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IN THE MATTER OF US WEST COMMUNI-
CATIONS, INC.'S COMPLIANCE WITH
§ 271 OF THE TELECOMMUNICATIONS
ACT OF 1996

Docket No. T-00000A-97-238

**QWEST'S RESPONSE TO AT&T'S OFFER OF SUPPLEMENTAL AUTHORITY
REGARDING PUBLIC INTEREST**

Qwest Corporation ("Qwest") respectfully submits this response to AT&T's March 6, 2002 "Offer of Supplemental Authority Regarding Checklist Item 2 and Public Interest."

AT&T's Offer is, at best, nothing more than a rehashing of a systems testing dispute that AT&T has already raised in both the checklist item 2 and public interest workshops in Arizona.¹ In response to AT&T's concerns about comprehensive production testing — and in compliance

¹ See, e.g., AT&T's Comments on Staff's Proposed Report on Qwest's Compliance with Checklist Item No. 2, *In the Matter of U S WEST Communications, Inc. 's Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238 (Oct. 26, 2001), at 6-9; Qwest's Legal Brief Regarding Disputed Issues: Checklist Items 2 (UNEs), 5 (Transport), and 6 (Switching), *In the Matter of U S WEST Communications, Inc. 's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000B-97-238 (May 18, 2001) ("Qwest Brief"), at 4; Affidavit of Mary Jane Rasher Regarding Track A and the Public Interest, *In the Matter of U S WEST Communications, Inc. 's Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238 (May 17, 2001) ("Rasher Affidavit"), at 16-17; Rebuttal Testimony of David L. Teitzel Re: Public Interest and Track A, *In the Matter of U S WEST Communications, Inc. 's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000B-97-238 (May 29, 2001) ("Teitzel Rebuttal"), at 18:12.

with Staff's recommendation that the parties agree upon appropriate SGAT language on this subject² — Qwest added a provision to its Arizona SGAT specifically designed to prevent such a dispute from ever arising in this state. Since the parties have already briefed this issue in full before the Commission, and since both the Facilitator of the Multistate Proceeding and a number of state commissions have already resolved this issue in Qwest's favor, Qwest urges the Commission to dismiss AT&T's supplemental filing and proceed to find that Qwest has complied with the requirements of checklist item 2. The Commission should likewise reject AT&T's last-ditch effort to turn the Minnesota testing dispute into a public interest issue.³

AT&T's Offer attaches an interim recommended decision of a Minnesota ALJ in a case arising out of AT&T's request to perform extensive systems testing on one thousand UNE-P lines in that state.⁴ AT&T requested SGAT language entitling it to the very same testing in the Arizona checklist item 2 workshops.⁵ Qwest opposed AT&T's request (as it did in both the

² See Final Interim Report on Qwest's Compliance with Checklist Item 2 – Access to Unbundled Network Elements (UNEs), *In the Matter of Qwest Corporation's Section 271 Application*, Docket No. T-00000A-97-0238 (Dec. 24, 2001) ("Staff's Final Interim Report") at 52-53.

³ The FCC has made clear that a party cannot use the public interest analysis to seek additional checklist item terms and conditions that are unavailable under the relevant checklist items themselves. See Memorandum Opinion and Order, *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, FCC 02-63 (rel. Feb. 22, 2002) ¶ 102 (affirming that the FCC "may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B)" as part of the public interest analysis).

⁴ See AT&T's Offer of Supplemental Authority Regarding Checklist Item 2 and Public Interest, *In the Matter of U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238 (Mar. 6, 2002) ("AT&T Offer").

⁵ AT&T presented written and oral testimony specifically on this subject, and brought a special witness, Michael Hydock, just to address the issue. See also Staff's Final Interim Report at 51-53 (summarizing AT&T's request for specific language).

Minnesota and Multistate Proceedings⁶) on the grounds that (a) the requested testing was duplicative of the OSS testing already underway (with respect to Arizona, the OSS testing conducted by Hewlett-Packard (HP) and Cap Gemini Ernst & Young (CGE&Y)), (b) the requested testing was unnecessary in light of other testing provided for in the SGAT, and (c) since AT&T had no plans to enter the local market through substantial use of Qwest's unbundled loops, it had no reason to request that testing other than to delay Qwest's application.⁷ The Commission currently has the issue under consideration.

Qwest notes that AT&T's proposed SGAT language has been rejected in every other state section 271 docket to rule on it thus far. The Facilitator of the Multistate Proceeding, for example, found that AT&T's testing proposal was inflexible and potentially duplicative; that the OSS test (which, with respect to the Multistate Proceeding and Minnesota, is the ROC OSS test) would "comprehensively address" AT&T's stated concerns with Qwest's OSS (including its "ability to handle commercial volumes of transactions"); and that AT&T's specific testing request "could prove disruptive to the OSS procedures now underway."⁸ The Facilitator also noted that "AT&T presented no argument or evidence that its near-term market-entry plans require any such test to be performed immediately."⁹ In short, the Facilitator said, "AT&T failed

⁶ Liberty Consulting Group, Unbundled Network Element Report, *In the Matter of Qwest Corporation's Motion for an Alternative Procedure to Manage Its Section 271 Application* (Aug. 20, 2001) ("Multistate Facilitator's UNE Report"), at 29.

⁷ See Qwest Brief at 5-6; Staff's Final Interim Report at 53.

⁸ Multistate Facilitator's UNE Report at 30.

⁹ *Id.* AT&T's claim that Qwest "deliberately fabricated evidence" to support its contention that AT&T had no local entry plans is not merely false, but deeply ironic. AT&T Offer at 3. Although the premise of AT&T's complaint in Minnesota was that it had plans to enter the local market, or was at least seriously considering such entry, AT&T failed to submit in the Minnesota proceeding any evidence to support that premise, and succeeded in blocking Qwest's efforts to take discovery to disprove it. Indeed, AT&T blocked Qwest's effort to submit into the record in Minnesota evidence that members of AT&T's Law and Government Affairs organization had

to demonstrate the need for such testing now, given the pendency of the comprehensive ROC OSS testing, with which AT&T's proposed testing could interfere."¹⁰ The findings of each section 271 docket to have ruled on this issue are consistent with those of the Multistate Facilitator.¹¹ Given that AT&T's arguments in Arizona are identical to the ones rejected in these other section 271 dockets, this Commission should likewise find that there is no need to provide for such testing in the Arizona SGAT.

Although Qwest has objected to the specific OSS testing that AT&T wanted to include, Qwest has always been willing to adopt SGAT language clarifying when CLECs can obtain individualized testing going forward, which will prevent these kinds of disputes in the future. Accordingly, Qwest included the following language in § 12.2.9.8 of its Arizona SGAT:

told Qwest contemporaneously with its testing request that AT&T was not serious about entering local markets in states other than those in which it had already entered.

¹⁰ Multistate Facilitator's UNE Report at 6.

¹¹ In the Multistate Proceeding, *see, e.g.*, Commission Decision Regarding Qwest Corporation's Compliance with 47 U.S.C. § 271 Checklist, *In the Matter of U S WEST Communications, Inc.'s Motion for an Alternative Procedure to Manage the Section 271 Process*, Case No. USW-T-00-3 (Nov. 21, 2001), at 4 (Idaho); Conditional Statement Regarding August 20, 2001, Report, *In re U S WEST Communications, Inc., n/k/a Qwest Corporation*, Docket Nos. INU-00-2, SPU-00-11 (Dec. 21, 2001) at 18 (finding the new SGAT language sufficient for compliance with checklist item 2 (Iowa)); Final Report on Checklist Item 2 — Access to Unbundled Network Elements and Checklist Item 4 — Access to Unbundled Loops, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. D.2000.5.70 (Jan. 30, 2002), at 32 (Montana); Interim Consultative Report on Group 4 Checklist Items, *U S WEST Communications, Inc. Section 271 Compliance Investigation*, Case No. PU-314-97-193 (Jan. 16, 2002), at 8-9 (acknowledging the new SGAT language and conditional compliance with checklist item 2) (North Dakota)). Colorado, Nebraska, and Washington have ruled similarly. *See, e.g.*, Thirteenth Supplemental Order Initial Order (Workshop Three): Checklist Item No. 2, 5, and 6, *In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996, In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022, UT-003040 (July 2001), at 9 (Washington).

[U]pon request by CLEC, Qwest shall enter into negotiations for comprehensive production test procedures. In the event that agreement is not reached, CLEC shall be entitled to employ, at its choice, the dispute resolution procedures of this Agreement or expedited resolution through request to the state Commission to resolve any differences. In such cases, CLEC shall be entitled to testing that is reasonably necessary to accommodate identified business plans or operations needs, accounting for any other testing relevant to those plans or needs. As part of the resolution of such dispute, there shall be considered the issue of assigning responsibility for the costs of such testing. Absent a finding that the test scope and activities address issues of common interest to the CLEC community, the costs shall be assigned to the CLEC requesting the test procedures.¹²

This language was originally proposed by the Multistate Facilitator, who determined that the proposed language “should preclude such a dispute in the future.”¹³ AT&T has now asked Qwest to remove this language from its SGAT in Arizona, and (since this language was intended to offer those carriers additional protections) Qwest is in the process of complying with its request.¹⁴ AT&T’s decision that these protections are unnecessary after all does not change the fact that Qwest was willing to resolve the UNE-P testing dispute in a manner that would have prevented AT&T’s Minnesota-specific dispute from ever even arising in Arizona. AT&T’s Minnesota UNE-P testing complaint should therefore be irrelevant to Qwest’s demonstration of full checklist item 2 compliance in Arizona.

Not content to litigate this issue once in the checklist item 2 workshops, AT&T raised it a second time in the public interest workshops. In the public interest docket in Arizona (as in the

¹² See Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services Provided by Qwest Corporation in the State of Arizona, Tenth Revision, § 12.2.9.8 (Jan. 17, 2001).

¹³ Liberty Consulting Group, Public Interest Report, *In the Matter of the Investigation into Qwest Corporation’s Compliance with § 271 of the Telecommunications Act of 1996*, Seven State Collaborative Section 271 Workshops (Oct. 22, 2001) (“Multistate Facilitator’s Public Interest Report”), at 9.

¹⁴ WorldCom has made a similar request.

section 271 dockets in other jurisdictions), AT&T tried to recycle its Minnesota UNE-P testing complaint into an alleged example of Qwest misconduct.¹⁵ The Multistate Facilitator rejected AT&T's desperate effort to find traction on this point, and this Commission should do the same. The Multistate Facilitator found that the Minnesota dispute (1) "do[es] not provide substantial evidence of a predictive, patterned refusal or inability of Qwest to comply with its wholesale service obligations," and (2) does not constitute "the kind of unique circumstances that the FCC believes it takes to support a finding that Qwest's entry into the in-region, interLATA market would contravene the public interest."¹⁶ As noted above, the Facilitator also acknowledged that the underlying question had been "the subject of a good-faith dispute" in the multistate checklist item 2 workshops, and that those workshops had produced "a clear resolution" — namely, the SGAT language discussed above — "that should preclude such a dispute in the future."¹⁷

Specifically acknowledging AT&T's recent proffer of the Minnesota ALJ's interim order,¹⁸ the Chairman of the Colorado PUC declared last Friday that this example, together with the rest of AT&T's evidence of alleged misconduct, failed to demonstrate "any 'pattern' of anticompetitive behavior in Colorado that is foreseeable to take place in the future or implicate welfare enhancement."¹⁹ Indeed, the Chairman went on to say that AT&T's efforts merely "highlight[] the heightened expectations that parties have in a public interest inquiry to sling as

¹⁵ See Rasher Affidavit at 16-17; Teitzel Rebuttal at 18:12.

¹⁶ Multistate Facilitator's Public Interest Report at 9.

¹⁷ *Id.*

¹⁸ Order on Staff Volume VII Regarding Section 272, the Public Interest, and Track A, *In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Docket No. 97I-198T, Decision No. R02-318-I (March 15, 2002), at 43.

¹⁹ *Id.* at 45.

much as they can on the wall to see what will stick.”²⁰ This issue clearly has not. The findings of the Multistate Facilitator and the Chairman of the Colorado PUC do not merely cast doubt upon the overheated statements in AT&T’s submission about Qwest’s conduct — they expressly and correctly refute them. Qwest asks the Commission to rule accordingly.

Moreover, even the Minnesota complaint itself is now moot on the facts. Staff noted months ago that the “example cited of Minnesota stands as at least one example where Qwest and AT&T have entered into a mutually acceptable agreement for large volume UNE-P testing.”²¹ Indeed, Qwest has now completed the testing that AT&T requested in Minnesota. Fully bearing out Qwest’s objection that the testing AT&T wanted would simply duplicate the work being performed in the OSS test, the Minnesota UNE-P test did not find anything that was not also found in the Arizona OSS test and the ROC OSS test, or that necessitated any changes in Qwest’s OSS at all. Subsequent events also confirmed Qwest’s good-faith belief that AT&T never actually needed the testing because it had no intention of entering the residential market in Minnesota via UNEs: after the test was complete, AT&T admitted in newspaper interviews that it did not plan to enter the residential market in Minnesota after all.²²

Finally, as noted above, the ALJ’s interim decision plainly does not concern any complaint or dispute *in Arizona*. None of the events at issue occurred in this state, and AT&T has never asked Qwest to conduct the same testing in Arizona that it demanded in Minnesota.

²⁰ *Id.* at 44.

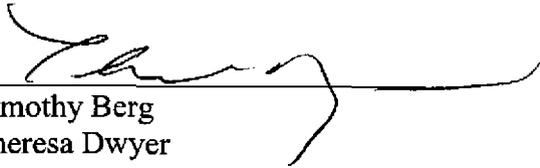
²¹ Staff’s Final Interim Report at 51.

²² See Steve Alexander, *Judge Recommends Qwest Be Fined for Impeding Local Service by AT&T; But AT&T Says It Won’t Enter Market*, Star Tribune, February 26, 2002, at D3. While AT&T did an “about face” the next day and stated that it did plan on entering the residential market in Minnesota “once an agreement can be made with Qwest,” *Clarification*, Star Tribune, February 27, 2002, Qwest believes that AT&T’s initial statement is a strong indicator of the company’s true intentions. Those intentions confirm Qwest’s initial opposition to the test.

AT&T does not even bother trying to tie its Minnesota allegations to any conduct in Arizona. Indeed, Qwest had provisioned 20,334 UNE-P loops in Arizona, as well as 27,388 additional stand-alone unbundled loops, as of December 31, 2001, evidencing that Qwest's systems in the state are functioning properly. AT&T's allegation thus says nothing about whether granting Qwest's interLATA application in Arizona would serve the public interest.

For the reasons discussed above, Qwest respectfully asks the Commission not only to reject AT&T's offer of supplemental authority, but to find that Qwest has fully satisfied checklist item 2 and that grant of Qwest's section 271 application would be consistent with the public interest.

RESPECTFULLY SUBMITTED this 18th day of March, 2002.

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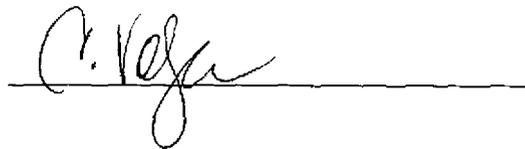
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A handwritten signature in cursive script, appearing to read "C. Vega", is written over a solid horizontal line.

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