

**BEFORE THE  
NEW MEXICO STATE CORPORATION COMMISSION**

IN THE MATTER OF THE )  
INVESTIGATION CONCERNING )  
U S WEST'S COMPLIANCE WITH ) Docket No. 97-106-TC  
SECTION 271(c) OF THE )  
TELECOMMUNICATIONS ACT OF 1996 )

**Testimony of Ronald J. Binz  
Competition Policy Institute**

**on behalf of  
The Attorney General of New Mexico**

**July 27, 1998**

## Direct Testimony of Ronald J. Binz

1 **Q. What is your name and address?**

2 A. My name is Ronald J. Binz. My business address is 3773 Cherry Creek North Drive,  
3 Suite 1050, Denver, Colorado 80209.

4

5 **Q. What is your occupation?**

6 A. I am the President and Policy Director of the Competition Policy Institute (CPI). The  
7 Competition Policy Institute is located at 1156 15<sup>th</sup> Street, N.W., Suite 520, Washington,  
8 D.C. 20005. In addition, I am the principal in Public Policy Consulting, a Denver firm  
9 specializing in energy and telecommunications regulatory matters.

10

11 **Q. Please describe the Competition Policy Institute.**

12 A. CPI is an independent nonprofit organization that promotes state and federal policies to  
13 bring competition to telecommunications and energy services in ways that benefit  
14 consumers. Consumer advocate Debra Berlyn and I founded CPI in March 1996 to  
15 provide a new voice for consumers in the debate about implementing pro-consumer, pro-  
16 competitive policies in both telecommunications and energy. I have attached CPI's  
17 Charter as Appendix A to this testimony.

18

19 We describe CPI as a combination consumer organization and "think tank." Its activities  
20 include research, advocacy, and working with other consumer organizations. CPI is  
21 active before state and federal regulatory agencies and in legislative arenas. We are  
22 frequent parties to proceedings before the Federal Communications Commission (FCC)  
23 on the implementation of the Telecommunications Act of 1996, on Universal Service,  
24 section 271 proceedings, rulemakings on local competition, rulemakings on Customer  
25 Proprietary Network Information and licensing of spectrum, among other issues. We  
26 have also published two major reports on restructuring in the electric power industry.

1 CPI is advised by a group of consumer advocates from across the country that forms its  
2 Consumer Advisory Committee. This consumer committee meets periodically to review  
3 the policy positions taken by CPI, and to discuss and recommend positions to be taken by  
4 the organization. However, the CPI's policy positions are the product of its senior staff.  
5 CPI is funded by unrestricted grants from a broad group of competitive  
6 telecommunications carriers and electric utility associations, but the organization  
7 operates independently of these funding sources when determining its policy positions.  
8 We also receive grants dedicated to special projects such as a symposium on  
9 telecommunications policy for state regulators we hosted last winter.

10  
11 Complete information about CPI is available at <[www.cpi.org](http://www.cpi.org)>. Our website contains the  
12 complete text of all CPI publications, speeches, studies, and regulatory and court filings.  
13 It also contains a list of CPI's consumer advisory board, a list of the organizations that  
14 have provided grants to CPI and biographies of the organization's staff members.

15  
16 **Q. Please summarize your experience in telecommunications policy and regulation.**

17 A. For eleven years until 1995, I was Consumer Counsel for the State of Colorado. In that  
18 role, I represented the interests of residential and small business consumers of  
19 telecommunications and energy before the Colorado Public Utilities Commission, the  
20 Federal Communications Commission, the Federal Energy Regulatory Commission, the  
21 courts and legislative bodies.

22  
23 I served as the President of the National Association of State Utility Consumer  
24 Advocates (NASUCA) for two years and chaired the organization's Telecommunications  
25 Committee for three years. In those roles I testified more than ten times before  
26 Congressional committees on federal telecommunications and energy legislation. On  
27 behalf of NASUCA, I lobbied during the deliberations on S. 652 and H.R. 1555, the  
28 Senate and House bills that became the Telecommunications Act of 1996. I testified in

1 several congressional hearings on these bills and on the predecessor legislation  
2 considered in prior years.

3  
4 Since passage of the federal legislation, I have testified before the Federal-State Joint  
5 Board on Universal Service and before the Senate Judiciary Committee on the effect of  
6 the proposed mergers of the Regional Bell Operating Companies on local exchange  
7 competition. I testified before the Public Utilities Commission of the State of Maine and  
8 the New York Public Service Commission on the proposed Bell Atlantic/NYNEX merger  
9 and before the California Public Utilities Commission on the proposed merger of SBC  
10 Communications and Pacific Telesis. In May 1998 I testified before the United States  
11 Senate Committee on Commerce, Science and Transportation in its oversight hearings on  
12 the FCC's Common Carrier Bureau. I have authored or participated in writing comments  
13 or testimony in numerous proceedings before the FCC and state regulatory commissions.  
14 I also serve as co-chair of the North American Numbering Council (NANC) to the FCC.  
15 Previously, I was a member of the Network Reliability Council to the FCC.

16  
17 I am a frequent invited speaker at regulatory meetings and conferences. I have been  
18 invited by the National Association of Regulatory Utility Commissioners (NARUC) to  
19 make presentations at many of their meetings, and made a presentation before the  
20 Regional Oversight Committee (ROC) of regulators in U S WEST states this past spring.  
21 I have lectured at numerous sessions of the NARUC Regulatory Issues conferences in  
22 Williamsburg and recently testified before state legislators at an American Legislative  
23 Exchange Council committee on taxation and rights-of-way.

24  
25 Prior to my work with the Colorado Office of Consumer Counsel, I was a utility rate  
26 consultant. I have testified before regulatory commissions in Colorado and in other

1 western states on behalf of a variety of clients, consumer organizations, senior citizen  
2 groups, agricultural utility consumers and local governments. I have attached a copy of  
3 my resume as Appendix B to this testimony.  
4

5 **Q. What is the purpose of your testimony?**

6 A. Under Section 271(d)(3) of the Communications Act, the Federal Communications  
7 Commission (FCC) may not approve the application of a Bell Operating Company  
8 (BOC) to provide in-region, interLATA service unless the FCC finds that: 1) the BOC  
9 meets the “competitive checklist” under Track A or Track B; 2) the BOC will comply  
10 with Section 272 requiring the use of a separate affiliate; *and* 3) “the requested  
11 authorization is consistent with the public interest, convenience, and necessity.”  
12

13 As a practical matter, most discussions about BOC applications under Section 271 in  
14 state commission proceedings and at the FCC have, to this point, focused on the first  
15 prong of the entry test, the “competitive checklist,” while referring to the public interest  
16 test only in passing. This is perhaps understandable; no BOC has yet been found to have  
17 fully implemented the 14-point checklist, and therefore the FCC and state commissions  
18 have not yet been required to reach conclusions about the public interest prong of the  
19 three-part test.  
20

21 Despite the small degree of attention on the public interest test, it is a vitally significant  
22 and legally necessary condition for approval of a BOC section 271 application. Because  
23 the public interest prong is equally as important as the requirements of the competitive

1 checklist and the separate affiliate safeguards, regulators must give the public interest test  
2 a separate, meaningful consideration. The legislative history of the Telecommunications  
3 Act of 1996 reveals that Congress rejected an amendment to identify the public interest  
4 test with checklist compliance. This means that, for the public interest test to have an  
5 independent status, it must theoretically be possible for regulators to find that the BOC  
6 fails the public interest test even if it has met the checklist.

7  
8 The New Mexico State Corporation Commission (Commission) is investigating the  
9 compliance of U S WEST Communications, Inc. (U S WEST) with Section 271(c) of the  
10 Communications Act. In its filing, U S WEST asks the Commission to issue an order  
11 that:

- 12 1) Verifies that U S WEST has satisfied the threshold requirements of Track A;
- 13 2) Verifies that U S WEST has satisfied the competitive checklist in New Mexico;
- 14 3) Advises the FCC that it would be in the public interest of the State of New  
15 Mexico for the FCC to grant U S WEST authority to enter the interLATA toll  
16 market in New Mexico; and
- 17 4) Recommends that the FCC approve U S WEST's section 271 application for the  
18 State of New Mexico.

19 My testimony focuses on the third issue on this list, the public interest test.  
20  
21

22 **Q. How should the Commission view its prerogatives under the public interest test?**

23 A. The public interest test allows regulators to review whether residential and business

1 consumers will benefit from a BOC's application to provide interLATA service. CPI  
2 believes that this allows a state commission (and the FCC) to adopt a consumer-oriented  
3 approach to assessing applications under section 271. For, while the competitive  
4 checklist is critically important to *competing carriers*, the public interest consideration is  
5 critically important to *residential and business consumers*. The public interest test allows  
6 regulators to step back from the technical details of the application and determine  
7 whether granting this application is consistent with the central purposes of the  
8 Telecommunications Act of 1996.

9  
10 If the New Mexico State Corporation Commission makes a finding on the public interest  
11 impact of the U S WEST petition in this case and offers a recommendation to the FCC on  
12 the public interest standard, I recommend that the Commission consider whether New  
13 Mexico residential and business consumers have a "realistic choice" of alternative  
14 carriers for local telephone service. In this way, the Commission's decision and  
15 recommendation to the FCC will help ensure that consumers receive the promised  
16 benefits of the Telecommunications Act of 1996: increased competition in both local and  
17 long distance markets.

18  
19  
20  
21 **Q. What do you mean by "realistic choice"?**

22 A. By "realistic choice" I mean that consumers must have the ability to subscribe to a carrier  
23 other than U S WEST for the provision of local telephone service. Consumers must be

1 able to receive service from carriers that are ready, willing and able to provide service.  
2 That choice cannot be theoretic; it is not enough if a competitor is authorized to provide  
3 service, has built facilities, and has ordered access and interconnection. If alternative  
4 carriers simply have an authorization to provide service but are not actually soliciting  
5 customers or providing service, then the consumers cannot be said to have a realistic  
6 choice.<sup>1</sup>

7  
8 “Realistic choice” also means that the consumer would be able to obtain service that is  
9 comparable in quality and price to the service provided by U S WEST. Determining  
10 whether a competitor’s service offering is comparable in quality and price to  
11 U S WEST’s service does not require a lot of work. For instance, the FCC recently found  
12 that Personal Communications Service (PCS) is generally not an alternative to an  
13 incumbent’s local telephone service today because of differences in service quality and  
14 price.<sup>2</sup> I should also note that “reconnection companies” or “phone sharks” that target  
15 service to customers with poor credit ratings (at very high rates) would not provide a  
16 realistic choice for consumers because of the very special market niche these companies  
17 inhabit.

18 When assessing whether consumers have a realistic choice, regulators should consider  
19 service offered by competing carriers provided by any of the three modes of competitive

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<sup>1</sup> The realistic choice approach is sometimes described as a “yellow pages” test. In other words, consumers would have a realistic choice if they could open the yellow pages, find an advertisement for a competing local telephone provider, call and sign up for service just as easily as the consumer could call U S WEST.

<sup>2</sup> Memorandum Opinion and Order, CC Docket No. 97-231, FCC 98-17, February 4, 1998 (“*Louisiana Order*”).

1 entry envisioned by the Telecommunications Act of 1996: resale, UNE-based entry or  
2 facilities-based competition. Of course, competitors' ability to enter the market through  
3 all three entry modes is critical to maximizing the chances that consumers will actually  
4 have a realistic choice.

5  
6 Finally, it is not necessary that the standard require that every consumer have a realistic  
7 choice. In determining whether the public interest is satisfied, it is important that the  
8 Commission examine not only the *number of consumers*, but also the *types of consumers*  
9 with realistic choice. In this regard, the Commission should examine the status of  
10 competition for at least these types of consumers: business and residential, consumers at  
11 various income levels, urban and rural consumers, and consumers living in apartment  
12 buildings and single-family homes.

13  
14 **Q. Has CPI proposed that the FCC consider the “realistic choice” approach to the**  
15 **public interest test found in section 271?**

16 A. Yes. On July 20, 1998 CPI and five other consumer organizations filed a joint Petition  
17 for Declaratory Rulings, asking the FCC to consider whether residential and business  
18 customers have a realistic choice of competing local carriers when conducting its public  
19 interest examination under section 271.<sup>3</sup>

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<sup>3</sup> “Petition for Declaratory Rulings on the Realistic Choice Standard for Implementing the Public Interest Test in Section 271 of the Communications Act of 1934” (*Realistic Choice Petition*). The FCC has issued notice DA 98-1467, CCBPol 98-4 seeking comment on the petition. Comments are requested by August 11, 1998, with Reply Comments sought by August 21, 1998. Joint Petitioners are the American Association of Retired Persons (AARP), Competition Policy Institute (CPI), Iowa Office of

1 I have attached a copy of the *Realistic Choice Petition* as Exhibit 1 to my testimony.

2 The petition explains the concept of “realistic choice” in detail as it applies to the section  
3 271 applications at the FCC. I will highlight the most significant aspects of the proposal,  
4 but will not repeat all of the detail in this testimony. I respectfully recommend that the  
5 New Mexico State Corporation Commission use this same standard when developing its  
6 opinion as to whether approval of U S WEST’s application would serve the public  
7 interest.

8  
9 **Q. What are the limitations on using the public interest test in section 271?**

10 A. CPI recognizes that the public interest test is not without limits. For example, the public  
11 interest test cannot be used to expand the competitive checklist. Section 271(d)(4)  
12 provides that the FCC “may not, by rule or otherwise, limit or extend the terms used in  
13 the competitive checklist set forth in subsection (c)(2)(B)”. Thus, the FCC cannot  
14 require a BOC to unbundle an additional item that is not already included in the 14-point  
15 checklist as a precondition to interLATA entry.

16 More generally, the public interest test cannot be used to establish an additional threshold  
17 requirement that must be met as a precondition for BOC entry. Congress enumerated the  
18 specific preconditions that must be met prior to BOC entry into long distance.

19 Policymakers cannot create additional factors that must be met prior to BOC entry in the  
20 same way that the checklist must be met.

21  

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Consumer Advocate, Maine Office of Public Advocate, South Carolina Department of Consumer Affairs,  
and Utility Consumers’ Action Network of San Diego.

1 At the same time, the public interest test must mean something or it would not have been  
2 included in the statute. CPI believes that the public interest examination allows  
3 policymakers to examine factors in addition to the preconditions established by Congress.  
4 This examination cannot yield preconditions, but it can, and should, inform the judgment  
5 as to whether the public interest is met by granting the application. If instead,  
6 policymakers do nothing more than to examine whether the BOC has met the checklist  
7 and has indicated its intention to satisfy the separate affiliate requirements of  
8 section 272, then the public interest test will have been stripped of all meaning.

9  
10 The *Realistic Choice Petition* respects this limitation on the use of the public interest test  
11 by proposing that the FCC include the realistic choice examination as the most important  
12 factor among all the factors it considers within the public interest test. We do not suggest  
13 that this should be the sole criterion in deciding the public interest. Further, we do not  
14 propose that “realistic choice” be a precondition or threshold requirement. Instead, it  
15 should create a presumption as to whether the public interest test is satisfied that could be  
16 overcome by other evidence. I discuss this last issue below.

17  
18 **Q. In its testimony, U S WEST argues that the public interest will be served if the**  
19 **company is able to compete in long distance markets. Is this an appropriate**  
20 **consideration in assessing the public interest impact of granting its section 271**  
21 **application?**

22 A. Yes. As a general matter, state commissions and the FCC have broad authority to make  
23 determinations under the public interest standard. The potential of increased competition

1 in the interLATA market should be one of the factors considered when evaluating the  
2 public interest impact of granting an application under section 271. However, the FCC  
3 has already stated that increased competition in long distance markets will not be the sole  
4 issue it considers when evaluating the public interest test. In its order denying the section  
5 271 application of Ameritech-Michigan, the FCC rejected the argument of some BOCs  
6 that the public interest inquiry “is limited narrowly to assessing whether BOC entry  
7 would enhance competition in the long distance market.”<sup>4</sup>

8  
9 CPI agrees with the FCC’s decision to consider the effect on competition in the long  
10 distance business as one of factors that informs its public interest determination. In fact,  
11 we note in the *Realistic Choice Petition* that consumers are more likely to realize  
12 benefits of additional long distance competition if they also have a realistic choice for  
13 local service.

14  
15 **Q. What importance should be given to the “realistic choice” standard?**

16 A. For reasons set out fully in the attached *Realistic Choice Petition*, CPI believes that the  
17 question of whether consumers have a realistic choice should be the most important  
18 factor in the public interest analysis for both state commissions and the FCC. We  
19 recommend that the FCC use the realistic choice standard to create a presumption: if  
20 consumers in a state have a realistic choice, then the BOC’s application should be

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<sup>4</sup> In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, *Memorandum Opinion and Order*, CC Docket No. 97-137, August 19, 1997, FCC 97-298. (*Ameritech Order*), para 385.

1 presumed to meet the public interest test; if consumers do not have a realistic choice, the  
2 application should be presumed to fail the public interest test. In each case, the  
3 presumption is not dispositive: it can be overcome, but only if other evidence is  
4 especially convincing. I respectfully suggest that the New Mexico Corporation  
5 Commission should take a similar view as to the importance of this standard.

6  
7 CPI recommends the “realistic choice” standard for several reasons:

- 8 1) The “realistic choice” approach is consistent with the intent of Congress in  
9 passing the Telecommunications Act of 1996. The overriding purpose of the Act  
10 was to open all markets to competition. At the time of enactment, the only  
11 telecommunications market not open to competition was the local market. The  
12 realistic choice approach captures that purpose by matching BOC long distance  
13 entry with the development of competition for local service.
- 14 2) The “realistic choice” approach appropriately focuses attention on the welfare of  
15 residential and business consumers. This is a distinctly different focus than that  
16 of the checklist, which addresses the concerns of competitors.
- 17 3) Determining whether competitors are actually offering service is the best “bottom  
18 line” test of whether compliance with the competitive checklist is sufficiently full  
19 to enable local competition. CPI believes that this standard is preferable to the  
20 “irreversibly open to competition” standard offered by the Department of Justice.  
21 When using “realistic choice,” regulators do not need to investigate the myriad  
22 component facts necessary to decide whether the market is “irreversibly open.”

1           4)     If consumers have a realistic choice of local service competitors, it is more likely  
2                   that they will realize the other benefits of lower long distance rates and  
3                   availability of competitive choices among providers offering “one-stop  
4                   shopping.” This follows because the possible loss of the local customer will  
5                   create market pressures on U S WEST to pass through savings and will limit its  
6                   ability to discriminate against its long distance competitors.

7

8     **Q.     Does U S WEST offer information in its testimony as to whether consumers in its**  
9     **service area have a realistic choice for local service?**

1 A. U S WEST offers examples of limited amounts of competition for both residential and  
2 business customers. These examples are limited to Albuquerque and involve a relatively  
3 small number of customers. U S WEST argues that a larger fraction of customers are  
4 theoretically “addressable” by competitors. I have not conducted a separate investigation  
5 of how many customers have a realistic choice for local service providers. Based on the  
6 testimony of U S WEST, it would appear that a small fraction of business customers in  
7 Albuquerque could actually choose a competitor to U S WEST. On the other hand, very  
8 few residential customers (those in two apartment complexes) could actually switch to a  
9 competitor if they choose to do so. U S WEST admits that there is no local competition  
10 outside of these examples.

11  
12 The Commission and the FCC will have to determine whether these limited instances of  
13 competition meet the technical threshold criterion for moving forward under “Track A”  
14 of the federal statute. However, the sharply limited amounts of competition appear to fall  
15 far short of a “realistic choice” standard in Albuquerque, much less the balance of the  
16 area served by U S WEST.

17  
18 **Q. What is your recommendation to the Commission?**

19 A. The FCC has the duty to confer with the New Mexico State Corporation Commission on  
20 whether U S WEST has met the requirements of Track A and the terms of the  
21 competitive checklist in New Mexico. The Commission also has the prerogative to  
22 advise the FCC on whether granting the application will serve the public interest. With  
23 regard to the public interest determination, I recommend that the Commission issue an  
24 order in this case that:

1           1)        Recommends that the Federal Communications Commission apply the “realistic  
2                    choice” standard when that agency conducts its public interest analysis of the  
3                    application; and

4           2)        Finds that U S WEST has not demonstrated that its New Mexico business and  
5                    residential consumers have a realistic choice for local telephone service.

6

7   **Q.     Does this conclude your testimony?**

8   A.     Yes.

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**AFFIDAVIT OF RONALD J. BINZ**

I, Ronald J. Binz, state that I am the individual whose prepared testimony accompanies this Affidavit, and that this Testimony is true and accurate to the best of my knowledge and belief and, further, that these statements are true and accurate answers to the questions contained therein, and that I adopt those as my sworn testimony in this proceeding.

Date: July 27, 1998

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Ronald J. Binz