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December 3, 2002

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: Ex Parte Statement  
WC Docket No. 02-314  
Application of Qwest Communications International Inc. to Provide In-Region InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming

Dear Ms. Dortch:

This letter is to update the record on an issue raised previously by Touch America, Inc. in the Qwest 271 dockets. Specifically, from time to time Touch America has made allegations here regarding its dissatisfaction with the performance of Qwest under commercial contracts between the companies related to Qwest's divestiture of its in-region interLATA operations. Touch America has simply restated in summary fashion claims it has presented in a pending complaint. In that complaint Touch America has argued that its commercial disputes present violations of the Commission's order approving the merger of Qwest and U S WEST, and of Section 271. *See* File No. EB-02-MD-004.

Qwest is vigorously contesting Touch America's interpretation of the facts, and its attempt to convert commercial disputes into Communications Act issues. Indeed, Touch America's FCC complaint itself overlaps with a previously-pending arbitration between the parties over various commercial matters arising from the divestiture. In that proceeding Qwest is seeking over \$100 million for unpaid services and related claims. Touch America is asserting its own claims as well as various defenses. The arbitration hearing has been completed and a decision is expected shortly.

As Qwest has previously stated, the commercial disputes between itself and Touch America are not relevant to the openness of its local exchange market or other factors considered under Section 271. However, because Touch America has alleged that its various complaints regarding Qwest implicate Section 271, Qwest is filing this ex parte letter that incorporates information provided today in the restricted docket covering Touch America's pending

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complaint.<sup>1</sup> That information updates the complaint docket with respect to a development in the related arbitration proceeding. The information filed in the restricted complaint proceeding is provided here verbatim in the accompanying attachment.

Qwest will continue to address Touch America's commercial claims in the context of the arbitration proceeding and the pending complaint docket. If anything, the attachment here further demonstrates that the disputes between the parties do not belong in a Section 271 proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dan L. Poole", written in a cursive style.

Daniel L. Poole

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<sup>1</sup> Because the information contains no proprietary information of Touch America, and in the interest of completeness, Qwest is providing the information here as it is provided in the formal complaint proceeding. This is not a waiver of any rights or duties of the parties in that restricted docket.

**Attachment**

*[Full Text of Letter Filed by Qwest Communications International Inc. in  
File No. EB-02-MD-004 on December 3, 2002]*

As you may know, Qwest management is taking a fresh look at various older disputes facing the company, and is looking for ways to eliminate issues and controversy. This philosophy is reflected in our approach to matters across the board.

In this connection, Qwest has recently decided to discontinue disputing one of Touch America's claims in the pending arbitration of business issues between the companies. Because the arbitration overlaps with Touch America's above-referenced complaint, we are bringing this matter to your attention.

Specifically, one of the many arbitration issues relates to billing of certain charges to Touch America for out-of-region wholesale services. It has been Touch America's position that it should not be charged for certain such services it received from Qwest because it had no need for the services given the optical capacity facilities it acquired from Qwest separately under an IRU Agreement covering both in-region and out-of-region facilities. (The Commission previously has been provided with a copy of this Agreement.)

The parties entered into this IRU Agreement to make certain that, as of Qwest's merger with U S WEST, Inc., Qwest would not be carrying any in-region interLATA traffic on its network. As of late June 2000, transfer of the majority of in-region dedicated services to Touch America facilities had been accomplished pursuant to the divestiture implementation plan developed by the parties.<sup>1</sup> However, at that time Touch America had not completed arrangements for network facilities of its own in certain locations sufficient to handle specific dedicated services that were to be transferred at divestiture. It also was anticipated that certain services might not be able to be moved to existing Touch America facilities prior to the planned June 30 closing.

Accordingly, the parties agreed that Qwest would sell Touch America IRUs in lit optical capacity at the OC-3 level or greater that would include in place the specific facilities capacity that Qwest had been using to provide any remaining dedicated services. This capacity was sold under Qwest's then-standard IRU agreement, which conveyed the capacity to Touch America for the capacity's estimated useful life. The result was that Qwest and Touch America were able to complete the divestiture on June 30 as scheduled in compliance with Section 271.<sup>2</sup>

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<sup>1</sup> This matter did not relate to divestiture of switched services, which were handled in an entirely different manner.

<sup>2</sup> Touch America's current position is that this IRU Agreement for optical capacity is not a violation of Section 271 because it was entered into prior to the merger of Qwest and U S WEST. (Obviously Qwest and Touch America have different points of view regarding the general question of whether optical capacity IRUs are facilities that are not covered by Section 271. This matter is before the Enforcement Bureau in EB-02-MD-003.)

As noted above, in the pending arbitration Touch America argued that, given the IRU capacity it had purchased, Qwest should not be billing it for certain out-of-region wholesale services. This week Qwest decided not to contest this position, removing one of the issues in the arbitration.

In connection with its review of this matter, Qwest has identified post-June 30, 2000 record-keeping and administrative deficiencies with respect to the IRUs acquired by Touch America at the time. This review has been hampered by the fact that many of the employees involved in this matter no longer are with the company. However, it appears that Qwest personnel did not update system records to reflect that the specific capacity identified in the IRU Agreement had been conveyed to Touch America as IRUs. In some instances it appears that Qwest (acting as Touch America's agent and in accordance with Qwest/TA network implementation plans) moved services from the Touch America IRU capacity to other Touch America facilities, or canceled or disconnected services on the Touch America IRU capacity at that company's request, without maintaining correct records for the original capacity and subsequently re-using the equipment and facilities associated with the IRU capacity for permitted purposes. Record-keeping problems also appear to have led Qwest in at least some cases to supply Touch America with more IRU capacity than was called for in the IRU Agreement.

At this time Qwest has no reason to believe that these matters impact other disputed issues in the arbitration or this complaint process. For example, Touch America has made general allegations that somehow the June 30 divestiture was not complete with respect to interLATA services provided to customers. However, these matters do not relate to customers; indeed, the purpose of the IRU Agreement was to ensure that Touch America had more than enough capacity to handle the customer business it was assuming. Nor do these matters relate to other allegations that Touch America has made in this docket.

Many other claims remain pending in the arbitration. Post-hearing briefing is in progress, and a decision from the arbitrator is expected relatively soon thereafter. Qwest will advise the Commission when the arbitrator has issued his decision. We hope that on or before that time our pending Motion to Dismiss will be granted.

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