

boundary instead, connecting with the advanced service that the BOC was allowed to offer. ^{52/} Of course, such a service could be intraLATA or out-of-region, since both are allowed by Section 271.

The Commission expressly defined a GSP as “the non-BOC carrier that a BOC ISP uses to carry its traffic across LATA boundaries.” ^{53/} Inherent in this statement is a Commission decision that, consistent with Section 271, it is permissible for the BOC to have a relationship with the GSP that carries interLATA traffic to its advanced service in another LATA. This principle is underscored several times in the *Fourth Report and Order*. For example, footnote 67 reads as follows:

We anticipate that many of the requests for the type of LATA boundary modification we discuss today will be made in the context of a BOC’s attempt to provide an integrated service package to a customer. . . . Certainly if the customer obtains the interLATA link, there would be no need for relief; however, we anticipate that the entities most likely to obtain interLATA data transport on the BOC’s behalf would be the BOC, its ISP affiliate, or the Global Service Provider (GSP) contracted by the BOC or its ISP to provide interLATA transport. ^{54/}

In other words, the Commission is fully anticipating that the “interLATA link” at issue would be provided by the GSP in conjunction with the BOC affiliate’s Internet service used by the customer. If no one other than the BOC is able to provide that

^{52/} *Id.* at ¶ 24.

^{53/} *Id.* at n.81 (emphasis added). In this case Bell Atlantic stated that it needed a high-speed packet-switched connection between Morgantown, West Virginia and Pittsburgh, Pennsylvania. *Id.* at ¶29.

^{54/} *Id.* at n.67.

link, the BOC can ask for a LATA boundary waiver. But first the BOC must show that neither it, nor a GSP with which it or its ISP affiliate has a contract, can provide the transport necessary to facilitate the advanced service. The Commission thus expressly contemplates that BOCs will be able to contract with GSPs to provide customers the interLATA links that the BOCs cannot provide in connection with their own advanced service. 55/ In order to justify a LATA modification, the BOC must demonstrate (among other things) that “its Global Service Provider” could not provide or obtain the relevant interLATA link. 56/

In short, the Commission has ruled that, in the context of advanced services like the Internet, a GSP relationship with a BOC or BOC ISP does not violate Section 271 -- either by its terms or under a “totality of the involvement” standard.

None of this is surprising. Again, as discussed in the Divestiture Report, the concept of a GSP is not new. Since 1996 the Commission has made clear that so long as another carrier “separately” provides a “necessary interLATA transmission component,” BOCs may provide interLATA information services such as Internet services. 57/ The Common Carrier Bureau approved Bell Atlantic’s

55/ *Id.* at ¶24 (referring to a GSP from whom “the BOC has contracted to obtain interLATA service”).

56/ *Id.* at ¶ 24 & n.75 (emphasis added).

57/ *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order, 11 FCC Rcd 21905, 21961, ¶ 115 (1996) (“*Non-Accounting Safeguards Order*”).

provision of Internet service on this basis 58/, and all other BOCs do the same. In each case the BOCs arrange with the GSP to offer the interLATA service to customers, and bill and collect for the GSP.

Given the *Fourth Report and Order* and previous precedent, the relationship contemplated by Qwest and Touch America clearly complies with Section 271. The Qwest ISP will sell permitted out-of-region Internet services. It may also sell in-region intraLATA services. Customers of the latter services may connect with Qwest's out-of-region services by a non-BOC's service, either a private line, or more typically the "high speed, packet-switched data transport" specifically referenced in the *Fourth Report and Order*. In this case the Qwest ISP will be separate from the U S WEST BOC, and the GSP will have a direct relationship with the end user. There is no Section 271 issue.

C. BOC ISPs Have No Equal Access or Other Obligation To Work With Multiple GSPs

AT&T also complains that "[c]ustomers that register to use Qwest's Internet access service cannot choose an interLATA Internet provider. . . . Rather, that customer will automatically receive Touch America as their GSP when enrolling." 59/ This assertion is incorrect. Qwest does and will continue to provide Internet services to customers that obtain connections from other carriers. More

58/ See *Bell Atlantic Telephone Cos. Offer of Comparably Efficient Interconnection to Providers of Internet Access Services*, 11 FCC Rcd 6919, ¶6936, ¶49-50 (CCB 1996) ("*Bell Atlantic CEI Order*").

59/ AT&T Comments at 33.

important, however, there is fundamentally nothing wrong with the arrangement, even as characterized by AT&T, as the Commission has already recognized.

First of all, in the Divestiture Report, Qwest explained that the “equal access” requirement of Section 251(g) does not apply to its Internet service offerings. Section 251(g) by its terms does not apply to a non-local exchange carrier entity (such as the corporate entity at issue here) providing a non-telecommunications service (such as Internet access or other information services). 60/ AT&T does not take issue with this analysis.

Second, neither the Communications Act of 1934 nor any FCC precedent imposes non-discrimination obligations upon providers of information services. To the contrary, a long line of precedent establishes that information services are not subject to common carrier rules and policies such as non-discrimination. 61/ A provider of information services can decide “whether and with whom to deal.” Thus, Qwest, in its role as purveyor of Internet access and other Internet-based information services, is free to deal with multiple telecommunications providers or a single provider.

60/ Report at 81-83.

61/ *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 209 (D.C. Cir. 1982); see also *MCK Telecoms. Corp. v. FCC*, 765 F.2d 1186, 1194-95 (D.C. Cir. 1988) (citing *id.*); *AOL v. greatdeals.com*, 49 F.Supp.2d 851, 855-56 (E.D. Va. 1999). To be sure, Section 272 and FCC rules promulgated thereunder apply certain restrictions to transactions between a BOC ILEC and its ISP and other affiliates, but the relevant BOC ILEC – U S WEST Communications, Inc. – has no connection to the matter at issue here.

Third, as is implicit in the discussion of the *Fourth Report and Order* above, there is no Section 271 or other principle that would require BOC ISPs to work with multiple GSPs. To the contrary, the *Fourth Report and Order* explicitly contemplates that a BOC or its ISP may contract with a single GSP for the carriage of traffic across LATA boundaries. ^{62/} There is no mention in that *Order* of any expectation that a BOC would make arrangements with multiple GSPs. Similarly, the *Non-Accounting Safeguards Order* holds that “if the necessary interLATA transmission component [of an information service] is separately provided by another carrier the BOC is not providing any interLATA services[.]” ^{63/} The reference to “another carrier” (in the singular) rather than “other carriers” (in the plural) further supports the proposition that BOC-affiliated information service providers are not required to make arrangements with multiple providers of interLATA transmission.

Finally, even if the Commission wanted to consider a “multiple GSP” requirement notwithstanding the above, it first would have to carefully consider the technical and economic feasibility of any such requirement. Serious issues and difficulties are presented that would affect all BOCs and all BOC Internet customers. Meanwhile, we understand that most BOCs’ ISPs (including U S WEST’s) work with only one GSP in offering service to customers. This established practice is consistent with applicable 271 precedent, including the *Fourth Report*

^{62/} *Fourth Report and Order*, n.67 & n.81.

^{63/} *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21963, ¶ 117 (1996) (emphasis supplied).

and Order. Qwest's divestiture plan follows that precedent in all relevant respects. ^{64/} If the Commission is inclined to consider a new requirement in this area, it should do so in a generic rulemaking and on a full record.

IV. QWEST IS NOT A "PROVIDER" OF IN-REGION INTERLATA SERVICES UNDER THE "TOTALITY OF THE INVOLVEMENT" STANDARD.

As AT&T notes, the FCC has determined that a BOC's involvement in the interLATA activities of another carrier can be so extensive as to result in a conclusion that the BOC is in fact "providing" interLATA services within the meaning of Section 271(a). As the Commission recognized in the *Qwest U S WEST Merger Order*, the governing test is set forth in *AT&T v. Ameritech*:

[I]n order to determine whether a BOC is providing interLATA service within the meaning of section 271, we must assess whether a BOC's involvement in the long distance market enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition. ^{65/}

^{64/} The *Fourth Report and Order's* Section 271 analysis did not turn on the nature or scope of the advanced service to which the interLATA link attached. In other contexts the Commission is encouraging RBOCs to compete out-of-region. The Commission presumably also wants Qwest to expand its own permitted out-of-region advanced services.

Indeed, it would be a bizarre result if the more out-of-region advanced services Qwest developed and made available to in-region customers, the less it could do in conjunction with interLATA links provided by a GSP. Such a perverse incentive structure would be inconsistent with the Section 271 legal principles of the *Fourth Report and Order*, and with general policies in support of advanced services deployment.

^{65/} *AT&T v. Ameritech*, 13 FCC Rcd at 21465, ¶ 37.

AT&T is wrong, however, in its application of this test to the facts set forth in the Divestiture Report and accompanying agreement documents.

In *AT&T v. Ameritech*, the Commission identified three factors in particular that it would consider in determining whether a BOC was engaged in “providing” interLATA services:

In making this determination, we balance several factors, including, but not limited to, [1] whether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long distance component in a combined [in-region local and long distance] service offering, [2] whether the BOC is effectively holding itself out as a provider of long distance service, and [3] whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public. In evaluating the BOC’s actions, we consider the *totality of its involvement*, rather than focus on any one particular activity. 66/

In this case, Qwest’s activities in connection with the business it will divest to Touch America creates no concerns under any of the factors identified in *AT&T v. Ameritech*. We discuss each of the factors identified by the Commission separately.

A. Qwest Obtains No Material Benefits from Any Combined Local-Long Distance Offering.

Unlike the situation in *AT&T v. Ameritech*, the Qwest divestiture of in-region long distance services and assets to Touch America will not give the U S WEST ILEC, U S WEST Communications, Inc., any “unique advantages” attributable to a combination of local and long distance services. As noted, neither

66/ *Id.*, 13 FCC Rcd at 21465-66, ¶ 37 (emphasis added).

Qwest nor U S WEST Communications, Inc. will have any joint marketing or "one-stop shopping" arrangement with Touch America's in-region long distance business. U S WEST Communications, Inc. will simply provide Touch America with interstate access, billing and collection, and other standard services offered to all interexchange carriers. Those services will confer no unique benefits on any entity. Qwest will gain no "first mover's advantage" or "jumpstart" in the market for combined local and long distance. 67/

Qwest also has no right to re-acquire the divested services subsequent to obtaining interLATA authority under Section 271, as discussed above and in the Divestiture Report. The divestiture is permanent and irrevocable. Qwest thus will not be in a position to capture the benefits of Touch America's success in expanding the divested in-region business.

As noted in the Divestiture Report, Qwest's provision of support services is transitional and at Touch America's option. Those services may be obtained, at Touch America's choice and at any time, from other providers after closing. Touch America has made clear its plan to move to other providers as promptly as reasonably possible. Meanwhile, the ongoing revenues that Qwest will receive from Touch America for support services are based on the cost of providing those support services – *not* in any way on a percentage of Touch America's revenue or any other measure related to Touch America's revenue.

67/ See *U S West Communications, Inc. v. FCC*, 177 F.3d 1057, 1060 (D.C. Cir. 1999).

Qwest also gains no material benefit from Touch America's provision of GSP service to Qwest's Internet services customers. As discussed above and in the Divestiture Report, Touch America sets its own rates for the GSP service, and Qwest receives no commission or other material benefits from Touch America. The arrangement is structured in the same way as the GSP model blessed by Commission in the *Fourth Report and Order*. The only "benefit" Qwest receives is the ability to provide Internet services to its in-region customers, the same benefit that the Commission recognized was permissible in that decision, inherently recognizing that no "totality" principle is violated in the context of GSPs used in connection with BOC advanced services. ^{68/} To the contrary, the bifurcated GSP arrangement necessitated by Section 271 places the BOC affiliate at a competitive disadvantage as compared to all other ISPs, which are free to – and do – offer fully integrated Internet access and telecommunications.

In sum, within the meaning of the *AT&T v. Ameritech* test, Qwest receive no benefits "uniquely associated with being able to participate in the long distance market." ^{69/}

B. Qwest Will Not Hold Itself Out As Providing In-Region Long Distance Service.

Qwest is making it clear to existing and prospective customers that it cannot provide interLATA telecommunications in the 14-state U S WEST region.

^{68/} See *supra*, Section III.B.

^{69/} *AT&T v. Ameritech*, 13 FCC Rcd at 21466, ¶40.

Qwest's arrangements with Touch America comply fully with the following

Commission admonition in the *Qwest-U S WEST Merger Order*:

Although Qwest attempts to make this transition process 'seamless' for the in-region customers, we note that Qwest must not represent itself to former in-region customers such that those customers perceive Qwest as [their] continued long distance provider. 70/

Qwest will not market in-region long distance services on Touch America's behalf, and there is no coordinated marketing agreement between the carriers. 71/

In particular, under the support services arrangements between Qwest and Touch America, every time Qwest employees interact with customers on Touch America's behalf, whether in writing (*e.g.*, through invoices provided under the billing and collection arrangement) or orally (*e.g.*, when operators assist Touch America's in-region customers as part of the support service for the operator services business divested to Touch America), they will make it clear that all in-region services are provided by Touch America. Touch America's brand name and logo will always be used, and Qwest's will never be used, in connection with the in-region services provided by Touch America. 72/ Thus, when a caller uses a calling

70/ *Qwest-U S WEST Merger Order*, n.58.

71/ Customers will be clearly informed that Touch America, not Qwest, provides all in-region interLATA transmission services in connection with the three narrow exceptions to the statement in the text above – Touch America's provision of GSP service in connection with Qwest's in-region Internet offerings, Touch America's provision of in-region calling card services for Qwest's out-of-region calling card holders, and the prepaid calling cards jointly offered by Qwest and Touch America. See Divestiture Report, §§ V.C.2., V.A.2., V.B.2; see also *supra*, § I.B.

72/ For more detail on this point, see Report, § III.C.3.

card or operator services in-region, the caller will hear the Touch America brand. Calling cards and prepaid cards include a legend indicating that Touch America is the carrier providing in-region calls. Any billing statements will clearly identify the in-region calls as provided by Touch America.

In the case of Internet services for which Touch America is the GSP, marketing materials, billing statements, and customer service contacts will make clear that Touch America, not Qwest, is providing the interLATA transport. Touch America, not Qwest will set the rates for that service, and if customers complain about those rates or the quality of transmission service, it will be Touch America's responsibility to respond to those complaints. The *Fourth Report and Order* makes clear that use of a GSP does not violate Section 271. 73/

In sum, there is no meaningful risk that the customer will perceive Qwest as the provider of in-region service, nor will Qwest be in a position to portray itself as the provider of in-region interLATA services to the divested customers.

C. Touch America – Not Qwest – Will Perform All Activities and Functions Typically Performed by InterLATA Carriers.

Touch America will perform all of the functions typically performed by carriers with respect to the in-region services divested by Qwest. Specifically, Touch America will: (a) determine the prices of its in-region services; (b) determine the product design for those services (*i.e.*, the terms and conditions and how the offerings will be packaged and presented); (c) file federal and state tariffs and take

73/ See Section III.B., *infra*.

care of all other regulatory matters; (d) provide all transmission over telecommunications facilities that it owns or that it leases from other carriers; (e) make all decisions regarding the sales and marketing of its services, including whether and how to use third-party agents and distributors; and (f) make all other decisions regarding how its services will be structured, marketed, and provisioned.

Qwest's role in providing support services to Touch America will be limited to the types of activities and functions that carriers (including Qwest itself, in many instances) typically contract out to third-party vendors. For example, carriers that fully control and operate their own telecommunications businesses typically obtain the following from outside vendors, sometimes including carriers: (a) billing and collection services; (b) leasing of telecommunications equipment, including switches; (c) provisioning, monitoring, and maintenance of telecommunications facilities that the carrier owns or leases; and (d) the use of call centers staffed by customer service representatives who handle customer calls in the manner determined by the carrier, using the carrier's brand name.

The fact that some interexchange carriers perform these functions for themselves, rather than contracting with third parties, does not convert the third party provider of support services into a "reseller" of the telecommunications services provided by the carrier, contrary to AT&T's suggestion. 74/ Qwest is not a reseller of Touch America's services.

74/ AT&T Comments at 18.

Moreover, as noted above, Qwest will provide these support services only for a limited time to enable Touch America to expand its own capacity to handle the substantial increase in its customer base. The fact that Touch America is free to terminate its use of the support services at any time, with no termination liability, provides further evidence of Touch America's full control over these out-sourced support services.

D. Qwest-U S WEST's Incentives to Satisfy Section 271 Are Not Diminished by the Arrangements With Touch America.

A general concern articulated by the Commission in the *Qwest-U S WEST Merger Order* was the possibility that the totality of Qwest's involvement with Touch America could lead the post-merger company to have diminished incentives to open its markets to local competition. ^{75/}

Nothing could be further from the truth here, as is apparent from the Divestiture Report. As discussed at length in Qwest's filings last fall, and as the Commission recognized in approving the merger, the combination of Qwest and U S WEST will create strong new incentives for compliance by U S WEST with the local market-opening requirements of Section 271. ^{76/} Nothing in Qwest's post-merger relationship with Touch America will change the fact that, through this divestiture, it will no longer be able to offer nationwide products to its customers, over a

^{75/} *Qwest-U S WEST Merger Order* at ¶ 57. See also *AT&T v. Ameritech* 13 FCC Rcd at 21465, ¶ 37.

^{76/} See *Qwest-U S WEST Merger Order* at § 57; see, e.g., Response to Comments on Applications for Transfer of Control of Qwest Communications Inc. and U S

seamless nationwide network. 77/ As noted above, Qwest also will lose its ability to earn revenues from interLATA services provided in the 14 U S WEST states. The relatively small amount of revenue that Qwest may earn from providing a limited range of support services to Touch America (for as long as Touch America chooses to obtain them from Qwest) does not change this calculus.

The other major incentive to open local markets created by the merger – the incentive to provide service to U S WEST’s existing in-region customer base over a network already paid for – is unaffected by any continuing arrangements with Touch America. 78/ Qwest will not be able to solicit and earn interLATA revenue from this customer base. As stated in the Report and in these reply comments, Qwest and Touch America have no coordinated marketing agreement. 79/ To the extent Touch America has agreed to provide in-region interLATA service to holders of Qwest’s prepaid cards and calling cards, and to provide GSP services to Qwest’s in-region Internet services customers, this is the same function carried out by unaffiliated interexchange carriers for all the other BOCs. These arrangements therefore should not create an issue under the “totality” test. The fact remains that Qwest/U S WEST, like the other BOCs, will not be able to sell in-region interLATA services until it obtains interLATA approval.

WEST, Inc., October 18, 1999, Attachment B (Declaration of Bruce M. Owen) (“Owen Affidavit”).

77/ See Report, § IV.

78/ See Owen Affidavit at 8.

79/ See Report at 45-49; *supra* § I.B.

In sum, Qwest's limited involvement with Touch America post-merger will in no way diminish U S WEST's incentives to satisfy Section 271 requirements at the earliest possible time.

CONCLUSION

Nothing in AT&T's filing or elsewhere in the record demonstrates that, upon divestiture, Qwest will be providing interLATA services in the U S WEST region in violation of Section 271 precedent. Accordingly, the Commission should proceed expeditiously to approve the Report and permit timely closing of both the Qwest-Touch America transaction, and the long-pending Qwest-U S WEST merger that requires this divestiture.

Respectfully submitted,

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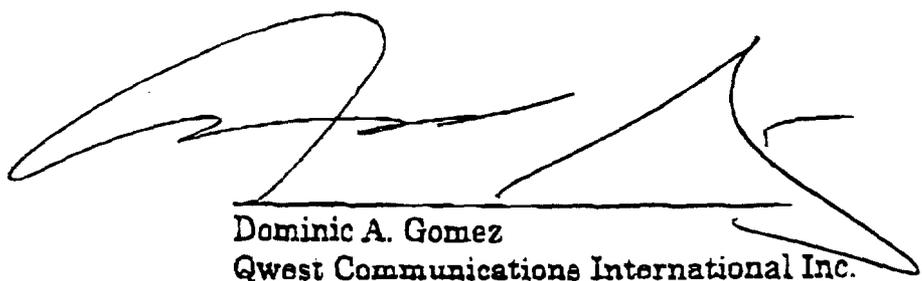
Counsel for Qwest Communications
International Inc.

Dated: May 12, 2000

AFFIDAVIT

I, Dominic A. Gomez, do hereby declare under penalty of perjury that the following is true and accurate to the best of my knowledge, information and belief:

1. I am Senior Vice President of Qwest Communications International Inc. ("Qwest"), a position I have held since August 1999.
2. In my capacity as Senior Vice President, my responsibilities include planning for and implementation of the merger between Qwest and U S WEST, Inc. My merger-related responsibilities include ensuring that the company's business and activities are in compliance with Section 271 of the Communications Act of 1934, as amended, 47 U.S.C. § 271, and the rules and policies of the Federal Communications Commission ("FCC") adopted pursuant thereto, at the time of the closing of the merger of Qwest and U S WEST, Inc.
3. I have reviewed the foregoing Qwest Reply to AT&T Comments on the Divestiture Compliance Report ("Qwest Divestiture Reply"), and do hereby certify that all facts and statements pertaining to Qwest and its direct and indirect subsidiaries and affiliates contained in the Qwest Divestiture Reply are true and accurate to the best of my knowledge, information and belief.



Dominic A. Gomez
Qwest Communications International Inc.
555 Seventeenth Street
Denver, CO 80202

Date: May 11, 2000

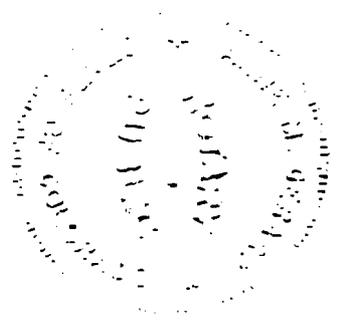
State of Colorado

County of Denver

Subscribed and sworn before me on this 11th day of May 2000.

My commission expires 2.7.02

Gene M. Arvid



ATTACHMENT A

POINT BY POINT RESPONSE TO AT&T COMMENTS ON THE QWEST DIVESTITURE COMPLIANCE REPORT

AT&T's arguments repeatedly misstate and misconstrue the facts regarding Qwest's divestiture filing; and, notwithstanding, those arguments fail to raise serious claims that would call into question the compliance of Qwest's divestiture with the Telecommunications Act of 1996. This Attachment responds to each of AT&T's claims.

AT&T Introduction & Summary

- *“Applicants have proposed essentially to “park” the transmission components of the in-region, interLATA services until such time as they comply with the Act and their Section 271 applications thus can be filed and granted. In the interim, Applicants will control nearly every other aspect of their in-region services provided to customers.” (p.1)*
 - This assertion is false. In-region customers will have *no* relationship with Qwest relating to their purchase of prohibited services. Qwest will provide no interLATA services for these customers, Qwest will receive no in-region interLATA revenues from these customers, Qwest will have no ability to determine or influence the price level or product structure of these customers' in-region interLATA services provided by Touch America, and Qwest as well as Touch America will go to great lengths to assure that these customers are aware of these facts. In all cases, Touch America's brand name and logo, not Qwest's, will be associated with the in-region services, which Touch America, not Qwest, will provide. In short, Qwest will not have any “control” over Touch America's independently provided in-region services.
- *“[T]hey have structured their transactions with the so-called ‘Buyer’ to make reacquisition of most, if not all, of the Transferred Customers by Qwest, after it obtains Section 271 authority, highly likely.” (p.2)*

- There is no basis for this unfounded allegation. Moreover, as discussed in more detail below, the non-compete provision of the Stock Purchase Agreement would preclude reacquisition of any of the Transferred Customers for a three year period, even assuming Qwest/U S WEST obtains Section 271 authority within that time frame.

AT&T I-B-1: “Qwest is Providing Everything Except In-Region Transport”

- *“The insignificance of this transfer, reflected in the relatively small purchase price . . .”* (p.5)
 - The purchase price reflected an arms-length negotiation between the parties following a process in which Qwest solicited proposals from a broad range of potential buyers. Qwest would have preferred a higher price, and doubtless Touch America would have preferred a lower price.
 - Among other factors, the level of the purchase price reflected the very significant start-up capital investments that any buyer would need in order to run the acquired business successfully, including additional expenditure on network infrastructure, above and beyond the acquisition price; the risks involved in buying this business (e.g., the risk of losing customers after the transaction closes); the relatively small number of potential purchasers with sufficient cash and capability to provide the services; and Qwest’s desire for closing the deal in an expeditious manner.
- *“The insignificance of this transfer . . . can be demonstrated by looking at what Qwest and Touch America will be providing to a ‘top Commercial account’ with in-region headquarters which purchases in-region and out-of-region switched and dedicated long distance service.”* (p.5)
 - Customers that could be characterized as “top commercial accounts” that purchase both in-region and out-of-region services account for a minority of the business being transferred from Qwest to Touch America. Most of these accounts relate to customers based outside the U S WEST region.

- » Of the total number of commercial customer accounts being transferred from Qwest to Touch America, 80% generate *no* out-of-region revenue to Qwest.
- AT&T's misleading focus on this small portion of the business being divested to Touch America causes it to misrepresent the permanence of the transfer and to mischaracterize the very limited relationship that Qwest will have to a small number of the transferred customers going forward.
- *"The Commission also wanted the Applicants, with respect to the leasing of voice and data ports, to 'make clear whether the traffic being transported by U S WEST would cross LATA boundaries.' [Merger Order ¶ 25] They have not done so."* (p.5, n.11)
 - As the Divestiture Report makes clear, there is no leasing of voice or data ports on in-region switches. Rather, Qwest is selling eleven data switches to Touch America, and is making available to Touch America the entire functionality of four voice switches. (The final deal negotiated with Touch America in March 2000 differs in several respects, including this one, from the menu of possible services described in the Qwest Divestiture Plan filed in October 1999.)
 - Providing access to switch functionality does not constitute the "transporting" of "traffic." Rather, it provides Touch America with the ability to control the operation of the switch as if it leased the actual switch. The Commission has held in similar situations that a party is not engaged in "telecommunications" when it merely supplies equipment that other parties use for transmitting information. ^{1/}

^{1/} See, e.g., *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5479, ¶ 290 (1997) (satellite operator leasing transponders is not transmitting information, and thus is not engaged in "telecommunications"); *Federal-State Joint Board on Universal*

[Footnote continued]

- Even assuming (contrary to established law) that such an agreement to lease switching equipment would constitute transport of traffic, it would be permissible for a BOC affiliate to do so as long as it does not transport the traffic across LATA lines. This is no different, in essence, from the switching functionality that every BOC provides today for every IXC as part of plain vanilla interstate access service. *See* 47 C.F.R. §§ 69.106, 69.111.
- *“Qwest will provide the initial welcome material fulfillment and will support fulfillment for up to 90 additional days. Qwest will handle credit for business and wholesale customers and will perform initial credit scoring pursuant to Qwest’s parameters unless otherwise mutually agreed by the parties. In doing so, Qwest is engaging in activities typical of resellers.”* (p.6)
 - AT&T mischaracterizes the scope of the support services that Touch America will purchase from Qwest. AT&T casts these services as if Qwest will perform these functions in its own name. But that is not the case.
 - Touch America’s name and logo will always be associated with the in-region services it provides, in all interactions with customers, written (*e.g.*, invoices) and oral (*e.g.*, contacts with Major Account Service Team customer service reps for the first 6 months). Most critically, customers will not have any knowledge that Qwest has any involvement in Touch America’s services. And Qwest’s activities are scheduled to terminate after a reasonably short transition period – 90 days for the welcome material fulfillment services discussed in the paragraph quoted above.

[Footnote continued]

Service, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776, 8864-65, ¶ 157 (1997), *aff’d sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (a party does not provide a “telecommunications service” when it sells to others “a facility or equipment used in the provision of a telecommunications service”).

- The services discussed above – (1) printing new customer welcome letters for Touch America, generating new calling cards, and mailing this information, and (2) operating a billing and collection service on behalf of a carrier – have nothing to do with “providing” telecommunications. To the contrary, these are functions that Qwest and many other carriers frequently out-source. In fact, this fulfillment service will be handled by Qwest’s third-party vendor, not by Qwest employees.
- *“Qwest will invoice the customer. The overall branding for the invoice, for national accounts, will be “Dual Overall Branding,” that is both logos on top not just for the initial six month period but thereafter regardless of the proportion of in-region and out-of-region service. This means that Qwest will be perceived as the only entity capable of offering one-stop shopping for local as well as in-region and out of region long distance services.” (p.6)*
- AT&T’s assertion about dual branding for an indefinite period is incorrect.
 - » Most affected customers – all residential customers with in-region addresses, and all business customers with 80% or more of their traffic in-region will receive invoices with *only* Touch America’s brand and logo on top beginning with the first invoice after the divestiture. Both logos will appear on top *only* for an initial six-month period for most customers with both out-of-region service from Qwest and in-region service from Touch America. After that, only the logo of the carrier that bills over 50% of the customer’s total revenues will appear. *See* Transition Services Agreement, Exhibit PSP.
 - » Both logos and brands will appear at the top of the invoice for the full term of the Transition Services Agreement – one year, with an option for Touch America to extend for up to two additional six-month periods – *only* for business customers that meet all four of the following criteria: (1) they are large enough to qualify as “national accounts;” (2) their corporate headquarters are in-region; (3) they were Qwest customers prior to the divestiture date; and (4) subsequently continue to purchase

both in-region service from Touch America and out-of-region service from Qwest. *Id.* A small proportion of the total commercial accounts falls into this category.

- AT&T apparently misreads provisions of the contract that provide that the parties will comply with the FCC's Truth-in-Billing rules, and ensure that bills identify the carrier that provided specific services in proximity to the charges for those services.
- AT&T's assertion about "one stop shopping" is without foundation.
 - » The branding rules described above apply only to pre-existing customers, and will not be used for new customers. Qwest and Touch America do not have any agreement to engage in coordinated marketing.
 - » Prospective new customers engaged in "shopping" for long-distance services both in-region and out-of-region will be able to obtain "one-stop shopping" from AT&T and other IXCs, but not from Qwest. Qwest will provide out-of-region, but not in-region, interLATA long distance service.
- *"Qwest will also provide collection services to Touch America. Qwest will disconnect Touch America users pursuant to Qwest's policies."* (p.6)
 - Although this assertion is correct, it is inconsequential. Touch America may apply any disconnect standards it chooses, including the choice that, initially, it will maintain the same standard operating procedures that applied to the disconnection of customers prior to Touch America's acquisition of the Qwest customer base. Touch America may change these criteria at any time, subject to the notice procedures specified in the Transition Services Agreement. *See* Transition Services Agreement, § 2.3.

- *“The account will continue to receive customer care services from the same Qwest’s (sic) dedicated team of Major Account Support Team (MAST) employees for an initial six month period.”* (pp.6-7)
 - AT&T neglects to mention that Qwest is providing these employees to Touch America as part of a “professional services” contract, and that these employees will work under the direction of Touch America using that company’s brand name in all interactions with customers. See Transition Services Agreement, Attachment SW, § 2.1.
 - AT&T’s use of the word “same” is misleading. Even national account customers, who take service both from Qwest (out-of-region) and Touch America (in-region) will get customer service from different individuals depending on whether they are inquiring about services provided by Qwest or services provided by Touch America. In other words, if a large corporation’s telecom manager calls his or her usual contact on Qwest’s MAST team, that customer service representative will not be able to help on issues relating to Touch America. Rather, the customer will have to call a different individual at a different phone number to get Touch America customer service. See Divestiture Report, p.36 & n.54.
- *“After the initial transition period, Qwest and Touch America ‘will agree to work together to develop a plan for delivery of Customer Care Services, including billing and collection, customer care, network maintenance and monitoring, and provisioning services at levels designed to offer a coordinated delivery of each party’s products to Common Existing Customers.’* (p.7)
 - There is *no* such agreement to work together, and *no* coordinated delivery of services or products after the termination of the Transition Services Agreement. The provision of the Stock Purchase Agreement cited by AT&T was based on an earlier version of the Transition Services Agreement that was superseded, through further agreement. That agreement was completed in advance of filing the Divestiture Report, and was correctly described in the Report. Qwest and Touch America have since agreed to