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May 18, 2001

VIA OVERNIGHT DELIVERY

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

Re: Docket No. T-00000A-97-0238

Dear Sir or Madam:

Enclosed are the original and ten copies of the affidavits of Mary Jane Rasher Regarding Track A and Public Interest and Cory W. Skluzak Regarding 272 on behalf of AT&T.

The affidavits that are being filed have proprietary Qwest information redacted. The pages with the proprietary information are being filed under seal in an enclosed envelope, and are on pink paper.

Yours truly,

Donald R. Finch

Enclosures

Arizona Corporation Commission
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BEFORE THE ARIZONA PUBLIC REGULATION COMMISSION

WILLIAM A. MUNDELL

Chairman

JAMES M. IRVIN

Commissioner

MARC SPITZER

Commissioner

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

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) **DOCKET NO. T-00000A-97-0238**
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**AFFIDAVIT OF MARY JANE RASHER
REGARDING TRACK A AND PUBLIC INTEREST**

(PUBLIC VERSION)

May 17, 2001

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**PUBLIC VERSION OF AFFIDAVIT OF MARY JANE RASHER REGARDING
TRACK A AND PUBLIC INTEREST**

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T") hereby submit this Affidavit of Mary Jane Rasher for the Workshop on Track A and Public Interest before the Arizona Corporation Commission ("Commission").

I. INTRODUCTION & QUALIFICATIONS

1. My name is Mary Jane Rasher. I am submitting this affidavit on behalf of AT&T. I am employed by AT&T Corp. as a Senior Policy Witness in the Western Region Law and Government Affairs organization. In that capacity, I am responsible for developing, interpreting and presenting AT&T's position as a subject matter witness on a variety of policy issues. I received a Bachelor of Science Degree in Business Administration from the University of Nebraska-Omaha in 1979. In the ensuing years, I have attended many corporate and industry training sessions. I have worked in the telecommunications industry for over twenty-two years in a variety of positions, including sales and sales management, local services product management, market management, strategic planning and pricing, and methods and procedures.

II. PURPOSE OF AFFIDAVIT

2. I will address four issues in this affidavit: (I.) that Qwest has not demonstrated compliance with Track A; (II.) that Qwest has not opened its local markets to competition and has provided no assurance that once its local markets are open to competition that they will remain so; (III.) that remonopolization will occur if Qwest is granted entry into the long distance market now; and (IV.) that a structural separation of Qwest is the key to truly opening the local market in Arizona to competition.

III. QWEST HAS NOT DEMONSTRATED THAT IT SATISFIES TRACK A.

3. To comply with 47 USC 271 (c)(1)(A), commonly referred to as "Track A," the Bell Operating Company ("BOC") bears the burden of establishing:

a. that the BOC has entered into one or more binding interconnection agreements that have been approved by the state commission;¹

b. that under such agreement(s), the BOC is providing access and interconnection to one or more competing providers of telephone exchange service;²

c. that such competing provider(s) are commercial alternatives to the BOC, are operational, and are providing telephone exchange service for a fee;³

d. that such competing providers are providing telephone exchange service to a significant number, more than a *de minimis* number, of business and residential subscribers;⁴

e. that such telephone exchange service consists of service provided either exclusively over the competing providers' own facilities or predominately over their own facilities in combination with the resale of the telecommunications services of another carrier.⁵ For the purpose of element (e), "own facilities" are either the network facilities constructed by such competing providers or unbundled network elements ("UNEs") that the competing providers have leased from the BOC.⁶

¹ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, FCC 97-298, Memorandum Opinion And Order (rel. August 19, 1997) (hereinafter "Ameritech Michigan Order"), ¶ 71.

² *Id.*, ¶ 74.

³ *Id.*, ¶ 75; *See also Application of SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, FCC 97-228, Memorandum Opinion And Order (rel. June 26, 1997) (hereinafter "SBC Oklahoma Order"), ¶¶ 14, 17.

⁴ *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, FCC 01-29, Memorandum Opinion And Order (rel. January 22, 2001) (hereinafter "SBC Kansas/Oklahoma Order"), ¶¶ 42, 44.

⁵ 47 USC § 271 (c)(1)(A).

⁶ Ameritech Michigan Order, ¶¶ 92, 101.

4. The BOC's burden is to establish each Track A element for each state in which the BOC seeks approval to provide interLATA service.⁷ Mr. Teitzel's testimony simply does not satisfy Qwest's burden to establish the elements of Track A in Arizona. For example, Mr. Teitzel's testimony is insufficient to demonstrate compliance with element (c). Element (c) requires evidence that competing providers are commercial alternatives to Qwest, that they are operational, and that they are providing telephone exchange service for a fee. Mr. Teitzel's claim of compliance, set forth below, is merely a claim and does not amount to evidence:

Competing providers need only be in the market and operational. In other words, they need only be accepting requests for service and providing service for a fee [footnote omitted].... Clearly, the activities of the competitive providers listed in Confidential Exhibit DLT-1C meet this requirement.⁸

Omitted from Mr. Teitzel's testimony are any facts or data supporting this allegation of "clear" compliance.

5. Similarly, Mr. Teitzel's testimony is insufficient to establish Qwest's burden of establishing element (d). This element requires a showing that competing providers are providing service to a significant number of business and residential subscribers. In Mr. Teitzel's testimony on "Residential and Business Subscribers," he overlooks element (d) altogether, and makes no effort to show that competing providers are serving a significant number of residential and business customers in Arizona.⁹ Without further proof, Qwest's application must be denied for failure to prove its case under Track A.

IV. QWEST HAS NOT OPENED ITS LOCAL MARKET TO COMPETITION AND HAS PROVIDED NO ASSURANCE THAT ITS LOCAL MARKET, ONCE OPENED, WOULD REMAIN OPEN TO COMPETITION. CONSEQUENTLY, IT

⁷ See SBC Kansas/Oklahoma Order, ¶¶ 41-43 (Track A analysis as to Kansas), ¶ 44 (Track A analysis as to Oklahoma).

⁸ *Before the Arizona Corporation Commission, The Matter Of Qwest Corporation's Compliance With § 271 Of The Telecommunications Act of 1996*, Docket No. T-00000B-97-238, Direct Testimony of David L. Teitzel Re: Track A and Public Interest, Qwest Corporation, April 17, 2001, (hereinafter "Teitzel Direct Testimony"), p 28.

⁹ *Id.*, Section "C. Residential and Business Subscribers," pp. 31-33.

WOULD NOT BE IN THE PUBLIC INTEREST FOR QWEST TO ENTER THE INTERLATA MARKET.

6. The Telecommunications Act of 1996 (the "Act") provides that the FCC shall not approve a BOC's request to enter the interLATA market unless "the requested authorization is consistent with the public interest, convenience, and necessity."¹⁰ This provision is commonly referred to as the "public interest" requirement.

7. The public interest requirement may be satisfied only when the BOC has opened its local markets to competition and has provided adequate assurance that its local markets will remain open to competition if entry into the interLATA market is permitted.¹¹ However, as set forth more fully below, Qwest has not opened its local markets to competition within Arizona. Further, Qwest relies on a performance assurance plan ("PAP") as the vehicle to assure that its local markets remain open to competition.¹² As noted by Mr. Teitzel, however, despite the fact that collaborative workshops have been ongoing since July 2000 to develop a PAP, there still is not an approved plan at this time. Accordingly, Mr. Teitzel's testimony does not present for consideration Qwest's plan to assure that markets will remain open to competition.¹³ Consequently, in both respects of (a) opening its local market to competition, and (b) assuring that they remain open, Qwest's present showing does not satisfy the public interest requirement.

A. CHECKLIST COMPLIANCE ALONE DOES NOT ESTABLISH THAT THE LOCAL MARKET IS OPEN TO COMPETITION. IT IS IMPORTANT FOR THE STATE COMMISSION TO IDENTIFY AND WEIGH ALL RELEVANT FACTORS IN ASCERTAINING WHETHER QWEST HAS SATISFIED THE PUBLIC INTEREST REQUIREMENT.

8. In connection with the public interest requirement, the FCC has ruled that checklist

¹⁰ 47 USC § 271 (d)(3)(C).

¹¹ See, e.g., Ameritech Michigan Order, ¶¶ 399, 402.

¹² Teitzel Direct Testimony, p. 41.

¹³ *Id.*

compliance alone is insufficient to establish that the local market is open to competition:

In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of the section 271, basic principles of statutory construction, and sound public policy...[T]he text of the statute clearly establishes the public interest requirement as a separate, independent requirement for entry.¹⁴

9. Mr. Teitzel erroneously suggests that checklist compliance, alone, is sufficient to show that the local market in Arizona is open to competition.¹⁵ This suggestion is contrary to the above-quoted FCC ruling.

10. The FCC has said, however, that checklist compliance is a "strong indicator" that long distance entry is consistent with the public interest.¹⁶ No such indication exists in the case of Qwest's local markets since no state commission has found Qwest to be in compliance with the checklist obligations. In fact, testimony by CLECs in this state's and other state 271 proceedings in Qwest's local region, as well as initial orders in these dockets, suggest that Qwest does not currently comply with the competitive checklist.

11. Section 271 grants the FCC broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest.¹⁷ As in the case of an FCC review, it is important for the state commission to identify and weigh all relevant factors in determining whether Qwest has satisfied

¹⁴ Ameritech Michigan Order, ¶ 389; *See also Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, FCC 99-404, Memorandum Opinion And Order (rel. December 22, 1999) (hereinafter "BANY Order"), ¶ 423, "Nonetheless, the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."

¹⁵ Teitzel Direct Testimony p. 37, lines 4-6.

¹⁶ BANY Order, ¶ 422.

¹⁷ Ameritech Michigan Order, ¶ 383.

the public interest requirement. After identifying and weighing *all* the relevant factors pertinent to Qwest, this Commission should conclude that it would be inconsistent with the public interest for Qwest to enter the Arizona interLATA market at this time.

B. BARRIERS TO CLEC MARKET ENTRY

12. The FCC has identified various factors that are illustrative, but not exhaustive, of the factors to be considered in determining whether a BOC has opened its local markets to competition.¹⁸ One such factor is whether all barriers to entry into the local telecommunications market have been eliminated.¹⁹ A market is not open to competition when there exists a barrier to entering the market.

13. Recalling the purpose of the Act, “to promote competition and reduce regulation to secure lower prices and higher quality services for all American telecommunications consumers,”²⁰ the three components of the post-Act policy trilogy constitute a simultaneous system for the transition to an irreversibly competitive marketplace.²¹ Thus, if the goals of the Act are to be achieved for all consumers, all three elements of the policy trilogy must be fully implemented. Specifically, *denying* new entrants the means to compete via the ready availability of competitively priced Unbundled Network Elements (“UNEs”) while also *allowing* carrier access charges to remain significantly above economic costs, has retarded, if not stopped altogether, the promise of choice for average consumers.

¹⁸ *Ameritech Michigan Order*, ¶ 398.

¹⁹ See *Ameritech Michigan Order*, ¶¶ 390, 396; see also *BANY Order*, ¶ 426.

²⁰ Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. § 151, et. seq.

²¹ The national deregulatory framework, termed the “Competition Trilogy” is articulated by the FCC in ¶¶ 6-9 of the Local Competition Order, CC Docket No. 96-98, (rel. August 8, 1996.)

14. The public interest analysis, therefore, must consider whether approval of a section 271 application will foster competition in *all* relevant telecommunications markets.²² Approval of a section 271 application for Qwest would not foster competition its local, residential markets because such approval would not remove the barriers to entering such markets as set forth below.

1. UNE Prices Preclude Competitive Entry

15. The pricing of UNEs in excess of economic cost creates a barrier for CLECs to enter Qwest's local, residential market in Arizona. Mr. Teitzel states that Qwest has entered into interconnection agreements that provide for "cost-based pricing of access, interconnection, and unbundled network elements and for wholesale discounts to reflect avoided costs."²³ In fact, Qwest's pricing is far from cost-based and has been a primary factor in keeping its local, residential markets closed to competition.

16. UNE rates are so high when comparing cost to retail rates, that CLECs cannot compete with Qwest for residential customers using the UNE-Platform ("UNE-P"). (See Table A below for Qwest's wholesale UNE-P rates versus its retail rates.)

TABLE A

QWEST'S WHOLESALE UNE-P RATES COMPARED WITH QWEST'S RETAIL RATES FOR A RESIDENTIAL LINE

STATE	Monthly Recurring Charge ("MRC")		Non-Recurring Charge ("NRC")	
	UNE-P* w/ features	1FR	UNE-P	1FR
Arizona	\$26.18	\$13.18	\$83.50	46.50

* All UNE-P MRCs include: analog loop + analog port + (750 minutes local usage) + 400 minutes shared transport.

²² *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, FCC 98-271, Memorandum Opinion And Order (rel. October 13, 1998) (hereinafter "Second BellSouth Louisiana Order") ¶ 361.

²³ Teitzel Direct Testimony, p. 52, ls. 16-18. For clarification, carrier access charges are not included in the Interconnection Agreements nor are they "cost-based."

17. According to Qwest's own data,²⁴ it retains **[PROPRIETARY: XXXX]** of the residential market in Arizona. That dominance is not surprising since the UNE-P monthly recurring charge ("MRC") that CLECs must pay Qwest for UNE-P is almost twice the rate that Qwest's end users pay for a residential line. UNE-P rates are just one element of CLEC costs of providing local service. It is critical to keep in mind that UNE-P rates do not include the CLEC's internal business costs such as those attributable to billing or customer service, and the rates do not include any margin or profit for the CLEC. So, to merely recover its UNE-P costs, the CLEC must charge its residential customer about two times (2X) more per month than what Qwest will charge the same customer for the same service. Residential customers are not going to pay a CLEC two times (2X) more each month than what Qwest would charge for the same service. Due to the vast disparity between wholesale and retail rates for the same service, UNE-P is not a viable entry strategy in the Arizona residential market. The UNE-P MRCs are a barrier to market entry. This is one reason why the residential market in Arizona is not open to competition.

18. Likewise, the non-recurring charge ("NRC") for local residential service is significantly higher on a wholesale basis for Qwest's CLEC customers than it is on a retail basis for Qwest's residential customers.²⁵ The NRC for UNE-P is a barrier to market entry using that serving arrangement. A residential customer pays Qwest a NRC of \$46.50 to obtain local service. However, Qwest charges a CLEC ordering the same service under UNE-P, a NRC of \$83.50. Clearly, a residential customer would not pay a CLEC nearly 1.8 times the NRC than is necessary to obtain the same local service from Qwest. The vast disparity between the wholesale

²⁴ Teitzel Direct Testimony, Confidential Exhibit DLT-2C.

²⁵ See Ameritech Michigan Order, ¶ 395, "As we noted above, unreasonably high non-recurring charges could chill competition."

and retail NRC is a second reason for a lack of competitive entry in the residential markets by way of a UNE-P strategy. The UNE-P NRC is a barrier to entry.

19. Given that UNE-P is a critical entry vehicle to open the residential market to competition, Qwest offers no basis for the Commission to conclude that the market is irreversibly open to competition.

2. Qwest's Intrastate Access Charges Are Significantly Above Cost And Would Provide It An Unfair Price Advantage In Serving the Combined InterLATA Long Distance and Local Market

20. Qwest's entry into the interLATA long distance market is also inconsistent with public interest due to the significant price advantage that Qwest would enjoy over competitors. Qwest's exorbitant intrastate access rates, priced significantly above cost (See Table B below), provide it with a source to subsidize its other products and services.

TABLE B

QWEST INTRASTATE ACCESS RATES* (Rates presented in ¢ per minute)

	Originating Call	Terminating Call	Two-Sided Call	Cost Surrogate for Two-Sided Call**	% Over Surrogate Rate
STATE					
Arizona	3.4¢	4.67¢	8.07¢	1.1¢	733.6%

* Intrastate rates are based upon tariffed CCL local switching and transport access rates from Qwest's intrastate access tariffs as of 4/01/01.

** Cost surrogate for Two-Sided Call reflects the federal interstate BOC surrogate "per access minute" charge of 0.55¢.

21. The FCC established an interstate access target rate for BOCs of 0.55¢ per access minute.²⁶ Although AT&T believes that Qwest's actual intrastate access cost for Arizona is

²⁶ *In the Matter of Access Charge Reform*, CC Docket No. 96-262, FCC No. 00-193, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, (rel. May 31, 2000), §61.3(qq), p. B-21.

lower than this interstate target rate, until Qwest's actual costs for intrastate access are determined, the interstate target rate is a proper surrogate for the cost of intrastate switched access. For toll calls that originate and terminate in Arizona (i.e., a two-sided call a/k/a a conversation minute), using the interstate rate as a cost surrogate, it is conservative to estimate that Qwest's intrastate access charge is over 733% in excess of its costs.

22. To demonstrate the significant impact of Qwest's high intrastate access rates, consider the following:

Qwest's Arizona intrastate access charges are 3.4¢ for originating minutes and 4.67¢ for terminating minutes. Those charges are billed on each end of a conversation, for a total of 8.07¢ per minute.²⁷ Those are real dollars that an IXC must pay to Qwest currently for intraLATA long distance calls, and which IXCs must build into their rate structure to make any money. As a result, if an IXC charges approximately 12¢ per minute for that call, then it will retain less than 4¢ per minute on the call after it pays Qwest. The IXC would still have to recover its other costs of doing business such as order processing, billing, customer service, etc., from the remaining 4¢ margin.

23. If Qwest were required to impute the same access price for a toll minute that it charges others – 8.07¢ – the initial reaction might be to say, “That’s fair.” After all, if you keep the price floor the same for both companies, the competition between them will be based on who can provide the best service above that floor.

24. However, Qwest's intrastate access is priced considerably above cost. Using the interstate rate as a surrogate, Qwest's costs of providing a minute of intrastate switched access is

²⁷ Originating plus terminating access.

only 1.1¢,²⁸ including both ends of the conversation.

25. So, when Qwest completes that call for its customer, if it charges 12¢ minute, then it actually makes a profit of nearly 11¢ per minute on the call. That's compared to an IXC's profit of 4¢. In addition, in this example, Qwest makes a profit of nearly 11¢ per minute on every call that IXCs carry.

26. If Qwest were to enter the interLATA market, there would be nothing to keep Qwest from pricing its interLATA long distance service at 9¢ a minute for its retail customers. Qwest would still make a profit of nearly 8¢ per minute. Since IXCs would have to pay Qwest the 8.07¢ per minute for access, it would not be able to price compete with Qwest. Thus, without intrastate access rate reform, Qwest's entrance into the interLATA long distance market would afford Qwest a huge anti-competitive price advantage. Qwest's entrance into the interLATA long distance market would, therefore, be inconsistent with the development of a competitive telecommunications marketplace.

27. Specifically, were Qwest to enter into the interLATA long distance market, Qwest would be able to bundle its local service with a long distance offering. Competitors, not afforded the same monopoly subsidization contained in intrastate switched access rates, will be squeezed out of the local market. Additionally, unless a serious and substantial change in the competitive local services landscape were to emerge quickly and irreversibly, Qwest will soon dominate and ultimately monopolize the adjacent, currently highly-competitive, long distance market as well. Qwest's high access rates result in substantial harm to consumers, to telecommunications competition, and to prospects for optimal investment in communications infrastructure.

²⁸ The interstate access target rate of $\$0.0055 \times 2$ (originating & terminating) = $\$0.0111$ or 1.1 cents per conversation minute.

28. The Commission must address Qwest's anti-competitive access charges *before* Qwest receives approval to provide in-region interLATA services in Arizona. The forward-looking economic cost for Qwest to provide access to itself for intrastate long distance calls is substantially less than the price that Qwest charges IXCs for the same, identical access. As illustrated in the above example, Qwest's competitors will be disadvantaged by a dramatic price squeeze were Qwest to receive in-region approval. Consequently, it is vital to remove barriers to competition before Qwest enters its in-region long distance market.

C. QWEST HAS NOT COOPERATED IN OPENING ITS LOCAL MARKET

29. Whether a BOC has cooperated in opening its local market to competition is another factor the FCC takes into account in determining whether the local market is in fact open to competition. In the words of the FCC:

Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.²⁹

30. Thus, evidence that a BOC has engaged in either (1) disobeying federal or state telecommunications regulations or (2) a pattern of anti-competitive conduct, is sufficient to demonstrate that the BOC has not cooperated in opening its local market to competition. The evidence that Qwest has not cooperated in opening its local market to competition is particularly compelling because the evidence consists of *both* types of behavior.

²⁹ Ameritech Michigan Order, ¶ 397.

1. Qwest Has Previously Violated Section 271 And Is Likely To Do So Again

31. There is no question that Qwest (and the former US WEST) has disobeyed federal telecommunications regulations. Indeed, without opening its local markets to competition and without even seeking FCC approval, Qwest entered the interLATA long distance market in violation of the statutory framework involved in this proceeding. The FCC ruled this year that:

In sum, U S WEST's participation in the long distance market through its 1-800-4USWEST Service enables it to obtain significant competitive advantages... The Service allows U S West to build goodwill with its local-service customers, depicting itself as a full-service provider prior to receiving section 271 approval. Indeed, the full-service, or one-stop shopping, advantages provided by the Service appear to have been U S WEST's primary objective in implementing the Service in the first place. [Footnote Omitted] As the Commission held in the *1-800-AMERITECH Order*, these competitive advantages could reduce U S WEST's incentive to open its local market to competition and, thus, run counter to Congress's intent in enacting section 271. [Footnote Omitted]³⁰

32. Similarly, in another proceeding, the FCC found that the former U S WEST's "provision of nonlocal directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service as defined in section 271(a) of the Act."³¹ So, once again, Qwest provided in-region, interLATA service without first demonstrating that its local markets were open to competition, without FCC approval, and in violation of Section 271.

33. In yet a third proceeding, the FCC addressed U S West's earlier business arrangement with Qwest, and Ameritech's similar arrangement with Qwest.³² Under the business arrangement, U S West and Ameritech provided their local customers with a one-stop shopping

³⁰ *In the Matter of AT&T Corporation v. U S WEST Communications, Inc., In the Matter of MCI Telecommunications Corporation, Inc. v. U S WEST Communications, Inc.*, Memorandum Opinion and Order, Adopted February 14, 2001, Released February 16, 2001, DA 01-418, ¶ 19.

³¹ *See Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc. for Forbearance*, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (rel. Sept. 27, 1999), ¶¶ 2, 63.

³² *AT&T Corporation, et. al. v. U S West Communications, Inc., and Qwest Corporation*, file No. E-98-42 (consolidated with File Nos. E-98-41 and E-98-43), FCC 98-242, Memorandum Opinion And Order (rel. to the public October 7, 1998) ¶ 52.

opportunity that included interLATA services, without first opening their local markets to competition, without FCC approval, and in violation of Section 271.³³ With the local market not open to competition, the results of offering local customers one-stop shopping were astoundingly anti-competitive. By leveraging its dominance in the local market to gain long distance customers, U S WEST persuaded 130,000 of its local customers to purchase Qwest's long distance service in just four weeks of marketing the one-stop shopping program.³⁴ Consequently, if Qwest were granted 271 relief before its local markets are open to competition, the same anti-competitive results will occur. Qwest will be able to leverage its dominance in the local market and extend it into the long distance market.

34. Qwest's violations of Section 271 are ongoing. Through review of Qwest's April 16, 2001 Auditor's Report and Qwest's April 16, 2001 certification submitted to the FCC as required in the FCC's approval of the Qwest-U S WEST merger, AT&T discovered Qwest's further violations of Section 271. The Auditor's Report finds that in-region private line services for 266 large business customers were "billed and branded as Qwest services" and that revenues associated with these services from July 2000 through March 2001 exceeded \$2.2 million. Through its branding of in-region interLATA transport services as its own, Qwest has once again violated Section 271, and there is no knowing when Qwest will stop doing so.

35. In its letter of May 1, 2001, a copy of which is marked as **Exhibit 1**, AT&T requested that the FCC take action against Qwest for its continuing violations of Section 271. Additionally, as set forth in AT&T's May 1, 2001 letter, good grounds exist to believe that Qwest is further violating Section 271 by reason of its teaming arrangements with long distance carriers to provide long distance services to federal agencies located within Qwest's local region.

³³ *Id.*, see also *Id.* ¶ 44.

³⁴ *Id.*

36. Related to Qwest's violations of Section 271 are Qwest's efforts in Arizona to make an end run around the law and provide long distance service here without opening its local market to competition and without FCC approval. Qwest sought to remove the LATA boundary within Arizona by asking this Commission to abolish the boundary. Qwest's plan was that once the LATA boundary was gone, Qwest could provide long distance service throughout the state because such service could not be characterized as "interLATA service" within the prohibitions of section 271. A copy of the June 1, 1999 letter from the FCC threatening charges against U S WEST (now Qwest) if it were to proceed with its plan is attached as **Exhibit 2**.

37. Due to Qwest's past and ongoing violations of Section 271, coupled with its efforts to avoid compliance, the Commission should lack confidence that Qwest has truly opened its local markets in compliance with Section 271. The Commission should also lack confidence that Qwest will comply with Section 271 in the future.³⁵

2. Qwest's Anti-Competitive Behavior Is Intended To Frustrate And Prevent True Competitive Entry In The Local Market

38. Although Qwest claims to welcome competition with open arms,³⁶ the truth is it wants to be granted entrance into the long distance market without fulfilling its obligation to let other carriers into its local markets. Qwest has a long history of maintaining its firm grip on its local markets through the use of anti-competitive behavior. From the very beginning in Arizona, U S WEST sent a clear message to new competitors that market entry would require expensive and extended litigation. U S WEST endeavored to oppose *every* new competitor's request for a

³⁵ See Ameritech Michigan Order, ¶ 399, "[W]e need to be confident that we can rely on the petitioning BOC to continue to comply with the requirements of section 271 after receiving authority to enter into the long distance market." It is difficult to have such confidence with Qwest, given its history of noncompliance with Section 271.

³⁶ Joseph P. Nacchio, Qwest's Chairman and CEO, told the National Association of Regulatory Utility Commissioners at its February 26, 2001 conference, "We like competition. We open our own markets and break into others."

certificate of convenience and necessity ("CC&N"). As a matter of course, U S WEST intervened in each of the CC&N proceedings, opposed each Commission decision to issue a CC&N and, after each certificate was issued, filed an application for rehearing arguing that the certificate should not have been issued.

39. When a new competitor succeeded in obtaining a CC&N from the Commission, it was promptly sued by U S WEST in Superior Court. In these lawsuits, U S WEST asked the court to (1) vacate the Commission's decision to grant the CC&N and (2) remand the matter to the Commission with instructions to allow U S WEST the same pricing flexibility extended to new competitors. Appeals associated with this litigation are still pending. These Qwest lawsuits impose actual and measurable costs on competitors and go a long way in persuading potential entrants to avoid Arizona, due to costs attributable to Qwest's anti-competitive behavior.

40. Many of the specifics of Qwest's anti-competitive behavior that have resulted in stymieing successful CLEC market entry are being discussed at length in the checklist workshops, so I will not go into the details here. However, below are a few examples of how Qwest leverages its monopoly position to preclude successful market entry by its local market competitors. Although these examples are state-specific, Qwest's operating systems, processes and training are region-wide. Thus, it is reasonable to conclude that this same anti-competitive behavior by Qwest is not restricted by state boundary. These examples make clear that Qwest continues to have no intention of opening its local market.

a. AT&T

41. On March 21, 2001, AT&T filed a complaint against Qwest with the Minnesota Public Utilities Commission ("MPUC"). The subject of the complaint is Qwest's violation of its interconnection agreement with AT&T as well as violations of state and federal law. In mid-

September 2000, AT&T informed Qwest that it intended to test unbundled network element platform (“UNE-P”) ordering and provisioning in Minneapolis (“Test Trial”). Since that time, AT&T has, to date, been unable to come to agreement with Qwest on a plan for the ordering and provisioning trial. Despite months of meetings between the parties and Qwest’s ever-changing requirements of AT&T, Qwest has now flatly refused to conduct the test trial. Because Qwest’s failure and refusal to provide facilities and necessary information inhibits AT&T from competing effectively, the public is being denied the benefits of competition, including lower prices and diversity of telecommunications services, contrary to Minnesota’s public policy and that of the Act favoring competition. On April 30, 2001, the MPUC issued an Order³⁷ granting AT&T temporary relief requiring Qwest to complete certification and bill-conductivity testing, and accept orders for 1000 residential lines (800 retail and 200 wholesale).

42. In response to another complaint filed by AT&T against Qwest, the Washington Utilities and Transportation Commission (“WUTC”) on April 9, 2001, ordered Qwest to promptly provide AT&T with access to inside wiring in multiple dwelling units (“MDUs”).³⁸ (The Order is attached as **Exhibit 4**.) Qwest had previously thwarted AT&T’s efforts to access MDU inside wiring. Qwest ripped out wires and conduit installed by AT&T from the various building access terminals located at the network interface device/minimum point of entry (“MPOE”) terminal(s).³⁹ Furthermore, Qwest padlocked boxes that contain wiring, refused to

³⁷ *Before the Minnesota Public Utilities Commission, In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. against Qwest Corporation*, Docket No. P-421/C-01-391, Order Granting Temporary Relief And Notice And Order For Hearing, Issued April 30, 2001. Attached as **Exhibit 3**.

³⁸ *Before the Washington Utilities and Transportation Commission*, Docket No. UT-003120, AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation, Second Supplemental Order Granting Motion to Amend Answer, Denying Emergency Relief and Denying Motion for Summary Determination. Issued April 9, 2001.

³⁹ Using definitions articulated by the Federal Communications Commission, the MPOE terminal is also a Network Interface Device as it is a cross-connect device used to connect facilities to inside wiring and is a means of interconnection of customer premises wiring to the incumbent LEC distribution plant. *See* Federal Communications Commission Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (September 15, 1999) (“FCC Third Order”) at ¶ 233.

negotiate access terms with AT&T and called the police when AT&T attempted to install its own wiring. Additionally, Qwest demanded non-viable, cost-prohibitive and commercially coercive methods for AT&T to obtain access to wiring inside the MDUs, such as insisting that such access required truck rolls by Qwest and that AT&T would have to reimburse Qwest its costs for each such truck roll.

43. Such actions by Qwest have made it virtually impossible for AT&T to provide local residential service to various Washington customers located in MDUs. Qwest's discriminatory conduct is contrary to the public interest as well as Washington and federal law.

b. SunWest Communications

44. On March 30, 2001, SunWest Communications Inc., a provider of local telephone service in Colorado, amended its previously filed lawsuit against Qwest. In the amended suit SunWest asserts that Qwest continues to delay putting SunWest customers through to the network switch, and as a result more and more of its customers are losing telephone service, or are forced to remain resale customers, a more profitable course for Qwest.

45. SunWest first sued Qwest last August for \$10 million. In its amended complaint, SunWest is asking for \$20 million, as a result of what it says are Qwest's delays, incompetence and negligence. SunWest's President, Dan Potter, said: "It's outrageous. It seems like Qwest is taking this action in an attempt to sabotage our relationship with our customers and put us out of business."⁴⁰ When SunWest sued Qwest in August, 2000, it alleged that Qwest breached an agreement between the two companies by failing to pay SunWest as previously agreed by the parties. Additional complaints followed in October and November when Qwest failed to provide interconnections in a timely manner, depriving customers of telephone service. Potter says

⁴⁰ "SunWest Increases Damage Claim Against Qwest to \$20 Million", SunWest Communications Inc., Press Release, March 30, 2001.

Qwest's size and attitude are key elements in the Qwest intransigence. Qwest now claims it is unable to "port" 3,000 SunWest customers who have a special type of circuit (Integrated Pair Gain) on their lines, and claims confusion inside Qwest on how to serve those customers. When Qwest does not "port" customers to SunWest's switch, the customers remain resale customers, and Qwest is able to keep the bulk of the revenue for its own. (SunWest press release and Complaint are attached as **Exhibit 5 and Exhibit 6**, respectively.)

46. In the recent Colorado 271 technical workshop (Docket No. 97I-198T, Workshop 5), as SunWest described its experiences with Qwest, it became clear that Qwest continues to view CLECs as competitors rather than as customers. Qwest does not consider it to be Qwest's job to help a CLEC make informed choices as to what Qwest product or service would best serve the needs of the CLEC.⁴¹ In the case of SunWest, despite the lengthy loss of dial-tone for many of SunWest's customers, Qwest's wholesale account manager never felt compelled to educate SunWest as to other viable serving arrangements that it could provide to meet SunWest's needs. Specifically, the account manager said that SunWest had been mailed a brochure regarding the enhanced extended loop ("EEL") product, but since SunWest had not asked about the product, she did not feel obligated to explain the product further. It is safe to assume that Qwest's retail account managers would not behave similarly with their retail customers.

c. **MCI Metro**

47. In a ruling issued February 10, 1999, the Washington Utilities and Transportation Commission ("WUTC") found that Qwest (U S WEST) had violated state

⁴¹ See *Before the Public Utilities Commission of the State of Colorado, Docket No. 97I-198T – Workshop 5, In the Matter of the Investigation of U S WEST Communications, Inc.'s Compliance With §271(c) of the Telecommunications Act of 1996*, April 17, 2001, (hereinafter referred to as Colorado Workshop 5). Partial Transcript included as **EXHIBIT 7**. Discussion regarding account manager responsibilities and customer needs from pp. 220 to 247. See p. 227 specifically.

48. laws and terms of its interconnection agreement by delaying MCI Metro from providing local phone service.⁴² The WUTC found that U S West's practices imposed undue disadvantages on MCI and granted unreasonable preferences to itself. Consequently, MCI's entry into the local telephone market was frustrated and delayed in the Puget Sound area.

49. "The commission does not underestimate the challenge of competing and cooperating at the same time," the Order stated. "However, MCI is dependent upon U S WEST in order to provide local service to its own customers. The commission seeks to minimize that dependence by enabling MCI to exercise greater control of its operations and make planning decisions based upon the same network information as U S West has available to itself. While competition is progressing in select markets, large scale local phone market competition has yet to develop...."

50. Chairwoman Anne Levinson agreed with the majority opinion, but also favored imposing substantial penalties against U S West. "This is a consistent pattern of behaviors that all operated to U S West's advantage, gave it undue preferences, and subjected MCI to an undue competitive disadvantage and improper discrimination," said Levinson in a separate opinion. "Although the commission lacks authority to award damages to a company harmed by violation of an interconnection agreement, an appropriate penalty provides a similar incentive to avoid future violations. Companies will be less tempted to violate the law, and have stronger incentives to comply, if violations are accompanied by the certainty of a penalty consistent with the seriousness of the offense," the chairwoman wrote.

d. Rhythms

51. Rhythms Links, Inc. filed a complaint against Qwest with the Colorado Public

⁴² See *Before the Washington Utilities and Transportation Commission, MCIMetro Access Transmission, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-971063, Commission Decision and Final Order, rel. February 10, 1999.

Service Commission regarding Qwest's discriminatory practices in offering ADSL- capable loops and ISDN-capable loops to CLECs.⁴³ Although Qwest disclaimed any ability to provide such a loop on an unbundled basis to CLECs, it used such a loop to provision its retail MegaBit DSL service to its own end users. Qwest's account team claimed that such a "product" would have to be developed for CLECs. In response to the filing of Rhythms' complaint and in settlement of it, Qwest began providing an ADSL-capable and an ISDN-capable loop to CLECs. This "product" development, for a loop that clearly existed for Qwest's retail customers, took nearly a year and impeded Rhythms' market entry throughout the Qwest region.⁴⁴

D. STATUS OF COMPETITION IN THE LOCAL MARKET INDICATES IT IS NOT OPEN TO COMPETITION

52. While the FCC has generally identified various factors it considers probative in determining whether a BOC's local market is open to competition, the FCC encourages interested parties to identify other factors that the FCC might consider in the context of a specific application.⁴⁵ In considering whether Qwest's local market is open to competition, one factor that the FCC and this Commission should consider is that a number of new market entrants have filed for bankruptcy. That a large and ever-growing number of new market entrants have found it impossible to compete in Qwest's local market is strong evidence that Qwest's local market is not open to competition.

1. Demise of New Market Entrants

53. In stark contrast to Qwest's dominant position, the CLEC industry now faces

⁴³ See *Before the Public Utilities Commission For The State Of Colorado*, Rhythms Links Inc. (Complainant) v. U S West Communications, Inc. (Respondent), No. 99F-493T, October 7, 1999.

⁴⁴ Before the Public Service Commission of the State of Utah, *In the Matter of the Application of U S WEST Communications, Inc. For Approval Of Compliance With 47 USC § 271(d)(2)(B)*, Docket No. 00-049-08, Affidavit of Valerie Kendricks, Rhythms Links, Inc., March 23, 2001, pp. 2-4.

⁴⁵ Ameritech Michigan Order, ¶ 398.

significant obstacles in raising the capital necessary to compete broadly with Qwest and the other BOCs.⁴⁶ Competitive LECs have become “marginalized” because they do not “own the strategic assets” necessary to compete but must “rely on the ubiquitous Bell network” – a network that remains largely closed to new entrants.⁴⁷ Qwest’s anti-competitive actions, coupled with adverse market conditions, have now threatened the minute level of CLEC market penetration that existed in the local market. Despite millions of dollars of investment, CLECs and Data Local Exchange Carriers (“DLECs”) have been kept at bay by Qwest’s anti-competitive actions and thereby have been unable to make significant inroads into Qwest’s local market. These same CLECs and DLECs are now suffering from the drought in the capital funding market and have either succumbed or are precariously clinging to life support. ICG Communications, Convergent Communications, Jato Communications, GST Telecommunications, eSpire, Pathnet, NorthPoint Communications, and REAnet are examples of CLECs and DLECs that have filed for bankruptcy in the last twelve months. The stocks of Rhythms NetConnections, Inc. and Covad Communications are trading at \$0.23 and \$0.97 after 52-week highs of \$35.625 and \$66 respectively.⁴⁸

54. In March 2000, four of the major DLECs⁴⁹ had a combined market cap of \$21.4B. A year later, the combined market cap of these DLECs was less than \$0.4B – that’s 2 cents on the

⁴⁶ In no market segment is this trend more apparent, or has the descent into free fall been sharper, than among “data LECs” that sought to provide competitive DSL services. These former “stock market darlings” are now on the verge of extinction. See P. Goodman, *Verizon Terminates Deal to Buy Stake in NorthPoint*, Washington Post, at E9 (Nov. 30, 2000). Indeed, Verizon terminated its plans to buy NorthPoint Communications Group, citing “the rapid decline of its would-be partner’s business” – “an enterprise in need of huge flows of cash to build its network, yet losing customers.” *Id.* As a result, NorthPoint is bankrupt. Analysts likewise have concluded that the data LECs are “unequipped to compete with the giants of the industry” – the incumbent local carriers – who “have clearly captured the upper hand in the battle to roll out DSL service.” See J. Hall, *NorthPoint’s Stock Plunges After Verizon Nixes Deal*, Reuters (Nov. 30, 2000) (quoting Michael Bowen).

⁴⁷ J. Whitman, *New Entrants: Battling the Bells*, Wall Street Journal, at R17 (Sept. 18, 2000). See also B. Ploskina, *It’s Open Season For CLEC Consolidators*, Interactive Week, at 16 (Oct. 9, 2000) (reporting that competitive LECs are “facing hard times” because they are forced to rely “on incumbent carriers”).

⁴⁸ CNBC online May 1, 2001.

⁴⁹ The four DLECs are Covad, NorthPoint, Rhythms, and DSL.Net.

dollar compared to their standing a year ago. CLECs have not fared much better. The combined market cap of five major CLECs⁵⁰ has collapsed from \$16.9B in March 2000 to \$1.2B a year later – 7 cents on the dollar. The “big three” IXC, AT&T, MCIWorldCom, and Sprint, have collectively lost over \$280B in market cap in the last year.

55. Even SBC has found it nearly impossible to break into the local markets outside of its monopoly territory. Under the terms of its acquisition of Ameritech, two years ago SBC had agreed to enter thirty new markets. It has now closed most of its newly opened regional sales offices. Those closings included SBC’s Denver, Minneapolis, and Seattle regional sales offices. Such action by a company of SBC’s stature demonstrates how costly and impossible it is to compete with Qwest’s monopoly position.

56. It could be argued that some of these CLECs’ and DLECs’ problems stem from poor management, under-financing, or other items. However, the point that cannot be ignored is the factor common to **all** of them – their dependence on Qwest for interconnection.

57. At the same time that Qwest was successfully driving digital subscriber line (“DSL”) competitors out of the market, it ran a full-page ad in the local papers capitalizing on consumer’s fears regarding the reliability of DSL providers, touting its own DSL service and mocking the demise of the DSL providers. (The ad is attached as **Exhibit 8**.) Qwest also sent an email with a similar message to its customers after Jato Communications folded its operations. (The email is attached as **Exhibit 9**.)

58. After sitting on the DSL technology for a number of years, and upon facing competition from broadband cable companies and smaller competitors, Qwest moved aggressively to extend its dominance in the local voice market to the local data market via the

⁵⁰ The five CLECS are Teligent, Intermedia, Mpower Communications, and ICG Communications.

DSL product. Now, Qwest leads the market in DSL penetration and plans to double its DSL customer base in 2001.⁵¹

59. Again, many of the specifics of Qwest's anti-competitive behavior are being addressed in the Checklist Workshops. Therefore, I have not reiterated them here. The critical element is that Qwest does not provide the same level of service to its wholesale customers that it provides to its retail customers. The net effect of that anti-competitive and discriminatory behavior is that customers are unable to reap the competitive benefits envisioned by Congress and this Commission.

2. Qwest Market Data Does Not Account For Competitors' Demise

60. The market data provided by Mr. Teitzel is already dated and does not account for the ongoing demise of new local market entrants. Contrary to Mr. Teitzel's claim that he has provided "ample evidence that the Arizona market is open to competition,"⁵² the facts state otherwise. By Qwest's own estimate, only [PROPRIETARY: XXXX] of the residential customers in Qwest's Arizona local territory are served by a local service provider other than Qwest. The fact remains that, at this time, Qwest's local market is far from being open to competition. When Qwest by its own admission controls over [PROPRIETARY: XXXX] of the residential market in this state, that market is not open to competition.

E. QWEST HAS PROVIDED NO ASSURANCE THAT ITS LOCAL MARKET, ONCE OPENED TO COMPETITION, WILL REMAIN OPEN IF GRANTED 271 RELIEF

61. Another factor the FCC considers under the public interest requirement is whether the Bell Operating Company ("BOC") has provided adequate assurance that its local markets will

⁵¹ Qwest 2000 Annual Report, p. 22.

⁵² Teitzel Direct Testimony, p. 40, ls. 5-7.

remain open to competition if the FCC grants 271 relief and allows the BOC to enter the interLATA market in its service region.⁵³ Mr. Teitzel's testimony indicates that Qwest will rely on a Performance Assurance Plan ("PAP") to demonstrate such assurance.⁵⁴ However, because Mr. Teitzel does not present a Performance Assurance Plan for consideration, it is impossible to find in his testimony any assurance whatsoever of future market openness.

62. Furthermore, at Qwest's request, several state legislative bodies (including Iowa, New Mexico, and North Dakota) recently sponsored resolutions urging their state commissions to "proceed as quickly as possible with the process of allowing Qwest Corporation to provide interstate telecommunications services." The resolutions made no mention of assuring future compliance by Qwest in keeping the local markets open upon being granted 271 relief. This omission reveals Qwest's true intention and demonstrates the clear need to have this Commission impose such a requirement.

63. The resolution failed to pass in Iowa. However, when additional legislation was drafted that had sought to prevent the occurrence of "backsliding" by ensuring ongoing compliance with the fourteen-point 271 checklist, Qwest successfully lobbied against this legislation. Iowa House Study Bill ("HSB") 158 had sought to (1) establish continuing standards for the provision of interconnection by ILECs to competitors; (2) allow competitors to pursue private rights of action in order to enforce those continuing standards; and (3) allow for the recovery of actual and punitive damages by competitors harmed by any failure on the part of ILECs to meet those continuing standards. Qwest's direct and vigorous opposition to this bill is

⁵³ *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, CC Docket No. 00-65, FCC00-238, Memorandum Opinion and Order, (rel. June 30, 2000) (hereinafter "SBC Texas Order"), ¶ 420; SBC Kansas/Oklahoma Order, ¶269.

⁵⁴ See Direct Testimony of David L. Teitzel, p.41.

another strong indicator of its true intention regarding any accountability once it has received 271 relief.

64. Qwest has questioned both state and federal authority regarding jurisdiction over any PAP, claiming to each that such authority resided with the other. Before the New Mexico Public Regulations Commission, Qwest argued:

The aforementioned subsections of proposed Rule 17.11.18 address quality of service standards, performance measures, minimum performance standards and financial incentives relating to the failure to achieve minimum performance standards. These proposed rules are unnecessary and conflict with the federal rules; therefore they should not be adopted by the Commission.⁵⁵

In Minnesota, Qwest again challenged the State Commission's authority to establish wholesale quality service standards. Qwest argued federal preemption over quality of service standards proposed by the MPUC.⁵⁶

65. However, at the FCC, Qwest argued:

States do not need guidance with respect to implementation of Sections 251 and 252. They have primary jurisdiction over privately-negotiated contracts under those sections, and have been exercising such authority through legislatively-endorsed mediation and arbitration authority unencumbered by federal rules regarding performance measurements for quite some time... There are considerable jurisdictional questions around the establishment of federal performance measurements under Sections 251 and 252.⁵⁷

66. Furthermore, Qwest has resisted any efforts to make such a plan mandatory. Qwest informed the Executive Committee for the Regional Oversight Committee ("ROC") for the

⁵⁵ *Before the New Mexico Public Regulation Commission, In The Matter Of The Adoption Of A Rule Ensuring The Accessibility Of Interconnection By Competitive Local Exchange Carriers In Both Urban And Rural Areas Of New Mexico Pursuant To House Bill 400*, Utility Case No. 3439, Qwest's Comments To The Proposed Rules For Interconnection And Unbundled Network Elements, p. 19.

⁵⁶ *See, Before the Minnesota Public Utilities Commission ("MPUC"), In the Matter of Qwest Wholesale Service Quality Standards*, MPUC Docket No. P421/AM-00-849, Qwest Corporation's Reply Comments Regarding The Joint Proposal For Qwest Wholesale Service Quality Standards, January 25, 2001.

⁵⁷ *Before the Federal Communications Commission; In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56; RM-9101, Comments of U S WEST Communications, Inc.; June 2, 1998, p. 15 (bolded text included in the original U S WEST filing, footnote omitted) and p. 20 (footnote omitted).

Operational Support Systems (“OSS”) test effort currently underway, that “[A] performance assurance plan is not a 271 requirement, nor is it designed to prove 271 compliance. Instead, it is a voluntary undertaking, which creates future obligations with significant corresponding penalties. Qwest cannot allow a voluntary undertaking of this magnitude to be subject to modification through an informal ROC governance process where the lines are not clearly drawn between negotiations participants and decision makers.”⁵⁸

67. Accordingly, the Commission should order that an effective, permanent PAP be approved and available for integration into Interconnection Agreements (“ICAs”) before any 271 relief is granted to Qwest. Until such a PAP is approved, however, and its details open to scrutiny, it is premature for the Commission to determine if the public interest would be served by Qwest’s entry into the long distance market.

V. REMONOPOLIZATION WILL OCCUR IF QWEST ENTERS THE LONG DISTANCE MARKET NOW.

68. The benefits of competition that the Act intended for consumers in Arizona have not come to fruition. As of February 28, 2001, according to Qwest’s estimates, CLECs provided only [PROPRIETARY: XXX] of the [PROPRIETARY: XXXXXX] local telephone lines in service to end users (business and residence) in the Arizona.⁵⁹ Significantly, five years after the Bell System was broken up, AT&T’s share of the long distance market had declined 25%, from 90.1% to 67.5%. By 1999, AT&T’s market share had declined to 40.7%.⁶⁰

⁵⁸ Letter from R. Steven Davis, Qwest, Senior Vice President, Policy and Law, to Bob Rowe, Allan Thoms, Marilyn Showalter, Stephen F. Mecham, Anne Boyle, Ray Gifford, and Ed Garvey, December 15, 2000, p. 2, (emphasis added).

⁵⁹ See Confidential Exhibit DLT-2C.

⁶⁰ FCC Bi-Annual Report “*Trends in Telephone Service*”, rel. December 21, 2000, Table 10.8.

69. Qwest's approach to entering the long-distance market has been to wear down the resistance of the FCC and state regulators. Qwest has succeeded in preserving their monopoly position in their local markets by forestalling competition by every means available.

70. Allowing Qwest into the long distance business prematurely can only make matters worse. Because it is far easier for Qwest to enter the long distance market than for CLECs to enter local markets, the premature Qwest entry into the long distance arena will accelerate the remonopolization of the Arizona telecommunications market. Consider what is already happening in Texas, where SBC's pervasive control of the market, only a few short months after its long distance entry, has enabled it to increase its consumer long distance prices by one to two cents per minute and its monthly DSL prices by \$10. The rate increase "highlights the fact that SBC feels like they are in control and they can set the price," said Gary Jacobi, an analyst with Deutsche Banc Alex Brown. "You start to do a billion minutes, and you pick up an extra 2 cents a minute. That's a lot."⁶¹

71. Business Week recently reported, "[W]ith more consolidation among the giants and less capital available for newcomers, there will be far less competition in some segments of the industry. Business customers, for example, won't see as many companies pounding on their doors with offers of cheap local telephone service....'God knows America is not getting the competition promised under the Telecom Act,' says William Kennard, the former FCC chairman."⁶²

72. Qwest needs to understand that unless and until it properly implements the requirements of this Commission for opening the local markets to competition, Qwest's 271 applications will not be endorsed. AT&T's declarations, submitted in the various 271

⁶¹ Austin-American Statesman, at G1, February 3, 2001.

⁶² Business Week, Special Report, "Telecom Meltdown," April 23, 2001.

workshops, provide not only AT&T's criticisms of Qwest's shortcomings to date in meeting the requirements of the Act generally and the 271 checklist specifically, but also explain, to the extent that AT&T can, the steps that Qwest must take to correct those shortcomings. Other CLECs, with different experiences and different market entry plans, have also identified problems with Qwest's services and systems which will need to be addressed before any 271 applications should be considered in earnest.

73. It is not enough for Qwest to promise that it will fix its systems and processes. Qwest must demonstrate full, irreversible, and measurable compliance with its obligations *before* the Commission endorses the Qwest applications. As Pat Shey, Iowa State Representative for House District 52, stated: "Either we insist the Mega-Bells comply with the law, or we throw up our hands and let the specter of monopoly re-enter the market, and give back the tremendous gains we have seen in telecommunications in the last 17 years. Promise and potential are simply not enough."⁶³ The consumers of Arizona deserve more.

VI. QWEST'S STRUCTURAL SEPARATION IS KEY TO TRULY OPENING THE LOCAL MARKET TO COMPETITION

74. Qwest's current stonewalling and anti-competitive actions are driven by its inherent conflict of interest. Qwest has two contradictory roles: (1) operator of the local telephone network that virtually all CLECs rely upon (in some form or fashion) to provide their local telephone service; and (2) the principal competitor of those same CLECs in the very same retail markets. The last five years have shown that whatever incentive Qwest has to fulfill its legal obligations to open its network, it has a stronger incentive to preserve its local monopoly and prevent its retail competitors from succeeding in capturing local market share. Because it

⁶³ "Why Local Phone Calls Aren't Cheaper", The Gazette (Cedar Rapids-Iowa City), March 13, 2001, Editorial by Pat Shey.

controls the facilities necessary for competitors to provide services, Qwest has both the ability and the willingness to discriminate in favor of its own retail services by charging competitors anti-competitive rates for access to those facilities and providing those facilities in a discriminatory fashion.⁶⁴ As Qwest's counsel recently demonstrated in the Colorado Checklist Workshop 5, Qwest clearly views CLECs strictly as competitors, not as customers, on a par with its retail customers.⁶⁵ Any assumption that the prospect of obtaining long distance entry would somehow resolve the inherent conflicts underlying Qwest's roles and compel it to comply with the requirements of the Act has been shattered by Qwest's conduct over the course of the last five years. Qwest has continued to challenge virtually every important rule promulgated by the Federal Communications Commission ("FCC") to implement the requirements of the Act. And when its scorched earth litigation tactics have failed, Qwest has foreclosed competition by providing competitors with inadequate and discriminatory access to its network facilities. As presented by CLECs at length during the Checklist workshops, Qwest has engaged in a relentless campaign to resist the Act's requirements at every turn. As a result, CLEC penetration into the local markets is insignificant. This lack of competition imposes enormous costs on consumers, who have no alternative but to purchase local phone service from Qwest.

75. It is now evident that current rules and regulations cannot overcome the inherent conflicts driving Qwest's actions. Instead, the Commission must take action to eliminate Qwest's conflict of interest by establishing a corporate structure that would separate Qwest's retail and wholesale activities into two separate subsidiaries. Specifically, Qwest must be

⁶⁴ See *"In Re Applications of Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer Control of Corporation Holdings Commission Licenses and Lines,"* Memorandum Opinion and Order, CC Docket No. 98-141, FCC No. 99-279, (rel. October 8, 1999) ("Ameritech-SBC Merger Order"); see also Burns, et. al., *Market Analyses of Public Utilities: The Now and Future Role of State Commissions*, (National Regulatory Research Institute July, 1999 (describing how incumbent monopolists can use control of bottleneck facilities to give "preferential treatment [to] affiliates or discriminate against affiliates' competitors").

⁶⁵ See **Exhibit 7** (Colorado Workshop 5, partial transcript), p. 247, lines 1 - 5.

ordered to establish a retail company with independent management that would interact with the wholesale company on the same arm's length, non-discriminatory basis it would with any other competitor.

76. As the FCC has observed, and as the United States Court of Appeals for the Sixth Circuit has affirmed, there is nothing "novel" about the use of structural separation.⁶⁶ Structural separation is a regulatory tool that has been routinely used by state regulatory commissions and the FCC to facilitate a smooth, fair transition from regulatory monopolization to full, vibrant competition. The *Modification of Final Judgment* ("MFJ"), the 1982 Consent Decree under which the Bell System was broken up and the BOCs were divested from AT&T,⁶⁷ prohibited the divested BOCs from offering interLATA long distance services. This structural remedy was adopted in order to prevent the BOC local service monopolies from using their monopoly market power to block competition in the adjacent long distance market. And because the BOCs were themselves precluded from providing long distance services, they were made to be indifferent as to which long distance carrier their customers might individually select. Section 271 of the Act established a process by which BOCs could enter the long distance market, provided that they implemented a series of specific measures that would have the effect of irreversibly opening their previously monopolized local telecommunications markets to competitive entry. To the extent that *local* market itself becomes competitive, the BOCs' ability to exert market power in the adjacent long distance market would be attenuated.

77. The FCC has repeatedly recognized that the potential for ILEC discrimination against new entrants to their retail local exchange markets is essentially an intractable, structural

⁶⁶ *GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 345 (6th Cir. 2000).

⁶⁷ *U.S. v. Western Electric Co. et al.*, 552 F. Supp. 131 (D. D.C., 1982), *aff'd sub nom. Maryland vs. U.S.*, 460 U.S. 1007 (1983); and *Modification of Final Judgment*, sec. VIII.B.

problem. In the context of its evaluations of the merger applications of both SBC/Ameritech and Bell Atlantic/GTE, the FCC concluded that ILECs have the ability and the incentive to discriminate against CLECs that rely upon the ILECs' inputs (including interconnection and unbundled network elements) to compete. In its 1999 Order granting conditional approval of the SBC/Ameritech merger, the FCC essentially elevated this realization to the level of a cornerstone of modern U.S. telecommunications policy:

Incumbent LECs in general have both the incentive and ability to discriminate against competitors in incumbent LECs' retail markets. This observation is the fundamental postulate underlying modern U.S. telecommunications law. The divestiture of AT&T rested principally on this observation. Two key sections of the 1996 Act – sections 251 and 271 – rest entirely on this point. Incumbent LECs have an incentive to discriminate against rivals to gain the business that these rivals lose as a result of such discrimination. This incentive exists in all retail markets in which they participate. Incumbent LECs' ability to discriminate against retail rivals stems from their monopoly control over key inputs that rivals need in order to offer retail services.⁶⁸

78. In the SBC/Ameritech merger case (and subsequently in the course of the FCC's review of the proposed Bell Atlantic/GTE merger this past year), the FCC accepted the merger applicants' proposal to create a structurally separate subsidiary to provide advanced services.⁶⁹ While the FCC refrained from requiring a structural separation for the merged companies' wholesale and retail basic exchange operations, the reasoning that the FCC put forth in support of the advanced services structural separation requirement is *at least* as applicable to basic exchange service as it is to advanced services. As the FCC expressed its reasoning in the BA/GTE merger order:

⁶⁸ *In re: Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order ("SBC/Ameritech Merger Order"), 14 FCC Rcd at 14712, 14797 ¶¶ 38, 190).

⁶⁹ SBC/Ameritech Merger Order, ¶ 211; *In re: Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order ("Bell Atlantic/GTE Merger Order"), 15 FCC Rcd 4032, 14143 (¶ 247).

Establishing an advanced services separate affiliate will provide a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services of the merged firm's incumbent LECs that are necessary to provide advanced services. Because the merged firm's own separate affiliate will use the same processes as competitors, wait in line for collocation space, buy the same inputs used to provide advanced services, and pay an equivalent price for facilities and services, the condition should ensure a level playing field between Bell Atlantic/GTE and its advanced services competitors. In this regard, the competitive safeguards will provide Bell Atlantic/GTE's competitors substantial benefits. For example, to the extent a Bell Atlantic/GTE incumbent LEC allows its separate affiliate to collocate packet switches, routers, or other equipment, the nondiscrimination safeguards compel the incumbent LEC to allow unaffiliated carriers to collocate similar equipment on nondiscriminatory rates, terms and conditions. Similarly, if a Bell Atlantic/GTE incumbent LEC works with its separate affiliate to develop new systems, products, or company-wide standards, it must cooperate with unaffiliated carriers in the same way.⁷⁰

79. Clearly, the same logic expressed here by the FCC applies with equal force to support a structural separation remedy to similarly protect competitors attempting to provide basic local exchange services. The basic problem of potential discrimination is *exactly the same* for basic local exchanges services as it is for advanced services. This inescapable conclusion was expressed by the FCC in the BA/GTE Merger Order in its analysis of the market for basic ("circuit switched") local exchange services:

Because the incumbent LECs compete with competitive LECs for the provision of retail local exchange services, incumbent LECs have the incentive to discriminate against competitive LECs that depend on the incumbents' inputs (such as interconnection and UNEs) to compete. *We find that a discriminatory interconnection policy will be profitable for an incumbent LEC insofar as its revenue gains in the provision of retail local exchange services exceed whatever revenue it forgoes from wholesale interconnection with rivals.*⁷¹

80. It follows, then, that when the structural separation remedy is applied to Qwest's basic local exchange services, it will establish the same type of "level playing field" that the FCC

⁷⁰ Bell Atlantic/GTE Merger Order, ¶ 261.

⁷¹ *Id.*, ¶ 201 (footnotes omitted, emphasis added). See also the parallel finding made by the FCC at ¶ 238 of the SBC/Ameritech Merger Order.

expected that the structural separation solution would create when it was applied to the advanced services market. Qwest's retail services affiliate "will use the same processes as competitors, wait in line for collocation space, buy the same inputs used to provide advanced services, and pay an equivalent price for facilities and services" in order to furnish basic local exchange services.

81. This is a critical transition time for local competition. The courts have now put to an end the BOCs' attempt to circumvent the 1996 Act and deny CLECs combinations of UNEs, the vehicle Congress intended to permit near-term competitive entry at the mass market level. At the same time, as discussed earlier, many CLECs have been pushed into or are on the verge of bankruptcy. If Qwest were permitted entry into Arizona's interLATA long distance market while remaining capable of blocking UNE-based competition in the local market, local competition will never develop. These circumstances will enable Qwest to establish itself as the only carrier that can offer on a mass market basis a package of local and long distance voice and data services – especially as it signs up more and more customers to long-term contracts for DSL service. Particularly in light of current market conditions, a CLEC that "earns" a poor reputation for service because of discrimination by Qwest will find it difficult, if not impossible to function in the marketplace.⁷² Similarly, Qwest can further deter entry by establishing a reputation for a willingness to engage in predatory conduct.⁷³ Indeed, as noted, Qwest's trench warfare tactics

⁷² *UNE Remand Order* ¶ 87 (noting competitive LECs are at a reputational disadvantage because "competitive LECs must establish a brand name and develop a reputation for service quality before they can overcome the incumbents' long-standing relationships with their customers."); *SBC-Ameritech Merger Order* ¶ 237 (reputational harms inflicted by incumbent LECs limit the ability of competitive LECs to enter the local telephone services market). See also Complaint, Decision and Order, *In re Digital Equipment Corporation*, FTC Docket No. C-3818, 1998 FTC LEXIS 75 (July 14, 1998); Proposed Consent Order and Analysis to Aid Public Comment, 63 Fed. Reg. 24544 (May 4, 1998). See generally N. Stoll, *Current Developments in Federal Antitrust Enforcement: Solutions, Settlements and Surrender*, 795 PLI/Corp 413 (1992).

⁷³ See J. Ordover & C. Saloner, *Predation, Monopolization, and Antitrust*, in Handbook of Industrial Organization 550 (R. Schmalensee & R. Willig eds., 1989) (discussing the benefits derived by the dominant firm through its reputation earned due to its predatory pricing activities); G. Hay, *The Economics of Predatory Pricing*, 51 Antitrust L.J. 361, 365 (1982) (demonstrating predatory pricing based on the reputational effects of the dominant firm).

have already resulted in many rivals having to rethink their attempts to serve residential customers.

82. For precisely these reasons, the Pennsylvania Public Utility Commission (“Pennsylvania PUC”) recently approved a “functional” separation of Verizon-Pennsylvania – *i.e.*, it ordered Verizon-Pennsylvania to establish functionally separate wholesale and retail divisions within the company.⁷⁴ The Pennsylvania PUC also ordered Verizon-Pennsylvania to come into compliance with a strict code of conduct.⁷⁵ Finally, the Pennsylvania PUC initiated a number of collaboratives and proceedings designed to strengthen the remedies applicable to Verizon-Pennsylvania’s performance, evaluate the need for reduced wholesale rates, and to implement other market-opening conditions.⁷⁶

83. Although the Pennsylvania PUC decided to “compromise” and, at least for now, stopped short of ordering full structural separation,⁷⁷ AT&T urges the Commission to take the next step and order full structural separation of Qwest in Arizona into distinct wholesale and retail units. Generally speaking, such structural separation would require Qwest to establish a retail affiliate which would provide finished services to consumers and have the customer relationship, and establish a separate wholesale affiliate which would continue to own and operate the network facilities necessary to provide local telephone services in Arizona. Thus, in order to provide finished retail services, Qwest’s retail affiliate would have to negotiate an interconnection agreement with the Qwest wholesale affiliate just like every other CLEC.

⁷⁴ Joint Motion of Chairman Quain and Vice Chairman Bloom, *Structural Separation of Bell Atlantic-Pennsylvania Inc. Retail and Wholesale Operations*, Docket No. M-00001353 (March. 22, 2001).

⁷⁵ *Id.*

⁷⁶ *Id.* The Staff of the New York Public Service Commission has also begun to explore structural separation of Verizon-New York in the context of reviewing New York’s existing price cap regulations (Case 00-C-1945).

⁷⁷ The Commission, however, made it clear that structural separation would be imposed if Verizon failed to fully and properly implement the functional separation and code of conduct approved by the Commission. *Id.*

84. Structural separation requires more than a mere accounting gimmick. Through a number of mechanisms, structural separation, properly done, would ensure that the newly separate affiliates are *functionally* separate, so that regulators, as well as competitors, can identify “the rates, terms, and conditions on which services will be available to all potential purchasers.”⁷⁸ Such separate corporate affiliates would, for example, maintain separate books, records, and accounts from the wholesale arm, maintain separate facilities, and deal at arms length, in writing, with the wholesale arm.⁷⁹ Thus, structural separation, while requiring corporate reorganization, would not require Qwest to divest economic ownership of any network facilities.

85. Similarly, structural separation includes a code of conduct like that being imposed by the Pennsylvania PUC to establish a higher degree of transparency in the wholesale-retail relationship. There are a number of requirements appropriate for a code of conduct, such as banning discrimination and cross-subsidization, requiring that Qwest not provide information to its retail affiliate without simultaneously sharing information with its retail rivals, requiring that the wholesale arm and retail affiliate maintain separate buildings and separate employees, barring the wholesale arm from providing operations, installation, and maintenance for the retail affiliate, and barring the wholesale arm from making misrepresentations about the relative quality of the retail affiliate’s repair or provisioning service.

86. Structural separation “is a pragmatic and moderate attempt to enable dominant producers or suppliers whose participation in a given market raises special problems to participate, while reducing the risks that their customers or competitors will be disadvantaged by

⁷⁸ Final Decision and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC.2d 384, ¶ 205 (1980) (“*Computer II*”).

⁷⁹ *Accord*, *CMRS Structural Separation Order* ¶ 38(1)-(3) (detailing separate affiliate requirements to be applied to LECs’ commercial mobile radio services affiliates).

such participation.”⁸⁰ In particular, structural separation of the wholesale and retail arms of Qwest would reduce both its ability and incentive to engage in price and non-price discrimination strategies discussed above short of requiring Qwest to divest its ownership of the network. Currently, Qwest has incentive to charge competitors the highest rates it can for UNEs because, no matter what it charges others, it pays only the actual economic cost of using its network.⁸¹ However, if Qwest were structurally separate, the retail arm would have to pay the same price for UNEs as CLECs. Because structural separation includes the mandate that the retail arm of Qwest would not be permitted to sell services below its costs,⁸² Qwest would now, for the first time, have at least some incentive to moderate its UNE rates so that its retail arm could effectively compete.

87. Likewise, structural separation would help prevent non-price discrimination by Qwest by decreasing Qwest’s incentives to engage in such discrimination and by making it easier to detect such discrimination should Qwest attempt it. As currently constituted, Qwest has the incentive to deny CLECs equal, nondiscriminatory access to the technical provisioning it gives itself.⁸³ Under this proposal, however, the retail affiliate would not own any network facilities but could only provide services by negotiating at arm’s length an interconnection agreement with the wholesale affiliate. To the extent that the retail arm negotiates beneficial terms, Qwest would be required to give those very same terms to CLECs.⁸⁴ By forcing the retail and wholesale units

⁸⁰ *Computer II* ¶ 205.

⁸¹ See Bell Atlantic-GTE Merger Order ¶ 166, (“[T]he incumbent LEC may profit from imposing high loop charges, or access charges, on both its affiliates and its competitors, because the charges to its affiliates constitute only an internal transfer.”)

⁸² This imputation would not impede universal service support. The retail arm would not be allowed to price service below cost, but the “price” would include any support the retail arm receives from a universal service fund or, until such time as an appropriate universal service fund is established, from whatever other mechanisms the Commission has in place to support affordable basic service in high cost areas. To comply with the 1996 Act, of course, such support must be nondiscriminatory. See 47 U.S.C. § 254.

⁸³ See Bell Atlantic-GTE Merger Order ¶¶ 201-05.

⁸⁴ See 47 U.S.C. §§ 251(c)(2)(C), (d), (i).

to deal at arm's lengths, structural separation would assist regulators in detecting discrimination by making it easier to benchmark the way in which the wholesale unit provisions UNEs. Adoption of a code of conduct would likewise help prevent discrimination. Specifically, requirements that the separate affiliates use separate buildings and separate employees and interact in writing and prohibitions against the wholesale arm providing operations, installation and maintenance for the retail arm would make it more difficult for the wholesale arm to act to favor the retail arm or to pass along information to the retail arm in a discriminatory manner.⁸⁵

88. Indeed, in light of the steadily decreasing number of BOCs for regulators to use as benchmarks by which to measure how each incumbent BOC provides service to its affiliates and to competitors, it is especially crucial that Qwest's regulators and competitors be able to determine and assess the terms by which Qwest provisions its affiliates and rivals.⁸⁶ Structural separation fosters such benchmarking by achieving a "minimum necessary level of transparency [that permits regulators] to police the price and non-price discrimination concerns."⁸⁷

89. The Commission should demonstrate that they are serious about a competitive market by following the lead of action taken in Pennsylvania, Florida, Illinois, Indiana, Minnesota, New Jersey, Tennessee and Virginia in considering some form of structural separation and associated code of conduct that would specify how Qwest would operate under such a separation. As he introduced such a structural separation bill (SF 2349) on April 24, 2001, Minnesota State Senator

⁸⁵ See, e.g., *Re Affiliated Activities, Promotional Practices, and Codes of Conduct of Regulated Gas and Elec. Cos.*, 202 P.U.R.4th 177 (Md. P.S.C. 2000) (instituting code of conduct in order to: "prevent regulated service customers from subsidizing unregulated affiliates; prevent affiliates from gaining any improper advantage in their competitive markets as a result of their affiliation to a regulated utility; minimize inappropriate communication between a utility and its affiliates regarding confidential information; protect the privacy of consumers; and prohibit discrimination in the provision of regulated services"); *SCANA Corp.*, 198 P.U.R.4th 158 (N.C.U.C. 1999) (implementing code of conduct in order "to avoid even the possibility of affiliate abuse and, in essence, to prevent the possibility of SCANA exercising market power by raising rivals' costs").

⁸⁶ Cf. *SBC-Ameritech Merger Order* ¶¶ 165-70 (noting the decreased ability of regulators to benchmark BOC provisioning against other BOCs because of recent mergers).

⁸⁷ *CMRS Structural Separation Order* ¶ 61.

Warren Limmer said, "The vast majority of Minnesotans today still do not have a choice of local phone companies even though the US Telecom Act was passed five years ago to allow competition. As we see the fall of more and more competitive local service competitors across the country, we must realize that consumers will not see competition any time soon unless we act. The monopolies of Baby Bells, including Qwest, are well intact." Limmer continued, "Minnesotans deserve a choice in local phone competition. They deserve lower prices, more service options, and better customer service. But so far, companies such as Qwest have more talking about welcoming competition than acting. The problem, I now see, is that Qwest has an inherent conflict of interest."⁸⁸

90. The time for the Commission to act is running short. This is a critical time for local telephone competition, as more and more CLECs and DLECs are unable to compete with Qwest and thus are withdrawing from the market. Yet at the same time, Qwest continues to reap tremendous profits from its local telephone business. As a result, if local markets are not opened to competition soon, it may be too late for competition to ever develop. This will mean not only the continued monopolization of traditional local telephone services, but also the more serious prospect of the monopolization of the next generation of advanced telecommunications services (*i.e.*, high speed access to the Internet) because these services also are largely dependent upon access to Qwest's network. This Commission can ensure, at minimal cost, that consumers in Arizona reap the benefits that telecommunications competition can deliver if given a chance to develop.

91. This Commission should conclude that it is both appropriate and necessary to require both structural separation and a code of conduct for Qwest's wholesale and retail arms.

⁸⁸ "Minnesota Senator Determined To Split Up Qwest," New Mexico Business Daily News, On-Line, April 30, 2001.

Although only full economic separation of Qwest's wholesale and retail arms would be fully sufficient to eliminate Qwest's incentives to abuse its bottleneck facilities, structural separation should significantly reduce Qwest's incentives and ability to engage in such anticompetitive conduct. That, in turn, will facilitate true competition in local exchange markets of Arizona – for the benefit of competitors and consumers alike. AT&T urges the Commission to order the structural separation of Qwest into distinct wholesale and retail corporate subsidiaries, before granting Qwest 271 relief.

VII. CONCLUSION

92. Qwest has not demonstrated that it has satisfied the requirements of Track A. Nor has Qwest complied with the directive of the Act to fully open its local market to competition. Rather it has seized every opportunity to forestall the advent of competition, thus preventing consumers from reaping the benefits envisioned by Congress. Furthermore, Qwest has previously violated and continues to violate Section 271 of the Act. The Commission should not reward Qwest's antics by recommending its entry into the long distance market. Public interest would not be served by Qwest's entry into the interLATA long distance market in Arizona. To the contrary, such premature entry would defy Congress' intent and result in a remonopolization of the telecommunications market by Qwest. In order to instill competition, so desperately lacking in the Arizona local market, the Commission should order Qwest to structurally separate its operations into wholesale and retail lines. Accordingly, until that happens and certainly until the Commission has found that Qwest satisfies each requirement of the competitive checklist, the Commission should recommend to the FCC that Qwest has not satisfied the requirements of Track A nor is its 271 application consistent with the public interest requirement of the statute.

VERIFICATION OF MARY JANE RASHER

I, Mary Jane Rasher, being duly sworn, hereby state that I am a Senior Policy Witness in the Western Region Law and Government Affairs organization of AT&T Corporation providing expertise on technical matters involved in this case (T-00000A-97-0238). By this Verification, I hereby verify that the factual assertions in the Affidavit of Mary Jane Rasher Regarding Track A and Public Interest are true and correct statements to the best of my knowledge and belief.

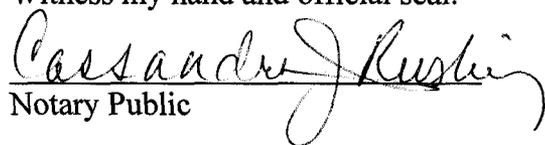
FURTHER AFFIANT SAYETH NOT.

Dated this 17th day of May 2001.


Mary Jane Rasher

STATE OF COLORADO)
) ss
CITY AND COUNTY OF DENVER)

SUBSCRIBED AND SWORN TO before me on this 17th day of May 2001 by Mary Jane Rasher, who certifies that the foregoing is true and correct to the best of her knowledge and belief.

Witness my hand and official seal.

Notary Public

My commission expires:
5-3-01

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL

Chairman

JAMES M. IRVIN

Commissioner

MARC SPITZER

Commissioner

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

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DOCKET NO. T-00000A-97-0238

**AFFIDAVIT OF CORY W. SKLUZAK
SECTION 272**

(PUBLIC VERSION)

May 17, 2001

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**PUBLIC VERSION OF AFFIDAVIT OF CORY W. SKLUZAK
REGARDING SECTION 272**

AT&T Communications of the Mountain States, Inc. and AT&T Local Service on behalf of TCG Phoenix (collectively "AT&T") hereby submit this Affidavit of Cory W. Skluzak for the Fourth Set of Workshops on Track A, Public Interest, section 272 and General Terms and Conditions. Specifically, this Affidavit will address section 272.

I. AFFIANT

1. My name is Cory W. Skluzak. My business address is 1875 Lawrence Street, Suite 1000, Denver, Colorado 80202.
2. I am employed by AT&T Corp. ("AT&T") as a policy analyst in the Access Management Group. As such, I provide analysis of various pricing and costing activities of local exchange carriers ("LEC") for the western region, and provide analysis for a number of subject matter areas, including revenue and cost analysis functions.
3. I have a Bachelor of Science degree in Business Administration with a major in Accounting from the University of South Dakota in Vermillion, South Dakota. I have a degree in law from the University of Colorado in Boulder, Colorado. I was formerly licensed as a certified public accountant in Colorado. I am licensed as an attorney in Colorado, though I am on inactive status, and I do not function in the capacity of an attorney for AT&T.
4. After obtaining my undergraduate degree, I worked several years as a certified public accountant with the firm of Deloitte, Haskins & Sells conducting financial audits. After law school, I was a judicial law clerk, an insurance defense litigator and an attorney with the State of Colorado's Attorney General's office dealing with the State Land Board Commission. From 1995 to the end of 1999, I was an owner and manager of two manufacturing companies

engaged in custom fiberglass programs and the manufacture and marketing of specialized tools.

I began my career with AT&T in December 1999.

II. SCOPE OF AFFIDAVIT

5. The purpose of this affidavit is to discuss the failure of Qwest Corporation, formerly U S WEST Communications, Inc., ("Qwest" or "QC"), Qwest Long Distance, Inc. formerly U S WEST Long Distance, Inc. ("Qwest LD" or "QLD"), and its new section 272 affiliate, Qwest Communications Corporation ("QCC"),¹ to meet its burden of establishing that it will operate in compliance with section 272 of the Telecommunications Act of 1996 (the "Act") if, and when, it is granted authorization to provide in-region interLATA services.

6. On-site reviews, or tests, of affiliated transactions were conducted in three (3) phases: the initial review, a follow-up review and a supplemental review.² This affidavit will reference these three distinct on-site reviews. All three reviews and testimony corresponding to them are applicable and probative of Qwest's compliance with section 272.

7. The initial on-site review of affiliated transactions between Qwest and the then existing section 272 affiliate, Qwest LD, occurred in August 2000 and covered a period ending in June 2000. The scope and procedures of this review are discussed below in conjunction with a discussion of section 272(b)(5) compliance.

¹ After the merger of Qwest Communications International, Inc. and U S WEST, Inc., the name of U S WEST Long Distance, Inc. was changed to Qwest Long Distance, Inc. It should be noted that, according to Qwest's testimony, Qwest Long Distance, Inc., will merge with QCC sometime in May 2001. The obligations of the Bell Operating Company ("BOC" or "RBOC") and the section 272 affiliate to comply with the Act commenced the date it was enacted, or February 8, 1996. Therefore, the BOC and the section 272 affiliates had an obligation to comply with the Act since February 8, 1996, regardless of the number of entities or the name of such entities. Creating a new section 272 affiliate does not restart the clock on the BOC's obligations or make the issues of past compliance irrelevant.

² Note that "review" and "test" will be used in this affidavit interchangeably. However, in general, the on-site visits were reviews of accounting details and certain sampling procedures were used to "test" individual billable transactions.

8. Sometime subsequent to the initial on-site review, Qwest decided that it would create a new section 272 affiliate. The initial on-site review and testing procedures and corresponding testimony regarding Qwest LD remain viable and probative as a predictive judgment of the BOC's and section 272 affiliate's adherence to section 272.

9. In April, 2001, I conducted a follow-up on-site review of affiliated transactions between Qwest and the former section 272 affiliate and attempted to review and test such transactions with the new section 272 affiliate. This follow-up review generally covered the period from July 2000 to December 2000. The scope and procedures of this follow-up review are discussed below in conjunction with a discussion of section 272(b)(5) compliance.

10. In May, 2001, I conducted a supplemental on-site review of affiliated transactions between Qwest and QCC. This review was made necessary by the lack of detail presented the previous month as to affiliated transactions between Qwest and QCC. This supplemental review generally covered a period from July 2000 to the present. The scope and procedures of this supplemental review are discussed below in conjunction with a discussion of section 272(b)(5) compliance.

11. Qwest LD will be merged with QCC in the near future and the two will become one.³ As such, QCC will inherit Qwest LD's past history, which includes violations of section 271. Regardless of this merger, the Arizona Corporation Commission (the "ACC") cannot ignore Qwest LD's history and must use such past as a predictive indicator of QCC's section 272 compliance.

³ Testimony of Judith L. Brunsting dated March 26, 2001 ("Brunsting Affidavit") at 7. "Qwest Long Distance continues to exist today as a fully compliant 272 subsidiary. Currently, plans are to merge Qwest Long Distance with QCC in the May, 2001 timeframe."

12. Several of the responses to data requests alluded to the fact that QLD “previously” provided to or received services from Qwest.⁴ Because of the merger of QLD into QCC, it is incorrect to assume that QLD is not required to adhere to section 272. Indeed, elsewhere in the data requests, Qwest admits “Qwest Long Distance has continued to do business with Qwest Corporation in 2001....”⁵ Thus, these transactions must adhere to the requirements of section 272, as well as any transactions with QCC. As I did not review or test these 2001 affiliated transactions of QLD, the Commissions should assure themselves that such adherence has been occurring.

13. I refute statements made in the affidavits of the QCC witness, Judith Brunsting, and the Qwest witness, Marie Schwartz, who state that QCC and Qwest currently comply, and/or prospectively will comply, with section 272 and the Federal Communication Commission’s (“FCC”) implementing orders.

14. Section 272 of the Act bars BOCs like Qwest from providing in-region interLATA service unless it provides such service through an affiliate that meets the separation and nondiscrimination requirements of this section. The qualifying conditions in section 272, along with the 14-point checklist of section 271, are necessary legal requirements that Qwest must meet to provide in-region, interLATA telecommunication services. These requirements are imposed by the 1996 Act and are not simply a charade or obstacle created by its competitors.

15. My affidavit focuses on why Qwest, Qwest LD and now QCC fail to comply with the structural and transactional safeguards of section 272(b), (and consequently the provisions of section 272(a)), the nondiscrimination safeguards of section 272(c) and (e) and the joint

⁴ Qwest Responses to AT&T Multistate Data Request Nos. 99 and 100.

⁵ *Id.*, No. 113.

marketing restrictions of section 272(g).

III. PURPOSE OF SECTION 272 AND THE ROLE OF THE ARIZONA CORPORATION COMMISSION

A. The Purpose of Section 272

16. Through a variety of accounting and non-accounting safeguards, section 272 attempts to prevent a BOC from discriminating against its competitors and in favor of its long-distance affiliate, and to prevent a BOC from subsidizing its affiliate by recovering the affiliate's costs through the BOC's local and exchange access service customers.

17. Section 272 demands that Qwest treat its competitors as it treats its section 272 affiliate. It provides a scheme, through the various safeguards, for the competition to evaluate whether a goal of this section -- to insure a level playing field for all competitors -- is fulfilled.⁶

18. Compliance with these safeguards is of crucial importance to protect consumers of Qwest from paying higher prices for local service because of improper cross-subsidization of QCC. Compliance is equally important to protect the competitive process in the interLATA market from Qwest's ability to leverage its market power over local services into the long distance market. Section 272 is not an afterthought. In fact, the FCC has stated that its "findings regarding section 272 compliance constitute independent grounds for denying an application [filed under 271]."⁷

19. In the *Ameritech Michigan Order*, the FCC ruled that BOCs bear the burden of proof under section 271(d)(3) to establish that they will operate in compliance with section 272 if

⁶ *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, (rel. Dec. 22, 1999), ¶ 402 ("*Bell Atlantic New York Order*").

⁷ *Id.*

granted interLATA authority.⁸ "Paper promises do not, and cannot, satisfy a BOC's burden of proof."⁹ The requirement that Qwest come forward with specific, tangible evidence is especially appropriate in the context of section 272 compliance, because most of the evidence relevant to such a determination lies exclusively in the hands of Qwest and QCC.

B. The Role of the Arizona Corporation Commission

20. Review of section 272 compliance is relevant in state proceedings to review Qwest's compliance with section 271, because Qwest's compliance with these provisions is required in order for Qwest to satisfy the requirements of section 271. Furthermore, documentation of such compliance will contribute to the detailed and extensive record the FCC will rely upon when reviewing Qwest's section 271 application.

21. To the extent possible based on the state's procedural schedule, the FCC has stated that a state proceeding is a proper forum to develop an evidentiary record with the opportunity to cross-examine the witness.¹⁰ Additionally, the FCC has only 90 days from the date of filing to review an RBOC's section 271 application before rendering its decision. Consequently, the FCC requires applications to be complete when filed and has stated that, "[w]e will consider carefully state determinations of fact that are supported by a detailed and extensive record, and believe the development of such a record to be of great importance to our review of section 271 applications."¹¹

⁸ *Application of Ameritech Michigan Pursuant To Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997), ¶¶ 43, 371 ("Ameritech Michigan Order").

⁹ *Id.*, ¶ 55.

¹⁰ The FCC stated the following in the *BellSouth South Carolina Order*: "...we emphasize that parties should make every effort to present their views to the state commission in the first instance, where such views can be adequately addressed by other interested parties and subjected to cross-examination." *Application of BellSouth Corporation, et. al. Pursuant To Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, FCC 97-418 (rel. Dec. 24, 1997), ¶ 27 (*emphasis added*) ("*BellSouth South Carolina Order*").

¹¹ *Ameritech Michigan Order*, ¶ 30.

22. Thus, to facilitate the FCC's review of Qwest's section 271 application, it is in Qwest's best interest to demonstrate compliance with section 272 requirements in the state record with substantive evidence, because the FCC will rely upon such a detailed record in assessing whether an RBOC has met the "preponderance of evidence" standard.¹²

23. The goal of the ACC relative to section 272 should be to hold Qwest to its burden of proving compliance through actual support of its claims. For example, below in my affidavit, I present AT&T's argument for Qwest's noncompliance with the joint marketing provisions in section 272(g). While the ACC cannot overrule the FCC on permitted forms of joint marketing, and AT&T certainly does not suggest such, they can flush out Qwest's position by requesting *actual* support for its ambiguous claims that it will comply with section 272(g). The ACC should be concerned about the effects of unfettered joint marketing between Qwest and QCC, given past violations of section 271 by U S WEST, Qwest and Qwest LD. If the ACC shares these concerns, it should make them known to the FCC and provide recommendations to mitigate them.

24. Additionally, under the Act, the ACC plays an integral role in overseeing QCC, through efforts such as participating in the joint Federal/State audit required by section 272(d) to determine compliance with accounting and non-accounting safeguards.

25. QCC acknowledges that the FCC's review regarding section 272 requires a predictive judgment regarding the future behavior of the BOC.¹³ This predictive judgment is based on past and present practices.¹⁴ This should set the stage for a broad review by the ACC.

¹² *Id.*, ¶¶ 45-46.

¹³ Brunsting Affidavit at 3.

¹⁴ *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (rel. October 13, 1998), ¶ 321 ("*BellSouth Louisiana II Order*").

Although a review of "past practices" is acknowledged by Qwest, the ACC will look in vain in the affidavits filed by Qwest and QCC for such past practices as: the former U S WEST's and Qwest's several past violations of section 271 as found by the FCC; the failure to post transactions to its separate affiliate website; the failure to have an independent affiliate; and the failure to prevent discrimination in services provided to Qwest/U S WEST LD and now QCC.

26. Therefore, a detailed record of the historical relationship between U S WEST and U S WEST LD, Qwest and Qwest LD, and now Qwest and QCC, is imperative. Further, due to the imminent merger of Qwest LD into QCC, the past history of Qwest LD is every bit as probative as before Qwest decided to switch to a new 272 affiliate. The ACC must look at past history in their determinations of fact regarding whether Qwest and QCC will comply with section 272 in the future.

IV. SUMMARY OF CONCLUSIONS

27. Based upon my review of the affidavits of Qwest and QCC, the section 272 affiliate web sites, my initial, follow-up and supplemental on-site reviews, and other materials, I conclude that Qwest, Qwest LD and QCC have failed to demonstrate that they will comply with their obligations under section 272. As will be discussed in more detail in this affidavit, Qwest has failed to:

- a. Prove that QCC meets the requirements of section 272(b)(5) and thus, is a separate affiliate under section 272(a).
- b. Prove that the section 272 affiliates' books, records, and accounts are maintained pursuant to the FCC's rules and that they are separate from Qwest's as required by section 272(b)(2).
- b. Prove that there is true separation between the two entities' officers, directors and employees as required by section 272(b)(3).
- c. Prove compliance with the affiliated transaction requirements of section 272(b)(5).

- d. Prevent discrimination between it and QCC and other entities pursuant to section 272(c).
- e. Prove compliance with the FCC's accounting principles as required under section 272(c)(2).
- d. Prove adequate compliance with, and evidentiary support for, the fulfillment requirements of section 272(e).
- e. Provide sufficient detail to determine future compliance with section 272(g) concerning joint marketing, especially given its past history of violation.

V. STRUCTURAL, TRANSACTIONAL, AND ACCOUNTING REQUIREMENTS OF SECTION 272

28. Section 272 of the Act contains accounting and non-accounting safeguards intended to ensure that the BOCs do not use their monopoly power in local exchange services to discriminate in favor of their section 272 affiliate, and to discourage and detect improper transactions between the BOC and the section 272 affiliate. In its *Ameritech Michigan Order*, the FCC confirmed that the obligations and restrictions under section 272 were of "crucial importance,"¹⁵ and that the BOCs and their section 272 affiliates have been required to comply with those obligations and restrictions since the date the 1996 Act was passed on February 8, 1996.¹⁶

A. Section 272(a) – Separate Affiliate

29. Qwest may not provide certain services, including interLATA services, except through a structurally separate affiliate. It is not enough to simply state that a separate affiliate has been established. Section 272(a)(1)(B) states that the affiliate must "meet the requirements of subsection (b)," which means it must:

- a. Operate independently from the BOC;

¹⁵ *Ameritech Michigan Order*, ¶ 346.

¹⁶ *Id.*, ¶ 371.

- b. Maintain books, records and accounts that are separate from the BOC and comply with generally accepted accounting principles;
- c. Maintain separate officers, directors, and employees;
- d. Obtain credit without recourse to the BOC; and
- e. Conduct all transactions with Qwest on an arm's length basis, reducing such transactions to writing, and making them available for public inspection.¹⁷

In addition, the BOC is prohibited from discriminating in favor of the affiliate in the provision of "goods, services, facilities, and information, or in the establishment of standards."¹⁸

30. QCC states there is no stock ownership as between it and Qwest Corporation and, therefore, "as both a legal and practical matter, the two companies are separate."¹⁹ This statement is conclusory and puts form over substance. Qwest and QCC may look like two separate corporations on paper, but that is not enough to satisfy section 272(a). As is discussed below, Qwest does not meet all of the requirements of section 272(b) and, by definition, is not a separate affiliate.²⁰

31. Further, as a functional matter, QCC is not operating separately, given the widespread policy of "employee sharing" and the intermingling of its management and, thus, is not a separate affiliate in substance. Qwest and QCC may have followed the proper form in creating a separate affiliate, but a review of what is actually happening belies the *prima facie* showing.

32. In its discussion regarding compliance with section 272(a), Qwest states that "it will not provide in-region interLATA services originating within the BOC 14 state region as long

¹⁷ 47 U.S.C. § 272 (b).

¹⁸ *Id.*

¹⁹ Brunsting Affidavit at 6.

²⁰ See *BellSouth Louisiana II Order*, ¶. 323, where the FCC used this same process to find that BellSouth did not satisfy section 272(a).

as the structural separation obligation of section 272 applies to this activity.”²¹ It should be noted that Qwest already has been providing such in-region interLATA services for a number of years, and these activities were found by the FCC to have violated section 271.²² The ACC should review assurances made by Qwest and QCC cautiously.

B. Section 272(b)(2) – Books, Records and Accounts

33. The FCC has interpreted this section to require the BOC’s section 272 affiliate to maintain its books, records and accounts pursuant to Generally Accepted Accounting Principles (“GAAP”) and maintain them separate from the BOC.²³ To determine compliance with this section the FCC has looked to such evidence as: different charts of accounts, use of separate accounting software maintained at a separate location and a regular audit program for the affiliate that ensures GAAP compliance.²⁴

34. QCC asserts that its “books, records, and accounts are maintained in accordance with generally accepted accounting principles (“GAAP”) and consolidated into Qwest Communications International Inc.’s financials.”²⁵ AT&T disputes this assertion of GAAP compliance.

35. Based upon my initial and follow-up on-site reviews, there is insufficient evidence presented by Qwest, Qwest LD and QCC to determine compliance with this section for the following reasons:

- a. It does not appear that Qwest LD is accounting for activity as incurred or is accruing expenses from year to year. During my on-site review, which is discussed more fully below, I found numerous examples of transactions occurring in 1999 that were not expensed until the year 2000. One of the transactions was

²¹ Affidavit of Marie Schwartz dated March 26, 2001 (“Schwartz Affidavit”) at 9.

²² For example, *see AT&T Corp. v. US WEST Communications, Inc.*, File No. E-97-28, Memorandum Opinion and Order, DA01-418 (rel. Feb. 16, 2001), for the most recent violation of section 271.

²³ *BellSouth Louisiana II Order*, ¶ 328.

²⁴ *Id.*

²⁵ Brunsting Affidavit, at 9.

for \$1,640,580 for work performed by Qwest Consumer Services for Qwest LD from January through December, 1999, yet this amount was not recognized as an expense until it was paid in January, 2000.²⁶ Qwest states that it “utilizes accrual accounting for its transactions between affiliates.”²⁷ But Qwest LD is not using accrual accounting based on the selections that I tested. Based on my follow-up testing, there continue to be problems with not using accrual accounting.

- b. The only transactions between Qwest and Qwest LD that are accounted for as “affiliate transactions” are those involving payments.²⁸ There is a concern that transactions not involving the exchange of money could occur and not be accounted for and reported. Ms. Schwartz states that “the BOC will be monitoring asset transfers on a quarterly basis beginning March 31, 2001, to insure compliance with section 272(b)(1).”²⁹ This gives some indication that there may indeed be non-cash transactions between these two entities.
- c. Initially, there was no evidence that there was a different Chart of Accounts for the two entities. Qwest LD initially provided its Chart of Accounts but without Qwest’s Chart, it was impossible to compare to see if they truly are different. Qwest and QCC subsequently provided their Chart of Accounts and they are different. QCC’s Chart of Accounts is dated [PROPRIETARY: XXXXXXXXX] (JLB-4C, proprietary). QCC has stated that Qwest LD and QCC will not merge until the May 2001 timeframe; however, the Chart of Accounts for QCC contains a number of accounts that refer to [PROPRIETARY: XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX]
- d. It is apparent that separate accounting software is not being utilized, nor is it being maintained at a separate location. Qwest processes Qwest LD’s financial transactions on Qwest’s systems.³⁰ According to testimony filed by QCC, the 272 Affiliate’s accounting and finance functions are performed by the Services Company, which is not the BOC.³¹ However, QCC also states that “BOC employees provide payroll services.”³² Thus, confusion remains as to what entities are performing what financial functions. Further confusing the issue, as discussed below in further on-site testing, is the existence of work orders and task orders indicating that QCC is both paying for and receiving payment for finance services. It still appears that, based on the March 30, 2001 testimony, that separate accounting software is not being utilized and maintained at a separate location.

²⁶ Qwest’s section 272 affiliate website: http://www.uswest.com/about/policy/docs/ld_1999_transactions.html.

²⁷ Qwest Response to AT&T Multistate Data Request No. 56.

²⁸ Qwest Response to AT&T Multistate Data Request No. 17. “The procedures for capturing affiliate transactions include downloading all payments to and payments from affiliates from the company’s financial systems.”

²⁹ Schwartz Affidavit at 12-13.

³⁰ Schwartz Affidavit at 15.

³¹ Brunsting Affidavit at 11.

³² *Id.*, at 13.

- e. Regarding the processing of financial transactions, Qwest states that under their systems "... it is simply not possible for one entity to enter transactions using an entity code belonging to another entity."³³ During my on-site review, discussed fully in the section 272(b)(5) section, I noted a posting to the 1999 transactions list that was a reversal. The description was "Billed in error USWC carrier should have been billed." Because employees of Qwest are processing the financial transaction for both Qwest and Qwest LD, there still exists the element of human error and inputting an accounting transaction to the wrong entity. However, the question remains how the error I previously identify could occur if it was impossible.
- f. To determine compliance with this section, Qwest LD must be auditable. Under section 272(d), an audit of the section 272 affiliate is not mandated until twelve months after section 271 approval. Given Qwest LD's present and historical failure to fully account for and disclose its required transactions, it is suggested that an opening audit should be required to verify that all accounting safeguards are in place and operational prior to Qwest LD's provision of long distance service. Qwest has engaged Arthur Andersen to review and update procedures for affiliate transactions,³⁴ and audits for 10-K's (which include QCC).³⁵ However, the "audit" of affiliate transactions is limited in scope to one line on the ARMIS reports.

36. Subsequent to my initial and follow-up reviews, I returned to Qwest to conduct a supplemental on-site review of QCC's transactions and based upon my supplemental review, AT&T continues to dispute Qwest's and QCC's assertions of compliance with this section.

37. At a minimum, Qwest and QCC are not utilizing accrual accounting for their affiliated billable transactions, and GAAP requires accrual accounting. Further, Qwest and QCC are not GAAP compliant where they have completely failed to book billable transactions between them for a nine-month period beginning July 2000, until the latter half of April 2001.

38. Qwest asserts, as additional evidence of compliance with section 272(b)(2), that it files "[a]nnual reports via the FCC's Automatic Reporting and Management Information Systems ("ARMIS") [which] are accompanied by the report of independent accountants, Arthur

³³ Schwartz Affidavit at 14.

³⁴ Schwartz Affidavit at 20.

³⁵ Brunsting Affidavit at 31.

Andersen”³⁶ This assertion appears to cast a veil of legitimacy, as the inferential logic is that Arthur Andersen has reviewed the ARMIS reports which proves GAAP compliance. I reviewed the ARMIS report for Qwest for the year 2000; the most recent report posted by the FCC.³⁷ For services purchased by Qwest from QCC, I did not see an amount or a line entry. For services sold by Qwest to QCC, a total of \$1,545,000 has been entered. These amounts do not reconcile to the total amounts that I discovered during my supplemental on-site testing. For affiliated transactions between Qwest and QCC, it appears that a single amount of services sold by Qwest to QCC is all that Arthur Anderson had the opportunity to review. Such would not afford an opportunity to review the transactions making up that total ARMIS amount.³⁸ The Commissions should question Qwest as to the audit procedures that Arthur Andersen performs to determine the validity of the reported ARMIS amounts for affiliated transactions. For example, does Arthur Andersen test for underreporting of revenues? If they did, perhaps they would have, or should have, detected the failure of Qwest to report the dollar amount of services sold by QCC to Qwest.

39. As Qwest has not filed any ARMIS report for 2001, no probative value can be given to Qwest’s assertions regarding ARMIS reports and its new section 272 affiliate.

40. QCC asserts, as further evidence of compliance with this section, that its financial results are consolidated with those of QCI’s financial statements included in the SEC Form 10-K, which includes Arthur Andersen’s “positive” opinion as to adherence to accounting

³⁶ Schwartz Affidavit, at 15.

³⁷ FCC’s ARMIS website, Report 43-02, Table 12 “Analysis of Services Purchased from or Sold to Affiliates.”

³⁸ Qwest asserts that Arthur Andersen was engaged to supplement the internal affiliate transactions policy during the transition from Qwest Long Distance to QCC and that over 150 interviews were conducted “to ensure that all transactions had been identified.” Schwartz Affidavit at 20. Given the extent of Arthur Andersen’s involvement and the addition of supplemental procedures, how does Qwest explain the complete failure to book billable affiliated transactions with QCC for a nine-month period and straddling two financial years?

principles.³⁹ AT&T disputes this assertion. Once again, given the complete failure to account for affiliated transactions between Qwest and QCC, seeming legitimacy of an Arthur Andersen “positive” opinion should not be transferred to QCC’s financial activities.

41. QCC states that QCI is subject to federal securities statute.⁴⁰ Given that Form 10Q (for the three months ended March 31, 2001) was recently filed by QCI, the Commissions should question Qwest as to the omission to book affiliated transactions with QCC on that recent filing. AT&T contends that QCC’s affiliated transactions with Qwest could not have been correct in either the 10-K, 10-Q or in the ARMIS report, as no billable transactions for the period July 2000 through March 2001 were accounted for in that period. Thus, when QCC states that QCI’s financial statements in the 10-K form include the “consolidated results of the 272 Affiliate” it must be underscored that this does not include affiliated transactions.

C. Section 272(b)(3) – Separate Officers, Directors and Employees

42. Section 272(b)(3) requires that QCC have “have separate officers, directors, and employees from the [BOC] of which it is an affiliate.” In prior orders, the FCC used as evidence of compliance the names of officers and directors submitted by the BOC and affiliates, and whether separate payrolls and administrative operating systems are present.⁴¹ In its *Ameritech Michigan Order*, the FCC found that that the intent of the separate officers and directors requirement is “that there be some form of independent management and control of the two entities.”⁴² In that order, the FCC was concerned about the fact that the presidents of both the BOC and the separate 272 affiliate reported to the same officer of the parent corporation of both entities.

³⁹ Brunsting Affidavit, at 9.

⁴⁰ *Id.*

⁴¹ *BellSouth Louisiana II Order*, ¶ 330, n. 1032.

⁴² *Ameritech Michigan Order*, ¶ 360.

43. An important indication of what “separate” means under this section can be found in the audit procedures of the biennial audit required pursuant to section 272(d). Certain audit procedures are used to test for separate officers, directors and employees and require the auditor to do the following:

Obtain the functional organizational chart of each section 272 affiliate ... and inspect it to determine whether any departments report either functionally or administratively (directly or indirectly) *to an officer of the BOC.*⁴³

44. In addition, the *Biennial Audit Procedures* require an independent auditor to perform the following tests:

Obtain a list of officers and employees who transferred from the BOC at any time to each Section 272 affiliate, and ... determine whether the company’s internal controls ... have been implemented. Also, interview these employees to determine whether they used any proprietary information (e.g., customer proprietary network information (CPNI), Network Planning Manuals, Plant Traffic Practices, Operation, Installation and Maintenance (OI&M) Practices) obtained while they were employees of the BOC or whether any of the above information is made available to them through friends and acquaintances still employed by the BOC.⁴⁴

Obtain a list of all employees of each Section 272 affiliate since February 8, 1996, the date of the Act [and] ... inspect company’s files which indicate employee’s employment history within the BOC family of companies and document whether they were employees of the BOC or any of its affiliates at any time. Also, document number of employees, number of times, and dates each employee transferred back and forth between the BOC or any other affiliate and the Section 272 affiliate since February 8, 1996.⁴⁵

45. Based upon my initial and follow-up on-site reviews, I noted the following deficiencies of Qwest, Qwest LD and QCC with respect to this section:

⁴³ See *General Standard Procedures For Biennial Audits Required Under Section 272 of the Communications Act of 1934, As Amended, as of December 16, 1998*. (“*Biennial Audit Procedures*”) at Objective III, Procedure 3, at 24 (emphasis added).

⁴⁴ See *Biennial Audit Procedures*, Objective III, Procedure 5 at 25.

⁴⁵ *Id.* at Objective III, Procedure 6 at 25.

- e. QCC employees formerly employed by Qwest have an incentive to take with them, and use, Qwest proprietary information without accounting for this acquisition of information and without offering this information to competitors.
- f. The converse of # 5 above would also be present. During my initial on-site review of some of Qwest LD's financial records, I noted several transactions pertaining to bonuses or "team awards" paid to former employees of Qwest LD that had since been rehired by Qwest. I could not determine the names or even the number of employees, as this information had been blacked out for my review. The use of the word "rehired" connotes that these employees were once employed at Qwest (or U S WEST), went to the LD affiliate and then returned to Qwest. After returning to Qwest the employees received "Team Awards." The choice by Qwest to black out this information raises an appearance of impropriety. I reviewed terminated Work Order RMLD099 on Qwest LD's website called "Go For The Gold/Bold Goal". This is a program from USWC/Qwest that rewards employees for customer referrals and cost saving ideas. USW LD employees were allowed to participate in this program.
- g. The incidence of employee migration is not isolated to the periods that I observed. Results from prior AT&T on-site reviews noted that numerous employees resigned from the LD affiliate to become employees at the then U S WEST. In 1997 alone, 22 employees transferred. Since Qwest LD had an approximate average of 93 employees, that means that over 23% of the employees of Qwest LD were rehired by Qwest.
- h. The free-flow movement of employees between Qwest and Qwest LD is of concern in that proprietary information is also flowing back and forth between the companies. Indeed, as was stated above, the independent auditor is required to document this type of migration.
- i. Qwest discussed the realignment of employees from Qwest and the section 272 affiliate to the Services Company "who would be ... writing contractual arrangements ..." and other matters.⁴⁹ This begs the question, "Where will these employees end up?" This may simply perpetuate the former problem of employees moving in and out of the BOC and the 272 affiliate.
- j. Qwest stated that it "does not do a comparison, per se, of actual payroll registers for employee matches on a regular basis."⁵⁰ Also, QCC and previously Qwest LD do not have separate payroll administration.⁵¹ Ms. Schwartz subsequently stated that she has "overseen" a comparison of payroll registers between Qwest and

⁴⁹ Schwartz Affidavit at 8.

⁵⁰ Response of Qwest to AT&T Multistate Data Request No. 58.

⁵¹ Brunsting Affidavit at 13.

QCC.⁵² However, it still appears that Qwest does not have separate payroll administration, as required.

46. Subsequent to my initial and follow-up reviews, I conducted a supplemental on-site review of QCC's transactions. Based upon my supplemental review, AT&T continues to dispute Qwest's and QCC's assertions of compliance with this section.

47. As part of my supplemental review, I scanned QCI's recently filed Form 10-Q, which is available on QCI's public web site. I noted that Robin Szeliga, Executive Vice President and Chief Financial Officer of QCI signed the Form 10-Q. I discuss elsewhere in this affidavit that Ms. Szeliga had signed the FCC-required certification statements for both QCC and Qwest in her capacity as a Senior Vice President of Qwest. Thus, it appears that Ms. Szeliga is an executive officer for both Qwest and QCI, which is the parent of both Qwest and QCC. Per additional data requests, Ms. Szeliga is also Executive Vice President and Chief Financial Officer of QCC and of Qwest Long Distance.⁵³ In summary, it appears that Ms. Szeliga is presently, or has been involved with QCC, Qwest Long Distance, Qwest and QCI. Ms. Szeliga is wearing many hats and such is a clear violation of the FCC's dictate that there be some form of independent management and control of Qwest and QCC.

48. My supplemental on-site review revealed a widespread pattern of "employee sharing". Qwest and QCC employees may be "separated" by which entity cuts them a payroll check, but to the extent that the employees are primarily devoted to working at the other entity, there is not functional separation. This is why simply

⁵² Schwartz Affidavit at 17. ("BOC employees provide payroll services to the 272 affiliate...")

⁵³ Response to AT&T Multistate Data Request No. 107, Exhibit A. Note that there are two "Exhibit A's" filed by Qwest and this is the second Exhibit A (Directors and Officers Lists).

52. The FCC rejected BellSouth's assertion that only summaries of its affiliate transactions were required, finding that full disclosures must include a description of the rates, terms, and conditions of all transactions, as well as the frequency of recurring transactions and the approximate date of completed transactions.⁵⁸

53. The FCC noted in its *Ameritech Michigan Order* that public disclosure requirements have been in effect *since the passage of the 1996 Act on February 8, 1996*, and that the requirement for posting of data on the Internet became effective with the implementation of the *Accounting Safeguards Order* on August 12, 1997.⁵⁹ In short, public disclosure has now been required for five years and posting has been required for almost four years. Qwest states that "there is no specific requirement that the 272 Affiliate meet section 272 obligations now..."⁶⁰ This statement is misleading by itself. Qwest has been under an obligation to disclose transactions since February 8, 1996, and post the transactions with, U S WEST LD, Qwest LD, and now QCC, since August 12, 1997. In order to make a predictive judgment of the future behavior of a BOC under section 272, the FCC has stated it will "look to the past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272."⁶¹

54. Qwest asserts that it consistently posts and makes public all transactions between Qwest and Qwest LD, and now Qwest and QCC, to its web site to satisfy the FCC's public disclosure requirements.⁶² AT&T disagrees.

⁵⁸ *Id.*, ¶ 337.

⁵⁹ See *Ameritech Michigan Order*, ¶ 371 (emphasis added). *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, FCC 96-490 (rel. Dec. 24, 1996) ("Accounting Safeguards Order").

⁶⁰ Brunsting Affidavit at 3.

⁶¹ *Ameritech Michigan Order*, ¶ 347 (emphasis added).

⁶² Brunsting Affidavit at 17. Also, Schwartz Affidavit at 24.

1. AT&T's Initial On-Site Review and Testing of Financial Records Up to and Through June, 2000.

55. To test Qwest and Qwest LD's compliance with section 272(b)(5), AT&T requested, through AT&T Multistate Data Request No. 53, an inspection of the financial records of Qwest and Qwest LD. On August 30, 2000, I viewed certain financial records on the 49th floor of Qwest, which is the legal department of Qwest Corporation. As discussed below, follow-up review and testing for the period after June, 2000 to the present was conducted as a result of the change in the 272 affiliate and the passage of time.

56. Made available to me in August 2000 were the payments made by "U S WEST LD, Inc. to U S WEST Communications, Inc. For Services Provided" for the period May, 1999 up and through June, 2000. Also made available were the year-to-date balance sheets and income statements, as well as the trial balances of the LD affiliate from 1995 up through December 31, 1999.

57. What was not made available were the payments from Qwest to Qwest LD for services provided by Qwest LD (revenues to Qwest LD). Thus, no detail testing could be done on services or assets provided by Qwest LD and flowing to Qwest.⁶³

58. For services provided by Qwest to Qwest LD (expenses to Qwest LD), I used a bilateral approach to testing the posting and adequacy of affiliate transactions from April 1, 1999, to June, 2000, by: 1) examining transactions posted to the web site and tracing back to supporting documentation, and 2) examining transaction detail and tracing to the affiliate website.

⁶³ Transactions for services from Qwest LD to Qwest totaled *almost \$29 million* for 1999 but I could not subject them to testing. This amount that could not be tested was over 8 times the total amount of services flowing from Qwest to Qwest LD. During my follow-up testing in April, 2001, I reviewed billing detail from Qwest LD to Qwest through 2000. See my comments below relating to the section 272 affiliate's revenue from Qwest.

a. Testing Procedures: From the Website transactions listing to the accounting detail.

59. To complete previous testing⁶⁴ for the year 1999, I selected 17 “billed amounts” for 1999 services provided by “U S WEST” to “U S WEST LD” from the affiliate website for 1999 transactions and attempted to trace back to documentation that would support these amounts. Documentation includes the various work orders and agreements on the website, as well as the invoice-level detail. These 17 selections totaled an approximate net amount of \$1,974,736, which was 56 % of the net total dollar amount for the year 1999. Note that 2 of the 17 selections were non-cash accounting reversals in the amount of \$183,702.

b. Testing Procedures: From the Accounting Detail to the Website

60. To complete the other half of the bilateral testing, I selected items representing the payment detail from Qwest LD to Qwest, and attempted to trace them to the 1999 and 2000 website transaction listings.

61. The scope of my testing included selecting 12 “tag numbers” from a tag summary sheet that purported to represent all payments made by Qwest LD to Qwest. There were separate summary sheets for the period May, 1999 to December, 1999 and for the year 2000 up and into June. Each tag represented a separate “authorization for payment” and, presumably, a separate check to Qwest. Each tag represented one or more invoices to be paid. Each invoice represented one or more billing activities. The tags were numbered sequentially. For example, for the year 2000 through June there were tags numbered 800 through 873. The assumption would be that there were 73 payments made in the year 2000 through June.

⁶⁴ Previous testing for the years ended 1996, 1997 and 1998 and for the period up to March 31, 1999, was performed by Warren Fischer, who was my predecessor at AT&T on section 272 subject matters. I am adopting the testing that he previously performed and his subsequent work product. I have reviewed and familiarized myself with Mr. Fischer’s testing procedures, documentation, and workpapers and personally met with him to become knowledgeable about his procedures and conclusions.

c. Results of AT&T's On-Site Review and Testing

62. As to the 17 items selected for testing from the website transaction postings, I found the following problems in attempting to follow an "audit trail" for the 17 selections:

- a. I was unable to trace/find supporting detail of any kind for 3.
- b. I was unable to find supporting accounting detail for an additional 3.
- c. I was unable to find accounting detail or explanations behind 2 more selections that were reversals from previous periods.
- d. 8 selections were traced to both the accounting detail and to the applicable agreement or document posted on the website. For 2 of these, I could determine that they were not posted within 10 days; and, for the remaining 6, I could not make a determination as to timely posting.
- e. For 1 selection, I was unable to properly trace it, as it was a summary of numerous billings.

63. That accounts for the 17 selections, but I found additional problems beyond whether there was an audit trail or proper posting.⁶⁵ I have listed these additional problems and other non-compliance problems and issues encountered in my additional testing procedures below:

- a. 2 selections were from the area of the 1999 transactions list denoted as "Exhibit () – Public Relations." I was unable to find any supporting detail for these transactions, and I was unable to trace the transactions to any agreement, document, work order, task order or the like on the website. In fact, it is stated on the 1999 transactions listing that there is "No Current Work Order" for public relations and the 9 transactions listed under this subgrouping. To the extent that Qwest makes the argument that all "transactions" were posted and in a timely fashion through the use of "agreements," there is a violation for transactions without a work order.
- b. One selection from the website was in the amount of \$419,769 for "billing and collection services to USWLD" for January through December 1999. This selection represents 12% of the entire billing amount from Qwest to Qwest LD for

⁶⁵ The FCC has looked to the maintenance of an audit trail of past Internet postings as assurance of compliance. *Application by SBC Communications Inc., Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (rel. June 30, 2000), ¶ 404. ("SBC Texas Order").

1999. I was unable to properly trace this amount to the invoice detail because there were 15 separate tags, or authorizations for payment, from May through December, 1999 for these services. Thus, the total amount is a *summary* of at least 15, and most likely more, as I did not get to see the tags for the period of January through April. This violates the FCC's rulings that there be no summaries of transactions. "True-ups" are discussed below.

- c. Several transactions were not properly recorded in the period of activity. They were expensed as paid, usually in the year 2000, without setting up an accrual. One transaction alone represented almost 47% of the entire billing amount from Qwest to Qwest LD for 1999. This transaction was for services provided from January through December 1999 but not paid and expensed until the following year. The failure to record transactions within ten days of occurrence is a violation of the FCC requirements but also hinders a proper examination by interested parties and the FCC's investigation into compliance with accounting procedures. This finding runs counter to Qwest's stated position that it "utilizes accrual accounting for its transactions between affiliates."⁶⁶
- d. Recurring transactions such as work performed by Qwest Consumer Services or rent for office space and furniture are billed monthly, are separate transactions and, with an accounting system purportedly adhering to GAAP, should be accounted for and posted to the website monthly rather than waiting until the following year. To the extent that Qwest does not provide such a billing "float" to non-affiliates, there is an issue of discrimination.
- e. As to all the 1999 individual or specific transactions occurring on or before June 1, 1999, there were no postings as of that date. AT&T's previous testing found that even 1998 individual transactions had not yet been posted. This is a violation of the *Accounting Safeguards Order* that requires posting of the terms, conditions and actual rates paid in each transaction to the Internet within *10 days* of the transaction.⁶⁷ The Internet posting requirement is continuous, not occasional.
- f. For the year 2000, I found *no* individual transactions or "billed amounts" that had been posted to the website; and, therefore, I was unable to trace back to supporting documentation.
- g. Qwest differentiates between "current transactions" and "specific transactions." Current transactions are found in the website under "active documents" (now called "current transactions") and specific transactions are found under "terminated transactions." Specific transactions are the product of an annual "true-up" of individual transactions from the prior year. The difference in transactions is confusing and should be rectified by requiring Qwest to comply

⁶⁶ Qwest's Response to AT&T Multistate Data Request No. 56.

⁶⁷ See *Accounting Safeguards Order*, ¶ 122.

with section 272(b)(5) by properly posting specific or individual transactions, when they occur, and not wait for a true-up.

- h. "True-ups" are posted annually, in May, for prior year's transactions, pursuant to the "Overview" section of the website. Thus, no separate transactions were posted for all of 1999 until May 2000, at the earliest. In AT&T's prior testing of the transactions with Qwest's section 272 affiliate, it was found that no "specific transactions" and therefore no true-ups had been posted to the website for either 1998 or 1999 year-to-date as of June 1, 1999. There is a problem with timeliness when transactions are not posted until the following May, but the problem is exacerbated when even this tardy deadline is not being followed.
- i. Qwest has stated in the past that the annual "true-ups will remain listed on the site until the following year's true-up is posted as a replacement." There is FCC guidance⁶⁸ on this matter, and it is logical that the products of the true-up -- specific transactions -- would continue to be useful and should not be purged.
- j. "Terminated Transactions" in the website "refer to records the BOC keeps on file that contained detailed billing information between the BOC and its 272 Affiliate. This billing information is simply back-up detail...." This "back-up detail" is now only available for inspection at Qwest under confidential agreement.⁶⁹
- k. The FCC further requires that the certifying statement be at Qwest's principle place of business. Prior AT&T on-site testing, in 1998 and twice in 1999, failed to locate such statement. I attempted to view such statement and all publicly-available records of affiliate transactions pursuant to Qwest's posting on their website by calling the listed number. It is stated that "Records of all affiliate transactions may be viewed between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, at U S WEST Communication's principle place of business."⁷⁰ Several phone calls to several different personnel ultimately resulted in the response from Qwest's legal department that AT&T could not view such records unless specifically requested in a formal data request. Subsequent calls, including one to a Qwest attorney, did not provide access to the public documents at Qwest's offices. Thus, I was unable to verify if such a certifying statement is on file, or even exists, and whether affiliate transactions are made publicly available as promised on the website.
- l. In my testing from the detail and tracing to the website, I noted that there was a

⁶⁸ The FCC has looked to the maintenance of an audit trail of past Internet postings as additional assurance of compliance. See *SBC Texas Order*, ¶404.

⁶⁹ Schwartz Affidavit at 21-22.

⁷⁰ Section 272 website address: <http://www.uswest.com/about/policy/docs/furtherInfo.html>.

gap in the tag numbers provided to me.⁷¹

- m. I was unable to trace any of the 9 tag selections from the year 2000 to a “Transactions” listing for services provided by Qwest to Qwest LD. As of the date of my testing there was no transactions listing for the year 2000 as I found for past years.
- n. I was unable to properly trace 3 tag selections from the year 1999 into transaction detail listed on the 1999 transactions website or into any “agreements” posted on the website. All three of these transactions pertained to “team awards paid to employees” of Qwest LD that had been rehired by Qwest. I was unable to read any of the employee names, or the number of employees transferring, because the detail provided to me had been blacked out as to those details.
- o. In testing from the 2000 detail selections to the posted “agreements,” I had a very difficult time. For example, I selected a tag number from the 2000 payment summary sheet for “Application Support Services.” The tag number consisted of three separate invoices of which I chose one. The invoice that I selected had the December bill for more than 15 separate project numbers. Each project number had a billable amount. To trace that billable amount associated with the project number into the website agreement consisted of going to the website: to “Active Documents;” to “Master Services Agreement, Amendment # 3;” to Agreement No. AR 96001; to Exhibit C – Information Technologies Services;” to Work Order No. ITLD079 – Information Technologies Services, only to find that separate project numbers are not delineated. This was unfortunate, as many of the projects have rather obtuse descriptions in the accounting detail, like “CEW 980501-78 USWLD-Exp Card Fl.” Whether by design or not, the method that Qwest had chosen to post transactions has the result of obfuscating the very purpose of posting – to provide information to the FCC (and non-affiliated entities) to determine compliance.
- p. There were 38 tariffed transactions listed under the heading “1998 Tariffed Services Purchased by U S WEST Long Distance from U S WEST Communications” and the exact same list of 38 was listed under 1999.⁷² I was unable to determine to which year the list of tariffed transactions applied to.

⁷¹ The year 1999 ended with tag number 748. The year 2000 began with the tag number 800. As I was instructed by Qwest’s attorney, Charles Steese, to forward any discrepancies through formal data requests, I was unable to reconcile the omission of the missing tag numbers. During my follow-up testing, I noted that an explanation page has been added in the tag binders explaining that Qwest follows a convention whereby tag numbers for each year start with the next “100” in sequence. This would explain the apparent gap in tag numbers from one year to the next.

⁷² Section 272 Affiliate Transactions website at <http://www.uswest.com/about/policy/docs/tariffServices.html>.

2. AT&T's Follow-up On-Site Testing of Financial Records From June, 2000 to Present

64. My initial on-site review and testing covered the period up to June 2000 for transactions between Qwest and Qwest LD. To update my review and testing to the present, of Qwest, Qwest LD and now QCC's compliance with section 272(b)(5), AT&T requested access to records to do an inspection of the financial records of Qwest, Qwest LD and QCC.⁷³

65. Pursuant to a previously submitted data request, during the week of April 22, 2001, I performed additional, or follow-up, testing on requested financial records on the 49th floor of Qwest, which is the legal department of Qwest Corporation.

66. For Qwest LD, the former 272 affiliate, Qwest made available to me the detail of payments made by Qwest LD to Qwest (expenses of Qwest LD) for services provided by Qwest for the year 2000 (to complete my previous testing of that year) and into 2001. I also received for Qwest LD, billing detail of payments made by Qwest to Qwest LD (revenues of Qwest LD) for services provided by Qwest LD for the years 1999 and 2000. Also made available were balance sheets and income statements for Qwest LD for 2000 and the first 3 months of 2001.

67. For QCC, the new 272 affiliate, Qwest made available to me a binder entitled "QC-QCC 2000 Billing Detail" which contained photocopies of what was available on the public website and some detail of payments made by QCC to Qwest (expenses of QCC) for services provided by Qwest and received by QCC for the year 2000. What I did not receive for QCC included: detail of payments made by QCC to Qwest (expenses of QCC) for services provided by Qwest and received by QCC for the year 2001; detail of payments made by Qwest to QCC

⁷³ I initially met with representatives of Qwest and QCC to determine what a member of the public could examine regarding section 272 transactions. Made available to me were photocopies of the section 272 affiliate websites. I was instructed to use a data request in order to see specific transactions. (Qwest refers to specific transactions as "billing information that is simply back-up detail".) Schwartz Affidavit at 22.

(revenues of QCC) for services provided by QCC for the year 2001; financial statements for QCC for any period. Per QCC's testimony, financial information would not be available until early May.⁷⁴ Finally, the detail that supported QCC's payment for services provided by Qwest for 2000 was not as thorough as the detail provided for Qwest LD. The impact of this is discussed below in the section discussing testing of expenses.

a. Procedures for Follow-Up Testing for Expenses of the 272 Affiliate: From the Website Specific Transactions Listing to the Accounting Detail.

68. I reviewed affiliated transactions that were expenses of, and revenues to, the 272 affiliate I will first discuss the review of affiliated expenses. For the follow-up testing of the 272 affiliate's expenses (payments from the affiliate for services provided by Qwest), I used a bilateral approach to test the posting and adequacy of affiliate transactions from June 2000 to the present by: 1) examining expense transactions posted to the website and tracing back to supporting documentation, and 2) examining expense transaction detail and tracing to the affiliate website.

69. As I discussed in my testimony on the initial on-site review and corresponding testing for the period ended June, 2000, *supra*, I found no specific or individual accounting transactions (Qwest refers to these as "billed data" or "billed amounts") posted to the websites of either Qwest LD or QCC. During my follow-up testing, once again, I found no postings of specific accounting transactions to the website for all of 2000. I was advised by Scott Hamilton, FCC Regulatory Accountant for Qwest, that starting January 1, 2000, specific "billed amounts"

⁷⁴ Brunsting Affidavit at 10. Given that QCC's statements are consolidated with Qwest Communications International, Inc.'s and the latter's statements were made public for the first quarter, it is curious as to why QCC's would not be available. Qwest has advised that the information in this paragraph will be made available for inspection on or after May 4, 2001. I intend to inspect the information and supplement my affidavit. As part of my supplemental review, discussed below, Qwest did make available accounting detail of affiliated transactions between Qwest and QCC. However, QCC's financial statements still were not made available to me.

were no longer posted to the website. Thus, I was unable to trace back specific, or “billable”, transactions to supporting documentation such as posted work orders and service agreements. This type of information should be posted (as was Qwest’s practice prior to January of 2000), as it assists unaffiliated interexchange carrier (“IXC”) in observing what the BOC and 272 affiliate are *actually* doing versus simply posting general work orders for prospective transactions. It is worth repeating the FCC’s guidance on the subject of transaction detail: a failure to fully disclose the details of the transactions is against section 272(b)(5) “because it impairs the FCC’s ability to evaluate compliance with our accounting safeguards and deprives unaffiliated parties of the information necessary to take advantage of the same rates, terms, and conditions enjoyed by the ... affiliate.”⁷⁵

**b. Procedures for Follow-Up Testing for Expenses of the 272 Affiliate:
From the Accounting Detail to the Website**

70. To complete the other half of the bilateral testing for the section 272 affiliates’ expenses, I first selected items representing the payment detail from Qwest LD to Qwest for services provided by Qwest, and attempted to trace them to the 2000 and 2001 website transaction listings.

71. For Qwest LD, the scope of the follow-up testing included selecting 13 “tag numbers” from tag summary sheets that purported to represent all payments made by Qwest LD to Qwest. There were separate summary sheets for the periods tested of June through December 2000 and into March of 2001. Each tag represented a separate “authorization for payment” and, presumably, a separate check to Qwest. Each tag represented one or more invoices to be paid. Each invoice represented one or more billing activities.

⁷⁵ *BellSouth Louisiana II Order*, ¶ 335. See also previous discussion in this affidavit at ¶ 51.

72. For QCC, testing of its expenses was compromised. As previously mentioned, the supporting documentation which purportedly supported QCC's payment for services provided by Qwest for 2000 was not as thorough as the detail provided for Qwest LD. The QCC detail provided did not contain such supporting detail as tag numbers, invoices and authorizations to pay, as did the detail for Qwest LD.⁷⁶ This type of detail is important to create an audit trail⁷⁷ and to allow the FCC to "evaluate compliance with the Commission's rules and to facilitate the detection of potential anticompetitive conduct."⁷⁸

c. Results of Follow-Up Review and Testing of section 272 Affiliates' Expenses

73. Following are specific problems and items of interest discovered during my follow-up review and corresponding testing of Qwest LD's and QCC's expenses.

74. From a review of Qwest LD's website, it appears that transactions between Qwest LD and Qwest after January 1, 2001, are no longer posted. Given that Qwest LD will be merged into QCC in May, 2001 and become one entity, it is of concern that no public postings of Qwest LD's transactions will be made after December 31, 2000. The FCC clearly mandates that the section 272 affiliate must provide detailed written descriptions of transactions posted to an Internet home page.

75. As was noted in my initial testing, there continues to be long periods of time before a specific or "billable" transaction is paid by the section 272 affiliate. Also, these specific transaction amounts are being expensed as they are being paid rather than being accrued in a timely manner – even when two years are implicated. The problem of not timely recording

⁷⁶ A further request was made for this information; supporting detail was provided and a supplemental review was performed as will be discussed below.

⁷⁷ As has been previously mentioned, the FCC has looked to the maintenance of an audit trail of past postings for additional assurance of compliance. See *SBC Texas Order*, ¶ 404.

⁷⁸ *SBC Texas Order*, ¶ 405.

79. The FCC rules require that a statement be available certifying that an officer of the BOC has examined postings to the website and such are true and accurate. I examined certification statements for QCC and Qwest, on file at Qwest, and noted that both were signed on March 20, 2001, by Robin Szeliga, a Senior Vice President of Qwest. However, when I compare that name to a listing of QCC's and Qwest's Officers and Directors in the testimony of Ms. Brunsting filed 6 days later,⁸⁰ Ms. Szeliga is not to be found. This raises a doubt as to the validity of the Officers and Directors lists in QCC's testimony and whether Qwest and QCC have a valid certification statement on file.

d. Follow-Up Review and Testing on the 272 Affiliates' Revenues for Services Provided by the Affiliates to Qwest

80. It should initially be noted that the FCC makes no distinction in its disclosure rules between a section 272 affiliate's expenses versus its revenues. The rule applies to "transactions." Thus, a review and testing of the section 272 affiliates' revenue side is appropriate and necessary.⁸¹

81. For the follow-up review of the section 272 affiliates' revenues (payments from Qwest to the section 272 affiliates for services provided by the affiliates), I first revisited the review and testing done on my initial on-site review in August 2000. At that time, no information was made available to review payments from Qwest to Qwest LD for services provided by Qwest LD.

⁸⁰ Brunsting's Affidavit, Exhibits JLB-5 and 6.

⁸¹ Indeed, one of the reasons that the FCC applies its affiliate transaction rules to transactions between BOCs and section 272 affiliates was to detect and protect against the flow of subsidies. See *Accounting Safeguards Order*, ¶ 176.

e. Procedures to Follow-Up Testing for Revenues of Qwest LD and QCC

82. For my follow-up testing on revenues, I received and reviewed billing detail of payments made by Qwest to Qwest LD (revenues of Qwest LD) for the years 1999 and 2000.

83. As was previously noted, I did not receive any detail of payments made by Qwest to QCC (revenues of QCC) for services provided by QCC for the year 2001 in the QCC binder that was given to me. Nor did I receive any QCC financial statements.

84. I reviewed the Service Agreements (SA) and related "task orders" (which signifies services provided by the section 272 affiliate to Qwest) for both Qwest LD and QCC.

f. Results of Follow-Up Review and Testing for Revenues of Qwest LD and QCC

85. Following are specific problems and items of interest discovered during my follow-up review and testing of Qwest LD's and QCC's revenues.

- a. Due to the lack of billing detail or financial statements, I cannot determine if QCC received any payments from Qwest for 2001. At a minimum, lack of an audit trail hinders the ability of Qwest and QCC to comply with the public disclosure rules of section 272(b)(5) and the failure to post a sufficiently detailed description impairs the FCC's ability to evaluate compliance with the FCC's accounting safeguards which, in part, are designed to detect and protect against the flow of improper subsidies.
- b. On QCC's website, under "Services Agreement", or SA, there are listed 3 Task Orders. Task Order #2, which provides for the leasing of transport capacity on QCC's fiber optic network, estimates annual revenues of \$464,484 to QCC for the leasing of transport capacity at \$38,707 per month. As billing is suppose to occur on a monthly basis, my failure to see any revenue billing detail may mean that Qwest is receiving preferential billing treatment or the internal accounting system is faulty.
- c. Also under QCC's SA, per Task Order # 1, Qwest has contracted for QCC to provide financial services, which include "financial analysis, financial advice, budgeting, accounting, and payroll support" in the amount of \$400,000 per year. The Commissions should question the rationale behind this task order, or the logic as to why Qwest would find it necessary to contract with its section 272 affiliate for such financial services. The inquiry into the rationale is magnified where QCC has contracted (see QCC's Work Order – Finance Services on the website)

copy of the "affiliate billing form" and supporting documentation. From the billing form, I traced to the applicable web-posted task order and amendments, if any.

c. Results of Supplemental On-Site Testing and Impact on Section 272(b)(5)

94. Findings from the supplemental on-site testing impact and supplemental data requests upon Qwest's and QCC's compliance with subsection 272(b)(5) will be discussed immediately below and the impact upon other sections will be discussed elsewhere in this testimony.

95. It is worth repeating the following admonition from the FCC in making a predictive judgment of the future behavior of a BOC under section 272. The FCC has stated that it will "look to the past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272."⁸⁴ Also, "paper promises do not, and cannot, satisfy a BOC's burden of proof."⁸⁵ In reading the results of this supplemental testing and review, I urge that the ACC keep the FCC's guidance in the forefront on how to judge Qwest's section 272 compliance.

(i) General Discussion of Supplemental On-Site Review

96. I discovered that, alarmingly, QCC and Qwest had not billed *any* of their affiliated transactions for the period July 2000 to present *until April 2001*.⁸⁶ Qwest admitted this in the documentation provided to me. On the summary sheets were notes that stated

PROPRIETARY: XXX

⁸⁴ *Ameritech Michigan Order*, ¶ 347 (emphasis added).

⁸⁵ *Id.*, at ¶ 55.

⁸⁶ This may explain why billable detail of accounting transactions was not made available to me for my previous on-site testing; *i.e.*, there was nothing available for my review. It further may explain the failure of Qwest to tender any 2001 financial statements for QCC.

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XX. The implications of this on Qwest's compliance with section 272(c)(2) and other 272 sections are discussed elsewhere in this testimony.

97. Qwest asserts that payments to and from QCC "are tracked and reconciled to ensure compliance with the requirements of section 272(b) [and] the processes for capturing transactions between Qwest Corp. and the 272 affiliate are the same as for all affiliates."⁸⁷ If the reconciliation procedures that are *actually carried out* extend to all affiliated transactions, then the problem of failing to accrue and timely account for transactions is much more widespread than just as to section 272 affiliated transactions.

98. To comply with section 272(b)(5), QCC must provide detailed written descriptions of transactions with Qwest, and the rates, terms and conditions must be posted on the website within 10 days of the transaction. Further, the written description must be sufficiently detailed to allow the FCC to determine compliance with its accounting rules.

(ii) Results of Supplemental Testing of Expenses of QCC

99. As was noted above in my affidavit discussing the results of the first two phases of on-site reviews, there continues to be long periods of time before a specific or "billable" transaction is billed, and consequently paid by QCC. Also, the unstated accounting policy continues (from Qwest LD and now to QCC) that there are no year-end, and certainly no month-end, accruals of expenses. This is because billable amounts are being expensed as invoiced. The

⁸⁷ Qwest Response to AT&T Multistate Data Request 104.

transaction to the Internet within 10 days. The Internet posting requirement is continuous, not occasional. The practical importance of posting in a timely manner is to provide information to competitors on goods, services, facilities or information that Qwest is providing to QCC. By shielding this information until March, 2001 Qwest discriminates in favor of QCC. Qwest attests that “[a]ny IXC will be able to view the transactions, evaluate the rates, terms and conditions of the offering, and decide whether it is interested in obtaining the same service from the “BOC”.”⁹² However, if nothing has been posted, there is nothing to view.

(iii) **Results of Supplemental Testing of Revenues of QCC**

103. I tested all **PROPRIETARY: X** of the “invoices” (a/k/a “affiliate billing forms”) presented to me that represent billings from QCC to QC for services provided by QCC and cover a period commencing in July 2000 and running into March 2001.

104. The same problems that were discovered in the review of QCC’s expenses were evident with its revenues: lack of accrual accounting, untimely accounting and improper posting for *all* **PROPRIETARY: X** of the invoices representing over \$5 million of transactions. Further, at least 7 of the **PROPRIETARY: X** invoices highlight the widespread and troubling practice of the liberal “sharing” of employees between the two entities that impacts upon section 272(b)(3). As was be discussed in that section, this practice of Qwest’s sharing employees casts doubt upon the actual independence from QCC.

105. Another issue that arose during my supplemental testing was whether Qwest is discriminating in the provision of services, goods, facilities or information on a *de facto* basis where it sets exorbitantly high rates for services. Although, Qwest may be following the FCC’s guidelines on pricing affiliated services, there are many examples of very high hourly billable

⁹² Schwartz Affidavit at 21.

4. What is a “transaction”?

107. Qwest has adopted the approach of the former U S WEST in choosing to report documents they collectively call “agreements” rather than individual transactions. This approach does not rise to a summary of the transaction, let alone a detailed description that would permit the FCC to determine if such transactions are nondiscriminatory.⁹⁵ Qwest states that the public inspection requirement of section 272(b)(5) “is to assist the FCC in determining that such transactions are conducted in compliance with FCC accounting rules and to make sure such services are available to third parties.”⁹⁶ The FCC would be unable to determine compliance with their accounting rules if specifically accounted for transactions are not posted. Also, third parties could not avail themselves of services or goods if Qwest does not post them in a timely manner.

108. Full disclosure must include a description of the rates, terms, and conditions of all transactions, as well as the frequency of recurring transactions and the approximate date of completed transactions.⁹⁷ It is not sufficient to post an agreement with the terms and conditions on the website and leave it at that. Qwest has attempted to comply with the 10-day posting requirement on the separate affiliate website by posting master agreements within 10 days of their execution and individual transactions, referred to Qwest as “[simple] back-up detail”⁹⁸ can only be viewed upon special request.

⁹⁵ The FCC has held that “our interpretation of section 272 (c)(1) as a flat prohibition against discrimination will work in conjunction with the section 272(b)(5) disclosure requirement to deter anticompetitive behavior.” *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order, FCC 96-489 (rel. Dec. 24, 1996), ¶ 324 (“*Non-Accounting Safeguards Order*”).

⁹⁶ Schwartz Affidavit at 19.

⁹⁷ *Also see BellSouth Louisiana II Order*, ¶ 337. In that order, the FCC found that BellSouth failed to comply with its obligations where it disclosed only basic contractual terms of its agreements while withholding the actual transactional details.

⁹⁸ Schwartz Affidavit at 22.

109. AT&T believes that a transaction is an event that captures a discrete accounting activity. Based on observations while conducting my testing, Qwest LD, and now QCC track billable activities which, in turn, can be traced to invoices. Either the billable activity or the invoice, if it only contains one activity, should be the transaction and should be publicly reported and disclosed. If Qwest would post this type of transaction, as incurred and not just when paid, within the required 10 days, then compliance with section 272(b)(5) could be properly determined. As it is now, failure to post actual transactional details means that Qwest fails to comply with section 272(b)(5). Further, this type of specific transaction posting would allow determinations to be made of errors and departures from GAAP and contravention of FCC safeguards, such as whether specific transactions are occurring in a discriminatory fashion.

E. Section 272(b)(5) – “Arm’s Length” Requirement

110. The second requirement of section 272(b)(5) is that all transactions between Qwest and Qwest LD, and Qwest and QCC, must be negotiated at “arm’s length” and include the recording of a transaction’s cost in accordance with a specified hierarchy of valuation methodologies.⁹⁹

111. Given the results of the three on-site reviews conducted by AT&T, AT&T concludes that transactions do not comply with the “arm’s length” requirement due to the many instances of intermingled management, “employee sharing” and failure to timely post offered services and goods. Regarding cost valuation requirements, AT&T believes that the high rates used for services act as a practical barrier for third parties to use such services.

⁹⁹ *BellSouth Louisiana II Order*, ¶ 339.

112. Alternatively, because Qwest has failed to comply with the posting requirements of section 272(b)(5) and the FCC's accounting principles, it is difficult to determine if there is compliance with the "arm's length" requirement.

113. QCC's Service Agreement with Qwest, posted on its website, contains Article 10 "Notices" which directs that all written notices, demands or other communications are to be made to the other party's address. Listed for QCC and Qwest are the exact same address, same suite and same organization. As both entities affirmatively state that all transactions will be conducted at arm's length and the two companies are to operate independently, it is curious to find such a close affinity and such belies Qwest's assertions of compliance with this section.

F. Section 272(c)(2) – Accounting Principles

114. Whereas the requirements of section 272(b) apply to Qwest LD and QCC, section 272(c)(2) applies to Qwest and can be viewed as a companion to the section 272(b)(2) accounting requirements for the section 272 affiliate.

115. This section requires Qwest to account for all transactions with Qwest LD and QCC pursuant to accounting principles designated or approved by the FCC. As was mentioned in the initial on-site review and testing discussion of this affidavit, AT&T was unable to review the supporting detail for receipts of money from Qwest to Qwest LD. These affiliate transactions, for 1999 alone, totaled almost \$29 million. In my follow-up testing, I was presented with monthly accruals of these amounts, which I attempted to trace into corresponding task orders. Payments from Qwest to Qwest LD, and now to QCC, should be subjected to close scrutiny because of the potential for improper subsidization.¹⁰⁰

¹⁰⁰ One reason that the FCC applied its existing affiliate transaction rules to transactions between BOCs and section 272 affiliates was to detect and protect against flows of subsidies. *See Accounting Safeguards Order*, ¶ 176.

116. Based upon its initial and follow-up review, AT&T would suggest that the following items be scrutinized in determining Qwest's compliance with this section:

- a. Because Qwest has failed to properly disclose specific, billable transactions between it and QCC/Qwest LD, a full evaluation of the compliance of affiliate transactions can not be accomplished.¹⁰¹
- b. The only transactions between Qwest and QCC/Qwest LD that are accounted for as "affiliate transactions" are those involving payments.¹⁰² There is a concern that transactions not involving the exchange of money may occur and not be accounted for and reported.
- c. Qwest focuses on the audit of its ARMIS Report, but admits that the auditor's compliance statement is "general in nature".¹⁰³ Also, the audit relates to the ARMIS data, which includes only summary information about transactions with section 272 affiliates.¹⁰⁴ Thus, the audit that Qwest discusses is not an audit specifically of the section 272 affiliate and its specific transactions.

117. Subsequent to my initial and follow-up reviews, I conducted a supplemental on-site review of QCC's transactions. Based upon my supplemental review, AT&T continues to dispute Qwest's and QCC's assertions of compliance with section 272(c)(2).

118. Under section 272(c)(2), Qwest is required to account for all transactions with QCC pursuant to FCC accounting principles. Despite the affiliated activity between Qwest and QCC stretching back to July 2000, there was no accounting booked until April of 2001 and, thus, Qwest cannot meet the requirements of this section which call for adherence to FCC accounting principles including GAAP.

119. Qwest states that the filings of its 10K report and its Cost Allocation Manual ("CAM") together with the annual audit "provide assurance that the BOC accounts for all

¹⁰¹ *BellSouth Louisiana II Order*, ¶ 340.

¹⁰² Qwest Response to AT&T Multistate Data Request No. 17. "The procedures for capturing affiliate transactions include downloading all payments to and payments from affiliates from the company's financial systems."

¹⁰³ Schwartz Affidavit at 30.

¹⁰⁴ *Bell Atlantic New York Order*, ¶ 411, n. 1268. It appears that the FCC reviews the ARMIS data and CAMs to compare the total amount of affiliate transactions.

G. Section 272(c) (1) – Nondiscrimination Safeguards

122. Section 272(c)(1) establishes requirements for the BOC. Under this section, a BOC must provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions. In other words, Qwest is required to treat unaffiliated entities as it treats QCC.¹⁰⁸

123. A *prima facie* case of unlawful discrimination under this section is established if it can be shown that a BOC has not provided an unaffiliated entity with the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms and conditions.¹⁰⁹ Neither can the BOC use a third affiliate to provide services to the section 272 affiliate to circumvent the requirements of this section. To do so would create a loophole around the separate affiliate requirement.¹¹⁰

124. Qwest provided copies of documents between a third affiliate known as U S WEST Advanced Technologies (“AT”) and other Qwest affiliates.¹¹¹ Among the agreement or project reports provided were several between AT and Qwest LD. AT&T believes that several of the services provided by AT for Qwest LD constitute discrimination in the provision of information and the development of new services. Failure to also offer such services and information to an unaffiliated entity constitutes noncompliance with this section.

¹⁰⁸ *Non-Accounting Safeguards Order*, ¶ 202.

¹⁰⁹ *Id.*, ¶ 212.

¹¹⁰ The FCC repeatedly has made clear that the affiliate transaction rules govern "chain transactions" where an unregulated affiliate stands between the BOC and the section 272 affiliate in the provision of assets, information, or services. *Accounting Safeguards Order*, ¶¶ 183, 251; *Non-Accounting Safeguards Order*, ¶ 309; *Ameritech Michigan Order*, ¶ 373. Because Qwest and QCC are both subsidiaries of Qwest Services Corporation, one must be especially careful that QSC is not used to get around the nondiscrimination provisions.

¹¹¹ Response to AT&T Multistate Data Request No. 16, Confidential Attachment C, Books 1 & 2 (the “Montana Affiliate Interest Reports filed with the Montana Public Service Commission in 1999 and 2000 for transactions in 1998 and 1999, respectively.”)

- d. Qwest has not stated that it would not discriminate in the processing of PIC orders.
- e. Qwest has not stated that it would comply with the FCC's prohibition against the use of its Official Services Network to provide interLATA services.
- f. The number of Qwest LD's or QCC employees, who are former employees of Qwest, and *vice versa*, creates a concern that there will be an improper flow of confidential information between the two entities.
- g. Finally, Qwest has not yet proved that it will provide nondiscriminatory access to its OSS.

128. In addition, Qwest discussed the process involved in offering new services that QCC requests.¹¹³ However, Qwest has not stated whether a QCC representative is on the compliance advisory board involved in the process. To the extent that QCC is represented on the compliance advisory group, Qwest is not meeting its nondiscrimination obligations. QCC should not be involved in the process.

129. Finally, as has been previously noted, my supplemental review disclosed that QCC had failed to post its various work and task orders in a timely manner. Thus QCC was provided goods, services, facilities and information on an exclusive basis for many months. Such is a *prima facie* case of unlawful discrimination under this section.

H. Section 272(e) – Fulfillment of Certain Requests

130. This section provides for certain requirements in the provision of exchange service (*i.e.* local service) and exchange access services (*i.e.* switched access services), and specifically mandates imputation for the BOC's own provisioning in subsection 272(e)(3) and mandates nondiscrimination in the provisioning of interLATA or intraLATA facilities or services to its 272 affiliate in subsection 272(e)(4).

¹¹³ Schwartz Affidavit at 28.

131. Qwest simply states that it “does not and will not discriminate in favor of the 272 Affiliate in the provision of telephone exchange service or exchange access.”¹¹⁴ This mere summarization of the rule is more than what QCC has offered, which was nothing. Section 272(e) applies to both the BOC and the affiliate. Neither entity has demonstrated or provided evidence, beyond mere words, to allow the Commissions to make a predictive judgment as to compliance with this section.

132. The mandate in 272(e)(3) is of heightened importance given the recent order issued by the Kansas Corporation Commission. The Kansas Commission has recently opened a docket, on its own motion, to investigate whether the rates and practices of Southwestern Bell Communications (“SBC”) and the 272 affiliate (“SBCS”) in offering long distance services are unjust, unreasonably discriminatory, or unduly preferential.¹¹⁵ The Commissions should review and use this section as a safeguard against anti-competitive pricing that will result in price squeezes.

133. The Kansas Commission further agreed to investigate allegations that preferential pricing from Southwestern Bell Telephone Company (“SWBT”) was occurring where access revenue was being collected by SWBT and then reinvested in SBCS to allow the latter to price long distance at or below cost.¹¹⁶ This method of preferential pricing implicates Section 272(e)(4), which requires that services or facilities must be “made available to all carriers at the same rates and on the same terms and conditions, and ... the costs are appropriately allocated.” It is worth repeating that the section 272 standards for compliance are set out in the FCC’s *Accounting and Non-Accounting Safeguards Orders*, which were designed to “discourage and

¹¹⁴ *Id.* at 34.

¹¹⁵ *Order on Petitions to Intervene, Emergency Motion for Suspension of Specific Rate Tariffs, and Petition for Reconsideration or Modification*, Docket Nos. O1-SBLC-693-TAR, O1-SBLC-323-TAR, and O1-SBLC-594-TAR.

¹¹⁶ *Id.* at 17.

facilitate the detection of improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.”¹¹⁷

134. Qwest has already displayed its intent in its filing to obtain pricing flexibility for its intraLATA toll services in the State of Colorado. Qwest applied for the premature elimination of the requirement to impute switched access rates into the price floor for the provision of intraLATA toll services. The Colorado Commission, in rejecting this application, wisely stated:

Before we eliminate the current imputation requirement for switched access, Qwest *must demonstrate* that there are comparable (in quality), widely-available, economically-feasible, and price-constraining alternatives to Qwest’s switched access services.¹¹⁸

135. Qwest states that the requirements of section 272 are “designed to prohibit anti-competitive behavior, discrimination, and cost shifting.”¹¹⁹ From a review of the section 272 affiliate website it is apparent that Qwest is, and will be, performing many functions for QCC. In pricing its services, the Commissions should mandate that QCC include the long-run incremental costs associated with these functions in the price floor and impute tariff rates for access charges and other tariffed services.¹²⁰

136. Given the current environment where the conventional wisdom is that toll service will soon be bundled, below cost or free, with high-end data service, the Commissions should

¹¹⁷ *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130 (rel. April 16, 2001), ¶ 226 (“*Verizon 271 Order*”).

¹¹⁸ *Application of U S West Communications, Inc., for the Commission to open an investigatory docket to eliminate on an expedited basis the requirement that U S West impute switched access rates into the price floor of its intraLATA long distance service.*, Decision Denying Exceptions, Adopted January 24, 2001, Docket No. 00A-201T, Section 5, at 13 (emphasis added).

¹¹⁹ *Id.* at 2.

¹²⁰ For example, a QCC work order for the “Sales of QCC Products and Services”, that includes Qwest’s service in selling QCC’s out-of-region long distance, is estimated to cost QCC over \$3 million/year. It would be expected that such cost would be included into QCC’s price floor so that it is not offering long distance services below cost.

assure themselves, as Colorado did in the switched access imputation case, that Qwest and QCC will adhere to the provisions of section 272(e) by implementing the suggestions listed in the paragraph below. To not do so may invite a "Kansas scenario" where the Kansas Commission finds itself in an investigation docket a month after the FCC permitted SBCS to provide long distance service.

137. The FCC has provided guidance in several of its past orders as to what evidence it will look at in determining compliance with this section.¹²¹ Based on a review of past FCC orders, Qwest's evidence is lacking in the following respects.

- a. Qwest and QCC did not provide specific performance standards for measuring its requirements of section 272(e)(1).
- b. Qwest has yet to prove nondiscriminatory access to its OSS, and this may result in a finding that Qwest does not comply with section 272(e)(1).
- c. Qwest has failed to make a showing that it will impute to itself rates for exchange service and exchange access. It has merely restated the requirements of section 272(e)(3).¹²²
- d. There presently is no performance measure or measures for access. Qwest should be required to develop such a measure or measures, obtain approval of the measures, and demonstrate that it is prepared to collect and report this data.
- e. AT&T also believes, especially given the recent developments in Kansas and the Commission's ruling in Colorado, that a concrete statement needs to be made by Qwest that imputation will be implemented for all services, which includes interLATA and intraLATA long distance services, in order to fully comply with the non-discrimination requirements.¹²³
- f. Qwest has made no affirmative assurance that it will maintain records tracking the quality of service to QCC for telephone exchange and exchange access services,¹²⁴ nor whether such will be posted to its website.

¹²¹ See generally, *BellSouth Louisiana II Order*, *Bell Atlantic New York Order*.

¹²² Schwartz Affidavit at 33-34.

¹²³ Note that BellSouth stated that if its section 272 affiliate used exchange access for the provision of its own service, BST (the BOC) would impute to itself the same amount it would charge an unaffiliated interexchange carrier. *BellSouth Louisiana II Order*, ¶ 354.

¹²⁴ *Verizon 271 Order*, ¶ 230, n 746.

I. Section 272 (g) -- Joint Marketing

1. Overview

138. Qwest is allowed to jointly market with QCC, but with certain restrictions. The restriction that this affidavit focuses on is contained in section 272(g)(3), which provides that the joint marketing and sale of services permitted under subsection (g) shall not be considered to violate the nondiscrimination provisions of section 272(c). The FCC clarified this subsection in its *Non-Accounting Safeguards Order*:

Some of the activities identified by the parties appear to fall clearly within the scope of section 272(g)(3) and hence would be excluded from the section 272(c) nondiscrimination requirements. For example, activities such as customer inquiries, sales functions, and ordering, appear to involve only the marketing and sale of a section 272 affiliate's services, as permitted by section 272(g). *Other activities identified by the parties, however, appear to be beyond the scope of section 272(g), because they may involve BOC participation in the planning, design, and development of a section 272 affiliate's offerings. In our view, such activities are not covered by the section 272(g) exception to the BOC's nondiscrimination obligations.*¹²⁵

139. Ms. Brunsting and Ms. Schwartz, in their affidavits, provide broad, vague and brief assertions as to QCC's compliance with section 272(g) and rely heavily on the *BellSouth South Carolina Order*. Ms. Schwartz states that "... it is critical to recognize that once the BOC obtains section 271 approval, the BOC and the 272 Affiliate may jointly market services without regard to the nondiscrimination provisions of section 272(c)."¹²⁶ Significantly, there is no discussion in the Qwest affidavits, nor in their data request responses, of the FCC's restrictions on the BOC providing product design, planning and/or development services.

140. A more thorough explanation of its marketing practices should be mandated of Qwest based on the unrestricted joint marketing that has impacted the competitive landscape in

¹²⁵ See *Non-Accounting Safeguards Order*, ¶ 296 (emphasis added).

¹²⁶ Brunsting Affidavit at 18-19.

New York and Texas,¹²⁷ and on Qwest's (and the former U S WEST's) current policy and their combined past history. Qwest should not be allowed to use the cloak of secrecy, especially regarding marketing scripts, provided by the *BellSouth South Carolina Order*, to shield how its joint marketing will impact the competitive landscape in its 14-state region.

2. Joint Marketing Restriction Violations.

141. Based on my review of Qwest's Master Services Agreement and related Work Orders posted on the Internet, Qwest is providing product planning, management and design functions for Qwest LD. Exhibit D (Marketing Services) to Qwest's Master Services Agreement states that the following services will be provided to Qwest LD:

- a. Identification of strategy and implementation of employee programs and event marketing including major customer promotions, trade shows and corporate sponsorships.
- b. Identification, development, presentation, implementation and/or referral of sales opportunities to customers on behalf of USWLD.
- c. Development of proposals, if needed.
- d. Provision of tactical and strategic plans for existing and new USWLD products/services.
- e. Identification, development and recommendation of sales plans for multimedia services to customers on behalf of USWLD.
- f. Development, production and distribution of marketing promotional materials to customers on behalf of USWLD.
- g. Product marketing for card services associated with launch activities including but not limited to, advertising, customer communication and feedback, product integration and vendor relationships.
- h. Market intelligence and Decision Support.

¹²⁷ On its web-based "Public Policy" page, Qwest boasts of this and states: "The response to Verizon's and SBC's entry into the long-distance market is astounding. In six months, more than one million customers in New York have signed up with Verizon's long-distance service. SBC is signing up customers just as fast in Texas." Such statements and statistics underscore the incredible advantage the local monopoly BOC has once section 271 approval is granted.

ability to offer long distance service. Therefore, these services should be subject to the non-discrimination provisions of section 272(c).

149. In my follow-up review of the new 272 affiliate's Master Services Agreement and accompanying current work orders on the web page, I no longer could find the items discussed directly above. However, there are two interim work orders in the "Expired Agreements – Transitional Phase" section.¹³² One pertains to planning and marketing and the other to product development services.

150. AT&T suggests that the Commissions should determine if QCC will import Qwest LD's work orders (especially as to joint marketing) when it merges Qwest LD or if it will rely on its interim work orders. The Commissioners should elicit from Qwest what its unambiguous plans are for joint marketing.

VI. PAST HISTORY AND FUTURE COMPLIANCE

151. "Those who do not remember the past are condemned to repeat it." This quote is especially apt in the context of section 272(g). The FCC has stated, "[p]ast and present behavior of the BOC applicant provides the best indicator of whether [the applicant] will carry out the requested authorization in compliance with section 272."¹³³

152. In developing a record and determining what weight to give to the evidence presented in Qwest's section 271 application, the state commissions and the FCC should look through the prism of Qwest's (and the former U S WEST's) rich history of violations pertaining to section 271. Such history should be part of the calculus in determining whether the evidence provided by Qwest, QCC and Qwest LD is sufficient to demonstrate that they will comply with

¹³² See QCC's specific web page at: <http://www.qwest.com/about/policy/docs/qcc/transitionalPhase.html>

¹³³ *Bell Atlantic New York Order*, ¶ 402.

the requirements of section 272.

153. In September 1999, the FCC found that the former U S WEST's "provision of nonlocal directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service as defined in section 271(a) of the Act."¹³⁴ U S WEST had petitioned for forbearance from the requirements of section 272 to provide nonlocal directory assistance service. In essence, U S WEST was attempting to carve out an exception for itself as to the requirements of section 272.

154. The FCC wrote: "... the record indicates that U S WEST refuses to provide unaffiliated entities with access to all of the telephone numbers that it uses to provide nonlocal directory assistance service..." and "[t]he record further reveals that U S WEST does not provide unaffiliated entities with access to the in-region telephone numbers it uses to provide nonlocal directory assistance at the same rates, terms and conditions it imputes for itself."¹³⁵ The FCC recognized that U S WEST had a competitive advantage in the provisioning of directory assistance service by virtue of the fact that it had a "...more complete, accurate, and reliable database than its competitors."¹³⁶

155. In its order, the FCC concurred with AT&T's position that "section 272 seeks to prevent BOCs from, among other things, leveraging their monopoly over local exchange services into interLATA markets."¹³⁷ The FCC recognized that section 272 was a bulwark to prevent a BOC such as U S WEST (and now Qwest) from unfairly using its dominant position and monopoly power to gain an unfair competitive advantage not only in an incidental service like

¹³⁴ See *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc. for Forbearance*, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (rel. Sept. 27, 1999), ¶¶ 2, 63.

¹³⁵ *Id.*, ¶ 34.

¹³⁶ *Id.*, ¶ 35.

¹³⁷ *Id.*, ¶ 52, n. 111.

directory assistance, but especially with regard to in-region, interLATA service.¹³⁸ The FCC ordered U S WEST to “make available to unaffiliated entities all of the in-region directory listing information it uses to provide region-wide directory assistance service at the same rates, terms, and conditions it imputes to itself. Thus, to the extent U S WEST charges unaffiliated entities for the in-region directory information it uses to provide nonlocal directory assistance on an integrated basis, it must impute to itself the same charges.”¹³⁹

156. Furthermore, the FCC concluded that “U S WEST’s provision of nonlocal directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service.”¹⁴⁰

157. On or about May, 1998, Qwest entered into two separate business agreements with Ameritech and with U S WEST to provide Qwest’s long distance service under their own brand names before these two BOCs had gained section 271 authorization to provide in-region long distance service. On September 28, 1998, the FCC issued its Memorandum Opinion and Order, which found that Qwest, the former U S WEST Communications, Inc., and Ameritech Corp. had violated section 271 by entering into the agreement and providing Qwest’s long distance service.¹⁴¹ The FCC wrote: “It is clear on this record that Ameritech’s and U S WEST’s business arrangements with Qwest pose the competitive concerns that section 271 seeks to address, and we accordingly find them unlawful under the Act.”¹⁴²

158. The illegal marketing alliance entered into by Qwest and U S WEST was an attempt to flout the plain requirements of section 271 of the Act. Qwest and U S WEST’s

¹³⁸ *Id.*, ¶ 54.

¹³⁹ *Id.*, ¶ 37 (footnotes omitted).

¹⁴⁰ *Id.*, ¶ 63.

¹⁴¹ See *AT&T v. Ameritech Corporation et al.*, File Nos. E-98-41, E-98-42 and E-98-43, Memorandum and Opinion and Order, FCC 98-242 (rel. Oct. 7, 1998), ¶¶ 38, 64.

¹⁴² *Id.*, ¶ 52.

argument before the FCC basically was that their clearly calculated attempt to circumvent section 271 should be excused because the marketing alliances would serve the public interest. The FCC noted that in its internal strategy sessions, U S WEST recognized the benefits of offering a combined package of services and began considering how to offer in-region interLATA service prior to section 271 approval and quoted one of U S WEST's admitted goals to "[p]reposition customers for U S WEST Long Distance by providing the convenience of one-stop shopping."¹⁴³ Upon completion of the negotiations with Qwest to provide its interLATA services, U S WEST commenced an aggressive marketing campaign in six of its states which included marketing through inbound telemarketing.¹⁴⁴

159. The FCC found that the record indicated that U S WEST was actively recommending Qwest's long distance service over other IXC's service ("U S WEST's marketing materials instruct its representatives to encourage its customers to select Qwest over all other long distance carriers.").¹⁴⁵

160. Violations of section 271 are not limited to pre-merger U S WEST Communications, Inc. On February 16, 2001, the FCC released its Opinion and Order which concluded that Qwest was providing in-region, interLATA service in violation of section 271.¹⁴⁶ Through its 1-800-4USWEST calling card service, the FCC found the following: (1) U S WEST was permitted to accumulate "a significant base of customers"; (2) it was enabled to "amass goodwill as a full-service provider with its local service customers"; (3) it held itself out as providing long distance service through promotional materials; and (4) it controlled "numerous

¹⁴³ *Id.*, ¶¶ 14, 41.

¹⁴⁴ *Id.*, ¶ 16.

¹⁴⁵ *Id.*, ¶ 60.

¹⁴⁶ *AT&T Corp. v. U S WEST Communications, Inc.*, File No. E-99-28, Memorandum Opinion and Order, DA01-418 (rel. Feb. 16, 2001)

functions, including marketing and customer care, that are typically performed by a reseller of long distance service.”¹⁴⁷

161. Because of its initial conclusion and findings, the FCC passed on consideration of other claims, including discrimination in providing transport services and circumvention of section 272 safeguards.

162. Among the evidence that was presented to the FCC was US WEST’s marketing tactics of using bill inserts and other mailings aimed at its local subscriber base and exercising exclusive control over the marketing of the service.¹⁴⁸

163. On April 16, 2001, Arthur Anderson, LLP released its post-merger Report on Qwest Communications International, Inc.’s Statement of Management Assertions dated April 16, 2001. The Statement was required by the FCC order approving the merger of U S WEST, Inc. and Qwest Communications International, Inc. Attachment I to the Report of Independent Public Accountants states that the auditors “noted that the account records of 458 customers included prohibited in-region InterLATA service component codes.” Of these, “certain non-metered services (e.g., private line services) for 266 customers were billed and branded as Qwest services.” The audit report raises questions whether Qwest’s parent was unlawfully providing section 271 long distance services *after* the merger.

164. If past behavior of Qwest is to be one of the indicators of its compliance with section 272, I would offer that the state commissions and the FCC should approach Qwest’s offers of compliance with the utmost skepticism. The past zeal of these two entities is the best indication of how future marketing under section 272(g) will be conducted. The past conduct

¹⁴⁷ *Id.* at ¶ 30.

¹⁴⁸ *Id.* at ¶ 3.

also provides a scenario of how future compliance will play out and the damage that will be incurred to the competitive market.

VII. CONCLUSION

165. The difficulty of preventing a BOC monopoly from using its power in the local exchange market to distort competition in the long distance market is not a reason for laxity in the enforcement of these provisions. Rather, section 272, vigorously enforced, can act as a trip-wire, alerting regulators and competitors to the presence of unseen and difficult to detect abuses, which can then be investigated. In the context of the present application, the section 272 requirements serve that function well. The failure of Qwest, Qwest LD and now QCC to satisfy the obligations of disclosure provides ample warning that Qwest plans to give, even at this early stage, cursory attention to these obligations.

166. Qwest has failed to meet its burden of establishing that it and its section 272 affiliates have and will comply with the requirements of section 272. Based on its failure to show compliance with section 272, Qwest's request for an affirmative recommendation from the Commissions to the FCC for in-region interLATA relief should be denied.



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May 1, 2001

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room Number TWB-204
445 12th Street, S.W.
Washington, DC, 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc.
and U S West Inc., Docket CC-99-272

Dear Ms. Salas:

On behalf of AT&T Corp., the attached letter addressed to Dorothy Attwood and David Solomon was hand-delivered to all addressees today. Please direct any questions to the undersigned.

Respectfully submitted,

Joan Marsh



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Senior Attorney

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May 1, 2001

VIA HAND DELIVERY

Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

David Solomon
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc. and U S West Inc., CC Docket No. 99-272

Dear Ms. Attwood and Mr. Solomon:

AT&T Corp. ("AT&T") has reviewed the April 16, 2001 Report of Independent Public Accountants ("Auditor's Report") prepared by Arthur Anderson LLP and the April 16, 2001 certification by Qwest ("Qwest Certification") submitted pursuant to the Commission's orders conditionally approving the Qwest-US WEST merger.¹ Although the Auditor's Report asserts that Qwest has fully complied with

¹ Memorandum Op. and Order, *Qwest Communications International Inc. and U S 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*, 15 FCC Rcd. 5376, ¶¶ 27, 70, 71 (March 10,

(footnote continued on following page)

the divestiture requirements specified in those Commission orders, the report actually confirms that Qwest has been “providing” in-region, interLATA services in violation of section 271 of the Communications Act, 47 U.S.C. § 271. In addition, the Auditor’s Report is incomplete because certain contracts – including Qwest’s teaming agreements with other carriers under which Qwest provides nationwide long distance services to federal agencies – have not been made available to the auditors.² In these circumstances, and as described more fully below, the Commission should act promptly to impose appropriate sanctions on Qwest for conduct that demonstrably violates the merger obligations; and should require that Qwest and its auditors withdraw the purported conclusions of compliance recited in their certification and report, respectively, and conduct a more complete audit.

The Auditor’s Report Establishes That Qwest Has Violated Section 271. Section 271 prohibits Qwest from “providing” in-region, interLATA services before it opens its local markets to competition. Qwest has not received authority to provide in-region long distance services in any state.

As the Commission has held, the term “providing” in section 271 is not limited to the physical transport of electrons across LATA boundaries. *See, e.g., AT&T Corp. v. Ameritech Corp.* 13 FCC Rcd. 21438, ¶ 34 (1998) (“*Qwest Teaming Order*”) (“Congress understood the prohibition [in Section 271] to be broader in scope than mere transmission”). Rather, a BOC “provides” interLATA service when it effectively holds itself out to the public as a provider of long distance service. *Id.* ¶¶ 45, 50. Thus, the Commission has held that a BOC may not “brand” in-region long distance services as its own prior to obtaining full section 271 authorization,

(footnote continued from previous page)

2000) (“*March 10 Merger Order*”); Memorandum Op. and Order, *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*, 15 FCC Rcd 11909, ¶ 42 (June 26, 2000) (“*June 26 Merger Order*”).

² See Auditor’s Report at 2.

even if another entity undertakes the actual transport of the interLATA traffic. *Id.* ¶¶ 34, 45, 50.

Here, the Auditor's Report and Qwest's Certification each confirm that Qwest has violated these standards. The Auditor's Report finds that in-region private line services for 266 customers were "billed and *branded* as Qwest services." Auditor's Report, Att. 1, at 1 (emphasis added). The auditors note that the revenues associated with these unlawful transactions from July 2000 through March 2001 were in excess of \$2.2 million. *Id.*

The Qwest Certification concedes that these services were billed and branded as Qwest services. Qwest's primary defense is that it did not actually transport any of this private line traffic. Qwest Certification ¶ 11. But, as noted above, the Commission has rejected that defense: a BOC "provides" long distance services when, as Qwest did, it brands transport services provided by a third party as its own. No other construction of Section 271 is possible, because the statutory prohibition does not distinguish between facilities-based and resold interLATA services. For that reason, the Qwest divestiture plan expressly required that, with respect to private line and data services, "Qwest will perform [only] a very limited set of support services (with the retail service *always branded* as Touch America) for a limited group of in-region customers." *June 26 Merger Order* ¶ 14 (emphasis added). *See also id.* ¶ 28, n.81 (discussing limited dual branding during the transition period).

Qwest suggests in the alternative that the Commission can overlook these violations of section 271 because the amounts are *de minimis*. Qwest Certification ¶ 10. There is, of course, no multi-million dollar, several hundred customer, *de minimis* exception to section 271. Furthermore, the anticompetitive effects of the conceded misbranding go well beyond the specific number of customers or dollars for which a violation is established, because such misbranding affects the perceptions of Qwest's most significant customers. As Qwest itself repeatedly emphasized throughout the

merger proceeding, the “branding issue” in this case at all times involved primarily this small but important segment of large business customers.³

Recognizing as much, Qwest also suggests that its violation was inadvertent, and that the “error” occurred because all of these private line customers entered into contracts at the time the order entry system went off line between June 26 and June 30, 2000. Qwest Certification ¶ 7. That excuse is irrelevant under section 271, which prohibits all unauthorized interLATA service, and under the merger conditions which demand strict compliance.⁴

In sum, the Qwest Certification is flawed insofar as Qwest incorrectly states therein that it “has operated its business in accordance with the Final Divestiture Plan and the FCC’s Orders in Docket No. 99-272” (Qwest Certification at 1, ¶2).⁵ Indeed, the Auditor’s Report shows on its face that Qwest’s conduct has plainly violated those Orders and Section 271.⁶

The Auditors Have Failed To Investigate Whether Qwest Is Engaging In An Impermissible Teaming Agreement With Touch America And Is Providing In-Region,

³ See e.g., Qwest’s Reply to AT&T’s Comments on the Divestiture Compliance Report, at 6-8 (identifying the branding issues as applying to “[o]nly a limited category of limited customers”) and Qwest’s Point By Point Response to AT&T’s Comments on the Qwest Divestiture Compliance Report, appended thereto at 5-6 and 8.

⁴ It is also not clear that this excuse is consistent with the explanation Qwest apparently provided to the auditors. See Auditor’s Report Att. 1, at 1 (According to the Auditor’s Report, “Qwest is reviewing the detail of these 266 customer accounts to identify potential exempt services which may be included in the above estimates”).

⁵ Qwest’s certification, which qualifies this statement with “in all material respects” is in fact non-compliant with the Commission’s orders (see, paragraph 46 of the June 26 Merger Order and paragraph 70 of the March 10 Merger Order) not only because there is no provision in those orders for a “materiality” qualification, but also because Qwest failed to certify that “that it continues to comply with section 271.” In fact, its activities are clearly not in compliance with Section 271.

InterLATA Services To The Federal Government. The auditors also failed to undertake an investigation into Qwest's provision of in-region interLATA calling to the federal government. In a recent filing made to the GAO protesting its exclusion from bidding on a contract to provide telecommunications services to multiple federal offices, Qwest stated that it "is currently performing a number of nationwide contracts with various federal agencies, including Treasury, in conjunction with Touch America."⁷ Although these contracts raise obvious and significant section 271 concerns, there is no mention of them in the Auditor's Report.

The Commission's orders place strict limits on the ability of Qwest to "team" with long distance providers to offer a bundled package of services. As the Commission stated in the *June 26 Merger Order* with respect to the issue of joint provisioning of long distance services, "Qwest's representation that there will be no such coordination for delivery of products or services [with Touch America] is one of the factors central to our finding that the divestiture agreement does not violate section 271." *Id.* ¶ 32 & n.90. Similarly, in rejecting Qwest and U S WEST's argument that their purported teaming arrangement complied with section 271 because it constituted "mere marketing," the Commission made clear that the scope of permissible joint marketing between a BOC and a long distance provider to in-region customers was limited to instances where the BOC "makes no representation that [any in-region long distance service] is associated with its name or services." *Qwest Teaming Order* ¶ 50 (emphasis added). The Commission held where the BOC "perform[s] various customer care functions in connection with the [in-region] long distances services," the BOC is "providing" long distance services in violation of section 271. *Id.*

(footnote continued from previous page)

⁶ Indeed the Auditor's Report, which contains a similar assertion of compliance must also be rejected in light of the showing, in the very same Report, that Qwest is not in compliance.

Qwest's advocacy in the GAO proceeding raises substantial concern that Qwest has once again crossed the line and is impermissibly participating in another carrier's provision of in-region long distance services to the federal government. In an ongoing proceeding before the GAO, Qwest has protested the fact that it had been denied a federal telecommunications contract on the ground that section 271 legally prevents Qwest from offering "ubiquitous nationwide telecommunications services" to federal offices. Qwest Protest at 1. Qwest argued that it could do so by teaming with another carrier (such as Intermedia) who would serve federal offices in Qwest's 14-state region and that Qwest had undertaken such teaming arrangements to serve other federal agencies. *Id.* at 6. According to Qwest, these teaming arrangements satisfy section 271 because "Qwest and its teaming partner would be providing only long distance services . . . not a combined package of local and long distance services," and because Qwest had disclosed to the government that it was teaming with another provider. *Id.* at 11-12.

However, the details of Qwest's teaming arrangements paint a different picture. According to a contract that Qwest provided to the GAO as representative of its teaming agreements with other carriers: "Qwest is the single point of contact with Customer for ordering, billing, Service inquiry, Service Assurance and trouble reporting for the Service." Qwest Protest, Exhibit 4. If Qwest were free to ignore Section 271, Qwest's apparent practice of entering into such contractual arrangements to win contracts to serve multi-location federal offices would be unsurprising, because many federal agencies are understandably interested in obtaining a sole supplier with a single point of contact for all their telecommunications needs rather than connecting their various offices using multiple carriers.

Given the uncertainty as to the terms of these teaming arrangements, and inference of broader Qwest involvement in light of its GAO protest submission, it is,

(footnote continued from previous page)

⁷ Protest of Qwest Communications International, Inc., B-287495 Opposition to

(footnote continued on following page)

at the very least, incumbent on Qwest to justify, and the auditors to verify, that these teaming arrangements comport with Section 271.

The Commission has set forth in the Qwest merger orders the ground rules for such arrangements. Even before Qwest selected Touch America as the purchaser of its in-region assets in order that its merger with U S WEST would comply with Section 271, the Commission warned Qwest that the provision of anything beyond billing and collection services to Touch America (*i.e.*, the entity that ultimately purchased Qwest's in-region long distance service) increased the likelihood of a section 271 violation. *March 10 Merger Order* ¶ 19. Indeed, the *June 26 Merger Order* found that Qwest's plan to sell its in-region long distance facilities to Touch America satisfied section 271 only after Qwest represented to the Commission that it would not provide any customer care for Touch America's long distance customers other than those services allowed for a very limited transitional period. *Id.* ¶ 32. Qwest's assertion that Section 271 is only implicated when a BOC and its teaming partner offer "a combined package of local and long distance services," Qwest Protest at 11, flies in the face of the Commission's holding in paragraph 50 of the *Qwest Teaming Order* that associating the BOC's brand with the in-region long distance service is what makes the teaming arrangement impermissible, not its bundling with the local service.

Thus, Qwest cannot be deemed to be in compliance with the Commission's merger orders or Section 271 until the teaming contracts with other carriers to offer long distance service to federal agencies with offices in its in-region states and the federal contracts themselves have been made available for review to the auditors to determine whether Qwest in engaging in teaming agreements that violate section 271 and, if violations are established, appropriate remedial action is taken.⁸

(footnote continued from previous page)

Motion for Summary Judgment at 7 (emphasis in the original) ("Qwest Protest").
⁸ AT&T cannot comment at this time on the volume discount issue, because insufficient information has been provided. Despite the fact that an extension

(footnote continued on following page)

* * *

In summary, in light of the deficiencies in the audit report and evidence of Section 271 violations, AT&T recommends that the Commission: (1) mandate a detailed analysis of the 266 accounts to determine when they were acquired, whether (and when) the revenue associated with those accounts has been handed over to Touch America, and whether customers have been notified of the violation; (2) levy a fine against Qwest at least equal to the amount of revenue it received from prohibited activities; and (3) mandate a detailed audit report of all Qwest teaming arrangements to ensure that they comply with prior Commission Orders.

Thank you for your attention to this matter. Please direct any questions to the undersigned.

Respectfully submitted,

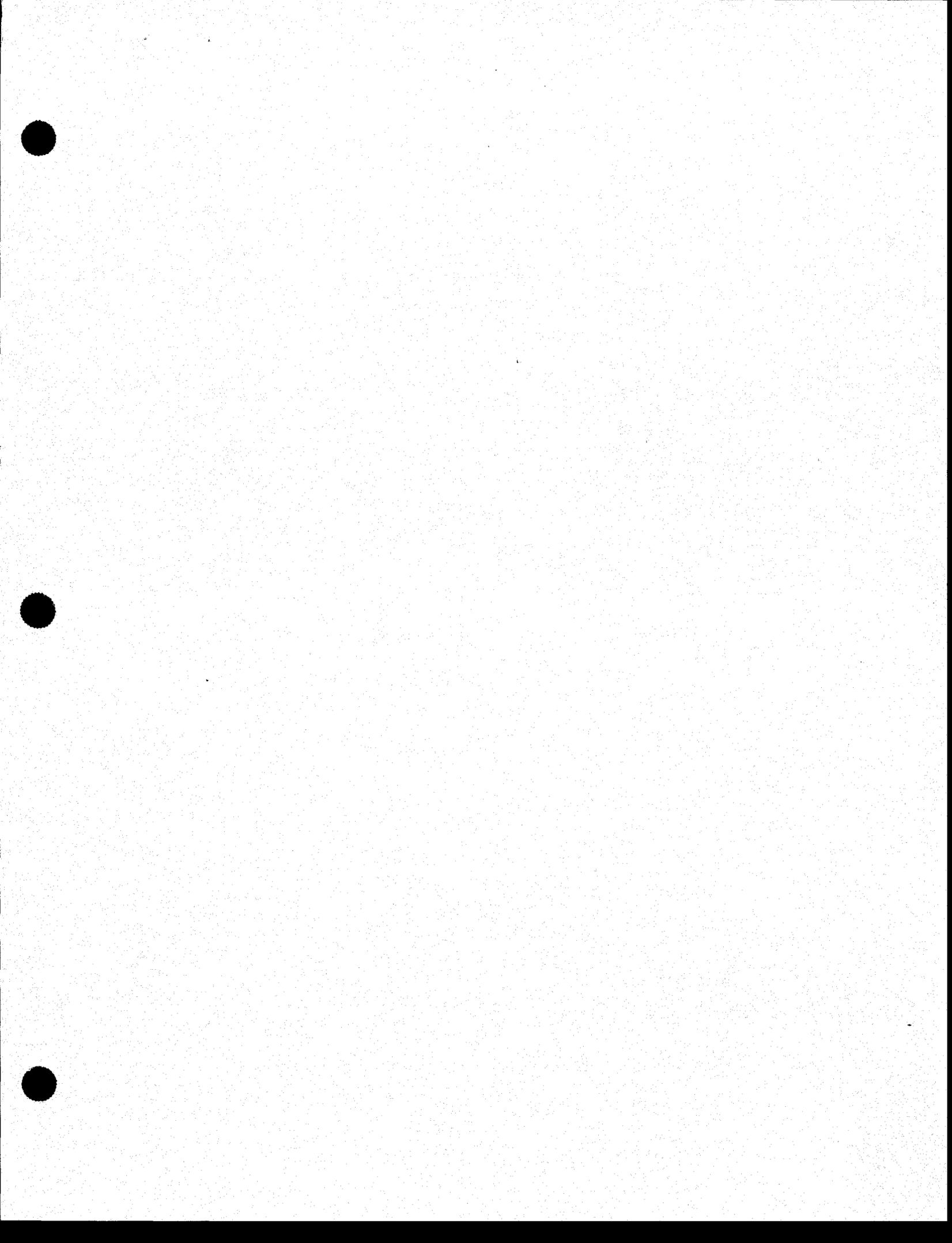
Aryeh S. Friedman

cc: Carol Matthey
Anthony Dale

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was granted to Qwest for the filing of the auditor's report due to this very issue, the auditor reported that: "all contracts requested for our review are *not yet available* and consequently, *we were unable to complete our procedures with respect to this requirement*," Auditor's Report at 2 (emphasis added). March 1, 2001 Letter from Carol E. Matthey, Deputy Chief, Common Carrier Bureau, to Mr. Peter Rohrbach, counsel for Qwest, at 1-2. The Qwest Certification explains that the issue of compliance with the volume discount obligation related to only two contracts, and to service bureau tapes for 47 customers and that they "fully expect that they will not show prohibited cross-discounting." *Id.* ¶ 12. Obviously, a contrary finding would establish clear violations of the *June 26 Merger Order*, in which the Commission held that such cross-discounting "appears tantamount to *joint marketing* of in-region interLATA service and out-of-region service" and "foster[s] the impression that Qwest can offer a "package" of in-region and out-of-region interLATA service." *Id.* ¶ 19.

Radhika Karmarkar





Federal Communications Commission
Washington, D.C. 20554

June 1, 1999

Mr. Bruce K. Posey
Senior Vice President
Federal Relations and Regulatory Law
U S WEST, Inc.
1090 19th Street, N.W., Suite 700
Washington, D.C. 20036

Dear Mr. Posey:

We have been following with concern events subsequent to U S WEST's filing of its February 22, 1999 Petition before the Arizona Corporation Commission (ACC) in Arizona Docket No. RT-000001-99-0095, and that Commission's Decision No. 61696 dated May 13, 1999. We are particularly troubled by the view, expressed by some U S WEST representatives, that the Federal Communications Commission may lack authority over the determination of in-state Local Access and Transport Area (LATA) boundaries and that U S WEST is free to provide telecommunications services across current LATA boundaries in Arizona without first applying to, and receiving approval from, the Federal Communications Commission for LATA boundary modifications.

As the Common Carrier Bureau stated explicitly in the 1997 *LATA Boundaries Order*, 12 FCC Rcd 4738, the Telecommunications Act of 1996 gives unambiguous, explicit, and sole authority over LATA boundaries to the Federal Communications Commission. Should U S WEST begin to offer service across currently recognized LATA boundaries without first receiving authority from the FCC, U S WEST will become subject to charges that it has committed a willful and knowing violation of the Act and this Commission's rules. We, thus, request your written commitment that U S WEST will not begin to offer any telecommunication services across current LATA boundaries prior to receiving authority to do so from the FCC. Please respond within ten business days.

Sincerely,

Lawrence E. Strickling
Chief
Common Carrier Bureau

cc: Carl J. Kunasek, Commissioner-Chairman, ACC
Tony West, Commissioner, ACC
James R. Irvin, Commissioner, ACC



BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
 Edward A. Garvey
 Joel Jacobs
 Marshall Johnson
 LeRoy Koppendrayner

Chair
 Commissioner
 Commissioner
 Commissioner
 Commissioner

In the Matter of the Complaint of AT&T
 Communications of the Midwest, Inc. against
 Qwest Corporation

ISSUE DATE: April 30, 2001

DOCKET NO. P-421/C-01-391

ORDER GRANTING TEMPORARY
 RELIEF AND NOTICE AND ORDER FOR
 HEARING

PROCEDURAL HISTORY

On March 22, 2001, AT&T Communications of the Midwest, Inc. (AT&T) filed a complaint against Qwest Corporation (Qwest). In the complaint AT&T alleged that Qwest has violated the terms of the AT&T/Qwest interconnection agreement as well as state and federal law by failing to participate in a cooperative test of the unbundled network element platform or UNE-P ordering and provisioning in Minnesota¹. AT&T requested an expedited proceeding² and temporary relief.³

On March 29, 2001, AT&T informed the Commission by letter that it would not object to the Commission taking up both the issue of temporary relief and the issue of whether to consider

¹ UNE-P is a method for a CLEC to provide competitive local exchange service. Under UNE-P, the CLEC purchases from the ILEC a specific group of unbundled network elements, including the loop, the network interface device, a switch port, switching functionality and transport. With this platform of unbundled network elements, the CLEC can provide basic local exchange service to residential and small business customers.

² Pursuant to Minn. Stat. § 237.462 subd. 6.

³ Pursuant to Minn. Stat. § 237.462 subd. 7.

permanent relief on an expedited basis at one meeting within 30 days from the filing of the complaint.⁴

On March 30, 2001, Qwest filed two letters with the Commission. In the first letter Qwest urged the Commission to set this matter for an expedited hearing on the merits after a short opportunity for discovery. In the second letter Qwest indicated that it did not object to the Commission dealing with AT&T's request for temporary relief beyond the 20 day deadline set forth in the statute.

On April 4, 2001, Qwest submitted a letter to the Commission requesting that Commission staff convene a conference call for that week to discuss future proceedings.

On April 9, 2001, Qwest filed its response to AT&T's complaint.⁵

On April 11, 2001, Qwest filed information and document requests that were inadvertently omitted from Qwest's response.

On April 17, 2001, the Department of Commerce (DOC) filed its comments on AT&T's complaint and Qwest's answer.

On April 17, 2001, AT&T filed a motion for a protective order.

On April 19, 2001, Qwest filed its memorandum in opposition to AT&T's motion for a protective order.

On April 19, 2001, this matter came before the Commission.

⁴ Minn. Stat. § 237.462, subd. 6 (e) requires the party responding to a complaint to file an answer within 15 days after receiving the complaint and subd. 6 (f) requires a Commission determination on whether the filing warrants an expedited proceeding within 15 days of receiving the answer to the complaint. Minn. Stat. § 237.462, subd. 7 (a) requires the Commission to issue a decision on whether to grant temporary relief within 20 days of the filing of the complaint.

⁵ Pursuant to Minn. Stat. § 237.462 subd. 6 (e), Qwest's response was due April 6, 2001.

FINDINGS AND CONCLUSIONS

In this Order the Commission addresses two main issues. The first issue is how to proceed with the complaint and the second is the question of whether temporary relief should be granted. Each of these issues will be considered separately.

I. Background Summary

A. AT&T's Complaint

In its complaint against Qwest, AT&T claimed that Qwest has violated the terms of the Qwest/AT&T interconnection agreement as well as state and federal law by failing to participate in a cooperative trial test of the unbundled network element platform (UNE-P) ordering and provisioning in Minneapolis. AT&T argued that Qwest's refusal to participate in this test hinders AT&T's ability to determine whether it is feasible for it to offer residential local exchange services in Minnesota through the combination of Qwest's unbundled network elements (UNEs). Without the testing AT&T would not be in a position to offer residential UNE-P service in Minnesota.

The purpose of the AT&T UNE-P test is for AT&T to test the Qwest-AT&T interface involved with UNE-P provisioning. AT&T's test trial is designed to test AT&T's procedures and processes needed to market local service via UNE-P and Qwest's ability to process and provision varying types of transactions and volumes of UNE-P orders.

AT&T requested an expedited proceeding under Minn. Stat. § 237.462, Subd. 6. AT&T indicated that because it has been limited in its ability to test its network, as well as its ordering, provisioning and billing systems, it has been limited in its ability to evaluate entering Minnesota's residential local exchange market on a UNE-P basis. This denies Minnesota residents the advantages of potentially increased competition including potentially lower prices and diversity of telecommunications services, contrary to public policy favoring competition.

AT&T also requested temporary relief⁶ pending the resolution of the dispute. This will be discussed below.

AT&T also requested that Qwest be required to pay penalties.⁷

By letter of April 17, 2001, AT&T requested a protective order with regard to Qwest's notices of depositions. AT&T objected to Qwest's request to take depositions of five employees and one outside consultant and also objected to Qwest's document requests.

⁶ Pursuant to Minn. Stat. § 237.462, subd. 7.

⁷ Pursuant to Minn. Stat. § 237.462, subd. 1-4.

B. Qwest's Response

Qwest alleged that AT&T's proposed test is not a legitimate pre-market test of AT&T and Qwest's systems. Instead, Qwest alleged that AT&T's test scenario is designed to generate invalid data that AT&T intends to use against Qwest in Section 271 proceedings in other jurisdictions.

Qwest stated that it is willing to work with AT&T in good faith. Qwest indicated it has been willing to fill as many legitimate orders as AT&T can place and assist AT&T in legitimate pre-market testing.

Qwest did not object to an expedited hearing but requested an opportunity for discovery prior to such hearing.

Qwest's response to AT&T's request for temporary relief will be discussed below.

C. Comments of the DOC

The DOC argued that an expedited hearing was warranted because of the seriousness of the allegations.

The DOC recommended that a decision on penalties be deferred until all the facts have been developed and presented.

The DOC's comments on AT&T's request for temporary relief will be discussed below.

II. Jurisdiction and Referral for a Contested Case Hearing

The Commission has jurisdiction over this complaint under Minn. Stat. § 237.081 subd.1(a) and 2(c) and Minn. Stat. § 237.462. Further, the Commission has reasonable basis to investigate the matter.

Under its rules of practice and procedure, the Commission initiates contested case proceedings when there are contested material facts and a legal right to a hearing or when the Commission finds that all significant issues in a case have not been resolved to its satisfaction. Minn. Rules 7829.1000. Here there are contested material facts as well as unresolved significant issues.

In this case, the ordering of an expedited hearing is discretionary with the Commission. The Commission recognizes the concern expressed by the parties that this dispute be resolved as expeditiously as possible. However, the Commission also recognizes the need for a well developed evidentiary record, and in this case this is primary to ensuring a just resolution of this matter. The Commission, for this reason, will refer this case to the Office of Administrative Hearings with a request that the Administrative Law Judge (ALJ) submit his/her report by June 1, 2001.

III. Issues to be Addressed

The Commission requests that the Administrative Law Judge make a determination on the following issues:

- whether it is legally appropriate and in the public interest for AT&T to proceed with its testing; and
- how the test should proceed, if warranted.

The test should be designed to evaluate the operation and interaction of both AT&T's and Qwest's systems.

The Commission further requests that the Administrative Law Judge resolve any pending discovery disputes.

IV. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Steve M. Mihalchick. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2544.

B. Hearing Procedure

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200. Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000.

Under these rules parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing. Failure to appear at the hearing may result in facts and issues being resolved against the party who fails to appear.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions. They should take note that any material introduced into evidence may become public data unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Karen Hammel, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 282-5720 or Diane Wells, Utilities Rates Analyst, Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 296-6068.

The times, dates, and places of evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

C. Intervention

Current parties to this proceeding are AT&T, Qwest and the DOC.

Other persons wishing to become formal parties to this proceeding shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held in this matter on Tuesday, May 1, 2001, at 8:00 a.m. in the Large Hearing Room, Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101. Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

E. Time Constraints

The Commission seeks to issue its final order as quickly as possible, consistent with a fair process, an adequate record, and thoughtful and deliberative decision-making.

The Commission asks the Office of Administrative Hearings to conduct contested case proceedings in light of this goal and these concerns. The Commission respectfully requests that the Administrative Law Judge submit his final report by June 1, 2001, if possible, to permit the Commission to issue a final Order as soon thereafter as possible.

V. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., apply to cases involving rate setting. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

VI. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

VII. Procedure After Submission of the ALJ's Report

The Commission, in order to expedite its review, will allow 7 days for exceptions to the ALJ's report. There will be no reply exceptions.

The Commission will put the matter on its next agenda meeting within seven days after receiving exceptions, subject to variance by the Executive Secretary.⁸

VIII. Temporary Relief

A. Legal Basis

Minnesota Statute § 237.462, subd. 7 provides that the Commission may order temporary relief pending resolution of the complaint. The statute provides that:

After notice and an opportunity for comment, the commission may grant an order for temporary relief under this subdivision upon a verified factual showing that:

- (1) the party seeking the relief will likely succeed on the merits;
- (2) the order is necessary to protect the public's interest in fair and reasonable competition; and
- (3) the relief sought is technically feasible.

⁸ Minn. Rules, part 7829.3100 provides for the Commission to vary time periods established by these rules and to delegate authority to vary time periods to the Executive Secretary.

An order for temporary relief must include a finding that the requirements of this subdivision have been fulfilled.

Minn Stat. § 237.462, subd. 7(c).

B. Temporary Relief Requested by AT&T

AT&T requested in its verified complaint that the Commission order Qwest to immediately engage in cooperative testing with AT&T for the ordering and provisioning of residential UNE-P. At the hearing before the Commission, AT&T clarified its request to indicate that AT&T was not requesting that the Commission order that testing begin immediately. Rather, AT&T was requesting that all parties be ordered to take all steps that would be necessary to allow the testing to start immediately after there is a decision on the underlying issues.

AT&T indicated that it would take 5-6 weeks for Qwest to install the lines AT&T is requesting for its testing. Further, AT&T needs about one week to install risers that are part of AT&T's obligation. AT&T's concern was that if AT&T were to prevail on the merits and the testing AT&T requested was ordered, several weeks would then have to be spent on preparing to test, thus delaying AT&T's testing further. AT&T stated that it would compensate Qwest for all work it does to install these lines, whether testing goes forward or not.

AT&T specifically proposed that:

- the certification testing be completed by May 18, 2001;
- billing conductivity testing be completed;
- Qwest accept and install AT&T's order for 1000 lines- 800 retail lines to be converted to UNE-P and 200 new UNE-P orders;
- AT&T compensate Qwest for its work whether or not any testing actually takes place.

C. Qwest's Position

Qwest requested that the Commission deny AT&T's request for temporary relief. Qwest argued that AT&T's written request for temporary relief was an exact mirror of AT&T's request for permanent relief and that if such relief were to be ordered it would be dispositive of the proceeding. Qwest requested that before the Commission make such a decision Qwest be given an opportunity for discovery and an opportunity to present its position to the Commission.

D. Position of the DOC

The DOC stated that the statutory criteria for temporary relief have been met. It argued that the interconnection agreement on its face supports the conclusion that AT&T is entitled to the testing that it requests.

The DOC argued that the testing requested by AT&T is necessary for AT&T to make a decision on offering local service through the UNE-P in Qwest's territory. There may be a few CLECs competing in isolated markets using UNE-P, but the DOC does not view this as fair and reasonable competition. For this reason temporary relief is necessary to protect the public interest in such fair and reasonable competition.

The DOC further indicated that the relief sought is technically feasible.

E. Commission Action

The Commission will grant the temporary relief requested by AT&T at the hearing before the Commission. That relief includes ordering both parties to take the steps necessary to be prepared to start testing at such time that the merits of this complaint are decided. Specifically, the Commission will order that:

- the certification testing be completed by May 18, 2001;
- billing conductivity testing be completed;
- Qwest accept and install AT&T's order for 1000 lines - 800 retail lines to be converted to UNE-P and 200 new UNE-P orders;
- AT&T compensate Qwest for its work whether or not any testing actually takes place.

The Commission finds that the statutory criteria set forth above have been met. First, the evidence demonstrates that AT&T will likely succeed on the merits. The Commission relies on the DOC's review of the interconnection agreement and finding that the language of the interconnection agreement, on its face, supports the claim that AT&T is entitled to the testing it has requested. The DOC found no language suggesting otherwise. While final interpretation of the interconnection agreement must await full briefing, the DOC's findings on initial review support the conclusion that AT&T will more likely than not prevail on the merits of its claim.

Second, given that AT&T has specifically stated that this testing is a precondition to AT&T's decision to offer local service through the UNE-P in Qwest's territory, it is clearly in the public interest of promoting fair and reasonable competition that AT&T be able to resolve the issues necessary to its decision with minimal delay. The temporary relief would provide the opportunity to begin testing immediately after final resolution, if AT&T prevails. Further, Qwest would be fully compensated for any work it does.

Finally, the relief sought is technically feasible. There has been no claim by either party that the testing Qwest requests is not feasible. The temporary relief does not require the testing but only that the parties make the necessary preparations to do so.

For these reasons the Commission will grant the temporary relief as requested by AT&T.

Further, Qwest raised the issue whether it would be in violation of its tariff if it were to allow the testing of residential systems in AT&T's downtown business location. For this reason, the Commission will, to the extent necessary, waive any Qwest tariff that may limit the provisions of the temporary relief discussed herein.

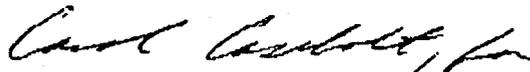
IX. Penalties

The Commission will defer any decision on penalties until after receipt of the ALJ's report.

ORDER

1. A contested case proceeding shall be held on the issues set forth above.
2. Exceptions to the Administrative Law Judge's report shall be filed within 7 days of its submittal to the Commission. There will be no reply exceptions.
3. The following temporary relief shall be granted:
 - certification testing shall be completed by May 18, 2001;
 - billing-conductivity testing shall be completed;
 - Qwest shall accept and install orders for 1000 residential lines, 800 of which are to be retail lines and 200 are to be wholesale lines;
 - AT&T shall compensate Qwest for its work irrespective of whether any testing actually takes place.
4. Any Qwest tariff that may limit the provisions of paragraph 3, above, is hereby waived.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION



Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

ATTACHMENT A

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Complaint of AT&T
Communications of the Midwest, Inc. Against
Qwest Corporation

MPUC Docket No. P-421/C-01-391

OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Steve M. Mihalchick, Office of Administrative Hearings, Suite, 1700, 100 Washington Square,
Minneapolis, Minnesota 55401; (612) 349-2544

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____



BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

AT&T COMMUNICATIONS OF THE)	DOCKET NO. UT-003120
PACIFIC NORTHWEST, INC.,)	
)	SECOND SUPPLEMENTAL
Complainant,)	ORDER GRANTING MOTION
)	TO AMEND ANSWER, DENYING
v.)	EMERGENCY RELIEF AND
)	DENYING MOTION FOR
QWEST CORPORATION,)	SUMMARY DETERMINATION
)	
Respondent.)	
.....)	

SYNOPSIS

1 This is a dispute between AT&T and Qwest that relates to an interconnection agreement under which they operate. The Commission directs Qwest to promptly provide access to AT&T, and orders the parties to continue the bona fide request (BFR) process to negotiate the compensation due Qwest for that access, and report back to the Commission within 30 days.

MEMORANDUM

2 **Parties:** Steven H. Weigler, attorney, Denver, Colorado, represents AT&T Communications of the Pacific Northwest, Inc. Lisa Anderl, attorney, Seattle, Washington, represents Qwest Corporation.

3 **Procedural History:** On November 6, 2000, AT&T Communications of the Pacific Northwest, Inc. (AT&T) filed with the Commission a complaint against Qwest Corporation. The complaint alleges that Qwest denied AT&T access to inside wiring in multiple dwelling units (MDUs). Specifically, AT&T alleges that Qwest denied AT&T access to various "Option 3"¹ MDUs. Qwest answered the complaint, denied its allegations, and argued that the complaint must be dismissed because the actions about which AT&T complains are governed not by state law, but rather by the Section 252 of the Telecommunications Act of 1996.

¹ In an "Option 3" building, the building owner has opted to have Qwest's regulated facilities terminate within the building at each customer unit. In an "Option 1" building, the building owner has opted to have Qwest's regulated facilities terminate at the point of entry into the property or the building. Facilities that are "inside wire" in an "Option 1" building remain a part of Qwest's loop plant in an "Option 3" building. See Qwest Tariff WN U-40, Sec. 2.8.1.B.5.

4 The Commission convened a prehearing conference on December 20, 2000. Among other things, the Commission established a procedural schedule, invoked the discovery rule (WAC 480-09-480), and entered a Protective Order (First Supplemental Order, January 2, 2001). Evidentiary hearing proceedings were scheduled for June 25-28, 2001.

5 On December 20, 2000, Qwest filed a Motion to Amend Answer to Include a Cross-Complaint for Emergency Relief. On January 11, 2001, Qwest filed a Motion for Summary Determination.

DISCUSSION AND DECISION

6 This Order addresses the two procedural motions filed by Qwest; it does not address the substance of the Complaint.

A. Qwest's Motion To Amend Answer to Include a Cross Complaint for Emergency Relief

7 Qwest seeks to amend its answer to include a request for emergency relief pursuant to RCW 34.05.479 and WAC 480-09-510, set forth in Attachment A, which authorize the Commission to use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare. Qwest alleges that AT&T's actions in gaining access to MDUs without agreement by Qwest have jeopardized the integrity of Qwest's network, have jeopardized service to all customers within the MDU, and have placed customers out of service. Qwest attaches the Declaration of Jeffrey T. Wilson in support of its motion. The declaration cites three instances where AT&T's unauthorized access to Qwest terminals was believed to be the direct cause of at least three customers being placed out of service. Qwest requests the Commission to Order AT&T to cease and desist its activities at once, unless and until the parties are able to agree on a reasonable protocol for interim access while the complaint is being resolved.

8 **AT&T's Response.** AT&T responds that Qwest's cross-complaint fails to meet the requirements for obtaining emergency relief. AT&T asks the Commission to deny the request for emergency relief and permanently enjoin Qwest from padlocking NID/MPOE² terminals until AT&T's complaint can be heard by this Commission in its entirety. AT&T argues in the alternative, that if the Commission believes that initiating an emergency adjudicative proceeding is warranted, the proceeding should include contemplation of emergency relief to AT&T on its Complaint. Thus, the

² NID is the Network Interface Device which includes all features, functions and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring. *UNE Remand Order*, ¶233. MPOE terminal is the Minimum Point of Entry terminal.

Commission should hear this matter, in its entirety, in an extremely expedited manner.

9 AT&T maintains that the Commission should afford little weight to Qwest's employee declaration. AT&T argues that the declaration only contains the employee's suspicions that AT&T is responsible for certain service outages. Qwest offers no direct evidence that AT&T actually caused those outages by its actions.

10 Following AT&T's response, the parties filed a series of unsolicited pleadings. Qwest moved for leave to file a reply to AT&T's response, AT&T filed an answer to Qwest's motion for leave to file a reply, Qwest responded to AT&T's answer, and AT&T responded to Qwest's response to AT&T's answer.

Commission Discussion and Decision

11 The Commission grants Qwest's motion to amend its answer to include a cross-complaint for emergency relief. The Commission denies, however, the request for emergency relief. RCW 34.05.479 authorizes the Commission to use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare. The facts alleged in the pleading fail to show the existence of an immediate danger to the public health, safety, or welfare requiring immediate agency action. We conclude that there is not an "emergency" within the meaning of RCW 34.05.479. Our decision to deny the request for emergency relief is based on Qwest's motion and AT&T's response. The remainder of the pleadings filed by the parties were not requested by the Commission, fail to address the merits of the motion, and are not germane to our decision.

B. Qwest's Motion for Summary Determination

12 **Standard of Review.** WAC 480-09-426(2), set forth in Attachment A, provides that a party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor. In considering a motion made under WAC 480-09-426(2) the Commission may look to, but is not bound by, the standards applicable to a motion made under Civil Rule 56 of the Civil Rules for Superior courts. CR 56 is the summary judgment rule.

13 CR 56(b) provides that a party against whom a claim is asserted may move with or without supporting affidavits for summary judgment in its favor as to all or any part of a claim. Summary judgment is appropriate where, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The decision-maker must view the

evidence in a light most favorable to a non-moving party; however, the non-moving party may not rely upon speculation or on argumentative assertions that unresolved factual issues remain.

14 **Qwest's Position.** Qwest contends that the real issue raised by the complaint is the dispute between Qwest and AT&T regarding the terms and conditions, as well as the prices, for sub-loop unbundling. Qwest contends that the material facts in this case are not in dispute, as the only facts which are material to a determination of the issue raised by this motion are whether the parties had an interconnection agreement governing the disputed issues. Qwest argues that the interconnection agreements currently in effect between Qwest and AT&T and Qwest and TCG do not contain terms and conditions governing access to the building cable in MDUs as described in AT&T's complaint. No sub-loop elements are identified as separately available in the Agreements, nor are there prices set for the sub-loop elements. Both Agreements provide for use of a bona fide request (BFR) process to request unbundling of sub-loop elements. AT&T did not use the BFR process.

15 Qwest does not dispute AT&T's right to access the sub-loop. Rather, Qwest disputes AT&T's claim that it can unilaterally dictate the terms and conditions for that access. Qwest maintains that AT&T's right of access to the sub-loop at the building terminal is based solely on the FCC's *UNE Remand Order*.³ In that order the FCC defined sub-loops as those portions of the loop that are accessible at terminals in the incumbent's outside plant – i.e., “where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within.” *UNE Remand Order* at ¶206. The FCC further defined such accessible terminals to include (1) any technically feasible point near the customer premises, such as the pole or pedestal, the NID, or the MPOE; (2) the feeder distribution interface (FDI) which might be located in the utility room in a multi-dwelling unit, in a remote terminal, or in a controlled environment vault (CEV); and (3) the main distribution frame in the incumbent's central office. *Id.* Also in that order the FCC established a “rebuttable presumption that the sub-loop can be unbundled at any accessible terminal in the outside loop plant. *Id.* at ¶223. Thus, if the incumbent and CLEC cannot reach an agreement pursuant to voluntary negotiations about the availability of space or the technical feasibility of sub-loop unbundling at a given location, then the incumbent will bear the burden of demonstrating to the state, in the context of a Section 252 arbitration proceeding, that there is no space available or that it is not technically feasible to unbundle the sub-loop at the requested point. *Id.*

16 Qwest argues that because AT&T is asking for relief available to it solely under the Act and FCC rules, it must use the mandated process of negotiating and then

³ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (November 1999) (*UNE Remand Order*).

arbitrating an agreement under the Act. Qwest contends that this Commission considered a similar complaint, three years ago, and decided that the rights and obligations of the parties were established by the interconnection agreement in effect between the parties at the time, and that disputes should be resolved by arbitration, not complaint. *MCI Metro Access Transmission Services, Inc., v. U S WEST Communications, Inc.*, Docket No. UT-971158, (Order Granting Motion for Summary Determination, February 19, 1998).

17 **AT&T's Response.** AT&T opposes the motion for summary determination. AT&T argues that pursuant to the *UNE Remand Order*, AT&T has a clear right of access to the various MPOE Terminals/NIDs at MDUs in order to connect its network to internal customer premises wiring. AT&T maintains that there is a clear mandate from the FCC to allow AT&T access to the MPOE/NID, without distinction as to who owns the internal customer premises wiring. The NID section of the *UNE Remand Order* specifically and without exception requires an incumbent LEC to allow a CLEC "to connect its own loop facilities to the inside wire of the premises through the incumbent LEC's network interface device, or any other technically feasible point, to access the inside wire subloop network element."⁴ AT&T argues that the NID section of the *UNE Remand Order* does not reference the need to pursue negotiation or arbitration under Section 252 of the Act, because a CLEC should not have to negotiate a right it is clearly afforded under law.

18 AT&T next argues that both the FCC and the Washington Commission allow AT&T to pursue independent state remedies when Qwest has denied AT&T rights afforded to it under the Act. AT&T cites the FCC's statement that "nothing in sections 251 and 252 or the implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes or the common law."⁵ AT&T further argues that the Washington Commission has held that a CLEC has the right to pursue state remedies when there is a perceived violation of rights afforded to it under the Act, regardless of whether there is an interconnection agreement in place on the specific subject.⁶ AT&T distinguishes *MCIMetro Access Transmission Services, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-971158 cited by Qwest, by noting that the dispute there was based on an alleged *contractual* obligation to perform testing based on a superceding agreement negotiated by the parties after the dispute at issue arose.

⁴ *UNE Remand Order* at ¶237.

⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, First Report and Order, FCC 96-325 (August 1996) ¶129.

⁶ *MCIMetro Access Transmission Services, Inc v U S WEST Communications, Inc., Order Denying U S WEST's Petition for Reopening the Record, Affirming the Initial Order, in part, and Modifying the Initial Order, in part*, UT-971063 (Feb. 10, 1999) at ¶117-123.

19 Finally, AT&T argues that Qwest has flagrantly violated Washington statutes by attempting to negotiate commercially coercive, anti-competitive terms that are inconsistent with relevant law. AT&T contends that Qwest has violated RCW 80.36.186 (relating to unreasonable preference or advantage of pricing of or access to non-competitive services), RCW 80.36.170 (relating to prohibition of unreasonable preference), RCW 80.36.090 (relating to failure to furnish suitable and proper connections for telephonic communications), RCW 80.36.080 (relating to failure to render services in a prompt, expeditious and efficient manner), RCW 80.36.186 (relating to giving unlawful preference to any telecommunications company) and 80.36.070 (relating to damage to property).

20 **Qwest's Reply.** Qwest argues that a careful reading of all of the relevant FCC decisions clearly demonstrates that the building cable to which AT&T seeks access in this case is a portion of Qwest's network that is properly identified as the sub-loop, and is governed by FCC pronouncements on that element, not the NID. Qwest references the paragraphs in the *UNE Remand Order* devoted to sub-loop (§§ 202-229) and NID (§§ 230-240) and asserts that the NID is really the point where the loop plant ends, and is connected to another element. Qwest argues that the building terminals in this case are not NIDs, because they are a point wholly within Qwest's loop plant – the loop extends on either side of the building terminal in Option 3 buildings, because Qwest owns the facilities on either side of the building terminal. The NID in those buildings, the place where regulated facilities end and customer-owned facilities begin, is located in each individual apartment unit.

21 Qwest also references the FCC's *Access to Wiring Order*⁷ as support for its position that AT&T seeks access to the sub-loop. Qwest argues that several passages in that order also make it clear that where the ILEC's network extends into the building, the issue of access to that building cable is indeed the same as access to a sub-loop element.

22 In response to AT&T's position that it has a right to relief wholly under state law, Qwest argues that AT&T has misinterpreted Commission precedent, and has overlooked important provisions of federal law governing this issue. Qwest reiterates that the Act and FCC orders interpreting the Act contemplate that the parties who assert rights under the Act will do so in accordance with the terms and conditions of an interconnection agreement. In further support of its position, Qwest references a

⁷ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, *First Report and Order and Further Notice of Proposed Rulemaking*, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Fifth Report and Order and Memorandum Opinion and Order*, *In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Network*, *Fourth Report and Order and Memorandum Opinion and Order*, FCC 00-366 (Oct. 25, 2000). (*Access to Wiring Order*), §§ 44 and 48.

January 2001 FCC order preempting the Virginia State Corporation Commission's jurisdiction because that Commission had purported to resolve the rights of parties in accordance with state law, not the Act.⁸

Commission Discussion and Decision

23 Based on the pleadings before us, the issue to be resolved is what process the parties must follow to address their underlying dispute. AT&T's right to unbundled access to the sub-loop is undisputed. Rather, it is the terms and conditions of the access that need to be resolved. Qwest argues that the interconnection agreements currently in effect between the parties do not contain terms and conditions governing access to the building cable in MDUs as described in AT&T's complaint. Therefore, Qwest asserts, AT&T must use the mandated process of negotiating and then arbitrating an agreement under the Act.

24 AT&T argues that it has a clear right of access to the building cable in MDUs. Therefore, AT&T asserts, it should not have to negotiate a right it is clearly afforded under law. AT&T maintains that a complaint under state law is the appropriate process because Qwest has violated Washington statutes by attempting to negotiate commercially coercive, anti-competitive terms.

25 We note that the Act and prior Commission orders contemplate that interconnection and unbundled access will be accomplished through agreements, not piecemeal litigation. However, we are unable to agree with Qwest, that AT&T has no recourse outside of a Section 252 proceeding. Viewing the facts in the light most favorable to AT&T, Qwest could have failed to negotiate in good faith, and that conduct could be a violation of state law.

26 Here the parties have a third option, contained in their existing interconnection agreements. Both agreements include provisions that allow AT&T to negotiate for elements not expressly included in the agreement through a BFR process. *AT&T Agreement*, para.48, p. 55; *TCG Agreement*, p. 32. Based on the pleadings before us, it is unclear whether the parties were negotiating under the BFR process. It is clear that AT&T requested access to portions of Qwest's network necessary to serve individual customers, though AT&T may have phrased the request incorrectly because of the changing FCC rules and interpretations of those rules. It is also clear that Qwest responded to AT&T's request with three proposals for access that would be technically feasible.

⁸ *In the Matter of Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No. 00-218, *Memorandum Opinion and Order*, FCC 01-20 (January 19, 2001). Qwest's Reply Attachment D.

27 AT&T has a right to this access, and it requested access. Qwest's response may not be that of a party negotiating in good faith. The appropriate next step is for Qwest to promptly provide access to AT&T in any technically feasible manner requested by AT&T. The *UNE Remand Order* established a rebuttable presumption that the subloop can be unbundled at any accessible terminal in the outside loop plant. We note the long period of time AT&T has awaited access and conclude that prompt access is consistent with the public interest. The parties should continue the BFR process to negotiate the business arrangements by which Qwest will be compensated for that access.

28 Accordingly, we deny Qwest's motion for summary determination. We direct Qwest to promptly provide access to AT&T in any technically feasible manner requested by AT&T, and order the parties to continue the BFR process to negotiate the compensation due Qwest for that access, and report back to the Commission within thirty days of receipt of this Order.

FINDINGS OF FACT

29 Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by reference.

- 30 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate telecommunications companies offering service to the public for compensation.
- 31 (2) Qwest Corporation (Qwest) and AT&T Communications of the Pacific Northwest, Inc. (AT&T) are engaged in providing telecommunications services for hire to the public in the state of Washington.
- 32 (3) The facts of record do not demonstrate the existence of an immediate danger to the public health, safety, or welfare requiring immediate agency action.
- 33 (4) AT&T is entitled to access to the portion of Qwest's network that is properly identified as the sub-loop, and Qwest is entitled to compensation for that access.
- 34 (5) The interconnection agreements currently in effect between Qwest and AT&T and TCG do not contain terms and conditions governing access to the sub-loop as described in AT&T's complaint.

- 35 (6) The interconnection agreements currently in effect between Qwest and AT&T
provide for use of a bona fide request (BFR) process to request unbundling of
sub-loop elements.
- 36 (7) Under the facts presented, it is unclear whether the parties followed the BFR
process.
- 37 (8) The pleadings show AT&T did request access and the parties were negotiating
the request. The pleadings also show that Qwest offered AT&T three proposals
for access that would be technically feasible.

CONCLUSIONS OF LAW

38 Having discussed above in detail all matters material to our decision, and having
stated general findings and conclusions, the Commission now makes the following
summary conclusions of law. Those portions of the preceding detailed discussion
that state conclusions pertaining to the ultimate decisions of the Commission are
incorporated by this reference.

- 39 (1) The Washington Utilities and Transportation Commission has jurisdiction over
the parties and subject matter of this proceeding. *RCW 80.04, RCW 80.36.*
- 40 (2) Qwest's motion to amend its answer to include a cross-complaint should be
granted.
- 41 (3) Under the evidence presented in this proceeding, there is not an immediate
danger to the public health, safety, or welfare requiring immediate agency action.
RCW 34.05.479
- 42 (4) Qwest's cross-complaint for emergency relief should be denied.
- 43 (5) Qwest's motion for summary determination should be denied.
- 44 (6) Qwest should be ordered to promptly provide access to AT&T in any technically
feasible manner requested by AT&T, and the parties should be ordered to
continue the BFR process to negotiate arrangements by which Qwest will be
compensated for that access, and report back to the Commission within 30 days of
receipt of this Order.

ORDER

THE COMMISSION ORDERS:

- 45 (1) Qwest's motion to amend answer to include a cross-complaint is granted.

- 46 (2) Qwest's cross-complaint for emergency relief under RCW 34.05.479 is denied.
- 47 (3) Qwest's motion for summary determination is denied.
- 48 (4) Qwest is ordered to promptly provide access to AT&T in any technically feasible manner requested by AT&T, and the parties are ordered to complete the BFR process to negotiate the business arrangements by which Qwest will be compensated for that access, and report back to the Commission within thirty days of receipt of this Order.

DATED at Olympia, Washington, and effective this ____ day of April, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

NOTICE OT PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-09-760.

Attachment A – Applicable Statute and Rules

RCW 34.05.479 Emergency adjudicative proceedings. (1) Unless otherwise provided by law, an agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

(2) The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

(3) The agency shall enter an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

(4) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when entered.

(5) After entering an order under this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

(6) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(7) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.

(8) This section shall not apply to agency action taken pursuant to a provision of law that expressly authorizes the agency to issue a cease

and desist order. The agency may proceed, alternatively, under that independent authority.

WAC 480-09-510 Emergency adjudicative proceedings. (1) The commission may use emergency adjudicative proceedings pursuant to RCW 34.05.479 to suspend or cancel authority, to require that a dangerous condition be terminated or corrected, or to require immediate action in any situation involving an immediate danger to the public health, safety, or welfare requiring immediate action by the commission. Such situations include, but are not limited to:

- (a) Failure to possess insurance;
- (b) Inadequate service by a gas, water, or electric company when the inadequacy involves an immediate danger to the public health, safety, or welfare; and
- (c) Violations of law, rule, or order related to public safety, when the violation involves an immediate danger to the public health, safety, or welfare.

(2) The commission shall hear the matter and enter an order. If a majority of the commissioners is not available, a commissioner shall hear the matter. If no commissioner is available, a commission administrative law judge shall hear the matter.

(3) The commission's decision shall be based upon the written submissions of the parties and upon oral comments by the parties if the presiding officer has allowed oral comments. The order must include a brief statement of findings of fact, conclusions of law, and justification for the determination of an immediate danger to the public health, safety, or welfare. The order is effective when entered. The commission must serve the order pursuant to WAC 480-09-120.

WAC 480-09-426 Motion for summary disposition.

(2) Motion for summary determination. A party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination

in its favor. In considering a motion made under this subsection, the commission will consider the standards applicable to a motion made under CR 56 of the civil rules for superior court.





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Friday March 30, 5:21 pm Eastern Time

Press Release

SOURCE: SunWest Communications, Inc.

SunWest Increases Damage Claim Against Qwest To \$20 Million

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COLORADO SPRINGS, Colo., March 30 /PRNewswire/ -- Local telephone provider SunWest has again raised the stakes in its battle with Qwest to keep customers connected. SunWest now asserts that Qwest continues to delay putting SunWest customers through to the network switch, and as a result more and more customers are losing telephone service, or are forced to stay resale customers.

When SunWest first sued Qwest last August, the claim, currently before an arbitrator, was for \$10 million. Now SunWest is asking for \$20 million, as a result of what it says is Qwest's delays, incompetence and negligence. SunWest today filed an amended complaint with the arbitrator, former Colorado Supreme Court Justice William Erickson.

"It's outrageous. It seems like Qwest is taking this action in an attempt to sabotage our relationship with our customers and put us out of business," said Dan Potter, SunWest president. Potter said he's agreed to arbitration, but he's been rethinking that offer because Qwest consistently has claimed it cannot allow some SunWest customers access to the SunWest switch through Qwest lines.

The dispute stems from a competitive battle between a telephone company that was founded to serve the area in northern El Paso County around Monument, and telecommunications megaforce Qwest. Until its problems with Qwest, SunWest has steadily signed up telephone users in emerging residential areas.

When SunWest sued Qwest in August, 2000, it alleged that Qwest breached an agreement between the two companies by failing to pay SunWest as previously agreed by the parties. Additional complaints followed in October and November when Qwest failed to provide interconnections in a timely manner, depriving customers of telephone service.

Potter says Qwest's size and attitude are key elements in the Qwest intransigence. Qwest now claims it is unable to "port" 3,000 SunWest customers who have a special type of circuit (Integrated Pair Gain) on their lines, and claims confusion inside Qwest on how to serve those customers. When Qwest does not "port" customers to SunWest's switch, the customer remains a resale customer, and Qwest is able to keep the bulk of the revenue for its own.

SOURCE: SunWest Communications, Inc.

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Docket No CIF-166T

SUNWEST COMMUNICATIONS, INC.

Complainant

v.

QWEST CORPORATION

Respondent

FORMAL COMPLAINT

SunWest Communications, Inc., by its attorneys, Dufford & Brown, P.C., for its formal complaint against Respondent, states and alleges as follows:

1. SunWest Communications, Inc., a Colorado corporation and successor by merger to Kings Deer Telephone Company ("SunWest"), is a telecommunications public utility which provides local telephone service to business and residential customers in El Paso County, Colorado.

2. Qwest Corporation, a Delaware corporation and successor to US West, Inc. ("Qwest"), is a telecommunications public utility and the incumbent local exchange carrier providing local telephone service to business and residential customers throughout Colorado and other states.

3. SunWest submits its Complaint pursuant to 4 CCR 723-1-61(b).¹ SunWest will cooperate in the prosecution of its Complaint and will appear at the hearing set in this matter

4. SunWest entered into an agreement with Qwest reflected in the letter dated February 27, 1998, from Larry Brotherson to George Coon and Chris Holden, a copy of which is attached hereto as Exhibit A (the "Agreement"). By the agreement of the parties and by its terms, the Agreement was separate from and independent of the interconnection agreement between SunWest and Qwest and their predecessors, which Qwest had stated it would not honor.

5. The parties intended the Agreement to be an interim resolution of the dispute between them arising out of Qwest's refusal or delay in processing and successfully completing SunWest's orders for switch interconnection, unbundled switch ports and local loops. SunWest required that such orders be processed successfully in order to become a facilities-based local exchange provider. The parties intended, and the Agreement reflects, that the payments from Qwest to SunWest are to replace the access charge revenue which SunWest would have been entitled to if Qwest had successfully processed SunWest's orders in a timely manner. Further, the payments were intended by the parties, as reflected in the Agreement and by the payments made by Qwest pursuant to the Agreement, to correspond with the growth in SunWest's customer base.

6. SunWest has performed its obligations under the Agreement through the present.

¹SunWest is not invoking the accelerated complaint procedures of 4 CCR 723-1-61(k).

7. Qwest performed its payment obligations by making the payments due to SunWest under the Agreement for periods through December 1999.

8. Qwest has failed and refused, despite repeated demands by SunWest, to make the payments due to SunWest under the Agreement from and after January 2000. In August 2000, Qwest purportedly terminated the Agreement retroactive to January 2000.

9. Qwest has not presently, and had not in either January or August of 2000, successfully processed SunWest's orders for unbundled switch ports to enable SunWest to fully become a facilities-based local exchange provider. Qwest has informed SunWest that it is unable or unwilling to make unbundled switch ports available to SunWest for approximately half of SunWest's local exchange customers, thereby forcing SunWest to remain a resale customer of Qwest as to those customers and to continue to forego the cost savings and revenue enhancements that would otherwise be available to SunWest.

10. The Agreement provides that after six months, either party may cancel it. Absent an alternative resolution by the parties, which has not occurred, the Agreement further provides that "either party may seek recourse for any arrangements going forward at the Colorado Commission."

WHEREFORE, SunWest respectfully requests the Commission to grant the following relief:

a. Determine that the Agreement may not be terminated by Qwest or that Qwest must continue the payments to SunWest contemplated by the Agreement until Qwest has

successfully completed SunWest's orders for unbundled switch ports for all of SunWest's customers; or

b. Such other equivalent relief which will appropriately address the circumstances which gave rise to the Agreement and which continue from and after the termination of the Agreement, if in fact the Agreement has been terminated.

Dated this 13th day of April, 2001.

DUFFORD & BROWN, P.C.

By: Richard L. Fanyo

Richard L. Fanyo, #7238

Scott J. Mikulecky, #16113

1700 Broadway, Suite 1700

Denver, CO 80290-1701

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Complainant's Address:

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Colorado Springs, Colorado 80918

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Larry B Brotherson
Senior Attorney

Via Fax 719-592-9952

February, 27th 1998

Mr. George Coon
President,
Kings Deer Telephone Company
6189 Lehman Drive, Suite 200,
Colorado Springs, CO 80918

Mr. Chris Holden, Esq.
Counsel
Kings Deer Telephone Company
6189 Lehman Drive, Suite 200,
Colorado Springs, CO 80918

Re. Dispute settlement between Kings Deer and U S WEST

Dear George and Chris

The purpose of this letter is to confirm in writing the offer by U S WEST that was verbally accepted by Kings Deer on our phone conversations of Thursday. This offer was made to resolve a dispute between our companies which arose due to the required time necessary for Kings Deer to place orders for unbundled switch ports as U S WEST outlined them and (Kings Deers belief that this delay will cause Kings Deer to forgo revenues that it otherwise would have been able to earn on those unbundled elements. We perhaps have an additional dispute over the ports themselves but the parties felt that an interim solution that would compensated Kings Deer while we work on a long term proposal to resolve the matter would be in the best interest of both sides.

The proposal I put forward on behalf of U S WEST was as follows:

U S WEST agrees to lease from Kings Deer the loops necessary to serve customers on the Kings Deer development through Kings Deer as the reseller.

The effective date of settlement and commencement of the lease payments will be February 25th 1998 and the term will be 6 months.

Kings Deer will continue to act as a reseller of U S WEST local service, such wholesale service being provided by U S WEST in part over facilities leased from Kings Deer .

As a reseller Kings Deer will be U S WEST 's customer of record and Kings Deer will be responsible for interface with and billing of their end users.

U S WEST will be responsible for and retain all originating and terminating access associated with the resale customers.

Kings Deer will keep repair and maintenance responsibilities for the leased Kings Deer facilities.

The compensation that U S WEST will pay Kings Deer to lease these loops will be calculated to replace the access revenue that Kings Deer otherwise would have been entitled to charge to IXCs on these loops and switch ports pursuant to approved state and federal tariffs filed by Kings Deer. Tandem transport and tandem switching are not included in these calculations.

Kings Deer will use its present intrastate and interstate filed and approved access rates during the term of this interim settlement. Kings Deer will provide U S WEST with verifiable records to support such charges

U S WEST will work any Kings Deer orders during this interim period as resale orders.

Kings Deer will forgo any Colorado Public Utility Commission complaints or actions based on the interconnection agreement during the interim period.

George and Chris, this is intended as a short term settlement of a monetary dispute that will protect Kings Deer from potential lost revenues while we hammer out the long term solution to our problems. As such this will be a settlement agreement separate from the interconnection agreement between our companies. You originally spoke of a four month period because a flat rate lease would not accommodate customer growth. Since the intent of this formula is to replace the lost access revenues as the customer base grows I would offer

a settlement period of six months. This should allow our companies adequate time to negotiate new arrangements. This interim settlement shall be for a period of 6 months. There after either party may cancel and if no agreement has been reached either party may seek recourse for any arrangements going forward at the Colorado Commission. The treatment of any compensation due between our companies during the 6 month period will be covered under this settlement.

If this letter accurately reflects your understanding of our agreement please concur by signing a copy and returning it to me.

Very truly yours,



Larry Brotherson
Senior Attorney



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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO
Docket No. 97I-198T - Workshop 5

* * *

IN THE MATTER OF THE INVESTIGATION OF US WEST
COMMUNICATIONS, INC.'S COMPLIANCE WITH SS 271(c)
OF THE TELECOMMUNICATIONS ACT OF 1996.

Pursuant to continuation, the Technical Workshop
was held at 8:35 a.m., April 17, 2001, at 3898 S.
Wadsworth, Lakewood, Colorado, before Facilitators
Hagood Bellinger and Margin Skeer.

APPEARANCES

(As noted in the transcript.)

1 loops, Loop-7.

2 MR. WILSON: Well --

3 MR. BELLINGER: Sunwest's concern --

4 MR. WILSON: What about -- what about the
5 other offices, Colorado Springs east?

6 MR. BELLINGER: Well, what I understood
7 was there was no collocation.

8 MR. POTTER: There is no collocation?

9 MR. WILSON: So it's Qwest's position
10 that if a carrier has no collocation in an office, you
11 can't -- you can't get unbundled loops; is that Qwest's
12 position?

13 MS. DEVOS: They are not in a position to
14 request them for those collocations.

15 MR. WILSON: We're not.

16 MR. BELLINGER: Are you referring to an
17 EEL? Is that what you are referring to, Ken?

18 MS. DEVOS: I'm not the EEL person to
19 address that, but I put that to Sunwest, I don't know
20 that there has been any EEL request for those or any
21 orders placed for those collocation areas.

22 MR. BRYAN: No, there have not been.

23 MR. WILSON: So you just --

24 MS. DEVOS: So it's not an issue.

25 MR. WILSON: So you just refuse to

1 provide -- I mean, if AT&T wanted to provide and the
2 people that were ordering didn't know, you just reject
3 them and there is no discussion about, Well, you
4 could -- you could order it this way or you have this
5 alternative? You just reject them and that's it?

6 MS. WALTERS: Well, part of the unbundled
7 loop process is you need to provide us with a CFA of
8 your collocation in order for the LSR to go through.
9 If you do not have a collocation, you will not have CFA
10 unless you have CFA from another possible co-provider
11 that you are going to lease it from. And if that's the
12 case, you could submit that. But an unbundled loop
13 does require that. That is part of the LSR process.

14 As far as your previous question on EEL,
15 Sunwest has not requested EEL. We have never had any
16 discussions in regards to EEL in these areas where they
17 currently do not have collocation.

18 MR. WILSON: Is it possible for Sunwest
19 or any carrier to get unbundled loops out of Colorado
20 Springs east if they aren't collocated in Colorado
21 Springs east?

22 MS. WALTERS: If they are going to
23 utilize another CLEC's collocation, there -- their
24 particular collocation to get that, yes, they could do
25 so. But as far as an unbundled loop directly -- are

1 you referring to like leasing our loop? That would be
2 basically like a resold line.

3 MR. WILSON: No, no, no.

4 MS. LISTON: Ken, I think this may help a
5 little bit.

6 When -- when we're using the term
7 unbundled loop -- and we've tried to be real careful in
8 our work, in our testimony for 271 purposes. We
9 strictly are talking about the plain unbundled loop.
10 We're not talking about a loop combination, we're not
11 talking about an EEL, we're just talking about an
12 unbundled loop.

13 And in response to some of the issues on
14 Sunwest, they said that they -- that they could not
15 convert these to unbundled loop. And we just looked to
16 see whether they had collocation on there, not saying
17 that there are not other alternatives; but we were
18 focusing strictly on the unbundled loop issue within
19 this workshop. And we were just looking at that
20 unbundled loop and then saying, If you want just a
21 plain unbundled loop, then that requires the
22 collocation.

23 You are right, there are other
24 alternatives; but it's not just a plain unbundled loop.

25 MR. WILSON: So this is an issue we

1 should take up in Thursday and Friday when we perhaps
2 discuss EELs again in the previous workshop?

3 MS. DeCOOK: Huh? You mean next time we
4 talk about EELs?

5 MR. WILSON: Well, we have --

6 MS. DeCOOK: I don't think we're doing
7 that this week.

8 MR. WILSON: We have part of carryovers
9 from the previous workshop; it's either that or reopen
10 it -- reopen EELs then.

11 MS. LISTON: I'm not sure, Ken. I'm kind
12 of missing the point.

13 MR. BELLINGER: What is the issue you
14 would like to open, Ken?

15 MR. WILSON: How is a carrier supposed to
16 get unbundled loops from an office where there is no
17 collocation space, for instance? How are they supposed
18 to do that?

19 MR. STEESE: Well, you dealt with that in
20 the EEL workshop, didn't you? You have dedicated
21 transfer going from a collocation in a different
22 central office to Central Office B, and you pick up a
23 loop. You talked about that at length for weeks in
24 different workshops.

25 MR. WILSON: We talked about it in the

1 theoretical ability; and I believe you said it's
2 theoretically possible, but I think what we're kind of
3 hearing is in actuality you may not be doing it.

4 MR. STEESE: I haven't heard that at all.
5 I heard them say they want unbundled loops. I heard
6 them say that they haven't made a request for an EEL.
7 And so we're looking at this as a straight unbundled
8 loop process which would require a collocation of a CO
9 they are getting the loop from.

10 MR. WILSON: Let me ask them, then, did
11 Sunwest ever ask in -- were they ever told that they
12 needed collocation in these other offices in order to
13 get a loop; and if you were told that, did you ask how
14 you could get the loops from that office to your
15 collocation, say to go from Colorado Springs east with
16 transport to Gate House where you have collocation; did
17 you ever ask -- did Qwest ever offer that explanation?

18 MR. POTTER: Not to my knowledge. We
19 have always been under the impression, in order to have
20 unbundled loop, we need to have collocation facilities
21 in that CO, we would like to take your office of
22 avoiding some of those through the EEL and see how that
23 works.

24 MR. STEESE: We have been talking at
25 length over the past several weeks about EELs in

1 Colorado; and there is a whole proposed set of contract
2 language on how you can get EEL. I would recommend
3 that you talk to your account team get that contract
4 language, put it in your contract, and order away.

5 MR. POTTER: So that is available now?

6 MR. STEESE: Oh, yeah -- has been for
7 some time.

8 MR. WILSON: And I guess that's part of
9 my problem. I mean, this is like I've Got a Secret.

10 MR. BELLINGER: Well, wait a minute.

11 MS. LISTON: Oh, come on, Ken.

12 MR. STEESE: That is not fair. We
13 submitted to every single co-provider in February of
14 2000, everyone, a proposed contract amendment that
15 included EEL, Ken -- every single co-provider. And for
16 you to say, I have a secret, is ridiculous to be
17 perfectly frank.

18 MR. WILSON: Let me ask your -- let me
19 ask your customers if that's how they --

20 MR. STEESE: What you are basically
21 telling us again is it's our obligation to go forth and
22 educate every customer about every option that might be
23 available and to sit down and work with each one. EEL
24 has been discussed at the FCC since 1996. And in fact,
25 when you look at UNE combinations, we specifically made

1 that offer in February of 2000 to every co-provider.

2 If they elect not to take advantage of
3 that, if they elect to, that is their choice.

4 MR. WILSON: You know --

5 MR. STEESE: And for you to say we're
6 hiding the ball is just not accurate.

7 MR. WILSON: If I go to an electrical
8 store and ask them for a certain piece part to do a
9 configuration and they are out of something, they
10 usually tell me, Well, why don't you try this; we don't
11 have this, why don't you do this.

12 That never happens in Qwest -- never
13 happens. It's, Reject the order; and you got to start
14 figuring out or guessing what you need to do to get
15 what you need to do to serve your customers. That's
16 why I made my comment.

17 MR. STEESE: How did you know to ask
18 about an EEL?

19 MR. WILSON: I have been doing this for
20 five years and running into these problems.

21 MR. STEESE: That is exactly the point.
22 You have been doing this for five years so you know
23 EELs exist. You know what? So do we. For us to
24 presume that they know nothing about it -- I mean --

25 MR. POTTER: I --

1 MR. STEESE: -- that's ridiculous.

2 MR. POTTER: I guess I share his
3 perspective. I don't think we're often treated like a
4 customer. There is not -- I would like to ask Terry,
5 does she know about the EEL and why didn't she
6 recommend it to us?

7 MS. WALTERS: I knew about the EEL.
8 There was a mailout that was mailed out to Sunwest when
9 EEL was first offered as a product. And it did advise
10 you that if you wanted to obtain information about EEL,
11 you were to contact your account manager who could then
12 go ahead and get the amendment sent out to you to sign
13 and then we could go ahead and refer you to the
14 technical publications for EEL, where you could look at
15 it to see if it would meet your needs.

16 I never heard anybody from Sunwest
17 stating that they were interested in EEL, they wanted
18 the amendment added to their contract to include EEL
19 language into their contract.

20 So as an account manager, every time a
21 new product comes out to our customers, we mail out the
22 mailouts to the individual customers. And I do not
23 personally call each and every one of my customers and
24 say, We sent a mailout about this product, are you
25 interested in it? I personally do not do that. And so

1 consequently --

2 MR. POTTER: So even though we have had
3 hundreds of phone conversations with you, you never
4 suggested an alternative that might be helpful to us,
5 the customer?

6 MS. WALTERS: To be perfectly honest with
7 you, I was not very familiar with EEL until I started
8 dealing with another customer that inquired about it --
9 it has not actually decided to use it -- and so
10 consequently I did not look at it as an option for you.
11 That is correct.

12 MR. POTTER: I appreciate your honesty.
13 I guess I would ask the question, if you are not
14 familiar with it, how are we supposed to be?

15 MS. WALTERS: Well, that is where --
16 that's where the mailout comes out. What I make it a
17 point as -- if I am not completely familiar with a
18 product, if I have a customer that's asking for a new
19 product, I will tell my customers up front, I'm not
20 familiar with this product; it's a new product to me as
21 well; I will gladly work with you to find out what it
22 can or cannot do for you and I work with my customers
23 on that.

24 But I do not go out and, so to speak,
25 solicit that product from them; because I do not know,

1 based on your particular business plan, based on your
2 infrastructure, if that is something you would actually
3 utilize. So I do not solicit that, but I learn with my
4 customers.

5 I have learned with Dave Bryan on the ASR
6 processes, the switch issues that we had. I was very
7 up front and honest with Dave Bryan and Tagan Hawker
8 that this was a new arena for me and I would gladly
9 work with them and learn as much as I can. So I do not
10 know every product and I am willing to learn and offer
11 what's available; but, again, I do not solicit these
12 products to my customers, say, We have this, is that
13 going to be useful for you?

14 MR. JOHNSON: But, Terry, you said we
15 were untrained personnel. You -- I heard you before,
16 you said we were the untrained personnel and that was
17 the reason why IPG and other situations happened; but
18 now you are indicating that you weren't trained on it
19 and you never brought it to our attention; but yet you
20 have a mandate under the 1996 Act, five years ago, as
21 you have a mandate to open up facilities to us. We
22 have testimony that facilities were exhausted, you
23 couldn't provide it.

24 MS. DEVOS: Just --

25 MR. JOHNSON: You have a mandate five

1 years ago to provide that to competitors.

2 MS. DeVOS: If I could interject, Terry
3 said she did apprise you of it and if you have an
4 interest in it that she -- that she would put you --
5 she would address it, she would work with you on it;
6 and she's worked with other customers on it and we have
7 made inquiries about a particular product.

8 MR. STEESE: When a product offering
9 comes out to you, what do you do with it?

10 MR. JOHNSON: I don't know. Who do you
11 send it to?

12 MS. WALTERS: It currently goes to --
13 George Coon, our contact person, is on all our
14 mailouts.

15 MR. STEESE: So, George, what did you do
16 with it?

17 MR. COON: We review all of them and then
18 we file them. And if it's not readily understandable,
19 then we put out some feelers. However this EEL
20 situation I have not seen anything on it. So I don't
21 know -- I have received -- I have received those things
22 all the time, but I have not seen the EEL -- this EEL.

23 MS. DeVOS: Or you don't recall
24 specifically seeing --

25 MR. COON: Yeah.

1 MS. DeVOS: You don't know either way.

2 MR. COON: As I understand how it's being
3 explained to me now, I would have jumped all over it
4 because I have -- I have jumped all over dark fiber, I
5 have -- on a number of occasions, as Terry will testify
6 to, we have talked on numerous occasions on those --
7 those notifications. However, I have not personally
8 seen this one and they all come to me.

9 MR. POTTER: I might point out also if
10 this was mailed out in February of 2000 it was before
11 we started porting and experienced the problems and had
12 all the significant problems with IPG.

13 MR. STEESE: Dan, I don't know --

14 MR. POTTER: It may not have been
15 applicable to our situation as it came out.

16 MR. STEESE: Let's re --

17 MR. POTTER: We were relying on our
18 account represents.

19 MR. STEESE: I think we're talking past
20 each other.

21 Go ahead, Jean.

22 MS. LISTON: I think as I started hearing
23 some of the issues on Sunwest that there may have been
24 a crossways discussion right now that happened. When
25 Ken started this whole discussion on EELs, it was

1 around the fact that we said, you know, because this
2 little sheet that says there is no collocation; and
3 therefore if there is no collocation, you can't do an
4 unbundled loop. The EEL situation would allow for an
5 opportunity to provision unbundled loops without
6 collocation in a central office.

7 It does not address some of the
8 situations with the problems that you would have with
9 IDLC. So I just wanted to make sure that was clear,
10 this was not -- because when you said our porting
11 problems, this is -- EELs would have nothing to do with
12 your porting -- with the problems with conversions to
13 unbundled loops on IDLC.

14 So I just wanted to make sure we were
15 clear that this had nothing to do with the IDLC issue
16 but this had to do with Ken asking, Do you have to have
17 collocation to have an unbundled loop?

18 MR. POTTER: And I appreciate that. I
19 want you to know though that through numerous meetings
20 with Qwest and mediation and negotiation and lawsuits,
21 we have indicated to them that we needed 6,000 -- 6500
22 lines in our switch to be at a break even -- to even
23 make it. And yet we've talked about that fact over and
24 over again, yet we've never been offered any other
25 alternatives to get these unbundled loops ported over.

1 And at the same time we were told we
2 couldn't -- we couldn't port IPG. So every time we
3 make a sale, 40 percent -- you know every time we make
4 sales, 40 percent of them go away because they are IPG.
5 So here we are teetering on the verge of bankruptcy
6 because my account representative hasn't been helpful.

7 MR. BELLINGER: Let me ask you a
8 question, these six offices listed here, do you want
9 unbundled loops in those?

10 MR. POTTER: Absolutely.

11 MR. BELLINGER: Okay. Have you ordered
12 collocation of a loop with that option -- that's your
13 first option, I assume.

14 MR. POTTER: Well, collocations take time
15 and money, neither of which I have.

16 MR. BELLINGER: Okay. So you decided not
17 to collocate; but now that you know about the EEL
18 option -- or have we discussed price -- you are
19 interested at least in approaching it from that
20 standpoint. Is that what I'm hearing?

21 MR. POTTER: Absolutely.

22 MS. QUINTANA: First of all, a statement
23 and then a request from -- for Qwest: I'm very
24 disheartened by this conversation. I think -- from my
25 point of view anyway, Dan hit it on the head with his

1 last statement there that it seems like the
2 communication is just nonexistent between Sunwest and
3 their account representative. I was under the
4 impression before, having sat through these workshops
5 for a year now, that the account representative is the
6 person who is supposed to know the information
7 pertinent to the CLECs, how to process orders, what
8 orders should be processed, available products, things
9 that are changing throughout the workshop process,
10 amendments to their ICAs that are available, all of
11 these types of things.

12 And so finding out today that this is
13 possibly where the miscommunication is happening is
14 going to probably lead to a lot of other questions in
15 our remaining workshops.

16 Having said that -- and I don't just mean
17 with this EEL notification. I think that there are a
18 lot of steps along the way -- for instance, another
19 example that I see where the communication lapsed was
20 when the customer held order came back from Sunwest to
21 Qwest and they were not notified or informed or
22 questioned by their account representative that they
23 needed to SUP that order in order for the disconnects
24 not to occur. I mean, just a miscommunication like
25 that -- I don't see how that happened.

1 But anyway, my request to Qwest is -- I
2 hope a minor one -- I would like to see a copy of the
3 EEL notification that went out in February to all of
4 the co-providers, just for my own sense of the
5 readability of those notifications and the timeliness
6 of that, please.

7 MR. BELLINGER: Let's see, that was a
8 February 2000 notification, wasn't it?

9 MS. QUINTANA: Right.

10 MR. BELLINGER: Is that what you said,
11 Chuck?

12 MR. STEESE: Correct.

13 MR. BELLINGER: So their point was they
14 were not really in that business --

15 MR. STEESE: And, Becky --

16 MR. BELLINGER: -- not to disagree with
17 your request.

18 MR. STEESE: And we certainly can get
19 that for you.

20 I'm troubled by your comment however.
21 When -- what I hear them saying is -- I'm not
22 attempting to be pejorative here, but -- they are so
23 unsophisticated, we need to treat them different.

24 MS. JENNINGS-FADER: No.

25 MR. STEESE: And we deal with account

1 teams all the time. You know what, they have people
2 and they know what they need to make their business
3 work.

4 MS. QUINTANA: But, Chuck --

5 MR. STEESE: This, I think, is a perfect
6 example. And for us to presume that someone is so
7 unsophisticated we need to educate them about every
8 product without -- beyond notifying them about it --

9 MS. QUINTANA: There is a difference
10 between AT&T who has been in the business before
11 Qwest -- and even a Covad who does multiple lines,
12 multiple orders, has been through this process for
13 years, and a new provider, whether it be Sunwest or New
14 Edge or whatever small CLEC is out there that is
15 starting up business and does not have the experience,
16 does not have the involvement in this workshop process
17 to know what products are being offered, how those
18 products are being offered.

19 It was my point of view and my belief
20 before today that that's what the account managers were
21 for.

22 MR. STEESE: So we're supposed to treat
23 CLECs different then? See, where do you think the
24 employees come from these companies? We had the
25 gentleman that runs the network say he's been in

1 telecommunications for 20 years. That's 17 years
2 longer than me. And the simple fact is, you are
3 presuming that these people in smaller companies are
4 unsophisticated.

5 I don't presume that. I presume that
6 they are sophisticated people that have dealt with
7 telecommunications for years, themselves, and they just
8 so happen to work in a company with fewer access lines.

9 MS. QUINTANA: I am not by any means
10 taking away any of the sophistication or knowledge base
11 from the small CLECs. I know that a lot of them come
12 from the RBOCs. I know that a lot of them have years
13 and years and years of experience in
14 telecommunications. What they do not have experience
15 in are the new product offerings, workshop processes,
16 SGAT processes that are taking place that they because
17 of resource constraints or because of whatever are not
18 participating in to know.

19 It was my understanding that this
20 information would be filtered down through Qwest to the
21 account representatives to then move -- send that
22 information on to the CLECs.

23 MR. STEESE: But that's exactly what we
24 said we did.

25 MS. QUINTANA: It doesn't seem to be

1 happening. There seems to be a disconnect there
2 between the account manager and the CLECs.

3 MR. STEESE: What are you expecting when
4 we send out a notification, a follow-up call to say,
5 Did you understand?

6 MS. QUINTANA: I'm saying the product
7 manager should know their customers and their
8 customers' infrastructure enough that when a company
9 such as Sunwest has collocation in three COs and has
10 customers out of another five or six and that -- that
11 account manager knows by talking to that customer that
12 that customer wants to provide service by unbundled
13 loops that that account manager should then say, We
14 have this EEL product that we have a new offering on,
15 here's the offering, would this work for you? And that
16 doesn't seem to be happening.

17 (Discussion off the record.)

18 (Recess.)

19 MR. BELLINGER: There were a couple other
20 people I think had been holding off and decided they
21 wanted to join in up at this end.

22 So, Mike, I think you wanted the floor,
23 you said?

24 MR. ZULEVIC: Yes. I will like to make a
25 few comment just briefly about Covad's experience as it

1 relates to dealing with our account managers account
2 managers and so forth. And I have got to pretty much
3 echo the frustration that's been made earlier that my
4 personal experience has been very lacking in getting
5 cooperation and really getting knowledgeable responses
6 from our product -- our account managers within Qwest.

7 And I've always felt as though they were
8 primarily there just to pass on policy statements to us
9 rather than really trying to help us as a customer.
10 And I think that that is not just the case with the
11 specific problems we've talked about here and a
12 specific account manager. I think it's more deeply
13 based than that and more widely spread across the
14 wholesale markets within Qwest.

15 The reason that I have been somewhat more
16 successful maybe is because I do know a lot of the in's
17 and out's within Qwest; and so rather than accepting an
18 answer from my account manager as to how things ought
19 to be, I know where to go to actually get the right
20 answer. And I can see where new entrants may
21 definitely have a problem finding the same responses
22 that I can get.

23 I think Ken hit it on the head, as did
24 some of the other folks here, that it's time that
25 Qwest's wholesale markets actually start developing a

1 pro-customer position and actually try to enable
2 competition.

3 MR. BELLINGER: Okay.

4 MS. DeVOS: If I could just -- you know,
5 Terry has had to listen to I think a number of sort of
6 attacks, and I think she needs -- it would be
7 appropriate for her to have an opportunity to talk
8 about what she does to for this customer -- because
9 it's been incredible, the kinds of things that she has
10 provided. She's saved them from outages. She's
11 watched things for them that she shouldn't have to
12 watch. And I would like to just give her the
13 opportunity to respond.

14 MS. WALTERS: Thank you.

15 I have done numerous things for this
16 customer that I have not done for other customers of
17 mine, such as during the ASR process that Sunwest was
18 experiencing numerous difficulties on, specifically
19 NCNCI codes. And as most of you are aware, those can
20 be very confusing, hard to understand what goes where
21 and what. And we had tried to work through these
22 issues with them, giving them resources they could go
23 to, things of that nature; however, to know avail were
24 we able to get the right combinations on some of their
25 ASRs.

1 Subsequently what I did is I provided
2 them with a very short list of, These are your options
3 and these are your only options that you have for the
4 types of services that you are offering. We also made
5 arrangements to have training provided, basically one
6 on one training on numerous occasions with them in both
7 the IMA system and in ASR issues as well.

8 There were numerous conversations I had
9 with their employees, Tagan Hawker, Annie Starks -- who
10 is no longer with the company -- Jessea Smith, who is
11 no longer with the company. I spent numerous hours on
12 the phones with these individuals, walking them through
13 actual IMA orders, screen by screen, by entry by entry
14 with them. I have done this numerous times with them.

15 I have prevented outages in the Gate
16 House central office. They had submitted orders in the
17 December of 2000 time frame; there was approximately 12
18 orders that were issued. We went out to that
19 particular central office and found their collocation
20 was not even completed; yet, however, these orders were
21 sitting there with a due date.

22 I subsequent --

23 MS. DeVOS: A Qwest issue or --

24 MS. WALTERS: It was a Sunwest issue.

25 Sunwest had not completed the installation of their

1 equipment in their collocation.

2 MS. DeVOS: And what did you do?

3 MS. WALTERS: And subsequently -- what I
4 did is I notified the appropriate internal departments
5 at Qwest to stop these orders, especially the
6 disconnects. I then notified Sunwest and said, We have
7 these orders that are due, but your collocation is not
8 ready yet. I have stopped these orders, but I need you
9 to SUP the orders with another due date.

10 They SUPed the orders out 30 days. At
11 that 30 day time frame I followed up those 12 orders.
12 Again, the collocation was not completed. Again, I
13 notified Tagan Hawker, We've got these 12 orders, we
14 need to have something done with them.

15 I was out of the office. I was on
16 vacation. I followed those orders up and I called the
17 appropriate internal departments to stop those
18 customers from going down because I know what the
19 problems they have had in the past were.

20 Those are the types of things that I have
21 done for them. I have walked them through numerous
22 processes. I have spent hours on the phone with Jessea
23 Smith, explaining what is the process of local number
24 portability; what needs to happen if you should port a
25 telephone number before your loop is turned up; how do

1 you release that number back to Qwest so Qwest can get
2 that number back up and working on the Qwest facility
3 with them.

4 I spent three days on the phone with her,
5 walking her through that processes on how that needs to
6 be done. So I have done a lot more for them than I
7 have the rest of my customers in regards to hand
8 holding them to try to make them successful.

9 But I feel that they in turn have not
10 taken some of the responsibility either. They have not
11 gone out to the different resources available to them
12 to look at what some of the processes are, what needs
13 to be done.

14 They are correct, I have not called them
15 on every new product offering to see if that's
16 available to them. But when they have contacted me on
17 new products, I have explained to them to the best of
18 my ability what that product is, how they may use it,
19 what needs to be done, and get the appropriate
20 amendments filed for them so we can offer that product
21 to them.

22 So I feel, being told that I have
23 basically been an ineffective account manager for them,
24 I feel is totally unfair on my part; because I feel I
25 have done more than my share to help them and try to

1 make them successful.

2 MS. BEWICK: Hagood?

3 MR. BELLINGER: On more down here.

4 Penny?

5 MS. BEWICK: This is Penny Bewick from
6 New Edge.

7 I want to respond to basically Becky and
8 Chuck's exchange and a little bit of what's going on
9 down here. And I can't speak to Sunwest's experience,
10 obviously; but I do want to clarify something for the
11 record. You know, when you indicated the experience
12 level of the CLECs, I think that we need to clarify for
13 the record that that's not always the case.

14 The average age of the people who work in
15 my operations department is about 22 years old. They
16 didn't come from an RBOC, they don't have that
17 experience at the RBOC. They have other experiences;
18 but I think that there has been a lot of CLECs that do
19 have people with experience, but our company is not one
20 of those.

21 One of the expectations that I have --
22 and I don't doubt that there is a lot of -- and I know
23 there are a lot of resources out there for our people
24 to look at. But when we call our account manager and
25 ask a question, one of my expectations is that the

1 account manager simply won't say, You can find it on
2 the website at such and such a site.

3 If I walk into Nordstrom's, they don't
4 refer me to a catalog; what they might do is they might
5 say, We don't have that at this store, you can find it
6 in a catalog on page such and such; this is what it
7 looks like. But they direct me to it and then they
8 give me a reference for the future.

9 That's my expectation as far as what I
10 expect of my account manager. I have had similar
11 experiences with our account manager, as far as their,
12 you know -- I don't know if it's a training issue or
13 they have too many customers to work for or what. And
14 I'm not here to say that I don't think they don't want
15 to help, sometimes I don't think they have the tools or
16 the time to help.

17 What we need -- but I did want to clarify
18 that we don't have a whole group of people sitting
19 there who have, you know, ten, fifteen years experience
20 from an RBOC. As a matter of fact, right here in this
21 room today, Qwest has more people sitting in this room
22 today than I have in my entire operations group. So
23 therefore, they don't have the time a lot of the time
24 to try to go to every link in the web or come over to
25 us and get the interconnection agreement and try to

1 find their answer. They are going to the account
2 representative and trying to get answers, and sometimes
3 it's just not that easy. So I just wanted to clarify
4 that.

5 MR. STEESE: The problem though -- I hear
6 Mr. Wilson's analogy to the hardware store and now your
7 analogy to Nordstrom's. And, you know, the simple fact
8 is, you are a business. You don't have people coming
9 into Nordstrom's that are saying, you know, I want to
10 buy, you know, 5,000 of those to support my store; now,
11 why don't you tell me what other things you have
12 available.

13 That's -- that's just an untenable
14 comparison. What you are basically saying is you
15 haven't put the resources and the effort into creating
16 a business plan for yourself and we're supposed to bail
17 you out of it.

18 I mean, when you look at the business,
19 you have a business, you have a plan. I would hope
20 that you have a plan that means that you can be
21 successful; but now what we're supposed to do is we're
22 supposed to say, you know, your plan really won't work;
23 that you are not supposed to have taken the time to
24 figure that out for yourself.

25 MS. BEWICK: That's not what I'm saying,

1 Chuck. What I'm saying when I walk into Nordstrom's,
2 I'm their customer. When I call your account
3 representative, I'm your customer.

4 MR. STEESE: That is a retail customer.

5 MS. BEWICK: That is the same thing.

6 (Discussion off the record.)

7 MR. STEESE: In terms of the level of
8 sophistication what you expect from someone buying in
9 mass is very different from what you expect when
10 someone comes in and says, I've never bought or done
11 any of this stuff before.

12 MS. BEWICK: All I'm saying, Chuck, is I
13 want to clarify -- and, first of all, to say I
14 disagree; but I want to clarify that the representation
15 that we continually hear from Qwest in these
16 proceedings is the fact that we have all of these
17 resources out there and all these people are out there
18 dying to help us.

19 What you are just sitting there now
20 saying is, you know, It's not our job to make sure your
21 business plan works. I'm not saying it is. But I'm is
22 saying that you do have an obligation -- we can't get
23 inside your business. You have access to this stuff
24 that we don't. We're just asking for someone to give
25 us the clarity. That's all I'm saying.





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Have you heard the news about the DSL changing marketplace?

Subject: Have you heard the news about the DSL changing marketplace?

Date: Wed, 10 Jan 2001 17:44:08 -0600 (CST)

From: partner@uswest.com

To: sales@nm.net

Dear Qwest DSL Host

As recent events in the DSL industry show, DSL technology and providers are rapidly changing. For example, the DSL provider Jato has suddenly announced they are no longer serving customers, yet their current DSL customers have a proven need for speed. (Source: 12/30/00, The Denver Post)

This is an opportune time to transition customers who may be looking for a DSL provider with stability and a proven track record.

Qwest® has a proven track record for stability, depth of financial commitment and sustainability. We believe we will hit our projected DSL subscriber volume and deployment objectives. We are eager to serve all customers with a need for high-speed access to the Internet or to a corporate LAN.

To help make it easier for end users to get the speed they want and need, Qwest offers highly competitive pricing and attractive promotions.

From January 3, 2001 to February 3, 2001, Qwest is waiving the DSL service activation charge (a \$69 value). We are also waiving customers' first month of service and are giving customers an internal DSL modem for Windows® desktop users at no charge. For customers with a Macintosh®, UNIX® or laptop computer or for those needing a LAN connection, we are offering a promotional price of \$150 for a Cisco external modem (a \$295 value) during the same period. All of our Qwest DSL Pro customers receive a Qwest technician installation AT NO CHARGE. .

Qwest offers some of the most aggressive pricing in the DSL industry.* For example, we offer Qwest DSL Pro services for Business customers for as little as \$50 per month. Our Qwest DSL Pro service offering includes a special 1-800 number for responsive technical support as well as service level assurances and a technician installation AT NO CHARGE.

For extra savings, unlike competitors, Qwest's DSL service rides on a customer's existing voice line, so they can avoid the cost of an additional line.

* Please see <https://www.extranet.interprise.com/megahost/msprice.htm> for current Qwest DSL subscriber pricing.

Thank you for your time.

Sincerely,
The Qwest DSL Marketing team

CERTIFICATE OF SERVICE

I certify that the original and 10 copies of the affidavits of Mary Jane Rasher Regarding Track A and Public Interest and Cory W. Skluzak Regarding Section 272 on behalf of AT&T in Docket No. T-00000A-97-0238 were sent by overnight delivery on May 18, 2001 to:

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