interest" analysis are without basis in the statute. In other parts of this Order, the Commission broadly assesses the effects of the merger on the local and long-distance markets. Whatever the merits of these conclusions – on which I

express no view – such considerations should play no role in the Commission’s decision to grant a license transfer application. The statute charges the Commission with the narrow task of reviewing license transfer applications, and the chief focus of this inquiry should be on whether the transaction in question would result in a violation of statute or regulations. We routinely review the overwhelming majority of license transfer applications under this standard. There is quite simply no basis in the law for Commission’s applying an entirely different framework – one that is so imprecise that it can be used to manufacture practically any result the Commission desires – to a small category of license transfer applications.