

ORIGINAL



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**BEFORE THE ARIZONA CORPORATION COMMISSION**

**WILLIAM A. MUNDELL**  
**Commissioner**  
**JAMES M. IRVIN**  
**Commissioner**  
**MARC SPITZER**  
**Commissioner**

Arizona Corporation Commission

**DOCKETED**

MAR 21 2001

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ARIZONA CORPORATION COMMISSION  
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**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**

**QWEST CORPORATION'S MOTION TO SUPPLEMENT BRIEFING  
REGARDING DARK FIBER IMPASSE ISSUE DF-1**

Qwest Corporation respectfully requests permission to supplement the record regarding impasse issue DF-1, which concerns whether any entity other than Qwest Corporation itself is subject to the unbundling obligations in 47 U.S.C. § 251(c)(3). In their March 8, 2001 brief, AT&T Communications of the Mountain States and TCG Phoenix (collectively, "AT&T") presented an entirely new argument for imposing unbundling obligations on affiliates that they had never described during the workshops. Because Qwest Corporation submitted its brief on dark fiber issues simultaneously with AT&T's, it had no warning of, and no opportunity to answer, this brand-new argument. This motion is necessary to give the Commission the benefit of full briefing on the new legal argument that AT&T has raised.

## BACKGROUND

Qwest Communications International (QCI) is a holding company that owns a variety of subsidiaries. These subsidiaries are separate corporations with defined assets and operations. Two of these corporations own and control significant telecommunications networks that provide telecommunications services pursuant to state or federal authority. Qwest Corporation ("QC"), the successor to the old U S WEST Communications, Inc. ("USWC"), is the only Qwest entity that provides (or has ever provided) local exchange services in Arizona. Qwest Communications Corporation ("QCC"), the successor to the pre-merger Qwest's businesses, holds Qwest's nationwide long distance network and provides only non-local-exchange services in Arizona. Neither QCC nor any other QC affiliates have ever provided any kind of local exchange service in this state, nor have they ever acquired any local exchange facilities or network elements from QC or USWC, nor have they been certificated as a LEC.<sup>1</sup>

In the workshops, AT&T suggested that QC's affiliates should be required to unbundle dark fiber, but gave no rationale, theory or citation to a legal source.<sup>2</sup> Because all parties typically have revealed at least their basic legal theories and authorities in the workshops, if not before, Qwest assumed AT&T had no such theories or authorities upon which to rely for its novel assertion. However, in its March 8, 2001 Brief on Dark Fiber Impasse Issues, AT&T finally revealed it was relying on a legal theory that the Qwest/U S WEST merger made all Qwest entities into ILECs by a "successor or assign" theory. *See* AT&T Br. 7. In that brief, AT&T also revealed for the first time that it was relying primarily on the FCC decisions on the Qwest/U S WEST merger and the SBC/Ameritech

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<sup>1</sup> Affidavit of Steve Haggerty (Haggerty Aff.) at 1:15-3:7. This affidavit is attached hereto.

merger as well as the D.C. Circuit's opinion on the appeal of the FCC's decision on the SBC/Ameritech merger. *See* AT&T Br. 7-10. Because Qwest was unfairly surprised by AT&T's brief, it is entitled to supplement its brief on this impasse issue.

### ARGUMENT

There is no basis for AT&T's theory in the 1996 Act, the FCC's orders, or any court case. First, QC's affiliates cannot be "incumbent local exchange carriers" subject to section 251(c) because AT&T's suggestion that every corporate affiliate of a ILEC automatically becomes a "successor or assign" of that ILEC pursuant to section 251(h)(1)(B)(ii) is contrary to the Act and based on a misreading of precedent. Because no QC affiliate has acquired substantial assets of, or continued any business of, the pre-merger USWC, AT&T's argument fails. Second, because none of QC's affiliates is a "local exchange carrier" in Arizona as Congress defined the term, none of them can be an "incumbent" local exchange carrier. Third, even if QC's affiliates *could* be deemed ILECs, the FCC has made clear that section 251(c)(3) does not extend to any long distance facilities an ILEC may own. As AT&T itself has acknowledged in another proceeding, sections 251 and 252 are intended to address ILECs' residual market power and network bottlenecks in the *local* market; ILECs have no such power in long distance.

#### **A. NONE OF QC'S AFFILIATES IS A SUCCESSOR OR ASSIGN OF U S WEST COMMUNICATIONS, INC.**

AT&T posits that the Qwest/U S WEST merger made all Qwest entities into ILECs because all Qwest entities became successors and assigns of U S WEST Communications, Inc., which was an ILEC. AT&T Br. 7. QC's affiliates do not meet

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<sup>2</sup> Transcript at 1401:3-7, 1402:23-1403:7.

the “successor or assign” requirements of section 251(h). In the very decision AT&T relies on, *see* AT&T Br. 7-8, the FCC ruled that one company is a “successor” of another for purposes of section 251(h) if there is “substantial continuity” between them, “such that one entity steps into the shoes of, or replaces, another entity.” *Applications of Ameritech Corp. and SBC Comm. for Consent To Transfer Control*, 14 FCC Rcd 14712, 14897-98 ¶ 454 (1999), *vacated in part sub nom. Association of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001). “Substantial continuity” exists where a company has “acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations.” *Id.* (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)). *See also* 47 C.F.R. §53.207 (BOC affiliate is a “successor or assign” of an ILEC only if the ILEC transfers assets to the affiliate that are subject to section 251(c)(3), and then only “with respect to such transferred network elements”). No affiliate of QC has “step[ped] into the shoes of, or replace[d]” the pre-merger ILEC, nor has any such affiliate “acquired substantial assets” of USWC or “continued” USWC’s ILEC business “without interruption or substantial change.” The only Qwest entity that has done these things (and, hence, the only one that is an ILEC “successor” for purposes of section 251(h)) is QC.<sup>3</sup>

Other provisions of the Act confirm that the regulatory status of a multi-part company such as Qwest must be determined separately for each of the company’s corporate entities. For example, section 272 prescribes certain requirements for any Bell Operating Company affiliate “which is a local exchange carrier that is subject to the requirements of section 251(c)” — clearly indicating that there can be BOC affiliates that

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<sup>3</sup> Second Supplemental Affidavit Of Karen A. Stewart Emerging Services Updates For Dark Fiber Portion Of Colorado Workshop No. 4, dated January 9, 2001, at 4-6 (filed in this

are *not* local exchange carriers and *not* subject to 251(c). 47 U.S.C. § 272(a)(1).

Similarly, 47 U.S.C. § 153(4) defines a “Bell Operating Company” as one of twenty listed companies (the original BOCs) together with *some* (but not all) successors and assigns and *some* (but not all) corporate affiliates, depending on whether they provide wireline telephone service.<sup>4</sup> Contrary to AT&T’s suggestion, Congress did not intend the various regulatory categories in the Act to sweep in entire corporate families without any regard to the particular services each entity in that family is actually providing.

Nothing that AT&T cites is to the contrary. *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (“*ASCENT*”), stands only for the proposition that once an ILEC is engaged in a line of business subject to regulation under section 251(c), the ILEC may not shield that business from regulation by moving it into a corporate affiliate. What the D.C. Circuit found “implausible” was “the notion that a wholly owned affiliate providing telecommunications services with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name of its ILEC parent, should be presumed to be exempted from the duties of that ILEC parent.” 235 F.3d at 668. The court never suggested, as AT&T does, that *every* corporate relative of an incumbent LEC is subject to regulation under section 251(c) no matter what it is doing. The concerns motivating the *ASCENT* decision are wholly absent here: QC has not sought to migrate any regulated business from USWC (or QC, its successor) to an affiliate; on the contrary, QC’s affiliates and their predecessors

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docket on January 24, 2001); Haggerty Aff. at 1:15-3:7.

<sup>4</sup> The term “(B) includes any successor or assign of any such [listed] company that provides wireline telephone exchange service; but (C) does not include an affiliate of any such company, other than an affiliate described in subparagraph . . . (B).” 47 U.S.C. § 153(4).

have always engaged in independent lines of business that do not overlap with QC or its predecessor, USWC.<sup>5</sup>

AT&T's out-of-context snippets from the FCC decision approving the Qwest/U S WEST merger are similarly off-point. The FCC was addressing the same type of concern at issue in *ASCENT*. McLeodUSA had opposed the merger on the ground that the combined company might try to escape regulation by moving certain business operations and lucrative customer accounts from the ILEC into another corporate entity. See *Qwest Comms. Int'l, Inc. and U S WEST, Inc. Applications for Transfer of Control*, 15 FCC Rcd 5376, 5398 n.128 (2000) ("McLeod also fears the new entity would be able to divert high-volume customers to the affiliated competitive LEC, which would become the provider of new innovative local services . . . ."); *id.* at 5399 n.131 (similar). The FCC dismissed McLeodUSA's concern. If the merged company tried to move operations from the ILEC into an affiliate, the FCC wrote, "[s]uch an affiliate of U S WEST would be considered a 'successor or assign' of U S WEST for the purposes of the obligations imposed by section 251(c)(4)." *Id.* at 5399 ¶ 45 (emphasis added). The FCC decidedly did *not* say that every Qwest corporate entity would be a successor or assign of U S WEST's ILEC simply by virtue of coming within the Qwest corporate family.

Once again, the concerns underlying the FCC's decision do not apply here. QC has not sought to avoid section 251(c) obligations by moving local network facilities or elements from QC to its affiliates and having the affiliates lease them back to QC or provide the services themselves.<sup>6</sup> There is no evidence in the record — and certainly

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<sup>5</sup> Haggerty Aff. at 1:15-3:7.

<sup>6</sup> Second Supplemental Affidavit Of Karen A. Stewart Emerging Services Updates For Dark Fiber Portion Of Colorado Workshop No. 4, dated January 9, 2001, at 4-6 (filed in this docket on January 24, 2001); Haggerty Aff. at 1:15-3:7.

nothing provided by AT&T — suggesting that any of QC's affiliates have pursued the same lines of business as QC in an effort to siphon off its customers.

**B. NONE OF QC'S AFFILIATES ARE LECS, LET ALONE ILECS, IN ARIZONA.**

By the terms of the Act, the only entities that are subject to section 251(c) are “incumbent local exchange carriers.” 47 U.S.C. § 251(c). Congress defined “incumbent local exchange carriers” as a subcategory of “local exchange carriers:” the ILEC in a given area is “the local exchange carrier that — (A) on [February 8, 1996], provided telephone exchange service in such area; and (B)(i) on such date . . . was deemed to be a member of [NECA] . . . ; or (ii) is a person or entity that, on or after such date . . . , became a successor or assign of a member [of NECA].” 47 U.S.C. § 251(h)(1) (emphasis added). A “local exchange carrier,” in turn, is defined in terms of its specific activities: a LEC is any carrier “that *is engaged in* the provision of telephone exchange service or exchange access.” 47 U.S.C. § 153(26) (emphasis added).<sup>7</sup>

None of QC's affiliates is “engaged in the provision of” *any* local exchange service in Arizona.<sup>8</sup> None therefore is a “local exchange carrier” within the meaning of the Act. QC's affiliates thus cannot be “incumbent local exchange carriers” as defined in section 251(h): they are not “*the local exchange carrier* that . . . provided telephone exchange service” in Arizona on February 8, 1996, nor are any a “*local exchange carrier*

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<sup>7</sup> The Act defines “telephone exchange service” as “(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service . . . by which a subscriber can originate and terminate a telecommunications service.” 47 U.S.C. § 153(47). “Exchange access” is defined as “the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.” 47 U.S.C. § 153(16).

that . . . is a person or entity that, on or after such date . . . , became a successor or assign” of such a LEC. 47 U.S.C. §§ 251(h)(1)(A), (B) (emphases added). Put simply, since QC’s affiliates are not “local exchange carriers” *at all*, they cannot be “incumbent local exchange carriers” for purposes of section 251(c).

Even if a QC affiliate were to provide local exchange services in the future in Arizona, it still would not be an *incumbent* LEC within the meaning of section 251(h) unless it became USWC’s successor or assign by acquiring “key local exchange and exchange access services and facilities” from USWC – specifically, “network elements that must be provided on an unbundled basis pursuant to section 251(c)(3).”

*Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 FCC Rcd 21905, 22054 ¶ 309 (1996). See also 47 C.F.R. §53.207 (FCC definition of a BOC “successor or assign”). None of QC’s affiliates have ever acquired such network elements from USWC or QC.<sup>9</sup> As the FCC has held, “a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange service; rather, section 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h),” in particular, that section’s “successor or assign” test. *Id.* at 22055 ¶ 310.

**C. SECTION 251(C) DOES NOT EXTEND TO AN INCUMBENT LEC’S LONG DISTANCE OPERATIONS OR NETWORK.**

The FCC has specifically considered how the unbundling obligations of section 251(c)(3) apply to carriers (such as Sprint and the former GTE) that provide both incumbent local exchange and long distance services, and it rejected the argument AT&T

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<sup>8</sup> Haggerty Aff. at 1:15-3:7.

makes here. In the *Advanced Services Remand Order*,<sup>10</sup> the FCC found “no merit” to the suggestion that “section 251 would inevitably require GTE and Sprint, acting in their capacity as incumbent LECs, to unbundle all their facilities, including their long distance facilities.” 15 FCC Rcd at 390 ¶ 13. These ILECs’ long distance facilities would not meet the “limitations Congress has established in section 251(d)(2)” on unbundling; access to them is not “necessary” to provide competitive local service, nor would the failure to unbundle such facilities “impair” a CLEC’s ability to compete. *Id.* at 390-91 ¶¶ 13-14. These limitations ensure “that the unbundling obligations under section 251(c) are consistent with section 251’s underlying goal of opening the *local* market to competition.” *Id.* at 391 ¶ 14 (emphasis added).

In a later appeal (which is still pending), the FCC explained its ruling on the basis that the unbundling of ILECs’ affiliated long distance networks would not serve the “‘underlying goal’ of sections 251 and 252: to bring competition to those telecommunications markets that are subject to the continuing *market power* of incumbent LECs.” Brief for Respondents at 30, *WorldCom, Inc. v. FCC*, No. 00-1002 (D.C. Cir. filed Dec. 22, 2000) (emphasis in original). As the FCC told the D.C. Circuit, ILECs have no market power and control no bottleneck facilities in long distance:

As a general matter, incumbent LECs have traditionally held market power not with respect to “long distance” networks as such, but with respect to the local bottleneck facilities (such as the loop) needed for “access” to those networks (and thus to the telecommunications and information services carried over those networks).

*Id.* The rationale for unbundling is absent in this context, as the FCC acknowledged.

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<sup>9</sup> Haggerty Aff. at 1:15-3:7.

Indeed, AT&T itself filed a brief *supporting* the FCC in that appeal. AT&T agreed with the FCC that the obligations of sections 251 and 252 are specifically directed to incumbents' *local* service networks:

Congress recognized that by virtue of having been the providers of local exchange services in an area prior to the adoption of the 1996 Act, ILECs possess monopoly control over local network facilities. Because new entrants cannot in the foreseeable future possibly replicate the ILECs' infrastructure, particularly their loops, Congress realized that the ILECs' status as incumbent providers of exchange service gave them insurmountable advantages over new entrants in the provision of all telecommunications services that utilize those networks . . .

Joint Brief of Intervenors in Support of Respondents in Opposition to the Qwest Petitioners at 6, *WorldCom, Inc. v. FCC*, No. 00-1002 (D.C. Cir. filed Dec. 22, 2000). AT&T's current suggestion that 251(c) applies without regard to whether the ILEC's *local* network is even at issue is an about-face from its earlier position.

As a result of the foregoing, it would make no difference even if QC affiliates *were* deemed to be ILECs because none provide local exchange service. The only telecommunications services they provide are operator services and long distance. Thus, any dark fiber held by them would be part of a long distance facility, and therefore be exempt from unbundling.<sup>11</sup>

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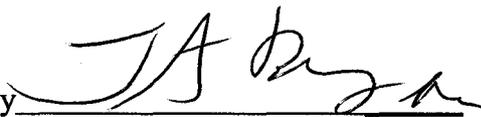
<sup>10</sup> Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999), *appeal pending sub nom. WorldCom v. FCC*, No. 00-1002 (D.C. Cir.).

<sup>11</sup> Haggerty Aff. at 3:9-14.

**CONCLUSION**

Qwest Corporation respectfully requests that its brief be supplemented with this filing and asks the Commission to find that AT&T's position with regard to the dark fiber of Qwest's non-ILEC affiliates is without factual or legal support.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of March, 2001.

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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL  
CHAIRMAN  
JIM IRVIN  
COMMISSIONER  
MARC SPITZER  
COMMISSIONER

IN THE MATTER OF QWEST )  
CORPORATION'S COMPLIANCE WITH )  
§ 271 OF THE TELECOMMUNICATIONS )  
ACT OF 1996 )  
\_\_\_\_\_ )

DOCKET NO. T-00000B-97-0238

DARK FIBER

AFFIDAVIT OF

STEVE HAGGERTY

QWEST CORPORATION

MARCH 20, 2001

1

I. Identification of Affiant

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4

My name is Steve Haggerty. I am a Senior Vice President of Qwest Local Broadband and Qwest Services Corporation. My office is located at 1801 California Street, Suite 5100, Denver, Colorado.

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My formal education includes a Bachelor of Arts degree in Business and a Masters of Business Administration from St. Mary's College of Moraga, California.

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In my current position, I oversee the CLEC operations of the Qwest corporate family, and I oversee all construction projects on Qwest's national backbone. As a result of my duties, I have personal knowledge of the telecommunications facilities of the Qwest corporate family. Prior to my current position, I was a Regional Vice President for Qwest Link Services.

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I have personal knowledge of the matters asserted in this affidavit.

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II. The Affiliates of Qwest Corporation are not Successors or Assigns of

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U S WEST Communications, Inc.

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On June 30, 2000, Qwest Communications International and U S WEST Inc. closed their merger. The surviving entity of that merger is named Qwest Communications International (QCI). QCI is a holding company that owns a variety of subsidiaries. These subsidiaries are separate corporations with defined assets and operations. Two of the corporations own and control significant telecommunications networks that provide telecommunications services pursuant to state or federal authority.

1           Prior to the merger, U S WEST Communications, Inc. ("USWC") was the  
2 only ILEC in the U S WEST corporate family. As part of the merger, USWC was  
3 renamed Qwest Corporation ("QC"). Also as part of the merger, Qwest  
4 Communications Corporation ("QCC") became the owner of the Qwest  
5 nationwide telecommunications facilities and a provider of long distance service.

6           QCC provides only non-local-exchange services in Arizona. Neither QCC,  
7 nor any other QC affiliate, have ever provided any kind of local exchange service  
8 in this state, nor have they been certificated as a LEC. The same is true for the  
9 predecessors of QC's affiliates.

10           QC is the only Qwest entity that provides (or has ever provided) local  
11 exchange services in Arizona. As noted, as part of the merger, USWC was  
12 renamed QC. None of the USWC Arizona assets were transferred. All the  
13 USWC assets remained under the ownership of the same entity that owned them  
14 before the merger. Pre-merger, that entity was USWC; post-merger, that entity is  
15 QC. In other words, none of QC's affiliates own any of the assets that were  
16 owned by USWC before the merger.

17           No affiliate of QC has stepped into the shoes of, or replaced the pre-  
18 merger USWC, nor has any QC affiliate acquired substantial assets of USWC or  
19 continued USWC's ILEC business without interruption or substantial change. No  
20 QC affiliate has acquired local exchange or exchange access services or  
21 facilities from USWC or QC. No QC affiliate has acquired from USWC or QC  
22 network elements that must be provided on an unbundled basis pursuant to

1 section 251(c)(3). The only Qwest entity that has done any of these things in  
2 Arizona is QC.

3 QC's affiliates and their predecessors have always engaged in  
4 independent lines of business that do not overlap with QC or its predecessor,  
5 USWC, at all. QC has not sought to avoid its section 251(c) obligations by  
6 moving local network facilities or elements from QC to its affiliates and having the  
7 affiliates lease them back to QC or provide the services themselves.

8

9 III. Any Dark Fiber held by an Affiliate of Qwest Corporation in Arizona is a Long  
10 Distance Facility

11 QC's affiliates in Arizona are all long distance or operator service  
12 providers. To the extent QC's affiliates may have dark fiber in Arizona, that dark  
13 fiber has been acquired for the provision of long distance services and not local  
14 exchange service.

15 IV. Conclusion

16 No Qwest entity other than QC is a successor or assign of USWC. No  
17 Qwest entity other than QC provides local exchange service in Arizona. Finally,  
18 the only dark fiber that may be held by a QC affiliate in Arizona is part of a long  
19 distance facility.

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL  
Chairman  
JIM IRVIN  
Commissioner  
MARC SPITZER  
Commissioner

DOCKET NO. T-00000A-97-0238

IN THE MATTER OF U S WEST  
COMMUNICATIONS, INC.'S COMPLIANCE  
WITH § 271 OF THE  
TELECOMMUNICATIONS ACT OF 1996

AFFIDAVIT OF STEVE HAGGERTY

STATE OF ARIZONA            )  
  )  
COUNTY OF MARICOPA        )

Steve Haggerty, of lawful age being first duly sworn, deposes and states:

1. My name is Steve Haggerty. I am Senior Vice President for Qwest Services Corporation, located in Denver, Colorado.
2. Attached hereto and made a part hereof for all purposes is my affidavit.
3. I hereby swear and affirm that my statements contained in the attached affidavit are true and correct to the best of my knowledge and belief.

\_\_\_\_\_  
Steve Haggerty

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of March, 2001.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: