Attachment 8

Before the

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of a Commission Investigation into Qwest's Compliance with Section 272 of the Telecommunications Act of 1996's Separate Affiliate Requirement	**PUC Docket No. P-421/CI-01-1372** **OAH Docket No. 7-2500-24487-2**

Affidavit

of

LEE L. SELWYN

on behalf of the

Minnesota Department of Commerce

December 5, 2001

REDACTED VERSION

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AFFIDAVIT OF LEE L. SELWYN

Introduction and Summary

Lee L. Selwyn, of lawful age, declares and says as follows:

1. My name is Lee L. Selwyn; I am President of Economics and Technology, Inc. ("ETI"), Two Center Plaza, Suite 400, Boston, Massachusetts 02108. ETI is a research and consulting firm specializing in telecommunications and public utility regulation and public policy. My Statement of Qualifications is annexed hereto as Attachment 1 and is made a part hereof.

2. I have presented testimony before this Commission on a number of occasions dating back to the mid-1970s. I have testified in a number of Northwestern Bell rate cases, Docket P-421/GR-75-496 for the Minnesota Retail Federation, in Dockets 77-1509, 79-388, 80-306 and 79-388 on Remand for the Minnesota Department of Public Service, in Docket 83-102 and in Docket 83-600 on behalf of the Minnesota Business Utility Users Council (MBUUC).

3. In the late 1970s and early 1980s, I served as a consultant to the Minnesota Department of Public Service in connection with several matters before the (then) Minnesota Public Service Commission. This work involved the development of a specialized data base management and retrieval system and the creation of a data base containing over 100,000 elements of information covering the more than one hundred operating telephone companies and the nearly 700 telephone exchanges under the Department's administrative jurisdiction. This effort was undertaken as part of the Minnesota Statewide Telecommunications Policy Guidelines Development project. In addition, I also served as a DPS Staff witness in two Northwestern Bell general rate cases and in a case involving the Restructured Private Line (RPL) tariff.

4. I have participated in numerous regulatory proceedings involving public utility affiliate relationships and inter-affiliate transactions and transfers. These have included merger proceedings before the California PUC involving Pacific Telesis Group and SBC, and Bell Atlantic and GTE, before the Illinois Commerce Commission involving SBC and Ameritech, before the Connecticut Department of Public Utility Control involving SBC and SNET, and before the Maine PUC involving NYNEX and Bell Atlantic. I also participated in written comments filed with the FCC regarding both the SBC/Ameritech and Bell

Atlantic/GTE merger applications. I have participated in a number of Section 271 proceedings, including those in Pennsylvania, New Jersey and California. I have also submitted testimony before several state commissions addressing proposals for structural separation of ILEC wholesale and retail operations. I participated in proceedings before the California PUC involving Pacific Bell's reorganization of its Information Services" (primarily voice mail) business into a separate subsidiary, and the spin-off of Pacific Telesis Group's wireless services business into a separate company. I have participated in a number of matters involving the treatment of transfers of yellow pages publishing from the ILEC to a separate directory publishing affiliate, including the recent case before the Washington Utilities and Transportation Commission addressing imputation of (then) US WEST yellow pages revenues. Here in Minnesota in the early 1980s, I sponsored testimony addressing the affiliate transactions between (then) Northwestern Bell and Bell Telephone Laboratories for the so-called "Business Information Systems" development activity. Most of these engagements were on behalf of commission staffs and state consumer/ratepayer advocacy agencies.

5. I have been asked by the Telecommunications Division of the Minnesota Department of Commerce ("DOC" or "Department") to review the evidence being offered by Qwest Corporation ("Qwest," "Qwest BOC," or "Company") in connection with its forthcoming application, to be filed with the FCC and with the Minnesota PUC pursuant to Section 271(d)(2)(B), for authority under Section 271 of the *Telecommunications Act of 1996* ("TA96" or "Act") to provide in-region interLATA long distance services within the State of Minnesota. As part of my analysis, I have been asked to provide an assessment of the Company's claims as to the current state of competition in the Minnesota local telecommuni-

cations market, to provide an analysis of the potential impact upon competition in the Minnesota interLATA long distance market that would result from Qwest's entry into the long distance market while the Company continues to maintain overwhelming dominance of the local telephone service market in the state, and to provide an opinion as to whether "the requested authorization is consistent with the public interest, convenience, and necessity." In addition to my review of the Application, testimony and supporting exhibits filed by Qwest in this proceeding, I have also reviewed the Company's responses to data requests propounded by the DOC and by other parties. Copies of the Qwest responses to which I will refer are provided in Attachment 2 to this Affidavit.

Qwest has interpreted and applied the structural separation requirements of Sections 272(a) and (b) as permitting the long distance affiliate to so extensively "contract" with the BOC for sales, marketing, billing and other services as to effectively create what amounts to a fully integrated operation of its local and long distance businesses.

6. The purpose of this Affidavit is to address Qwest's claims as to its compliance with the "separate affiliate" requirements set out at Sections 272(a) and 272(b) of the *Act*. In Affidavits submitted on behalf of Qwest by Judith L. Brunsting and Marie E. Schwartz, the Company indicates that it intends to engage in "joint marketing" of local exchange services provided by Qwest Corporation (the "Qwest BOC") and interLATA long distance services to be provided by its Section 272(a) long distance affiliate, Qwest Communications Corporation ("QCC" or "272 Affiliate"), once its receives Section 271 authority.[1] "Joint marketing" is an activity that is permitted (or more accurately, not prohibited) by Section 272(g) of the *Act*. A "joint marketing" program of the type being contemplated by Qwest will necessarily involve

1. Schwartz (QC), at 32-33.

the use by both the BOC and long distance entities of a common pool of personnel, equipment, real estate, and various other corporate resources. As I will discuss, Ms. Brunsting and Ms. Schwartz maintain that the use of this common pool of resources is permitted by the Section 272(g) "joint marketing" provisions.

7. A BOC's ability to engage in joint marketing of its own local services with its affiliate's long distance service is found at Sections 272(g)(2) and (3) of the 1996 *Act*:

> 272(g)(2): BELL OPERATING COMPANY SALES OF AFFILIATE SERVICES— A Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d).
>
> 272(g)(3): RULE OF CONSTRUCTION— The joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c).

The "nondiscrimination provisions" being referred to here are found at subsection (c)(1) of Section 272:

> (c) NONDISCRIMINATION SAFEGUARDS— In its dealings with its affiliate described in subsection (a), a Bell operating company--
>
> (1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.

But subsection 272(c)(2), which is *not* superseded by subsection 272(g)(3) (which refers specifically to "the nondiscrimination provisions of subsection (c)") and thus applies to all joint marketing activities as well, states that a Bell operating company

> (2) shall account for all transactions with an affiliate described in subsection (a) in accordance with accounting principles designated or approved by the Board.

Hence, the *Telecommunications Act* does not so much *permit* BOC joint marketing of its affiliate's long distance service, but rather does not expressly prohibit it. Rather, the *Act* merely sanctions the operation of a BOC, having satisfied the requirements of Section 271(c), to enter into the long distance arena and to jointly market its (local) services with the long distance services being offered by the Section 272(a) affiliate, subject to all of the separate affiliate provisions set forth at Section 272(b). *Nothing in subsection 272(g)(3) in any way exempts Qwest or its Section 272(a) interLATA affiliate QCC from the requirements of Section 272(b) with respect to any "joint marketing" activities.*

8. Structural separation of the BOC and long distance entities is required by Section 272(a) for the first three (3) years following Qwest's receipt of Section 271 authority in a particular state, and may thereafter be extended indefinitely by the FCC. Interactions between the structurally separated BOC and long distance entities with respect to the use or provision of common or shared resources must conform to a set of five conduct provisions set out at Section 272(b), which require that Qwest's long distance affiliate:

> (1) shall operate independently from the Bell operating company;
>
> (2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;
>
> (3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;

(4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and

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

The various interactions described in the two Qwest Affidavits submitted in this docket embrace a broad range of corporate activities and functions, the nature and extent of which raise serious questions as to the actual, *de facto* extent of "separation" that will prevail in practice as between these two supposedly separate corporate units. A significant portion, although by no means all, of these interactions center around the "joint marketing" activity. It is for this reason that the Department of Commerce sought discovery of the specific marketing plans, marketing scripts and associated employee training materials that Qwest will utilize in support of the "joint marketing" activity.[2] When Qwest declined to provide this information in response to DOC information requests, the Department on November 9, 2001 filed a Motion with the Administrative Law Judge to Compel Qwest to produce this material. The Department's Motion was granted on November 20 in the ALJ's *Fourth Prehearing Order*. The ALJ's ruling permits parties to supplement their December 5, 2001 submissions with additional testimony arising from their examinations of the joint marketing materials, and I would therefore anticipate that I will be submitting a supplemental affidavit with respect to those materials at a later date.

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2. Qwest response to DOC 15032.

9. In my view, the permissive "joint marketing" language at Section 272(g) only implies the right of a BOC and its long distance affiliate to *collaboratively* ("jointly") participate in marketing activities with respect to their respective local and long distance offerings). Read in the context of the structural separation requirements of Sections 272(a) and (b), it does not, and should not be interpreted to, permit the long distance affiliate to effectively *transfer* virtually all of its long distance service sales and marketing activities to the BOC affiliate by, for example, contracting for services of the affiliate's employees to perform what amounts to the full extent of the long distance affiliate's sales and marketing functions. Such an arrangement would have the effect of creating what amounts to fully integrated operation of the local and long distance businesses, and as such would effectively make the Section 272(a) separate affiliate requirement a nullity.

10. The purpose of the Section 272(a) separate affiliate requirement and the Section 272(b) code of conduct was *and is* to forestall the potential for discriminatory and anti-competitive conduct arising out of the ability, as an *economic* matter, for the Qwest BOC to extend its market power in the *local* telecommunications market into the adjacent long distance market.[3] The Commission's evaluation of Qwest's compliance with the separate affiliate requirements of Sections 272(a) and (b) must be made in the context of the history and background that gave rise to the separate affiliate requirement in the 1996 federal legislation. That history begins with the US Department of Justice's 1974 antitrust case

3. *Conference Report on S. 652, Telecommunications Act of 1996* (House of Representatives- February 01,1996) Congressional Record, H1171.

against the pre-divestiture Bell System[4] in which the DoJ alleged, *inter alia*, that the Bell companies were using their local service monopoly to prevent competition in the adjacent long distance market. The *Modification of Final Judgment* ("MFJ"), the 1982 Consent Decree under which the former Bell System was broken up and the Bell Operating Companies ("BOCs") were divested from AT&T,[5] prohibited the divested BOCs from offering interLATA long distance services. This *structural remedy* was adopted in order to prevent the BOC local service monopolies from using their monopoly market power in the local services market to block competition in the adjacent long distance market. And because the BOCs were themselves precluded from providing long distance services, they were made to be *indifferent* as to which long distance carrier their customers might individually select. Section 271 of the federal *Telecommunications Act of 1996* replaced the MFJ long distance "line of business" restriction with a process by which BOCs could enter the "in-region" long distance market, provided that they implemented a series of specific measures that would have the effect of irreversibly opening their previously monopolized local telecommunications markets to competitive entry. To the extent that the *local* market itself becomes competitive, the BOCs' ability to exert market power in the adjacent long distance market would be attenuated. Conversely, if a BOC such as Qwest is allowed to offer in-region long distance service in a less-than-fully-competitive local market, then the BOC would have the ability to engage in precisely the same type of anticompetitive conduct that the *MFJ* was intended to prevent.

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4. *United States v. Western Electric Company, Inc., et al*, Civil Action No. 74-1698 (D.D.C.).

5. *U.S. v. Western Electric Co. et al.*, 552 F. Supp. 131 (D. D.C., 1982), *aff'd sub nom. Maryland vs. U.S.*, 460 U.S. 1007 (1983); and *Modification of Final Judgment*, sec. VIII.B.

11. In establishing the Section 272(a) and (b) separate affiliate requirements, Congress clearly sought to create a transition between the outright prohibition of long distance entry that had prevailed under the MFJ with a transitional separate affiliate mechanism that could be extended by the FCC beyond the minimum three-year period,[6] so as to provide safeguards against anticompetitive behavior that had been unnecessary under the pre-1996 outright prohibition against long distance entry.[7] That congressional purpose is not served if all that the structural affiliate requirement entails are nominal bureaucratic constructs satisfied by the BOC and its affiliate maintaining merely facial separation. Yet on the basis of the two Qwest Affidavits, as well as agreements already entered into by Qwest and its 272 Affiliate, it is evident that Qwest seeks to interpret and apply the separate affiliate requirement in precisely that superficial manner.

12. The scope and extent of interactions between the Qwest BOC and long distance entities are broad and deep. Among the specific "joint" activities in which Qwest states it will engage are these:

- Qwest BOC and long distance affiliate employees will occupy the same Qwest buildings and in some cases will be located on the same floors.[8] Their specific corporate affiliation will be identified by colored dots on their security badges.[9]

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6. 47 U.S.C. Sec. 272(f)(1).

7. *Infra*, footnote 3.

8. Qwest response to DOC 15029.

9. *Id. See also* Brunsting (QCC), at 14; Schwartz (Qwest Corporation), at 17.

- While employees of each of the two entities will be on only one company's payroll,[10] any employee of one of the two entities may be "loaned" to the other for up to four (4) months per 12-month period.[11] During this "loan" period, that employee will be under the supervision and authority of the company he or she is loaned to, not the company issuing the employee's paycheck.[12]

- An employee of one entity may be assigned to perform "services" on behalf of the other entity under an affiliate agreement entered into between the two entities without such employee being considered to have been "loaned" by one entity to the other or otherwise "shared" by the two entities.

- Administrative services such as payroll,[13] human resources,[14] accounting and financial functions,[15] and computer systems[16] will be provided by the Qwest BOC or the Qwest service company to QCC.

- The Qwest long distance entity will have very few employees of its own to support the *in-region* long distance business; QCC currently employs only 3,916 people the majority of whom are likely engaged in Qwest's *national* (i.e., out-of-region) interexchange carrier operations (since Qwest is currently not providing in-region long distance services in any of its fourteen states). QCC has designated only 168 employees as Minnesota personnel.[17]

- Assuming that QCC contracts with the Qwest BOC for the provision of "joint marketing" services, the two entities will then be using the same personnel to market

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10. Schwartz (Qwest Corporation), at 16.

11. Brunsting (QCC), at 15.

12. Qwest response to DOC 15044.

13. *Finance Services Work Order*, Affiliate Transaction (included in Attachment 3).

14. *Human Resources Work Order*, Affiliate Transaction (included in Attachment 3).

15. Brunsting (QCC), at 12.

16. *Information Technologies Services Work Order*, Affiliate Transaction (included in Attachment 3).

17. Qwest response to DOC 15034(a).

local Qwest BOC and QCC long distance services. It is unclear at this point whether these individuals will be employees of the BOC or of the Qwest service company.

- The Qwest BOC will provide billing and collection services on behalf of the Qwest long distance entity,[18] and Qwest BOC customer service representatives will provide billing inquiry services for and on behalf of QCC.[19] Billing and collections services to be provided by the Qwest BOC to QCC appear to have been contracted for under terms and conditions that differ from those being offered by the Qwest BOC to nonaffiliated interexchange carriers.

In short, Qwest seems to view the separate affiliate provisions of Section 272 as requiring little more than a set of perfunctory facial "compliance" measures that in no way undermine its "right" to operate the local and long distance businesses as a functionally integrated activity. Indeed, Qwest's position is succinctly articulated by Ms. Brunsting herself:

> It is important to note that while Congress anticipated the need for structural separation between a BOC and the Section 272 subsidiary, the *Act* specifically contemplates that a BOC and its Section 272 subsidiary would be affiliates under a single parent company. The very structure utilized by Qwest Communications International Inc. is contemplated by the terms of Section 272 and FCC decisions. *As affiliates, the 272 Affiliate and BOC have unique financial and business obligations and responsibilities to their boards of directors and ultimately to their shareholders, notwithstanding Section 272 requirements.*[20]

Ms. Brunsting and Qwest seem to miss the point: The "financial and business obligations and responsibilities" that the various Qwest entities have to their respective boards of directors, to the parent Qwest Communications International Inc., and ultimately to its shareholders, would

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18. Qwest response to DOC 15027; see also *Provision of Billing and Collection Services Affiliate Agreement* (included in Attachment 3).

19. *Provision of Billing and Collection Services Affiliate Agreement* (included in Attachment 3).

20. Brunsting (QCC), at 17, emphasis supplied.

require profit-maximization and any lawful self-dealing. The purpose of Section 272 is thus specifically to *constrain* and limit what would otherwise be actions taken in the parent company's and its shareholders' own self-interest. Ms. Brunsting's brazen suggestion, as revealed in her "notwithstanding Section 272 requirements" qualification, that the Section 272 requirements are subordinate to Qwest's "obligations and responsibilities" to directors and shareholders, sets out the theme for all of Qwest's "compliance" actions.

13. As I shall discuss in detail in the following sections of this Affidavit, what Ms. Brunsting and Ms. Schwartz describe as "compliance" with Section 272(b) is in reality a transparent portrayal of a highly and fully integrated local/long distance business operation that ignores fundamentally the purpose of the separate affiliate requirement and the very specific conduct limitations that are imposed by Section 272(b).

The FCC has determined that state commissions retain authority to enforce the requirements of Section 272 once the FCC has granted a BOC 271 authority, and thus the Minnesota PUC must now determine whether Qwest can be expected to comply with Section 272 to prevent backsliding and anticompetitive conduct by Qwest post-271.

14. The FCC has recognized that, where the policies of a state place more stringent competitive requirements on a BOC than those of the federal statute or the FCC, the State has the authority to enforce those requirements. The *Telecommunications Act of 1996* confirms that states have authority beyond the requirements of the *federal* Act. Section 253(b) states:

> (b) STATE REGULATORY AUTHORITY—Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

15. The FCC has found, in the *Non-Accounting Safeguards Order*, that in the event that the FCC determines that the BOC has complied with Section 271, a state Commission has the authority to impose *any* requirements it deems necessary short of delay or denial of entry into the intrastate interLATA market.[21] In addition to the duties that the Minnesota Commission holds with respect to Sections 271 and 272, the Commission is also bound by the requirements of the Minnesota statutes regarding, *inter alia,* nondiscriminatory treatment of competing providers,[22] consumer protection,[23] and, if applicable, affiliate transactions between a regulated utility and its affiliates.[24] The FCC's *Non-Accounting Safeguards Order* clarifies the intent of the 1996 *Act* and gives the FCC full authority to grant *rights of entry* interLATA authority, including intrastate interLATA authority:

> In this regard, based on what we find is clear congressional intent that the Commission is authorized to make determinations regarding BOC entry into interLATA services, we reject the suggestion by the Wisconsin Commission that, after the [FCC] has granted a BOC application for authority under section 271, a state nonetheless may condition or delay BOC entry into intrastate interLATA services.[25]

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21. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *First Report and Order*, released December 24, 1996, 11 FCC Rcd 21905, 21929 ("*Non-Accounting Safeguards Order*").

22. See, e.g., Minn. St. Ch. 237.07; 237.09; 237.12; 237.121; 237.163, Subd. 7.

23. See, e.g., Minn. St. Ch. 237.66; 237.662, 237.663.

24. Minn. St. Ch. 237.65; 216B.48.

25. *Non-Accounting Safeguards Order*, 11 FCC Rcd 21929 (footnotes omitted).

However, while the FCC affirmed its authority to grant interLATA entry, the Wisconsin Commission's concerns as presented in its reply comments in the *Non-Accounting Safeguards* proceeding "respecting universal service, public welfare, service quality and consumer safeguards, or section 271(c), respecting state advancement of competition beyond federal minimums",[26] were not dismissed. Instead, the FCC expressly held that "a state would retain authority to enforce obligations relating to a BOC's provision of intrastate interLATA service, such as those identified by the Wisconsin Commission, through mechanisms other than denial or delayed of [sic] entry into the intrastate interLATA market."[27] Thus, all authority in limiting or placing obligations upon BOC provision of intrastate interLATA service remains with the state, and it is the duty of the state commission to consider whether additional restrictions on Qwest's activity are necessary to protect competition in the intrastate interLATA market.

16. As a means for ensuring that a BOC maintains the appropriate competitive safeguards after receiving Section 271 authority, the *Act* sets out various structural and procedural requirements at Section 272. Enforcement of these safeguards, provided for under Section 272(d), requires a joint federal/state biennial audit. The *Act* specifically requires that, when reviewing the audit, the states consider "particularly whether such company has complied with the separate accounting requirements under subsection (b)."[28] Considering

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26. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *Reply Comments of the Public Service Commission of Wisconsin*, at 7.

27. *Non-Accounting Safeguards Order*, 11 FCC Rcd 21929, footnote 97.

28. 47 U.S.C. Section 272(d)(1).

this Commission's authority in reviewing Section 272 compliance two years from now (in the event that Qwest obtains Section 271 authority at this time), the Commission needs to consider, *at this time*, Qwest's plans for compliance with the requirements of Section 272 as these will apply during the time period between now and the completion of the first biennial audit. Qwest Minnesota should not be allowed a "free ride" during the critical first years of its interLATA operation, at most promising some sort of vague after-the-fact compliance in its dealing with those CLECs that are by that time still active in the market.

17. This Commission's findings with respect to Section 272 are instrumental to the long term viability of both local and long distance competition in Minnesota. In the *Non-Accounting Safeguards Order*, the FCC clearly recognized the capacity of a BOC to backslide on checklist compliance after it receives 271 authority:

> Moreover, we need to ensure that the market opening initiatives of the BOCs continue after their entry into the long distance market. It is not enough that the BOC prove it is in compliance at the time of filing a section 271 application; it is essential that the BOC must also demonstrate that it can be relied upon to remain in compliance. This may be demonstrated in various ways. For example, we must be confident that the procedures and processes requiring BOC cooperation, such as interconnection and the provision of unbundled network elements, have been sufficiently available, tested, and monitored. Additionally, we will look to see if there are appropriate mechanisms, such as reporting requirements or performance standards, to measure compliance, or to detect noncompliance, by the BOCs with their obligations. Finally, the BOC may propose to comply continually with certain conditions, or we may, on a case-by-case basis, impose conditions on a BOC's entry to ensure continuing compliance. The section 271 approval process necessarily involves viewing a snapshot of an evolving process. *We must be confident that the picture we see as of the date of*

filing contains all the necessary elements to sustain growing competitive entry into the future.[29]

Insofar as Section 272 sets forth the structural and transactional requirements designed to ensure continued compliance, enforced by the regulatory authority to undertake the biennial review, Section 272 provides the regulatory framework to prevent this backsliding. In this Section 272 proceeding, the Commission must determine not only that Qwest is in compliance with the Section 272 requirements, but that the nature of this "compliance" is sufficient to prevent backsliding on checklist items, and to ensure that Qwest is unable to engage in anti-competitive activities. To the extent that Qwest has not as yet fully disclosed the full extent of its various affiliate agreements applicable to services to be provided by and other transfers from QC to QCC and vice versa, the Commission does not have a record before it to support a finding that Qwest will comply with Sections 272(a) and (b) were it granted Section 271 authorization.

The Minnesota PUC has previously prohibited as anticompetitive the type of joint marketing of local and long distance service that Qwest contemplates pursuing following Section 271 approval.

18. The *source* of Qwest's ability to use its joint marketing authority to exercise market power in the long distance market *arises directly from its near-monopoly position in the local market.* Experiences in both New York and Texas, the first two states in which BOCs have obtained Section 271 authority, confirm the extraordinary marketing advantage, *available*

29. *In the Matter of Application of Ameritech Corp. 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*, Rel. August 19, 1997 *(Michigan 271 Order)*, at para. 19, 12 FCC Rcd 20555, emphasis supplied.

solely to BOCs, stemming from their use of this "inbound channel" to "sell" their affiliate's long distance service to *local service* customers. This advantage has not been overlooked by Wall Street. As a February 8, 2001 Credit Suisse First Boston ("CSFB") report commented:

> We've been watching this industry for almost 20 years and we have never seen consumer share gained at the rate of VZ in NY and SBC in TX (the former 20% share in 12 mos and the latter 18% share in 6 months).[30]

In considering whether Qwest has satisfied the requirements of Section 272, it is essential that the Commission recognize that what Qwest seeks in its application is not simply the right to enter yet another isolated line of business, but the right to *integrate* local and long distance service into a single package, to make the two services essentially indistinguishable from the consumer's perspective, and to leverage its dominance of the local market to similarly come to dominate the long distance market as well. CSFB makes the point profoundly clear in its comparison of (pre-merger) GTE's approach to selling long distance services through a separate CLEC affiliate vs. Verizon's and SBC's ability to offer long distance services directly to their ILEC customers:

> In stark contrast to Verizon's huge and quick 20% consumer LD share gains in NY State, LD subscribership was flat in the GTE franchise areas in '00 despite GTE's benefitting from similar pre-established branding and billing relationships. The difference is that GTE has not leveraged the inbound channel and also had been running its LD effort through its "CLEC", in effect forcing customers to switch to the GTE CLEC both their local service from GTE's ILEC and their LD service from another LD customer. Not very successful if you ask us and certainly worthy of change given the empirical evidence that VZ's and SBC's

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30. "VZ: Analyst Mtg Provides Comprehensive '01 Outlook," Credit Suisse First Boston, 09:47am EST, 8-Feb-01 ("*CSFB Report*").

> use of the inbound channel and separate LD sub (but not bundled with local) have been extraordinarily successful.[31]

19. As the CSFB report observes, this preemptive use of the "inbound channel" by both Verizon and SBC to "sell" their long distance service to *new* local service customers has been the principal explanation for their extraordinary success in acquiring customers in the first year in which they have been permitted into the long distance business. Indeed, SBC has apparently been sufficiently satisfied with its market performance that it has recently elected to *increase* its interstate long distance rates in Texas. As reported in the *Ft. Worth Star-Telegram*, February 2, 2001:

> Southwestern Bell announced it was raising the interstate rate on its flagship plan from 9 cents a minute to 10 cents a minute for new customers seven months after entering the long-distance market in Texas. Current subscribers will see no change in their domestic U.S. calling charges, said Shawn Ramsey, a San Antonio-based spokeswoman for Southwestern Bell, a unit of SBC Communications.
>
> Ramsey defended the increase, which doesn't require approval by the state's Public Utility Board, by saying the plan is superior to many offered by the major long-distance services. "We beat the pants off of them," she said. "We've got great rates any way you slice or dice it." Asked if the higher rate reflects a need to boost profits, she said: "We've been in the market about eight months now. We've learned a lot and made a number of changes that reflect what we've seen. And we've changed our plan accordingly."[32]

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31. *Id.*

32. "SW Bell raises interstate rate; current subscribers unaffected; PUC approval not needed," *Ft. Worth Star-Telegram*, February 2, 2001.

20. A BOC's ability to separately *and preemptively* identify *and recommend* its own affiliate's long distance service affords it a substantial advantage over its long distance rivals in being the first to offer and to sign up a new local service customer for long distance service. The FCC itself has recognized the advantage to an IXC of appearing early (or even first) on the list of service providers by its *express requirement*, as set forth in the *Non-Accounting Safeguards Order*, that the names of IXCs be read to inbound callers *in random order*.[33] The practical effect of the physical impossibility of simultaneously making the BOC affiliate recommendation while contemporaneously reading the full list of available IXCs, together with the BOC's right to make its "recommendation" *prior to identifying any alternative long distance providers*, affords it an enormous marketing advantage in selling long distance services. This preemptive use of the "inbound channel" by both Verizon and SBC to "sell" their long distance service to *new* local service customers has been the principal explanation for their extraordinary success in acquiring customers in the first year in which they have been permitted into the long distance business.[34] Indeed, as I have noted above, SBC has apparently been sufficiently satisfied with its market performance in Texas that it has recently elected to *increase* its interstate long distance rates.

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33. *Non-Accounting Safeguards Order*, 11 FCC Rcd 22046, citing *In the Matter of Investigation of Access and Divestiture Related Tariffs, Allocation Plans Waivers and Tariffs, Memorandum Opinion and Order*, 101 FCC 2d (1985) at 950.

34. Verizon has reported that through the end of the third quarter of 2001, after just 21 months since it began offering long distance service in New York, its long distance affiliate Verizon Long Distance has captured 31.7% of the residential subscribers in Verizon New York's service areas. Verizon Press Release, "Verizon Communications Reports Solid 3Q Earnings And Provides Outlook for Remainder of 2001," October 30, 2001. SBC has reported that through the third quarter of 2001, *less than nine months* following its Section 271 entry in Texas, the Company has signed up 21% of its 10-million Texas access lines for SBC long distance. *SBC Investor Briefing*, April 23, 2001, at 7.

21. There are, in fact, a number of reasons why a customer might initiate a contact with a LEC and, to the extent that the BOC continues to enjoy overwhelming market dominance, most such contacts will inevitably be with the BOC in areas in which the BOC offers local exchange service as an ILEC. Contacts initiated by customers would take place where the customer needs to place an order for new telephone service, for an additional access line, or to add or change service features. Customers may also initiate contacts for bill inquiries, repair service, or to obtain information about new services that might become available such as, for example, ADSL. Data provided in this Commission's consideration of Qwest Corporation's *Alternative Form of Regulation Service Quality Plan* indicates that, in September 2001, Qwest in Minnesota received 290,953 calls regarding billing and collection, and 183,732 calls ordering installation (of these, 20,350 calls were new connect orders, for which a customer would need to choose a PIC).[35] Thus, Qwest has the ability to address approximately 475,000 potential customers each month, during calls *initiated by the customers themselves* and at a time when they are already thinking about their telephone service.

22. Indeed, at least with respect to these types of sales at the time of the initial local service contact, the BOC need spend little if any resources actually advertising or otherwise marketing its long distance services. The inbound caller has already made the contact with "the phone company" for basic telephone service and, unless that customer is a student of telecommunications industrial organization and regulation, there is a strong likelihood that the

35. "Qwest Quarterly Service Settlement Report," a monthly report regarding Minnesota customers, as required by the Commission's *Order* in *Qwest Corporation's Alternative Form of Regulation (AFOR) Service Quality Plan*, Docket No. P-421/AR-97-154, filed November 15, 2001.

customer will simply accept the BOC service representative's "recommendation" as the only and obvious choice. That selling long distance services to "inbound" *local* service customers is a centerpiece of Qwest's long distance marketing strategy can be reasonably inferred from the discussion of this subject in the Brunsting and Schwartz Affidavits,[36] from the existing practices of Verizon and SBC in New York, Texas, and in their other "271" states, and from Qwest's own refusal to confirm its intention to use the same competitively-neutral script that the Commission had previously ordered with respect to intraLATA marketing.[37]

23. The Minnesota PUC has considered and addressed this very same preemptive joint marketing of local and long distance services on "inbound" local service contacts in the context of *intraLATA* toll services. Prior to 1996, all intraLATA toll calls in Minnesota that were dialed on a "1+" basis were automatically routed to then-US WEST. Although IXCs were permitted to offer competing intraLATA toll service in the state, customers desiring to utilize those competing services were required to dial an access code (in the form of '10XXX', where 'XXX' was (at that time) a 3-digit "Carrier Identification Code") preceding *each call* to designate an intraLATA toll carrier *other* than US WEST. In 1996, the PUC ordered US WEST to provide "intraLATA equal access" allowing customers to designate an intraLATA Presubscribed Interexchange Carrier ("LPIC") in addition to the customer's interLATA Presubscribed Interexchange Carrier ("PIC").[38] If an LPIC other than US WEST

36. Brunsting (QCC), at 21-24; Schwartz (QC), at 31-33.

37. Qwest response to DOC 15047.

38. *In the Matter of an Investigation into IntraLATA Equal Access and Presubscription*, Minnesota PUC Docket No. P-999/CI-87-697, *Order Establishing US West Business Practices for IntraLATA Presubscription*, January 12, 1996.

was selected, intraLATA calls dialed on a 1+ basis would be routed to the customer's chosen IXC. Although US WEST was prohibited from offering *interLATA* service in Minnesota, the IXCs' *intraLATA* services were now competing directly with those being offered by US WEST.

24. The MPUC specifically addressed the manner in which US WEST customer service representatives would be using inbound sales and other customer contacts to "sell" US WEST intraLATA toll services:

> The Commission agrees with commenting parties that US WEST must not use its position as the dominant local carrier to achieve a superior competitive status in the opening intraLATA toll market. When a customer contacts US WEST seeking new service, or for any other reason that relates to US WEST's position as the customer's local service provider, US WEST's customer service representatives should not influence the customer's choice of intraLATA toll carrier or persuade the customer to subscribe to US WEST.
>
> The Commission will not at this time require US WEST to establish a separate group of customer service representatives to market the Company's intraLATA services, as some commenting parties have suggested. The Commission will, however, require US WEST to do any necessary training or monitoring to ensure that its service representatives do not handle their customer contacts in anything but a competitively neutral fashion.
>
> The Commission agrees with the Department that US WEST should be required to submit for Commission approval a proposed script which its customer service representatives will follow when contacted by customers seeking service. The script should cover the Company's proposed method of informing the customer regarding intraLATA toll carrier choice. The script must not contain language which seeks to leverage US WEST's dominant local carrier position into competitive advantage in the intraLATA toll arena.

Following that order, US WEST submitted a script for the Commission's approval. As described in the Commission's April 2, 1996 *Order Denying Reconsideration*, US WEST had proposed a sales script that specifically suggested that the customer select US WEST's own intraLATA service:

> You now need to choose a company to carry your local long distance. Many companies provide this service. I'd be glad to read you a list of the companies available to you, or I can arrange for US WEST to provide this service for you.[39]

In rejecting the script proposed by US WEST, the Commission reiterated its original conclusion that this use of inbound contacts was anticompetitive:

> In the January 12, 1996, Order, the Commission stated that the Company "script must not contain language which seeks to leverage US WEST's dominant local carrier position into competitive advantage in the intraLATA toll arena." Order at p. 8.
>
> US WEST's proposed script would place competitors at a disadvantage vis a vis the incumbent carrier. Only US WEST's name would be mentioned. Customers would face the alternatives of listening to a list of unnamed carriers or of having US WEST "arrange to provide the service" for the customer. These distinctions definitely do not promote a competitively neutral environment as the intraLATA toll market opens.
>
> Furthermore, US WEST cannot say that it will have any disadvantage under the Staff's proposed language. Far from requiring US WEST to "advertise" other carriers, the language will simply require notice that a selection of carriers is available. Since all potential players will be placed on the same footing, US WEST will have the same opportunity as its competitors to win customers through advertising and quality of service. The Commission has found that competition in the intraLATA toll market place is in the public interest. The Commission's imposition of reasonable language requirements is part of its right and duty to regulate the provision of intraLATA toll service so that true competition exists.

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39. *In the Matter of an Investigation into IntraLATA Equal Access and Presubscription*, Minnesota PUC Docket No. P-999/CI-87-697, *Order Denying Reconsideration and Clarifying Order*, April 2, 1996, at 6.

> The Commission denies US WEST's request to reconsider its Order requirements regarding service representative contacts with customers. The Commission will require US WEST's representatives to use the script approved by Commission Staff when dealing with new, transferred, or changed PIC service.[40]

The specific script that was approved by the Commission was the one that had been recommended by the Commission Staff:

> You now need to choose a company to carry your local long distance calls. Many companies provide this service. I'd be glad to read you a list of the companies available to you.[41]

25. The concern that was raised by competing IXCs and that was addressed and resolved by the Commission with respect to *intraLATA* toll services applies with equal force in the case of *interLATA* services. Indeed, while nominally being offered by a "separate affiliate," Qwest's long distance service would be marketed by Qwest BOC employees during inbound new local service order and other contacts *initiated by the customer*. Moreover, the similarity between the names of the two Qwest entities — Qwest Corporation and Qwest Communications Corporation - whether purposefully or not will nevertheless have the effect of creating customer confusion with respect to the identity of the entity that is actually providing the interLATA service — the local Qwest phone company vs. the Qwest long distance entity. Accordingly, absent the application of comprehensive competitively-neutral marketing rules, the Commission's 1996 conclusion with respect to intraLATA services marketing contacts can be readily paraphrased to apply to the marketing of QCC interLATA services:

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40. *Id.*, at 7-9.

41. *Id.*, at 5.

> *Qwest's proposed script would place competitors at a disadvantage vis a vis the incumbent carrier. Only Qwest's name would be mentioned. Customers would face the alternatives of listening to a list of unnamed carriers or of having Qwest "arrange to provide the service" for the customer. These distinctions definitely do not promote a competitively neutral environment as the interLATA toll market opens.*

26. As I have previously noted, state commissions are expressly authorized by the FCC "to enforce obligations relating to a BOC's provision of intrastate interLATA service...," such as "respecting universal service, public welfare, service quality and consumer safeguards, or section 271(c), respecting state advancement of competition beyond federal minimums."[42] Thus, the authority to limit or impose obligations on the BOC with respect to its and its affiliate's provision of intrastate interLATA service remains with the state. This Commission may therefore clearly apply to Qwest's interLATA "joint marketing" activities the very same competitively neutral marketing rules that it had previously adopted with respect to intraLATA services.

Qwest has failed to show that it has implemented separate ownership and servicing of all BOC and Section 272 affiliate operating, installation and maintenance facilities and functions.

27. Section 272(b)(1) requires that a 272 affiliate "shall operate independently from the Bell operating company." In interpreting this subsection, the FCC has determined that

42. *Non-Accounting Safeguards Order*, 11 FCC Rcd 21929, footnote 97, referencing *Reply Comments of the Public Service Commission of Wisconsin*, at 7.

"operate independently" does not have, in its view, a "common sense" interpretation.[43] Therefore, the FCC concluded that it is free to define this provision consistent with its reading of Congressional intent. Here the FCC reads the Congressional intent of Section 272(b)(1) as "ensur[ing] the operational independence of a section 272 affiliate from its affiliated BOC."[44] On the basis of that reading, the FCC proceeds to draw a very narrow definition of the "operate independently" requirements of Section 272(b)(1):

> We decline to read the "operate independently" requirement to impose a blanket prohibition on joint ownership of property by a BOC and a section 272 affiliate. Rather, we limit the restriction to joint ownership of transmission and switching facilities and the land and buildings where those facilities are located. We conclude that the prohibition we have adopted should ensure that the section 272 affiliate's competitors gain nondiscriminatory access to those transmission and switching facilities that both section 272 affiliates and their competitors may be unable to obtain from other sources.[45]

In addition to requiring that a BOC and its Section 272 affiliate do not share ownership of switching and transmission facilities, the BOC and 272 affiliate are also prohibited from contracting with each other for one entity to provide operating, installation, or maintenance services with respect to the other's facilities:

> As stated above, we believe that a prohibition on joint ownership of transmission and switching facilities is necessary to ensure that a BOC

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43. *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *Third Order on Reconsideration*, released October 1, 1999, 14 FCC Rcd 16299, 16305 ("*Third Order on Reconsideration*").

44. *Non-Accounting Safeguards Order*, 11 FCC Rcd 21985.

45. *Id.*, at 21983.

> complies with the nondiscrimination requirements of section 272. Consistent with that approach, we further interpret the term "operate independently" to bar a BOC from contracting with a section 272 affiliate to obtain operating, installation, or maintenance functions associated with the BOC's facilities. Allowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors.

By limiting the meaning of the Section 272(b)(1) "operate independently" clause to what is known as "OI&M" (operation, installation and maintenance) functions, the FCC draws the not particularly demanding requirement that the 272 affiliate must deal with the *facilities* of the BOCs in the same manner as all other competitors. The 272 affiliate would not be able to leverage its relationship with the BOC in order to gain a competitive advantage from superior access to BOC underlying network operations.

28. Despite the FCC's narrow delineation of this requirement, however, Qwest has failed to demonstrate compliance with it. All that Qwest has done is to provide statements by its two affiants averring that the Qwest BOC and QCC will not jointly own any network facilities or share OI&M functions.[46] In its data request #15010, the Department asked Qwest for more specific information that, if provided, would permit an independent assessment as to Qwest's compliance with Section 272(b)(1):

> a) Please provide a map of all transmission and switching facilities, which QCC will use to provide interLATA long distance services in Minnesota, and identify who owns these facilities.
>
> b) If any transmission facilities are owned by anyone other than QCC,

46. Brunsting (QCC), at 8-9; Schwartz (QC), at 10-11.

please provide all documentation or contracts showing the terms and conditions under which QCC will obtain these facilities.

c) Please identify all locations, including the address of QCC switching facilities, that will be used to route Minnesota interLATA calls, and the owner of each of the switching facilities.

d) Will any of the switching facilities mentioned in (c) be used to route intraLATA traffic? Local traffic? EAS traffic?

e) Who owns the land and/or buildings in which the QCC switching facilities are located?

f) Please provide all documentation, contracts or collocation agreements identifying the terms and conditions under which QCC will locate its switching facilities.

In its response, Qwest states that it is "still in the process of completing its network strategy," but in other respects has refused to provide any of this information.[47] Although Qwest now claims that its network is incomplete and unknown, in addressing the benefits of its merger with US WEST, the Company stated:

> The post-merger company will also have incentives to satisfy Section 271 quickly because the new company, unlike US West, will already own an interLATA network. This means that the merged company will be able to re-enter the in-region interLATA market immediately upon Section 271 relief with its own high-capacity, state-of-the-art network. It will not have to incur the expense and delay associated with constructing new facilities or depend on having to resell the services of another carrier.[48]

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47. Qwest response to DOC 15010.

48. *In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and US WEST Communications, Inc.*, Docket No. P3009, 3052, 5096, 421, 3017/PA-999-1192, Reply Comments of Qwest and US WEST filed January 18, 2000, at 7.

Ms. Brunsting's and Ms. Schwartz's assurances are hollow without the details as to the actual ownership of facilities and responsibilities for OI&M functions. Hence, the Commission has no factual basis, beyond the unsupported assertions by Ms. Brunsting and Ms. Schwartz, upon which to find that Qwest is currently complying with the "operate independently" requirements of Section 272(b)(1).

29. Furthermore, Qwest's claim that the two entities do not jointly own *in a legal sense* any network facilities does not address the possibility of some alternative ownership or sharing arrangement that would, from an economic perspective, be for all practical purposes entirely equivalent to joint legal ownership. For example:

- The BOC and QCC entities could create a type of "condominium" arrangement whereby the ownership of the common facility would be divided between the two entities with respect to identifiable network elements, such as specific strands in a fiber optic cable.

- The parent company or some other Qwest affiliate could be the legal owner of facilities that both the BOC and QCC would then lease.

The statements made by the two Qwest witnesses would not preclude either of these arrangements;[49] if one or both were being pursued by Qwest, the effect would be an evasion

49. Ms. Brunsting (at 8) states: "The 272 Affiliate does not and will not jointly own, with the BOC, telecommunications transmission and switching facilities, or the land and buildings

(continued...)

of the "operate independently" requirement. Indeed, with respect to the "third party" ownership approach, the FCC has found that, should the parent corporation own any of these facilities or provide any OI&M services for both the BOC and the 272 affiliate, the parent would be subject to the same 272(b)(1) requirements as the BOC and the 272 affiliate.[50] Neither Qwest affiant has stated that the two entities will not use in common switching and transmission facilities owned by the Qwest parent company or by another Qwest affiliate.[51]

30. In prohibiting joint ownership of switching and transmission facilities, the FCC has attempted to ensure that a BOC would continue to deal with the 272 affiliate with respect to the affiliate's use of BOC facilities in a competitively neutral manner. This means that the affiliate would be required to purchase the use of BOC facilities on the same terms and conditions as would any nonaffiliated competitor, which usually means pursuant to tariff. Joint ownership would allow the affiliate access to facilities and service on terms equivalent to those available to the BOC itself, and significantly more favorable than terms available to competitors. Condominium ownership, unless also offered to nonaffiliated competitors, would have the same effect, affording the affiliate superior access to whatever facilities in the BOC

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49. (...continued) on which such facilities are located." Ms. Schwartz states (at 11): "The BOC and the 272 Affiliate do not and will not jointly own telecommunications switching or transmission facilities, or the land or buildings where those facilities are located, so long as such restriction applies under the rules."

50. *Non-Accounting Safeguards Order*, 11 FCC Rcd 21992.

51. All that they have committed to with respect to their dealings with other Qwest entities is that "no switching and transmission facilities have been transferred from the BOC to the 272 affiliate" [Schwartz at 11] and that "[n]either the BOC nor any other Qwest affiliate performs any OI&M functions associated *with the 272 Affiliate's* switching and transmission facilities." [Schwartz at 12, emphasis supplied].

central office that the 272 affiliate "owns," while allowing the BOC to deny access to similar facilities (perhaps based on a lack thereof) to the affiliate's competitors. The FCC clearly never intended to permit such a loophole:

> To the extent that a section 272 affiliate jointly owned transmission and switching facilities with a BOC, the affiliate would not have to contract with the BOC to obtain such facilities, thereby precluding a comparison of the terms of transactions between a BOC and a section 272 affiliate with the terms of transactions between a BOC and a competitor of the section 272 affiliate.[52]

The *Non-Accounting Safeguards Order* continued to specifically disallow this type of "condominium" arrangement in a BOC's central office:

> Moreover, the ban on joint ownership of facilities should protect local exchange competitors that request physical collocation by ensuring that a BOC's section 272 affiliate does not obtain preferential access to the limited available space in the BOC's central office.[53]

In the example cited above, where a portion of the strands in a fiber optic cable are owned by the 272 affiliate and the rest by the BOC, the Section 272 affiliate would have its own access to the BOC's central office, and would not need to obtain a dark fiber UNE. Where a competitor requires the same access, it would be required to lease dark fiber from the BOC at tariff prices, assuming that the BOC had dark fiber capacity available. The 272 affiliate would have what amounted to outright ownership of what would normally be considered a BOC's dark fiber. Until Qwest provides evidence that it is not participating in this type of

52. *Non-Accounting Safeguards Order*, 11 FCC Rcd 21983.

53. *Id.* (footnotes omitted).

"condominium" arrangement, as well as that it has not transferred any of its network assets to its parent corporation or to another Qwest affiliate for the purpose of avoiding the 272(b)(1) requirements, Qwest has failed to show that its proposed long distance affiliate satisfies the FCC's "operate independently" requirement. Qwest has thus not met its burden to demonstrate that it is in compliance with even the FCC's limited scope of the Section 272(b)(1) "operate independently" provision. Moreover, to the extent that Qwest's carefully worded "commitment" would not preclude it from pursuing other creative forms of "ownership," the Commission has no firm basis to conclude that Qwest satisfies or will in the future satisfy Section 272(b)(1).

This Commission should view the "operate independently" requirement as embracing any operational practices that work to blur the distinction or otherwise achieve functional integration between the BOC and its Section 272 Affiliate.

31. The FCC has interpreted the Section 272(b)(1) "operate independently" requirement as being limited solely to *network* operations. Yet network operations are only one part of a BOC's myriad of operating functions. Section 272(b)(1) needs to be read in conjunction with the overall Section 272(a) separate affiliate requirement and with the other four subsections of 272(b), which collectively outline a comprehensive code of conduct that cannot be interpreted as in any sense permitting *integrated* "operations" in the non-network functions of the BOC and long distance entities. As the ALJ has found in the *Fourth Prehearing Order*, the issue of who has ultimate control over policy in a corporate entity is properly within this proceeding,[54] and it is entirely appropriate for this Commission to apply a broader inter-

54. *Fourth Prehearing Order*, November 20, 2001, at footnote 7.

pretation of "operate independently" if it concludes that limiting this requirement solely to "network operations" is insufficient to foreclose the potential for anticompetitive and discriminatory acts on the part of Qwest.

32. Indeed, the narrow "network operations" interpretation of "operate independently" cannot be squared with Section 272(b)(5), which obligates the BOC and its 272 affiliate to deal with each other "on an arm's length basis." As Ms. Brunsting has conceded,[55] the management and Board of Directors of Qwest International Inc., the parent company of the Qwest BOC and QCC entities, is ultimately responsible to Qwest's shareholders. As such, the parent company's role is to make decisions that are in the best interests of the overall corporation, even if such decisions may adversely affect the fortunes of individual components thereof. Thus, and absent the "arm's length" transaction requirement of Section 272(b)(5), the Qwest parent company may determine that it should sacrifice profits in one subsidiary to benefit another if by so doing it could increase overall corporate profits. For example, if the 272 Affiliate were able to purchase services or obtain information from the BOC entity at less than fair market value (or for "free"), the affiliate could then underprice its competitors, allowing it to capture market share and realize higher overall corporate profit. But an "arm's length transaction" requirement obligates each of the entities to operate vis-a-vis each other not with the goal of maximizing *corporate* profits, but rather with the objective of *maximizing profits in each of the affiliate entities on a stand-alone basis*. The "arm's length" requirement thus precludes the BOC entity, for example, from affording favorable treatment to the 272 Affiliate if by so doing the financial or business interests of the BOC

55. Brunsting (QCC), at 17.

entity would be compromised *even if the overall financial or business interests of the parent Qwest International, Inc. would be enhanced.* Thus, the 272(b)(5) requirement works to impose an "operate independently" obligation with respect to *all* facets of the BOC's and its 272 Affiliate's activities and operations, *even where that causes overall Qwest corporate profits to be less than they would be under fully integrated operations with all transactions between and among affiliates based upon the best interests of the parent corporation rather than the best interests of each affiliate standing on its own.*

33. Significantly, the mere fact that transactions between the BOC and 272 Affiliate must be recorded may not by itself preclude the entities from engaging in conduct that focuses upon overall corporate results rather than upon individual affiliate impacts. For example, the BOC entity will provide billing and collection services for the long distance affiliate, for which it will be compensated under the affiliate agreement. In reality, of course, the BOC will be preparing and mailing bills to its local service customers anyway, so the incremental cost of including the 272 affiliate's long distance charges is at or near zero. In setting its own retail prices, the affiliate may simply ignore its billing "costs" (i.e., its "payments" to the BOC for billing and collection services), enabling it to offer lower prices than competing IXCs, who must incur the actual, out-of-pocket cost to bill their long distance customers on a stand-alone basis. Thus, the 272 Affiliate could offer "discount toll plans" with no monthly charge or minimum commitment, even if that may result in the revenues being obtained from some low-use customers falling below the nominal "billing" payment it makes to the Qwest BOC, because QCC's "loss" will still translate into a net "profit" for Qwest International, Inc. as a whole.

34. As another example, consider the types of "tie-in" arrangements that Verizon Long Distance and Verizon New York have pursued as part of their "joint marketing" program.[56] In New York, Verizon Long Distance ("VLD") was offering a $4.60 credit when a customer selected the basic VLD Schedule "C" ($0.10 per minute, no minimum, no monthly charge) calling plan and also subscribed to the Verizon BOC's "Value Pack" service, a package of local exchange service and selected vertical features.[57] The Schedule C rate plan was targeted at the relatively low-use customer who would be attracted by the absence of either a monthly charge or minimum usage commitment. If, for example, such a customer were to make no long distance calls at all during a given month, VLD would sustain a loss of at least $4.60 in that it would still have to "pay" the credit to Verizon New York while receiving no offsetting long distance revenue from the customer. Verizon New York, however, would realize S17.99 in actual revenues from the customer (the price of Value Pack service)[58] plus the additional S4.60 "payment" from Verizon Long Distance. VNY gains $22.59 while VLD "loses" $4.60, which still results in a net gain to the consolidated Verizon bottom line of $17.99, erasing the VLD "loss" when examined at the parent level. VLD's ability to offer this "promotion" and to potentially sustain the "losses" arising therefrom is solely and

56. It should be noted that at the time that this affidavit was filed, the Department had not had sufficient opportunity to review the joint marketing scripts and plans provided by Qwest as compelled by the *Fourth Prehearing Order*. To the extent that the materials to be provided by Qwest reveal analogous marketing plans, the Department will file supplemental testimony relating thereto.

57. Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, New York PSC Tariff No. 1, Original Promotional Attachment No. 5. Package No. 1 Promotion and Rate Schedule (Section 3.5.3).

58. http://www22.verizon.com/foryourhome/SAS/StateSelector.asp?ID=choosefeat, accessed 11/28/01.

uniquely attributable to its affiliate relationship with the Verizon BOC. From the perspective of any *competing* non-affiliated interexchange carrier attempting to make a comparable "promotional" offer, that same $4.60 "payment" would be a real *cash payment*, representing a true out-of-pocket cost to the IXC. In Verizon's case, even though the inter-affiliate "payment" is (presumably) actually being recorded on the two entities' respective books, VLD is behaving as if no such "payment" is actually taking place. Were QC/QCC to engage in similar "promotional" or "tie-in" offers, the effect would be to impose an anticompetitive price squeeze on its long distance rivals.

35. QCC has expressly "reserve[d] the right to utilize any and all vendors and sales sources, including but not limited to, those available through joint marketing with QC (Qwest Corporation)."[59] The Qwest BOC's provision of "joint marketing" services to the 272 affiliate, assuming that it is pursued, provides perhaps an even more compelling example of less-than-arm's length behavior. In addition to furnishing personnel to support this function, the BOC would also be providing its affiliate with unfettered access to the BOC entity's customer base and to the customer-initiated contacts that arise as a consequence of the Qwest's BOC's near-monopoly control of the local service market. Competing long distance providers must engage in extensive advertising, direct mail, and telemarketing to promote their service, and do not get anywhere near the quantity of inbound customer contacts as does the BOC, and those which IXCs do receive are primarily the result of the IXCs' advertising and other promotional efforts, undertaken at not inconsiderable cost to those IXCs.

59. Qwest response to DOC 15037.

36. Customer acquisition is among the most costly aspects of an interexchange carrier's operation. Without the benefit of the embedded ubiquitous customer base that is uniquely available to QCC, other IXCs must pursue active marketing strategies involving extensive media advertising, telemarketing, direct mail, and special promotions (cash, airline miles, etc.). When spread over the number of sales that are actually consummated, these costs can amount to hundreds of dollars per customer acquired. I am aware of at least one analysis that has put such cost at "up to $300 to $600 in sales support, marketing and commissions" per customer acquired.[60] Qwest has itself recently provided this Commission with information as to its own customer acquisition costs. In testimony filed in the *Termination Liability Assessments* proceeding, Qwest estimated its customer acquisition cost at 12.7% of retail revenues.[61] Qwest witness D. M. Gude identified Qwest's up-front "sales costs" as including the following activities: "Third Party Sales Commissions, Custom System Design, Account Sales/Servicing, and Telemarketing."[62] The prevailing industry customer acquisition cost represents the fair market value of the customer acquisition services that the Qwest BOC provides to QCC. I have been unable to identify any specific provision in any Qwest/QCC affiliate agreements or other documents under which QCC's "payments" to the BOC entity for any customer acquisition services that may be provided will be more than a minute fraction of this fair market value.

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60. See Borna, Claude, "Combating Customer Churn," in *Business and Management Practices*, Vol. 11, No. 3; Pg. 83-85; ISSN: 0278-4831, Horizon House Publications, Inc., Telecommunications Americas Edition (March, 2000).

61. *In the Matter of Qwest Corporation's Refiling of its Proposed Tariffs Regarding Termination Liability Assessments as Applied to Resale Arrangements*, MPUC Docket No. P-421/AM-00-1165, P-421/C-98-10, Direct Testimony of D. M. Gude, Attachment DMG-1.

62. *Id.*, at 11.

37. The Qwest BOC and 272 Affiliate cannot be considered to "operate independently" unless the Section 272(b)(5) arm's length transaction requirement is satisfied. Ms. Brunsting and Ms. Schwartz testify that transactions are being recorded, but afford no evidence that the dollar amounts being reflected on the two entities' books bear any resemblance to the proper valuation of the services provided, i.e., the amounts that firms dealing with each other on a truly arm's length basis would demand. Consequently, there is no basis for the Commission to conclude that either Sections 272(b)(1) or 272(b)(5) are being satisfied by Qwest.

Qwest's application of the arm's length standard, as required by the *Accounting Safeguards Order's* interpretation of Section 272(b)(5), is insufficient.

38. Section 272(b)(5) provides that, to the extent a BOC and 272 affiliate contract with each other for services, those services must be conducted on an arm's length basis, the terms reduced to writing, and made publicly available. The affidavits of Ms. Brunsting and Ms. Schwartz provide a sampling of these affiliate agreements, and refer to Qwest's web posting for the complete set.[63] Each contract includes a brief description of services to be provided, the employees providing the service, and the rate at which the service will be charged. In order to assess the validity of the pricing method assigned by Qwest to the services, the Department propounded information request DOC 15025, asking that Qwest describe and provide supporting documentation pertaining to the basis for the specific transfer prices and transfer pricing methodology for each of the affiliate transaction work orders recorded on the Qwest affiliate transaction website. The parts of this data request not publicly available on Qwest's website are reproduced here as Attachment 3.

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63. Brunsting (QCC), at 19-20; Schwartz (Qwest Corporation), at 21.

39. FCC affiliate transaction requirements, as set forth in the *Accounting Safeguards Order* and applied to Section 272(b)(5) by the *Non-Accounting Safeguards Order*, define the process for determining an arm's length transaction.[64] For services provided from the BOC affiliate (Qwest Corporation) to the 272 affiliate (Qwest Communications Corporation) where the total billing for that service is estimated annually at over $500,000, non-tariffed services must be provided at the greater of fair market value or fully distributed cost. To ensure that the appropriate pricing method is used, Qwest provides a Fair Market Value Questionnaire to be filled out concurrently or prior to the execution of the contract. This Questionnaire asks the respondent to specify

> (1) if the estimated annual billing for this service is greater than $500,000;
>
> (2) whether benchmarking studies have been performed (and if so, the studies must be attached to the worksheet); and
>
> (3) whether an external market exists for the service, and any explanation/studies this would entail.

Copies of this questionnaire as provided to the Department (and appended hereto in Attachment 3) indicate consistent misrepresentation, omissions, and errors in this document.

40. Primarily, and most egregiously, the fair market value questionnaire for consumer

64. *Accounting Safeguards under the Telecommunications Act of 1996*, CC Docket No. 96-150, *Report and Order*, 11 FCC Rcd 17539, 17607. and *Non-Accounting Safeguards Order*, 11 FCC Rcd 21996 and 21997.

markets–joint marketing services[65] dated 09/05/01 states that <<BEGIN TRADE SECRET END TRADE SECRET>> As a result, no fair market value study or benchmarking report was undertaken. However, contrary to the "anticipations" of Qwest Corporation, billing data provided in response to the Department's Information Request #15031, total billing for November for the <<BEGIN TRADE SECRET END TRADE SECRET>>[66] that have provided services to support or benefit QCC indicates that this staff alone invoices charges for <<BEGIN TRADE SECRET END TRADE SECRET>> for just the month of September. This same invoice indicates a previous balance of <<BEGIN TRADE SECRET END TRADE SECRET>> (on which no payments were made and no late charges were assessed).

41. This information strongly suggests that there may already have been several violations of the arm's length requirement for joint marketing services, even before Qwest is allowed into the in-region interLATA service business. The balances indicated in the invoice cited above (which, it should be noted, is just one of the invoices for service under the consumer markets section of the joint marketing work order for that time period) clearly indicate that Qwest's assertions that the total billing for this service would be less than

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65. See *Fair Market Value Questionnaire*, ASF Number: CSMK 311, included in Attachment 3.

66. See *Affiliate Billing Request Form*, BART BAN# BIQCC030, and Invoice NO: A681201, included in Attachment 3.

$500,000 annually[67] are <<BEGIN TRADE SECRET END TRADE SECRET>>. When the value of a service is over $500,000 annually, Qwest is required to justify its pricing methodology. Despite the fact that billing had already exceeded <<BEGIN TRADE SECRET END TRADE SECRET>> when the contract marked "no billing >$500,000.00 is anticipated!!" was deemed effective, Qwest undertook no fair market value study, and asserted a value of the services that had, in fact, already been proven to be false. It also appears that <<BEGIN TRADE SECRET END TRADE SECRET>>, the employee responsible for the estimation of the value of services under this work order, had reason to know that this assertion of value was false, inasmuch as her name is listed on the invoice cited as the internal contact to whom billing questions should be referred.

42. In addition to being improperly executed, the joint marketing work order appears to involve the provision of BOC services that are expressly prohibited by Section 272(c)(1). In the *Non-Accounting Safeguards* proceeding, BellSouth asked the FCC to "broaden its interpretation of the terms "marketing" and "sale of services" in Section 272(g)(3) to include product planning, design, and development of a section 272 affiliate's offerings." The FCC refused to make this finding in its Order, stating:

> In our view, such activities are not covered by the section 272(g) exception to the BOC's nondiscrimination obligations. We see no point to attempt at this time to compile an exhaustive list of the specific BOC activities that would be covered by section 272(g). We recognize that such determinations are fact specific and will need to be made on a case-by-case basis.[68]

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67. Services referred to here are consumer markets services as outlined in ASF# CSMK 111 and ASF# CSMK 311.

68. *Non-Accounting Safeguards Order*, 11 FCC Rcd 22048.

The FCC reiterated this position in the *Third Order on Remand.* In that order, the FCC states:

> The broad interpretation of the "joint marketing and sale of services" exception BellSouth advocates would create a loophole that would allow potential BOC discrimination in countless activities. Section 272(c)(1) would provide little protection against BOC discrimination were we to construe section 272(g)(3) as exempting all activities that may impact on marketing and sales activities from the nondiscrimination requirements.[69]

43. The *Joint Marketing Work Order* between the Qwest BOC and QCC defines the Agreement as including the following services:

> *Planning for In-region InterLATA (Local Access and Transport Area) Services* – Includes planning functions required to be ready to sell interLATA services when 271 relief is granted. Also includes pre-implementation activities such as sales operations functions, budgets, establishing sales expectations, planning sales and promotion functions, developing marketing and customer segmentation plans such as provisioning billing, order entry and management, customer care, reporting, training, and compensation; and determining requirements for changes to systems and processes.
>
> *Qwest Communications Corporation (QCC) Sales* – Providing various aspects of selling QCC products and services inside and outside the 14 state region such as private line data and out of region long distance. Includes activities such as direct sales, supporting alternative sales channels, support for planning for out of region sales, managing marketing efforts for out of region services, and development of raining for Section 272 products, services, policies and processes for sales and sales support personnel.

Although these descriptions are vague as to the actual development services being provided, the amount billed in October 2001, as discussed above, certainly indicates that a large

69. *Third Order on Reconsideration*, 14 FCC Rcd 16325.

quantity of work is being provided in connection with these planning services. If the services do, as they appear to from their broad descriptions, entail the 272 affiliate's contracting with the BOC for marketing *planning* functions, then the joint marketing work order violates the FCC interpretation of Section 272(g)(1) as well as Section 272(b)(5).

44. In addition to the *Joint Marketing Work Order*, several other of the Qwest Affiliate Transactions appear to violate Section 272(b)(5). The *Information Technologies Work Order* contains provisions for "Facilities Management" (floor space in the Qwest Corporation Zuni facility), "Network Access" (access to internal communications and network services), "Processing Services" (end user computing for QCC employees), "Operations Services" (computer attendant), and "Training Services" (Information Technologies Performance Solutions Training). The first provision of this work order, "Facilities Management," appears to be in lieu of a formal real estate lease between QC and QCC for office space in Denver, Colorado. However, unlike a lease, QCC and QC have failed to define the *amount* of office space to be provided to QCC. Either Qwest and QCC have contracted for an undetermined amount of office space, rendering the contract overly vague, or Qwest and QCC have failed to reduce the amount of space covered under this contract to writing, an express violation of Section 272(b)(5)'s requirement that all agreements be reduced to writing and made publicly available. In addition, while Qwest claims that the estimated annual billing for this "service" is below $500,000, the Department has no way of testing this assertion without knowing the amount of space for which QCC has contracted.

45. In provisioning network access to *Qwestnet* and network access to internal communications, Qwest provides the following statement to support its fully distributed cost

pricing methodology:

> Qwest Corporation provides its affiliates access to its internal computer network as well as internal communications. The network further provides access to shared corporate information such as employee directories and corporate polities which include proprietary information. When taking this service to market, it is important to consider both tangible and intangible aspects of the service. Access and the components of access can be taken to market, i.e., the hardware, software, and employee values can be identified in the market place. However, the intangible portion must also be identified. The intangible portion is what the affiliates are accessing. The affiliates are able to access the Qwest internal network, Global Village, e-mail network, and the underlying data in those network. It should also be noted that some affiliates (such as Section 272 organizations) are limited in the information and applications that are made available to them to comply with appropriate requirements. The value of being able to access information in the network cannot be identified in the markets as no such service can be identified. The network contains information that exists as a result of the aggregation of knowledge within Qwest.
>
> As a result, a similar comprehensive service does not exist in the market. In order to obtain a similar service in the market place, the vendor would have to be able to provide the physical network along with access to a mainframe network and its associated applications. This would also include access to a knowledge repository, access to a communications network, and support for all the above. Therefore, this service cannot be taken to market.

Based upon this agreement, which is applicable to all affiliates of Qwest, the value of Qwest's internal network is the sum of its tangible (hardware, software) and intangible (Qwest corporation data, including proprietary information) attributes. The pricing has therefore been based upon the fully distributed cost, since (by Qwest's reasoning) no outside market exists that would encompass both tangible and intangible attributes. However, from the caveat regarding the restriction of information to Section 272 affiliates, QCC is presumably not benefitting from the intangible value of Qwestnet. Therefore, with regard to the benefits received by the 272 affiliate, those tangible services are available on the market, and a full market value study should have been performed. To the extent that any information on Qwestnet is *not* blocked from a section 272 affiliate's access, this agreement would constitute contracting for information that would violate the Section 272(b)(1) "operate independently" requirement, as well as the Section 272(c)(1) nondiscrimination safeguards.

46. That Qwest has entered into many of these affiliate agreements as a way of justifying integrated operation is illustrated in the external market rationale of the Information Technology ("IT") Operations service *Fair Market Value Questionnaire*. Qwest maintains that the mainframe includes "application systems in the area of payroll, human resources, accounting, network, and customer billing. ... The mainframes allow users to find and retrieve information, create/maintain files, store data, print reports/bills, as well as print payroll checks." In justifying why this service was not "taken to market" in order to determine a fair market value, Qwest states:

> Short of placing a RFP in the marketplace, we feel that it will not be possible to obtain market quotes through reasonable efforts. Placing an RFP in the market place with no intent of outsourcing the program would be a poor business practice and could possibly damage Qwest's reputation in the marketplace. Thus, taking this service to market is not feasible.

The service in question is provided by Qwest to QCC, the unregulated QCC has a strong incentive to operate efficiently in order to maximize profits, and any incentive it would have to contract with its BOC affiliate for IT Operations service would stem from its desire to participate in any economies of scale that such a contract would afford. Qwest, however, clearly indicates that, regardless of the economies of scale that may or may not exist in this case, QCC has no intention of contracting with an outside provider for this service. QCC clearly intends to have integrated IT systems regardless of any economic advantage it would gain by obtaining the service from an outside provider. The only reasonable conclusion that can be drawn from this contention is that QCC intends to use not just the IT services, but the *integration* of the services to its advantage.

47. Finally, when determining the presence of an outside market both for Accounts Payable services and Human Resources services, QC indicated in each case that its services were customized to provide for specific Qwest Corporation needs. For example, the Accounts Payable explanation provides the following rationale:

> The regulated employees who perform accounts payable functions provide for payment of vendor invoices, payment of employee expenses, image processing, corporate card, vendor base, reconciliation, system administration duties. These employees are specialists for Qwest in the knowledge of our accounts payable process. External vendors do not offer such a broad spectrum of support and services. Nor do they have the expertise specific to Qwest accounts payable process. Therefore, the services performed by these regulated employees are not available in the same degree in the market place.

Once again, Qwest misses the point: The fact that some "customization" of accounts payable, payroll, human resources or any other *generic* corporate management functions may be required does not render these functions incapable of being subject to a fair market value assessment. Indeed, many of these types of generic activities are frequently "outsourced," i.e., purchased from a third-party provider, and are thus amenable to market valuation. To be sure, where the provision of the generic service does not specifically benefit from integration or scope (market dominance) as is the case with services such as payroll and accounts payable, the "cost" and "fair market value" of many such services may not be all that different. However, for services such as billing and collection, where the ability to incrementally include the QCC billing on QC bills may involve little or no additional cost to Qwest when viewed on a consolidated basis, or "joint marketing," where existing QC employees incrementally include a long distance sales activity in inbound customer contacts that arise routinely from QC's dominance of the local market, the "fair market value" to QCC as the purchaser will likely exceed, by a considerable amount, the cost that QC incurs in providing the service. By relying upon "cost" rather than "value," QCC is thus enabled to acquire these services, with all of their associated tangible and intangible benefits, at a small fraction of what a competing long distance provider would be required to incur to produce or otherwise obtain comparable services by or for itself.

48. Qwest's reasoning with respect to its obligations to value a service it provides to QCC "at market" is squarely at odds with the principle of arm's length transactions. By Qwest's reasoning, since "[t]he value of being able to access information in the network cannot be identified in the markets as no such service can be identified," it has no obligation to develop a market value for such information. Again Qwest misses the point: Information that Qwest develops in the normal course of its business would be extremely valuable to QCC; were QCC required to independently acquire these same "intangibles" on its own (if it even could), it would incur substantial out-of-pocket costs. The "market value" of intangibles provided by QC to QCC does not require that QC actually offer to sell access to these intangibles in the marketplace, but rather must be based upon *what QCC would have to pay to independently acquire those same assets on its own.*

49. In short, the "fair market value" of an asset or a service is what the *buyer* of that

asset or service would be *willing to pay* to acquire it, not what the seller incurs to produce it. That amount, in turn, will be dictated not by the seller's cost, but by what the buyer would have to spend to acquire the item in some alternative manner. In an arm's length transaction, the seller would base its price to the buyer not on the seller's cost, but on the buyer's willingness to pay. Acceptance by the Qwest BOC of a payment from QCC that is anything less than QCC's "willingness to pay" amounts to nothing short of an outright cross-subsidy flowing from the BOC to the 272 affiliate.

50. Interestingly, Qwest observes "that some affiliates (such as Section 272 organizations) are limited in the information and applications that are made available to them to comply with appropriate requirements." Yet Qwest BOC customer service representatives will have access to that "information and applications" in the course of their routine work, which work could include providing sales and marketing services for QCC. Qwest's approach is tantamount to ascribing a value of zero to any intangibles that it provides to QCC. This situation would never arise for actual "arm's length" transactions between independent nonaffiliated companies; indeed, it is extremely unlikely, were QC and QCC not part of the same corporate "family," that the Qwest BOC would willingly turn over *any* of its customer, market, or other intangible data to QCC. And that is the ultimate test as to whether the Section 272(b)(5) "arm's length" standard is being satisfied: Would the transaction occur at all, and if it did at what price, were the two entities not affiliated. Clearly, the transactions between QC and QCC do not come even close to satisfying this test.

Qwest contemplates little more than facial compliance with the "separate employees" requirement of Section 272(b)(3), and portrays an organizational structure that amounts

to *de facto* integration of its local and long distance business activities.

51. Another instance where Qwest's transactions fail this arm's length test is in the case of employee transfers among Qwest affiliates. By either contracting for QC "services" or by an outright transfer of employees from QC to QCC, QCC also has access to a highly trained and experienced workforce it obtains without recruitment or training costs. At least one state commission has determined that, with regard to any BOC employee transferred to an affiliate, the affiliate gains intangible value from the BOC, and the BOC is therefore entitled to compensation for that value. Specifically, the California PUC concluded:

> Our basic transfer pricing theory has been to charge the affiliate the higher of cost or market value for transferred services. In this way, we protect ratepayers by assuring that the utility treats an affiliate just as it would any other unaffiliated firm; that is, charge what the market will bear, but decline the transaction if the market will not pay at least the cost of providing the transferred service.
>
> Intangible benefits as defined by this decision are provided at no direct cost to the utility. However, there are other benefits (like technical information) that may be costless to provide yet valuable to receive. We question why a market pricing standard can be used for other costless services, but not for "intangibles." ... We are persuaded that intangible "benefits" of any appreciable magnitude can be identified and priced by an appropriate market pricing standard. ...[70]

The California PUC adopted a 25% "employee transfer fee" to be applied against the annual salary of any Pacific Bell employee that is transferred to an affiliate.[71] Qwest does not contemplate the payment or imputation of any employee transfer fee for employees that are moved from the BOC to QCC.

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70. California Public Utilities Commission, D.87-12-067, 27 CPUC2d 1, 136.

71. *Id.*

52. Qwest has already or is in the process of transferring a large number of BOC employees to QCC. According to a Qwest response to a DOC information request, "110 employees were transferred from the BOC to the 272 Affiliate."[72] Included in those employees moved from the BOC to the 272 Affiliate were <<BEGIN TRADE SECRET END TRADE SECRET>>[73] On the other hand, the Section 272 Affiliate has transferred 39 employees to the BOC. These mostly consisted of <<BEGIN TRADE SECRET END TRADE SECRET>> employees.[74] In addition, this accounting doesn't even begin to consider the 2,749 employees transferred from the BOC to the Qwest Service Company[75] – nor is it clear that employees transferred to the Service Company were then not immediately reassigned (whether formally transferred or just "loaned" in some manner) to the 272 Affiliate. The 272 Affiliate is gaining high level, experienced professionals from the BOC, while the BOC receives no comparably valuable employees in return. Such transfers would never take place under true "arm's length" conditions between nonaffiliated firms. The very existence of these transfers, coupled with the absence of any employee transfer fee, unambiguously violates the arm's length requirement of Section 272(b)(5).

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72. Qwest response to DOC 15039S1.

73. *Id.*

74. *Id.* <<BEGIN TRADE SECRET END TRADE SECRET>>

75. *Id.*

53. Ms. Brunsting testifies that the Qwest BOC and QCC each do not have any officers or directors who are officers, directors or employees of the other entity.[76] Ms. Schwartz makes a corresponding assertion.[77] Ms. Brunsting states that "[t]he 272 Affiliate and the BOC maintain and will continue to maintain separate payrolls,"[78] and that "[a]s long as the requirements of Section 272 remain in force, no officer, director or employee of the 272 Affiliate will simultaneously *act* as an officer, director or employee of the BOC."[79] The operative word here is "act." Obviously, if confined to separate payrolls, no individual will simultaneously be a legal "employee" of more than one Qwest entity. The payroll designation or the "color code" on the employee's security badge will not and is not contemplated to limit the ability of an individual employee of one Qwest entity to "act as an ... employee" of the other.

54. Ms. Brunsting explains that "Qwest has a policy prohibiting the loan or 100% use of an employee between the BOC and the 272 Affiliate for more than four months out of any twelve-month period."[80] But this "prohibition" is in all material respects equivalent to saying that "Qwest has a policy permitting the loan or 100% use of an employee between the BOC and the 272 Affiliate for up to four months out of any twelve-month period." A BOC employee that is "loaned" or "100% used by" the 272 Affiliate is, for all practical purposes,

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76. Brunsting (QCC), at 13-14.

77. Schwartz (QC), at 16.

78. Brunsting (QCC), at 14.

79. *Id.*, emphasis supplied.

80. *Id.*, at 15.

"acting" as an employee of the 272 Affiliate for the duration of that "loan" or "use." This fact is confirmed by Qwest itself, which readily concedes that "[t]he activities performed by a loaned BOC employee would be directed by QCC management."[81] The color of the dot on the employee's badge or the name of the paying entity notwithstanding, such a "loaned BOC employee" would be "acting" as an employee of QCC for the duration of the "loan."

55. This "four month" policy is, at the very least, curious: By instituting such a "policy" and by discussing it in its Section 272 Affidavits, Qwest would appear (although admittedly not explicitly) to be suggesting that this "policy" somehow works to satisfy the requirements of Section 272(b)(3) with respect to employee separation between the two entities. There is, of course, nothing in the language of Section 272(b)(3) or in any FCC interpretations of which I am aware that could be read as suggesting that "separate" means "for at least eight months out of each twelve-month period." A practice of "lending" BOC employees to the 272 Affiliate, or of the 272 Affiliate otherwise "using" BOC employees to support its activities, is the economic and functional equivalent of having common employees, save only for the color of the dot on the employee's badge and the name of the entity on the employee's paycheck. The Commission should find that this practice constitutes a clear and unambiguous violation of Section 272(b)(3).

56. Significantly, Qwest's "policy" regarding the maximum of four months per twelve-month period appears to apply only in the case of "full-time" assignment of an employee to the other entity. Qwest explains that "[t]he policy reference to '4 months' refers to the loan

81. Qwest response to DOC 15044.

of an employee for '4 consecutive months on a full-time basis over a 12-month period."[82] But even this "policy" is, apparently, easily circumvented:

> Many BOC employees perform services for QCC which [sic] require some activity by them on a daily, weekly or monthly basis. This is not considered a loaned employee situation such as is covered by the [4-month] policy, but rather is the normal requirement of the provision of the particular service shown on the various work orders and these BOC employees' activities are directed by the BOC who [sic] is the provider of the service.[83]

Qwest confirms that BOC employees may either be "loaned" to the 272 Affiliate or may "perform services for QCC which require some activity by them on a daily, weekly or monthly basis." These "services" would include, *inter alia*, joint marketing, billing and collection, billing inquiry services, human resources, payroll, finance and accounting, and other perhaps unspecified functions. The *effect* of this arrangement is *full functional integration* of the Qwest BOC and 272 Affiliate entities. If it were Congress' intention to sanction the level of functional integration that Qwest has described in its Affidavits, no purpose would be served by requiring the BOC to "go through the motions" of Section 272(b) at all.

57. Ms. Brunsting asserts that "[s]everal policies and guidelines are in place to restrict the sharing of information by employees who move between [Qwest] entities."[84] Ms. Brunsting's description is unclear as to whether such "policies and guidelines" apply to

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82. *Id.*

83. *Id.*

84. Brunsting (QCC), at 16.

"loaned" employees or to BOC employees who "perform services for QCC." Indeed, the Qwest *Code of Conduct* to which Ms. Brunsting refers would seem to *permit*, and certainly not prohibit, the use and exchange of confidential information among Qwest entities:

> CONFIDENTIAL INFORMATION: You must safeguard all confidential information. Use the information for Qwest business only. Disclose it only to those people with a legitimate need to know. Do not discuss it with people outside Qwest, including family, and do not use it for personal gain. Do not leave confidential records out where they can be easily read by others.[85]

Note the references here to "Qwest business only" and to "people outside Qwest." These references to "Qwest" make no distinction among entities within Qwest and imply no specific prohibition against the sharing or exchanging of information *within and among different Qwest entities*. The phase "legitimate need to know" could be interpreted as embracing the prohibited sharing of information between the Qwest BOC and 272 Affiliate entities, but the Code of Conduct itself makes no reference to any specific Qwest entities nor advises employees as to any legal restrictions to which Qwest is subject with respect to the sharing of information within the Qwest family. Insofar as QCC claims it is *already* 272 compliant, had Qwest intended to enforce this distinction among its employees, the Code of Conduct should have already been modified.

58. Beyond that, it is a practical impossibility to limit the exchange of Qwest BOC and 272 Affiliate information when the same person performs services for both entities. Qwest's ability to engage in the kind of marketing practices that the Commission prohibited in the case of intraLATA toll services (and that it should prohibit for interLATA services as well)

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85. Schwartz (QC), Exhibit MES-272-15, at 14.

arises directly from the ability of the Qwest BOC service representative to instantly utilize the confidential information acquired as part of the *local service* transaction to benefit the long distance affiliate.

59. Both the Brunsting and Schwartz Affidavits paint a picture of a highly integrated organization that pays no more than lip service to the requirements of Section 272(b)(3) and that ignores at its most fundamental level any realistic policy basis for the separate affiliate requirement. In Qwest's fanciful interpretation of the federal statute, all that Section 272(b)(3) requires is different colored dots and separate payrolls (which can still be prepared by the same BOC or service company payroll department, including being prepared in the same file and even printed in the same batch). These entirely superficial gestures cannot and do not come even remotely close to complying with Section 272(b)(3), and the Commission should so conclude.

Due to the highly integrated nature of the Qwest BOC/QCC operation, there is no basis for the Commission to determine whether, in performing the myriad of "services" that are being contemplated for the BOC to undertake on behalf of QCC, the result will not amount to *de facto* access to the BOC's capital assets by QCC.

60. Section 272(b)(4) requires that Qwest's long distance affiliate "may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company." This provision would prohibit a BOC from pledging its assets to secure a QCC credit obligation, and it would also prohibit the BOC entity from providing capital to finance the 272 Affiliate's operations, since that BOC-provided capital would necessarily involve recourse to the BOC's assets.

61. The specific functional integration that Qwest contemplates as between its BOC and QCC entities requires the former to provide an extensive array of services for and on behalf of the latter. QCC will have few employees of its own, relying upon BOC employees for a wide variety of sales, marketing, billing, collection, human resources, payroll, accounting, finance, real estate, and other support activities. The provision of these functions by the Qwest BOC will (presumably) be compensated via intercompany transfer payments flowing from QCC to the BOC entity. The timing of these payments relative to the dates at which the BOC's services are actually furnished is critical to the determination of compliance or non-compliance with Section 272(b)(4). Specifically, if the BOC entity maintains a net account receivable from the Section 272 Affiliate, it is in effect providing capital to finance the affiliate's operations, which will be reflected as an account payable on the 272 Affiliate's balance sheet. In response to an information request, Qwest provided the Department with copies of bills showing exactly this type of unpaid balance.[86] Qwest had not even levied a late fee on the balance carried over, despite the fact that such a late fee is required by the Master Services Agreement, Amendment #1.[87] Moreover, in the event of default on the part of the 272 Affiliate, the BOC will be left with a potentially uncollectible receivable, which is the financial equivalent in all material respects of an "arrangement that would permit a creditor [the BOC in this case], upon default [by QCC], to have recourse to the assets of the Bell operating company." Indeed, were the BOC effectively forced to write-off QCC's obligations in the event of default, the accounting effect of such a write-off would be the same as an uncompensated transfer of funds from the BOC entity to the 272 affiliate; while

86. Qwest response to DOC 15031.

87. Schwartz (QC), Exhibit MES-272.7.

having no net effect on the Qwest consolidated financial statements, the transaction would constitute a "forgiveness of indebtedness" by the BOC to the benefit of the 272 affiliate, and would be recorded as a gain on the 272 affiliate's books.[88]

62. Incredibly, both the Brunsting and Schwartz Affidavits are entirely silent on this point. While assuring the Commission that the BOC will not guarantee any credit extended to QCC, neither witness addresses the matter of the extent to which the BOC's provisioning of an extensive array and quantity of services to QCC, for which they will be paid at a later date, will itself have the effect of the BOC providing capital financing (in the form of an account receivable) to QCC, or what happens in the event of default on the part of QCC with respect to such receivable. Indeed, Ms. Brunsting states that:

> The Master Services Agreement ("MSA") between the BOC and the 272 Affiliate states that contracts entered into by the 272 Affiliate are the sole responsibility of the 272 Affiliate and have no recourse to the BOC's assets. In case of default, liability is limited to charges for costs incurred under the Agreement.[89]

The Master Services Agreement, however, provides for payment by the Affiliate 30 days after *receipt* by QCC of the invoice from the BOC, creating in excess of 30 days' of effectively permanent financing of QCC's purchases of BOC services, i.e., the time between the Affiliate's receipt of the services and the BOC's receipt of compensation. In addition, to the extent that the Qwest BOC must pay its employees for their time spent on behalf of QCC

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88. It is my understanding that in the event of default on the part of QCC, the Qwest BOC would be placed in the same position as any other unsecured creditor insofar as its ability to "collect" the debt from the 272 affiliate.

89. Brunsting (QCC), at 18.

before receiving payment from QCC for those services, the Qwest BOC is advancing cash for QCC's benefit for which it will not be reimbursed until a later date. Put another way, were the individuals performing services for QCC employed by QCC, QCC would be required to pay these people sooner than it is required to reimburse the Qwest BOC for the use of the BOC's employees. Assuming that affiliate services are ongoing in nature (as is indicated by the affiliated agreements), QCC will have a permanent liability for BOC services that, if previous billing is any indication, would likely run into the millions of dollars.

63. Another means by which the BOC entity could effectively "finance" QCC is via the affiliates' *Billing and Collection Agreement*. Under the terms of the billing and collection services that QC will be furnishing to QCC, the BOC entity will acquire QCC's receivables and make a "settlement payment" to QCC for their value. The timing of those settlement payments relative to the timing of the BOC entity's receipt of payments from its end user customers is critical to any determination as to whether Qwest will be in compliance with Section 272(b)(4), yet Qwest has provided no evidence or testimony addressing this issue.

64. Absent a definitive showing that in providing services to QCC the BOC entity will not also be a *de facto* creditor to QCC — a showing that is conspicuously absent from Qwest's 272 Affidavits — the Commission has no basis to determine that the Qwest BOC/272 Affiliate relationship satisfies Section 272(b)(4).

Conclusion

65. Qwest has not provided this Commission with evidence sufficient for the

Commission to conclude that Qwest has satisfied the requirements of Sections 272(a) and (b) of the 1996 *Act*. Instead, Qwest has described an operating arrangement between the BOC and 272 Affiliate entities that amounts to functional integration of their operations. The impropriety of this arrangement cannot be overcome by nonsubstantive facial "compliance" measures such as nominally "separate" employees that in fact "act" simultaneously as employees of both entities in direct violation of Section 272(b)(3). QC and QCC are in no sense dealing with each other "at arm's length" as required by Section 272(b)(5), and by virtue of the extensive array and quantity of "services" that QCC will be "purchasing" from QC, the BOC entity is contributing to the capital financing and extending unsecured credit to QCC, in violation of Section 272(b)(4). And even considered under the relatively narrow application of the Section 272(b)(1) "operate independently" requirement as adopted by the FCC, Qwest has failed to demonstrate that the two entities will not in fact be jointly utilizing transmission and switching facilities.

66. Finally, Qwest appears to be planning extensive "joint marketing" of the BOC's local and QCC's long distance service in a manner that this Commission has previously rejected with respect to intraLATA toll services. This type of "joint marketing," in which QCC is to be afforded preemptive access to the entire Qwest BOC customer base, violates the Section 272(b)(5) "arm's length" requirement by inadequately compensating the BOC entity for the extremely valuable (to QCC) joint marketing services it is to perform, resulting in cross-subsidization of QCC's operations by the BOC entity and its local service customers. Qwest's pursuit of these types of "joint marketing" arrangements has the potential to diminish competition in the interLATA long distance market, and as such is decidedly contrary to the public interest.

67. Accordingly, the Commission should find that Qwest is not in compliance with Sections 272(a) and (b) and that by virtue of this lack of *true* structural separation and arm's length inter-affiliate dealings, Qwest has failed to satisfy the Section 272(d)(3)(C) requirement that "the requested authorization is consistent with the public interest, convenience, and necessity."

68. This completes my testimony at this time.

VERIFICATION

I declare under the pains and penalties of perjury that the foregoing Affidavit is true and correct to the best of my knowledge, information, and belief.

Executed on this 5 day of December 2001.

Lee L. Selwyn

Commonwealth of Massachusetts)
) ss.
County of Suffolk)

Subscribed and sworn to before me this 5th day of December 2001.

Ellen B. Wasserman
Notary Public

My commission expires 3/31/06

ELLEN B. WASSERMAN
MASSACHUSETTS
NOTARY PUBLIC

Attachment 1

Statement of Qualifications

DR. LEE L. SELWYN

Dr. Lee L. Selwyn has been actively involved in the telecommunications field for more than twenty-five years, and is an internationally recognized authority on telecommunications regulation, economics and public policy. Dr. Selwyn founded the firm of Economics and Technology, Inc. in 1972, and has served as its President since that date. He received his Ph.D. degree from the Alfred P. Sloan School of Management at the Massachusetts Institute of Technology. He also holds a Master of Science degree in Industrial Management from MIT and a Bachelor of Arts degree with honors in Economics from Queens College of the City University of New York.

Dr. Selwyn has testified as an expert on rate design, service cost analysis, form of regulation, and other telecommunications policy issues in telecommunications regulatory proceedings before some forty state commissions, the Federal Communications Commission and the Canadian Radio-television and Telecommunications Commission, among others. He has appeared as a witness on behalf of commercial organizations, non-profit institutions, as well as local, state and federal government authorities responsible for telecommunications regulation and consumer advocacy.

He has served or is now serving as a consultant to numerous state utilities commissions including those in Arizona, Minnesota, Kansas, Kentucky, the District of Columbia, Connecticut, California, Delaware, Maine, Massachusetts, New Hampshire, Vermont, New Mexico, Wisconsin and Washington State, the Office of Telecommunications Policy (Executive Office of the President), the National Telecommunications and Information Administration, the Federal Communications Commission, the Canadian Radio-television and Telecommunications Commission, the United Kingdom Office of Telecommunications, and the Secretaria de Comunicaciones y Transportes of the Republic of Mexico. He has also served as an advisor on telecommunications regulatory matters to the International Communications Association and the Ad Hoc Telecommunications Users Committee, as well as to a number of major corporate telecommunications users, information services providers, paging and cellular carriers, and specialized access services carriers.

Dr. Selwyn has presented testimony as an invited witness before the U.S. House of Representatives Subcommittee on Telecommunications, Consumer Protection and Finance and before the U.S. Senate Judiciary Committee, on subjects dealing with restructuring and deregulation of portions of the telecommunications industry.

In 1970, he was awarded a Post-Doctoral Research Grant in Public Utility Economics under a program sponsored by the American Telephone and Telegraph Company, to conduct research on the economic effects of telephone rate structures upon the computer time sharing industry. This work was conducted at Harvard University's Program on Technology and Society, where he was appointed as a Research Associate. Dr. Selwyn was also a member of the faculty at the College of Business Administration at Boston University from 1968 until 1973, where he taught courses in economics, finance and management information systems.

Dr. Selwyn has published numerous papers and articles in professional and trade journals on the subject of telecommunications service regulation, cost methodology, rate design and pricing policy. These have included:

"Taxes, Corporate Financial Policy and Return to Investors"
National Tax Journal, Vol. XX, No.4, December 1967.

"Pricing Telephone Terminal Equipment Under Competition"
Public Utilities Fortnightly, December 8, 1977.

"Deregulation, Competition, and Regulatory Responsibility in the Telecommunications Industry"
Presented at the 1979 Rate Symposium on Problems of Regulated Industries - Sponsored by: The American University, Foster Associates, Inc., Missouri Public Service Commission, University of Missouri-Columbia, Kansas City, MO, February 11 - 14, 1979.

"Sifting Out the Economic Costs of Terminal Equipment Services"
Telephone Engineer and Management, October 15, 1979.

"Usage-Sensitive Pricing" (with G. F. Borton)
(a three part series)
Telephony, January 7, 28, February 11, 1980.

"Perspectives on Usage-Sensitive Pricing"
Public Utilities Fortnightly, May 7, 1981.

"Diversification, Deregulation, and Increased Uncertainty in the Public Utility Industries"
Comments Presented at the Thirteenth Annual Conference of the Institute of Public Utilities, Williamsburg, VA - December 14 - 16, 1981.

"Local Telephone Pricing: Is There a Better Way?; The Costs of LMS Exceed its Benefits: a Report on Recent U.S. Experience."
Proceedings of a conference held at Montreal, Quebec - Sponsored by Canadian Radio-Television and Telecommunications Commission and The Centre for the Study of Regulated Industries, McGill University, May 2 - 4, 1984.

"Long-Run Regulation of AT&T: A Key Element of A Competitive Telecommunications Policy"
Telematics, August 1984.

"Is Equal Access an Adequate Justification for Removing Restrictions on BOC Diversification?"
Presented at the Institute of Public Utilities Eighteenth Annual Conference, Williamsburg, VA - December 8 - 10, 1986.

"Market Power and Competition Under an Equal Access Environment"
Presented at the Sixteenth Annual Conference, "Impact of Deregulation and Market Forces on Public Utilities: The Future Role of Regulation" Institute of Public Utilities, Michigan State University, Williamsburg, VA - December 3 - 5, 1987.

"Contestable Markets: Theory vs. Fact"
Presented at the Conference on Current Issues in Telephone Regulations: Dominance and Cost Allocation in Interexchange Markets - Center for Legal and Regulatory Studies Department of Management Science and Information Systems - Graduate School of Business, University of Texas at Austin, October 5, 1987.

"The Sources and Exercise of Market Power in the Market for Interexchange Telecommunications Services"
Presented at the Nineteenth Annual Conference - "Alternatives to Traditional Regulation: Options for Reform" - Institute of Public Utilities, Michigan State University, Williamsburg, VA, December, 1987.

"Assessing Market Power and Competition in The Telecommunications Industry: Toward an Empirical Foundation for Regulatory Reform"
Federal Communications Law Journal, Vol. 40 Num. 2, April 1988.

"A Perspective on Price Caps as a Substitute for Traditional Revenue Requirements Regulation"
Presented at the Twentieth Annual Conference - "New Regulatory Concepts, Issues and Controversies" - Institute of Public Utilities, Michigan State University, Williamsburg, VA, December, 1988.

"The Sustainability of Competition in Light of New Technologies" (with D. N. Townsend and P. D. Kravtin)
Presented at the Twentieth Annual Conference - Institute of Public Utilities Michigan State University, Williamsburg, VA, December, 1988.

"Adapting Telecom Regulation to Industry Change: Promoting Development Without Compromising Ratepayer Protection" (with S. C. Lundquist) *IEEE Communications Magazine*, January, 1989.

"The Role of Cost Based Pricing of Telecommunications Services in the Age of Technology and Competition"
Presented at National Regulatory Research Institute Conference, Seattle, July 20, 1990.

"A Public Good/Private Good Framework for Identifying POTS Objectives for the Public Switched Network" (with Patricia D. Kravtin and Paul S. Keller) Columbus, Ohio: *National Regulatory Research Institute*, September 1991.

"Telecommunications Regulation and Infrastructure Development: Alternative Models for the Public/Private Partnership"
Prepared for the Economic Symposium of the International Telecommunications Union Europe Telecom '92 Conference, Budapest, Hungary, October 15, 1992.

"Efficient Infrastructure Development and the Local Telephone Company's Role in Competitive Industry Environment" *Presented at the Twenty-Fourth Annual Conference, Institute of Public Utilities, Graduate School of Business, Michigan State University, "Shifting Boundaries between Regulation and Competition in Telecommunications and Energy"*, Williamsburg, VA, December 1992.

"Measurement of Telecommunications Productivity: Methods, Applications and Limitations" (with Françoise M. Clottes)
Presented at Organisation for Economic Cooperation and Development, Working Party on Telecommunication and Information Services Policies, '93 Conference "Defining Performance Indicators for Competitive Telecommunications Markets", Paris, France, February 8-9, 1993.

"Telecommunications Investment and Economic Development: Achieving efficiency and balance among competing public policy and stakeholder interests"
Presented at the 105th Annual Convention and Regulatory Symposium, National Association of Regulatory Utility Commissioners, New York, November 18, 1993.

"The Potential for Competition in the Market for Local Telephone Services" (with David N. Townsend and Paul S. Keller)
Presented at the Organization for Economic Cooperation and Development Workshop on Telecommunication Infrastructure Competition, December 6-7, 1993.

"Market Failure in Open Telecommunications Networks: Defining the new natural monopoly," *Utilities Policy*, Vol. 4, No. 1, January 1994.

The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers, (with Susan M. Gately, et al) a report prepared by ETI and Hatfield Associates, Inc. for AT&T, MCI and CompTel, February 1994.

Commercially Feasible Resale of Local Telecommunications Services: An Essential Step in the Transition to Effective Local Competition, (Susan M. Gately, et al) a report prepared by ETI for AT&T, July 1995.

"Efficient Public Investment in Telecommunications Infrastructure" *Land Economics*, Vol 71, No.3, August 1995.

Funding Universal Service: Maximizing Penetration and Efficiency in a Competitive Local Service Environment, Lee L. Selwyn with Susan M. Baldwin, under the direction of Donald Shepheard, A Time Warner Communications Policy White Paper, September 1995.

Stranded Investment and the New Regulatory Bargain, Lee L. Selwyn with Susan M. Baldwin, under the direction of Donald Shepheard, A Time Warner Communications Policy White Paper, September 1995

"Market Failure in Open Telecommunications Networks: Defining the new natural monopoly," in *Networks, Infrastructure, and the New Task for Regulation*, by Werner Sichel and Donal L. Alexander, eds., University of Michigan Press, 1996.

Establishing Effective Local Exchange Competition: A Recommended Approach Based Upon an Analysis of the United States Experience, Lee L. Selwyn, paper prepared for the Canadian Cable Television Association and filed as evidence in Telecom Public Notice CRTC 95-96, Local Interconnection and Network Component, January 26, 1996.

The Cost of Universal Service, A Critical Assessment of the Benchmark Cost Model, Susan M. Baldwin with Lee L. Selwyn, a report prepared by Economics and Technology, Inc. on behalf of the National Cable Television Association and submitted with Comments in FCC Docket No. CC-96-45, April 1996.

Economic Considerations in the Evaluation of Alternative Digital Television Proposals, Lee L. Selwyn (as Economic Consultant), paper prepared for the Computer Industry Coalition on Advanced Television Service, filed with comments in FCC MM Docket No. 87-268, In the Matter of Advanced

Television Systems and Their Impact Upon the Existing Television Broadcast Service, July 11, 1996.

Assessing Incumbent LEC Claims to Special Revenue Recovery Mechanisms: Revenue opportunities, market assessments, and further empirical analysis of the "Gap" between embedded and forward-looking costs, Patricia D. Kravtin and Lee L. Selwyn, In the Matter of Access Charge Reform, in CC Docket No. 96-262, January 29, 1997.

The Use of Forward-Looking Economic Cost Proxy Models, Susan M. Baldwin and Lee L. Selwyn, Economics and Technology, Inc., February 1997.

The Effect of Internet Use On The Nation's Telephone Network, Lee L. Selwyn and Joseph W. Laszlo, a report prepared for the Internet Access Coalition, July 22, 1997.

Regulatory Treatment of ILEC Operations Support Systems Costs, Lee L. Selwyn, Economics and Technology, Inc., September 1997.

The "Connecticut Experience" with Telecommunications Competition: A Case in Getting it Wrong, Lee L. Selwyn, Helen E. Golding and Susan M. Gately, Economics and Technology, Inc., February 1998.

Where Have All The Numbers Gone?: Long-term Area Code Relief Policies and the Need for Short-term Reform, prepared by Economics and Technology, Inc. for the Ad Hoc Telecommunications Users Committee, International Communications Association, March 1998.

Broken Promises: A Review of Bell Atlantic-Pennsylvania's Performance Under Chapter 30, Lee L. Selwyn, Sonia N. Jorge and Patricia D. Kravtin, Economics and Technology, Inc., June 1998.

Building A Broadband America: The Competitive Keys to the Future of the Internet, Lee L. Selwyn, Patricia D. Kravtin and Scott A. Coleman, a report prepared for the Competitive Broadband Coalition, May 1999.

Bringing Broadband to Rural America: Investment and Innovation In the Wake of the Telecom Act, Lee L. Selwyn, Scott C. Lundquist and Scott A. Coleman, a report prepared for the Competitive Broadband Coalition, September 1999.

Dr. Selwyn has been an invited speaker at numerous seminars and conferences on telecommunications regulation and policy, including meetings and workshops sponsored by the National Telecommunications and Information Administration, the National Association of

Regulatory Utility Commissioners, the U.S. General Services Administration, the Institute of Public Utilities at Michigan State University, the National Regulatory Research Institute at Ohio State University, the Harvard University Program on Information Resources Policy, the Columbia University Institute for Tele-Information, the International Communications Association, the Tele-Communications Association, the Western Conference of Public Service Commissioners, at the New England, Mid-America, Southern and Western regional PUC/PSC conferences, as well as at numerous conferences and workshops sponsored by individual regulatory agencies.

Attachment 2

Qwest Responses to Information Requests Referenced in this Affidavit

Attachment 3

Qwest Affiliate Agreements
and Associated Inter-entity Billing

ECONOMICS AND
TECHNOLOGY, INC.