

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Qwest Communications International Inc.)
)
Petition for Declaratory Ruling)
On the scope of the Duty to File and)
Obtain Prior Approval of Negotiated)
Contractual Arrangements)
Under Section 252(a)(1))

WC Docket No. 02-89

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**OPPOSITION OF TOUCH AMERICA, INC.
TO PETITION FOR DECLARATORY RULING
OF QWEST COMMUNICATIONS INTERNATIONAL INC.**

Touch America, Inc. ("Touch America"), by its attorneys, hereby files its Opposition to the Petition for Declaratory Ruling of Qwest Communications International Inc. ("Qwest Petition") in the above-captioned docket. For the reasons stated herein, Touch America requests that the ruling Qwest seeks be denied as to those types of negotiated contractual arrangements to which Qwest's Petition is addressed. In support thereof, the following is shown.

INTRODUCTION AND OVERVIEW

Touch America is a nationwide, facilities-based broadband provider and full-service telecommunications carrier. Formerly a subsidiary of The Montana Power Company, in February 2002, Touch America emerged, debt-free, from a corporate restructuring as a stand-alone company that owns and operates a 22,000-mile, state-of-the-art, fiber optic network.

Pursuant to Federal Communications Commission ("Commission" or "FCC") orders¹, on June

¹ *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, 15 FCC Rcd. 5376 (2000) ("Merger Order") and In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of*

30, 2000, Touch America acquired Qwest's interLATA businesses in the fourteen-state territory of the former U S WEST Communications, Inc. ("in-region") in order for Qwest to comply with federal laws and regulations associated with its merger with U S WEST.²

Qwest's Petition seeks a declaratory ruling with respect to section 252(a)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act"), 47 C.F.R. § 252(a)(1). Ostensibly, Qwest seeks to have the Commission rule that certain types of negotiated contractual arrangements between incumbent local exchange carriers ("ILECs") and competitive LECs ("CLECs") should not be subject to the mandatory filing and 90-day state commission pre-approval requirements of Section 252(a)(1) of the Act. *See* Qwest Petition at 3. Qwest further argues that the Commission's guidance is needed to achieve a uniform interpretation of federal law and to avoid the application of inconsistent requirements to identical agreements and terms in multiple states. *Id.* at 4. Qwest asserts that Commission guidance may help ensure that Congress' objectives in the Act are not thwarted. *Id.*

Qwest's Petition is a subterfuge, comprised of a meandering dissertation of irrelevancies that attempts to cloak the true purpose of its filing in meaningless rhetoric and jumbled logic.

Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, 15 FCC Rcd. 11909 (2000) ("Divestiture Order").

² Touch America currently has pending two formal complaints against Qwest Communications International Inc., Qwest Communications Corporation and Qwest Corporation (collectively, "Qwest") in connection with its acquisition of Qwest's in-region interLATA assets, facilities and customers. *See* File No. EB-02-MD-003 (alleging Qwest's sale of so-called "Capacity IRUs" are in essence long-distance voice and data telecommunications services that specifically violate Section 271) and File No. EB-02-MD-004 (challenging Qwest's compliance with FCC Merger and Divestiture Orders and alleging Qwest has violated or is presently violating Sections 201, 202 and Section 271 of the Telecommunications Act of 1996, by engaging in unreasonable and discriminatory activities and failing to fully divest its long-distance business and cease providing in-region long distance services).

What is at stake here is whether the Commission will waste administrative resources and officially consider Qwest's Petition - a Petition that at its core is a ploy to involve the Commission in Qwest's documented efforts to (1) compromise the 271 approval process, and the important role state commissions play in that process, by "buying" the silence of its competitors so as to create false and incomplete records of its activities in resisting the advent of competition in its monopoly local markets, and (2) compromise the protective provisions and intent of Section 251 itself by cloaking its dealings with CLECs in secrecy, away from the neutral authoritative oversight of the states and the Commission.

I. PRESENT CIRCUMSTANCES BELIE QWEST'S EXPRESSED PURPOSE FOR ITS PETITION

The circumstances prompting Qwest to file its Petition require a much different description of the declaratory ruling Qwest seeks. Having run afoul of state rules adopted in furtherance of the Commission's rules implementing Section 252(a)(1) of the Act, rules in effect and having now been applied for upwards of five years, Qwest now comes before the Commission under the guise of seeking an interpretation Section 252(a)(1) of the Act. What is clear is that, far from the purported goal of having the Commission clarify ambiguous legislation, what Qwest really wants is to have the Commission condone Qwest's having entered into secretive side agreements with its CLEC competitors intended to secure their commitment not to file or speak in opposition of Qwest's efforts to obtain state commission approval of its bid to reenter the in-region long distance market. Fully understood, what Qwest seeks is a ruling that uses bogus issues about the effect of and interpretation of Section 252(a)(1) to obtain exemptions so it may more broadly and readily manipulate and extend its dominance in the local markets and use that dominance to discipline and compromise the rights of its competitors and the public.

Such an evaluation of Qwest's Petition is warranted based on an understanding of the circumstances that prompted its filing. These circumstances are alluded to most directly at page 20 of the Petition. Here, Qwest "discusses" the complaint filed by the Minnesota Department of Commerce ("DoC"). Notably, Qwest avoids mentioning why the DoC filed its complaint or the specific allegations of the complaint. What is at issue in the DoC complaint is Qwest's entering into agreements with its competitors to obtain their commitment not to oppose Qwest's 271 bid to enter the Minnesota long distance market in exchange for preferential interconnection terms – terms Qwest did not make available to all CLECs, as Section 252(i) requires. The DoC complaint has spurred several other in-region states to open inquiries to examine Qwest's practice of buying the silence of its would-be critics and flouting state rules adopted in furtherance of Sections 251 and 252 of the Act.³

The issue then is not whether every contract between an ILEC and a CLEC is subject to the mandatory filing and 90-day pre-approval requirements. Some may clearly not be subject to such requirements. For example, an agreement by an ILEC to sell a building or fleet of trucks to a CLEC and other agreements wholly-unrelated to interconnection and local competition.

The real issue Qwest's Petition raises is whether Qwest can create a false premise upon which to conceal contracts that are directly related to Section 252(a)(1) concerns not only from the scrutiny of the states, but ultimately the Commission as well. First and foremost are the contracts addressed by the DoC. As used by Qwest, these ILEC/CLEC "contracts" call for in-region CLECs to remain silent before the states as a condition governing how and when Qwest will interconnect with them. By investigating the circumstances under which these contracts

³ See Exhibit A (*Qwest Asks FCC to Clarify Deal-Making Rules; States Continue Secrecy Probes*, Warren Publishing, State Telephone Regulation Report (May 10, 2002)); see also, e.g., Iowa Utilities Board, *In re: AT&T Corporation v. Qwest Corporation*, Docket No. FCU-02-2; Wyoming Public Service Commission, *In the Matter of the Complaint of AT&T Communications of the Mountain States, Inc., Requesting an Investigation into Qwest Corporation's Business Practices in Wyoming*, Docket No. 70017-TC-2-26.

were created, the Commission will find that in some, if not all cases, the *quid pro quo* for the CLECs' silence was Qwest's agreement to relent on its stonewalling and obstructionist tactics in providing interconnection pursuant to Section 251. See Exhibit B, Kris Hudson, "Qwest long-distance may get busy signal, Sweetheart deals alleged, but firm calls playing field level," Denver Post (March 24, 2002) ("According to documents Qwest submitted in response to the year-long Minnesota investigation, Qwest's "secret" deals provided competitors with service-improvement commitments, methods for escalating complaints to the attention of top-level managers, and payments to resolve service disputes. In return, some companies agreed not to publicly oppose Qwest's merger with U S West or its bid for regulatory approval to sell long-distance.").⁴

⁴ It is particularly troubling to Touch America that Qwest appears to have bought the silence of several vocal critics of Qwest's proposed merger with U S WEST at a time when the FCC was undergoing its regulatory review of Qwest's proposed divestiture of in-region businesses to Touch America to determine if Qwest's plan for divestiture complied with Section 271. Companies such as McLeodUSA, Allegiance and Eschelon, all of which appear to have succumbed to Qwest's secret "sweetheart" deals, had filed Comments and Reply Comments expressing concerns about the merger, in general, and Qwest's "initial" Plan for Divestiture, in particular. For instance, McLeodUSA pointed out that Qwest's initial Plan allowed it to retain in-region facilities. See Petition to Deny of McLeodUSA, CC Docket No. 99-272 (filed October 1, 1999) at pg. 8. McLeod indicated that Qwest's retention of in-region facilities would allow the merged company to thwart Section 271's prohibitions. *Id.* As evidenced by Touch America's two formal Complaints, *supra*, n. 2, these concerns were warranted. It should be a matter of serious concern that it appears that sometime between the Commission's March 10, 2000 conditional merger approval and June 26, 2000 order on divestiture and final merger approval, Qwest succeeded in silencing McLeodUSA and other critics. The lone exception to this coup has been AT&T Corp. (the only party to file Comments on Qwest's final divestiture plan). Such tactics must have a chilling effect on the public's and Qwest competitors' trust in the regulatory process. If the states and the Commission can so easily be denied access to the facts of what is going on in Qwest's local markets, any action providing Qwest with additional authority to operate in its monopoly markets severs any tie between the protections of the 1996 Act and their proper enforcement. It is incumbent on the Commission to ensure that Congressional purposes, as set forth in the statute the Commission is entrusted to enforce, are not so easily and contemptuously defeated.

First and foremost, Qwest's Petition hopes to obtain the right to negotiate provisions that directly affect the 271 approval process by "silencing" its competitors and keeping them from coming forward to disclose facts about the true state of Qwest's compliance with Section 271's 14-point checklist. In other contexts, a case could be made that these tactics border on obstruction of justice, essentially "bribing" parties to not participate in public proceedings.

Qwest's "arrangements" with its competitors are all the more disingenuous if, as has been publicly disclosed, Qwest obtained its competitors' silence and non-participation in the 271 state processes through coercive means. Public reports indicate that at least some competitors who were offered these "sweetheart" deals were, at the time offered, engaged in interconnection-related disputes with Qwest. *See Exhibit A* ("An agreement with Minneapolis-based Eschelon Telecom stipulated that Qwest pay Eschelon \$10 million to resolve service disputes, assign two Qwest employees to Eschelon's offices to ensure the company's service orders are properly filled, and provide Eschelon a procedure for elevating its complaints as high as Qwest chief executive Joe Nacchio, if need be.").

Other public reports show that competitors were systematically being set up by Qwest. First, Qwest frustrates its competitors' attempts to implement and exercise their rights under Section 251. Next, as Qwest's timetables for merger approval and then state 271 approvals drew near, Qwest offered to become more pliable in its interconnection dealings. In return, however, its competitors had to agree not to oppose Qwest's efforts before the various regulatory bodies. Qwest calls this a "settlement agreement." And at page 34 of its Petition, Qwest argues that these types of agreements should, by Commission preemption, be exempted from public scrutiny by the states and hence by the Commission.

If this type of “gamesmanship” is tolerated, Qwest and other ILECs will be encouraged to stonewall their compliance with Sections 251 and 252 and then relent in return for the silence of those adversely affected by such stonewalling in the first place. Such a situation makes a mockery of the entire 271 process and seems contemptuous of both the state commissions’ and FCC’s roles in administering their respective obligations under Sections 251, 252 and 271.

II. QWEST’S MANUFACTURED STATUTORY AMBIGUITY ARGUMENT HAS NO MERIT

A brief examination of one of Qwest’s fundamental arguments in support of its Petition reveals the Petition for what it is – a desperate attempt by Qwest to escape prosecution for flaunting the rules governing the interconnection processes adopted by the states in which it does business, rules that are well-grounded in statute, precedent and purpose. Qwest’s statutory ambiguity argument is so patently “manufactured” and so obviously self-serving, that its very filing suggests a shockingly high degree of disregard for the effectiveness of Commission processes and analysis.

Qwest’s Petition is premised on the argument that the statutory language of Section 252(a)(1) does not require ILECs to file with state commissions “CLEC-ILEC arrangements” that have “nothing to do with a schedule of charges.” Qwest Petition at 6. This pathetic attempt to limit the scope of “interconnection agreements” as contemplated by Congress must be rejected for the sophistry that it is.

Congress delegated to the states the authority to promulgate rules to execute their duties consistent with Sections 251 and 252 and the Commission’s rules interpreting them. Numerous states, having done so after lengthy deliberations and rulemakings, established policies, rules and procedures that, by and large, obligate ILECs to negotiate interconnection agreements that include more than just “a schedule of charges” and to submit such interconnection agreements

for commission approval. Once approved by a state commission, the ILEC must make the interconnection agreement publicly available. In subsequent negotiations with requesting carriers, the ILEC must permit the carrier to “pick and choose” provisions from the approved agreement. This process has been going on for years and has met with the approval of the Supreme Court. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) (an ILEC “may negotiate and enter into a binding agreement” with the new entrant “to fulfill the duties” imposed by §§251(b) and (c), but “without regard to the standards set forth” in those provisions. §§252(a)(1), 251(c)(1). That agreement must be submitted to the state commission for approval, §252(e)(1), which may reject it if it discriminates against a carrier not a party or is not consistent with “the public interest, convenience, and necessity,” §252(e)(2)(A)).

Qwest’s present attack on the scope and application of Section 252 is contradicted by its consistent compliance with state rules and regulations adopted in furtherance of Section 252. For the past 6 years, insofar as is known, U S WEST/Qwest, without protest, has consistently submitted to the state commissions in its operating territory interconnection agreements that included terms and conditions, provisions and clauses, other than the “schedules of charges,” and that governed equally important aspects of interconnection with its competitors. Qwest has no basis to deny or shed this history, but should be held bound by it. Indeed, this history is most relevant in evaluating the integrity of Qwest’s intent in seeking the rulings it does. It creates a forceful argument that Qwest should be collaterally estopped from questioning the existing statutory interpretation of this section. And further, when Qwest’s statutory ambiguity argument is judged in light of this history and Qwest’s unstated motivation to use the Commission’s processes as a potential shelter from the realities of its misdeeds, denial of Qwest’s Petition should be swift and forceful.

III. POTENTIAL FOR ANTI-COMPETITIVE AND DISCRIMINATORY CONDUCT WEIGHS IN FAVOR OF REQUIRING ILECS TO FILE ILEC-CLEC “AGREEMENTS” AFFECTING INTERCONNECTION

Touch America need not burden this record with the serious allegations contained in its two formal complaints pending against Qwest in connection with its post-divestiture conduct. Suffice to say that the gravamen of those complaints are Qwest’s disregard for and insensitivity to the orders, rules and requirements imposed on it by another critical section of the Act, Section 271, and specific orders of the Commission issued in furtherance thereof. The conduct those complaints bring to the Commission’s attention range from deliberate “gaming” of the regulatory process to outright disregard of its lawful obligations to overt misrepresentations – all taken in order to preserve its market dominance or to expand it by restoring it to the market segment it was required to abandon (long distance) without first meeting the legal conditions required for it to do so.

Once again, in seeking to compromise the effectiveness of the 271 requirements, Qwest engages in false propaganda about “statutory ambiguities” leading to unnecessary regulatory impediments to efficient contracting with its competitors. But its premise is illogical and lacking in substance. It is obvious that Qwest can effect debilitating discrimination against its competitors other than through manipulating its schedule of charges for interconnection. What else are the special benefits Qwest has bestowed on those CLECs from which it has bought their silence but discriminatory advantages and preferences? Not all CLECs received a \$10 million payment to resolve service disputes. Not all CLECs had Qwest employees assigned to their offices to ensure the company’s service orders were properly filled. Not all CLECs were provided with a procedure for elevating their complaints as high as Qwest’s chief executive Joe

Nacchio. Not all CLECs got such “sweetheart” deals as the popular press has accurately dubbed these special arrangements.

Of course, with special arrangements for some competitors and not for others competition in the marketplace is skewed. Those not selected by Qwest for these special favors cannot compete effectively with those that do. By silencing some critics, Qwest integrates them unwittingly in its scheme to handicap the marketplace in its favor for future exploitation. And, once compromised by such sweetheart deals, the momentarily favored CLECs expose themselves to even greater danger once their usefulness has served Qwest’s purposes. The ultimate results of such manipulations is that Qwest retains control and the ability to discipline competitors in its local monopoly markets and set itself up to do much the same in another core market, the long distance market. The very fact that relenting on its obstructionist tactics in one market enables Qwest to gain immediate advantages in another market is convincing enough proof of the untoward market power that Qwest wields in its 14 state territory.

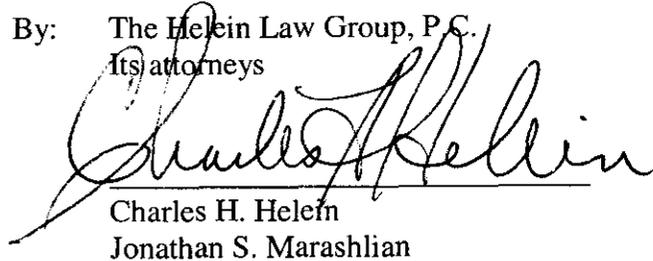
IV. CONCLUSION AND REQUEST FOR ALTERNATIVE DECLARATIONS

The Commission cannot entertain Qwest’s Petition and should deny it as an unfounded and singularly meritless attempt to distort the regulatory process and to involve the Commission in a scheme to interfere with the states lawful authority to administer their policies and regulations in their spheres of influence under the Act. In addition, the Commission should order Qwest, under Section 211 of the Act, to file all of its agreements with CLECs entered into as “settlements of disputes” over interconnection or other issues. *See* 47 U.S.C. § 211. Once these agreements are filed, it should review their terms and require Qwest to publish those terms as standard and generally available terms for all CLECs. Only by this latter action can the

Commission eliminate the discrimination that Qwest's tactics have brought into the marketplace of its 14-state territories.

RESPECTFULLY SUBMITTED,
TOUCH AMERICA, INC.

By: The Helein Law Group, P.C.
Its attorneys

A handwritten signature in cursive script, appearing to read "Charles H. Helein", written over a horizontal line. The signature is written in black ink and is positioned to the right of the typed name.

Charles H. Helein
Jonathan S. Marashlian

Susan Callaghan
Senior Attorney
TOUCH AMERICA, INC.

Dated: May 29, 2002

EXHIBIT A

16TH STORY of Level 1 printed in FULL format.

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STATE TELEPHONE REGULATION REPORT

MAY 10, 2002

SECTION: Vol.20, No.9

LENGTH: 793 words

HEADLINE: QWEST ASKS FCC TO CLARIFY DEAL-MAKING RULES; STATES CONTINUE SECRECY PROBES

BODY:

Qwest asked the FCC last week to settle a controversy that has erupted in several of its states involving allegedly preferential and secret deals it made with certain CLECs to get them to drop their opposition to its regulatory initiatives. Meanwhile, state regulators were moving ahead with their own investigations into the allegations.

Qwest's FCC petition (Wireline Competition Case 02-89) asserts that public disclosure and state approvals aren't required for negotiated dispute settlements, mechanical details of interconnection and operation support system implementation, administrative details of parties' business-to-business relationship or provisions relating to services not subject to Sec. 251. It asserts the only contract terms that must be publicly filed for state review are descriptions of services and functions the CLEC receives, options available to the CLEC, service quality and performance guarantees and rates for services, including any volume or term commitments that trigger discounts. Comments are due at FCC May 29, replies June 13.

AT&T called Qwest's FCC petition a "highly disingenuous ploy" to turn down the heat Qwest has been taking over its dealmaking ever since mid-Feb., when the Minn. Dept. of Commerce, acting as consumer advocate, sparked the controversy by seeking a fine of up to 200 million for Qwest's allegedly anticompetitive side deals with at least 3 CLECs for discounts and preferential service priority. Side deals weren't filed publicly, so other CLECs couldn't opt into terms. AT&T has been a leader among CLECs in calling for states to investigate Qwest's dealmaking.

While the FCC is considering Qwest's petition, states' regulators are continuing their inquiries into Qwest's CLEC agreements.

A Minn. PUC administrative law judge last week concluded hearings into state Commerce Dept. allegations that Qwest's side deals with CLECs were secret preferential agreements that violated Chap. 237 of the state's telecom code and Sec. 251 and 252 of the Telecom Act. The testimony didn't address Qwest's petition to the FCC.

Commerce Dept. officials described unfiled deals that they said gave certain CLECs preferential terms and conditions for service access and provisioning as well as preferential discounts unavailable to the general body of CLECs. Qwest said the agreements weren't secret but represented negotiated dispute resolutions and business transactions that didn't change material contract terms and didn't have to be filed for state approval.

However, AT&T told the PUC Qwest had made "concerted" efforts to conceal its agreements and skirt filing requirements. Qwest's intent with the pacts, AT&T said, was to defuse CLEC opposition to its Minn. bid for interLATA long distance entry. It said any time Qwest gave discounts or other preferential treatment to any CLEC, that was an interconnection agreement that should be filed publicly for state approval and available for opt-in.

The ALJ is expected to issue a recommended order in mid- June, with a PUC decision possible as early as the end of July.

In other states, the Colo. PUC said it was evaluating responses it sought from all companies that might have knowledge of alleged Qwest-CLEC "sweetheart deals" to see if there were cause for action. A PUC spokesman said the agency began an "informal" inquiry 2 months ago in response to complaints about alleged preferential agreements with selected CLECs that weren't filed with Colo. regulators, meaning other CLECs in Qwest's headquarters state couldn't opt into them. Staff attorneys of the Colo. Attorney Gen. Office are participating in the review and an AG spokesman said the issue was being taken seriously.

The Ore. PUC staff is reviewing 68 Qwest-CLEC contracts in an informal investigation of allegations raised by AT&T of secret Qwest deals. A PUC spokesman said the staff anticipated an initial report to the PUC around the end of May or early June on whether there were any grounds for state action. Staffers said a major concern was whether some Qwest dispute resolutions with CLECs actually or potentially were discriminatory and therefore should have been filed for state review.

The N.M. Public Regulation Commission has assigned a hearing examiner to review CLEC contracts filed by Qwest. The state Attorney Gen. has joined the case as an intervener. The open question in that docket is whether Qwest has agreements in force beyond those on file and whether such pacts are discriminatory. PRC staffers declined to speculate on how long the investigation might take.

Regulators in Iowa, Utah, Arizona and Washington also have begun inquiries into Qwest's dealmaking that are in their early stages.

LOAD-DATE: May 13, 2002

EXHIBIT B

Denver Post

Qwest long-distance may get busy signal Sweetheart deals alleged, but firm calls playing field level

By Kris Hudson
Denver Post Business Writer

Sunday, March 24, 2002 - A complaint filed against Qwest Communications International in Minnesota could complicate or even delay the company's efforts to get back into the multibillion-dollar long-distance business in its home territory.

The complaint accuses Qwest of cutting secret, sweetheart deals with rival phone companies for access to its phone lines while denying others those terms. Filed last month by the Minnesota Department of Commerce, the complaint alleges that the deals circumvent Qwest's obligation as a Baby Bell to provide equal access to its lines for all competitors, and therefore they violate state and federal law. It proposes a fine of \$50 million to \$200 million.

Denver-based Qwest counters that the deals in question, with 11 companies doing business in Minnesota, included only minor revisions from other deals already made public and therefore available to other telecom firms. In fact, the company said, its willingness to provide special terms to competitors that request them demonstrates its support of the wide-open telecom competition envisioned in the landmark 1996 Telecommunications Act.

The complaint now sits before an administrative law judge. Regulators in most states are awaiting the judge's report before acting, though some have launched their own informal inquiries.

Meanwhile, Qwest competitors have differing views of the deals. Those included in the pacts call them proper, while others hint that Qwest used the exclusive terms to remove potential opponents to its long-distance bids.

At stake is an estimated \$1 billion to \$3 billion in annual revenue Qwest could gain by offering long-distance service in the 14-state former U S West territory. It's a cash haul Qwest needs to support its hefty debt.

"In Minnesota, we think this is a very significant case," said Tony Mendoza, deputy commissioner for the Minnesota Department of Commerce, which oversees the state's consumer-advocacy efforts. "We do think it has implications for Qwest's (long-distance) applications.

"This is a classic antitrust case, where you have the monopoly owner of a bottleneck marketplace granting sweetheart terms to some companies to the detriment of others."

Qwest says the deals in question do not fit the definition of terms that must be submitted for regulatory approval under the Telecom Act.

"I see that as having no impact on our (long-distance) application whatsoever," said Steve Davis, Qwest's senior vice president of policy and law.

The Telecom Act requires that Baby Bells make their local-phone networks available for easy and efficient use by competitors in delivering their own telecom services to customers. Once a Baby Bell has done so to the satisfaction of state and federal regulators, it is rewarded with permission to sell long-distance service in states where it has qualified.

Qwest so far does not offer long-distance in any of the 14 states where it is considered a Baby Bell by virtue of its 2000 merger with U S West. However, the company has spent more than \$3 billion since 1996 to shore up its phone networks and prepare to seek regulatory approval to offer long-distance. Qwest intends to file applications with the Federal Communications Commission later this spring to enter that market in most of its states.

According to documents Qwest submitted in response to the year-long Minnesota investigation, Qwest's "secret" deals provided competitors with service-improvement commitments, methods for escalating complaints to the attention of top-level Qwest managers, and payments to resolve service disputes. In return, some companies agreed not to publicly oppose Qwest's merger with U S West or its bid for regulatory approval to sell long-distance.

An agreement with Minneapolis-based Eschelon Telecom stipulated that Qwest pay Eschelon \$10 million to resolve service disputes, assign two Qwest employees to Eschelon's offices to ensure the company's service orders are properly filled, and provide Eschelon a procedure for elevating its complaints as high as Qwest chief executive Joe Nacchio, if need be.

"We agreed not to oppose Qwest in (the long-distance bid) and instead to try to pursue with Qwest resolutions of our business disputes by having an escalation process," said Jeff Oxley, vice president and general counsel for Eschelon. The company subsequently attempted for several months to meet with Nacchio to resolve an issue but eventually gave up early this year.

Under a deal with Cedar Rapids, Iowa-based McLeodUSA, Qwest agreed to pay McLeod \$30 million to resolve service and billing disputes.

Covad Communications, a Santa Clara, Calif.-based high-speed Internet provider, received service-improvement commitments from Qwest in exchange for withdrawing its opposition to the Qwest-U S West merger.

Other companies named in the deals include USLink, InfoTel Communications, Advanced Communications and several smaller competitors. The deals included confidentiality clauses, according to the complaint.

Qwest contends that the Minnesota complaint focuses on terms reached in service-dispute settlements that are similar to terms Qwest offers all other competitors. The company disputes that it required confidentiality pacts, adding that the agreements allow the parties to disclose their terms "when compelled to do so by law."

"At all times, (Qwest) is willing to enter into good faith negotiations with (competitors) on business issues of interest and concern to them," Qwest wrote in its response to the Minnesota complaint. "Indeed, stripped of its misleading and overheated rhetoric, the department's complaint confirms that Qwest is willing to negotiate with and accommodate the concerns of the full range of its wholesale customers, large and small."

At least one former FCC official who reviewed documents filed in the Minnesota case said the complaint probably won't derail Qwest's chances of gaining approval for its long-distance applications. John Nakahata, FCC chief of staff from 1997 to 1998, is now a partner at Washington, D.C., law firm Harris, Wiltshire & Grannis.

"I suspect it would complicate it somewhat," Nakahata said. "But, looking at it quickly, they did not look like the types of issues that would materially slow down a Qwest application. Virtually everybody has had complaints against them. Verizon did, and they still got approved. It's a little hard to tell, but it's not clear that these issues are so significant that they really go to the fundamental ability of a competitor to come in and compete."

What's more likely, Nakahata and some state regulators say, is that the allegations raised in the Minnesota complaint could influence the recommendations state regulators make on Qwest's long-distance applications.

In reviewing those applications, the FCC considers each state's recommendation on whether to approve or deny a Baby Bell's application. "It is quite unlikely that the FCC would proceed with an application in the absence of the state commission saying it's OK," Nakahata said.

To this point, most Qwest states are waiting to see an outcome in Minnesota before deciding whether to take action of their own. Colorado, Oregon, Arizona and New Mexico have launched informal inquiries to see if deals like those outlined in the Minnesota complaint have taken place within their boundaries.

"At this point, our investigation is informal," said Bob Valdez, a spokesman for the Oregon Public Utilities Commission. "Depending on what we find and how cooperative Qwest is, the investigation might become more formal."

Colorado has sent letters to telecom companies in the state asking if they are party to any deals with Qwest not reviewed and approved by the state's Public Utilities Commission. The PUC is still gathering those responses.

Meanwhile, opinions among Qwest's competitors vary widely.

Qwest's archrival, AT&T Corp., has alerted every utilities commission in the U S West territory of the Minnesota complaint as if, as Qwest chief executive Nacchio puts it, AT&T had discovered Watergate.

Eschelon officials speak as though they regret their deal with Qwest, noting that they might have gotten their disputes resolved more quickly by participating in state hearings about Qwest's long-distance bid than by agreeing to Qwest's suggested dispute-resolution procedure.

McLeod executives side with Qwest in saying their deals did not need to be filed with state commissions. "All I can say is that (Minnesota commerce officials) obviously are considering a different judgment than we made," said David Conn, McLeod deputy general counsel. "It really is a judgment call in some sense."

Other companies said they noticed a pattern of Qwest's critics in the long-distance hearings in front of state commissions suddenly dropping out. In Colorado, some point to Colorado Springs-based SunWest Communications, which quit participating in long-distance hearings after it reached a settlement of a lengthy and often bitter dispute with Qwest. SunWest did not return repeated phone messages seeking comment for this report.

At telecom conference CompTel in Miami earlier this month, Dan Moffat, president and CEO of Vancouver, Wash.-based New Edge Networks, commented during a panel discussion that Qwest had approached his company with an offer. "They would approach us and say, 'If you'll roll over on (long-distance), we'll cut you a special deal like we did with McLeod,' " he said. "That went on pretty extensively last year."

New Edge executives later backpedaled from that remark, explaining that Qwest spoke with New Edge about resolving the companies' service disputes but did not propose a specific deal. "I would say that's a little out of the context of what the full conversation was," said Penny Bewick, New Edge's director of external affairs. "There wasn't really what I would consider an overt approach like that."

Bewick said New Edge never agreed to talk to Qwest under the promise it would back out of a state hearing on long-distance. She added that Qwest implied to her that such a withdrawal would give the

appearance something was amiss. Even so, she said she's seen it happen.

"I'm never certain that a business contract may not be agreed to out there," Bewick said. "It wouldn't surprise me in the least, because I'm in those (state) proceedings on a daily basis. I see the (competitors) falling by the wayside. I know for a fact that they've made some sort of deal. I also know that McLeod pulled out of the proceedings after they made a deal with Qwest."

Still other competitors say they've heard nothing of Qwest cutting deals to keep competitors quiet. Among those are PacWest Communications and Allegiance Telecom.

"Qwest has been a pretty good (Baby Bell) for us to work with," said Doreen Best, a vice president for Dallas-based Allegiance. "They've made some pretty big advancements on the wholesale front for us since becoming Qwest. It was harder when they were U S West."

Qwest's \$1.6 billion long-distance opportunity

A study by Banc of America Securities predicts Qwest could gain annual revenue of more than \$1.6 billion if regulators allow it to re-enter the long-distance market in US West's region.

| State | Total Qwest lines | Projected long-distance customers* | Projected annual revenue |
|--------------|-------------------|------------------------------------|--------------------------|
| | | | <i>In millions</i> |
| Arizona | 3,018,000 | 905,400 | \$272.6 |
| Colorado | 2,993,000 | 885,900 | \$266.8 |
| Idaho | 579,000 | 173,000 | \$52.3 |
| Iowa | 1,160,000 | 348,000 | \$104.8 |
| Minnesota | 2,429,000 | 728,700 | \$219.4 |
| Montana | 393,000 | 117,900 | \$35.5 |
| Nebraska | 528,000 | 158,400 | \$47.7 |
| New Mexico | 663,000 | 264,900 | \$79.8 |
| North Dakota | 225,000 | 67,500 | \$20.3 |
| Oregon | 1,625,000 | 457,500 | \$137.8 |
| South Dakota | 285,000 | 85,500 | \$25.7 |
| Utah | 1,198,000 | 359,400 | \$108.2 |
| Washington | 2,684,000 | 805,200 | \$242.5 |
| Wyoming | 268,000 | 80,400 | \$24.2 |
| Total | 18,128,000 | 5,437,700 | \$1,637.8 |

*Banc of America assumes an average of 30% of customers will sign up for Qwest long-distance service over time.

Sources: company filings, Banc of America estimates

The Denver Post

CERTIFICATE OF SERVICE

I, Suzanne Rafalko, a legal secretary in the law offices of The Helein Law Group, P.C., do hereby state and affirm that copies of the foregoing "Opposition of Touch America, Inc. to Petition for Declaratory Ruling of Qwest Communications International Inc.," WC Docket No. 02-89, were delivered upon the following via hand delivery, this 29th day of May, 2002.

Marlene H. Dortch

(Original + 4 Copies)

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