alliance is an effort to leverage the value of its local exchange monopoly into the long distance market while evading the fundamental market-opening requirements of the 1996 Act.

If U S WEST is permitted to bypass the competitive checklist and offer long distance service before it has opened its local markets to competition, the primary function of Section 271 -- to prevent BOCs from providing long distance service until they have opened their networks to competitors -- will be eviscerated. U S WEST will then be able to use its local monopolies to gain the very advantages that Section 271 was enacted to prevent.

Moreover, if U S WEST is permitted the benefits of in-region, interLATA entry without being required to open its local markets to competition, it will lose all incentive to open those markets in the future. It will be able to retain its local monopoly while reaping the benefits of its long distance marketing efforts, and competition in both long distance and local markets will be harmed. That will irreparably harm AT&T and other carriers who are seeking to compete with U S WEST in the local services market. McMaster Aff. ¶¶ 43-44.

III. A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION WOULD CAUSE NO UNDUE HARM TO OTHERS.

Finally, in contrast to the irreparable harm to AT&T, other carriers, and the public interest that will result in the absence of a stay, a stay will cause no undue harm to U S WEST or Qwest. As U S WEST has conceded, it would not have been permitted to engage in a joint marketing alliance with an interexchange carrier under the terms

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of the MFJ.[25] Thus, since the break-up of the Bell system in 1982, U S WEST could not and did not create the kind of alliance it has now forged with Qwest. During that time, U S WEST and Qwest have marketed and provisioned local and long distance service, respectively, without benefit of a joint marketing arrangement. It would strain credulity to suggest that any further delay in joint marketing during the pendency of this lawsuit would cause undue harm to either U S WEST or Qwest. Moreover, even if this conduct were later held to be permissible, U S WEST could earn the same per-customer payments in the future that are available today. During the pendency of the lawsuit, U S WEST stands only to lose the present value of Qwest's payments to it during the term of the joint marketing arrangement. None of the marketing opportunities it anticipates from its alliance will dissolve during this time.

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[25] AT&T Corp. v. U S WEST Communications, Inc., FCC File No. E-97-28, Opening Brief of U S WEST Communications, Inc., p. 13 (filed Sept. 17, 1997) ("[U]nder the MFJ in the Court's view, not only were BOCs prohibited from furnishing the physical transport for interLATA telecommunications services, but BOCs were also prohibited from selling, promoting, or marketing the interLATA services of an unaffiliated carrier.") (Emphasis added).

CONCLUSION

For the reasons stated, plaintiff's motion for a temporary restraining order or a preliminary injunction should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT&T CORP., MCI TELECOMMUNICATIONS CORPORATION, ASSOCIATION FOR LOCAL TELE-COMMUNICATIONS SERVICES, McLEODUSA TELECOMMUNICATIONS SERVICES, INC., ICG COMMUNICATIONS, INC. GST TELECOM, INC. PLAINTIFFS vs. U S WEST COMMUNICATIONS, INC., DEFENDANT	C. A. No. ________ **DECLARATION OF JOHN A. McMASTER**

Pursuant to 28 U.S.C. § 1746, I, John A. McMaster, declare as follows:

1. I am Vice President, Consumer Markets Division of AT&T Corp. ("AT&T"). I have worked for AT&T since 1978. My business address is 295 N. Maple Avenue, Basking Ridge, New Jersey. I submit this declaration in support of AT&T's motion for an order requiring U S WEST Communications, Inc. ("U S WEST") immediately to cease the joint marketing of its local services and the long distance services of Qwest Communications International Inc. ("Qwest") or any other long distance carriers in the 14 States where U S WEST has local monopolies. This affidavit will explain that, unless this activity is stopped, AT&T (and other carriers) will incur harm that is irreparable and incalculable.

2. This Affidavit is divided into four parts. Part I describes the multitude of uncontrollable ways in which U S WEST could use its local telephone monopolies to shift business to any long distance carrier in whom U S WEST had a financial interest and explains that these are the reasons that the Modified Final Judgment ("MFJ") and § 271 of the Communications Act have prohibited U S WEST and other Bell Operating Companies ("BOCs") from providing long distance service while they have local telephone monopolies.

3. Part II explains that U S WEST continues to have local monopolies throughout its region, and that U S WEST has been sanctioned for its failures to take even the initial steps necessary to allow local competition and (unlike other BOCs) has not even applied for long distance authority under § 271.

4. Part III describes the so-called "Buyers' Advantage Program" through which U S WEST will acquire an interest in the success of one

long distance carrier (Qwest) and will use its local monopoly to give Qwest artificial advantages over AT&T and other long distance carriers.

5. Part IV explains why and how these marketing activities will irreparably cause damage to AT&T, other carriers, and the public if the U S WEST/Qwest Alliance is not enjoined.

I. U S WEST, Its Bottleneck Monopolies, And The Equal Treatment Of All Long Distance Carriers Required by the MFJ and Sections 271 and 251(g) of the Communications Act.

6. **U S WEST's Control Over Long Distance Carriers.** U S WEST is a BOC that provides local telecommunications services in specific geographic service areas (including all the major metropolitan areas) in its fourteen state territory in the western United States.[1] In each of these service areas, U S WEST has long had a monopoly over the local telecommunications facilities that hook up every home and business. These U S WEST facilities are used to carry all local telephone calls between all these homes and businesses. The local network facilities are further connected to the long distance networks of AT&T, MCI, Sprint, WorldCom, Qwest, and other long distance carriers. U S WEST local facilities are used to originate virtually every long distance call that is placed in each of its service territories and to terminate virtually every long distance call that is placed to homes and businesses in its service territories.

[1] U S WEST's service territory covers portions of the following states: Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

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7. These local monopolies give U S WEST control over long distance carriers that want to provide service to U S WEST's local customers and would give U S WEST an essentially uncontrollable ability to favor, and illicitly to shift business to, any long distance carrier in whose success U S WEST had a financial interest. This ability to discriminate exists, in the first instance, because no long distance carrier can effectively provide service to any business or residential customer unless the necessary facilities and physical connections are arranged by U S WEST and the prices (called "access charges," which may represent nearly 40% of the cost of a long distance call) that U S WEST charges for them are reasonable and nondiscriminatory. But the process of establishing the necessary physical connections is itself complex, subjective, and highly discretionary, and there are an infinite number of ways in which a BOC could discriminate in favor of an individual carrier in establishing new kinds of access facilities and in installing, maintaining, and repairing existing access facilities and services. Similarly, there are myriad ways in which the use of these facilities can be priced that would give a select long distance carrier immense cost advantages over its competitors.

8. Perhaps even more fundamentally, apart from the pricing, installation and maintenance of access facilities, U S WEST's monopoly over local calling and other purely local services means that it has a vast array of other ways in which it could use its monopoly not just to favor any long distance carrier that it had a financial incentive

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to help, but virtually to assure that that long distance carrier receives vast amounts of business it otherwise would not obtain. For example, all residential customers, most small business customers, and even some larger customers will select their long distance service through the local telephone company when they first sign up for local telephone service. U S WEST thus administers the long distance "carrier selection" process in its service territories. If U S WEST's representatives told actual or prospective customers who contacted U S WEST that it recommended a particular long distance carrier or if they stated, or implied, that only that long distance carrier's services were available with U S WEST's local service, it would artificially shift large volumes of business to the preferred carrier for reasons having nothing to do with the price or quality of its services. Because some 20% of customers will move or otherwise place orders for new service in any given year, this itself gives U S WEST substantial control over a substantial percentage of long distance customers.

9. Further, U S WEST's direct contacts with these customers are not limited to the calls placed by customers seeking to order service. Virtually any time a customer has any question about telephone service or wants to change, or consider changing, some feature of his service, the customer will call U S WEST. Each such contact is an opportunity for U S WEST not just to market the long distance service in which it has an interest, but to urge and even pressure the customer to subscribe to it.

10. U S WEST's local monopoly means that it not only has unique

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credibility and leverage with its customers, but also that it alone has complete information concerning the usage and calling patterns and volumes of each customer in its service territories. If U S WEST engaged in marketing on behalf of an individual long distance carrier, U S WEST could readily use this "customer proprietary network information" to target the best customers and to make offers to them on the basis of information about them that no one else had. Although illegal, such conduct would be exceedingly difficult to detect.

11. Finally, in contrast to the calls that customers place to a carrier -- which are referred to as "inbound telemarketing"-- long distance carriers often engage in "outbound telemarketing," when a representative of a particular carrier will telephone prospective customers and try to persuade them to switch to its service from that of a competing carrier. U S WEST's local monopoly would then give it the same leverage and other unique advantages that are discussed above.

12. **The MFJ And §§ 271 & 251(g).** Prior to January 1, 1984, U S WEST and other BOCs had been part of the former Bell System and had both themselves provided long distance services to residential and business customers and had been affiliated with a carrier (the Long Lines Division of AT&T) that provided specialized long distance services. Through their monopoly position, the BOCs and AT&T had more favorable access to the BOCs' monopoly assets, and therefore were able to provide higher quality long distance service at lower cost than any potential rival, and to exploit their unique access to information about the BOCs' local customers. After competition in the provision

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of long distance services became technologically possible and was authorized by the FCC, long distance carriers and other competitors repeatedly claimed that the BOCs had used their local telephone monopolies to discriminate in favor of their own long distance services. These and similar claims led to some 70 private antitrust suits and a government suit, as well as regulatory proceedings that sought to develop rules and reporting and other requirements that would make it more difficult for BOCs to engage in this discrimination.

13. In United States v. AT&T, No. 74-1698 (D.D.C.), the United States contended that the integration of local telephone monopolies and competitive long distance businesses was inherently anticompetitive and would operate as a powerful impediment to competition. In particular, the United States claimed that neither regulation nor after-the-fact antitrust remedies could be adequate to prevent harm to actual or potential long distance competitors because: (1) much BOC discrimination that was competitively harmful was so subtle that it could not be detected, (2) even if discrimination was detected, a BOC could impose immense litigation costs and uncertainty over the availability of after-the-fact relief by claiming that its conduct was a legitimate efficiency of integrated services that was good for consumers or a good faith response to regulatory policies, and (3) in all events, monitoring BOC behavior to prevent or identify discrimination imposed immense costs on actual or potential competitors (and the public) that itself gave the BOCs illicit advantages over carriers who sought to compete with them.

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14. The Bell System consented to a decree that granted the precise relief the United States had sought -- the MFJ -- because it ultimately agreed that only a structural remedy that eliminated any "incentive" for the BOCs to engage in discrimination could eliminate the litigation and monitoring costs that were crippling the Bell System and the rest of the industry.

15. Under the MFJ, U S WEST and the other BOCs were not only prohibited from providing any long distance ("interexchange" or "interLATA") services while they had local monopolies, but also were subject to nondiscrimination and other "equal access" requirements. These expressly required that each BOC treat all interexchange carriers equally in all respects and prohibited any form of favoritism of one interexchange carrier over another.

16. Under the MFJ, BOCs could not endorse or recommend the service of any individual long distance carrier. They could not provide any carrier with preferential access to U S WEST's monopoly services or facilities, or directly or indirectly give any individual long distance carrier the benefits of customer or other information that U S WEST and other BOCs controlled. When new or existing local service customers contacted them, U S WEST and other BOCs were required merely to provide a list of all the long distance carriers that offered service to customers in that area and tell the customer to select one of those carriers. Customers would then make long distance carrier selection decisions based solely on their views of the price, features, and quality of the different carriers' services.

17. Similarly, U S WEST and other BOCs were prohibited from

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having any direct financial interest in the success of any individual long distance carrier. The only payments the BOCs were allowed to receive from any long distance carriers were nondiscriminatory charges for the "access service" of originating and terminating long distance calls over its local monopoly networks, for administering the carrier selection process, and for providing billing and collection services. Other long distance carriers thus had no reason to fear discrimination and no reason to engage in costly monitoring of U S WEST's and other BOCs' pricing and provisioning of monopoly access facilities, of U S WEST's conduct when it engaged in inbound or outbound telemarketing, or of any other aspect of the carrier selection process.

18. While competition in the long distance market was trivial when the MFJ was entered, it exploded thereafter. Numerous carriers entered the market, and prices dropped by well over 50%.

II. U S WEST Has Not Opened Its Local Markets To Competition.

19. In 1996, the MFJ was superseded by amendments to the Communications Act that codify the core of the MFJ. After codifying the MFJ's equal access requirements, these new provisions prohibit U S WEST and other BOCs from "provid[ing] interLATA services" -- with a few explicit exceptions -- unless and until they allow long distance (and other) carriers to offer local and access services at the same terms, and economic cost, that the BOC enjoys. This reflects the commercial reality that if a BOC entered long distance and were the only carrier that could jointly offer local and long distance service in a single package, the BOC would monopolize the long distance business of the substantial number of customers who want to engage in

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"one stop shopping" and obtain local and long distance jointly. AT&T (and many others) have sought to enter local markets and compete with the local monopolies throughout the nation.

20. Under the Act, U S WEST cannot provide interLATA services originating in any one of its 14 States unless it has, at a minimum, implemented a "competitive checklist" of specific provisions necessary to allow effective local services competition and unless the FCC has approved its application by finding not only that the checklist has been implemented, but also that U S WEST's provision of interLATA services is "consistent with the public interest, convenience, and necessity," and will comport with the separate affiliate and nondiscrimination requirements of § 272.

21. Solomon Trujillo, the President of U S WEST, has asserted that "[a] lot of us Bells are frustrated" by the need to meet a "cumbersome" checklist.[2] The FCC, however, has made explicit that the competitive checklist is critical to opening local markets to competition and that it therefore must be fully implemented before a BOC can offer in-region, interLATA service.[3] U S WEST, however, has not even applied to the FCC for authority to provide interLATA services to customers in any of the states in its region. Indeed, it has even been fined for failing to comply with its contractual duties to turn over critical documents necessary to provide nondiscriminatory

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[2] John J. Keller and Stephanie N. Mehta, U S WEST Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules, The Wall Street Journal, p. A2 (May 7, 1998)(Exhibit 3).

[3] See In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (Aug. 19, 1997) ("Ameritech Michigan Order").

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access to components of its local networks, as required by the competitive checklist and the independent statutory requirements (of §§ 251-52 of the Act) that are incorporated in the checklist.[4] U S WEST has thus unquestionably failed to open its local markets and is prohibited from providing interLATA services to customers in each of its 14 States.

III. The "Buyer's Advantage Program" And Use of U S WEST's Local Monopoly To Confer Artificial Advantages Upon Qwest.

22. On May 6, 1998, U S WEST announced a local and long distance marketing alliance with Qwest which it calls the "Buyer's Advantage" program. As a result of this Alliance, U S WEST will no longer be neutral in its treatment of long distance carriers; rather, it will actively market and promote the service of a single long distance carrier (Qwest) in exchange for a fee. It will use inbound and outbound telemarketing to inform customers that they can receive Qwest long distance service in connection with U S WEST local service and to urge customers to do so.[5] In return, "Qwest will compensate U S WEST largely on a per-customer basis for its marketing successes."[6]

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4 See Order Finding Continuing Violation and Levying Civil Penalties, State of Iowa, Dept. of Commerce Utilities Board, In re MCIMetro Access Transmission Services, Inc., and U S WEST Communications, Inc., Doc. No. A1A-96-2 (Arb. 96-2) (Apr. 4, 1997); see also Order to Show Cause and Notice of Prehearing Conference, Colorado Public Utilities Commission Docket No. 97C-432T (Sept. 26, 1997) (directing U S WEST to justify use of web-based interface to provide access to resale and certain network elements, which State has determined "may not comply with the Act and the FCC Order"); In re: U S WEST Communications, Inc., Iowa Utilities Board Docket No. RPU-96-9, Final Decision and Order (Apr. 23, 1998) (finding web-based interface developed by U S WEST for access to resale and certain network elements does not meet requirements of the Act).

5 http://www.uswest.com/com/insideusw/policy/docs/buyers _advantage2. html, p. 1 (May 7, 1998) ("U S WEST Public Policy Web Page") (Exhibit 4).

6 Ibid.

Thus, U S WEST will have a direct financial stake in Qwest's success by earning some unspecified amount for each customer it attracts to Qwest, plus scme additional amount for the favored status U S WEST has conferred on Qwest.

23. The U S WEST/Qwest Alliance ends the neutrality in U S WEST's treatment of long distance carriers that has been required since the MFJ was implemented. Qwest's President and CEO (Joseph Nacchio) has stated that U S WEST selected Qwest for this Alliance after requesting and receiving proposals from several interexchange carriers. Qwest's CEO stated that, although many interexchange carriers expressed interest in the marketing Alliance, U S WEST chose to select only one carrier, Qwest.[7] Indeed, the very nature of the Alliance -- preferred marketing status in exchange for a fee -- is inconsistent with broad-based participation by all or even multiple interexchange carriers.

24. Although U S WEST has not publicly disclosed the full terms and conditions of its agreement with Qwest, it has stated that "any long distance carrier may participate in Buyer's Advantage under the same terms and conditions set forth in the contract with Qwest or with long distance rates lower than those established by Qwest."[8] By tying preferred long distance carrier status to the price that a long distance carrier may charge for its services, U S WEST has now made itself the arbiter of what price, and corresponding level of quality,

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[7] Qwest Press Conference Transcript, p.4 (May 7, 1998) (statement of Joseph P. Nacchio) (Exhibit 5).

[8] U S WEST Public Policy Web Page, p. 2 (Exhibit 4).

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long distance carriers should provide their customers.

25. Furthermore, no carrier can obtain the same benefits that Qwest, as the first carrier selected by U S WEST, has secured. Qwest's CEO has emphasized this advantage, stating that even if other carriers join the Buyer's Advantage program, Qwest alone will enjoy a "first mover advantage" in offering long distance bundled with local service: "[T]ime to market is extremely important here. Also, since this is the only offer that [U S WEST] ha[s], this is the one they will be marketing. . . .[F]irst mover advantage . . . is very compelling."[9] As one industry analyst has noted, "This agreement accelerates [Quest's'] penetration in [U S WEST's] service territory on a first to market basis."[10] Thus, even if other carriers agreed to the same terms and conditions as Qwest, they will receive substantially less in return. U S WEST therefore has conferred a discriminatory advantage on one interexchange carrier.

IV. U S WEST's Joint Marketing Arrangement Will Cause Harms To AT&T That Cannot Be Readily Quantified And That Are Irreparable.

26. There are at least three respects in which U S WEST's arrangement with Qwest will cause harm to AT&T and other carriers that cannot be quantified and that can only be prevented by an order that the joint marketing and related activities cease immediately. First, the Alliance will cause a large shift in AT&T's customer base to Qwest and harm to AT&T's reputation and goodwill that cannot be remedied even if the Alliance is ordered to cease at some future date. Second,

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9 Qwest Press Conference Transcript, p. 9 (Exhibit 5).

10 UBS Securities Equity Research, USW: Marketing Alliance With QWST Enhances Full Service Capability (May 7, 1998).

because U S WEST will have the incentive and ability to engage in a host of subtle forms of discrimination in the pricing and provisioning of access services and in the carrier selection process, AT&T and other long distance carriers will incur incalculable direct and indirect costs of monitoring U S WEST's behavior, of evaluating, challenging, and attempting to prove suspected acts of discrimination, and of suffering the consequences of discrimination that is unproven. Third, by allowing U S WEST to profit from the long distance business in other ways, the Alliance will eliminate U S WEST's incentive to open its local market and delay AT&T's and other carriers' entry.

27. **Irreparable Loss of Business And Damage to Goodwill.** The U S WEST marketing Alliance will unfairly shift customers from AT&T to Qwest. This shift will not result from traditional competitive forces of price or product quality, but will result from U S WEST's leveraging of its local exchange monopoly position into the long distance market. Qwest's President and CEO has openly acknowledged that its decision to enter into the joint marketing arrangement was grounded in an understanding that its unique relationship with U S WEST would assure that it captures a significant portion of the long distance market that Qwest would not otherwise now obtain:

> "We are being conservative in our estimates on the impact on our business, but if you look at most of the market research most people believe about half the market will buy bundled; and if you look at what the anticipation is for when a Bell Operating Company is able to offer a package, you know people would expect 25-35% of the share of customers would vote that way."[11]

Market analysts are also predicting substantial market share gains for

[11] Qwest Press Conference Transcript, p.3 (Exhibit 5).

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Qwest, and at least one analyst has assumed that Qwest will capture 800,000 customers through the Buyer's Advantage program in the first year alone.[12]

28. Actual market experience supports these expectations. In Connecticut, the incumbent local exchange carrier (SNET) is not a "Bell operating company" and is not prohibited from providing in-region, interLATA long distance services. SNET, however, retains monopoly control of its local markets and has not taken the steps required under the Act to open its local markets to competition. SNET began marketing some interLATA services in 1994 but did not initiate any major marketing to residential and small business customers in Connecticut until 1996.[13] It then quickly captured some 25% of the Connecticut long distance market by offering long distance service in connection with its local service. As a recent study conducted for AT&T demonstrates, the Connecticut experience is powerful evidence of the ability of a local exchange monopolist to attract large numbers of long distance customers not through superior product or pricing, but through leveraging of its local monopoly into long distance by jointly offering and marketing local and long distance service in a single package.[14]

29. In addition to the loss of existing customers to Qwest, the

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[12] USW Announces That It Will Market Qwest's Long Distance Service, Prudential Securities (May 7, 1998).

[13] Prior to 1996, SNET offered long distance service primarily through its affiliate SONECOR, whose activities were targeted to large business customers inside and outside of Connecticut.

[14] Lee L. Selwyn, Helen E. Golding, Susan M. Gately, The "Connecticut Experience" With Telecommunications Competition: A Case Study In Getting It Wrong (Economics and Technology, Inc., Feb. 1998), p. 9

Alliance will severely harm (in ways that cannot readily be quantified) AT&T's ability both to win future customers from Qwest and to win back customers that it has lost to Qwest. Qwest's president and CEO has predicted that the US WEST marketing partnership will "cut our . . . customer churn by 75%."[15] This prediction of dramatically reduced churn, in an industry where over 56 million customers change long distance carriers annually, further underscores Qwest's competitive advantage. Plainly, Qwest believes and understands that far fewer customers will switch away from its service because of U S WEST's endorsement and marketing efforts and the fact that only Qwest can offer a long distance service that is packaged with local service and affords genuine "one-stop shopping." The effect of this reduced churn rate would be directly to limit the number of customers that AT&T can attract to its own service.

30. While it would be possible to calculate some elements of the losses that AT&T would thus incur, AT&T will suffer other losses that cannot be readily calculated. Once a customer leaves AT&T, no subsequent marketing efforts, alliances, or even court decrees can guarantee return of that customer to AT&T, so the effect of the Alliance would be permanent losses of some customers AT&T would otherwise retain. The goodwill associated with the customer, and the future revenue that the customer would have generated, is irretrievably lost. Further, it would be very difficult, if not impossible, to calculate the damage incurred by AT&T's lost

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[15] John Keller and Stephanie N. Mehta, <u>U S WEST Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules</u>, The Wall Street Journal, p. A2 (May 7, 1998)(Exhibit 3).

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opportunity to win customers from Qwest.

31. Moreover, by endorsing Qwest as its preferred long distance carrier and packaging its service only with Qwest's, U S WEST would cause irreparable harm to AT&T's goodwill. In the time since AT&T first began offering consumers long distance services in 1984, it has amassed tremendous goodwill by offering high quality services at ever declining prices and by providing superior customer care, service, and support. It has a strong reputation for quality that it earned while competing on a level playing field with many other long distance carriers and without any endorsement or assistance from U S WEST or other BOCs.

32. In addition to the customers that will be artificially shifted to Qwest as a result of U S WEST's marketing, endorsements, and related activities, these activities will damage the goodwill that AT&T has earned with all customers. By endorsing Qwest's service and jointly marketing Qwest's and its own local service in a single package, U S WEST is, in the first instance, inevitably creating the confusion among customers over Qwest's relationship with U S WEST that will assuredly cause many customers to believe that Qwest and U S WEST are affiliated or related and that this relationship itself enables Qwest to offer better service than AT&T and other long distance carriers.

33. Further, by endorsing only Qwest's service and offering it in connection with U S WEST's own, U S WEST is implicitly or explicitly telling all local customers in its region that only Qwest offers service that is cost-effective or that satisfies some quality

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standard. Indeed, U S WEST's Press Release on the Alliance states that only carriers that satisfy certain standards of customer service would be considered for the program.

34. Qwest's CEO Joseph Nacchio has underscored these facts in its public statements about the Alliance. In particular, he stated that the relationship will strengthen Qwest's brand, which is simply to say that it enhances Qwest's reputation and goodwill. Because the Alliance would artificially enhance Qwest's reputation and goodwill, the Alliance would diminish the goodwill of AT&T and other carriers. All the foregoing harm to AT&T's goodwill cannot, to say the least, be readily quantified.

35. This is particularly so because U S WEST would be promoting Qwest's service in a number of ways. It will do so when it is contacted both by the large percentage of customers who move and order new service each year and by the even larger percentage that contact U S WEST with questions about service. Further, U S WEST will engage in outbound telemarketing in which its representatives telephone existing customers and urge them to switch to the joint U S WEST/Qwest service. The value of these efforts to Qwest is reflected in its "conservative estimate" that the Alliance would generate $100-$200 million in additional annual revenues in the first year.[16]

36. **Risks of Discriminatory Conduct and Costs of Monitoring.** Further, the Alliance will subject AT&T and carriers to the same risks of discrimination for which there is no adequate after-the-fact remedy that led first to the MFJ (and now § 271). In particular, U S WEST

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[16] Qwest Press Conference Transcript, p. 3 (Exhibit 5).

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retains a monopoly over the exchange access services that are necessary for AT&T and all long distance carriers to originate and complete calls in U S WEST's territory, and U S WEST thus has the ability to discriminate in favor of select carriers in the pricing and provisioning of these bottleneck facilities. Because U S WEST receives a payment for each Qwest customer it obtains, the U S WEST/Qwest Alliance gives U S WEST a clear financial incentive to do whatever it can to cause Qwest's services to be selected by as many customers as possible.

37. As noted above, discrimination in the provisioning of access services can be very subtle and difficult to detect. Telecommunications networks are extremely complex, and they are constantly evolving. This constant change and complexity means that wide ranges of discretion are built into the design, timing, and pricing of exchange access services offered by U S WEST. Because U S WEST has a stake and interest in Qwest's success, U S WEST will benefit from any abuse of this discretion that favors Qwest. Thus, U S WEST can increase the relative quality of Qwest's service by provisioning Qwest's circuits more quickly when that is competitively important; it can offer new access features to Qwest before it offers them to competing long distance carriers; and it can provide Qwest advanced notice of changes to its network that may require corresponding adjustments by Qwest and other long distance carriers. This type of discrimination is extraordinarily difficult to detect and even harder to prove. When it exists, but is not proven, AT&T and other long distance carriers obviously incur irreparable harm. And

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even if it never occurs (or occurs and is proven), long distance carriers would incur other costs because of the U S WEST/Qwest Alliance that Qwest would not incur and for which there is no remedy: i.e., the cost of monitoring U S WEST's behavior to protect against discrimination.

38. AT&T and other long distance carriers must also be vigilant against the potential for discrimination in the pricing of access services. Facially neutral tariffs can readily be designed to provide an advantage to a favored IXC. For example, U S WEST can offer a discount on access services that is tied not to a long distance carrier's volume of business but to its growth in business. Such a tariff would plainly favor Qwest, who alone among long distance carriers can anticipate rapid growth in the coming months. The specter of such discrimination immediately imposes upon AT&T an obligation to monitor the access tariffs U S WEST files in 14 states.

39. Further, U S WEST can discriminate in pricing access services merely by giving Qwest advance notice of price changes, so that Qwest can adapt its own prices to the change more quickly than other carriers. Again, such discrimination would be nearly impossible to prove. Although AT&T and other long distance carriers might notice that Qwest was responding to price changes more quickly, they would be unable to prove that this was the result of discriminatory treatment.

40. In the few days that U S WEST has had an incentive to discriminate against other long distance carriers, AT&T's costs of

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monitoring U S WEST have already begun. Within days of U S WEST's announcement of its joint marketing arrangement, I learned of at least two instances in which U S WEST telemarketers offered long distance service not under the Qwest brand name but under its own brand name. This tactic may well advantage Qwest and will certainly advantage U S WEST, because the strength of the U S WEST brand and the offer of a single local/long distance provider will be attractive to many consumers. Similarly, AT&T is already concerned about the potential for U S WEST illegally to use its information about its customers and their usage of long distance and other services to target long distance customers for Qwest and market services on the basis of information that no other long distance carrier has.

41. Indeed, illegal price discrimination appears to be inherent in the U S WEST/Qwest relationship. For example, Qwest is offering a $.10 flat per minute rate in a region where the effective per minute cost of U S WEST's originating and terminating access charges often approaches or even exceeds that rate. Qwest inevitably would lose money on those calls unless it were receiving an illegal rebate on the access charges it pays through aspects of its relationship with U S WEST.

42. But even if U S WEST never were to discriminate in favor of Qwest in any of the foregoing ways, their alliance causes undoubtable harm to AT&T and other long distance carries who must immediately begin efforts to monitor U S WEST's behavior to detect discrimination, and must expend considerable resources attempting to prove discrimination where it is suspected. These injuries, which will

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