

1 provision by BOCs of interLATA services (§271(a)), while  
2 simultaneously establishing express exceptions for out-of-region and  
3 specified "incidental" long distance services that the MFJ court and  
4 the D.C. Circuit had held were prohibited by the MFJ (§§ 271(b)(1) &  
5 (2)). See supra pp. 11(citing cases). Under the MFJ, the arrangement  
6 between U S WEST and Qwest would have constituted the unlawful  
7 provision of interLATA services on two separate grounds that do not  
8 fall within any of Section 271's exceptions to the MFJ's ban.

9 First, the MFJ court squarely held that any arrangement in which  
10 a BOC marketed the service of select interexchange carriers in  
11 competition with other interexchange carriers violated the MFJ's  
12 restriction against "provid[ing]" interexchange services. See United  
13 States v. Western Elec. Co., 552 F. Supp. 131, 227 (D.D.C. 1982)  
14 (Section II(D)(1)). The fundamental premise of U S WEST's defense of  
15 its arrangement with Qwest is that "[a] carrier 'provides' a service  
16 when it supplies or furnishes the service, by operating the necessary  
17 facilities or buying access to another carrier's network, not when it  
18 merely markets another's service."<sup>8</sup> But that premise was consistently  
19 rejected by the MFJ court. See, e.g., United States v. Western Elec.  
20 Co., 627 F. Supp. 1090, 1101-03 (D.D.C. 1990) ("Shared Tenant  
21 Services"); United States v. Western Elec. Co., 675 F. Supp. 655, 666  
22 & n.46 (D.D.C. 1987); United States v. AT&T, C.A. No. 82-0192, at 3  
23 (D.D.C. filed Apr. 11, 1985) (unpublished order) (attached hereto as  
24 Exh. 6).

25 In 1987, for instance, the Court expressly discussed its  
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27 <sup>8</sup> See U S WEST Public Policy Web Page, p. 2 (Exh. 4).

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1 understanding of the importance of the terms "providing" and  
2 "provisioning" in its MFJ decree and explained its efforts to use the  
3 terms consistently. Western Elec. Co., 675 F. Supp. at 666. The  
4 Court examined the different contexts in which the terms are used in  
5 the decree, including Section II(D)(1)'s directive that "'no BOC shall  
6 . . . provide interexchange telecommunications services or information  
7 services,'" and the Court expressly held that "the term 'provide' or  
8 'provision' was to be synonymous with furnishing, marketing, or  
9 selling." Id. at 666 & n.46 (emphasis added). Thus, under this  
10 definition, the marketing of a service in exchange for a fee would  
11 constitute providing that service even if the BOC did not physically  
12 transmit it.

13 This was also one of the several independent grounds on which the  
14 Court had previously held that it would violate the MFJ's  
15 interexchange restriction for a BOC to recommend to customers a  
16 particular long distance carrier as offering the lowest cost service.  
17 In Shared Tenant Services, supra, a BOC had proposed to offer a  
18 service to apartment buildings and other large facilities under which  
19 it would route calls to the long distance carrier that it had  
20 identified as the lowest cost provider. Id. at 1101 ("The [BOCs]  
21 expect to perform these functions by making selections of  
22 interexchange capacity on what they deem the lowest-cost basis and by  
23 marketing the services thus assembled"). The Court found that this  
24 endorsement and routing of calls, even apart from the BOC's purchase  
25 and resale of long distance service, violated the MFJ. It held that  
26 the "selection of carriers . . . constitute[s an] integral part[] of  
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1 the interexchange business, and that, by performing these functions,  
2 the Regional Companies would be directly competing with the  
3 interexchange carriers for that business." Id. at 1102; see also  
4 id. at 1101 ("marketing" of other carriers' long-distance services  
5 would mean that the BOC would "be directly competing with the  
6 legitimate interexchange providers").

7 Similarly, in United States v. AT&T, supra, the Court was asked  
8 to determine whether one of the BOCs had violated the non-  
9 discrimination provisions of the MFJ when the BOC endorsed the  
10 services of an interexchange service reseller to which the BOC had  
11 sold some switching equipment. Civil Action No. 82-0192, at 1-2. The  
12 Court ruled that the BOC's "endorsement of quality" plainly violated  
13 the decree. Id. at 3. In fact, as the Court noted, the violation was  
14 so clear that no BOC participating in the proceedings even attempted  
15 to defend the endorsement. Id. at 3 n.4.

16 Moreover, although the marketing alone renders the alliance with  
17 Qwest unlawful, U S WEST has further aggravated the illegality of that  
18 arrangement by also dictating the pricing and service standards of the  
19 long distance offering it will market. U S WEST has agreed to give  
20 Qwest's service its corporate endorsement and is vouching for that  
21 service to its customers. U S WEST therefore states that Qwest has  
22 specified both its price and the "standards it will meet for provision  
23 of service and customer support," and U S WEST requires that any long  
24 distance carrier seeking a similar marketing arrangement with U S WEST  
25 must agree to "the same terms to which Qwest has agreed, or with lower  
26 long distance rates than Qwest is offering." U S WEST Public Policy  
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1 Web Page, pp. 2, 3 (Exh. 4). U S WEST is thus not only marketing the  
2 offering, but designing it as well, and thus assuming a role  
3 prohibited under the MFJ of "arbiter of future interLATA services, .  
4 . . shap[ing] interLATA competition to suit its needs." United  
5 States v. Western Elec. Co., 583 F. Supp. 1257, 1259 (D.D.C. 1984).  
6

7 Second, the MFJ barred any arrangement in which a BOC had a  
8 financial stake in the success of an individual long distance carrier,  
9 for the whole point of the ban on a BOC's provision of interexchange  
10 services was to assure the BOCs had no "incentive" to favor a  
11 particular interexchange carrier and to disadvantage its rivals. See  
12 United States v. Western Elec. Co., 552 F. Supp. 131, 160-65 (D.D.C.  
13 1982), aff'd, 460 U.S. 1001 (1983). An arrangement in which a BOC  
14 markets one carrier's long distance service in exchange for a payment  
15 for each customer that the BOC signs up epitomizes the relationships  
16 that create this illicit incentive and that thus constitutes the  
17 unlawful "provi[sion]" of long distance services. Indeed, in the  
18 Shared Tenant Services case the MFJ court struck down the "marketing  
19 [of] a telecommunication package that included interexchange services"  
20 in part because the BOC "would have a direct financial interest in  
21 ensuring that a particular mix of carriers -- those offered . . . in  
22 conjunction with the [BOC] -- was selected." 627 F. Supp. at 1100  
23 n.39.

24 U S WEST's Public Policy Web Page does not deny that U S WEST's  
25 arrangement with Qwest would have been unlawful under the MFJ, that  
26 it would have constituted the forbidden "provi[sion] of interexchange  
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1 services," or that it would create the precise incentive to  
2 discriminate in favor of one long distance carrier that the MFJ was  
3 designed to eliminate. It appears to contend, however, that the 1996  
4 Act silently modified this aspect of the MFJ's interLATA restriction  
5 when it codified that restriction in Section 271(a). That contention  
6 is baseless.

7 It could not be clearer that Section 271(a), which prohibits any  
8 BOC from "provid[ing] interLATA services except as provided in this  
9 section" (47 U.S.C. § 271(a)), continues all of the interLATA  
10 prohibitions of the MFJ except where the Act itself (or a subsequent  
11 FCC order under § 271) permits BOCs to offer interLATA services.  
12 Congress used exactly the same word -- "provide" -- that the MFJ court  
13 construed and found so central to its decree and subsequent orders.  
14 Further, while Congress enacted express exceptions for out-of-region  
15 services, incidental services, and previously authorized services --  
16 and thereby overruled a series of earlier judicial decisions under the  
17 MFJ -- Congress created no exception for marketing. When "Congress  
18 adopts a new law incorporating sections of a prior law, Congress  
19 normally can be presumed to have had knowledge of the interpretation  
20 given to the incorporated law, at least insofar as it affects the new  
21 statute." Lorillard v. Pons, 434 U.S. 575, 581 (1978). Moreover,  
22 "[t]hat presumption is particularly appropriate" where, as here,  
23 Congress has "exhibited both a detailed knowledge of the [MFJ's]  
24 provisions and their judicial interpretation and a willingness to  
25 depart from those provisions regarded as undesirable or inappropriate  
26 for incorporation." Id. Further, the legislative history confirms

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1 that Section 271 would prohibit all of the activities prohibited by  
2 the MFJ, unless the statute permitted them.<sup>9</sup>

3 Contrary to the argument made in U S WEST's Public Policy Web  
4 Page, Section 272(g)(2) of the Act, 47 U.S.C. § 272(g)(2), provides  
5 no basis for any different view. Section 272(a) establishes a  
6 "separate affiliate" requirement for most interLATA services that a  
7 BOC could be authorized to provide. Section 272(g)(2) states:

8 Bell operating company sales of affiliate services -- A  
9 Bell operating company may not market or sell interLATA  
10 service provided by an affiliate required by this section  
11 within any of its in-region States until such company is  
12 authorized to provide interLATA services in such State  
13 under Section 271(d).

14 U S WEST maintains that "[t]here would be no reason for that specific  
15 prohibition of marketing an affiliate's long distance service if  
16 Section 271 prohibited a BOC from all marketing of long distance  
17 services." U S WEST Public Policy Web Page, p. 2 (Exh. 4).

18 But U S WEST is here refuting a straw man in an attempt to  
19 support a wholly nonsensical interpretation of Section 272(g)(2). No  
20 one has ever suggested that Section 271 prohibits a BOC from "all  
21 marketing of long distance services," for it plainly does not.  
22 Section 271(g), for example, permitted a BOC to begin providing, and  
23 therefore presumptively to market, several categories of "incidental"

24 <sup>9</sup> Thus, the Conference Report describes the effect of Section 271 as follows:

25 New section 271(b)(1) requires a BOC to obtain Commission authorization prior  
26 to offering interLATA services within its region unless those services are  
27 previously authorized, as defined in new section 271(f), or 'incidental' to the  
28 provision of another service, as defined in new section 271(g).

H. Conf. Rep. 104-458, at 147 (emphasis added).

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1 interLATA services on the day the 1996 Act was enacted. And Section  
2 272(a)(2) provides that some of those incidental services -- those  
3 specified in Section 271(g)(4) -- may only be provided by the BOC  
4 through a separate affiliate. Section 272(g)(2) therefore has an  
5 obvious "reason." Until a BOC obtains long distance authorization in  
6 a state, § 252(g)(2) prohibits the BOC from jointly marketing with its  
7 affiliate those long distance services that Section 271 authorizes a  
8 BOC to provide before it obtains general long distance authority under  
9 Section 271 and that Section 272 requires the BOC to provide through  
10 that separate affiliate. By contrast, Section 272(g)(2) has no  
11 application whatsoever to the core (non-incidental) long distance  
12 services that Qwest provides and that U S WEST is prohibited from  
13 providing under Section 271(a). Because neither a BOC nor its  
14 affiliate can provide any such services at all prior to receiving  
15 authorization under Section 271 from the FCC, there has never been --  
16 and could never be -- any issue regarding whether such non-existent  
17 BOC affiliate services may be marketed.<sup>10</sup>

18 The negative inference that U S WEST contends should be drawn  
19 from Section 272(g) -- that Congress meant implicitly to permit joint  
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21 <sup>10</sup> Accordingly, U S WEST's assertion that "The FCC in its [Non-Accounting Safeguards] decision  
22 agreed that the language of Section 272(g) restricts only the BOCs' ability to market or sell interLATA  
23 services provided by an affiliate" is both true and completely irrelevant. U S WEST Public Policy Web  
24 Page, p. 2 (Exh. 4). Section 272(g)(2) is entitled "Bell operating company sales of affiliate services,"  
25 and it restricts joint marketing "only" with respect to an affiliate's service because that is the only  
26 relationship it addresses. The FCC therefore correctly stated that Section 272(g) is "silent" on the  
27 marketing of non-affiliate's services prior to a BOC's receiving interLATA authority. The restrictions  
28 on U S WEST's marketing of Qwest's long distance service come not from Section 272(g)(2), but from  
Section 271(a) (prior to U S WEST's obtaining Section 271 interLATA authority) and, as the FCC  
explained in the very paragraph miscited by U S WEST, from Section 251(g). Non-Accounting  
Safeguards, 11 FCC Rcd. at 22047 ("equal access requirements pertaining to 'teaming' activities that  
were imposed by the MFJ remain in effect until the BOC receives section 271 authorization").

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1 marketing with non-affiliates prior to a BOC's receiving general  
2 interLATA authority -- is further refuted by Section 274. Section  
3 274(a) requires any BOC that seeks to provide electronic publishing  
4 through its own phone lines to do so only through a separate affiliate  
5 or joint venture. 47 U.S.C. § 274(a). Section 274(c)(1), like  
6 Section 272(g)(2), then establishes a general prohibition on joint  
7 marketing between the BOC and its electronic publishing affiliate.  
8 47 U.S.C. § 274(c)(1). However, contrary to U S WEST's suggestion  
9 that such provisions alone carry a negative implication that joint  
10 marketing with unaffiliated entities is permissible and that no  
11 further statutory authorization is necessary, Congress went on  
12 expressly to authorize such joint marketing with non-affiliates in  
13 Section 274(c)(2)(A).<sup>11</sup> Section 274(c)(2)(A) shows that where  
14 Congress wished to authorize joint marketing with unaffiliated  
15 entities, it did so explicitly.

16 There is thus no support or logical basis for U S WEST's  
17 contention that Section 272(g)(2) sub silentio modifies the  
18 longstanding definition of "provide" in Section 271(a). To the  
19 contrary, Section 272(g) confirms the continuing validity of that

20 \_\_\_\_\_  
21 <sup>11</sup> Section 274(c)(2)(A) provides:

22 (2) Permissible joint activities

23 (A) Joint telemarketing -- A Bell operating company may provide inbound  
24 telemarketing or referral services related to the provision of electronic publishing for a  
25 separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic  
publisher: Provided that if such services are provided to a separated affiliate, electronic  
26 publishing joint venture, or affiliate, such services shall be made available to all  
27 electronic publishers on request, on nondiscriminatory terms.

28 47 U.S.C. § 274(c)(2)(A)(emphasis added).

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1 definition. It restricts the BOC's ability to engage in joint  
2 marketing with an affiliate prior to the date on which the BOC  
3 receives long distance authority under Section 271 (i.e., before the  
4 BOC has opened its monopoly markets to competition), but permits such  
5 joint marketing once a Section 271 application has been granted and  
6 those local markets have thus been held to have become competitive.  
7 Section 271(a) likewise restricts a BOC's marketing of other carriers'  
8 long distance services prior to, but not after, that same date. In  
9 both provisions, the statute ensures that during the period in which  
10 a BOC maintains its local monopoly it will not be able to use that  
11 monopoly to foreclose competition for those customers that would find  
12 one-stop shopping for local and long distance service attractive, and  
13 will not have the incentive to discriminate in favor of one long  
14 distance carrier and against others in providing its monopoly access  
15 services to them.<sup>12</sup>

16 **B. U S WEST Is Violating The Equal Access Requirements Of**  
17 **Section 251(g).**

18 The U S WEST/Qwest arrangement independently violates Section  
19 251(g). Section 251(g) codifies the "equal access" requirements of  
20 pre-existing consent decrees, including the MFJ, "until such  
21 restrictions and obligations are explicitly superseded by regulations  
22 prescribed by the [FCC]." 47 U.S.C. § 251(g). The FCC has not yet

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24 <sup>12</sup> U S WEST's reliance for its contrary interpretation on an FCC order regarding a provision in Section  
25 275 on alarm monitoring is baseless. U S WEST Public Policy Site, p. 2 (Exh. 4). Even if the statement  
26 in that order were assumed to be correct, section 275 is a different provision with a different history  
27 presenting far less serious competitive concerns. Even in that context, the FCC order holds that some  
28 marketing arrangements would violate § 275. See Implementation of the Telecommunications Act of  
1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, 12 FCC Rcd. 3824, 3841-  
3842 (1997).

1 adopted or even proposed any such regulations, and therefore, as the  
2 FCC has noted, "any equal access requirements pertaining to 'teaming'  
3 activities that were imposed by the MFJ remain in effect until the BOC  
4 receives section 271 authorization." Non-Accounting Safeguards, 11  
5 FCC Rcd. at 22047.

6 The core theory of the MFJ depended upon removing the incentives  
7 for the BOCs to prefer the services of particular long distance  
8 carriers. The MFJ's equal access provisions reinforced this by  
9 strictly requiring, among other things, that statements BOCs made to  
10 local customers about long distance service ensured equal treatment  
11 among long distance carriers. See, e.g., United States v. Western  
12 Elec. Co., 578 F. Supp. 668, 676-77 (D.D.C. 1983). The FCC has  
13 reiterated that those requirements mandated then, and mandate now,  
14 "nondiscriminatory treatment" of long distance carriers. Non-  
15 Accounting Safeguards, 11 FCC Rcd. at 22046. They specifically  
16 require, for example, that BOC sales representatives receiving calls  
17 from customers to sign up for service provide those customers with the  
18 names "of all of the carriers offering interexchange services in [the  
19 BOC's] service area" in "random order." Id.

20 The MFJ Court repeatedly held that any arrangement in which a BOC  
21 marketed the services of long distance carriers violated these  
22 requirements. For example, the Court held that the issuance or  
23 marketing of calling cards that automatically routed interexchange  
24 calls to AT&T violated the equal access requirements of the MFJ. It  
25 explained that "[a]ny Regional Company advertising at this juncture  
26 will have the direct foreseeable effect of promoting AT&T services  
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1 over those of the other interexchange carriers. This violates the  
2 nondiscrimination provisions of the decree." United States v. Western  
3 Elec. Co., 698 F. Supp. 348, 356 (D.D.C. 1988).

4 The arrangement between U S WEST and Qwest constitutes classic  
5 discrimination and "unequal access," and that is precisely why Qwest  
6 is willing to pay substantially for it. Qwest has not joined with U  
7 S WEST because U S WEST's sales representatives have any special  
8 marketing talents -- when you work for a monopoly, there is very  
9 little occasion to develop such expertise. Instead, Qwest is paying  
10 for preferential access to U S WEST's monopoly assets: (1) the ability  
11 to bundle its long distance service with U S WEST's monopoly local  
12 service and thus be the only long distance carrier to offer one-stop  
13 shopping; (2) the distribution channels and customer information U S  
14 WEST controls as a result of the fact that all residents and  
15 businesses in its area must contact it for local service; and (3) the  
16 corporate endorsement of the monopoly local provider.<sup>13</sup> Qwest also  
17 has created a situation in which U S WEST will have an incentive to  
18 provide it with preferential exchange access services, and to degrade  
19 the services provided to rival carriers, in order to promote Qwest's  
20 position in the marketplace -- and in which those rivals will have to  
21 expend substantially more resources monitoring U S WEST to determine  
22 whether and to what extent such preferences are being granted.

23 U S WEST concedes, as it must, that the equal access requirements  
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25 <sup>13</sup> Indeed, by asserting that any offering that it markets must be equal or lower in price to Qwest's, U  
26 S WEST is implicitly declaring that higher-priced services are not offering sufficiently greater value to  
27 justify the difference. But the whole point of equal access was to ensure that customers would decide  
28 on a long distance carrier based on price, quality, and any other attribute that is important to them,  
without the BOC placing its thumb on the scale.

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1 of Section 251(g) "apply to the BOCs' communications with potential  
2 customers of the interexchange carriers." U S WEST Public Policy Web  
3 Page, p. 3 (Exh. 4). Nonetheless, U S WEST claims (id.) that it meets  
4 the exacting standards imposed by Section 251(g) because, it asserts,  
5 (a) the arrangement is open to any other long distance carrier that  
6 wishes to participate, and (b) the FCC approved a similar arrangement  
7 in the BellSouth Order.<sup>14</sup> Both of those claims are meritless.

8       **1. "Open to Everyone."** Although U S WEST has not publicly  
9 disclosed the full terms and conditions of its agreement with Qwest,  
10 it has stated that "[a]ny long distance carrier may participate in  
11 Buyer's Advantage under the same terms and conditions set forth in the  
12 contract."<sup>15</sup> That statement is a transparent sham for three reasons.

13       First, the very nature of the benefit conferred by the alliance  
14 -- preferred marketing status -- is inconsistent with broad-based  
15 participation by all interexchange carriers. U S WEST cannot  
16 recommend to its customers multiple participating carriers  
17 simultaneously. Thus, Qwest's CEO, when asked at his press conference  
18 how such multi-carrier participation could possibly work,  
19 understandably stated, "[t]o be perfectly honest with you, Alvin, I  
20 don't know how they'll do it." See Qwest Press Conference Transcript,  
21 p. 9 (Exh. 5).

22       Second, even if multiple-carrier participation were not self-  
23 contradictory, U S WEST has structured the arrangement so that only

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25 <sup>14</sup> See Memorandum Op. and Order, Application of BellSouth Corporation, et al. Pursuant to Section  
26 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in  
South Carolina, CC Docket No. 97-208 (Dec. 24, 1997).

27 <sup>15</sup> U S WEST Public Policy Web Page, p. 2 (Exh. 4).

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1 one carrier will enjoy its benefits for at least a considerable period  
2 of time, and that carrier will thereby obtain a critical "first mover"  
3 advantage. Qwest itself has stated that U S WEST selected only one  
4 carrier for this coveted status and denied similar requests of other  
5 carriers. Id. at 4 ("Other long distance carriers competed for this  
6 opportunity and we're delighted that U S WEST selected us").<sup>16</sup> U S  
7 West stated that other long distance carriers could enter into the  
8 same arrangement if they were willing to agree to the same undisclosed  
9 terms that were secretly negotiated with Qwest only days before U S  
10 WEST launched a massive campaign on behalf of Qwest. See supra p. 15.  
11 Qwest recognizes the exceptional importance of this head start.  
12 Qwest's President thus stated that he was not concerned about U S  
13 WEST's statement: "time to market is very important here . . . since  
14 [Qwest's service] is the only offer that [U S WEST] ha[s], this is the  
15 one they will be marketing. If you have your distribution channels  
16 filled just on an offer, you know, first mover advantage in something  
17 this compelling is very compelling." See Qwest Press Conference  
18 Transcript, p. 9 (Exh. 5).

19 Indeed, the enormous value of that "first mover advantage" is  
20 assuredly reflected in the compensation that Qwest was willing to  
21 agree to pay U S WEST. Subsequent carriers that seek to join, by  
22 contrast, would be forced to pay the same price for only a fraction  
23 of the value, and none will therefore do so. That is another reason

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25 <sup>16</sup> Under the parallel equal access provisions of the GTE decree, the Court held that it was unlawful for  
26 GTE to conduct a competitive bidding to select one or more interexchange carriers that were deemed  
27 by GTE to offer the best value or to satisfy particular conditions and to offer access to that carrier or  
28 carriers on a preferential basis. See United States v. GTE Corp., 1988-2 Trade Cas. (CCH) ¶ 68,369,  
1988 U.S. Dist. LEXIS 16525 (D.D.C. 1988).

1 why Qwest has no reason to be concerned: any paper offer by U S WEST  
2 to replicate the Qwest arrangement with others could not rationally  
3 be accepted by any competing long distance carrier. See McMaster  
4 Aff., ¶ 25.

5 Third and most fundamentally, even if there were some way to  
6 enable other carriers to obtain the same benefits as Qwest (which  
7 there is not), that could not cure the equal access violation. Equal  
8 access means equal treatment -- not an equal right to pay for favored  
9 treatment. A BOC may not use its monopoly power to extort payment  
10 from captive long distance carriers in return for special privileges.  
11 U S WEST has created a situation in which some carriers, if they are  
12 willing to pay for it, are "more equal than others."<sup>17</sup>

13 **2. The BellSouth Order.** Nor does the BellSouth Order remotely  
14 endorse this kind of arrangement. The FCC stated there that it  
15 believed it would be permissible for a BOC to recommend its  
16 affiliate's long distance offering to customers after the BOC had  
17 received approval to offer long distance service under Section 271.  
18 It noted that Section 272(g) grants the BOCs a statutory right to  
19 engage in joint marketing with their long distance affiliates once  
20 they receive long distance authority under Section 271, and that the  
21 equal access requirements, which "were written at a time when BOCs  
22 could not provide (and therefore could not market) long distance  
23 service," must be "balance[d]" against that "right." BellSouth Order

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25 <sup>17</sup> See G. Orwell, Animal Farm 123 (Penguin Books 1972). Indeed, the reductio ad absurdum of U S  
26 WEST's "multi-tiered" approach to equal access would be if all long distance carriers felt compelled  
27 to participate in order to avoid being competitively disadvantaged, and therefore all paid U S WEST for  
28 the mere privilege of being treated equally -- which Section 251(g) guarantees as a matter of right.

1 ¶¶ 237-238. It therefore approved an "inbound telemarketing" script  
2 in which BellSouth recommends its own affiliate's long distance  
3 service, but offers to read a list of other long distance carriers if  
4 the customer so desires. Id. ¶ 233.

5 U S WEST's claim (U S WEST Public Policy Page, p. 3 (Exh. 4))  
6 that it can therefore use the same script today with an unaffiliated  
7 entity is a complete non sequitur. The FCC's order specifically  
8 applied to the period of time after the BOC had been found to have  
9 satisfied Section 271 by opening its local markets to competition, at  
10 which point the BOC will have lost the ability to foreclose  
11 competition either by (1) being the only carrier able to provide  
12 bundled local and long distance service, or (2) discriminating against  
13 interexchange carriers in the pricing and provisioning of monopoly  
14 exchange access services. As the FCC noted, the requirement that the  
15 BOC provide the names of long distance carriers only in random order  
16 were designed for a time "when BOCs could not provide (and therefore  
17 could not market) long distance service" (BellSouth Order ¶ 238) --  
18 and until U S WEST satisfies Section 271, it will remain unable to  
19 provide or market such services and the requirements will remain  
20 appropriate.<sup>18</sup> Indeed, Section 272(g)(3) itself makes a similar  
21 distinction. It states that the "joint marketing . . . permitted  
22 under this subsection" will not be deemed to violate the  
23 nondiscrimination rules of Section 272(c). The "joint marketing  
24 permitted under this subsection" is joint marketing after the BOC has  
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26 <sup>18</sup> The fact that the FCC in that passage equated an inability to "provide" with an inability to "market"  
27 further confirms that "provide" is defined in this context to include marketing. See supra pp. 16-21.

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1 demonstrated satisfaction with Section 271.

2       Moreover, the FCC did not even suggest that it was altering the  
3 established definition of equal access, but rather made clear that it  
4 was "balancing" those obligations against the specific statutory right  
5 of those BOCs that had satisfied Section 271 "to market and sell  
6 services of their long distance affiliates." BellSouth Order ¶ 239;  
7 see also id. ¶¶ 231, 234, 237-238. It therefore determined either  
8 that there was a statutory exception to Section 251(g) that applied  
9 only after the BOC received interLATA authority, or that it should  
10 exercise its statutory authority to "supersede" the MFJ's equal access  
11 requirements to create this narrow exception. No such "balancing"  
12 would have been necessary if the equal access requirements, standing  
13 alone, did not prohibit such conduct, and the U S WEST/Qwest  
14 arrangement, unlike BOC joint marketing of affiliate services, is not  
15 supported by any statutory right that can be balanced against those  
16 requirements.

17 **II. U S WEST'S JOINT MARKETING ARRANGEMENT WILL CAUSE IRREPARABLE**  
18 **INJURY TO AT&T, OTHER CARRIERS, AND THE PUBLIC INTEREST.**

19       Unless a temporary restraining order or a preliminary injunction  
20 is issued against U S WEST's "Buyers' Advantage Program," it will  
21 irreparably harm AT&T, other long distance carriers, and also other  
22 firms that are seeking to take advantage of Sections 251-53 of the Act  
23 and compete with U S WEST's local monopoly service. In particular,  
24 these harms cannot be quantified and will be irreparable for the same  
25 reasons that first the MFJ and now Section 271 have prohibited U S  
26 WEST and other BOCs from providing long distance services while they

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1 have local telephone monopolies.<sup>19</sup> Indeed, U S WEST's conduct will  
2 irreparably harm competing carriers, and the public interest codified  
3 in Section 271, in several independent respects. The resulting  
4 increases in AT&T's and other carrier's costs, too, cannot be readily  
5 compensated by damages. Id. ¶¶ 30, 42. Lastly, the Qwest/U S WEST  
6 arrangement will irreparably harm actual or prospective competition  
7 for local telephone services by removing the incentive the Act  
8 provides to U S West to open its monopoly local exchange market to  
9 competition.

10 **A. U S WEST's Endorsement And Marketing Of Qwest's Service In**  
11 **A Package With U S WEST's Local Monopoly Services Will**  
12 **Cause Competing Carriers To Lose Customers That Will Not Be**  
13 **Re-obtained After The Program Ends And Will Cause Harm To**  
14 **Competing Carriers' Goodwill That Cannot Be Adequately**  
15 **Compensated In Money Damages.**

16 First, the Qwest/U S WEST marketing alliance will confer  
17 substantial and artificial competitive advantages on Qwest that will  
18 cause large groups of customers to leave AT&T (and other carriers) and  
19 use Qwest for reasons that have nothing to do with the price or  
20 quality of Qwest's service. In addition to revenues that AT&T will  
21 lose in the period before this court can make a final determination  
22 of the lawfulness of U S WEST's conduct, that conduct will harm AT&T's  
23 goodwill, reputation, and relationship with actual and prospective  
24 customers in ways that cannot be readily compensated by damages.  
25 McMaster Aff. ¶¶ 27-35.

26 As U S WEST has elsewhere stated, "harm to a company's

27 <sup>19</sup> It is well-established that where a plaintiff will "suffer[] substantial injury that is not accurately  
28 measurable or adequately compensable by money damages, irreparable harm is a natural sequel." Ross-  
Simons of Warwick v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996) (collecting cases).

1 relationship with its customers is not readily compensated by damages  
2 and hence is irreparable."<sup>20</sup> In particular, courts have held that  
3 when unlawful marketing activities by a competitor will cause lost  
4 advertising efforts, defections of customers, and harm to a firm's  
5 goodwill with actual and prospective customers, the injuries cannot  
6 be readily quantified and are thus irreparable and sufficient to  
7 support grant of a preliminary injunction.<sup>21</sup>

8 If U S WEST's conduct is not enjoined now, its arrangements with  
9 Qwest will cause AT&T and other long distance carriers to lose not  
10 only existing customers, but also prospective customers that they  
11 would otherwise obtain during the period before there is a final  
12 determination of the lawfulness of U S WEST's conduct.

13 Qwest's own public statements illustrate the tremendous magnitude  
14 of the potential losses. In particular, although Qwest has not  
15 garnered any significant share of the market through its own  
16 independent efforts, Qwest's CEO has stated publicly that it could  
17 acquire 25-35 percent of the customers in U S WEST's service territory  
18 because of the arrangement with U S WEST, and that "our conservative  
19 estimate" is that the arrangement will increase Qwest's revenue by

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22 <sup>20</sup> U S WEST Motion for Stay Pending Judicial Review, U S WEST Communications v. FCC, Docket  
23 No. 97-3576 (8th Cir. Oct. 2, 1997).

24 <sup>21</sup> See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc., 944 F.2d 597, 602 (9th Cir.  
1991); see Gateway Eastern Ry Co. v. Terminal R.R. Ass'n., 35 F.3d 1134, 1140 (7th Cir. 1994)  
25 ("showing injury to goodwill can constitute irreparable harm that is not compensable by an award of  
26 money damages"); Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992) (finding of  
27 irreparable injury proper where "competitive injuries and loss of goodwill are difficult to quantify").  
Here, there are multiple respects in which the benefits U S WEST confers on Qwest will injure  
competing carriers in ways that cannot be remedied adequately in a damages award.

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1 \$100-200 million in the first year alone.<sup>22</sup> These predictions,  
2 moreover, are consistent with experience in similar circumstances in  
3 which only one firm offered long distance service in a package with  
4 the local service of the incumbent monopolist. McMaster Aff. ¶ 28.

5 And, in addition to revenues lost while this case is pending,  
6 once a long distance carrier loses a customer it would otherwise  
7 retain or obtain, there is no subsequent marketing effort, alliance,  
8 or court order that can guarantee return of that customer after the  
9 U S WEST/Qwest alliance is declared unlawful. Id., at ¶ 30. AT&T and  
10 other carriers irretrievably lose not only the future revenue that all  
11 these customers would have generated, but also all of the goodwill and  
12 brand loyalty associated with the customer. It thus "follow[s]  
13 inexorably that neither the adverse impact on sales nor the  
14 concomitant insult to goodwill could be measured accurately." Ross-  
15 Simons of Warwick v. Baccarat, Inc., 102 F.3d 12, 20 (1st Cir. 1996).

16 Second, the U S WEST/Qwest alliance provides Qwest with a cost  
17 advantage over other long distance carriers, that again derives solely  
18 from its relationship with U S WEST. The benefits of U S WEST's  
19 monopoly customer base, customer lists, and unique role as monopoly  
20 provider of local service will reduce its customer acquisition costs  
21 -- and Qwest's CEO has predicted that the U S WEST marketing alliance  
22 will "cut our customer acquisition costs by 50% . . . and give us  
23 access to 14 million customers in the U S WEST territory." "U S WEST  
24 Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules,"  
25 Wall Street Journal, supra, p. A2 (Exh. 3). No after-the-fact damages

26 \_\_\_\_\_  
27 <sup>22</sup> Qwest Press Conference Transcript, pp. 2-3 (Exh. 5).

1 award can reliably determine the amount of business that individual  
2 competing carriers lose because of U S WEST's wholly artificial  
3 reduction in Qwest's costs.

4 Third, the harms to AT&T and other carriers affect their  
5 relationship with prospective customers as well as their existing  
6 ones, for the advantages that Qwest anticipates are not limited to  
7 attracting new customers. Because it alone will be offering a package  
8 that is tied to local monopoly services and that no other long  
9 distance carrier can offer, Qwest has predicted that its marketing  
10 alliance will cut its "customer churn by 75%." Id. In an industry  
11 where over 56 million customers change long distance carriers  
12 annually, such a dramatic reduction in churn constitutes a major  
13 competitive advantage. McMaster Aff. ¶ 29. It further means that  
14 it will be far more difficult and costly for AT&T and other competing  
15 long distance carriers to attract the business of those prospective  
16 future long distance customers who have subscribed to the Qwest/U S  
17 WEST package of local and long distance service. Id.

18 Fourth, AT&T's and other carriers' relationships with existing  
19 and prospective customers will be harmed even in the case of those  
20 customers who do not immediately switch to the U S WEST/Qwest package.  
21 The mere fact that U S WEST is endorsing Qwest in advertisements and  
22 in outbound and inbound telemarketing calls to customers who today  
23 receive service from AT&T or other carriers, or may in the future  
24 receive service from these companies, would relatively damage AT&T's  
25 and other carriers' reputations and goodwill in ways that will impair  
26 their ability to obtain and retain customers even after the Qwest/U  
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1 S WEST relationship hereafter ends. Id. ¶¶ 31-35. Indeed, Qwest's  
2 CEO has stated U S WEST's endorsement and marketing of Qwest would  
3 strengthen Qwest's reputation and goodwill -- thus relatively  
4 weakening the reputation and goodwill of competing carriers. McMaster  
5 Aff., ¶ 34. These injuries to the reputation and goodwill of AT&T and  
6 other competitors epitomize the kinds of harm for which an injunction  
7 is the only effective remedy. See p. 33 n. 19, supra. Indeed, it was  
8 the inadequacy of after-the-fact damages remedies that was the reason  
9 for the prohibitions on the BOCs' endorsement and marketing of  
10 individual long distance carriers' services in the MFJ and now in  
11 Section 271 of the Communications Act. Id. ¶¶ 13-14.

12 Finally, Qwest has secured a competitive advantage that no  
13 carrier -- even one willing to participate in U S WEST's violation of  
14 the Communications Act -- can now attain at any price: the first  
15 mover advantage. Id. ¶ 25. In emphasizing the benefits of its  
16 alliance with U S WEST, Qwest's CEO stressed this point, stating,  
17 "[T]ime to market is extraordinarily important here. Also, since  
18 this is the only offer that [U S WEST] ha[s], this is the [only] one  
19 they will be marketing. . . . [F]irst mover advantage . . . is very  
20 compelling."<sup>23</sup>

21 The harm caused by Qwest's ability to be the first carrier to be  
22 promoted by U S WEST is alone sufficient to establish irreparable  
23 injury. In Mova Pharm. Corp. v. Shalala, \_\_ F.3d \_\_, 1998 WL 168710  
24 (D.C. Cir. 1998), the Court affirmed a preliminary injunction based  
25 in part on the irreparable harm that would be caused to a drug company

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27 <sup>23</sup> Qwest Press Conference Transcript, p. 9 (Exh. 5).

1 if the FDA were permitted to authorize its competitor to market a new  
2 drug first. It found the irreparable injury requirement to be  
3 satisfied because "the earliest generic drug manufacturer in a  
4 specific market has a distinct advantage over later entrants," and  
5 because the plaintiff "would find it extremely difficult to compete  
6 against the much larger [competitor] if [the competitor] got its  
7 product to market first." Id., at \*5. In this case, there is no  
8 question that Qwest will gain a "distinct advantage" from its unique  
9 position as the first long distance carrier to be able to offer "one-  
10 stop shopping" with U S WEST. Further, because U S WEST is a monopoly  
11 provider of local service and has unparalleled access to the  
12 telecommunications customers in its territory, AT&T and other carriers  
13 who do not have a first-mover advantage will "find it extremely  
14 difficult to compete" against the joint U S WEST/Qwest offering.

15

16 **B. The U S WEST Marketing Alliance Will Require AT&T And Other**  
17 **Long Distance Carriers To Incur Costs Of Monitoring U S**  
18 **WEST's Conduct And Will Cause Harms Resulting From Subtle**  
**Discrimination For Which Courts And Congress Have**  
**Determined There Is No Adequate Damages Remedy.**

19 The U S WEST/Qwest arrangement will also subject AT&T and other  
20 long distance carriers to risks of subtle discrimination and to the  
21 costs of monitoring U S WEST's behavior that are the very reason that  
22 first federal courts and then Congress prohibited U S WEST and other  
23 BOCs from marketing or otherwise providing long distance services  
24 while they possess local monopolies. McMaster Aff. ¶¶ 36-42. Here,  
25 too, the MFJ and Section 271 represent determinations that there is  
26 no adequate after-the-fact damages remedy in this circumstance, and

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1 that only an injunction can prevent the resulting harms to competition  
2 from such arrangements.

3 The overriding fact is that the arrangement with Qwest would,  
4 unless enjoined, give U S WEST a direct financial stake in Qwest's  
5 success, because each additional customer that U S WEST signs up for  
6 Qwest will generate more revenue and profits for U S WEST. U S WEST  
7 thus has a financial incentive to do whatever it can to make Qwest's  
8 services as attractive as possible to prospective customers. Id. ¶¶  
9 36-37.

10 The history of the MFJ and the findings that led to its entry  
11 establish that there are a nearly infinite number of competitively  
12 significant ways in which U S WEST could use its local monopoly to  
13 discriminate in favor of Qwest, but that are, as a practical matter,  
14 unlikely to be detected -- much less proven. These range from giving  
15 Qwest advance notice of changes in the pricing and physical  
16 characteristics of U S WEST's monopoly facilities, to developing  
17 facially neutral access pricing plans that in fact favor Qwest, giving  
18 Qwest preference in establishing new access services or installing  
19 existing ones, using customer proprietary network information in  
20 marketing services for Qwest, making representations to individual  
21 customers that are improper, or offering improper "rebates" of access  
22 charges to Qwest through the marketing and related services that no  
23 other long distance carrier can obtain. In this regard, there is even  
24 now reason for AT&T and other long distance carriers to believe that  
25 U S WEST has already engaged in some such misconduct in its dealings  
26 with Qwest, and there is a clear risk that U S WEST will do so if the

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1 arrangement is not enjoined. Id. ¶¶ 37-41.

2 In all events, regardless of whether such discrimination actually  
3 occurs or can be proven, the effect of the U S WEST/Qwest arrangement  
4 will be to impose costs on AT&T and other long distance carriers that  
5 U S WEST and Qwest do not incur. In particular, while neither Qwest  
6 nor U S WEST face any risk of being discriminated against by the local  
7 monopolist in the U S WEST region, AT&T and other long distance  
8 carriers will face a substantial risk of such discrimination so long  
9 as U S WEST has a financial incentive to favor Qwest or any other  
10 individual long distance carrier. AT&T and other long distance  
11 carriers will thus have to incur substantial direct and indirect costs  
12 of monitoring U S WEST's behavior to try to ascertain whether they  
13 have been victims of any illicit discrimination or cross-subsidies  
14 and, if so, whether there is a remedy that can be pursued effectively.  
15 AT&T and other long distance carriers thus will incur the direct costs  
16 of dotting every "i" and crossing every "t" in dealing with U S WEST  
17 to eliminate any pretext for it to discriminate, of attempting to  
18 measure their treatment by U S WEST as compared to Qwest's in the  
19 pricing and provisioning of U S WEST's monopoly access facilities, of  
20 reviewing each and every tariff filing in U S WEST's 14 states to  
21 assure there is no hidden preference for Qwest, and of devoting  
22 substantial management time that should be spent on improving the  
23 quality or reducing the cost of services, rather than on these  
24 monitoring efforts. Id. ¶¶ 36-42.

25 It was because these artificial costs constitute a barrier to  
26 entry -- and because there was no other adequate remedy -- that the

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1 MFJ court and then Congress prohibited U S WEST and other BOCs from  
2 providing long distance services while they have local monopolies.  
3 These determinations establish that AT&T and other carriers will be  
4 irreparably harmed if U S WEST's arrangement with Qwest is not  
5 enjoined pending this court's final determination of the merits of  
6 plaintiffs' claims that this arrangement is unlawful. See Rent-A-  
7 Center, Inc. v. Canyon Television and Appliance Rental, Inc., 944 F.2d  
8 597, 602 (9th Cir. 1991); Ross-Simons of Warwick v. Baccarat, Inc.,  
9 102 F.3d 12, 19-20 (1st Cir. 1996).

10 **C. The Arrangement Is Against The Public Interest Because It**  
11 **Will Irreparably Harm Actual Or Prospective Local Services**  
12 **Competition And The Objects Of Sections 251-53 As Well As**  
13 **Section 271 Of The Communications Act.**

14 Finally, because the U S WEST/Qwest alliance allows U S WEST to  
15 profit from the long distance business without opening its local  
16 markets to competition, it will, unless enjoined, irreparably harm  
17 AT&T and other carriers (such as McLeod, ICG, and GST) who are seeking  
18 effectively to compete with U S WEST's local monopolies, as well as  
19 substantially undermine a central objective of the Communications Act.  
20 Solomon Trujillo, the President of U S WEST Communications, has  
21 asserted that "[a] lot of us Bells are frustrated" by the need to meet  
22 a "cumbersome" checklist before providing local and long distance  
23 services.<sup>24</sup> This "cumbersome" checklist, however, contains the core  
24 market-opening requirements that a BOC must meet under Section 271  
25 before it is permitted to offer in-region, interLATA services. See  
26 47 U.S.C. § 271(c)(2)(B). Plainly, the U S WEST joint marketing

27 <sup>24</sup> "U S WEST Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules," Wall Street  
28 Journal, supra, p. A2 (Exh. 3).