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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. T-00000A-97-0238
IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. RT-00000F-02-0271
ARIZONA CORPORATION COMMISSION Complaintant. v. QWEST CORPORATION Respondent.	DOCKET NO. T-01051B-02-0871

FILING OF SUPPLEMENTAL AUTHORITY

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T") hereby file as supplemental authority the Federal Communication

Commission's ("FCC") Notice of Apparent Liability for Forfeiture[1] filed against Qwest Corporation ("Qwest").

The FCC's Notice supports the Staff's initial testimony and recommendations, the positions of the other parties and the Administrative Law Judge's ("ALJ") recommended opinion and order. The FCC found that Qwest's failure to file a number of agreements with the state commissions for approval was willful and egregious. Notice, ¶¶ 1, 3, 40 & 41. The FCC stated that, "[r]egarding the Arizona agreements, Qwest again appears to concede that its litigation strategy – not its construction of the Act or our orders – controlled its decision to delay filing." *Id.*, ¶ 38. The FCC found that it appeared that the timing of Qwest's filing of the agreements had more to do with the filing of its section 271 application than with its section 252 obligations. *Id.*, ¶¶ 38-39.

The FCC found that a number of reasons Qwest gave the FCC for not filing the agreements lacked merit. The FCC found that its *Declaratory Ruling* "does not contain a filing exception for form or standardized agreements." *Id.*, ¶ 29. The FCC found that the FCC did not "create a general 'web-posting' exception to section 252(a)." *Id.*, ¶ 32. "Section 252(a) does not condition filing on a state commission first telling a carrier that a certain agreement (which has not yet been seen) must be filed." *Id.*, ¶ 33. Furthermore, "[p]roviding interconnection agreements to state commission staff in an investigation does not satisfy the requirements of section 252." *Id.*, ¶ 36.

Finally, the FCC did not preclude state enforcement action. The FCC Chairman stated that state enforcement actions are complementary. Statement of Chairman Michael Powell.

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[1] *Qwest Corporation Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, Notice of Apparent Liability for Forfeiture, FCC 04-57 (rel. March 12, 2004) ("Notice"). The Notice is attached hereto as Attachment A.

The FCC made a number of other interesting and relevant findings. However, more importantly, the FCC Notice supports the work of the Staff and the findings and conclusions of the ALJ.

Dated this 16th day of March, 2004.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. AND TCG PHOENIX

By _____

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

In the Matter of	)	
	)	
Qwest Corporation	)	File No. EB-03-IH-0263
	)	NAL Acct. No. 200432080022
Apparent Liability for Forfeiture	)	FRN No. 0001-6056-25
	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 11, 2004 **Released:** March 12, 2004

By the Commission: Chairman Powell issuing a statement.

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL") we find that Qwest Corporation ("Qwest")[1] is apparently liable for willfully and repeatedly violating its statutory obligations in section 252(a)(1) of the Communications Act of 1934, as amended (the "Act")[2] by failing to file 46 interconnection agreements with the Minnesota Public Utilities Commission ("Minnesota Commission") and Arizona Corporation Commission ("Arizona Commission") for approval under section 252.[3] Based on our review of the facts and circumstances surrounding this matter, we find that Qwest is apparently liable for a total forfeiture of $9 million.

2. We propose a forfeiture of such size against Qwest because of Qwest's disregard for the filing requirements of section 252(a) of the Act and the Commission's orders and the potential anticompetitive effects of Qwest's conduct. Qwest's failure to comply with section 252(a) of the Act undermines the effectiveness of the Act and our rules by preventing

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[1] Qwest Corporation, an incumbent local exchange carrier ("LEC") that provides local telephone service in 14 midwestern and western states, was formerly US West, Inc. (one of the original Regional Bell Operating Companies). *See 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 99-272, Memorandum Opinion and Order, 15 FCC Rcd 5376 (2000); Memorandum Opinion and Order, 15 FCC Rcd 11909 (2000). References to Qwest include its predecessor, US West, Inc.

[2] 47 U.S.C. § 252(a)(1).

[3] As discussed below, these agreements were executed several years earlier, but not filed with the state commissions pursuant to section 252(a)(1) of the Act until mid-2003. *See infra* nn.81 & 83.

competitive LECs (or "CLECs") from adopting interconnection terms otherwise available only to certain favored CLECs. Despite our clear and repeated instruction regarding the section 252(a) filing obligations, Qwest apparently withheld dozens of interconnection agreements from state commissions until it was ready to seek our approval to provide in-region, interLATA service for the relevant states.[4] In Minnesota and Arizona, the last two states for which Qwest sought section 271 approval, Qwest delayed filing 46 interconnection agreements until several years after the agreements were executed and months after filing similar agreements in other states. These agreements were filed long after we had clarified, and reiterated, the filing requirements of section 252(a)(1). Indeed, months after Qwest assured us that it had filed all of its previously unfiled interconnection agreements, Qwest filed an additional 53 agreements in six states, some of which date back to 1998.[5]

3. Qwest's actions are egregious because, according to Qwest documents, Qwest company policy since May 2002 explicitly requires filing such agreements with the state commissions, in compliance with section 252(a). Rather than filing the agreements at issue here, however, Qwest withheld them apparently until it was ready to seek section 271 approval from the Commission. As we discuss below, Qwest admits that its decision to file its 34 unfiled agreements in Minnesota "was influenced by the fact that it was preparing to file its application for 271 authority in Minnesota."[6] Qwest further admits that the impetus for filing twelve previously unfiled agreements with the Arizona Commission was not to comply with the Act but rather because "[b]y May, Qwest was less concerned that such a filing might be treated as an admission of liability and result in material penalties."[7] Qwest's cavalier attitude toward the Act's filing requirements shows a disregard for Congress's goals of opening local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms. As we have stated previously, we "consider any filing delays to be extremely serious."[8] The

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[4] In the 1996 amendments to the Act, Congress required Bell Operating Companies ("BOCs") to demonstrate compliance with certain market-opening requirements in section 271 of the Act before providing in-region, interLATA service. *See* 47 U.S.C. § 271(d)(2)(A), (B). On June 13, 2002, Qwest Communications International Inc. filed section 271 multi-state applications for authorization to provide in-region, interLATA service in Colorado, Idaho, Iowa, Nebraska, and North Dakota ("Qwest I"); and on July 12, 2002, for Montana, Utah, Washington, and Wyoming ("Qwest II"). Many of the *ex parte* letters and other documents cited in this NAL were filed in one or both of those dockets. At times, herein, Qwest Communications International Inc. and Qwest Communications Corporation are referred to as "Qwest."

[5] *See infra* para. 17 & n.61.

[6] Qwest Memo at 12. The Qwest Memo was part of Qwest's response to the Bureau's letter of inquiry. *See infra* n.21.

[7] Qwest Memo at 13.

[8] *See Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Michigan*, WC Docket No. 03-138, Memorandum Opinion and Order, 18 FCC Rcd 19024, 19123, ¶ 180 (2003) ("*SBC Michigan 271 Order*"). In the *SBC Michigan 271 Order*, we said that incumbent LECs had adequate notice of their legal obligations under section 252(a) and that we would consider appropriate enforcement action when carriers fail to meet these obligations. *Id.*

forfeiture we propose here today reflects the gravity and scope of Qwest's apparent violations.

II. BACKGROUND

4. Section 252(a)(1) of the Communications Act requires incumbent LECs to negotiate interconnection agreements with CLECs.[9] Once finalized, the agreements must be submitted to state commissions for approval under section 252(e).[10] As we observed in the *Local Competition Order*,

> requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements . . . to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.[11]

After an interconnection agreement is approved by the state commission, other carriers may adopt the terms, conditions, and rates in the agreement pursuant to section 252(i).[12]

5. For more than two years, we and states throughout Qwest's region have examined whether Qwest has violated its statutory duty to file its interconnection agreements. This scrutiny began during the summer of 2001, when the Minnesota Department of Commerce ("Minnesota DOC") sought to determine if Qwest was engaging in anticompetitive conduct.[13] On February 14, 2002, the Minnesota DOC filed a complaint with the Minnesota Commission claiming Qwest had violated state and federal law by not seeking section 252 approval for eleven agreements between Qwest and competitive LECs.[14] Soon thereafter, several other state commissions in Qwest's region, including the Arizona Commission, initiated similar investigations.[15]

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[9] 47 U.S.C. § 252(a)(1).

[10] 47 U.S.C. § 252(e).

[11] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15583, ¶ 167 (1996) (subsequent history omitted, emphasis in original) ("*Local Competition Order*").

[12] 47 U.S.C. § 252(i). *See also* 47 C.F.R. § 51.809(a). One of the key purposes of the section 252(a) filing requirement is that carriers will know which interconnection agreements (and terms) are available under section 252(i).

[13] *See* Findings of Fact, Conclusions, Recommendation and Memorandum, Minn. Docket No. P-421/C-02-197 at 10 (Sept. 20, 2002).

[14] *Id.*

[15] For a summary of the state investigations into unfiled agreements in the first nine application states, see *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, 17 FCC Rcd 26303, 26559-66, ¶¶ 460-471 (2002) ("*Qwest 9-State 271 Order*"). For a summary of the state investigations into unfiled agreements in New (continued....)

6. As the state investigations proceeded, Qwest filed a petition with this Commission on April 23, 2002, seeking a declaratory ruling on what types of agreements between incumbent LECs and their competitors are subject to the mandatory filing and state commission approval requirements of section 252.[16] Qwest argued that section 252(a)(1) required filing and state approval only for a "schedule of itemized charges" and related service descriptions.[17]

7. Notwithstanding the position taken in its petition, in May 2002, Qwest informed the state commissions in its region of a new policy of filing all new "contracts, agreements, and letters of understanding" between Qwest and competitive LECs that "create obligations to meet the requirements of Section 251(b) or (c) on a going-forward basis."[18] Qwest also announced the formation of a "new committee comprised of senior managers from Legal Affairs, Public Policy, Wholesale Business Development, Wholesale Service Delivery, and Network as well as a Policy and Law Regulatory Attorney" to review and determine whether Qwest must file particular

(Continued from previous page)
Mexico, Oregon, and South Dakota, see *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota,* WC Docket No. 03-11, Memorandum Opinion and Order, 18 FCC Rcd 7325, 7397-400, ¶¶ 127-131 (2003) ("*Qwest 3-State 271 Order*").

More recently, the Washington Utilities and Transportation Commission ("Washington Commission") initiated an enforcement proceeding against Qwest and thirteen CLECs, alleging, *inter alia,* that Qwest and the other carriers had not filed all their interconnection agreements for state review; that Qwest had given certain carriers an undue or unreasonable preference; that Qwest had discriminated against carriers; and that carriers had agreed not to oppose Qwest positions in various proceedings. *See Washington Utilities and Transportation Commission, v. Advanced Telecom Group, Inc., et al.*, Complaint and Notice of Prehearing Conference (Sept. 8, 2003), Docket No. UT-033011, filed Aug. 13, 2003. The Washington Commission also issued an order regarding section 252(e)(1) filing requirements. *See Washington Utilities and Transportation Commission, v. Advanced Telecom Group, Inc., et al.*, Order Granting Commission Staff's Motion for Partial Summary Determination; Granting in Part and Denying in Part the Motions to Dismiss and for Summary Determination of Qwest, ATG, AT&T/TCG, Eschelon, Fairpoint, Global Crossing, Integra, MCI, McLeodUSA, SBC, and XO (Feb. 12, 2004). In addition, the staff of the Colorado Public Utilities Commission submitted initial comments in Docket No. 02I-572T, "In the Matter of the Investigation into Unfiled Agreements Executed by Qwest Corporation," (Feb. 27, 2004), recommending, *inter alia*, that the Colorado Commission conduct a hearing on Qwest's willful and intentional violations of state and federal law.

[16] Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89 (filed Apr. 23, 2002) ("Qwest Petition").

[17] Qwest Petition at 6.

[18] *See* Letter from Peter A. Rohrbach, Mace J. Rosenstein, Yaron Dori, Attorneys for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148 (filed Aug. 13, 2002) (including letters to the commissions of Colorado, Idaho, Iowa, Nebraska, and North Dakota – the Qwest I application states – and the Larry Brotherson Qwest I Reply Declaration ("Brotherson Declaration")). Qwest's letters to the state commissions provided that: (1) Qwest would file all agreements with CLECs that create obligations to meet the requirements of section 251(b) or (c) on a going forward basis and (2) Qwest was forming a committee to review such agreements with CLECs and make the necessary filings. *See* Documents Q-PUB-000449 through Q-PUB-000477. The Commission sought comment on Qwest's proposal. *See* "Comments Requested in Connection with Qwest's Section 271 Application for Colorado, Idaho, Iowa, Nebraska, and North Dakota," *Public Notice*, 17 FCC Rcd 16234 (2002).

agreements under section 252.[19] According to Qwest, "[t]hrough the new committee process, and the broad standard it applies, Qwest is ensuring that it will file and obtain necessary PUC approval for all future negotiated agreements with CLECs."[20]

8. On August 1, 2002, this committee – referred to in Qwest documents as the "Wholesale Agreement Review Committee" – met via conference call. According to various drafts of the minutes of this meeting, the committee discussed the treatment of new agreements versus preexisting agreements.[21] The minutes indicate that Qwest had decided to treat pre-existing unfiled agreements differently from new agreements.[22] According to an early draft of the minutes, "[p]ast ancillary agreements are being handled by the litigation team. Going forward, all future ancillary agreements are to be filed with the respective state commission(s) out of an abundance of caution though they may be 'form contracts' not subject to [section] 252."[23] The minutes also state: "Issue: do we need to go back and file old agreements handled by the litigation team?"[24] Handwritten notes next to this question state: "Litigation to analyze."[25]

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[19] Brotherson Declaration at ¶ 7; Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Dockets 02-148 and 02-189, at 2 (filed Aug. 20, 2002) ("Qwest August 20 Letter").

[20] Brotherson Declaration at ¶ 9.

[21] These drafts of the minutes were provided to the Commission in response to a letter of inquiry from the Enforcement Bureau. *See* Letter from William H. Davenport, Deputy Division Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Sharon J. Devine, Qwest Communications International, Inc., dated June 26, 2003 ("LOI"). The LOI response contained a letter from Sharon J. Devine, Qwest Communications International, Inc. to William H. Davenport, Deputy Division Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated July 31, 2003 ("Qwest July 31 Letter"); a Confidentiality Request, seeking confidential treatment of the LOI response; a memorandum ("Qwest Memo"); declarations from R. Steven Davis, Todd Lundy, Dan Hult, and Larry Christensen; a lengthy privilege log; and three boxes of documents. The declarations were all properly notarized, with the exception of the Christensen declaration which was signed by the declarant two days *after* the notarization. Qwest's request for confidential treatment was denied by the Enforcement Bureau. *See Qwest Communications International, Inc.*, DA 03-3521 (Enf. Bur. rel. Nov. 4, 2003). Subsequently, Qwest narrowed the range of documents for which it claimed confidential treatment; the documents cited herein are no longer deemed confidential by Qwest. *See Qwest Communications International, Inc.* File No. EB-03-IH-0500, Application for Review in Part (filed Nov. 12, 2003).

[22] Qwest apparently recognizes this inconsistency. In Qwest's response to the Bureau's LOI, Declarant Todd Lundy states: "it is Qwest's understanding that agreements relating to operator services and directory assistance do not have to be filed." Lundy Declaration at 14. Nevertheless, Lundy continues, the "Wholesale Contract Review Committee out of an abundance of caution has directed the filing of these types of operator services and directory assistance agreements executed since the committee's formation in June of 2002." *Id. See also* Qwest Wholesale Agreement Review Committee Settlement Tracking Sheet, which provides that agreements for directory assistance list information should be filed. Documents Q-CONF-000933, 000936, 000939, 000942, 000948, 000954, 000960, 000966. Several of the unfiled Arizona agreements were for directory assistance.

[23] Document Q-CONF-003506.

[24] *Id.*

[25] Document Q-CONF-000909.

A subsequent draft of the meeting minutes deletes these references to the "litigation team."[26]

9. On August 20, 2002, as the Commission considered Qwest's applications for section 271 approval for nine of its fourteen in-region states, [27] Qwest informed us of its May 2002 letters to the state commissions.[28] Qwest indicated that pursuant to its May 2002 policy, it would file all new agreements that include provisions creating on-going obligations that relate to Section 251(b) or (c).[29] Qwest did not, however, commit to file all such prior unfiled agreements for all states.[30]

10. Soon thereafter, in late September 2002, the Qwest Wholesale Agreement Review Committee provided Qwest employees with a "Training Outline for CLEC Agreements."[31] Qwest told its employees that "[s]ection 252(a) of the Telecommunications Act requires that all agreements with CLECs in Qwest's fourteen state region relating to 'interconnection, services or network elements' shall be filed with the state commissions for approval under Section 252(e)."[32] The outline also gave nearly two dozen examples "of the types of agreements with CLECs in Qwest's fourteen-state region that need to be filed," including "services that are also reflected in the SGATs [Statements of Generally Acceptable Terms]."[33]

11. On October 4, 2002, we ruled on Qwest's petition for a declaratory ruling.[34] As noted above, notwithstanding its more recent statements, Qwest had argued in its petition that section 252(a)(1) required filing and state approval only for a "schedule of itemized charges" and

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[26] Document Q-CONF-004082.

[27] On September 10, 2002, Qwest withdrew its Qwest I and Qwest II pending section 271 applications. Ten days later, Qwest filed a single application with the Commission for authorization to provide in-region, interLATA service in all of the nine states covered in the previous section 271 applications. The Commission granted Qwest's nine-state 271 application on December 23, 2002. *See Qwest 9-State 271 Order*, 17 FCC Rcd 26303.

[28] Qwest August 20 Letter at 2. *See supra* n.18 (describing the letters).

[29] Qwest August 20 Letter at 2.

[30] *Id.* at 1-4. Qwest stated that it would file agreements with CLECs for approval by state commissions in the Qwest II states to supplement the plan announced in its reply comments in the Qwest I proceeding, WC Docket No. 02-148. *Id.* at 1.

[31] Documents Q-CONF-002147 through Q-CONF-002149.

[32] Document Q-CONF-002148.

[33] *Id.* An SGAT contains interconnection terms and conditions available to CLECs operating in that state. *See* 47 U.S.C. § 252(f)(1). The submission or approval of an SGAT does not relieve a BOC of its duty to negotiate the terms and conditions of an agreement under section 251. 47 U.S.C. § 252(f)(5).

[34] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337 (2002) ("*Declaratory Ruling*").

related service descriptions.[35] We rejected this "cramped reading" of section 252, noting that "on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions."[36] Instead, we broadly construed section 252's use of the term "interconnection agreement," holding that carriers must file with state commissions for review and approval under section 252 any "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation . . . ."[37]

12. Shortly after release of the *Declaratory Ruling,* on November 1, 2002, the Minnesota Commission adopted in full a recommended decision by a Minnesota administrative law judge ("ALJ") that Qwest had committed 26 individual violations of the Act and Minnesota statutes by failing to file 26 distinct provisions found in twelve separate agreements with CLECs for interconnection, access to unbundled network elements ("UNEs") and/or access to services.[38] After Qwest rejected a proposal for paying restitution to CLECs for the damage caused by the secret deals, the Minnesota Commission ordered Qwest to pay a $26 million fine and undertake various compliance measures, including retroactive discounts to competitors.[39] Qwest subsequently filed a complaint in federal district court challenging the Minnesota Commission's authority to impose such a penalty.[40]

13. On December 23, 2002, we released the *Qwest 9-State 271 Order*, granting Qwest's section 271 applications for in-region interLATA service in nine of its fourteen in-region states.[41] We discussed the various state investigations, including the Minnesota

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[35] Qwest Petition at 6.

[36] *Declaratory Ruling,* 17 FCC Rcd at 19340-41, ¶ 8.

[37] *Id.* (emphasis omitted).

[38] *See* Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, Minn. Docket No. P-421/C-02-197 (Nov. 1, 2002). Among other things, the ALJ found five different public interest implications arising from the unfiled agreements: (1) Qwest's attempt to subvert the "pick and choose" provisions of the Act; (2) Qwest's attempt to prohibit CLECs from participating in section 271 proceedings; (3) Qwest's attempt to prohibit CLECs from participating in the Qwest/US West merger proceeding; (4) Qwest's attempt to prevent disclosure of negative performance information in the section 271 proceeding; and (5) Qwest's attempt to have a CLEC become an advocate for Qwest in various proceedings, at Qwest's request. *See* Findings of Fact, Conclusions, Recommendation and Memorandum, Minn. Docket No. P-421/C-02-197 (Sept. 20, 2002) at 48.

[39] On February 28, 2003, the Minnesota Commission issued an Order Assessing Penalties, Minnesota Docket No. P-421/C-02-197 (Feb. 28, 2003). After considering petitions for reconsideration, the Minnesota Commission issued, on its own motion, modifications to the February 28, 2003 Penalties Order. *See* Order after Reconsideration on Own Motion, Minn. Docket No. P-421/C-02-197 (Apr. 30, 2003).

[40] *See Qwest Corporation v. Minnesota Public Utilities Commission, et at., Complaint for Declaratory Judgment and Injunctive Relief to Prevent Enforcement of Public Utilities Commission Orders*, Civ. File No. 03-3476, D. MN. (filed June 19, 2003).

[41] *See Qwest 9-State 271 Order*, 17 FCC Rcd 26303.

proceeding, and expressed concern about Qwest's failure to file its agreements with the states.[42] Qwest assured us, however, that "in August 2002 Qwest filed with utility commissions in the application states all previously-unfiled contracts with CLECs that contained currently-effective going forward terms related to section 251(b) or (c) matters."[43] Based on the record in that proceeding, we concluded that Qwest had filed all of its interconnection agreements with the relevant state commissions at issue in the proceeding, with one exception: an Internetwork Calling Name Delivery Service Agreement ("ICNAM")[44] with Allegiance.[45] We rejected Qwest's claim that, because the terms were available through Qwest's SGATs, it did not have to file this agreement in Colorado and Washington.[46] We held that the ICNAM agreement "does not appear on its face to fall within the scope of the filing requirement exceptions set forth in the Commission's declaratory ruling, and accordingly, it likely should have been filed with the states."[47] While we ultimately determined that Qwest's failure to file this agreement did not affect its section 271 application, we also noted that "failure to file this agreement ... could subject Qwest to federal and/or state enforcement action...."[48]

14. Following the release of the *Qwest 9-State 271 Order*, Qwest filed ICNAM contracts in New Mexico on January 9 and January 10, 2003;[49] in Oregon on January 9, 2003;[50]

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[42] *See id.* at 26553-77, ¶¶ 453-486.

[43] Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314, at 1 (filed Dec. 13, 2002) ("Qwest December 13 Letter").

[44] Calling Name Delivery ("CNAM") allows a subscriber to receive the calling party name information and date and time of the call on a specialized display device before the call is answered. The calling party name is retrieved from a database accessible by the terminating central office switch, using non-call-associated signaling. *See* Telcordia Notes on the Networks, Network Architecture and Services, SR-2275, Issue 4, § 14.3 "CLASS Features" (Oct. 2000).

[45] *See Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-72, ¶ 478 n.1746. In the nine-state proceeding, AT&T alleged that twelve unfiled agreements should have been filed under section 252. *Id.* After reviewing the agreements, we concluded that all but the ICNAM agreement had been filed, terminated, superseded, or were not related to the duties imposed under section 251 of the Act. *Id.*

[46] *Id.* The *Declaratory Ruling* does not create such an exception, but provides that any "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)." *Declaratory Ruling*, 17 FCC Rcd at 19340-41, ¶ 8 (emphasis omitted).

[47] *See Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-72, ¶ 478 n.1746. This was also reiterated in the *Qwest 3-State 271 Order*, 18 FCC Rcd at 7397, ¶ 126.

[48] *Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-72, ¶ 478 n.1746.

[49] These three agreements were approved by the New Mexico Commission, as were four of the five agreements filed by Qwest on September 9, 2002. *See Qwest 3-State 271 Order*, 18 FCC Rcd at 7398-99, ¶ 129.

[50] The Oregon Commission approved the three agreements filed on January 9, 2003, as well as sixteen agreements filed on September 4, 2002. *See id.*, 18 FCC Rcd at 7399, ¶ 130.

and in South Dakota on January 13, 2003.[51] On January 14, 2003, Qwest filed a section 271 application with the Commission for authorization to provide in-region, interLATA service in the states of New Mexico, Oregon, and South Dakota.[52]

15. On March 25-26, 2003, more than four months after the *Declaratory Ruling*, Qwest sought the Minnesota Commission's section 252 approval for 34 previously unfiled agreements, including four agreements that had been the subject of the Minnesota enforcement proceedings.[53] On March 28, 2003, Qwest filed a section 271 application with the Commission for authorization to provide in-region interLATA service in Minnesota.[54] The Minnesota Commission subsequently found all 34 agreements, in whole or in part, constituted "interconnection agreements" under section 252.[55]

16. As noted above, the state of Arizona also investigated the Qwest unfiled agreements issue.[56] On May 23, 2003, more than seven months after the *Declaratory Ruling*, Qwest filed twelve previously unfiled Arizona interconnection agreements with the Arizona Commission. In the cover letter accompanying each agreement, Qwest's counsel stated that the agreements reflected form, standard provisions that were available to CLECs on Qwest's website and SGATs and "very well may not be agreements subject to the filing requirement under the

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[51] The South Dakota Commission approved the eight agreements filed on January 13, 2003, as well as the four agreements filed on September 24, 2002. *See id.*, 18 FCC Rcd at 7399-400, ¶ 131.

[52] The three-state application was granted on April 15, 2003.

[53] Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90, at 1 (filed May 23, 2003) (including a summary of the agreements).

[54] The Minnesota 271 application was granted on June 26, 2003. *See Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Minnesota,* WC Docket No. 03-90, Memorandum Opinion and Order, 18 FCC Rcd 13323 (2003) ("*Qwest Minnesota 271 Order*"). We note that the Minnesota commissioners did not reach a consensus on whether the Commission should approve Qwest's application. The Chair recommended approval; however, the remaining three voting commissioners recommended denial. *See* Minnesota Comments in WC Docket No. 03-90 at 18.

[55] On June 12, 2003, the Minnesota Commission approved thirteen of the agreements and approved in part and rejected in part the other 21 previously unfiled agreements. *See* Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90 (filed June 20, 2003).

[56] Qwest and the Arizona Commission staff proposed to settle the Arizona investigation. Under the terms of the consent decree, which also included other matters, Qwest agreed to make a total of more than $20 million in payments and CLEC credits. We note that this consent decree remains under review by the Arizona Commission. We further note that the reviewing ALJ recommended denial because the settlement was too lenient. *See In re Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, Arizona Corporation Commission Docket No. RT-00000F-02-0271; *In re US West Communications, Inc.'s Compliance with Section 271 of the Communications Act of 1996*, Arizona Corporation Commission Docket No. T-00000A-97-0238; *Arizona Corporation Commission v. Qwest Corporation*, Arizona Corporation Commission Docket No. T01051B-02-0871, Opinion and Order (filed Dec. 2, 2003).

FCC's October 4, 2002 [*Declaratory Ruling*] Order; however, the FCC's subsequent order granting 271 relief to Qwest's 9-state application suggested the contrary."[57] On September 4, 2003, Qwest filed a section 271 application with the Commission for authorization to provide in-region interLATA service in the state of Arizona.[58]

17. While the Arizona Commission investigation was still ongoing, we granted Qwest's 271 application for Minnesota. In the *Qwest Minnesota 271 Order*, we did not decide whether Qwest had violated section 252(a) by delaying its filing of interconnection agreements with the Minnesota Commission. Nevertheless, we expressed grave concerns with Qwest's conduct:

> At the same time, we are seriously troubled by Qwest's decision to delay filing 34 agreements with the Minnesota Commission until March 25-26, 2003, and refer this matter to the Enforcement Bureau for investigation and appropriate enforcement action. The Commission clarified the incumbent LECs' obligation to file interconnection agreements under section 252(a)(1) in a Declaratory Ruling on October 4, 2002, nearly six months before Qwest filed the Minnesota agreements. We note that Qwest has provided no explanation in the record for this delay in filing the interconnection agreements. Given that it had adequate notice of its legal obligations under section 252(a), we intend to review with careful scrutiny any explanation that Qwest may provide in the context of a potential enforcement action.[59]

That same day, the Enforcement Bureau issued an LOI to Qwest regarding the unfiled agreements issue.[60] Shortly thereafter, Qwest filed 53 additional agreements dating back to 1996 in six of its in-region states.[61] Qwest responded to the LOI on July 31, 2003.

III. DISCUSSION

A. Qwest Apparently Willfully and Repeatedly Failed to File Its Interconnection Agreements in Minnesota and Arizona

18. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any

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[57] *See, e.g.*, Letter from Timothy Berg, Fennemore Craig Law Offices, to Docket Control, Arizona Corporation Commission, filed May 23, 2003 (Document Q-PUB-000436).

[58] We note that the Arizona Commission did not reach a unanimous conclusion on whether we should approve Qwest's 271 application; Qwest's application was found to be in the public interest by a vote of three to two. *See* Evaluation of the Arizona Corporation Commission in WC Docket No. 03-194 at 23.

[59] *Qwest Minnesota 271 Order*, 18 FCC Rcd at 13371, ¶ 93 (citations omitted).

[60] *See supra* n.21.

[61] *See* Lundy Declaration at 15-20. These agreements are listed in Appendix A.

rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[62] In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.[63] The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has willfully or repeatedly violated the Act or a Commission rule.[64] As we set forth in greater detail below, we conclude under this standard that Qwest is liable for a $9 million forfeiture for 46 apparent violations of section 252(a)(1) of the Act.

1. The Commission Has Established Clear Standards Under Section 252(a)(1) of the Act

19. The fundamental issue in this case is whether Qwest apparently willfully or repeatedly violated the Act by delaying its filing of the Minnesota and Arizona interconnection agreements. The filing requirement is in section 252(a)(1) of the Act, which states:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement . . . shall be submitted to the State commission under subsection (e) of this section.[65]

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[62] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act indicates that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) ("*Callais Cablevision*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision.*, 16 FCC Rcd at 1362, ¶ 9.

[63] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

[64] *See, e.g., SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002).

[65] 47 U.S.C. § 252(a)(1). In addition, section 252(e)(1) of the Act states:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

47 U.S.C. § 252(e)(1).

20. Once submitted, if an interconnection agreement is approved by the state commission, other carriers may also adopt the terms and conditions or the rates in the agreement pursuant to section 252(i).[66] Through this mechanism, competitive carriers avoid the delay and expense of negotiating new agreements with the incumbent LEC and then awaiting state commission approval. Absent such a mechanism, "the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated . . . ."[67]

21. We have historically given a broad construction to section 252(a)(1). As noted above, in the *Local Competition Order,* we found that

> requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements . . . to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.[68]

In that same order, we applied this broad construction in adopting the "pick and choose" construction of section 252(i), under which CLECs may adopt parts of interconnection agreements with incumbent LECs, rather than adopting those agreements in their entirety.[69]

22. Although section 252(a)(1) is explicit in its filing requirements, the *Declaratory Ruling* provided certainty to those requirements by stating that any "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[70] We further stated:

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[66] 47 U.S.C. § 252(i). *See also* section 51.809(a) of the Commission's rules, 47 C.F.R. § 51.809(a), which provides:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

47 C.F.R. § 51.809(a).

[67] *Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321.

[68] *Id.* at 15583-84, ¶ 167 (emphasis in original).

[69] *Id.* at 16137-42, ¶¶ 1309-23.

[70] *Declaratory Ruling,* 17 FCC Rcd at 19340-41, ¶ 8 (emphasis omitted). The sentence quoted in the text is a summary of the interconnection obligations listed in section 251 of the Act. 47 U.S.C. § 251. With respect to directory assistance, listed under "dialing parity" in section 251(b)(3), we concluded earlier that LECs must provide nondiscriminatory access to local directory assistance databases at nondiscriminatory and reasonable rates. *See* (continued....)

> This interpretation, which directly flows from the language of the Act, is consistent with the pro-competitive, deregulatory framework set forth in the Act. This standard recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impairments to commercial relations between incumbent and competitive LECs . . . . Indeed, on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions.[71]

23. The *Declaratory Ruling* noted some reasonable but narrow exceptions to the general rule that any agreement relating to the duties outlined in sections 251(b) and (c) falls within section 252(a)'s filing requirement. Such exceptions, however, flow from the general standard of ongoing obligations. Specifically, we found that agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) do not have to be filed if the information is generally available to carriers.[72] We stated that settlement agreements that simply provide for backward-looking consideration that do not affect an incumbent LEC's ongoing obligations relating to section 251 do not need to be filed.[73] In addition, we found that forms completed by carriers to obtain service pursuant to terms and conditions of a underlying interconnection agreement do not constitute either an amendment to that agreement or a new interconnection agreement that must be filed under section 252.[74] Finally, we held that agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court and that do not otherwise change the terms and conditions of the underlying interconnection agreement are not themselves interconnection agreements or amendments to interconnection agreements that must be filed under section 252(a).[75]

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Provision of Directory Listing Information under the Telecommunications Act of 1934, as amended, First Report and Order, 16 FCC Rcd 2736, 2752, ¶ 35 (2001). We also stated that "[c]arriers have an obligation to provide nondiscriminatory access to that data, and that, to carry out that obligation, section 252 creates a mechanism for public disclosure of the rates, terms, and conditions contained in interconnection agreements. Carriers and competitive [directory assistance] providers should then be able to opt into those rates and terms. Thus, in order to make this nondiscrimination requirement meaningful, we would expect carriers to comply with section 252 and make rates, terms, and conditions data available to requesting parties in a timely manner." *Id.* at 2752, ¶ 36.

[71] *Declaratory Ruling*, 17 FCC Rcd at 19340-41, ¶ 8.

[72] *Id.* at 19341, ¶ 9.

[73] *Id.* at 19342-43, ¶ 12.

[74] *Id.* at 19343, ¶ 13.

[75] *Id.* at 19343, ¶ 14. In addition, we recently held that to the extent that the *Declaratory Ruling* requires an agreement pertaining solely to wireline-to-wireless porting to be filed as an interconnection agreement with a state commission pursuant to sections 251 and 252 of the Act, we forbear from those requirements. *See Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697, 23711-12, ¶¶ 35-37 (2003).

24. As discussed above, we again dealt with the filing requirements of section 252(a)(1) in the *Qwest 9-State 271 Order*. There we referred to the *Declaratory Ruling* in concluding that all but one of the twelve agreements brought to our attention "need not be filed with state commissions under the standards enunciated in the Commission's declaratory ruling."[76] With regard to that one agreement, we stated that Qwest likely should have filed an ICNAM agreement, even though Qwest claimed that the *Declaratory Ruling* did not require that filing because the agreement was a "form agreement" the terms of which were available through SGATs in two states.[77] We reiterated this finding in the *Qwest 3-State Order*.[78]

2. Qwest Withheld Interconnection Agreements from the Minnesota and Arizona Commissions in Apparent Willful and Repeated Violation of Section 252(a)(1)

25. By January 14, 2003, when Qwest filed its three-state application with the Commission, Qwest had filed previously unfiled agreements in twelve of the fourteen states in its region either pursuant to state commission order, in accordance with the Qwest August 20 Letter – in which Qwest announced that it would file "all such agreements that include provisions creating on-going obligations that relate to Section 251(b) or (c) which have not been terminated or superseded by agreement, commission order, or otherwise" – or following the Commission's rulings regarding unfiled agreements in the *Declaratory Ruling* and the *Qwest 9-State 271 Order*.[79] Despite Qwest's pronouncements that it was complying with section 252 with respect to new agreements, Qwest did not file the unfiled Minnesota and Arizona agreements until several months later, filing 34 agreements with the Minnesota Commission on March 25 and 26, 2003 and filing twelve agreements with the Arizona Commission on May 23, 2003.[80]

26. Qwest executed the Minnesota agreements with various CLECs between 1997 and 2002.[81] The Minnesota Commission approved all 34 agreements, in whole or in part, pursuant to

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[76] *Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-72, ¶ 478 n.1746.

[77] *Id.*

[78] *See Qwest 3-State 271 Order*, 18 FCC Rcd at 7397, ¶ 126.

[79] In addition, Qwest filed 53 unfiled agreements after receipt of the LOI. *See supra* n.61.

[80] On September 4, 2003, Qwest filed an application for authorization to provide in-region, interLATA service in the state of Arizona.

[81] The Minnesota agreements filed on March 25 and 26, 2003, consist of the following: June 9, 2000 ICNAM agreement with Allegiance; December 27, 2001 Facility Decommissioning Reimbursement agreement with AT&T; December 22, 1999 agreement for CMDS hosting and message distribution for co-providers (in-region with operator services) with Cady & addendum to agreement for CMDS hosting and message distribution for co-providers with Cady; November 15, 2001 Facility Decommissioning Reimbursement agreement with DSLnet Communications; March 1, 2002 settlement agreement with Eschelon; July 13, 2001 billing settlement agreement with Global Crossing; October 3, 2001 Facility Decommissioning Reimbursement agreement with Hickory Tech; January 15, 2000 Transient Interim Signaling Capability Service Agreement with IdeaOne; August 6, 1999 LIDB storage agreement with InfoTel; July 9, 1999 ICNAM agreement with InfoTel; September 29, 2000 ICNAM agreement with MainStreet; May 1, 2000 settlement agreement with McLeod; April 28, 2000 billing settlement agreement with (continued....)

section 252(e) of the Act.[82] The Arizona agreements date from 1998 to 2001.[83] As noted above, all twelve Arizona agreements were approved by operation of law pursuant to section 252(e).[84] As a general matter, many of the Minnesota and Arizona agreements are the same types of agreements that Qwest filed earlier in other states,[85] and meet the standards Qwest described to its employees in its September 2002 Training Outline for CLEC Agreements.[86] Indeed, seven of these agreements are ICNAM agreements, which we explicitly declared "likely should have been filed" in the *Qwest 9-State Order.*[87]

27. Qwest raises several arguments to support its delayed filing of the 46 agreements at issue here. As an initial matter, however, we emphasize Qwest's inconsistent approach

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McLeod; October 26, 2000 confidential agreement with McLeod; June 29, 2001 business escalation agreement with MCI; June 29, 2001 billing settlement agreement with MCI; December 27, 2001 Facility Decommissioning Reimbursement agreement with MCI; October 13, 1999 8XX Database Query Service agreement with MediaOne; October 13, 1999 ICNAM agreement with MediaOne; October 13, 1999 LIDB storage agreement with MediaOne; November 5, 1997 ICNAM agreement with OCI; October 22, 1997 agreement for CMDS hosting and in-region message distribution for alternately billed messages for co-providers (with operator services) with OCI & addendum; October 22, 1997 Physical Collocation Agreement with OCI; January 8, 2001 Transit Record Exchange Agreement to Co-Carriers (Wireline-Transit Qwest-CLEC) with Otter Tail; January 8, 2001 Transit Record Exchange Agreement to Co-Carriers (WSP-Transit Qwest-CLEC) with Otter Tail; June 1, 2000 settlement with SBC; October 5, 2001 Facility Decommissioning Reimbursement agreement with SBC; April 18, 2000 confidential stipulation for Toll Services and OSS with Small Minnesota CLECs; July 14, 1999 letter with US Link/InfoTel re/ extended area service; November 14, 2000 ICNAM agreement with Val-ed Joint Venture; January 18, 2000 Transit Record Exchange Agreement to Co-Carriers (WSP-Transit USW-CLEC) with Val-ed Joint Venture; January 18, 2000 Transit Record Exchange Agreement to Co-Carriers (Wireline-Transit USW-CLEC) with Val-ed Joint Venture; December 31, 2001 billing settlement agreement with XO. Documents Q-PUB-001087 through Q-PUB-001339.

[82] *See supra* n.55.

[83] The Arizona agreements consist of the following: March 23, 2000 ICNAM agreement with Allegiance; June 29, 2000 directory assistance agreement with Allegiance; July 12, 2001 Custom Local Area Signaling Services agreement with Adelphia; July 14, 1999 directory assistance agreement with Frontier; July 14, 1999 operator services agreement with Frontier; March 14, 2001 operator services agreement with Ionex; March 14, 2001 directory assistance agreement with Ionex; April 20, 2001 LIDB storage agreement with Adelphia; October 4, 1999 operator services agreement with OnePoint; October 4, 1999 directory assistance agreement with OnePoint; December 16, 1998 Transient Interim Signaling Capability Service Agreement with US West Wireless; and February 26, 1999 operator services agreement with Winstar Wireless. Documents Q-PUB-000318 through Q-PUB-000447.

[84] *See Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*, WC Docket No. 03-194, Memorandum Opinion and Order, 18 FCC Rcd 25504, 25534, ¶ 55 n.205 (2003); Qwest Memo at 13. *See also* Qwest Application, WC Docket No. 03-194, at 124 (explaining that these agreements "have been approved by the Arizona Commission by operation of law.")

[85] *See* Lundy Declaration at 6-11, listing the states in which the terms of 32 of the Minnesota unfiled agreements were also available.

[86] *See, e.g.*, Qwest "Training Outline for CLEC Agreements." Documents Q-CONF-002147 through Q-CONF-002149.

[87] *See Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-72, ¶ 478 n.1746; *Qwest 3-State 271 Order*, 18 FCC Rcd at 7397, ¶ 126.

towards the filing of its interconnection agreements – an inconsistency that underscores the egregious nature of Qwest's actions at issue here. While Qwest argues that the Minnesota and Arizona agreements are not interconnection agreements subject to the requirements of section 252(a)(1), the carrier's documents indicate that Qwest has taken a different approach towards the same or similar types of previously unfiled interconnection agreements in the states for which it was seeking section 271 approval and for new agreements.

28. As discussed above, as early as May 2002, Qwest claimed a policy of "broadly filing all contracts, agreements, or letters of understanding between Qwest Corporation and CLECs that create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis."[88] On August 21 and August 22, 2002, Qwest submitted previously unfiled agreements with the state commissions in all nine states for which it was seeking section 271 approval at the time.[89] Accordingly, with respect to selected states, *i.e.*, those with section 271 applications pending before this Commission, Qwest claimed to have identified and submitted all its previously unfiled agreements in August 2002. In addition, following the release of the *Qwest 9-State 271 Order*, Qwest filed ICNAM contracts in New Mexico on January 9 and January 10, 2003;[90] in Oregon on January 9, 2003;[91] and in South Dakota on January 13, 2003.[92] Shortly thereafter, on January 14, 2003, Qwest filed a section 271 application with the Commission for authorization to provide in-region, interLATA service in those three states.[93] Qwest's treatment of interconnection agreements depended on when the agreement was executed, and for the pre-May 2002 agreements, on whether a section 271 application was imminent. Because Qwest only

[88] Qwest August 20 Letter at 2.

[89] Qwest August 20 Letter. In Iowa, Qwest filed its previously unfiled agreements on July 29, 2002, pursuant to an order from the Iowa Board. The Colorado Commission reviewed sixteen agreements, found that all sixteen met the definition of interconnection agreements, and approved two of the sixteen agreements, and rejected twelve due to provisions that "violate the public policy" and two as incomplete. *See Qwest 9-State 271 Order*, 17 FCC Rcd at 26559-60, ¶ 461. The Idaho Commission approved all seven agreements. *See id.* at 26560-61, ¶ 463. The Iowa Board concluded, in its own investigation of Qwest's unfiled agreements, that Qwest had violated section 252, as well as a state rule, by failing to file the agreements with the Board. *See id.* at 26561-62, ¶ 464-65. Pursuant to the Iowa Board's order, Qwest filed fourteen agreements, which were subsequently approved. *Id.* The Montana Commission approved four agreements and denied three agreements. *See id.* at 26563, ¶ 466. The Nebraska Commission approved the ten agreements that Qwest filed. *See id.* at 26563-64, ¶ 467. North Dakota approved the three agreements Qwest filed. *Id.* at 26564, ¶ 468. The Utah Commission approved the eleven agreements Qwest filed, by operation of law. *Id.* at 26564, ¶ 469. The Washington Commission approved the sixteen agreements Qwest filed. *Id.* at 26565, ¶ 470. The Wyoming Commission approved the four agreements Qwest filed. *Id.* at 26566, ¶ 471.

[90] These three agreements were approved by the New Mexico Commission, as were four of the five agreements filed by Qwest on September 9, 2002. *See Qwest 3-State 271 Order,* 18 FCC Rcd at 7398-99, ¶ 129.

[91] The Oregon Commission approved the three agreements filed on January 9, 2003, as well as sixteen agreements filed on September 4, 2002. *See id.,* 18 FCC Rcd at 7399, ¶ 130.

[92] The South Dakota Commission approved the eight agreements filed on January 13, 2003, as well as the four agreements filed on September 24, 2002. *See id.,* 18 FCC Rcd at 7399-400, ¶ 131.

[93] We granted the three-state application on April 15, 2003.

filed the previously unfiled agreements as the date approached for its section 271 applications in a particular state, we believe these filings were not made "out of an abundance of caution," as Qwest suggests. With respect to Minnesota and Arizona, Qwest took no action to file its pre-existing unfiled agreements until it was preparing to file its section 271 application with this Commission.

29. Citing the *Declaratory Ruling*, Qwest argues that many of the Minnesota and Arizona agreements at issue here are "form" agreements for ordering services available through its SGATs, and as such did not warrant filing under section 252(a).[94] Contrary to Qwest's assertions, however, the *Declaratory Ruling* does not contain a filing exception for form or standardized agreements. While the *Declaratory Ruling* stated that section 252(a) did not require the filing of ordering forms completed by carriers pursuant to an underlying agreement, it did not create an exception for "form" interconnection agreements. Specifically, the Commission stated that "forms completed by carriers to obtain services pursuant to terms and conditions set forth in an interconnection agreement do not constitute either an amendment to that interconnection agreement or a new interconnection agreement that must be filed under section 252(a)(1)."[95]

30. This language nowhere suggests that an interconnection agreement memorialized by way of a standardized contractual form is not required to be filed pursuant to section 252(a)(1). Indeed, we rejected this argument in the *Qwest 9-State 271 Order* with respect to an ICNAM agreement between Qwest and Allegiance. In response to CLEC criticism that the ICNAM agreement and others should have been filed under section 252(a), Qwest referred to the *Declaratory Ruling's* language exempting ordering forms from section 252(a)'s requirement.[96] In rejecting this argument, we held that Qwest "likely should have" filed the ICNAM agreement with the Colorado and Washington state commissions, despite its alleged "form" status and Qwest's allegation that its terms were available through Qwest's SGATs for those states.[97]

31. Moreover, Qwest's alleged "form interconnection agreement" exemption is the veritable exception that swallows the rule, since virtually all terms and conditions of interconnection could be reduced to such a form or standardized agreement. Additionally, any

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[94] Qwest July 31, 2003 Letter.

[95] *Declaratory Ruling*, 17 FCC Rcd at 19343, ¶ 13. *See, e.g., Core Communications, Inc. v. Verizon Maryland, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7962, 7971, ¶ 24 (2003) (explaining that Core accepted the terms of Verizon's Maryland SGAT; Core and Verizon signed a schedule to the SGAT entitled "Request for Interconnection"; and, therefore, the Maryland SGAT served as the parties' interconnection agreement).

[96] *See* Qwest December 13 Letter at 2 & Attachment 1, at 1 (attaching matrix of agreements with explanation as to why Qwest did not file each agreement; stating with respect to the Allegiance ICNAM agreement, "[t]he FCC's Declaratory Ruling held that order and contract forms 'completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement do not constitute either an amendment to that interconnection agreement or a new interconnection agreement that must be filed under section 252(a)(1)' . . . . "). Attachment 1, at 2 (quoting *Declaratory Ruling*, 17 FCC Rcd at 19343, ¶ 13).

[97] *Qwest 9-State 271 Order*, 17 FCC Rcd at 26571-73, ¶ 478 n.1746.

such "form" agreement in use by Qwest today could be revised tomorrow.[98] Unless such agreements are made available to other carriers via the process outlined in section 252, Qwest's competitors would not be able to opt into these agreements pursuant to section 252(i) because they would be unaware of the previous agreements' existence, not to mention the specific terms and conditions. The *Declaratory Ruling* ensures that the agreement terms are memorialized in a public document, subject to state approval, which permits other carriers to opt into the terms of the agreement under section 252(i). Under Qwest's interpretation, there would be no publicly available document. Furthermore, as noted above, Qwest's internal policy conflicts with this argument. Qwest's September 2002 "Training Outline for CLEC Agreements" explicitly states that "services that are also reflected in the SGATs" are among "the types of agreements with CLECs in Qwest's fourteen-state region that need to be filed."[99]

32. Qwest further contends that "the [*Declaratory*] *Ruling* states that if information on service offerings is generally available to CLECs, such as through posting on a website, agreements covering these matters need not be filed."[100] Once again, Qwest misreads our order. In rejecting Qwest's argument that "dispute resolution and escalation provisions" are *per se* outside the scope of section 252(a)(1), we held "[u]nless this information is generally available to carriers (*e.g.*, made available on an incumbent LEC's wholesale website), we find that agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements."[101] This exception is for contact lists and procedures for escalation, posted on websites and available to all carriers. This exception does not apply to "service offerings," as Qwest contends. At no point did we create a general "web-posting exception" to section 252(a). As with Qwest's asserted "form agreement" exception to section 252(a)(1), a "web-posting exception" would render that provision meaningless, since CLECs could not rely on a website to contain all agreements on a permanent basis. Moreover, unlike the terms of an SGAT, web-posted materials are not subject to state commission review, further undermining the congressionally established mechanisms of section 252(e).[102]

33. Qwest contends that it had no legal obligation to "rush out and file any and all contracts with CLECs that might arguably be deemed interconnection agreements under the [*Declaratory*] *Ruling*."[103] Qwest takes the position that until a state commission tells Qwest that a certain agreement must be filed, Qwest has no obligation to file the agreement.[104] We

[98] *See, e.g.*, Qwest Memo at n.30 (explaining that the "form" contract for CMDS had changed in June 2003). We also note that a carrier's SGAT may change.

[99] Document Q-CONF-002148.

[100] Qwest July 31, 2003 Letter at 2-3.

[101] *Declaratory Ruling*, 17 FCC Rcd at 19341, ¶ 9.

[102] *See* 47 U.S.C. § 252(f).

[103] Qwest Memo at 4.

[104] Qwest Memo at 10.

emphatically disagree. The statute clearly contradicts Qwest's argument. Under section 252(a)(1), LECs must file interconnection agreements with state commissions for approval. In the *Declaratory Ruling*, the Commission clarified the types of agreements that must be filed. Any interconnection agreement filed and approved by the state commission under section 252 must be made available to any other requesting carrier upon the same terms and conditions, in accordance with section 252(i). Section 252(a)(1) does not condition filing on a state commission first telling a carrier that a certain agreement (which has not yet been seen) must be filed.

34. Nor does Qwest's argument find any support in our *Declaratory Ruling* or other orders. Qwest's reliance on the statement in the *Declaratory Ruling* that "state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed" is misplaced.[105] After an agreement is filed with a state commission, the commission may approve or reject that agreement. The state commission can advise the carrier whether a certain type of agreement is considered an interconnection agreement that requires filing in that state.[106] Until an agreement is filed, however, the state commission would not be in a position to approve, reject, or determine whether a certain type of agreement does not require filing.[107]

35. Moreover, Qwest has not even followed its asserted construction of section 252(a)(1). Qwest claims that it "appropriately deferred more formal filing of the four MN DOC contracts in that state until after the PUC at least issued its first order on remedies."[108] But Qwest did not file the Minnesota agreements until March 25 and 26, 2003. By that point, nearly five months had passed since the Minnesota Commission held that Qwest had violated section 252(a) by withholding the agreements in question,[109] and more than seven months had passed since the initial ALJ finding to the same effect.[110] We find that Qwest's timing appears to have had more to do with litigation strategy and its impending section 271 application (which it filed on March 28, 2003) than instructions from the Minnesota PUC. As noted above, Qwest internal documents refer to pre-existing unfiled interconnection agreements being handled by the "litigation team." Additionally, Qwest admits that its decision "was influenced by the fact that it was preparing to file its application for 271 authority in Minnesota," and that it had earlier followed the same

[105] Qwest Memo at 10 (citing *Declaratory Ruling*, 17 FCC Rcd at 19341-42, ¶ 10).

[106] *Declaratory Ruling*, 17 FCC Rcd at 19341-42, ¶ 10.

[107] We also note that in the Qwest August 20 Letter, in which Qwest discussed filing the previously unfiled agreements in Colorado, Idaho, Nebraska, and North Dakota, Qwest asserted that the filings would be made to comply with the requirements of section 252. Qwest August 20 Letter at 1-2.

[108] Qwest Memo at 10.

[109] *See supra* n.38.

[110] *See* Findings of Fact, Conclusions, Recommendation and Memorandum, Minn. Docket No. P-421/C-02-197 (Sept. 20, 2002) at 52.

procedure of filing previously unfiled agreements in connection with the three-state application.[111]

36. Qwest also argues that it provided the Minnesota agreements to the Minnesota Commission in the context of the investigation.[112] According to Qwest, its provision of these agreements to the Minnesota DOC investigative staff provided adequate notice to the Minnesota Commission of these agreements. Additionally, Qwest argues, the Minnesota DOC's decision not to include all 34 agreements in its enforcement proceeding amounts to a finding that those agreements did not have to be filed under section 252. We disagree with Qwest's position. Qwest's compliance with investigative demands from the Minnesota Commission staff is irrelevant to its compliance with section 252. Section 252(e)(1) of the Act unambiguously states: "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies."[113] Until Qwest submitted the agreements to the state commission, the agreements did not have state approval and other CLECs did not have the opportunity to adopt those agreements. Providing interconnection agreements to state commission staff in an investigation does not satisfy the requirements of section 252.

37. Moreover, we note that Qwest's argument is belied by the Minnesota DOC's finding, adopted by the Minnesota Commission, with respect to each of the late-filed agreements, that "[a]lthough this agreement was not one of the agreements that the Department chose to use as part of its complaint, this should not suggest that Commission approval of this agreement is not necessary. The agreements selected by the Department were limited for the purposes of the contested case process in Docket No. P421/IC-02-197. It is the position of the Department that Qwest has always been obligated to file this agreement."[114]

38. Regarding the Arizona agreements, Qwest again appears to concede that its litigation strategy – not its construction of the Act or our orders – controlled its decision to delay filing. Qwest contends that in light of the Arizona Commission investigation into the unfiled agreements the carrier "has been cautious about making filings that could be viewed as a

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[111] Qwest Memo at 12.

[112] Qwest July 31, 2003 Letter at 2. We note that Qwest provided these agreements to the Minnesota DOC, not the Minnesota Commission per se. The Minnesota DOC is an independent arm of the Minnesota Commission, charged with representing "the broad public interest in all telecommunications matters before the [Minnesota Commission]." *See* Minnesota DOC website: http://www.state.mn.us/cgi-bin/portal/mn/jsp/content.do?subchannel=-536881735&programid=536884839&sc3=null&sc2=null&id=-536881351&agency=Commerce.

[113] 47 U.S.C. § 252(e)(1).

[114] *See, e.g.*, Application for Approval of the March 26, 2003 Amendment to the Interconnection Agreement between U.S. Link, Inc. and Qwest Corporation (Originally Approved in Docket No. P-465,421/M-97-1316); Incorporating the Ability to Use Local Tandem Functionality to Transport Calls to and from Extended Area Service (EAS) Calling Areas, Minnesota Public Utilities Commission Docket No. P-465,421/IC-03-456 (Jun. 12, 2003).

concession."[115] Qwest admits that in May 2003, it was negotiating a settlement with Arizona Commission staff and preparing to file its section 271 application with this Commission; therefore, it decided to file the twelve unfiled agreements in Arizona.[116] In addition, Qwest's documents indicate that contemporaneously with filing the Arizona agreements on May 23, 2003, Qwest's counsel effectively conceded that the *Qwest 9-State 271 Order* required filing those agreements. In the cover letter attached to each of the twelve Arizona interconnection agreements filed on May 23, 2003, Qwest's counsel stated that each agreement reflects form, standard provisions that are available to CLECs through Qwest's website and the SGAT and "very well may not be agreements subject to the filing requirement under the FCC's October 4, 2002 Order; however, the FCC's subsequent order granting 271 relief to Qwest's 9-state application suggested the contrary."[117]

39. We conclude that Qwest apparently failed to comply with section 252(a)(1) of the Act regarding 34 interconnection agreements in Minnesota and twelve interconnection agreements in Arizona. Rather than promptly seeking state commission review of its agreements, as required under section 252(a)(1), Qwest apparently withheld nearly four dozen agreements to avoid the negative reaction that would accompany such a filing. Qwest apparently calculated that compliance with section 252(a)(1) only for pending application states would suffice to avoid our denial of its section 271 applications. Thus, during the nine-state application process, Qwest agreed to follow section 252 for new agreements, formed the Wholesale Contract Review Team, and filed previously unfiled agreements in the nine application states. Similarly, just before filing its three-state application, Qwest filed previously unfiled agreements in those states. Immediately prior to filing the Minnesota section 271 application, Qwest filed the previously unfiled Minnesota agreements, and as Qwest was settling with the Arizona Commission, and prior to submitting the Arizona section 271 application, Qwest filed the previously unfiled Arizona agreements. Finally, shortly after receiving the Enforcement Bureau's LOI, Qwest filed an additional 53 agreements in six states – seven months after Qwest had assured us that it had filed "all previously-unfiled agreements" for those same jurisdictions.[118]

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[115] Qwest Memo at 13.

[116] *Id.*

[117] *See, e.g.*, Letter from Timothy Berg, Fennemore Craig Law Offices, to Docket Control, Arizona Corporation Commission, filed May 23, 2003 (Document Q-PUB-000436).

[118] *See* Qwest December 13 Letter.

40. We find that Qwest's apparent violations were willful and repeated, as described in section 503(b) of the Act. The Commission has previously held that "willful," as used in section 503(b), means the conscious and deliberate commission or omission of any act, irrespective of any intent to violate the law.[119] Thus, even if the record did not contain ample evidence that Qwest knew that it was violating section 252(a)(1) by withholding the agreements, Qwest would be subject to a forfeiture. In addition, Qwest's actions were "repeated," as that term is used in section 503(b), since Qwest withheld more than 40 interconnection agreements from the state commissions of Arizona and Minnesota.[120]

41. The Commission's *Declaratory Ruling* and the *Qwest 9-State 271 Order* made clear our filing requirements. Qwest nevertheless apparently delayed filing the Minnesota and Arizona agreements, while at the same time filing similar unfiled agreements with the state commissions for which it had pending 271 applications before the Commission. During this time period, Qwest was also filing new agreements, in compliance with section 252(a) and the *Declaratory Ruling*. In pursuit of section 271 approval, Qwest repeatedly told this Commission that it had implemented new processes to ensure section 252 compliance with respect to new agreements in some states, but at the same time apparently intentionally withheld filing of dozens of agreements in Minnesota and Arizona. We conclude that Qwest apparently willfully and repeatedly violated section 252(a)(1) of the Act by failing to timely file 46 interconnection agreements in Minnesota and Arizona.

B. Proposed Action

42. Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to $120,000 for each violation or each day of a continuing violation, up to a statutory maximum of $1.2 million for a single act or failure to act.[121] In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[122]

43. Qwest argues that it should not be subject to forfeiture for any violations of section 252(a) because "neither the Act itself, nor any FCC rule or order, sets forth with 'ascertainable certainty' any deadline by which an agreement subject to Section 252(a)(1)'s filing requirement must actually be filed with the state."[123] Qwest's reliance on the notice requirement in *Trinity Broadcasting* is misplaced. With respect to notice of a filing deadline, Qwest

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[119] *See, e.g., Southern California Broadcasting Co.*, 6 FCC Rcd at 4388.

[120] *Southern California Broadcasting*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision.*, 16 FCC Rcd at 1362, ¶ 9.

[121] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80(b)(2); *see also Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000).

[122] 47 U.S.C. § 503(b)(2)(B).

[123] Qwest Memo at 4 (quoting *Trinity Broadcasting Corp. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000)).

overlooks the point that the filing requirement is part of the section 251 interconnection obligation, not a separate requirement with a separate deadline. Qwest, as an incumbent LEC, has certain interconnection obligations set forth in section 251.[124] Agreements to provide the services listed in section 251 must be filed with the state commission for approval.[125] Until the agreements are approved by the state commission, they are not valid interconnection agreements.[126] Executing agreements with CLECs does not fulfill Qwest's section 251 obligations until the agreements are filed and approved. Thus, Qwest cannot meet its section 251 obligations without filing and obtaining approval of interconnection agreements. For Qwest to claim that it was not required to file agreements because neither the Act nor the Commission provided a specific deadline for filing ignores the fact that filing (and approval) of agreements is a prerequisite for a valid interconnection agreement.[127] Furthermore, we note that interconnection agreements are only effective for a term, often three years. Under Qwest's logic, it could delay filing for an indefinite period of time. In fact, Qwest's failure to file agreements for the entire length of the agreement – which appears to have happened with the expired Minnesota agreements – could lead to a permanent alteration in the competitive landscape or a skewing of the market in favor of certain competitors.

44. In any event, we also find that Qwest had ample notice of the filing requirements under section 252(a)(1), but complied only selectively with these requirements. Qwest has been on notice of its potential violation of section 252(a)(1) since initiation of the Minnesota investigation into Qwest's unfiled agreements in 2001. While Qwest adopted in May 2002 a policy of filing all new interconnection agreements with CLECs, and created the Wholesale Agreement Review Committee to file new agreements,[128] Qwest did not file its unfiled agreements in Minnesota or Arizona. Qwest then sought to clarify the filing requirements of section 252 by filing the Qwest Petition; but even after release of the *Declaratory Ruling,* Qwest still failed to file the Minnesota and Arizona unfiled agreements. Subsequently, we discussed the

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[124] These obligations are, in brief: the duty to provide resale, number portability, dialing parity, access to rights-of-way; to establish reciprocal compensation; to negotiate in good faith the section 251 duties; to provide interconnection; to provide access to unbundled network elements; and to provide collocation. *See* 47 U.S.C. § 251(b) & (c).

[125] 47 U.S.C. § 251(a), (e).

[126] *See Qwest 9-State 271 Order*, 17 FCC Rcd at 26569, ¶ 475 (addressing the issue that an agreement is not an "interconnection agreement" until the state commission has made that determination).

[127] *See, e.g., AT&T Corporation Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 23398, 23402, ¶ 9 (2003) (explaining that AT&T did not comply with the requirement that it place consumers' names on the do-not-call list within a reasonable time; that AT&T's own policy of placing customers' names on the list within 30 days was the outer limit of reasonableness; and that AT&T apparently did not even meet this standard).

[128] *See* Qwest August 20 Letter at 2. The Qwest proposal is summarized at *Qwest 9-State 271 Order*, 17 FCC Rcd 26555-56, ¶ 457. Qwest's May 2002 policy also involved filing previously unfiled agreements for states that were subject to section 271 applications. *See id.* at 26569, n.1738. The fact that Qwest assured the Commission that it had filed or was filing previously unfiled interconnection agreements in application states does not justify its failure to file previously unfiled interconnection agreements in other states.

unfiled agreements issue in the *Qwest 9-State 271 Order,* in which we held that Qwest "likely should have filed" an ICNAM agreement even though the terms were available through Qwest's SGATs for the relevant jurisdictions, and that "failure to file this agreement ... could subject Qwest to federal and/or state enforcement action...."[129] Qwest apparently took the Commission's instructions in the *Qwest 9-State 271 Order* seriously, but only with respect to the three states for which it intended to file 271 applications in the near future.[130]

45. Qwest did not file the 34 Minnesota agreements until March 25 and 26, 2003, more than three months after release of the *Qwest 9-State 271 Order*, more than five months after release of the *Declaratory Ruling*, and more than ten months after implementing its May 2002 policy of filing unfiled agreements. Qwest's conduct is more egregious with respect to the twelve Arizona agreements, which it did not file until May 23, 2003. Even if we assume that Qwest did not realize that the Minnesota and Arizona agreements should have been filed when the contracts were executed, by any reasonable measure Qwest should have filed those agreements shortly after October 4, 2002, under the guidance of the *Declaratory Ruling* and in keeping with its own internal policy of section 252(a) compliance, initiated in May 2002. As we held in the *SBC Michigan 271 Order,* "incumbent LECs have had adequate notice of their legal obligations under section 252(a)" since the *Declaratory Ruling.*[131]

46. As discussed above, these apparent violations merit a substantial forfeiture. In the *SBC Michigan 271 Order*, we noted that "if such proceedings find that this or other agreements should have been filed ... under section 252(a)(1), we would consider any filing delays to be extremely serious."[132] Section 252(a)(1) is not just a filing requirement. Compliance with section 252(a)(1) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors.

47. Indeed, the Minnesota Commission found that Qwest had discriminated against CLECs by failing to file interconnection agreements:

> In each of the twelve interconnection agreements cited by the Minnesota Department of Commerce, Qwest provided terms, condition, or rates to certain CLECs that were better than the terms, rates, and conditions that it made available to the other CLECs and, in fact, it kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs. In short, Qwest knowingly and

[129] *Id.* at 26571-72, ¶ 478 n.1746.

[130] *See supra* para. 14.

[131] *SBC Michigan 271 Order*, 18 FCC Rcd at 19122-23, ¶ 180.

[132] *Id.*

intentionally discriminated against the other CLECs in violation of Section 251.[133]

Similarly, the Arizona Commission's proposed settlement with Qwest also reflects allegations that Qwest discriminated against CLECs by failing to file its interconnection agreements.[134] Although we do not determine here whether Qwest engaged in unlawful discrimination with respect to the 46 agreements at issue in this proceeding, the potential for such discrimination underlies our concerns regarding Qwest's apparent violations of section 252(a)(1).[135] Even if no such discrimination took place, Qwest may not ignore the requirements of the Act and our repeated instructions regarding section 252(a)(1).

48. Qwest ignored the potential for discrimination and competitive harm by withholding the agreements at issue here. Qwest concedes that it delayed filing the interconnection agreements at issue primarily because it wished to minimize any damage to its positions in state or federal regulatory proceedings. Qwest admits that its decision to file its agreements in Minnesota "was influenced by the fact that it was preparing to file its application for 271 authority in Minnesota."[136] Similarly, Qwest admits that it "decided in May to proceed with filing of the 12 form contracts before the ACC [Arizona Corporation Commission]. By May, Qwest was less concerned that such a filing might be treated as an admission of liability and result in material penalties."[137]

49. As noted above, pursuant to section 503(b)(2)(B), we may propose a forfeiture against a common carrier of no more than $120,000 per violation or per day of a continuing violation, up to a maximum of $1.2 million. In the Minnesota proceeding, after the state assessed a $26 million penalty against Qwest, the carrier delayed filing until several days before submitting its application for section 271 authority with this Commission. Similarly, the Minnesota penalty did not convince Qwest to file the Arizona agreements. Rather, Qwest took nearly three months to file the Arizona agreements, and did so not to comply with the law, but because it no longer feared that such a filing would compromise its litigation posture in the Arizona enforcement proceeding. Moreover, despite the Minnesota fine and the Arizona

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[133] Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, Minnesota Docket No. P-421/C-02-197, at 5 (Nov. 1, 2002).

[134] Specifically, the proposed settlement agreement contains an allegation that "Qwest violated section 252(e) of the Telecommunications Act by failing to file for Commission review and approval certain agreements with Competitive Local Exchange Carriers ("CLECs") operating in the state of Arizona" and an allegation that "Qwest improperly entered into settlement agreements with CLECs that resulted in nonparticipation by such CLECs in the Commission docket evaluating Qwest's application under Section 271 of the Telecommunications Act ...." *See* July 25, 2003 Settlement Agreement between Qwest Corporation and Arizona Corporation Commission. We note that this settlement has not been approved by the Arizona Commission. *See supra* n.56.

[135] *See SBC Communications, Inc. Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 19923, 19935, ¶ 24 (2002) (assessing a significant penalty due to the potential competitive impact of SBC's violations).

[136] Qwest Memo at 12.

[137] Qwest Memo at 13.

proposed settlement on the unfiled agreements at issue and having advised us that all unfiled agreements had been filed in the states covered by the nine and three-state section 271 applications, Qwest only recently filed an additional 53 agreements in six of those states. In order to deter future violations of this and other important market-opening obligations under the 1996 Act, we believe a substantial penalty is warranted.

50. Qwest delayed filing 46 agreements with the Arizona and Minnesota Commissions, in apparent violation of section 252(a)(1). Even if we assume that Qwest did not have clear notice of its obligations under section 252(a)(1) until release of the *Declaratory Ruling*, Qwest delayed filing the Minnesota and Arizona agreements for at least an additional five and seven months, respectively. Thus, Qwest's apparent violations of section 252(a)(1) are continuing violations,[138] and we could potentially subject the carrier to a penalty of $1.2 million per agreement, for a total proposed forfeiture of $55.2 million. We find, however, that the maximum penalty for each unfiled agreement would be excessive under the circumstances.[139] Therefore, based on the circumstances of this case, including pending penalties at the state commissions, we exercise our discretion to propose a total forfeiture of $9 million for Qwest's 46 apparent violations of section 252(a)(1).

51. The Commission has made clear that it will take into account a violator's ability to pay in determining the amount of a forfeiture so that forfeitures against "large or highly profitable entities are not considered merely an affordable cost of doing business."[140] In second quarter 2003, Qwest Communications International, Inc. (the parent company of Qwest Corporation) had total operating revenues of $3.601 billion.[141] For a company of this size, a $9 million forfeiture is not excessive. Indeed, a smaller forfeiture would lack adequate deterrent effect.

52. Therefore, based on the above discussion and pursuant to section 503(b)(2) of the Act and our rules, we find that Qwest is apparently liable for each of its 46 apparent violations of section 252(a)(1) of the Act, for a total proposed forfeiture of $9 million.

IV. ORDERING CLAUSES

53. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80 of the

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[138] Our action today covers the twelve-month period prior to the release data of this NAL.

[139] *See Verizon Telephone Companies, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 18796, 18803, ¶ 17 (2003) (explaining that we would not propose the maximum possible forfeiture because that would result in an excessive amount under the circumstances).

[140] *See Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17099-100, ¶ 24 (1997); *recon. denied*, 15 FCC Rcd 303 (1999).

[141] *See* "Qwest Communications Reports Second Quarter 2003 Net Loss Per Share of $0.05; Financial Statements Essentially Complete," Press Release, Sept. 3, 2003.

Commission's rules, 47 C.F.R. § 1.80, that Qwest Corporation is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of $9 million for willfully and repeatedly violating the Act and the Commission's rules.

54. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, within thirty days of the release date of this NOTICE OF APPARENT LIABILITY, Qwest Corporation SHALL PAY the full amount of the proposed forfeiture currently outstanding on that date or shall file a written statement seeking reduction or cancellation of the proposed forfeiture.

55. Payment of the forfeiture may be made by check or similar instrument, payable to the order of the Federal Communications Commission. Such remittance should be made to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. referenced above and FRN No. 0001-6056-25.

56. The response, if any, to this NOTICE OF APPARENT LIABILITY must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554 and must include the NAL/Acct. No. referenced above.

57. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

58. Requests for payment of the full amount of this NAL under an installment plan should be sent to Chief, Credit and Management Center, 445 12th Street, S.W., Washington, D.C. 20554.[142]

59. Under the Small Business Paperwork Relief Act of 2002, Pub.L.No. 107-198, 116 Stat. 729 (June 28, 2002), the Commission is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within 30 days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division, Enforcement Bureau, 445 12th Street, S.W., Washington, D.C. 20054. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list in Appendix B of this NAL. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to section 503(b) of the Communications

[142] *See* 47 C.F.R. § 1.1914.

Act. If you have any questions regarding any of the information contained in Appendix B, please contact the Commission's Office of Communications Business Opportunities at (202) 418-0990.

60. IT IS FURTHER ORDERED that a copy of this NOTICE OF APPARENT LIABILITY AND ORDER shall be sent by certified mail, return receipt requested, to Qwest, 607 14th Street NW, Suite 950, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Qwest agreements filed after LOI issued

9/30/99 Transient Interim Signaling Capability Service agreement with Aliant Cellular (Nebraska); 2/10/98 Custom Local Area Signaling Services ("CLASS") Network Interconnection Agreement with Aliant Midwest (Nebraska); 4/20/01 Line Information Data Base ("LIDB") Storage Agreement with Adelphia (Colorado); 7/12/01 Custom Local Area Signaling Services ("CLASS") Network Interconnection agreement with Adelphia (Colorado); 11/23/99 Internetwork Calling Name Delivery Service ("ICNAM") agreement with Allegiance (Colorado); 3/2/98 Transient Interim Signaling Capability Service agreement with Qwest Wireless (Colorado); 3/7/00 Centralized Message Data System ("CMDS") Hosting and Message Distribution for Co-Providers (In-Region with Operator Services) agreement & Addendum with Eschelon (Colorado); 2/01/01 Centralized Message Data System ("CMDS") Hosting and Message Distribution for Co-Providers (In-Region with Operator Services) agreement with Integra (Colorado); 3/31/98 Transient Interim Signaling Capability Service agreement with CommNet (Iowa); 12/13/99 Transit Record Exchange Agreement with Goldfield (Iowa); 2/11/98 Custom Local Area Signaling Services ("CLASS") Network Interconnection Agreement with Aliant Midwest (Iowa); 5/02/02 Transit Record Exchange Agreement to Co-Carriers (Wireless Service Provider – Transit Qwest – CLEC) with Consolidated Communications Networks (North Dakota); 5/02/02 Transit Record Exchange Agreement to Co-Carriers (Wireline – Transit Qwest – CLEC) with Consolidated Communications Networks (North Dakota); 1/18/00 Transient Interim Signaling Capability Service Agreement with IdeaOne (North Dakota); 2/1/01 Centralized Message Data System ("CMDS") Hosting and In-Region Message Distribution for CLECs agreement & Addendum with Integra Telecom of Minnesota and Integra Telecom of North Dakota (North Dakota); 5/22/02 Transit Record Exchange Agreement to Co-Carriers (Wireless Service Provider – Transit Qwest – CLEC) with Midcontinent Communications (North Dakota); 5/22/02 Transit Record Exchange Agreement to Co-Carriers (Wireline – Transit Traffic – CLEC) with Midcontinent Communications (North Dakota); 1/5/01 Centralized Message Data System ("CMDS") Hosting and In-Region Message Distribution for Co-Providers agreement & Addendum with Skyland Technologies (North Dakota); 1/18/00 Transit Record Exchange Agreement to Co-Carriers (Wireless Service Provider – Transit Qwest – CLEC) with Val-ed Joint Venture (North Dakota); 1/18/00 Transit Record Exchange Agreement to Co-Carriers (Wireline – Transit Traffic – CLEC) with Val-ed Joint Venture (North Dakota); 2/1/01 Centralized Message Data System ("CMDS") Hosting and In-Region Message Distribution for CLECs agreement & Addendum with Integra (Utah); 8/7/01 Custom Local Area Signaling Services ("CLASS") Network Interconnection Agreement with FirstDigital (Utah); 8/7/01 Internetwork Calling Name Delivery Service ("ICNAM") agreement with FirstDigital (Utah); 8/7/01 Line Information Data Base ("LIDB") Storage Agreement with FirstDigital (Utah); 10/14/96 Basic and Enhanced 911 Emergency Communications Systems Agreement with NextLink (Utah); 10/14/96 Home Numbering Plan Area Directory Assistance Agreement with NextLink (Utah); 1/25/02 Centralized Message Data System ("CMDS") Hosting and In-Region Message Distribution for Co-Providers agreement with Skyland Technologies (North Dakota); 1/25/02 Centralized Message Data System ("CMDS") Hosting and In-Region Message Distribution for CLECs agreement with Town of Eagle Mountain (Utah); 7/22/01 Custom Local Area Signaling Services ("CLASS") Network Interconnection Agreement with Town of Eagle

Mountain (Utah); 1/11/02 Line Information Data Base ("LIDB") Storage Agreement with Town of Eagle Mountain (Utah); 4/20/01 Line Information Data Base ("LIDB") Storage Agreement with Adelphia (Washington); 7/12/01 Custom Local Area Signaling Services ("CLASS") Network Interconnection Agreement with Adelphia (Washington); 9/11/01 Custom Local Area Signaling Services ("CLASS") Network Interconnection Agreement with Allegiance (Washington); 11/2/99 Internetwork Calling Name Delivery Service ("ICNAM") agreement with Allegiance (Washington); 5/1/01 Internetwork Calling Name Delivery Service ("ICNAM") agreement with Computer 5* dba LocalTel (Washington); 5/1/01 Line Information Data Base ("LIDB") Storage Agreement with Computer 5* dba LocalTel (Washington); 5/1/01 Custom Local Area Signaling Services ("CLASS") Network Interconnection Agreement with Computer 5* dba LocalTel (Washington); 4/9/01 Transient Interim Signaling Capability Service agreement with Computer 5* dba LocalTel (Washington); 6/24/99 Custom Local Area Signaling Services ("CLASS") Network Interconnection Agreement with Focal (Washington); 2/8/00 Internetwork Calling Name Delivery Service ("ICNAM") agreement with Focal (Washington); 2/8/00 Transient Interim Signaling Capability Service agreement with Focal (Washington); 6/7/99 Custom Local Area Signaling Services ("CLASS") Network Interconnection Agreement with Fox (Washington); 6/7/99 Internetwork Calling Name Delivery Service ("ICNAM") agreement with Fox (Washington); 6/7/99 Centralized Message Data System ("CMDS") Hosting and Message Distribution for Co-Providers agreement with Fox (Washington); 6/7/99 Line Information Data Base ("LIDB") Storage Agreement with Fox (Washington); 2/1/01 Centralized Message Data System ("CMDS") Hosting and Message Distribution for Co-Providers agreement & Addendum with Integra (Washington); 2/8/00 Transient Interim Signaling Capability Service agreement with Focal (Washington); 12/16/98 Transient Interim Signaling Capability Service agreement with Qwest Wireless (Washington); 9/15/99 Transit Record Exchange Agreement to Co-Carriers (Wireline – Transit Traffic – CLEC) with International Telecom (Washington). *See* Documents Q-PUB-001341 through Q-PUB-001740.

APPENDIX B

FCC List of Small Entities

As described below, a "small entity" may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization

Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

(2) Small Governmental Jurisdiction

Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.

(3) Small Business

Any business concern that is independently owned and operated and is not dominant in its field, *and* meets the pertinent size criterion described below.

Industry Type	Description of Small Business Size Standards
Cable Services or Systems	
Cable Systems	Special Size Standard – **Small Cable Company** has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	$12.5 Million in Annual Receipts or Less
Open Video Systems	
Common Carrier Services and Related Entities	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

International Services	
International Broadcast Stations	$12.5 Million in Annual Receipts or Less
International Public Fixed Radio (Public and Control Stations)	
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
Mass Media Services	
Television Services	$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – **Small Business** is less than $40M in annual gross revenues for three preceding years
Wireless and Commercial Mobile Services	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - **Small Business** is average gross revenues of $15M or less for

700 MHZ Guard Band Licensees	
Private and Common Carrier Paging	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - **Small Business** is $40M or less in annual gross revenues for three previous calendar years **Very Small Business** is average gross revenues of $15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - **Small Business** is $15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	
Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	**Small Business** is 1,500 employees or less **Small Government Entities** has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	**Small Business** is $40M or less average annual gross revenues for three preceding years **Very Small Business** is average gross revenues of $15M or less for the preceding three years
39 GHz Service	
Multipoint Distribution Service	Auction special size standard (1996) – **Small Business** is $40M or less average annual gross revenues for three preceding calendar years Prior to Auction – **Small Business** has annual revenue of $12.5M or less
Multichannel Multipoint Distribution Service	$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – **Small Business** is $40M or less average annual gross revenues for three preceding years **Very Small Business** is average gross revenues of $15M or less for the preceding three years

218-219 MHZ Service	First Auction special size standard (1994) – **Small Business** is an entity that, together with its affiliates, has no more than a $6M net worth and, after federal income taxes (excluding carryover losses) has no more than $2M in annual profits each year for the previous two years New Standard – **Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	**Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Miscellaneous	
On-Line Information Services	$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	$29 Million in Annual Receipts or Less
Nursing Homes	$11.5 Million in Annual Receipts or Less
Hotels and Motels	$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)

STATEMENT OF CHAIRMAN MICHAEL POWELL

Re: In the Matter of Qwest Corporation Apparent Liability for Forfeiture

Today we release a Notice of Apparent Liability for Forfeiture against Qwest, containing the largest proposed forfeiture in the Commission's history. We propose a forfeiture of this size, $9 million, due to Qwest's apparent non-compliance with the pro-competitive requirements of section 252 of the Communications Act and Commission orders.

I would like to emphasize that our action complements state enforcement actions in Minnesota and Arizona. This action sends a clear message, along with the complementary state actions, that violations of the key pro-competitive provisions of the Act will not be tolerated.

CERTIFICATE OF SERVICE
(Docket No. T-00000A-97-0238, RT-00000F-02-0271, T-01051B-02-0871)

I certify that the original and seventeen copies of AT&T Communications of the Mountain States, Inc. and TCG Phoenix's Filing of Supplemental Authority were sent by overnight delivery on March 16, 2004 to:

Arizona Corporation Commission
Docket Control – Utilities Division
1200 West Washington Street
Phoenix, AZ 85007

and a true and correct copy was sent by overnight delivery on March 16, 2004 to:

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