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IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. T-00000A-97-0238

NOTICE OF FILING STAFF'S FINAL REPORT ON QWEST'S COMPLIANCE WITH § 272 OF THE 1996 ACT

The Arizona Corporation Commission Staff ("Staff"), by its undersigned attorneys, hereby files Staff's Final Report on Qwest Corporation's compliance with 47 U.S.C. § 272.

RESPECTFULLY SUBMITTED this 19th day of April 2002.

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IN THE MATTER OF QWEST CORPORATION'S SECTION 271 APPLICATION

ACC Docket No. T-00000A-97-0238

FINAL REPORT ON QWEST'S COMPLIANCE

With

SECTION 272

April 18, 2002

I. FINDINGS OF FACT

A. PROCEDURAL HISTORY

1. On June 11, 2001, a Workshop on Section 272 of the Telecommunications Act of 1996, 47 U.S.C. § 272, took place at Qwest's facilities in Phoenix. Parties appearing at the Workshop included Qwest, AT&T, MCI WorldCom, Cox and the Residential Utility Consumer Office ("RUCO"). Qwest relied upon its filed affidavits submitted on March 26, 2001. Additional comments were filed on May 17, 2001 by AT&T. Qwest filed Rebuttal Comments on May 29, 2001. The parties also agreed to incorporate the record from the subsequent Colorado Workshops on Section 272.

2. While many issues were successfully resolved between the parties, Section 272 was deemed "disputed" due to parties' inability to come to agreement on a number of issues which eventually went to "Impasse". Staff issued its Proposed Findings of Fact and Conclusions on November 17, 2001. Qwest filed comments on Staff's proposed report on November 26, 2001. On December 5, 2001 AT&T filed comments on Staff's Proposed Findings of Fact and Conclusions of Law.

3. In addition, the parties made numerous supplemental filings on this issue. On November 26, 2001 Qwest filed with the Arizona Corporation Commission, KPMG's November 9, 2001 Report of the Independent Public Accountants, Attestation Examination with respect to the Report of Management on Compliance with Applicable Requirements of Section 272 of the Telecommunications Act of 1996, a report which was filed with the seven states involved in the multi-state 271 process on November 15, 2001. AT&T filed comments on the November 9, 2001 KPMG report filed by Qwest on December 20, 2001

4. Qwest filed a Supplemental KPMG declaration on December 20, 2001. AT&T filed additional comments on KPMG's Audit Report on January 3, 2002. AT&T also filed supplemental comments on Section 272 on February 15, 2002 to which Qwest replied on February 25, 2002.

5. The following paragraphs constitute Staff's final report on Section 272. These paragraphs address the initial AT&T May 17, 2001 filing, the Qwest March 26, 2001 affidavit and its May 29, 2001 rebuttal filing, the June 11, 2001 Arizona Workshop, the July 24, 2001 Colorado Workshop supplemental reports and subsequent filings by the parties (as described in paragraphs 3 and 4 above) up through and including Qwest's February 25, 2002 reply to AT&T's Supplemental Comments, Qwest's statement of Supplemental Authority dated March 18, 2002, (providing the Colorado March 15, 2002 Order) AT&T's Notice of Supplemental Authority dated March 20, 2002, (filing the Minnesota ALJ's recommendation) Qwest's March 21, 2002 response and AT&T's March 28, 2002 response to Qwest Corporation concerning AT&T's Supplemental Authority – Section 272, filed that day with the Arizona Commission.

B. DISCUSSION

1. Section 272

a. FCC Requirements

6. Section 272 defines the separate structure and business relationship that the Bell Operating Company ("BOC") must establish with its affiliates that will be providing InterLATA services. Section 272 requirements are as follows:

7. BOCs and their affiliates may not provide certain services unless they provide that service through one or more affiliates separate from any operating company entity, and meet certain requirements. The services are:

- Manufacturing
- Origination of InterLATA telecommunications services, other than some incidental InterLATA services, certain out-of-region services described in Section 271(b)(2) and previously authorized activities described in Section 271(f)
- InterLATA information services, other than electronic publishing and alarm monitoring

47 U.S.C. § 272(a)(2).

8. There are five structural and transactional requirements which apply to the separate affiliate as follows:

- Operate independently
- Maintain books, records, and accounts separate from the books, records, and accounts maintained by the affiliate BOC
- Have separate officers, directors, and employees from the BOC
- Not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the BOC
- Conduct all transactions with the affiliate BOC on an arm's length basis and maintain all transactions in writing and available for public inspection.

47 U.S.C. § 272(b).

9. Nondiscrimination safeguards are established for dealing with the BOC affiliate. In these dealings the BOC may not discriminate and must also account for all transactions according to accounting principles established by the FCC. 47 U.S.C. § 272(c).

10. Section 272 calls for a biennial audit of affiliate transactions and dealings, and spells out the conditions for the audit. Any company required under Section 272 to maintain a separate affiliate must pay for a joint federal/state compliance audit conducted every two years by an independent auditor. Among other provisions, the FCC, state commissions and the auditor are to be provided with access to all relevant financial accounts and records. The audit is required to produce a report to the FCC and every state commission relevant for the affiliate. Any party may comment on the report and all working papers are to be available to the FCC and the state commissions. 47 U.S.C. § 272(d).

11. Section 272(e) describes provision of services that must be made available to non-affiliates. The BOC must fulfill requests from affiliates and non-affiliates with the same speed. Facilities, services, or information concerning provision of exchange access to the affiliate described must be made available to non affiliates in that market on the same terms and conditions. The BOC must charge the affiliate, or impute to itself, an amount for access to its telephone exchange service and exchange services that is at least equal to what is charged to any unaffiliated interexchange carriers. Finally, the BOC may provide any InterLATA or IntraLATA facilities or services to its Section 272 affiliate, as long as they are made available to all carriers at the same rates and on the same terms and conditions, and the costs are appropriately allocated. 47 U.S.C. § 272(e).

12. The ("Sunset") provisions of Section 272 shall apply for three years after authorization is granted to provide InterLATA services, except as defined in 272(e). This only applies to manufacturing and long distance, InterLATA information services and preservation of existing authority. The FCC reserves the right to extend this time. Finally, the FCC reserves the right to prescribe additional safeguards, as required. 47 U.S.C. § 272(f).

13. A BOC affiliate may not market or sell telephone exchange services provided by the BOC ("Joint Marketing") unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services. A BOC may not market or sell InterLATA service provided by an affiliate required by this section within any of its in-region states until such company is authorized to provide InterLATA services in such State. 47 U.S.C. § 272(g).

b. Background

14. Section 272 attempts to prevent a BOC from discriminating against its competitors, in favor of its long-distance affiliate. The section attempts to do this through a variety of accounting and non-accounting safeguards including a means of evaluation. Among other things, these safeguards are intended to prevent cross subsidization through

local and exchange access customers and to ensure that the BOC treats competitors as it treats its own long distance affiliate.

15. Four companies are discussed repeatedly in this report. They are (1) Qwest Services Corporation (QSC or the "Services Company"); (2) Qwest Communications Corporation (QCC or the Section "272 Affiliate") (3) Qwest Corporation (QC or the "BOC") and (4) Qwest Long Distance (LD) the predecessor of QCC. QSC is the Parent Company of QCC and QC.

c. Position Of The CLECs[1]

16. In its May 17, 2001 comments, AT&T claimed that, in the past, Qwest Long Distance and now QCC have failed to totally disclose details of transactions between the BOC (QC) and its Section 272 affiliate (QCC), thus "depriving unaffiliated parties of the information necessary to take advantage of the same rates, terms and conditions enjoyed by the BOC and its affiliate."[2] Further, 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 Commission to the FCC for in-region InterLATA relief should be denied.

17. AT&T begins with a summary of items that they believe Qwest has not accomplished. They later conclude that Qwest, and its affiliates Qwest LD and QCC, have failed to demonstrate that they will comply with their obligations under Section 272.[3] AT&T states that Qwest has failed to:

- Prove that QCC meets the requirements of Section 272(b)(5) and thus, is a separate affiliate under Section 272(a).
- 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).
- Prove that there is true separation between the two entities' officers, directors and employees as required by Section 272(b)(3).
- Prove compliance with the affiliated transaction requirements of Section 272(b)(5).
- Prevent discrimination between it and QCC and other entities pursuant to Section 272(c).

[1] AT&T was the only CLEC to address Qwest's compliance with the requirements of Section 272.
[2] AT&T brief, pg. 21, BellSouth Louisiana 11 Order ¶ 335.
[3] Testimony of Cory W. Skluzak, Pgs 8-9

- Prove compliance with the FCC's accounting principles as required under Section 272(c)(2).

- Prove adequate compliance with, and evidentiary support for, the fulfillment requirements of Section 272(e).

- Provide sufficient detail to determine future compliance with Section 272(g) concerning joint marketing, especially given its past history of violation.

18. Section 272(a) – Separate Affiliate: AT&T states that the lack of stock ownership between Qwest and QCC is not enough to satisfy Section 272(a). QCC is not operating separately because of employee sharing between Qwest and QCC and the intermingling of its management. Thus, AT&T asserts that QCC is not a separate affiliate in substance, but only on paper.

19. AT&T counters the Qwest statement that "it will not provide in-region InterLATA services originating within the BOC 14 state region as long as the structural separation obligation of Section 272 applies to this activity."[4] AT&T notes 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.[5]

20. Section 272(b)(2) – Books, Records and Accounts: AT&T states that this section requires the BOC's affiliate to maintain its books, records and accounts pursuant to Generally Accepted Accounting Principles ("GAAP") and maintain them separate from the BOC.[6] Compliance with this section includes 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.[7] AT&T disputes the QCC assertion of GAAP compliance based upon initial and follow-up on-site reviews.

21. AT&T states that there is insufficient evidence presented by Qwest, Qwest LD and QCC to determine compliance with Section 272(b)(2) for the following reasons:

- Problems with Qwest not using accrual accounting. It does not appear that Qwest LD is accounting for activity as incurred or is accruing expenses from year to year, although Qwest states that it "utilizes accrual accounting for its transactions between affiliates."[8] Qwest LD is not using accrual accounting based on the transactions tested by AT&T.

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[4] Affidavit of Marie Schwartz dated March 26, 2001 ("Schwartz Affidavit") at 9.
[5] For example, *see AT&T Corp. v. U S 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.
[6] *BellSouth Louisiana II Order*, ¶ 328.
[7] *Id.*
[8] Qwest Response to AT&T Multistate Data Request No. 56.

- The only transactions between Qwest and Qwest LD that are accounted for as "affiliate transactions" are those involving payments.[9] There is a concern that transactions not involving the exchange of money could occur and not be accounted for and reported.

- Initially, there was no evidence that there was a different Chart of Accounts for the two entities. AT&T goes on to state that Qwest and QCC subsequently provided their Chart of Accounts and that they are different.

- 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.[10] According to testimony filed by QCC, the Services Company perform the 272 affiliate's accounting and finance functions, which is not the BOC.[11] However, QCC also states that "BOC employees provide payroll services."[12] Based on the March 30, 2001 testimony, AT&T states that separate accounting software is not being utilized and maintained at a separate location.

- 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". However, 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.

- To determine compliance with this section, Qwest LD must be auditable. 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. However, the "audit" of affiliate transactions conducted by Arthur Anderson for Qwest is limited in scope to one line on the ARMIS reports.

22. Based on supplemental visits, AT&T asserts that, at a minimum, Qwest and QCC are not utilizing accrual accounting for their affiliated billable transactions as required by GAAP. Further, Qwest and QCC are not GAAP compliant since 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.

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[9] 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."

[10] Schwartz Affidavit at 15.

[11] Brunsting Affidavit at 11.

[12] *Id.*, at 13.

23. AT&T states that the Qwest ARMIS filing is not evidence of compliance with 272(b)(2) and that there is an inference that Arthur Anderson reviewed all ARMIS records for GAAP compliance. 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. AT&T wants the Commission to question Qwest as to the audit procedures that Arthur Andersen performs to determine the validity of the reported ARMIS amounts for affiliated transactions.

24. AT&T disputes the QCC assertion that because its financial results are consolidated with those of Qwest Communications International Inc.'s (QCI's) financial statements included in the SEC Form 10-K, which includes Arthur Andersen's "positive" opinion as to adherence to accounting principles, then they are therefore in compliance.[13] According to AT&T, the legitimacy of an Arthur Andersen "positive" opinion should not be transferred to QCC's financial activities.

25. 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 include the "consolidated results of the 272 affiliate"; it must be underscored that this does not include affiliated transactions.

26. Section 272(b)(3) – Separate Officers, Directors and Employees: AT&T notes that the FCC used as evidence of compliance the names of officers and directors submitted by the BOC and affiliates, and questioned whether separate payrolls and administrative operating systems are present.[14]

27. AT&T then points to the audit procedures of the biennial audit required pursuant to Section 272(d) to define "separate". Certain audit procedures are discussed including a review of organization charts, review of lists of transferred employees since enactment of the Act as well as interviews with these employees. Further, these employee transfers should be documented.

28. AT&T then reports on findings using these audit criteria. AT&T states that a number of employees of one or more Qwest affiliates are also employees of other Qwest affiliates in violation of the criteria noted. The organizational entities include Qwest, Qwest LD, and QCC. AT&T also points to a QCC general counsel who is also a general counsel of Qwest Communications International, Inc. with associated concerns over attorney client privilege, among other things.

29. AT&T goes on to comment on concerns over the number of QCC employees who are former employees of Qwest. AT&T found during reviews that certain former employees of Qwest went to QCC and were then rehired by Qwest, at which time they had already received bonuses or team awards. The exact timing of the rehire and bonus is not specified. AT&T also notes a program under which

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[13] Qwest Affidavit of Judith Brunsting, at 9.
[14] *BellSouth Louisiana II Order*, ¶ 330, n. 1032.

USWC/Qwest and USW LD employees were both able to participate. AT&T is particularly concerned with the flow of propriety information that could follow the flow of employees. AT&T further addresses the need for separate payroll. More specifically, it appears Qwest does not have separate payroll administration.

30. AT&T also conducted a supplemental on-site review of QCC's transactions and based on this, AT&T continues to dispute Qwest's and QCC's assertions of compliance with Section 272(b)(3). Specific contentions are that it appears that Ms. Robin Szeliga is presently, or has been involved with, QCC, Qwest Long Distance, Qwest and QCI. AT&T states that this is a clear violation of the FCC's dictate that there be some form of independent management and control of Qwest and QCC.

31. On the subject of employee sharing, AT&T states that there is not functional separation but rather a separation based on which entity actually employ the person. The "overarching issue" of AT&T is "whether safeguards are sufficient to prohibit information flows between Qwest and QCC. The ACC should question Qwest on how its existing controls could possibly prohibit information flow given the rampant practice of "employee sharing".[15] AT&T continues with several other examples but these examples contain such a significant degree of propriety information that drawing a conclusion or summary for inclusion in this report is impossible.

32. Section 272(b)(5) – Affiliate Transactions – transactions at arm's length, in writing, and publicly available: AT&T submitted 26 pages of testimony on the public disclosure requirements of Section 272(b)(5). AT&T describes requirements of Section 272(b)(5) taken from previous FCC Orders. "The Section 272 affiliate must provide, at a minimum: a detailed written description of the asset transferred or the service provided in the transaction, and post the transaction's terms and conditions on the Section 272 affiliate's Internet Home Page within 10 days of the transaction.[16] The description "should be sufficiently detailed to allow us to evaluate compliance with our accounting rules," and they must be made available for public inspection at the BOC's principal place of business and must include a statement certifying the truth and accuracy of such disclosures. "[17]

33. AT&T states that based on past cases, summaries of transactions are inadequate and 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.[18] Further, the public disclosure requirements have been in effect *since the passage of the 1996 Act on February 8, 1996*, and that the requirement for posting data on the Internet became effective with the implementation of the *Accounting Safeguards Order* on *August 12, 1997*. AT&T asserts that Qwest's postings do not comply with the requirements of Section 272(b)(5).

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[15] AT&T Testimony of Cory W. Skluzak, pg 20.

[16] *BellSouth Louisiana II Order*, ¶¶ 332-339.

[17] AT&T Testimony of Cory W. Skluzak, pg 22

[18] *Id.*, ¶ 337.

34. AT&T initially tested transactions through June, 2000 from the website back to supporting detail and from supporting detail to the website. Of the 17 transactions tested by AT&T from web site transaction postings, AT&T listed the following problems:

- No supporting detail of any kind for 3 transactions.
- No accounting detail for an additional 3.
- No accounting detail or explanations behind 2 more selections that were reversals from previous periods.
- Of the 8 selections traced to both the accounting detail and to the applicable agreement or document posted on the website, 2 were not posted within 10 days; and, for the remaining 6, a determination was not possible as to timely posting.
- The remaining selection was a summary of numerous billings.

35. AT&T notes additional problems including:

- Transactions could not be tied to agreements or other detail.
- Transactions were conducted without a work order.
- Summary transactions rather than detail were reported.
- Failure to record transactions within 10 days.
- Recurring charges to affiliates are not posted monthly but are aggregated and posted annually.
- 1999 postings were not made prior to June 1.
- For the year 2000, no individual postings had been made to the website.
- AT&T states that the terms "current transactions" and "specific transactions" as used on the website are confusing.
- True ups for 1999 were not posted until May of 2000.
- AT&T wants the specific transactions behind the true ups to remain on the site for one year.
- Back-up to the terminated agreement is only available under a confidentially agreement.

- AT&T was unable to determine if the certifying agreement is on file at Qwest's principle place of business, as required.
- Various problems with tagged selections including ability to tie back to supporting documentation.

36. AT&T conducted follow-up on-site testing of financial records from June, 2000 to the present. AT&T used a two part approach for this testing as well. This involved: 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.

37. AT&T found no postings of specific accounting transactions to the website for all of 2000. Thus, they were unable to trace back specific or "billable" transactions to supporting documentation such as posted work orders and service agreements. AT&T argues that these details should be posted and that the FCC requires such posting.

38. AT&T describes specific problems discovered during the follow-up review:

- Transactions between Qwest LD and Qwest after January 1, 2001 are not posted. The FCC mandates this posting.
- Apparent generous payment terms being extended to affiliates and the amounts are not being recorded on an accrual basis.

39. AT&T provides additional specific details but much of this information is proprietary and was not available for inclusion in this report. AT&T also calls into question the officer signing the statement, indicating that the posting has been reviewed. Specifically, AT&T notes that the officer was not listed in the Qwest or QCC officer listing.

40. AT&T also tested 272 revenues from the provision of services from the affiliate to Qwest and notes that the FCC makes no distinction in its disclosure rules between a Section 272 affiliate's expenses versus its revenues.

41. AT&T notes the following issues and problems with the payments for services from the affiliate to Qwest.

- Due to the lack of billing detail or financial statements, AT&T cannot determine if QCC received any payments from Qwest for 2001.
- On a particular task order, AT&T did not see monthly billings, and questions whether this might again mean preferential treatment between affiliates.

- AT&T notes that Qwest has contracted for QCC to provide financial services, in the amount of $400,000 per year. AT&T suggests that the commission should question why Qwest requires these services from its 272 affiliate especially when there is another work order for similar services to be provided to QCC from Qwest

- Regarding the task order pertaining to the 1-800-4USWEST Calling Card products, AT&T states that this has been found to be an illegal venture.

42. AT&T also performed what they term a supplemental on-site review. AT&T found that QCC and Qwest had not billed *any* of their affiliated transactions for the period July 2000 to present *until April 2001*.[19][Emphasis in original] AT&T states that Qwest admitted this in documentation provided to them but the discussion of the admittance is proprietary. AT&T again states that the unstated Qwest accounting policy continues (from Qwest LD and now to QCC) that there are no year-end, and certainly no month-end accruals of expenses because billable amounts are being expensed as invoiced. AT&T again points to evidence of favorable accounting terms and failure to post the necessary information.

43. AT&T disagrees with the Qwest assertion that it consistently posts and makes public all transactions between Qwest and Qwest LD (now Qwest and QCC) to its web site. Further, AT&T argues that the requirement that detailed written descriptions of transactions are to be posted within 10 days, is not being followed.

44. AT&T also performed supplemental testing of revenues of QCC and found the same problem and issues as in the revenues of QCC described above. These include: lack of accrual accounting, untimely accounting, and improper posting. The invoice review included a number of invoices for employee costs and AT&T again points to the issue of employee sharing and the question of independence of the organizations.

45. Another issue that arose during the 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. There are many examples of very high hourly billable rates for services. By setting such high rates, competitors may be functionally excluded from utilizing these services and discrimination "in substance" is achieved. The corollary concern to setting high rates for services is that it may be a mechanism for Qwest to flow subsidies back to QCC.

46. Specific issues with the QCC revenues were provided but again the extent of proprietary information makes complete and accurate reporting in this document impossible.

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

47. AT&T goes on to discuss the fundamental difference of opinion regarding the definition of a transaction. AT&T states that Qwest uses agreements to satisfy the transaction reporting including the posting of master agreements on the web site. AT&T does not believe this reporting is appropriate and that a much greater level of detail is required. AT&T states this should be the billable activity or invoice.

48. In addressing the "arms length" requirement of Section 272(b)(5), AT&T states that based on three on-site reviews conducted by AT&T, it concludes that Qwest transactions do not comply with the "arm's length" requirement due to 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.

49. AT&T points to a number of items that the FCC reviewed to determine if BellSouth was meeting its Section 272(c)(1) nondiscrimination obligation.[20] The items for which Qwest has not provided any information are as follows:

- Qwest has not stated whether it will inform QCC of planned network outages before public notice is given pursuant to FCC rules.

- Qwest has not stated its commitment to continue participating in public standard-setting bodies.

- Qwest has not stated that it is committed not to discriminate in favor of Qwest LD in the "establishment of standards relating to interconnection or interoperability of public networks."

- Qwest has not stated that it would not discriminate in the processing of PIC orders.

- 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.

- 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.

- Finally, Qwest has not yet proved that it will provide nondiscriminatory access to its Operations Support Systems (OSS).

50. Qwest has not stated whether a QCC representative is on the compliance advisory board involved in the process. If QCC is represented on the compliance advisory group, Qwest is not meeting its nondiscrimination obligations. Finally, AT&T

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[20] *BellSouth Louisiana II Order*, ¶¶ 342-347.

points out that their supplemental review disclosed that QCC had failed to post its various work and task orders in a timely manner.

51. Based upon its initial and follow-up review, AT&T suggested that the following items be scrutinized in determining Qwest's compliance with Section 272(c)(2) – accounting principles:

- Qwest has failed to properly disclose specific, billable transactions between it and QCC/Qwest LD. Therefore, a full evaluation of the compliance of affiliate transactions can not be accomplished. AT&T references the BellSouth Louisiana order.[21]

- Only payments between Qwest and QCC/Qwest LD are accounted for as "affiliate transactions". Transactions not involving the exchange of money may occur and yet not be accounted for and reported.

- Qwest focuses on the audit of its ARMIS Report. However, the audit that Qwest discusses is not an audit specifically of the section 272 Affiliate and its specific transactions.

52. Further, 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.

53. Qwest states that the filings of its 10K report and its CAM together with the annual audit "provide assurance that the BOC accounts for all transactions in accordance with the accounting principles approved by the FCC."[22] The FCC has stated that an audit of a BOC's Cost Allocation Manual (CAM) information and ARMIS data will not conclusively prove compliance with Section 272(c)(2).[23] If Qwest had proper internal controls, then proper GAAP accounting would have been employed. Such was not, and has not been the case. Qwest has not demonstrated compliance with this section.

54. Neither Qwest nor QCC has demonstrated or provided evidence, beyond mere words, to allow the Commission to make a predictive judgment as to compliance with Section 272(e) – Fulfillment of Certain Requests.

55. AT&T states that given the conventional wisdom that toll service will soon be bundled, below cost or free, with high-end data service, the Commission should 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 changes to overcome problems listed in the paragraphs below. These issues are based on AT&T's review of past FCC orders. AT&T states that Qwest's evidence is lacking in the following respects;

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[21] *BellSouth Louisiana II Order*, ¶ 340.
[22] Schwartz Affidavit at 31.
[23] *BellSouth Louisiana II Order*, ¶ 340.

- Qwest and QCC did not provide specific performance standards for measuring its requirements of Section 272(e)(1).

- Qwest has yet to prove nondiscriminatory access to its OSS.

- Qwest has failed to make a showing that it will impute to itself rates for exchange service and exchange access.

- 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.

- 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.[24]

- 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,[25] nor whether such will be posted to its website

56. AT&T states that 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, Section 272 (g) -- Joint Marketing. The Commission should require a more thorough explanation of Qwest's marketing practices. This should be mandated based on the unrestricted joint marketing that has impacted New York and Texas,[26] and on Qwest's (and the former U S WEST's) current policy and their combined past history. Qwest should not be able to shield how its joint marketing will impact the competitive landscape in its 14-state region.

57. AT&T then discusses joint marketing restriction violations based on review of Qwest's Master Services Agreement and related Work Orders. AT&T states Qwest is providing product planning, management and design functions for Qwest LD.

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[24] 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.

[25] *Verizon 271 Order*, ¶ 230, n 746.

[26] 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.

Exhibit D of Qwest's Master Services Agreement, titled Marketing Services, states that the following services will be provided to Qwest LD:

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

58. AT&T argues that the provision of referrals to Qwest LD implies that Qwest will market Qwest LD services to inbound callers. Qwest must inform callers that they have a choice of long distance carriers and offer to read, in random order, the names and, if requested, the telephone numbers of all available interexchange carriers.

59. The other services described above either explicitly or implicitly involve Qwest in the planning, design, and development of Qwest LD's offerings. The FCC specifically held that planning, design and development activities were not exempt from Qwest's nondiscrimination obligations under Section 272(c). Provision of these services demonstrates a discriminatory relationship between Qwest and its affiliate. Qwest has not shown to the satisfaction of AT&T, that it would provide similar services to a non-affiliate.

60. Further, the list of services provided to Qwest Wireless compared to those provided to Qwest LD, shows that the scope of services provided to Qwest LD is much more extensive. The services provided to Qwest LD do not fall under the definition of sales or joint marketing and therefore are not exempt from Section 272(c)'s non-discrimination requirements.

61. In the July 24, 2001 Colorado Workshop Witness Skluzak challenged Qwest's contention that it had an unbroken, unblemished five-year history of Section 272

compliance citing to a number of errors related to transactions with Qwest Long-Distance and the need to bring in Arthur Anderson to supplement their Section 272 efforts.[27]

62. Witness Skluzak similarly challenged Qwest's representations of when QCC actually became a 272 affiliate. Witness Skluzak points to Qwest's own exhibits and his testimony to suggest that Qwest Long-Distance ceased being the 272 affiliate at least as early as December 31, 1999 and QCC became the affiliate at least as early as January, 2000. Skluzak supports his conclusion by pointing to the fact that no transactions can be found for Qwest LD in the active section.[28]

63. Witness Skluzak asserts that his own testing shows that Qwest is not accruing from month to month and year to year as they have asserted in their testimony. Witness Skluzak asserts they are not complying with GAAP's requirement for timeliness. Worse still for Witness Skluzak is the fact that transactions between Qwest and QCC for a nine-month period beginning in July 2000 are not booked at all which Qwest characterizes as a one-time disruption.[29]

64. In support of its assertion that Qwest is not in compliance with Section 272 requirements on March 20, 2002, AT&T filed a Supplemental Authority (the findings of Fact and Conclusions of Law and Recommendations of the Administrative Law Judge in a Minnesota proceeding to determine Qwest Corporation's compliance with Section 272 of the Telecommunications Act of 1996.)

65. The Minnesota ALJ ruled that Qwest was in compliance with Section 272(b)(2), separate books and records, and with Section 272(b)(4), no credit with recourse to assets of the Qwest BOC. However, the ALJ ruled that Qwest was not in compliance with Section 272(b)(1), independent operation, Section 272(b)(3), separate officers and employees, Section 272(b)(5), arms length transactions, Section 272(c), non-discrimination, and Section 272(g), joint marketing. The rulings of non-compliance are described in the following paragraphs.

66. The Minnesota ALJ ruled that Qwest has not met its burden of proof that the Qwest BOC and 272 Affiliate will "operate independently". However, the Judge stated that Qwest can meet its burden of proof in this regard by completing an asset deployment inventory which shows that the Qwest BOC and its 272 Affiliate do not jointly own any transmission and switching facilities, or the land and buildings where those facilities are located at the time when QCC is authorized to enter the InterLATA market in the Qwest BOC service region.

67. The Minnesota ALJ ruled that Qwest has not demonstrated by a preponderance of the evidence that it has safeguards in place to prevent the improper communication of confidential information between the Qwest BOC and its 272 affiliate. Qwest's policy of loaning employees to the 272 affiliate violates the requirement of

[27] Workshop 7 conducted before the Public Utilities Commission of the State of Colorado Docket no. 97I-198T July 24, 2001, p. 95

[28] Id. p. 98.

[29] Id. p. 98

Section 272(b)(3). There are individuals who share officer and director functions between the 272 affiliate and other non-Qwest BOC entities. Employees of the Qwest BOC or the 272 Affiliate may be assigned to perform "services" on behalf of the other entity. Administrative services such as payroll, human resources, accounting and financial functions, and computer systems are provided by the Qwest BOC or QSC to the 272 Affiliate.

68. The Minnesota ALJ further stated that the mechanisms proposed by Qwest are inadequate to distinguish among employees of Qwest BOC, QCC and QSC. Also, Qwest's policy of lending BOC employees to the 272 Affiliate violates the requirement of Section 272(b)(3) that the separate affiliate have separate employees. Finally, the ALJ stated that the integration of management structure proposed by Qwest conflicts with the FCC's interpretation of what constitutes separate officers and directors.

69. The Minnesota ALJ ruled that the current operations of the Qwest BOC and the 272 Affiliate do not meet the arms length transaction requirement of Section 272(b)(5). Qwest's intended manner of operation of the 272 Affiliate is akin to that of a closely-held affiliate, rather than a separate affiliate, as required by Section 272. He stated that the Qwest BOC and the Qwest 272 Affiliate are wholly owned subsidiaries of the Qwest Services Corporation. The organizational chart of the Qwest corporate structure indicates that both the 272 Affiliate and the Qwest BOC report to the Qwest Services Corporation. Qwest Services Corporation provides legal and policy support services for all Qwest Affiliates, including the Qwest BOC and the 272 Affiliate. The Judge stated that entities dealing with each other cannot depend upon the same source for legal services, public policy analysis, and financial consulting with respect to transactions occurring between the two entities and remain at "arms length" in a transaction. The decision maker of the separate affiliate cannot report to the same officer of the joint owner of the affiliate and the BOC and maintain "arms length" in a transaction. Finally, in this regard, the ALJ stated that with interlocking management structures between the parent and the affiliates, different means of pricing for different transactions, and the expressed intent that transactions be structured for the benefit of the Qwest BOC, the arms length requirement of Section 272(b)(5) is not met.

70. Section 272(b)(5) also requires that all transactions with the 272 Affiliate be made available for public inspection. The ALJ ruled that the current manner of reporting transactions between the Qwest BOC and the 272 affiliate falls short of the requirement that such transactions be "public" within the meaning of Section 272(b)(5). The ALJ did not state that Qwest was non-compliant. However, the ALJ stated that Qwest must ensure that future posting must comply with the public inspection requirement to meet the standards of Section 272. The Minnesota ALJ stated that compliance with the non-discrimination requirements regarding transactions are assessed in the context of specific transactions for goods and services. He further stated that specific instances of non-compliance were noted at findings 73 and 117. Finally he stated that Qwest has not met its burden to show that the Qwest BOC will not discriminate in favor of its 272 Affiliate. However, in response to AT&T's assertion that Qwest discriminates by performing an evaluation for any services requested from the Qwest BOC by the 272 affiliate, the Administrative Law Judge pointed out that the flow

chart describing the process indicates that the submission of the request to the single point of contact is the "[s]ame process used by third-party requests for products/services/information". He further stated that the process, as described, does not discriminate against competing IXC's.

71. With respect to joint marketing, Section 272(g), the Minnesota ALJ stated that the *Joint Marketing Work Order* violates the non-discrimination requirements of Section 272(c)(2) because it does not sufficiently disclose the services, terms, and conditions provided by the Qwest BOC to the 272 Affiliate. Qwest acknowledged that its right to jointly market services for both the Qwest BOC and its 272 affiliate does not exempt Qwest from the non-discrimination requirement for "product design, planning, or development." The FCC, according to the ALJ, has explicitly addressed what a BOC may state in jointly marketing InterLATA telephone services. The FCC identified the approach in the *BellSouth South Carolina Order* as a "safe harbor so that the BOC's will have some guidance on what we view as consistent with Sections 251(g) and 272." The Department of Commerce has not identified how its proposed limitations on Qwest's marketing scripts can be applied on a competitively neutral fashion. The ALJ also stated that the proposed limitation is beyond the authority of the Minnesota Public Utility Commission (MPUC) in the context of this 271 application. He further stated that should the MPUC conclude that joint marketing between all LEC's and IXC's should be regulated, restrictions could be crafted on a competitively neutral basis. But a fuller record would need to be established to determine the proper extent of such regulation, beyond that developed in this proceeding. Thus, although the Minnesota ALJ tended to lean toward the point of view that Qwest was non-compliant relative to joint marketing, he did not go so far as to state that Qwest is non-compliant, with the exception of the *Joint Marketing Work Order* as it applies to Section 272(c)(2), and Section 272(c)(5). Relative to the joint marketing work order, the ALJ stated that Qwest has not met its burden of proof that it will comply with Section 272(g)(1).

72. On March 28, 2002 AT&T supplemented its previous comments acknowledging that its earlier references to actions recommended in Minnesota represent only a "recommended decision of the Administrative Law Judge...that will be voted on by the full Commission after exceptions and replies are filed....but notes that the Arizona Staff, ALJ and Commission can give [it] what weight they wish in their decision-making.[33]

d. <u>Position of Qwest</u>

73. With regard to the requirement in Section 272(b)(1) to operate independently, Qwest states that the BOC and the 272 affiliate do not and will not jointly own telecommunications switching or transmission facilities, or the land or buildings

[30] Workshop 7 conducted before the Public Utilities Commission of the State of Colorado Docket no. 97I-198T July 24, 2001, p. 95
[31] Id. p. 98.
[32] Id. p. 98
[33] Reply of AT&T to Response of Qwest Corporation to AT&T Supplemental Authority – Section 272 filed in Docket No. T-00000A-97-0238 before the Arizona Corporation Commission, March 28, 2002, p.1-2.

where those facilities are located for so long as such a restriction applies under the rules. Further, no switching and transmission facilities have been transferred to the 272 Affiliate. On a going-forward basis, the BOC will be monitoring asset transfers on a quarterly basis beginning March 31, 2001.

74. Regarding Operations, Installation and Maintenance (OI&M) aspects, neither the BOC nor any Qwest affiliate performs any OI&M functions on behalf of the 272 affiliate's switching and transmission facilities nor does the 272 affiliate perform such functions associated with the BOC facilities.

75. When the Qwest 272 affiliate provides InterLATA long distance service, it will use its own transmission and switching facilities and obtain wholesale network services from unaffiliated carriers. The 272 affiliate will perform OI&M on its own network facilities.[34]

76. Qwest points to several facts that show the 272 affiliate satisfies the provisions of 272(b)(2) Books, Records and Accounts in their opinion.

- The 272 affiliate follows Generally Accepted Accounting Principles ("GAAP"), as adopted by the FCC in Docket 96-150. The 272 affiliate's books, records, and accounts are maintained in accordance with GAAP and consolidated into Qwest Communications International Inc.'s financials which also reports its financial activities in accordance with GAAP.

- Qwest Communications International Inc.'s consolidated financial statements as contained in the Form 10-K filed with the Securities and Exchange Commission ("SEC"), include the report of its independent auditor, Arthur Andersen, L.L.P., which provide a positive opinion that Qwest Communications International Inc. has prepared its financial statements in conformance with GAAP. These financial statements include the consolidated results of the 272 affiliate.

- The 272 affiliate has established and maintains a Chart of Accounts that is separate from the BOC's Chart of Accounts.

- The 272 affiliate maintains a separate set of financial statements from those of the BOC for internal and corporate use.

- The 272 affiliate maintains expenditure controls that ensure the 272 affiliate's funds are expended appropriately.

- The ledger system of the 272 affiliate is separate from the BOC's ledger system. The system contains "edits" to control and validate appropriate classification of expense.

[34] Qwest Affidavit of Judith Brunsting, pg 8

- The Services Company perform the 272 affiliate's accounting and finance functions on behalf of the 272 affiliate.

- The 272 affiliate has its own federal tax identification number that is separate from the BOC's federal tax identification number.

- The 272 affiliate pays applicable taxes and fees to various taxing and regulatory agencies separately from the BOC.

- The 272 affiliate complies with state and FCC regulatory reporting requirements separately from the BOC.

77. Qwest provided the following facts to support the compliance of the 272 affiliate with Section 272(b)(3) – Separate Officers, Directors and Employees; Section 272(b)(4) – No Recourse to BOC's Assets.

- The 272 Affiliate has no officers, directors, or employees that are also officers, directors, or employees of the BOC.

- No director of the 272 affiliate will also act as a director of the BOC and, as long as the requirements of Section 272 remain in force, no director of the 272 affiliate will also simultaneously act as a director of the BOC.

- The 272 affiliate has two (2) directors, Drake Tempest and a recent vacancy. Mr. Tempest is not an officer or a director of the BOC. Qwest points to an FCC Louisiana ruling stating that there is no standard for minimum number of directors.

- The 272 affiliate and the BOC maintain and will continue to maintain separate payrolls. The 272 affiliate currently employs a separate staff from the BOC. No 272 affiliate employee is an employee of the BOC and, as long as applicable Section 272 requirements exist, no employees of the 272 affiliate will be simultaneously employed by the BOC.

- The 272 affiliate, the BOC, and the Service Company have provided color identification material to employees that assist in identifying the associated affiliate. The color indicates the affiliate for which a given employee works.

- Separations between 272 affiliate and BOC employees are maintained throughout. When BOC employees provide payroll services to the 272 affiliate, the services are documented in the form of a Work Order and the rates, terms, and conditions are available for public inspection, as required by Section 272(b)(5). When 272 affiliate employees provide services to Qwest affiliates, including the BOC, the employees are required to complete a time report and the BOC is charged for their time using rates set according to applicable FCC requirements. These services are documented in the form of a Task Order and the rates, terms, and conditions are available for public inspection, as required by Section 272(b)(5).

- The 272 affiliate initiates a series of activities when an employee accepts employment with another company in the Qwest corporate family. The departing 272 affiliate employee must notify his/her manager of their decision to leave; a letter of resignation may accompany their notice, but is not required. A resignation date is then determined and prior to this date, the departing 272 affiliate employee must return 272 affiliate-owned assets and account for documents in their possession. After the resignation date, the 272 Affiliate removes the ex-employee from its payroll.

78. Qwest states that to meet its burden of proof, the Section 272 affiliate must only provide evidence that its officers, directors, and employees are separate from those of the BOC.

79. Qwest points to the following facts as evidence of the 272 affiliate's compliance with section 272(b)(4):

- The 272 affiliate has not requested, nor will it request, any Qwest entity, to co-sign a contract or any other agreement with the 272 affiliate in a manner which would allow a creditor to obtain recourse to the BOC's assets.

- The 272 affiliate is capitalized separately from the BOC. Funding for the 272 affiliate is provided by financial obligations issued by Qwest Capital Funding, Inc. ("QCFI"), a separate subsidiary of Qwest Communications International Inc. The debt issued by QCFI is guaranteed by Qwest Communications International Inc., and neither the debt obligations issued by QCFI, nor the guarantee by Qwest Communications International Inc. provide creditors recourse to the assets of the BOC. The BOC issues its own direct financial obligations to fund its operations – principally commercial papers, notes, and bonds.

- The Master Services Agreement ("MSA") between the BOC and the 272 affiliate states that contracts entered into by the 272 affiliate are the sole responsibility of the 272 affiliate and it has no recourse to the BOC's assets. In case of default, liability is limited to charges for costs incurred under the Agreement.

80. While AT&T addressed Section 272(b)(5) Affiliate Transactions – transactions at arm's length, in writing, and publicly available as two topics, Qwest's

argument is consolidated into one. Qwest states that its 272 affiliate has and will continue to account for all transactions between itself and the BOC in accordance with the FCC's affiliate transaction rules. Qwest originally identified affiliate service through their affiliate transaction process which was supplemented by Arthur Anderson loaned staff to meet Section 271 procedural schedules. This occurred during the transition from Qwest Long Distance to the 272 affiliate.[35] Qwest provides the following additional facts as evidence of compliance:

- All transactions between the 272 affiliate and the BOC are documented as part of an MSA, Service Agreement ("SA"), stand-alone contract, or are purchased as a tariffed service offering.

- All transactions between the 272 affiliate and the BOC are posted on Qwest Communications International Inc.'s Internet Home Page site[36], the contents of which are intended to be part of this record:

  http://www.qwest.com/about/policy/docs/qcc/overview.html

- The 272 affiliate, as an added protection, is required to contact its BOC Sales Executive Team-Sales Executive, to obtain access services. Sales Executives are the contact people who ensure that all interexchange carriers have equivalent access to the BOC's goods, services, facilities, and information.

- The 272 affiliate is also required to use the BOC Service Management Team as a single source of support for all provisioning, maintenance, and repair issues.

81. The BOC will post 272 transactions on the Internet within 10 days of execution. Transactions between the BOC and Qwest Long Distance are on the Qwest Communications International, Inc. web site on the Qwest LD web page. BOC and 272 affiliate transactions from June 30, 2000 to December 31, 2000 are on the QCC web page. Transactions after this time "Phase II" transactions are documented via work orders. These are to be posted within 10 days at the web address noted above in the bulleted list. [37]

82. Qwest states that the FCC evaluates the sufficiency of BOC Internet disclosures by referring to ARMIS filings, Cost Allocation Manual (CAM) and CAM audit work papers. The BOC has reconciled these transactions for Qwest LD for the year ended December 31, 2000. The biennial audit will also thoroughly review these transactions.[38]

[35] Qwest Affidavit of Marie Schwartz, pg 20
[36] Staff verified that such transactions are so posted.
[37] Qwest Affidavit of Marie Schwartz, pgs 23-24
[38] Qwest Affidavit of Marie Schwartz, pg 26

83. With respect to Section 272(c)(1) – Nondiscrimination Safeguards, Qwest states that the 272 affiliate is required to contact its IXC Sales Executive Team representative at the BOC to obtain services available to every interexchange carrier. Standard offerings provided to the 272 affiliate will also be extended to unaffiliated interexchange carriers under the same terms and conditions, and at the same rates. Non-standard services and services that have not previously been offered outside the corporate family undergo a review process before being offered to the 272 affiliate on a nondiscriminatory basis. The 272 affiliate does not currently have access to the BOC's OSS. If the 272 affiliate becomes a CLEC it will be required to access OSS in the same manner as non-affiliated CLECs. Transactions are reduced to writing and made available on the Internet. Service requests not covered by an existing tariff, MSA, or stand-alone contract, go through a formal information gathering and review process.

84. With respect to Section 272(c)(2) – Accounting Principles; Section 272(d) – Biennial Audit, Qwest states that the BOC's books are kept in compliance with GAAP and regulatory accounting rules, as required by the FCC. Affiliate transactions are recorded in compliance with Part 32, Uniform System of Accounts for Telecommunications Companies, specifically the Affiliate Transactions Rules of Part 32.27 as modified by the FCC in the Accounting Safeguards Order, and Part 64, Subpart 1, Allocation of Cost. The FCC's affiliate transaction rules as amended in the Accounting Safeguards Order apply a valuation hierarchy to BOC transactions with the 272 Affiliate. The BOC files an ARMIS report annually along with an audit opinion (collectively the Joint Cost Report). Qwest concedes that the Joint Cost Report does not specifically focus on the BOC-272 Affiliate relationship but includes a sample base including general administrative type services between the two entities. Qwest concludes: "Therefore, the statement of compliance rendered by Arthur Andersen as part of that audit is general in nature and concludes, based on the sample, that the BOC complies with the affiliate transactions rules in all material respects."

85. The BOC also files a 10 K report annually along with an audit opinion concerning among other things, GAAP compliance. The BOC also files a CAM annually.

86. Qwest summarizes that the BOC has provided evidence that it is prepared to comply with Section 272(c). The 272 affiliate must obtain services like any other IXC and these services are documented, priced, and posted according to the requirements set out in Section 272 (b)(5).

87. Qwest points to the biennial audit as another means of verifying compliance. The Arizona Staff (as well as the independent auditor) will have access to the financial accounts and records of the BOC and the 272 affiliate. The FCC and Arizona Staff will have access to the working papers and supporting materials of the auditor who performs the audit with appropriate protection for proprietary information. The biennial audit acts as an additional control to ensure the BOC complies with the requirements in Section 272.

88. In response to the four defined requirements of Section 272(e), (Fulfillment of Certain Requests; Section 272(f) – Sunset) Qwest provides the following

affirmation: "The BOC does not and will not discriminate in favor of the 272 affiliate in the provision of telephone exchange service or exchange access. Upon obtaining Section 271 approval in Arizona, the 272 affiliate will obtain such services from the BOC under the same tariffed terms and conditions as are available to unaffiliated interexchange carriers. The 272 affiliate will contact its Sales Executive Team representative for these tariffed services through the same procedures that are available to other interexchange carriers. The IXC representatives will process orders in a nondiscriminatory manner."

89. Qwest states that they will adhere to the requirements of Section 272(f).

90. With respect to Section 272(g) – Joint Marketing; and Section 272(h) – Transition, Qwest states that the 272 affiliate will not market or sell InterLATA services with the BOC until the 272 affiliate is authorized to provide InterLATA service in the State of Arizona by the FCC. Further, the 272 affiliate understands its obligations under previous FCC 271 orders relative to Section 272, and is prepared to follow the joint marketing rules. Qwest states that they are not providing marketing plans or scripts in this application and in their opinion they are not required to do so. Further, Qwest points out that the FCC in its *Non-Accounting Safeguards Order*, stated that "no regulations are necessary to implement Section 272(g)(1)."[39]

91. Qwest states that the BOC has satisfied this section of the Act because U S WEST Communications, Inc. was not engaged in InterLATA information or InterLATA long distance services or manufacturing in February 1996.

92. On May 29, 2001 Qwest filed rebuttal testimony to AT&T's earlier submissions. In its May 29 filing Qwest maintained that – granted interLATA relief -- it has the appropriate controls and processes in place to enable it to meet the Section 272 rules required by the FCC. p.2. Witness Schwartz asserts that Qwest Long Distance – and its successor Qwest Communications Corporation ("QCC") – is a separate entity with separate officers and employees, all transactions with Qwest LD are documented and posted to an Internet website, creditors of Qwest LD have no recourse to BOC assets and other controls to ensure compliance.[41]

93. Responding to criticism contained in AT&T's May 17, 2001 Comments, Qwest asserts that it is not surprising that they (Qwest) do not have all 272 compliance issues resolved for the new affiliate. Qwest asserts that Section 272(h) of the Act provides BOCs a one-year transition period to become 272 compliant.[42]

94. Qwest suggests in its May 29, 2001 filing that it currently is in a transition phase as it endeavors to realign certain responsibilities from Qwest Long Distance to the

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[39] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22,043-44, at ¶286.
[40] Statement of Supplemental Authority Regarding the Public Interest filed on behalf of Qwest Corporation in Docket No. T-00000B97-0238 before the Arizona Corporation Commission, March 18, 2002, Letter, p.2.
[41] Rebuttal Affidavit of Marie E. Schwartz filed on behalf of Qwest Corporation in Docket No. T-00000B97-0238 before the Arizona Corporation Commission, May 29, 2001, p.3.
[42] Id. p.5-6

newly designated 272 affiliate -- Qwest Communications Corporation – to demonstrate compliance with the Section's requirements. Qwest suggests that many of the examples contained in AT&T affidavit, such as interim common supervision, were the result of transitional activities, are no longer provided and cannot be used to conclude how Qwest will meet the 272 requirements on a going forward basis. Qwest argues that it would be completely unreasonable to look only at this transitional period and conclude that the BOC will not meet the Section 272 rules going forward under more typical circumstances.[43]

95. Qwest offers the opinion that the transition period was a one-time event which is not indicative of on-going operations or future behavior. Qwest argues that with the end of the transition period, monthly billing is taking place between Qwest and its 272 affiliate and that it has employed "catch-up" billing to bring the transactions current. Qwest acknowledges that occasional manual errors in data or in postings have occurred from time to time but that does not suggest they are out of compliance with Section 272. Instead, Qwest points to its ability to find and correct errors as evidence that the company's controls are in place and are working.[44]

96. Secondly, Qwest argues against AT&T's suggestion that the FCC requires that individual billings be construed as "transactions" and posted on the Internet. Qwest points to the fact that the FCC rejected the same argument from AT&T earlier in its Bell Atlantic-New York Order. Qwest points to the fact that its own Internet postings evidence the same FCC requirement components of information --. rates, terms, conditions, frequency, number and type of personnel, and level of expertise -- that were prescribed by the FCC in the Bell Atlantic-New York Order. Qwest further argues that additional billing detail – such as that sought by AT&T – was not required by the FCC to be posted but Qwest indicated that it has made such detail available to AT&T on a confidential basis through responses to data requests.[45]

97. Qwest similarly challenges AT&T's characterization that certain billing rates are "artificially high". Qwest maintains that the specific bill rates referenced by AT&T for its illustration appear very reasonable if one recognizes that they include fully distributed costs at rates similar to those charged by the BOC for the same salary grades and are, therefore, not artificially high.[46]

98. Qwest also suggests that AT&T's concern that a transfer of assets could be occurring is unfounded. In response to an incident concerning an untraceable account code Qwest noted that the code was a Field Reporting Code which directed an expense to be booked to the proper account. Qwest suggests that the examples referenced by AT&T only point out that many of their concerns and issues are unfounded or overstated and can be reasonably explained.[47]

[43] Id. p. 7.
[44] Id. p. 8.
[45] Id. p. 10.
[46] Id. p. 11.
[47] Id. p. 11-12.

99. On a separate matter, Qwest challenges AT&T's assertion that federal requirements to maintain separate books, records and accounts includes being in separate locations. Qwest refers in its response to the FCC's Non-Accounting Safeguards Order for support citing to the fact that the federal agency's rules "permit the sharing of administrative and other services". Qwest also offers the opinion that the FCC would even allow the same accounting software to be used in processing transactions by both parties but the 272 affiliate has chosen to use a separate general ledger system.[48]

100. Qwest also maintains that it follows Generally Accepted Accounting Principles ("GAAP") to properly record expenses and its auditor confirms that the GAAP rules are followed in all material respects. Qwest maintains that concerns raised regarding certain transactions that could not be identified were immaterial when compared to the total affiliate transactions reported for the BOC in 2000 – amounting to less than 1% of the total value of such transactions.[49]

101. Qwest also rebuts any suggestion that its reporting structure may not be compliant with Section 272 requirements. Qwest maintains that each company maintains separate officers and directors just as the FCC rules require. Furthermore, Qwest points to the fact that both the BOC and the 272 affiliate have separate employees, paid from separate payrolls. Qwest notes, however, that other FCC rules still permit officers in the BOC and the 272 affiliate to report to the same officer in the parent company.[50]

102. Qwest further asserts that -- using the FCC's shared employee test --BOC employees who provide services to the 272 affiliate are not considered shared employees. Qwest argues that it shares "services" between its business units and there are no prohibitions by the FCC regarding how many services can be provided, how many employees can be used, or which specific services can be provided. Accordingly, Qwest argues that services provided back and forth between the BOC and the 272 affiliate do not violate any shared employee rules.(p.16-17) On a similar note Qwest asserts there are no explicit limitations from the FCC – nor any mention of rules –governing the transfer of employees between the BOC and the 272 affiliate in either the Accounting Safeguards Order or the Non-Accounting Safeguards Order nor in any Section 272 approval order.[51]

103. Qwest maintains that no third party carrier has expressed any interest in purchasing any of the Section 272 services it has posted on its website despite the fact that third party carriers could purchase services at the same rates, terms and conditions paid by the Section 272 affiliate. Qwest notes that even after a detailed analysis of the posted transactions performed by AT&T in its Affidavit AT&T has yet to ask to purchase any service.[52]

104. Qwest submits that there are no non-cash transactions conducted between the BOC and the 272 affiliate noting that all transactions are on a cash basis. According

[48] Id. p. 12.
[49] Id. p. 13.
[50] Id. p. 13-14.
[51] Id. p. 17-18.
[52] Id. p. 18-19.

to Qwest any concern regarding non-cash transactions are moot because all 272 affiliate transactions are done on a cash basis.[53]

105. Qwest takes issue with AT&T's apparent conclusion that non-BOC affiliates that provide services to the 272 affiliate are required to offer those services to third parties. Qwest argues that non-BOC affiliates may provide services to its Section 272 affiliate without offering similar services to third parties so long as the transactions is not a "chaining" transaction involving the BOC. In the specific instance cited by AT&T Qwest maintains the BOC did not provide any services to its Advanced Technologies affiliate that were in turn chained to Qwest Long Distance; similarly services that Qwest Long Distance purchased from Advanced Technologies did not involve the BOC and, therefore, those services are not subject to the nondiscrimination requirements.[54]

106. Qwest also takes issue with any suggestion that prices it charges to the 272 affiliate are not in compliance with FCC requirements. Qwest notes that for those services provided by the BOC to the 272 affiliate Qwest uses the pricing hierarchy prescribed in FCC Part 32.27 and CC Docket 96-150, the Accounting Safeguards Order. Qwest further notes that its external auditors have reviewed its methods and procedures in conjunction with their audits without any findings of non-compliance.[55]

107. Qwest strongly objects to any suggestion that the Commission should impose additional requirements intended to ensure Qwest does not engage in price squeezes. Qwest cites for support to the fact that the FCC specifically rejected the idea as not necessary because adequate mechanisms are available to address the issue.[56]

108. Finally, Qwest takes issue with AT&T's suggestion that executing different agreements with different affiliates involving similar services is not permitted under Section 272. Qwest argues that joint marketing services provided to different affiliates are likely to vary and a comparison of the services provided has no relevance to Section 272 compliance. Qwest suggests that its Section 272 compliance obligation is limited to posting the transaction on the Internet.[57]

109. In the June 11, 2001 Arizona Workshop Witness Schwartz indicated that Qwest Corporation, the BOC, formerly UW West Communications has consistently had a 272-compliant subsidiary since the release of the Act.[58]

110. Witness Schwartz testified to the fact that despite the one year timeframe permitted by the FCC to bring a 272 affiliate into compliance Qwest completed its efforts

[53] Id. p. 19.
[54] Id. p. 20-21.
[55] Id. p. 21-22.
[56] Id. p. 22-23.
[57] Id. p. 24-25.
[58] Transcript of Workshop 7 conducted by the Arizona Corporation Commission in Docket T-00000A-97-0238 on June 11, 2001., p.20, lines 19-21

to make QCC a compliant Section 272 subsidiary in three months all the while maintaining Qwest Long Distance as a compliant Section 272 subsidiary.[59]

111. In the Colorado 272 Workshop conducted on July 24, 2001 Witness Schwartz suggested that it is important to remember that US West Long-Distance (the predecessor to Qwest Communications Corporation ["QCC"]) has been a compliant Section 272 subsidiary since the release of the Telecommunications Act of 1996. In the opinion of Witness Schwartz Qwest has always had a compliant Section 272 subsidiary.[60]

112. Witness Schwartz also pointed out that the decision to merge with Qwest – and the associated challenges of merging two companies – created some one-time disruptions in accounting controls. Schwartz argued that Qwest was ready and made corrections immediately as they became known. Schwartz maintained that almost all of the discrepancies that appear in AT&T's testimony were discovered by Qwest's internal controls and provided to AT&T.[61]

113. Witness Schwartz characterizes AT&T's concerns as unfounded noting for the record that AT&T agrees the BOC and QCC have separate charts of accounts, use separate versions of PeopleSoft and that those separate softwares are maintained at separate physical locations. Schwartz also suggests that concern over its use of GAAP is equally unfounded pointing to the fact that all publicly traded companies are required to follow GAAP – including all Qwest companies. Witness Schwartz states that all Qwest companies are required to follow GAAP and they do. More importantly, they have an unqualified audit opinion from the company's auditors for QC, the BOC and QCI.[62]

114. Witness Schwartz notes that Qwest has always met the Internet 10-day posting requirement for affiliate transactions for Qwest Long-Distance and continues to meet the 10-day requirement for QCC since they "turned up" the QCC on the 272 web site on March 26, 2001. Schwartz notes that the average posting time for QLD transactions was 6.7 days and for QCC is 4.7 days.[63]

115. Witness Brunsting acknowledges that Qwest Services Company ("QSC") – a subsidiary of Qwest Corporation – provides certain services for both the BOC and QCC, however, QSC is not subject to the same 272(C) discrimination safeguards that the QCC is required to satisfy.[64]

116. On March 18, 2002 Qwest submitted a statement of supplemental authority in this proceeding covering an investigation conducted by the Public Utilities Commission of the State of Colorado (Docket No. 97I-198T). In its March 18 submission, Qwest asserted that many of the issues raised in Colorado are identical to

[59] Id. p.23, lines 1-5.
[60] Workshop 7 conducted before the Public Utilities Commission of the State of Colorado Docket no. 97I-198T July 24, 2001, p.21.
[61] Id. p. 22.
[62] Id. p. 27-28.
[63] Id. p. 31-32.
[64] Id. p. 92.

those being considered in the Arizona proceeding and encourages the Commission to take note of the Colorado Chairman's resolution of those issues. Qwest specifically directs attention to the fact that the Hearing Commissioner found that structures, safeguards, separations and procedures Qwest has in place fully satisfy the requirements of Section 272.[65]

117. On March 21, 2002 Qwest responded to AT&T's supplemental authority filing, dated March 20, 2002. In its reply, Qwest stated that a number of the Minnesota ALJ's positions are inconsistent with the determinations of every other authority that has addressed Qwest's Section 272 showing. This includes the Multistate Facilitator, the Nebraska Commission, the New Mexico Commission, The Washington Commission, the Montana Commission (in its preliminary report) and, most recently, the Order of the Chairman of the Colorado Commission. Qwest pointed out also that under Minnesota law the ALJ recommendations have no legal effect unless they are expressly adopted by the Commission as a final order. The AT&T filing included the Findings of Fact and Conclusions of Law and Recommendations of the Administrative Law Judge. It did not include an Order of the Commission.

118. Qwest stated that the Minnesota ALJ rejected AT&T's principal claims concerning Sections 272(b)(2) and Section 272(b)(4). With respect to other aspects of Section 272, Qwest stated that the report indicated that Qwest had not yet met its burden of demonstrating compliance but could do so by taking recommended actions. Qwest further stated that while it is in the process of reviewing the Minnesota ALJ's recommendations (some of which are in fact already in place at Qwest) they go well beyond what the FCC has required of other BOC's who have received 271 approval. Finally, Qwest stated that the FCC has made clear that a State Commission may not "condition or delay BOC entry into intrastate InterLATA services" with requirements inconsistent with those imposed by the FCC, whether or not the State Commission has a different view of what "common sense" requires. Finally, Qwest, in its response, maintains that its evidence meets the requirements of Section 272 as applied by the FCC.

e. Disputed Issues

DISPUTED ISSUE NO. 1 (272-1): AT&T claims that Qwest violates other provisions of Section 272, preventing a finding that Qwest's 272 Affiliate is a separate affiliate.

119. This issue revolves around Section 272(a) and portions of 272(b). Section 272(a) states that a BOC may not provide in-region, InterLATA services unless it provides that service through an affiliate that is separate from the BOC and meets the requirements of Section 272(b)

[65] Statement of Supplemental Authority Regarding the Public Interest filed on behalf of Qwest Corporation in Docket No. T-00000B97-0238 before the Arizona Corporation Commission, March 18, 2002, Letter, p.2.

120. The separate affiliate provision is contained primarily within Section 272(b). Subsections 272(b) (1) and (2) which are relevant for this impasse issue, read as follows: Section 272 (b) Structural and Transactional Requirements, The separate affiliate required by this section:

- Shall operate independently from the Bell operating company;

- Shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;

121. These separate affiliate requirements are addressed in further detail in CC Docket 96-149, the Non-Accounting Safeguards Orders,[66] and CC Docket 96-150, the Accounting Safeguards Order.

a. <u>Summary of Qwest and CLEC Positions</u>

122. AT&T states that QCC is not a separate entity because 272(b) requirements are not met and the affiliate is not separate as a practical matter. AT&T points to provision of non-local directory assistance to in-region subscribers as provision of InterLATA service and the nationwide component of non-local directory assistance was "unlawfully configured.[67]"

123. AT&T goes on to argue that on February 16, 2001, the FCC concluded that Qwest, through its 1-800-4US-WEST calling card service, was providing in-region, InterLATA service in violation of section 271.[68] AT&T also cites to the FCC's September 28, 1998 finding that U S WEST, was providing in-region, InterLATA service in violation of section 271 through its pre-merger marketing arrangements with Qwest.

124. AT&T states that "Qwest was in violation of section 272(a) and cannot continue to support their oft-repeated claim of an unbroken chain of section 272 compliance since the Act's inception."[69]

125. Qwest states that: QCC is indeed a legal and separate entity for purposes of Section 272(b). The BOC and the 272 affiliate do not own and will not jointly own telecommunications switching or transmission facilities, or the land or buildings where those facilities are located for so long as such a restriction applies under the rules.

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[66] See *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-489 (rel. December 24, 1996).

[67] AT&T brief 8/23/01, pg. 4

[68] *AT&T Corp v. U S WEST Communications, Inc.*, File No. E-99-28, Memorandum Opinion and Order, DA01-418 (rel. Feb. 16, 2001). *See* 7 ATT 1, ¶ 160.

[69] AT&T brief 8/23/01, pg 4

b. Discussion and Staff Recommendation

126. The incidents or situations relied upon by AT&T occurred or existed before March 26, 2001, the date of the transition from Qwest LD to QCC as QC's Section 272 affiliate. AT&T has argued that QCC was "identified" as the 272 affiliate in January 2001 and therefore the period January 1 through March 26, 2001 should be considered and not regarded as a transition period. Even when considered, however, the incidents cited by AT&T are not really indicative of Qwest's noncompliance with Section 272 requirements as much as they are indicative of Qwest's apparent misunderstanding of what constituted the provision of in-region inter-LATA service. The FCC's subsequent rulings resulted in Qwest having to cease and desist providing the services, to the extent they constituted in-region InterLATA service in violation of Section 271.

127. As described in Qwest's brief, QCC is prepared to offer service in compliance with Section 272, once it receives authority from the FCC to provide in-region InterLATA service. Qwest points out that AT&T made no claims of untimely postings after QCC replaced Qwest LD as the 272 affiliate on March 26, 2001.

128. Staff's opinion is that AT&T's claims regarding late postings, etc. should not prevent a finding that Qwest's 272 affiliate is a separate affiliate. This has not occurred since the LD affiliate was set up and any infractions in the future should be discovered in the context of a biennial audit looking at actual transactions of the 272 affiliate.

129. The testimony of Qwest's witnesses establishes that QCC, the designated 272 affiliate, is a separate entity.[70] Neither QCC nor QC owns any stock in the other.[71] They do not jointly own transmission and switching facilities or provide each other with OI&M services. Qwest stated that no switching and transmission facilities have been transferred to the 272 Affiliate. On a going-forward basis, the BOC will be monitoring asset transfers on a quarterly basis beginning March 31, 2001. The 272 affiliate will perform OI&M on its own network facilities. The 272 affiliate has established and maintains a separate Chart of Accounts. The 272 affiliate maintains a separate set of financial statements from those of the BOC for internal and corporate use. The ledger system of the 272 affiliate is separate form the BOC's ledger system. Qwest has demonstrated that it will maintain separate books records, and accounts in accordance with the accounting methods approved by the FCC. There will be separate officers, directors and employees. Therefore, Staff finds that Qwest has sufficiently demonstrated that QCC is a separate entity and will operate as such as required by Section 272.

130. In making this finding, Staff has also taken into consideration the supplemental authority relied upon by the parties. Staff believes that the record in Arizona supports a finding that Qwest is complying with all FCC requirements in this regard.

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[70] Citation is Witness Schwartz appearance at June 11, 2001 Workshop Number 7. pgs.24-27.

[71] See 7 Qwest 3 ("Brunsting Direct) at 5-6.

DISPUTED ISSUE NO. 2 (272-2): Does Qwest follow GAAP, accrual accounting? Does Qwest have a separate chart of accounts?

131. This issue focuses on Section 272(b)(2), which states that, the separate affiliate required by this section:

132. Shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate

a. Summary of Qwest and CLEC Positions

133. AT&T has alleged that Qwest and QCC fail to follow a requirement of the *Accounting Safeguards Order* that mandates adherence to Generally Accepted Accounting Principles.[72] AT&T has provided numerous examples of what they consider noncompliance by both QCC and QC.

134. AT&T states that Qwest does not use accrual accounting and has other accounting lapses that do not conform to GAAP. AT&T takes issue with Qwest's allegation that QCC's compliance with GAAP is not relevant prior to March 26, 2001, because QCC did not become a Section 272 affiliate until that date. AT&T states that as a subsidiary of a publicly-traded company, QCC has always been required to follow GAAP, regardless of the Section 272 requirement to do so. Further, AT&T argues that Qwest must comply with 47 C.F.R. §32.27 in accordance with GAAP, regardless of the materiality of the particular transactions in question.

135. Qwest takes the position that it and its affiliates do use GAAP accounting and that QCC's separate books, records and accounts are maintained in accordance with GAAP and consolidated into QCI's financial statements. Qwest also states that QC follows GAAP and the FCC reviews of QC ARMIS reports has found no problems for the past 3 years.

b. Discussion and Staff Recommendation

136. Qwest states that it and QCC follow GAAP and acknowledges that GAAP requires accrual accounting. Qwest states that QCC's separate books, records, and accounts are maintained in accordance with GAAP and consolidated into QCI's financial statements.[73] Qwest further stated that the audit opinion of Arthur Andersen accompanying QCI's consolidated financial statements confirms that QCI follows GAAP in all material respects with respect to these consolidated operations.[74]

137. AT&T acknowledged that it has identified no untimely accruals following the overlay of Section 272 controls on QCC. While AT&T did identify several instances

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[72] *See* AT&T Brief at 5 - 7 and 28, regarding discussion of noncompliance with GAAP as to sections 272 (b) and 272 (c)(2).
[73] See 7 Qwest 3 (Brunsting Direct) at p. 9.
[74] See 7 Qwest 7 (Qwest's Auditor's Opinion).

where expenses were not properly accrued, those instances appeared to be isolated and were subsequently corrected by Qwest. Should infractions of this nature occur again, Staff is confident that they would be identified in the conduct of an independent audit by Qwest's independent auditors and/or during the mandated biennial audit that will examine this issue with transaction records form the relevant period.

138. The FCC has found in the context of other Section 271 applications that evidence of the type presented by Qwest in this proceeding (corporate policies and instructions together with an independent audit program to ensure GAAP compliance and a Form 10-K indicating that separate audits were being conducted by independent auditors of the RBOC's consolidated financial statements) provided sufficient assurances that a 272 affiliate maintains its books, accounts, and records in accordance with GAAP.[75]

DISPUTED ISSUE NO. 3 (272-3): Does QCC and QC use separate accounting software and is this a requirement of Section 272?

139. This issue once again calls into question Qwest's compliance with Section 272(b)(2)'s requirement that the 272 affiliate "maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate."

a. Summary of Qwest and CLEC Positions

140. AT&T states that separate accounting software is not used and it is not being maintained at a separate location and that Qwest processes Qwest LD financial transactions on Qwest's systems.

141. Qwest states that the Services Company performs accounting and finance functions and that the ledger system is separate with controls to validate appropriate expense classification.

b. Discussion and Staff Recommendation

142. Qwest states "QCC maintains a Chart of Accounts separate from that of QC, has a separate ledger system, and maintains separate accounting software which is kept at a separate geographic location. 6/11/01 Ariz. Tr. at 74." The accounting operations in place at Qwest are not unusual in that one entity often maintains the hardware and software necessary for payroll administration for all affiliates. What is important is that accounting and system controls are used and in place to maintain appropriate separation. Finally, Section 272 does not specify separate accounting software, but only separate books, records and accounts.

[75] See *BellSouth Louisiana II Order* at para. 328; n. 1029.

143. In addition, the FCC itself has recognized the benefits inherent in the integration of some services.[76]

144. Therefore, Staff concurs with Qwest's position that its maintenance of the hardware and software necessary for payroll administration for all affiliates and other accounting functions is not inconsistent with the requirements of Section 272(b)(2), as accounting and system controls are in place to maintain appropriate separation.

DISPUTED ISSUE NO. 4 (272–4): Should the Commission require Qwest to undergo a Section 272(d) audit before it obtains interLATA relief even though Section 272(d) states that this obligation begins one year after 271 relief is granted?

145. Qwest and AT&T disagree over whether appropriate accounting and affiliate transaction controls are in place and whether they are working. Specifically, Section 272(d) states, with respect to a Biennial Audit:

> (1) **General requirement**: A company required to operate a separate affiliate under this section shall obtain and pay for a joint Federal/State audit every 2 years conducted by an independent auditor to determine whether such company has complied with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under subsection (b).
>
> (2) **Results submitted to commission; state commissions**: The auditor described in paragraph (1) shall submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection. Any party may submit comments on the final audit report.
>
> (3) **Access to documents**: For purposes of conducting audits and reviews under this subsection:
>
> (A) the independent auditor, the Commission, and the State commission shall have access to the financial accounts and records of each company and of its affiliates necessary to verify transactions conducted with that company that are relevant to the specific activities permitted under this section and that are necessary for the regulation of rates;

[76] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Third Order on Reconsideration, 14 FCC Rcd 16,299 at para. 18 (1999) ("Third Order on Reconsideration").

(B) the Commission and the State commission shall have access to the working papers and supporting materials of any auditor who performs an audit under this section; and

(C) the State commission shall implement appropriate procedures to ensure the protection of any proprietary information submitted to it under this section.

a. Summary of Qwest and CLEC Positions

146. AT&T states that an opening audit should be required. In its reply brief, it clarified that it "...did not argue that an audit is required under Section 272 prior to a finding that Qwest complies with section 272. Neither did AT&T argue that Qwest be the entity audited. AT&T suggested that the Commission may, and should, based on the Section 272 affiliates' past Section 272 violations, perform an audit of accounting safeguards of the Section 272 affiliate prior to finding that Qwest is in compliance with Section 272.[77]

147. AT&T initially proposed the audit be conducted to verify that all accounting safeguards are in place and operational prior to Qwest LD's provision of long-distance service.

148. Qwest states that neither the FCC nor the Act requires opening audits and that no other BOCs have been required to perform such an opening audit.

b. Discussion and Staff Recommendation

149. AT&T stated in its brief that it did not argue that an audit is required under section 272. Rather, it recommended, based on alleged past Section 272 violations, that an audit be conducted of accounting safeguards of the Section 272 affiliate prior to finding that Qwest is in compliance with Section 272. Qwest argues that the premise of AT&T's claim, regarding past Section 272 violations, is unwarranted.

150. Staff agrees with Qwest on this point. AT&T has agreed that there is no Section 272 justification for the audit, a biennial audit is mandated and will be conducted one year after commencement of operations and safeguards are in place and will be reviewed for sufficiency during the biennial audit [78]. No pre-approval audit of QC should be required.

DISPUTED ISSUE NO. 5 (272-5): Can officers of the 272 Affiliate report to officers of the parent company? Can the BOC and the 272 Affiliate both have the same parent company?

151. This issue relates to Section 272(b), which states that with respect to 272(b) Structural and Transactional Requirements: The separate affiliate required by this

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[77] AT&T Reply Brief Pg 10

[78] Qwest Brief of 8/23/01, pgs 32-34

section: shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate.

a. Summary of Qwest and CLEC Positions

152. AT&T believes that there are deficiencies with Qwest's compliance with Section 272(b)(3), in that employees go back and forth between the BOC and Section 272 affiliates, that there is widespread employee sharing, and that "many" Qwest employees spend 100% of their time working for the Section 272 affiliate.

153. Qwest's interpretation of the FCC requirement is that officers and directors cannot be in QC and QCC at the same time and that the FCC does not have specific reporting structure requirements. Qwest states that the BOC and Section 272 affiliate have separate employees, paid from separate payroll registers.

154. Employees who move from one organization to another are terminated and rehired, and go through a process that is similar to the external hiring process. The BOC employees who provide services to the 272 affiliate do so under contract. The contracts are in writing and available for public inspection.

b. Discussion and Staff Recommendation

155. Section 272(b)(3) states that the 272 affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate." Qwest submitted testimony that QCC and QC do not and will not have overlapping officers, directors or employees.[79] Qwest Witness Brunsting testified further that all services performed by one of these corporations for the other are documented by work orders or task orders, and the rates, terms and conditions are available for public inspection.[80]

156. Regarding the AT&T challenge that QCC and QC are affiliates controlled by a common parent, by definition if two entities are affiliates, they must have a parent company. Also by definition, the affiliate CEO must report to an officer of the parent company. Staff does not agree that this violates in any respect Section 272(b)(3) requirement to have separate officers, directors, and employees. Staff agrees with Qwest that the Act specifically contemplated that the BOC and the 272 affiliate would both have the same parent company; that being inherent in the definition of an "affiliate." Moreover, in other Section 271 applications, the FCC did not prohibit this structure, but simply stated that it underscored the need for separate directors for the BOC and 272 affiliate.[81]

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[79] See 7 Qwest 3 (Brunsting Direct) at pps. 11-12.
[80] Id. at pps. 9-11.
[81] See *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20, 543 at para. 371 (1997)("*Ameritech Michigan Order*").

157. Further, QCC and QC provided detailed lists of officers and directors, which demonstrated that there was no overlap.[82] Qwest also conducted an analysis of the payroll registers of both entities, which again demonstrated no overlap.[83] This type of comparison has been accepted by the FCC to demonstrate Section 272(b)(3) compliance.[84]

DISPUTED ISSUE NO. 6 (272-6): Can employees move from the BOC to the 272 Affiliate and vice versa without violating 272(b)(3)?

158. The exact wording of Section 272(b)(3) is shown in Impasse Issue 272-5.

a. Summary of Qwest and CLEC Positions

159. AT&T is concerned about the movement of employees between the BOC and Section 272 affiliate. AT&T is also concerned about the associated information flow. Comments and concerns are similar to those in Impasse Issue 272-5.

160. Qwest argues that there are no specific FCC prohibitions against such moves and that sufficient internal controls are in place to prohibit improprieties. See Impasse Issue 272-5 for more discussion.

b. Discussion and Staff Recommendation

161. Staff believes that Qwest meets the requirements of Section 272(b)(3). Qwest Witness Brunsting testified that there would be no overlap of employees and that any services performed by one corporation for another would be fully documented and made available for public inspection. The FCC found in the *Non-Accounting Safeguards Order* that Section 272(b)(3) prohibits "simultaneously serving as an employee of both".[85] Further, the FCC has acknowledged that the integration of some services outweigh any potential for harm to competition created thereby and economically benefits consumers by allowing a BOC and its Section 272 affiliate to derive the economies of scale and scope inherent in such an arrangement.[86] Qwest further testified

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[82] 7 Qwest 3 (Brunsting Direct) at p. 12; Exhs. JLB-5, JLB-6.

[83] __ Qwest __ (Schwartz Direct) at p. 16.

[84] See *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*, Memorandum Opinion and Order, 15 FCC Rcd 18, 354 at para. 401(2000)("*SBC Texas Order*"); *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, Memorandum Opinion and Order*, 15 FCC Rcd 3953 (1999), aff'd *AT&T Corp. v. FCC*, 220 F.3d 607 at para. 409 (D.C.Cir. 2000)("*BANY Order*").

[85] Id at para. 178.

[86] See *Third Order on Reconsideration* at para. 18.

that the pricing for such services provided by the BOC to QCC would follow the pricing hierarchy of 47 C.F.R. Section 32.27 and the *Accounting Safeguards Order*.[87]

162. Qwest also provided significant testimony on the safeguards and procedures it had put into place for employee transfers between the BOC and its Section 272 affiliate. Such safeguards would eliminate the flow of information and use of proprietary information following transfer of an employee to another company in the Qwest corporate family. These procedures include formal return of assets and documents, non-disclosure agreements and other documentation, training and badge separation by color code.[88] Qwest also noted that thus far, only approximately 100 employees have moved between QC and QCC out of a total of approximately of 51,000 employees – 49,000 QC employees and 2,000 QCC employees.[89] Based upon the above discussion, Staff recommends that Qwest be found to comply with the "separate officer, director and employee" requirement of Section 272(b)(3).

163. Staff has also considered the supplemental authority submitted by the parties on this issue. Staff believes that Qwest has demonstrated that it complies with all applicable FCC requirements in this regard.

DISPUTED ISSUE NO. 7 (272-7): Does Qwest have separate payrolls and has an analysis of payroll registers been conducted?

a. Summary of Qwest and CLEC Positions

164. AT&T states that Qwest does not have separate payroll administration. Qwest conducted an analysis of payroll registers in response to AT&T complaints that a comparison of Section 272 and Qwest registers had not been conducted. AT&T's argument then becomes that there is no evidence that this same analysis was done for prior years to determine if there was overlap.

165. AT&T also states as part of this argument that Qwest and QCC do not have separate payroll administration and that Qwest provides this for both Qwest and QCC. AT&T admits that separate payroll administration is not a specific requirement but that the FCC looks to this separation as evidence of compliance.

166. Qwest states that they have verified that the payrolls are separate and the FCC does not prohibit that shared payroll administration. Qwest provided a complete listing of the BOC's Board of Directors and officers, none of whom are employees, officers, or directors of the 272 affiliate.[90]

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[87] *Implementation of the Telecommunications Act of 1996; Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17,539 (1996)("*Accounting Safeguards Order*").
[88] Qwest Brief of 8/23/01, pgs 17-18
[89] 6/11/01 Tr. at p. 50.
[90] Affidavit of Judith L. Brunsting, pg 12

b. Discussion and Staff Recommendation

167. There are really two separate issues which require discussion. With regard to the first, whether Qwest actually conducted a payroll register comparison presumably to demonstrate that there was no overlap in officers, directors and employees, of QCC and QC, Qwest Witness Brunsting testified that such a comparison was indeed conducted as discussed earlier.[91] The analysis demonstrated that there was no overlap. AT&T has also argued that there is no evidence of a payroll register analysis being done in prior years. There is no requirement for a prior years register analysis. Therefore, Staff concurs with Qwest on this issue.

168. The second issue is whether separate payroll administration is required. Staff accepts Qwest's position on this issue that under earlier FCC Orders, separate payroll administration is not required for QC and QCC as long as certain conditions are met. Qwest Witness Brunsting testified that the payroll function for both QC and QCC is performed by QC at published rates, terms and conditions that are available to other carriers.[92] The FCC has specifically approved of sharing of services to derive the economies of scale and scope inherent in the integration of some services.[93]

DISPUTED ISSUE NO. 8 272-8: Whether Robin Szliga was an officer of the BOC when she signed the officer verification.

a. Summary of Qwest and CLEC Positions

169. AT&T has stated that Ms. Robin Szliga was not an officer of the BOC when she signed the officer verification.

170. Qwest agrees that Ms. Szliga was not an officer of the BOC and provided a new officer certification signed by a BOC officer. When Ms. Szliga signed the officer verification for QC, she was a financial officer of the parent company and had also previously signed the ARMIS reports for QC.

b. Discussion and Staff Recommendation

171. Qwest acknowledged that Ms. Szliga was not an officer at the time and had signed in error. Qwest provided a new officer certification signed by BOC officer, Mark A. Schumacher, Controller for QC, on May 11, 2001[94]. Accordingly, Staff believes this issue is now resolved.

[91] 7 Qwest 3 (Brunsting Direct) at p. 16.
[92] 6/8/01 Multi-State Transcript at p. 190.
[93] *Third Order on Reconsideration* at para. 18.
[94] Footnote 48 on pages 14 and 15 of Qwest's brief of 8/23/01

DISPUTED ISSUE NO. 9 (272-9): What is Augustine Cruciotti's current status and is he an officer/director/employee of both Qwest Corporation and QCC?

a. Summary of Qwest and CLEC Issues

172. AT&T raised a similar concern that Mr. Cruciotti is a QCC employee and an officer of QCI.

173. Qwest responds that Mr. Cruciotti is not an officer, director or employee of both QC and QCC.

b. Discussion and Staff Recommendation

174. Qwest's states, "Since QCC became the 272 Affiliate on March 26, 2001, Augustine Cruciotti has not been an officer, director, or employee of QCC[95]. Mr. Cruciotti is an employee and officer of QSC and a Director of QC." Accordingly, Staff believes that this issue is now resolved.

DISPUTED ISSUE NO. 10 (272 –10): Whether the 272 Affiliate can contract to hire BOC employees without violating section 272(b)(3)? If this is acceptable, are the employees' billing rates for which others could contract to hire them reasonable?

a. Summary of Qwest and CLEC Positions

175. AT&T states that where QC employees are dedicated to QCC work, those employees are not separate and therefore violate the shared employee test. AT&T also believes that the affiliate rates used are too high.

176. Qwest states that when BOC employees provide payroll services to the 272 affiliate, the services are documented in the form of a Work Order and the rates, terms, and conditions are available for public inspection, as required by Section 272(b)(5). When 272 affiliate employees provide services to Qwest affiliates, including the BOC, the employees are required to time report and the BOC is charged for their time using rates set according to applicable FCC requirements. These services are documented in the form of a Task Order and the rates, terms, and conditions are available for public inspection, as required by Section 272(b)(5) which states:

> 272(b) Structural and Transactional Requirements: The separate affiliate required by this section shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

[95] Footnote 48, page 15 of Qwest's brief of 8/23/01

b. Discussion and Staff Recommendation

177. Qwest states that QC and QCC have no shared employees, i.e. employees on both payrolls at the same time. Qwest does employ shared services, as affirmed by the FCC, in order to obtain the related economic benefits.[96] Qwest states also that "the BOC charges QCC the same prices for services that the BOC would charge any other carrier.[76]" The methods and procedures for pricing the services are contained in the BOC CAM which has been approved by the FCC. Qwest also provided testimony that QC's external auditors have reviewed the process without any findings of non-compliance.[97]

178. Qwest Witness Brunsting also provided testimony that the services are also provided pursuant to written agreements posted on the Internet.[98] Other IXCs can obtain similar services and/or functions from QC under the same rates, terms and conditions.[99] Further, when QCC provides services to QC, the same Internet posting processes will be followed.[100] Staff believes that Qwest has demonstrated that it meets all applicable requirements pertaining to shared services and their availability to non-affiliated providers.

DISPUTED ISSUE NO. 11 (272-11): Does Qwest post transactions on the Section 272 website within 10 days as required by the *Accounting Safeguards Order*?

a. Summary of Qwest and CLEC Issues

179. AT&T is concerned that Qwest does not post sufficient transaction detail on its website and that the postings are not timely. AT&T also argues that QCC became a Section 272 affiliate by operation of law as of the date of July 2000 and postings should have been made beginning with that date.

180. Qwest believes that the posting meets the FCC required level of detail, that billing detail at the level requested by AT&T is not required and the postings are timely. Qwest argues that its record of postings demonstrates that they have been posted in less than the required 10 days. A major point of contention is the date that postings were required and more specifically, whether postings were required prior to establishment of the 272 affiliate.

b. Discussion and Staff Recommendation

181. Section 272(b)(5) requires QCC to make available for public inspection its transactions with QC. 47 U.S.C. Section 272(b)(5). In the *Accounting Safeguards*

[96] Qwest brief of 8/23/01, pg 18
[97] Qwest brief at pps. 19-20.
[98] 7 Qwest 3 (Brunsting Direct) at pps. 16-17.
[99] Id. at p. 20.
[100] 6/7/01 Multi-State Transcript at pps. 300-301.

Order, the FCC requires that a description of such transactions be posted on the Internet within 10 days.[101]

182. Staff believes that Qwest demonstrated that QCC is consistently meeting the 10 day posting requirement. [102] Qwest also demonstrated that QCC's predecessor (Qwest LD) satisfied this posting requirement on average in less than 6 days. Qwest responds that AT&T's complaints focus on work orders before March 27, 2001, the date the website was turned up.[103]

183. As to content, Qwest Witness Brunsting testified that the general test established by the FCC is whether the transaction description is sufficiently detailed to "facilitate the purchasing decisions of unaffiliated third parties."[104] Qwest states that its postings meet all FCC requirements including rates, terms, conditions, frequency, number and type of personnel, and level of expertise. Qwest also states that it has modeled its website after those approved by the FCC in other Section 271 cases, and that its postings contain all FCC required information.[105] QCC has conformed its postings to those made and approved in the *SBC Texas Order.*[106] Qwest also studied the website of Verizon and found that its website was comparable in the level of detail posted.[107] Based upon Qwest's testimony and representations, Staff believes that Qwest has demonstrated that it complies with all applicable requirements at this time.

DISPUTED ISSUE NO. 12 (272-12): Does Qwest Corporation provide its 272 Affiliate with preferential treatment in billings and collections as compared to other IXC's?

a. Summary of Qwest and CLEC Issues

184. AT&T believes that QCC is receiving favorable time periods before receiving and paying bills from QC.

185. Qwest notes that there were some delays in billing during the transition period but that monthly billing is now occurring.

b. Discussion and Staff Recommendation

186. The only reference to this issue which Staff can find in AT&T's brief is the concern for discrimination between the BOC's 272 affiliate and unaffiliated entities.

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[101] Id. at para. 122.
[102] 7 Qwest 13 (Qwest LD Internet Posting Summary)
[103] Qwest reply brief pgs 8 and 9
[104] Citing *Application of Bell South Corporation , BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20,599 (1998) ("*BellSouth Louisiana II Order*") at para. 337; *SBC Texas Order* at para. 405.
[105] Qwest reply brief pg 9
[106] 6/8/01 Multi-State Tr. at p. 51.
[107] Id. at p. 51.

187. Qwest responds that there were some delays in billing QCC as a direct result of strategic changes caused by the merger of two corporations and the subsequent redesignation of the 272 affiliate.[108] Qwest specifically states that QCC is billed with interest when appropriate and that QCC does not receive extended payment terms. Qwest makes no direct mention of IXC billings.

188. No evidence has been presented that would lead Staff to believe that the billing discrepancies noted are anything but the result of problems or unexpected glitches encountered due to the merger of two large corporations and the subsequent redesignation of the 272 affiliate as Qwest represents. To the extent the billing discrepancies reoccur in the future, AT&T or any other CLEC may bring this to the attention of the Commission to determine whether QC is in fact giving its affiliate preferential treatment in this area.

DISPUTED ISSUE NO. 13 (272-13): Is Qwest Corporation properly billing its 272 Affiliate for services, etc. which it provides?

189. In particular, do the past due transactions and reporting between Qwest and QCC indicate a systemic and ongoing problem in violation of GAAP?

a. Summary of Qwest and CLEC Positions

190. AT&T claims that proper billing is not taking place. AT&T points to delays in billing QCC for Qwest transactions and the fact that interest was not originally included in the bill. Further, the applicable Master Service Agreement did not include an interest component. AT&T argues that this indicates "either the internal accounting processes were not in place or there was a total collapse of them.[109] "

191. Qwest states that during the transition period there were billing abnormalities but that proper billing had historically taken place and is now occurring.

b. Discussion and Staff Recommendation

192. Once again, Staff believes that it has insufficient evidence before it to determine that the billing discrepancies noted are the result of any sort of preferential treatment on the part of QC of its affiliate, QCC, or systematic and recurring problems. Rather, these appear to be isolated instances that arose as a result of the merger's implementation and redesignation of the 272 affiliate, as claimed by Qwest. If additional evidence surfaces at a later date to indicate a systematic or recurring problem in this regard, such evidence may be brought before the Commission for examination and remediation.

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[108] Qwest brief pg 25
[109] AT&T reply brief, pg 13

DISPUTED ISSUE NO. 14 (272-14): Does Qwest report all "transactions" between it and the 272 Affiliate on its website and if so, how?

a. Summary of Qwest and CLEC Issues

193. AT&T has claimed that Qwest is not reporting all necessary transactions. Qwest is not posting all the necessary information on its website, and there may be non-cash transactions between the entities.

194. Qwest responds that it has posted all information required by the FCC and that again the billing detail requested by AT&T is not required.

b. Discussion and Staff Recommendation

195. Staff believes that this raises issues virtually identical to the issues raised in Disputed Issue No. 11 above and should be resolved in a similar fashion. Until additional evidence is presented to indicate that what Qwest is doing violates or is inconsistent with existing FCC rules and regulations, Staff recommends that Qwest be found in compliance with FCC requirements at this time.

DISPUTED ISSUE NO. 15 (272-15): Does the nondiscriminatory obligation of Section 272(c)(a) extend beyond the BOC – Qwest Corporation - to other Qwest affiliates?

a. Summary of Qwest and CLEC Positions

196. AT&T states that the services that Advanced Technologies provided to QLD should have been made available to other carriers. AT&T states that this issue is broader than just whether Advanced Technologies was used to circumvent the requirements of this section.

197. AT&T states that "this is emblematic of QC's approach to Section 272 to circumvent where possible and accomplish the bare minimum to pass the form test. The Commissioners should carefully weigh Qwest's machinations when tendering its recommendation to the FCC."

198. Qwest believes that the non-discrimination requirement only applies to the BOC and not to BOC affiliates.

b. Discussion and Staff Recommendation

199. Qwest states that Section 272(c) bans certain discrimination by a BOC in its dealings with its 272 affiliate.[110] Because the transactions in question were between a 272 affiliate and another non-BOC affiliate, there was no requirement that they be disclosed. The service did not involve the BOC, and no assets or services were provided

[110] Qwest brief pgs 29, 30, and 31,

to the BOC, therefore they are not subject to the non-discrimination requirements. They need not have been made available to other carriers under Section 272(c)(1). Section 272(c) does not apply to transactions between affiliates where the BOC is not involved and in fact Section 272(c) specifically refers to the Bell operating company. Therefore, Staff concurs with Qwest's position regarding this issue. The plain language of Section 272(c) limits its application to the BOC.

DISPUTED ISSUE NO. 16 (272-16): Do the concerns raised by AT&T with respect to Section 272(b)(5) prevent a finding with respect to Section 272(c)(2)?

200. AT&T maintains that if the Section 272 affiliate fails to properly account for a transaction in accordance with Section 272(b)(2), and the BOC also fails to properly account for the transaction, then the BOC has failed to comply with Section 272(c)(2). For convenience, these sections are shown below. 272(b) Structural and Transactional Requirements: The separate affiliate required by this section:

- Shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;

- Shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

272(c) Nondiscrimination Safeguards: In its dealings with its affiliate described in subsection (a), a Bell operating company:

- Shall account for all transactions with an affiliate described in subsection (a) in accordance with accounting principles designated or approved by the Commission.

a. Summary of Qwest and CLEC Positions

201. AT&T does not believe that Qwest meets the FCC accounting principles required by Section 272(c)(2) and as such the BOC has failed to comply with Section 272(c)(2). The BOC must comply with Part 32, and Part 32 incorporates the concept of GAAP. Both Qwest and QCC, whatever side of the transaction they are on, must comply with GAAP, and depending on how a transaction is treated by the companies, there may be a violation of Section 272(b)(2), Section 272(c)(2), or both. AT&T questions Qwest's compliance with the arms length requirement because both companies have "the exact

same address" and the same employees handle contract administration for both companies.[111]

202. Qwest believes that issues regarding transactions should be resolved in Section 272 (b)(5).

b. <u>Discussion and Staff Recommendation</u>

203. Section 272(c)(2) states that a BOC shall account for all transactions with a Section 272 Affiliate in accordance with the FCC's accounting principles. AT&T's brief Section D addressed four matters: Posting transactions to the web page, what is a transaction (what level of detail), Certification Statement (statement that all statements of fact are true...) and the Arm's Length Requirement.[112]

204. This issue is again a question of conformance with Part 32 and GAAP. This issue has been treated in Impasse Issue 272-6 and in Impasse Issues 272-11 through 272-14, and as such, resolution of those impasse issues apply equally here.

205. Further, the Facilitator in the Multistate Proceeding found that Qwest had made "substantial efforts to bring its transactions, both past and current, into compliance with applicable accounting requirements" of Section 272. The Facilitator recommended that Qwest undertake an independent evaluation to provide validation of the results of those efforts, and Qwest has recently done so. This evaluation included independent third-party testing by KPMG of accounting and billing for transactions between Qwest and QCC reflected on their books from April to August 2001, which included transactions initiated prior to completion of the transition to QCC on March 26, 2001. Qwest filed a copy of the KPMG report with the Arizona Commission to further support its compliance with Section 272. Qwest notes that KPMG concluded that except as noted in the report, Qwest and QCC had complied "in all material respects" with Sections 272(b)(2), 272(b)(5), 272 (c)(2), and applicable FCC rules and regulations governing accounting for their transactions with each other. Qwest also stated that the KPMG report confirmed Qwest's testimony that it had identified untimely accruals and billings or recording of transactions in the course of the transition to QCC. Qwest stated that the exceptions to the Report identified only eight examples of such untimely accrual, billing, or recording, every one of which had been previously identified by Qwest and all of which were corrected. Qwest noted that the estimated net financial impact of the untimely bookings, which have been corrected, was actually to disadvantage QCC.

206. Qwest also noted that KPMG's report identified four transactions in which the price established was not in conformance with the requirements of the FCC's affiliate pricing rules, either because Qwest or QCC had used fully distributed cost rather than fair market value valuations, or because it had calculated fully distributed cost inaccurately. In response, Qwest is undertaking additional training programs designed to ensure proper application of the affiliate pricing rules in the future. AT&T also noted in its Comments to Staff's Proposed Report, that as a result of the deficiencies identified by

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[111] AT&T brief of 8/23/01, pg 25
[112] AT&T Brief of 8/23/01 pgs 15-25

KPMG, Qwest instituted additional controls, additional training, additional procedures and additional regular review processes.

DISPUTED ISSUE NO. 17 (272-17): Does the Commission need to conduct an additional investigation with respect to whether Qwest satisfies Section 272(c)?

a. Summary of Qwest and CLEC Positions

207. AT&T is concerned that QCC will not impute access charges when those are necessary.

208. Qwest has already stated that it will impute when necessary.

b. Discussion and Staff Recommendation

209. AT&T claims that Qwest has failed to demonstrate compliance with Sections 271(c)(1) and 271(c)(2).[113] In its brief, AT&T referred to the same billing discrepancies (a failure to timely pay pursuant to the agreements, task orders and work orders and a failure to make timely payments generally.) discussed in several earlier impasse issues. Further, AT&T in its brief again referenced the GAAP and Part 32 requirements. AT&T also raised the access charge issue and whether QCC will impute access charges when those are necessary.

210. Staff resolves the issues raised consistent with its resolutions of Impasse Issues 2, 12 and 13. Further, QCC must impute access charges as has always been required by this Commission.

DISPUTED ISSUE NO. 18 (272-18): Can the Commission review and approve the marketing scripts of Qwest Corporation as a prerequisite of proving satisfaction of Section 272(g)?

211. Section 272(g) Joint Marketing reads:

- Affiliate sales of telephone exchange services: A Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.

- Bell operating company sales of affiliate services: A Bell operating company may not market or sell interLATA service provided by an affiliate required by

[113] AT&T Brief of 8/23/01pgs 27 and 28 Reply Brief pgs 14-16.

this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d).

a. Summary of Qwest and CLEC Positions

212. AT&T believes that the Commission should mandate Qwest to provide a more thorough explanation of marketing practices.

213. Qwest believes that the FCC has already clearly stated that there is no requirement or ability to review marketing scripts and this requirement would constitute a higher level standard for Qwest.

b. Discussion and Staff Recommendation

214. AT&T states in its brief that Section 272(g) sets forth the restrictions on joint marketing between the BOC and its 272 affiliate. Qwest states in its brief, that the only limitation is that the 272 affiliate may not market or sell telephone exchange services provided by the BOC unless the BOC allows other utilities to do the same. The only issue is whether the ACC can and should review and approve marketing scripts as a prerequisite of providing Section 272(g) compliance.

215. Qwest states that the FCC has clearly rejected similar AT&T efforts to review marketing scripts (see footnote 156-Bell South Carolina order).

216. Staff believes that it would be appropriate for the ACC Staff to review and approve marketing scripts for compliance with Section 272(g). The ACC has reviewed and approved such scripts in the past and Staff believes that it would be appropriate in this instance.

DISPUTED ISSUE NO. 19 (272-19): Does the material posted on the website with respect to Work Orders for Card Services mean that Qwest Corporation discriminates in favor of its 272 Affiliate?

a. Summary of Qwest and CLEC Positions

217. AT&T believes that Qwest likely cannot show that it would provide product management services to a non-affiliate.

218. QC has posted a Work Order, which included product management and therefore this service is available to non-affiliates.

b. Discussion and Staff Recommendation

219. This issue appears to be a specific incident which is raised also in Impasse Issue 272-20, but does not appear in either AT&T's or Qwest's briefs or reply briefs. However, the general theme of discrimination against non-affiliates has been addressed in

Impasse Issues 272-11 through 272-15 and 272-17 and as such, the same resolution applies here. Additionally, Qwest's has committed several times on the record that if a Work Order is posted to its web-site, it is fully aware of its obligations to make the service available to non-affiliates.

<u>DISPUTED ISSUE NO. 20 (272-20): Whether US West business arrangement with Qwest (Buyers Advantage) and the Calling Card Services prohibits Qwest from establishing that it satisfies Section 272 of the Act today.</u>

a. <u>Summary of Qwest and CLEC Positions</u>

220. AT&T raises concerns regarding past violations of Qwest with respect to Section 272. In addition, they again point to over reliance on the biennial audit to provide protection. AT&T argues that the past behavior of Qwest is relevant and should not be discarded by the Commission.

221. Qwest believes that a past occurrence, now corrected, does not prelude it from obtaining Section 272 approval.

b. <u>Discussion and Staff Recommendation</u>

222. This issue is based on past violations of Qwest regarding Section 272. It was partially addressed in Impasse Issue 272-19. AT&T's brief states that the FCC concluded, on February 16, 2001, that Qwest through its 1800-4 US West calling card services, was providing in-region InterLATA service in violation of Section 271; but it did not address the discrimination issue raised in Impasse Issue 272-19.[114]

223. Qwest stated that "The FCC did not then proceed to adopt the view that AT&T is taking here – that instances of past non-compliance disqualify a BOC from demonstrating its ability to comply with Section 272 in the future".[115]

224. Qwest has already been held accountable for its past violations of Section 271 by the FCC. Those violations are more indicative of Qwest's apparent misunderstanding of all that is encompassed within the InterLATA restriction than any noncompliance with Section 272 of the Act.

e. <u>Verification of Complance</u>

225. The KPMG report cited four instances of non-compliance with FCC affiliate transaction rules as required in Sections 272(b)(2) and 272(c)(2); and eight instances in which Qwest did not process accounting entries and affiliate billings (including interest as necessary) and did not reduce to writing certain services provided

[114] AT&T Brief pg 4
[115] Qwest Brief pg 8

between the Qwest BOC and the Qwest 272 affiliate during the examination, period as required in Sections 272(b)(2) and 272(c)(2) of the Act and CC Docket No. 96-150, paragraph 1222.

226. The net understatement of Qwest BOC's expenses and corresponding net understatement of Qwest 272 affiliate's revenues during the examination period related to all exceptions, totaled $2,604,000. Qwest witnesses Maria E. Schwartz and Judith L. Brunsting, whose testimony was filed with the ACC on November 26, 2001, responded to each of the non-complaint instances, except for one relating to data entry services regarding out-of-region long-distance orders amounting to $64,000.

227. The KPMG report stated that: "in our opinion, except for the instances of non-compliance described above, Qwest Corporation complied, in all material respects, with the aforementioned requirements for the period April 1, 2001 to August 31, 2001.

228. In AT&T's comments dated December 5, 2001, AT&T posed three questions; 1) Has Qwest been in compliance with the Act since the date of the enactment of the Act, 2) Has Qwest been in compliance with the accounting safeguards order since August 12, 1997 and 3) Will Qwest comply with Section 272 in the future. AT&T observed that the KPMG report stated that new controls were to be established in order to ensure compliance in the future. AT&T questions whether or not they will be installed, and if so, whether or not they will be effective.

229. In its December 20, 2001 filing, AT&T contended that the November KPMG and Qwest affidavits failed to demonstrate that Qwest has complied with all requirements of Section 272. It further stated that Qwest was not currently in compliance. AT&T stated that KPMG's audit was limited in scope, it offered a qualified opinion and found significant instances of non-compliance. AT&T concluded, therefore, that the KPMG report fell far short of its goal, and that little reliance could be placed on the testimony of Qwest's witnesses, since they had testified earlier that Qwest was in compliance.

230. AT&T stated the KPMG report did not address several elements of Section 272, including 272(a), 272(b)(1), 272(b)(3), 272(b)(4) or 272(g). AT&T expressed concern that KPMG did not offer an opinion that there are reasonable assurances that a continuation of the practices and procedures which it had examined in the audit, would continue to provide the accuracy, completeness, timeliness and arms length conduct found in examining Qwest's past actions. Finally, in this regard, AT&T stated that the limited review in the KPMG report did not approach the level of examination and test which Liberty Consultants had recommended to the Regional Oversight Committee (ROC). AT&T also expressed concern for KPMG's use of the term "materiality", finding this unacceptable because it is too vague.

231. Following submission of the original KPMG Audit Report, Qwest engaged KPMG to perform a supplemental review with two objectives: to verify that each of the discrepancies identified in the KPMG report had been corrected, and to verify

that the supplemental controls identified in the affidavits submitted with the KPMG report are now in place.

232. On December 20, 2001 Qwest filed a supplemental KPMG declaration. This declaration confirmed that Qwest had corrected all discrepancies identified in the KPMG report as stated in the affidavits of Qwest's witnesses, which were submitted to the Arizona Corporation Commission with the November 15, 2001 KPMG report. It also confirmed that Qwest had implemented the specific controls as stated in the affidavits, as well as controls that address discrepancy G from the KPMG report, which was not specifically addressed in those affidavits.

233. The supplemental KPMG report concluded that "Qwest has corrected all discrepancies identified in the KPMG report by posting the transactions to the Qwest website and by billing or booking these transactions". The Supplemental KPMG Report confirmed that the Qwest witness affidavits were completely accurate in their representations about corrections of past discrepancies, and implementation of enhanced controls which were designed to prevent, as well as detect and correct, any discrepancies in the future.

234. Qwest stated that all of the additional unprecedented steps described in the KPMG Supplemental Report demonstrate that Qwest has both the ability and the intention to comply with Section 272 when it obtains FCC authorization to provide in-region InterLATA service, and that it will have sufficient controls in place at that time that are "reasonably designed to prevent, as well as detect and correct, any non-compliance with Section 272".

235. On January 3, 2002, AT&T again filed comments to the effect that KPMG and Qwest had failed to demonstrate that Qwest has complied, much less is in compliance with the requirements of Section 272. AT&T pointed to the $6.35 million[116] of transactions which were incorrectly reported as between the BOC and its affiliate.

236. February 15, 2002, AT&T filed supplemental comments concerning Section 272(e)(1). Specifically, AT&T stated that Qwest and QCC did not provide specific performance standards for measuring its requirements of Section 272(e)(1). AT&T further stated that on careful review it could not find any discussion of this section in the disputed issues section of Qwest's compliance.

237. On February 25, 2002 Qwest replied to AT&T's February 15, 2002 comments. It stated that the reason AT&T could not find a discussion of Section 272(e)(1) in the disputed issues section of Staff's final report was that no party had previously raised the issue. Although this should be reason enough to reject AT&T's concern, Qwest stated that the claim is without merit in any event. Qwest has committed, in its testimony that it: "does not and will not discriminate in favor of the 272 affiliate in the provision of telephone exchange service or exchange access".[117] It also has provided

[116] This is AT&T's annualized number. The November 9, 2001 KPMG report listed $2,604,000 of incorrectly recorded transactions during the test period.
[117] In the matter of Qwest Corporation's 271 Application, ACC Docket No. T-00000A-97-0238, Affidavit

evidence of controls in place that will assure compliance with Section 271(e).[118] Qwest has also conducted extensive training for its Staff on Section 272, including Section 272(e).[119]

238. Qwest further stated that states which have addressed Section 272(e) have all found Qwest in compliance. Reports of Section 272 compliance in Colorado, New Mexico and Nebraska, attestations to this were submitted with Qwest's February 25, 2002 filing.

239. Staff believes that AT&T's concern for Qwest's ability to fulfill requests from nonaffiliated companies in the same period that it provides itself or its affiliates, and that Qwest has not attempted to provide a specific performance standard (as specified in Section 272(e)(1)), overlooks the range of performance measurements developed and now being implemented by Qwest in order to demonstrate, through the OSS Tests, that it is providing access to its OSS to nonaffiliates (CLEC's) in the same manner and time it provides it to its own retail customers. It also overlooks the range of performance measurements that have been established for implementation with the Performance Assurance Plan (PAP), which are intended to assure that Qwest provides continuing equal access and an opportunity to compete to CLEC's as it does to its own affiliate.

240. Staff believes that AT&T's concern, expressed in its December 20, 2001 filing, that KPMG did not address a series of subsections of Section 272 in its audit, also overlooks the range of tests of Qwest's OSS and its interfaces that are designed to ensure that Qwest provides equal access to its OSS. It also overlooks the scrutiny of the other Checklist Items, that are not OSS Test related, which are also designed to ensure that, among other things, Qwest will continue to provide the accuracy, completeness, timeliness and arms length conduct required for it to satisfactorily meet the requirements of Section 272.

241. Staff concurs with Qwest, in its March 21, 2002 response to AT&T's March 20, 2002 Supplemental Authority Filing. In its response, Qwest pointed out that the Nebraska, New Mexico, Washington State and Montana Commissions, in addition to that of Colorado, have separately and independently reported that Qwest complies with Section 272. Qwest also pointed out that the Minnesota ALJ found Qwest to be in compliance with two subsections of Section 272 and qualified certain subsections, where he found that Qwest was not in compliance, by describing the means whereby Qwest could come into compliance. Qwest stated that it is reviewing the Minnesota ALJ's recommendations (some of which are in fact already in place at Qwest) but also cautioned that many go well beyond what the FCC has required of other BOC's who have received 271 approval. Finally, Qwest stated that the FCC has made clear that a state Commission may not "condition or delay BOC entry into intrastate InterLATA services" with requirements inconsistent with those imposed by the FCC, whether or not

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of Marie E. Swhwartz, March 26, 2001, at 32 ("Schwartz Aff")

[118] Id, at 31 – 32.

[119] Id, at 35 – 37.

the State Commission has a different view of what "common sense" requires. As stated earlier in this paragraph, Staff concurs with Qwest rather than with AT&T.

242. Section 272 attempts to prevent a BOC from discriminating against its competitors, in favor of its long-distance affiliate. In consideration of the record herein, including the preceding paragraphs of this section, and the discussion and Staff recommendations for each of the disputed issues, Staff recommends that Qwest be found to comply with requirements of Section 272. These requirements include: 1.) Separate affiliate for competitive activities, 2.) Structural and transactional separation, 3.) Non-discrimination safeguards, 4.) Biennial audit, 5.) Fulfillment of certain requests, 6.) Establishment of Sunset, and 7.) Joint marketing limitations.

II. CONCLUSIONS OF LAW

1. 47 U.S.C. Section 271 contains the general terms and conditions for BOC entry into the InterLATA market.

2. Qwest is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282 and the Arizona Commission has jurisdiction over Qwest.

3. Qwest is a Bell Operating Company as defined in 47 U.S.C. Section 153 and currently may only provide InterLATA services originating in any of its in-region states (as defined in subsection (I) if the FCC approves the application under 47 U.S.C. Section 271(d)(3).

4. The Arizona Commission is a "State Commission" as that term is defined in 47 U.S.C. Section 153(41).

5. Pursuant to 47 U.S.C. Section 271(d)(2)(B), before making any determination under this subsection, the FCC is required to consult with the State Commission of any State that is the subject of the application in order to verify the compliance of the Bell Operating Company with the requirements of subsection (c).

6. In order to obtain Section 271 authorization, Qwest must, inter alia, meet the requirements of 47 U.S.C. Section 272, which provides a series of structural and nonstructural safeguards applicable to the provision of in-region InterLATA service.

7. Section 272 of the Telecommunications Act of 1996 imposes a series of specific requirements, whose purposes include: (a) preventing improper cost allocation and cross-subsidization between Qwest and its Section 272 affiliate, and (b) assuring that Qwest does not discriminate in favor of this affiliate.

8. As a result of the proceedings and record herein, Qwest meets the requirements of Section 272, and will provide in-region InterLATA service through an affiliate that is separate from the BOC, which will maintain separate books and records in the manner prescribed by the FCC, with separate officers, directors and employees.

Transactions between the BOC and the Section 272 affiliate will be conducted on an arms length basis and reduced to writing, available for public inspection. Finally, Qwest Corporation will not discriminate in favor of its Section 272 affiliate in any transactions between the two and will account for all transactions with its Section 272 affiliate in accordance with FCC accounting principles.